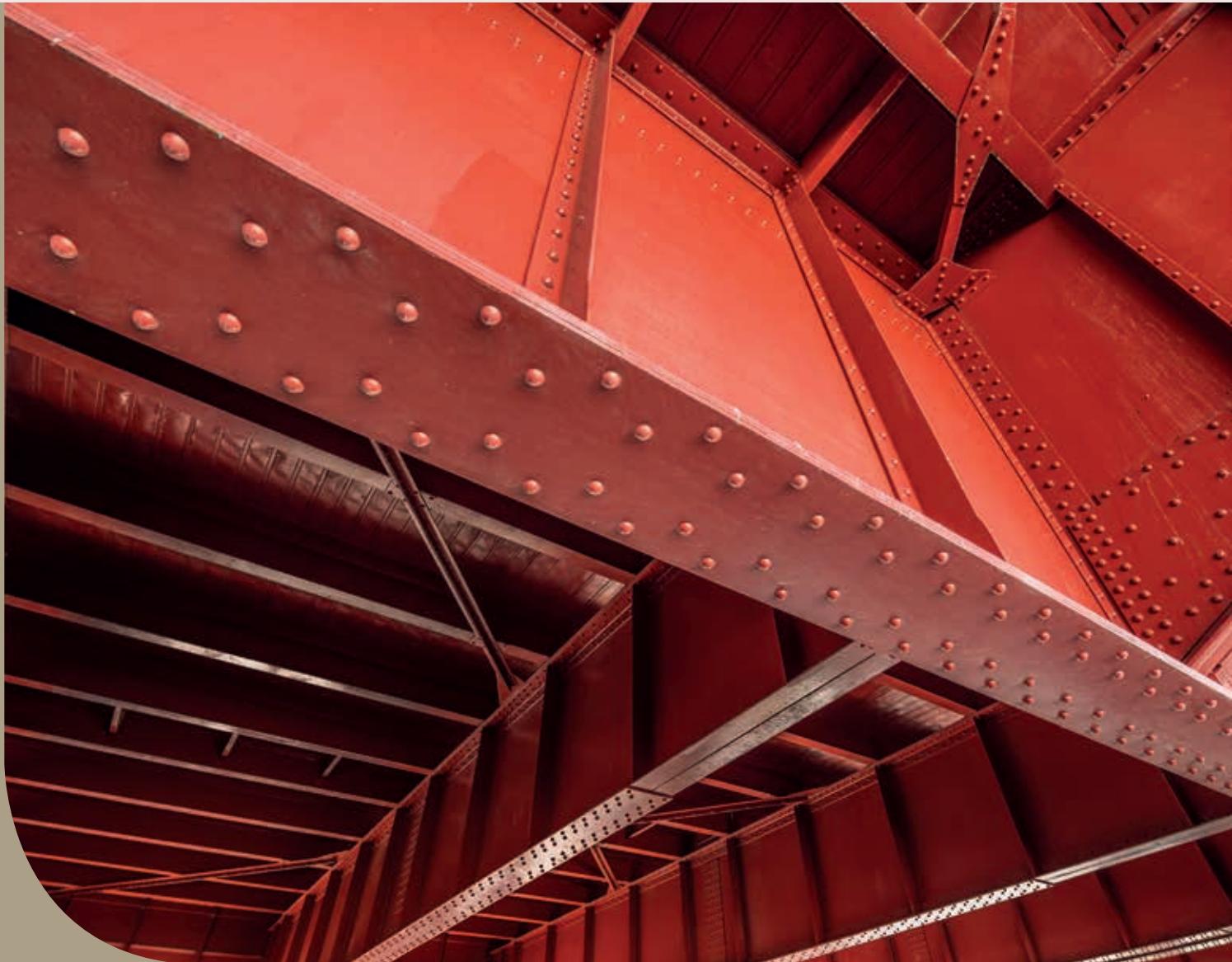




CIS MODEL PUBLIC-PRIVATE PARTNERSHIP: DEVELOPING PRACTICAL GUIDELINES



In the context of global, financial and economic instability, many countries are experiencing difficulties in solving large-scale infrastructure problems due to various public funding restrictions and volume limitations. International practice demonstrates that the mechanism of the public-private partnership (PPP) could be effective for raising much-needed funding and attracting private investment, managerial experience and know-how skills in the infrastructure sector.

The need for the development of public infrastructure is extremely relevant for the Commonwealth of Independent States (CIS) countries. The existing infrastructural restrictions are well known, and in recent years many of those countries have become actively involved in creating conditions for the development of PPPs.

