**May 2006**

# AN ASSESSMENT BY THE EBRD

This Assessment was last updated during the preparation of the 2006 EBRD Strategy for Poland and reflects the situation at that time. It does not constitute legal advice. It was prepared by the Office of the General Counsel of the EBRD. For further information please contact ltt@ebrd.com

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Basis of Assessment: The assessment contained in this document is grounded on legal assessment work conducted by the Bank (see www.ebrd.com/law). The assessment also draws on the experience of the Office of the General Counsel in working on EBRD investment and legal reform activities in Poland. This publication does not constitute legal advice.

## 1. Overall Assessment

Poland has been fairly successful in aligning its legislation with EU regulations as a prerequisite to accession and has continued the reform process after joining the EU. However, despite having introduced some major laws, sustained effort will be necessary to strengthen the existing framework with secondary legislation that will enhance proper implementation of the legislation.

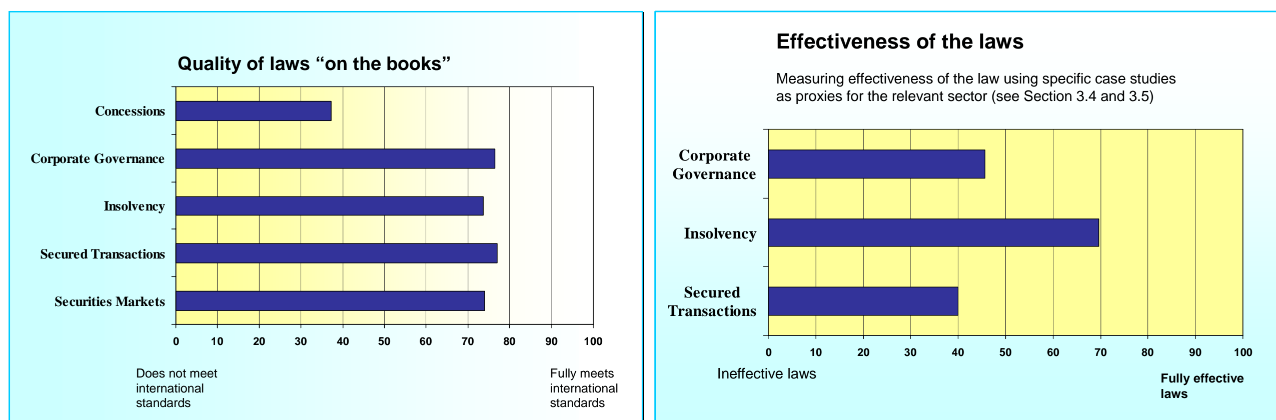
Most areas of commercial law have seen improvements. Laws governing the securities market have been fundamentally amended. New laws on the public offering conditions (establishing new standards for the prospectus, enhancing disclosure, introducing squeeze out rules, etc.), on trading in financial instruments (introducing new features to securities trading) and on capital market supervision have been adopted. In the corporate governance sector, the “law on the books” was ranked in “high compliance” with the relevant international standards. However, an assessment of how those laws work in practice revealed some flaws in the four areas examined: institutional environment, enforceability, complexity and speed.

In the field of concessions, a new Law on Public Private Partnerships has been adopted. However comprehensive secondary legislation will need to be drafted for the law to be properly implemented. The insolvency framework requires improvements in a number of areas such as conditions for insolvency, rights of secured creditors and financing during reorganisation. The effectiveness of the insolvency regime also leaves room for improvement.

The secured transactions sector framework requires substantial intervention to support business activities. Recommended actions to improve existing conditions include streamlining the registration procedure, ensuring access to relevant information and simplifying out-of-court procedures. The telecommunications sector is regulated by a new set of recent legislation which reorganised the regulatory authorities responsible for electronic telecommunications and broadcasting. Fixed line penetration rates remain quite low and the liberalisation of the market is slow.

Overall Poland has created a fairly sound legal environment which complies in most areas with international and EU standards. The remaining challenge is proper implementation of existing legislation, which will require extensive secondary legislation, an efficient judiciary and transparent administration. Chart 1 below shows the effectiveness of the laws as compared to their compliance with international standards.

**Chart 1 – Snapshot of Polish commercial laws**




***Source:*** *EBRD legal assessments 2002-2005*

# 2. The Legal System

## *2.1. Constitution and courts*

The Constitution of Poland was adopted by the National Assembly in April 1997. The Constitution establishes a bicameral parliament constituted of 460 seats in the lower house or "Sejm" and 100 seats in the Senate. The term of office for both deputies and senators is 4 years. Elections to the Sejm are based on proportional representation, whereas the Senate is elected by direct vote. The Sejm and the Senate exercise legislative power in the country. The President of Poland is elected by direct vote by the citizens of the country for a 5-year term. The President is the head of state with the following responsibilities: to ratify and revoke international agreements, ensure observance of the Constitution, safeguard the sovereignty of the state and grant citizenship. The President can also issue regulations and executive orders.

The Council of Ministers is in charge of the internal affairs of the country and foreign policy. The President names the Prime Minister and the members of the Council of Ministers upon proposal by the Prime Minister. The Council of Ministers shall obtain the vote of confidence of the Sejm. Among the responsibilities of the Council of Ministers are: to supervise administrative authorities, ensure implementation of laws, issue regulations, protect the interests of the treasury and draft and supervise implementation of the State Budget.

The Constitution sets out the basic principles of the judicial system. Judges are appointed by the President based on the recommendation of the National Council of the Judiciary. The National Council of the Judiciary safeguards the independence of courts and judges.

The judicial system is a four-tier system comprising regional, district and appellate courts, and the Supreme Court. The Supreme Court is the highest appeal instance against decisions issued by the lower and military courts. The Supreme Court and lower courts are divided into criminal, civil, labour and family chambers. There are also administrative courts and the Chief Administrative Court which try cases involving public administrative acts and actions by public servants.

In addition, Poland's justice system comprises a Constitutional Tribunal and a Tribunal of State. The Constitutional Tribunal decides on constitutional matters, including conformity of the laws and international agreements with the Constitution, and complaints regarding breaches of constitutional provisions. The Tribunal of State judges violations committed during their office by certain

categories of public officials, including the President, the Prime Minister and members of the Council of Ministers, the President of the National Bank, Deputies and Senators.

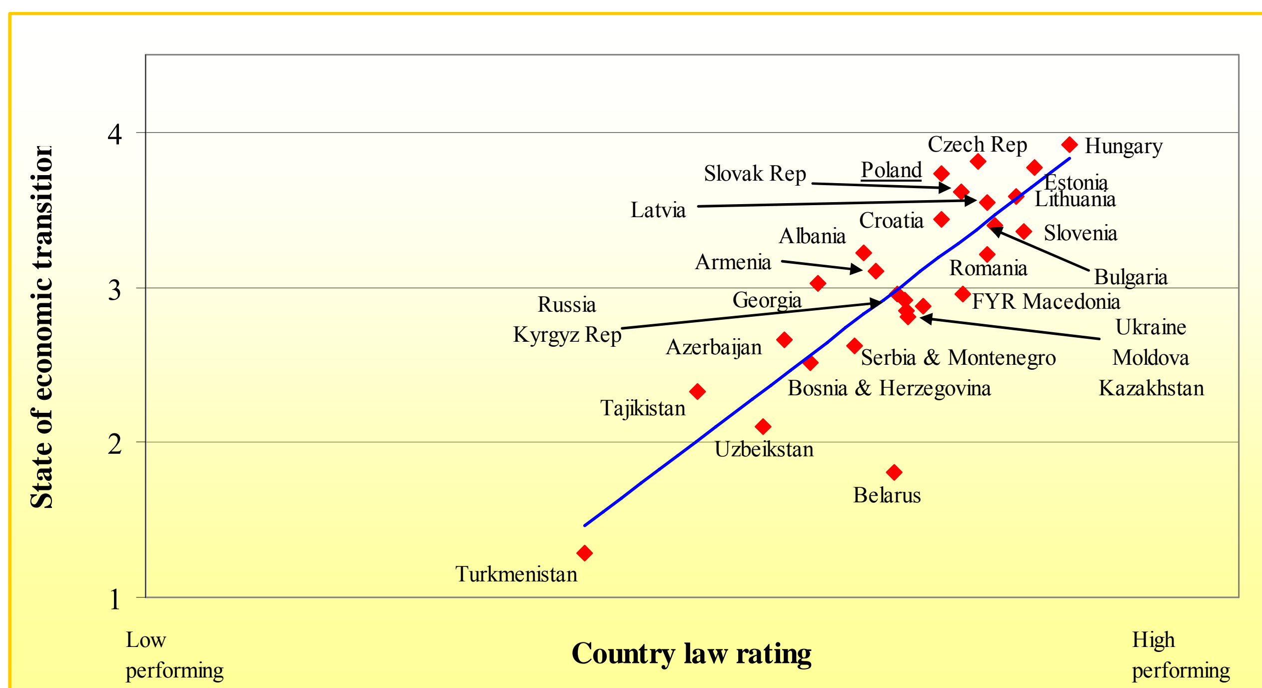
Measures are being undertaken to speed up the process in the courts, reduce legal costs and simplify procedures. Remaining challenges for the judicial system include improving efficiency and transparency, providing continued professional development for judges, improving administration and the supply of resources.

