Commercial laws of the Kyrgyz Republic
An assessment by the EBRD
June 2015
COMMERCIAL LAWS OF KYRGYZ REPUBLIC
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Basis of Assessment: This document draws on legal assessment work conducted by the Bank (see www.ebrd.com/law) and was last updated during the preparation of the 2015 EBRD Strategy for the Kyrgyz Republic, reflecting the situation at that time. The assessment is also grounded on the experience of the Office of the General Counsel in working on legal reform and EBRD investment activities in the Kyrgyz Republic, it does not constitute legal advice. For further information please contact ltd@ebrd.com.
Overall assessment

Following the change of government in 2010, a number of legislative reforms took place that aimed at enhancing the investment climate in the country. Among the main positive developments is the fact that the quality of the administration of justice has improved significantly. Furthermore, the new Law on Public-Private Partnership was adopted in 2012 and has been assessed by the EBRD to be in high compliance with international best practices. The Bankruptcy Law is rather comprehensive as well. The legal framework governing secured transactions has undergone several rounds of amendments, including incorporating the possibility for extrajudicial enforcement of creditor rights. A large step forward in the area of energy saving and energy efficiency was made in 2011, when the government adopted the Law on Energy Performance of Buildings, effectively transposing the EU Directive on Energy Performance of Buildings. The legislative reform with respect to energy performance of buildings shows the government’s commitment to harmonise the national framework with EU legislation.

At the same time, there is a wide range of areas requiring further improvement. The impartiality of courts in Kyrgyz Republic is perceived to be questionable, and enforcement of court judgments is another major issue for the entire region. The existing public procurement law is based on the 1994 UNCITRAL standards and to a large extent is now outdated. The Kyrgyz Republic corporate governance legal framework is rather weak. In the area of bankruptcy law, weaknesses have been identified in the reorganisation process and overall Insolvency expertise of the court system should be improved. The Renewable Energy Sources Law, introduced in 2008, is considered insufficient for the proper stimulation of investment into renewable energy sources.

In addition to the above, major barriers to foreign investment arise to a greater extent from lack of adequate implementation and less so from the gaps in existing laws. As is often the case in early transition countries, implementation of laws remains a major issue.

Since the current government is eager to continue reforms to improve the investment climate in the country, it is believed that if the present political cycle concludes without major political disruptions, investor confidence will be enhanced. Political instability prevailing in the past several years may have hampered investor confidence in the country, and the current government has acknowledged the need to further improve the business climate. It is therefore believed that provided the current political cycle finishes without major political disruption the investor confidence in the country could improve.

Legal system

Constitutional and political system

The new Constitution of the Kyrgyz Republic was approved by a popular referendum on 27 June 2010. It proclaims the Kyrgyz Republic a democratic, secular and social state. The Constitution incorporates the principle of separation of powers with clear division of responsibilities among the legislative, executive and judiciary. The new Constitution also shifted the balance of power from the President to a multi-party organisation of state incorporating the features of both presidential and parliamentary system of government. The Constitution of the Kyrgyz Republic is believed to be one of the most liberal and advanced in the region in terms of human rights guarantees incorporated in it, however the implementation of the latter appear to be an area for improvement.

Constitutional oversight is entrusted to the Constitutional Chamber within the Supreme Court of the Kyrgyz Republic. The Constitutional Chamber is composed of eleven judges elected by the Parliament upon a proposal of the President that is based on a suggestion of the Council for Selecting Judges. Judges of the Constitutional Chamber are appointed for an initial period of seven years which is subsequently extended until the judge reaches 70 years of age.

The unicameral parliament (Jogorku Kenesh) consists of 120 members elected for a five-year term on a proportional basis. The threshold for obtaining a seat in the parliament is established at 5% of the country’s registered voters. No party may hold more than 65 mandates in the Parliament. The most recent elections to Jogorku Kenesh took place in October 2010, with the next elections due to be held in the autumn of 2015.

The President is the head of state and is elected by Kyrgyz nationals for a 6-year term. Nobody can be elected President twice. The current President took up his position in December 2011, with the next presidential elections expected to take place in 2017.

The Government, led by the Prime Minister, is the highest executive body. The candidate for the Prime Minister’s office is proposed by the party that has won over half of the seats in the Parliament and is approved by the President. If no party has reached the designated majority in the Parliament, the President entrusts the proposal of candidate for the office of the Prime Minister to one of the parties in the Parliament. The present Government was formed in 2014, following a period of political instability that
was seen to be a reason for reduced investor confidence.

The success of the continuing legal reform that has been announced by the government will greatly depend on continued political stability. It is expected that there will be no more political turbulence in the run-up to the next elections, investor confidence is likely to be restored.

**Freedom of information**

The right of access to information is incorporated in the Constitution (Article 33) whereby everybody is entitled to receive information on the operation of government and other public authorities and agencies.

