

**EUROPEAN BANK
FOR RECONSTRUCTION AND DEVELOPMENT**

CONCESSION LAWS ASSESSMENT 2007/8

COVER ANALYSIS REPORT

FINAL REPORT

JULY 2008

INTRODUCTION

Gide Loyrette Nouel ("GLN"/ "the Consultant")¹ has been selected by the European Bank for Reconstruction and Development ("**EBRD**")² to provide it with an evaluation of concession laws and legal framework applicable to public private partnership (**PPP**) in each of its countries of operations benchmarked against best international practice, in particular the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects adopted in 2000 (the "**PFI Guide**"). The PFI Guide is intended to be used by national authorities and legislative bodies when preparing new laws or reviewing the adequacy of existing laws and regulations.

The 2007/8 concession laws assessment (the "**Project**") is part of the EBRD's efforts to improve the legal environment in its countries of operations. Through the Project, the EBRD aims to encourage, influence and provide guidance to policy and law makers, while developing the concessions and PPP related legal reform in the region.

In addition to concession laws assessment the EBRD has undertaken similar evaluations in secured transactions, corporate governance, bankruptcy and securities markets.

EBRD sector assessment projects concern legal areas that the EBRD considers essential for the investment climate and private sector development. The aim is to compare the legislation applicable in the above-mentioned areas to international standards and, in so doing, identify the reforms needed. The projects place an emphasis on the written legislation ("*law on the books*"), whereas its application ("*effectiveness*") is measured by the use of other tools³.

The purpose of this report is to present and analyse concession assessments results as well as the evolution from the past assessments. Such analysis supposes the presentation of Project components, background and methodology.

The report is structured as follows: after a brief presentation of the scope of the Project (Section 1), the concession checklist is analysed (Section 2) and the rating methodology presented (Section 3). The assessment process is then presented (section 4) as well as the "limits" of the final results (Section 5). Such results are then analysed by core area and by country (Section 6) and the evolution and trends discussed in the last section (Section 7).

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³ Since 2003, the EBRD has conducted case studies to measure effectiveness of the laws in various fields.

An effectiveness assessment of the Concession laws has been conducted by EBRD in 2006 see <http://www.ebrd.com/country/sector/law/concess/assess/index.htm>

1. **SCOPE OF THE PROJECT**

To achieve the objectives of the assignment the Consultant will undertake the following tasks:

- (a) familiarise himself with the 2004 Assessment and its methodology with a view to using them as a framework for the Project;
- (b) research, identify and gather up-to-date materials necessary for the Project, including *inter alia* texts of concession laws for the countries under review and of the relevant best international standards and principles;
- (c) verify the results by confirming with at least one law firm in the relevant country that the laws and regulations to be used for the Project are up-to-date and complete;
- (d) based on this research and personal knowledge and expertise, adjust and refine, if necessary, the 2004 Assessment methodology and the Concession Checklist for the purposes of the Project;
- (e) prepare as required the Methodology Memorandum that shall include *inter alia* an analytical statement of international best practice to be used as a benchmark and a detailed methodology for ranking/grading the level of compliance to these developed benchmarks;
- (f) assess the quality of the laws and policies regulating concessions in all the EBRD's countries of operations;
- (g) tabulate the results for each country assessed in an accessible database available for future use by the EBRD;
- (h) compile the results of the Project and present them in a comprehensive Final Report that shall at the very least include: a general section describing any update on the international best standards and practice regarding concession legislation, an assessment methodology, a cross-country overview, a detailed analysis of each country, individual country and comparative charts, a brief analysis of the assessment undertaken in task and any implications that might arise, and general conclusions;
- (i) based on the results, as necessary, adjust the Final Report of the 2006 EBRD Concession Legal Indicator Survey;
- (j) provide assistance with the promotion of the Project results, as well as their compilation together with the results of the 2006 EBRD Concession Legal Indicator Survey into a cohesive report, and answer any follow-up questions that might arise;
- (k) based on own experiences with the Project, provide a written evaluation of the methodology and suggest possible improvements for future implementations.

2. CONCESSION CHECKLIST

2.1 Core Areas

2.1.1 Selection of Core Area

The Project comprises a detailed analysis of the concession laws of the EBRD's 28 countries of operations benchmarked against seven selected core areas (the "Core Areas"): (i) policy framework, (ii) institutional framework (iii) definitions and scope of the concession law, (iv) selection of the concessionaire, (v) project agreement, (vi) security and support issues and (vii) settlement of disputes and applicable law.

It is difficult to generalise what should and should not be included in a concession law (the "**Law**") and to create a questionnaire making it possible to assess whether the Law is over prescriptive or whether it contains problematic omissions. In addition, not only are the content and scope of the Law to be considered, but also the way in which it is structured and drafted.

This new questionnaire applied in the course of the Project aims to bring further clarity and simplification and contains fewer questions (50 instead of 78). However, the retained core areas are different from the previous assessment as a result of the allocation of a specific area for the Institutional framework in addition to the Policy framework, regrouping of general policy framework and general concession legal framework

The selection of Core Areas and the drafting of questions were accomplished on the basis of international standards developed in the concession field (mainly the UNCITRAL PFI Guide) and the experience gained in implementing public private partnership ("PPP") projects in EBRD countries of operations and in other countries, as well as on the past concession assessment experience.

Other international standards used are listed below:

- UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects, 2003;
- Commission Interpretative Communication on Concessions Under Community Law, 2000 ("**EU Concessions Communication**");
- UNIDO BOT Guidelines, 1996;
- European Commission Guidelines for Successful Public-Private Partnerships, 2003 ("**EU PPP Guidelines**");
- OECD Basic Elements of a Law on Concession Agreements, 1999-2000;
- European Commission Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions dated 30 April 2004 ("**EU PPP Green Paper**");
- Additional EU major documents/ decisions /recommendations on concessions including Directives 2004/18/EC and 2004/17 EC of 31 March 2004;
- Report on the public consultation on the Green Paper (Brussels, 3.5.2005 SEC(2005) 629) Communication from the Commission to the European

Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions (Brussels, 15.11.2005. COM(2005) 569) European Parliament resolution on public-private partnerships and Community law on public procurement and concessions (2006/2043(INI)).

For each Core Area, we have determined the main objective that needs to be satisfied for the development of PPP in the country. The Core Areas and objectives are presented on the first page of the Checklist and are aimed at those seeking a quick overview of a country's rating and assessment.

2.1.2 Explanation of Core Areas

(a) Policy Framework (Questions 1-7)

PPP projects tend to work best when they form part of a fully thought-out policy. The aim of the questions in this Core Area is to appreciate the country's overall policy framework and efforts in improving the legal environment for PPP and promoting PPP.

The existence of policy framework documents is considered as a positive sign of a country's efforts to improve the legal environment for PPP.

This Core Area evaluates the existence of a specific Law or of a comprehensive set of laws regulating concessions and allowing easy access to a clear and stable legal environment for PPP projects. Such an environment facilitates PPP project structuring, negotiation and closing.

The existence of sector-specific laws, regulating concessions in specific sectors and of a "local services law", regulating "municipal concessions" was investigated. The existence or not of such laws is not considered as a positive element *per se*. What is considered positive is the clarity of the legal regime applicable to a particular sector/infrastructure/service.

(b) Institutional Framework (Questions 7 to 10)

The existence of an institutional framework dedicated to concession including a PPP "task force" in either a loose format or in a more structured way, e.g. a PPP Unit set up to implement the policy framework and to assist in the selection of PPP project and in their achievement has appeared from experience as one of the most important elements for the success of PPP project in any country and as such it has been decided to distinguish Institutional framework from Policy framework and to make it a separate core area. The existence of a sound institutional framework for PPP is considered a very positive sign of a country's efforts to improve the legal environment for PPP and of its will to make the law effective. Such a task force concentrates the required expertise through proper training and accumulation of experience by a few local experts of different educational backgrounds working on various projects. These experts will be able to assist the granting authorities in project preparation, during the selection and award of the concession to a selected candidate, as well as in collection and keeping a record of the project documents

which will serve as a documentary reference for future projects.

(c) (c) Definitions and Scope of the Concession Law (Questions 11-18)

Questions in this Core Area assess the existence of a clear definition of the boundaries and scope of application of the concession legal framework.

Clarity in this respect helps to limit the risk of a challenge to the validity of a project agreement, irrespective of the name given to the document. Precise identification of public authorities empowered to award concessions and enter into project agreements, their coordinated functioning and non-discrimination against domestic and/or foreign persons becoming concessionaires is considered here. The applicable sectors are analysed, as well as the implications of the Public Procurement Law.

(d) Selection of the Concessionaire (Questions 19-33)

The principle objective of this Core Area is to measure the existence of a mandatory application of a fair and transparent selection process and tender rules, limited exceptions allowing direct negotiations, competitive rules for unsolicited proposals and the possibility to challenge illegal awards. Reference to the principles of transparency, non-discrimination, proportionality and efficiency is made, as well as to the publicity of project information and award. The existence of provisions providing at the same time clear guidance - guaranteeing a certain degree of objectivity and minimum standards - and sufficient flexibility for Contracting Authorities while organising procedures for pre-selection and requests for proposals is also measured. Elements that avoid long and non-transparent project agreement negotiations are taken into consideration, as well as procedures for aggrieved bidders and third parties.

(e) Project Agreement (Questions 34-40)

This Core Area assesses flexibility with respect to the content of the provisions of project agreements which will allow a proper allocation of risks without unnecessary or unrealistic/not bankable/compulsory requirements/interference from the Contracting Authority (obligations, tariff, termination, compensation). The existence of a "model concession agreement" or model provisions is not in itself considered a positive element but this may be the case where use of such models is not compulsory and for guidance only and a mandatory list of provisions to be included in the agreement is not a handicap and even has a positive effect as a reminder of the necessity to cover a specific matter if the content of such provision is left for negotiation.

(f) Security and Support Issues (Questions 41-46)

This set of questions addresses the availability of reliable security instruments on the assets and cash flow of the concessionaire in favour of lenders, including "step-in" rights and the possibility of government financial support or the guarantee by the contracting authority of proper fulfilment of its obligations.

(g) Settlement of Disputes and Applicable Laws (Questions 47-50)

The final questions assess notably the possibility of obtaining proper sanctions for breach under the applicable law through international arbitration and enforcement of arbitral awards. The ratification by the countries of the relevant international conventions contributes to the evaluation in this Core Area, this being a fundamental element for the existence of such a possibility. In addition, notice is taken of whether the parties are free to agree on the governing law and choice of dispute resolution procedure.