## *2.2. Relationship between legal transition and economic progress.*

Since the start of economic reforms, Poland has made considerable progress in developing a stable and functioning market economy, and is now regarded as one of the advanced transition countries in central and Eastern Europe.

Moreover, the country has made significant progress in establishing the rule of law and democratic institutions. Given the positive correlation throughout the Bank's countries of operations between these two dimensions, i.e., legal transition and overall economic progress, it is reasonable to expect that the future success of the transition process in Poland will be dependent on further improvements to the legislative framework, successful implementation of the legislation and on improving the quality of the courts. (See Chart 2 for Poland's position in terms of legal and economic progress compared to other countries in the region).
Poland is viewed as one of the transition countries where both dimensions are relatively advanced (see Chart 2).

**Chart 2 – Rule of law and progress in transition in the EBRD countries of operations**




*Source: EBRD Transition Report 2005, Table 1.1; EBRD Composite Country Law Index, 2005*

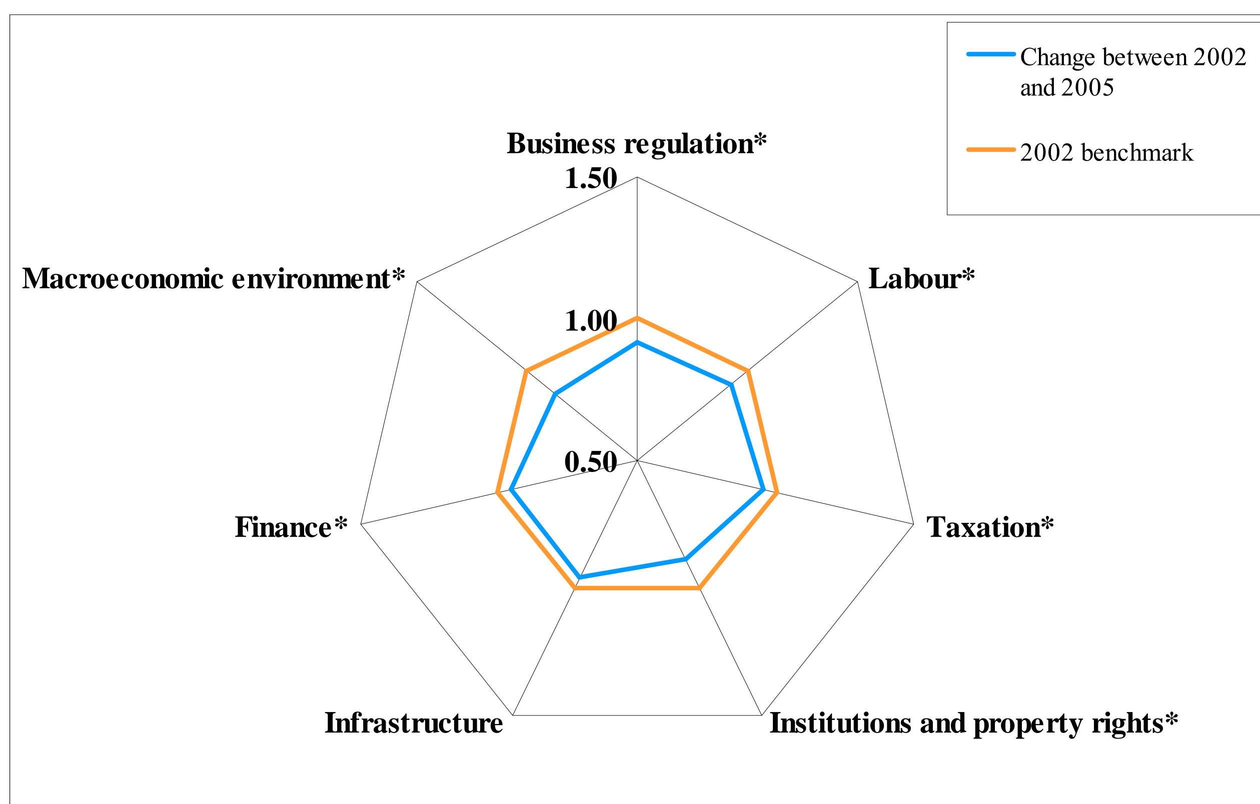
***Note:** The **horizontal axis** measures the performance of commercial and financial law. The **vertical axis** displays the EBRD transition index as an average of transition indicators between 1997 and 2003, with 1 referring to very early transition stages, and 4 referring to an advanced transition level.*

## *2.3 Implications for the investment climate*

The business environment in Poland is considered to be generally favourable. The tax and legal environments have undergone radical changes since the end of the Communist era and continue to improve, which reflects positively on the investment climate. EU membership and a steady programme of reforms have ensured for Poland considerable success in attracting foreign investment. In addition, the size of the Polish market encourages an increasing interest of export oriented industries and other businesses. A steady flow of inward investment is also supported by the favourable prognosis of international organisations on the development of the Polish economy in the short term.

The results of the Business Environment and Enterprise Performance Survey 2002/2005, developed jointly by the World Bank and the EBRD, suggest however that a stable legal environment is not the sole prerequisite for creating a sound investment climate in the country. According to the survey, other factors still represent major transition challenges facing Poland, most notably access to finance, tax issues and macroeconomic environment. (See Chart 3). Tackling bureaucracy, improving infrastructure and eradicating corruption should also be on the agenda of the policy makers.

**Chart 3 – Changes in the business environment in transition countries, 2002-05**




***Sources:*** *BEEPS 2002 and 2005*
*World Bank and EBRD*

***Notes:*** *The spider charts show changes in seven aspect of the business environment between 2002 and 2005. The 2002 data represent a benchmark of no change. Where the line falls inside the benchmark, this represents an improvement in that aspect of the business environment. Where the line falls outside of the benchmark, this represents deterioration in the business environment. Wherever the changes are statistically significant, the relevant categories are marked with an asterisk. The business environment was assessed on a scale from 1 (no obstacle) to 4 (major obstacle).*

## 3. Evaluation of selected commercial laws

The EBRD has developed and regularly updates a series of assessments of legal transition in its countries of operations, with a focus on selected areas relevant to investment activities: capital markets, concessions, corporate governance, insolvency, secured transactions and telecommunications. The existing tools assess both the quality of the laws "on the books" (also referred to as "extensiveness") and the actual implementation of laws (also referred to as "effectiveness").

All available results of these assessments can be found at www.ebrd.com/law.

### *3.1. Capital markets*

The legal framework governing the securities market in Poland was fundamentally amended in July 2005, with the approval of the new Act on Public Offering Conditions Governing the Introduction of Financial Instruments to Organised Trading (”Act on Public Offering”); the new Act on Trading in Financial Instruments and the new Act on Capital Market Supervision. These three Acts supersede the much amended Law on Public Trading in Securities, which remains in force relating parts not conflicting with any subsequent Acts. The new legislation entered into force on 24 October 2005.

The new Act on Public Offering is meant to transpose the relevant EU legislation on prospectus, moving away from standards on trading in securities in use since the beginning of the 1990s. The Act grants the Polish market regulator (the Polish Securities and Exchange Commission) new tasks including the approval of the prospectus, supervision over carrying out a public offering, admission to trading on a regulated market and conduct of promotional activities and maintaining a register of qualified investors. The new law also enhances the disclosure of shareholdings in a public company. Notification is required when a shareholder has achieved or exceeded 5%, 10%, 20%, 25%, 33%, 50%, 75% of the total vote in a public company. The new Act also introduces “squeeze out” and “sell out” rights: a shareholder owning at least 90% of the total voting rights has the right to demand that all minority shareholders sell their shares (“squeeze out”). On the other hand, minority shareholders can request the shareholder having 90% of the voting rights to buy their shares (“sell out”). Finally, criminal liability resulting from breach of shareholding disclosure responsibilities has been replaced by a regime of administrative liabilities.