In implementation of the Constitution, the two main legal instruments governing access to public information in Kyrgyz Republic are the Law on Access to Information Held by State Bodies and Local Self-Government Bodies (2006) and the Law on Guarantees and Freedom of Access to Information (1997).

The Law on Access to Information Held by State Bodies and Local Self-Government Bodies envisages both the right to make an oral or written request for information and the obligation of state and self-governing bodies to publish certain information. Response to a written request should be provided within two weeks of the date of receipt of the request by the relevant entity, and any denial of access to information should be motivated; however there are instances reported where no reason was given for denial to provide the requested information. State and self-governing bodies are obliged to provide certain kinds of information (such as powers and responsibilities, budget etc.) on an annual basis.

**Recent developments in the investment climate**

Major obstacles to the investment climate in the country are the poor condition of infrastructure, political volatility and the small size of the market.

The government is aware of the need for further legal reform to ensure an attractive environment for foreign investment and has announced its intent to advance relevant reforms. In the Forecast for Social and Economic Development for Kyrgyz Republic for 2015-2016 the government acknowledged that a stable political, social and economic environment is crucial for attracting investments to the country. To improve the investment policy it has undertaken to, inter alia, further develop investor-friendly legislation and improve access to information.4

The legal system (law on the books) is rather advanced, however implementation remains a major issue. The country’s investment legislation contains a number of favourable provisions that resulted from preparation for WTO accession and later revisions of legislation in the early 2000s. Major barriers to foreign investment derive from a lack of adequate implementation rather than gaps in existing laws.

The anticipated accession to the Eurasian Economic Union (EEU) is expected to require amendments to the legal framework to bring the latter in compliance with EEU standards. Major changes are expected to deal with, inter alia, foreign trade legislation. Furthermore, the entry into the EEU is likely to bring to a period of economic transition. It is expected that Russia and other members of the Customs Union will assist in sharing the cost of the economic adjustment. The strategic alliance with Russia is expected to carry on.

Corruption remains an issue despite the continuous and express efforts of the government to eradicate it. The measures to counter corruption are at times seen to be political and thus ineffective. In the Transparency International Corruption Perception Index, the country rates 136 out of 175, higher than the previous year rating which was 150 out of 177. Some cases of corruption take the form of “express fees” – essentially payments for a more expedited processing of the documents. This is encouraged by the overwhelming bureaucracy.

The 2015 World Bank Doing Business ranking of the Kyrgyz Republic has dropped by 3 places (from 99 to 102 place).

**Judicial system**

The Kyrgyz Republic’s judiciary comprises threetiered courts of general jurisdiction vested with authority to hear criminal and civil matters. First instance matters are heard by district courts, including inter-district courts that deal exclusively with commercial matters, which include both corporate and administrative disputes. Appeals lie to the regional courts and thereafter to the Supreme Court of the Kyrgyz Republic, both of which have separate chambers for civil, commercial and administrative matters.

The Judicial Training Centre, formed under the authority of the Supreme Court, is responsible for professional development, including training and qualification of judges, as well as the general improvement of the judicial system.

Judges are appointed by the Parliament and nominated by the President upon recommendation by the Council of Judges, a self-regulatory authority consisting of 15 judges.

The EBRD Judicial Decisions Assessment found court judgments in commercial law matters in the Kyrgyz Republic to be above the regional CIS average in terms of quality and predictability, a finding consistent with the EBRD’s support for commercial
Law judicial training in the country from 2006 to 2011. However, the improvements in commercial law judgments are not evident in other areas of law. As in other countries of the region, the courts often wrongly apply general civil and procedural rules rather than relevant provisions of specific laws governing the dispute in question. In addition, the operative parts of court judgments often do not dispose fully of limited access to case law along with frequent changes to legislation, this adversely affects the predictability of court judgments.

Enforcement of court judgments is another major issue for the entire region. In the Kyrgyz Republic, one of the most problematic areas is non-compliance with time limitations for the relevant procedures, mainly due to a lack of effective instruments to counter the improper behaviour of debtors making spurious claims that hinder the enforcement process. Insufficient staffing of the enforcement agency and lack of professional training on enforcement procedures are other factors contributing to the low rates of enforcement.

The impartiality of courts in the Kyrgyz Republic is perceived to be questionable. This is consistent with data from the EBRD / World Bank Business Environment and Enterprise Performance Survey, where only 24% of local respondents considered that courts were fair, impartial and uncorrupted. Lack of easy access by lawyers and the general public to judicial decisions limits public scrutiny of the courts output and results in common allegations of corruption. The courts are also believed to show particular deference to the government and entities in which the state has a substantial interest. The speed of justice remains another issue due to heavy caseloads; courts also suffer from limited financial resources, which is evident in the quality of court premises and equipment in many areas.

