



PUBLIC PRIVATE PARTNERSHIPS IN FRANCE—STATE GUARANTEE
SUPPORTS THE CONGESTED PIPELINE

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Aiming to boost economic growth and minimize the effects of the financial crisis, the Government of France adopted a large stimulus package (*Plan de relance*) in the beginning of 2009.² The Plan is particularly geared at supporting investments in public infrastructure and comprises a State guarantee for public private partnerships (the “Project guarantee”), which the French Ministry of Economy can award under certain conditions pursuant to Article 6 of the Law Amending the French Finance Law (*Loi de finances rectificative*) of February 4, 2009 (the “LFR 2009”).³

The Project guarantee has already been approved for several major projects currently being negotiated in France, but no project benefiting from the guarantee has been closed to date. Even though it is still too early to measure its exact impact and sufficiency, the measure is showing some positive effects. This Article will examine the main characteristics of the guarantee, its use in current projects, and its initial results.

I. CONDITIONS FOR AWARDING THE PROJECT GUARANTEE AND ITS MAIN
CHARACTERISTICS

The Project guarantee is intended to support public private partnership (PPP) projects in the context of the economic crisis. The crisis increased the cost of funding and reduced tenors, making the financing of large infrastructure projects more difficult. The Project guarantee is one of the two main measures conceived to boost the PPP market in France, the second one being an €8 billion co-financing envelope of funds managed by the *Caisse des dépôts et consignations*.⁴

The LFR 2009 provides that the purpose of the Project guarantee is to “facilitate the financing of priority projects,”⁵ but does not contain precise criteria for determining a “priority” project. Thus,

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² For an analysis of other responses to the effect of the financial crisis on the Public Private Partnerships market across the European Union, see European PPP Expertise Centre (EPEC), *The Financial Crisis and the PPP Market—Potential Remedial Actions* (Aug. 2009).

³ Law No. 2009-122 of Feb. 4, 2009, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Feb. 5, 2009, p. 2032.

⁴ The *Caisse des dépôts et consignations* is the public group managing a substantial part of French savings and acting as an escrow account for notaries, bankruptcy trustees, and social security institutions.

⁵ Law No. 2009-122, *supra* note 3, § 6.I.

the Ministry of Economy has a large discretion in the award of the guarantee.⁶ In practice, requests are sent by relevant public authorities to the *Mission d'Appui à la réalisation des contrats de partenariat* (the “MAPPP”), the French task force for PPPs, attached to the Ministry of Economy. The “Guarantee committee,” composed of the members of several of the Ministry’s directorates (Budget, Treasury, Legal Affairs, and the MAPPP), recommends projects to the Minister of Economy that are to benefit from the guarantee, and the Minister decides on the matter.⁷

PPPs include various legal instruments whereby a private party is responsible for the definition, conception, realization, and exploitation of a public infrastructure.⁸ In France, this includes in particular “partnership contracts” (*contrats de partenariat*) and “delegations of public services” (*délégations de service public*), notably concessions. Partnership contracts and concessions are subject to different legal regimes in France. Partnership contracts are a relatively new legal instrument, created in 2004,⁹ whereby the public authority remunerates a private party through periodic payments. Such “availability payments”¹⁰ are typically directed to lenders through a Dailly mechanism.¹¹ Concessions, on the other hand, are an old instrument under French law whereby the private party is remunerated by user fees and taxes and thus substantially assumes the exploitation risk.

Financial, geographic, and time conditions for the award of the Project guarantee are provided under Article 6 of the LFR 2009. Up to 80% of the loan or securities financing the project can be subject to the Project guarantee. The issuer of securities can be either the signatory of the PPP contract or the bank financing the project.¹² The maximum aggregate amount of the Project guarantee is €10 billion.¹³

The beneficiary must have a “sound financial situation and adequate solvency”¹⁴—the idea is to avoid, as much as possible, that the guarantee be called.¹⁵ Signatories of concession contracts,

⁶ Rozen Noguellou, *La crise et l'exécution financière des marchés publics et des partenariats public-privé*, REVUE DE DROIT IMMOBILIER [RDI] 278 (May 2009) (Fr.).

⁷ Minister of Economy, Industry, and Employment, Minister for the Implementation of the Stimulus Package, *Circulaire d'application de l'article 6 de la loi n. 2009-122 du 4 février 2009 de finances rectificative pour 2009 instituant une garantie d'Etat et de la loi n. 2009-197 du 17 février 2009 pour l'accélération des programmes de construction et d'investissement publics et privés, dans ses dispositions relatives aux contrats de partenariat* [Circular for the Application of Article 6 of the Law No. 2009-122 of February 4, 2009 Providing for a State Guarantee and of the Provisions Related to Partnership Contracts of the Law No. 2009-197 of February 17, 2009 for the Acceleration of Public and Private Construction and Investment Programs] [hereinafter Administrative Circular], July 23, 2009.

