Commercial laws of Bosnia and Herzegovina
An assessment by the EBRD
August 2014
COMMERCIAL LAWS OF BOSNIA AND HERZEGOVINA
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Overview

The legal environment continues to be complex and challenging. Some significant reforms have occurred in the past but more are needed. The country’s multi-layered constitutional and political structure continues to have a negative impact on legal reform. The problems of the multi-layered legal structure are in evidence in a number of areas of law. Corporate governance is regulated at the Entity level; two distinct corporate governance regimes exist and each Entity has its own primary and secondary legislation. In the judicial sector there are two separate legal systems and there is limited coordination at the federal level. The legal framework for the securities market is regulated at the Entity level and each has its own securities commission and stock exchange.

For some areas of law, B&H has laws on the books that meet or exceed the standard found in other EBRD countries of operations; however, in practice the application of those laws tends to be poor due to the failings of key institutions. The law on bankruptcy and insolvency has a score of ‘high compliance’ as compared with international standards; however, the practical functioning of the insolvency regime has weaknesses in terms of appropriate regulation of insolvency office holders. The law and framework on secured transactions is modern; however, in practice, enforcement is slow and susceptible to obstruction. Concerns as to court efficiency and its difficulty in coping with demands is seen as the weakest link of the regime, thus debtors are able to obstruct the enforcement process. The laws that apply to PPPs and concession are complex and fractured; a composite set of coexisting legislative acts at various levels regulate similar issues.

Prospects for Bosnia and Herzegovina depend largely on the implementation of practical legal reforms and integration both internally and regionally.

Legal system

Overview of the legal environment

The legal framework in Bosnia and Herzegovina (BiH) is quite complex due to the combination of different government systems. In addition to the State, the two Entities the Republika Srpska (“RS”) and the Federation of Bosnia and Herzegovina (“FBiH”), have their own legal systems. In addition, the Brčko District has a separate legal framework. Only a small number of laws are adopted at the State level. The majority of existing laws were in force in the former Yugoslavia, and accepted as Entity laws, in most cases with no major alterations.

As the Entities have wide legislative competences, each of them may adopt completely different laws.

However, with the stimulus of the Office of the High Representative (OHR), the Entities started enacting the so-called “mirror laws”, i.e. laws being identical but enacted separately by the Parliaments in each Entity.

As a result of the country’s political structure, legal reform was very difficult to achieve during the period after the war and up until 2002. However, the situation is improving and a number of substantial positive developments occurred under the auspices of the OHR.

One of the main legal challenges facing the country is creating a single economic space in which to do business. Pursuant to the ‘Bulldozer Initiative’ (an OHR initiative to build a working partnership between politicians and business people) a number of legal reforms have been enacted to this end through the mechanism of having the Entities enacting similar laws. For example, this is the case of the bankruptcy law (one of the few insolvency laws in high compliance with international standards in the EBRD countries of operation), the law relating to taking security over movable property and the framework law on business registration. This latter framework law will enable firms in one Entity to register more easily in the other. The new system is expected to reduce the time needed to register companies to five days from the current 54 days.

Constitutional and political system

Initialled in Dayton (USA) on 21 November 1995 and formally signed in Paris (France) by the Republic of Croatia, the FRY and the Republic of BiH, the General Framework Agreement for Peace in BiH (the “Dayton Peace Accords”) marked the end of a violent chapter in the short history of modern BiH (“BiH”).

The Dayton Peace Accords is described in the Introductory Note of 35 International Legal Materials 75 as “an extremely complex instrument, and is the centre-piece of an even more complicated and extensive set of arrangements involving numerous international organisations and some individual states.”

Annex 4 to the Dayton Peace Accords sets forth the constitution of BiH. The BiH constitution is unusual not only because it is an annex to an international treaty signed by three different states but also because it establishes two Entities (the Federation and RS) which themselves ratify the instrument that creates them. Reflecting deep-rooted mistrust between the three ethnic groups, the BiH constitution established a decentralised governmental structure composed of a weak central State and two fairly strong independent Entities. The State has only limited powers:

- Foreign policy
- Foreign trade policy
- Customs policy
- Monetary policy
- Finances of the institutions and for the international obligations
- Immigration, refugee and asylum policy/regulation
- International and inter-Entity criminal law enforcement
- Establishment and operation of common international communications facilities
- Regulation of inter-Entity transportation
- Air traffic control

Pursuant to Article 3.3 of the Constitution, any residual powers are automatically assigned to the Entities.

The BiH government is headed by a three member Joint Presidency. Two members of the Joint Presidency (one Bosniac and one Bosnian Croat) are directly elected in the Federation. The third Bosnian Serb member is directly elected in the territory of RS. The Joint Presidency appoints the Council of Ministers. At least one third of the members of the Council of Minister have to be Bosnian Serb. The Council of Ministers can be dismissed by a vote of no-confidence of the Parliamentary Assembly.

BiH has a bicameral Parliamentary Assembly consisting of the House of Peoples and the House of Representatives. The House of Peoples is composed of 15 Delegates (5 from each ethnic group) appointed directly by the parliamentary assemblies of the Federation (5 Bosniacs and 5 Bosnian Croats) and the RS (5 Bosnian Serbs). The House of Representatives has 42 Delegates, two-thirds of whom are elected in the Federation and one-third in RS.

The BiH constitution also creates a Constitutional Court. Composed of nine members, the Constitutional Court has jurisdiction over disputes that arise under the BiH constitution between the Entities and BiH, between the Entities themselves or between the joint institutions of BiH. In addition, at the request of any court in BiH, the Constitutional Court examines the constitutionality of any law (including Entities’ laws) or the compatibility thereof with the European Convention for Human Rights and Fundamental Freedoms and applicable rules of international public law. Finally, the Constitutional Court has appellate jurisdiction over constitutional matters arising from judgements rendered by other courts in BiH.

Constitution of the Federation

The Entities are the depositories of any residual powers under the BiH constitution. The Federation has a federal structure composed of several Cantons each with their own constitution, government, parliamentary assembly and judiciary.

The Federation is headed by a President and a Vice-President appointed jointly by the House of Peoples and the House of Representatives. The appointees (one Bosniac and one Bosnian Croat) serve alternative one-year terms as President and Vice-President during a four-year period. The President and the Vice-President appoint the Cabinet (including the Prime Minister who presides over the Government) in consultation with the Prime Minister. Each Cabinet Member has a Deputy who comes from a different ethnic group than the Cabinet Member. At least one third of the Cabinet Members has to be of Bosnian Croat origin. The appointments by the President and the Vice-President have to be approved by the House of Representatives. The Cabinet can be dismissed by the President and the Vice President or by a vote of no-confidence of both chambers of the Parliamentary Assembly.

The Federation has a bicameral Parliamentary Assembly consisting of the House of Peoples and the House of Representatives. The House of Peoples is composed of at least 60 Delegates (30 Bosniacs, 30 Bosnian Croats and *other Delegates who are neither Bosniacs or Bosnian Croats*, a rather oblique way of designating the Bosnian Serb minority in the Federation) appointed directly by the parliamentary assemblies of the various Cantons in the Federation. The House of Representatives counts 140 Members elected directly in the Federation. In order to be represented in the House of Representatives a party has to obtain at least 5% of the total votes cast.

Constitution of RS

Unlike the Federation, RS has a centralised structure. RS is headed by a directly elected President and Vice-President with a five-year mandate. The President is the supreme commander of the armed forces and nominates the Prime Minister for appointment by the National Assembly. The President and the Vice-President can be impeached by the people of RS. The Prime Minister, the Deputy Prime Minister and the Ministers are appointed for a four-year term by the National Assembly out of the party or coalition who have won the elections. Together they form the government. The President may dismiss the Prime Minister at the request of 20 Deputies of the National Assembly. The President can indirectly dismiss the government by dismissing the National Assembly and calling for new elections.

RS has a unicameral National Assembly consisting of 83 Deputies directly elected for a four-year term. The President may - after consultation with the Prime Minister and the President of the National Assembly - dismiss the National Assembly and call for new elections. RS also has a Senate whose 55 members are appointed by the President. The Senate does not
have a legislative role but advises the government on issues of national importance.

**Judicial system**

**The judicial system of the Federation**

The judiciary of the Federation consists of Municipal Courts, Cantonal Courts and Federation Courts. Municipal Courts are the courts of first instance for civil and commercial matters. The Cantonal Courts normally serve as appellate courts but in more serious matters they can directly seize jurisdiction. The three Federation Courts form the summit of the judicial pyramid in the Federation. The Constitutional Court resolves conflicts among the various levels of administration (Municipalities, Cantons and the Federation) and conflicts among the institutions of the Federation. It also examines the constitutionality of laws adopted by the Parliamentary Assembly of the Federation.

**The judicial system of the RS**

The judiciary of RS consists of Municipal Courts, District Courts, the Supreme Court and the Constitutional Court. As in the Federation, Municipal Courts are the courts of first instance. District Courts serve, in principle, as appellate courts for decisions at municipal level but have original jurisdiction for serious criminal offences. The Supreme Court is the highest court of law. It hears both civil and criminal cases and has a special chamber for administrative cases. The Constitutional Court decides among others on the constitutionality of laws, regulations and decrees, on the legality of regulations and decrees and on jurisdictional conflicts between the three branches of government or between state and municipal institutions.