At the same time, there are a number of problems and limitations that do not permit full use of the potential of the PPP mechanism. Most of them are relatively generic for these countries. The most obvious difficulty is the high-quality regulatory framework and PPP-enabling environment. Having assessed the problem and contemplated possible solutions the CIS legislators and the authorities concluded that the development of PPP guidance and methodological materials offers practical assistance to public officials in the identification, preparation, implementation and monitoring of PPP projects.



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EBRD AND CIS IPA

The history of cooperation between the EBRD and the CIS Inter-parliamentary Assembly (IPA) dates back to 1994, when the Taurida Palace in St Petersburg hosted the EBRD's Annual Meeting. The cooperation between the two organisations was furthered later with the signing of a Memorandum of Understanding and cooperation between the two organisations.

Since 1999 there has been a good deal of cooperation in the field of legislative development and harmonisation. With the EBRD's technical expertise and financial support, the CIS IPA developed and approved five CIS Model Laws; among them the Model Law On Public Private Partnership of 28 November 2014 by IACIS¹ (the "Model Law").

Without doubt, the latter law is an effective instrument in the unification of the legislation on public-private partnership in CIS countries. The main objectives of the Model Law were to achieve uniform and systematic regulation of PPPs and to bring the national legislation of the CIS countries into compliance with best international practices and the requirements of funding organisations in order to ensure the bankability of PPP projects.

Regulatory acts based on the Model Law stimulate the inflow of private investors, including those who are foreign, who are willing to invest their money in the implementation of projects on the principles of PPP, and affect the increase in the number of ongoing projects. As far as bankability is a key and the most crucial aspect of successful project implementation, the Model Law regulates in detail the issues of equitable risks allocation between the parties and the consequences of termination of the PPP agreement, in particular, compensation payment.

The framework and non-mandatory nature of the provisions of the Model Law allows the governments of the CIS countries to choose the most appropriate regulatory option, taking into account local and territorial specifics. It is also important to note that the Model Law is a conceptual basis for the implementation of cross-border PPP projects in the CIS region.

A high level of legal drafting methodology eliminates the controversial and ambiguous interpretation of the provisions of the Model Law.

Some provisions of the Model Law have already been successfully implemented in the national legislation. After the Model Law was adopted, national laws on PPPs were adopted in such CIS IPA countries as Belarus and Kazakhstan in 2015, and later in 2018 in a number of countries within and beyond CIS who reviewed the Model Law and used many of its concepts for their national legislation; including, in particular, China, Georgia, the Kyrgyz Republic, Russia, Ukraine among others. The adopted laws contain a number of progressive provisions from the Model Law, namely, providing for an open list of PPP objects, public financial support for PPPs by state bodies, provision of a national regime for foreign legal entities, and guarantees of private investor rights and funding organisations, including the following:

- exclusion of discriminatory measures
- the right for compensation of losses
- taking into account private investments during the formation of tariffs
- non-interference of state and municipal bodies into investors' activities
- the possibility of changing the PPP agreement due to a significant change in circumstances
- so-called "grandfather clause".

In particular, the Law on Public-Private Partnership was approved by the Parliament of Georgia in May 2018 (the "Georgian PPP Law"). The Georgian PPP Law largely follows the concepts of the Model Law which, in its turn, advances recent trends in modern PPP legislative developments and permits both concessionary and non-concessionary partnerships, meaning that a private partner can either collect funds directly or indirectly from the end-consumers of the public (municipal) services (alternatively, a private partner can also be compensated by a public partner for these services or the public infrastructure it has created).

Moreover, similar to the Model Law, the Georgian PPP Law provides clear guidance on the rules related to project identification, initiation and preparation, as well as detailed procedures for the selection of private partners, stages of project implementation, monitoring and even



post-implementation relations. The Georgian PPP Law also provides that projects may be initiated not only by the government, but also by potential private investors (this rule mainly concerns the energy sector, which the Georgian PPP Law recognises as one of the most strategically important).

As a result, the Georgian PPP Law incorporates all the elements needed for the comprehensive and effective regulation of relations between the state and investors. Accordingly, the newly created legal framework adequately addresses the requirements of all major stakeholders (the government, the private sector and financial institutions) and will promote investment in Georgia's infrastructure and improve public services.

The Model Law also became the basis for adopting amendments to the PPP Law of the Kyrgyz Republic, introducing an assessment of the effectiveness and comparative advantage of PPP projects, as well as the possibility of initiating a PPP project by a private partner in accordance with the best practices of unsolicited proposals. The model legislation has also had

a significant influence in Russia, where changes to the Federal Law No. 115-FZ on Concession Agreements dated 21 July 2005 regarding the establishment of unsolicited proposals, were based on the provisions of the Model Law, which for the first time in the region provided for unsolicited proposals.

The current review of the PPP Law of Kazakhstan takes a similar approach and is largely based on the Model Law, combining widely recognised best standards in governing PPP.

