COMMERCIAL LAWS OF SERBIA

March 2007

AN ASSESSMENT BY THE EBRD

This Assessment was last updated during the preparation of the 2005 EBRD Strategy for Serbia and reflects the situation at that time. It does not constitute legal advice. It was prepared by the Office of the General Counsel of the EBRD. For further information please contact ltt@ebrd.com
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Basis of Assessment: This information is based on the experience of the Office of the General Counsel whilst conducting legal assessments on behalf of the Bank. It also draws on EBRD investment and legal reform activities in Serbia (see www.ebrd.law).
1. **Overall Assessment**

Legal reform in Serbia continues to be a top priority. Although the continuing transition has not yet eliminated all structural barriers, the Serbian government has recognized the need to reform the business environment and open the economy to foreign participation.

In the past two years a number of important legislative acts have been enacted to support the reform of the business environment, including the: law on banks, foreign exchange law, law on securities, companies’ law, take-over law, law on investment funds, law on arbitration, law on mortgages and law on the organisation of courts. Others, such as the law on foreign investment and law on factoring, have been drafted and await parliamentary vote.

Further, the Serbian government launched its second Action Plan for 2005-2006 identifying barriers and setting up a framework to work with the business community to eliminate these barriers. The Action Plan and the *Strategy for Encouraging and Developing Foreign Investment* prepared and published by the government in March 2006 recognised the following law related issues as major barriers to foreign investments in Serbia: (i) land ownership and access to land, (ii) improvement and modernisation of the court system, (iii) privatisation and deregulation of the telecoms sector, (iv) construction laws and building regulations, and (v) non-competitive and uncertain fee and levy structures. The strategy provided for deadlines in the adoption of various laws to eliminate the above barriers. Some of the new laws listed in the preceding paragraph have been adopted in accordance and compliance with these activities.

As described in the following sections, despite the adoption of modern laws vital for the economic sector, there is still room for improvement, as regards the laws on the books as well as the implementation of the new framework. (See Chart 1) The assessment of the effectiveness of the corporate governance rules revealed simple and speedy procedures on paper whose enforcement is unpredictable and time-consuming in practice, largely due to the inefficiency of the court system. The new Concessions Law establishes a clear and comprehensive concessions regime, although one which is lacking coordination with other relevant laws and being poorly implemented. The Law on Bankruptcy Proceedings, recently brought into force, is considered among the best in the EBRD countries of operations, showing only minor deficiencies and only with regards to regulating certain procedural matters. The law dealing with the registration of charges over movable property was adopted in 2003 but, due to the fact that the adoption of the implementing instruments was considerably delayed, did not operate until mid 2005. The telecommunications sector has benefited from a law adopted in 2003 that, amongst other things, set up a Telecommunications Agency, as well as from a range of other useful measures undertaken by the government so as to spur growth in the market.
The legal reform status in Kosovo is less bright, its legal framework being a mixture of the regulations of the United Nations Interim Administration Mission in Kosovo (UNMIK) and of the former Yugoslavian law. Lack of a uniform source of law creates confusion among the enforcement bodies and as a result unpredictability as to the outcome. The capital market is insufficiently regulated, whereas the effectiveness of corporate governance is in urgent need of reform. In the concessions sector a new, modern law was adopted in 2006. The insolvency regime is regulated by a special law applicable to private sector companies (except companies operating in certain sectors, e.g. financial and insurance). The framework for secured transactions is perceived to be fragile and difficult to fit into the local legal tradition. In the telecoms sector there is need to promote participation of the private sector and fair competition.

2. The Legal System

2.1. Constitution and courts

The Constitution of the Republic of Serbia was unanimously approved by the parliament in October 2006 and confirmed by a referendum in November 2006. It replaced the Constitutional Charter of the State Union of Serbia and Montenegro following the Montenegro’s referendum and ensuing declaration of independence in June 2006. The Constitution declares the state to be based on the rule of law and social justice, principles of civil democracy, human and minority rights and freedoms, and commitment to European principles and values. The government of the country is declared to be split between legislative, executive and judicial powers and should have a balanced relationship and mutual control. The Constitution provides for the adoption of special laws regulating each branch of the state.

The legislative power in Serbia is vested with a unicameral parliament (the National Assembly), consisting of 250 members elected for a four year mandate. Besides its legislative powers the parliament has powers of election that include appointment of: the Prime Minister and his Government, judges of the Constitutional Court, the Chairman of the Supreme Court of Cassation, chairmen of courts, the General Public Prosecutor, public prosecutors, judges and deputy public prosecutors, etc.
The President of Serbia is elected by the citizens of Serbia for a term of five years and cannot be elected for this position more than twice. The President represents the Republic of Serbia, promulgates laws, nominates the Prime Minister and presides over foreign affairs of the country. The Government, itself nominated and subsequently headed by the Prime Minister, is responsible for implementation of laws, adoption of regulatory instruments, establishment of policies, etc. Resignation of the Prime Minister results in a dissolution of the existing government.