The new Act on Trading in Financial Instruments eliminates the “concentration rule” so that trading in securities can now be executed off the stock market and without intermediation of a brokerage house, so ending the monopoly of the Warsaw Stock Exchange. This also applies to depository and settlement systems such as the National Depository for Securities which is no longer the only institution allowed to settle transactions executed in alternative trading systems. Capital requirements for Polish investment firms have also been changed and an initial capital of PNL 4 million is no longer required if the investment activity is of limited scope. However, investment firms are allowed to obtain civil liability insurance for any damage caused in the course of their investment activities and if the insurance provides a minimum coverage of 1.5 million EURO the initial capital is not required. The Act also introduces new definitions in line with EU legislation.

Finally, the new Act on Capital Market Supervision sustains the central role of the Polish Securities and Exchange Commission. The Act regulates in detail the supervision and enforcement of the new Acts, sets out particular types of enforcement proceedings and increases the supervisory and enforcement powers of the Securities and Exchange Commission.

According to the EBRD Securities Markets Legislation Assessment conducted in 2004, the country was found to be in “medium compliance” with the Objectives and Principles of Securities Regulation published by the International Organization of Securities Commissions (IOSCO).

The assessment was updated in 2005 and the findings confirmed the 2004 results. However, the new legislation – which came into force after the assessment–dramatically improves the already relatively sound Polish legal framework. Such changes will also help overcome some shortcomings in the securities market legislation.

### *3.2 Concessions*

Before the approval of a new Law on Public Private Partnership (“PPP Law”) that came into force on 1 October 2005, Poland had a very limited legal framework for the development of the PPP in infrastructure/services with rules set forth in several acts. Similarly, the government had no clear PPP policy established or published. For this reason, the 2004/2005 EBRD Assessment of Concession Laws throughout the 27 countries of EBRD operations, which was carried out prior to the PPP Law coming into force , rated the Polish regime as only partly conforming with internationally accepted principles of concessions laws.
The PPP Law directly states that a project can only be developed on a PPP basis if benefits to public interests outweigh those brought by other forms of project undertaking. Thus the PPP Law declares the value for money principle which would inevitably translate into a thorough preparation by the public sector of a potential PPP project. Some detailed steps to be followed by public authorities on this account can be found in the PPP Law along with the list of issues to be covered by a PPP contract.

The PPP Law does not contain any detailed procedures, providing instead a number of references to the procurement law. The PPP Law refers to model PPP contracts to be developed by the Ministry of Economy in connection with its enactment. However, it is not clear whether such model contracts plan to serve as guidance only or could become binding.

The PPP Law refers to Polish law as applicable to dispute resolution. The possibility of international arbitration is not expressly discussed. Nor are there references to the availability of security instruments over concessionaire’s interests in favour of lenders including step-in rights. However, the latter may be possible under general legal framework.

The PPP Law is not a comprehensive piece of legislation and will require secondary legislation in order for it to work in practice. Authorities are reported to be working on regulations, standard documentation and guidelines aimed at facilitating the application of PPP schemes. It is yet to be seen what implications the PPP Law will have on the inflow of private investment in transport, utilities and elsewhere. However, a number of projects have already been reported as signed or underway in the highway, health, sports and leisure sectors as well as in municipal utilities.

### *3.3 Corporate Governance*

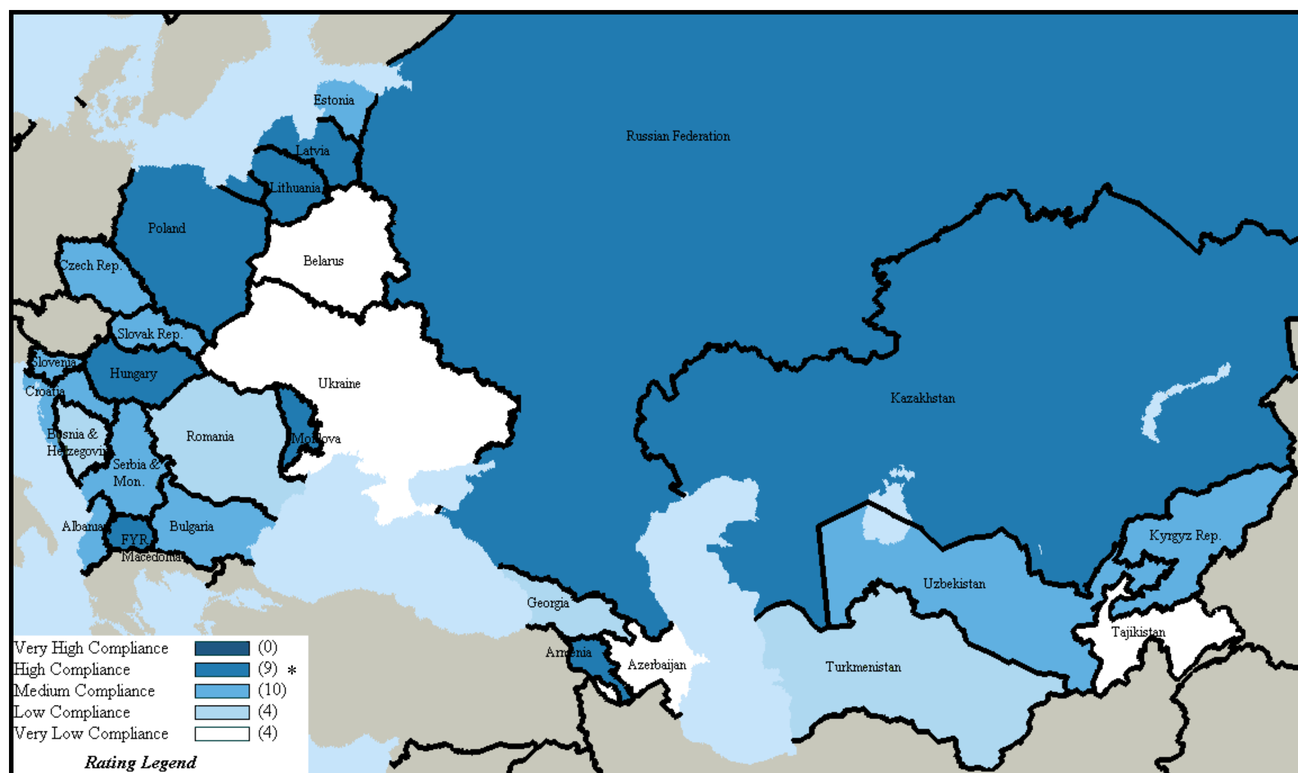
The main legislation regulating corporate governance issues in Poland is the Commercial Companies Code of 2000 (the "Companies Code"), as last amended in 2004. Two types of corporate form are available under the Companies Code: companies limited by shares (i.e. joint stock companies and limited liability companies), and partnerships (i.e. registered, limited, professional limited and limited joint stock partnerships).

Apart from mandatory legislation, the Warsaw Stock Exchange ("WSE") adopted a voluntary corporate governance code (Best Practices in Public Companies 2005) for companies listed on the

WSE. Listed companies are required to issue an annual declaration stating whether or not they comply with the code and explaining the reasons for any non-compliance.

According to the results of the EBRD's 2004 Corporate Governance Sector Assessment Project, Poland's corporate governance related laws (i.e., "law on the books", not how the relevant legislation is being implemented) were assessed as in "high compliance" when compared to the OECD Principles of Corporate Governance and evidenced only minor flaws. (See Chart 8)

