

**BULGARIA****ASSESSMENT OF THE QUALITY OF THE PPP LEGISLATION AND OF THE EFFECTIVENESS OF ITS IMPLEMENTATION****2011**

I- PPP Legislative Framework Assessment (LFA)	Compliance of the PPP legal framework with PFI Guide recommendations¹ and Best Practice		
Core Area		Rating	Assessment
1- PPP Legal Framework	Existence of specific PPP law or a comprehensive set of laws regulating concessions and other forms of PPP and allowing a workable PPP legal framework	16/21	
2-Definitions and Scope of the Law	Existence of a clear definition of the boundaries and scope of application of the concession legal framework (e.g. definition of "PPP", sectors concerned, competent authorities, eligible Private party) limiting the risk of a challenge to the validity of PPP contracts, irrespective of whether the act is specifically targeted at PPP	17/24	
3-Selection of the Private Party	Mandatory application of a fair and transparent tender selection process. Limited exceptions allowing direct negotiations, competitive rules for unsolicited proposals and	40/45	

¹ UNCITRAL *Legislative Guide on Privately Financed Infrastructure Projects*, 2001 (hereinafter the "PFI Guide")

Checklist Bulgaria



	the possibility to challenge illegal awards.		
4-Project Agreement	Flexibility with respect to the content of the provisions of the Project agreements which should allow a proper allocation of risks without unnecessary or unrealistic/not bankable/compulsory requirements/interferences from the Contracting Authority (obligations, tariff, termination, compensation).	19/30	
5-Security and Support Issues	Availability of reliable security instruments to contractually secure the assets and cash-flow of the Private Party in favour of lenders, including "step in" rights and the possibility of government financial support, or guarantee of, the Contracting Authority's proper fulfilment of its obligations.	9/21	
6-Settlement of Disputes and Applicable Laws	Possibility to obtain proper remedy for breach under the applicable law through international arbitration and enforcement of arbitral awards.	14/15	
General LFA Rating			
		73.7/%	High Compliance
II-Legal Indicators Survey (LIS)	Effectiveness Assessment : How the PPP law works in practice		
Core Area		Rating	Legal Indicator Survey
7- Policy Framework	Existence of a policy framework for public private partnerships	9/24	
8 Institutional Framework	Existence of an institutional framework for public private partnerships	56/27	
9- PPP Law Enforcement	Award and implementation of PPP projects in compliance with the Law	21/30	
General LIS Rating		49,7/%	Low compliance
OVERALL RATING		61,6/%	Medium compliance



3.

Local Expert²: ARSOV, NATCHEV, GANEVA Law Firm

² The Local Experts in charge of each country have been consulted for the elaboration of the responses to the Checklist in their capacity of well recognized established law firm in the country but the Local Experts as well as EBRD are in no way responsible for the responses given to any question in this Checklist as the Consultant was free to use any other sources of information for its final determination.

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**RATING:** Key for assessment of Each Question

✓ ✓ ✓	Yes	3 points
✓ ✓	Yes, with reservations	2 points
✗ ✗	No, with Limited compliance / redeeming features	1 point
✗ ✗ ✗	No	0 point
N/A	Not applicable	0 point/ Not included in total

Key for Assessment of Each Core Area and for Overall Assessment

≥ 90%	Very High Compliance/Effectiveness
≥ 70%-89%	High Compliance/Effectiveness
50%-69%	Medium Compliance/Effectiveness
30%-49%	Low Compliance/Effectiveness
< 30%	Very low Compliance/Effectiveness

TERMINOLOGY

So as to keep answers consistent and avoid ambiguity, we set out below some brief definitions of the terminology used in this questionnaire. Any definition is provided solely to clarify some of the terminology used below. The reader should note that any such definition does not correspond with any given definition under best international practice (which does not provide for any standardised PPP legal definitions recognised worldwide) neither should it be interpreted that we recommend the adoption of such definitions under actual documentation, but they are

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included in the interests of clarity for the completion of this questionnaire, and we should be grateful if you could adopt such definitions for the purposes of completing the questionnaire.

- **"Public Private Partnership" - "PPP" or "PPP project"** includes all types of long-term arrangements between public authorities and private institutions, including but not limited to; Concessions, BOT and derived forms, PFI and Institutional PPP. For the purposes of this questionnaire, PPP excludes the sale of public assets or of public company shares which are part of a privatisation process and also excludes public works, services or supply contracts which are subject to public procurement rules.

The following types of Public - Private Partnership Agreements may be adopted by a Contracting Authority for undertaking infrastructure projects. These are solely indicative in nature and the Contracting Authority may seek to adopt a combination of the different contractual arrangements, which incorporate some of their elements or combine elements.

- **"BOT"** - (Build-Operate-and-Transfer)- and derived forms : a contractual arrangement whereby the Private Party undertakes to finance, design, construct under a turnkey risk basis, operate and maintain an Infrastructure project for a specified period after which period the project facilities are transferred to the Granting Authority usually without payment of any compensation.

The Private Party has the right to collect contract or market based tariffs or fees from the users of the infrastructure project, as specified in the PPP agreement, to recover its investment and operating and maintenance expenses for the project. A BOT type of PPP arrangement may provide for all the implementation and operational efficiencies of the private sector, together with new sources of infrastructure capital. Derived forms of BOT contractual arrangements exist such as Build-Own-Operate-and-Transfer (BOOT) similar to the BOT agreement, except that the Private Party owns the Infrastructure project during the specified term before its transfer to the Contracting Authority or its designee, or such as Build-Own-and-Operate (BOO) which is a contractual arrangement similar to the BOT agreement, except that the Private Party owns the Infrastructure project and no transfer of the project to the Contracting Authority or its designee at the end of the fixed period is envisaged. Derived forms incorporating Lease right rather than Ownership or dealing with rehabilitation or extension rather than construction which extent the possible combination which for the purpose of this questionnaire will all be hereafter referred to as BOT for simplification purpose except where legal specificity requires specific treatment.