2.2 Reference to the Relevant "International Standard"

At the beginning of a particular section or sub-section, reference is made, where applicable, to the relevant PFI Guide recommendation. Such recommendation, if consulted in parallel, gives the rationale for the selected question and further explains it.

2.3 "Article" and "Commentary"

The column "**article**" makes provision for readers wishing to obtain more information and refer to a particular piece of legislation.

The column "**commentary**" provides limited additional explanatory information when needed to avoid any misinterpretations. If the answer contains a "reserve" ("yes, with reservation" or "no, with reservation"), care has been taken to provide a commentary, whenever possible.

2.4 "For Information"

The section "*for information*", contained in a number of questions (e.g., etc.) is aimed at refining the question and/or answer to which it refers. The answers to "*for information*" questions are not directly rated, but contribute indirectly to the rating of the question they refer to.

3. RATING METHODOLOGY

3.1 Keys for assessment

3.1.1 Keys for assessment of Each Question ("Key 1")

In order for the answers to be **clear**, **visible** and **uniform**, the following symbols, keys and point system were used:

✓ ✓ ✓	Yes
✓ ✓	Yes, with reservations
✗ ✗	No, with reservations
✗ ✗ ✗	No
N/A	Not applicable

The above symbols and keys are consistent with those used in the EBRD Secured Transactions Regional Survey.

The difference compared to the latter project is that we have omitted the inclusion of "uncertain" as a possible answer in order to forestall the use of this category for "difficult" questions.

3.1.2 Key for Assessment of each Core Area and for Overall Assessment ("Key 2")

The keys for assessments of each Core Area were determined based on the desire to make the assessments per Core Area and overall correspond as much as possible to the objective "reality" of a particular law/environment. As provided below, the keys for the assessments of the countries with/without a law on concessions are the same (percentage, corresponding number of questions), with the exception of the wording that needed to be adapted to the subject of the evaluation (set of laws, considered globally as representing a particular environment).

For the purposes of this exercise, percentage figures do not take into account elements coming after the whole number.

> 90%	Very High Compliance
70- 90%	High Compliance
50%-70%	Medium Compliance
30%-50%	Low Compliance
< 30%	Very low Compliance

3.2 Non Weighting of Questions and Core Areas

It was decided neither to weight the questions nor to weight the Core Areas (i.e. to consider every question and Core Area of equal importance).

The evaluation of the importance of a particular question/Core Area is a "subjective" task, depending in particular on the party involved. For example, a lender to a PPP project would probably not accord the same weight to a question related to "step-in" rights or to the Support and Financial Securities Core Area as would a public entity representative.

However, a negative answer to certain questions could be considered as a "deal breaker". Non-weighting such questions might not sufficiently clearly represent such questions/answers. That is why, the Overall Assessment of the Law refers to the existence of such difficulty, where applicable (see 3.4).

3.3 **Overall Assessment and Assessment by Core Area of all countries**

In addition to evaluating the total compliance score, we calculated the degree of compliance for each of the seven Core Areas.

For each of the countries we have applied the same mode of evaluation irrespective of the presence or not of a concession law, but for the purpose of this questionnaire, the set of rules applicable to concessions in the absence of a specific concession law has been evaluated contrary to what was done in the previous assessment where two different evaluation processes and questionnaires applied.

3.4 **Overall Appreciation of the Law: Main Areas Where Improvement is Required**

The second page of each country assessment contains a short summary of the findings from the questionnaire, with areas requiring improvement and positive elements from the law.

4. **FROM INITIAL TO FINAL ASSESSMENTS**

The documentation and information collection process was performed largely from August 2007 to January 2008, in parallel with the finalisation of the update of the re-designed Concession new Checklist in collaboration with EBRD.

Based on the legislation, translations and information collected from local experts, GLN prepared Initial Assessments of the concession law/concession granting legislation in each country. Initial Assessments were conducted between October 2007 and January 2008

Initial Assessments were submitted to local experts for verification in January and February 2008. Local experts were required to:

- **Complete** only certain answers (notably those not directly related to a law);
- **Correct** all elements considered incorrect; and
- **Add** any information considered relevant in particular with respect to the Effectiveness of the Law.

The majority of the Verified Checklists were received from end of January to March 2008 and analysed in March 2008 and finalised in July-August 2008. The results of the assessment are however valid as at 1 January 2008.

Final Checklists result from the Verified Checklists, amended and completed after review by local experts and the rating harmonisation conducted after the finalisation of every Checklist.

5. **COVERAGE**

Even though we have done our best to make the rating correspond as much as possible to the "reality" of the Law/Concession Granting Legislation of each country

(see process followed in 4.), every such exercise has inherent limits. We have identified below the main reasons for such limits:

- The Project is focused on the "*law on the books*", thus the actual practice and the implementation of the law have not been taken into consideration and reference should be made to the 2006 EBRD Concession Legal Indicator Survey except for some countries for which additional comments on the effectiveness of the law have been added under a specific item at the end of the Checklist. Thus, if the "implementation gap" were to be taken into consideration, the assessment results might have been different;
- The Project is focused on the assessment of a Law/Concession Granting Legislation (considered generally). However, only a comprehensive due-diligence of the overall general and sector-specific legislation will allow identifying all the deficiencies of a particular legislation and make more detailed recommendations for improvements.
- As described in 2. above, the Checklist was developed on the basis of international standards developed in the concession field (mainly the PFI Guide). The transformation of such standards into a list of questions creates a degree of rigidity;
- The assessment results may seem too critical. However, one should bear in mind that a number of laws were passed before "international standards" in the concession field were developed and that many of the laws were drafted when helpful documents and precedents were not yet available. In this respect, we note that the European Commission is, at this very moment, questioning its approach to PPPs (see EU PPP Green Paper);
- The assessment was made taking into consideration the legislation in force while certain countries might be in the process of developing a new law. At this stage, only the "for information" section of question 4 informs the reader of the existence of a draft law and no significant PPP law seemed to be close to ratification as of 31/12/2008 in any State with the exception of FYR Macedonia, which adopted its new PPP law in January 2008 and has been taken into account of in the evaluation.

6. ASSESSMENT RESULTS

6.1 Statistics

The average compliance for all relevant countries falls within the **medium compliance** (in 2004 the average compliance was low compliance). This suggests that there has been some progress but still considerable room for improvement.

Very High	High	Medium	Low	Very Low
NONE	ALBANIA	BOSNIA AND HERZEGOVINA	BELARUS	ARMENIA
	LITHUANIA	BULGARIA	ESTONIA	AZERBAIJAN
	SLOVENIA	CROATIA	GEORGIA	
		CZECH REPUBLIC	KYRGYZ REPUBLIC	
		HUNGARY	RUSSIA	
		KAZAKHSTAN	TURKMENISTAN	
		LATVIA	UZBEKISTAN	
		FYR MACEDONIA	TAJIKISTAN	
		MOLDOVA		
		MONTENEGRO		
		POLAND		
		ROMANIA		
		SERBIA		
		SLOVAK REPUBLIC		
		UKRAINE		

The analysis of the results by Core Area identifies particular strengths and weaknesses (see 6.2).

6.2 Commentary by Core Area

Before analysing the results in each Core Area, it should be noted that Security and Support Issues Core Area obtained the worst compliance rating. Settlement of Disputes and Applicable Law was the Core Area with the best compliance rating, with one country having a "very high compliance" rating and 17 rated as "high compliance".

6.2.1 Policy Framework

In this Core Area, the range of compliance is between the following categories: "high compliance" and "very low compliance". The average compliance falls within the category **medium compliance**.

(a) Countries rated "very high compliance"

NONE.

- (b) Countries rated “high compliance”
BULGARIA, CROATIA, CZECH REPUBLIC, KYRGYZ REPUBLIC,
LATVIA, LITHUANIA, FYR MACEDONIA, SLOVENIA, UZBEKISTAN.
- (c) Countries rated “medium compliance”
ALBANIA, ARMENIA, GEORGIA, HUNGARY, MONTENEGRO,
POLAND, ROMANIA, RUSSIA, SLOVAK REPUBLIC.
- (d) Countries rated “low compliance”
BOSNIA AND HERZEGOVINA, KAZAKHSTAN, MOLDOVA,
TURKMENISTAN, UKRAINE.
- (e) Countries rated "very low compliance"
AZERBAIJAN, BELARUS, ESTONIA, SERBIA, TAJIKISTAN.

In many countries, a general policy framework for PPP has not been identified and we note that the existence of such a framework is not necessarily linked with the quality of the law.

Where a general policy framework exists, it is generally based on policy framework documents.

We note that certain Laws specifically refer to the adoption of a "policy" document, e.g. Bosnia and Herzegovina, Tajikistan. However, in both examples, such a document has not been identified.

Very few countries have clear elements permitting the identification of a piece of legislation regulating the granting of concessions in a particular sector, infrastructure or service.

Such identification is particularly crucial in the countries where several general laws regulate PPP. For example, in Bulgaria, municipal concessions are governed by the Municipal Properties Act and all other concessions are governed by the Concessions Law. Given a clear **cross-reference** in the law to the Municipal Properties Act and subject to a clear definition of "municipal property", a relevant piece of legislation seems fairly easy to determine in this case.

Another example of a "dual" regime is the one applicable in Romania: concessions of public property are regulated by Emergency Ordinance no. 54/2006 and concessions of public works and services are regulated by Emergency Ordinance no. 34/2006.

6.2.2 Institutional Framework

In this Core Area, the range of compliance is between the following categories: “high compliance” and “very low compliance. The average compliance falls within the category **medium compliance**.

- (a) Countries rated “very high compliance”
NONE.

(b) Countries rated “high compliance”

ALBANIA, CZECK REPUBLIC, ESTONIA, LITHUANIA, FYR MACEDONIA; SLOVENIA; UZBEKISTAN.

(c) Countries rated “medium compliance”

BOSNIA AND HERZEGOVINA, BULGARIA, CROATIA; KAZAKHSTAN; MONTENEGRO; ROMANIA, RUSSIA, SERBIA, SLOVAK REPUBLIC.

(d) Countries rated “low compliance”

BELARUS, KYRGYZ REPUBLIC, LATVIA, POLAND,, TAJIKISTAN. HUNGARY, MOLDOVA.

(e) Countries rated "very low compliance"

ARMENIA, AZERBAIJAN, GEORGIA, UKRAINE, TURKMENISTAN.

The existence of a special dedicated institution or a "task force" for PPP remains quite rare; PPP promotion and development being generally executed by several bodies. This contributes neither to the harmonisation of the approach to PPP throughout the various sectors, nor to the facilitation of learning across sectors. However it is to be noted that the latest legislation really dedicated to the promotion of PPP and not to EU harmonisation only often provides for a special task force.

