



TURKEY
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	12/18	
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	15/24	
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 the possibility to challenge illegal awards.	19/45	
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).	15/27	
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.	7/18	
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	

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

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2.

General LFA Rating		59,8%	Medium 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	10/24	
8 Institutional Framework	Existence of an institutional framework for public private partnerships	5/15	
9- PPP Law Enforcement	Award and implementation of PPP projects in compliance with the Law	21/26	
General LIS Rating		52%	Medium Effectiveness
OVERALL RATING		56%	Medium Compliance/Effectiveness

Local Expert²: Gide Loyrette Nouel Istanbul

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.

Checklist Turkey



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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 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.

Checklist Turkey



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- **"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 extend 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.
- **"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



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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 questionnaire, 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 governmental 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.*]
- **"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.



OVERALL ASSESSMENT TURKEY 2011

Turkey is one of the first countries to have developed Public-Private Partnership (PPP) legal schemes for infrastructure projects. Law No 3096 on the Generation, Transmission, Distribution and Trade of Electricity by entities other than Turkish Electricity Agency of 1984 was one of the first examples of PPP.

Turkish law embodies different legal models for PPPs. However, some of these models are based on legislation that does not directly govern PPPs, such as the Privatisation Law No 4046 of 1994.

Concessions are awarded on the basis of sector specific laws. By way of example, Transfer of Operation Rights of Airports and Ports are governed by Law No 5335 of 2005 and this law cross-refers to the Privatization Law for the selection of concessionaires for the Transfer of Operation Rights of Airports and Ports. Concessions related to construction, maintenance and operation of highways are governed by Law No 3465 Regarding the Construction, Maintenance and Operation of Highways by entities other than Turkish General Directorate of Highways of 1983.

Some projects are governed by the BOT Law (1994) which currently is dormant, as it is no longer used or the BO Law. A new PPP law ("**Draft Law**") has been prepared in November 2007 and waiting to be voted for couple of years. .

The Turkish legislation on PPPs is therefore, not very tidy and is scattered through various pieces of legislation making it, to a certain extent, difficult to grasp for market participants and financiers. This also heightens the potential risks that may be faced by sponsors in implementing projects, as various government bodies may be involved in a project as opposed to a one-stop-shop policy.

Lack of specific legislation on various crucial matters such as creation of security interests is quite common. The relevant parties in these circumstances will need to resort to the general principles of Turkish law and case law. This often brings with it ambiguity due to concepts such as "public policy" and "public interest".

We are of the view that the legislator should take prompt action to remedy the various short falls under Turkish law that currently make PPPs unattractive. In this context, more flexibility in Concession contract negotiations as well as availability of more security instruments to the benefit of the lenders are crucial to future development of PPPs.

General Note on Concession Contracts

There is no single definition of concession contracts under Turkish law. The types of concession contracts are not listed in an exhaustive manner under Turkish law.



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Administrative actions that are not of a unilateral nature may be qualified as "concession contracts" by the Council of State should certain criteria as set in the various judgments of the Council of State be met.

Regardless of the fact that an administrative contract is not identified by its parties as a concession contract, the Council of State may still qualify such contract as a concession if it meets the criteria set out by the Council of State. The approach of the Council of State is substance over form on concession contracts.

The information provided in connection with the concession contracts in this Questionnaire is based on the main relevant legislation and should not be considered as an exhaustive study on all concession contracts under Turkish law.



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?	XX		<p>There is not a single act for Concessions or PPPs. Instead, there are number of Laws and Regulations governing PPPs in different sectors.</p> <p>Note that there is a draft law constituting a general policy framework for PPPs (“Draft PPP Law”). The evaluation in this document is based on the legislation in force; however certain references are made to the Draft PPP Law is made when necessary.</p> <p>Legislations regulating the granting of concessions and constituting a Concessions/ PPP framework for Turkey are as follows;</p> <p>Build-Operate-Transfer:</p> <p style="padding-left: 40px;">a. Law No.3996 (Official Gazette: 13 June 1994, no 21959). regarding the realization of certain</p>