Constitutionality or legality issues can be examined by the Constitutional Court at its own initiative or at the initiative of anybody else. Other issues may be submitted to the jurisdiction of the Constitutional Court without restrictions by the President, the National Assembly or the Government and under certain conditions by other bodies or organisations.

**Freedom of information**

Freedom of access to information is *sine qua non* in condition of a democratic society and constitutes constitutional category which appears as independent right, i.e., as integral part of right to freedom of expression determined by Article 10 of the European Convention on Human rights (ECHR). This right is a basic democratic right and is a very important tool in ensuring the rule of law and good governance. Access to information enables elected representatives to be accountable to its citizens and protects against abuses, and also enables participation of citizens in determination of governmental priorities, which also contributes to the concept of good governance. With a view to ensure realisation of concept of good governance, governmental institutions are obliged to ensure transparency of their work through duly and comprehensive information on their activities and provide them to the public, meet needs of the citizens, ensure accessibility and transparency. Right to access to information includes access to users of information, i.e., availability of information and right to further dissemination of available information. What should be particularly stressed is that the right to access information is not against the authorities, but in favour of both “citizens” and “the authorities”.

Bosnia and Herzegovina, seeking accession to the EU, was the first country in the region to adopt a Freedom of Access to Information Act¹, at first on the State level and then in 2001 in both of its entities². In accordance with the mentioned act, access to information is subject to a particular procedure. The request for access to information must be in written form containing minimum of data as envisaged by the request form, personal data, address, contact and with precise indicating the information requested.

The right to submit the request for access to information belongs to any natural or legal entity. The request must be submitted to the BiH Ombudsmen (The Institution of Human Rights Ombudsman of BiH is independent institution dealing with protection of rights of natural persons and legal entities in accordance with the Constitution of BiH and international human rights instruments appended thereto).

Upon processing the request for access to information, the BiH Ombudsmen can approve access to requested information, entirely or partially³.
Commercial legislation

Even before the financial crisis, investors regarded the BiH business environment as challenging by regional standards. The country’s complex institutional structure results in inconsistent legal and regulatory requirements that further compartmentalise a relatively small market. In addition, public administration at all levels generates bureaucratic obstacles to investment. Transparency International ranked BiH 72nd (of 177 countries) in the Corruption Perceptions Index in 2013.

The EBRD has developed and regularly updates a series of assessments of legal transition in its countries of operations, with a focus on selected areas relevant to investment activities. These relate to investment in infrastructure and energy (concessions and PPPs, energy regulation and energy efficiency, public procurement, and telecommunications) as well as to private-sector support (corporate governance, insolvency, judicial capacity and secured transactions).

Detailed results of these assessments are presented below starting with infrastructure and energy and going into private sector development topics.

The completed assessment tools can be found at www.ebrd.com/law.

Infrastructure and Energy

Concessions and PPPs

Overview

PPPs/concessions in Bosnia and Herzegovina are regulated by a composite set of laws, reflecting the country’s complex federative structure. The Concession Law of Bosnia and Herzegovina of 2002 is the central piece of legislation at the federal level, co-existing along several acts at the entity and regional levels. Overall, the laws of Bosnia and Herzegovina in the PPP/concessions sector are a step forward in the development of a modern legal system and demonstrate the intention to create a reliable legal basis for granting a concession that could attract foreign investment. Benefiting from the expertise of international advisors who participated in their drafting, these laws relatively clearly define the scope of application, regulate the procedure for selection of a private partner and set up quite a flexible framework for project agreements. Moreover, these laws clearly refer to the principles of transparency, non-discrimination, proportionality and refer to consumers’ rights.

However, market cooperation in Bosnia and Herzegovina is still in the early stages of development and the PPP/concessions are relatively new models for the country. The Policy Paper on Granting Concessions in Bosnia and Herzegovina of 2006 adopted by the Concession Commission and adopted by the Council of Ministers and the House of Peoples of the Parliamentary Assembly in 2006 has identified a general policy framework for improving the legal environment and promoting PPP. The paper states that there are still many issues to be resolved in order to improve the business climate. In the recent EBRD PPP/Concessions Laws Assessment, the quality of laws was rated as “in medium compliance with the international best standards”, and their workability in practice was ranked “medium effectiveness,” largely due to somewhat unclear PPP policy, inconsistent legal framework as well as underdeveloped institutional capacity.

The assessment shows that some improvement has been achieved in ensuring a clearer definition of the boundaries and scope of application of the PPP legal framework, including a clearer definition of “PPP”, “concerned sectors”, “competent authorities”, and “eligible private party”. The clear scope and definition will limit the risk of challenges to the validity of PPP contracts.

One of the issues faced by the country is the co-existence of several legislative acts regulating similar issues at various levels. For instance, it is not entirely clear whether the Law on Public Procurement 2004 applies to concession awards, particularly given the existence of separate concessions legislation. Moreover, the definition of a concession in the concessions laws includes also other forms of agreements on public-private partnership. Thus, harmonisation of sectoral laws remains necessary in order to avoid overlaps, inconsistencies and loopholes. With EU accession having been put as a priority for the country by the state authorities, aligning national legislation with the acquis is one of the fundamental goals of the government, including in the PPP/concession sector.
On the books, BiH’s PPP legal framework was found to be in “Medium compliance” with internationally accepted standards (66.2 per cent). The assessment measured the quality of PPP legislation in BiH and scores were given according to compliance with international benchmarks.¹ (See Chart 1 below)

The Concession Law allows for a wide range of project schemes including, build–operate–transfer (BOT), build-own-operate-transfer (BOOT). The framework fares exceptionally well with the possibility to obtain a proper remedy for breach under applicable law through international arbitration and enforcement of arbitral awards and relatively well with respect to the availability of reliable security instruments to contractually secure the assets and cash flow of the private party² in favour of lenders, including “step in” rights and the possibility of government financial support to, or guarantee of, the contracting authority’s proper fulfilment of its obligations.

A good PPP legal framework mandates the application of a fair and transparent tender selection process, with limited exceptions allowing direct negotiations, and competitive rules for unsolicited proposals and the possibility to challenge illegal awards. BiH fares relatively weakly in this regard. For instance, the law does not contain provisions regulating final negotiations so that transparency, equal treatment and competition are preserved.

A PPP framework should also allow private firms to propose projects to government entities, and provide a framework for these proposals to be developed into PPP projects. However, it is crucial that the rules and processes in place by which these unsolicited projects will be considered and adopted are clearly defined. The framework requires the governing law to be BiH law, which is standard for this type of contract and should not be an issue for investors.

As illustrated in Chart 1, while the legislative provisions covering settlement of disputes in PPP arrangements, as well as security and project agreement are regulated fairly extensively, areas such as the definitions and scope of the law, the selection of the private party and the security and support issues could benefit from further improvement in order to meet the requirements of a modern legal framework facilitating private sector participation.

As indicated in Chart 1, the core area “PPP Legal Framework” concentrates on the existence of a specific PPP law or a comprehensive set of laws regulating concessions and other forms of PPPs and allowing a workable PPP legal framework.

BiH has a Concession Law of Bosnia and Herzegovina of 2002 at the federal level, co-existing along several acts at the entity and regional level.

In the Brčko District, a PPP law was adopted by the Parliament of Brčko District and came into force in January 2010.

In Republika Srpska, the Law on PPP (the “PPP Act”) was adopted by the Parliament of Republika Srpska on 11 June 2009 and became effective on 10 July 2009. The PPP Act is fully in compliance with the relevant EU Directives.

In BiH, due to the administrative system, the PPP legislation is a complex set of federal and local PPP laws complemented by national, federal and local concession laws.

The PPP Act defines PPPs as a special form of long term cooperation agreement, wherein the public and private sector join together resources, capital and professional knowledge in order to fulfil a public need. The public partner of PPPs can be the government of Republika Srpska, a public institution founded by the government of RS, a public enterprise whose majority shareholder is RS, municipalities and cities, a public institution founded by a municipality or city and a public enterprise whose majority shareholder is a municipality or city. Private partners of PPPs can be legal entities founded by a domestic or foreign legal entity in accordance with the laws of RS, which have concluded a PPP agreement (the “PPP Agreement”) and which perform the PPP Agreement in accordance with the PPP Act.

There are no legal restrictions on the sectors that are eligible for PPP. Public-private partnership projects can be concluded for commercial sectors, such as energy, transport, water, and oil and gas; as well as for non-commercial activities, in the form of government services such as schools, hospitals and housing.

Among the advantages of the Concession law is that it allows the use of security interests against the private party’s assets in favour of lenders. Further, the law provides the lenders with the right to “step-in” and take over project management in the event of default by the private party, whether directly or through a third party. The law also allows for the possibility of government to provide financial support and to guarantee the contracting authority’s fulfilment of its obligations and the standard mechanism for resolving disputes is arbitration.

The law allows the PPP agreement to be amended during the lifetime of the project in order to accommodate unforeseen circumstances, such as a change in law. In the event that an unforeseen circumstance is adverse to the private party and cannot be mitigated.

**Definitions and scope of the law**

In the assessment, the core area “selection of the private party” (See Chart 1) questioned the mandatory application of a fair and transparent tender selection process, with limited exceptions,
allowing direct negotiations. Equally important is the accessibility of the rules and procedures governing the selection of the private party, awarding and further implementation of a PPP project. Sound PPP legislation should foresee a process that guarantees a competitive selection process, equal treatment of potential investors, the opportunity to challenge the rules and decisions of contracting authorities and competitive rules for unsolicited proposals.