**Chart 8 – Quality of Corporate Governance legislation in the EBRD Countries of operation**

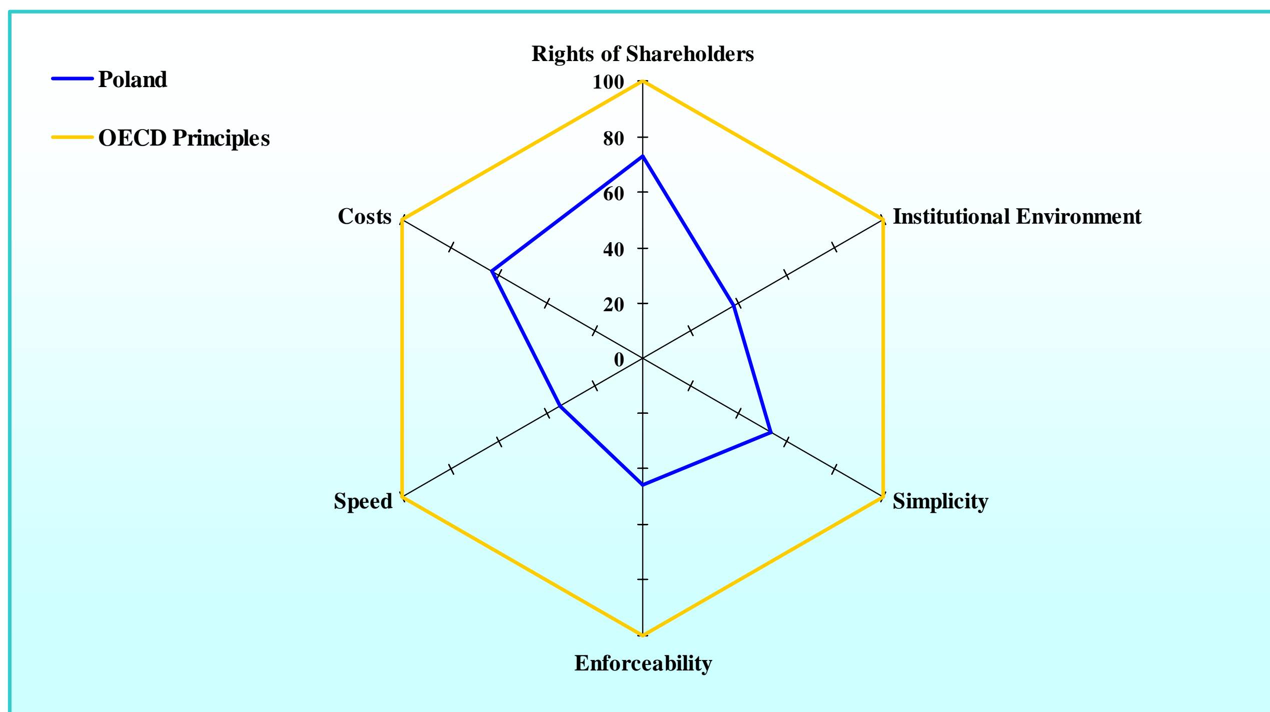



***Source:*** *EBRD Corporate Governance Sector Assessment 2004*

***Note:*** *The various categories represent the level of compliance of a country's legislation (the "laws on the books") with international standards as set out in the OECD Principles of Corporate Governance. The asterisk indicates in which category Poland ranks.*

The graph below (Chart 9) reveals the degree of shortcomings in the basic elements of the corporate governance legislation, based on the 2004 Assessment mentioned above.

**Chart 9 – Quality of Corporate Governance legislation – Poland, 2004**

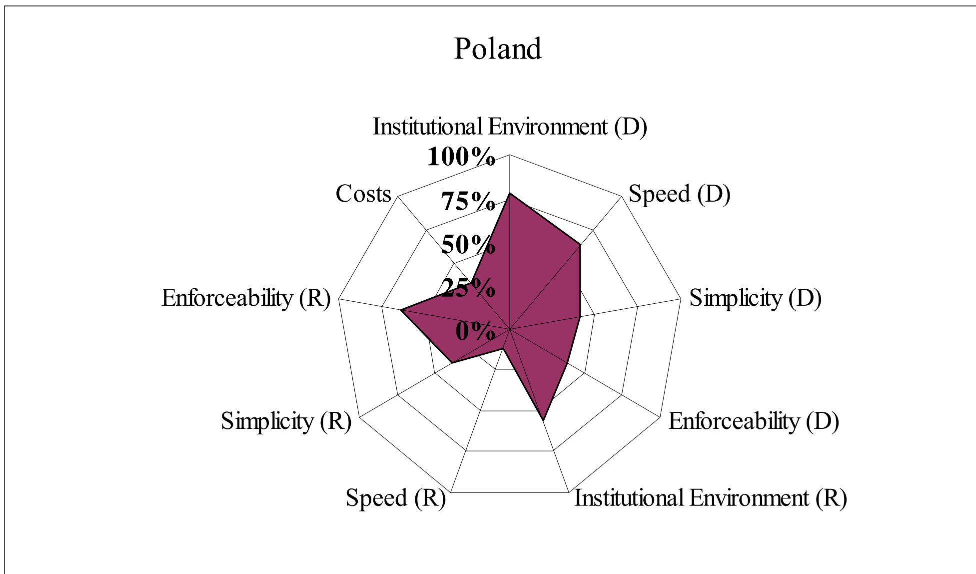



***Source:*** *EBRD Corporate Governance Sector Assessment 2004*

***Note:*** *The extremity of each axis represents an ideal score in line with international standards such as the OECD Principles of Corporate Governance. The fuller the 'web,' the more closely the country's corporate governance laws approximate these standards.*

In 2005, the EBRD launched a survey for testing the effectiveness of corporate governance (how the law works in practice). Two case studies dealing with related-party transactions in a listed and unlisted company were designed. The case studies investigated the position of a minority shareholder seeking to access corporate information in order to understand if a related-party transaction was indeed entered into by the company and how it was possible to obtain compensation in case damage was suffered. Effectiveness of legislation was then measured according to four principal variables: institutional environment, enforceability, complexity and speed. The survey revealed that a minority shareholder wishing to obtain disclosure in unlisted companies might be hindered due to the limited availability of effective actions. The situation is deemed to be better in listed companies, although procedures are considered complex and enforceability might be a problem. The time needed to obtain disclosure is usually limited to a couple of months, but can be easily delayed by the other party. When considering redress, procedures are considered complex and it would take about 3-4 years to obtain an executable judgement. The institutional environment is generally sound: the only reported flaws are the limited experience and competence of lower courts and the prosecutor in corporate law cases (See Charts 10 and 11).

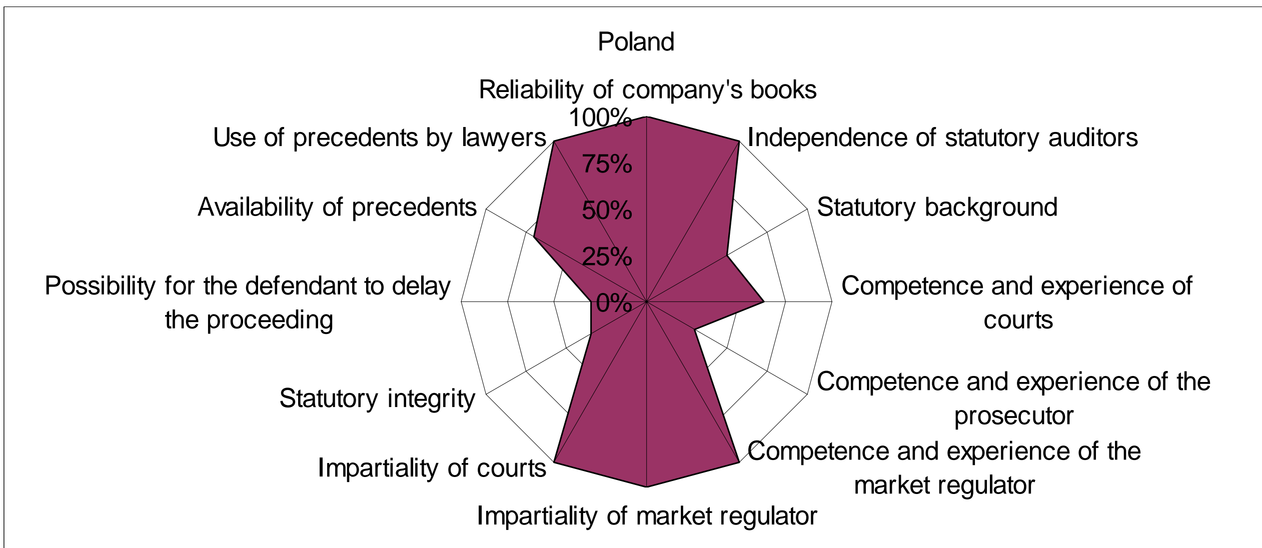
## Chart 10 - Effectiveness of corporate governance in Poland




*Source: 2005 Legal Indicator Survey*

*Note: The graphs show disclosure, redress and the institutional environment in the transition countries. The average results from the case study scenarios are shown. Disclosure refers to a minority shareholder's ability to obtain information about their company. Redress refers to the remedies available to a minority shareholder whose rights have been breached. Institutional environment refers to the capacity of a country's legal framework to effectively implement and enforce corporate governance legislation. Costs refer to the expenses a minority shareholder must pay to take legal action. The extremity of each axis represents an ideal score: the fuller the 'web', the better the corporate governance framework.*