6.2.3 Definitions and Scope of the Concession Law

In this Core Area, the range of compliance is between the following categories: “high compliance” and “very low compliance”. The average compliance falls within the category **medium compliance** (2004: same score).

(a) Countries rated “very high compliance”

NONE

(b) Countries rated “high compliance”

FYR MACEDONIA, SLOVENIA.

(c) Countries rated “medium compliance”

ALBANIA, BOSNIA AND HERZEGOVINA, BULGARIA, CZECH REPUBLIC, ESTONIA, HUNGARY, LITHUANIA, MOLDOVA, UKRAINE.

(d) Countries rated “low compliance”

BELARUS, CROATIA, GEORGIA, KAZAKHSTAN, LATVIA, MONTENEGRO, POLAND, ROMANIA, RUSSIA, SERBIA, SLOVAK REPUBLIC, TAJIKISTAN.

(e) Countries rated "very low compliance"

ARMENIA, AZERBAIJAN, KYRGYZ REPUBLIC, TURKMENISTAN, UZBEKISTAN.

Certain Laws do not define the term "concession" (e.g. Hungary), and the majority of the Laws contain unsatisfactory definitions.

Concessions are often defined as "the right to use" (sometimes qualified as "exclusive") certain objects (e.g. Bulgaria: facility of public interest; Latvia: resources), and perform certain activities (e.g. Hungary: activities referred to as "exclusive competence of state or local government"). Concessions are also defined in certain Laws by reference to a lease (e.g. Georgia: "long term leasing agreements"), sometimes restricted to certain sectors (e.g. Kyrgyz Republic: "leasing a property, land and underground mineral resources"). Such definitions are inadequate.

In this respect, the PFI Guide and the UNCITRAL Model Provisions are of limited assistance, given that no agreement was reached at that time between the member states on a common definition.

However, it should be noted that, the EU Concessions Communication provides for a definition according to which concessions cover all project/contracts with the following elements:

- the grantor is a public entity (State or local authority);
- the concessionaire may be private or public entity;
- the concessionaire is entrusted with total or partial management of public infrastructures or services (i.e. works and/or services having an economic value and for which the grantor would normally be responsible);
- the concessionaire bears the risk of operating such works/services; and
- the concessionaire has the right to charge a fee for the use of the works/services.

Certain Laws define concessions by referring to the characteristics of the concession type arrangements (e.g. Belarus: "determined time period", "compensation"; Latvia: "specific time period", Moldova: compensation, management of the concession object, risk transfer; Ukraine: paid and "time" basis; Lithuania: reference to all the elements from the EU Concessions Communication). Albanian law includes in the definition of concession the transfer of risk to the concessionaire and the remuneration considerations.

The exclusion of a wide range of PPP arrangements can be implied from the generality of certain definitions, but is rarely provided for explicitly.

In the countries that do not have a Law, the term "concession" is rarely defined (certain isolated definitions provided in sector-specific acts e.g. Armenia), and is sometimes defined differently in different legislations (e.g. Azerbaijan).

Many Laws do not clearly state their boundaries, one of the basic elements that limits the risk of a project agreement being challenged.

Certain Laws refer to "other legal acts" regulating concessions, without further precisions (e.g. Belarus: concessions are regulated by the law and "other legal acts of the Republic of Belarus and international agreements of the Republic of Belarus"), the lack of which limits the scope of application of the Law and further increases

uncertainty.

Only very few Laws apply to all contracts entering into the concession definition, irrespective of the name given to the document (e.g. Albania). Some prevail over sector-specific laws. In this respect, the Hungarian Law contains a useful provision specifying that sector-specific laws may only "provide in the scope of the law" while the Macedonian Law considers sector-specific laws as complementary to the law. Such an approach constitutes a relatively solid basis for the creation of a harmonious approach to PPP regulation in a particular country. Similarly, the Moldovan Law obliges the government to make "its normative acts" in conformity with the Law and to propose necessary suggestions to the Parliament, while the Ukrainian Law prevails over laws regulating concessions previously adopted. The Croatian Law, on the other hand, clearly states that sector-specific law may derogate from the law. Such an approach clearly reduces the rationale of the general law.

The status of concessions awarded before the Law came into effect is frequently unregulated (the Law of Bosnia and Herzegovina being an exception).

Even though the general legislation of many countries would, as observed by numerous local experts, declare null and void any contract entered into without due regard to the terms of the law, it is rarely clearly stipulated in the law (the Law of Bosnia and Herzegovina is again an exception).

Public bodies are often referred to in fairly imprecise terms (for example the Law of Georgia refers to an: "authorised body as defined under the legislation of Georgia"; Kyrgyz Republic: "government authorised or specially set up agencies", Belarus: "Republic of Belarus, represented by the Government" or the "republic administrative body authorised by the Government") and can often include a number of different bodies (e.g. Serbia, Bulgaria). Only the Bosnia and Herzegovina Law provides for the creation of a permanent special agency. However, the establishment of a tender commission on a project basis is often provided (e.g. Serbia, Georgia, Albania). In this respect, we note that the EU PPP Guidelines suggest that, given the complexity of the implementation of concessions, the establishment of a special purpose agency with the sole responsibility for overseeing PPP projects is one of the most effective steps towards achieving such a goal.

With respect to the concessionaire, the majority of the Laws do not contain provisions against domestic or foreign persons becoming concessionaires, though some do contain provisions against the former (e.g. Tajikistan, Georgia). We also note the possibility, provided in the Belarus Law, to restrict the procedure to domestic or foreign investors only. Also, the requirement to register a company in a country is often stipulated (e.g. Bosnia and Herzegovina, Bulgaria, Hungary), provided it is not representing a particular issue in the implementation of PPP projects.

Very few Laws refer to concessionaire shareholders whereas any potential restriction in this respect can pose a major problem in PPP implementation (the concessionaire is often a local company, with a significant foreign participation). The Bosnia and Herzegovina and Lithuanian Laws referring specifically to domestic or foreign shareholders are an exception. The Belarus Law limits public participation in the concessionaire to 25%, while the Moldova Law refers to the "grantors' participation in the managing organs of the concession company", without further description.

Regarding the sectors involved, numerous laws contain a list of sectors in respect of which concessions may be granted (e.g. Albania, Bulgaria, Hungary, Russia); sometimes this list is not exhaustive (e.g. Serbia) or distinct from the one on privatisation (e.g. Lithuania). Certain Laws provide for publication of such a list by a separate act, the nature of which remains unclear - general act or an act adopted on a project by project basis - and/or was not identified (e.g. Georgia, Kyrgyz Republic).

However, a number of Laws do not contain such a list and refer to the nature of activities/property (e.g. Belarus: activities subject to "exclusive Republic management right", "object subject to exclusive state property", FYR Macedonia: "possessions of common interest" and activities related thereto, Serbia: "goods in general use", "activities in general interest") or remain very general (e.g. Latvia: "concession resources"). Such an approach does not facilitate the identification of sectors, infrastructures and services that may be subject to concession and creates legal uncertainty in this respect.

However, the major concern in this respect is the limitation of the scope to a very limited number of sectors (e.g. Georgia: "natural resources and activities related thereto", Tajikistan, Uzbekistan: natural resources).

Very few countries adequately regulate the extent of the application of the Public Procurement Law to Concessions. The Macedonian and Ukrainian Laws are examples of legislations that address this issue, and state in their Law on Procurement that its provisions do not apply to procurement in connection with the granting of concessions. Therefore the rules applicable to concessions are entirely governed by the specific Concession Law. In many cases however the situation is not as clear. A variety of situations exist, ranging from the non application to the full application of Procurement rules with few specific provisions concerning types of concessions or with respect to subcontracting by concessionaires.

The same problem applies to EU acceding countries which is a direct consequence of the fact that the Community Law applicable to the award of concessions is derived primarily from general obligations. These leave the Member State at liberty to choose whether or not to adopt specific governing rules for works or services concessions provided that Directive 2004/18/EC is satisfied, in addition to the EU general principles (see developments in this respect in the EU Concessions Communication, EU PPP Green Paper and EU PPP Guidelines). The way this matter has been dealt with by EU acceding countries which have tried to integrate the Public Works Directives into their new Procurement Law governing the award and implementation of works or services contracts and concessions demonstrates the extent of confusion in this domain.

6.2.4 Selection of Concessionaire

In this Core Area, the range of compliance is between the following categories: "very high compliance" and "very low compliance". The average compliance falls within the category **medium compliance** (2004: same score).

- (a) Countries rated “very high compliance”
ALBANIA, SLOVENIA.
- (b) Countries rated “high compliance”
BULGARIA, CZECH REPUBLIC, LITHUANIA, FYR MACEDONIA,
POLAND, ROMANIA.
- (c) Countries rated “medium compliance”
BELARUS, BOSNIA AND HERZEGOVINA, CROATIA, ESTONIA,
KAZAKHSTAN, LATVIA, MOLDOVA, MONTENEGRO, SLOVAK
REPUBLIC.
- (d) Countries rated “low compliance”
AZERBAIJAN, HUNGARY, RUSSIA, TAJIKISTAN, TURKMENISTAN,
UKRAINE.
- (e) Countries rated "very low compliance"
ARMENIA, GEORGIA, KYRGYZ REPUBLIC, SERBIA, UZBEKISTAN.

Even though the majority of Laws refer to competitive procedures for the selection of the concessionaire and contain certain provisions in this respect, very few contain sufficient guidance for the selection procedures (e.g. Lithuania, FYR Macedonia).

Reference to the EU principles of transparency, non-discrimination, proportionality and efficiency is rare (Romania being an exception). However certain Laws do follow similar principles (e.g. Bosnia and Herzegovina: "equitable treatment of the private sector"; Serbia: "equal and equitable treatment", "free market competition", "autonomy of will", Tajikistan: "mutual advantage").

Publication of information related to the competitive procedure is often provided, but very rarely is reference made to international publication. However, certain Laws do require international publication (e.g. Albania, Serbia, Bosnia and Herzegovina), whereas others leave it to the Contracting Authority's discretion (e.g. Bulgaria, Lithuania).

Numerous Laws require the registration of the main elements pertaining to the selection procedure/concession award (e.g. Bulgaria, Serbia), but public access to such register is rarely accorded (an exception here is the Hungarian Law). Sometimes the registration procedure is to be defined in a separate act, which has not always been identified (e.g. Georgia).

