



INSIGHTS AND RECOMMENDATIONS FROM THE LATEST PUBLIC-PRIVATE PARTNERSHIPS LAWS ASSESSMENT

Efficient and transparent policies are vital for the effective functioning of the infrastructure sector (which includes, for example, transport and energy and water supply, as well as social infrastructure for education and health care), as are legal and institutional frameworks that encourage private sector participation. Over the past 15 years, the EBRD has conducted a number of assessments looking at the effectiveness of legislative frameworks governing public-private partnerships (PPPs) in the EBRD region.

These compare the legal frameworks in the various countries with internationally accepted standards and best practices, identifying strengths and weaknesses in terms of both extensiveness (law on the books) and effectiveness (law in practice). With international standards and trends in the PPP sector constantly evolving, the EBRD performed its latest assessment in 2017;¹ the previous one was carried out in 2011.²

The findings of these assessments are used to develop practical recommendations for policy-makers, helping them to address, through technical assistance, any weaknesses identified in the national PPP framework.

METHODOLOGY

The EBRD PPP Laws Assessments examine both concessions and non-concessions Private Finance Initiative-type PPPs. For definitions and methodologies details see the EBRD Transition Report 2017-18 (Annex 3.1: legal frameworks governing public-private partnerships: insights and recommendations, as part of the Infrastructure section) or the EBRD website (refer note 2).

The two-part assessments are based on a set of criteria developed by the EBRD. Part I looks at the comprehensiveness of legal rules, while Part II deals with issues of policy, institutional framework, the workability of the PPP regime overall and lessons learned from the implementation of PPP projects. The EBRD 2017 PPP Laws Assessment was sponsored by the EBRD Shareholder Special Fund.

In the 2017 assessment, which was carried out on the basis of laws and regulations as at 30 June 2017,³ some countries in the EBRD region were subject to a more detailed evaluation. First, all countries were assessed using a range of public resources (legislation, national reports, legal articles, research findings and press coverage). Second, a select group, which consisted of 12 countries⁴ was in addition subjected to a more extensive assessment, which included interviews with national authorities and private sector stakeholders. The assessment's findings were then verified by qualified local lawyers, with each country being given a score.

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The countries were placed in five groups on the basis of the EBRD's assessment of their compliance with international standards and the effectiveness of their legal frameworks.

FINDINGS ON COMPLIANCE

Mongolia, which displayed a very high level of compliance in the 2011 assessment, has maintained that ranking. Its Concessions Act, which was adopted in 2010, represents a comprehensive legal framework governing both concessions and Private Finance Initiative (PFI)-type PPPs. Serbia, meanwhile, has significantly improved its ranking since the 2011 assessment and now boasts a comprehensive and very highly compliant legal framework governing PPP projects.

A large number of countries have been placed in the highly compliant category on account of their sophisticated legal frameworks, their transparent procurement practices, their easy access to justice (including arbitration), and the fact that a range of security instruments are available, all of which facilitate financing.

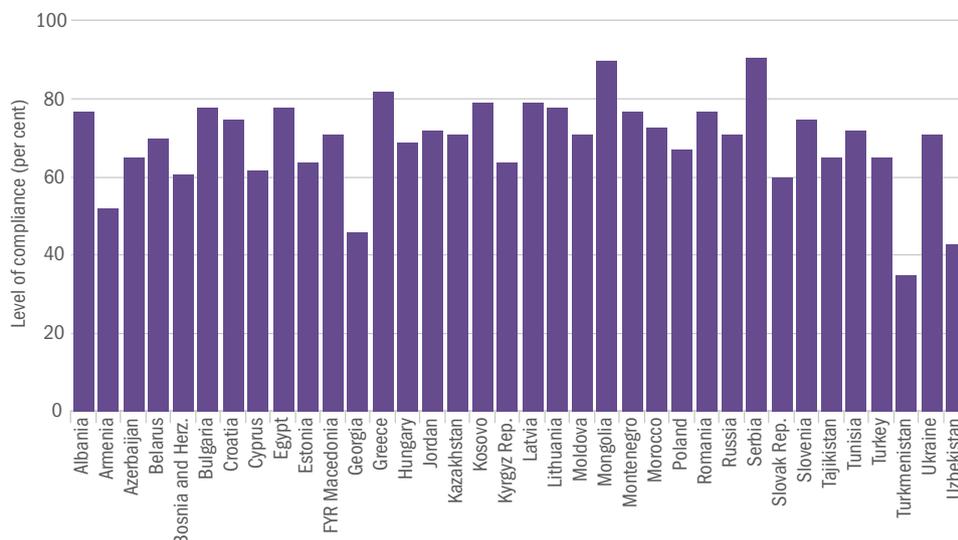
Moderately compliant countries are characterised by a business-friendly environment and fairly well-developed legal frameworks, which provide for opportunities to establish PPP projects. Core aspects, such as: (i) the legal framework; and (ii) guidelines

or flexibility as regards the contents of a project agreement, the selection of a private partner and the availability of reliable security instruments, are covered by laws and regulations, although not always in a comprehensive and clear manner. This can cause scepticism and increase the risks perceived by investors.