- **"Concession"**: is an act attributable to the State whereby a Contracting Authority entrusts to a third party the total or partial management of public services for which that authority would normally be responsible and for which the third party assumes all or part of the risk.



6.

- **"PFI"** (Private Finance Initiative) : a form of cooperation and partnership between public authorities and Private Parties which aim to ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of service to the infrastructure without the delegation of the public service itself. It is a contractual arrangement whereby the Private Party undertakes the financing and the construction of an infrastructure project and after its completion transfer it to the Contracting Authority or its designee. This arrangement may be employed in the construction of a public service facility for which the public service must be operated directly by the contracting authority for whatever reason but the operation and maintenance of the facility remain the responsibility of the Private Party for the entire duration of the PPP agreement. The contracting authority will reimburse the total project investment on the basis of a rent based of an agreed schedule with the payment starting from the date of commencement of operation and pay for the services rendered to the facility on a performance basis.
- **"IPPP"**(Institutional PPP): a structural or corporate form of PPP which provide for the cooperation between public authorities and a Private Party through a joint venture or mix (publid- private shareholding) company in which case all reference to the slection process refers to the selection of the Private Party.

Other definitions:

- The **"Law"** or **"PPP Law"**: a law regulating any form of PPP including but not limited to Concession, BOT, PFI, IPPP and including, for the purpose of this questionnair, the set of rules applicable to any PPP in the absence of a specific PPP law. The Law for the purpose of this questionnaire also includes any implementing regulation and any form of governemental act regulating PPP.
- **"BOT Law"** : a law regulating a BOT type of PPP in their multiple forms.
- **"Concession Law"**: a law regulating a Concession form of PPP.
- **"Contracting Authority"**: a public authority empowered to award a PPP and enter into Project Agreements
- **"PFI Law"**: a law regulating a PFI form of PPP.
- **"PPP unit"** : specialized institution/agency/ministerial department established to promote and take care of PPP.
- **"Private Party"** : Private Party or other entity in the form of a special purpose company to which a Project Agreement in general has been awarded. [*The word Private party will be used for the sake of this study even in case the PPP regulation allows PPP business partner to be a mix company or even a public entity.*]

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7.

- **"Project Agreement"**: an agreement(s) between the Contracting Authority and the Private Party regulating their respective rights and obligations with respect to the PPP project.

REFERENCE TO BEST PRACTICE

- UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, 2001 (hereinafter the **"PFI Guide"**) and UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects, 2003 (UNCITRAL Model Legislative Provisions).
- EC - Commission Interpretative Communication on Concessions Under Community Law dated 12 April 2000; together with additional EU major documents/decision /recommendation on concessions including Directives 2004/18/EC and 2004/17 EC of 31 March 2004; Green Paper on Public Private Partnerships and Community Law on Public Contracts and Concessions dated 30 April 2004; Report on the public consultation on the Green Paper (SEC(2005) 629- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions (Brussels, 15.11.2005.COM(2005) 569) European Parliament resolution on public-private partnerships and Community law on public procurement and concessions (2006/2043(INI)); European Commission Guidelines for Successful Public-Private Partnerships (2003).Commission Interpretative Communication Brussels, 05.02.2008 C (2007)6661on the application of Community law on Public Procurement, and Concessions to Institutionalised Public-Private Partnerships (IPPP);
- EBRD Core Principles for a Modern Concessions Law – selection and justification of principles Prepared by the EBRD Legal Transition Team.2005;
- UNIDO Guidelines for Infrastructure Development through Build Operate Transfer (BOT) Projects, 1996 (UNIDO BOT Guidelines); and
- OECD Basic Elements of a Law on Concession Agreements, 1999-2000.

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BULGARIA OVERALL ASSESSMENT

The main piece of legislation under Bulgarian law governing PPP projects is the Concessions Act. The Act sets forth a comprehensive regulation of concessions, and allows for BOT and some of its derived forms, including BOO and BOOT, to be implemented in Bulgaria. Thus, Bulgaria has a good basis for the development of concessions: concessions can be granted for the majority of sectors, through a competitive procedure and in a flexible project agreement framework. Application of fair and transparent tender selection process is mandatory under the law, as well as proper remedies for breach are available.

However, the existing concessions legislation does not allow for PFI projects to be implemented. In this connection, currently in process of consideration by the Bulgarian Parliament is a new PPP Act which will further extend the scope of possible PPP forms in the country.

A clear and specific framework should be elaborated for the PPP bidding process in Bulgaria. This should include not only laws, which are largely adequate, but a public-sector comparator, model contracts for complex projects and steps to ensure that the actors in the playing field in Bulgaria are brought to a sufficient high level of PPP professionalism and that the public itself is more open to PPP project to avoid social and political resistance like it has been experienced in France in Portugal and in many other civil law countries where all change to the status of public service or public wealth is politicall very sensitive.

A PPP unit must be created at the national level to monitor, oversee and review projects, to ensure that their potential benefits are realized and communicated to the public.

The public sector must accept its management or "governance" role in PPP, along the lines envisaged by the UNECE or demonstrated by the governments of the UK and other countries that have utilized PPP.

A strategic vision for PPP should be elaborated by the government and communicated clearly to citizens. This would ensure continued support for projects and give security to potential investors into the longer term.

There are no major legal obstacles to implementing concessions in the country. One of the factors impacting the successful completion of concession tender procedures is the heavy process of project preparation and the insufficient in certain cases capacities of the Bulgarian administration. Further, the existence of concessions only as a form of PPP, limits the options for use of PPP projects in specific sectors, where the concession form is not the most appropriate one.

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**ASSESSMENT & LEGAL INDICATOR SURVEY****1. LEGAL FRAMEWORK****1.1 Existence of different forms of PPP legal framework**

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Does the country have a single act dealing specifically with Concessions or a generalised act incorporating the legal framework for PPP, including Concessions ?	✓ ✓ ✓		Currently, the main piece of legislation governing PPP in Bulgaria is the Concessions Act adopted in 2006, last amended as of 1 st July 2011.