Tendering and awarding procedures are provided in detail under the Concession Law, including the pre-selection of bidders, the procedure for requesting proposals and a competitive dialogue on a two-stage basis. In the event that the contracting entity rejects an application at the time of pre-selection or disqualifies a bidder, the entity is required to inform the rejected bidder of that decision. The downside however is that there is no requirement that the contracting entity makes public the reasons for rejection. This has the potential of undermining the transparency of the selection process. In terms of the equal treatment of investors, it is possible for a PPP to be awarded to a foreign company, a domestic company with foreign participation in the share capital and/or management.

One of the drawbacks of the law is that it does not provide the contracting entity with the authority to terminate negotiations with an invited bidder and start negotiations with the second ranked candidate if it becomes apparent that the bid will not result in an agreement. A positive feature is the ability to challenge certain administrative awards. Bidders who claim to have suffered a loss or damages can seek review of the contracting entity’s actions or failure to act.

On average, about 20 to 30 per cent of a PPP project is financed by the private party itself. The other 70 or 80 per cent is usually borrowed from lenders under a security arrangement according to which the private party gives to the lenders security over its rights under the project agreement. However, in order for this security to be effective, the state should also provide an assurance in case the enforcement of the security becomes necessary.

PPP legislation should ensure the possibility to protect the rights and interests of both parties under an effective system of dispute resolution, including the possibility for international arbitration and enforcement of arbitral awards. This principle is especially important for creating a more secure, predictable and attractive climate for investors.

Accordingly, this area of the assessment evaluates the possibility of obtaining a proper remedy for breach under the applicable law, through international arbitration and enforcement of arbitral awards. BiH has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral awards as well as the Washington Convention on the Settlement of Investment Disputes (ICSID).

An assessment of the effectiveness of the PPP framework in practice in BiH shows that the country is in “medium compliance” with international best practice (66.2 per cent). This is mainly attributable to a lack of clear PPP policy framework in addition to weak enforcement in practice in recent years. Chart 2 below illustrates the effectiveness of PPP legislation in practice.

In contrast to the results reflecting the quality of the PPP legislative framework in Chart 1, where PPP rules on the books appear to be in close proximity to internationally recognised standards, Chart 2 shows a lower level with respect to PPP practice in BiH.

A key problem that has been reported is the complex administrative system in BiH. The PPO legislation is a mixture set of federal and local authority-pay PPP laws complemented by national, federal and local concession laws. The results of the effectiveness assessment are further explained below.

This core area evaluates the existence of a PPP institutional framework, along with how well the relevant institutions perform in practice and whether the different entities coordinate and interact, both with each other and with other market participants, in an efficient manner.

Subject to the approval of the Commission the request for qualification may be issued by the Conceding Party prior to public invitation. The request for qualification shall be published and distributed to persons recognized for their expertise as well as business practices and financial strength. Request for qualification shall contain also the criteria to be used in the process of selection.

The Conceding Party shall submit to the Commission a proposal of public invitation and related documents for consideration and approval. Within 21 days from the day of receiving of proposal of public invitation, the Commission shall inform the Conceding Party whether the invitation is approved.

In considering the proposal of public invitation the Commission shall take into account all relevant elements, including:

- whether the evaluation criteria, the procedure and selection of successful tender are satisfactorily based on clear, transparent and non-discriminatory principles accessible to all;
- whether the proposal of public invitation substantially deviates from feasibility study approved by the Commission.

The Commission may give recommendations pertaining to each submitted invitation. Such recommendations are binding.

A modern PPP law should be based on a clear policy for private sector participation. Like a sound legislative framework, clear government policy and
strategy for private sector participation is important for signalling the commitment of the government to develop a stable and attractive investment environment and to reflect its efforts in improving the legal environment. Such strategy should generally be developed on the level of a government approved document. This core area examines the effective statistical implementation of PPP projects and whether such projects have been awarded and implemented in compliance with the law.

In BiH, the PPP Law is relatively recent. According to the European PPP Expertise Centre report, not a single PPP project was closed in BiH to date. As a result, enforcement of the PPP Law has not been sufficiently tested in practice. Several tenders are currently open or under preparation.

Chart 1 – Quality of the PPP legislative framework in Bosnia and Herzegovina

Note: The extremity of each axis represents an ideal score in line with international standards such as the UNCITRAL Legislative Guide for Privately Financed Infrastructure projects. The fuller the “web”, the more closely concessions laws of the country approximate these standards.

Source: EBRD 2012 PPP Legislative Framework Assessment (LFA)
Energy

Bosnia and Herzegovina’s energy import dependency is low at 38 per cent with domestic production of coal, wood and hydropower. However, in terms of oil products and gas, it is 100 per cent import dependent and import volumes are increasing. Import sources and routes are diversified for oil products but the country relies on Russia for natural gas and one pipeline. Stock of oil products and coal are operational but there are no regulations on minimum stock levels. No gas storage facilities exist.

In July 2013, the FBiH Parliament finally adopted a new Electricity Law (the Law), which was published at the very end of August 2013 in the Official Gazette of FBiH7. The Law is an entirely new enactment, since the previous law regulating this area had been amended numerous times. The solutions provided by the Law are harmonized both with European Union directives and certain provisions of the Electricity Law of the RS.

This Law defines all components of the electric power strategy, which is a first in the Federation, and also what precisely electric power activity is, excluding from it the production of electric power for one’s own needs. The Law prescribes an obligation for electricity entities that perform two or more electricity related activities (or perform additional activity to the electricity activity) to provide for functional unbundling of the performed activities.

Market participants are an Independent System Operator (ISO BiH), a single company for transmission, traders, three separate vertically integrated utilities engaged in generation, distribution and supply, each of which is state or Entity owned, and eligible customers.

The Federation’s primary challenge is its unique political structure, which complicates and slows development of the regulatory framework and operations thereunder. Within the electricity sector, phased market opening is underway, but while competition is a allowed as a matter of law, only the very largest customers has chosen eligibility, the legal framework is not yet comprehensively developed to support competitive supply, and lack of metering and billing support present further obstacles to the development of a competitive market framework. Nonetheless, in 2008 the sector as a whole operated profitably for the first time in decades, and BiH is one of the few exporters of power in the region.
Chart 3 – Quality of energy (electricity) legislation in Bosnia and Herzegovina

Note: The spider diagram presents the sector results for Bosnia & Herzegovina in accordance with the benchmarks and indicators identified in an assessment model. The extremity of each axis represents an optimum score of 100 that is full compliance with international best practices. The fuller the “web”, the closer the overall regulatory and market framework approximates international best practices. The results for Bosnia & Herzegovina are represented by the green area in the centre of the web.

Source: EBRD 2011 Energy Sector Assessment
Gas

As noted, the gas market is in its nascent stages. Market participants include the transmission owners, distribution and supply. BiH has no domestic production and imports, all gas requirements are served by Russia via Ukraine, Hungary and Serbia. Gas consumption is limited (about 363 Mcm in 2006), and concentrated in two large industrial plants (about 55% of sales). There is no storage. Only about 30% of the population is reached by natural gas.

End user prices are currently regulated by the Ministry and by local authorities, as integrated supply tariffs. Distribution margins for the largest company (Sarajevo Gas Sarajevo) have not changed for the last five years and may now be lower than costs. No access tariffs are available.

Future development depends upon a harmonised legal framework and coordinated development plans. To date, there is no single plan for development of the gas transmission network in BiH. Import capacity is underutilised, also due to consumption seasonality and lack of storage.

Development of BiH’s legal and regulatory gas framework is in its nascent stages, with only the RS establishing a regulator and little gas legislation in place.

Chart 4 – Quality of energy (gas) legislation in Bosnia and Herzegovina

Note: The spider diagram presents the sector results for Bosnia and Herzegovina in accordance with the benchmarks and indicators identified in an assessment model. The extremity of each axis represents an optimum score of 100 that is full compliance with international best practices. The fuller the “web”, the closer the overall regulatory and market framework approximates international best practices. The results for Bosnia and Herzegovina are represented by the green area in the centre of the web.

Source: EBRD 2011 Energy Sector Assessment
Energy efficiency/renewable energy

The Law on Renewable Energy Sources and Efficient Cogeneration (the RES&EC Law) was adopted by the FBiH Parliament in July 2013 and published in the Official Gazette of FBiH no. 70/13 in September 2013. This is the first time that planning and incentives measures for the production and consumption of energy from renewable sources and efficient cogeneration (RES&EC) is regulated by a separate law.

As incentives measures, the RES&EC Law provides for number of benefits for producers of electricity from RES, such as: priority in the connection to the electricity grid; priority in the delivery of electricity produced from RES&EC to the grid; the right of a certificate of origin; the right to repurchase produced electricity by the reference price; and other. This piece of legislation also regulates the obligation for end consumers to pay incentives compensation for the production of electricity derived from RES&EC, which will be further established by the Decree on Incentives for Production of Electricity from RES&EC and for Determining Incentives Compensation. This decree should be adopted by the FBiH Government within six months form the entry of this law into force.