Provisions related to direct negotiations and unsolicited proposals are often not regulated with sufficient precision, and so leave room for uncertainties in respect both of the cases, where such procedure is allowed, and the procedure to be followed (e.g. in Turkmenistan and in Uzbekistan, direct negotiations are allowed in "exceptional cases" which is a non defined wording). Review of the selection process by aggrieved bidders is more often properly regulated than the possible challenge of a project agreement.

Limitation of final negotiations is rare: the Lithuanian Law is an exception as it states that the scope of negotiations is limited by reference to technical, financial and commercial specifications set forth in the tender conditions.

For the countries that do not have a Concession Law, the selection process is regulated either by general or sector-specific acts, or by a combination of the two (e.g. in Estonia, reference to the Competition and Public Procurement Act is provided in the sector-specific laws). This contributes to their rating.

6.2.5 Project Agreement

In this Core Area, the range of compliance is between the following categories: “high compliance” and “very low compliance”. The average compliance for countries that have a concession law falls within the category **low compliance** (2004: same score).

(a) Countries rated "very high

NONE.

(b) Countries rated “high compliance”

BOSNIA AND HERZEGOVINA, BULGARIA, LITHUANIA.

(c) Countries rated “medium compliance”

ALBANIA, CROATIA, KAZAKHSTAN, FYR MACEDONIA, MONTENEGRO, ROMANIA, SERBIA, SLOVENIA.

(d) Countries rated “low compliance”

CZECH REPUBLIC, ESTONIA, HUNGARY, KYRGYZ REPUBLIC, MOLDOVA, POLAND, RUSSIA, SLOVAK REPUBLIC, TAJIKISTAN, TURKMENISTAN, UKRAINE, UZBEKISTAN.

(e) Countries rated "very low compliance"

ARMENIA, AZERBAIJAN, BELARUS, GEORGIA, LATVIA.

The majority of Laws contain provisions on the project agreement and a few countries have a model project agreement (e.g. Ukraine). However, the provisions regarding the terms of the project agreement are often prescribed too narrowly, giving rise both to inflexibility and to uncertainty as to what can be included.

Termination provisions are frequently oriented on Contracting Authorities' prerogatives (e.g. Moldova). Provisions on compensation for cases of early termination, where provided, are often insufficient and sometimes limited (excluding compensation in the case of concessionaire's fault).

Provisions regarding tariffs and service standards are omitted in the great majority of cases, creating ambiguity as to what can be negotiated with respect to minimum standards.

Moreover, a number of Laws contain certain unnecessary restrictions regarding the project agreement (e.g. Romania: prohibition to sub-concede; Tajikistan, Uzbekistan:

priority of the state to purchase concession production – unclear under which conditions –; Moldova: prohibition of concession transfer).

6.2.6 Security and Support Issues

In this Core Area, the range of compliance is between the following categories: “medium compliance” and “very low compliance”. The average compliance for countries that have a concession law falls within the category **very low compliance** (2004: same score).

(a) Countries rated “very high compliance”

NONE.

(b) Countries rated “high compliance”

NONE.

(c) Countries rated “medium compliance”

LITHUANIA, SERBIA.

(d) Countries rated “low compliance”

BOSNIA AND HERZEGOVINA, CROATIA, GEORGIA, HUNGARY, KAZAKHSTAN, LATVIA, MONTENEGRO, ROMANIA, SLOVENIA, UKRAINE.

(e) Countries rated “very low compliance”

ALBANIA, ARMENIA, AZERBAIJAN, BELARUS, BULGARIA, CZECH REPUBLIC, ESTONIA, KYRGYZ REPUBLIC, FYR MACEDONIA, MOLDOVA, POLAND, RUSSIA, SLOVAK REPUBLIC, TAJIKISTAN, TURKMENISTAN, UZBEKISTAN.

This Core Area is generally either entirely omitted, or contains inflexible elements.

There are a few exceptions (Lithuanian and Albanian Law), which contain specific reference to concessionaires’ power to create securities and to obtain governmental support. Latvian Law cross-refers to another law for the purposes of the government support issues. The Moldovan Law specifically refers to privileges accorded to concessionaires using “progressive technologies and accomplishing priority activities” and the Ukrainian Law provides for the support of concessionaire with regard to “disadvantageous and low profit objects”.

Countries that do not have a general concession law benefit from references to general legal framework (such as the Civil Code).

6.2.7 Settlement of Disputes and Applicable Law

In this Core Area, the range of compliance is between the following categories: very high compliance and very low compliance. The average compliance for countries that have a concession law falls within the category **high compliance** (2004: same score).

(a) Countries rated “very high compliance”

ALBANIA.

(b) Countries rated “high compliance”

ARMENIA, BELARUS, BOSNIA AND HERZEGOVINA, BULGARIA, CROATIA, CZECH REPUBLIC, ESTONIA, FYR MACEDONIA, HUNGARY, KAZAKHSTAN, KYRGYZ REPUBLIC, LATVIA, LITHUANIA, MONTENEGRO, ROMANIA, SERBIA, SLOVAK REPUBLIC, SLOVENIA, UKRAINE.

(c) Countries rated “medium compliance”

AZERBAIJAN, GEORGIA, MOLDOVA, POLAND, RUSSIA, TURKMENISTAN.

(d) Countries rated “low compliance”

UZBEKISTAN.

(e) Countries rated “very low compliance”

TAJIKISTAN.

The relatively good score in this Core Area comes from the ratification, by numerous countries of the relevant international treaties (on arbitration and protection of foreign investments).

Generally speaking countries refer to arbitration, but not particularly to international arbitration (e.g. Bulgaria), even though a non explicit reference does not signify that international arbitration is excluded. However, certain Laws do specifically refer to "international arbitration" (e.g. Bosnia and Herzegovina, Lithuania). Sometimes international arbitration is allowed only for foreign concessionaires (e.g. Belarus), which might raise an issue where a concessionaire is a domestic legal entity but foreign-controlled.

The great majority of the laws require, directly or indirectly, the application of national law (e.g. Bosnia and Herzegovina); Lithuanian law is an exception to this.

6.3 Commentary by Country in the Region

6.3.1 Albania (High Compliance)

Even though a general policy framework for improving the legal environment and promoting PPP has not been identified in Albania, the way the Government recently approached concession legal framework reform shows its interest in promoting and using PPP in its infrastructure and services. The Albanian Law, dated 2006 is very close to the PFI Guide recommendations.

It is one of the few Laws in the region that includes in its definition the transfer of risk to the concessionaire and the remuneration considerations. It also requires a value for money analysis. However, reference to “management contract” in article 2 is unclear.

The entities involved and sectors concerned are clearly identified. Sectors eligible for PPP include *inter alia* transport, electricity, water, waste water, solid waste, education, health care and prison as well as any other sector approved by government resolution.

The Law contains provisions assuring a fair and transparent selection process (pre-selection of bidders, procedure for requesting proposals - with a distinction drawn between technical and financial proposals, possibility of two-stage procedure, publication of concession award, limited exceptions to concession award without competitive procedure, existence of review procedures, parameters for the negotiation process).

The provisions regulating the project agreement give clear guidance on the main issues to be covered and yet remain sufficiently flexible, thus allowing the parties to freely negotiate its terms.

However, the Law is silent on security and support issues. We understand that this comes from the fact that Albania is particularly concerned with the degree of public debt and potential consequences on the public budget of PPP projects.

The Albanian Law is one of the best drafted laws in the region. The lack of practical experience in the implementation of the Law may present an obstacle to investors at this stage.

6.3.2 Armenia (Very Low Compliance)

An indirect general policy framework for improving the legal environment and promoting PPP has been identified in Armenia (Poverty Reduction Strategic Paper).

Armenia does not have a general concessions Law. General laws do not refer to or regulate concessions (apart from the general reference in the Law on Foreign Investments providing that concessions are one of the forms of foreign investments).

Two sector-specific laws regulate concessions, in the mining and water sectors. However, such laws do not contain clear definitions and need to be improved with regard to selection procedures (even though the general rule is that concessions are granted based on a tender/auction). In the water sector, the use of a model concession agreement is optional. The recently adopted Republic of Armenia Law “On Railway Transport” contains specific reference to concession by stating that the concessions shall be regulated under the relevant contract as approved by the government of the Republic of Armenia. Government support and financial securities are defined in the general legislation (Civil Code, Law on Budgetary System) and allow, to a certain extent, such elements.

No clear reference is made to international arbitration. In this respect, it should be noted that international arbitration has been provided in privatisation contracts in Armenia.

Thus, despite certain positive features, the general legal framework for PPP still needs to be elaborated in Armenia.

6.3.3 Azerbaijan (Very Low Compliance)

No general policy framework for improving the legal environment and promoting PPP has been identified in Azerbaijan.

Azerbaijan does not have a general concession Law. The Civil Code and the Law on Protection of Foreign Investments recognise concessions, but define the term differently. In the Civil Code the term is related to the definition of "commission". The Law on Protection of Foreign Investments contains only one article relating to concessions and limits the 'concessions' to natural resources and 'concessionaires' to foreign investors.

The Law on State Purchase dated 2001 sets the basis for public procurement, organisation, rules of tenders, other methods of public procurement, selection of the contractor and complaints procedures.

The Regulations on transfer of state enterprises (objects) into management on a contractual basis, dated 1996 regulate the transfer of the right of use of certain public enterprises (infrastructure), based on management contracts, as a preparation for future privatisation. Such contracts are awarded on a competitive basis.

Sector-specific laws do not regulate specifically concessions, but privatisation and private ownership.

Thus we note the absence of general legal framework for PPP. Azerbaijan has yet to adopt a favourable legal basis to PPP.

6.3.4 Belarus (Low Compliance)

A general policy framework for improving the legal environment and promoting PPP has not been identified in Belarus. However, Belarus now has some elements of a governmental policy for promoting PPP and improving its legal environment.

Belarus does not have a specific concession Law, but the Investment Code dated 2002, as amended in 2006, does contain detailed provisions regulating concessions (Section III-articles 49 to 76). Although substantial work remains to be done to enable an effective legal and regulatory environment for private sector investment into public utilities and services, clear signs are evident of the Government's intent to attract private sector investment into some municipal services as well as renewable energy projects.

The Investment Code needs serious improvement concerning regulation of the project agreement: it is silent on certain major elements in this respect (in particular termination/compensation provisions). In addition, it contains very few elements regarding government support and financial securities.

Moreover, the scope of application (Contracting Authority and possible sectors, relation with the Public Procurement Law) and the provisions on the selection procedure need to be improved (the introduction of the possibility of pre-qualification procedure, not allowing only domestic or foreign concessions except possibly for "small concessions", and the extension of the preferential right existence to the initial concessionaire can be questionable). However, we do note certain positive elements (e.g. a reference to "equal rights and obligations" of all participants, publicity of concession award, registration, review procedures, etc.).

