Law in transition
Spring 2002

Page 1
Foreword
Noreen Doyle, First Vice President, Banking, EBRD

Page 2
Ten years of progress for intellectual property rights in transition countries
Jenő Bobotványi, Acting Director, Division for Co-operation with certain Countries in Europe and Asia, World Intellectual Property Organisation

Page 10
Fighting corruption through an independent judicial system
Peter Eigen, Chairman, Transparency International

Page 16
European energy security and co-operation: the Energy Charter Treaty and its Protocol on Transit
Karl Petter Waern, Senior Expert, the Energy Charter Secretariat

Page 23
The EU acquis communautaire and the position of employees in the event of their employer's insolvency: a comparison of statutory regulations
Mario Thumer, Managing Director, and Anton Kraft, Project Manager Research, Centre of Legal Competence

Page 30
Focus on southeastern Europe

Page 31
Private sector development and the role of the EBRD in southeastern Europe
Olivier Descamps, Business Group Director, EBRD

Page 39
Reforming the legal environment in post-conflict societies: legal and policy aspects of the EBRD’s activities in southeastern Europe
Kamen Zahariev, Senior Counsel, EBRD

Page 44
Survey of judicial codes of conduct in south-eastern Europe
Angela K. Conway, Country Director, & Amanda Gilman, Program Associate, American Bar Association – Central and East European Law Initiative

Page 51
Mobilising the private sector in municipal infrastructure projects in southeastern Europe
Kate & Associates, Eurolex Bulgaria, Law Office Bogdaranovic & Dolicki, Law Office Polonak, Nestor Nestor Diculescu, Karanovic & Nikolic Adekadi

Page 62
Romania’s legal regime for security interests in personal property
Cristina I. Stoica and Valeriu Stoica, Stoica & Associates

Page 67
Bulgaria: from paper-based registries to electronic, central registries
Stephan Z. Kyutchukov, Partner, Djingov, Kyutchukov & Velichkov

Page 72
Legal transition developments

Page 78
Legal transition events

The European Bank for Reconstruction and Development (EBRD) is an international institution whose members comprise 60 countries, the European Community and the European Investment Bank. The EBRD operates in the countries of central and eastern Europe and the Commonwealth of Independent States committed to multiparty democracy, pluralism, and market economies. The EBRD’s countries of operations are: Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, FR Yugoslavia, F.Y.R. Macedonia, Georgia, Hungary, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Poland, Romania, Russian Federation, Slovakia, Slovenia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan.

The EBRD works through the Legal Transition Programme, which is administered by the Office of the General Counsel, to improve the legal environment of the countries in which the EBRD operates. The purpose of the Legal Transition Programme is to foster interest in, and help to define, legal reform throughout the region. The EBRD supports this goal by providing or mobilising technical assistance for specific legal assistance projects which are requested or supported by governments of the region. Legal reform activities focus on the development of the legal rules, institutions and culture on which a vibrant market-oriented economy depends.

Law in transition is a publication of the Office of the General Council of the EBRD. It is published twice a year and is available in English and Russian. The editors welcome ideas, contributions and letters, but assume no responsibility regarding them. Submissions should be sent to: David Bernstein, Office of the General Counsel, EBRD, One Exchange Square, London EC2A 2JN, United Kingdom; or bernsted@ebrd.com

The contents of Law in transition are copyrighted and reflect the opinions of the individual authors and do not necessarily reflect the views of the authors’ employers, law firms, the editors, the EBRD’s Office of the General Counsel or the EBRD generally. Nothing in the articles should be taken as legal advice.


All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, including photocopying and recording, without the written permission of the copyright holder. Such written permission must also be obtained before any part of this publication is stored in a retrieval system of any nature.

European Bank for Reconstruction and Development
One Exchange Square
London EC2A 2JN
United Kingdom
Tel: +44 20 7338 6100
Fax: +44 20 7338 6100
http://www.ebrd.com

Law in transition is printed on FSC-certified paper. The publisher and printers have taken measures to reduce the environmental impact of the production of this issue by using environmentally responsible paper and inks and by the use of a low-impact, waterless offset litho process.

Ref: 3188 Law in transition, Spring 2002.
Making up for lost time in south-eastern Europe: unlocking investment by improving governance

This issue of Law in transition, published in conjunction with the EBRD’s 2002 Annual Meeting in Bucharest, provides the Bank with an opportunity to focus its attention on south-eastern Europe (SEE), a region that has presented the EBRD and other investors with a unique set of transition risks and challenges. Recent developments in the region may now provide the opportunity for SEE countries to make up for lost time and increase the pace of their transition to market economies and multiparty democracies.

While all of the EBRD’s countries of operations have had to struggle with the challenges of simultaneously transforming their political and economic systems, many of the SEE countries have had to undertake these transformations in the shadow of war and civil conflict. This added level of political instability and insecurity has resulted in investors remaining on the sidelines or putting their money into more reliable and safe markets. Foreign direct investment per capita into SEE has only been one-quarter of that achieved in central Europe and the Baltic states since 1999. The EBRD, however, has been active in the region: at the end of 2001, the Bank had committed £4.319 million in debt and equity to the seven SEE countries (Albania, Bosnia and Herzegovina, Bulgaria, Croatia, FR Yugoslavia, FYR Macedonia and Romania).

With the recent political changes in the Federal Republic of Yugoslavia and the negotiated end to ethnic strife in the Former Yugoslav Republic of Macedonia late last year, SEE countries are now entering a period of greater political stability that can restore investor confidence. However, to attract the investment necessary to advance economic transition, these countries must double their efforts to build the effective institutions and undertake the structural reforms that have proven critical to economic growth and development. SEE can now learn from and improve on a decade of transition in central and eastern Europe.

The EBRD’s experience has shown that a key component of successful transition is the establishment of sound governance, both at the micro and macro levels. In the early stages of transition, the EBRD was faced with the task of identifying commercially viable investments in SEE. Now, good private sector projects can be identified but investors are put at risk by poor corporate governance practices and a lack of transparency from managers and controlling shareholders. While inadequate corporate governance has been identified as an impediment to investment throughout the transition countries, the problem is more acute in SEE.

Recently, SEE countries have begun to make up ground by building the legal foundation for sound economic development. In some commercial legal areas, such as pledge and company laws, SEE countries are perceived as close to or on a par with EU accession countries. However, in other areas critical to improving corporate governance, such as bankruptcy and capital market reform, SEE countries lag behind their neighbours. In order to correct the micro-level governance problems in the region, SEE countries must continue to bring their laws and regulations up to best international practice as well as focus additional resources on building institutions that can effectively implement these laws.

The corporate governance constraints to attracting foreign, direct investment are compounded by public sector governance failings in SEE. The EBRD and others have documented the negative effects that poor state institutions have on economic transition. Corruption, ever-changing investment laws and regulations and a weak, ineffective judiciary are impediments to attracting investment in several of the SEE countries. In surveys conducted by the EBRD, investors have indicated that their lack of interest in SEE is due to ineffective protection of property rights and contract enforcement by SEE judiciaries as well as uncertainty and instability in privatisation policy. Addressing and adequately funding judicial reform, deciding on a transparent, long-term privatisation policy and creating effective legal institutions, should be high priorities for SEE countries if they are to overcome investor fears.

The governance problems that SEE countries must address in order to advance economic and political transition are not new - all transition and developing countries are grappling with the same issues. What is new for many of the SEE countries is that after ten years of war and conflict, there is sufficient political stability in the region to permit these countries to focus their energy on building sound governance principles and practices. Over the past decade of transition the EBRD has gained experience in helping private companies and governments identify solutions to their governance problems and the Bank is now putting this experience to good use in countries of SEE.
Ten years of progress for intellectual property rights in transition countries

Intellectual property refers to the legal rights that result from intellectual activity in all types of fields – scientific, technological, literary and artistic. There are two main reasons that justify the existence of laws to protect intellectual property. Firstly, they give statutory expression to the moral and economic rights of creators and the rights of the public accessing those creations. Secondly, as intentional acts of government policy, they promote creativity, disseminate the application of its results and encourage fair trading – all of which contribute to positive economic and social development. This article explores the advances made in intellectual property law in transition countries over the last ten years and the work of the World Intellectual Property Organisation (WIPO) to facilitate such progress.
WIPO is a specialised agency of the United Nations (UN) focusing on global cooperation in intellectual property. It aims to promote creativity, innovation, technological exchange, economic growth and cultural development. It attempts to fulfill its global mandate concerning the promotion and protection of intellectual property rights by harmonising certain norms of international intellectual property law through the work of its Standing Committees and by administering certain global treaties. In this way WIPO can provide global intellectual property services and facilitate the acquisition and maintenance of industrial property rights.

It is widely recognised that over the last decade, economic, technical and legal developments have increased international attention on intellectual property. Economic factors have influenced the increasing importance of intellectual property protection. Globalisation and the liberalisation of world markets have intensified competition among companies. Increasingly, resources of an intellectual nature (as opposed to physical assets), are of crucial importance to businesses. The development of intellectual property rights is due to a large extent to the revolutionary technological advances that have been made in the fields of information technology and biotechnology over the last decade. Such technologies are difficult and expensive to develop, but easy and cheap to imitate, therefore requiring more protection than traditional technologies. At a corporate level, it is widely recognised that intellectual property particularly inventions, designs and trademarks, represents intangible assets and intellectual value components of certain market commodities which provide an important competitive edge in technological innovation and marketing. Creating and developing such assets involves substantial investment and risk-taking. On the other hand, their use introduces sophisticated and distinctive products into the market and is therefore linked to economic growth and cultural development. This often generates considerable income.

As a consequence of economic and technological advances, the need for appropriate intellectual property protection has been recognised at national, regional and global levels of trade policy. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) is the result of this global recognition. The legal protection of intellectual property is highly important for empowering the holders of these intangible assets. Intellectual property rights are legal vehicles for these values as they provide exclusive rights for their industrial and commercial use, thus allowing the recuperation of the investment made and a fair return on the work of inventors or authors. Legal protection prevents the imitation and misappropriation of intellectual values, and establishes a legal basis for technology transfer, sales and licensing.

An efficient intellectual property framework constitutes a precondition for the confidence and willingness of foreign investors to enter into economic commitments in any country. The legal and organisational infrastructure for the protection of intellectual property has the same importance for the technological, economic and cultural development of a country as roads and bridges do for the transport of goods and services.

WIPO and its member countries, including transition countries, closely follow intellectual property related global issues. These issues concern: electronic commerce, particularly the conflict of domain names and trademarks; the patentability of business methods; the prior art effect of internet publications; and jurisdiction and applicable law. There are also important issues concerning biotechnology, particularly the patentability of biotechnological inventions; the protection of plants; the biological disclosure by deposit of biological material or by DNA sequence listing; traditional knowledge; and genetic resources and folklore.

**Intellectual property systems in transition countries**

One of the focus areas of WIPO’s work is assisting developing countries and transition countries to utilise intellectual property-oriented market developments as a platform for their economic transformation. During the period that transition countries were governed under command economies, their intellectual property laws were distorted or hindered in functioning. In several countries the state practically expropriated inventions by means of the so-called “socialist protection form” of an inventor’s certificate. During the first decade of transition of these countries to market economies, there was a renaissance of the concepts of intellectual property protection.
The legal and organisational infrastructure for the protection of intellectual property has the same importance for the technological, economic and cultural development of a country as roads and bridges do for the transport of goods and services.

This meant not only the introduction or reintroduction of classical market-oriented intellectual property laws but also the beginning of significant efforts to bring these laws into compliance with the TRIPS Agreement, the WIPO treaties and European norms and to further develop the intellectual property sector.

The 27 countries in transition in Europe and Central Asia have differing levels of development, diverse languages, religions and cultural traditions, dissimilar social problems and vastly different needs and political orientation. For reasons of policy coordination, WIPO distinguishes between two groups of countries: the central European and Baltic states group\(^2\) and the Caucasian, Central Asian and eastern European countries group.\(^3\) Among the countries in these groups there are 20 newly independent countries (underlined in the footnotes) that have established their national intellectual property legislation and administrations and joined WIPO during the last ten years. Most of them are still in the process of developing their intellectual property sectors through the preparation of new legislation or the amendment of existing legislation, human resources development, institution building and modernisation, with the aim of joining the World Trade Organisation (WTO).

In seven of the transition countries\(^4\) the protection of intellectual property through traditional laws, institutions and human resources has been evolving over almost a hundred years. Central European countries are mostly “old” members of WIPO and the WTO, and aim to establish closer ties and cooperation with the EU, the European Patent Organisation (EPO)\(^5\) and other European institutions. Some of the countries in the group of Caucasian, Central Asian and eastern European countries have set up regional organisations in close cooperation with WIPO, such as the Interstate Council on the Protection of Industrial Property and the Eurasian Patent Organisation.

WIPO has developed a cooperation programme focusing on transition countries. The objectives of this programme are to assist in reforming and strengthening intellectual property systems and to encourage their effective use. Within the programme, WIPO continues to assist in strengthening national policies and legal frameworks of intellectual property, taking into account relevant international standards and trends. It also focuses on the modernisation of industrial property and copyright administrations, human resources development and the introduction of modern management systems. Special efforts are being made to support national administrations in expanding their access to technological, legal and other relevant information. WIPO assists the respective countries in increasing general awareness of the fact that effective protection and proper use of intellectual property are essential for access to markets, foreign investments and the transfer of technology.

WIPO assistance has resulted in the adoption of new intellectual property laws or the amendment of existing ones and has enabled the transition countries to accede to the most important treaties administered by WIPO and the regional organisations (see Tables 1 and 2). In addition, these countries have set up or modernised intellectual property offices and other institutions. They have also upgraded patent information services and human resources, partly through WIPO’s assistance and with the aid of regional organisations working within the framework of the EU’s RIPP and TACIS programmes.\(^6\) As a result of these developments and through cooperation in the framework of WIPO, 20 newly independent countries have been integrated into the global intellectual property community during the last decade.

**Progress of patent laws**

During the last ten years, patent laws have been enacted, renewed or amended in most transition countries, mainly in order to comply with the Paris Convention, the TRIPS Agreement, the Patent Cooperation Treaty (PCT) and, in the case of the central Europe and Baltic states, with the European Patent Convention and its Regulations and the European Directives and Council Regulations. The essential elements of patent law revision concern the availability, scope and use of patent rights in accordance with the TRIPS Agreement.

A recently adopted Patent Law Treaty (PLT) streamlines formalities and procedures for national and regional patent applications and patents.\(^7\) It provides for simple filing date requirements, a standardised set of formal requirements, simplified procedures, means for avoiding unintentional loss of rights and basic principles for electronic filing. Users...
Table 1: State parties to IP related treaties in the central European and Baltic states (as of 1 January 2002)

<table>
<thead>
<tr>
<th></th>
<th>Bulgaria</th>
<th>Czech Republic</th>
<th>Estonia</th>
<th>Hungary</th>
<th>Latvia</th>
<th>Lithuania</th>
<th>Poland</th>
<th>Romania</th>
<th>Slovenia</th>
<th>Slovak Republic</th>
<th>Albania</th>
<th>Bosnia and Herzegovina</th>
<th>Croatia</th>
<th>FYR Macedonia</th>
<th>FYR Yugoslavia</th>
</tr>
</thead>
<tbody>
<tr>
<td>W</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
</tr>
<tr>
<td>P</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
</tr>
<tr>
<td>MM</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
</tr>
<tr>
<td>MP</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
</tr>
<tr>
<td>PCT</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
</tr>
<tr>
<td>PLT</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
</tr>
<tr>
<td>TLT</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
</tr>
<tr>
<td>H</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
</tr>
<tr>
<td>GH</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
</tr>
<tr>
<td>BP</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
</tr>
<tr>
<td>LI</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
</tr>
<tr>
<td>IPC</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
</tr>
<tr>
<td>N</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
</tr>
<tr>
<td>VC</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
</tr>
<tr>
<td>LO</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
</tr>
<tr>
<td>MI</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NOS</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
</tr>
<tr>
<td>UV</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
</tr>
<tr>
<td>B</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
</tr>
<tr>
<td>RO</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
</tr>
<tr>
<td>PH</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
</tr>
<tr>
<td>S</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
</tr>
<tr>
<td>WCT</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
</tr>
<tr>
<td>WPPT</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
</tr>
<tr>
<td>WTO</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
</tr>
<tr>
<td>EPO</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
</tr>
<tr>
<td>EA</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

| W        | WIPO Convention |
| P        | Paris Convention |
| MM       | Madrid Agreement (Marks) |
| MP       | Protocol to the Madrid Agreement |
| PCT      | Patent Cooperation Treaty |
| PLT      | Patent Law Treaty (Signatories) |
| TLT      | Trademark Law Treaty |
| H        | Hague Agreement (Industrial Designs) |
| GH       | Geneva Act of Hague (Signatories) |
| BP       | Budapest Treaty |
| LI       | Lisbon Agreement |
| IPC      | Strasbourg Agreement |
| N        | Nice Agreement |
| VC       | Vienna Agreement |
| LO       | Locarno Agreement |
| MI       | Madrid Agreement (Indications of Source) |
| NOS      | Nairobi Treaty |
| UV       | International Convention (New Varieties of Plants) |
| B        | Berne Convention |
| RO       | Rome Convention |
| PH       | Phonograms Convention |
| S        | Satellite Convention |
| WCT      | WIPO Copyright Treaty (Ratifications) |
| WPPT     | WIPO Performances and Phonograms Treaty (Ratifications) |
| WTO      | World Trade Organisation |
| EPO      | Accession to EPO in 2002 |
| EA       | Extension Agreement on European Patents |
Table 2: State parties to IP related treaties in the Caucasus, Central Asia and eastern Europe (as of 1 January 2002)

<table>
<thead>
<tr>
<th></th>
<th>Armenia</th>
<th>Azerbaijan</th>
<th>Georgia</th>
<th>Kazakhstan</th>
<th>Kyrgyzstan</th>
<th>Tajikistan</th>
<th>Turkmenistan</th>
<th>Uzbekistan</th>
<th>Belarus</th>
<th>Moldova</th>
<th>Russia</th>
<th>Ukraine</th>
</tr>
</thead>
<tbody>
<tr>
<td>W</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
</tr>
<tr>
<td>P</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
</tr>
<tr>
<td>MM</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
</tr>
<tr>
<td>MP</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
</tr>
<tr>
<td>PCT</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
</tr>
<tr>
<td>PLT</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
</tr>
<tr>
<td>TLT</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
</tr>
<tr>
<td>H</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
</tr>
<tr>
<td>GH</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
</tr>
<tr>
<td>BP</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
</tr>
<tr>
<td>LI</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
</tr>
<tr>
<td>IPC</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
</tr>
<tr>
<td>N</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
</tr>
<tr>
<td>VC</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
</tr>
<tr>
<td>LO</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
</tr>
<tr>
<td>MI</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
</tr>
<tr>
<td>NOS</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
</tr>
<tr>
<td>UV</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
</tr>
<tr>
<td>B</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
</tr>
<tr>
<td>RO</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
</tr>
<tr>
<td>PH</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
</tr>
<tr>
<td>S</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
</tr>
<tr>
<td>WCT</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
</tr>
<tr>
<td>WPPT</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
</tr>
<tr>
<td>WTO</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
</tr>
<tr>
<td>EAPO</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
</tr>
</tbody>
</table>

W: WIPO Convention  
P: Paris Convention  
MM: Madrid Agreement (Marks)  
MP: Protocol to the Madrid Agreement  
PCT: Patent Cooperation Treaty  
PLT: Patent Law Treaty (Signatories)  
TLT: Trademark Law Treaty  
H: Hague Agreement (Industrial Designs)  
GH: Geneva Act of Hague (Signatories)  
BP: Budapest Treaty  
LI: Lisbon Agreement  
IPC: Strasbourg Agreement  
N: Nice Agreement  

VC: Vienna Agreement  
LO: Locarno Agreement  
MI: Madrid Agreement (Indications of Source)  
NOS: Nairobi Treaty  
UV: International Convention (New Varieties of Plants)  
B: Berne Convention  
RO: Rome Convention  
PH: Phonograms Convention  
S: Satellite Convention  
WCT: WIPO Copyright Treaty (Ratifications)  
WPPT: WIPO Performances and Phonograms Treaty (Ratifications)  
WTO: World Trade Organisation  
EAPO: Eurasian Patent Organisation (EAPO) membership
of the patent system will be able to rely upon predictable and simple procedures for filing national and regional patent applications and for the maintenance of patents in all Contracting Parties. The PLT will enter into force three months after ten countries have deposited their instruments of ratification or accession. WIPO is also promoting the accession of transition countries to the PLT.

The adoption of the PLT has opened the door for discussions on substantive harmonisation of patent law. This encouraging perspective will hopefully lead to results which will positively affect the examination of applications and obtaining of patents throughout the world. Such work will have to be closely coordinated with the ongoing efforts on the reform of the PCT. It is hoped that the reciprocal influence of these related exercises with the participation of the transition countries will be an important factor in the development of an effective international patent system.

With respect to regional cooperation in the patent field, the countries of central Europe and the Baltic states have entered into close cooperation with the EPO. Seven countries9 concluded agreements on the extension of European patents to their territory and ten countries10 have been invited to accede to the European Patent Convention with effect from 1 July 2002. The accession will strengthen the European Patent Convention with effect from all of the Contracting States by a single registration covering all of the respective European Directives, Council Regulations and towards the accession to the

Progress of the trademark and industrial design laws and the laws on geographical indications

The increased competitive value of trademarks, industrial designs and geographical indications11 require a higher level of protection at regional, national and international levels. Consequently, the most important developments in international intellectual property law during the last decade have aimed at strengthening the protection of these rights and simplifying the procedures for obtaining such protection. The requirements below serve as a basis for the renewal and amendment of the respective laws and procedures:

- compliance with the standards of the TRIPS Agreement concerning the availability, scope and use of trademark rights and rights involving industrial designs and geographical indications;
- compliance with the standards of the Trademark Law Treaty harmonising and simplifying national trademark procedures;
- improvement of the protection of well known marks in accordance with the WIPO Joint Recommendation adopted in September 1999;
- harmonisation and simplification of the formal requirements for the recording of trademark licences in accordance with the WIPO Joint Recommendation adopted in 2000;
- protection of trademarks on the internet, in particular concerning abusive domain name registration and use of trademarks on the internet in accordance with the WIPO Joint Recommendation adopted in 2001;
- the addressing of conflicts between trademarks and certain other signs, in particular International Non-proprietary Names (INNs) of pharmaceuticals; and
- enlargement of the geographical scope of the Madrid Agreement and Protocol to it on the international registration of trademarks and the Hague Agreement and its Geneva Act concerning the international deposit of industrial designs.

Through the EU integration process12 many of the central European countries and Baltic states are oriented towards compliance with the respective European Directives, Council Regulations and towards the accession to the

[10] Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, the Slovak Republic and Slovenia.
[12] A trademark is a badge of identity and performs functions which are related to the distinguishing of marked goods or services, their origin, their quality and their promotion in the market place. Industrial designs, such as ornamental appearances of products, appeal to the eye and the aesthetic sense of the buyers. Geographical indications identify goods as originating in the territory of a country or a region or locality in that territory, where a given quality, reputation or other characteristic of the goods is essentially attributable to its geographic origin.
[13] The approximation of laws to the Council Directives is aimed at avoiding disparities which may distort competition. The European Community Trademark System provides for a single registration covering all member states of the EU.
it is not unusual to have combinations of the use or disclosure of business secrets. Finally, criminal, administrative, commercial or civil of another law. Other countries have enacted legislation on unfair competition or as part of trade secrets, either under the specific and legal provisions. Some countries have rised use and disclosure by various methods. The transition countries have regulated in the process of elaborating similar laws.

The protection of these special creations is required by the TRIPS Agreement. Protecting intellectual property in integrated circuits is very important because unauthorised copying and the use of innovative semiconductor chips causes substantial losses of revenue to innovative semiconductor companies. Given the complexity of integrated circuits, almost all intellectual property rights come into play when protecting the rights of those who invest in the design and production of such circuits. Several transition countries have adopted special laws on the protection of layout-designs of integrated circuits, and other countries are in the process of elaborating similar laws.

The transition countries have regulated the protection of trade secrets against unauthorised use and disclosure by various methods and legal provisions. Some countries have enacted special provisions for the protection of trade secrets, either under the specific legislation on unfair competition or as part of another law. Other countries have enacted criminal, administrative, commercial or civil law provisions prohibiting the unauthorised use or disclosure of business secrets. Finally, it is not unusual to have combinations of the above means of protection available.

The progress of copyright laws
In the field of copyright, most transition countries have adopted or renewed their respective laws to make them compliant with the Berne Convention, the Rome Convention, the Phonograms Convention and the TRIPS Agreement.

In December 1996 two new international treaties were adopted at the Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions, namely the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). These two WIPO “Internet treaties” provide international protection, attempting to meet challenges presented by modern digital communication technology, particularly the Internet. These treaties, the promotion of which has been a priority activity of WIPO, have already been ratified or implemented by several transition countries. Compliance with the European Copyright Directives represents another challenge for the countries aiming to join the EU.

Participation of transition countries in intellectual property-related activities
Transition countries have been active participants in a series of intellectual property-related activities of WIPO, such as:

- institution building focusing on modernising and strengthening the capacities of patent offices, copyright agencies and organisations for collective management of copyright and related rights;
- human resource development by awareness-building, distance learning and providing forums for decision makers, policy advisers and professionals;
- development of information technology, in particular WIPonet and information technology services in the framework of the Standing Committee on Information Technologies;
- upgrading the capacity of governmental, private and civil society to meet the intellectual property needs of small and medium-sized enterprises (SMEs);
- development of infrastructure services and innovation promotion, in particular cooperation with associations of inventors, and innovation support centres by the organisation of exhibitions and the granting of awards.

Strengthening of enforcement
WIPO views the strengthening of enforcement mechanisms of intellectual property rights as a crucial element to the advancement of intellectual property protection. The enhancement of intellectual property implementation mechanisms has become increasingly important due to the expansion of imitation technologies which facilitate the infringement of protected creations of mind and commercial symbols. Violations of intellectual property rights are rampant in several countries. Some of the consequences of trademark violations, counterfeits and patent infringements are:

- consumers are cheated and health and safety is jeopardised when consumers purchase counterfeit pharmaceuticals, food, beverages, spare parts and other goods;
- jobs are lost, the black market economy expands, governments lose considerable revenue in uncollected taxes;
- the reputation of valued trademarks and patents is damaged as low quality imitations flood the market;
- intellectual property rights without effective enforcement are regarded as “paper tigers” without meaningful value;
- foreign and domestic investments are hindered as companies prefer investing in countries where intellectual property rights are protected;
- the price of imported technology increases as the owner of technology translates his or her higher legal risk into a higher price;
- admission of certain countries to key multilateral organisations (for example, the WTO) is delayed.

Effective enforcement is possible through vigilance and the coordinated efforts of governments, enforcement agencies, right holders and the public. The development of appropriate enforcement mechanisms has been an area of concern to WIPO, the WTO and other organisations and to transition countries, as well as, in recent years, to the private sector which has been cooperating with such organisations (in particular the Coalition for Intellectual Property Rights (CIPR) concerning the CIS countries).
The invigoration of intellectual property systems, the strengthening of the capabilities of the judiciary, police, customs and other enforcement agencies by informing and training such bodies are methods through which enforcement of intellectual property rights can be strengthened. The aim is to ensure that right holders are able to act against infringers rapidly, effectively and in a cost-effective manner.

Conclusion

The last decade was a period of revival at an advanced level of intellectual property protection in the transition countries. WIPO is committed to continue promoting this positive process, as a precondition of technological progress, economic growth and cultural development for the benefit of the transition countries and the intellectual property community worldwide.


16 Countries party to the two Agreements are: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Ukraine and Uzbekistan.

17 WIPOnet will promote international cooperation by facilitating the digital exchange of intellectual property information between the intellectual property offices of its member states. It will also enable these states to undertake operations related to intellectual property rights management, in particular, those related to the international treaties, such as the Patent Cooperation Treaty (PCT). In doing so, WIPOnet will promote the progressive development and application of global standards and guidelines, and enhance the worldwide use of strategic information for more effective protection and enforcement of intellectual property rights.

* Jenő Bobrovsky, Acting Director, Division for Cooperation with Certain Countries in Europe and Asia, World Intellectual Property Organisation

34, chemin des Colombettes
P.O. Box 18
1211 Geneva 20
Switzerland
Tel: +41 22 338 9397
Fax: +41 22 338 8110
E-mail: Jeno.Bobrovsky@wipo.int

The views expressed in this article are the personal views of the author and are not necessarily shared by the World Intellectual Property Organisation.
Fighting corruption through an independent judicial system

The independence of the judiciary is a fundamental component of a fair and transparent legal system. It is vital that the executive arm of government respects the independence of the judiciary and other office-holders who are given powers of independent action. Judicial independence can be undermined by the executive, which is able to manipulate the assignment of cases through a compliant chief justice, or by appointing as many of its political supporters as possible to the bench. A dysfunctional judicial system is a primary indicator that corruption is spiralling out of control. Transparency International (TI) believes the Rule of Law is of paramount importance in ensuring independence and accountability.
An effective judiciary is an essential pillar in establishing and protecting the Rule of Law. TI’s fight against corruption focuses closely on the judiciary for two reasons. Firstly, the judicial system is an essential element of any integrity system that protects society against corruption; and secondly, the judiciary is also vulnerable to corruption and therefore needs protecting.

The importance of the judiciary

An independent, impartial and informed judiciary is crucial to the realisation of just, honest, open and accountable government.

The constitutional role of the judiciary is to review actions taken by the government and to determine whether they comply with the constitution and the laws enacted by the legislature. To perform this role effectively, the judiciary must be independent of the executive. In emerging democracies, the judiciary has the additional task of guaranteeing that new laws passed by an inexperienced executive or legislative branch do not violate the constitution or other legal requirements.

Of the three arms of government, the judiciary is perhaps the most vulnerable to corruption. If the executive and the legislature do not respect the independence of the judiciary, then it can be severely undermined. For instance, when the corruption of Peruvian President Alberto Fujimori was exposed, a series of videos emerged. One showed the head of the National Intelligence Agency, Vladimiro Montesinos, apparently offering a congressmen a bribe. Another showed Montesinos bribing ministers, judges and police chiefs.

The capacity of the judiciary should not be overstretched. By itself, it is not able to carry the whole burden of securing the Rule of Law. History has shown how easily the judicial system can be made subservient to dictatorship and abuse. Examples of this can be found in many parts of the world. For instance, in Pakistan five successive elected governments have been dismissed on charges of corruption and mismanagement since 1998. Most recently, the Sharif government’s alleged manipulation of a trial judge in the Bhutto case, and Sharif’s exile to Saudi Arabia in the “national interest”, left little doubt as to the political motives of official anti-corruption drives.

In Ukraine, it is said that 70 per cent of all court decisions are not enforced. The old apparatchik structures have been a key barrier to reform. In 1998, officials sabotaged Operation Clean Hands, an anti-corruption initiative developed by the Ministry of Justice. Powerful bureaucrats fought a fierce battle against the reforms. They successfully weakened key elements of the policy and blocked funds for the poorly paid and under-trained judiciary and police.

TI has paid particular attention to the task of strengthening the judiciary and has participated in various efforts to address vulnerabilities at both local and international levels. A notable example of this work is the drafting of a code of judicial conduct, which was prepared last February by a judicial group in Bangalore (the Bangalore Draft). This code will be discussed later.

Maintaining an independent judiciary

Independence protects judicial institutions from the executive and the legislature. As such, it lies at the very heart of the separation of powers. The other arms of governance are accountable to the people but the judiciary alone is accountable to the higher value of justice, and should meet the high standards of judicial rectitude.

The concepts of the independence and accountability of a judiciary within a democracy reinforce each other. Judicial independence relates to the institution – independence is not designed to benefit an individual judge, or even the judiciary as a body. It is designed to protect the people.

The appointment and promotion of judges

A judge must be independent and is not entitled to act in an arbitrary manner. The right to a fair trial before an impartial court is universally recognised as a fundamental human right.

Individuals selected for judicial office must have integrity, ability, and appropriate training and qualifications in the field of law. The selection process should not discriminate against a person on the grounds of race, ethnicity, gender, ideology, religion or class.

The ways in which judges are appointed and subsequently promoted are crucial to their independence. They must not be seen as political appointees, but rather as judges

---

selected for their competence and political neutrality. The public must be confident that judges are chosen on merit and for their individual integrity and ability, and not for partisan reasons.

The election of judges poses a particular risk. While it has the attraction of being a democratic process, the populist candidate may be favoured over the professional candidate. This risk can be reduced if the list of candidates is vetted for professionalism and non-partisanship. Still, the prospect of having judges campaigning for re-election is particularly unattractive. An individual in court is entitled to a fair trial and this is hardly assured if the judge has to pander to popular opinion in order to win re-election.