The Constitution provides for courts of general and special jurisdiction, with or without participation of jurors. The highest judicial court in Serbia is the Supreme Court of Cassation. A separate special law should regulate the establishing, organization, jurisdiction, system and structure of courts.

The judges are entitled to permanent tenure which they acquire in two steps. On the first stage a candidate is recommended by the High Judicial Council to the parliament who appoints the judge for the first term of three years. After serving the first term the High Judicial Council may decide to appoint the judge for permanent tenure. The High Judicial Council is an independent and autonomous body that guarantees independence and autonomy of courts and judges.

The Constitutional Court is an autonomous and independent body that decides upon the constitutionality of laws and ratified international treaties, as well as to the legality of other statutory acts. According to the Constitution, generally accepted rules of international law and ratified international treaties shall be an integral part of the legal system in the Republic of Serbia and apply directly.

Autonomous provinces

In addition to mainland Serbia, the Republic of Serbia has two autonomous provinces: the Province of Vojvodina and the Autonomous Province of Kosovo and Metohija. Following the NATO campaign in Serbia and Montenegro and the UN Security Council Resolution 1244 of 10 June 1999, the United Nations established an international civil presence in Kosovo, known as the United Nations Interim Administration Mission in Kosovo (UNMIK), to prevent further conflicts in the province and to maintain the substantial autonomy granted to it under Resolution 1244/1999. While confirming that Kosovo is at present a part of Serbia and Montenegro (currently Serbia, as the union’s successor), Resolution 1244/1999 provides that its final status is to be decided in future political negotiations.

2.2. Relationship between legal transition and economic progress.

The conventional wisdom is that economic development and legal transition progress or regress hand in hand. Accordingly, it is fair to say that Serbia’s future economic prosperity will be dependent in part on the country’s ability to foster observance of the rule of law and to improve the efficiency of its court system. Chart below (see Chart 2) shows the relative position of the country on the two axes of legal and economic development in comparison to other countries of operations.
Chart 2 – Rule of law and progress in transition in the EBRD countries of operations

Note: The horizontal axis measures the performance of commercial and financial law. The vertical axis displays the EBRD transition index as an average of transition indicators between 1997 and 2003, with 1 referring to very early transition stages, and 4 referring to an advanced transition level.

2.3 Implications for the investment climate

Serbia has, since the end of the Slobodan Milosevic era in 2000, managed to advance its economic and legal reform. It has made progress in negotiations and rehabilitation of relations with international donors, and has been somewhat successful in making the environment investor friendly, providing modern frameworks for vital sectors of the economy and aligning these with best available international standards and practice. To this end it has reduced its corporate tax to only 10% and introduced international accounting standards as the bases for computing tax.

However, despite some good results in macroeconomic reform, the pace of structural reform has been slow. There is a high level of corruption and bureaucracy in the country. The quality of the public administrative infrastructure needs to be significantly improved. The same conclusions can be drawn with reference to the work of the judicial system, which is perceived as lacking in impartiality and efficiency.

Economic reform is to a certain degree impeded by political factors. Successful cooperation with the International Criminal Tribunal for former Yugoslavia in the Hague (ICTY) should contribute to Serbia’s European economic integration. Additionally, a very important element of future political stability in Serbia is to resolve the issue of Kosovo’s status.
3. Evaluation of selected commercial laws

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: capital markets, concessions, corporate governance, insolvency, secured transactions and telecommunications. The existing tools assess both the quality of the laws "on the books" (also referred to as "extensiveness") and the actual implementation of laws (also referred to as "effectiveness"). This issue of the assessment uses the results of the assessments undertaken before the split and refer to Serbia and Montenegro together. However, most of the materials used for such assessments referred to Serbia.

Due to its complexity and unwavering distinctiveness, we have also included, in each of the abovementioned areas, a section on the legal framework in Kosovo. This is in essence a mix of United Nation Interim Administration Mission in Kosovo (UNMIK) regulations and former Yugoslavian law. According to UNMIK Regulation No. 24/1999 – as amended - on the “Law Applicable in Kosovo”, the applicable law is composed of the regulations promulgated by the Special Representative of the Secretary-General (…) and the law in force in Kosovo on 22 March 1989. In case of a conflict, the regulations take precedence. If a court (…) determines that a (…) situation is not covered by the [above mentioned] laws but is covered by another law in force in Kosovo after 22 March 1989 which is not discriminatory (…) the court, as an exception, shall apply that law”. [Paragraph moved from 3.1. so as to serve as introduction for all sectors.]

All available results of these assessments can be found at www.ebrd.com/law.
3.1. Capital markets

The primary legislation governing the securities market of Serbia is comprised of the “Securities and Other Financial Instrument Market Act” (the “Securities Act”) of 1 October 2003, last amended in 2006; the “Takeover Act”, enacted in May 2006; and the “Law on Investment Funds”, enacted on 30 May 2006. The assessed legislation was ranked in “medium compliance” with the Objectives and Principles of Securities Regulation published by the IOSCO.