Low-compliance countries continue to face challenges in the core assessment areas. These countries typically recognise PPPs, but have so far failed to establish an appropriate legal framework.

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CHART 1 COMPLIANCE WITH INTERNATIONALLY ACCEPTED STANDARDS AND BEST PRACTICES



SOURCE: EBRD (2017). Note: Although it had not yet been adopted at the time of the assessment, so was not taken into consideration, Georgia's new PPP Law, which is due to be finalised and adopted shortly, should significantly improve its PPP framework and make it more compliant with internationally accepted standards and best practices.

FINDINGS ON EFFECTIVENESS

The effective implementation of laws is a challenge in many countries. Where countries do not have dedicated legislative frameworks specific to concessions or PFI-type PPPs, or they have low-compliance frameworks, the reasons for such a lack of effectiveness are fairly clear. Investors expect legal certainty regarding the scope of a law's application and may be discouraged if a PPP project is only governed by general laws, such as the country's civil code or an investment law.

The reasons for modest levels of effectiveness even in high-compliance countries seem to be twofold. It may be that in some countries public authorities and local investors do not regard concessions or PFI-type schemes as an effective means of improving their countries' infrastructure. On the other hand, there may be countries where the process of adjusting legislation has been undertaken, but no significant transactions have taken place to date.

WHAT CAN POLICY-MAKERS DO?

Establish a firm policy that will be adhered to irrespective of political developments

A comprehensive policy document and/or clear strategic guidelines will indicate a country's commitment to supporting PPPs in achieving national development goals. Policy documents

are particularly welcome in low-compliance countries, but some high-compliance countries also need to make more effort in this area in order to ensure that their policy documents are successfully implemented.

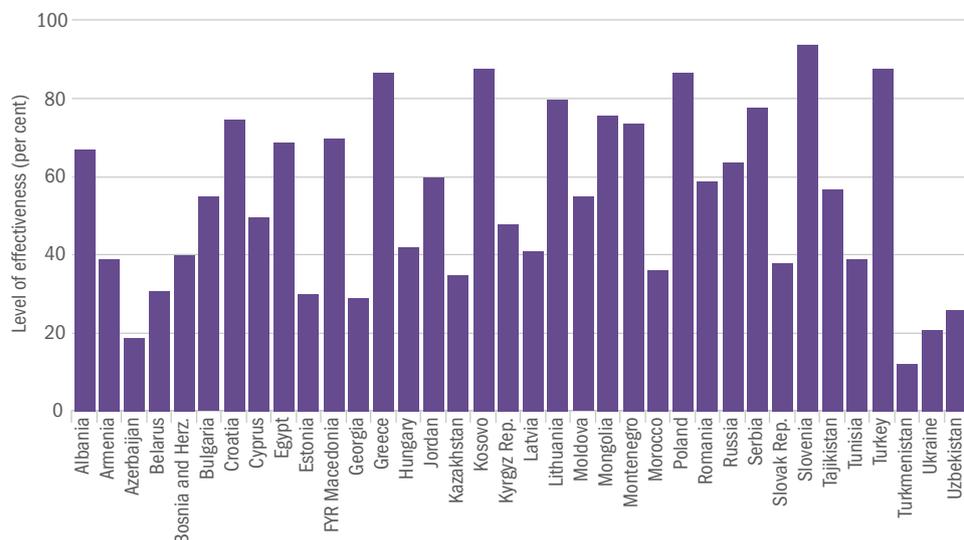
Extol the benefits of PPPs in public

PPP projects need additional promotion, especially in countries with small numbers of transactions, preferably by means of awareness-raising campaigns run nationally. The public often have limited knowledge about the benefits and advantages of PPPs, which may lead to resistance. PPPs are often regarded as expensive models that favour private partners and facilitate the privatisation of public wealth and services via the back door. This is especially true if PPPs have previously been associated with corruption or negative experiences in the form of failed projects, bad management or a lack of feasibility studies.

Develop a set of template documents

Even in the presence of well-established legal frameworks, many countries need assistance in order to facilitate and expedite PPP projects, given their complexity. Template documents (such as tender forms or standard heads of contract terms) drawn up by a government PPP unit can provide useful guidance to public entities when it comes to the development and negotiation of PPPs, especially if those template documents incorporate the standards expected by investors.

CHART 2 EFFECTIVENESS OF POLITICAL AND INSTITUTIONAL FRAMEWORKS AND BUSINESS ENVIRONMENTS



SOURCE: EBRD (2017). Note: Although it had not yet been adopted at the time of the assessment, so was not taken into consideration, Georgia's new PPP Law, which is due to be finalised and adopted shortly, should significantly improve its PPP framework and make it more compliant with internationally accepted standards and best practices.