		<p>infrastructure and public services with the BOT model. (“BOT Law”).</p> <p>b. Law No.3096 for the generation, transmission, distribution and sale of Electricity by private undertakings (“Electricity Law”).</p> <p>c. Law No.3465 on building, maintenance and operation of the Highways. (“Highways Law”)</p> <p>Build-Operate:</p> <p>d. Law No.4283 on erection and operation of thermal power plants with the BO model. (“BO Law”).</p> <p>Build-Lease-Transfer:</p> <p>e. Law No.5396 regarding Build Lease of Healthcare Institutions (“BL Law”).</p> <p>Transfer of Operation Rights:</p> <p>f. Law No. 5335 amending certain Laws including provisions related to the lease and/or transfer of operating rights of Airports and privatization (including transfer of operation rights) of assets owned by Turkish Railroads (including ports).</p> <p>g. Highways Law</p> <p>h. Electricity Law.</p> <p>Long-Term Lease:</p> <p>i. The Privatization Law No.4046.</p> <p>j. Law No. 5335 amending certain Laws including provisions related to the lease and/or transfer</p>
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		<p>of operating rights of Airports and privatization (including transfer of operation rights) of assets owned by Turkish Railroads (including ports).</p> <p><i>Other relevant legislation:</i></p> <p>k. Law No.4501 regarding the application of International Arbitration on Concession Agreements.</p> <p>l. Law No.576 related to the concessions (<i>This is a narrow framework dating from before the Republic of Turkey but still in effect</i>).</p> <p><i>Legislations referring to concessions/PPP's are as follows;</i></p> <p>m. The Law on Telegram and Telephone numbered 406. <i>The provisions of these laws have been repealed (save for certain exceptions). The Electronic Communications Law No. 5809 of 2008 (the "ECL") governs the matters formerly regulated by the repealed provisions.</i></p> <p>n. International Arbitration Law No.4686.</p> <p>o. State Council Law No.2575.</p> <p>p. Administrative Procedural Law No.2577.</p> <p>q. Municipality Laws No.5216 and No.5393.</p> <p>r. Special Provincial Administration Law No.5302.</p> <p>In addition, Articles 47, 125 and 155 of the Constitution refers to concession agreements.</p> <p>For the purpose of this questionnaire, we will be</p>
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			referring to the above Laws and their related Regulations as the Laws and Regulations.
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?	✓ ✓ ✓		Yes. • BOT Law • BO Law • Highways Law • BL Law Please refer to our answers to Q1
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?	✓ ✓		Law No.5396 regarding Build Lease of Healthcare Institutions (“BL Law”).
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?	N/A		Please refer to our answers to Q1.

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?

There is a draft law constituting a general policy framework for PPPs (“**Draft PPP Law**”). As stated in the draft law, the new PPP Law's secondary regulation presenting the detailed provisions for the implementation will be drafted by an inter-ministerial commission within six months following the release of the law. The Draft Law invalidates all the existing laws and regulations and standardizes the provisions applicable to all sub-models such as BOT, BO and TOR.

The Draft Law has been prepared in November 2007 and waiting to be voted since 2009.

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>Turkey has two public procurement laws:</p> <p>(i) Law No. 4734 on Public Procurement (PPL), (ii) Law No.2886 on State Procurement (SPL).</p> <p>PPL and SPL together are the Public Procurement Laws. In principal, Public Procurement Laws do not directly apply to granting of concessions even though they do not specifically exclude the Public Procurement Laws. Note however the following:</p> <p>(1) BOT Law and BO Law specifically exclude the application of SPL (PPL was not enacted at the time of their issuance). BL Law for Healthcare Institutions specifically excludes the application of SPL and PPL. Draft PPP Law specifically excludes the application of PPL.</p>
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			<p>(2) Municipality Laws permit the municipalities to grant concession for certain public services but does not regulate the procedures regarding the granting of the concession. It is not clear which law applies to the selection procedures. In practice, Municipalities apply SPL.</p> <p>(3) BL Regulation for Healthcare Institutions and Highways Law refer to provisions of PPL for determining the parties who cannot apply for a concession.</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?	✓ ✓ ✓		Please refer to our answers to Q 1, 2 and 3.
7. Does the country have a Law allowing the Institutional form of PPP (IPPP) which regulates IPPP participation to PPP?	✗ ✗		There is no reference to IPPPs under the applicable laws.