2. Does the country have an act that allows BOT or derived forms such as BOOT, BOO or other forms either as part of a specific act or as part of a general PPP Law?	✓ ✓ ✓	3(1)	The regulation under the existing Concessions Act allows for BOT and some of its derived forms, including BOO and BOOT, to be implemented in Bulgaria.
3. Does the country have an act that allows PFI, either as part of a specific act or as part of a general PPP Law?	× × ×		The existing PPP (Concessions) legislation does not allow for PFI projects to be implemented. Such projects can only be launched under the public procurement rules.
4. If the answer is <i>No</i> to any of the three first questions concerning a specific form of PPP does the Constitution or other general act (ex: the Civil Code, sectoral law) recognise the basic principles of the concerned PPP and regulate its granting?	✓ ✓		Certain PFI projects may be implemented under the regulatory regime set forth in the Public Procurement Act, adopted in 2004, last amended as of 15 th June 2011.

For our general information: Is a new PPP Law or an amendment to the existing Law being prepared, or considered, in the country?

If so, at what stage of the legislative process is such new PPP Law or amendment to the existing Law?

Since August 2010 Council of Ministers' experts have been working on a new general PPP Law aimed at providing the necessary legal basis for PPP forms not regulated under the current Concessions Act. As of the present moment, after several reviews, discussions and amendments, the Draft PPP Law has been approved by the Council of Ministers and on the 13th of September, 2011 was filed in the National Assembly for discussion and adoption.



1.2 Specificity and integration of PPP the legal framework

<p>5. If the country has a Public Procurement Law, is it clear to what extent does the Public Procurement Law apply or not to the granting of a PPP?</p>	<p>✓ ✓</p>	<p>54</p>	<p>The Public Procurement Act does not apply to the selection of the concessionaire. However the general principle is that it applies to sub-contracts to be entered into by the concessionaire of works concessions if the latter's sub-contractor is not a related entity.</p> <p>Further, certain definitions under the Concessions Act refer to those set forth in the Public Procurement Act, including the definition of 'public service'.</p>
<p>6. If the country has sectoral laws regulating PPP in specific sectors, is it clear which law is applicable to the granting of PPP for each particular sector?</p>	<p>✓ ✓ ✓</p>		<p>There are sector-specific laws applying concurrently with the Concessions Act. These are:</p> <ul style="list-style-type: none"> ▪ Civil Aviation Act, 1972, as amended; ▪ Sea Waters, Internal Water Ways and the Ports of the Republic of Bulgaria Act, 2000, as amended; ▪ Water Act, 2000, as amended; ▪ Underground Natural Resources Act, 1999, as amended.
<p>7. Does the country have a Law allowing the Institutional form of PPP (IPPP) which regulates IPPP participation to PPP?</p>	<p>✓ ✓ ✓</p>	<p>18(5)</p>	<p>Yes, the Concessions Act explicitly envisages the Institutional form of PPP (IPPP). In this scenario the concession is awarded to a newly established commercial entity the share capital of which is owned</p>

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			by the private party selected through the concession procedure on the one hand, and the State or the respective municipality (municipalities) or other public body on the other hand.
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2. DEFINITIONS AND SCOPE OF THE PPP LAW(S)

2.1 PPP definition³

QUESTION	ANSWER	ARTICLE	COMMENTARY
<p>1. Does the Law define one or several term(s) (<i>i.e.</i> "PPP", "Concession", "BOT", "Partnership" etc. and/or respective agreements) for the arrangements to be regulated by the Law which specify the limits of application of the Law?</p> <p>For our general information,: <i>please provide the given definition(s), if any.</i></p>	<p>✓ ✓</p>	<p>3 4</p>	<p>The Law defines three types of concession:</p> <ul style="list-style-type: none"> ▪ Works Concession: ▪ Services Concession ▪ Concession for extraction <p>Under a works concession the private party is awarded the whole or partial construction, management and maintenance of infrastructure facilities at the risk of the concessionaire and in exchange for the right of the concessionaire to exploit the object of the concession, or of that right in addition to compensation on the part of the contracting authority.</p> <p>The service concession is a concession by virtue of</p>

³ PFI Guide, Consolidated Legislative Recommendations, Recommendation 3 and Commission Interpretative Communication on Concessions Under Community Law dated 12 April 2000; together with additional EU major documents/decision /recommendation on concessions including Directives 2004/18/EC and 2004/17 EC of 31 March 2004; Green Paper on Public Private Partnerships and Community Law on Public Contracts and Concessions dated 30 April 2004; Report on the public consultation on the Green Paper (SEC(2005) 629- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions (Brussels, 15.11.2005. COM(2005) 569) European Parliament resolution on public-private partnerships and Community law on public procurement and concessions (2006/2043(INI))



			<p>which the private party is granted the right to operate (provide) a public service at its own risk and the concessionaire's consideration consists either only of the right to operate the service of public interest, exploit the services, or of that right in addition to compensation on the part of the contracting authority.</p> <p>The mining concession is granted for the extraction of underground resources. It is regulated by the Underground Resources Act.</p>
2. Does the Law apply to all contracts entered into that fall under the definition(s) given above, irrespective of the name given to such contract (<i>concession, license, usufruct right, lease, etc.</i>)?	✓ ✓		The Law applies to all contracts falling under the definition of concession and having the content of a concession contract, irrespective of the name they are given.
3. Does the Law make a clear distinction between a PPP agreement (<i>such as a Concession</i>) and a license (<i>i.e. an authorisation to operate by a public authority</i>)?	✓ ✓		There is no explicit distinction made by the Law. However, sector-specific laws regulate licensing regimes applicable to specific activities which may in the same time be subject to concession /e.g. underground resources extraction/.