International arbitration is possible for foreign investors.

Thus, despite certain favourable elements, the Investment Code does not constitute a sufficient legal basis for the development of PPP in Belarus.

6.3.5 Bosnia and Herzegovina (Medium Compliance)

A general policy framework for improving the legal environment and promoting PPP has been identified through The Policy paper on granting concessions in BiH but a PPP document has not been adopted yet. In October 2006, the Commission for Concessions of Bosnia and Herzegovina (BiH) adopted The Policy paper on granting concessions in BiH. In this Document the Commission concluded that there are still many issues to be resolved in order to further improve the business climate.

The Law (30/09/2002) relatively clearly defines its scope of application: it regulates the selection procedure and provides for a flexible framework for the project agreement. It is one of the few Laws in the region to contain a clear reference to the principles of transparency, non-discrimination and proportionality (and to the "equitable relations toward the private sector") and to refer to consumers' rights (contract, claims). The Law defines particularly clearly its scope of application, stating that it does not apply to concessions awarded before it came into force and that every contract entered into contradiction with its terms is null and void. In addition, a reference is made to the "international invitation to tender".

However, certain provisions, in particular those concerning collaboration of public authorities, involved pre-qualification procedure (reference to the "request of fulfilment of conditions" that is "delivered" to qualified persons), direct negotiations, and compensation in case of early termination could be improved/supplemented. Also, a reference should be made to the publication of contract award.

Moreover, provisions regarding security interests, lenders' rights and government support need to be created/ supplemented.

Thus, the Bosnia and Herzegovina Law constitutes a solid basis for the development of PPP in the country. However, it requires a good delineation of competences between the federal and entities levels, and effective functioning of the Commission for Concessions and collaboration with the "competent ministry" (to be defined). The Commission for Concessions in Republika Srpska was created and has granted a number of concessions during 2004-2005.

The organisation of the Bosnia and Herzegovina State may, in practice, impede the effective application of the Law, given the existence of four similar Laws in one state (Bosnia and Herzegovina Law, Concession Law of Republika Srpska, Concession Law of the Federation of Bosnia and Herzegovina and Concession Law of Brcko district).

6.3.6 Bulgaria (Medium Compliance)

Two pieces of legislation govern the granting of concessions in Bulgaria: the Concession Law and the Municipal Property Law. In addition, Regulations, adopted on the basis of the Concession Law, regulate in more detail the granting of concessions. Thus, Bulgaria has a good basis for the development of concessions:

concessions can be granted for the majority of sectors, through a competitive procedure and in a flexible project agreement framework.

However, the existence of several texts, amended a number of times, creates a very detailed and complex overall framework the functioning of which will in practice depend on the efficiency of each government body involved and its capacity to abide by the Law. We note certain contradictions between the Law and Regulations.

Certain aspects require clarification such as the relations with the sector legislation, the possibility of pre-selection procedure as well as financial and compensation issues.

6.3.7 Croatia (Medium Compliance)

To facilitate the implementation of PPP projects, many European states have adopted special regulations or guidelines to provide legislative framework or to direct and encourage the implementation of such projects.

Implementation of PPP in the Republic of Croatia has already started but has encountered a number of difficulties resulting from the absence of a clear legal framework for concession/PPP.

An important precondition for further development is to achieve strong political willingness to further develop and implement a PPP model for the growth and building of infrastructure in the Republic of Croatia.

On 1 September 2006, the Croatian Government issued the Guidelines for Purely Contractual Public Private Partnerships (the "Guidelines"), but not covering institutional PPPs such as joint venture-type arrangements. The Guidelines prescribe: (i) the principles which have to be complied with by the PPP project and the procedures of cooperation between public and private partner; (ii) the rules for foundation and execution of PPP which would mitigate the risks for public budget, and (iii) the competences of public authorities to enter into PPP. Besides defining PPP set-ups which will be applied in PPP project implementation, the Guidelines set out the procedure for the selection of the private partner, the basic elements of PPP contract, approval of PPP projects.

Pursuant to the provisions of Article 13 Paragraph 4 State Budget Execution Act for 2007 (National Gazette No. 137/2006), at the meeting held on 15 February 2007, the Government of the Republic of Croatia passed a Regulation on issuing a pre-approval for public private partnership following the model of Private Finance Initiative.

In the meantime the Public Procurement Act was amended in July 2005 to comply with EU Directives.

In addition to the Guidelines, two laws govern the general concession legal framework in Croatia: the Concession Law of 1992 and the Municipal Activities Law of 1995. Both laws are very general and provide by themselves insufficient specifications as far as all Core Areas are concerned, but combined with the Guidelines they now provide a more acceptable set of rules and proper references to the basic principles adopted by the EU. The Law is however considered as a subsidiary piece of legislation, compared to the sector-specific legislation. As such,

confusion may still arise and a specific set of legislation may still be necessary despite the existence of the Guidelines.

According to the Croatian Concession Act (NN 89/92), a concession entitles to the commercial utilisation of natural resources and other assets for which specific legislation determines that they are of interest to the Republic of Croatia. Concessions cannot be issued for a period longer than 99 years.

In Croatia there are at least 16 specific sector-related laws which allow the granting of concessions, not always under identical terms. These elements should be harmonised according to the Guidelines with the EU law in a new Concession Act of the Republic of Croatia which has not yet been enacted.

6.3.8 Czech Republic (Medium Compliance)

The Concession Act was introduced with the aim of separating concessions (as a specific type of public private partnership) from the regulation of public procurement, recognising the specific nature of concessions. Prior to the adoption of the Concession Act (see definition below), the Public Procurement Act (see definition below) applied to these relations.

Yet the two acts are closely interconnected since the Concession Act is rather concise and makes frequent cross references to the Public Procurement Act. However, the cross reference is at times vague and therefore the scope of application of the Public Procurement Act on concessions is not always entirely clear.

The Concession Act implements the relevant European directives and to a certain extent exceeds the minimum regulation harmonised by these directives. For example, the Concession Act governs not only concessions on public works but also services and regulates activities excluded from the scope of the Directive 2004/18/EC (water management, energy sector, postal services etc.).

Some parts of the Concession Act, however, may be seen as unclear (for example identification of the public procurement contracts which are governed by some provisions of the Concession Act).

In some cases, the different regulation in the Public Procurement Act and the Concession Act seems ungrounded – for example the possibility to conclude the concession contract with SPV (special purpose vehicle/concession company) of the selected concessionaire or the Contracting Authority, lacking in the Public Procurement Act.

Certain situations are not regulated by the Concession Act at all, which may be seen as a deficiency – for example lack of provision enabling direct negotiations for award of additional works.

The first amendment to the Concession Act will soon enter into effect, aiming to remedy the initial flaws. The practice will surely demand more such amendments. Yet at this stage the Concession Act provides a more or less clear legal environment for concessions as one type of PPP, while also implementing the European regulation.

6.3.9 Estonia (Low Compliance)

A general policy framework for improving the legal environment and promoting PPP has not been identified in Estonia and the country does not have a general law on concessions.

Concession-related issues are regulated by the Competition Act, dated 2001 (and the Decree adopted on its basis) and the Public Procurement Act, dated 2007. More particularly, the former regulates the granting of "special or exclusive rights" and the latter regulates the granting of a "construction work concession" (and other contracts concluded by public authorities above certain thresholds). However, the application of one general law over the other is not simple to determine. The new Public Procurement Act of 24 January 2007 came into force on 1 May, 2007, thus the Public Procurement Act of 19 January 2001 is no longer in force. The aim of the new act is to bring Estonian public procurement legislation into line with EU public procurement directives 2004/17/EC and 2004/18/EC and to update the law.

Sector-specific legislation does not refer directly to concessions, even if the regulation of certain activities (e.g. transport) allows concession-type arrangements. The procedure to be followed is rather vague in the sector-specific laws that refer to the general law (Competition Act or Public Procurement Act).

Thus, the general legal framework for PPP is yet to be elaborated if the country wishes to use PPP.

6.3.10 Georgia (Low Compliance)

An implicit general policy framework for improving the legal environment and promoting PPP has been identified in Georgia (numerous government statements).

The Georgian Law (Law of Georgia "On the Procedure for Granting Concessions to Foreign Countries and Companies") was adopted in 1994.

The Law needs to be improved regarding the scope of application (concessions are defined as "long-term leasing agreements" and seem to be limited to natural resources and activities related thereto; Contracting Authority is not clearly defined - "authorised body as defined under legislation" - and domestic investors are discriminated against). The Law provides for the adoption of a list of objects that can or cannot be subject to concessions but no such list could be identified.

Moreover, the Law contains very few provisions regarding the selection of the concessionaire and provides for the adoption of regulations in this respect. No such regulations could be identified. Also, the Law refers to the establishment of a special register of concession agreements, but no such register could be identified. Thus, the selection procedure is (at this stage) insufficiently regulated. We note, however, a number of positive elements (e.g. concessionaires' right to bring claims to the court or to the arbitration court "against public organs for their abuse of power").

The Law contains very few elements regarding the project agreement, government support and financial securities. We note, however, a certain number of positive elements in this respect (e.g. reference to the protection of rights and security guarantees, to the right of the concessionaire to manage its own products and profits after paying all dues and taxes, and to the obligation of the Contracting Authority to

reimburse all damages suffered by the concessionaire due to "illegal acts of state organs").

Finally, the possibility of international arbitration is not clearly provided for.

Thus, whilst it contains a number of positive features, the Law does not constitute a sufficiently solid legal basis for the development of PPP. We note that a first step towards improvement could be the adoption of numerous legal texts provided in the Law, with certain minor amendments to the law (in particular concerning the definition of concession and the sectors concerned).

6.3.11 Hungary (Medium Compliance)

A general policy framework for improving the legal environment and promoting PPP has been identified in Hungary with the/a PPP task force team set up by the Ministry of Economy and Transport in 2003.

The Hungarian Concession Law was adopted in 1991.

The Law needs serious improvement regarding selection, government support and financial securities (in particular, introduction of the possibility of pre-qualification procedure, details in respect of the procedure for requesting proposals, regulation of unsolicited proposals and of review procedures). However, we note the requirement to publish the concession award and to maintain records that are accessible to the public.

Moreover, the Law contains very few provisions regarding the project agreement (in particular, insufficient termination/compensation provisions).

