



INTERNATIONAL TRENDS IN PUBLIC-PRIVATE PARTNERSHIP AND CONCESSION LAWS



The EBRD has conducted several assessments of legislative frameworks regulating public-private partnerships (PPPs) and concessions in the Bank's countries of operations, with the last occurring in 2011.¹ These assessments identify the strengths and weaknesses of a given framework with regard to the extent and effectiveness of its laws. They highlight legislative gaps by comparing laws in the region with modern, internationally accepted legal standards for the private financing of infrastructure.

The latest EBRD assessment of PPP/concession legislative frameworks began in 2016 and will finish in 2017. This article, which draws on the preliminary findings of that assessment, identifies eight trends that are receiving increased attention from legislators drafting PPP/concession laws and that are not covered in the UNCITRAL Legislative Guide on Privately Financed Legislative Projects (the UNCITRAL Legislative Guide).² In some cases the authors give their opinion as to the desirability of addressing these topics through legislative reforms in the EBRD region.



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PREPARATORY STUDIES

This section looks at the trend towards making more detailed preparatory studies mandatory for PPP and concession projects.

In France, for example, the law regulating private finance initiatives (PFIs) requires a study evaluating the financial sustainability of a project throughout its lifetime, in addition to the preparatory study. It also requires this budgetary sustainability study to be approved by the Ministry of Finance before a PFI project can proceed. This is because PFI contracts involve the direct financial commitment of public budgets, mainly through fixed payments over a long period, with no commercial risk and no delegation of public services. They therefore expose contracting authorities to a different form of financial risk, compared with traditional concession contracts, and warrant a separate financial sustainability study.

In traditional concession and build-operate-transfer (BOT) contracts, the concessionaire and its lenders are primarily responsible for the project's financial performance. In the case of concessionaire default and early contract termination, however, the contracting authority is exposed to financial liabilities. These may result from public guarantees (for example, regarding minimum levels of traffic or revenue or the performance of another public body) or from the cost of the public purchase of the project's non-depreciated assets.

Article 7 of the Model Law on Public-Private Partnerships for the CIS Member States³ (CIS Model Law) stipulates that all PPP projects shall be prepared on the basis of preliminary financial and economic calculations that help assess their rationale and efficiency, as well as identifying the optimal form for successful implementation. A requirement to prepare a financial feasibility study for public-private partnership projects appears in Article 9 of the Model Law.

COMPARATIVE STUDIES AND VALUE FOR MONEY

When a contracting authority is considering engaging in a PPP project, it needs to conduct comparative studies as part of its preparatory work. These enable the authority to determine whether a PPP is the most appropriate form of public procurement for a given facility or service. An important feature of comparative studies is that they consider whether a proposed project represents good value for money.

A PPP project is said to achieve value for money if it costs less than the best realistic public sector project alternative (often a hypothetical version of the project) delivering the same (or very similar) services. This public sector alternative is often referred to as the "public sector comparator" (PSC).⁴ A value-for-money definition is included in many recent PPP laws, mainly in common law countries such as Ghana or Timor-Leste.

Value-for-money assessment exercises may, however, prove extremely sophisticated, costly and time-consuming while also lacking objectivity. A pragmatic approach is therefore recommended.

OWNERSHIP CRITERIA

Rather than emphasising the traditional distinction between government-paid PFI contracts and user-pay concession agreements, Russia's new PPP law features an ownership criteria. The law defines a PPP project as one allowing private ownership of the infrastructure in question. Concessions, by contrast, are marked by public ownership of the infrastructure.

Under this ownership test, concessions therefore include traditional concessions as well as some other forms of contract (such as BOTs) where the ownership of facilities becomes public on completion of works and remains public. In a PPP, the possibility exists of the infrastructure remaining in private hands, although this does not necessarily occur.

The CIS Model Law features a provision requiring the transfer of ownership to the public at the end of a project's operation phase in cases where its public financing exceeded any private financing. Similar provisions exist in the legislation of various CIS countries.