Chart 3 – Quality of securities market legislation in the EBRD Countries of operation

Note: The various categories represent the level of compliance of a given country’s legislation (the “laws on the books”) with international standards such as the IOSCO Principles. The asterisk indicates in which category Serbia ranks.

The amended Securities Act contains new detailed provisions on public offerings of securities, reporting requirements for public companies, insider-trading, status and scope of activities of brokerage firms and custody banks, status and competences of the Serbian Securities Exchange Commission (SEC) and the Central Registry of Securities. The Securities Act also introduces the possibility of setting up an over-the-counter securities trading market (OTC) in Serbia. Takeovers, which were previously included in the Securities Act, are now regulated separately. Under the new Takeover Act, a bid must be launched by anyone acquiring a share participation in a company of more than 25%. Following the initial bid, any further increase in a shareholding might trigger the obligation to launch other bids. The SEC is in charge of the supervision of takeovers.

The Law on Investment Funds regulates three different types of investment funds: open-ended, closed-ended and private. Open-ended funds have no legal personality, while closed-ended and private funds are organised as open joint-stock companies and limited liability companies.

1 Over-the-Counter (OTC) is a market for securities made up of dealers who may or may not be members of a securities exchange. OTC firms conduct business over the telephone and act either as principals or dealers or as a broker or agent and charging a commission.
respectively. Open-ended funds issue investment units; closed-ended funds issue shares and private investment funds issue ownership interests. The Law on Investment Funds is effective as of 7 December 2006, and should be complemented by a number of implementing provisions.

The Belgrade Stock Exchange (BSE) was founded on 21 November 1894 and functioned until the breakout of World War II. In 1953 it was formally closed. It was reopened in 1989 as the Yugoslavian Capital Market and in May 1992, after the break-up of the country, it was renamed back to BSE. In 1996 four departments were set up containing the basic exchange functions: listing, trading, clearing, and marketing. In 2001, large scale privatisation began and the exchange started trading privatised stock. A year later, trade with state bonds started. In September 2004, the BSE was accepted into the Federation of Euro-Asian Stock Exchanges. In 2005, the turnover of the BSE was worth CSD 48.4 billion (over €580 million), representing an increase of 19.1% compared to 2004; 173,485 transactions were concluded on the exchange, representing an increase of 25% compared to 2004.

The Legislation Assessment mentioned above revealed that the main weaknesses were in the “Collective Investment Scheme” sector, as at the time of the assessment, there was no specific legislation dealing with this issue. (see Chart 4)
Kosovo

[Paragraph moved to 3.0. so as to serve as introduction for all sectors.]
The legal framework on capital markets in Kosovo is essentially limited to a number of UNMIK regulations applying to the banking sector as there is no stock exchange in the region. The UNMIK Regulations relevant to the capital markets are essentially: Regulation No. 1999/20 and 2001/24, “on the Banking and Payments Authority of Kosovo” – which establish and regulate the Banking and Payment Authority of Kosovo; Regulation No. 1999/13, “on the Licensing of Non-Bank Micro-Finance Institutions in Kosovo” – which provides the licensing procedure and requirements for non-bank micro-finance institutions; Regulation No. 1999/21 “on Bank Licensing, Supervision and Regulation” - which regulates the use of the term “bank”, bank licensing and revocation procedures, banks’ minimum capital, mergers and governance of banks; and Regulations No. 2004/2, 2004/10, 2005/9 and 2006/9 “on the Deterrence of Money Laundering and Related Criminal Offences”. 

Note: The extremity of each axis represents an ideal score in line with international standards such as the IOSCO Principles. The fuller the ‘web,’ the more closely the country’s capital markets laws approximate these standards.
3.2 Concessions

Serbia’s 2003 concessions law (the “Concession Law”) sets out a fairly comprehensive framework for the development of concessions in Serbia. It clearly defines sectors, activities and entities which could be developed by way of concessions, as well as the selection process. The law seems to be designed for big projects such as infrastructure (the award procedure being very much centralised), as opposed to small-sized municipal concessions. There also exists a clear general policy framework for improving the legal environment and promoting Private Sector Participation in Serbia.

The Concession Law clearly defines its scope of application (concessions, BOT and other modifications of similar arrangements included, clear identification of entities involved and sectors concerned), regulates the selection procedure and provides for a relatively flexible framework for the project agreement.

It is one of the few laws of its kind in the region to contain an implicit reference to the principles of transparency, non-discrimination, proportionality and efficiency ("equal and equitable treatment", "free market competition", "autonomy of will") and a specific obligation for the publication of information related to the competitive procedures in international media (for strategic/international projects). Also, there is a clear reference to "step-in" rights.

Concerning the selection procedure, the Concession Law not only provides clearly for the possibility of pre-selection procedure, but also simplifies the overall procedure (number of steps and bodies involved - proposal for concession award, proposal concession enactment, concession enactment/competent ministry, government, tender commission, negotiation commission and, possibly autonomous province and local self-government unit involved).