The Kyrgyz Republic joined the International Centre for the Settlement of Investment Disputes (ICSID) in June 1995 and ratified the treaty in 1997. It has also been a member of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards since 1997.

The Kyrgyz Republic legal framework includes anti-monopoly regulation, and there is an anti-monopoly department within the Ministry of Finance responsible for monitoring monopolies.
Commercial legislation

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

Electronic Communications

The 1998 Law on Telecommunications and Posts (the ‘1998 Law’) is the primary law impacting the electronic communications sector in the Kyrgyz Republic.

The 1998 Law has some features of best practice but, given the advances in the sector since its passage, it is overdue having either a fundamental overhaul or replacement.

In 2012, the EBRD completed an assessment of the legal and regulatory frameworks for electronic communications markets in its countries of operations (EBRD 2012 Electronic Communications Comparative Assessment). A comparison of the legal framework for telecommunications with international practice is represented in Chart 1, which reveals that major issues exist in the areas of “Universal Service”, “Regulator independence and structure” and “Authorisation regime”.

Although the 1998 Law provides for separation of the policy function carried out by the Ministry for Transport and Communications (MTC) and regulatory function conducted by the State Communications Agency (SCA), a number of deficiencies impede SCA’s ability to regulate the sector. There is no clearly established sector policy and, although the Law provides nominal independence and substantial authority for SCA, other government agencies are seen to interfere with its decision making. Most recent attempts to update the 1998 Law to take into account advances in technology and regulation have not been successful.

The 1998 Law fails to establish a clear structure for SCA and, despite its clear provisions, the regulator has lost its status as a “national” agency, so that it is now a “state” communications agency, understood to be of a lower status within the government structure. In addition, the Law on Normative Legal Acts deprived SCA of the authority to adopt its own regulations, so that SCA now requires approval by the government of its regulations. That act also requires that a regulatory impact analysis be completed by a separate ministry for each new regulation proposed by SCA that impacts business interests. This process makes it extremely difficult for SCA to adopt effective regulations.

The Licensing Law establishes an individual licensing regime, rather than a best practice general authorisation scheme, and that regime provides discretion to SCA to set licence conditions and obligations for each operator. In practice, SCA issues licences based on different types of services within the list of activities defined by that law.

The 1998 Law requires that SCA, jointly with the state anti-monopoly authority, take measures to prevent anti-competitive activity. In practice this means that tariffs must be established in consultation with the authority, appearing to contradict other provisions of the 1998 Law, which authorise SCA to establish tariffs and price regulation. Also, the provisions addressing market analysis in the 1998 Law seem to contradict the tariff provisions of the Law on Natural and Authorised Monopolies. The Ministry for Economy and the State Agency for Anti-Monopoly Regulation have challenged the functions of SCA from time-to-time with respect to important decisions, making SCA’s decisions difficult to enforce. In addition, SCA lacks clear legislative authority to enforce its powers or impose effective penalties and decisions made by SCA may be appealed in the government or the parliament, which may cancel or suspend SCA decisions.

Interconnection provisions in the 1998 law are generally aligned with best practice and grant clear authority for SCA to regulate joint use of infrastructure. However, these provisions are very general and effective secondary legislation is absent. In addition, there are problems with consideration of
disputes that reduce the authority of the regulator and cause significant problems for market entrants.

Management of scarce resources, including spectrum, is not closely aligned with best practice. The functions of the State Commission on Radio Frequency (SCRF) and SCA on frequency management and administration of spectrum are not clearly defined and frequencies are not clearly separated into military and civil uses, resulting in non-transparency in allocation of frequency. However, in practice, spectrum management appears effective enough and SCA now seems to independently assign frequency and resolve all issues with respect to spectrum allocation.

There are no provisions in Kyrgyz legislation with respect to universal service, causing deficiencies in the provision of communications services in remote mountainous areas of the country.

“Market Conditions for Wireless Services”, “Market Conditions for Wired Services”, “Legal Framework” and “Sector Organisation and Governance” are the main weaknesses in terms of overall legal/regulatory risk for telecommunications in the Kyrgyz Republic as compared to international practice (see Chart 2).

Some revisions to the legal framework are understood to be currently under preparation, but their nature and extent is unclear.
Energy

Multiple agencies are involved in regulating the energy sector in the Kyrgyz Republic, including the Parliament, the Agency for Anti-Monopoly Policy and Competition, the Ministry of Industry, Energy and Fuel Resources, the State Department of Fuel and Energy Regulation, and the State Inspectorate for Environmental and Technical Safety. A reported lack of clarity as to division of responsibilities among these authorities calls for a better regulatory framework to incentivise investment.


Electricity

The major legal instruments governing the electricity sector in the Kyrgyz Republic are the Law on Energy (1996) and the Law on Electricity (1997).