2.2 Contracting Authority

QUESTION	ANSWER	ARTICLE	COMMENTARY
4. Does the Law identify (<i>or allow clear identification by reference to other laws or</i>	✓ ✓ ✓		The Law differentiates between the state authority empowered to award the concession /contracting

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2.3 Private Party and Project Company

QUESTION	ANSWER	ARTICLE	COMMENTARY
5. Is it possible for a PPP be awarded to a foreign company, a Private Party or to a domestic company with foreign participation in the share capital and/or management (<i>without discrimination</i>)?	✓ ✓ ✓		The Law does not make a difference between domestic and foreign persons.

For our general information: *can a PPP be awarded to public entities or to entities jointly owned by private and public entities (IPPP)? Are there restrictions imposed on such contracts?*

2.4 Concerned sectors⁴

QUESTION	ANSWER	ARTICLE	COMMENTARY
6. Does the Law identify (<i>or allow identification by reference to other laws or regulations</i>) the sectors and/or types of infrastructure and/or services in respect of which a PPP may or may not be granted?	✓ ✓	13	The Law explicitly specifies the type of property in respect of which a concession may be granted. Operated on concession in accordance with the Law may be the following objects: <ul style="list-style-type: none"> ▪ exclusive state property;

⁴ For further information on the concerned sectors please refer to: PFI Guide, Consolidated Legislative Recommendations, Recommendation 3 and 4.



			<ul style="list-style-type: none"> ▪ public state property or public municipal property by means of which economic activity is performed; ▪ private state property or private municipal property, by means of which economic activity is performed; ▪ properties of public organizations by means of which economic activity is performed. <p>At the same time, the Law does not expressly deal with the type of services the operation of which may be granted by means of a PPP.</p>
7. Do the sectors eligible for PPP correspond to a large extent to those listed below, or if not, is the list of eligible sectors an open-ended one (<i>as opposed to being exhaustive</i>) allowing (<i>or at least not preventing</i>) PPP to be granted in numerous sectors”?	✓ ✓		The Law contains only general provisions with respect to the assets that may be awarded on concession and does not provide for a list of sectors eligible for PPP. Restrictions as regards the eligibility of certain assets/services to be awarded on concession may be explicitly imposed in sector-specific laws.
8. Do the sectors eligible for PPP includes the non commercial activities such as the provision of government services (<i>schools, hospitals, prisons, defence and housing, others</i>). in addition to merchant sectors of the economy (<i>energy, transport, water, oil and gas.....</i>)	XX		<p>Under the existing Bulgarian legislation, concessions can be awarded in all major merchant sectors of the economy.</p> <p>However, even though there is no formal restriction in the Law (or elsewhere) preventing award of government services concessions, no viable PPP mechanism exists either. The Law provides that in the cases of service concessions, the operator’s</p>



			consideration consists either only of the right to operate the service (i.e. to receive direct payment from the end users of the service in the form of fees etc.), or of that right in addition to a compensation. Therefore, as long as private operators cannot receive direct payment from the users in the case of most government services, and financial support is available only in exceptional circumstances, no concession can practically be granted.
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For our general information: Please indicate the restrictions if any imposed by the Law on the sectors eligible for PPP:

3. **SELECTION OF THE PRIVATE PARTY**⁵

3.1 **General Considerations**

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Does the Law require, in principle, the Contracting Authority to select Private Parties through a competitive tender process?	✓ ✓ ✓	24	Yes. The concessionaire is determined always by a competitive procedure. Currently, the Law provides that selection of the concessionaire can only be performed through an open procedure.

⁵ For further information on the selection of the Private Party, please refer to: PFI Guide, Consolidated Legislative Recommendations, Recommendations 14 to 39 included.



2. Is there reference in the Law to the principles of transparency, equal treatment and proportionality?	✓ ✓ ✓	23	Yes, the Law provides for all these principles in respect of the carrying out of the competitive selection procedures.
3. Is there a provision in the Law concerning the publication of information related to the competitive procedures in the country media and in the international media (<i>for large projects</i>)?	✓ ✓ ✓	42 (2) 29 (3) of the Regulations on the Implementation of the Law	The promulgation of the announcement of the opening of a concession procedure in the State Gazette is mandatory. The announcement is recorded with the National Concessions Register. The Law provides for the obligation of for the Contracting Authority to forward electronically to the European Commission the announcement of a works concession of a value exceeding the notification thresholds set forth in the EU procurement legislation.
4. Are there provisions within the Law or any special manual or recommendations governing in detail the selection of the Private Party (<i>i.e.: the pre-selection of bidders, the procedure for requesting proposals or other procedure such as competitive dialogue/two stage procedure</i>)?	✓ ✓ ✓	Chapter III, Section IX of the Law Regulations on the Implementation of the Law	The Law and the Regulations on its implementation provide detailed rules governing the selection of the private operator through an open procedure.



5. Does the Law provide that if the Contracting Authority rejects an applicant at the time of pre-selection or disqualifies a bidder, it must make public the reasons for the decision (<i>or inform the rejected bidder thereof explaining the reasons for rejection</i>)?	✓ ✓ ✓	25 83	The decision of the Contracting Authority disqualifying a bidder shall be announced to the participants in the procedure and is subject to appeal.
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3.2 Award of PPP

QUESTION	ANSWER	ARTICLE	COMMENTARY
6. Does the Law provide that all proposals are ranked solely on the basis of a predefined evaluation criteria set forth in the pre-selection documents/ request for proposals?	✓ ✓ ✓		Only proposals meeting the minimum requirements set out in the documentation for participation shall be considered and ranked. Ranking according to the Law is solely on the basis of a predefined evaluation criteria set forth in the tender documents.
7. Does the Law provide for the publication of a notice of the award of the project, identifying the Private Party and including a summary of the essential terms of the project agreement?	✓ ✓ ✓	58.3 59.1	The Law explicitly states that the decision of the contracting authority on selection of concessionaire shall be published in State Gazette. The said decision shall contain the essential terms of the concession.
8. Does the Law provide that the Contracting Authority or any other public authority maintain records of key information pertaining to the selection and award proceedings?	✓ ✓ ✓	96 97	The Council of Ministers maintains a National Concessions Register (NCR), wherein data on all concessions shall be recorded. NCR contains a file for each concession, containing the following