The single major shortcoming of the Concession Law is that it does not clearly define its boundaries and lacks coordination with, on one hand the Municipal Activities Law, and the Public Procurement Law provisions and on the other the sector-specific laws.

The EBRD’s 2004-2005 Concession Law Assessment which measured the quality of law on the books in its countries of operations, rated the Concession Law as being in “medium compliance” with international standards, taking into account the deficiencies referred to above. (See Charts 5, 6)
Chart 5 – Quality of Concessions legislation in the EBRD Countries of operation

Source: EBRD Concessions Sector Assessment 2004

Note: The various categories represent the level of compliance of a given country’s legislation (“the laws on the books”) with international standards such as the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects. The asterisk indicates in which category Serbia ranks.
According the EBRD’s 2006 Legal Indicator Survey, which measured the effectiveness of laws in practice, the implementation process of the Concession Law was also rated as “medium/satisfactory”.

Kosovo
Pursuant to UNMIK Regulation 1999/24, the Kosovo Trust Agency (KTA) is authorised to "grant concessions or leases with respect to enterprises," as long as these concessions are appropriate "to preserve or enhance the value, viability, or governance of the enterprise concerned." The Law on the Procedure for the Award of Concessions (the “Kosovo Law”) is a fairly comprehensive and modern piece of legislation covering definitions, multi-staged selection procedures, project agreement, termination and compensation, security interests and assignment and even unsolicited proposals. However, since the Kosovo Law was only approved in April 2006 its application in practice remains to be assessed.

3.3. Corporate Governance

Corporate governance in Serbia is mainly regulated by the new Law on Business Companies, enacted on 30 November 2004. The law details provisions on incorporation, liquidation, organisation and governance of companies. The previous Law on Enterprises remains in force only with respect to the parts dealing with socially owned companies and with the corporate governance of companies undergoing privatisation. The EBRD Corporate Governance Sector Assessment in
2004 ranked the country in “medium compliance” with OECD Principles of Corporate Governance. (see Chart 7)

Chart 7 – Quality of Corporate Governance legislation in the EBRD Countries of operation

![Chart 7](image)

**Source**: EBRD Corporate Governance Sector Assessment 2004

**Note**: The various categories represent the level of compliance of a country’s legislation (the “laws on the books”) with international standards as set out in the OECD Principles of Corporate Governance. The asterisk indicates in which category Serbia ranks.

The new law removed the requirement for employees’ representatives to serve on corporate bodies and limited the company incorporation document to the memorandum of association only. Four types of business companies can be incorporated in Serbia: partnerships, limited partnerships, limited liability companies, and joint stock companies (JSCs). Compared with the old law, the new law includes some improvements, in particular on minority shareholder protection and voting rights. However, some inconsistencies with other pieces of legislation exist.

JSCs are organised under a one-tier system and can be in closed or open form. Shares of closed JSCs can be issued only to founders. Closed JSCs can have a maximum of 100 shareholders. The minimum initial capital for JSCs is €10,000 (in dinar countervalue) for closed JSCs and €25,000 (in dinar countervalue) for open JSCs. Closed JSCs can have either a single director or a board of directors, while open JSCs must have a board of directors. Directors are appointed by the general shareholders meeting. See graph below (Chart 8) for graphical presentation of the quality of laws on corporate governance in Serbia.
In 2005, the EBRD conducted a survey for testing the effectiveness of corporate governance (how the law works in practice). A case study dealing with related-party transactions was designed. The case study investigated i) the position of a minority shareholder seeking to access corporate information on a presumed related-party transaction was indeed entered into by the company and ii) how compensation could be obtained in case damage was suffered. Effectiveness of the system for both questions was assessed based on four principal variables: complexity, speed, enforceability and institutional environment.

The survey revealed that in Serbia there are a number of avenues allowing a minority shareholder to request disclosure of corporate information. On paper, procedures are generally simple, but in reality it is difficult to predict the time needed to obtain an executable court judgement and the obstacles that could be encountered when enforcing executable judgments. Even temporary injunction procedures – which are typically requested in case of urgency – can last for several months. This shortcoming is essentially due to the slow and ineffective court system in Serbia. (See Chart 9)
Chart 9 – Effectiveness of corporate governance in Serbia (2005)

The extremity of each axis represents an ideal score: the fuller the ‘web’, the better the corporate governance framework.

When considering the institutional environment, the survey evidenced that the framework for related party transactions is quite effective and the competence of the prosecutor in corporate cases adequate. On the other hand, the quality of company information, the independence of statutory auditors, the competence and experience of courts and market regulators leaves room for improvement. Finally, corruption and partiality of judgements are reported as problems. (see Chart 10)


Note: Institutional environment refers to the capacity of a country’s legal framework to effectively implement and enforce corporate governance legislation. Statutory background relates to how comprehensive, clear and well structured a country’s definition of related-party, self-interested, self-dealing, or conflict of interest transactions is. In particular, whether this definition covers transactions in which the director or the dominant shareholder has an indirect interest (for example, the party to the transaction is a dominant shareholder’s subsidiary). Statutory integrity refers to the level of corruption within a transition country, as determined by Transparency International’s Corruption Perception Index 2005. This index is measured on a scale from 1 to 10, with 1 being the most and 10 the least corrupt environment. The extremity of each axis on the graph represents an ideal score: the fuller the ‘web’, the better the institutional environment.