Under the law, the Operator for Renewable Energy Sources (RES Operator) is to be established by the end of 2013. RES Operator does not have the status of a supplier and it will be established as a non-profit legal entity for the purpose of creating an institutional structure for the operationalization of the system of incentives for the production and purchase of electricity from plants using RES&EC.

Prior to the adoption of the law, the Government’s Decree on the Use of Renewable Energy and Cogeneration (Decree) regulated the renewable energy sources. The Decree was declared unconstitutional in June 2012 for not being adopted by the competent authority and was no longer applicable in 2013.

The RES&EE Law came into force on 19th September 2013. However, the commencement of application is postponed for a period of 6 months, i.e. by March 2014. It is expected that within this period the FBiH Action Plan for the RES will be adopted as well.

BiH has certain basic energy resources, in particular solid fuels as well as hydropower, and also natural forest biomass and other renewable energy sources (RES). Indigenous coal, lignite and hydropower remain predominant sources of primary energy consumption and are expected to remain as such in the long-term perspective. The country currently exports electricity with the potential of growing production and export.

The share of hydropower, combustible renewables and waste comes up to 12% in the total energy consumption. The Strategy of Development of BiH states that renewable energy (RE) and energy efficiency (EE) are priority sectors for the country’s economic development. Nonetheless, there is still no coherent policy and regulatory action plan for stimulating the RE sector neither on a country nor on an entity level. With EU accession being a strategic priority for the country and the broader energy sector potentially having a key role in contributing to economic development, the government is taking solid steps towards attracting sector investment. It has been acknowledged that the limited development of RES is due to a number of factors, including: higher cost of energy systems using RES than those using fossil fuels, absence of a RES-specialised policy, legal and institutional framework, low level of exploration of RES potential in the country, and lack of quality statistical (primarily climatic) data that could serve as support for the use of RES.

The electricity produced from RES is bought out at a promotional feed-in tariff which is formed on the basis of tariff adjustment coefficients, which vary depending on technology. Being party to a number of international treaties, including the Energy Charter Treaty and Energy Community Treaty, BiH is committed to increasing the share of renewable energy up to 20% in energy consumption by 2020, which has contributed to setting out the national policy for the sector.

Energy prices are kept artificially low, particularly for the household sector, which largely discourages implementation of energy efficiency measures. Cross subsidies exist between the various groups of consumers and reform efforts should be targeted at potentially phasing out subsidies. At the same time, energy poverty is wide spread in the country and any ongoing and planned reform of the energy sector should include instruments for energy poverty reduction. The National Environmental Action Plan (the “NEAP”) and the Medium-Term Development Strategy emphasise the importance of energy savings as a means to address energy poverty.

There is no dedicated EE legal, regulatory or institutional framework at a country level. EE is indirectly covered by generic energy regulations and in regulators’ practices when setting tariffs and considering investors’ applications. While there are no established EE targets in the country, it is expected that BiH would aim to comply with the relevant EU targets and regulatory framework. On the implementation level, no visible incentives are being set up to promote the use of generally costly EE measures. There are a number of subsidy programmes in the country for the most vulnerable electricity consumers.
The Federation ratified the Kyoto Protocol to the United Nations Framework Convention on Climate Change in 2007. A Designated National Authority for clean development mechanisms has yet to be established or identified.

Since the development of the energy sector is being considered as a priority for the country, policy makers’ attention has shifted to energy reform in particular to enabling the RES sector to function properly. Policy decisions on setting goals and targets are expected to be manifested in the formulation of enabling legal and regulatory framework. The two entities (Federation of BiH and RS) have introduced incentives for RES which differ and potentially can create inefficiencies. Further, these rules are inconsistent with the deficient sector regulation at a state level and the lack of national strategy for promoting renewable energy leaves any legislative work at the moment fragmented and isolated.

A number of international donors provide financing in the sector, including the Bank who is actively investing in a number of EE projects through its wider up to €60 million EU/EBRD Western Balkans Sustainable Energy Credit Line Facility to provide financing to banks involved in lending for EE and RES projects in Serbia, Bosnia and Herzegovina, FYR Macedonia and Montenegro.

**Energy Efficiency**

The country has yet to focus further efforts on developing strategic goals and enabling regulatory environment for energy efficiency. Certain efforts in this direction are being taken, e.g., an initial document with respect to EE is being developed by one of the regions – Sarajevo Canton.

International institutions, including the EU, the Bank, GIZ, KfW, UNDP and USAID, are taking an active role in fostering the EE development, with an emphasis on setting up appropriate targets and incentives. The €60 million EU/EBRD Western Balkans Sustainable Energy Credit Line Facility is an important financing instrument for providing financial support to banks involved in lending for RES projects in Serbia, BiH, FYR Macedonia and Montenegro. EU has been actively supporting, including through its Instrument for Pre-Accession Assistance, the country’s efforts to harmonise its legislation with the EU Directives. One of the areas includes a €13.5 million EU grant for technical assistance projects to support EE projects and to provide incentives to kick-start investments.

The government should focus on improving the formulation, implementation and on-going review of country-tailored energy efficiency policy and objectives, which should serve as a basis for developing specialised EE legal and regulatory framework aligned with the EU Directives. The state and entity governments have to ensure that the proper institutional capacity is in place for implementation of the policy objectives. Campaigns focused on raising awareness of the benefits of EE improvements in various industries and households will be a crucial factor for achieving EE objectives.

**Public procurement**

Public procurement in BiH is regulated by the Law no. 49, 2 November 2004 (PPL). In the EBRD 2010 assessment the PPL scored low to medium compliance in the region (Chart 1). The scores have been calculated on the basis of a legislation questionnaire, based on the EBRD Core Principles for an Efficient Public Procurement Framework. Detailed scores of the quality of legislation are presented in Chart 7.

**Regulatory institutions**

In BiH two dedicated public procurement bodies have been established: the Public Procurement Agency (“PPA”) and the Procurement Review Body (“PRB”). PPA is an independent administrative authority and its main function is to ensure the proper implementation of PPL, whereas the PRB is responsible for the public procurement review and remedies.

The PPAs core functions are:

- proposing amendments to PPL and implementing regulations in order to ensure the effectiveness and suitability of legislation
- publishing procurement manuals, guidelines and the development and maintenance of standard forms and models, to be utilized by the contracting entities
- providing technical assistance and advice to both the contracting entities and suppliers on the application and interpretation of the PPL
- monitoring the compliance of the contracting entities with PPL
- collecting, publishing information about public procurement procedures and awarded public contracts and submitting annual report to Council of Ministers of BiH
- developing a nation-wide electronic information system to supplement the Official Gazette to publish tender documents
- supporting the development of electronic procurement and communication
- maintaining the register of accredited trainers in public procurement;

Chart 3 illustrates the results of the review of the BiH institutional framework.

The PPL covers both national and local government procurement and contains specific procurement rules for public law institutions and utilities sector. Concession contracts are awarded according to the separate laws of BiH on concessions. The PPL clearly

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<th>Public Procurement</th>
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**Penalties and Remedies**

Penalties and Remedies in Public Procurement describe a type of sanctions and enforcement mechanisms used in public procurement systems in BiH. This section looks at the nature of the remedies, their effect on the tendering process, and how they are applied. The remedies are divided into administrative and judicial remedies.

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**Enforcement**

The enforcement of public procurement laws in BiH is primarily carried out by the Procurement Review Body (PRB). The PRB is responsible for reviewing the legality of public procurement procedures and punishing any irregularities.

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states distinction between the public procurement contract and procedures and concessions.

The PPL provides for a decentralized procurement function and does not establish a Central Purchasing Body. The PPL also provides for some general eligibility criteria and allows contracting entity to decide on individual prequalification requirements. Open and restricted tender are the default procedures. The contracting entity may apply other procedures only in situations where the law allows. PPL incorporates a clear test between the choice of tendering and negotiated procedures, based on EU PP Directives.

PPL does not require public procurement to be accomplished in a reasonable amount of time. Furthermore, PPL does not allow for an accurate estimation of the length of the PP process for the procurement of works and goods of a significant value. PPL does establish several specific deadlines throughout the public procurement procedure such as a deadline for submitting tenders and a deadline for publishing information about a concluded contract. However, no time limit has been established for a tender evaluation. The PPL requires mandatory aggregation of lots. PPL provides for aligning value and scope of the contract with the formality of the procedure.

PPL requires mandatory aggregation of lots. PPL provides for aligning value and scope of the contract with the formality of the procedure. The PPL does not contain clear requirements on the use of specific methods of communication. The PPL only states, that “Written” or “in writing” includes information that is transmitted and stored by electronic means, provided the security of the content is ensured and the signature identifiable.

The PPL does not stipulate that the costs of tender participation should be kept low. The regulation directly concerned with the cost of participation is a provision for tender security. The contracting entity may request that the effectiveness of tenders should be guaranteed by appropriate tender securities. The tender security shall not exceed 1-2 per cent of the tendered prices.

The Procurement review Body (PRB) is an independent administrative body; its members are appointed by the Parliament from candidates recommended by the Council of Ministers.

Any tenderer who has a legitimate interest in the specific public procurement contract and believes that the contracting entity, during the contract award procedure, has breached one or more provisions of PPL or its implementing regulations, has the right to raise an objection against the procedure in the manner and within time limits set forth in PPL to the PRB. PRB has the right to suspend the contract award procedure.