In addition, Ukraine is currently preparing a reform of the Law on Concessions, which will also be carried out taking into account the provisions of the Model Law among other modern international standards and best practices references.

PPP MODEL DOCUMENTATION AND ENABLING TOOLS

The Model Law is an important act of harmonisation. The adoption of the Model Law and preparation of the national laws of the CIS member states on PPPs on its basis allowed the

creation of a solid legal footing for the long-term mutually beneficial cooperation of public and private partners in order to achieve the objectives of socio-economic development and improve the availability/quality of public services. Moreover, it also allowed harmonisation of the legislation of the CIS member states and elimination of gaps of national legal regulation.

The commentary to the Model Law, as well as guidance papers and model recommendations on various aspects of the preparation and implementation of PPP projects (that were developed further to adoption of the Model Law) are also of great practical importance for the preparation of specific projects. The importance of this work lies not only in the "educational" nature of the application of these documents, but also in the fact that they are used (and referred to) in the preparation and discussion of projects in various sectors and different countries.

In addition, these model documents are used in the CIS countries while preparing amendments to regulatory and other acts governing relations in the field of PPP, to justify the need for selective innovations.

One of the most recent projects involving cooperation between the Bank and the CIS IPA went for the first time beyond the model legislation development, focusing instead on PPP model practical documentation and

enabling tools. This project originally envisaged two phases: phase one focused on developing the Model Law and relevant commentaries, phase two is to collate guidance for an appropriate enabling environment for developing and implementing PPP projects in the context of the Model Law following the successful completion of the first phase of the project.

The Model Law was developed based on internationally accepted standards and best practices in PPP legal frameworks. The Model Law was approved by the CIS IPA in November 2014 and recommended for incorporation into national legislation of the CIS member states. A detailed commentary was developed further with the EBRD's assistance. At an international conference presenting the Model Law and commentary authorities from the majority of the CIS countries spoke in favour of expanding the work and extending it to a set of practical tools and guidance materials to help national PPP units' employees, government and municipal officials implement these in their day-to-day work.

The EBRD pays considerable attention to the development of PPP instruments in its regions, notably in the CIS countries. While the adoption of the Model Law is a significant step towards developing a comprehensive and harmonised model PPP legislation for the CIS countries, the effectiveness of PPP implementation depends a lot on the relevant enabling environment in place. To facilitate the implementation of the Model Law and in response to specific requests from a number of CIS countries, in September 2016 the EBRD and the CIS IPA began working on the first set of model documents identified as priority – practical tools and methodologies for the preparation and implementation of PPP projects, including the evaluation of the effectiveness of projects, key performance indicators (KPIs), private partner selection procedure, development of a risk allocation matrix, heads of terms for a PPP agreement, and so on.

As a result of the current phase of cooperation between the EBRD and the CIS IPA, the EBRD through its Legal Transition Programme (LTP) developed the first collection of model documents, guidelines and practices, which includes the following:

- heads of terms for a PPP agreement
- project implementation guidelines

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YURI OSIPOV,
SECRETARY GENERAL
OF THE CIS IPA

- model PPP policy terms
- termination and compensation checklist
- value for money matrix
- PPP projects effectiveness evaluation guidelines
- risk allocation matrix
- methodology on the KPIs' application to a PPP project
- annotated recommendations on monitoring the quality of services and output in PPP projects.

In the course of a few rounds of consultations the national parliaments, authorities and non-governmental organisations in the CIS provided comments on the draft guidance tools: over 400 comments and suggestions were received after the initial draft of nine modules was presented. It is noteworthy that the group of EBRD consultants and commentators working on the texts did their best to take into account all such comments. As a result there were only seven further comments put forward when the advanced texts were presented for second consideration by the relevant body – the CIS IPA Standing Economic and Finance Commission. As a result the set of all nine PPP Practical Tools was approved at the CIS IPA Plenary Assembly in St Petersburg on 29 November 2018. Following approval the EBRD plans publication of the approved set of guidance and methodological materials early in 2019.

“Thanks to the EBRD for the much-needed practical guides to PPP as an alternative to the public procurement mechanism of private sector participation in public infrastructure. They will serve as good guidance in the CIS countries in the process of practical work on preparation and implementation of PPP projects,” said Mr Yuri Osipov, Secretary General of the CIS IPA.

Following numerous requests from a number of CIS countries for the continuation of the work, the EBRD is in discussion with the CIS IPA to identify the next set of guidance materials to be developed. “One of the beauties of such work is that we are able to reach out to 10 countries in one go,” said Michel Nussbaumer, EBRD Director of the Bank’s Legal Transition Programme.

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¹ Model Law On Public-Private Partnership (Appendix to the Decree No. 41-9 of the Inter-parliamentary Assembly of Member Nations of the Commonwealth of Independent States, dated 28 November 2014).