The main issues pertaining to the legal framework for the energy (electricity) sector appear to be “Market framework” and “Network access”, as well as “Regulatory independence”, based on the EBRD 2011 Energy Sector Assessment (see Chart 3).

The electricity market commenced unbundling into companies by function (generation, transmission and distribution). However, energy sector restructuring has not thus far resulted in establishment of a competitive wholesale market. The legal framework does not provide for separate (independent) operators for transmission and distribution networks.

The law incorporates the possibility of third party access. There are no separate network access tariffs.

There is no definitive framework for setting company tariffs or a tariff methodology applied in consistent manner. Tariffs for end-users are set differently for various consumer groups. The tariffs do not appear to reflect all necessary expenses, and cross-subsidisation exists among various consumer groups.

Activities related to producing, transmitting, distributing and selling electric and thermal energy are subject to licensing.

The State Department of Fuel and Energy Regulation (the State Department) is charged with carrying out licensing activities, and its Executive Council is authorised to set tariffs.

There are no restrictions on foreign investments into the energy sector, and certain incentives for investors are present. Investors are selected based
on a competitive tendering process. The existing legislation and tariff policy envisage guarantees of return of investments made in new generation capacities.

Chart 3 - Quality of energy (electricity) legislation in the Kyrgyz Republic

Note: The spider diagram presents the sector results for the Kyrgyz Republic 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 Turkmenistan are represented by the green area in the centre of the web.

Source: EBRD 2011 Energy Sector Assessment

Gas
The Law on Oil and Gas (1998) is one of the principal legal instruments regulating gas market in Kyrgyz Republic.

The government is in the process of carrying out gradual restructuring of natural monopolies, including in the gas sector, by creating a transparent and competitive environment, developing market mechanisms, attracting investment, reducing state subsidies and pursuing a tariff policy based on self-support principles.

The Law on Oil and Gas requires a holder of a licence for gas transportation to provide open third-party access for transportation of oil, gas and oil products given excess in pipelines and premises. Open access is provided subject to payment of necessary transport tariffs, and based on a contract signed by the two parties.

Similar to the case of electricity, the State Department’s Executive Council is authorised to set tariffs; separate tariffs for gas transportation and distribution exist.

In 2014, the national gas distributing company Kyrgyzgas was sold to Gazprom, which is seen as a means to improve the old piping infrastructure and reduce the price paid for natural gas. In January 2015, a program to support the gas infrastructure development in Kyrgyz Republic was launched in cooperation with the Russian Gazprom.

Energy efficiency/renewable energy
With high levels of energy intensity and over-dependence on energy imports, the promotion and implementation of energy efficiency (EE) measures in all sectors of the economy is essential. The residential buildings sector is the largest energy end-
user in the Kyrgyz Republic (it takes up almost 42% of the final national energy consumption). At the 20,100 TJ up to 2025 and another over half of that amount up to 2050. Investment opportunities needed to realise the energy saving potential are estimated at approximately €12 billion. These investments are associated with improvement of existing housing stock up to the level required by the new building regulations. Energy prices are heavily subsidised both in terms of allowances to residents and by direct subsidies in the form of tariffs set below cost recovery levels.

The target for energy savings set in the Energy Saving Programme is 1.2 million tons of standard fuel by 2015. The Energy Savings Law provides the basic legal framework for the sector, including the requirement to conduct energy audits. However, the overall sector regulation until recently remained scarce and insufficient. A large step forward was made in 2011, when the government adopted the Law on Energy Performance of Buildings (the “EPB Law”), which effectively transposes the EU Directive on Energy Performance of Buildings. The EPB Law was developed with EBRD technical assistance and entered into force in February 2012. In September 2012, the EPB Law was supplemented by a number of supporting regulations also developed with EBRD technical assistance. These include, among others, the introduction of minimum energy efficiency requirements for new developments and major renovations of all types of buildings, energy performance assessment methodology, energy performance certification, regular inspections on commercial basis and obligation of national authorities on monitoring and recording of energy performance certificates. This marks the first instance of a post-Soviet country adopting EE legislation on buildings compatible with the EU Directives and the international ISO EN standards. The legislative reform with respect to the energy performance of buildings shows the government’s commitment to harmonise the national framework with EU legislation.

The Kyrgyz Republic ratified the Kyoto Protocol to the United Nations Framework Convention on Climate Change in May 2003. The economy of the Kyrgyz Republic remains highly energy-intensive and relies to a large extent on energy imports. Energy security is a state priority and rapid expansion of the use of renewable energy sources (RES) is at the centre of the government’s policy efforts. The Energy Saving Programme (till 2015) and the longer-term Strategy for the Fuel and Energy Complex Development (till 2025) set the policy framework for the sector. The government has also approved a high-level action plan to implement the Energy Saving Programme, including a reduction in energy losses, introducing development of small-scale energy projects and modernisation of energy.

same time, the residential building sector offers one of the largest energy saving potential with over infrastructure. The current RES generation comes primarily from small-scale hydropower plants, which could attract more future investments. Biogas and solar power can be mainly applied in micro-generation, the residential sector and in small-scale industrial projects. Wind has a limited potential as the wind speed is low and the wind map has to be further developed. Geothermal sources are also to be explored.