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" <i>etc. and/or respective agreements</i>) 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>The Laws define Concession Agreements, BOT, BO and Transfer of Operating Rights. The definitions of BOT and Transfer of Operating Rights are general definitions. The definitions of Concession Agreements and BO are sector specific definitions.</p> <p>BOT: BOT is defined under the BOT Law and is as follows: <i>"The BOT is a special financing model to be used in projects requiring high technology or high financial resources in which the investment costs including the</i></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><i>profit to be earned are recovered with the proceeds of the sale of goods or services obtained from the administration or the beneficiaries of these services during the operation period.”</i></p> <p>Transfer of Operating Rights: Transfer of Operating Rights is defined under article 18 the Privatization Law and is as follows: <i>“Transfer of Operating Rights is the transfer of operating rights of an entity as a whole or the production units of the goods and services of its assets without transferring the ownership rights of the assets of such entit , in return for a consideration and under certain conditions and time limits.”</i></p> <p>Concession Agreement: The term concession is not defined under Turkish Law. Please however note that by virtue of the Electronic Communications Law (the "ECL"), Article 1 of the Law No. 406 providing the definitions has been repealed.</p> <p>The definition provided under the Law No. 406 is no longer included therein. Nevertheless, according to provisional Article 2 of the ECL, the definitions</p>
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		<p>provided by the last paragraph of Article 1 of the Law No. 406 shall remain valid only in connection with the existing concession agreements such as the concession agreement entered into with Turkcell and Telsim/Vodafone.</p> <p>BO: BO is defined under the BO Law and for the purposes of such law is as follows: <i>“The BO is a model regulating the establishment and operation of the power plants under the ownership of generation companies and the sale of the electricity in accordance with the rules and principles to be determined”</i>.</p> <p>In addition, the BL Law on Healthcare Institutions refers to BL (Build and Lease) Model for the building of the hospitals on lands allocated by the Ministry of Finance. The law does not define the BL model.</p> <p>Note that the following PPP models are defined in the Draft PPP Law: BOT, BO, BL and Transfer of Operating Rights. Draft PPP Law also permits the creation of new models in which “Building Stage” of BOT, BO or BL model includes completion, renovation, development, research, restoration and maintenance</p>
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<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>)?</p>	<p>✓ ✓</p>		<p>There is no such provision in the law but regardless of the fact that an administrative contract is not identified by its parties as a concession contract, the Council of State may still qualify such contract as a concession if it meets the criteria set out by the Council of State. The approach of the Council of State is substance over form on concession contracts.</p>
<p>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>)?</p>	<p>✓ ✓</p>		<p>Such a distinction is not explicitly made under the Laws regulating different PPP sectors. However, there are additional laws and regulations that apply to these regulated sectors and the requirements/conditions of the licensed are regulated under these sector specific regulations whereas concessions/PPPs are regulated under different laws as referred to under Q1 of Section 1.</p>

2.2 Contracting Authority

QUESTION	ANSWER	ARTICLE	COMMENTARY
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Checklist Turkey



<p>4. Does the Law identify (or allow clear identification by reference to other laws or regulations) the public authorities ("Contracting Authorities") that are empowered to select projects, prepare for, and award PPPs and enter into Project Agreements ?</p>	<p>✓ ✓</p>		<p>In principle, each of the Laws directly identifies the relevant Contracting Authority.</p> <p>BOT Law however does not identify the Contracting Authority but authorizes the High Planning Council to appoint the Contracting Authority.</p>
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For our general information: *If yes, which of the following authorities are identified:*

- *National authorities (e.g.: the government, ministries, and independent agencies); YES*
- *Regional/state-level authorities; NO*
- *Local or municipal authorities; or State owned companies? YES/NO*

2.3 Private Party and Project Company

QUESTION	ANSWER	ARTICLE	COMMENTARY
<p>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>)?</p>	<p>✓ ✓ ✓</p>	<p>Art. 2 of Law no.4501 Art. 2 of Law no.4686</p>	<p>Yes, concessionaires and its shareholders can be domestic and/or foreign persons</p> <p>Please note that foreign persons that are granted concessions are generally required to be incorporated in Turkey.</p>

Checklist Turkey



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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?*

PPP can be awarded to entities jointly owned by private and public entities, however a PPP cannot be granted to fully public entities.

2.4 Concerned sectors⁴

QUESTION	ANSWER	ARTICLE	COMMENTARY
6. Does the Law identify (or allow identification by reference to other laws or regulations) the sectors and/or types of infrastructure and/or services in respect of which a PPP may or may not be granted?	✓ ✓	Article 47 of the Constitution Decree Law No.2011/1807 ("BOT Decision")	The Law does not identify the sectors and/or types of Infrastructure and/or services in respect of which concessions may or may not be granted. Article 47 of the Constitution provides that concessions may only be granted to the extent regulated by law. Therefore concessions may be granted only if a law is enacted for the grant of such concession. Sectorial laws allow the identification of services or sector concerned. BOT Decision setting forth the implementation of BOT Law explicitly lists the sectors

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



			for which BOT projects can be developed.
7. Do the list of sectors eligible for PPP correspond to 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”?	XX		<p>Sectors which are currently eligible for concessions are sectors for which a law for the related concession is enacted.</p> <p>Regarding the PPP projects, the sectors are listed in an exhaustive manner (e.g. wording of the BOT Decision).</p>
8. Do the sectors eligible for PPP includes non commercial activities such as the provision of government services (such as <i>schools, hospitals, prisons, defence and housing</i>) in addition to the merchant sectors of the economy (<i>energy, transport, water, oil and gas</i>).	XX		For the non commercial purposes, the sectors eligible for PPP include only the healthcare. Healthcare services can be provided pursuant to the BL Law No. 5396.

For our general information: Please indicate the restrictions if any imposed by the Law on the sectors eligible for PPP:

Government has monopoly over the transmission of electricity.

The Municipality Law permits granting of water concessions by Municipalities. The Law does not specify whether it refers to water production, water treatment, wastewater treatment etc. We are aware however of concessions related to water production and water distribution.