In a case when the decision or action taken by the contracting entity was in breach of any of the obligations, the PRB has the power to annul in whole or in part any act or decision of the contracting entity inconsistent with PPL or instruct the contracting entity to correct any breaches. The review decision is final unless appealed to the court within 45 days of its announcement to the complainant.

In the 2010 assessment, the BiH PPL showed some areas of strength, including competition and uniformity of the PP legal framework.

The public procurement regulations of BiH is quite comprehensive and covers national and local government procurements, providing specific rules for the utilities sector and public law institutions.

In the 2010 assessment the BiH PP regulation scored below 50 per cent compliance on efficiency of public contract indicators, and in general scored low in the economy of the PP process and proportionality indicators (65 per cent compliance rate only). These results are mainly due to unsatisfactory regulation of the pre-tendering and post-tendering phases of public procurement.

The 2010 assessment of local procurement practice results show that, in general, local practitioners consider PPL to be clear and comprehensive. In addition, some local contracting entities adopt internal procurement rules and update them when necessary. In practice, internal rules and procurement decisions are disclosed to the public. Moreover, local contracting entities claim that internal roles in their procurement process are clearly allocated and they in most cases they provide regular training for their internal PP stakeholders. Chart 8 presents scores for the general quality of local PP practice in BiH.

Compliance of PP procedures with the law is monitored by a dedicated public regulatory authority, the PPA. Chart 8 illustrates how the local institutional framework has been evaluated by local contracting entities and practitioners.

A survey of local practice confirmed that the public sector procurement in BiH is covered by the PP regulation.

In practice the general eligibility criteria are adhered to. In addition, local contracting entities declared that they usually establish qualification criteria, which include:

Experience; past performance on similar contracts and capabilities with respect to personnel, equipment, and construction or manufacturing facilities, as well as financial position. Tenderers are generally obliged to submit documents which prove their compliance with the conditions for participation in the process. In practice there are no regulations which prevent affiliates of the contracting entity from participating in public procurement procedures.
Tenders are typically used though negotiated procedures can be used for specific or complex contracts. In most cases it is necessary for the contracting entity to explain their choice of procurement method.

In BiH it is difficult to estimate the duration of the procurement procedure to sign PP goods or works contract of significant value.

In practice it is mandatory to complete the procurement plan before a public procurement process is started. However, technical, financial and procurement planning coordination is not mandatory. Internal procurement process and decision making is only partially regulated. Internal PP monitoring and auditing arrangements are not common.

The standard tender documents, national standard contract forms and procurement records template are in practice mandatory. Nevertheless, as a general rule, international standard contract forms for all types of procurements are not used. There are guidelines regarding how to draft the appropriate tender documents and standard forms of contract notices are widely used. In practice sufficient time is provided to prepare and submit tenders and that evaluation of tenders is normally completed within the original validity period. In practice, obtaining tender documents is never free of charge.

In the 2010 assessment local contracting entities answered only part of the questionnaire and refused to answer questions regarding quality of the public procurement review in BiH.

Based on the data provided, the remedies procedure is considered to be straightforward, non-discriminatory but not necessarily effective. The speed of the remedy proceedings is reasonable and it takes about 30 days to obtain the review decision. Also the cost of the remedies procedure seems to be affordable. What is important, the remedies body is not perceived corrupt.

The results of the assessment of local PP practice reveal that changes in the public contract are usually monitored but no specific contract administration procedures are adopted. There are no manual or computerized procurement and contract monitoring systems and the system lacks the appropriate procedures to monitor delivery of goods and services to verify quantity, quality and timeliness. The contract is generally completed with the originally approved budget, but only in some cases contracts are completed on time.

Review of local practice revealed that there are no elements of practice scoring below 50 per cent in BiH; however, several indicators scored low and some implementation gaps were identified. In particular, efficiency and economy of the PP process could be improved.

In addition, institutional PP capacities could be improved, as the PP practice survey revealed implementation gaps of between 10 per cent and 50 per cent on all institutional capacity indicators. Furthermore, local PP practice is not modern and eProcurement solutions should be more promoted as they are hardly used in practice.

As not mandated by law, pre-tendering and post-tendering phases of the PP process are not internally regulated by local contracting entities. Internal PP monitoring and auditing arrangements are not provided for. In practice, the access to electronic communication is limited. In spite of PPL requirements, the contract notices are not always published electronically.

In the 2010 assessment BiH’s legal PP framework achieved low to medium compliance with international standards (average 67 per cent compliance rate). The PPL provides for basic PP regulatory features but several significant regulatory gaps were identified. Some integrity safeguards and efficiency instruments have been adopted, but not all as recommended by current international PP standards. In the assessment of local practice BiH scored again low to medium compliance (average 78 per cent compliance rate). Several implementation gaps were identified and a general conclusion is that there are substantial gaps in implementation of laws and institutional framework capacities. Finally, local PP practice scored a 13.1 per cent compliance rate in the PP sustainability survey; significantly lower than other countries in the Western Balkans.
Chart 7 – Bosnia and Herzegovina’s quality of public procurement legislation

Note: The chart shows the score for the effectiveness of the national public procurement laws. The scores have been calculated on the basis of a questionnaire on legislation that is developed from the EBRD Core Principles for an Efficient Public Procurement Framework. Total scores are presented as a percentage, with 100 per cent representing the optimal score for each Core Principles benchmark indicator. The bigger the “web” the higher the quality of legislation.

Source: EBRD 2011 Public Procurement Assessment
Telecommunications

The main legislation governing the electronic communications sector in BiH includes: the Law on Communications of BiH, enacted on 21 October 2003 and amended on 19 September 2006 and 22 April 2010; the Law on General Administrative Procedure enacted on 25 June 2002; the Law on Consumer Protection enacted on 21 February 2006; the Law on Personal Data Protection enacted on 23 May 2006; and related legislation. The legislative framework largely conforms with EU framework requirements in several important areas, including interconnection and access to infrastructure, tariff regulation, market analysis, significant market power designation and the imposition of market remedies.

The Communications Regulatory Agency (RAK) appears to have adequate enforcement powers as well as monitoring, inspection and equipment certification powers. However, RAK should also be enabled to impose monetary penalties based on the percentage of the income made by a provider of telecommunications services, which could be a more meaningful sanction for larger operators that fail to comply with legal and regulatory requirements.

A number of components of the legislative regime require revision in order to fully align with the EU framework, including the introduction of a general authorisation scheme for the provision of telecommunications services.

The universal service provisions do not conform to the EU framework, with no clear definition of universal services scope, no procedure for determining universal service operators or their right for reimbursement.

The law does not adequately address consumer protection with respect to confidentiality in communications, limitation of long-term contracts, and protection against spam, consumer dispute settlement procedure or shorter deadlines for enacting number portability.

Other areas requiring adaptation are the procedures for numbering assignment, the enabling of rights of way for operators, prohibition on illegal interception, more clarity in dispute resolution, clear authority for RAK to make binding decisions, and clear obligation to publish such decisions.

BiH’s legal framework lags behind the other countries in the region. The electronic communications law is mainly based on the EU 1998
The regulatory framework and the country does not appear to have made much progress in drafting a new electronic communications law or cyberspace legislation. Against the background of continued discussions on broader division of powers between the entities and the state, separate electronic commerce and electronic signature laws have been adopted at state level and in RS and are not aligned with each other. The legislative processes were further slowed down by the delays in the establishment of the state level legislative and executive authorities following the general elections of October 2010.

The national market was liberalised in 2002. At that point, the three incumbent operators in three different parts of the country received national licences: BiH Telecom d.d Sarajevo (BA-bh), based in Sarajevo, F BoiH.Hrvatske Telekomunikacije d.o.o. Mostar (BA-h), based in Mostar, F BiH. Telekom Srpske a.d. Banja Luka (BA-ts), based in Banja Luka, RS.

All three incumbent operators have been designated as having significant market power in the markets for fixed and mobile voice telephony services and leased lines, based on a 25 per cent market share criterion.

None of the three incumbents face much competition with regard to fixed voice telephony services, but there is strong competition from alternative cable and wireless networks offering broadband access. Each of the incumbents also offers mobile services nationwide. Fixed-line penetration is a reasonable 24/100 population, which is around the regional average, but still significantly short of the EU average of 40/100 population. Fixed broadband has grown at over 50 per cent per annum since 2009 and has reached a penetration of 11/ 100 population which is around the Group B regional average. Mobile penetration has grown from 34/100 population in 2005 to 83/100 population in 2011. Mobile broadband is still at a very early stage, with 3G services being launched only in 2010.

Of the three incumbent operators, only Telekom Srpske is fully privatised. The other two are still controlled by the F BiH, although HT Mostar is 39.1 per cent owned by T-Hrvatski Telekom, the Croatian incumbent operator, which is itself owned by Deutsche Telekom.

At government level, the Council of Ministers is responsible for adopting policies and the Ministry of Communications and Transport drafts policies and legislation. RAK was established in 2001 as a converged regulator for telecommunications and media.

Implementation of the EU regulatory framework is hindered by a lack of administrative capacity and resources both at the regulator and in the Ministry. The Council of Ministers has notably failed to formally appoint the Director General of RAK since 2007 and RAK council members since 2009. Authorities of RAK in respect of market analysis should be strengthened, in order to allow imposing of price caps and functional separation to SMP operators when necessary.