There are also potential dangers in the appointment of the judiciary exclusively by the legislature, executive or judiciary itself. As a general rule, in countries where either of the first two bodies is responsible for the formal appointment process, and there is general satisfaction with the calibre and independence of judges, appointments do in fact involve some degree of cooperation and consultation between the judiciary and the authority actually making the appointment.

The promotion of judges should be based on objective factors, particularly ability, integrity and experience. Promotion should be seen as a reward for outstanding professional competence, and never as a kickback for dubious decisions favouring the executive. The selection of judges for promotion should involve the judges themselves, and any role that the executive might have should be minimal.

Secure tenure and the immunity of judges

It is widely accepted that a judge must enjoy personal immunity from civil damages claims for improper acts or omissions in the exercise of judicial functions. This is not to say that the aggrieved person should have no redress, rather than the judge.

If judges are not confident that their remuneration or tenure of office is secure, their independence is clearly threatened. The principle of the “permanency” of the judiciary, with no removal from office other than for just cause and by due process, and their security of tenure at the age of retirement, is an important safeguard of the Rule of Law. It is desirable that judges retire when they reach the stipulated retiring age. This reduces the scope for the executive to prolong the tenure of hand-picked judges whom they find sympathetic, while reducing the judge’s temptation to court the executive or other appointing authority, for approval for re-appointment as the date of retirement nears.

Judicial independence is best served by individual accountability being handled by judges, at least up to the point where impeachment by the legislature comes into play. The question of how impartiality and integrity can be maintained needs to be addressed.

Accountability of the judiciary

Judicial accountability is not exercised in a vacuum. Judges must operate within rules and in accordance with their oath of office, which limits them from thinking they can act unilaterally. How can individual judges be held accountable without undermining the essential and central concept of judicial independence?

Individual judges are held accountable through the particular manner in which they exercise judicial power and by the environment in which they operate. Judges should:

- sit in courts open to the public;
- be subject to appeal and judicial review;
- be obliged by the law to give reasons for decisions and to publish them;
- be subject to the law of bias and perceived bias;
- be subject to questions in the legislature and open to media criticism;
- be subject to removal by the legislature (or by a supreme judicial council);
- be accountable to their peers.

Until very recently, it was almost unacceptable to raise the question of the accountability of the judiciary. Now, however, there is an increasing awareness that accountability, far from eroding independence, actually strengthens it. The fact that individual judges can be held to account increases the integrity of the judicial process and helps to protect judicial power from those who would encroach on or misuse it. An appropriate code of conduct is a powerful tool aimed at ensuring judicial accountability. This code should be developed by the judges themselves, and provide both for its enforcement and for advice to be given to individual judges when they are in doubt as to whether a particular provision in the code applies to a given situation.

Enforcing accepted rules of judicial conduct

It would not be desirable to give more power to the executive, whose decisions the courts review, nor to the legislature, as that would draw judges into the political sphere. There is also a need to be cautious about individual judges being accountable to a chief justice. A judge in Hong Kong was once removed by a chief justice whose decision was later reversed by Hong Kong’s highest court, which ruled that even a chief justice has to comply with the law. Peer pressure is important, but independence from colleagues in a collegiate court can also be very important. In an appellate court, each judge has to be able to keep his or her mind independent from the influence or biases of other colleagues.

Fair procedures and due process are needed for judges who are accused of impropriety. A system is required for separating serious misconduct (which may call for removal) from minor matters (for example, lack of sensitivity, which may require a discreet word rather than an open reprimand). Judges should be subject to removal or suspension only for reasons of incapacity or behaviour that renders the individual unfit to discharge his duties.

It is customary to make a clear distinction between the arrangements for the lower courts where standard cases are heard, and the superior courts, where the judges are fewer in number, have been more carefully selected and discharge the most important judicial functions under the constitution. Lower court judges are customarily appointed in a much less formal fashion and are more easily removed for just cause. However, neither higher nor lower court judges are above the law. There must be sanctions for those who may be tempted to abuse their positions or who display gross professional incompetence.
The removal of a judge is a serious matter. It cannot be permitted to occur simply at the whim of the government of the day, but rather it should be carried out in accordance with clearly defined and appropriate procedures in which the remaining judiciary plays a part. The involvement of the senior judiciary in policing its own members in a public fashion is generally regarded as the best guarantee of independence.

The powers of removal would appear to have been used for good cause, albeit in grave circumstances, when in March 2000 the Albanian Ministry of Justice announced that “the Supreme Justice Council has fired 70 judges for corruption and incompetence in the last three years. The latest dismissals were on 4 March 2000, when three judges were sacked and stripped of their immunity for releasing a rapist without sentencing him.”

The vulnerability of the judiciary

The concepts and tools discussed above are widely accepted and promoted to protect the independence and accountability of the judiciary. However, in practice they are often not employed effectively, if at all.

Surveys suggest that in many countries the public regard their judiciaries as hopelessly corrupt. The Global Corruption Report 2001 states that “the key to effective implementation of anti-corruption laws is often the strength, independence and integrity of judiciaries. In Malaysia, the independence of legal institutions is a cause for concern: a recent survey found that eight out of ten people are unhappy with the courts. In the Philippines, 57 per cent of respondents to a 1999 World Bank survey said that most judges could be bribed. Only 4 per cent bothered to report incidents of bribery, saying that reporting them would be futile.” Few people are willing to pin their hopes for reform on institutions like the judiciary if they are deeply sullied or perceived as corrupt. Often the primary indicator that corruption is spiralling out of control is a dysfunctional judicial system.

This parlous state of affairs is exacerbated by the actions of others working in the legal system. Lawyers may demand bribes for the judge, but keep the money themselves. Court clerks may purposely lose files and require money to find them, or they may withhold bail bonds until bribes have been paid. The judiciary is therefore vulnerable because those around it may be failing in their duties.

In Kazakhstan there is common agreement that the rights and freedoms of the media exist only in theory. The Global Corruption Report 2001 finds that “the cards are stacked: attempts by journalists to appeal to the law, the constitution or the Universal Declaration of Human Rights are, as a rule, unsuccessful, while the provisions of the Law on Media and other legislation used against journalists, editors, publishers and media owners are implemented with favour. The arbitrary nature of judicial decisions is an obstacle, thwarting attempts by journalists to write about corruption.”

Most frequently it is the executive that tries to unduly influence the judiciary. The methods used to undermine the independence and integrity of the judiciary are many and varied. Some are subtle, such as awarding honours or ranking judges in the hierarchy at state occasions. Others are more blatant, such as providing houses, cars, and privileges to judges or their families.

Perhaps the most obvious abuse by the executive is the practice of appointing as many of its supporters or sympathisers as possible to the bench. The appointment process is therefore a critical one, even though some governments have found that their own supporters develop a remarkable independence of mind once appointed to high office. To undermine this independence, the executive can manipulate the assignment of cases, perhaps through a compliant chief justice, and determine which judge hears a case of importance to the public regard their judiciaries as hopelessly corrupt.

It cannot be permitted to occur simply at the whim of the government of the day, but rather it should be carried out in accordance with clearly defined and appropriate procedures in which the remaining judiciary plays a part. The involvement of the senior judiciary in policing its own members in a public fashion is generally regarded as the best guarantee of independence.

The powers of removal would appear to have been used for good cause, albeit in grave circumstances, when in March 2000 the Albanian Ministry of Justice announced that “the Supreme Justice Council has fired 70 judges for corruption and incompetence in the last three years. The latest dismissals were on 4 March 2000, when three judges were sacked and stripped of their immunity for releasing a rapist without sentencing him.”

The vulnerability of the judiciary

The concepts and tools discussed above are widely accepted and promoted to protect the independence and accountability of the judiciary. However, in practice they are often not employed effectively, if at all.

Surveys suggest that in many countries the public regard their judiciaries as hopelessly corrupt. The Global Corruption Report 2001 states that “the key to effective implementation of anti-corruption laws is often the strength, independence and integrity of judiciaries. In Malaysia, the independence of legal institutions is a cause for concern: a recent survey found that eight out of ten people are unhappy with the courts. In the Philippines, 57 per cent of respondents to a 1999 World Bank survey said that most judges could be bribed. Only 4 per cent bothered to report incidents of bribery, saying that reporting them would be futile.” Few people are willing to pin their hopes for reform on institutions like the judiciary if they are deeply sullied or perceived as corrupt. Often the primary indicator that corruption is spiralling out of control is a dysfunctional judicial system.

This parlous state of affairs is exacerbated by the actions of others working in the legal system. Lawyers may demand bribes for the judge, but keep the money themselves. Court clerks may purposely lose files and require money to find them, or they may withhold bail bonds until bribes have been paid. The judiciary is therefore vulnerable because those around it may be failing in their duties.

In Kazakhstan there is common agreement that the rights and freedoms of the media exist only in theory. The Global Corruption Report 2001 finds that “the cards are stacked: attempts by journalists to appeal to the law, the constitution or the Universal Declaration of Human Rights are, as a rule, unsuccessful, while the provisions of the Law on Media and other legislation used against journalists, editors, publishers and media owners are implemented with favour. The arbitrary nature of judicial decisions is an obstacle, thwarting attempts by journalists to write about corruption.”

Most frequently it is the executive that tries to unduly influence the judiciary. The methods used to undermine the independence and integrity of the judiciary are many and varied. Some are subtle, such as awarding honours or ranking judges in the hierarchy at state occasions. Others are more blatant, such as providing houses, cars, and privileges to judges or their families.

Perhaps the most obvious abuse by the executive is the practice of appointing as many of its supporters or sympathisers as possible to the bench. The appointment process is therefore a critical one, even though some governments have found that their own supporters develop a remarkable independence of mind once appointed to high office. To undermine this independence, the executive can manipulate the assignment of cases, perhaps through a compliant chief justice, and determine which judge hears a case of importance to the government. It is therefore essential that the task of assigning cases be given to the judges themselves, not to government servants, and that the chief justice enjoys the full confidence of his or her peers.

When a particular judge falls from executive favour, a variety of ploys may be used to try to bring the judge to heel. Such a campaign may be aimed at criticising certain judges or claiming that a mistake was made when they were selected for appointment. In such instances, judges are not in a position to fight back without hopelessly compromising themselves and their judicial office. To minimise the scope for this, responsibility for court administration matters, including budget and postings, should be in the
Much of the effort made to date by the international community to build effective judiciaries has looked promising on paper, but has been of little practical impact in real terms.

Law societies and bar associations do not take sufficiently stern action against members who behave corruptly. The fact that a legal system may itself be corrupt does not mean that lawyers have to become part of the system. Although, in some situations, it may be an unavoidable necessity for a client to pay a “backhander” to a lawyer acting as gate-keeper, it is highly questionable whether the lawyer need ever professionally be in such a position.

Another area of vulnerability for a judge is the issue of income after retirement. Judicial pensions tend to be less than generous, and the practice in some countries of rewarding selected judges with diplomatic posts on their retirement from office is clearly open to abuse if not handled through a fair and transparent process.

The judicial group on strengthening judicial integrity

The Draft Code of Conduct for the Judiciary is a notable example of TI’s work. The Code was developed in Bangalore in February 2001 by a group of eight chief justices from different countries. The values upheld by the Code are: propriety, independence, integrity, impartiality, equality, competence, diligence and accountability.

Rules under each heading provide guidance to judges. Through a process of consultation, and with the support of Mary Robinson, the United Nations High Commissioner for Human Rights, TI hopes the draft Code of Conduct will develop into a global code and be adapted and adopted in countries around the world.

Codes alone will not suffice, however. Specific problems and weaknesses need to be properly identified and addressed in each country. Loopholes in the judicial system explored by corrupt court staff, lawyers and judges need to be closed. For example, in one country it was found that court clerks were refusing litigants access to their files unless they paid a small bribe. On discovering this, the chief justice ordered that the court list be posted on the Internet. Not all people have access to the Internet of course, but this action stripped the court clerks of their monopoly and the practice of demanding bribes stopped abruptly.

Building and protecting an effective judiciary

It is hoped that TI and other international organisations will be able to help to build independent and honest judiciaries in small and incremental steps. Simply providing judges with travel scholarships (often paid through government ministries), or depositing books and computers with staff, is unlikely to change the way people behave. Much of the effort made to date by the international community has looked promising on paper, but has been of little practical impact in real terms.

TI has placed great importance on helping build and protect effective judicial systems, mainly by supporting its 85 national chapters in their quest to pursue this goal. It is the people in each society and in each country, who need to diagnose the weaknesses of their own judiciary, and who need to develop strategies and tools to strengthen it. To empower civil society to play this role, TI helps develop specific instruments, based on experiences in a variety of countries. These are then considered and adapted for particular situations, if found useful.

The judiciary and comprehensive integrity systems

An independent and accountable judiciary committed to the Rule of Law cannot alone and unaided, ensure that the Rule of Law is upheld, or that just and honest government functions effectively. In this larger role, the judiciary is one of a number of the institutions, which make up what TI calls the National Integrity System.

The National Integrity System comprises a number of institutions - the executive, the legislature, watchdog agencies, a free press, an active civil society, the private sector and the judiciary. Collectively, they provide assurance to citizens that the government will function in accordance with the law.

These institutions must be mutually reinforcing. Independence, transparency, accountability, sound rules governing conflict of interest, guarantees of access to information and of a free press and free speech, are essential attributes of the National Integrity System. However able and independent the judiciary, it must still be supported by a populace willing to speak out; by independent and able investigators; by independent lawyers of integrity; and by honest court clerks. If any of the elements of the Integrity System are not
place, the risk that the government and legal systems will become corrupt increases.

As the eminent American jurist, Felix Frankfurter, once remarked, “The Court’s authority - possessed of neither the purse nor the sword - ultimately rests on substantial public confidence in its moral sanctions.” In other words, it rests on the confidence that civil society has in the way it discharges its essential functions. It is in this area that Ti and others are working.

Ti believes that the most effective judicial reform programmes will be developed and implemented by uniting all the stakeholders in the judicial process in the vanguard of reform. Civil society will be both the main beneficiary and a key component of the reform effort. In this way, a better future will be built on the basis of a truly independent and accountable judiciary.


* Dr. Peter Eigen
Chairman
Transparency International
Otto-Suhr-Allee 97–99
10585 Berlin
Germany
Tel: +49 30 3438 2010
Fax: +49 30 3470 3912
Email: ti@transparency.org
Web: http://www.transparency.org

Transparency International, with national chapters now operating in 85 countries, is the world’s leading non-governmental organisation engaged in the fight against corruption.

+ This article is based on a speech delivered at a World Bank Conference co-hosted by the Government of Russia, “Empowerment, Security and Opportunity through Law and Justice”, Tavrichesky Palace, Saint Petersburg, Russia, 8–12 July 2001.
European energy security and cooperation: the Energy Charter Treaty and its Protocol on Transit

This article outlines the transit provisions of the Energy Charter Treaty and examines the effects of the Energy Charter Protocol on Transit on third party access to energy transport facilities. The Protocol is currently being negotiated between the 51 signatories to the Treaty. Given the expected increased energy import dependency in the European Union, stable long-term energy solutions can be found in greater multi-dimensional international cooperation. An international minimum standard of third-party access to energy transport facilities used for transit is beneficial for the 51 Treaty signatories. This analysis is based on the political, geographical and energy market realities of the European Union, central and eastern Europe (CEE) and the Commonwealth of Independent States (CIS).
Energy Charter Treaty

In December 1991, 54 states (including the United States, Japan, Russia and the member states of the EU) signed a political commitment referred to as the European Energy Charter (the Charter). The Charter envisaged the creation of an Energy Charter Treaty (the Treaty), which was concluded in 1994. The map below shows the signatories and observers to the Charter, the Treaty and related instruments.

The objective of the Charter is to develop the relationship in energy matters between the CIS, CEE and the West. Article 2 of the Treaty states as its purpose the establishment of a legal framework to promote long-term cooperation in the energy field, based on complementarities and mutual benefits between the contracting parties of the Treaty. This energy relationship between the signatories of the Charter is well documented. On the assumption that all international energy trade takes place between the 54 signatories to the Charter, the eastern constituency of the Charter together with Norway and the UK may cover up to 50 per cent of the net energy imports of the western part of the constituency. The mutual dependency is clear.

The objectives and principles of the Charter are not legally binding under public international law. However, the signatories pursued these objectives, and broadened their cooperation by negotiating the Treaty from 1991 to 1994. To date, 51 countries in Europe and Central Asia have signed the Treaty, which is binding and effective under public international law. Forty-five countries have ratified the Treaty and the remaining six countries are in various stages of preparation for ratification. Two signatories, Russia and Belarus, apply the


The relevant net energy export numbers for 1997 may be found in International Energy Agency, Key World Energy Statistics from the IEA, 1999.
The Energy Charter Treaty is the first economic agreement uniting the CIS, CEE and the majority of the members of the OECD.

Treaty provisionally. The Treaty is the first economic agreement uniting the CIS, including Azerbaijan, Kazakhstan, Russia and Turkmenistan, CEE and the majority of the members of the Organisation for Economic Co-operation and Development (OECD).

The main areas of economic activity addressed in the Treaty are: energy transit, energy investment, energy trade and energy efficiency and related environmental aspects. The Treaty also provides for the possibility of international arbitration in case of a dispute on the interpretation of Treaty provisions between the signatory states and between signatory host governments and investors when the dispute relates to investment.²

The Energy Charter Conference is the governing body of the Treaty. The Energy Charter Secretariat is the international organisation supporting the work of the Conference. The Secretariat works in close cooperation with other intergovernmental organisations, such as the World Trade Organisation (WTO), the International Energy Agency (IEA), the OECD, the World Bank and the European Commission (EC). Detailed work is carried out by delegations from the signatory states in subsidiary bodies or working groups established and mandated in accordance with the provisions of the Treaty.

To illustrate the practical implications of the provisions of the Treaty, it is useful to look at the case of Russia and its neighbouring states. However, it must be emphasised that the Treaty’s provisions apply individually, and in any combination of states, for the 51 signatories of the Treaty. All members of the CIS have ratified the Treaty, with the exception of Russia and Belarus, who apply the Treaty provisionally. However, the ratification process is currently progressing in the Russian State Duma and consequently, all the major transit states from a Russian perspective are either contracting parties to the Treaty or apply the Treaty provisionally.³

Energy Charter Treaty’s transit provisions

Article 7 of the Treaty deals specifically with the issue of energy transit, which is defined as the movement of energy materials and products, such as crude oil, oil products, natural gas or electricity, from one contracting party of the Treaty through the territory of another contracting party, destined for the territory of a third contracting party. Energy transport facilities are defined as pipelines or grids used to transport crude oil, oil products, natural gas or electricity respectively. For example, natural gas produced in Russia and destined for Germany would be in transit through the territories of Belarus and Poland.

The major transit obligation of Russia and its neighbouring states under the Treaty is to implement the principles of freedom of transit without distinction as to the origin, destination or ownership of the energy and of non-discriminatory pricing. Russia and its neighbouring transit states, such as Ukraine, Belarus or the Baltic states agree to encourage cooperation in the modernising, interconnection, development and operation of energy transport facilities, including mitigation of the effects of interruption in the supply of energy. Russia and its neighbouring transit states shall establish or maintain their domestic laws or regulations relating to the transport of energy in such a way that energy in transit shall be treated no less favourably than energy produced domestically and exported or energy imported. The contracting parties of the Treaty shall not place obstacles in the way of new energy transport facilities being constructed. However, if the security or the efficiency of the existing energy transport facilities is endangered, including the security of supply, permission for the construction or modification of new or additional transit can be refused, but the established flows of energy in transit shall be secured.

Article 7(6) of the Treaty obliges signatories not to interrupt or reduce the existing flow of energy in transit in the event of a dispute over such transit prior to the conclusion of a set of conciliation procedures laid down in Article 7(7) of the Treaty. These procedures call for the use of a conciliator with powers to set interim tariffs and other terms and conditions for a period of 12 months or until resolution of the dispute, whichever is earlier. Settlement of disputes between the contracting parties concerning the application or interpretation of the transit-related provisions of the Treaty should be settled through diplomatic channels. If diplomatic channels cannot reach a solution, the dispute may, in accordance with Article 27 of the Treaty, be submitted to a tribunal with three arbitrators using the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL). An arbitration award is final and binding on the parties to the dispute. The conciliation procedure of Article 7 is a specialised transit dispute resolution mechanism, whereas the international arbitration mechanism is applicable to disputes on the application or interpretation of any provision of the Treaty.

Unless otherwise explicitly stated, all obligations of the Treaty are between the states signing and ratifying the Treaty. However, as a member of the Treaty, Russia shall not encourage any state enterprise or any entity, established or maintained under Russian law, which is granted exclusive or special privileges, to conduct its activities in a manner inconsistent with Russia’s obligations under the Treaty. If Russia establishes or maintains an entity and entrusts the entity with regulatory, administrative or other governmental authority, the entity must conduct its authority in a manner consistent with Russia’s obligations under the Treaty. In addition, Russia is responsible for the observance of the provisions of the Treaty by regional or local governments.

The Treaty contains a general set of exceptions to the obligations laid down in Article 7, including an exception to avoid actions that may endanger human, animal or plant life or health. Conditions of short supply exempt Treaty members from obligations under Article 7, as do the protection of the essential security interests or the maintenance of public order of a contracting party.

An important part of the Treaty’s transit provisions is found in Article 29, which requires the application of WTO trade and transit rules for those signatories that are not yet WTO members.⁴ The applicability of WTO rules under the Treaty is of particular relevance to Russia, which is not yet a WTO member. As a result of Article 29, all transit-related provisions of the WTO apply fully under the Treaty. The general exceptions of the WTO also apply. However, a special, simpler dispute resolution procedure has been established under the Treaty replacing similar provisions under the WTO. This implies that Russia, or any neighbouring states, such as Ukraine or Georgia, may invoke the Treaty’s energy trade dispute resolution procedure to solve any energy dispute.
The case for international rules on energy transit

Russia and the other 50 signatories to the Treaty have established the foundation for an energy exportation, importation and transit regime that is potentially beneficial to all states. However, the practical implementation of the above principles is in its infancy in Russia and most of the CIS. Currently, the signatories to the Treaty are negotiating an Energy Charter Protocol on Transit, in which the transit principles outlined above will be further supplemented, extended or amplified.

The regulation of third-party access to energy transport facilities used for transit is a missing part of a fully-fledged regulatory system for energy transit between the 51 signatories to the Treaty. To analyse third-party access issues under the Treaty and draft Protocol, the following sub-sections use the natural gas sector as an example. While the provisions of the Treaty and draft Protocol cover natural gas, crude oil, oil products and electricity, it is possible to treat different energy carriers similarly for the purpose of this analysis. This is important from the perspective of legal harmonisation.

Energy transport facilities as natural monopolies

A necessary condition for establishing perfect competition is the presence of multiple independent consumers who take the market price as given when deciding the quantity to purchase. Perfect competition also requires the presence of multiple independent suppliers taking the market price as given when deciding the quantity to supply. Both consumers and suppliers must have access to the same complete information about the market conditions. Only when these conditions are fulfilled will competition yield a cost-efficient supply of a commodity and promote the optimal allocation of resources in the economy.

The establishment of sufficient competition in the supply of energy transport facilities requires public regulation, due to the cost characteristics and large economies of scale present when constructing and operating these facilities. For example, when increasing the transportation capacity of a natural gas pipeline by 50 per cent, the marginal unit cost is significantly lower than the average unit cost prior to expansion of capacity. Consequently, the average unit cost decreases after the expansion of capacity. Potential new entrants wanting to construct a parallel pipeline face the possibility of significant short-term cost-cutting competition from incumbent pipeline providers. The incumbent maximises the long-term profits by supplying capacity short-term at a price covering variable cost only, pre-empting the establishment of new, independent capacity. In the long run, after the attempt to establish new capacity has been successfully pre-empted, the incumbent can increase the price of capacity to a level yielding monopoly returns. As a result, public regulation of energy transit facilities is needed.

Geography and European energy import dependency

The EC started a debate on the security of energy supply in 2001. Increased energy import dependency is expected based on widely accepted assumptions on energy demand growth, energy carrier mix and the expected development in the indigenous production of primary energy in the EU. Currently, the EU imports 40 per cent of its natural gas consumption. Natural gas import dependency is expected to increase to 70 per cent over the next 25 years, according to an EC Green Paper. To address the issue of increasing energy import dependency, the EU should seek solutions through increased international cooperation across as many dimensions of mutual interest as possible.

It is important to acknowledge the geographical features of the European natural gas market. Before 1991 the issue of natural gas transit was largely solved inside the Soviet Union’s sphere of influence. Today, both the EU and Russia must address the issue of natural gas transit across CEE. This scenario may become clearer as the energy industry privatisation in CEE and the CIS progresses.

The challenges facing the EU in the fields of transit and supply source competition become clear if it is assumed that both demand and supply need to be liberalised in order to reap the benefits of a competitive market and that the supply of competitively priced energy transport capacity is only possible if a public regulator is able to regulate the price and other terms and conditions of access to energy transport facilities. The Green Paper on European security of energy supply does not go far enough in
applying a multilateral perspective in this regard. The need for an international approach by the EU in this field arises due to the location of energy resources outside the region that are required to meet growing demand and import dependency within the EU.

The 51 signatories of the Treaty are an appropriate unit of analysis in order to address all the conditions necessary to obtain sufficient competition in the natural gas market on the European continent. With this broader focus, the issue of third-party access to energy transport facilities used for transit has different implications. The major natural gas companies of the EU will increasingly become net buyers of natural gas transportation capacity outside the territory of the EU. Consequently, it may be beneficial to introduce third-party access provisions under public international law in order to create a larger, pan-European playing field that is level.

It is interesting to observe that the net energy exports of Russia are of a magnitude to align the interests of the EU and Russia in the field of energy transit. With an optimistic development of primary energy production in the Caspian area, the demand for transit capacity on the territory of Russia increases. Russia, however, remains a net purchaser of energy transit in neighbouring states, such as Belarus, the Czech Republic, Poland, the Slovak Republic and Ukraine, compared with the expected supply of transit capacity on Russian territory. Based on data from the IEA, Russia exported approximately 350 million tonnes oil equivalent (mtoe) in 1998, whereas the Caspian states exported about 35 mtoe or approximately 10 per cent of the Russian net exports. Consequently, Russia is in a position to favour a level playing field in the area of energy transit. The competition for west European market share between Russian and Central Asian natural gas is not likely to change Russia’s position concerning a level international energy transit playing field. This is due to the existence of spare natural gas transportation capacity in Russia offsetting any detrimental impact of lost natural gas market share.

The countries of central and eastern Europe will benefit from increased transit business in the future, based on the above analysis. Appropriate international rules may prevent the construction of unnecessary energy transport facilities and facilitate construction and pipeline routing decisions based on economic criteria only. It is in the interest of the incumbent owner of energy transport facilities to avoid pipeline-to-pipeline competition. Due to the cost characteristics of natural monopolies described above, pipeline-to-pipeline competition may lead to short term aggressive price underbidding, which ultimately leads to inadequate rates of return on employed capital. Consequently, establishing a set of international rules on the public regulation of third party access to energy transport facilities may stabilise the realised rate of return for the incumbent pipeline owners. The security of energy supply in CEE may be enhanced through diversification of sources of supply, away from suppliers operating in Russia and towards suppliers operating in the Caspian area or western Europe. However, this diversification does not necessarily equate with a decrease in natural gas exports from Russia, as increasing economic growth and a successful transition to a market economy are likely to increase primary energy consumption in CEE.

Central Asia has proven reserves of hydrocarbons and needs market access and energy transit capacity to commercialise these reserves. Therefore, it is in the interest of these states to establish an internationally recognised set of rules to address third-party access to energy transport facilities. Such rules should include provisions limiting the market-distorting consequences of abuses by dominant transport suppliers. The establishment of clear binding rules under public international law will increase the probability that foreign direct investment will be channelled to the appropriate upstream exploration and production projects. The corresponding pipeline investments will then only be made as the existing energy transport facilities are filled to capacity utilising third party access provisions. In addition, the full potential of energy location swaps should be exploited to ensure the optimal timing of new pipeline infrastructure capital expenditure. Rules and regulations legally binding under public international law can substantially reduce the geopolitics involved in the design and decision-making related to upstream exploration and production, not to mention the reduction of geopolitics involved in the choice of pipeline routing or use of existing capacity in the Caspian area.

**European Union third-party access legislation**

The process if not the speed of the developments of regulated or negotiated third-party access in the EU may set an example of how to proceed in developing the same issues in the Energy Charter process. Of particular relevance for the negotiation of the Protocol are the EU’s Natural Gas Transit Directive and the Natural Gas Directive.

In the Natural Gas Transit Directive, defined entities such as Ruhrgas AG, Distrigaz SA or Gaz de France are obligated to open negotiations on the conditions of natural gas transit when requested. They must also inform the EC of these requests. Failure to conclude such negotiations must also be reported to the Commission. The Directive establishes a conciliation body under the auspices of the EC in case of dispute. This access procedure may be seen as the first step in establishing an internal market in natural gas in the EU. The Directive is widely accepted as only codifying existing business practice at the time of its implementation.

The fourth preamble clause of the Natural Gas Directive contains a direct reference to the Natural Gas Transit Directive showing the historic line in the development of a liberalised competitive market. The overall criteria of objectivity, transparency and non-discrimination are laid down for the implementation of the Natural Gas Directive, which contains provisions covering negotiated third-party access and regulated third-party access. Negotiated third-party access gives eligible consumers a right to negotiate access to energy transport facilities based on commercial conditions published by the owner or operator of the facilities. Regulated third-party access gives eligible consumers a right to access energy transport facilities on the basis of published tariffs and other terms and conditions for the use of the facilities. Refusal of access to energy transport facilities must be based only on substantiated reasons. The EU member states may choose between regulated or negotiated third-party access in meeting the Directive’s overall objective of creating competitive natural gas markets and establishing an internal market in natural gas. Access is granted to eligible consumers, defined on the basis of the annual consumption of natural gas. The definition is based on a minimum expected potential market opening of 20 per cent as of August 2000, which then increases in steps to 33 per cent by 2008. Finally, the Directive contains a dispute resolution mechanism, in order to enforce its provisions.

The actual implementation of the Natural Gas Directive is encouraging. The average potential market opening in the EU is 79 per cent, since most member states have defined eligible consumers with lower annual natural gas consumption than foreseen in the Directive. Eight member states, including Belgium and the UK, have implemented regulated third-party access through the creation of a public regulator, three member states have hybrid systems and Austria and Germany have implemented negotiated third-party access. Greece and Portugal have not decided on a third-party access system. Based on the Directive, Greece and Portugal are entitled to derogations due to their status as emerging natural gas markets. Some member states have implemented legal unbundling, which requires that the operation of the energy transport facilities be performed by a subsidiary to ensure objective, transparent and non-discriminatory access.
The EC proposed new legislation in 2001 to speed up the market opening process, with full market access for all consumers planned for 2004–05. In addition, mandatory legal unbundling and the establishment of a public regulator are required by the proposed legislation. To ensure transparency, the publication of transportation tariffs and expected available capacities will be mandatory in the new proposals. It is expected that these changes will lead to the development of a single European natural gas market.


There is no provision explicitly addressing access to energy transport facilities in the Treaty. Mandatory third-party access to energy transport facilities is excluded in an Understanding adopted by the states at the signing of the Treaty in December 1994. Instead, Article 7(1) of the Treaty states that “each Contracting Party shall take necessary measures to facilitate the transit of energy materials and products... without imposing any unreasonable delays, restrictions or charges”. Under some circumstances, access to energy transport facilities can be one of the components of transit facilitation. If a refusal to negotiate access to facilities is construed as imposing an unreasonable restriction, Article 7(1) of the Treaty may serve as implicitly obliging the contracting parties to undertake negotiation on access. However, the under-utilisation of existing pipeline infrastructure and the discussion of expensive bypasses in the Baltic Sea area, Poland or the Caspian Sea area indicate that more explicit provisions on access to energy transport facilities may benefit the economies of the Treaty members.

The draft Charter Protocol negotiation presents an opportunity to establish provisions on third-party access to energy transport facilities used for transit. The article on third-party access of the draft Protocol states that:

“Each Contracting Party shall ensure that owners or operators of Energy Transport Facilities under its jurisdiction will negotiate in good faith with any other Contracting Parties or Entities of Contracting Parties requesting access to and use of Available Capacity for Transit. Such negotiations shall be based on transparent procedures, and on commercial terms and be non-discriminatory as to the origin, destination or ownership of the Energy Materials and Products.”