3. SELECTION OF THE PRIVATE PARTY⁵

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?	✓ ✓	Article 3 of BO Law and Article 6 of BO Regulation (<i>defined below</i>)	Even though the Laws (except BO Law and BO Regulation) do not directly refer to competitiveness; the Laws reflect competitive bidding procedures. BO Law and BO Regulations clearly indicate that the selection should be competitive. Article 9 of the Draft PPP Law refers to competitiveness of selection procedures as one of the main principles of the same.
2. Is there reference in the Law to the principles of transparency, equal treatment and proportionality?	✗ ✗		The Laws do not refer to the principles of transparency, equal treatment and proportionality. Paragraph (i) of Article 2 and the last paragraph of Article 18 of the Privatization Law refers to the transparency principle. Draft PPL Law refers to transparency, competition, equal treatment, availability of necessary information for public supervision and efficiency.

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



<p>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>)?</p>	<p>✓ ✓</p>	<p>Article 6 of BOT Decision, Article 6 of BO Regulation, Article 20 of Highways Regulation, Articles 8 of Regulation for the BL of Healthcare Institutions, Article 18 of Privatization Law Article 17 of the Regulation on the Privatization Application Procedures</p>	<p>There is not any uniform publication requirement for the Laws.</p> <p>(1) For BOT Projects, bids are announced in the Official Gazette and 2 widely distributed newspapers. Announcement in international media may be possible if the context of the project requires so.</p> <p>(2) For BO Projects, bids are announced in the Official Gazette.</p> <p>(3) For Transfer of Operation Rights of Highways, bids are announced in the Official Gazette and at least 2 widely distributed newspapers.</p> <p>(4) For BL Projects, bids are announced in the Official Gazette, at least 2 widely distributed newspapers and the Internet.</p> <p>(5) Under the Privatization Law, bids are announced in accordance with the Privatization Law which only requires the bidding specifications to be announced before the tender and the results after the tender in accordance with the transparency principle.</p> <p>(6) Decisions regarding sale or final transfer shall be published in the Official Gazette</p>
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			Draft PPP Law does not provide specific rules in connection with the announcement principles but states that these announcement principes, among other matters, will be regulated under the secondary regulations.
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>)?	✓ ✓ ✓		<p>(1) Regulation for BO Projects for Thermal Power Plants (BO Regulation) dated 01.08.1997</p> <p>(2) Decision of the Council of Ministers for BOT Projects (BOT Decision) dated 26.04.2011</p> <p>(3) Regulation for the Construction, Maintenance and Operation of Highways (Highways Regulation) dated 01.03.1993</p> <p>(4) Regulation for BL Projects for Healthcare Institutions dated 03.07.2006</p> <p>Listed regulations include detailed provisions regarding the selection of the concessionaire including the pre-selection of bidders, the procedure for requesting proposals. Draft PPP Law also refers to regulations (to be drafted) governing the selection of the concessionaire in detail.</p>
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>)?	× × ×		

3.2 Award of PPP

Checklist **Turkey**



QUESTION	ANSWER	ARTICLE	COMMENTARY
<p>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?</p>	<p>✓ ✓</p>		<p>(1)BO Regulation sets forth the evaluation criteria and indicates that the bidding commission should evaluate the bids based on such criteria. Evaluation criteria includes compliance with pre-selection documents, engineering and design of the project, safety of the project (including safety standards of the suggested equipment), availability of the financing, production costs and bidding price. The bidding commission is required to prepare a comparative study of the bids.</p> <p>(2)BOT Decision does not require that proposals to be ranked solely on the basis of the evaluation criteria set forth in the pre-selection documents. BOT Decision requires the bidding commission to select the bid with lower economic burden to Treasury when there are 2 bids with equal terms.</p> <p>(3)Privatization Law does not have an article providing that the proposals are ranked solely on the basis of the evaluation criteria</p> <p>(4)Highways Regulation requires the bidding commission to select the bidder with the highest bid to the extent that such offers meets the evaluation criteria.</p> <p>(5)BL Regulation for Healthcare Institutions indicates that the bidding commission should evaluate the bids</p>



			<p>based on the evaluation criteria set forth in the selection documents.</p> <p>Article 8 of the Draft PPP Law indicates that bidding strategy includes the evaluation criteria to be applied for the appointment of the bidder.</p>
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?	XX		<p>Such a requirement is only provided in the Privatization Law, the Regulation on the Privatization Application Procedures and the Law on the Transfer of Operation Rights of Airports. Both laws require the notice of award to be disclosed to the public. No detailed provisions as to the scope of the notice of award.</p>
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?	XX		<p>BOT Decision requires to keep record of this information only in the event of tender by way of negotiation.</p> <p>BO Regulation requires the bidding commission to prepare a bidding report including key info such as pricing of offers and the reasons of the bidding commission for selecting the winning bidder in case of closed bidding and tender for predetermined bidders.</p> <p>Privatization Law requires all actions during the tender process are recorded in a report to be signed by all parties to the tender.</p> <p>BL regulation provides that all bidders and the bids are recorded before selection proceeding.</p>
9. If the answer to the previous question is <i>Yes</i> ,	XXX		