The lack of modern regulatory framework until recently has been a major barrier to sector development. In 2008, the first Renewable Energy Sources Law (RES Law) was enacted. While providing for basic regulatory mechanisms, RES framework requires a substantial upgrade in order to stimulate RES development. The RES Law introduced basic principles of regulation of RES production and distribution, including licensing of RES facilities (other than those used for own consumption), cost-based tariffs for RES-produced electricity with separate coefficients for each RES type, import duty exemption for RES equipment and mandatory purchase of the RES-produced electricity. One of the amendments introduced to the RES Law in 2012 provides for the RES producers’ right to claim lost profit from energy companies for breach of their obligations under the RES Law. Despite the introduced incentives, the RES Law is considered insufficient for the proper stimulation of RES investment. This is primarily due to the short pay-off period (8 years) for cost-based tariffs. Another drawback of the RES legislative framework is the lack of supporting regulations which are vital for a framework-type law such as the RES Law. Development of RES is significantly hindered by a subsidised and very low cost of electricity in the country.

International donors are working with the government on improving the investment environment. The EBRD provides support to RES and energy efficiency development through the Kyrgyz Sustainable Energy Financing Facility (KyrSEFF) – a credit facility to local banks, which would enable further lending for RES and EE projects based on the established eligibility criteria.

PPPs / Concessions

The new Law of the Kyrgyz Republic on Public-Private Partnership (the “PPP Law”) was adopted in 2012. The PPP law has been completely redrafted compared to the previous 2009 law in order to address the deficiencies evidenced in the 2011 EBRD Assessment. Chart 5 below reflects major drawbacks in the old system, such as “Project Agreement”, “Definitions and Scope of the Law”,

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“Selection of the Private Party” and “Security and Support Issues”.

The PPP Law was drafted with the assistance of international PPP experts and international institutions. An Asian Development Bank assessment "Enabling Identification of Public-Private Partnership (PPP) Projects and Capacity Building in Kyrgyz Republic" published in August 2012 was “... made with reference to the EBRD ‘Core Principles’ (of Modern Concession laws) which themselves include and reference other sources and especially those from UNCITRAL”. It states that the PPP Law fully meets best international practice related to many Principles, such as providing a sound legislative basis and detailing PPP project support. Other principles, such as clarity of rules are largely met but with the need for comprehensive detailing of provisions through implementing regulations and guidelines.

The PPP Law is assessed by the EBRD as being in high compliance with international best practices. This covers all major elements and procedures normally attributed to PPP laws. By regulating key provisions in the law it leaves a number of arrangements to project documentation and agreements, e.g. properly requiring risk allocation between the public and private parties, as well as compensation for possible changes in the contract, to be specified in the PPP contract. The more plausible features of the PPP Law include its acknowledgement of financing and the necessity to provide for government support and guarantee.

Based on the EBRD 2012 PPP Legislative Framework Assessment, the practical implementation of the old PPP Law was suboptimal (see Chart 6). It is still premature to judge how the newly created institutions will perform and to assess at this early stage the effectiveness and efficiency of the law. However, at the moment the formal application of the EBRD Assessment checklist to the PPP Law effectiveness in practice, measuring clarity of policy framework, maturity of PPP institutional infrastructure and project implementation compliance and enforcement is considered low.

There exists a general PPP policy framework in that the Government Mid-term Development Programme for 2012-2014 refers to PPP development and confirms the Government’s commitment to support PPP in the country. The PPP Law remains ambiguous as to precisely what state body is involved and responsible at what stage. In addition, according to the ADB the key issue is that the institutional network is still weak and the capacity (time available, seniority and expertise) of staff is still extremely limited and needs to be enhanced.
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)

Chart 5 – How the PPP law is implemented in practice in the Kyrgyz Republic

Note: The extremity of each axis represents an ideal score, that is, a fully effective legal framework for PPPs.

Source: EBRD 2012 PPP Legal Indicator Survey (LIS).

Public procurement

Public procurement rules are highly relevant to the development of infrastructure (e.g., roads) necessary to strengthen linkages with neighbouring countries.

On 3 April 2015, the Parliament of the Kyrgyz Republic adopted a new Law on Public Procurement. The new law introduces, inter alia, framework agreements and a special commission for reviewing procurement-related disputes.

Prior to the adoption of the new law, public procurement in the Kyrgyz Republic was regulated by the 2004 Public Procurement Law (the PPL). The PPL was based on the 1994 UNCITRAL standards and was to a large extent outdated. The PPL provided specific procurement rules for government procurement and public institutions, including state-owned companies. There was no separate regulation for public procurement in the utilities sector.