It is important to note that the provision provides negotiation rights to private parties. Entities can include a natural person having the nationality or citizenship of a contracting party or who is permanently residing in a contracting party or companies or other organisations established in accordance with the domestic laws of a contracting party. The main obligation is found in the wording “will negotiate in good faith... access to and use of Available Capacity for Transit”. This obligation imposed on the owner or operator of energy transport facilities is similar to the negotiation obligation imposed on similar players in the energy sector of the EU under the Natural Gas Transit Directive. The wording “access to and use of Available Capacity for Transit” limits the scope of the obligations to only those facilities that may handle transit in the territories of the contracting parties. In the Treaty as well as in the Protocol, transit is defined as the movement of crude oil, oil products, natural gas or electricity crossing two state borders. Energy transport facilities are high-pressure natural gas transmission pipelines, high-voltage electricity transmission grids and lines, crude oil transmission pipelines, coal slurry pipelines and oil products pipelines. It is expected that only large corporations or consortia undertake energy transit, involving at least three states utilising such facilities. In practice, this parallels the limitations found in the Natural Gas Transit Directive through the list of high-pressure natural gas grid owners in the Annex of the Directive.

Another article of the Protocol addresses the public regulatory aspects of third-party access to the transportation capacity of energy transport facilities in the absence of competition. Because of the natural monopoly characteristics of energy transit facilities and the high barriers to entry for new transport operators, there is a need for public regulation to circumscribe possible abuses by dominant operators and to alleviate market distortions. The draft article states that:

“Each Contracting Party shall take all necessary measures to ensure that Transit Tariffs and other conditions are objective, reasonable, transparent and do not discriminate on the basis of origin, destination or ownership of Energy Materials and Products in Transit. Each Contracting Party shall ensure that Transit Tariffs and other conditions are not affected by market distortions, in particular those resulting from abuse of a dominant position by any owner or operator of Energy Transport Facilities used for Transit.”

The first provision in the draft article would require that certain minimum standards of objectivity and transparency be observed, for example the publication of indicative tariffs and other terms and conditions. A more expansive reading of the provision would imply the additional publication of expected available capacity of energy transport facilities used for

---

8 While additional Russian gas from western Siberia will be likely to be more expensive to extract and therefore less competitive than gas from Central Asia, this can be offset by increased natural gas transit income earned on Central Asian gas that must transit through Russia. For an analysis of the Russian natural gas industry and the need for new Siberian natural gas field development, see International Energy Agency, Energy Policies of the Russian Federation – 2000 Survey, 2002.


12 The entities that may apply the provisions of the Natural Gas Transit Directive are limited to the 44 natural gas transmission companies listed in the Annex of the Directive.


15 Contracting parties are those states that have ratified the Treaty.

16 Signatories may decide to add positive obligations in the Protocol to undertake multilateral negotiations necessary to establish third party access in the spirit of the EU’s Natural Gas Directive.
The states participating in the Energy Charter process are expected to finalise the negotiation of the Protocol, if possible, by Spring 2002.

Karl Petter Waern
Senior Expert
Energy Charter Secretariat
Boulevard de la Woluwe, 56
B–1200 Brussels
Belgium
Tel: +32 2 775 98 58
Fax: +32 2 775 98 42
Email: KarlPetter.Waern@encharter.org
http://www.encharter.org/index.jsp

The comments and opinions expressed in this paper are the author’s own and do not necessarily reflect those of the Energy Charter Secretariat.

transit. The standard of non-discrimination is a minimum requirement for allowing the establishment of new suppliers of energy. The second provision addresses the concerns raised by the existence of natural monopolies in the supply of available capacity of energy transport facilities used for transit by limiting the possibilities for abuse of a dominant position. An interpretative understanding agreed by the negotiators notes that transit tariffs should incorporate a reasonable rate of return on investment. This understanding implies that the calculation of a reasonable rate of return will be used to assess the absence of abuse of a dominant position. As a consequence, all transit tariffs should be, in the long run, cost-reflective.

Conclusion
Detailed and explicit third-party access provisions under public international law aim to: promote more efficient use of available capacity in existing transit infrastructure; promote more efficient flows of energy in transit; and avoid the duplication of energy transport facilities including the construction of expensive bypasses. In short, third-party access provisions should lead to an improvement of economic efficiency under the clear rule of law.

The Energy Charter Protocol is currently being developed in recognition of the growing importance of the economic area of energy transit, in particular in CEE and the CIS. The EU-Russia Energy Partnership, the EC initiative on security of energy supply in the EU, and the Energy Charter process are clear evidence that energy cooperation is a viable basis for international dialogue. In addition, it is of vital importance to include the appropriate set of states when designing a multilateral initiative. In this respect the Energy Charter process, with its 51 signatory states, has a comparative advantage when the agenda is European energy policy.

An international minimum standard of third-party access to energy transport facilities used for transit will benefit the EU, CEE, Russia and the Caspian states. Over the next 25 years, Europe will require additional energy imports. Central and eastern Europe will benefit from a further development of their energy transit industry and increased economic integration with the EU. The question of security of energy supply will be addressed for CEE through the integration of several sources of energy supply. Chief among the new sources of energy supply will be the Caspian area. Russia and the Caspian states will need financial resources and technology for the development of their energy export industry and will benefit from increased economic integration in Europe.

In preparing clear, transparent rules for interstate cooperation in energy transit, the Energy Charter process (through the draft Protocol) is pursuing not only an economic objective but also the political objective that energy transit will play a significant role in promoting regional stability and security. The Energy Charter process illustrates how governments can cooperate in an economic sector-specific context to further the broader political objective of strengthening international economic security and stability based on the fundamental principle of respect for the rule of law.
The EU *acquis communautaire* and the position of employees in the event of their employer’s insolvency – a comparison of statutory regulations

This article compares the EU *acquis communautaire* in the field of employee protection in the event of employer insolvency with the corresponding current legal situation in the transition countries of Bulgaria, the Czech Republic, Hungary, Poland and the Slovak Republic. The article also discusses the significance of the connection between the integration of the rights to recourse, which have been transferred to guarantee institutions (especially funds), in most cases by way of an assignment by operation of law, and any possible preferential claims of other secured creditors (usually secured by encumbrances) – the so-called preferential creditors.
In order to ensure a certain (minimum protection) under Community law, the Insolvency Directive requires Member States to create a guarantee institution that provides for the satisfaction of outstanding claims relating to the remuneration for work of employees of employers who have become insolvent, for a certain (minimum) period.

When dealing with the insolvency law of the transition countries of central and eastern Europe, a common problem arises. As a general rule, secured creditors lose a part of their secured legal position, either because their claims are satisfied only in part – as is already required by the applicable law – from the proceeds of realising the collateral (which is the case in the Czech and Slovak Republics and in Hungary), or simply because of their lower ranking in the distribution of liquidation proceeds (which is the case in Poland). This is unsatisfactory for crediting banks and the banking industry is demanding that the framework and dynamics of the accession process are used to introduce the acquis communautaire – the existing legislation of the EU – as quickly as possible in the immediate candidate countries for EU accession. This would create the adequate framework conditions and reduce investment risks. However, this task is more difficult when the investment-obstructing arrangements are included in the acquis communautaire and need to be transformed by the national legislator of the candidate countries for EU accession. Regarding the rights of employees the implementation of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (Insolvency Directive) by the aforementioned transition countries is essential.

This is a legal area which at first sight concerns labour and social law. It appears to have little in common with the legal position of secured creditors in cases of insolvency. However, this article illustrates the detrimental effect which the provisions of this Directive may have on secured creditors in case of insolvency.

Applicable Community law

Relevant legal standard

On the level of EU Community law, Council Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (20 October 1980) and Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (Transfers Directive) are of key importance for the protection of employees’ claims in the event of the insolvency of their employer. In addition, the Council Regulation of 29 May 2000 on insolvency proceedings (Insolvency Regulation) will enter into force on 31 May 2002. However, the latter is only of minor importance for the main questions of interest here. For the purposes of further developing insolvency law, taking account of the development of the internal market, harmonising the Insolvency Directive with other labour law directives of the Community, adopted at a later stage, and taking account of the recent jurisdiction of the European Court of Justice, the Commission recently submitted a proposal for a Directive of the European Parliament and of the Council amending the Insolvency Directive (hereinafter referred to as the “Proposed Amendments”).

Insolvency Directive

The Insolvency Directive consists of four Sections and one Annex: Section I (Articles 1 and 2 of the cited law) determines the scope and contains definitions; Section II (Articles 3 to 5 of the cited law) contains provisions on guarantee institutions; Section III (Articles 6 to 8 of the cited law) relates to provisions concerning social security; and Section IV (Articles 9 to 13 of the cited law) contains general and final provisions. The Annex lists the categories of employees that were admissibly excluded from the scope of the Insolvency Directive by the Member States.

Scope and definitions

The Insolvency Directive applies to claims of employees from contracts of employment or employment relationships against employers who are in a state of insolvency. The Member States may exclude the claims of certain categories of employees from the scope of application of the Insolvency Directive by virtue of the special nature of the employee’s contract of employment or employment relationship, or because of the existence of other forms of guarantee offering employee protection equivalent to that resulting from the Insolvency Directive (Article 1 (1) and (2) of the Insolvency Directive). The Insolvency Directive does not prejudice the law of the individual Member States regarding the definitions of the terms “employee”, “employer”, “pay”, “right conferring immediate entitlement” and “right conferring prospective entitlement” (Article 2 (2) of the Insolvency Directive).

An employer is considered to be insolvent if (1) a request has been made for the opening of proceedings involving the employer’s assets, as provided for under the law, regulations and administrative provisions of the Member State concerned, to satisfy collectively the claims of creditors and which it possible to take into consideration the claims of employees, and (2) where the authority which is competent pursuant to the said laws, regulations and administrative provisions has either decided to open the proceedings or established that the employer’s undertaking or business has been definitely closed down and that the available assets are insufficient to warrant the opening of proceedings (Article 2 (1) of the Insolvency Directive).

The Proposed Amendments for Section I of the Insolvency Directive recommend a stricter delineation of its scope, as well as dispensing with the Annex. They also propose to use a wider definition of “insolvency” and to bring the definition more into line with the Directives that have been adopted since the creation of the Insolvency Directive. There is a risk, according to the Proposed Amendments, that the scope of protection of the Insolvency Directive is restricted, on account of the provision that the term “employee” in particular, is left to national law and that Member States may exclude certain categories of employees from the application of the Directive whenever the aforementioned requirements prevail. The Proposed Amendments therefore propose that the Member State may no longer exclude employees by virtue of the special nature of an employee’s contract of employment or employment relationship, with the exception of two cases that are of minor significance in economic exchanges.

Individual Member States are expressly forbidden to exclude part-time workers, as defined in Council Directive 97/81/EC, employees with fixed-term work, as defined in Council Directive 99/70 EC, and loaned employees, as defined in Council Directive 91/383/EEC. From the perspective of the Member States, this restrictive approach of the Commission concerning exclusion is somewhat mitigated by Article 10 of the Insolvency Directive, which makes it possible for Member States to take the measures necessary to avoid abuses, as well as to refuse or reduce the obligation for payments.
or guarantees. The categories of employees that are currently listed explicitly in the Annex as being excluded from the scope of the Directive, on account of the existence of other forms of guarantee (under national law) offering the employee protection equivalent to that resulting from the Directive, may continue to be excluded. By dispensing with the Annex, however, the need to mention them explicitly is to be eliminated.

As regards the concept of insolvency, the Proposed Amendments suggest that the definition of the Regulation on insolvency proceedings be used, as it covers bankruptcy (liquidation) proceedings as well as other collective insolvency proceedings. With this broader definition of the term, the objectives of the Transfers Directive are also brought in line with those of the Insolvency Directive - as is stated in the Proposed Amendments.

Provisions on guarantee institutions

In order to ensure a certain (minimum protection) under Community law, the Insolvency Directive requires Member States to create a guarantee institution that provides for the satisfaction of outstanding claims relating to the remuneration for work of employees who have become insolvent, for a certain (minimum) period. The Insolvency Directive grants Member States the right to limit the liability of the guarantee institutions and therefore gives them the possibility to Article 3 (the so-called liability obligation) and Article 4 of the Insolvency Directive to choose from among several reference dates and associated reference periods, in order to be able to limit the time frame of the guarantee obligation. In this connection, any limit must not be shorter than the (minimum) period under Community law (Article 4 of the Insolvency Directive). It is fully in line with the social objective of the Insolvency Directive that the Member States may set a ceiling to the liability for employees’ outstanding claims (Article 4 (3) of the Insolvency Directive).

According to Article 3 (2), in connection with Article 4 (2) of the Insolvency Directive, Member States have the option to choose among three possible reference dates as well as reference periods:

- The onset of the employer’s insolvency, in which case the payment of outstanding claims must be ensured that relate to pay for the last three months of the contract of employment or the employment relationship occurring within a period of six months preceding the date of the onset of the employer’s insolvency.
- The date of the notice of dismissal issued to the employee concerned on account of the employer’s insolvency, in which case the payment of outstanding claims must be ensured that relate to pay for the three months of the contract of employment or the employment relationship preceding the date of the notice of dismissal issued to the employee on account of the employer’s insolvency.
- The date of the onset of the employer’s insolvency or that on which the contract of employment or the employment relationship with the employee concerned was discontinued on account of the employer’s insolvency, in which case the payment of outstanding claims must be ensured that relate to pay for the last 18 months of the contract of employment or the employment relationship preceding the date of the onset of the employer’s insolvency or the date on which the contract of employment or the employment relationship with the employee was discontinued on account of the employer’s insolvency. In this case, Member States may limit the liability to make payment to pay corresponding to a period of eight weeks or to several shorter periods totalling eight weeks.

The Proposed Amendments suggest a simplification of the – admittedly unnecessarily complicated – arrangements, to the effect that only one minimum period should be laid down under Community law, leaving it to the Member States to fix a date and a reference period. The Proposed Amendments argue that when adopting this approach, one could also react to a practice commonly followed by Member States, i.e., that the statutory guarantee should also cover claims arising after a specific reference date. However, the currently valid Insolvency Directive only relates to claims arising before a reference date. The Proposed Amendments therefore provide that Article 3 should include among the claims that guarantee institutions take over such outstanding pay claims relating to a period prior to and/or, as applicable, after a given date determined by the Member States.

The option to limit the liability of the guarantee institutions is to be retained. If the period is
A particularly significant issue is the level of satisfaction afforded to the claims of employees or the funds set up for their protection on the one hand, and the claims of secured creditors on the other.

limited, for which the guarantee institutions must pay outstanding claims, this period must not be shorter than a period covering the last three months for which pay is still outstanding. In this regard, Member States may stipulate in their national law that this (minimum) period must be placed within a reference period of at least six months (Article 4 of the Proposed Amendments). By the same token the possibility, available to Member States, to set a ceiling on payments to be made by the guarantee institution to employees is to remain unchanged.

The details of the organisation, the financing and the operation of the guarantee institution are left to the discretion of Member States which must comply with three principles: (1) the assets of the institutions shall be independent of the employers’ operating capital and be inaccessible to proceedings for insolvency (of the employer) (Article 5 (a) of the Insolvency Directive); (2) employers shall contribute to the financing, unless it is fully covered by the public authorities (Article 5 (b) of the Insolvency Directive); and (3) the institution’s liability shall not depend on whether or not obligations to contribute to the financing have been fulfilled (Article 5 (c) of the Insolvency Directive). It is therefore also up to the Member States to decide whether and in what form (for example, in what pay-off ranking etc.) to allow the guarantee institutions to participate in proceedings concerning the assets of an employer for collectively paying off his or her creditors.

Provisions concerning social security

The Insolvency Directive requires in its provisions on social security (Section III, Articles 6 to 8 of the cited law) that the Member States take measures (under national law): (1) to ensure that non-payment of compulsory contributions due from the employer, before the onset of his or her insolvency, to their insurance institutions under national statutory social security schemes does not adversely affect employees’ benefit entitlements in respect of these insurance institutions in as much as the employees’ contributions were deducted at source from the remuneration paid (Article 7 of the Insolvency Directive; the so-called guarantee obligation); and (2) to protect the interests of employees and persons having already left the employers undertaking or business at the date of the onset of the employer’s insolvency in respect of rights conferring on them immediate prospective entitlements to old-age benefits, including survivors’ benefits, under supplementary company or inter-company pension schemes outside the national statutory social security schemes (Article 8 of the Insolvency Directive). Pursuant to Article 6 of the Insolvency Directive, the Member States may stipulate that the provisions on guarantee institutions (Section II, Articles 3 to 5 of the cited law) do not apply to contributions by employees due under national statutory social security schemes or under supplementary company or inter-company pension schemes outside the national statutory social security systems.

Provisions concerning transnational institutions

In response to the growing international interdependency of companies, the Proposed Amendments provide that a new section, IIia (Articles 8a and 8b of the Proposed Amendments), should contain provisions on cross-border cases. When an undertaking with establishments in the territories of at least two Member States is in a state of insolvency within the meaning of Article 2 (1) of the cited law, and the opening of insolvency proceedings has been requested in a Member State other than that in which the worker habitually works, the competent guarantee institution shall be that in the latter Member State (Article 8a (1) of the Proposed Amendments). The extent of employees’ rights is to be determined by the law governing the competent guarantee institution (Article 8a (2) of the Proposed Amendments).

General and final provisions

The Insolvency Directive grants Member States the right to take the measures necessary to avoid abuses and to refuse or reduce the liability obligation referred to in Article 3 or the guarantee obligation referred to in Article 7 of the Insolvency Directive if it appears that the fulfillment of the obligation is unjustifiable because of the existence of special links between the employee and the employer and of common interests resulting in collusion between them.

Legal situation in the accession states

Bulgaria

In Bulgaria, claims secured by a pledge, mortgage or a retained lien are satisfied from the proceeds obtained for the collateral as first and second priorities (Article 722 (1) 1 and 2 of the Commercial Code). While the Code does provide for the distinction of two ranks of creditors, this only appears to be a form of pay-off ranking, as all secured creditors must be paid off anyway from the assets serving as collateral or the retained assets, which are not part of the insolvent assets and therefore only used to satisfy secured creditors. All possible claims of preferential creditors are covered from the other pay-off ranks - if there are enough assets available.

Claims of employees that arose up to one year before the opening of insolvency proceedings, are paid off as a fourth priority (Article 722 (1) 4 of the Code). At present, there is no institution (guarantee fund) in Bulgaria, as is required by the Community’s acquis communautaire. However, plans in such an institution may be expected in the near future, in the course of the envisaged comprehensive reforms of the Bulgarian insolvency law. It would be desirable if a solution were found that would raise employees’ claims to the first rank, which would pass to a fund by way of an assignment through the operation of law, which in turn would be able to obtain recourse in a rank behind the secured creditors.

Czech Republic

There is no separate guarantee institution in the Czech Republic. However, the law on the protection of employees in the event of their employer’s insolvency (the Law), which entered into force on 1 July 2000 does provide for some adaptation of the legal situation to the Community’s acquis communautaire, as specific employees’ claims (see section 5 of the Law regarding protected or secured claims) are satisfied by the Ministry of Labour and Social Affairs, after they are first claimed at the locally responsible labour office, in the event of an employer’s insolvency. In this case, the claims for wages and salaries of employees pass to the responsible labour office in the actually paid amount (section 8 of the Law), which may resort to recourse in the course of the proceedings against the employer (assignment by operation of law pursuant to section 11 (3), sentence 1, of the Law). Since neither the Law nor the law on bankruptcy and debt recomposition (KAG) provide a special ranking for rights to recourse, the labour office assumes the privileged legal position of the employee (section 31 (3) of the KAG), as is in line with assignment provisions, and its rights to recourse are satisfied from the
insolvent assets on an ongoing basis, together with the claims against the insolvent assets (section 31 (2) of the KAG) in the course of the bankruptcy proceedings.

As under Slovak law, collateral also constitutes special insolvent assets in the Czech Republic, the proceeds of which may be used to pay off secured creditors on an ongoing basis in the course of the bankruptcy proceedings (section 28 in connection with section 31 (1) of the KAG). There is, however, the restriction that in any event secured creditors only get a maximum of 70 per cent of the proceeds from the special insolvent assets securing his or her claim. The remaining 30 per cent goes to the general insolvent assets and (also) serves to satisfy the rights to recourse of the labour offices.

As a result, the Czech Republic has also adopted the requirements of the Insolvency Directive without, however, paying sufficient attention to the possibilities of providing some relief for the insolvent assets, which the establishment of a guarantee institution allows. Such a relief could also be achieved, in the case of the Czech Republic, by, for example, eliminating the privileged position of the rights to recourse of the labour offices and by treating their claims on the same basis as all other claims.

Hungary

The Hungarian legal situation is not significantly different from that in Poland. Although Hungary distinguishes between general insolvent assets and special insolvent assets which are used to pay off secured creditors, section 49/D of the law on bankruptcy and liquidation proceedings and final settlement (KonkG) provides, however, that the receiver may give to the secured creditors only 50 per cent of the proceeds obtained for the special insolvent assets. The remaining 50 per cent becomes part of the general insolvent assets and is distributed according to the pay-off ranking pursuant to section 57 (1) of the KonkG. The latter provides that secured creditors are paid off for their preferential claims in the second place, with the first 50 per cent being deducted, which they received before. The first priority is for claims against the insolvent assets, which include employees’ claims. As in Poland, if assets are of little value secured creditors will occasionally suffer considerable losses.

A guarantee institution for the protection of employees’ claims in the event of an employer’s insolvency – which is not in conformity with Community law in many respects – was established in Hungary as early as 1994 (law creating a Salary Guarantee Fund, the “SGF Law”). The Salary Guarantee Fund is part of the Labour Market Fund and is set up with the Ministry of Labour (section 1 (3) of the SGF Law). In contrast to Poland, the Slovak Republic and the Czech Republic, employees’ claims do not pass to the Salary Guarantee Fund, but the debtor is granted an interest-free loan (from section 5 of the SGF Law), for which he or she may apply to the receiver. This must be returned from the insolvent assets as a first priority (section 57 (1) a to i, in connection with (2) b of the KonkG). There are no plans to change this privileged pay-off ranking with bill No. Ti 4644 concerning an amendment of the SGF Law. The bill serves exclusively to adjust Hungarian legal norms to the Insolvency Directive.

An article by Tiborné on the creation and operation of the Salary Guarantee Fund sheds some light on the Hungarian understanding of the issue. While the author is familiar with bill No. TI 4644 and recognises that the SGF Law needs to be adapted to the requirements under Community law (especially regarding its scope of application), he points out that the legislative changes must not lead to any increases in contributions, as the Salary Guarantee Fund is sufficiently funded and actually has accumulated a surplus, since it is used only inadequately (receivers and administrators are not obliged to apply to the Fund). This is hardly surprising, bearing in mind that payments from the Salary Guarantee Fund are limited to five times the statutory monthly minimum wages per eligible applicant (section 7 (1) of the SGF Law). The suggestion of the author, which bill No. Ti 4644 does not address, also aims to highlight the monthly average gross income.

As a result, the planned changes of the SGF Law will transpose the requirements of the Insolvency Directive. However, as in Poland, and the Czech and Slovak Republics, the possibilities for providing relief for the insolvent assets, offered by the creation of a guarantee institution, were not given sufficient attention. In Hungary, such a relief may, for example, be an extension of the scope of the SGF Law (bill No. Ti 4644 already takes account of this suggestion), an increase of the ceiling for paying the unsatisfied

---


13 The Bulgarian insolvency law applying to businesspeople is contained in Part Four of the Commercial Law Code (HG).


15 Law No. 118/2001 Sb. See also: Regular Report 2000 of the Commission on the progress achieved by the Czech Republic on the way to accession, p.71.


17 This general restriction is the result of the amendment of the KAG which entered into force on 1 May 2000 (Law No. 105/2000 Sb.). Prior to that date, it was possible to limit the pay-off rate only under circumstances that still prevail today in the Slovak Republic. Parallel to weakening the legal position of secured creditors, Law No. 105/2000 Sb. strengthened the position of employees’ claims. Under the old legal regime only claims from employment relationships had to be satisfied on an ongoing basis from the insolvent assets, which had existed at the time or one month before the opening of bankruptcy proceedings (section 31 (3) of the KAG in its old version), claims from employment relationships that occurred in the course of the last three years prior to the opening of bankruptcy proceedings now also enjoy this privilege (section 31 (3) of the KAG in its new version).

18 Law No. IL/199 in the currently valid version.

19 Law No. LXVI/1994, in the currently valid version.

20 Bill no. Ti 4644 relating to an amendment of Law No. IV/1991 on the protection of employees’ claims on the employer, which bill No. Ti 4644 was amended by Law No. 118/2001 Sb. See also the judgments of the
claims of employees, and an elimination of the privileged position of claims under a loan.

Poland

As early as 1994, a law on the protection of employees’ claims in the event of an employer’s insolvency (ArbnFSchG) was enacted, which provides for a guarantee institution (the so-called Fund on Guaranteed Employees’ Claims) that is largely in conformity with Community law. Any employees’ claims (for protected or secured claims see Article 6 of the cited law) that the Fund satisfies become ex lege its claims (assignment by operation of law pursuant to Article 10 section 1 of the cited law).

Pursuant to Article 10 section 2 of the cited law, the rights of recourse of the Fund “enjoy the same legal protection as it is provided in separate provisions for liabilities arising from work”. The separate provision in the present case is Article 204 section 1 of the Polish insolvency law which governs the ranking for payoffs. It stipulates that claims from work performed must be paid off as a first priority (the so-called Class 1 according to Article 204 section 1 (1) of the cited law), while claims secured by pledge, mortgage, entry in the ships’ register or by retaining liens need only be paid off as fourth priority (the so-called Class 2b according to Article 204 section 1 (2) b of the cited law). When bearing in mind that the ranking for payoffs is based on the general insolvent assets, which also include the collateral, and that no special insolvent assets are formed, then it may well be – in the case of a low volume of assets, which is not so rare – that the insolvent assets are not sufficient to (fully) pay off the secured claims, ranked fourth, which means that creditors will occasionally suffer considerable losses.

If the position of the secured creditors is to be improved – without basically changing the existing ranking for payoffs, i.e., by granting the secured creditors a “genuine” preferential right – then it is necessary to provide some relief for the higher ranks. This could be achieved, for example, by giving up the privileged position of the Fund’s rights to recourse in connection with guaranteed employees’ claims by treating its claims just like all other claims. Such an approach is fully in line with Community law, since the details on organisation, financing and operation of the guarantee institution is left to the Member States, as are the arrangements as to whether, and if so in what form (for example in what ranking for payoff, etc.), the guarantee institutions are to share in the assets of an employer for collectively paying off of his creditors (from Article 5 (a) Insolvency Directive).

The equal treatment of the Fund’s rights to recourse for guaranteed employees’ claims presupposes, however, that the government would have to reconsider the financing of the Fund and would possibly have to boost the funding.

Slovak Republic

The guarantee institution required by the Insolvency Directive was set up in the Slovak Republic on 1 May 2000. The relevant regulations can be found in subsections 64a to 64f of the Labour Law Code (ArbGB) and in different places in the law on employment (BeschG). Employees’ claims (regarding secured claims see section 64b (2) a to i of the ArbGB, or section 22 (2) a to i of the ArbGB, as of 1 April 2002), which the guarantee institution (Fund) has satisfied, become ex lege claims of the institution (assignment by operation of law according to section 128 b (8) of the BeschG).

The Fund’s rights to recourse are claims against the insolvent assets (section 31 (3) of the law on bankruptcy and debt recomposition – KAG), which are satisfied in the course of the proceedings. The preferential treatment of the Fund’s rights to recourse does not affect the legal position of the secured creditors, as their claims are satisfied at any time during the proceedings and outside of the decision on the distribution of the remaining assets from the proceeds obtained for the collateral, up to the amount of the secured claim (section 28 (2) of the KAG). Limiting the payoff percentage for secured creditors to 70 per cent, which is possible pursuant to section 28 (5) of the KAG, only applies to those cases where the insolvent assets are not even sufficient to pay the remuneration and the expenses of the administrator, in connection with the preservation and administration of the insolvent assets. According to recent statistics on insolvencies, this is hardly ever of any significance, as of the 7,435 bankruptcy proceedings that were pending or opened during the first semester, only 386 of the applications for bankruptcy had to be dismissed for lack of sufficient insolvent assets.

Although the legal situation of secured creditors is more favourable than that in Poland, it must also be said that that while the requirements of the Insolvency Directive were transposed in the Slovak Republic, insufficient attention was paid to the possibilities for providing some relief to the insolvent assets, arising from the establishment of a guarantee institution. This could also be achieved in the case of the Slovak Republic, for example, by giving up the privileged position of the Fund’s rights to recourse and by treating its claims on the same basis as all other claims. At any rate, this would allow an increase in the achievable payoff rate for unsecured creditors (section 32 of the KAG).
Conclusion

There are varying degrees of tension surrounding insolvencies and related laws in the transition countries reviewed above. A particularly significant issue is the level of satisfaction afforded to the claims of employees or the funds set up for their protection on the one hand, and the claims of secured creditors on the other. With the exception of the Slovak Republic, the privileged position of employees’ and guarantee institutions’ claims goes hand in hand with a weaker position of the secured creditors – especially in the case of insolvencies with only few assets. The table below summarises the situation. The present study shows that the adoption the principles of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (Insolvency Directive), which has basically been effected in the aforementioned accession states, does not result in a better position of secured creditors. One might counter this statement by saying that this is not the objective of the Insolvency Directive. Other approaches would therefore have to be followed in order to improve the legal situation of secured creditors in the accession states. If that were to be done, however, it would mean to forego the problem-solving potential provided by the Insolvency Directive. Outsourcing the claims of employees, which deserve protection and must therefore be satisfied with priority, to a guarantee institution offers the possibility of distributing a higher pay-off rate among the secured creditors, while maintaining the social balance. However, the difficulty in implementing this approach lies in the need to reconcile the interests of all parties involved: employers, banks, trade unions and the public sector. Such an approach would yield better results in the area of the protection of investments, which is an indispensable factor for promoting prosperity in the ongoing transition process, than would an approach which favours intervention to the detriment of one class of creditors, i.e., the secured creditors.

<table>
<thead>
<tr>
<th>Pay-off ranking</th>
<th>Pay-off rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Claims of employees or the guarantee institution (if available)</td>
<td>Claims of secured creditors</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>Fourth priority</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>First priority</td>
</tr>
<tr>
<td>Hungary</td>
<td>First priority</td>
</tr>
<tr>
<td>Poland</td>
<td>First priority</td>
</tr>
<tr>
<td>Slovak Republic</td>
<td>First priority</td>
</tr>
</tbody>
</table>

As a rule, only the proceeds are distributed (as a percentage) after deducting the costs for the administration and disposal of the collateral or the special insolvent assets, as well as the expenses incurred in connection with the special insolvent assets and the share of the remuneration due to the receiver that is attributed to the special insolvent assets.
Focus on south-eastern Europe

The countries of south-eastern Europe (SEE) (Albania, Bosnia and Herzegovina, Bulgaria, Croatia, FR Yugoslavia, FYR Macedonia and Romania) have faced particularly tough obstacles on the path to achieving democratisation and the transformation into market-oriented economies. Political instability, low inflows of foreign direct investment and the effects of civil wars in the region have hindered the transition process. As a result, the pace of progress in these countries has been slower than that of the central European and Baltic countries, for example. Although all seven countries of the SEE region aspire to full-fledged membership of the European Union, only Bulgaria and Romania have effectively started accession negotiations. Bosnia and Herzegovina and FR Yugoslavia are at the other end of the transition spectrum. The state still dominates economic activity and large-scale privatisation is yet to take place.

Olivier Descamps’ article outlines the economic factors contributing to the ongoing difficulties of SEE countries in attracting foreign direct investment. The article discusses: the major challenges facing the region that are currently only in the early stages of being tackled; the improvement of the investment climate by addressing barriers to entry; high and arbitrary taxation and corruption; the enhancement of access to finance, particularly for small and medium-sized enterprises (SMEs) and new start-ups; and the lowering of barriers to intra-regional trade in order to attract foreign investors. The article concludes by emphasising the encouraging progress that SEE countries have made and the important role that international financial institutions, including the EBRD, will continue to play in assisting the region to develop its private sector.

The second article, by Kamen Zahariev, explores the legal and policy aspects of the institution building activities of the EBRD in SEE countries. The article examines the state of legal infrastructure in the region and provides specific examples of the EBRD’s role in promoting law reform and institution building.

The following article by Angela Conway and Amanda Gilman focuses on the efforts of SEE countries to develop codes of judicial conduct aimed at strengthening their respective judicial systems. It examines the status and nature of those efforts in each of the countries and the regulation of judicial conduct more generally. It notes that while these codes commonly provide for sound principles of judicial behaviour, their practical bearing is often seriously hindered by various factors, such as a lack of adequate implementing legislation, poor enforcement capacity, and the lack of resources and independence of the bodies in charge of judicial discipline.