Finally, the Law is not very clear in its scope of application (the term concession is not defined and the Law seems only to apply to a contract named "concession"). We note however a certain number of positive elements in this respect (possibility for the sector-specific act to apply only within the framework of the Law, clear identification of major sectors eligible for PPP).

Thus, even though Hungary does have a solid concession track record, the actual Law already appears to be somewhat outdated and not very clear in many respects. In the context of EU integration and the adoption of the new Public Procurement Law in 2004, a new PPP law, harmonised with PFI Guide, would contribute to the development of PPP in Hungary.

6.3.12 Kazakhstan (Medium Compliance)

In recent years Kazakhstan has introduced notable reforms to its legal system, including to PPP and in particular the adoption of the new concessions law in 2006⁴. However, Kazakh commercial laws still fall short in certain respects of standards that are generally acceptable internationally.

The new Kazakh Concessions Law No. 167-III was approved on 7 July 2006 and became effective on 19 July 2006 (the "Concession Law" or "CL").

⁴ According to the document "STRATEGY FOR KAZAKHSTAN" as approved by the EBRD Board of Directors on 21 November 2006

The Concession Law was motivated by government policy to promote PPPs (including numerous sector-specific and municipal policy framework documents) and sets forth the legal framework for concession-type arrangements in various industries, except for those involving subsoil use (oil, gas and mining).⁵

The Concession Law states that the President of Kazakhstan may define a list of assets/facilities which may not be transferred into concession. The Concession Law is a bit vague as to whether a particular concession is within the authority of the State Property Committee or a relevant industry regulator. It states that the choice will be made by the government, though it is unclear how that choice will be made.

The new Law contains a number of shortcomings and certain provisions are somewhat ambiguous. It lacks flexibility such as the 30 year duration for all concession which in many cases may not be justified. Security issues may also present a significant obstacle to the bankability of potential projects.

Its acceptability to foreign investors will largely depend on the position taken by the Government in specific pilot projects as the State keeps an overall tight control over all steps of the selection of the project to be handled under the Concession law and of all stages of the awarding process.

It is unlikely that any concession contracts will be awarded under the Concession Law until the necessary implementing regulations are adopted, including the list of public assets which cannot be transferred into concession and regulations concerning concession tender procedures (including a standard concession agreement). There is currently no indication of when such regulations will be adopted.

6.3.13 Kyrgyz Republic (Low Compliance)

An implicit policy framework for improving the legal environment and promoting PPP has been identified in the Kyrgyz Republic (in the scope of the promotion of foreign investments).

The Kyrgyz Concession Law (*Law of the Kyrgyz Republic on Concessions and Foreign Concessionary Entities*) was adopted in 1992. The Law was amended on 9 December 2004. Such amendment removed the discrimination against domestic investors becoming concessionaires.

The Law is too vague as far as the majority of Core Areas are concerned. Its scope of application requires significant improvement (a concession is defined as "a permit (...) to run certain kinds of entrepreneurial activities connected with the leasing of property, land and underground mineral resources", unclear definitions of the sectors concerned). In this respect, the Law provides for the adoption of a list of objects that can or cannot be subject to concessions. However, no such list could be identified.

The selection procedure is not detailed. The Law states that such a procedure, together with the list of necessary documents to be attached to a bid are to be defined by the Government; again, no such document could be identified (it is not clear whether such documents have general application or are particular to each concession).

⁵ Subsoil use concessions are specifically exempt from application of the Concession Law and are subject to special subsoil use regulations

Even though the Law contains provisions on the project agreement, these do not contribute to the creation of a flexible environment for the negotiation of such agreements (e.g. limitation of concession transfer, possibility for the government to withdraw the decision on the objects included in the list of concessionable objects "due to provisions of the concession agreement which are contrary to the interests of the Kyrgyz Republic").

Finally, the Law is mostly silent as far as government support and financial securities are concerned (with a reference to eventual tax benefits only).

We note, however, a certain number of positive elements: clear reference to compensation in case of unilateral termination (including lost profit), to compensation for "inseparable improvements" of concession object and to international arbitration as well as to the right of possession and use (not disposal).

Despite certain positive elements, the Law does not constitute a sufficiently solid legal basis for the development of PPP in infrastructure and utility services in the Kyrgyz Republic.

6.3.14 Latvia (Medium Compliance)

A general policy framework for improving the legal environment and promoting PPP has been identified in Latvia (Concession Division, "Conception on facilitation of Concessions", approved by the Cabinet of Ministers in 2002). The Latvian Investment and Development Agency cooperates with the Latvian Ministry of Finance, and assists with the implementation of PPP projects, proposals for promotion of PPP developments, provision of informative and legal services and the elaboration of standard documentation. Latvia adopted a PPP Policy Framework Document in 2005 and is currently working on a PPP Action Plan due to be finalised in 2009. The tasks in the Action Plan include establishing an adequate institutional set-up for PPPs and promotion framework, legal framework, PPP's interaction with national planning instruments and effectively disseminating knowledge on PPP. The Action Plan further provides for the drafting of a new and more detailed Concessions Law, which has already been done. This law has been adopted at the second level of the legislative procedure (there are three levels in total). The Action Plan also provides for the drafting of government regulations on PPP in accordance with the EU directives.

The Latvian Concession Law was adopted in 2000.

The Law is too general as far as the majority of Core Areas are concerned.

Its scope of application needs to be improved (the Law seems to apply only to agreements entitled "concession", vague identification of the sectors/types of infrastructure/services - reference to "concession resources" only).

The selection procedure also needs to be specified (no reference to the possibility of a pre-selection procedure; unsolicited proposals and direct negotiations not regulated). However, we note the reference to the "non-discrimination" principle, the publication of concession award and the possibility to review procedures.

Many issues in the project agreement are to be included in "conditions for granting concessions" (e.g. termination, tariffs), and it is unclear whether or not such

conditions can be negotiated.

The Law is rather restrictive as far as financial securities are concerned (e.g. prohibition of pledge of concession resources). On the other hand, regarding government support, the Law refers to the "guarantees of a conceder to a concessionaire regarding financial and commercial risks" (to be provided in "conditions for granting concession"), and to the Law on the Control of State and Local Government Aid Provided for Commercial Activity which provides for different types of government support.

Thus, the Law would require improvements in order to constitute a sufficiently solid legal basis for the development of PPP in the infrastructure and utility services in Latvia.

For the past couple of years, the Latvian Parliament has been considering a new Concession Law. Amendments to the Law on the Control of State and Local Government Aid Provided for Commercial Activity are currently also under preparation. Pursuant to the publicly available information, both documents have been adopted in the first level of the legislative procedure (there are three levels in total). Considering the draft Concession Law available in the Parliament, this statutory instrument seems to be more detailed and substantial than the existing regulation. The deadline for submission of proposals for the draft laws for the second level of legislation is already over. However the timeframe for adoption of the final drafts of the above laws is not certain yet.

6.3.15 Lithuania (High Compliance)

Even though a general policy framework for improving the legal environment and promoting PPP has not been identified in Lithuania, the way the Government recently approached concession legal framework reform shows its interest in promoting and using PPP in its infrastructure and services. The Lithuanian Law, dated 2003 was very close to the PFI Guide recommendations and the 2006 amendment goes in the same direction. Recent changes to the legislation include amendments to the Law on Concessions (2006), amendments to the Law on Local Self-Government (2006), and amendments to the Law on Management, Usage and Disposal of State and Municipal Property (2006).

The scope of application of the Law has been further clarified and the absence of sector-specific laws regulating concessions and the existence of a comprehensive definition of concessions should avoid potential conflicts.

It is one of the few Laws in the region that includes in its definition the notion of "activities having a commercial component" and of the transfer of risk to the concessionaire particularly as far as the operation is concerned.

The proposed definition can include a wide range of PPP structures. The concession can be applied to healthcare (construction, renovation and maintenance of hospitals), education (construction, renovation and maintenance of schools and other educational institutions), transport (design, construction and maintenance of roads and transport facilities), and collection and management of waste, waste water and energy.

There have been a number of positive developments in the legal regulation of

concessions, which is presently a good legal environment. Recent changes to the Law on Concessions include a stipulation that the awarding authority shall appoint a commission (or several commissions) to arrange and award the concessions. It was also established that the refusal of applications for tender offers shall be based on the grounds specified under the Law on Concessions. Furthermore, the authorities supervising concessions must be established by the Government and provide assistance to granting authorities.

The Law on Concessions, as amended, also provides the possibility of setting up a special purpose company, controlled throughout the concession period by the concessionaire, either national or foreign, to implement the project.

The Law contains provisions assuring a fair and transparent selection process (pre-selection of bidders, procedure for requesting, possibility of two-stage procedure, publication of concession award, limited exceptions to concession award without competitive procedure, existence of review procedures and recourse in case of violation of the rules, etc.). We note however that the Law does not refer to unsolicited proposals.

These amendments elaborate the essential terms of the concession agreement:

It was established that concessions should not last more than 25 years but shall be of a sufficient duration to allow depreciation of new infrastructure and return on investment, and that the concession agreement must describe the sharing of risk between the concessionaire and the awarding authority.

It is also one of the few Laws in the region stating that a concessionaire has the right to create security over its property, rights and assets and that the parties are free to agree (subject to Lithuanian Civil Code) on the governing Law applicable to the project agreement with a possibility of international arbitration.

The provisions regulating the project agreement give clear guidance on the main issues to be covered and yet remain sufficiently flexible, thus allowing the parties to freely negotiate its terms.

It is noteworthy however that the Law does not provide for establishing a record of the key information pertaining to the selection and award.

The Lithuanian Law is one of the best drafted Laws in the region.

6.3.16 FYR Macedonia (Medium Compliance)

A general policy framework for improving the legal environment and promoting PPP has not been identified in FYR Macedonia.

A new Law for Concession and other types of Public Partnership was adopted by the Government of the Republic of Macedonia and published in the Official Gazette of the Republic of Macedonia No. 7/2005) on 15 of January 2008.

The Law clearly defines its scope of application, regulates the selection procedure (publication, pre-selection and procedure for requesting proposals, publication of concession award, possibility of review procedures) and provides for a flexible framework for the project agreement (with reference to termination/compensation, tariff setting/service standards, etc) as well as the manner and procedure for the

granting of the agreements regarding other types of public private partnership, contest of the agreement of public private partnership, rights and obligations of the public and the private partner and legal protection in the procedure for the granting of the agreements for public private partnership.

The Law, however, applies to "possessions of common interest", an ambiguous phrase and it relies heavily on sectoral law for implementation purposes. Additionally, the Law does not contain clear provisions concerning government support and financial security and generally, the possibility of international arbitration remains questionable, except with respect to arbitration governed by the Washington Convention on the Settlement of Investment Disputes (ICSID).