			<p>information:</p> <ul style="list-style-type: none"> ▪ type of the concession; ▪ decision for opening the concession procedure, for selection of concessionaire, as well as all subsequent decisions regarding the concession granted; ▪ the announcement of the planned conducting of a concession procedure; ▪ description of the object of the concession; ▪ the period of the concession; ▪ the date of execution and the date of entry into force of the concession agreement; ▪ individualisation of the concessionaire; ▪ the body, having executed the concession agreement and the body exercising control over the implementation of the concession agreement; ▪ main content of the concession: <ul style="list-style-type: none"> ▪ principal rights and obligations of the parties to the contract; ▪ the type and scope of liability for non-performance of the duties under the agreement; ▪ reasons for early termination of the agreement and the rights of the compliant party; ▪ the date, legal grounds and the act of termination of the concession agreement. <p>The file of each concession should also include any changes to the data registered.</p>
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9. If the answer to the previous question is <i>Yes</i> , does the Law provide that such record is accessible to the public, or at least to interested parties?	✓ ✓ ✓	96.3	The National Concessions Register is public and access to it via Internet shall be ensured.
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3.3 Final negotiations

QUESTION	ANSWER	ARTICLE	COMMENTARY
10. Does the Law contain provisions regulating final negotiations (i.e. post contract award) so that transparency, equal treatment and competition are preserved?	✓ ✓	63(1)	Negotiations on the draft project agreement provided as part of the tender documents are not allowed.
11. Does the Law provide that the Contracting Authority has the authority to terminate negotiations with the invited bidder if it becomes apparent that the bid will not result in an agreement and start negotiations with the second ranked candidate?	✓ ✓ ✓	63(2)	The Contracting Authority has the authority to invite the second ranked candidate in case the invited bidder refuses to sign the project agreement.

3.4 PPP Award without competitive procedure

QUESTION	ANSWER	ARTICLE	COMMENTARY
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12. Does the Law provide that the Contracting Authority has the authority to award a PPP without a competitive process? Is this only in limited/ exceptional circumstances?	✓ ✓		Concessions cannot be awarded without a competitive procedure under the Law.
13. Does the Law provide for a procedure, set of rules or principles to be respected when awarding a PPP without a competitive process?	N/A		

For our general information, please specify the conditions which would allow such direct negotiations?

3.5 Special case of unsolicited proposals

QUESTION	ANSWER	ARTICLE	COMMENTARY
14. Does the Law provide for an adequate framework for the Contracting Authority to manage unsolicited proposals/private initiatives (i.e. a proposal relating to the implementation of a PPP that is not submitted in response to a request or solicitation by the Contracting Authority) that ensures transparency and equal treatment and does not distort competition?	✓ ✓ ✓	20	Private parties may submit unsolicited proposals justified with pre-investment studies. The Contracting Authority shall consider such proposals and issue a decision on the commencement of preparatory activities for a concession procedure or refusal of the proposal. The private party does not have any extra rights or privileges in case a concession procedure is started.

3.6 Review procedures

QUESTION	ANSWER	ARTICLE	COMMENTARY
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<p>15. Does the Law allow the bidders who claim to have suffered, or that may suffer loss or injury, to seek review of the Contracting Authority's actions or failure to act?</p>	<p>✓ ✓ ✓</p>	<p>83.1 84</p>	<p>Any decision, action or omission to act by a state body, involved in the concession procedure is subject to appeal as regards its conformity with the law before the Commission for Protection of Competition.</p> <p>Furthermore, each interested party may file a claim for establishment of invalidity of a concession agreement, as well as a claim for compensation for damages, suffered as a result of violation of the law in the course of conduct of a concession procedure before the relevant Bulgarian courts.</p>
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4. **PROJECT AGREEMENT**⁶

4.1 **Model or list of provisions**

QUESTION	ANSWER	ARTICLE	COMMENTARY
<p>1. Does the Law contain (or refer to) a model PPP agreement (which is an optional template agreement for guidance only) or a list of mandatory material provisions which must be included in the agreement (<i>the content of such</i></p>	<p>✓ ✓</p>		<p>There if no model PPP agreement adopted. However, the Law contains a list of mandatory material provisions which must be included in the agreement.</p>

⁶ For further information on the project agreement definition, please refer to: PFI Guide, Consolidated Legislative Recommendations, Recommendations 12 and 40 to 68 included.



<i>provisions being left for negotiation)?</i>			
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4.2 Duration and extension of the Project Agreement

QUESTION	ANSWER	ARTICLE	COMMENTARY
2. Does the Law provide that the duration of the Project Agreement should depend on the length of time taken for the amortisation of the Private Party's investment and an appropriate return on the capital?	✓ ✓	10	<p>The maximum duration set forth by the law is 35 years.</p> <p>The particular duration of the project agreement shall be determined on the basis of the financial and economic indicators of the concession, the technological specifics of the object of concession and/or the management of the public service.</p> <p>Explicit reference to amortisation of the Private Party's investment and an appropriate return on the capital is not made by the Law.</p>
3. Does the Law provide that the renewal or extension of the Project Agreement should be limited and depend on exceptional circumstances (<i>such as Contracting Authority default or an event of force majeure</i>)?	✓ ✓	10	<p>The term of the concession can be extended if this is envisaged in the initial tender documentation and only if a total duration of 35 years is not exceeded.</p>

For our general information, *please provide the given minimum and maximum duration (if any)*