A Competition Council was established in 2004, but it has no formal agreement with the RAK. Plans to establish an Agency for the Development of the Information Society have not been successful.

BiH has signed a Stabilisation and Association Agreement with the EU, setting the need for the legal and regulatory regime to be fully aligned with the EU framework. The main requirement is for the regulator to continue with market analysis and to enforce the resulting regulatory obligations. BiH is undergoing discussions about its accession to the WTO.

BiH has been slow with implementation of competitive safeguards. However, several important provisions have been introduced and implemented over the past two years. Carrier pre-selection finally became available in practice in 2009. Number portability for fixed networks was introduced in September 2011.

Call termination charges on fixed networks are regulated, but are significantly higher than the EU average, despite decreases since 2009. The rates are €0.0089 per min for local termination, €0.0134 per min for single transit and €0.0179 per min for double transit. True cost-based figures have not yet been calculated.

The incumbents do not yet offer wholesale line rental or wholesale broadband access to alternative service providers. The three incumbent operators, who compete nationally, have equivalent spectrum blocks in all three bands. UMTS licences were awarded in 2009. Since 2010, the 900 and 1800 MHz allow the deployment of 3G services. The digital switchover plan is to be approved in Q1 2012, with a planned switchover date of 1 December 2014. No licences for fixed wireless access have been awarded, but several operators offer wireless broadband services in the unlicensed 2.4 GHz and 5 GHz bands.

Number portability for mobile networks it is expected to become available during 2012. The first reference interconnection offers were published by mobile operators in April 2011 together with provisions enabling MVNO access. There is no direct interconnection between the mobile networks and all calls have to transit through the fixed incumbents. Mobile termination rates are significantly above the EU average level, and no cost-basis has yet been applied by the regulator.

There is no legislation on cybercrime, electronic documents or eGovernment at state level. Laws exist at entity level. For example, RS and the F BiH both have laws on electronic commerce and electronic signatures, which are not aligned with each other. The law also does not require prior authorisation, but
market access might be hindered by the fact that the law requires providers to notify their services to a supervision body which has not been established. BiH does not yet have a provider for issuing qualified certificates for electronic signatures. BiH is the only country in the region which does not have a provision against illegal interception or explicit legislation on spam.

The Data Protection Authority is responsible for supervision. There is no explicit provision allowing a national authority to audit personal data security measures, although it might be possible that RAK or the Data Protection Authority can use some general inspection powers for that purpose.

In BiH there is no cybercrime legislation at state level, but at entity level the R S has some cybercrime provisions in its criminal code. Cyber-squatting dispute resolution is based on ICANN's Uniform Domain Dispute Resolution Policy.

A unique aspect of the market is the existence of three incumbent operators. While in theory this should produce a ready-made competitive environment (as each have national licences) they face little actual competition with regard to fixed voice telephony services, but strong competition from alternative cable and wireless networks offering broadband access. Each of the incumbents also offers mobile services nationwide. Mobile broadband is still at a very early phase.

BiH is impaired by an apparent lack of coordination between different levels and institutions within its government, the struggle for competencies between the state and the entities and overall limited administrative capacity. This has hindered full alignment with the latest EU regulatory framework and weakened the position of the sector regulator RAK. Preparations have been made to support the launch of virtual mobile operators, which, if implemented in 2012, should see new service providers entering the mobile market in 2013.

There is a high growth for fixed broadband services (over 50 per cent per annum growth for the last two years), fuelled by fixed wireless competitors to the incumbent service providers. Mobile broadband has been slow to develop, with 3G services only being launched in 2010, and mobile broadband penetration is well below the regional average. From a low base, mobile broadband grew 69 per cent in 2011, showing good potential. Around 40 per cent of the population are already internet users, but total broadband penetration has so far only reached the regional average of around 14/100.

Chart 5 – Comparison of the legal framework for telecommunications in Bosnia and Herzegovina with international practice

Key: Extremities of the chart = International best practice
Note: The diagram shows the quality of the legal framework as benchmarked against international standards (European Union). The extremity of each axis represents an ideal score of 100 per cent, that is, full compliance with international standards. The fuller the “web”, the closer the overall telecommunications legal framework of the country approximates these standards.
Source: EBRD 2012 Electronic Communications Comparative Assessment.
Chart 6: Comparison of the overall legal/regulatory risk for telecommunications in Bosnia & Herzegovina with international practice

Key: Extremities of the chart = International best practice

Note: The diagram shows the quality of the legal framework as benchmarked against international standards (European Union). The extremity of each axis represents an ideal score of 100 per cent, that is, full compliance with international standards. The fuller the “web”, the closer the overall telecommunications legal framework of the country approximates these standards.

Source: EBRD 2012 Electronic Communications Comparative Assessment.
Private Sector Support

Access to finance

Legal framework

At the state level of BiH, the creation of pledge is governed by the Framework Pledge Law (adopted on 21 May 2004, and subsequently amended in November 2004) and the Law on the Protection of Personal Data.

With regard to the Federation of Bosnia and Herzegovina (“FBiH”), the legal framework for secured transaction consists of:

- Law on Enforcement Procedure in the Fe BiH (Official Gazette of the F BiH nos. 32/03, 33/06, 52/03, 39/06, 39/09, 74/11 and 35/12)
- The Law on the Obligations, Published in the Official Gazette of the SFR Yugoslavia (Službeni list SFRJ) nr. 29/78; Amendments in nrs.: 39/85, 45/89, and 57/89; Published in the Official Gazette of the Republic of Bosnia and Herzegovina, no. 2/92, 13/93, 13/94, Official Gazette of the F BiH. 29/03, 42/11;
- Law On Property Rights, Official Gazette of the F BiH, nos. 6/98 and 29/03
- The Law on Leasing in the FFBiH, Official Gazette of the F Bi H, no. 85/08, 39/09
- Law on Securities, Official Gazette of the F Bi H, no. no.85/ 2008

With regard to the RS the legal framework for secured transaction consists of:

- The Law on the Obligations, Published in the Official Gazette of the SFR Yugoslavia (Službeni list SFRJ) nr. 29/78; Amendments in nrs.: 39/85, 45/89, and 57/89; Published in the Official Gazette of the Republic of Srpska in nrs.: 39/85, 45/89, and 57/89;
- Published in the Official Gazette of the R S, nr. 17/93, 3/96, 74/04
- Law On Business Companies, Official Gazette of Republic of Srpska”, no. 127 of 31st December 2008, 58/09, 100/11,
- Law On Property Rights, Official Gazette of the Republic of Srpska” nos. 124/08 and 58/09, 887/11
- The Law on Leasing in the Republika of Srpska, Official Gazette of the Republic of Srpska nos. 70/07 and 116/11
- Law on Securities, Official Gazette of RS”, no. 92 of 22 September 2006, 34/09, 30/12
- Law On Enforcement Procedure, Official Gazette of “Republic of Srpska” nos. 59/03, 85/03, 64/05, 118/07 and 29/10, 57/12

Secured Transactions

Mortgages are regulated at the entity level. Each of the entities has its own legal system, a separate court and registry system. Real estate ownership and property rights are registered in land books which are maintained by the municipal courts in FBiH and by the basic courts in the RS. In both entities the land registry record contains three sections: a description of the real estate in section A; the registration of ownership in section B, together with any restrictions on the owner's rights of disposal and notes on ownership; and details of encumbrances and restrictions in section C.

Article 68 of the F BiH Property Act defines that for the purpose of securing a certain claim, the real estate may be burdened with the pledge right in favour of the creditor (mortgage), who is entitled to, in the manner determined by the law, request the compensation of his claim from the value of the real estate before the creditor who does not have a mortgage over it, as well as before the creditor who has acquired the mortgage over it after him, with no regard to the change of the owner of the burdened real estate. Mortgage covers the whole real estate, its fruits until they are separated, as well as its other component parts and fixtures, including the improvement of its condition created upon the establishment of the mortgage. It can be established on the basis of the mortgage contract, court decision or by act of law. Mortgages established on the basis of a contract or court decisions are valid from the moment of their registration. Mortgage creditor may establish the mortgage on the existing mortgage in favour of a third party without the consent of the mortgagor (sub-mortgage). Similarly in articles 143 to 165 of the R S Property Act. The major difference between the two acts is that under the Federation BiH one a mortgage may be transferred to another person only with the transfer of a claim secured by the mortgage while the RS one allows to the owner of the real estate to, on the basis of invoice or other document proving the termination of the claim secured by the mortgage, transfer the mortgage to a new creditor for a claim which is not higher than the previous one.

Bosnia and Herzegovina is equipped with a modern and unified legal framework for secured transactions based on a national Framework Pledge Law. It adopts a so-called “functional” approach to security, providing the same regime for possessory pledges (when the debtor must transfer the collateral to the creditor or a third party), non-possessory pledges, liens, leases and other security rights. A pledge can encompass tangible property, bank accounts, account receivables, or shares in a company with limited liability. The law leaves the parties with great freedom to define both the object of the security (specifically or generally, including as a pool of fluctuating assets) and also the secured debt (including revolving loans, credit lines, etc).
A pledge is constituted if (1) the parties have concluded a pledge agreement; (2) the pledgor is the owner or will acquire ownership over the pledged property; (3) the pledgee (or a third party in accordance with the pledge agreement) has given a loan to the pledgor (or a third party in accordance with the pledge agreement); and (4) the pledge has been registered at the Pledge Registry. The Registry is a centrally held register operated by the Ministry of Justice and is available electronically (upon subscription) at www.reg-zaloga-bih.gov.ba.