Kosovo

The UNMIK Regulations relevant to corporate governance are essentially Regulation No. 2001/6 “on Business Organisations”; Regulation No. 2001/30 “on the establishment of the Kosovo board on standards for financial reporting and regime for financial reporting of business organisations” and Administrative Direction 2002/22 implementing UNMIK regulation 2001/6 on business organisations.
According to Regulation 2001/6, a business organisation in Kosovo can be established in the form of a personal business enterprise, a general partnership, a limited partnership, a joint stock company (JSC) or a limited liability company. Limited liability companies can have up to 50 shareholders; if this number is exceeded, the company must be reorganised as a JSC. The minimum capital of a JSC is €25,564.6 (i.e. former 50,000 DEM). JSCs are organised under a one-tier system, where the general shareholders meeting appoints the board of directors, which is in charge of the company management.

When considering corporate governance effectiveness, the 2005 EBRD survey revealed a situation in urgent need of reform (see Chart 11). Minority shareholders have practically no avenue to request disclosure of company information. The UNMIK Regulations do not provide any legal basis for obtaining redress. While the former Yugoslav law provides some legal basis for starting a redress action, there is reluctance by local judges to apply the Yugoslav law, which adds to the uncertainty of the case. Judicial proceedings are complex, long and judgement very difficult to enforce.

![Chart 11 - Effectiveness of corporate governance in Kosovo (2005)](image)

Note: The graphs show disclosure, redress and the institutional environment in Kosovo or delete? The average results from the case study scenarios are shown. Disclosure refers to a minority shareholder’s ability to obtain information about their company. Redress refers to the remedies available to a minority shareholder whose rights have been breached. Institutional environment refers to the capacity of a country’s legal framework to effectively implement and enforce corporate governance legislation. Costs refer to the expenses a minority shareholder must pay to take legal action. The extremity of each axis represents an ideal score: the fuller the ‘web’, the better the corporate governance framework.

When considering the institutional environment, the survey revealed weakness in all areas under consideration. The quality of corporate books and the independence of statutory auditors were only revealed to be acceptable in the case of international auditing firms. (See Chart 12)

![Chart 12 - Institutional Environment in Kosovo (2005)](image)

Note: Institutional environment refers to the capacity of a country’s legal framework to effectively implement and enforce corporate governance legislation. Statutory background relates to how comprehensive, clear and well structured a country’s definition of related-party, self-interested, self-dealing, or conflict of interest transactions is. In particular, whether this definition covers transactions in which the director or the dominant shareholder has an indirect interest (for example, the party to the transaction is a
dominant shareholder’s subsidiary). Statutory integrity refers to the level of corruption within a transition country, as determined by Transparency International’s Corruption Perception Index 2005. This index is measured on a scale from 1 to 10, with 1 being the most and 10 the least corrupt environment. In Kosovo there is neither active stock exchange nor a market regulator. The extremity of each axis on the graph represents an ideal score: the fuller the ‘web’, the better the institutional environment.

3.4. Insolvency

In 2004, the Law on Bankruptcy Proceedings (“LBP”) was passed, and 1 February 2005, it became effective, replacing the older Yugoslavian Act on Compulsory Composition with Creditors, Bankruptcy and Liquidation. The LBP was reviewed in the context of the 2004 EBRD Insolvency Sector Assessment, despite the fact that the law was only in draft form. The Assessment, which examined the extensiveness of a country’s insolvency legislation by comparing them against a set of core elements essential for an insolvency law and measuring the results against internationally recognised standards, found that the LBP had a high level of compliance ranking it amongst the highest in the EBRD countries of operation. The results are set out on the graphs below. (See Charts 13, 14)

Chart 13 – Quality of Insolvency legislation in the EBRD Countries of operation
Note: The various categories indicate the level of compliance of each country’s legislation (the “laws on the books”) with international standards, such as the World Bank’s Principles and Guidelines for Effective Insolvency and Creditor Rights Systems, the UNCITRAL Working Group on Legislative Guidelines for Insolvency Law, and others. The asterisk indicates in which category Serbia ranks.
The LBP represented a significant improvement over the earlier law. Where the earlier law offered a slow and somewhat cumbersome insolvency process which did little to create a climate for corporate restructuring, the LBP was given high scores for its commencement, hearing and determination process for insolvency cases. The law sets out clear and reasonable deadlines for bankruptcy administrators and the courts, promising a relatively swift and efficient hearing of cases. The LBP was also given high marks for its treatment of creditors, adopting the concept of “adequate protection”, fully engaging them in the proceedings and giving them significant power in the decision making process. The LBP further protects the interests of creditors by including a relatively simple means to avoid pre-bankruptcy transactions.