## *Chart 11 - Institutional Environment in Poland*




*Source: 2005 Legal Indicator Survey*

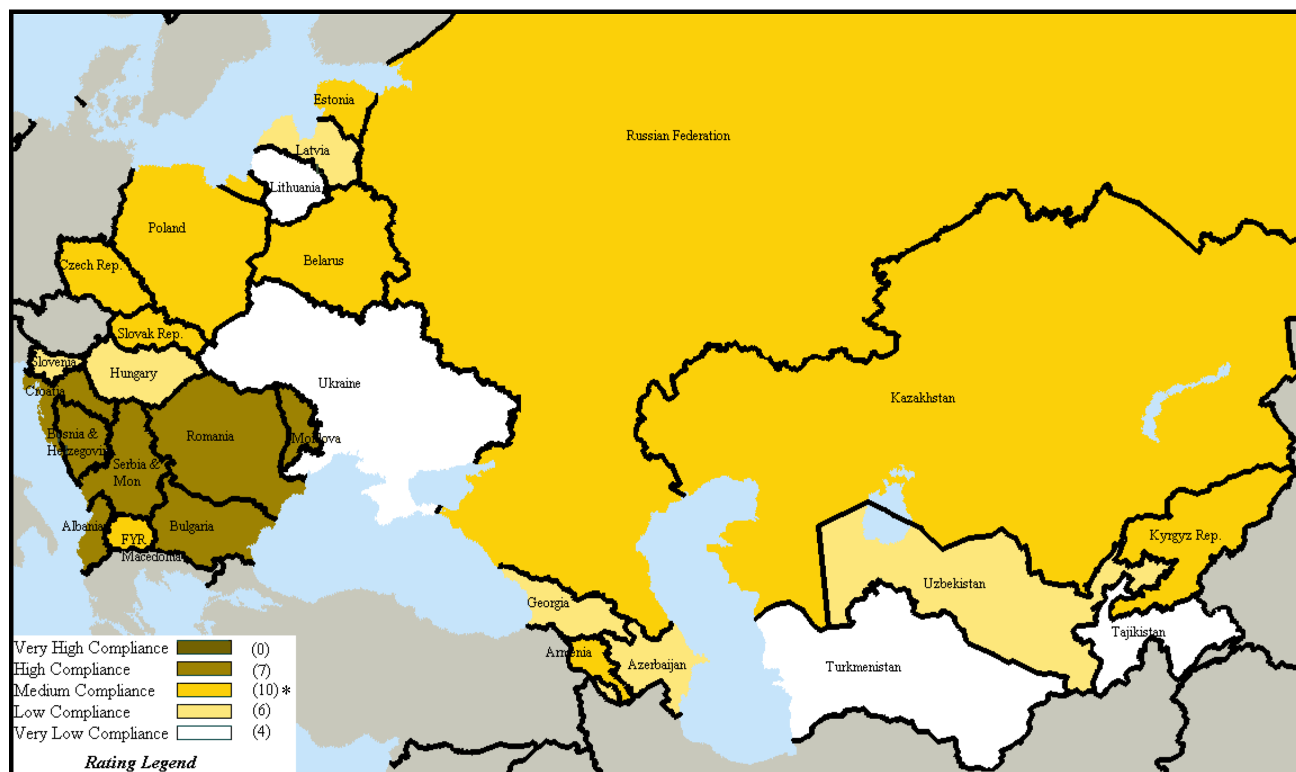
*Note: Institutional environment refers to the capacity of a country's legal framework to effectively implement and enforce corporate governance legislation. Statutory background relates to how comprehensive, clear and well structured a country's definition of related-party, self-interested, self-dealing, or conflict of interest transactions is. In particular, whether this definition covers transactions in which the director or the dominant shareholder has an indirect interest (for example, the party to the transaction is a dominant shareholder's subsidiary). Statutory integrity refers to the level of corruption within a transition country, as determined by Transparency International's Corruption Perception Index 2005. This index is measured on a scale from 1 to 10, with 1 being the most and 10 the least corrupt*

*environment. The extremity of each axis on the graph represents an ideal score: the fuller the 'web', the better the institutional environment.*

### *3.4 Insolvency*

Bankruptcy and insolvency in Poland are governed by the Law on Bankruptcy and Redress (2003) (as amended) (the "Insolvency Law"). This law scored "medium compliance" when compared with international standards in the EBRD's 2003-04 Sector Assessment Survey. (See Chart 10)

**Chart 12 – Quality of Insolvency legislation in the EBRD Countries of operation**

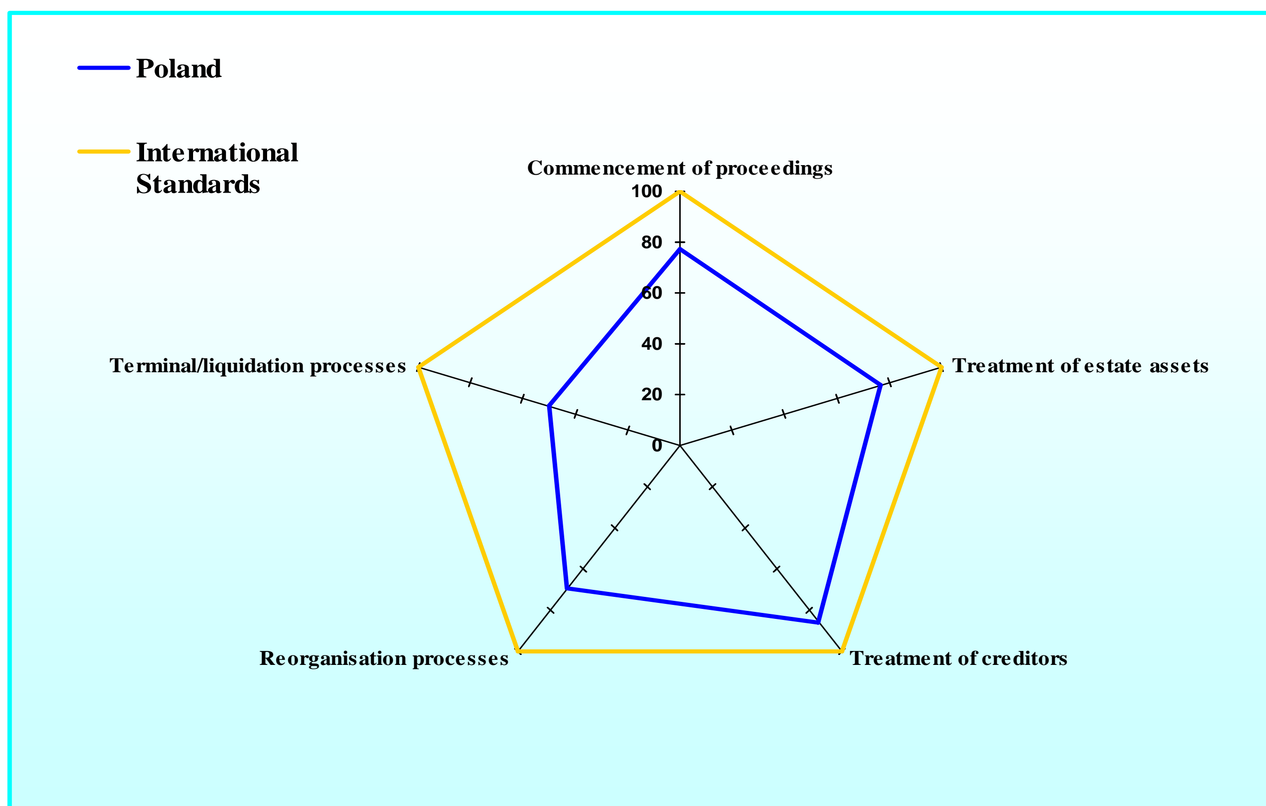



***Source:** EBRD Insolvency Sector Assessment 2004*

***Note:** The various categories indicate the level of compliance of each country's legislation (the "laws on the books") with international standards, such as the World Bank's Principles and Guidelines for Effective Insolvency and Creditor Rights Systems, the UNCITRAL Working Group on Legislative Guidelines for Insolvency Law, and others. The asterisk indicates in which category Poland ranks.*

The graph below (Chart 13) displays the data collected in this project and shows levels of compliance of the Insolvency Law with international standards in five core areas:

**Chart 13 – Quality of Insolvency legislation – Poland, 2004**




***Source:*** *EBRD Insolvency Sector Assessment 2004*

***Note:*** *The extremity of each axis represents an ideal score in line with international standards, such as the World Bank's Principles and Guidelines for Effective Insolvency and Creditor Rights Systems, the UNCITRAL Working Group on Legislative Guidelines for Insolvency Law, and others. The fuller the 'web,' the more closely the country's insolvency laws approximate these standards.*

As the graph reveals, the Insolvency Law has some strengths in certain areas. Specifically, the law is very strong on notifying and involving creditors in the bankruptcy process and on simplifying the requirements to commence proceedings. The law also has fairly comprehensive provisions (when compared to other countries of operations) dealing with the avoidance of pre-bankruptcy transactions. All of these elements represent significant strengths.