Thus, the Macedonian Law is one of the best drafted in the region and constitutes a solid basis for the development of PPP in the country, provided the financing and arbitration issues can be solved in accordance with best international practice for PPP. The Law is, however, quite a recent development, so its implementation is to be verified in practice.

6.3.17 Moldova (Medium Compliance)

The Moldovan Law on Concessions was adopted in 1995 and completed by International Tender Regulations in 1996.

The scope of application of the Law and the selection procedure are clear (e.g. concession definition includes the notion of "risk", publicity provided, pre-selection, and procedure for requesting proposals provided, notification of the applicants on the tender results, registration, limited grounds for direct negotiations, etc). It is one of the few Laws in the region that refers to the grantor's participation in concession company organs.

Certain provisions in relation to the project agreement may give rise to inflexibility in negotiations (e.g. the use of model concession agreement is compulsory, reference to "obligatory conditions" of concession agreement to be fixed by the Parliament, prohibition of concession transfer, only grounds for the Contracting Authority's right to claim early termination provided).

The Law contains no provisions regarding security interests to be created by the concessionaire and the lender's rights. However, it does refer to the possibility of government support (for concessionaires using "progressive technologies" and accomplishing "priority activities").

International arbitration is no longer provided for; Article 23 (3) of the Concessions Law providing the concessionaire with the possibility to defend his rights by means of international arbitration was repealed in 1996. There are only references to administrative and other local courts (e.g. for disputes in case of unforeseen circumstances) or the necessity to refer to the Washington Convention on the Settlement of Investment Disputes (ICSID). It seems however that Article 23 (3) of the Concession Law provides the concessionaire the possibility to defend his rights by means of access to a competent court (including international), as well as by arbitration, according to the agreement between the parties. Therefore, the concession agreement may provide an international arbitration clause.

Thus, Moldova has a relatively solid legal framework for the development of PPP.

However, serious amendments may be required in order to create a clearer, more flexible and more stable legal environment for PPP.

6.3.18 Montenegro (Medium Compliance)

An implicit general policy framework for improving the legal environment and promoting PPP has been identified in Montenegro. Privatisation and concession policy and legal framework are closely connected.

Concessions are regulated in Montenegro by the Law on Participation of the Private Sector in Performing Public Services, dated 2002.

Even though the Law refers to and/or regulates different PPP arrangements (concession, BOT, lease, management contract), every such arrangement is regulated separately, in certain cases by reference to public procurement regulations. Concessions seem limited to natural resources, while BOT arrangements are applicable to other sectors such as transport, electricity or water. Numerous public entities are involved, including the Privatisation Council, which makes the overall process rather complex and lacking coordination. The selection procedure is also unclear in many respects (e.g. provisions regulating pre-qualification and request proposals procedures are not clearly distinguished) and seems difficult to implement. Provisions regulating the project agreement need to be improved as well (e.g. two articles in the Law regulate provisions to be included in such agreement) but they do give guidance as to the main issues to be covered, and remain flexible.

The Law regulates a number of important areas and is rather incoherent. A number of terms used are not defined, a number of provisions are imprecisely drafted (e.g. reference to "newest EU Rules") and some of them conflict.

Thus, even though Montenegro appears to have a relatively solid legal framework for the development of PPP in the country, the Law creates a very detailed and complex overall framework, not ensuring full reliability and stability.

6.3.19 Poland (Medium Compliance)

A general PPP Law was introduced in Poland in October 2005. The PPP Law largely conforms with internationally accepted principles of concession laws for some core areas, with however some serious exceptions which could undermine the success of PPP projects in the country.

Regrettably, there are no government institutions specialising in the promotion and development of PPP in Poland.

There is no explicit PPP policy except for the law itself. The position with respect to security issues necessary for financing is unsatisfactory, and uncertainty prevails as to the possibility of application of international arbitration. The situation is aggravated by Poland's non-ratification to date of the Washington Convention on the Settlement of Investment Disputes ("ICSID") which could have imposed the validity of an international arbitration provision backed by the ICSID.

The lack of institutional government support for PPP projects and the relative novelty of the PPP regulations in Poland mean that PPP projects have yet to be

implemented in practice. It can reasonably be expected that the situation will change in the next few years since many large infrastructure projects (stadia and toll motorways) are to be developed in connection with the co-hosting of EURO 2012 football championship in Poland.

6.3.20 Romania (Medium Compliance)

Since its accession to the EU, Romania has undergone significant changes to its legislation, including to its concession regime, which is now subject to entirely new legislation.⁶

Concession agreements governing public assets are regulated by Emergency Ordinance no. 54/2006 (hereafter "GEO no.54") concerning the legal regime of public property, and by the Methodological Norms regarding the application of GEO no.54, issued in February 2007 (hereafter the "Norms").

Concession agreements governing the award of Government public work concessions and public services concessions are regulated by Emergency Ordinance no. 34/2006 (hereafter "GEO no.34") completed by the Standards for the application of the provisions relating to the award of service concessions and public works concessions approved by Government Decision no. 71/2007 of 24 January 2007 (hereafter the "Standards")

Thus, a distinction has been drawn between the concession of public assets on the one hand, and the concession of public works and services, on the other.

A Regulation for Organising and Functioning of the National Council for Settlement has also been enacted.

Romania has endeavoured to align its public procurement legislation with European Union regulations through the adoption of GEO no. 34 concerning the award of procurement agreements and of concession agreements for public works and services. The new law merges EU 2004 Directives 17 and 18 into a single act. The unitary law is intended to facilitate usage by all participants in the public acquisition process but the fact that it also regulates concessions for public works and services and special sectoral procurement legislation for water, transport, energy and postal services and others makes it quite complex and not always clear in its application.

The Law specifies numerous situations for sectoral contracts under which the Law should not apply, but without reference to the legal framework applicable to such numerous exceptions.

GEO no. 34 further provides for too many exceptional circumstances which allow the contracting authority to apply direct negotiation without publication of a participation notice.

With respect to concession, the same basic principles are applied but the basis for the

⁶ The two Government Emergency Ordinance N° 34 and 54 have replaced two general acts: the *Concession Law*, dated 1998 and the *Government Ordinance on Public-Private Partnership Agreements*, dated 2002 ("PPP Ordinance").

decision for the realization of the project, the way of transferring and recuperating the object of the concession, the modalities for preparing the tender documentation and the specific ways for applying the procedures provided by this law for awarding the concession contract are to be determined by Government Decision, which is precisely the objective of the "Standards for the application of the provisions relating to the award of service concessions and public works concessions" which clarify the matter to some extent.

GEO no.54 with respect to concession of public assets has been drafted along the same lines as the EU fundamental principles, such as: transparency, proportionality, equal treatment, non-discrimination and free competition.

The interaction between the two legislations, despite the priority given to GEO no. 34 in case of joint application of the two texts, remains unclear as does the interaction between public procurement and concession for works or services.

The parties involved in the concession process are clearly defined, subject to the proper separation of state, county and municipal property and interests. There is no discrimination between foreign and Romanian entities for the purpose of becoming a concessionaire / private investor.

The GEOs contain very few references to financial and security issues, even though they provide for a principle of "financial balance". GEO no. 34 refers to an arbitration clause (not specifically to international arbitration) and GEO no. 54 does not contain any provisions in this respect.

Thus, even though Romania now has a solid legal framework for the development of concessions in the country based on EU principles, the existence of several texts, amended a number of times, creates a somewhat over-detailed and complex overall framework, not ensuring full reliability and stability.

The Assessment is based on the Government Emergency Ordinance and this may have contributed to the higher than anticipated rating of the country.

6.3.21 Russia (Low Compliance)

The Russian Law on Concession Agreements was adopted in 2005 (the "Law"). It was completed with Model Concession Agreement regulations. It is not supported by a general policy framework for PPP.

The Law is a relatively long piece of legislation (37 articles) covering issues that one would expect to be covered by a general concession law including *inter alia* entities involved in the concession granting process, concerned sectors, selection procedure, concession agreement as well as certain financial security and government support issues. It contains a number of other positive elements (guarantee of non - discrimination, open tender procedure, etc.).

The Law is a comprehensive piece of legislation that contains no fundamental omissions.

However, the Law (*i*) is too detailed and over prescriptive regarding a number of issues which can make the implementation of concession projects based on the Law difficult / impossible in practice and (*ii*) contains numerous general / unclear articles

the application of which can create a degree of legal insecurity in practice. In particular, the Law is very restrictive regarding the creation of security instruments, too prescriptive regarding concessionaire's obligations and selection procedure, does not contain clear reference to international arbitration and provides for a case by case institutional scheme.

Generally speaking, the Russian Law constitutes a solid basis for the development of PPP in the country, but needs some significant improvements compared to international standards. Given the very recent passing of the Law, its implementation is yet to be verified in practice.

6.3.22 Serbia (Low Compliance)

Serbia does not have a general policy framework for PPPs, even though seminars are organised from time to time on the subject.

The Serbian Concession Law was adopted in 2003. Serbia is currently working on a new concession law, the objective being to create a modern legislation in line with EU and international standards that will enable more efficient implementation of concessions in the country.

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

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

Concerning the selection procedure, the Law should provide clearly for the possibility of pre-selection procedure but also simplify the overall procedure (number of steps and bodies involved - proposal for concession award, proposal concession enactment, concession enactment/ competent ministry, government, tender commission, negotiation commission and, eventually autonomous province and local self-government unit involved).

Given that a project agreement must be concluded in accordance with the concession enactment, the degree of flexibility will depend, in practice, on the generality of such document (as stated in the Law, such provisions are rather general).

Thus, the Law seems to be adapted to "big" concessions (the award procedure being very complex and centralised), as opposed to "small"/municipal concessions.

A major shortcoming of the Law is that it does not clearly define its boundaries and coordination with, on the one hand, the *Law on Public Companies and Activities in General Interest*, *Municipal Activities Law* and the *Public Procurement Law* provisions, and on the other hand, the sector-specific laws.

6.3.23 Slovak Republic (Medium Compliance)

A strong policy framework for improving the legal environment and promoting PPP was developed in the Slovak Republic by the Ministry of Finance and approved by the Government. In addition, methodological Guidelines for the implementation of PPP have recently been published. However, the Slovak Republic does not have a specific Concession or PPP Law.

Several sources of public law (including the Public Procurement Act, laws governing the administration of property owned by the state or self-administration, the Budgeting Act, the Road Traffic Act and the Act on Electronic Toll Collection) and private law (the Commercial and Civil Codes) may apply to PPP, the main source being the Public Procurement Act.