does the Law provide that such record is accessible to the public, or at least to interested parties?			
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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?	×××		
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?	✓ ✓	Article 31 of the BO Regulation on the Privatization Application Procedures	In the BO Regulation and the Regulation on the Privatization Application Procedures, Contracting Authority has the right to terminate the execution procedures if the concessionaire does not come to execute the agreement or does not bring the required bid security. Contracting Authority may invite the second (or third) ranked candidate if the first (or second) ranked bidder does not come to execute the agreement or does not bring the required bid security.

3.4 PPP Award without competitive procedure

QUESTION	ANSWER	ARTICLE	COMMENTARY
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Checklist **Turkey**



12. Does the Law provide that the Contracting Authority has the authority to award a PPP without a competitive process only in limited/ exceptional circumstances?	XX		Even though the Laws (except BO Law and BO Regulation) do not directly refer to competitiveness, the Laws reflect competitive bidding procedures which limit the possibility to use direct negotiations.
13. Does the Law provide for a procedure, set of rules or principles to be respected when awarding a PPP without a competitive process?	XXX		

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

N/A



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?	✓ ✓	Article 3 of BO Law and Article 6 of BO Regulation	BO Law/Regulation permits unsolicited proposal. If the Contracting Authority accepts an unsolicited proposal, it is then required to create competitive bidding grounds. The Contracting Authority is required to draft a tender document and announce the tender in the Official Gazette.

3.6 Review procedures

QUESTION	ANSWER	ARTICLE	COMMENTARY
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?	✓ ✓	Articles 11-13 of Law on Administrative Proceedings	Not regulated in the Laws. Pursuant to the Law on Administrative Proceedings, in case a bidder claims to have suffered or that may suffer loss, it has the right to ask the Contracting Authority to review its decision/act or failure to act. If such request is dismissed by the Contracting Authority, the bidder has the right to bring an action before the Administrative Court.



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4. **PROJECT AGREEMENT**⁶

4.1 **Model or list of provisions**

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Does the Law give flexibility to the negotiation of most terms of the Project agreement and if it contain (or refer to): (i) a model PPP agreement it is an optional template agreement for guidance only or (ii) a list of mandatory material provisions which must be included in the agreement, the content of such provisions is left for negotiation)?	✓ ✓	Article 10 of the BO Regulation, Article 18 BOT Decision and Article 30 of the BL Regulation for Healthcare Institutions	BOT Decision, BO Regulation, BL Regulation for Healthcare Institutions set forth a mandatory list of provisions to be included in the agreement. The content of such provisions are being left to the Contracting Authority to determine. Very little flexibility however in the negotiation of the provisions of the proposed draft of Concession Agreement Privatization Law and Highways Regulation include neither a model agreement nor a mandatory list of provisions.

4.2 **Duration and extension of the Project Agreement**

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



QUESTION	ANSWER	ARTICLE	COMMENTARY
<p>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?</p>	<p>✓ ✓</p>	<p>Article 7 of BOT Law, Article 5 of the Highways Law and Article 6 of the BL Regulation for Healthcare Institutions, Article 15 of the Privatization Law</p>	<p>(1)BO Regulation caps the duration of the power purchase agreement between the Turkish Electricity Trading Corp and the concessionaire with 20 years. Parties can decide to extend the term of the power purchase agreement by mutual agreement to be determined 1 year before the expiry of the contract.</p> <p>(2)BOT Law caps the duration of the concession to 49 years and indicates that the Contracting Authority should determine the duration of the concession considering the nature of the project, amortization of the investment including return, repayment of the loans, the amount of the capital and operating principles. No provision for extension.</p> <p>(3)Privatization Law caps the duration of the transfer of operation rights to 49 years. No provision for extension.</p> <p>(4)BL Regulation for Healthcare Institutions caps the duration of the concession to 49 years and indicates that the Contracting Authority should determine the duration of the concession considering the feasibility of the project. Duration should include the investment phase and the operation phase. No provision for extension.</p> <p>(5)Highways Law provides that the concession duration shall not exceed 49 years. No provision for extension.</p> <p>Draft PPP Law caps the duration of all concessions/PPP projects in Turkey with 49 years. It also requires that</p>



			the Contracting Authority determines the duration of the concession considering the amortization of the investment. The Draft does not include any provisions regarding extension.
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>)?	✓ ✓		<p>According to Article 20 of BOT Decision, duration of contract cannot be longer than 49 years including force majeure events and events caused by the Contracting Authority.</p> <p>According to Highways Regulation, extension of the contract term is possible only in case of occurrence of force majeure events.</p> <p>Extension of duration of the contract is not foreseen under the BO Regulation.</p>

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

Please refer to our answers to Q2

4.3 Termination of the Project Agreement

QUESTION	ANSWER	ARTICLE	COMMENTARY
4. Does the Law leave open to the Project Agreement negotiations the list of possible ground for termination and the content of to the	✓ ✓	Article 28 Of BOT Decision, Article 6 of	The Law does not provide for a restrictive list of termination events. The following regulations provide for the termination rights of the Contracting Authority. (1) BO Law does not list the termination events.