The fourth article investigates the practice of channelling private investments into municipal infrastructure projects. It provides an analysis of legal frameworks for raising municipal finance and examines the possibilities for mobilising the private sector in municipal infrastructure projects. The article explores cooperation between local governments and private investors, and the commonality and diversity of experiences in the region. The main issues and challenges that each country faces in developing its legal regime on municipal financing are summarised, and areas where law reform or better law implementation are needed are outlined.

The last two articles provide local practitioners’ insights into current legislative developments in Bulgaria and Romania, and propose methods for the improvement of existing laws. Cristiana I. Stoica and Valeriu Stoica discuss the Romanian legal regime for creating security interest on personal property, analyse the main provisions of the law and provide a critical assessment of its implementation. The authors emphasise the importance of the introduction of a unified and transparent statutory regime for the creation and enforcement of security interests and suggest this would promote certainty in commercial and financial secured transactions. The new coherent and predictable security enforcement regime provides better protection for creditors and improves the Romanian investment climate. Stephan Kyutchukov’s article examines the functions of company and property registries in Bulgaria and their role as fundamental components of legal infrastructure supporting commercial activity. It describes the structure of paper-based registries and outlines the main problems associated with them. Recognising the need to create an electronic, centralised company, property and security registry, the article details the efforts of the Ministry of Justice in Bulgaria to promote the establishment of this kind of registry. The establishment of the electronic Central Registry of non-possessor pledges, the enactment of the Law on the Electronic Document and the Electronic Signature and the World Bank and EU Phare project for the creation of electronic cadastral maps of Bulgaria are discussed. These provide a sound basis for the further evolution of the registry.
Private sector development and the role of the EBRD in south-eastern Europe

The Stability Pact for south-eastern Europe (SEE) launched in 1999 deems the creation of vibrant market economies in the countries of this region its primary objective. Since 1999 significant efforts have been made to establish investor-friendly regimes and encourage private sector development. This article reviews the work carried out within the last years and the progress made by the countries to comply with the objectives of the Stability Pact.
At the launch of the Stability Pact for southeastern Europe (SEE) in Cologne on 10 June 1999, one of the objectives was the creation of “vibrant market economies based on sound macro policies, markets open to greatly expanded foreign trade and private sector investment, effective and transparent customs and commercial/regulatory regimes, developing strong capital markets and diversified ownership, including privatisation, leading to a widening circle of prosperity for all our citizens”.

More than two years later, it is time to evaluate the role of the private sector in achieving this objective. Have governments in SEE made substantial progress in creating an enabling environment for private sector development? How have local enterprises and entrepreneurs responded to the changing and sometimes volatile investment climate? How successful have countries in the region been in attracting greater levels of foreign direct investment (FDI)? In short, to what extent is private sector development in SEE “catching up” with the more advanced countries of central Europe and the Baltic states (CEB)? Can the international donor community start to withdraw, leaving future development in the hands of the private sector?

This article argues that the private sector in SEE has made encouraging progress in the past two years and is indeed catching up with the more advanced transition countries. Some SEE countries, the informal economy may account for nearly half of economic activity. With this caveat in mind, it is possible to give rough estimates at least of the percentage of GDP accounted for by the private sector.1 Chart 1 shows how this percentage has evolved in SEE over the past four years. The chart shows a modest upward trend, from 56 per cent in 1998 to more than 60 per cent in mid-2001 but the region remains below the central European and Baltic states, where private sector activity accounts for about 75 per cent of GDP on average. The state retains a dominant share in economic activity in two countries of SEE, Bosnia and Herzegovina and FR Yugoslavia. Taken together, these facts suggest that, once these countries embark fully on long-delayed large-scale privatisation, the gap between the two regions will be narrowed over the medium term.

Privatisation

The rise in private sector activity noted above has come largely from the increased pace of privatisation over the past two years. In most countries, small-scale privatisation is largely complete, the exceptions in the region being Bosnia and Herzegovina and FR Yugoslavia. However, large-scale privatisation and the sale of strategic enterprises and public utilities are far more difficult tasks. Chart 2 evaluates the progress in large-scale privatisation as measured by the EBRD index, where 1 indicates little or no progress, and 4+ indicates a standard
similar to advanced market economies (see Transition Report, various issues, for more details). The chart tells an interesting story. Between 1994 and 1999, large-scale privatisation in SEE was lagging behind even the countries of the Commonwealth of Independent States (CIS). Since then, however, there has been a significant acceleration and preliminary estimates suggest that the SEE region has now overtaken the CIS. The region has seen a number of significant “flagship” privatisations since mid-1999.

**Capital flows**

Foreign investors are playing a significant role in the sustainable development of the SEE region. Investors have shown considerable caution in recent years. Total private flows to SEE, close to US$ 6 billion in 1997, had fallen to US$ 2.4 billion in 1999, reflecting the general instability in the region. However, the two years since then have seen a significant upturn in private flows, with the total for 2001 forecasted to be around US$ 4.5 billion (see Chart 3).

Since 1998 FDI has accounted for well over half of the capital flows (see chart 4). However, compared with CEB, the countries of SEE have been less successful in attracting FDI, reflecting a slower pace of reform, the late start of privatisation and less market confidence about EU accession prospects. FDI inflows per capita into SEE since 1999 have been relatively stable but are only about one-quarter of those achieved in CEB. In countries that have received substantial flows of FDI, privatisation programmes have been the main source of inflows, and FDI and privatisation revenues are closely correlated. Bulgaria increased per capita FDI inflows to US$ 123 in 2000, on a par with Hungary or Lithuania. Privatisation of large public enterprises and of the major banks were the key sources of inflows, and with the expected completion of the privatisation of public utilities over the next two years, Bulgaria will increasingly face the same challenge as CEB countries in trying to maintain FDI. In Romania the privatisation of large-scale state-owned enterprises and public utilities is still in the early stages and FDI inflows have so far failed to regain their peak level of over US$ 2 billion in 1998. If strong structural reforms and adherence to macroeconomic austerity can be maintained, FDI inflows into Romania could double over the medium term. FDI in Croatia dipped significantly in 2000 relative to 1999.

Other SEE countries have lagged a long way behind in terms of FDI, mainly because of the high level of political instability that has prevailed in the region and the slower pace of reforms, especially in large-scale privatisation. As a result, they have been far more dependent on official financial flows, which have typically covered around one-third of their current account deficits, and on occasional large deals, as the sale of Macedonian Telecoms earlier this year illustrates. Replacing official flows with private financing will be a key challenge to prevent costly external adjustment once donor resources diminish. The case of FR Yugoslavia will be particularly instructive in this

**Chart 3: Total net private and official flows to south-eastern Europe**

![Chart showing capital flows](chart3.png)

**Source:** World Economic Outlook Database and EBRD Database

**Note:** Figures for 2001 are forecasts
According to local businesses, the most significant impediments to their investment and growth are haphazard and arbitrary taxation, excessive business regulation and weak judicial protection of property rights.

Major challenges

It is clear that, notwithstanding the considerable progress over the last two years, much more investment from both domestic and foreign sources is required if the region is to achieve a path of sustainable high growth. In 1999 total investment as a percentage of GDP was around 25 per cent in CEB, but less than 15 per cent in SEE, and these figures have changed little in the intervening period. How can the gap between the two regions in terms of investment levels be closed? The experience of the past few years suggests that there are three major challenges that are only in the early stages of being tackled.

The first is improving the investment climate by tackling barriers to entry, high and arbitrary taxation, and corruption. The second is enhancing access to finance, particularly for small and medium-sized enterprises (SMEs) and new start-ups. The third is lowering barriers to intra-regional trade, so that foreign investors in particular might be attracted by the prospect of a larger market for the fruits of their investment. These challenges are discussed in turn.

Investment climate

During 1999 and early 2000, the EBRD and World Bank carried out a joint survey of more than 3,000 enterprises across almost all transition countries. The surveys were designed to elicit from enterprises themselves what they saw as the main obstacles to doing business in their country.

Although there were significant differences between, for example, advanced countries in CEB and early stage transition economies in Central Asia, common themes emerged across all countries. Local businesses repeatedly said that the most significant impediments to their investment and growth are haphazard and arbitrary taxation, excessive business regulation and weak judicial protection of property rights.

There are notable similarities across the countries of SEE: policy instability is generally considered an important obstacle to investment and expansion, while taxes and regulation (and in particular business licensing) and lack of access to finance also figure prominently as major constraints. However, there are also some striking differences. Albanian enterprises, for example, are deeply concerned about law and order issues, although this is an area where significant advances have been made in the last couple of years, whereas enterprises in Romania are more worried about macroeconomic instability as a constraint.

One very significant step towards tackling the problems identified is the South East Europe Compact for Reform, Investment, Integrity and Growth (the “Investment Compact”). This is a key component of the broad structure of the Stability Pact and facilitates commitments by countries in the region to take concrete actions across a range of investment climate issues, with specific targets and timetables for each action. Under the sponsorship of the OECD, each country has prepared a set of “monitoring instruments”, so that progress, or lack of progress, on specific areas is immediately apparent. The increased transparency brought about by the introduction of monitoring instruments strengthens considerably the hand of reformers in each country.

In addition, several countries have benefited from a detailed assessment of barriers to foreign investment by the Foreign Investment Advisory Service (FIAS), a joint service of the IFC and World Bank.

The role of SMEs

In the SEE region, SMEs are, and will continue to be, at the heart of sustainable economic growth. However, SMEs face a number of difficulties that larger enterprises find easier to overcome, and any strategy to promote SMEs must simultaneously tackle the three “pillars” of (i) finance, (ii) improvements in the business environment and (iii) the strengthening of SME support networks.

Access to finance is one of the main obstacles cited by SMEs in the region. The EBRD-World Bank survey in 1999–2000 shows that the finance constraint affects small enterprises relatively more than larger businesses, with the exception of Bosnia and Herzegovina. The finance constraint is relatively less binding in Albania than in the other economies, perhaps because micro and small enterprises in Albania benefit from substantial remittances flows, estimated to be equal to 20 – 40 per cent of GDP; the private enterprise sector has largely relied on these inflows to meet its financial needs.

A comprehensive overview of the banking sector shows that, even where privatisation and restructuring have advanced, the intermediation of the banking system in the region is poor. Bank credit to the enterprise sector has grown modestly but banks rarely...
meet enterprise needs in terms of maturity and collateral requirements. Shortage of funds, lack of credit skills, unavailability of good lending opportunities, and poor and/or deteriorating loan portfolios are among the many factors responsible for a low level of bank credit to the private sector. Sometimes a relatively high level of bank credit to enterprises with respect to GDP hides a high level of insider or related party lending. Moreover, micro and small enterprises are rarely recipients of bank credit outside very specialised programmes funded by IFIs and donors.

One response of the international donor community to this lack of credit has been to create banks that specialise in micro-enterprise lending. The performance of these banks to date is discussed in the box below. Looking ahead however, the challenge of assisting SMEs and improving their access to finance is a major one. To date, the only country in which the banking system is playing some role is Croatia. With capital markets being underdeveloped or non-existent, the burden of intermediation falls on the banking system. Policy-makers in the region must address the often inadequate legal and regulatory environment, poor supervision capabilities and inadequate accounting standards. The enhanced presence of Western banks can also play an important role, as recent experience in most countries of the region indicates.

Intra-regional trade
Trade integration is key to promote higher growth in the countries of southern Europe and longer-term integration into the EU. Given the small size of the domestic markets, integration can offer clear benefits for investors. To illustrate how small these countries are in economic terms, GDP in Romania is less than a quarter of the level in Greece, and the GDP of Albania, Bosnia and Herzegovina and FYR Macedonia combined is only one-third of Romania’s.

This long-term objective contrasts sharply with the current situation, with trade playing diverse roles in the countries of the SEE region. A typical indicator of trade openness is the trade-to-GDP ratio, defined as the sum of total exports and imports over GDP. At the end of 2000 these ratios varied from a low of 32 per cent of Albania, to 56 per cent of Romania, up to the 90 per cent of Bulgaria and FYR

Micro-enterprise banks
The primary purpose of micro-finance is to provide access to finance for very small private sector entrepreneurs who otherwise have little opportunity of securing debt financing on acceptable terms. Commercial banks often view micro lending as labour-intensive, risky and therefore unprofitable. Being small, new and unknown, micro-enterprises are frequently forced to operate in the black economy, and are therefore unable to provide tax returns or prepare business plans. Therefore, they cannot communicate to lenders information about their creditworthiness, if the lenders use traditional credit techniques.

One approach that has gained popularity in recent years is the establishment of new institutions, “micro-banks,” which focus solely on micro lending. The EBRD participates in the capital in the new institutions and invests together with other IFIs, bilateral agencies, micro specialist institutions and in some cases local commercial banks. These micro-finance institutions are recipients of substantial grant and subsidised donor funding which supports start-up costs and constitutes the initial funding base for lending activities while the institution becomes locally known and starts building up its own deposit base. Governance and financial fragility problems are obviously overcome through this approach.

Four banks have been set up so far. MEB Kosovo, MEB Bosnia and FEFAD Bank Albania are all operating on a highly successful basis. MFB Yugoslavia opened for business on 10 April 2001 and ProCredit Bank Bulgaria on 8 October 2001. Plans for a similar bank are well advanced in Romania, where a finance company has already been established. Plans for Croatia and FYR Macedonia are being explored. The existing banks have all made excellent progress in 2001 and are fast approaching sustainability.
In light of restricted public sector budgets, governments in the region have recently started to consider whether public private partnerships (PPPs) can be an effective complement to financing infrastructure projects.

Macedonia. These values are low compared to other transition countries of CEB, where it exceeds 100 per cent. Based on these considerations, trade volumes can be expected to increase, especially after the re-opening of the Yugoslav border and the restoration of the main trading routes towards central Europe.

Extra-regional trade shows a strong and increasing orientation towards the EU. Four countries in the region - Albania, Bulgaria, Croatia and Romania - send more than half of their exports to the EU. In the case of Albania, trade with the EU accounts for almost 90 per cent of the country total exports, while it stands for 51, 55 and 64 per cent of Bulgarian, Croatian and Romanian exports respectively. By contrast, intra-regional trade is relatively small. Trade turnover between neighbours Bulgaria and Romania represents around 1–2 per cent of their total trade, and their trade with other countries of the region is not much more substantial. Albania has virtually no trade with the rest of the region. There are far stronger trade links among some of the successor states of the former Yugoslavia: between Croatia and Bosnia and Herzegovina (11.2 per cent of Croatia’s exports go to Bosnia and Herzegovina), and between FR Yugoslavia, Republika Srpska and FYR Macedonia.

The existence of these links points both to the significant potential for greater integration, and it suggests that other barriers to trade related to recent conflicts may be as important as policy barriers.

Regional private sector initiatives

The EBRD was given a mandate to coordinate the international community’s efforts to promote economic development and regional integration in south-eastern Europe through Private Sector Development. To this end, a paper was presented to the Stability Pact at the March 2000 Funding Conference entitled “International Financial Institutions; Regional Private Sector Initiatives in South-Eastern Europe”. The paper describes ten specific Regional Initiatives, selected through a process of consultation among the IFIs as having the most immediate impact. In order to improve the pace of implementation, most of the initiatives are based on existing operations or proven models, which can be extended from one country to another. The paper indicated a need for bilateral donor grant co-finance and technical assistance for “Quick Start” extension or implementation of these initiatives of €104 million.

Private Sector Development under Working Table II attracted total pledges of €356 million. Out of this amount, €253 million was pledged by the IFIs themselves including the World Bank Group, the EBRD, the European Commission and the Council of Europe Development Bank (CEDB). Bilateral donor grant co-finance and technical assistance pledges totalled €102 million effectively meeting the identified target for the “Quick Start” programme.

It is encouraging to note that the more advanced and well-defined initiatives are already having an impact on the ground, especially the EBRD’s Trade Facilitation Programme and the IFC’s South Eastern Europe Development (SEED). The Stability Pact has had a very definite impact by generating incremental resources to the operations and programmes managed by the IFIs and a higher concessional element.

Future initiatives of the EBRD and other IFIs

Looking ahead, what role can the EBRD and other members of the international donor community, including the IFIs, play in promoting private sector development and investment flows in SEE over the medium term? The highest priority for the IFIs is to speed up the implementation of existing projects and confirm their risk appetite and support for the region. This section evaluates the possible contribution of a number of concrete, project-related products and concepts under active consideration by the EBRD that have been applied successfully elsewhere and could be implemented in the region, or that already exist but could be expanded further with additional donor support.

Public-private partnerships and risk-sharing in infrastructure

Infrastructure in south-eastern Europe is characterised as being outdated, inadequate to support economic growth, expensive to maintain and having regional imbalances. In light of restricted public sector budgets, governments in the region have recently started to consider whether public private partnerships (PPPs) can be an effective complement to financing infrastructure projects. This interest is primarily motivated by a desire to finance infrastructure projects off budget. Nonetheless, in order for PPPs to be effective, there needs to be a strong commitment to establish the appropriate enabling environment to attract private sector investment.

Trade facilitation programmes

EBRD guarantees cover commercial and political risk of non-payment by the issuing bank. They do not assume any risk of the exporter or the importer. For each EBRD guarantee issued, the EBRD will charge a guarantee fee or - in the case of pre-export advances - interest, which will depend on the agreed market rate and tenor of the EBRD exposure. There are no commitment fees. The introduction during 2000 of umbrella guarantees with maturities of up to one year has proved popular in the region. The guarantee permits exporters to ship with the support of a first class bank guarantee, and the importer to have flexible payment terms. The combination of enhanced payment security for the exporter and flexibility for the importer with minimum documentation is proving to be an attractive combination.

The EBRD is looking to provide longer terms in support of the import of capital equipment needed in the region to improve the industrial base. Some transactions have been completed already.

In addition to providing trade finance guarantees, the EBRD has recently been extending short-term revolving loans to banks in its countries of operations. These loans are structured to fund trade related advances to local companies. To date however, no such line has been finalised with any bank in the SEE region, due to the weaknesses in the banking system noted earlier in the paper. However, this situation is expected to change in 2002.

A need for working capital amongst exporters in FR Yugoslavia has been identified by the EBRD and a Framework Facility has been approved. In the immediate future, the EBRD expects to be offering pre-export finance facilities to exporters, with the sources of repayment linked to the proceeds of export sales.
SME/micro-finance support

Given the problems noted earlier with the financial sector in the region, what else can be done to enhance the SME sector? In FR Yugoslavia, the complete restructuring of the banking sector is a pre-condition for SME finance. The EBRD is working with the government on several projects with the aim of allowing a few banks to commence proper banking operation. One proposal is that Technical Cooperation (TC) funds be used in parallel with the financing of the EBRD with a focus on supporting lending to SMEs. This should take the form of introducing modern credit technologies, risk management policies, portfolio management skills and training of loan officers.

The remaining countries will also require ongoing support in improving corporate governance and lending techniques to SMEs and micro enterprises. The National Savings Bank of Albania, which is in the process of being privatised, is such an example.

Municipal environmental infrastructure

The needs of municipal authorities in the region to upgrade the provision of basic services are well documented. The EBRD has gained extensive experience in working with municipalities and local service utilities by the financing of water and waste water investments, district heating, and urban transport.

The key requirements for implementing these projects are adequate technical assistance (aimed at project preparation and institution building for improved service delivery and operational management), combined with appropriate financing structures including grant and concessionary funding. Parallel arrangements which support project preparation activities and strengthen implementation capabilities at the municipal level may also provide opportunities for the EBRD and bilateral donors to accelerate the development and implementation of joint projects.

In FR Yugoslavia, projects in excess of €140 million are being developed by the EBRD. Municipal programmes are planned with institution-building requirements in other countries of the region.

Institution building

Institution-building categories which can be identified on a region-wide basis and which are linked to this priority objective in the SEE region include:

■ TurnAround Management - the EBRD TAM Programme is a vehicle for delivering managerial, operational and marketing advice to transform SMEs into competitive businesses. TAM and bilateral donors have discussed the management needs of local businesses in the region, and there is a broad understanding of the role that TAM could continue to play in addressing and overcoming widespread management weaknesses.

■ Strengthen commercial banks and other financial institutions - in addition to the institutional strengthening of SMEs and micro-finance referred to above, weaknesses of commercial banks, leasing companies, pension funds, insurance companies and other financial intermediaries serving private businesses are a binding constraint to private sector development in the Bank’s countries of operations. Drawing upon the lessons of the Russian banking crisis of 1998, the EBRD is committed to overcoming these weaknesses in order to meet the financing needs of local private businesses and to promote mobilisation of savings. Assistance to financial intermediaries includes improvement of credit policies and procedures, treasury management, accounting standards, internal audits and staff training. With some banks, the EBRD is sponsoring twinning programmes to transfer best practice. Because weaknesses in financial intermediaries are widespread, the institution building task is immense.

■ Legal transition - the EBRD has an established Legal Transition Programme, through which advice and technical assistance is provided. Focusing on key commercial and financial sectors, legal transition assistance is often a precursor to additional EBRD investment activity.

■ Corporate governance - the EBRD is working with its clients to improve corporate governance. Priority areas have been environmental compliance, accounting standards and health and safety.

Conclusion

In the last two to three years the countries of SEE have made encouraging progress in catching up with more advanced transition economies and improving the investment climate. Governments throughout the region are making serious efforts to tackle the difficult tasks of privatisation of large-scale enterprises, improving standards of corporate governance and competition, and lowering impediments to investment and economic activity. However, the pace of progress has been slower than some had expected, and much more remains to be done in coming years. Western governments and IFIs must therefore continue to play a key role in assisting private sector development and enabling greater flows of foreign investment through enhanced risk-sharing, and an active policy dialogue with governments.

* Olivier Descamps
Business Group Director for south-eastern Europe and the Caucasus
EBRD
One Exchange Square
London
Tel: +44 20 7 338 7164
Fax: +44 20 7 338 7218
Email: DescampsO@ebrd.com
Web: www.ebrd.com

This article is an edited extract from a paper presented by the author at the Second Regional Conference for south-east Europe in Budapest on 25–26 October 2001. That paper was prepared jointly by economists and bankers at the EBRD under the direction of Olivier Descamps (Business Group Director for south-eastern Europe and the Caucasus), Jean-Marc Peterschmitt (south-eastern Europe Co-ordinator) and Peter Sanfey (Senior Economist and Lead Economist for south-eastern Europe).
Reforming the legal environment in post-conflict societies: legal and policy aspects of the EBRD’s activities in south-eastern Europe

This article explores the legal and policy aspects of the institution building activities of the EBRD in SEE countries. It examines the state of legal infrastructure in the region and describes examples of the EBRD’s role in promoting law reform and institution building.
Since the demise of communist regimes a decade ago, the countries of central and eastern Europe (CEE) and the Commonwealth of Independent States (CIS) have undergone radical and sometimes traumatic social, political and economic change. The countries of south-eastern Europe (SEE) – Albania, Bulgaria, Bosnia and Herzegovina, Croatia, FYR Macedonia, Romania and FR Yugoslavia – have had to carry a particularly heavy burden. Their transition process to democratic, market-oriented societies has often been hindered by political instability, civil wars and ethnic violence. The energy poor economies of the region suffered from the collapse of their traditional markets for value added exports (the Soviet Union, the internal market of the former Yugoslavia and the Middle East), which was exacerbated by the loss of access to preferential energy imports from Russia. As a result, the countries of the region incurred excessive foreign debt, low per capita private investment flows, hyperinflation and economic recession on unprecedented levels. The armed conflicts in former Yugoslavia, economic sanctions and the weakening of government structures, led to the rise of organised crime, delays in urgently needed reforms and the pernicious effects of delayed or opaque privatisation deals. As a result, almost all of the poorest countries in Europe are now concentrated in the south-east.

Legal infrastructure

The difficulties experienced by the countries of south-eastern Europe have also delayed the process of establishing the legal and regulatory environment necessary for the development of private sector activities and foreign investment. Despite the uniformly bleak economic and political environment in which the emerging markets of that region developed in the last decade, the present state of their legal and regulatory environment is far from uniform. South-eastern Europe is probably the most heterogeneous region in Europe in terms of its history and ethnic and religious diversity. This is also true for the legal traditions and systems of the region. This is so despite the great divide between the countries which were historically under the influence of either the Ottoman Empire or the Austro-Hungarian Empire. There were also different patterns of integration of west European constitutional and commercial law into the legal systems of the region. Romania followed the French Civil Code, Bulgaria adopted the German system of civil law and Yugoslavia followed the Austro-Hungarian model in many respects. The post-war experiences of the countries also influenced the diversity and development of the legal systems in the region. During this period, Romania and Bulgaria were firmly within the Soviet sphere of influence, Yugoslavia was experimenting with “social ownership”, neutrality and openness to the rest of the world and Albania represented the opposite approach with the crudest forms of communist experiments in isolationism (which at times included the abolition of the teaching of law as it was deemed an “unnecessary bourgeois concept”). A third factor contributing to the differences in the current status of privatisation and legislative reforms is the effect of the civil wars and ethnic conflicts which followed the disintegration of former Yugoslavia.

The annual EBRD Legal Indicator Survey reflects some of these differences. The map above shows the composite commercial law indicators of the region as being “barely adequate” for normal private sector commercial activities, while at the same time indicating that Bosnia

Local lawyers’ perceptions of the quality of commercial law

<table>
<thead>
<tr>
<th>Adequate</th>
<th>Barely adequate</th>
<th>Inadequate</th>
<th>Detrimental</th>
</tr>
</thead>
</table>

Note: No country’s laws were perceived as “comprehensive”. No data available for Kyrgyzstan.

Local lawyers’ perceptions of capital markets regulations

<table>
<thead>
<tr>
<th>Extensiveness</th>
<th>Effectiveness</th>
</tr>
</thead>
</table>

Note: The Y axis reflects both the extent to which capital markets regulations approximate international standards and their effectiveness.

Local lawyers’ perceptions of Company Laws

<table>
<thead>
<tr>
<th>Extensiveness</th>
<th>Effectiveness</th>
</tr>
</thead>
</table>

Note: The Y axis reflects both the extent to which company laws approximate international standards and their effectiveness.
and Herzegovina and Albania are lagging further behind. In the case of the former, this is mainly due to the weakness of the institutions inherent in the forced federation of former enemy entities, and, in the case of Albania, because of the particularly extreme and isolationist form of communist rule experienced by that country.

A similar picture is revealed by looking at company law and the regulation of capital markets in the region, which show the slower progress of Albania and FR Yugoslavia. In the case of the latter this reflects the significant delays in privatisation and in kick-starting the reform of commercial law.

A comparison of the legal transition indicators of the countries of the region with other transition countries suggests that in the last two to three years the pace of legal reform has picked up. Commercial legislation in south-eastern Europe is catching up with more advanced transition economies and in some areas, such as the regulation of secured transactions and bankruptcy law, it has already reached or even exceeded their level.

The role of the EBRD in fostering reform

Initiatives to improve laws and legal institutions in the region are focusing significantly on reducing excessive government control, strengthening the judiciary, improving corporate governance and tackling official corruption at all levels. The activities of the EBRD in assisting the countries of south-eastern Europe in meeting these challenges are focussed on three main areas. They are:

- promoting infrastructure development, foreign investment and privatisation through investments which have a high demonstration effect for the development of the private sector;
- promoting legal reform in key areas of commercial law; and
- providing assistance in post-conflict communities.

In the first area, the EBRD’s investment activities in the region have concentrated on accelerating large-scale industrial and bank privatisation (see Box 1). There is also a focus on introducing financing structures and products which are particularly suited to countries with underdeveloped infrastructure and low capacity for sovereign debt financing due to high levels of foreign indebtedness. These include municipal infrastructure financing based on public-private partnerships (PPP), concessions and financial

---

1 Of the seven countries in the region, only Bulgaria and Romania have EU pre-accession status and they are lagging behind the core group of central European EU accession candidates.
4 The EBRD’s Legal Indicator Survey has been conducted annually since 1995 and measures the perceptions of lawyers and legal experts in its countries of operations on the commercial laws and financial regulations of their countries. The results of the survey are published in the EBRD’s Transition Report and in Law in transition.
6 A similar trend is observed in the private sector development in the region. See the analysis provided by Olivier Descamps, “Private sector development and the role of the EBRD in south-eastern Europe”, in this issue of Law in transition.
Box 1: Examples of privatisations, 1999–2001

Albania: Albanian Mobile Communications

The most significant privatisation in Albania to date was concluded in July 2000, when an 85 per cent stake of the state-owned mobile phone company, Albanian Mobile Communications (AMC), was sold for US$ 85.6 million to a consortium comprising Telenor of Norway and Cosmote of Greece. As a consequence of this privatisation, mobile phone users have already benefited from a fall in tariffs, an improved service and increased investment in the sector.

Croatia: Croatia Telecoms

In 1999 the government privatised a 35 per cent strategic stake of the fixed-line telecommunications monopoly, Croatia Telecoms (HT), to Deutsche Telekom for approximately US$ 850 million. Ahead of the sale, the EBRD provided €35 million in a long term loan to Sofijska Voda, a joint stock company which will operate the city of Sofia’s water and waste water system. The loan concluded several years of work on the part of the EBRD and the city of Sofia to successfully bring much needed new investment into the city’s water and waste water system. In addition to financing these improvements outside of the city’s budget, the project will also result in efficiency gains and improved services.

Box 2: Sofijska Voda: Sofia water concession project

The EBRD provided €35 million in a long term loan to Sofijska Voda, a joint stock company which will operate the city of Sofia’s water and waste water system. The loan concluded several years of work on the part of the EBRD and the city of Sofia to successfully bring much needed new investment into the city’s water and waste water system. In addition to financing these improvements outside of the city’s budget, the project will also result in efficiency gains and improved services.

The deal is the first of its kind in the region and will have an important demonstration effect in bringing in private investment into the water sector. The investors are a consortium which includes International Water Limited (UK), Bechtel Enterprises Holding, United Utilities plc and the city.

EBRD involvement began in early 1996 when the Bank was invited by the city to monitor the privatisation process and ensure that the selection of the concessionaire would be fair and transparent. This process was concluded with the provision of a long term loan by the EBRD. Working closely with city officials over a period of several months, a concept paper was developed which established an effective blueprint for moving forward, including an outline of the preferred form of PPP for the project, which was a concession. Moreover, the concept paper provided all parties with a clear understanding of what the issues would be and what kind of commitment was needed by the city in order to progress.

With the support of the city, which contributed 20 per cent of the funding for technical cooperation, the EBRD then helped to mobilise EU funding to engage a multi-disciplinary advisory team for the city. Among their other tasks, the advisers played a key role in guiding the city through the procurement process to ensure that appropriate procedures were in place and that the selection criteria was consistent with good international practice.

Another area of the EBRD’s activities in south-eastern Europe is the provision of assistance with analysing and reforming countries’ commercial laws. Included in this group of activities is the EBRD’s legal sector assessment work, along with the annual EBRD Legal Indicator Survey of lawyer perceptions in the region. Legal sector assessments benchmark the development of key commercial law sectors in each country against international standards, providing an analysis of the existing legislative framework. Among the specific legal reform projects implemented by the EBRD in the region are: the development of modern pledge laws in Bulgaria and Romania which are based on the EBRD Model Law on Secured Transactions; the Albanian telecommunications law reform project; and the assistance provided to FR Yugoslavia to prepare a new privatisation law for the Republic of Serbia. Another aspect of the EBRD’s role in the SEE region is its assistance to post-conflict states and communities. The EBRD seeks to help post-conflict countries build better societies by drawing on the advantages offered by its status as an international financial institution; key features of which are its treaty making status and its related ability to absorb political risk.
Focus on south-eastern Europe – Law in transition

Box 3: Albanian telecommunications

This project, funded by the United Kingdom in cooperation with France, permitted the adoption of a new telecommunications sector policy in 1999 in anticipation of the privatisation of Albtelecom. It also provided training on tariff rebalancing and interconnection charges to the Telecommunications Regulatory Entity. The EBRD assisted in the drafting of a new telecommunications law, which was adopted in June 2000. The new law established the foundation for a modern regulatory framework favouring competition and private investment. This legal reform project has had a direct impact on the EBRD's investments in Albania.

The Bank has provided a loan to Albtelecom, the state-owned incumbent fixed-line operator and is prepared to consider further financing to support the privatisation of the Company, previously announced by the government. The EBRD is also seeking to provide finance to the private sector, which is beginning to develop as a result of the Albanian Government’s new sector policy and the overall improvement in the regulatory environment, as evidenced by the privatisation of the Albanian Mobile Company and the awarding of a second GSM mobile licence to Panafon, the Greek mobile operator, which is supported by Vodafone as the major shareholder.

Following the success of the first telecommunications reform project, the government asked the EBRD to assist it in preparing all tender documents for the award of the second GSM licence through an open and transparent bidding process. With the EBRD’s assistance, the tender documents were prepared and the tender was launched in Autumn 2000. The EBRD’s involvement helped reassure the participating bidders of the fairness and transparency of the bidding process.