The PPL covered both national and local government and contained specific procurement rules for both the utilities sector and public law institutions; however there were several exceptions for procurement from state-owned companies. The PPL established the national regulatory authority at the Ministry of Finance - the Department of Methodology and Analysis of Public Procurement, in charge of the procurement policy and development of the eProcurement system. There was no independent review and remedies system in the Kyrgyz Republic; administrative review of public procurement related complaints was conducted by the Ministry of Finance.

The PPL sufficiently regulated tendering and covered some of the key matters in the pre-tendering and post-tendering stages of procurement process. The PPL provided for the following procurement procedures: (a) a reverse auction, (b) restricted tender, (c) two-stage tender, (d) request for quotations, (e) direct contracting; some of the procedures were conducted electronically (the piloting of eProcurement system was initiated in June 2014). However, the PPL did not forbid preferential treatment of domestic bids.
According to the 2011 assessment conducted by the Bank, the PPL showed a medium level of compliance with current international standards. As seen on Chart 7, “Uniformity” and “Transparency” were the areas where greatest success in the legal framework has been achieved. The quality of public procurement practices has also been rather high, with “Enforceability” and “Uniformity” being the best ranking indicators, based on the EBRD 2011 Public Procurement Assessment (see Chart 7).

**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
Chart 7 - Quality of public procurement practice in the Kyrgyz Republic

Note: The chart shows the score for the extensiveness 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
Private Sector Support

Access to finance

In the Kyrgyz Republic, the primary legislation governing secured transactions includes the Law on Pledge adopted by Government Decree No. 49 on 12 March 2005. This law has repealed and replaced the 1997 Pledge Law and the 1999 Mortgage Law. A number of changes have been made to the law since 2005. One of the most significant amendments provided for extrajudicial enforcement of creditor rights. The civil code provisions on pledge were amended in February 2007 to reflect the new law. More recent reforms took place in 2008-09 when the Kyrgyz Republic amended its civil code and pledge law to make secured lending more flexible by allowing general descriptions of encumbered assets and of debts and obligations. Technical amendments have been made multiple times since 2007, most recently in July 2011.

Mortgage

The Pledge Law appears to provide the necessary framework for the development and enhancement of primary and secondary mortgage markets. Apart from the agricultural land (reserved only for Kyrgyz citizens and financing reserved for local financial institutions) there are no limitations on who can grant and take mortgage and it can be established over all types of immovable property (except over publicly or municipally owned residential houses and apartments and the living quarters provided by an employer). Any valid obligation between parties can be secured. Future debt can also be secured but according to the local court practice specific description of the debt is required, thus creating legal risks for securing loans based on the fluctuating pool of debt, e.g. revolving loans. Mortgage agreements have to be in written form, signed by parties and notarized. A mortgage agreement is considered perfected upon its registration with the on-line real estate register but even the mortgage established in good faith does not survive seizure of the property by a third party due to an invalid title of the mortgagor. A good feature of the law is that the parties are free to agree on the usage of the property during the term of the mortgage. Creation and registration of mortgage takes up to 2-3 business days, including registration. In case of transfer of mortgage a registration of the transferee is required in the register, however, this is not viewed as creating a new mortgage. The mortgage automatically follows the transfer of the main secured claim and all rights of the former creditor toward the mortgage are assigned to a new creditor. Mortgage on a land plot extends to constructions and additions thereon only if they already exist, even if incomplete. The mortgagor is free to construct in the future on the mortgaged land plot, however, mortgage does not extend automatically to such future constructions, unless otherwise provided in the mortgage agreement. Out-of-court enforcement of mortgaged property is used in practice and is determined in accordance to the agreement between parties. To be valid, the agreement must be notarized and the mechanism of enforcement must be specified in this agreement. However, speed of enforcement can be influenced by the mortgagor’s actions as for instance according to the Civil Code the mortgagor can request postponement of sale for a year in certain circumstances. The eviction process is considered to be a time-consuming and complicated process.

Pledge

Since both mortgage and pledge are regulated in the same act, the same general rules applying to mortgage apply to pledge as well. There are no limitations on who can grant and take mortgage and it can be established over all types of movable property. It seems that the property can be generally described as both the Civil Code and the Pledge Law stipulate that the pledge can be described in general terms as long as this description allows its identification. What is unclear is whether the requirement for identification needs to be fulfilled within the time of conclusion of the pledge agreement or enforcement. The pledge can be established over future property and over a fluctuating pool of assets as the pledgor can dispose of the assets and change the composition of the universality, but the total value of the charged assets provided in the security agreement must be maintained. Same as for mortgages, any valid obligation between parties can be secured. Future debt can also be secured but according to the local court practice specific description of the debt is required, thus creating legal risks for securing loans based on the fluctuating pool of debt, e.g. revolving loans. All pledges of movable property securing an obligation the amount of which exceeds 300 calculation indexes shall be subject to mandatory registration with the Pledge Registration Office against the name of the pledgor. The registration of the pledge comprising negotiable instruments or corporate securities is performed by the bodies authorized to maintain the registries of holders of such instruments and securities. Creation and perfection of pledge takes up to two business days, including registration. The data in Single Pledge Register is centralised but the online access to the Register is not available at the moment.