The reorganisation process was singled out for its encouragement of reorganisations. Where the previous law provided no mechanism to allow for funds to be advanced to the debtor on a priority basis after the filing for bankruptcy, the LBP clearly deals with the issue of post-filing priority financing.

The LBP is a modern law placing significant emphasis on the role of the bankruptcy administrator and limiting the role of the courts to judicial matters rather than day to day oversight of the process. In recognition of the need for a skilled and effective group of administrators, the LBP sets out training, examination and licensing requirements for administrators. To license and supervise the
new administrators, a separated statute created a new agency, the Bankruptcy Supervisory Agency (BSA).

The LBP also adopted the UNCITRAL Model Law on Cross Border Insolvency with only a few key exceptions. The main change to the Model Law is that the LBP modifies Article 3 of the Model Law, stating that in the case of a conflict between an international agreement to which Serbia is a party and the Model Law, the international agreement would take precedence over the Model Law only if the agreement is multilateral in nature – bilateral agreements would not take precedence in the case of a conflict between the two. Article 3 of the Model Law formally allowed all international agreements to prevail in the case of a conflict.

Despite being modern and reasonably compliant with international standards, the LBP is not without flaws. The law does not provide for a mechanism to administer estates of debtors whose assets are insufficient to meet the costs of administration. The LBP fails to provide a means whereby a third party who is suspected of having information concerning the debtor, assets and affairs generally can be compelled to provide that information to the administrator. The law also fails to provide for set off. Even the reorganisation scheme is not without shortcomings. There is no requirement for independent analysis of a reorganisation plan, no restriction on insider voting with regards to such plan, nor any ability to amend or modify the plan once it has been approved.

Relative to other EBRD countries of operation, the statute is reasonably strong. In practice, however, it appears that there is a significant gap between the extensiveness of the statute and the effectiveness of its implementation. As in most jurisdictions, it will take time to properly implement even the best laws and Serbia is no exception. The 2004 Legal Indicator Survey (LIS), which studied the effectiveness of the insolvency system in practice demonstrated that the Serbian system performed somewhat better than other countries in the survey despite scoring poorly – a reflection of the generally poor effectiveness of insolvency systems within the EBRD countries of operation. (See Chart 15) There is reason to expect that the effectiveness of the Serbian system will improve in future: the LBP came into force after the 2004 LIS was completed and should create a more efficient system; the creation of the BSA should ensure that administrators are better qualified and supervised; and the capacity building programs being run in Serbia by the EBRD, USAID, GTZ and the World Bank should improve the law, the administration of the law and the training and oversight of the insolvency administrators.

Chart 15 – Effectiveness of Serbia & Montenegro insolvency regime

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<th>Creditor-Initiated Insolvency</th>
<th>Debtor-Initiated Insolvency</th>
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<td>Access &amp; degree of formality</td>
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<td>Court identification and experience</td>
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<td>Judicial predictability and competence</td>
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<td>Management of debtor</td>
<td>Application of rule of law</td>
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<td>Enforcement and contract enforcement</td>
<td>Credit involvement</td>
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<td>Application of rule of law</td>
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<td>Judicial predictability and competence</td>
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<td>Speed</td>
<td>Enforcement and contract enforcement</td>
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<tr>
<td>Access and degree of formality</td>
<td>Speed</td>
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Source: EBRD 2004 Legal Indicator Survey on Insolvency

Note: The results have been derived from stakeholder responses to questions about the practical functioning of the insolvency regime. The fuller the “web,” the more effective the country’s insolvency regime is.
Kosovo
The Special Representative of the Secretary-General of the UN proclaimed the Law on Liquidation and Reorganisation of Legal Persons in Bankruptcy (the Kosovo Bankruptcy Law) into force, effective 14 July 2003. Pursuant to the authority granted under United Nations Security Council resolution 1244 (1999) and in conformity with United Nations Interim Administration Mission in Kosovo (UNMIK) Regulation No. 2001/9, the Kosovo Bankruptcy Law does not apply to government agencies, publicly-owned enterprises, insurance companies and financial institutions and appears to rely heavily on the Montenegro Bankruptcy Law. Under the Kosovo Bankruptcy Law, bankruptcy cases are heard by the specialised District Economic Court located in the jurisdiction in which the debtor’s principal place of business is located. The bankruptcy process may be initiated by either the debtor or a creditor and would begin with the submission of a petition to the court. The law sets relatively strict and transparent (i.e. easily identifiable and measurable) conditions under which the debtor or a creditor may submit a bankruptcy petition.