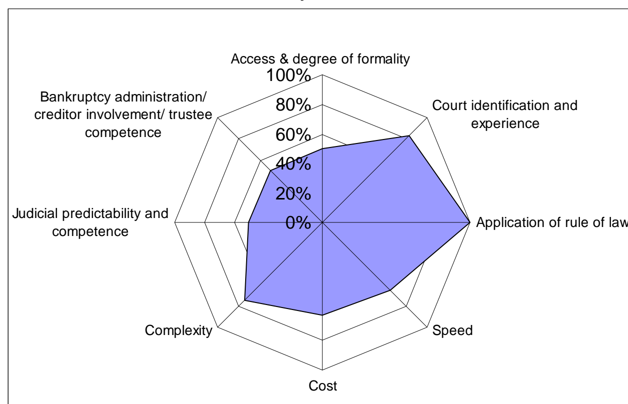
As the above graph also indicates, however, there is much room for improvement in the Insolvency Law. Specifically, the provisions specifying the financial conditions required to constitute insolvency are vague and unclear. In addition, it is unclear what happens to the contractual enforcement rights of secured creditors once an insolvency has commenced. There are no provisions to allow for ongoing financing during a reorganisation (this is a common weakness throughout the region) and the provisions requiring relevant parties to deliver assets and records of the debtor company to the court or the court's functionary are insufficient.

Although the Insolvency Law does contain some positive elements (as described above) there is some doubt as to whether any positive attributes in this law can be properly implemented. The EBRD 2004 Legal Indicator Survey on Insolvency which examined the 'effectiveness' (or how the law works in practice) of insolvency regimes in both creditor-initiated insolvencies and debtor-initiated insolvencies, in particular, the effectiveness of the regime as it relates to the commencement of insolvency proceedings and the granting of an initial insolvency court order (sometimes called the "effective final order"), revealed that the practical application of the Insolvency Law by creditors is likely to run into serious barriers to access and undue formality. In

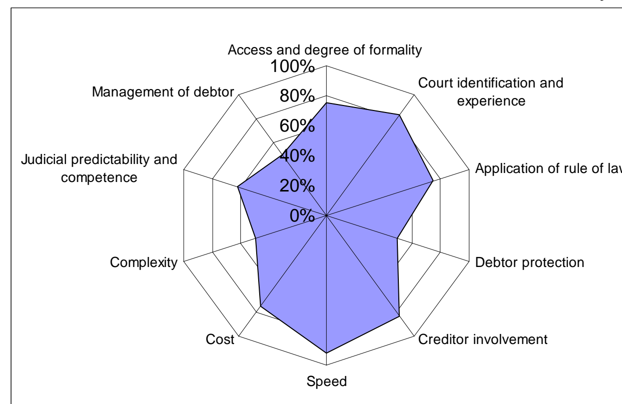
addition, creditors can be easily thwarted by the delaying tactics of debtors and have very little confidence in the skill levels of appointed functionaries (i.e. insolvency administrators). This latter point is a consistent problem throughout the region and has prompted EBRD to, among other things, engage in a detailed standard setting exercise to attempt to promote more uniform practices with respect to the governance of insolvency administrators. The results of the Survey are graphically represented in the graphs below (Chart 12):

**Chart 14 – Effectiveness of Poland insolvency regime**

Creditor-Initiated Insolvency




Debtor-Initiated Insolvency




***Source:*** *EBRD 2004 Legal Indicator Survey on Insolvency*

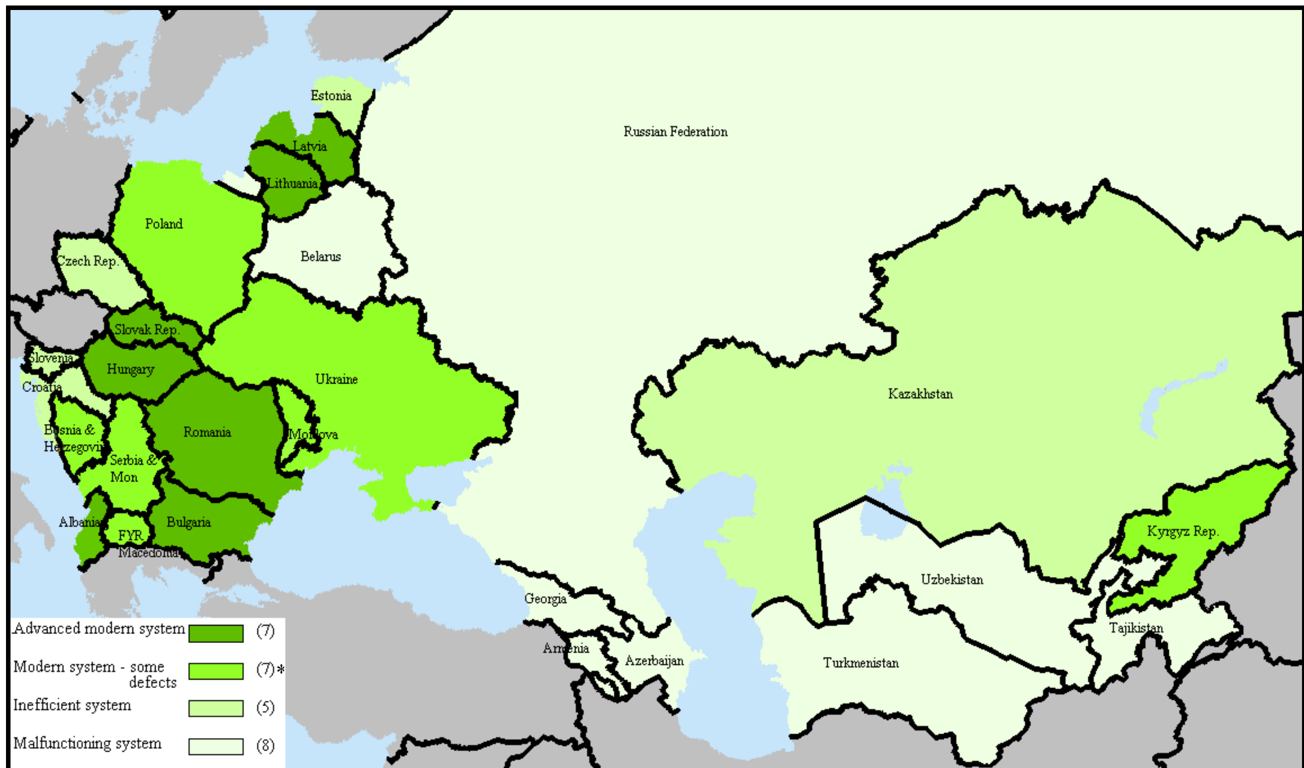
***Note:*** *The results have been derived from stakeholder responses to questions about the practical functioning of the insolvency regime. The fuller the "web," the more effective the country's insolvency regime is.*

While the results of the survey leave some room for optimism, certain factors in the 'debtor initiated' table above militate against the insolvency regime functioning properly to restructure businesses that are fundamentally viable. Specifically, there is often little practical protection for debtors and the judiciary cannot always be relied upon to deal with these cases in a coherent and predictable fashion. Reform in this area is needed to help create a legal regime that tries to limit the disruption that insolvencies cause by promoting the rescue of fundamentally healthy companies.

### *3.5 Secured Transactions*

Poland is generally considered an advanced transition country yet its legal system does not always seem to adequately support commercial activities. The quality of its secured transactions legislation was assessed in EBRD Regional Survey of Secured Transactions Legislation 2004 and was described as "modern system with some defects". (See Chart 13)