4.3 Termination of the Project Agreement

QUESTION	ANSWER	ARTICLE	COMMENTARY
4. Does the Law leaves open to the Project Agreement negotiations the list of possible ground for termination and the content of to the termination provision ?	✓ ✓	73 74 75	The Concessions Act sets forth a list of events in case of which the concession agreement may be terminated. Thus, if any of the set forth termination events occur, the concession agreement shall be terminated. The project agreement may contain additional termination provisions as long as mandatory law provisions are not violated.
5. If the answer to the previous question is <i>No</i> does the Law provide for a list of grounds of termination which does not affect the balance between the parties rights and obligations (<i>one sided provisions</i>) or the stability of the contractual relation under the Project Agreement (e.g.: <i>too large or non exhaustive list</i>)?	✓ ✓ ✓		The list of termination events does not affect the balance between the parties rights and obligations
6. Does the Law provide for (<i>or at least does not prevent</i>) compensation of the Private Party for losses incurred as a result for termination on the grounds of public interest for losses incurred as a result of public authority acts?	✓ ✓		In all cases of early termination of the concession agreement, the private party is entitled to compensation for the assets financed in accordance with the concession agreement, after deduction of the respective depreciations. Compensation for losses incurred as a result of termination on public interest grounds is not expressly provided for by the Law, nor is it prohibited. It is



			usually subject to the provisions of the concession agreement.
7. Does the Law provide for (<i>or at least does not prevent</i>) compensation of the Private Party for all cases of early termination (<i>including in case of serious breach or failure by the Private Party</i>), for fair value after depreciation of the assets financed by the Private Party?	✓ ✓ ✓	80	In all cases of early termination of the concession agreement, the private party is entitled to compensation for the assets financed in accordance with the concession agreement, after deduction of the respective depreciations.

4.4 Tariff setting, service standards

QUESTION	ANSWER	ARTICLE	COMMENTARY
8. Does the Law provide clear guidance on all aspects of interaction between the bodies that have the power to award PPP and the bodies that regulate tariffs and service standards?	✗✗		There is not direct guidance in this aspect in the Concession law. The relations between the private party and the bodies that regulate tariffs and service standards are generally regulated by the laws regulating the sector specific laws. Further, specific provisions are usually included in the project agreement.

4.5 Financial responsibilities of the Private Party and Contracting Authority

Checklist: **Bulgaria**



QUESTION	ANSWER	ARTICLE	COMMENTARY
9. Does the Law provide that the Private Party can collect tariffs or fees for the use of the facility or its services?	✓ ✓		<p>The right of the concessionaire to collect fees is not explicitly set forth by the Law. However, in the Decision for opening the concession procedure the right of the concessionaire to collect fees shall be set fort as part of its general rights and obligations.</p> <p>Some sectoral laws explicitly set forth such right, e.g. in accordance with the Civil Aviation Act the airport fees shall be collected by the concessionaire – under terms and by an order determined by the project agreement.</p>
10. Does the Law provide for the possibility of fixed and/or consumption-based payments to the Private Party by the Granting Authority or other public authorities (<i>in the case of Power Purchase Agreement , shadow tool or PFI for instance</i>) ?	×××		There is no such option under the Law.

5. SECURITY AND SUPPORT ISSUES⁷

5.1 Security Interests

⁷ For further information on support and financial securities, please refer to: PFI Guide, Consolidated Legislative Recommendations, Recommendations 13, 49, 57 and 60.



QUESTION	ANSWER	ARTICLE	COMMENTARY
<p>1. Does the Law provide for <i>(or does not specifically prevent)</i> a Private Party to create security interests over the project assets, rights and proceeds or other valuable guarantees related to the project?</p>	<p>× ×</p>		<p>The Law does not contain specific provisions in this respect. However, under Bulgarian law security interest over public municipal or state property can not be established. Therefore, in case the project assets are public property by virtue of law they cannot be pledged or assigned.</p> <p>Other restrictions with respect to other project assets may be established by the Project Agreement.</p>
<p>2. If the answer to the previous question is <i>Yes</i>, does the Law clearly state which types of security can be provided and include some of the most common type of guarantees in project financing (such as those listed in the request for general information below)?</p>	<p>× ×</p>		<p>Under Bulgarian law in general, a private party can, as long as no specific restrictions are set out in the project agreement, pledge or assign by way of security any of the following enumerated items:</p> <ul style="list-style-type: none"> • the proceeds and receivables arising out of the PPP; • shares of the Project Company; • its property.

For our general information, please can you confirm whether a Private Party may pledge or assign by way of security:

- *the proceeds and receivables arising out of the PPP;*
- *the assets for which it has rights of use under a project agreement;*

Checklist: **Bulgaria**



- *its property;*
- *shares of the Project Company;*
- *the project agreement; or*

obtain other valuable guarantees (please specify)?

5.2 Government support

QUESTION	ANSWER	ARTICLE	COMMENTARY
3. Does the Law provide for (<i>or does not specifically prevent</i>) the public authority to provide support to the Contracting Authority and a guarantee for the proper implementation of the PPP by the Contracting Authority?	✓ ✓	6	<p>An option for compensating the concessionaire by the Contracting Authority for part of the expenses for construction and/or management of the object of concession or provision of the services, is set forth by the law. The compensation may provided in limited circumstances in cases where it is necessary to:</p> <ul style="list-style-type: none"> ▪ Ensure a socially acceptable price of the services provided through the concession, when such price is determined by an act of legislation; or ▪ Reconstruction of the object of the concession after the force majeure event occurrence. <p>The Law does not provide for guarantees for the proper implementation of the PPP by the Contracting Authority but does not prohibit such guarantees.</p>
4. Does the Law provide for (<i>or does not specifically prevent</i>) the Public Authority to	✓ ✓	6	The compensation options referred to under the



provide financial or economic support for the implementation of PPP?			previous question may be in the form of financial support.
5. If the answer to the previous question is <i>Yes</i> , does the Law clearly state which public authorities may provide such support and which types of support can be provided? (i.e. <i>tax and customs benefits; foreign exchange protection (convertibility and transfer guarantees; subsidies; equity or loan participation)</i>)?	✓ ✓		According to the Law the support should be provided by the Contracting Authority which covers part of the expenses for construction, management and maintenance of the object of concession. Foreign exchange protection is available on general grounds to foreign investors.