A pledge must be described with enough specificity in the pledge agreement to enable a subsequent determination of the nature and extent of the pledge. The description of the pledge in the Pledge Registry does not have to be detailed, but in the case of a pledge of specific property, the serial number of the pledged property must be entered into the Register.

In case of default, the pledged property must be sold through a private sale (if so provided in the pledge agreement) or a public auction. The secured creditor will have the right to settle its claim from the proceeds of the sale. The pledge agreement cannot provide that the creditor would acquire ownership over the pledged property upon default.

In practice, enforcement may be the weakest link of the new regime because the judicial system has difficulty coping with the regime’s demands, in particular in terms of speed. Debtors are thus often able to obstruct enforcement process.

Leasing

Both entities have their own leasing laws. The Law defines: the conditions for establishment, operations and cease of operations of leasing companies, leasing contracts, rights and obligations of entities in leasing operations, termination of the leasing contract, registrations of ownership and other rights related to the subject of leasing, risk management, financial reporting and supervision of the leasing companies operations. Leasing companies are regulated, require license and are supervised by the Banking Agency of Federation of Bosnia and Herzegovina in FBiH and Banking Agency of Republika Srpska in RS. Both financial and operative leasing is regulated by the respective laws which provide modern legislative framework for undertaking leasing transactions.

Factoring

According to the Central Bank of Bosnia and Herzegovina, factoring is in its infancy in BiH, but it has the potential to bring important benefits to the BiH business community and contribute to an improved business environment. There is no special legislation of factoring apart from general “assignment of claim by contract” provisions of the Obligations Acts in both RS and FBiH which provide basis for assigning account receivables. As a result there is no definition of factoring services or types of factoring transactions which can help increase legal certainty of the factoring transactions and hence reduce involved costs and risks of re-characterisation of transactions. Feasibility study done by SEED - Southeast Europe Enterprise Development (World Bank) in 2009 contains recommendations for the introduction of a factoring law which would among other things mandate written form of factoring contact, regulate scope and validity of general conditions for factoring contracts, remove the debtors consent as a precondition for validity of assignment of claims, explicitly regulate assignments of future claims, etc.

Credit Bureau

There is both a public and private credit registers offering their services in Bosnia. The private bureau was formed in 2000 and the public registry in 2006. There is no specific legislation on credit bureaus however both private and public register are subject to Law on the Protection of Personal Data. The Central Bank has the powers to collect complaints and issue penalties and disciplinary sanctions, while the Data Protection Commission has corresponding powers to consult on legislation, collect complaints, conduct investigations, and issue monetary fines. Although this is consistent with the development of a dual system of credit information reporting, there is a significant risk of implementation gaps if personal data are being treated differently in different institutions. Credit report contains information on all registered debts of financial institutions (banks, MCOs, leasing firms, insurance agencies, municipal corporations, as well as other companies that offer their products and services in monthly instalments), type and amount of credit, payment habits, late or on-time payments and overall payment habits based on monthly obligations.

Capital Markets

Legal and Regulatory framework

Bosnia and Herzegovina (“BiH”) is composed of two autonomous entities: the Federation of Bosnia and Herzegovina (“FBiH”) and the Republika Srpska (“RS”), which results in separate legal and regulatory frameworks, including regulators.

The FBiH:

The securities markets regulator is the Securities Commission, while the Banking Agency of the FBiH oversees the banking sector. The basic legislation on the securities market is the Law on Securities Markets, enacted in December 2008. The law regulates trading and issuance of securities and aims at aligning national legislation with the Acquis Communautaire. Other relevant laws include the Law
on Companies, the Law on Takeovers and the Law on Investment Funds.

The only stock exchange in the FBiH is the Sarajevo Stock Exchange. At the end of 2012, its total market capitalisation was about USD $2.84 billion with 179 listed companies. The trading volumes are rather low.

RS

The securities market regulator is the Securities Commission of Republic of Srpska, while the banking regulator is the Republic of Srpska’s Banking Agency. The basic legislation on the securities markets is the Securities Market Law, redrafted in 2006 and then amended in 2009. This Law regulates the issuance and trading of securities, the conduct of participants on the securities market, the functions of the stock exchange and the central registry of securities and details rules for transparency of the market and protection of investors. Other relevant laws include the Law on Companies, the Law on Takeovers and the Investment Funds Act. In 2011 the RS adopted a law governing the primary market of treasury bills.

There is only one stock exchange in the Republic of Srpska, the Banja Luka Stock Exchange. At the end of 2012, its total market capitalisation was about USD $2.26 billion with 736 listed companies.

Analysis of the main features of capital market in BiH

The financial market in BiH has all characteristics of those in the developing countries in transition. In the recent years, the liquidity of capital markets was based mainly on trading the company’s shares. The capital market in BiH is a small, separated and illiquid.

The debt capital market in the BiH is almost non-existent, there are only government bonds issued; corporate bond sector has not yet developed. Debt market in BiH still lagged behind other neighbouring countries.

The FBiH

The securities markets legislation lacks comprehensive provisions governing issuance and trading of bonds. There is also uncertainty in terms of enforceability of derivatives transactions and close-out netting.

The RS

In RS, Similarly to the FBiH, the major flaws are the lack of comprehensive legislation on bonds and provisions providing for enforceability of derivatives. Similarly, primary government debt issuances in the RS also began in 2011.

Corporate governance

Overview

Bosnia and Herzegovina (“BiH”) is composed of two autonomous Entities: the Federation of Bosnia and Herzegovina (“FBiH”) and Republika Srpska (“RS”). It also includes a relatively small third region, the Brčko District, which is formally under the sovereignty of both of the above entities. Each Entity regulates its own corporate governance regime and has its own Securities Commission. The FBiH and RS have their own stock exchanges, the Sarajevo Stock Exchange (“SASE”) and the Banja Luka Stock Exchange (“BLSE”). Brčko regulates its own joint stock companies and has a separate Securities Commission, but does not have a stock exchange. Joint stock companies in Brčko can be traded in either Entity and tend to adopt the corporate governance practices of the Entity where they are traded. For this reason, as well as the relative size of the Brčko District, this section will focus on the FBiH and the RS.

The Federation of Bosnia and Herzegovina (“FBiH”)

The EBRD’s 2007 Corporate Governance Sector Assessment ranked the FBiH as in “medium compliance” with the OECD Principles of Corporate Governance, and the regulatory framework does not appear to have changed significantly since the Assessment.

Republika Srpska (“RS”)

Similar to the FBiH, the EBRD’s 2007 Corporate Governance Sector Assessment ranked the RS as in “medium compliance” with OECD Principles. The 2011 Standards of Corporate Governance are a mix of mandatory provisions and those adopting the “comply or explain” principle. The Standards recommend that the majority of the members of the supervisory board be independent, and provide a thorough list of criteria for independence. The Standards also recommend the creation of special committees by the supervisory board, and in particular mandates the creation of an audit committee to be appointed by the shareholders. Audit committee members must fulfill the criteria for independence. The 2009 Law on Companies mandated Boards of Directors to comply with the Standards, and although the Standards themselves do not specify an enforcement mechanism, companies listing under the BLSE must meet the Standards to be eligible as a new issuer. The BLSE also adopted corporate governance scorecards to monitor and incentivize better corporate governance. However, it is rare to see listed companies reporting their compliance with the Standards on Corporate Governance.
In BiH, the law grants shareholders with rights such as the right of ownership registration, the right to convey or transfer shares, obtain relevant corporate information, participate and vote in general shareholder meetings, elect members of the board, and share in profits.

In line with good international standards, the opportunity is provided for shareholders to ask questions to the board and to place items on the agenda at general meetings. Shareholders with 5 per cent or more of the voting rights in FBiH and 10 per cent in RS can amend the agenda within 8 days of receiving it.

Further, shareholders are entitled to receive timely notice prior to a general shareholders meeting. In FBiH, the minimum notice period that is required before convening a shareholders meeting is 30 days, which appears to be enough to ensure informed participation by all shareholders. In RS, notice must be given at least 21 days in advance. A corporate governance framework should also allow for the use of electronic communication and easily accessible and transparent voting in absentia procedures.

Shareholders in BiH companies are able to vote in person or in absentia. In practice, voting by proxy is common. Moreover, in each entity, shareholders are not allowed to vote by post, and although available in theory, electronic voting is rarely ever used in practice.

The OECD Principles of Corporate Governance mandate that shareholders have the right to participate in, and to be sufficiently informed of, decisions concerning fundamental corporate changes such as amendments to the company’s statutes, or articles of incorporation; the authorisation of additional shares; and extraordinary transactions, including the transfer of all (or substantially all) of the company’s assets, that in effect result in the sale of the company. Most of these rights are provided under BiH law.

In both entities, shareholders have pre-emptive rights in the case of a new share issue. In FBiH, existing shareholders have the right to buy new shares within 30 days of the deadline for registering new shares. However, in both entities these rights can be waived. In BiH, each entity requires owners with 5 per cent or more to disclose ownership and changes in ownership to the Securities Commission, issuer and stock exchange. However, this information is not passed on directly to the public. External auditors should be accountable to the shareholders and owe a duty to the company to exercise due professional care in the conduct of the audit.