Both the mortgage and the pledge law provide the possibility to use “security manager” as a security agent for registration of security interests in favour of syndicate creditors. The manager is authorised to act in its name and in the syndicate member’s favour. It is also possible to contractually subordinate creditors (for priority of a mortgage, the subordination must be
registered in the registry) secured with the same asset. Subordination of secured creditors is recognised in the bankruptcy situation.

Credit Bureaus

The credit reporting system is a private credit bureau called CIB Ishenim. There is not a public credit registry in operation in the Kyrgyz Republic. Ishenim was established in 2003 with the financial support of EuropeAid. In 2004 it issued its first credit reports. It is a non-profit organisation and all its current members are founders. In March 2010 the credit bureau reached the milestone of including 500,000 credit histories, which reflected a coverage rate of 15.6 per cent of the population. The code of conduct developed by the IFC support became effective on January 1, 2012.

Financial leasing and factoring

Financial leasing is regulated by the Financial leasing law. The law provides for a relatively modern legislative framework for undertaking leasing transactions, including sale and lease back. Leased assets may include any non-consumable good including enterprises and other property complexes, buildings, facilities, equipment, transport vehicles and other movable and immovable property, used for commercial activity.

There is no special legislation for factoring apart from general “assignment of claim by contract” provisions of the Civil Code which provide a 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. Reported factoring activity is currently insignificant and the development of a factoring market might facilitate access to finance, especially for SMEs.

Capital Markets

Capital markets legislation in the Kyrgyz Republic consists of: the Law of the Kyrgyz Republic on Securities Market from July 2009 (Securities Market Law); the Civil Code of the Kyrgyz Republic (CCKR) from May 1996, as amended in March 2003; the Law on Investment Funds in the Kyrgyz Republic from July 1999; the Law on Investments in the Kyrgyz Republic from March 2003; and the Law on State Service for Regulation and Supervision of the Financial Market of the Kyrgyz Republic from July 2009.

Since 2007, capital markets activity in the Kyrgyz Republic has primarily been regulated by the State Service for Regulation and Supervision of the Financial Market of the Kyrgyz Republic (FSA).7 There is one stock exchange, the Kyrgyz Stock Exchange (KSE), founded in 1994 as a non-profit organization and transformed into a joint-stock company in May 2000, with Borsa Istanbul as one of its shareholders.8 A single depository provides clearing and settlement services, the Central Depository of the Kyrgyz Republic (Depository).

The Kyrgyz Republic has made considerable efforts to reform its commercial and financial laws, including capital markets law, in the past decade. The most recent reform included the 2009 amendment of the Securities Market Law, the primary law governing capital markets. The law covers, among other areas: (i) the regulated market; (ii) the public offering and issuance of securities; (iii) the secondary market of securities; (iv) the clearing and settlement system; (v) the disclosure, reporting, and other obligations of issuers and public companies; (vi) the protection of ownership and transfer of ownership of securities; (vii) the requirements for and obligations of securities market intermediaries; and (viii) the responsibilities of self-regulatory organizations.

Day-to-day trading activities are governed by the rules and regulations of the KSE. Laws and regulations for derivatives and other sophisticated products are nascent, as market activity remains restricted to sophisticated financial institutions and corporates. Common stock and government bonds remain the major products traded and foreign investor participation in the market has been restricted. Efforts have been underway to introduce more activity and liquidity via increased participation of investment funds.

Although efforts to introduce more financial products and the above mentioned reforms of capital market laws have been beneficial, the key to fostering the development of an active and liquid local capital market lies in establishing a functioning, reliable, and transparent institutional framework. The establishment and enforcement of corporate governance standards is needed in particular to support local corporate bond issuance, such as the EBRD assisted September 2013 inaugural som corporate bond issue by the Kyrgyz Investment and Credit Bank (KICB) for an equivalent of USD 2 million.

Corporate governance

The principal legal instruments governing corporate governance in Kyrgyz Republic are:

- the Law On Joint Stock Companies (JSCs), enacted on 27 March 2003 (as amended), which details the establishment and functioning of JSCs in Kyrgyz Republic;
- the Law On Banks and Banking Activity, enacted on 29 July 1997 (as amended), which regulates the functioning of banks and the structure of the banking system in the country;
the Law On Securities Market, enacted on 24 July 2009 (as amended), which provides a framework for functioning of the securities market in the country and activities of market participants;

- the Administrative Code, enacted on 27 November 1999 (as amended), which among others - establishes penalties for violation of disclosure procedures and insider trading;
- Resolution No. 32/7 of the National Bank’s Governance Body, enacted on 20 November 2003 On Principal Requirements for the Audit Committee.