Enhance the institutional framework

Countries with well-developed legal frameworks usually have a dedicated unit or body dealing specifically with PPPs. These bodies are established by law and have predefined competences that guarantee their involvement in the selection, preparation, oversight and implementation of projects. The institutional framework is a weak point for most countries with moderate and low levels of compliance. These countries should focus on establishing dedicated bodies which deal solely with concessions and other PPPs.

Enhance the legal framework

All high-compliance countries have dedicated legal frameworks addressing issues such as project selection, tender procedures and contracting in an effective manner. The scope of such frameworks needs to be clearly defined (with clarity, for example, regarding the definition of a PPP, the sectors concerned, the competent authorities, the eligibility of private entities and the use of public procurement law for certain procedures in PFI-type PPPs in EU countries) in order to ensure legal certainty and limit the risk of challenges to the validity of PPP contracts. Although most countries now have a dedicated legal framework governing PPPs, some do not.

Variety/flexibility in terms of models

Some countries adopt a PPP law in addition to a concession law, while others opt for a single piece of legislation covering both concessions and other PPPs. Many countries recognise the need to provide for a wide range of PPP arrangements (including Build Operate Transfer models). Countries with a limited range of PPP arrangements can be expected to engage in further legislative activity with a view to providing for greater flexibility in terms of models.

Feasibility studies

An economic feasibility study ascertaining the viability and financial sustainability of a project over the lifetime of the contract (as well as the project's socio-economic benefits and environmental impact) is an essential element of the preparatory process. In many countries, however, such studies are still not mandatory, or the requirements governing them are not clearly specified. In most cases, no such studies are performed, which highlights the need to make them mandatory. At the same time, the required evaluation should not be excessively complex or costly.

Selection of private partners

Private partners must be chosen by means of a fair and transparent selection process. Exemptions allowing for direct negotiations should be limited, and legislation should contain clear rules on the choice of tender procedure. Tenderers have a lot at stake when pitching for PPP projects, and the cost of participating in a tender procedure can be very high. Quick and effective legal remedies in the event of appeals against the decisions of the contracting authority will provide valuable protection for investors, while minimising delays to the award process.

Establish a "one-stop shop" for permits

Policy-makers often focus solely on the award procedure itself. However, private entities face many other legal issues when it comes to PPPs, particularly regarding the permits required for construction and operations. Such problems can be addressed by means of a "one-stop shop" incorporating other permits that need to be obtained in connection with the PPP contract.

Provide for reliable security instruments

The bankability of a project is dependent on the availability of reliable security instruments relating to the rights and assets of the private partner in the project and other instruments that can be used to contractually secure the private partner's cash flow in favour of lenders. In order to stabilise a private partner or a project company in turbulent economic times, direct agreements and step-in rights are required. The option of government support and guarantees regarding the contracting authority's proper fulfilment of its obligations will also significantly reduce risks relating to the financing of projects.

Provide for international arbitration and enforcement of arbitral awards

Privately financed infrastructure projects require reliable dispute resolution mechanisms that are trusted by investors. International arbitration is a key dispute resolution instrument, and the absence of a provision enabling international arbitration is sometimes regarded by investors as a deal-breaker or as an indication of significant political risk.

CONCLUSION

A significant number of countries have amended their legislation since the 2011 assessment, either building on laws adopted before 2011 or introducing laws governing non-concession PPPs in addition to existing legislation on concessions. Highly and very highly compliant countries have the potential to establish significant numbers of PPPs in the next 10 years. However, their current transaction record seems to point to the under-utilisation of such instruments, partly reflecting a perceived lack of political desire to promote the use of PPPs, as well as the need to train public officials.

Moderately compliant countries have supportive business environments and fairly well-developed legal frameworks, providing opportunities for the establishment of PPP projects. However, core areas relating to project selection, tender procedures and, in particular, the bankability of projects need to be improved further in order to increase transparency and legal certainty.

Lastly, countries with low and very low levels of compliance need to adopt dedicated legislation governing PPPs or improve their legal frameworks in other ways. All countries should continue to enhance their institutional capacities, preferably by establishing a specialist unit tasked with developing, actively promoting and supervising state-of-the-art PPP solutions.

The Legal Transition Programme uses its regular PPP Laws Assessments, as well as its participation in (or, in some cases, leading of) major standard-setting initiatives, in order to pursue policy dialogue with the authorities in its countries of operations. It advises governments on any identified gaps and on how to improve legislative, regulatory or institutional frameworks.

References

- EBRD (2012), Concession/PPP Laws Assessment 2011.
- EBRD (2017), Concession/PPP Laws Assessment 2017.

- 1 See EBRD (2017). This article summarises the *Transition Report 2017-18*'s legal annex, which presents more detailed findings from the 2017 assessment.
- 2 See EBRD (2012). www.ebrd.com/what-we-do/sectors/legal-reform/ppp-concessions/sector-assessment.html
- 3 In exceptional cases, significant legislative developments occurring in July 2017 were also taken into consideration, in order to ensure the completeness and accuracy of the assessment.
- 4 Albania, Armenia, Croatia, Egypt, Jordan, Kazakhstan, Lithuania, Mongolia, Poland, Romania, Russia and Turkey.