In each entity, the legislation on auditor liability is vague and has never been tested. Auditors face a range of sanctions but these have not been imposed. Furthermore, shareholders should have the opportunity to obtain redress for violation of their rights. Effective methods should be in place to ensure redress at a reasonable cost and without excessive delay. Shareholders in each entity can under certain circumstances call an extraordinary general meeting, request the company be audited and challenge the decisions of the general meeting.

However, restrictive and divergent legal provisions, the limited specialization of the court system and the costs and delays of going to court to enforce these actions under the law have limited the impact of these shareholder powers.

The principle of the equal treatment of shareholders of the same class is a key issue in corporate governance. Within any series of a class, all shares should carry the same rights. All investors should be able to obtain information about the rights attached to all series and classes of shares before they purchase.

The rules governing the rights of minority shareholders could benefit from some fine-tuning. For instance while minority shareholders are able to pool their votes for the election of a certain board candidate, and cumulative voting is encouraged under the law, the law does not provide for a mechanism for the implementation of cumulative voting in practice. Cumulative voting provides minority shareholders with a better chance to have a say in electing board members and thus allows them the opportunity to share in setting the direction of the company’s management.

A good framework should also ensure that minority shareholders are protected from abusive actions by, or in the interest of, controlling shareholders acting either directly or indirectly, and should have effective means of redress.

In FBiH, shareholders who dissent from certain decisions of the general meeting including capital increase, dividend payments and mergers can demand the company to purchase the shares at the thirty day average market price. In RS, the law does not entail similar requirement.

The corporate governance framework should guarantee that the rights of stakeholders, including company employees and creditors, are both protected by the law and respected in practice.

The Law contains provisions which permit stock ownership plans and mandates that the company adopts an employee profit-sharing mechanism. The Law also contains some provisions which provide for the protection of creditor rights. The violations of creditors’ rights are criminal offenses and can be prosecuted by the relevant authority. Creditors also have additional redress in the case of bankruptcy. However, in order to enforce such a right, recourse to lengthy court procedures is necessary, and in practice creditors do not seem to possess effective and easily workable remedies for the violation of their rights.
One of the essential rights of stakeholders is to receive regular and reliable information for a sound assessment of the company’s management and profitability. A good corporate governance framework should ensure that investors, creditors, employees, the market and all other stakeholders can rely on the information received by the company and act accordingly. The integrity of the market requires information to be reliable, disclosed in a timely manner, regularly updated and easily accessible.

A corporate governance framework should ensure that timely and accurate disclosure is made with respect to all material issues regarding the corporation, including the financial situation, performance, ownership, and governance of the company.

In addition disclosure should include, but not be limited to, material information on company objectives, majority shareholder ownership, and remuneration policies for members of the board and key executives, and information about board members, including their qualifications and selection process, other company directorships, and related party transactions.

In BiH non-financial reporting tend to be minimal. Omissions in annual reporting include company objectives, foreseeable risk factors, stakeholder issues and governance structures and policies. Few companies produce annual reports consistent with international good practice. In each entity, ownership remains opaque. Only direct ownership is reported and compliance is far from being perfect.

A sound corporate governance framework should ensure: that the board fulfils its role in providing strategic guidance to the company, effectively monitors management, and that the board is accountable to the company and the shareholders.

In FBiH, JSCs have a supervisory board which appoints the director who in turn appoints executives with the Board’s approval. Management does not serve on the supervisory board. In the RS, JSCs have a supervisory board and a management board and an optimal committee of executives.

In both entities, the supervisory board is accountable to shareholders and the company, as well as responsible for any misrepresentation of company information. The law does not require that the supervisory boards of companies have independent directors, nor does it provide a definition for ‘independent director’ or ‘board independence’.

A positive feature is that in the FBiH, the same person may not be supervisory board chairman in more than three companies or banks. In the RS, there are no limits on the number of board seats although the board member is required to disclose his other board memberships.
Chart 11 – Quality of the Corporate Governance Legislative Framework in Bosnia and Herzegovina

Note: the extremity of each axis represents an ideal score, that is, legislation fully in line with the OECD Principles of Corporate Governance; the fuller the ‘web’, the better the quality of the legislative framework.

Source: EBRD Corporate Governance Assessment 2007
Chart 12 – How the corporate governance framework works in practice in Bosnia and Herzegovina

Note: the extremity of each axis represents an ideal score: the fuller the ‘web’, the more effective the corporate governance framework.

Source: EBRD Corporate Governance Assessment 2007
Insolvency

As a result of the complex democratic and governmental system of Bosnia and Herzegovina (which is divided into two entities, the Federation of Bosnia and Herzegovina (the FBiH) and Republika Srpska (the RS)) insolvency proceedings in respect of businesses (including sole traders) are governed by two main pieces of legislation: (i) the Law on Bankruptcy Proceedings applicable to the FBiH (as amended, the LBP)11 and (ii) the Law on Bankruptcy Proceedings of RS (as amended)12.

Further provisions applicable in the FBiH are found in the Law on Liquidation Procedure of the FBiH13 as well as in the Law on Civil Procedures14. There are slight differences amongst the rules applicable in the FBiH and in the RS. The Pilot Assessment has focused primarily on the provisions applicable in FBiH and has excluded Brčko District from its scope.

The Insolvency Law contains many of the elements that international insolvency standards and best practices recognise as critical to a well-functioning insolvency legal regime. As reflected in the graph below, the EBRD’s 2009 Insolvency Sector Assessment found that the Insolvency Law is in “high compliance” with international standards, based on five core areas most relevant to the sector.

The Insolvency Law provides for one entry into bankruptcy, leading either to the ‘liquidation’ of the debtor or reorganisation, one of the main objectives of which is preservation of the activities of the debtor’s business. There is no separate or fast-track reorganisation procedure; ordinary bankruptcy proceedings must be converted into reorganisation proceedings, although the debtor may file a reorganisation plan together with its proposal to open bankruptcy proceedings. Where time is of the essence, the absence of a separate reorganisation procedure may give rise to undue delays. The World Bank ‘Doing Business Report’ 2013 suggests that efficiency of court proceedings is an issue in BiH and cites bankruptcy cases lasting on average 3.3 years.

Three core areas of the Insolvency Law performed exceedingly well when compared with international standards: assets of the estate, commencement of proceedings and treatment of creditors.

In the areas of commencement of proceedings and treatment of creditors, the Insolvency Law is similarly very strong. The financial condition precedent to commencing an insolvency case is clear, and the law applies to natural persons, legal entities and state-owned enterprises.

Alternative remedies of liquidation and reorganisation are contemplated and an automatic stay of actions against the debtor applies upon commencement of proceedings. Creditors enjoy adequate opportunity to participate in insolvency proceedings and the law contains provisions to keep them informed as the case progresses. Furthermore, the Insolvency Law sets adequate procedures for submitting and determining allowable claims and treats claims within the same class equally.

Although these core areas performed exceptionally well, the EBRD’s assessment reveals that there is still some room for improvement of the Insolvency Law (see chart 13 above). In particular, the law is generally weak in the area of reorganisation proceedings. Specifically, the law should be reformed to include provisions for independent analysis of a proposed reorganisation plan to ensure that it meets minimum requirements. The Insolvency Law also currently lacks provisions for reorganisation financing and fails to prohibit the termination of essential services to a debtor attempting reorganisation. Additionally, the law currently does not contain any restrictions on voting by connected parties or any provisions that allow post-approval modification of a plan.

Provisions relating to insolvency office holders are largely found in the LBP. In the FBiH, a rulebook governs the fees and the amount of compensation for experts and interim bankruptcy trustees15. A similar rulebook is not yet applicable to the RS.

The results of the 2009 EBRD Assessment also reveal that the legislative framework relating to insolvency administrators is weak and should be improved. The 2009 Assessment revealed that this particular aspect of the Insolvency Law is in “low compliance” with internationally recognised standards. The provisions in the Insolvency Law regarding the bases for appointment and replacement of insolvency administrators are fair but could be considerably improved. Currently, there are no provisions for the resignation, retirement or death of an insolvency administrator. Furthermore, there are no provisions for professional standards or ethical codes of conduct for insolvency administrators.
Chart 13 – Quality of insolvency legislation in Bosnia and Herzegovina

Note: The extremity of each axis represents an ideal score, that is, legislation fully in line with international standards such as the World Bank’s Principles and Guidelines for Effective Insolvency and Creditor Rights Systems, the UNCITRAL Working Group’s “Legislative Guidelines for Insolvency Law”; and others. The fuller the ‘web’, the better the quality of the legislative framework.

Source: EBRD Insolvency Sector Assessment 2009

1 http://www.legislationline.org/documents/action/popup/id/6402
2 http://www.ombudsmen.gov.ba
4 These include the UNCITRAL Legislative Guide for Privately Financed Infrastructure.
5 "Private party": a private party or other entity in the form of a special purpose company to which a project agreement in general has been awarded.
6 http://www.eib.org/epec/resources/publications/epec_wbif_overview_ppp_institutional_arrangements_institutional_frameworks
9 The BLSE rules can be found on http://www.biberza.com/Pages/DocView.aspx?id=25093
10 Published in the Official Gazette of FBiH No. 53/03 and 19/06.
12 In the FBiH it was adopted in 2004 and amended in 2005 and 2006.