Box 4: FR Yugoslavia: Serbian Privatisation Law

In June 2001 the Republic of Serbia enacted a new Privatisation Law along with several related laws and regulations. The new Privatisation Law was prepared with the assistance of the EBRD in close consultation with the World Bank. It was funded by the United Kingdom’s Department for International Development (DFID). The new Privatisation Law is the third attempt to privatise social and state owned capital in the Republic of Serbia. Previous attempts, which were largely unsuccessful, were based on an insider privatisation model where up to 60 per cent of a company was transferred to workers and pensioners and the decision on whether to privatise the company was left to the sole discretion of the company. The new Privatisation Law represents a radical break with previous attempts. Under the new law at least 70 per cent of the social and state owned capital of a company subject to privatisation must be offered for sale. The remainder up to a maximum of 30 per cent of the social and state owned capital of the company can be transferred to the company’s employees and other citizens. The new law also puts foreign and domestic natural and legal persons on an equal footing to participate in the privatisation process. In this respect it is noteworthy that existing shareholders of a company do not have a right of first refusal with respect to the capital to be privatised. Additional features of the new Privatisation Law include mandatory privatisation within a four year time frame, a relatively straightforward privatisation process and cash compensation for property nationalised after the Second World War. The launch of an international tender in October 2001 to sell up to 70 per cent stakes in the Beocin, Novi Popovac and Kosjeric cement plants, the first privatisation under the new law, attracted eight multinational parties.

Notes:

Kamen Zahariev
Senior Counsel
EBRD
One Exchange Square
London
Tel: +44 20 73386907
Fax: +44 20 73386150
Email: zahariek@ebrd.com
Web: http://www.ebrd.com

Charts and map prepared by Olivia Oddi.
Survey of judicial codes of conduct in south-eastern Europe

Over the past few years, countries and other legal jurisdictions throughout south-eastern Europe have worked to develop discrete codes governing judicial conduct. This article examines the status and nature of those efforts and the regulation of judicial conduct more generally throughout the region. It notes that while these codes commonly provide for sound principles of judicial behaviour and constitute remarkable attempts to strengthen the judicial systems of these countries, their practical bearing is often seriously hindered by factors such as the discretionary nature of the codes themselves, lack of adequate implementing legislation, poor enforcement capacity and lack of resources and independence of the bodies in charge of judicial discipline.
Discrete codes of judicial conduct now exist in almost all countries and legal jurisdictions of the region. This fact is in large part due to the efforts of professional associations of judges, who have led efforts to put such codes in place. Most of these codes remain voluntary and apply only to association members. However, some codes are referenced in separate legislation governing judicial discipline and are thus enforceable. Although legislation governing judicial discipline generally establishes guidelines for judicial conduct, these provisions are rather limited and vague. In contrast, many of the discrete codes of conduct describe obligatory and prohibited conduct in some detail.

Even where legislation provides for the enforcement of codes of conduct and/or disciplinary rules, the mechanisms for performing this task are universally weak. In most instances, the institutions responsible for enforcement lack sufficient staff and resources to execute their work. As a result, despite the existence of a relatively significant body of regulations pertaining to judicial conduct, most countries in the region adjudicate only a handful of misconduct cases each year.

The treatment of judicial conduct in the countries and regions of south-eastern Europe is reviewed below. The accompanying chart reflects research conducted by the American Bar Association’s Central and East European Law Initiative (“ABAJEEII”) during autumn 2001 and compares approaches to substantive and procedural aspects of this area across the region.

**Albania**

The Albanian National Judicial Conference developed a code of ethics for judges at the end of 2000. Through its 29 articles, the Albanian code establishes standards for conduct in core areas such as independence, impartiality and diligence. The code is comparatively in depth and detailed, addressing issues such as ex parte communications, which are not treated by many other codes in force in the region. Although the code states that the Conference is responsible for its enforcement, it does not delineate specific enforcement procedures and is not being actively enforced at the present time.

Despite the existence of a code of conduct and discrete disciplinary rules, the overall framework governing the regulation of judicial conduct in Albania continues to be viewed as ineffective. A variety of factors seem to contribute to this perception. These factors include an apparent overlap in the jurisdiction of the High Judicial Council (HJC) and the Ministry of Justice (MOJ) in the enforcement area, and some uncertainty surrounding the legal status of the HJC. With regard to this last point, the law governing the HJC is currently being revised. The proposed changes would alter the process for handling investigations and complaints regarding conduct. If adopted, the changes would direct complaints regarding judicial conduct be made to the HJC and then sent to the MOJ for investigation. The HJC would continue to adjudicate conduct proceedings. Although the HJC has almost no resources to support enforcement efforts, giving full responsibility for this area to the MOJ does not necessarily address the problem as it also has significant resource limitations. Moreover, there is some controversy over the appropriate role of each of these two actors in the disciplinary process. Citing the HJC’s composition, some critics have stated that it is overly protective of judges in disciplinary matters. From the other side, the MOJ has been criticised for misusing disciplinary actions to intimidate judges and exert influence over them.

The perception that the current system is unworkable is reinforced further by the lack of information and transparency regarding standards of conduct, procedures for complaining about conduct and for processing misconduct cases. In this transitional period, neither the MOJ nor the HJC are vigorously pursuing cases of misconduct. Even matters involving conduct that is potentially criminal have escaped review. As a result, members of the public are left with the impression that judicial corruption is widespread and that little action is being taken to address it.

**Bosnia and Herzegovina**

**Federation of Bosnia and Herzegovina (FBiH)**

The FBiH Judges’ Association adopted a code of judicial conduct in 1999. The code was enacted pursuant to the enabling statute of the judges’ association and promulgated in the State Gazette of the FBiH. The Federation code is based on European and international standards of conduct. It consists of five brief...
Discrete codes of judicial conduct now exist in almost all countries and legal jurisdictions of the region. This fact is in large part due to the efforts of professional associations of judges, who have led efforts to put such codes in place.

Articles, focusing only on major issues such as independence, impartiality, conflict of interest, professionalism and participation in outside activities. The text of the articles is fairly broad, stating general principles as opposed to providing detailed guidelines in each of the areas addressed. The code is accompanied by separate rules detailing procedures for handling code violations through the FBiH Judges’ Association’s Court of Honour.

It is enforceable through the Association’s own Court of Honour and via the Law on Judicial and Prosecutorial Service, which includes violations of the code among the grounds for disciplinary actions. The existence of such mechanisms for enforcing the code makes the FBiH fairly distinct among the jurisdictions in the region. However despite this, the number of judicial discipline cases remains low and no cases based on a violation of the code have been brought to date. As is the case elsewhere in the region, the lack of sufficient institutional resources for monitoring conduct and pursuing violations has served as a significant obstacle to activity in this area.

Pursuant to the new Law on Judicial and Prosecutorial Service, the International Judicial Commission⁴, along with the Federal and Cantonal Commissions, has recently begun auditing judges in the FBiH. As part of this review, the Commissions will consider complaints received about judicial performance and alleged code violations. In connection with this process, the Office of the High Representative has led an extensive public awareness campaign on the procedures for making complaints against judges.⁵ It is thus possible that there will be increased activity in this area in the near future.

The adoption of the code is viewed by many as an important step towards advancing the independence and professionalism of the judiciary. Notably, the presidents of the FBiH and Republika Srpska (RS) judges’ and prosecutor’s associations have agreed to accept and honour the standards enumerated in the Federation code (the RS code of conduct is nearly identical to the Federation code) as those which are minimally acceptable for member judges in both jurisdictions.

Republika Srpska (RS)

As noted above, the RS Association of Judges and Prosecutors has also adopted a code of conduct. The text of the RS code is essentially the same as the Federation’s code, with the significant distinction that it applies to both judges and prosecutors. Similar to the Federation’s code, the RS code violations are considered grounds for disciplinary action under the Law on Courts and Judicial Service.⁶ In the area of enforcement, the RS faces many of the same obstacles stemming from lack of resources that exist elsewhere in the region. The High Judicial Council (HJC) has primary responsibility for enforcing disciplinary rules but does not have its own staff or office space. Consequently, it must rely on the resources of the Supreme Court and Office of the Public Prosecutor. This reliance leaves the HJC in the undesirable position of being dependent on the very entities that it must regulate.⁷ To date, no judge has been charged with violating the code of conduct.

As it is the case in the Federation, the RS’s Law on Courts and Judicial Service calls for a comprehensive review of all sitting judges. The International Judicial Commission is presently leading this review in cooperation with the Federal and Cantonal Commissions. The scope of this review, however, does include some areas of conduct.

Bulgaria

Under the leadership of the Bulgarian Judges’ Association, a committee of judges has recently completed an initial draft of a code of conduct. The drafting committee has now turned its attention to developing a framework for enforcing the code. In addition, the Bulgarian Ministry of Justice recently announced its intention to develop a code of judicial conduct. At this point, it is unclear whether these two efforts will merge or proceed independently. It should also be noted that the by-laws of the Judges’ Association contain ethical rules, which serve as voluntary guidelines for members.

One obstacle to the adoption of a code of conduct in Bulgaria is the lack of support from members of the judiciary. A significant percentage of judges believe that rules contained in the Judicial Systems Act provide sufficient regulation in this area. Some believe a separate code of conduct will serve as a “criminal code” for judges. The Judges’ Association recognises the need to educate judges about the nature and role of a discrete code of conduct and develop their support for such a step. In this respect, it has plans to undertake an initiative to raise awareness and support in the near future.

The draft code is relatively extensive and covers most of the major recognised principles of conduct. It is also among a handful of codes in the region that go beyond merely reciting general principles and offers guidance on the meaning of the principles in specific contexts (e.g. judges may not disclose confidential information pertaining to matters before them, but they may discuss legal problems with other judges).⁸ In addition, some of the provisions of the code qualify their application. These exceptions may leave too much room for the subjective discretionary application of the code. Other unique aspects of the code include a provision stating that it is permissible for judges to receive compensation for extra-judicial activities such as training and lecturing.⁹ It is also the only code in the region to obligate judges to make financial disclosures.¹⁰

If the draft code is adopted, it is envisaged that its implementation will be challenging. This will largely due to the fact that the Supreme Judicial Council, despite being currently the only entity responsible for regulating judicial discipline, is perceived as lacking the administrative capacity necessary to undertake additional work in this area.

Croatia

The Association of Croatian Judges first promulgated a code of judicial conduct in 1991. This code consisted only of general principles. The Association undertook an extensive revision and expansion of the code in 1999. The code now includes a narrative on the rationale for a code of conduct, an implementing thesis, a glossary of terms, explanatory commentary on each article and instructions for implementation. The extensive explanatory text included in the code and its accompanying documents make it the most detailed and understandable document of its type in the region.

Substantively, the code focuses on behavioural standards inside and outside the courthouse. It addresses the issues of independence,
impartiality and fairness, respect for the institution of the court, diligence and professional development. Although the text of the code does not discuss its enforcement, the Association has developed accompanying implementing instructions that cross reference statutes that make certain code provisions legally binding. This consolidation of legal standards and ethical principals establishes the clearest relationship between a judicial association’s ethics code and statutes governing judicial conduct among the Balkan states.

Croatia is in the midst of implementing new legislation that will significantly impact the regulation of judicial ethics and discipline. The recently codified Law on the State Judicial Council (SJC) will introduce a body responsible for both monitoring and enforcing standards of judicial conduct independently from the executive. The majority of SJC representatives will be appointed from the judiciary and the remaining from the broader legal community. The reconstituted SJC will appoint, monitor and conduct disciplinary hearings for judges. Each judge will undergo a performance review every three to five years that will include an examination of conduct. This new system has only recently been implemented and it is too early to predict its potential for success. However, anecdotal evidence indicates that it is already having a positive effect. Prior to the enactment of this new legislation, no judicial disciplinary proceedings had ever been systematically processed. In the short time since the new law took effect in the Spring of 2001, however, a few cases have already been initiated.

FYR Macedonia

The Macedonian Judicial Ethics Code was among the first in the region, approved by the Macedonian Judges’ Association (MJA) in 1994. Substantively, the code covers a broad range of judicial rights and obligations, including independence, immunity, impartiality, diligence, and even salary and pensions. The code specifically circumscribes its enforceability, stating that judges are “morally” responsible to uphold the code, but are not legally liable in cases of its violation. Legislation governing judicial discipline does not reference the MJA code, and therefore judges cannot be held accountable for code violations under these laws. However, the Republic Judicial Council (RJC), the state entity responsible for monitoring judicial performance, has promulgated guidelines for determining judicial competence, which include failure to adhere to the code of ethics as an element of this determination.

The RJC is the primary body responsible for hearing and deciding cases of judicial misconduct. Of its seven members, all of whom are appointed by parliament and none of them are political representatives, more than half are representatives of the judiciary and the remaining members are representatives of the wider legal community. The RJC maintains its own office space and administrative staff. It has adjudicated a relatively low number of conduct cases, despite having been in existence for several years.

Although the law limits the powers of the executive to influence judicial disciplinary procedures, anecdotal evidence indicates that in practice the executive and political parties may and do influence the process in some cases.

Romania

Over the past few years the Supreme Magistrates’ Council (SCM) has developed a code of conduct for magistrates. According to the drafters, the recently completed code is intended to serve as a guide for institutions with responsibility for overseeing judicial conduct. Accordingly, the code indicates that it is not intended to serve as a basis for disciplinary liability except in cases of serious violations. Consistent with such indication, it notes that establishing additional institutions to apply the code is beyond the scope of the code itself.

The drafters have indicated that the main principles of the code are drawn from obligations of the magistracy outlined in other legislation including the constitution and international law. The code addresses the key issues of maintaining the dignity of the profession, neutrality, professional development, transparency of assets and participation in political activities. One notable shortcoming of the code, however, is the absence of any provision pertaining to communications between the judge and parties outside of the courthouse. With judicial corruption being a continuing and significant concern, the lack of guidance or limitations on such interactions is problematic.
Judicial discipline is enforced through the SCM, which executes this responsibility under the direction of the Ministry of Justice (MOJ). As part of this framework, the MOJ’s judicial inspectors initiate and investigate disciplinary and conduct-based actions. This framework has raised concerns that it creates the potential for infringement on the independence of judges. Some judges have indicated that they feel the inspectors are accustomed to maintaining an atmosphere that pressures judges to yield to political influences in their decision-making.

The SCM considers only a handful of disciplinary cases per year. With no staff of its own and the limited staff at the MOJ (there are approximately twenty inspectors, who are responsible for monitoring issues relating to overall court function), its capacity is extremely limited. Given this, it does not seem likely that the SCM will be capable of any meaningful enforcement of the code of conduct in the near future. Moreover, the current disciplinary process is widely viewed as lacking sufficient transparency and being open to misuse. Contributing to this problem is the SCM’s heavy reliance on the MOJ to execute its responsibilities.

Federal Republic of Yugoslavia

Serbia

In 1998 the Serbian Judges’ Association developed an ethics code outlining ten tenets of judicial responsibility. The code discusses judicial independence, fairness, anti-corruption, professionalism and courage among the principles of judicial integrity. Although the code is not legally binding on judges, at the time of its development it represented an important effort to exercise judicial independence from political influence. The then Ministry of Justice strongly opposed the creation of a judicial ethics code, viewing it as a competing focus of judicial loyalty.

Under the previous government, the state controlled the integral functions and membership of the Serbian judiciary, including judicial discipline, through the Ministry of Justice. Such activities were conducted without transparent standards or legally prescribed procedures. Even today, the Serbian justice system remains vulnerable to political interference. This vulnerability was recently demonstrated in November 2001 when the new Serbian Government initiated proceedings to dismiss 188 magistrates from service. The allegations on which these proceedings were initiated range from electoral fraud to incompetence. The legality of these proceedings has been questioned because the information on which they were based was collected under a law which is no longer in effect. The Serbian Parliament recently passed a series of reforms which establish institutional parameters between the government and the judiciary. This is a positive step that promises to improve the political neutrality of the disciplinary process.

Currently in Serbia, judges can be legally disciplined for minor infringements either at individual court level by the respective court president, or at Supreme Court level for egregious acts of judicial misconduct warranting dismissal. The Supreme Court hears very few cases on judicial misconduct, because once a judicial misconduct case is initiated before the Supreme Court, dismissal is the only sanction that can be applied under the Law of the Courts. Therefore, many complaints are left unanswered, because the offence is deemed at the outset as not serious enough to merit dismissal. The absence of clear procedures for a range of judicial conduct violations in this area has also allowed the Ministry of Justice to initiate and pursue cases independently, presenting cases directly to the Parliament, rather than going through the Supreme Court as the law stipulates.

Kosovo

A discrete code of judicial conduct does not presently exist in Kosovo. The newly formed Kosovo Judges’ Association is working to draft an internal code of ethics to serve as a guideline for conduct and disciplinary action against members of the association. The United Nations Mission in Kosovo (UNMIK) Judicial and Prosecutorial Council has recently completed a detailed draft code, which comprehensively sets forth standards for both prohibited and obligatory behaviour in a broad range of categories. In this regard, some of the provisions seem to exceed the typical boundaries of ethics and address judicial procedure more generally. For instance, one of the provisions states that “a judge shall encourage parties to reach a friendly settlement.” This approach is unique among the codes in the region. The UNMIK code faces opposition by members of the judiciary who had extremely limited participation in its development.

UNMIK is also responsible for judicial discipline more generally. The UNMIK regulation governing this area provides for disciplinary proceedings based on conduct and expands to indicate that violations of the ethics code may also trigger disciplinary action. Although the UNMIK Council’s work in this area is relatively nascent, it has been criticised by some local institutions for its reliance mainly upon international judges and prosecutors and failure to consult with or involve local entities in its processes.

Montenegro

The Montenegrin Judges Association has developed and adopted a code of judicial ethics. The code is very brief and provides general “moral” guidance to members of the Association on the issues of independence, impartiality, conflict of interest, and participation in political activities. The code does not discuss the consequences of violating its principles. A separate Law of Courts provides corresponding legislation on judicial conduct and discipline. Although this law establishes procedures for dismissing judges, these procedures are extremely vague. In addition, the law is silent on the right of accused judges to counsel or to review information and evidence relating to the charges brought against them. To date, few cases of judicial misconduct have been brought forward. The parliament is currently considering a revised Law on the Courts, which may clarify standards and procedures for monitoring and reviewing judicial conduct.

Conclusion

Given the widespread perception of significant corruption among the judiciaries of south eastern Europe, judges, governments and citizens alike can benefit from initiatives that promote adherence to clear standards of judicial conduct. Policy-makers should build on the advances made in this area to date by developing mechanisms for enforcing such standards. These efforts should include safeguards against allowing rules of conduct to serve as a basis for politically motivated sanctions and dismissals.
### Regulation of judicial conduct – codes and statutes

#### Albania

| Code exists | Yes |
| Binding enforcement mechanisms | No enforcement procedures yet. |
| Implementing entity | National Judicial Conference |
| Laws govern judicial discipline | Yes |
| Entity responsible for monitoring or enforcing | Ministry of Justice and High Council of Justice |
| Entity responsible for adjudicating complaints | High Judicial Council |
| Right to appeal | Yes, to High Court or Constitutional Court |
| Types of sanctions | Civil |

#### Bosnia and Herzegovina – Federation of BiH

| Code exists | Yes
| Binding enforcement mechanisms | No |
| Implementing entity | FBiH Judges’ Association Court of Honor |
| Laws govern judicial discipline | Yes |
| Entity responsible for monitoring or enforcing | Court presidents and Federal Commission for the Appointment and Dismissal of Judges and relevant cantonal commissions. |
| Entity responsible for adjudicating complaints | President of the relevant court; Federal Commission for the Election and Appointment of Judges. |
| Right to appeal | Yes |
| Types of sanctions | Civil |

#### Bosnia and Herzegovina – Republika Srpska

| Code exists | Yes
| Binding enforcement mechanisms | No |
| Implementing entity | Association of Judges and Prosecutors is responsible for implementation of the code. |
| Laws govern judicial discipline | Yes |
| Entity responsible for monitoring or enforcing | High Judicial Council |
| Entity responsible for adjudicating complaints | High Judicial Council
| Right to appeal | Yes, but appeal remains within the High Judicial Council. |
| Types of sanctions | Civil |

#### Bulgaria

| Code exists | Under development |
| Binding enforcement mechanisms | No, but under development. |
| Implementing entity | To be determined. |
| Laws govern judicial discipline | Yes |
| Entity responsible for monitoring or enforcing | Ministry of Justice and Supreme Judicial Council |
| Entity responsible for adjudicating complaints | Supreme Judicial Council |
| Right to appeal | Yes, but appeal remains with a Supreme Judicial Council panel. |
| Types of sanctions | Civil |

#### Croatia

| Code exists | Yes |
| Binding enforcement mechanisms | No |
| Implementing entity | None at present. |
| Laws govern judicial discipline | Yes |
| Entity responsible for monitoring or enforcing | Court presidents and State Judicial Council |
| Entity responsible for adjudicating complaints | State Judicial Council |
| Right to appeal | Yes |
| Types of sanctions | Civil |

#### FYR Macedonia

| Code exists | Yes |
| Binding enforcement mechanisms | No |
| Implementing entity | Macedonian Judges’ Association |
| Laws govern judicial discipline | Yes |
| Entity responsible for monitoring or enforcing | Ministry of Justice, Court presidents and Republic Judicial Council. |
| Entity responsible for adjudicating complaints | Republic Judicial Council |
| Right to appeal | Yes, but appeal remains with the Republic Judicial Court |
| Types of sanctions | No specific sanctions |
It is anticipated that the ethics code will be codified in the near future. ABA-CEELI Survey on Mechanisms for Enforcing Judicial Ethics Codes, at 12. **Disciplinary procedures currently exist under other laws, but are vague. Clarification anticipated under the new law on the courts, now under development.**

*American Bar Association
Central and East European Law Initiative
740 15th Street NW
Washington, DC 20005–1022
(202) 662–1597
http://www.abanet.org/ceeli

The statements and analysis contained herein are the work of the American Bar Association’s Central and East European Law Initiative (ABA/CEELI), which is solely responsible for its content. The Board of Governors of the American Bar Association has neither reviewed nor sanctioned its contents. Accordingly, the views expressed herein should not be construed as representing the policy of the ABA. Furthermore, nothing contained in this report is to be considered rendering legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel.

### Romania

<table>
<thead>
<tr>
<th>Code exists</th>
<th>Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Binding enforcement mechanisms</td>
<td>None; serves as a guide.</td>
</tr>
<tr>
<td>Implementing entity</td>
<td>None</td>
</tr>
<tr>
<td>Laws govern judicial discipline</td>
<td>Yes</td>
</tr>
<tr>
<td>Entity responsible for monitoring or enforcing</td>
<td>Ministry of Justice and Supreme Judicial Council of Magistrates.</td>
</tr>
<tr>
<td>Entity responsible for adjudicating complaints</td>
<td>Supreme Council of Magistrates’ conducts hearings with the president of the Supreme Court presiding.</td>
</tr>
<tr>
<td>Right to appeal</td>
<td>Yes</td>
</tr>
<tr>
<td>Types of sanctions</td>
<td>Civil</td>
</tr>
</tbody>
</table>

### FR Yugoslavia – Serbia

<table>
<thead>
<tr>
<th>Code exists</th>
<th>Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Binding enforcement mechanisms</td>
<td>No</td>
</tr>
<tr>
<td>Implementing entity</td>
<td>Serbian Judges’ Association</td>
</tr>
<tr>
<td>Laws govern judicial discipline</td>
<td>Yes</td>
</tr>
<tr>
<td>Entity responsible for monitoring or enforcing</td>
<td>Court presidents and Ministry of Justice</td>
</tr>
<tr>
<td>Entity responsible for adjudicating complaints</td>
<td>High Personnel Council or Supreme Court</td>
</tr>
<tr>
<td>Right to appeal</td>
<td>Yes</td>
</tr>
<tr>
<td>Types of sanctions</td>
<td>Civil</td>
</tr>
</tbody>
</table>

### FR Yugoslavia – Kosovo

<table>
<thead>
<tr>
<th>Code exists</th>
<th>Under development</th>
</tr>
</thead>
<tbody>
<tr>
<td>Binding enforcement mechanisms</td>
<td>No</td>
</tr>
<tr>
<td>Implementing entity</td>
<td>N/A</td>
</tr>
<tr>
<td>Laws govern judicial discipline</td>
<td>Yes</td>
</tr>
<tr>
<td>Entity responsible for monitoring or enforcing</td>
<td>UNMIK/ Kosovo Judicial and Prosecutorial Council Judicial Inspection Unit.</td>
</tr>
<tr>
<td>Entity responsible for adjudicating complaints</td>
<td>Kosovo Judicial and Prosecutorial Council</td>
</tr>
<tr>
<td>Right to appeal</td>
<td>No</td>
</tr>
<tr>
<td>Types of sanctions</td>
<td>Civil and criminal</td>
</tr>
</tbody>
</table>

### FR Yugoslavia – Montenegro

<table>
<thead>
<tr>
<th>Code exists</th>
<th>Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Binding enforcement mechanisms</td>
<td>No</td>
</tr>
<tr>
<td>Implementing entity</td>
<td>Montenegrin Judges’ Association</td>
</tr>
<tr>
<td>Laws govern judicial discipline</td>
<td>Yes</td>
</tr>
<tr>
<td>Entity responsible for monitoring or enforcing</td>
<td>Court presidents and Judicial Council</td>
</tr>
<tr>
<td>Entity responsible for adjudicating complaints</td>
<td>The Judicial Council reviews complaints and submits them to Parliament.</td>
</tr>
<tr>
<td>Right to appeal</td>
<td>No</td>
</tr>
<tr>
<td>Types of sanctions</td>
<td>Civil</td>
</tr>
</tbody>
</table>
Mobilising the private sector in municipal infrastructure projects in south-eastern Europe

This article examines the legal framework of local government financing in south-eastern Europe and investigates the practice of channelling private investments into municipal infrastructure projects. The article features sections on Albania, Bulgaria, Croatia, F Y R Macedonia, Romania and F R Yugoslavia. It contains examples of successful cooperation between local governments and private investors. A number of suggestions for legislative improvements are considered, and both the commonality and diversity of experiences in the region are explored.
Government devolution and decentralisation in the transition economies of south-eastern Europe have given rise to new responsibilities for local governments, particularly in the provision and financing of services to local constituencies. However, the national policy dimensions of such decentralisation and the strong dependence of local governments on the state budget have adversely affected their ability to mobilise financial resources and make independent spending decisions. Moreover, the expanded local government role in providing services is constrained by weak institutional capacity, inadequate legal frameworks and limited financial resources. Therefore, the financial constraints and the new decentralised environment has prompted many local governments to become more self-reliant and cost-efficient by transferring, where possible, the operation of some of their activities to the private sector, and by raising revenue from their own sources.

This article examines local experiences and practises in municipal asset management in south-eastern Europe. It provides an analysis of the legal framework for raising municipal finance and examines the possibilities for mobilising the private sector in municipal infrastructure projects. The article covers Albania, Bulgaria, Croatia, FYR Macedonia, Romania and FR Yugoslavia and reflects contributions from local practitioners with experience in municipal financing.

Each country section covers the legal framework of municipal finances and the power of municipalities to borrow funds for investment projects; the municipal concessions regime; the possibility of providing municipal assets as security for municipal borrowing; and the power of municipalities to independently collect municipal taxes. Examples of each country's experience in the use of the private sector in managing and financing municipal infrastructure projects are also pointed. Each section concludes with a brief description of the main issues and challenges in developing the legal regime of municipal financing, specifying the areas for law reform or the means of better implementation of existing legislation.

**Albania**

**Kalo & Associates**

**The legal framework**

Until recently all public property was under the ownership of the Government of Albania, represented by the Ministry of Public Economy and Privatisation. The Albanian Parliament has recently introduced a new law on local government based on the principles of local autonomy and decentralisation (Law no. 8652, dated 31 July 2000). For the first time in the history of Albanian legislation, the Law provides that local government units are owners of public immovable property, and rules the transfer of ownership or possession from the central government to the local governments. Within municipalities as territorial administrative units, the council of municipality exercises the ownership rights.

**Income generation**

Under the new Law on Local Government, municipalities are entitled to create and collect revenues, establish new fees and tariffs, carry out commercial activity and rent their immovable property. Proceeds originating from alienation, rent or other uses of their property go to the municipality’s budget. These represent the main sources of income for municipalities.

The most important and permanent source of income for municipalities are local fees provided for by Law no. 8435, dated 28 December 1998 entitled “On Fees in the Republic of Albania”. The law in question also provides that the council of the municipality, within the margins of the local fee, is entitled to change the fee by up to 20 per cent. The council of a municipality may impose other interim fees at its own discretion. Local fees are collected by public or private entities that transfer the collected proceeds to the municipality, reserving the right on a defined percentage on such proceeds. Law no. 7973, dated 26 July 1995 and entitled “On concessions and mobilising the private sector in public services and infrastructure” authorises local governments to grant concessions for water supply infrastructure and wastewater collection systems, the management of recycling of solid and harmful refuse, the industrial areas, parks and free zones. Priority is given to concessions for water supply infrastructure and wastewater collection systems. Since the enactment of the law, a considerable number of municipalities have entered into concession agreements with local or foreign investors.

Since municipalities do not have the necessary infrastructure to carry out public works such as public lighting, recycling, and restoration and painting of buildings, they often outsource these activities to private entities. Municipalities focus on borrowing funds and try to engage the private sector in public works through tenders. Municipalities procure funds and select the private entities to deal with specific public works.

Sponsorship, donations, economic aid and fines are also sources of income. The law on administrative contraventions (no. 7697, dated 7 April 1993) provides that the council
of a municipality may, to a certain extent, define what actions constitute administrative contraventions and impose fines within its territory.

A significant aspect of decentralisation is the local government's right to independently collect income and organise its own budget. Local governments can also decide on its involvement in and implementation of projects of economic development. To date the practice has been that funds from the state budget were the main source of fulfillment of public functions and infrastructure services. The new Law on Local Government specifically provides that infrastructure projects should be financed by income generated by local governments' own sources as well as by the state budget.

Privatisation is another form of both municipal income generation and involvement of the private sector in the financing of municipal infrastructure projects. The most widely used forms of privatisation include the acquisition of shares of state owned enterprises, and the formation of new joint stock companies or companies with venture capital. This leads to better management and profitability of the companies.

The Law provides that as of January 2002, local government units are entitled to apply for loans. This deadline corresponds with the intended completion date of the process of transfer of ownership of immovable properties from central government to the local governments. The transfer of ownership is based on two legal instruments, the Law on State Owned Immovable Properties and the Law on Transfer of Titles from Central Government to Local Government. Therefore, municipalities will have autonomy in managing their revenues and will be able to apply for medium and long term loans and secure such loans with their properties in order to finance and implement infrastructure development projects.

Regarding immovable property, municipalities are in the process of evidencing and registering such property with the public registry of real estate. They are entitled to use their properties and to collect revenues generated from leasing or disposal of such property.

Current examples of municipal infrastructure projects: Tirana municipality

Currently, Albanian municipalities, particularly Tirana municipality, are concentrating their efforts on the rehabilitation and development of public markets and trade networks and related infrastructure. Since there are private entities capable of financing such municipal projects in the capital, Tirana municipality is in the process of preparing projects for several public markets and shopping centres to be implemented with the involvement of the private sector.

The work of Tirana municipality in association with the Albanian Development Fund is another example of a municipal infrastructure project. These projects aim at securing ten per cent of their overall value by contributions from the local community. One such project is the rehabilitation of a number of main commercial streets in Tirana. The rehabilitation process is being carried out with the financial support of entrepreneurs and other businesses whose premises are located in these streets. Tirana municipality is also implementing an ambitious project with the World Bank and the Ministry of Transport which aims to improve the Tirana ring road.

Future issues and challenges:

Tirana municipality is developing some further infrastructure projects in association with the International Organisation for Migration. These are primarily focused on: the rehabilitation of sport areas within the premises of elementary and high schools; the illumination of several public streets; and the rehabilitation and regeneration of the Lana River embankment. Other Tirana municipality projects include the creation of several pedestrian areas in the main squares, parking areas and the improvement of shopping centres. All these projects are being implemented with significant private sector participation.

Bulgaria

EUROLEX Bulgaria*

The legal framework

The legal status of municipalities is regulated by the Constitution of the Republic of Bulgaria, the Local Self-Governance and Local Administration Act (the Act), the Municipal Property Act and the Municipal Budgets Act. According to the legislation, municipalities are responsible for a number of activities and public utilities such as: the urbanisation and development of the territory, education, health, culture, water and waste water, electricity and central heating, streets, garages and public transport, local environment, parks and waste disposal, social welfare and assistance, and local historical, cultural and architectural inheritance. The investment needs of the municipalities in these areas are substantial, making it vital for municipalities to identify and exploit all financial sources provided for under law.