3.5. Secured Transactions

In 2001, with EBRD technical assistance, Serbia undertook to reform its secured transactions and a Law on Registered Charges over Movable Property was adopted by the Serbian parliament in May 2003. It provides for the first time in the country the legal means by which lenders, investors and borrowers can secure their operations. The new provisions create a new legal instrument (registered charge) by which movable and intangible assets can be encumbered while the borrower remains in possession of the collateral. The collateral can comprise a wide range of assets, including inventory, receivable accounts, and future assets. Full publicity is provided via a notice filing system, which clearly establishes priority ranking. Provisions ensure that, after a transition period, tax-related claims would also be subject to priority ranking based on registration of the claim. Finally, parties are free to agree on an out-of-court enforcement procedure and collateral realisation either by direct negotiated sale or public auction. The EBRD Regional Survey of Secured Transactions Legislation 2004 qualified the framework for secured transactions of Serbia and Montenegro (though it was mostly the Serbian framework being assessed) as a modern system with some defects (see Chart 16).
Chart 16 – Quality of secured transactions legislation in the EBRD Countries of operation

Montenegro

*Source: EBRD Regional Survey of Secured Transactions Legislation 2004

Note: The level of reform referred to in the legend above is assessed in relation to the EBRD’s Model Law on Secured Transactions and the ’ten core principles of secured transactions law.’ The asterisk indicates in which category Serbia ranks.

Officially entered into force on 1 January 2004, the Law on Registered Charges over Movable Property did not in effect operate until 15 August 2005 when the Charge Register started to function. The Charge Register is operated by the Business Registration Agency, an independent body which also operates the Company / Business Register and Leasing Register. Early feedback
regarding the register was generally positive, in particular it seems that micro and SME financing is using the new system with general satisfaction. However, it is unclear whether the Register has been set up in a way which would enable to take advantage of the advanced features of the Law on Registered Charges over Movables Property, in particular with regard to the description of the collateral.

Charts below make a graphical presentation of the results of the EBRD New Legal Indicator Survey 2003 regarding the effectiveness of the secured transactions framework. (see Charts 17, 18)

Note: The chart shows how much a secured creditor can expect to recover (amount), how quickly (time), and how simply (simplicity). The higher the bar, the more efficient and creditor-friendly the system is.


Note: “Process” factors measure the impact that specific obstacles would have on the enforcement proceedings. “Scope” factors give an indication of how effective enforcement would be when conducted on various types of collateral and in the context of debtor insolvency. The fuller the coloured area, the more serious the problems are.
Secured Transactions in Kosovo are governed by Regulation No. 2001/5 on Pledges promulgated by the Special Representative of the United Nations (UN) Secretary General under the authority of the UN Interim Administration Mission in Kosovo (UNMIK) pursuant to the authority of UN Security Council resolution 1244 (1999) of 10 June 1999. The Regulation on Pledges entered into force on 7 February 2001. The Law, influenced by US Article 9 of the Uniform Commercial Code, provides for a regime by which pledges are created via an agreement, and attach to the charged assets, but become only perfected (that is, opposable to third parties) when registered or when possession of the collateral is transferred by the chargor.

The Law provides extensive rules on priority, types of collateral, and enforcement of the pledge. There is some concern on the adaptation of the law into local legal tradition – discussion with some banks’ in-house lawyers seemed to suggest that some of the law’s features were not well understood.

It also provides perfection of the pledge by notice filing. The Registry started operating at the end of 2001. The management of the registry was contracted to an association, Kosovo Credit Information Services (KCIS), for two years. KCIS founders and management board are drawn from the microfinance and banking community in Kosovo. KCIS expressed some concerns on the institutional set up of the system, in particular on the relationships between the registry, the government and USAID, who supplied the software. Also, some comments were expressed by some that the Regulation presented important flaws and needed some key amendments. Although there were indications in 2004-2005 that the Bureau of Payment of Kosovo (BPK) could take over KCIS or KCIS functions, to create a compulsory credit bureau, which may entail taking over the Pledge Registry, it is unclear whether this will happened at all. Such fragility in the system is most regrettable.

3.6. Telecommunications

The sector is currently regulated by the Republic Agency for Telecommunications (RATEL) and governed by the Law on Communications, 2003. RATEL was established as an independent regulatory agency in 2005 and is currently implementing the new regulatory framework for the sector as set out in the 2003 Law. This law reflects internationally accepted standards and is a major step towards harmonisation with relevant European Union sector standards. The Ministry for Capital Investment (the “MKI”) – a successor to the Ministry for Transport and Communications – is responsible for longer term sector strategy.

On the operational side, the partly state owned incumbent operator, Telekom Srbija (‘TS’), was partially privatised in 1999, with the Milosevic government selling a 49% stake to a consortium comprising Telecom Italia and OTE (partly state owned Greek incumbent operator). Partial renationalisation of TS occurred toward the end of 2003 with the purchase by the Serbian government of the Telecom Italia shareholding. The state shareholding is held by PTT Srbija (state owned post and telecom holding company). Although the TS monopoly was abolished in June 2005, alternative fixed operators of substance have yet to make any impact in the market place.