<p>termination provision?</p>		<p>Highways Law.</p>	<p>(2)BOT Law lists the termination events for the project agreements such as breach by the concessionaire of its contractual obligations, insolvency or bankruptcy of the concessionaire. The Law does not describe the list as restrictive.</p> <p>(3)Highways Law identifies the termination events as breach by the concessionaire of its contractual obligations and insolvency of the concessionaire.</p> <p>(4)Regulation of BL for Healthcare Institutions identifies the termination events as breach by the concessionaire. The Regulation provides for a cure period.</p>
<p>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>)?</p>	<p>N/A</p>		



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?	XX		The Laws do not prevent compensation of the Private Party. They indicate however that the consequences of termination are to be regulated in 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?	XX		Please refer to our answers to Q6

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?	XXX		Note however that the Highways Law refers to general criteria for setting the tariffs and BL Regulation for Healthcare Institutions sets forth the criteria for determining the lease amount. As a side note, please be informed that the Contracting Authority and the authority that set the tariffs/pay the fees are generally the same entity in Turkey.



4.5 Financial responsibilities of the Private Party and Contracting Authority

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>(1) BOT Law provides that the concessionaire can collect tariffs or fees for the use of the facility or its services for the BOT Projects.</p> <p>(2)BL Regulation for Healthcare Institutions and BO's, there is a direct payment mechanism from the contracting authority to the concessionaire. In the BOs, concessionaire can sell the energy which is not purchased by the contracting authority and can directly collect the fees.</p> <p>(3)Highways Regulation does not specifically determine who collect the tariffs. Note however that the regulation indicates that the contracting authority will receive a certain portion of the collected tolls. This implies that the concessionaire will collect the tolls and transfer a certain portion to the contracting authority.</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>) ?	✓ ✓ ✓		<p>(1)BOT Regulation provides for payments by the public authorities but does not regulate the scope of payments and indicates that the project agreements should regulate the payments.</p> <p>(2)BO Regulation provides for capacity payments to the concessionaire by the contracting authority. Capacity payments are up to certain percentage of the annual net</p>

Checklist **Turkey**



37.

			<p>production capacity.</p> <p>(3)BL Regulation for Healthcare Institutions determines the lease price to be paid by the public authority based on the investments costs and profit margin of the concessionaire.</p>
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5. SECURITY AND SUPPORT ISSUES⁷

5.1 Security Interests

QUESTION	ANSWER	ARTICLE	COMMENTARY
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?	XX	Article 40 of the BL Regulation on Healthcare Institutions	<p>The Laws do not explicitly provide for the possibility for (or not specifically prevent) a concessionaire to create security interests on the project assets. It should be noted, however that, the BL Regulation on Healthcare Institutions which require the approval of the Ministry of Health for transfer of lease agreements during the investment and operation phase. This may be interpreted as the approval of the Ministry of Health is required for the assignment of lease revenues.</p> <p>Turkish concession agreements, however, generally restrict the ability of the lenders lending to the project to obtain a security interest in the share capital of the concessionaire and there is no example of step in right granted to the Lenders</p> <p>In practice, in telecommunication sector, we are aware of some GSM operators that entered into financing arrangements and granted various security interests on their assets.</p>

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



			<p>Some typical examples of these are: assignment of receivables, account pledges, share pledges, subordinations of parent loans.</p> <p>Regardless of the fact that some share pledges have been created on the shares of some GSM operators, share transfers are explicitly regulated and, in certain conditions, are subject to the approval of the TA and therefore, enforcement of pledges on such shares will require the parties to observe the share transfer related regulation and restrictions on these shares.</p> <p>Please note that although commercial enterprise pledges have been created by some GSM operators, to the best of our knowledge, the authority has restricted the right of operators to grant security interest on equipment, machinery and similar assets of GSM operators.</p> <p>In addition, to the best of our knowledge, there have been some privatizations (especially port privatizations) where limited steps-in rights were granted in respect of some concession agreements.</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>N/A</p>		<p>No reference to types of security.</p> <p>Based on the general security law principles in Turkey.</p>



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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; YES
- the assets for which it has rights of use under a project agreement; NO
- its property; YES
- shares of the Project Company; YES/NO
- the project agreement; or NO

obtain other valuable guarantees (please specify)? Please clarify

5.2 Government support

QUESTION	ANSWER	ARTICLE	COMMENTARY
3. Does the Law provide for (or does not specifically prevent) the public authority to provide support to the Contracting Authority and a guarantee for the proper implementation of the PPP by the Contracting Authority?	XX		Not specifically provided or prevented depend on sectorial policy not on the PPP nature of the contract.
4. Does the Law provide for (or does not specifically prevent) the Public Authority to	XX		Under the BO Law, Turkish Electricity Trade Corporation is permitted to buy a certain percentage of the net annual production capacity of the plant.