**Chart 15 – Quality of secured transactions legislation in the EBRD countries of operation**

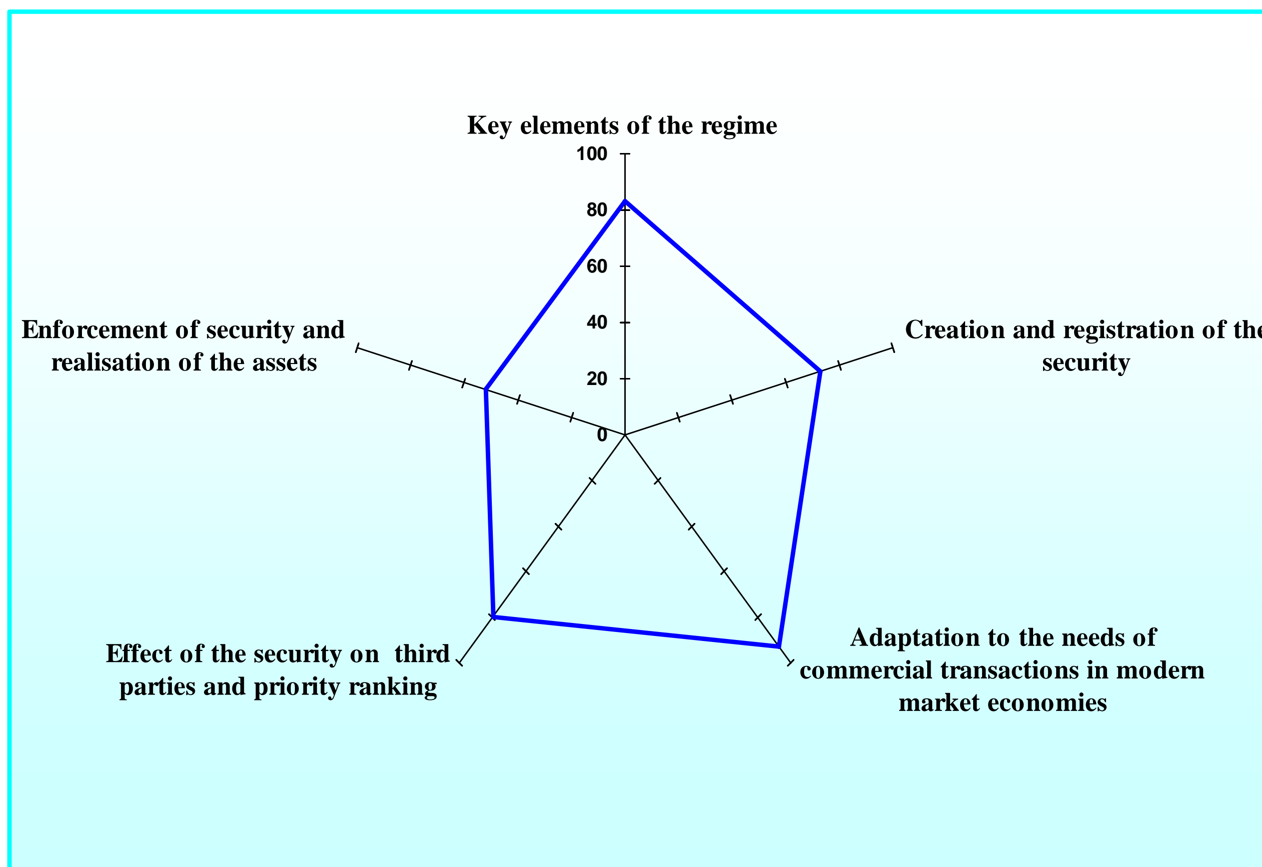



***Source:*** *EBRD Regional Survey of Secured Transactions Legislation 2004*

***Note:*** *The level of reform referred to in the legend above is assessed in relation to the EBRD's Model Law on Secured Transactions and the 'ten core principles of secured transactions law'. The asterisk indicates in which category Poland ranks.*

The Regional Survey pointed to the overly lengthy perfection of the security (registration in the Collateral Registry, held at the District Courts) and the uncertainty of enforcement. (See Chart 14)

**Chart 16 – Quality of secured transactions legislation – Poland, 2004**

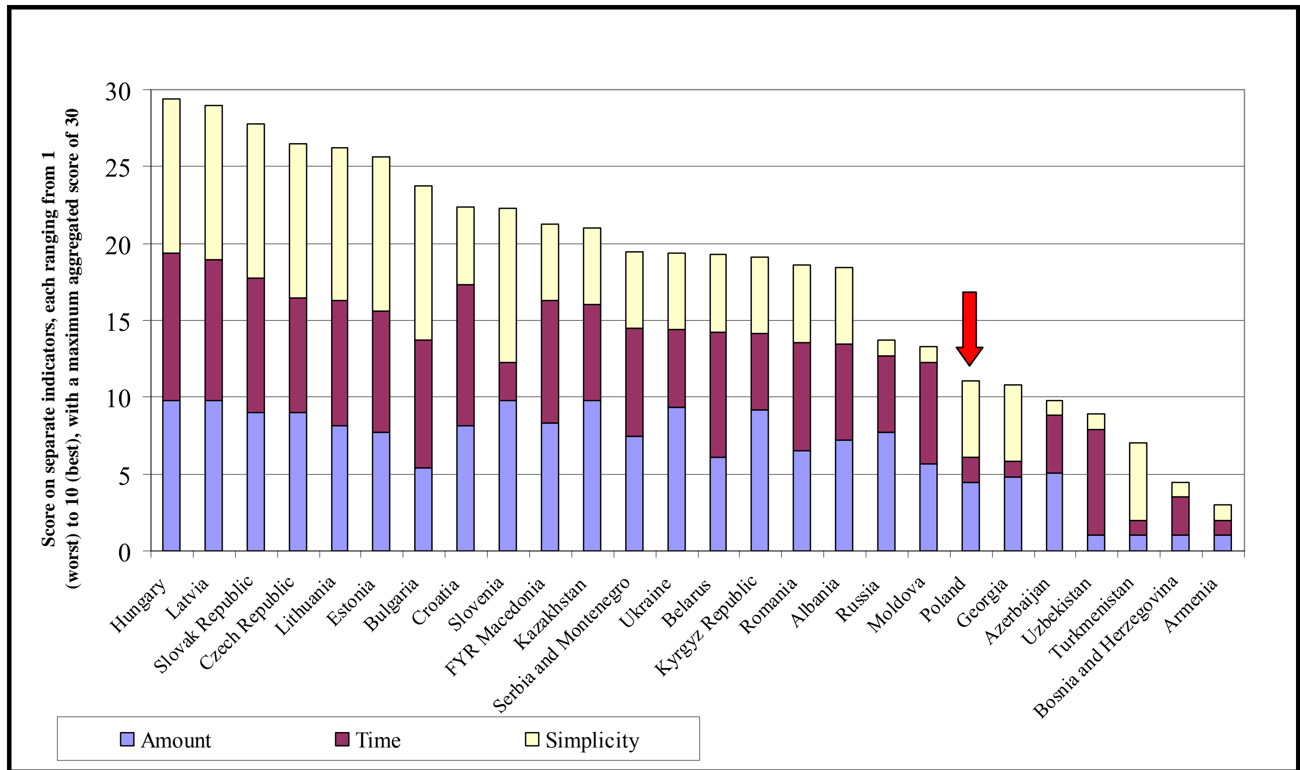



***Source:*** *EBRD Regional Survey of Secured Transactions Legislation 2004*

***Note:*** *Scoring is done on a scale of 1 to 100, with 100 representing the most advanced legal regime. The fuller the 'web,' the more advanced the country's secured transactions legal system is.*

Whilst, the legislation in the sector seems relatively good, the effectiveness of such legal framework raises concerns. In the EBRD 2003 Legal Indicator Survey which focused on the enforcement of security rights, Poland was assessed as the least efficient of all countries in Central Europe and the Baltic States in terms of the return that the creditor could expect, the time involved and the simplicity of the process. (See Chart 15 and 16)

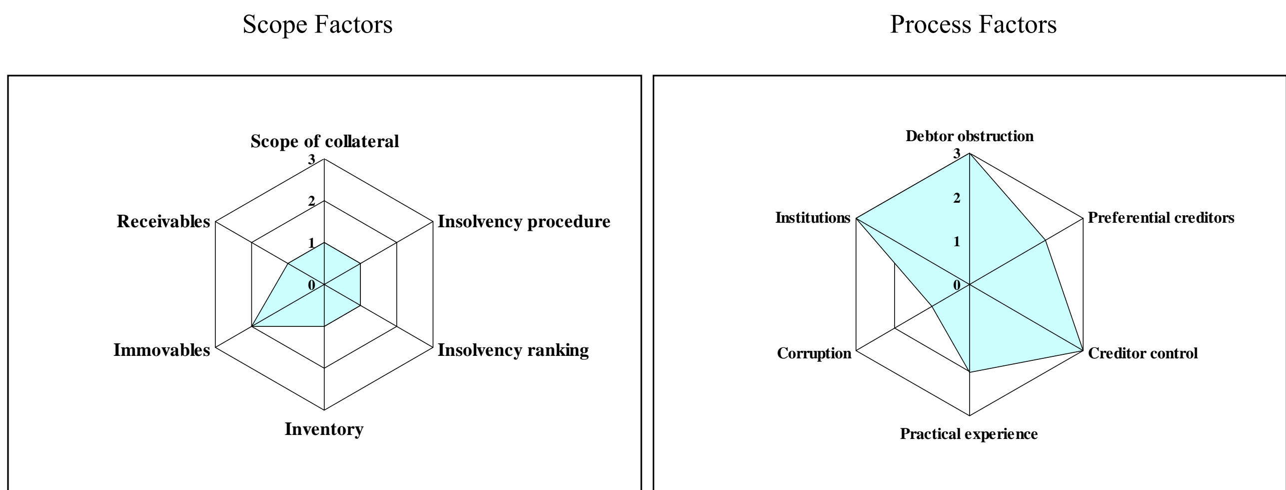
**Chart 17 – Effectiveness of the Charge Enforcement Process – Poland (2003)**