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UNSOLICITED PROPOSALS

Political sensitivities around unsolicited proposals may generate strong opposition to the enactment of a PPP law. In some cases, critics of a proposed law consider that it does not sufficiently reward the private innovation necessary for a country's development. In other cases, opponents of a draft law argue that it gives undue advantage to the private party generating the proposal. They suggest that this may encourage private companies to try to bribe public officials in order to win excessively lucrative contracts.

The general trend in recent legislative developments is for the public party to consider the unsolicited proposal and, if it elects to retain the project as a PPP following a feasibility study financed by the private party, to start a normal tender process. The proposer is invited to participate in the tender if it has the required qualifications and may receive limited financial compensation if the contract is awarded to another party.

During the UNCITRAL Colloquium in Vienna in 2014⁵ it was agreed that this issue, which is addressed in the UNCITRAL Legislative Guide, should be revisited in response to concerns about corruption in the handling of unsolicited proposals.

There are provisions regarding unsolicited proposals in the CIS Model Law, in the new Russian PPP law and in recent amendments to the Russian law on concessions, as well as in most other recent PPP and concession laws.

In Senegal, one of the main reasons for the enactment of a new BOT law in 2014⁶ was to update the provision on unsolicited proposals. This is probably the most liberal PPP law, with regard to unsolicited proposals, as the previous legislation was believed to have prevented large volumes of investment from the Gulf countries. The new law provides better incentives for the proposer, such as the possibility of direct negotiations in some circumstances or of submitting a final bid in cases where the proposer is not the best bidder.

Another issue for legislators to consider is the extent to which unsolicited proposals comply with a government's general development policy. PPP legislation should strike a balance between encouraging private initiative and innovation and protecting the state from excessive financial risk, while also ensuring that unsolicited proposals do not become a way of by-passing other tender procedures that reflect the established needs of a country.

COMPETITIVE DIALOGUE

Competitive dialogue may be very useful for complex contracts requiring highly specialised technical or financial skills that contracting authorities do not possess or cannot obtain through the use of consultants. Often, however, it involves parallel negotiations that carry serious risks with respect to transparency and fair competition. These negotiations may also generate scope for collusion if the tender process is not fully mastered by the contracting authority.

The 2004 EU Procurement Directive allowed for the use of competitive dialogue only in the case of particularly complex contracts (Article 29).⁷ But the latest EU Procurement Directive,⁸ dating from 2014, allows the use of competitive dialogue in a wider range of circumstances. These include the absence of readily available alternative solutions, the need for innovative solutions or the inability of the contracting authority to establish technical specifications that are sufficiently precise.

The CIS Model Law is more restrictive and seems to propose the most reasonable solution, at least for emerging economies. It establishes that:

“In the case of a particularly complex public-private partnership project, where it is objectively impossible for a public subject to identify the most efficient technical, legal, and financial forms of project implementation, it shall be allowed to hold a competitive dialogue with private parties with a view to identifying the most advantageous form of the project implementation”.

DIRECT AGREEMENTS

In most cases, the financial closing of a PPP requires the signature of one or more direct agreement(s) between the government, lenders and guarantors as well as with the project’s main contractors and operators. A direct agreement allows lenders to agree with the guarantor on the steps to be taken, in the case of concessionaire default, to preserve the lenders’ and the government’s interests. The agreement also allows for the replacement of the defaulting concessionaire and the continuation of public services.

The CIS Model Law features 16 references to direct agreements. This shows their importance as a means of facilitating the financial closing of a PPP project. The inclusion of a reference to direct agreements in a PPP law can save a great deal of time that project participants might otherwise spend on discussing an issue that most lenders consider a potential barrier to concluding a project agreement.