In mobile telephony, competition in Serbia is currently divided among two operators, Mobilna Telefonija Srbije (MTS- the mobile arm of TS) and Mobtel. Mobtel was formerly jointly owned by PTT Srbija and the BK Group through a complicated and conflicting cross-ownership structure. Mobtel was seized by the authorities in December 2005 following allegations that it contravened its licence. Following interim administration of Mobtel (renamed Mobi 63) by TS, the Government
successfully completed a tender for the sale of the Mobtel licence and network to the Norwegian Telenor group in August 2006. It is expected Mobi 63 will be re-branded to reflect its new ownership. MTS and Mobi 63 are expected to be joined in late 2006/early 2007 by a third mobile operator, the licence tender having been launched in September 2006. Mobile teledensity reached approximately 75% by Q3 of 2006 and it remains a major driver of the overall growth in domestic telecom sector. The growth in the Mobile market should continue given the impetus which the fresh competition, enabled by the events above, should give to the market.

Communications in Serbia represents one of the last untapped marketplaces in Europe. While there appears enormous potential, events of the past decade and a half have left the sector neglected and resulted in one of the most undeveloped markets in Europe. However, the significant positive developments of the last two years indicate an apparent commitment on the part of the Government to tackle and resolve the major sector issues. Recent privatisation of Mobtel/Mobi 63 and the announcement of a third mobile licence should significantly enhance competition. In addition, the establishment of RATEL is a major step in the implementation of the sector’s legal and regulatory framework.

Going forward, the momentum seen in reform and implementation over the past 18-24 months must be maintained. RATEL and MKI must be fully supported by the Government in their implementation of crucial reforms. RATEL for its part must move quickly to draw up and implement all secondary legislation necessary for the full functioning of the new regulatory environment. Key issues for RATEL are the facilitation of meaningful competition across the sector through full implementation of a modern, non-discriminatory and transparent interconnection regime and adoption of cost oriented tariffing for regulated services. MKI must urgently finalise and adopt a clear strategy for the sector, issuing publicly available sector policy and strategy documents at the earliest juncture. These documents must clearly direct sector development towards attracting private investment through maximising private participation in the sector (including the appropriately timed privatisation of TS). Both the MKI and RATEL should also seek to settle policy and implementation plans for universal service.

Kosovo

The telecommunications sector in Kosovo is formally regulated by a combination of the Ministry of Transport and Communications (MTC) of the Provisional Institutions of Self-Government (PISG) and the Telecommunications Regulatory Authority (TRA) on the basis of the framework Telecommunications Law of 2003 and relevant regulations of the United Nations Mission in Kosovo acting as the transitional administration (UNMIK). The 2003 law provides for a regulatory body for telecommunications (TRA) which was formally established in 2004.

With respect to the operational environment, since cessation of hostilities in 1999, all public fixed telecommunications facilities (with the exception of certain exchanges in areas of Serb population) have been operated by Posts and Telecommunications of Kosovo (“PTK”). At present, PTK falls under the authority of the UNMIK controlled Kosovo Trust Agency (KTA). KTA administers the assets of all publicly and socially-owned enterprises in trust in Kosovo.

Only one provider is currently legally operational in the mobile market: Vala900 (a PTK held “newco” established by UNMIK) operating a service hub from the Principality of Monaco (using an international access code assigned to Monaco). Vala900 operates pursuant to a contract awarded in December 1999 following a tender invitation by UNMIK, subsequently extended. A tender for a second mobile licence was held in June 2004, though the result was subsequently invalidated by UNMIK following a report of the Kosovo Auditor General’s Office citing instances of non-compliance within the pre-qualification evaluation, compliance errors and inconsistencies.
throughout the tender process. The launching of a new tender for a second GSM licence is anticipated during Q4 of 2006. In addition to Vala900, Serbian operator Mobtel provided service pursuant to its pre-1999 nationwide (including Kosovo) licence. However in December 2006, in a coincidental closely timed move, the Government of Serbia cancelled Mobtel’s licence (and appointed Telekom Srbija to manage Mobtel), while in Kosovo the authorities moved to close down Mobtel Kosovo operations when Mobtel claimed the operator had sold its rights to operate in the Kosovo without receiving the required approval from the Serbian cabinet.

While practical implementation of the new regulatory regime continues, the sector in Kosovo continues to operate without clear strategic direction. In this respect PISG and MTC (in consultation with UNMIK, where appropriate) should move swiftly to adopt an appropriate policy and strategy for the development of the sector. Such strategy should seek to attract investment into the sector through the maximisation of private participation in the sector, ideally through appropriately timed liberalisation and privatisation of publicly held sector assets. Further, as an appropriate regulatory environment is critical to the attraction of the necessary private investment, PISG and MTC should continue to respect TRA independence and support it in the full implementation of all provisions of the legal and regulatory framework. TRA for its part should move swiftly to fully implement all provisions of the framework currently within its authority.

The EBRD is currently providing the authorities in Kosovo with technical assistance aimed at addressing three interrelated priority areas for telecommunications sector development: strategic policy; practical assistance to TRA; and, assistance addressing numbering and access code peculiarities currently hindering sector development.