5.3 Lenders' rights

QUESTION	ANSWER	ARTICLE	COMMENTARY
6. Does the Law provide for the Parties to arrange the financing with reasonable flexibility under the Project Agreement without strict time constraints or other constraints (<i>except with respect to security package and government support</i>)?	✗ ✗		The Law does not regulate the financing arrangements which are usually set forth in the tender documents.
7. Does the Law provide, in the event of the default of the Private Party for the lenders to “ <i>step-in</i> ” or substitute the Private Party with a qualified new Private Party without initiating a new tender process?	✗ ✗ ✗		No such options are provided for by the Law.



6. SETTLEMENT OF DISPUTES AND APPLICABLE LAWS⁸

6.1 Settlement of disputes

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Does the Law permit the Contracting Authority to enter into a Project Agreement that is subject to international arbitration?	✓ ✓ ✓		There are no limitations on provision of international arbitration clauses in the concession agreement
2. Has the government of the country ratified the Washington Convention on the Settlement of Investment Disputes (ICSID) (1965)?	✓ ✓ ✓		The Republic of Bulgaria is a party to the Washington Convention on the Settlement of Investment Disputes (ICSID).
3. Has the government of the country ratified the New York Convention on recognition and enforcement of foreign arbitral awards (1958)?	✓ ✓ ✓		The Republic of Bulgaria has ratified the New York Convention on recognition and enforcement of foreign arbitral awards.

6.2 Applicable laws

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⁸ For further information on the settlement of disputes, please refer to: PFI Guide, Consolidated legislative Recommendations, Recommendations 57, 69 and 71.



QUESTION	ANSWER	ARTICLE	COMMENTARY
4. Does the Law permit (<i>or does not prevent</i>) the Contracting Authority) to enter into side agreements to the Project Agreement (such as <i>a direct agreement with the lenders to the project or a support and guarantee agreement in respect of the Project Agreement</i>) that is governed by foreign law.	✓ ✓		There are no restrictions in the Law on applicability of foreign law to Project Agreements.
5. Has the country ratified any international convention for the protection of foreign investments?	✓ ✓ ✓		The Republic of Bulgaria is a signatory to more than thirty BITs.



II- EFFECTIVENESS ASSESSMENT: HOW THE LAW WORKS IN PRACTICE:

(Please comment based on the previous 2006 effectiveness general assessment)

7. POLICY FRAMEWORK

7.1 Existence of PPP Policy Framework

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Is there a general/national policy framework (explicit or implicit) for PPPs for infrastructure or public services?	× × ×		<p>Currently, no general/national policy framework for PPPs exists.</p> <p>A draft Strategic Program for development of Bulgarian transport through the concession mechanism was proposed in 2010 but is not adopted yet.</p>
2. Is there any administrative guidance or printed information edited by the government or the PPP Unit concerning the legal framework for PPP projects in the country?	✓ ✓		<p>Methodological guidelines for implementation of successful PPPs have been prepared by and published on the website of the Ministry of Finance, dealing particularly with the financial parameters of PPP projects.</p> <p>Guidelines on good EU practices in structuring PPP projects have been prepared by the Council of Ministers as well.</p>

Checklist: **Bulgaria**



3. Is there a municipal/regional policy framework (explicit or implicit) for PPPs in infrastructure or public services?	×××		Currently, no municipal/regional policy framework for PPPs exist.
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7.2 PPP Awareness and Sustainability

4. Is there a national and/or municipal /regional long term programme for PPP promotion and awareness?	××		There is no long term programme for PPP promotion and awareness operating in Bulgaria. PPP promotion and awareness initiatives usually form part of specific projects implemented for the purpose.
5. Are there PPP training programmes on a national and/or municipal/regional level for public servants and other PPP concerned people?	✓✓		Training programmes and seminars on PPP projects have been occasionally carried out as part of projects for enhancing the capacities of the Bulgarian public administration on both national and municipal levels.
6. Are there PPP courses as part of university curriculum or specialist departments and faculties in universities teaching PPP?	×××		



7.3 Obstacle to implementation of PPP Policy

7. Are you of the opinion that there are no social/political obstacles to implementing PPP in the country (e.g. grass roots opposition, policy measures against private sector participation in public infrastructure/services, etc.)?	✓ ✓		There are no major social/political obstacles to implementing PPP in the country.
8. Are you of the opinion that there are no legal obstacles to implementing PPP in the country (e.g. non-publication of a decree provided under the Law and necessary for such law to become effective, etc.)?	✓ ✓		There are no legal obstacles to implementing most PPP types in the country.

For our general information, please describe the existing impediment and obstacles if any with respect to the two previous questions

8. INSTITUTIONAL FRAMEWORK

8.1 Existence and role of PPP Central Units/Agency

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Is there a specialised institution/agency/ministerial department established to promote PPP and to serve as Central PPP Unit?	✗ ✗		No specialised institution/agency is established to deal exclusively with PPP promotion and governance. Coordination and supporting activities in the PPP field,

Checklist: **Bulgaria**



			including legislation drafting, training of public administration etc., can be performed by specialized directorates within the Council of Ministers and the Ministry of Finance.
2. Is such Central PPP Unit composed mainly of specialists recruited from the business community and not exclusively composed of civil servants coming from different public ministries?	×××		The intraministerial concession departments and the specialized directorates within the Council of Ministers and the Ministry of Finance are exclusively composed of civil servants working with the respective administration.
3. Is the role of such Central PPP Unit comparable to a "task force" assisting in the development of projects in general and not limited to promotion of PPP?	×××		The development of projects is usually performed by the intraministerial concession departments.
4. Is the consent or recommendation of such Central PPP Unit necessary for the development and granting of most PPP projects (<i>except small or local PPP</i>)?	×××		The Law does not require the explicit consent or recommendation of a Central PPP Unit for the development and granting of a PPP project .
5. Is one of the roles of the Central PPP Unit to assist in building capacity namely of the public sector with respect to PPP?	N/A		

For our general information, please name such establishment and specify its place in public hierarchy, format and key functions (regulatory, operational, know how collecting, etc. or a combination thereof).