PPP FUNDS

Several recent PPP laws⁹ require the creation of a fund to finance a project’s preparatory work, evaluation or feasibility studies and selection process. Funds of this type help contracting authorities in emerging countries access external advice before concluding PPP agreements with private operators who are often much better acquainted with project finance techniques. External assistance of this nature makes an important contribution to capacity-building efforts within contracting authorities.

In 2014, the EBRD launched the Infrastructure Project Preparation Facility (IPPF)¹⁰ to help public bodies structure and develop their PPP projects.

- 1 <http://www.ebrd.com/what-we-do/sectors/legal-reform/ppp-concessions/sector-assessment.html> (last accessed 17 January 2017).
- 2 <http://ppp.worldbank.org/public-private-partnership/library/uncitral-legislative-guide-privately-financed-infrastructure-projects> (last accessed 17 January 2017).
- 3 <http://www.ebrd.com/what-we-do/sectors/legal-reform/ppp-concessions.html> (last accessed 17 January 2017).
- 4 www.eib.org/epcc/g2g/index.htm - (Guidance 1) (last accessed 17 January 2017).
- 5 <http://www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2014.html> (last accessed 17 January 2017).
- 6 BOT/CET Law number°05/2014 dated 10 February 2014.
- 7 <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32004L0018> (last accessed 17 January 2017).

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Other international financial institutions (IFIs), including the Asian Development Bank (ADB) and the World Bank Group, have created or are in the process of creating similar funds.

Guarantee funds, such as those established in Brazil, help to reduce the need for numerous state guarantees, multi-annual budgetary commitments or prior authorisation through budgetary law. They can also assist in keeping project costs down and limiting public liabilities.

PPP investment funds help to fill temporary or structural financial gaps. For example, the draft PPP law in Ghana foresees the creation of a Viability Gap Support Scheme for projects that are economically profitable but not financially viable.

PUTTING PEOPLE FIRST

Governments must determine whether the possible detrimental effects of a PPP project on society or the environment outweigh its potential benefits and consider how any negative impacts may be mitigated. Several new PPP laws, such as those of Ghana or Timor-Leste, take the socioeconomic and environmental impacts of projects into account and make provisions for greater stakeholder

participation in order to improve the sustainability of a PPP contract’s design and implementation.

The CIS Model Law also underlines the need to involve citizens from the bid selection stage (for example through a public enquiry) through to the implementation stage (through regular information-sharing initiatives and efficient complaints procedures).

IFIs, including the EBRD and the World Bank, and other lending institutions require adherence to strict environmental and social standards and only finance those PPP or concession projects for which an environmental impact assessment has been carried out.¹¹

Last year, the United Nations Economic Commission for Europe (UNECE) organised workshops in Bangkok and Geneva on “People first PPPs” and issued guidance on PPPs that featured a new “value for people” criteria.¹²

CONCLUSION

The PPP market has been developing fairly rapidly since its inception around 1990. Accordingly, both policies and techniques used to prepare and implement PPPs keep evolving. The trends discussed in this article are just some of the more interesting features and arrangements that have come under the spotlight recently. A number of other ideas and approaches are being debated and tested in practice as more and more countries are motivated to try PPPs. The authors keep a close eye on various regulatory experiments and legislative trends – some of which may become the subject of a future article.

⁸ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0024> (last accessed 17 January 2017).

⁹ Examples include the PPP laws of India, Thailand and Vietnam and Ghana’s draft PPP law.

¹⁰ <http://www.ebrd.com/news/2014/ebrd-launches-infrastructure-project-preparation-facility.html> (last accessed 17 January 2017).

¹¹ The World Bank and the International Finance Corporation (IFC) follow the IFC’s Environment, Health and Safety Guidelines. The EBRD’s set of environmental standards can be found on the EBRD website <http://www.ebrd.com/who-we-are/our-values/environmental-and-social-policy.html>

¹² <http://www.unece.org/info/media/news/economic-cooperation-and-integration/2016/putting-people-first-in-ppps-for-sustainable-development/doc.html> (last accessed 17 January 2017).