***Source:*** *EBRD New Legal Indicator Survey 2003*

***Note:*** *The chart shows how much a secured creditor can expect to recover (amount), how quickly (time), and how simply (simplicity). The higher the bar, the more efficient and creditor-friendly the system is.*

**Chart 18 - Obstacles to Charge Enforcement Process – Poland (2003)**




***Source:*** *EBRD Legal Indicator Survey 2003*

***Note:*** *"Process" factors measure the impact that specific obstacles would have on the enforcement proceedings. "Scope" factors give an indication of how effective enforcement would be when conducted on various types of collateral and in the context of debtor insolvency. The fuller the coloured area, the more serious the problems are.*

The main reason for such a poor performance was again the lack of ability commercial courts have to handle the case swiftly. Similar criticisms have come from other sources, in particular the World Bank *Doing Business in 2004* and *Doing Business in 2005* reports (see http://www.worldbank.org/DoingBusiness) pointing, for example, to the fact that it would take on average 1000 days to enforce a simple contract, and that on a scale of 1 to 10 the legal rights of

borrowers and lenders scored just 2. In 2004, the National Bank of Poland (NBP) approached the EBRD Legal Transition Team. Recognising that the current secured transactions regime is inadequate, the NBP sought EBRD's expert assistance to help it better understand precisely where the deficiencies lie and how they can be concretely addressed.

The report, available at www.ebrd.com/st, was published in early 2006 and points to a list of issues. It makes the following recommendations:

1. The system for pledge registration should be changed to a "notice" system which enables immediate registration of information as presented by the parties, and immediate access to all registered information by any member of the public.

   Regardless of whether or not the courts remain in charge of the registration system, such a notice system should:
   - preclude any requirement for judicial review of registration applications or examination of the pledge agreement.
   - give maximum flexibility to the system so that parties can tailor the pledge according to the context of their transaction (including collateral description) as was envisaged in the pledge law.
   - include tax pledges, currently registered separately in the Central Register of Treasury Pledges, in the Pledge Registry so that the public can easily and quickly find all registered pledges in one single place.
   - provide real time access by the public to all registered information via the internet and a user-friendly search engine.

2. The processes for registration of mortgages and for accessing information in the mortgage registers should be made simple, fast and inexpensive.

   Problems with mortgage registration are not all due to the outdated, paper-based land registries, thus they need to be tackled in parallel to the computerisation of the information. Superfluous requirements and formality should be removed, and checking should be limited to necessary issues of substance. Despite the formalism associated with mortgage registration because of the nature of the land registry, the procedures should be adapted to market economy transactions. The public should be given easy and immediate access to all registered information concerning mortgage.

3. The mortgage law should be reviewed to remove unnecessary or out-of-date restrictions and constraints, and to make mortgage an attractive and flexible instrument of security which gives maximum economic benefit to borrower and lender.

   Unnecessary limitations surrounding the taking of mortgages have made the instrument unattractive to lenders. These limitations should be removed because they have no *raison d'être*. It should be made possible to secure any pecuniary claim by a single mortgage irrespective of its nature or form. The process for creation of a mortgage should be made as simple as possible with maximum scope for the parties to tailor the detail of their agreement to fit the actual needs of their transaction.

4. Simple, fast and inexpensive procedures should be introduced allowing out-of-court sale of pledged and mortgaged assets under the control of the secured creditor, aiming at rapid realisation at market value in a manner which is fair for creditor and debtor alike.

The severe limitations on the ability to enforce are one of the prime causes of the ineffectiveness of pledge and mortgage in supporting credit markets and they considerably increase the cost of borrowing. Alternative methods introduced by the pledge law have failed to serve the needs of the users, for a variety of reasons. Poland should take a fresh look at what can be offered to the parties, in the context of both pledge and mortgage. Successful examples of out-of-court realisation procedures can be found in all of the reference countries. Typically, the creditor can initiate sale of the collateral without going to court, and he or some other third party designated by the parties can effect the sale either at auction or as a direct sale. Similar procedures should apply for mortgage as for pledge as there is no reason to submit one instrument to different rules than the other.

5. The rules and procedures for court involvement on enforcement of pledges and mortgages should be revised to ensure that the courts will provide practical and timely assistance or protection if needed by either party during out-of-court enforcement so that creditor can rely on the realisation procedure giving him a viable means of recovering the money he is owed, and a debtor can be assured of adequate remedy if the actions of the creditor exceed what he is entitled to do under the terms of the law or the security agreement.

   Ultimately parties will rely on the courts to guarantee that legal effect is given to their agreement for security. Currently, court involvement is seen by users as hampering the process through unjustified delays, chronic debtor obstruction, and lack of market understanding. Creditors have lost confidence in enforcement procedures enabling them to recover their unpaid claims. Whereas general reform of court procedures may be a gradual process, effort is needed now to design balanced rules defining clearly the rights and responsibilities of the parties on enforcement. In the case of dispute, the role of the courts should be only to ensure that those rules operate efficiently and fairly to give effect to the legitimate intentions of the parties.

6. The rules and practices for obtaining possession or control of pledged or mortgaged assets on enforcement should be changed to ensure that the basic right to obtain possession or control of secured assets is upheld and that the procedure for doing so is simple, fast and inexpensive.

   The procedures available to the creditor for obtaining possession or control constitute an essential, complementary part of enforcement procedures. They need to provide a rapid and effective means of protecting the pledged or mortgaged assets during enforcement so that the assets can be delivered to a purchaser under the realisation process. Poland is relying on the work of bailiffs to provide such protection but this is failing the market.

Although the private sector has shown an encouraging degree of agreement with EBRD findings and recommendations, there is an obvious difficulty of translating the words of the report into real change. As yet there does not appear to be a convincing strategy for taking the recommendations forward, EBRD will continue to liaise with the NBP and to give such support and encouragement as it can.

### *3.6 Telecommunications*

The telecommunications sector in Poland is currently regulated by the Urzędu Komunikacji Elektronicznej (UKE)(Electronic Communications Authority) and is governed by the Telecommunications Act of 2004. UKE replaced the Post and Telecommunications Regulations Office (URTiP) on 14 January 2006 by virtue of new legislation adopted by parliament on 29 December 2005. This legislation reorganised the regulatory authorities responsible for electronic communications and broadcasting. Responsibility for policy development resides with the Ministry

of Transport and Construction, established in September 2005 to replace the Ministry for Infrastructure.

UKE is an independent full sector regulator whose main responsibilities include the regulation of telecoms activities, management of frequencies and electro-magnetic compatibility issues, as provided for by the Telecoms Act and by secondary legislation; granting licences, handling registrations of telecoms activities and assignment of numbers to public operators in accordance with the national numbering plan; monitoring the operation of the telecoms and telecoms equipment markets; and, intervention in the telecoms market on its own initiative or on application made by other interested parties, including end users and telecoms operators.

Fixed line penetration rates are lower in Poland than in peer countries and currently hover around the 35% mark. The market was formally fully liberalised at the beginning of 2003, with the abolition of the incumbent (TPSA) exclusivity on international telephony. Prior to this, a gradual liberalisation process had been pursued. This slow progress in liberalisation reflected an apparent protective attitude by the then government towards TPSA. While TPSA still dominates the market and will continue to do so in the near term, a significant number of competitive operators have now entered the market and are beginning to make an impact. This competition has seen TPSA's market share declining in almost all segments, falling to below 80% of long-distance market and below 70% in the international market.

The mobile market is divided among PTC (operator of networks Era and Heyah), Polkomtel (Plus, Sami Swoi) and Centertel (Idea). In common with most developed and transition markets his sector has been growing rapidly, though with penetration rates currently just above 65% there is still scope for healthy growth. Despite the level of competition, however, the European Commission voiced an opinion that Polish mobile tariffs were the highest in the EU during 2004. Current Government plans to award another GSM licence during 2006 should have a positive influence in this area, adding a fourth operator to compete within the market.

While significant advances have been made in the Polish telecoms market, particularly in the context of the obligations taken on as part of EU membership, the full practical implementation of individual elements of the regulatory framework has not gone smoothly. Delays in full liberalisation and in implementing market access mechanisms allowed the incumbent operator to entrench their market position, one which is only now being appropriately challenged. Although the current government appears committed to following through with full implementation of relevant frameworks, given the newness of the domestic legal framework and revised institutional structure, extra attention will be required to ensure meaningful competition is sustained in all markets of the sector.