⁸ *Id.*

⁹ Ordinance No. 2004-559 of June 17, 2004 on Partnership Agreements (Feb. 26, 2010).

¹⁰ Availability payments are periodic payments made by the public authority to the private party, subject to contracted services being available.

¹¹ A Dailly mechanism is an assignment of receivables whereby a creditor transfers the benefit of certain receivables directly to its banks. In the case of French partnership contracts, the public authority granting the contract (which is hence liable for a stream of unitary payments to the project company over the life of the contract) can *in advance* decide to accept the transfer of the benefit of a portion of these payments to the lenders, under certain conditions provided for in the contract. See European PPP Expertise Centre (EPEC), *Note on the French System of “Cession de Créances”* (Nov. 2009).

¹² Law No. 2009-122, *supra* note 3, §§ 6.II, 6.III.

¹³ *Id.* § 6.IV.

¹⁴ *Id.* § 6.II.

exposed to the market risk, are subject to greater scrutiny than signatories of partnership contracts, where the private partner is remunerated directly by the public authority. Project guarantee is an on-demand guarantee: independent, irrevocable, and unconditional. It ranks *pari passu* with senior loans and may be called upon partially or entirely. The fact that the guarantee is called does *not* automatically accelerate the loans that are being guaranteed.¹⁶ These characteristics are crucial for the lender's security.

The price of the Project guarantee is fixed by the Ministry of Economy and is calculated taking into account "normal conditions" for covering "comparable" risks.¹⁷ More particularly, the contract, the project type, its soundness, and its tenor are taken into account in determining the price.¹⁸ The price is composed of a fixed commission, payable at the contract signature, and a variable component calculated in a number of basis points on the guaranteed amount. The MAPPP estimates that the cover will cost between 75 bp to 150 bp over Euribor, in addition to the fixed commission. This cost is taken into account by the bidders in the preparation of their financial proposal.

Project guarantee can only be awarded to companies established in the European Union or the European Economic Area and the project must be situated in France.¹⁹ Finally, the time condition provided in the LFR 2009 requires that the PPP contract be signed before December 31, 2010.²⁰

More generally, in order to benefit from the Project guarantee, the project should demonstrate:

- Solid technical and economic plan;
- Balanced risk sharing between public and private parties during the construction and exploitation period;
- Balanced contractual scheme, in particular with respect to provisions related to early contract termination; and
- Balance between financial actors of the project, which the State is guaranteeing.²¹

In order to solicit the project guarantee, the relevant public authority must prepare an information memorandum whose content is detailed in the Administrative Circular providing guidance to the application of the Article 6.²² It includes elements traditionally used to assess PPP projects—risk matrices, contract provisions related to early termination, financing, and economic balance of the project. It also includes issues specific to the general purpose of the Project guarantee—impact of the project on the economic growth (sales, impact on employment, and tax revenues), as well as the description of possible difficulties related to financial closing.

¹⁵ Noguellou, *supra* note 6.

¹⁶ Administrative Circular, *supra* note 7.

¹⁷ Law No. 2009-122, *supra* note 3, § 6.III.

¹⁸ Administrative Circular, *supra* note 7.

¹⁹ Law No. 2009-122, *supra* note 3, § 6.II.

²⁰ *Id.*

²¹ Administrative Circular, *supra* note 7, at Annex 1, 2/2.

²² *Id.*

II. USE OF THE PROJECT GUARANTEE IN THE CURRENT PROJECTS MARKET IN FRANCE

Given the time limit provided for in Article 6 of the LFR 2009 (December 31, 2010) and the timing required for the implementation of PPP projects, only projects that have already been launched by now will be able to benefit from the Project guarantee.

There is a significant deal volume hanging on the success of the new guarantee. There are now 10 to 15 large infrastructure projects in the French pipeline across the road, rail, transport, defense and education sectors—representing between €30–40 billion in project spending for the rail/transport sector alone. But not many are moving towards financial close. And the pipeline continues to fill—for example, most recently, the €400 million A355 Strasbourg toll road concession launched.²³