Income generation

The budget sources available to Bulgarian municipalities for investment purposes comprise a state subsidy for each fiscal year and a portion of up to 5 per cent of the municipal revenues, as defined in Article 11 (1) of the 2001 State Budget Act. In order to tighten financial discipline, the Ministry of Finance has introduced a regulation that only 90 per cent of the allocated state subsidy shall be transferred to the municipality, while the 10 per cent outstanding would be provided only if the budget deficit for the fiscal year is within the prescribed limits. Extra budgetary funds, mainly revenues from municipal privatisation, can also be applied to finance infrastructure projects. Article 6 (2) of the Municipal Budgets Act defines municipal revenues as the local taxes and fees, other taxes defined by law and non-tax receipts. The Constitution stipulates that all taxes and their rates should be defined by law, giving local authorities no autonomy to establish their tax revenues. Furthermore, the municipalities develop their budgets on the basis of the projections of the central tax administration within the Ministry of Finance. Tax revenues are collected by the tax administration, which prevents the municipalities from influencing the revenue collection.

Another source of income generation is municipal borrowing in the form of bank loans or credits from other financial agencies, or in the form of municipal bond issues, as provided by Article 40 of the Municipal Budgets Act. However, the access of the municipalities to the credit market is restricted by Article 10 of the Act, which stipulates that the municipal
advantage of a PPP created through a capital increase in the privatisation process. Another problem with employee options which often increase in existing municipal companies is an asset or an enterprise is often conditional according to the type of municipal property – public or private – as defined in the Municipal property act.

If the assets are private municipal property, the legal forms for PPP can take the form of privatisation, leases, management contracts and other contractual arrangements governed by commercial law.

Privatisation
Municipal privatisation is regulated by the State and Municipal Enterprises Transformation and Privatisation Act. The procedure, regulated in great detail by the law, is regarded by local practitioners as time consuming and clumsy. The privatisation of an asset or an enterprise is often conditional upon achieving specified infrastructure improvements. The municipality may retain an equity share in the privatised company and maintains control over decision making. Funds accumulated in the Municipal Privatisation Fund are at the municipality’s disposal and could be re-invested in infrastructure projects.

Enterprises capital increase
Attracting a private partner through a capital increase in existing municipal companies is an efficient way to create a PPP while avoiding the problems with employee options which often arise in the privatisation process. Another advantage of a PPP created through a capital increase and share subscription is the fact that the name and the practice of an existing municipal structure will back the private partner.

Joint ventures
The establishment of new legal entities usually aims at obtaining fresh resources from the private investor for the development of new businesses. The municipality’s equity contribution is usually in the form of fixed assets (including land plots) and in administrative support (e.g. construction permits).

Management contracts
A private partner may be invited to manage and more efficiently operate an existing municipal enterprise and thereby provide a higher quality of service. Although no new cash is invested in the company, the municipality benefits from the improved management of the company and the decrease in operating expenses.

Others
There are various other types of business deals, such as lease contracts and service agreements. The municipalities are obliged to follow the public procurement rules under the Public Procurement Act when awarding contracts for construction works, supplies and services above determined thresholds.

As already mentioned, the legal type of PPP hinges on the type of municipal property committed to the joint venture. If the assets are public municipal property, the only possible forms of partnerships with the private sector are concessions and three year fixed term lease contracts. A concession is defined as a special right for exploitation, operation and management of existing or future assets that are public municipal property. A concession may also be defined as a permit for rendering activities that the municipal authorities are empowered by law to reassign to a private partner. Concessions are compulsory for mineral water springs, water and wastewater networks and equipment, inert materials, water basins and adjacent beaches, local roads and municipal forests. In practice, concessions are granted in the form of the Build, Operate, Transfer (BOT) schemes under which the concessionaire undertakes to build new infrastructure assets. The maximum term for concession contracts is 35 years and may be extended for another 15 years by the mutual consent of the parties and an approval by the municipal council. The concessionaire commits to repair and maintain the existing facilities, and to develop the infrastructure by undertaking new construction works, while managing the activities, optimising the expenditures and increasing the revenues. The public interests are protected via a concession contract and a transparent procedure for the selection of the private partner.

Current examples of municipal infrastructure projects

The Sofia Municipality Water Concession
With EBRD support, on 23 December 1999 the Municipality of Sofia signed a 25 years concession agreement with International Water Ltd., which came into force on 6 October 2000. International Water Ltd. was selected as the first ranked bidder for the concession for offering:

- The lowest tariff (average amount for the period – 43.5 stotinki of a cubicle meter without VAT) for the provided services.
- Minimum investments of US$ 150 million, from which US$ 65.5 million will be invested during the first three concession years, meaning that the highest activity for the renovation of the network should be in the 2002-2003 period.

Under the investment scheme International Water has entered into a joint venture company named Sofiyska Voda with the existing municipal water and wastewater enterprise VIK-Sofia. International Water Ltd. holds 75 per cent of Sofiyska Voda and VIK-Sofia the remaining 25 per cent (representing assets assessed by the concessionaire as necessary for the concession). The VIK staff has been transferred to the new company and subsequent staff reductions are to be effected following the scheme offered in International Water’s bid. After the concession expires the concessionaire’s shares should be transferred to VIK-Sofia with the perspective of merging the two companies.

The Sofia Municipality eurobond issue
In December 1998 Sofia obtained a credit rating from Standard & Poor’s of B+. In May 1999 the Municipality issued an equivalent of €50 million in 3-year bonds bearing interest at 9.75 per cent, payable annually in arrears. The French PARIBAS acted as an agent of the issue. The eurobonds were listed on the Luxembourg Stock Exchange and the issue was priced at 99.5 per cent. With issue expenses of €662,000, plus the discount, the net proceeds were €49.088 million, equivalent to 96 million leva. Thus the effective interest rate is about 9.93 per cent. The eurobonds issue was the first appearance of Bulgarian debt bonds since the Brady bonds issue in 1994.

In 1999 Sofia Municipality utilised some 37.5 million leva of the bond proceeds while the remainder of the issue was temporarily
invested in Bulgarian State securities. As planned the issue was fully utilised in 2000 for road rehabilitation.

The present intentions of the Sofia Municipality are to redeem the eurobonds partly from the privatisation fund (25 million leva) and the remainder (72.8 million leva) and the final interest payment of 9.5 million leva, from the municipal budget.

**Sofia Municipality Zentralni Hali Renovation Project**

In July 1998 the Sofia Municipality and the Israeli “ASHTROM Properties” Ltd. established a joint venture company “Zentralni Hali” JSC. The Sofia Municipality provided the building and the plot of the Zentralni Hali to the new company while “ASHTROM Properties” Ltd. provided the investments needed for the reconstruction and the operation of the historic central city market. About 20 Bulgarian construction companies took part in the overhaul as sub-contractors. The market place, which has three levels with shops, boutiques, restaurants, food stores and a parking area, was officially opened in May 2000.

**Future issues and challenges**

The general financial weakness of municipalities and the legal restrictions imposed on the fiscal and budgetary system by the currency board directly affect the investment capacity of Bulgarian municipalities. These restrictions raise serious doubts as to their conformity with the Bulgarian Constitution which grants broad autonomy to local governments. To date, two disputes relating to municipal property and finances have had to be referred to the Constitutional Court.¹

Currently the Bulgarian municipalities seek PPP as a last resort for meeting their investment needs. The future legislation will need to establish a better balance between the mobilisation of their own municipal finances and private sector participation for the development of municipal infrastructure projects. This could be achieved through the development of a municipal credit market, as recently proposed by the Association of the Bulgarian Municipalities in a Draft Municipal Debt Act. Another option is to loosen the restrictions on investment spending imposed on the municipal budgets through the granting of greater powers to the local authorities in developing and implementing their budgets.

**Croatia**

Law Office, Bogdanovic & Dolicki*

**The legal framework**

Croatia is a signatory to the European Charter of Local Self-Government of 1985, which took effect in Croatia in 1997 (the European Charter) and has adopted many of the principles of the European Charter in its legislation.

The Croatian law on local self-government establishes city, county and municipality as entities of local government. The country is divided into counties and each county has a number of municipalities within its borders. Zagreb is the only city in Croatia, which has the status of city for local government purposes.

The Law on Financing of Local Self-Government and Government Entities regulates the financing of local governments and obliges them to match their expenses and income. Each entity of local government provides information in its annual budget with respect to the funding of its activities. There are special rules which govern the matching process. Each entity derives income from its own activities, common taxes and money allocated by the state.

**Income generation**

Sources of income for counties are:

- income from its own property;
- county taxes, taxes on inheritance and gifts, vehicle taxes, boat taxes and taxes on entertainment and sporting events;
- penalties for offences prescribed by counties;
- other incomes prescribed by special law.

Sources of income for municipalities and cities are:

- income from its own property;
- municipal or city taxes, tax on expenditure, holiday-houses, advertising, registering company names and taxes on usage of public spaces;
- penalties for offences prescribed by the municipality or city;
- administrative fees levied pursuant to a special law;
- travel taxes levied pursuant to a special law;
- utility fees, contributions and other fees levied pursuant to a special law;
- fees for usage of public, municipal or city spaces;
- other incomes prescribed by special law.

Taxes collected by counties, municipalities and cities are:

- income tax;
- capital gains tax;
- tax on gambling;
- tax on sale of real estate.

---

¹ 2001 State Budget Act, Article 9 (2).
² Local taxes include real estates tax, inheritance tax, donations tax, vehicle tax, real estates acquisition tax etc. Local fees include fees for solid waste, market places, fairs and street stalls, kindergartens and nurseries, summer camps, social welfare establishments, resorts, quarries, technical and administrative services, dogs, graveyard lots, etc.
³ e.g.: 1. The municipal tax – the portion from the Corporate Income Tax of 10 per cent that goes into the budget of the municipalities. 2. The tax on profits of the commercial entities with more than 50 per cent shares of the municipalities – under Article 52 of the Corporate Income Tax Act the full amount of this tax goes into the budgets of the municipalities, unlike the tax on the profit of enterprises in which the municipalities do not possess or possess less than 50 per cent of the shares and which goes in the state budget.
⁴ Remunerations from concession contracts, fines, interest payments, income from leases of municipal property, etc.
⁵ Article 51(3) empowers the municipality to perform commercial activities and to invest assets and funds not the targeted subsidy.
⁶ For construction works: 600 thousand leva; for supplies: 50 thousand leva; for services: 30 thousand leva.
⁷ According to Article 70 of the Municipal Property Act concession in the form of a permit is granted for the activities related to water and wastewater services, use of networks and facilities of the transport infrastructure and activities related to the transportation services, commercial activity for which public municipal property is utilised.
⁸ Constitutional Court Decisions no. 2/18.01.2001 and no 16/12.06.2001.
Income tax and capital gains tax are distributed between the state, municipalities, cities and counties. Taxes on gambling and on the sale of real estate are distributed between all these levels of government except counties.

Incomes of the districts with special self-government status are as follows:
- incomes from its own assets;
- special municipal and district taxes and fees, pursuant to the special law;
- subventions and donations from Croatia as prescribed by the state budget, i.e., by special law;
- other incomes stipulated by the special law.

There are strict rules governing how much money local entities can borrow. This is monitored by the State Audit Bureau to ensure that local government entities do not jeopardise their solvency. Local government entities may raise money from the public by issuing bonds upon approval of the Ministry of Finance. The general rule is that local government entities cannot borrow money to finance their regular activities, except on a short-term basis. Special projects may be funded with borrowings. The city or county governments are competent to pass decisions on short term (up to six months) borrowings. The loan agreements are signed by the president of the city or county government, or by a person authorised for performance of budget and finance based on the authorisation of the city or county governments. Local government entities may give guarantees to the users of the budget and take loans of up to 20 per cent of the value of their own assets, provided that an opinion of the State Audit Bureau and an approval of the Ministry of Finance have been obtained in advance.

Concessions are means by which a public authority (state, entity of local or self-government and other bodies carrying public authorities) permits a certain entity to use particular resources or to perform certain works or activities as regulated by the provision of the Law on Concessions. This law has a character of a general law, however, there are a number of special laws which regulate the possibility of granting concessions. Such special laws regulate concessions on: maritime property, the performance of harbour activities, exploring and exploiting minerals, water and water resources, exploiting farmlands owned by the state, hunting rights, public roads, performance of municipal services and telecommunications. Some acts of concession are of a mixed nature – displaying elements of both public and private (civil) law.

Current examples of municipal infrastructure projects

Although budget funds collected from local government and self-government entities often seem to be insufficient for financing local public needs, special sector involvement in financing municipal infrastructure projects has only recently been developed.

Such private financing may take the form of a bond issuance. The Croatian market on municipal bonds was established by the issuance of bonds of the Istrian county. The bonds were of a face value of DM 1,000 (€510) and had a coupon interest rate of 11 per cent and a maturity of three years. The owner of the bond acquired DM 199.27 (€102) semi-annually. After the three year period expires, the owners of the bonds acquire six instalments amounting to DM 199.27 (€102), meaning that the investor acquired DM 1,195.62 (€610) in total during the three years of holding bonds.

In practice, concession agreements are more often used to finance municipalities than are the issuance of municipal bonds. For instance, an international tender for granting concession on the cleansing of liquid waste in the city of Zagreb was completed at the end of 2000. This was the first signed concession agreement for building of communal infrastructure under BOT (Build, Operate, Transfer) model in the Republic of Croatia. Signatories of this agreement were the City of Zagreb as an entity granting the concession, Zagrebacke otpadne vode d.o.o. as concessionaire and three (only) shareholders of the company Zagrebacke otpadne vode d.o.o., a company organised in the Republic of Croatia. While the international tender was still open (after the bids were opened and evaluated), and first ranking bidder was known, a discussion was initiated on legal ground for certain elements of the tender documents. The discussion also related to some legal aspects on granting and agreement on concession according to BOT model in Croatia. The opinions were and still are divided. Although the project of cleansing of liquid waste is of communal and urban importance for Croatian capital, its echo is much bigger. No doubt the BOT models will gradually take primary position in public projects in Republic of Croatian and on other levels of state organisation and for other types of infrastructure (airports, harbours, motor roads etc.). Keeping up with highly developed countries requires investments in infrastructure, which the public sector is unable to provide. While the risks of development are big and only partially predictable, the project gives essential proofs to private investors on advantageous investment climate.

Borrowing is the most usual model of municipal financing. The Croatian Bank for Reconstruction and Development established program of granting loans for financial restructuring to municipalities as support for the development of communal infrastructure. The beneficiaries of these loans are commercial banks (indirect financing), while actual beneficiaries of loans are entities of local government and self-government (direct financing). Indirect financing is secured by blank promissory notes and debenture instruments of commercial banks and additionally promissory notes and debenture instruments of entities of local government and self-government. Direct financing is secured by accepted promissory notes and debenture instruments of entities of local government and self-government, without any additional security instruments.

Future issues and challenges

Numerous principles of European Charter are accepted in legislation of the Republic of Croatia on the field of financing of entities of local government and self-government. However, there is still a necessity for more detailed regulation of some issues like concessions and issuance of municipal bonds.

Previously public needs, including essential investments, were financed almost totally by incomes from taxes and state transfers. However, currently there is a lack of funds for financing local public needs. The private sector may have an important role in the performance of local and regional investment programs due to this lack of budget funds. The contribution of private investment can take the form of project financing, privatisation and municipal bonds, for example.

Financing local government and self-government entities is regulated by special laws which provide an opportunity to obtain finance from non-fiscal incomes. Financial instruments such as project financing and the issuance of municipal bonds are not yet well developed. This is due to a lack of detailed regulation and the unwillingness of the local government and self-government entities to use it. A Law on Obligatory Pension Funds was enacted recently in Croatia, and the investment policy on pension funds, as well as the Law itself predict investment of up to 30 per cent of the pension funds in municipal bonds. There will now be significant funds made available for investment by issuing municipal bonds to cities and counties. These funds may finance capital projects and the funds from this resource could become cheaper than banking loans over time.
The legal framework

The basic legal framework for financing municipalities is set forth in the Constitution of FYR Macedonia of 1991 and the Law on Local Government (the Law) published in the Official Gazette of the Republic of Macedonia, (no. 52/95 and 60/95 respectively). Article 81 (9) of the Constitution describes the local government as a “foundation value of the constitutional order of the Republic of Macedonia”. According to the Law on Local Government, municipalities represent units of local government, have the capacity of a legal entity and are independent to perform the competencies granted by the Constitution and the laws. In addition, the Law on Administration (published in the Official Gazette of the Republic of Macedonia, no. 58/00) provides for the establishment of a Ministry for local government to propose policy, guidelines and strategies for the balanced development of the region, and to monitor developments in this area. Within this framework, the Ministry of local government has created an office for commercially underdeveloped regions.

Pursuant to the Law, the units of local government are the municipalities and the city of Skopje, which, as a separate unit of local government, is regulated by a special Law on the city of Skopje. The Law regulates the rights and competencies of the municipalities, the participation of the citizens in the decision making process, the organisation and operation of the municipal offices, the methods of financing the government and the supervision and protection of the local government and other rights.

Income generation

Section VIII of the Law on Local Government defines what constitutes municipal property and the means for municipal financing. The property of the municipality consists of land, facilities and assets in the amount that was and is financed by the citizens with self-contributions or their participation in another way in the construction of the infrastructure and other movable and immovable assets, finances and rights. Each municipality disposes of its property and operates in the public interest of its citizens as a sound business unit. The income generated from such a disposition or operation with the property could be re-invested in order to increase the value of the municipal property or to improve it.

The right of the municipalities to finance themselves independently from the state is contained in Article 62 of the Law on Local Government, which also describes the sources of income of the municipalities. The Law lists the following sources of income:

- taxes that encompass: part of the tax on circulation of goods and services, property tax, inheritance and gift tax, tax on circulation of realty and rights;
- land tax, communal tax, and service incomes;
- own property income;
- income from taxes received from FYR Macedonia and abroad (in goods and money);
- profits from public companies and public services founded by the municipality;
- part of the profit that is realised by the public companies that have branches in the local government, as determined by law;
- other income given to the budgets of the municipalities on a different basis in accordance with law.

Collecting additional revenue from fines imposed for violations of municipal regulations used to be an additional means of finance for the municipality, but was considered unconstitutional and abolished by a decision of the Constitutional court of FYR Macedonia (U. no. 133/2000/06.12.2000). The rationale was that the municipality may not enact regulations for income collection that may only be determined by law and therefore, only pursuant to an act of the FYR Macedonian parliament.

The Law also provides that the municipalities are funded by the state budget when they perform “transferred competencies”, i.e. competencies that belong to the state but have been transferred to the competence of the municipalities. An example of such transferred competence is the construction and maintenance of medical and educational facilities transferred from the state to the municipality pursuant to the General Planning Act and the Detailed Planning Act.

Municipalities may also obtain loans from the budget of FYR Macedonia. The application of such loans, however, is limited to covering the budget deficit of the municipality and may not be used for infrastructure projects. Government may also finance municipalities for particular entrusted matters. Furthermore, municipalities can borrow money for certain projects and issue bonds in accordance with procedures determined by law. The municipality may offer its movable and immovable property as security for the loans.

In addition, legal entities and natural persons are legally permitted to finance municipalities provided that such financing is applied only to
particular projects. Municipalities may also accept donations from foreign or local persons and legal entities.

According to the Law, each municipality should create a supervising board, which is entitled to supervise the municipal finances. The supervising board regularly informs the municipality and the Ministry of finance about its work.

The Law on concessions (Official Gazette of the Republic of Macedonia, no.42/92 and 40/99) stipulates that only FYR Macedonia can grant concessions and that the municipalities cannot grant concessions. This limitation of sources of income includes all objects and land owned by the municipality, which are considered to be goods of public interest.

Current examples of municipal infrastructure projects

There is no experience in FYR Macedonia concerning large projects involving municipal financing, nor have there been any projects financed by individuals contributing to the improvement of local communities.

Future issues and challenges

The existing legislation regulates the matter of municipality financing with some deficiencies. Such deficiencies are particularly evident on the part of the Law on Local Government which does not provide for a possibility for the local government to grant concessions. Also, the state government restricts the use of additional finances gained by performing transferred functions, because the law denies the possibility to use such means for other needs of municipalities. This is particularly serious when the numerous financing needs of municipalities are taken into consideration, such as the construction of roads, the illumination and maintenance of streets, parks and other public facilities and the establishment of schools.

The local government as structured in the Law on Local Government is still to be developed. According to government officials, regulatory changes of the regime of municipal financing can be expected, but the current political situation in FYR Macedonia may delay the enactment of such changes. Unfortunately, the overall situation in the country has not allowed a more rapid development of the municipalities as part of the daily lives of FYR Macedonian citizens. The recent political developments in the country require a redefinition of some articles of the Law on Local Government, thus making a significant role for local government possible and enabling the municipalities to reach their potential.

Romania

Nestor Nestor Diculescu Kingston Peterson*

The legal framework

The term municipality used herein refers to the local public administrative units of Romania, which consist of counties, towns and communes. Romanian municipalities are currently organised on two main principles, the principle of local autonomy and the principle of public services decentralisation. The legal framework within which the Romanian municipalities are organised and function is shaped so as to observe these two main principles.

Income generation

The rights granted to Romanian municipalities to establish and collect local taxes, to enter into associations with private entities, and to raise debt finance are the most relevant to municipal financing.

Direct or indirect local taxes can be established by municipalities within the limits provided by the Law on Local Taxes. As such, the municipalities have the power to establish and collect taxes and charges in relation to property, vehicles (for road and water transportation), and the issuance of construction authorisations, certificates and permits, outdoor advertising, accommodation in tourist resorts, villages and towns. Other taxes which municipalities have the right to establish relate to the temporary use of public assets such as museums, and historical and archaeological monuments.

The municipalities can, upon decision of the local councils, enter into an association with private entities and undertake certain projects or services of local interest. The terms and conditions of such associations are decided by each local council, within the larger framework of the applicable laws. Municipalities can also take equity participation or establish a commercial company whose activities fall within their responsibilities.

In order to undertake investment programmes of local interest or to refinance municipal debt, the Romanian municipalities, through their local councils, have the power to incur domestic and/ or foreign debt either as loans or as municipal bonds. Both debt instruments can be guaranteed directly by the borrowing municipality. Domestic debt guarantee must be notified, prior to being raised/ granted, by the borrowing municipality to the Romanian Ministry of Finance, while the foreign debt/ guarantee must be authorised prior to being raised/ granted by a special commission appointed by the government.

Municipalities can borrow and/ or guarantee debt up to a maximum annual threshold of 20 per cent of the borrowing municipality’s current own revenues, including the allocation of a specific quota of the global income tax of individuals from the state budget.

The law provides that a municipality can guarantee debt with its own revenue, thus appearing to prevent the municipalities from securing debt through assets in their property. Therefore, it seems that the implicit intention of the legislator was to create a derogation from the rule according to which the private property of municipalities generally follows the legal regime of any other private property, including the creation of guarantees, except when otherwise expressly provided by law. Foreign municipal debt can be also secured through a state guarantee as per the public debt law.

Main municipal financing sources

Municipalities have the following main sources of financing available:

- Own sources, consisting mainly of fiscal revenue (various local direct and indirect taxes and other fiscal charges), non-fiscal revenue (including revenue from concession and lease), and divestiture related revenue (including proceeds from the privatisation of municipality-owned commercial companies);
- Allocations and subsidies from the state budget, consisting mainly of quota from the tax on global income of individuals; and
- Raised funds, consisting mainly of debt finance (domestic or foreign).

The breakdown of the aggregate municipal budgets financing resources over the period 1997–2001 is presented in the figure on page 59. Concessions are contractual means to ensure the long term use of property in the local private or public domain by private operators, as well as the long term rendering of local public services. It is also a method of ensuring private investments in local public services, which the concessionaire commits to undertake when awarded the concession.

Local public services are defined as including, but are not limited to, water supply, sewerage and draining waters and wastes, sanitation, heat supply, natural gas supply, electricity supply, local transportation and administration of the public domain. These services can be rendered either by specialised municipal departments or by independent operators, authorised for that purpose by the respective municipal regulatory bodies after being awarded a concession.
Privatisation of municipal property is another means of obtaining finances by municipalities, as the privatisation proceeds are revenues of the respective municipality. Municipal companies solely owned by the municipality are privatised according to the existing privatisation legislation. Municipalities are obliged to take all necessary measures with respect to the privatisation of those companies. Therefore, the municipalities are empowered to: (i) determine the appropriate privatisation method; (ii) prepare the privatisation-related documentation; (iii) effect the sale of their shareholdings at market price; and (iv) initiate or approve the sale of assets of companies each municipality is shareholder of.

In addition to their own budget and financing sources, the Romanian municipalities can also benefit directly or indirectly through local organisations and entities from non-reimbursable financing from the European Community devoted to implementing various types of projects, including infrastructure projects. The Instrument for Structural Policies for Pre-Accession (ISPA) Programme for instance, is a programme for infrastructure and project developments in the field of transport and environment, which municipalities can benefit from, subject to submitting sustained and eligible projects and having such projects approved. In addition, finance is sometimes available for municipalities from governments of developed countries for undertaking different projects on a bilateral basis.

Current examples of municipal infrastructure projects

Private sector involvement in managing and financing municipal infrastructure projects is primarily based upon concessions, privatisation, partnerships and associations. However, two municipalities have recently targeted the fixed income market by successfully issuing municipal bonds. The municipalities of Predeal and Mangalia are the pioneers of this type of municipal financing in Romania.

Pre-deal municipal bonds

This was the first issue of municipal bonds after 1989 and amounted to ROL 5 billion, with quarterly payable interest (floating annual interest rate of 3 per cent over the Romanian average interbank rate for placing deposits and taking loans). The issue has a maturity of six months for half redemption, and of 18 months for the remaining half redemption. The finance raised is to be utilised for arranging a new ski slope in Predeal, a town famous for its ski facilities. The issue is guaranteed by the town’s tax revenue. The public offer was successfully closed, and the bonds are to be listed on the Bucharest Stock Exchange.

Mangalia municipal bonds

This was the second issue of municipal bonds after 1989 and amounted to ROL 10 billion, with quarterly payable interest (floating annual interest rate of 2 per cent over the Romanian average interbank rate for placing deposits and taking loans). The issue has a maturity of 12 months for half redemption, and of 24 months for the remaining redemption. The finance raised is to be utilised for infrastructure works in Mangalia and for construction works in the town’s education infrastructure. Mangalia is a town on the banks of the Black Sea, and a summer seaside resort. The issue is guaranteed by the town’s tax revenue. The public offer was successfully closed, and the bonds are to be listed on the Bucharest Stock Exchange.

Both municipal bond issues are likely to be considered small for a mature market. They may be small, but they are the first in contemporary Romania and their merits lie in demonstrating that the Romanian capital market responds to such offers, and that finance can be raised in this manner, rather than in their amount.
Future issues and challenges
The reform which the Romanian government has embarked upon since 1990 has led to significant change for municipalities. The enactment in 1991 of the law regarding the local administration saw the centralised system replaced with local autonomy. For the first time since the Second World War, municipalities were awarded title and right over property of public local interest, and were given the power to establish, organise and administrate public services and activities, including lucrative businesses.

Furthermore, since the principles without the means to achieve them would remain only well intentioned words in law, the principles were complemented by regulations with respect to the municipalities’ finances. Mechanisms and procedures were established with respect to the formation, raising and allocation of financial resources by municipalities, separately from the state budget. In addition, the municipalities were granted the power to establish taxes and charges for specific fields, as well as to collect these taxes and charges as their own revenue.

The basic legal infrastructure was thus established, granting the municipalities the main powers and means to achieve the role which these organisations play in a free market economy. They could now become partners of the private sector with respect to projects and programmes of local interest. It is now time for municipalities themselves to devise mechanisms and practices that best fit this legal infrastructure to their needs. The infrastructure itself is not beyond criticism and is certainly not perfect. It still needs to be developed, fine tuned, clarified and completed in certain areas where inconsistencies and gaps could be identified. However, looking back at Romania’s starting point, one could say it is on the right track. Looking ahead, Romania still has a long way to go, and the time has come for municipalities to learn to make the best use of the benefits, which the public-private partnerships have to offer to local communities.

**FR Yugoslavia**

**Karanovic & Nikolic Advokati**

**The legal framework**

The role of the private sector in financing municipal infrastructure and in providing communal services has been negligible in FR Yugoslavia over the last 50 years. All municipal services and projects were financed by the state and therefore the possibility for private investors to participate in this sector was nominal.

Serbian legislation defines local self-governance units as municipalities, cities and the city of Belgrade (collectively referred to as the municipalities). The legal status of the municipalities is regulated by the Constitution of the Republic of Serbia (published in the Official Journal of the Republic of Serbia, no. 1/90), the Local Self-Government Law (published in the Official Journal of the Republic of Serbia, no. 48/99 and 27/01) and the Statutes enacted by the municipalities.

**Income generation**

Pursuant to the Local Self-Government Law, the municipalities are financed from the state budget.

Serbia is authorised to determine and collect taxes. Part of the collected tax is transferred to the municipalities. The municipalities are entitled to receive the proceeds from the following taxes:

- income tax;
- inheritance tax;
- property transfer tax;
- turnover tax.

In addition, the law provides for a municipality’s local revenues, collected by the municipalities themselves. The local revenues include local administrative taxes, local communal taxes, and fees imposed and collected by the municipalities’ administrative authorities.

The Local Self-Government Law lists the activities that may be performed by the municipalities. Generally, the municipalities are entitled to regulate the organisation and operation of communal activities and to establish public communal companies in order to provide various communal services (water, wastewater, heating, public transport, etc.). This law does not explicitly provide that the municipalities are entitled to raise funds for investment projects. The Statutes of the Municipalities regulate this issue. Each municipality may therefore provide in its statutes that it shall be entitled to borrow funds for various investment projects within the scope of its activities (e.g. the Statutes of the city of Belgrade contains specific provision that the city of Belgrade is entitled to borrow funds in order to finance various municipal projects. Recently, the city of Belgrade entered into a loan agreement with the EBRD to finance water supply, heating supply and public transport services).

The Law on Credit Transactions with Foreign Entities regulates credit transactions between local persons and legal entities and foreign entities. The law requires Yugoslav entities to register their credit transaction with the National Bank of Yugoslavia and therefore the municipalities are obliged to register any credit transaction they enter into, including when to borrow funds from foreign entities.

Concessions are regulated both at federal and republic level. As the assets used by the municipalities are owned by Serbia, the Law on Concessions (published in the Official Journal of the Republic of Serbia, no. 20/97, k22/97, and k25/97) enacted by the Parliament of Serbia is applicable.

The Law on Concessions provides that only the Government of Serbia can grant concessions. A municipality cannot grant a concession, because Serbia owns all assets used by the municipalities. Some municipal activities such as water supply services and maintenance of communal water systems are subject to concessions and therefore a concession for those activities could be granted to a private entity. When a concession is granted, the concessionaire is obliged to establish a concession company in order to commence its activities.

The Law on Communal Activities (published in the Official Journal of the Republic of Serbia, no. 16/97 and 42/98) restricts the provision of some communal services (such as water and heating supply services), which can exclusively be provided by public communal companies where a foreign entity’s share cannot exceed 49 per cent.

However, the Government of Serbia has not yet granted concession licenses in accordance with current legislation and there are no implementation precedents so far. It is therefore not clear whether a private entity can obtain a concession to provide communal services. Under a more conservative reading of the law it appears that only companies with a state shareholding of not less than 51 per cent could provide communal services.

Municipalities do not have ownership rights over property. Serbia’s Law on Property provides that all assets (immovables, movables, rights, securities and cash) used by the municipalities and by the public communal companies are owned by Serbia.
This Law provides that the municipalities are entitled to provide their assets as security for obligations undertaken with the prior approval from Serbia’s Property Agency and pursuant to a resolution of the municipalities’ authorised body. Without approval from the Agency, a pledge or mortgage over the assets cannot be validly created or enforced.

Current examples of municipal infrastructure projects

A number of attempts have been made in the last ten years to include the private sector in the financing of municipal infrastructure but none of the projects was successful.

Although the current legislation enables private investors to invest in municipal infrastructure and to finance the development and management of communal activities, in the last ten years there has been no private participation in the municipal sector.

There have been attempts to invest in the Belgrade water supply system. A project involving the city of Belgrade and a French investor has not been completed due to the economic and political situation in FR Yugoslavia.

The Belgrade public transport project is another example of an unsuccessful attempt to involve the private sector in municipal infrastructure projects. In the 1990s Belgrade public transport faced huge difficulties due to the economic problems experienced by the Belgrade Public Transport Company. In order to provide public transport to its citizens, the city of Belgrade invited local private companies and entrepreneurs to participate in providing public transport services. Since then, the role of the private sector in the public transport sector has increased and currently almost half of the bus public transport services are still provided by private companies. However, the state-owned Belgrade Public Transport Company provides the trolleybus and tramway transport services exclusively, as the law prohibits private participation in that sector.