8.2 Other institutions concerned by PPP

Checklist: **Bulgaria**



6. Is there any PPP unit/agency or department of the Central PPP unit either at the municipal or regional level?	XXX		
7. Is there any specific PPP unit department in any ministry (other than the central PPP unit) or at sectoral level?	✓ ✓ ✓		Specific concessions/PPP departments are formed in each ministry to deal with PPP issues within the respective sector of industry.
8. Is there either a specific "one stop shop" for PPP authorisations and formalities or a "one stop shop" which services are available to the sponsors of PPP project as well as other investors?	XXX		
9. Is the division of power between different public authorities involved in the PPP granting process simple and coordinated?	✓ ✓		<p>The manner of division of powers between different public authorities involved in the concessions granting process set by the Law intends to create a simple and coordinated allocation and division of functions.</p> <p>However, specific issues in the division of powers may arise if the object of concession is shared ownership of the state and municipality/municipalities. Due to the application of sectoral laws there may be cases when it is difficult the contracting authority to be determined, as well as the authority responsible for the preparatory activities.</p>



9. PPP LAW ENFORCEMENT

9.1 Effectiveness of PPP enforcement and compliance with the Law

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Have any PPP projects in any form ever been awarded in the country on the basis of the Law discussed above ? <i>(with or without specific reference to the Law)</i>	✓ ✓ ✓		Yes, PPP projects in the form of concessions have been awarded specifically on the grounds of and in accordance with the procedures of the Concessions Act.
2. Have such PPP projects, if any, been awarded generally following a transparent competitive selection procedure <i>(and only through direct negotiation under exceptional legal circumstances as may be provided by the Law)</i> ?	✓ ✓ ✓		Yes, transparent competitive selection procedure has always been followed.
3. Have any PPP projects or similar long term agreements <i>(falling under the definition of PPP under this questionnaire)</i> been awarded on any legal basis different from the Law since the Law has been in force?	✓ ✓		Similar long term agreements have been awarded in accordance with the laws governing municipal and state property for establishment of rights to build or lease real property, including the right to operate the building/facility for a specified period of time.

For our general information, please give example of legal instruments, or reasons used, to bypass the Law and establish a PPP.

9.2 Statistics on PPP implementation under the Law

4. Have most of the awarded PPP projects been successfully implemented and put into operation	N/A		Most of the PPP projects have been successfully commenced, however all major projects and still in
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Checklist: **Bulgaria**



in compliance with the Law?			process of implementation and their successful completion remains to be seen.
5. Has a PPP project ever been awarded and implemented in the country at the local /regional /municipal level in compliance with the Law?	✓ ✓ ✓		Yes. The Water and wastewater services concession of the city of Sofia is a prime example.
6. Have PPP project ever been awarded in the country in the non merchant sector (<i>such as Hospital, School, prisons</i>) and not exclusively in the merchant sector (<i>energy, water, transport</i>)?	× × ×		No. PPP projects in non merchant sectors have never been awarded.

For our general information:

- Approximately how many PPP projects are presently in operation (figure or order of magnitude) in the country and in what sectors have PPP projects been awarded (energy, water, education, health for example)?
 - ✓ The major PPP projects are in the airport operation, port operation and water and wastewater sectors.
- Please give some examples of the most significant project awarded:
 - under which legal form have such PPP projects been awarded (Concession, BOT, PFI, other):
 - ✓ Works Concessions (BOT): The most significant project awarded is the Varna and Burgas Airports Concession
 - ✓ Services concession: The most significant project awarded is the Water and Sewerage Concession of the City of Sofia
 - have such PPP project been granted by (i) central, (ii) sub-sovereign/regional (if applicable) or (iii) municipal government as Contracting Authority;
 - ✓ Central and Municipal

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- when did PPP begin to be awarded in the country: (i) in the last 10 years or before; (ii) in the last 5 years; or (iii) within the past few years only;
 - ✓ Last 10 years
- and
- please give examples of any PPP projects awarded but not implemented (or not implemented under a PPP form)
 - ✓ No significant PPP projects have been awarded but not implemented. However, concession tender procedures in the airport operation sector have been unsuccessfully carried out (no offers were submitted).
- Are there any PPP/Project Agreements in discussion?
 - ✓ Yes, possible concessioning of Sofia Airport and Varna Port were subject to recent discussions by the Government

9.3 Challenge of PPP

7. Are you of the opinion that there is a reasonable chance for an unsuccessful bidder to successfully challenge in the country a PPP awarded under conditions contrary to the Law?	✓ ✓ ✓		Yes, there are examples of such successful challenges.
8. If the answer to the previous question is <i>Yes</i> , are you of the opinion that there is a reasonable chance for the plaintiff to get some compensation or for such action to result in the cancellation of the award?	✓ ✓ ✓		Successful challenge will result in cancellation of the award.
9. Have PPP project been implemented by the parties most generally without serious claims/arbitration by either Party concerning the performance of the Project Agreements under the Law?	✓ ✓		Till now most PPP projects in the country are being implemented without serious claims/arbitration intervention. However, all major PPP projects are still in process of implementation, and it remains to be seen if disputes will follow the completion of the projects.



10. If any Project Agreement has been terminated prior to the end of the contractual period by the Contracting Authority, has fair compensation been paid to the Private Party in compliance with the Law?	✓ ✓		The cases of early termination shall in general be governed by the concession agreement and envisage fair compensation.
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For our general information, can you provide any examples of a successful legal challenge in the courts or otherwise of a PPP award in the country based on the PPP Law? Please describe the matter and, if known, the outcome of such matter.

An example of successful legal challenge in the courts of a concession award is the initial award of the Varna and Burgas airports concession. Following appeal of the Decision of the tender committee awarding the concession to Copenhagen Airports A/S, the Supreme Administrative Court annulled the decision and the concession was granted to the second-ranked bidder in the procedure - Fraport AG.