According to the MAPPP, as of March 2010, the Ministry of Economy has approved the Project guarantee for four projects—two partnership contracts and two concessions. The global amount that has been proposed to date is approximately €3 billion, one-third of the maximum amount available under the LFR 2009. For each particular project, the bidders have to assess the proposed amounts and terms and decide whether and to what extent to incorporate the Project guarantee in their financial offer. The Partnership contracts are for a tram-train on the French island of La Réunion and a high-speed rail project, Bretagne–Pays de la Loire. The Réunion Tram-Train is a €1.55 billion project consisting of a thirty-eight kilometer line with twenty-five stations from the town of Saint Paul to Roland Garros Airport in Sainte-Marie, and incorporates two tunnels and the highest viaduct in the world.²⁴ The proposed amount of the guarantee for the Tram-Train is €505 million.²⁵ This is envisaged to cover up to 80% of the construction risk, whereas the post-construction phase will be covered by the Daily mechanism, guaranteeing that the lenders will benefit from regular availability payments made by the State.²⁶ The project consortium led by Bouygues is due to sign the contract, but the financial close has been held up for some time now. The next meeting has been scheduled for May 2010.²⁷ For the second Partnership contract, Bretagne–Pays de la Loire, the amount of the Project guarantee envisaged is in the range of €850 million. The project cost is between €3–4 billion and involves the building of 214 kilometers of high-speed tracks running between Le Mans and Rennes. Bouygues, Eiffage, and Vinci are running for this twenty-five-year partnership contract and the bidding is expected to follow by June 2010.²⁸

The concession contracts concerned by the Project guarantee are a high-speed rail project—Sud Europe Atlantique (between Tours and Bordeaux) —and Charles de Gaulle Express, a high-speed

²³ Miles Lang, *New French Project Guarantee Debuts*, PROJECT FIN., Sep. 2009.

²⁴ *Tram-Train May Hit the Wall*, PROJECT FIN., Nov. 2009.

²⁵ Veronique Le Billon, *L'Etat a accordé sa garantie à quatre projets de partenariat public-privé*, LES ECHOS, Dec. 15, 2009.

²⁶ Lang, *supra* note 23.

²⁷ Le Billon, *supra* note 25.

²⁸ *Transport*, PROJECT FIN., Oct. 2009.

thirty-two kilometer service between Paris East and Charles de Gaulle airport. Sud Europe Atlantique is a €8 billion, sixty-year concession. The Project guarantee proposed amount is slightly above €1 billion and the guarantee could have a potential life of thirty years, covering half of the concession's demand risk. Bouygues, Vinci, and Eiffage have pre-qualified. As for the second concession contract, Vinci is the only bidder that ultimately submitted an offer for the Charles de Gaulle Express concession in November 2009 and the financial close is expected by the end of 2010.²⁹ The proposed amount of the Project guarantee for this project is under €700 million. Negotiations are expected to be difficult, considering the decrease in the number of airline passengers brought about by the economic crisis and the competition that this project faces from the RER B.³⁰

The list of projects for which a Project guarantee has been requested is not public, but according to the Ministry of Economy approximately ten projects are expected to benefit from this measure.

III. THE FUTURE AND IMPACT OF THE PROJECT GUARANTEE

Even though no project benefiting from the Project guarantee has been closed to date, many consider that the guarantee has already had positive effects in that it enabled a number of major projects to not be abandoned in the economic climate characterized by unavailability of long-term financing and increased pricing terms. Some argue that the mechanism would have been necessary even without the crisis and that it may be insufficient in light of the current needs and objectives.³¹ The Project guarantee may become necessary—a “need to have, not nice to have,” to use the words of one sponsor regarding the TIFIA debt (implemented through the U.S. government program providing projects with thirty-five-year subordinated debt at a single-digit market to U.S. treasuries).³²

The impact that the Project guarantee had on pricing is also difficult to assess given that no project has been closed to date. Expectations on how pricing will shift under the influence of the guarantee range between the current level (above 250 bp over Euribor) and the pricing before the crisis (100 bp–200 bp over Euribor).³³

From the public perspective, the fact that the State is being remunerated will enable it to benefit from regular payments as well as from not having to include the guarantee in the public debt.³⁴ According to the French Ministry of Economy, the Project guarantee should not have a consolidation effect pursuant to Eurostat rules, and the European Commission is expected to declare it compatible with the E.U. legal framework on state aid.

²⁹ Lang, *supra* note 23.

³⁰ *Liaison CDG Express: Vinci poursuit les discussions*, LES ECHOS, Mar. 4, 2010.

³¹ Loïc Levoyer, *La garantie de l'Etat sur les PPP*, CONTRATS PUBLICS, June 2009, at 68; Stéphane Braconnier, Jean-Luc Champy & Jean-Baptiste Morel, *Le soutien financier de l'Etat aux partenariats public-privé*, REVUE CONTRATS ET MARCHES PUBLICS, Apr. 2009.

³² Tom Nelthorpe, *New Infrastructure Lending Initiatives Hit and Miss*, PROJECT FIN., Jan. 2010.

³³ Lang, *supra* note 23.

³⁴ Noguellou, *supra* note 6.