Checklist **Turkey**



<p>provide financial or economic support for the implementation of PPP?</p>			<p>Law No 4749 regarding Public Financing (including guarantees to be provided by public authorities) permit for guarantees to BOT, BO and Transfer of Operations projects by the Treasury. Guarantees are in the form of payment guarantees of the payments by the purchasing public authority.</p> <p>Please note that pursuant to Electricity Market Law No 4628, Treasury guarantees within the framework of BOT Law and BO Law are no longer available (except for grandfathered projects).</p>
<p>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>)?</p>	<p>× ×</p>		<p>We have answered this question based on the Laws and the Law No 4749 regarding Public Financing. We have not included the subsidies that may be provided to the PPP projects in other regulations not because of their PPP nature but because of the sector invested.</p> <p>In addition to the types of support provided in the list, the Laws permit for allocation of publicly owned land to a PPP project in the form of usufruct rights. Under the BL Law for Healthcare Institutions, usufruct rights over the publicly owned land are provided to the project without cost. Article 21 of the Draft PPP Law clearly permits for the allocation of publicly owned land and/or grant of usufruct rights to PPP.</p> <p>Law No 4749 regarding Public Financing (including guarantees to be provided by public authorities) provide for guarantees by the Treasury of payments to concessionaires by the public authorities in BOT, BO</p>



42.

			<p>and Transfer of Operations projects. Loan Guarantees by the Treasury are also permitted to a private company to the extent that more than 50% of the share capital of such company is owned by public entities.</p> <p>Article 19 of the Draft PPP Law provides for guarantees by the public authorities, Ministry of Finance or by Treasury for payments to be made to the concessionaire by the public authorities or consumers. If the demand by the public authorities or consumers is predictable, such guarantee cannot exceed 50% of the estimated demand. Draft PPP Law also permits for bridge loans, repayment guarantee for bridge loans.</p>
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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>)?	✓ ✓		Every Contracting Authority decides on the time period for financing based on magnitude of the project. For example in the transport sector for airport terminals, the general period is 3 months. On the other hand in İzmit-Gebze highway project the period was 6 months
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?	✗ ✗	Article 5 of Licensing Regulation regarding the Electricity, Natural Gas, LPG	No step-in rights in the Laws or in the existing Concession Agreements <u>Step-in rights under energy market related regulations</u> In principle, under no condition the licenses can be transferred. However, if the banks and/or finance institutions provide limited or non-recourse project financing to the licensee, as per the provisions of their loan agreements, the related banks and/or financial institutions may request from the Authority, together with their justification, that another legal entity be granted the related license provided that they assume all obligations of the related licensee in line with the provisions of this Regulation. The legal entity proposed by such institutions shall be granted the related license on condition to comply with the obligations indicated herein.



44.

			<p>Please note that the energy licenses may be claimed to be unilateral administrative acts rather than concession contracts.</p>
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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?	✓ ✓ ✓	125 of Constitution-International Arbitration Law No4501	Law No 4501 permits for international arbitration in concession agreements to the extent that (i) at least one of the shareholders of the concessionaire is a foreign entity or (ii) the project is capitalized with foreign funds or (iii) the project is financed with foreign funds/lenders.
2. Has the government of the country ratified the Washington Convention on the Settlement of Investment Disputes (ICSID) (1965)?	✓ ✓ ✓		
3. Has the government of the country ratified the New York Convention on recognition and enforcement of foreign arbitral awards (1958)?	✓ ✓ ✓		

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



6.2 Applicable laws

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.	✓ ✓	Article 4 of Law numbered 4501	International Arbitration Law No 4501 permits the parties to determine the applicable law to the dispute. Therefore the parties are indirectly allowed to enter into side agreement to the concession agreement that is governed by foreign law.
5. Has the country ratified any international convention for the protection of foreign investments?	✓ ✓ ✓		Turkey ratified the Convention of the Multinational Investment Guarantee Agency. Turkey signed bilateral investment treaties with different countries including with the United States, United Kingdom.