Future issues and challenges

The laws and regulations governing communal activities and concessions do not provide a solid legal framework for private participation in providing these services. In order to make communal services more effective and favorable to private investors, the current restrictions imposed by Yugoslav and Serbian legislation should be lifted.

The first restriction relates to the possibility for private investors to invest in and to manage public communal companies by providing all forms of public communal services. Legislation in this sector should only provide a general legal framework and strict regulations only with respect to the liabilities of the communal service providers.

The tariffs for providing communal services are set by the public communal companies with the approval of the Government of Serbia and were not established in accordance with market practice. The government used its authority in order to provide social stability in the country when the economy was depressed, which resulted in public communal companies’ inefficiency and losses that prevented any potential development and investment into these companies. It is necessary to remove these restrictions and to allow public communal companies to set tariffs freely without interference from the state.

In order to enable municipalities to use their assets freely and to invite foreign and local investors to participate in municipal infrastructure financing, it is important to amend the current legislation providing that Serbia owns all assets. Amendments to the Law on Assets Owned by Serbia should be made soon and should provide for the transfer of the assets to the municipalities.

Currently only the Government of Serbia grants concessions and the municipalities have no authority in this sector. It may be more effective for the municipalities to be authorised to grant concessions upon their sole discretion for activities organised and managed by the municipalities (for example, the municipalities water supply system, heating supply system, etc).

The new Privatisation Law enacted in 2001 provides that all state-owned companies will be privatised within four years. Companies can be privatised by either public tender or public auction. Currently, there is no indication as to whether and when the privatisation of the public municipal companies will commence.

This Law provides that only up to 70 per cent of the shares of the companies can be sold to private purchasers. This imposes a further restriction with respect to private participation in the public sector. It is essential that all legislation in respect to the public sector be harmonised, particularly with the newly enacted Privatisation Law.
Romania’s legal regime for security interests in personal property

This article provides an overview of the Romanian legal regime for creating security interests in personal property. It analyses the main provisions of the law that was adopted in 1999, and provides a critical assessment of its implementation. The introduction and role of the new electronic registration system is also examined.
The regulation of security interests within the Romanian legal system

Romania has a civil law based continental legal system. Historically, it was based on the French legal system. The Romanian Civil Code is a copy of the Napoleon Civil Code and was adopted in 1866. Since 1990 the entire legal system has undergone significant change. A number of laws required to facilitate the transition process were adopted during this period, including legislation regulating the creation of security interests. Prior to the enactment of the new law on security interests in personal property (the Law), the regulation of security interests was based on the general legal principles governing the creation of security interests contained in commercial and civil codes (mainly the possessory pledge and the hypothec). Since the Law came into force in August 1999 Romania has become one of the transition countries with a modern law governing secured transactions. The introduction of the Law was the result of a World Bank initiative, and involved extensive preparatory work and consensus building efforts by the EBRD. As a result of the involvement of foreign experts, the Law is in part based on the principles of common law, and consequently, its implementation needed to be adapted to Romania’s civil law based legal system.

The main features of the Law

The scope of the Law is extensive. Article 1 provides that the Law regulates the legal regime of security interests in personal property. An individual or party is entitled to secure the performance of a civil or a commercial obligation, arising from any contract concluded between natural persons or legal entities. The Law sets out a special system of recording and publishing civil or commercial contract obligations which are applicable to all security interests in personal property (Chapters III and IV).

Article 2 applies to any kind of civil or commercial obligations, including:
- all assignments of debt and conditional sales;
- any kind of legal acts, irrespective of their form or name, which secure the fulfilment of an obligation with moveable goods;
- leases of goods for a term longer than a year;
- consignment contracts for goods with a value over €1,000;
- warrants and deposit receipts.

Article 4 of the Law contains specific definitions of such notions as debtor, creditor, deposit account and rental, including leasing.

The only obligations that may be secured with personal property are contractual obligations, which can arise from civil or commercial contracts (Article 1). Article 10 (1) expressly stipulates that the obligations which may be secured with personal property are: present and future obligations, conditional or unconditional obligations, divisible or non-divisible obligations, determined or determinable obligations. Obligations can be secured with domestic or foreign currency.

The scope of personal property that may be subject to security is very broad. Article 6 (1) stipulates that all movable, tangible or intangible assets are subject to the Law. Article 6 (5) provides a list of movable assets which may form the object of a security interest. This list includes:
- stocks of tangible or non-tangible assets;
- credit balances in deposit accounts or savings accounts, or time deposits in banks or other financial institutions;
- depositary receipts, bills of cargo and other similar documents;
- shares of joint stock or limited liability companies;
- the rights to exploit natural resources and to operate public services under the conditions prescribed by the law;
- the rights arising from patents, trademarks and other intellectual property rights;
- insurance policies and accounts receivable;
- negotiable instruments, including those secured by mortgage (hypothec);
- all movable assets belonging to a debtor, which may include the inventory of present or future assets;
- forests, agricultural crops, minerals and hydrocarbons that have been or are to be extracted;
- moveable goods of a value greater than €1,000;
- negotiable instruments, including those secured by mortgage (hypothec);
- all movable assets belonging to a debtor, which may include the inventory of present or future assets;
- forests, agricultural crops, minerals and hydrocarbons that have been or are to be extracted;
- moveable goods of a value greater than €1,000;
- negotiable instruments, including those secured by mortgage (hypothec);
- all movable assets belonging to a debtor, which may include the inventory of present or future assets;
- forests, agricultural crops, minerals and hydrocarbons that have been or are to be extracted;
- moveable goods of a value greater than €1,000;
- negotiable instruments, including those secured by mortgage (hypothec);
- all movable assets belonging to a debtor, which may include the inventory of present or future assets;
- forests, agricultural crops, minerals and hydrocarbons that have been or are to be extracted;
- moveable goods of a value greater than €1,000;
- negotiable instruments, including those secured by mortgage (hypothec);
- all movable assets belonging to a debtor, which may include the inventory of present or future assets;
- forests, agricultural crops, minerals and hydrocarbons that have been or are to be extracted;
- moveable goods of a value greater than €1,000;
- negotiable instruments, including those secured by mortgage (hypothec);
- all movable assets belonging to a debtor, which may include the inventory of present or future assets;
- forests, agricultural crops, minerals and hydrocarbons that have been or are to be extracted;
- moveable goods of a value greater than €1,000;
- negotiable instruments, including those secured by mortgage (hypothec);
- all movable assets belonging to a debtor, which may include the inventory of present or future assets;
- forests, agricultural crops, minerals and hydrocarbons that have been or are to be extracted;
- moveable goods of a value greater than €1,000;
- negotiable instruments, including those secured by mortgage (hypothec);
- all movable assets belonging to a debtor, which may include the inventory of present or future assets;
- forests, agricultural crops, minerals and hydrocarbons that have been or are to be extracted;
- moveable goods of a value greater than €1,000;
- negotiable instruments, including those secured by mortgage (hypothec);
- all movable assets belonging to a debtor, which may include the inventory of present or future assets;
- forests, agricultural crops, minerals and hydrocarbons that have been or are to be extracted;
The law is in part based on the principles of common law, and consequently, its implementation needed to be adapted to Romania’s civil law based legal system.

■ rights arising from the lease of real property;
■ equipment or agricultural machinery;
■ corporate rights;
■ any right, whether exclusive or not, to deal with movable assets or to provide services which may be assigned. The assignment is subject to restrictions or requires the consent of the assignor or the authorisation from another person;
■ rights arising from the lease of personal property for more than one year.

The products resulting from the assets mentioned above can also form the object of a security interest (Article 7). Article 12 defines a produce as follows:

■ an asset, received by the debtor, replacing the secured asset, following a sale, or an exchange;
■ the fruits, products and proceeds from the secured goods;
■ if the secured goods have been insured, the proceeds resulting from the insurance policy.

Article 8 of the Law expressly provides for exceptions such as assets or rights which may not be the subject of a security interest. They include inheritance rights or intellectual property rights and other rights arising from various situations which are defined and regulated by the Civil Code.

The effects of creating a security interest

The Law identifies the basic principles introduced as to the effect of creating a security interest:

■ the security interest in personal property represents a right in rem the purpose of which to secure an obligation of any type (Article 1);
■ the obligation secured with personal property gives the creditor the right to be satisfied prior to any other unsecured creditor, or prior to any obligation ranking behind another creditor;
■ the security interest can be created with or without the transfer of possession of the secured asset to the secured creditor.

In addition to the principal obligations and unless the parties agree otherwise in the security agreement, the security interest covers all interest, expenses of enforcement and sale, insurance costs and payment of taxes relating to the possession and preservation of the assets (Article 10 (2)).

The creditor’s rights with respect to secured property are specified in Article 11 and include:

■ taking possession of or retaining the asset(s);
■ selling the asset to obtain the payment of the secured obligation;
■ inspecting the asset securing the obligation;
■ accelerating the debt and commencing enforcement proceedings where the creditor has reasonable commercial grounds to believe that the secured property is in jeopardy or the possibility of payment is impaired.

The legal conditions for creating a valid security interest

The security agreement must be concluded in written form (notarised or not notarised) or by deed under private signature and signed by the debtor. A definition of the written private form of such a contract is given in Articles 13 and 14 of the Law.

There is no obligation to fix the maximum amount of the secured obligation in the security contract. The asset over which a security interest is being created must be identified in the contract, however the inclusion of the words “all personal property” is considered a sufficient description for the purposes of the Law.

When sums of money deposited in a bank are pledged, a bank account number is required (Article 16 (1)).

The security interest extends to the products or the proceeds from the secured asset only if this is expressly set out in the contract. In this case, the contract should also contain an acknowledgement that the secured obligation is reduced to the extent of such products or proceeds pass to the secured creditor.

The creation of a valid security interest over future assets is subject to certain publication requirements applicable to the assets (Article 18 (1)). When the secured assets consist of securities or documents of title, which are transferred by endorsement or possession, particular formalities must be observed (Articles 13 and 25).

The security interest in personal property can be assigned to another party and the proof of such an assignment is accepted by private written act (signed by the parties, without requirement of a notarised form) (Article 43).

The registration of security interests

The Law outlined the requirements for the creation of a national, computerised registration system. Priority is established by the time and date of registration, subject to identified exceptions where publicity is to be accomplished through possession or other means. Notice of security interests is registered through the filing of a security interest notice, and searches are based on the debtor’s name or serial number in the case of motor vehicles. A supervisory authority of the Government of Romania oversees the registration system.

The registration of the security interest notice is valid for five years and the renewal of the registration is mandatory if required by the principal obligation secured. Otherwise the effects of the initial registration are no longer effective. Liens in favour of the state must also be registered in order to achieve priority.

Methods of enforcing security interests

The Law gives creditors the option to pursue enforcement through the procedure set out in the Romanian Civil Procedure Code or to use the enforcement procedure specified in the Article 62 (1) of the Law. Unless specifically stipulated, the enforcement procedure specified in the Law will apply. The Law gives creditors the right to “peacefully” take possession of the debtor’s assets, provided such a process does not disturb public order or threaten the debtor (Article 63). If a voluntary transfer of possession is not possible, the creditor has the right to take possession of the secured asset by way of an enforcement procedure, with the help of court officers, bank officers or of any enforcement authority. The Law outlines the enforcement procedure in detail. It also sets out the remedies available to the debtor and other creditors to challenge in court the right of the creditor to sell the secured assets or to distribute the proceeds from the sale (Article 67 and following). The enforcement procedure commenced pursuant to the Law is not suspended by subsequent bankruptcy proceedings (Article 86(1)). The Law also prescribes various sanctions against...
creditors who breach the requirements for the realisation of the security interests.

Regulation of international operations related to security interests

Regulation of international operations related to security interests in personal property are expressly provided for in the Law. The basic principles of international private law as contained in Law no.105/1992 are taken into consideration by the Law, with respect to the validity of a legal act, when this is an secondary act.

The Law provides the effects in Romania of the ranking of priority of a security interest in personal property, as to its opposability, in case of an initial registration in another state. The Law regulates in particular the following situations:

- the security interest in personal property is created over an asset located in another country than Romania. The validity of this security interest is submitted to the conditions prescribed by the law of that state where the asset is located when security interest was created.
- after the security interest’s creation in another state than Romania, the asset is transferred in that later country (Romania).

In this case, the Law provides that the security interest such created and registered in a foreign state preserves its ranking, if the security interest is registered in the electronic archive, in Romania. This registration in Romania has to be operated within 60 days since the asset entered in Romania or within 15 days since the creditor learned about this entering into Romania. In any of the circumstances, this registration should be operated before the priority ranking obtained by the registration in the foreign state ceases to produce effects.

The practical implementation of the law: issues and experience

The Law entered into force on 27 August 1999, 90 days after the date of its official publication on 27 May 1999. Security interests in assets referred to by the Law, which were created prior to the Law entering into force, were considered validly created in conformity with the relevant law applicable at the date of their creation.

The courts were ordered to transfer the registers and documents related to the above security interests within 120 days from the date on which the Electronic Archive for Security Interests in Personal Property (the Archive) created pursuant to the Law began its activities. However there was no specific deadline by which the Archive had to start functioning. Within the 90 day term mentioned above, the Government of Romania was required to adopt the Rules for the Electronic Archive for Security Interests in Personal Property (the Rules). The Rules entered into force in October 1999.

The Archive was conceived as a national registration system for all types of security interests in personal property, as defined by the Law. The Archive is structured as a database system which is updated through one or more interconnected servers. The Ministry of Justice acts as the Supervisory Authority and authorised special operators enter the data into the system. Access to the information contained in the Archive is available to the public and accessible on the internet.

The Law initially provided for the possibility of granting public concessions for the operation of the Archive. However, it became clear that the procedure for public concession was time consuming and highly bureaucratic. Particular conditions of selection by public concession could also result in a limited number of operators. The need for a more flexible, transparent and rapid operator selection system led to the enactment of a new regulation regarding the authorisation procedure of Archive operators and the registering of operations. The implementation of this ordinance required a number of instructions to be issued by the Ministry of Justice to regulate issues such as the fee system for registration and the procedure for authorising operators.

The selection of operators was given effect by order of the Ministry of Justice in October 2000. The selection criteria was aimed at ensuring the authorisation of operators with appropriate financial resources and geographical coverage, modern equipment and a large range of services.

Another important issue was the choice of infrastructure for the Archive. Initially a closed network where operators are interconnected was recommended. This kind of system could not be accessed externally. However, it was
decided that the advantages of this secure network were not significant enough to justify the high costs involved. The Romanian Government then selected a system based on the interconnection of the operators through an open network via the internet. The costs were significantly lower, as the administration of the database required only the acquisition of a server. All operators were connected to this server. In order to enhance the security of the entire system, the access to it by the operators was protected by a password.

An essential element for the functioning of the electronic system is the software which ensures the correct administration of the database. The existing software enables searches of Archive registrations on the basis of various criteria, such as the name of the creditor, the name of the debtor or the asset given as security. It was decided, during the developmental stages of the system, that the software did not meet the requirements of the Ministry of Justice and its future major operators – the Trade Register Office, the National Union of Public Notaries and the Institute for Informational Research. Further modifications of the software were required before the current version was put into operation.

At the end of 2001 there were several operators working throughout Romania under the supervision of the Ministry of Justice. The Supervisory Authority clarifies the rules and regulations issued in respect of the Archive by giving an appropriate interpretation when necessary.

The Authority also exercises financial and accounting control over the operators’ activities regarding the correct payment of fees. It also authorises the operators’ registration of each security, the payment of fees to the state and the professional liability insurance.

The Archive technical staff monitor the functioning of the equipment to ensure the uninterrupted registration of the data by the operators and the access of the public to the information available in the Archive.

So far, the Archive has proved to be a simple and efficient registration system of security interests in personal property. It allows individuals to have immediate access to essential information about creditors, debtors or assets securing a commercial or civil transaction concluded anywhere in Romania. Access to this information is open to people anywhere in the world via the internet. Information about the existence of a security interest in personal property previously involved prohibitive amounts of time and money. Now that same information is significantly easier and cheaper to obtain.

Conclusion

The new Law is a very important step by the Romanian Government and Parliament in promoting commercial and financial transactions secured by personal property. The introduction of a unified and transparent statutory regime for the creation, priority and enforcement of security interests is a significant development. There is of course room for improvement of this Law and of the regulations issued for its implementation. However, despite some organisational difficulties, the benefits of this new legal system are already apparent to the government, the public and investors. There is now a more consistent and predictable enforcement regime in case a debtor cannot satisfy its obligations towards the creditor. The civil and commercial circulation of the assets that could form the object of a security is not affected. There is now better protection of creditors and an improved climate for local and foreign investment in Romania.

The Law sets out a special system of recording and publishing civil or commercial contract obligations which are applicable to all security interests in personal property.
Bulgaria: from paper-based registries to electronic, central registries

Registries are a fundamental component of the legal infrastructure supporting commercial activity. Those willing to register material facts or circumstances must be able to access the registry in a practicable way with the certainty that the information input will correspond to the information output provided to those searching the registry.
If registries fail to function properly and do not ensure timely registrations and registry searches, they become detrimental to, rather than beneficial for, commerce.

No matter how well-organised and user-friendly a registry is, it is only through a search subsequent to filing that certainty that the registry has performed its functions may be achieved. Therefore, when registering a security interest and before disbursing, a prudent lender should not be satisfied with a confirmation that its security interest has been duly registered. Before disbursing, the lender should perform a subsequent follow-up search of the registry and be satisfied that the generated registry report shows both the registration of the lender’s security interest and the absence of conflicting security interests with priority over the lender’s security interest. A similar logic applies in respect of executing transactions with corporate entities. A party signing an agreement having received evidence as to who the entity’s registered representative with signatory powers was, would not wish to act on the agreement before ensuring that the signatory was still authorised to act on behalf of the relevant registry as of the moment of signing. If a registry is to perform its function of bringing certainty to commercial transactions, particularly in the field of lending and sizeable transactions, it must offer a practicable way for subsequent searches to be undertaken.

If registries fail to function properly and do not ensure timely registrations and registry searches, they become detrimental to rather than beneficial for commerce. To the extent that there is no practicable way for a registry to be searched, the parties concerned tend to rely on knowledge about certain facts or circumstances from sources other than the registry. However, in a number of cases only the constructive knowledge of such facts or circumstances is relevant and the only source of such knowledge is the registry. Therefore, those who have done their best to learn of the facts or circumstances concerned, but have not searched the registry due to the lack of a practicable way to do so, are penalised instead of supported by the registry system. This also applies to those who have not filed relevant information in the registry due to the lack of a practicable way to do so and have thus enabled third parties to rely on outdated knowledge which is obtained from a registry.

Criteria for assessing the practicability of register searches

The criteria as to what constitutes a practicable way to update or search a registry should be formulated through an examination of the existing status of Bulgarian registries which handle registrations of corporate entities, registration of title and other rights in rem in real estate, and registration of security interests.

Time for accessing the registry

The time it takes for a traditional Bulgarian registry to complete a registration would ideally be one week (i.e., registration of the relevant information and the issuance of a registration certificate). It is extremely rare that a quicker registry response is obtained and often the period might be longer. A one-week delay poses a serious timing problem for modern business transactions.

Similarly, if an individual applied for an extract or certificate from a traditional Bulgarian registry (e.g., a certificate of good standing in respect of a company, or a certificate for encumbrances in respect of a person’s owned real estate, etc.), it would be not issued in under a week.

Location of the registry

Corporate entities in Bulgaria are registered in 28 decentralised paper-based registries with the existing District Courts. Real estate transactions are registered in 107 decentralised paper-based registries with the existing Regional Courts. Therefore, if an individual did not want to correspond with these registries via mail or local agents, distances of up to 500 kilometres might have to be covered if a filing or a request for information is to be made. Since the registry statement concerning the filed registration or requested information would not be issued on the spot, the magnitude of the problem is doubled. While covering distances is a burden itself, the decentralisation of registries exacerbates the problems of registries’ inaccessibility.

Precision of timing

Traditional Bulgarian registries work in time increments equal to a day. Therefore, if the change of a registered manager and a transaction take place within the same day, the registry would not be able to provide the required backing in respect of determining whether the transaction was signed by the registered authorised signatory or not.

Paper carrier

Traditional Bulgarian registries are paper-based, which makes them incapable of being accessed via electronic media, such as the Internet. This directly affects the time it takes to access information. More importantly, the paper carrier makes such registries unreliable or even incapable of performing their basic functions. For example, real estate registry books in Bulgaria are over a century old. Due to heavy use over the years, significant parts of them have been worn away to an extent that they are not legible. Corporate and real estate registry books are often tampered with illegally: pages or even entire books disappear or are stolen by interested parties. By its very nature, paper is much more difficult to protect from wear and tear and tampering, without slowing down the search process.

Uniformity of registry and registry reports

Traditional Bulgarian registries are incapable of enabling automated processing of incoming and outgoing information. The delays in processing information and its inaccessibility via electronic media are just two aspects of the problem caused by lack of computerised processing. Another important aspect is the inconsistency of statements. One and the same certificate – (for example, a certificate of encumbrances on one party’s real estate) – might come in a broad variety of forms, depending on the specific individual who drafts or issues it. Often there are discrepancies in the contents of the actual registry and the registry certifications. Some certificates might omit important data, others might be certifying information which is irrelevant.

Appeals against decisions of registrars

In the case of a disagreement between the applicant and the registry judge concerning a registration, the process might stall for weeks or months. Applicants hardly ever appeal unjustified denials of registration to the superior court, as such an appeal would delay registration for up to years. Therefore, following dramatic disputes, the registration usually takes place after each and every whim of the registry judge has being addressed.
The impact of traditional Bulgarian registries on commerce

The first registries to be set up in Bulgaria about one century ago handled filings in respect of title and other rights in rem in real estate. Although these registries have gone through numerous organisational changes, they have never been discontinued as a state function and their principles of operation have not been materially altered. Therefore, searches of the registries dating back to their origins do not present problems.

By contrast registries handling corporate filings have been practically discontinued, insofar as their functions for handling commercial corporate registrations are concerned since the abolition of the 1898 Law on Commerce in 1951. With the enactment of the Law on Commerce of 1991, these registries were reinstated with a structure that was not principally different from the original one that existed prior to 1951.

Commerce in Bulgaria relies on real estate registries and corporate registries, with the exception of some modern developments of secured transaction law dating from 1996. Therefore, commerce has to rely on and comply with the capacity of infrastructure tools conceived in nineteenth-century Europe and designed to accommodate the level of technical accomplishments of that era. As a result, businesses willing to function through use of the Internet, are restricted with regard to interchange with registries. Due to the bureaucratic procedure of obtaining registry statements, all businesses transact on the basis of information concerning the corporate good standing of their partners which dates back days, weeks or even months from the moment of transaction. Thus, businesses have to rely on representations made by the individuals signing the respective agreements, to the effect that those same individuals are the registered signatories of the respective company as of the moment of signing. While this secures the contracting party at least a claim for damages in case of misrepresentations, the risk of the signed agreements with registries dating back to their origins does not present problems.

Lenders in Bulgaria take advantage of their stronger bargaining position prior to disbursement and do not disburse until the promised mortgage has been properly recorded and until evidence has been shown to the effect that the mortgaged property was not encumbered prior to registering lender's mortgage. It is the borrower in this instance who suffers from the inefficient registry system, for he or she does not see his or her money until the slowly operating real estate registry issues the requisite certificate. It is not unusual that the certificate would not give the proper certification of all circumstances desired by a lender, in which case a new certificate would have to be issued.

Central Pledges Registry with the Ministry of Justice

In October 1996 the Bulgarian Parliament enacted the Law on Registered Pledges. The Law took effect on 1 April 1997 and for the first time introduced a comprehensive, institutionalised system for the creation and perfection of non-possessor security interests in movables and certain categories of intangibles. The Law not only introduced a versatile and convenient type of security interest, but it also led to the introduction of the first centralised and exclusively computer-based registry: the Central Pledges Registry.

The system of registered pledges is structured around the Central Pledges Registry and provides a national system of filings. A group of professional lawyers with backgrounds in academia, commercial banks, private practice and the court system inspired its establishment. Initially it received the support of the Central and East European Law Initiative of the American Bar Association and Bulgarian pro-reform non-governmental organisations. Later, the support of the Institutional Reform and the Informal

---

1 There are a variety of “practical” rules established by various administrations and private notaries in respect to how long after issuing a certificate of good standing of a corporate entity should be trusted. Sometimes a one-month-old certificate is acceptable, at other times a six-months-old certificates would still be trusted. The law does not specify a period of time after which a certificate of good standing should not be trusted. In practice, the only case where a certificate of good standing should be trusted is if it is issued after the relevant event and if this relevant event took place during the historic period covered by the certificate.
Traditional Bulgarian registries are paper-based, which makes them incapable of being accessed via electronic media, such as the Internet.

Institutional framework of the Central Pledges Registry

The Central Pledges Registry with the Ministry of Justice (the Registry) has the status of an independent public agency under the Minister of Justice. One Director manages the affairs of the Registry and has its own independent budget within the Budget of the Ministry of Justice. The Minister of Justice is authorised to open local outlets (branches) of the Registry on a needs-basis. Local outlets receive filings, do initial processing and forward the filings for registration by the central Registry office. Local outlets also collect requests for certificates to be issued by the Registry, forward them to the central Registry office and then issue the certificates to the applicant based on a draft generated by the database in the central Registry office. Specific registrations are handled by registration clerks and public servants employed in the Registry, who process incoming and outgoing information and effectuate registrations and issue certificates in the name of the Registry Director. The Registry Director’s denials to register are subject to appeal before the Minister of Justice. In turn, the Minister’s denials to register are subject to appeal before the Supreme Administrative Court. An appeal against denial to register has as its immediate effect the prompt registration of the relevant security interest, subject to public notice in the Registry that the registration might be annulled in case of an unsuccessful appeal by the applicant. Under law, the Registry’s operation may be sub-contracted to a private operator. The Registry has not yet introduced a bill in parliament and its successful enactment into law.

Registrations and certifications

Applications to register must be in writing and in special forms pre-approved by the Minister of Justice, consisting of a few groups of boxes to be filled in. Detailed instructions as to standardising the information written in each box have been supplied by way of a regulation adopted by the Minister of Justice. The information required is in respect of: identifying the secured creditor and the pledgor; to the extent different from the latter, the obligor under the secured debt; the secured debt; and the collateral pledged as security. Upon filing, the Registry clerk makes sure that there is no empty box on the form or, if there is no information to be supplied, the respective box is filled in with N/A (not applicable). If the Registry clerk is satisfied with the form and if the applicable fee has been paid, he or she authorises the registration in the name of the Registry Director.

Registration is effectuated pursuant to a methodology built into the system. First, the clerk has the system generate a unique registration number for each accepted filing form. A bar code sticker is pasted onto a special box on the form. The form being processed is scanned and an image file of the form is created in the system and is automatically associated with the generated filing number. Then a special menu opens which enables the operator to key in the data concerning the identity of the creditor, pledgor and main obligor. This information goes into the database and allows computer searches by pledgor details. The Registry retains no paper registrations.

The Registry issues two types of reports. The first enables the requesting party to obtain the full record of each person in the Registry, in that person’s capacity as pledgor. This type of report, however, omits the image files themselves and provides details concerning the number of associated pages of scanned image. The report provides details concerning each filing on the record, which are sufficient to enable a follow up search concerning any one of such filings. The report provides information on the sequential number of each filing and the exact date and time the system completed the filing. In this way the sequential order of completed filings is identifiable. The system can also generate reports with the full details of one or more specific filings. Such reports may be issued upon request, to the extent the applicant is aware of the sequential number of the specific filing. If not, the applicant must first do a personal search, obtain the first type of report, and then enter into each concerned filing’s details.

Assessing the effectiveness of access to the Central Pledges Registry

Using the criteria outlined earlier, it is possible to assess the extent to which the parties concerned can effect registrations of security interests or run various types of searches in the Central Pledges Registry.

Time for accessing the Registry

In practical terms, if a person was standing in front of the registry door with a signed registration application, it would take five minutes to complete the process (i.e., registration of the relevant information and the issuance of a registration certificate), unless there would be a queue in front of the door. Filing applications may be sent via mail as well but that takes extra time. If the applicant waited for that five-minute period, he or she would walk out with a confirmation of filing, which represents a replica of the information that was actually placed on the Registry and that would be issued to any party searching the Registry. This also applies to a party searching the Registry, to the extent that such party has defined its search criteria.

Location of the Registry

For the time being, the Registry has the same problems of distance that exist with traditional registries. However, due to the fact that a registration certificate is issued within minutes, an applicant should never have to take more than one trip.

Precision of timing

Each certificate issued by the Registry lists the exact moment a filing was made, the filing’s absolute sequential number and the time and number of the issued certificate. This makes the system reliable in respect of preventing disputes as to the exact time of registration.

Electronic carrier

The Registry is entirely based on digitally stored information. Therefore, computerised processing of data is possible and makes searches and reporting extremely fast. Since there is no paper archive, back-up of Registry information is easy, economical and secure. The risk of tampering or wear and tear is negligible. The Registry is capable of being accessible to outside users via the Internet.
Uniformity of Registry and Registry reports

The Registry operates based on standardised filing forms. The actual information contained in the Registry is an exact copy of what was submitted by the applicant. The Registry certificates are generated on the basis of a standard template and are automatically filled in with the actual data from the Registry.

Appeals against refusals of registration

Appeals against the denial of registration do not have a timing impact on accomplishing an appealing applicant’s goal, which is a prompt completion of the desired registration, regardless of how long an appeals process might take.

Impact of the Registry on commerce

This analysis demonstrates that the parties willing to rely on the Registry have a practicable way to ensure that the proper information is registered and obtained in a timely fashion from the Registry. Such information is reliable in terms of being precise and comprehensive. Therefore, the Registry might be viewed as an institution that can improve commerce in Bulgaria.

Potential for reform

Bulgaria has enacted a Law on the Electronic Document and the Electronic Signature, which took effect in October 2001. This law, which is compatible with EU standards and Directives, provides a sound basis for electronic commerce. The Law provides for state agencies to exchange electronic documentation by way of both receiving applications and issuing statements in electronic form. It also provides that individual administrative agencies under central government shall start receiving and issuing electronic statements by way of a decree of the Council of Ministers.

Furthermore, a universal Central Registry could be created to record all structural components of transaction activity. A Central Registry should be computer-based and centralised for the entire jurisdiction of Bulgaria. It should also provide on-line access for filings and certifications, thereby enabling users to have immediate access to up to date information. Registration of all legal entities, excluding state agencies, political parties and trade unions, could be maintained in the Central Registry. Such a Registry could also maintain the registration of security interests in assets other than real estate.

A Central Registry could contain the full description of objects of real estate (for example, plots of land, buildings or parts of buildings) as well as transactional information concerning real estate. This information could include transfers, encumbrances and mortgaging, and would allow users to determine the ownership status of property at any given moment. An electronic registry concerning real estate would allow searches and filings based on both personal data and property data for the first time.

The transition to a Central Registry could be based on a number of existing structural accomplishments, which can be further developed and streamlined. The Law on the Electronic Document and the Electronic Signature provides a sound basis for the communication infrastructure of the Central Registry. The Central Pledges Registry with the Ministry of Justice will provide the platform on which an enhanced registry structure might grow, and whose procedures and experience to date will be utilised by the new Central Registry. The World Bank and EU Phare financed project for the creation of electronic cadastral maps of Bulgaria, which is currently under way, will provide the property data that will serve as the basis for the property registration.

It would be easy to enhance the Registry so that it could receive filings and issue certificates electronically and sign them electronically, via the Internet. The distance factor would then be removed and the practicability of accessing the Registry for filing and certification purposes would be significantly improved.
## Legal transition developments

### Armenia

**Legal reform project**

The EBRD completed its telecommunications regulatory reform project in Armenia during the third quarter of 2001. Working with the Ministry of Transport and Communications and the Ministry of Justice, the EBRD and its consultants delivered to the Armenian Government a substantial regulatory reform package, including a draft law and measures necessary to establish, empower and equip an effective and well managed independent telecommunications regulatory authority. This package, when implemented, will afford powerful instruments enabling further development of the telecommunications sector in Armenia.

### Belarus

**Legal developments**

**Proprietary law**

On 13 November 2001, pursuant to Edict No. 667, the President repealed a 1999 decree that provided that the President could transfer to state ownership the property of any individual or any legal entity that caused “damage to the state”. The 1999 decree provided that property could be returned to its previous owner if the damage caused to the state was compensated in full, or if a court of law held that the relevant person was not responsible for causing the damage. The repeal of the 1999 decree is a welcome development, as “damage to the state” was not precisely defined and seemed to indicate that legal entities could be held responsible for misdeeds of their shareholders/investors. This possibility contradicted the basic principle laid down in Belarus’s Civil Code that legal entities are not responsible for the obligations of their shareholders/equity owners.