Furthermore, the National Corporate Governance Code was enacted on 18 December 2012 and approved by the Order of the Executive Council of the State Service for Regulation and Supervision of the Financial Market in the Kyrgyz Republic. In the Introduction to the Code it is declared that the Code is based on the OECD Principles of Corporate Governance and consists of eight main chapters, dealing with (i) Main Principles of Corporate Governance; (ii) General Meeting of Shareholders; (iii) Supervisory Board; (iv) Executive Body; (v) Company’s Secretary; (vi) Information Disclosure; (vii) Control over Financial and Business Activities of Company; and (viii) Dividends. The Code is voluntary and not endorsed by the Kyrgyz Stock Exchange. It is recommended for the companies to develop their own corporate governance code based on international best practices and take into consideration specifics of their own business.

JSCs can be organised as open, closed and public companies. In closed JSCs, shares can be transferred only among existing shareholders, public offering of shares not allowed and the number of shareholders is limited to 50. In Open JSCs, there is no need for consent of other shareholders to transfer shares to third parties. They can have an unlimited number of shareholders and can have a public offering of shares. Open JSCs are considered public companies. JSCs are organised under a two-tier system, where the general shareholders meeting (GSM) has the exclusive authority to appoint and dismiss the members of the supervisory board. JSCs with less than 50 shareholders are not required to establish the supervisory board. JSCs must also have an executive body which may either be represented by a single executive (i.e., CEO/General Director) or an executive body, appointed by the supervisory board; and a revision commission appointed by the GSM. Executive directors and members of the revision commission cannot sit on the board. There is significant gender inequality in the corporate sector; the boards of only two out of 10 largest listed companies in the country have women on them.

The most recent EBRD assessment on corporate governance showed the Kyrgyz Republic being weak in many areas under consideration, and especially in the “Responsibilities of the Board” section (see Chart 9). Moreover, the institutional framework supporting corporate governance practices was found to be weak. As shown on Chart 10, “Simplicity” and “Enforceability” of the corporate governance practices are among the highest ranking criteria, whereas “Speed (Disclosure)” has received a very low rating.
The Kyrgyz Republic Law on Bankruptcy (the “Bankruptcy Law”) was adopted in 1997 and subsequently amended. EBRD’s 2009 Insolvency Sector Assessment concluded that the Bankruptcy Law was relatively comprehensive; the major weaknesses are observed in the areas of “Reorganisation process” and “Commencement of proceedings” (see Chart 11).

The Bankruptcy Law contains a framework for liquidation, restructuring (involving a divestment of the debtor’s business from its existing shareholders) and reorganisation/ rehabilitation.

The Bankruptcy Law provides for one gateway into insolvency proceedings which may lead to either (i) special administration, resulting in the liquidation of the insolvent legal entity or restructuring involving a change in ownership and organisation of the business into one or more new legal entities for the purpose of a subsequent sale for the benefit of the creditors or restructuring; or (ii) rehabilitation, aimed at the restoration of the debtor’s solvency based on a recovery plan agreed between the debtor and its majority creditors. In addition, a voluntary settlement agreement may be agreed at any stage of the proceedings between the debtor and its creditors. In practice, the majority of cases in the Kyrgyz Republic appear to be cases involving special administration resulting in liquidation.

Some of the concerns raised by the 2009 Insolvency Sector Assessment are still relevant. The Bankruptcy Law excludes state owned enterprises. Cases under the Bankruptcy Law are decided by ordinary courts; there are no special bankruptcy or commercial courts with jurisdiction in insolvency cases. The statutory moratorium or stay on judicial and other enforcement actions does not apply to secured creditors (even in the context of rehabilitation). In rehabilitation there is still no requirement for the disclosure of material information in respect of a proposed plan or requirement for independent analysis of such plan. There is no requirement on third parties to deliver up property of the debtor, and provisions governing the avoidance of pre-bankruptcy transactions remain vague.

The areas for improvement include the provisions on reorganisation incorporated into the Bankruptcy Law.
as well as improving insolvency expertise of the court system.

Chart 11 – Quality of insolvency legislation in Kyrgyz Republic

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

4 [http://www.gov.kg/?page_id=31098&lang=ru](http://www.gov.kg/?page_id=31098&lang=ru)
5 [http://www.doingbusiness.org/data/exploreeconomies/kyrgyz-republic](http://www.doingbusiness.org/data/exploreeconomies/kyrgyz-republic)