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?	✓ ✓		Please refer to our answers to Q1 n Section 1.
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?	× × ×		
3. Is there a municipal/regional policy framework (explicit or implicit) for PPPs in infrastructure or public services?	× ×		Local Public Services are regulated by Municipality Laws No 5216 and 5393, and Special Provincial Administrations Law No.5302. Municipality Laws entitle the Municipalities to grant concessions limited to public transportation services



			<p>(bus, rail and seelines) and water supply and waste water treatment services.</p> <p>Municipality Laws and Special Provincial Administrations Law do not regulate the selection procedures. In practice, Municipalities follow the principles set forth in the SPL.</p>
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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?	✓ ✓		<p>For the last five years, the Government, in the progress report, declares that PPPs will be promoted and given priority.</p> <p>International PPP Platform Turkey is an association established for the purpose of developing public and private partnership and is accessible via (www.ppp.org.tr).</p>
5. Are there PPP training programmes on a national and/or municipal/regional level for public servants and other PPP concerned people?	× × ×		



6. Are there PPP courses as part of university curriculum or specialist departments and faculties in universities teaching PPP?	✓ ✓		First PPP courses have started at Fatih University since 2011-2012 academic year.
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7.3 Obstacle to implementation of PPP Policy

<p>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.)?</p>	<p>✓ ✓ ✓</p>		<p>There are no social or political obstacles.</p>
<p>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.)?</p>	<p>× × ×</p>		<p>The main legal obstacle is the belated entry into force of the Draft PPP Law.</p>



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?	XX	Art. 47 of Constitution, Art. 6 of Draft PPP Law	<p>There is no specialized agency established for concessions. Contracting Authorities are required to obtain the opinion of the State Council regarding the concession agreement. This is however not in the form of a consent.</p> <p>Note that under the Draft PPP Law, in order to grant a concession for projects exceeding YTL 10 million (approximately €4.1 million), contracting authority is required to be authorized by the High Planning Council. For projects with a value below YTL 10 million thresholds, the contracting authority can grant a concession with the affirmative opinion of the State Planning Council Department.</p>
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?	N/A		



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?	N/A		
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>)?	N/A		Please refer to our answers to Q1
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).

N/A

8.2 Other institutions concerned by PPP

6. Is there any PPP unit/agency or department of the Central PPP unit either at the municipal or regional level?	×××		



7. Is there any specific PPP unit department in any ministry (other than the central PPP unit) or at sectoral level?	✓ ✓		PPP Department under the Ministry of Development
8. Is there either a specific " <i>one stop shop</i> " for PPP authorisations and formalities or a " <i>one stop shop</i> " which services are available to the sponsors of PPP project as well as other investors?	× × ×		No one-stop-shop process. Not streamlined. This was one of the main reasons behind the revisions made to the authority and requirement to receive State Council approvals for concessions.
9. Is the division of power between different public authorities involved in the PPP granting process simple and coordinated?	✓ ✓		The division of power between different public authorities involved in a concession is set by laws. It is therefore clear. However we do not know how simple and coordinated the internal interaction between such public authorities is.

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>)	✓ ✓ ✓		



<p>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>)?</p>	<p>✓ ✓</p>		<p>Eventhough the Laws (except BO Law and BO Regulation) do not directly refer to competitiveness, the Laws reflect competitive bidding procedure. BO Law and BO Regulation clearly indicate that selection should be competitive. Paragraph (1) of Article 2 and the last paragraph of Article 18 of the Privatization Law refer to the transparency principle.</p> <p>In practice selection procedure is transparent.</p>
<p>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?</p>	<p>× × ×</p>		

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

N/A

9.2 Statistics on PPP implementation under the Law

<p>4. Have most of the awarded PPP projects been successfully implemented and put into operation in compliance with the Law?</p>	<p>✓ ✓ ✓</p>		



5. Has a PPP project ever been awarded and implemented in the country at the local /regional /municipal level in compliance with the Law?	✓ ✓ ✓		
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>)?	✓ ✓		Healthcare services can be provided pursuant to the BL Law No. 5396

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)? **Approximately 20 PPP projects (big and significant) have been awarded in total in Turkey**
- Please give some examples of the most significant project awarded:
 - under which legal form have such PPP projects been awarded (Concession, BOT, PFI, other): **BOT (e.g, airport terminals)**
 - have such PPP project been granted by (i) central, (ii) sub-sovereign/regional (if applicable) or (iii) municipal government as Contracting Authority; **Central, depending to the related Ministry**
- 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; and **in the last 10 years or before**
- *please give examples of any PPP projects awarded but not implemented (or not implemented under a PPP form) N/A*

Checklist Turkey



- are there any PPP/Project Agreements in discussion? **On November 17, 2011 the bidding for Adnan Menderes Airport will take place.**

9.3 Challenge of PPP

<p>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?</p>	<p>✓ ✓ ✓</p>		
<p>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?</p>	<p>✓ ✓</p>		
<p>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?</p>	<p>✓ ✓ ✓</p>		
<p>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?</p>	<p>N/A</p>	<p>Article 28 of BOT Decision</p>	<p>No case law is available for this question. According to article 26 of BOT Decision issues related to the termination and its consequences will be governed in the contract between parties</p>



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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.*
N/A