### Azerbaijan

**Legal developments**

**Civil Code – Pledges**

On 1 September 2001, the new Civil Code entered into force. The Civil Code includes new provisions applicable to the taking of security over property. The Pledge Law of 19 August 1998 also remains applicable but only to the extent that it does not contradict the new Civil Code. A reform process was initiated for the creation of a unified, centralised, pledge register operated by the Ministry of Justice, but the register has not yet been developed.

### Legal reform project

In November 2001, at the request of the State Committee for Securities, the EBRD undertook a project to assist Azerbaijan in preparing a new Law on Joint Stock Companies and a new Law on Securities. Funded by the United Kingdom, this project is expected to help bring these two pieces of primary legislation governing the securities market into line with international standards and the sound practices of more developed markets.

### Bosnia and Herzegovina

**Legal developments**

**Election law**

In September 2001, the Election Law of Bosnia and Herzegovina entered into effect. The law regulates, among other things: the conduct of elections; rules of conduct for political parties; the election of members of the Presidency of Bosnia and Herzegovina; the election of delegates to the House of Peoples and the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina; the composition of the Parliament of the Federation of Bosnia and Herzegovina, the National Assembly of The Republika Srpska; and the mandates for canton assemblies, municipal councils/assemblies and city councils/assemblies.

### Bulgaria

**Legal developments**

**Deposit insurance law**

On 9 December 2001, the Parliament approved the amended Deposit Insurance Law. According to its provisions, deposits of up to BGN 10,000 (£5,106) will be fully insured and there will be no insurance for sums above this amount. The threshold is calculated after adding together all accounts of a depositor in a bankrupt bank. The Law provides that funds found to be related to money laundering will not be guaranteed. Under the law, each bank must deposit a yearly premium of 0.5 per cent of all deposits for the previous year in the national insurance fund.

### Czech Republic

**Legal developments**

**Competition law**

On 1 July 2001, a new Law On Protection of Economic Competition came into effect, bringing substantial changes to competition law. The new Law, which fully replaced the previous legislation, is designed to achieve full harmonisation with EU competition regulations. The Law protects economic competition against elimination, restriction or other interference caused by (i) agreements of competitors, (ii) abuse of dominant position; and (iii) concentration of competitors. It also provides definitions for some of the terms that were regularly used by the Office for the Protection of Economic Competition, but which were not defined under previous legislation. Like its
predecessor, the new Law prohibits agreements that distort competition, but provides a new system of individual and general (block) exemptions, including a de minimis rule exempting agreements with low market impact from the statutory ban and considerably changing the procedure for granting individual exemptions. The Competition Office has enacted eight block exemptions which, under certain conditions, can apply to some of the most important types of research and development agreements.

Civil Code

On 1 January 2002 amendments and new provisions to the Civil Code relating to security rights entered into force. The provisions introduce a new regime for the creation and registration of pledges over certain assets. These assets include movable and real property not registered in the Cadastre Registry, collective assets and sets of assets. The pledge agreement for these assets shall have the form of a notarial deed and the pledge shall be created by registration in a pledge registry maintained by the Czech Chamber of Notaries. With the exception of possessory pledges over movable property, which may be created by means of a written pledge agreement and the handing over of the assets to the pledgee, there are no other methods for creating a pledge. It is no longer permissible to create a pledge by labelling the property. The Chamber of Notaries is currently drafting internal rules and guidelines for the operation of the registry, which is expected to become fully operational during 2002.

Estonia

Legal developments

Contracts law

On 25 September 2001, Parliament passed the long-awaited Contracts and Non-Contractual Obligations Law. All contractual obligations will continue to be regulated by the old civil code until this Law comes into force. The Law will not alter basic contracts law, but will provide greater detail and relevance for a post-Soviet state and will enhance consumer protections. In order for the Contracts Law to become effective, parliament must pass new civil code general provisions, the international private law act and an enactment law. While the two former draft laws have been completed, the latter has not yet been referred to parliament. Consequently, the new Contracts Law is likely to come in force sometime late in 2002.

Securities market law

On 17 October 2001 parliament passed a new Securities Market Law that aims to harmonise national regulations with relevant EU requirements. The new Law regulates matters related to the provision of investment services and securities settlement. The new Law, together with the enactment in June 2001 of the Law establishing the Financial Services Authority as a single regulator for financial services (see Law in transition, Autumn 2001), is expected to help improve the creditability and transparency of the country’s capital market.

FR Yugoslavia

Legal reform projects

Telecommunications

At the request of the Yugoslav authorities, the EBRD will initiate a project to assist with the establishment of a clear and predictable telecommunications regulatory framework likely to attract private investment and enable the overall development of the telecommunications sector. The objectives of the project are the elaboration of a sector policy for telecommunications, together with: policies for licensing, interconnection and tariffs; the adoption of a modern telecommunications law; the establishment of an independent regulatory authority; and the improvement of general awareness on telecommunications law and policy. It is expected that this reform project will begin during the first half of 2002.

Secured transactions

The EBRD has initiated a new project for the reform and implementation of a secured transactions law in FR Yugoslavia. The project includes the drafting of new provisions governing the taking of security over movable assets, the registration of the security into a centralised registry and enforcement of secured creditor rights. The EBRD is working closely with USAID and their consultants on this reform project. In addition to drafting new legislative provisions, the EBRD will assist with the implementation of the new provisions by helping to create a pledge registry, developing ancillary regulations and ensuring that the reform fits in with the existing legal framework. The United Kingdom has funded the first phase of this project.

FYR Macedonia

Legal developments

Money laundering

From 1 March 2002 a new Law against Money Laundering is to take effect. The Law provides a broad definition of what constitutes money laundering. It imposes a direct obligation on individuals and legal entities that could be involved in money laundering activities (even unknowingly), including banks and law firms, to report suspect activities to a special directorate to be created as part of the Ministry of Finance.

Hungary

Legal developments

Secured transactions

On 1 September 2001 a number of amendments to the Law on Charges set forth in Act IV of the Civil Code became effective. These amendments aim to clarify the existing rules enacted in 1997. One important clarification concerns the priority of a floating charge, which now clearly relates to the date of its formation rather than its conversion into a pledge. Under the amended rules it is also now possible for the parties to agree in advance to the sale of collateral outside of the judicial foreclosure process.

Money laundering

In October 2001 the government approved a number of amendments to laws regulating cash management and money transfers to combat money laundering. Among these measures are the elimination of anonymous savings accounts. Parliamentary approval of these amendments was given at the end of 2001.

Kazakhstan

Legal developments

Currency regulations


Civil Procedure Code

On 11 July 2001, significant amendments to the Civil Procedure Code were approved, including the elimination of the mandatory pre-filing procedure for “property-related” disputes (i.e., those involving claims that can be expressed in monetary terms); the abolition of the appellate procedure known as the cassational complaint; the adoption of new procedures for appealing court rulings which have already gone into effect; and the introduction of new provisions governing the “reverse enforcement” of a court decision, by which the effects of a prior decision that is subsequently reversed are eliminated. These changes represent a significant simplification in the judicial process.
Legal reform project
Telecommunications regulatory reform
At the request of the Kazakh authorities, the EBRD continued its legal assistance with the launch of a further phase of the current telecommunications regulatory reform assistance programme. This third phase builds upon the work done in phases one and two and provides assistance with tariff rebalancing and the development and implementation of a universal service policy. It also provides advice on telecommunications law and aims to improve general awareness on telecommunications law and policy. When completed, this assistance will provide the basis for the Kazakh authorities’ finalisation of a Concept Paper on Telecommunications and the presentation to Parliament of proposed laws on telecommunications and a Universal Service Fund in Kazakhstan.

Latvija
Legal developments
Investors protection law
In January 2002, the Latvian Law on Commerce entered into force. This comprehensive law set in place a cohesive, revamped body of jurisprudence applicable to the rights and relations of persons engaged in all aspects of commerce and trade in Latvia. It is the most significant piece of legislation relating to Latvian business passed in recent memory. The Cabinet of Ministers has introduced before parliament a draft Investors Protection Law that is likely to take effect from 1 January 2002. Once enacted, the new legislation is expected to establish a scheme to protect the financial and securities investments of small investors by compensating them for losses from irrevocably lost investments and undelivered investment services.

Telecommunications law
On 30 November 2001, the new Law on Telecommunications came into effect, replacing the Department of Communications and the Ministry of Transport with a Telecommunications Regulatory Commission. This new regulator will be responsible for all functions pertaining to public telecommunications networks and services, including the settlement of disputes arising from interconnection, tariffs and frequency allocation. The Law also reduces the fixed-line monopoly of Lattelekom by ten years to 1 January 2003 and brings forward number portability from 2005 to 1 January 2003. The Law also provides for the establishment of a universal telecommunications fund for financing development in rural areas. This Law brings Latvia into line with the second wave of EU liberalisation.

Accounting law
The Law on Certified Auditors enters into force on 1 January 2002, allowing a transitional period for a number of requirements. Most importantly, the new Certified Auditors Law allows audit firms to sign off accounts of Latvian companies in addition to licensed individuals; sets new liability insurance requirements; and applies special rules to audits of financial institutions and listed companies.

Lithuania
Legal reform project
In December 2001, the EBRD began assisting the Lithuanian Ministry of Economy in amending its Concessions Law and developing implementing regulations. Proposed amendments to the existing Concessions Law are expected in early 2002 and the project is expected to be completed by summer 2002.

Moldova
Legal developments
Pledge law
On 30 July 2001, parliament approved the new Law on Pledge, which came into effect in November 2001, except for one chapter which came into effect in January 2002. The new Law contains detailed provisions regulating the pledge over an enterprise, although it is unclear how the description of the collateral should be made in order for the pledge to be valid. On enforcement, the Law gives the pledgee the right to sell the pledged property independently, under the control of a judicial body or to take possession for the purposes of administration, especially in the case of an enterprise. Many provisions of the new law are based on the creation of an effective registration system, which does not yet exist in Moldova. It is unclear whether the Ministry of Justice has taken measures to establish such system. The new provisions constitute major improvements in the secured transactions regime in Moldova but their effectiveness will depend on the implementation of the Law.

Bankruptcy law
In November 2001, the new Law on Insolvency entered into force. The new law combines the concepts of re-structuring and bankruptcy in a single mechanism of legal securing of insolvent enterprises, thus combining two laws in one: According to the new law the realisation of the re-structuring process of the insolvent enterprises and the insolvency proceedings (bankruptcy) are viewed as two stages of pre-judicial and judicial proceedings. However the criteria of insolvency, which lead to the realisation of one or another procedure over the debtor, are marked rather vaguely. The new law also introduces judicial insolvency proceedings applicable to banks. However, it is still prohibited for the debtor bank to independently commence insolvency proceedings and the right to file an insolvency claim remains exclusively with the National Bank of Moldova. The new law emphasises the role of the administrator in the process of bankruptcy of an enterprise. It sets the principles for the foundation and operation of the creditors’ representative bodies, namely the creditors’ meeting and the creditors’ committee. The new law also introduces a definition for “disqualification”, which is aimed to raise the responsibility of persons engaged in the administration of debtor enterprises.

Poland
Legal developments
Consumer credit legislation
On 21 July 2001, parliament adopted a Law governing consumer credit. The Law regulates the principles and procedures for concluding consumer credit agreements, principles of consumer protection and obligations imposed on entities that undertake consumer credit. The new Law will come into force during the course of 2002.

Environmental law
On 1 October 2001, the Environmental Protection Law became effective. The Law introduces the concept of a contaminated land regime, defining liability for soil and groundwater contamination and setting legally binding soil and groundwater clean-up standards. The Law adopts the principle that the polluter must pay and allows until 2004 for a determination of liability for existing pollution. If no party can be found to be responsible for the past pollution, the local government authority is responsible for the clean up. The Law also introduces a publicly available contaminated land register. The Law is part of a number of legislative changes being implemented as part of the EU accession process.

Intellectual property law
On 22 August 2001, the new Law on Industrial Property became effective. The Law concerns regulations relating to invention, utility models, industrial designs, trademarks, geographical indications and topographies of semiconductors. It also introduces changes to the regulations governing Poland’s Patent Office, modifying the procedure for granting trademark protection. The new Law also introduces a new definition of geographical indications.
Legal reform projects

CIS Model Securities Law

On 24 November 2001, the Commonwealth of Independent States (CIS) Inter-Parliamentary Assembly approved the CIS Model Securities Law that was drafted with the support and technical assistance of the EBRD and the German Agency for Technical Co-operation (GTZ). The Model Law regulates circulation of securities, their clearance and settlement, the role and functions of professional market participants and licensing. It also governs the activities of a national Securities Market Regulator. The Model Law is based on International Organisation of Securities Commissions (IOSCO) internationally recognised principles.

CIS model laws are of an advisory nature for member states. Therefore, it is expected that the Model Securities Law will serve as the basis for new national laws or amendments to existing laws in CIS countries. On 20–21 December 2001 the heads of national securities regulators and the heads of finance committees of national parliaments met to discuss ideas for implementing the Model Law’s provisions into national laws.

CIS model investor protection and bank bankruptcy laws

The General Secretary of the CIS Inter-Parliamentary Assembly Council has requested that the EBRD assist the Council with the development of model legislation to improve investor protection and bank bankruptcy and liquidation. Model investor protection legislation will be designed to provide a more stable investment environment by empowering national securities commissions to impose meaningful incentives and penalties on professional market participants and issuers. Model bankruptcy law and liquidation legislation will assist with the efficient and fair liquidation of distressed banks. These legal assistance projects will be presented to EBRD management for approval and funding during the first half of 2002.

Corporate governance assessment

In November 2001, the EBRD initiated a Corporate Governance Assessment Project, which is expected to provide the Bank with an evaluation of corporate governance in the 27 transition countries of central and eastern Europe (CEE) and the CIS. Corporate governance rules will be benchmarked against the Organisation for Economic Co-operation and Development (OECD) Principles of Corporate Governance and best international practice. The assessment conducted under the project will provide the Bank with a detailed analysis of the laws, regulations, and decrees in the corporate governance sector and will enable the EBRD to identify gaps, conflicts or other deficiencies in the corporate governance legal framework of the transition countries.

Russia

Legal developments

Land Code

On 26 October 2001, the president signed into law the new Land Code of Russia, which came into effect on 30 October 2001. The new Code, which replaces the 1991 Soviet-era Land Code, codifies the legal relations on land and represents a significant development in Russian legislation. According to the new Code, land and all buildings and structures on it constitute a whole entity and may not be sold or privatised separately, except in certain cases. The new Code gives former owners, under certain conditions, the right to purchase land in Russia and grants foreigners owning buildings or enterprises in Russia the pre-emptive right to acquire ownership to the land under such buildings or enterprises. However, the Code prohibits the right to obtain state-owned land in so-called “perpetual use” following the Code’s entry into force. The Code also restricts the sale of certain types of valuable land, including farmland and forest land.

Money laundering legislation

On 7 August 2001, the president signed into law new measures against money laundering, which entered into effect on 1 February 2002. The law orders financial organisations to report suspicious deals to financial monitoring agencies. At the same time, it makes it an offence to divulge, for competition purposes, information received by such an agency. Operations by Russian individuals and corporations outside Russia are subject to joint monitoring by a specialist Russian agency and similar bodies in other countries.

Company law

On 1 January 2002, the Federal Law On the Introduction of Amendments to the Federal Law on Joint Stock Companies of 7 August 2001 came into force. The law passed, will facilitate the development of a modern telecommunications legislative and regulatory framework that will help attract private investment and enable the overall development of the sector. The objective of this project is to assist the Russian authorities in introducing legislation that incorporates international best practice. To that end, the Bank and its consultant will review the draft amendment to identify legal issues that may be in need of clarification, expansion or revision and suggest the necessary amendments or additions. Upon adoption of the draft amendment, the EBRD will consider the provision of further regulatory reform assistance to the Russian authorities aimed at the development of the telecommunications regulatory framework and mechanisms reflected in the amended law. It is envisaged that this additional assistance would cover issues such as interconnection, universal service and licensing.
Corporate Governance Code

The EBRD has been assisting Russia’s Federal Commission for the Securities Market (FCSM) in preparing Russia’s Corporate Governance Code. As part of the consultation process, the FCSM presented the draft Code to the international business and investor community in Boston, London, Moscow, New York and Washington D.C. between September and November 2001. On 28 November 2001 the Russian Government endorsed the draft Code. The Code’s provisions are of an advisory nature. However, companies will be required to disclose in their annual reports the degree of compliance with the Code’s provisions. The draft Code is available on the internet in both Russian and English (http://www.rid.ru), and is expected to be finalised by Spring 2002.

Slovak Republic

Legal developments

Commercial Code

On 3 October 2001, the parliament approved an amendment to the Commercial Code, which entered into effect in January 2002. This amendment strengthens minority shareholder rights and gives more power to creditors of troubled firms. The new changes require majority shareholders to increase the transparency of their disclosure by reporting additional details on company results and management decisions. The amendment, which brings Slovak commercial legislation into line with that of EU member countries, affects both joint stock companies and limited liability companies. The management of joint stock companies is now required to provide public access to all documents related to the company’s business license, such as company articles, annual financial statements and auditors reports. The amendment also allows minority shareholders with a minimum 5 per cent stake (together or individually) to call special shareholders’ meetings to propose changes to management and to sue company representatives for mismanagement.

Ukraine

Legal developments

Civil and Commercial Codes

In December 2001, the new umbrella Civil and Commercial Codes were approved by parliament and both Codes will enter into force in January 2002. The Civil Code contains important provisions regarding intellectual property protection and creditors’ rights. It is composed of eight volumes and covers contracts, family and inheritance law, property rights, copyright and trademarks and private international law. The new Civil Code introduces fines for the violation of intellectual property rights and requires compensation to the right holder for losses and the return of profits made through the illegal use of intellectual property. The new Civil Code also amends the procedures for registering copyright and other intellectual property rights.

The Commercial Code covers corporate behaviour, competition, securities law, insurance, banking and auditing. The Commercial Code introduces harsher sanctions that can be imposed on commercial entities for breach of contract, but does not take away from the freedom of parties to stipulate their own damages. The Commercial Code has been designed to operate in connection with the Civil Code.

Land Code

On 13 November 2001, the president promulgated the new Land Code, which came into effect on 1 January 2002. The new Code clarifies land property rights and regulates relations based on the principle of the private ownership of land. The long-awaited adoption of the Land Code ends a heated debate on private ownership of rural land, including agricultural land. The new Code consolidates existing, sometimes contradictory, regulations on land relations and clarifies private ownership. It clearly defines land use and the categories of people who may own land. The new Code adopts a liberal definition of agricultural land, granting the Government the authority to define the procedure for changing the use of land, and local councils and regional authorities, rather than parliament as is currently the case, the authority to approve each case. The Code defines all land as a commodity, which can be acquired, sold, pledged, exchanged, inherited and given as a gift. However, the sale of land will only become legal at the earliest on 1 January 2005. The Code permits the sale of virtually all non-agricultural land to any potential buyer, including foreigners. Foreigners are barred from acquiring agricultural land in principle, while they are entitled to acquire non-agricultural plots if these plots are the location for their business activities. It is anticipated that 15 laws and 20 by-laws are required to fully implement the new Land Code. The key issues that these laws will deal with include land valuation, the establishment of a property registry, the use of land as collateral, the creation of a mortgage bank and the development of bankruptcy procedures.

Deposit insurance law

On 20 September 2001, a new Law on the Fund Guaranteeing the Deposits of Natural Persons was approved and became effective on 24 October 2001. The new Law requires that all banks holding a banking license in Ukraine make an initial payment into the deposit guarantee fund equal to 1 per cent of the bank’s registered statutory capital within 30 days of the bank receiving its banking license. In addition, each bank must pay biannually an amount equal to 0.25 per cent of the total amount of its deposits, including accrued interest, by 31 December and 30 June of each year.

Financial services legislation

On 22 August 2001, a new Law on Financial Services and State Control over Financial Services Markets dated 12 July 2001 came into force. The new Law governs the provision of financial services in Ukraine. Under the Law, a license must be obtained for activities relevant to insurance funds, pension funds, the use of withdrawn funds for provision of financial loans and direct or indirect use of financial assets owned by individuals for the provision of any financial services.

Enforcement of foreign judgements

In December 2001, parliament passed a Law on the Enforcement of Foreign Court Judgements. The new Law allows foreign court verdicts in civil, labour, family and criminal cases and also of foreign arbitration bodies to be enforced in Ukraine by means of the State Enforcement Service, which will act on the basis of permission from the district appeals courts, the Kiev and Sebastopol city courts and the Crimean Court of Appeal, depending on where the defendant resides. Ukrainian courts may decline enforcement if the foreign court decision has not yet taken effect or the claim is not subject to litigation under Ukrainian law.

State-enterprises legislation

In December 2001, the president of Ukraine signed into law a bill imposing a moratorium on the forced sale of assets of companies in which the state owns 25 percent or more. The moratorium will remain in effect until parliament amends the nation’s bankruptcy laws, making it more difficult for creditors to thwart the privatisation of state-owned enterprises by forcing them into bankruptcy over debts. In the past, creditors could compel the sale of the state firms’ most valuable assets, often at fire-sale prices, leaving the state with little of value to privatise. Adoption of the law came more than six months after creditors forced the sale of assets belonging to a handful of Ukraine’s largest state-owned companies, which sales were sharply criticised by analysts and investors, arguing that the assets were transferred in a non-transparent manner at prices well below their actual values prior to scheduled privatisations. The new law is seen to protect the interests of both the state and of potential investors.
Uzbekistan

Legal developments

Currency convertibility regulations

On 22 June 2001, the Cabinet of Ministers passed a Resolution on Measures for Further Liberalisation of the Foreign Exchange Market, which establishes new rules on certain currency conversion matters. Amongst other things, small and medium-sized enterprises (SMEs) are now exempt from the mandatory sale of convertible currency proceeds and may export goods and services for payment in cash in convertible currency. Also, as of 1 July 2001 non-SMEs that are subject to the mandatory convertible currency sale requirements must sell 50 per cent of their convertible currency export proceeds at the market rate, as opposed to the Central Bank rate.

On 10 July 2001, the Cabinet of Ministers passed a Resolution on Measures to Organise the Operations of the Over-the-Counter Foreign Exchange Market, designed to improve the cumbersome process of changing soums into convertible currency, implementing the 22 June Resolution. The July Resolution puts in place a procedure for purchasing and selling convertible currency on the over-the-counter market and establishes new rules on the conversion of local currency into convertible currency.

On 18 July 2001, the Cabinet of Ministers passed a Resolution on Additional Incentives for Liberalisation of Secondary Exchange Market which has abolished from 1 August 2001 the system of licensing by the Central Bank of foreign currency purchases by importers of consumer goods. The resolution states that companies importing “socially significant” consumer goods and medicine may purchase foreign currency from the authorised banks within the limits established for each bank per quarter. However, the resolution does not provide a list of the “socially significant” goods and medicine.

Draft production sharing law

During its August 2001 session, parliament passed in its first reading the draft of a new Law on Production Sharing Agreements. Pursuant to the draft Law, foreign investors can obtain exclusive rights to explore and produce mineral resources in Uzbekistan at their expense and risk by entering into a production sharing agreement. Until the draft Law is adopted, all proposals for production sharing agreements continue to require approval by specific presidential decree, which hinders investment. As an alternative, investors have been strongly encouraged to participate in a joint venture with a domestic entity and to share in the use of such entity’s license rights. The draft Law, which is anticipated to be adopted by the end of December 2001, constitutes an import development in the legal framework for the exploration and production of mineral resources by foreign investors in Uzbekistan.

EBRD

Legal Transition Team

David Bernstein
Chief counsel and head of legal transition team
Craig Averch
Counsel, Corporate Recovery/bankruptcy reform
Hsiannin Chen
Counsel, Capital market regulation and corporate governance
Frederique Dahan
Counsel, secured transactions project
Paul Moffatt
Counsel, telecommunications regulatory reform
Alexei Zverev
Counsel, concessions/Russia legal reform
Anila Gramshi
Associate, financial market regulation
Joint Vienna Institute (JVI) seminar on business practices, Vienna

In September 2001 the JVI ran a one week seminar on Western business practices targeted primarily at Yugoslav private sector executives. The JVI, a training institute established at the initiative of a number of international organisations including the EBRD, offers a variety of management courses to individuals from the EBRD’s countries of operations. These courses are designed to build the basic economic, financial and managerial skills necessary for the transition from centrally planned to market economies. At the seminar on business practices, EBRD Associate Banker Marek Lorinc outlined the Bank’s role in transition countries. EBRD Counsel Francis Delaey made a presentation on the contractual framework underpinning project finance transactions and the legal issues arising in connection with such transactions.

OECD Roundtable on corporate governance in south-east Europe, Bucharest

The Organisation for Economic Co-operation and Development (OECD) and World Bank Group sponsored the first South-east Europe Corporate Governance Roundtable, which was held in September 2001. The Roundtable was hosted by the Bucharest Stock Exchange and the Romanian National Securities Commission. The meeting brought together public and private sector experts primarily from the countries of south-eastern Europe (SEE), including the chairmen of securities commissions and heads of national stock exchanges. The participants discussed shareholder rights and equitable treatment.

The Roundtable provided a forum to share national experiences and problems and to discuss how to adapt various remedies adopted in OECD countries. The participants agreed that:

- SEE countries suffer from similar corporate governance difficulties;
- weak enforcement of existing laws and regulations is a critical problem throughout the region;
- improving corporate governance practices will help to develop regional equity markets.

The participants agreed to use the Roundtable process to develop a regional White Paper that will propose a set of practical recommendations, which can serve as a means to set priorities for implementing corporate governance reform at the national and corporate level.

The next SEE Roundtable on Corporate Governance is scheduled for May 2002 in Bulgaria and will focus on issues of transparency and disclosure.

United Nations Commission on International Trade Law (UNCITRAL) sessions on secured transactions, Vienna

At its 34th session in July 2001, UNCITRAL’s secured transactions Working Group met and decided to prepare a legislative guide on secured transactions. The Working Group agreed that the guide would adopt an integrated approach to secured transactions by including general rules applicable to tangible assets and then identifying any different rules necessary for intangible assets. This was the preferred approach because, in practice, a security package is likely to include both tangible and intangible assets. In December 2001, an Expert Group met in Vienna to begin developing a first draft of the secured transactions legislative guide. At the Expert Group meeting it was decided that the first draft of the guide would be prepared in time to be discussed at the joint Commercial Finance Association-International Bar Association-UNCITRAL colloquium in March 2002 in Vienna. A revised draft of the legislative guide would then be prepared for the next Working Group meeting in New York on 20–24 May 2002.

UNCITRAL Privately Financed Infrastructure Projects Working Group and Experts Group meetings, Vienna

As part of its ongoing programme on private financing for infrastructure projects, UNCITRAL has established a Working Group with the task of drafting core model legislative provisions based upon recommendations contained in the UNCITRAL Legislative Guide for Privately Financed Infrastructure Projects. These model provisions are intended to serve as an addendum to the Guide. This decision reflects the significant demand for model legislative provisions to provide specific guidance to countries in the process of enacting new legislation or revising existing legislation, particularly in developing and transition countries.

In September 2001, the Working Group held its first session and is expected to have its second meeting in September 2002. In order to begin drafting the model legislative provisions, UNCITRAL formed an Experts Group which met in Vienna in January 2002. During the Expert Group meeting, a first draft of the provisions prepared by the UNCITRAL Secretariat was discussed and debated. EBRD Counsel, Alexei Zverev, is a member of both the Working and Expert Groups.
**Russian Corporate Governance Code seminar, London**

On 22 October 2001, the EBRD hosted a seminar to introduce the draft of Russia’s Corporate Governance Code at its London headquarters. The EBRD, with funding from the Government of Japan, is working with Russia’s Federal Commission for the Securities Market (FCSM) to help develop the Corporate Governance Code. The seminar was opened by EBRD First Vice President, Noreen Doyle, and moderated by EBRD General Counsel, Emmanuel Maurice. FCSM Chairman Igor Kostikov presented the draft Code to representatives of the business, investor and legal communities in the UK, with a particular interest in Russia. Alexei Zverev, EBRD Counsel, and lawyers from Couderts Brothers, representing the consultants’ consortium, discussed the issues raised during the drafting process and preparation of the draft Code. The speakers provided a detailed overview of the draft Code and its implications for business development in Russia. Interested participants were invited to comment and to take part in consultations on the draft Code.

**Presentations to the Japan Institute for Overseas Investment and Japanese Bar Association, Tokyo**

On 10 December 2001, the Japan Institute for Overseas Investment (JOI) hosted a seminar at which EBRD General Counsel Emmanuel Maurice gave a presentation on the issue of concessions and public-private partnerships in central and eastern Europe. He outlined the results on concession law development from the EBRD’s annual Legal Indicator Survey. The seminar was chaired by Yutaka Yokoyama, Deputy Director of the JOI, and the audience consisted of members of the Japanese government and business communities. On the same day, the Japanese Bar Association held a seminar on contract enforcement. Emmanuel Maurice made a presentation on the EBRD’s experiences in contract enforcement in the transition countries as part of a panel of experts. The Bar Association seminar was attended by leading members of the Japanese legal community, including legal academics.

**UNCITRAL Insolvency Law Working Group, Vienna**

UNCITRAL held a session of its Working Group on insolvency law in Vienna in December 2001. The EBRD was among a select number of organisations invited to attend the Working Group’s session as an observer. UNCITRAL has undertaken an ambitious task of preparing: (i) a comprehensive statement of key insolvency law objectives and core provisions of an effective and efficient insolvency regime; (ii) a legislative guide on insolvency law; and (iii) alternative approaches to out-of-court insolvency procedures. Despite the significant amount of progress made at the session, more work is required. Accordingly, UNCITRAL has tentatively established another meeting of the Working Group for May 2002 in New York.

**OECD Corporate Governance Roundtable for Russia, White Paper on Corporate Governance, Moscow**

In January 2002, the OECD hosted a session of its Russian Corporate Governance Roundtable in Moscow in order to finalise the Roundtable’s White Paper on Corporate Governance. The White Paper is the product of two years of debate and discussion between Russian and international experts that have participated in the four meetings of the Roundtable. It is an agenda for action addressed to all the key players of corporate governance reform in Russia: the government, regulators, judges, professional associations, investors, and corporate boards and management. At the January meeting, a small group of representatives from key Russian private and public sector bodies and international organisations, including the EBRD, met to discuss two new White Paper chapters on boards of directors and stakeholders. The representatives also reviewed comments on the White Paper provided since the last Roundtable meeting and agreed on comments needed to finalise the Paper. In addition, the Roundtable participants adopted priorities for the implementation of the White Paper recommendations prepared by the OECD. The final version of the White Paper on Corporate Governance in Russia was presented to an audience of senior Russian and international decision-makers from the public and private sectors in late March 2001.
The Legal Transition Programme is an international initiative whose members comprise 60 countries, the European Community and the European Investment Bank. The EBRD operates in the countries of central and eastern Europe and the Commonwealth of independent States committed to multiparty democracy, pluralism and market economies.

The EBRD's countries of operation are: Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, FR Yugoslavia, FYR Macedonia, Georgia, Hungary, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Poland, Romania, Russian Federation, Slovak Republic, Slovenia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan.

The EBRD works through the Legal Transition Programme, which is administered by the Office of the General Counsel, to improve the legal environment of the countries in which the EBRD operates. The purpose of the Legal Transition Programme is to foster interest in, and help to define, legal reform throughout the region. The EBRD supports this goal by providing or mobilising technical assistance for specific legal assistance projects which are requested or supported by governments of the region. Legal reform activities focus on the development of the legal rules, institutions and culture on which a stable market-oriented economy depends.

Law in transition is a publication of the Office of the General Counsel of the EBRD. It is published twice a year and is available in English and Russian. The editors welcome ideas, contributions and letters, but assume no responsibility regarding them. Submissions should be sent to David Bernstein, Office of the General Counsel, EBRD, One Exchange Square, London EC2A 2JN, United Kingdom; or bernsted@ebrd.com.

The contents of Law in transition are copyrighted and reflect the opinions of the individual authors and do not necessarily reflect the views of the authors' employers, law firms, the editors, the EBRD's Office of the General Counsel or the EBRD generally. Nothing in the articles should be taken as legal advice.


All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, including photocopying and recording, without the written permission of the copyright holder. Such written permission must also be obtained before any part of this publication is stored in a retrieval system of any nature.

Law in transition is printed on Treehaven paper which is an environmentally responsible paper. The pulp used in its manufacture is taken from sustainable forest sources and is 100% TCF (Totally Chlorine Free).

The report is printed by Hyway Printing Group, London, using the waterless offset litho process. Hyway hold the ISO 14001 international standard for effective management of environmental impact including waste minimisation and recycling.

Ref: 5188 Law in transition, Spring 2002.