



PUBLIC-PRIVATE PARTNERSHIPS: THE UNECE-EBRD MODEL LAW



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POTENTIALS OF PUBLIC-PRIVATE PARTNERSHIPS

When properly structured and implemented, public-private partnerships (PPPs) can offer all sorts of advantages for society. They can advance the efficient and cost-effective development, provision and operation of public infrastructure and public services by effectively and sustainably harnessing the skills, resources, know-how and/or finance of the private sector on a long-term basis and structuring projects in ways that allocate the risks and responsibilities involved most appropriately over their life.

Whether it is in design, construction, rehabilitation, operation and/or maintenance, this can stimulate new funding and investment opportunities, raise the quality of public services and improve the public's access to these services.

PPPs therefore help to foster economic growth and social development in ways that promote the Sustainable Development Goals (SDGs) of the United Nations (UN), leading to a higher and more sustainable quality of life for everyone and stronger environmental protection.

UNIFICATION OF APPROACHES

To harmonise the approach to PPP legislation worldwide, the Model Law has been drawn up as part of the wide-ranging corpus of guidance documents, modules and studies on PPPs. The Model Law is currently being produced on behalf



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of the PPP Group within the United Nations Economic Commission for Europe (UNECE) and the EBRD's Legal Transition Programme. It aims to assist governments seeking to create or develop PPP systems of their own, especially in the economies where the EBRD invests and those doing so for the first time.

Governments seeking to launch or expand PPP systems often decide to put a PPP law in place, especially in countries based on civil law systems and/or relatively highly regulated commercial activities where a comprehensive and explicit set of rules applicable to PPPs may be considered helpful or necessary. Many common law countries, however, have done without one altogether, or only have very focused and limited new legislation in this area, since existing legal and contractual principles are often thought to constitute an adequate framework for them.

Many PPP laws have been adopted by different countries around the world in the past few years. Others are now doing so or are planning to do so. However, there is still a considerable disparity in the quality of those laws already in place. Some constitute extremely well-thought-out and structured laws, and others rather less so. Moreover, most of these laws do not yet take into account the challenges that have arisen when attracting private business to infrastructure in connection with the SDGs, and in particular with the Guiding Principles on People-First Public Private Partnerships, set out in the document of that title published by the United Nations in 2019 (the "People-First PPP Principles").¹

In drawing up the Model Law the authors made extensive use of those existing laws that they believe represent leading precedents and international best practice in this field. On the one hand, the availability of these documents has made the production of a Model Law based on them feasible. On the other, the number of countries still seeking to enact new or revised legislation of this kind provides a clear justification for publishing a model, in terms of offering further guidance.



MODEL LAW FEATURES

The United Nations Commission on International Trade Law (UNCITRAL) team has recently revised and published its own Legislative PPP Guide (with template clauses) on this subject, which has been a leading authoritative text in this field for the past 20 years. The authors of the Model PPP Law have also drawn heavily and fruitfully on those published clauses in structuring and wording its provisions, which cover some of the same ground and are designed to be generally compatible with them.

The Model PPP Law is, however, more comprehensive, therefore representing a standalone complete act compared with the UNCITRAL text which focuses on a few specific aspects of PPPs. The prepared Model Law enshrines and gives effect to the Guiding Principles on People-First Public Private Partnerships. These principles represent a new paradigm for PPPs, designed to achieve a range of sustainable development outcomes, which are critical to the SDGs and build on the PPP attributes described above, including:

- increased access to essential services and decreased social inequality and injustice
- enhanced resilience and adaptability
- proper responsibility for environmental sustainability
- improved socioeconomic effectiveness and sustainability
- vigilance against corruption
- replicability and the development of further similar projects
- full involvement of and consultation with stakeholders.

PPPs structured and implemented in accordance with the provisions of the Model Law can therefore be expected to promote those outcomes. They should represent enhanced “value for people” as well as “value for money” in terms of their long-term net value for consumers, the government and the wider public, considered over their lifecycle in light of all their significant impacts, for the greater good of everyone.



Promoting PPPs in Lebanon

Since October 2019, the EBRD Legal Transition Programme (LTP) has been engaged in providing technical assistance to the High Council for Privatisation and PPP (HCP) focusing on capacity enhancement and enabling framework development related to PPP project identification, preparation and implementation. The HCP is the country’s PPP unit charged with appraising potential PPP projects and determining whether to reject or pursue a particular project.

The key objective of the LTP’s assistance is to conduct a detailed gap analysis of the current institutional set-up and provide PPP institutional capacity enhancement assistance including, notably, through designing a comprehensive PPP training strategy for the HCP and relevant ministries and the delivery of training. The project team has completed the legal and institutional review of the PPP framework in Lebanon and has presented to HCP a draft set of recommendations for improvement. A set of further PPP guidelines have recently been drafted to provide additional clarification on PPP project implementation.

THE PEOPLE FIRST

The People-First PPP concept can provide invaluable guidance and focus, even if this is just a matter of emphasis. Highlighting the human, social, environmental and ethical aspects of PPPs should contribute to better designed PPPs in ways that are intrinsic to the wider mission of the UN.

The People-First PPP concept has now been formally supported, and its use recommended, by four United Nations Regional Commissions, namely UNECE, ECA, ESCWA and ECLAC, which in May 2019 announced their decision to collaborate and work together to make PPPs fit for purpose for the 2030 Agenda for Sustainable Development. The Model Law has been drawn up specifically with the People-First PPP objectives in mind and contains a number of cross-references to them. The core principles behind it are cited in its preamble.

“The Model Law assumes a fine balance between general regulatory control by the government over the PPPs implemented under its terms and freedom of contract for the parties to the relevant PPP contracts.”



Promoting PPPs in Tunisia

The LTP has been supporting Tunisia with PPP/concessions legal advisory since 2015. With the assistance of the EBRD, the country adopted its new PPP law in 2015. The new law brought greater clarity and transparency to the overall regime for private sector participation in infrastructure projects. Adoption of the PPP law was one of the highest priorities on the government's agenda, and it laid the groundwork for further cooperation between the EBRD and the Tunisian authorities in the area of developing PPP/concessions frameworks.

In 2017 the President of the Concessions Monitoring Unit, the main body mandated to coordinate, provide advice on and monitor PPPs and concessions in Tunisia, requested the EBRD's technical assistance with reviewing the old concessions law and enhancing capacity to implement concession projects. Following LTP's successful engagement on reviewing the PPP/concessions framework, in 2019 the government of Tunisia requested LTP's further support in developing a PPP policy that will declare public support for PPPs, define their key characteristics and promote the development and practical implementation of concession projects in the country.

WIDE USE OF THE MODEL LAW

The Model Law is not, of course, a template piece of legislation that can simply be pulled down and enacted by any country. It is designed to offer guidance, not cut-and-paste statutory clauses. Careful consideration will always be needed.

In the end, there are many different ways of approaching laws of this kind and the various provisions they contain. They give rise to questions and issues to which different countries will offer different answers and reach different conclusions.

Furthermore, any PPP law that a country adopts must be fully compatible with its wider legal system, jurisprudence and legislative traditions, as well as with the idiosyncrasies of its PPP system. That may call for extensive modification to the Model Law where it is being used as a helpful precedent.

The Model Law represents the type of PPP law that aims to be relatively comprehensive in scope, setting out a robust framework to govern all the fundamentals of a PPP system, the basic elements of PPP projects and the procedures and regulatory mechanisms that apply to their preparation, award and implementation.

But it may not always be technically necessary at a legal level to do this. Some of the relevant legal concepts and arrangements may already be in place. For example, the country's existing procurement regime may be adequate for PPP purposes and the country may already have a long history of successfully using PPPs. In that case, a shorter, more focused law may be appropriate. That is something each country must decide for itself.

The advantage of the approach reflected in the Model Law and the reason it is often adopted, in particular in civil law countries, is that the new PPP law then becomes a comprehensive enabling statute, offering clarity and certainty as to what is feasible in the PPP context and how individual projects should be approached and implemented. This can work to everyone's advantage.

It should also be noted that the Model Law is not directed primarily at member countries of the European Union (EU) or the accession countries. The EU already has a wide-ranging body of laws and requirements applicable to the procurement of PPPs. Any EU accession countries that seek to



draw on Model Law provisions should therefore carefully consider how to harmonise their PPP laws with the EU *acquis* and how to adapt the clauses from the Model Law accordingly.

The Model Law assumes a fine balance between general regulatory control by the government over the PPPs implemented under its terms and freedom of contract for the parties to the relevant PPP contracts. Some countries may prefer to include additional tiers of approval of and control over a PPP's elements, terms and implementation. The degree of regulatory control that any country seeks to establish is a matter of the country making its own decision in light of its political and jurisprudential traditions and socioeconomic system.

The Model Law and its commentary are the work of a team of distinguished legal, and some non-legal, experts in the field of PPPs, who have been collaborating on this exercise for over 18 months under the aegis of the United Nations and the EBRD.



- 1 See https://www.unece.org/fileadmin/DAM/ceci/documents/2018/PPP/Forum/Documents/The_8_Guiding_Principles_for_People-first_PPPs_in_support_of_the_UN_SDGs-Part_II.pdf (last accessed 13 February 2020).