A recent Public Procurement Law dated 2004 containing provisions regulating concessions has now been repealed and replaced by Act No. 25/2006 Coll. on Public Procurement, as amended.

Slovak public procurement law is harmonised with EU public procurement legislation. Specifically, through the new Public Procurement Act (effective as of February 2006), the Slovak Republic transposed into its law the acts of the European Communities and of the European Union regarding public procurement (Directive 2004/17/EC, Directive 2004/18/EC, Council Directive 89/665/EEC, Council Directive 92/13/EEC, and Commission Directive 2005/51/EC).

In addition to the general provisions on procurement, the Public Procurement Act also introduced provisions regarding concessions for the procurement of building works, and as such enabled the creation of contractual relationships between public and private actors (such as PPP projects). The contracting authority is obliged to follow these provisions where the estimated value of a building works concession contract equals or exceeds €5,923,000. The provisions need to be followed accordingly also if the estimated value is below this amount, and however equal to or higher than SKK 12,000,000. [Art 97, 98]

Concessions are defined by reference to work or service contracts. The law does not regulate project agreements in any way (apart from specifying duration) and makes no reference to possible government support and financial securities. The selection procedure, as provided for, may not be suitable for certain PPP projects (for example there is no reference to unsolicited proposals).

The main, if not sole, objective of this new Public Procurement Act has been to comply with the EU harmonisation requirement by copying parts of concerned Directives rather than to promote PPP or concession in any way.

The fact that the former Concession Law (adopted in 1996) has been cancelled and that references to concession are now part of the general Public Procurement Law but only with respect to Work Concession (not Service Concession) and for operation in sectors other than water, energy, transport, and postal services for which no specific legislation has been enacted (in contrast to the existence of more flexible rules provided by EU Directive 2004/17/EC for such specific activities) means that the law is broad enough to cover all types of concession and PPP and is not sufficiently specific to concessions and PPP. Thus, in addition to the Public Procurement Law (regulating public contracts and possibly certain works or service concessions), the

development of PPP in the Slovak Republic requires the adoption of a specific PPP law or substantial expansion of the existing part of the Public Procurement Law.

However, the adoption of a specific Concession Law is not currently being considered.

6.3.24 Slovenia (High Compliance)

The new Slovenian Public-Private Partnership Act entered into force on March 7 2007. The new Act systematically regulates the way in which government services and private business ventures are funded and operated through a partnership between government and one or more private sector companies. The Act implements Directive 2004/181 8/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and regulates not only "construction works concessions" but also "service concession", which are entirely excluded from EC secondary legislation. The Act includes provisions to improve transparency in public procurement procedures.

The new Act applies on a subsidiary basis, which means that it only applies when certain PPP issues are not otherwise regulated in a specific act (for example in the Public Procurement Act or the Public Utilities Act). However, for certain legal instruments such as competitive dialogue, construction work concessions, the definition of public procurement and exclusive right, the Act applies on a primary basis.

The Act on public-private partnership will be applicable to all forms of PPP: contractual partnerships such as concessions, BOT, BOO and similar forms, licence authorisations and public contracting relationships (public works and public services). It also seems to apply to privatisations.

It appears to observers that the fact that it wishes to cover every type of PPP both contractual and institutional with a broad definition of partnership including all forms of public-private type cooperation from public procurement to quasi privatisation is certainly an interesting intellectual exercise but one which leads to a great deal of confusion.

The law aims at regulating concessions, public procurement and equity participation where public and private interests coexist and in each case to incorporate EU Directives with respect to work concession and service concessions with a special treatment for water, energy, transport and postal services. The issue is further confused by the fact that the Law aims to give a "subsidiarity" effect applicable only for the procedures of establishing and operating PPPs with regard to those issues that are not regulated otherwise by a special act or regulation (sector law or local government regulations) except on specific provision..

In this context it is hard to reconcile the provision of the Law with the PFI Guide as benchmark. Furthermore, there is little doubt that foreign investors will have some difficulty deciphering the legal framework applicable to concessions in a specific sector and the associated risks which may further give the impression of bureaucracy and protectionism which is just the opposite of the objective of the Law.

One of the most positive developments is that Slovenia now has a PPP framework which forces the awarding authority to undertake a compulsory feasibility study

before entering into any public procurement contract.

The issues which still leave room for improvement concern the content of the concession agreement and termination provisions, as well as the security package available to the lenders which remains very unclear but without express prohibition.

6.3.25 Tajikistan (Very Low Compliance)

A policy framework for improving the legal environment and promoting PPP has not been identified in Tajikistan (even though the Concession Law provides that the Government shall draw up "priority investment programmes").

The Tajik Concession Law was adopted in 1997. It was supplemented in 2000 by the regulations on concession agreements and on auction and tender. Additionally the Resolution on Approval of the List of Objects not Subject to Transfer into Concession, and Objects Subject to Transfer into Concession by Resolution of the Government of the Republic of Tajikistan lists objects which may be the subject of concessions. The Regulations on Procedure of Concession Contract Registration provide for the registration of concession contracts. The Law is too vague as far as the majority of core areas are concerned.

Its scope of application needs serious improvements (concession defined as "transfer of temporary exploitation of enterprises (associations) belonging to the state, land with right of extraction of minerals, construction of infrastructure, water resources (...) and other natural resources not forbidden by the Republic of Tajikistan", discrimination against domestic investors, unclear definition of concerned sectors).

The selection procedure merits further clarification. Even though regulations exist in this respect, they are in many respects repetitive in comparison to the Law (pre-selection procedure is not mentioned, unclear grounds for direct negotiations – "exceptional cases", subject to government decision, no regulation of unsolicited proposals). We note, however, that the Law provides for notification to all participants of the tender results and for the right to challenge them. The Law also provides for the registration of project agreements.

Even though the Law contains provisions on the project agreement, they do not contribute to the creation of a flexible environment for the negotiation of such agreements (e.g. priority of the State to purchase concession production, non assignment of concessionaires' rights). We note, however, the possibility of unilateral termination by the Contracting Authority only in case of misrepresentation by the concessionaire.

Finally, the Law is not substantially developed as far as support and financial securities are concerned. Also, international arbitration is limited.

We note, however, a certain number of positive elements such as the reference to the "mutual advantage", and "non involvement in economic activity of the concessionaire".

Despite certain positive components, the Law does not constitute a sufficiently solid legal basis for the development of PPP in infrastructure and utility services in Tajikistan.

6.3.26 Turkmenistan (Low Compliance)

A policy framework for improving the legal environment and promoting PPP has not been identified in Turkmenistan.

The Turkmenistan Law was adopted in 1993 (*Law on Foreign Concessions*). The Law is too vague as far as the majority of Core Areas are concerned.

Its scope of application needs serious improvements (concession is defined as "a permission of the state to carry out a specific type of business activity").

The Contracting Authority is not clearly defined and there is discrimination against domestic investors. Sectors that may be subject to concessions are not defined, and seem limited to natural resources.

The selection procedure is not developed. The Law refers to the Cabinet of Ministers decisions in this respect. No such general public document was identified (except in the oil and gas sector) even though certain internal rules are used in this respect.

The settlement of disputes privileges domestic courts.

We note, however, a certain number of positive elements (e.g. provisions regulating compensation for early termination, general principle of government assistance in "achieving objectives" of concession agreements).

Despite certain positive components, the Law does not constitute a sufficiently solid legal basis for the development of PPP in infrastructure and utility services in Turkmenistan.

6.3.27 Ukraine (Medium Compliance)

A policy framework for improving the legal environment and promoting PPP has not been identified in Ukraine.

The Ukraine Concession Law was adopted in 1999. The Economic Code of Ukraine dated 2003 also contains provisions on concessions (Chapter 40).

Numerous decisions of the Cabinet of Ministers of Ukraine "On Conformation of the List of the Objects of State Ownership which may be given into concession" have taken place since 2006. The most recent amendments were made on 15 March 2006. "Amendments to the Law of Ukraine 'On Concessions' concerning the specifics of application of concession contracts with regard to the objects of the state or communal ownership, that are used for realisation of centralised water and heat supply and water discharge activity", on "Concessions on Construction and Exploitation of Highways", on "Distinctions of Transfer into Concession of the Objects of Heating Supply, that are in Communal Ownership", "On Distinctions of Transfer into Concession of the Objects of Water Supply and Water Discharge, that are in Communal Ownership" was put before the Verkhovna Rada of Ukraine and either accepted or rejected by the Parliament of Ukraine in 2007. At the time of writing, the review of the Draft Law by the Parliament of Ukraine is postponed because of the dissolution of the Verkhovna Rada of Ukraine.

The Law as it currently stands clearly defines its scope of application. It would be advisable to develop in the Law or, as an implementing regulation, clearer and more detailed tender rules (with principles of transparency, non -discrimination,

proportionality and efficiency, clear regulation of the pre-selection procedure and of review procedures). The identification and collaboration between different public entities involved could be improved.

The provisions regulating the project agreement give relatively clear guidance on the main issues to be covered, and they remain sufficiently flexible to allow the parties to freely negotiate its terms (existence of a model project agreement the use of which is optional).

The Law should place an emphasis on lenders' requirements with respect to security and step-in provisions (not regulated at this stage). We note the possibility of obtaining government support for the concessionaire "of disadvantageous and low-profit concession objects".

Thus, the Law constitutes a relatively solid legal basis for the development of PPP in infrastructure and utility services. Certain improvements may however be required.

6.3.28 Uzbekistan (Low Compliance)

A policy framework for improving the legal environment and promoting PPP has been identified in Uzbekistan (Resolution *On approval of the concept of furthering economic reform in the public utility services system*, dated 1998, Commission on Perfection of the Public Utility Services in the Market Economy).

The Uzbek Law was adopted in 1995. The Law is too vague as far as the majority of Core Areas are concerned. Its scope of application needs serious improvement (concession being defined as an authorisation "for the performance of a certain kind of economic activity connected with the granting of property, plots of the land and subsoil to an investor on the basis of the conclusion of the concession agreement", discrimination against domestic investors, unclear definition of the concerned sectors). In this respect, we note that other general pieces of legislation do contain certain interesting provisions (in particular the *Law on Guarantees and Measures for the Protection of Foreign Investors' Rights* of 1998).

The selection procedure is not detailed (no reference to the pre-selection procedure, to the publication of concession award, no sufficiently clear grounds for the possibility of direct negotiations- "exclusive cases", Cabinet of Ministers decision, no reference to review procedures).

Even though the Law contains provisions on the project agreement, these do not contribute to the creation of a flexible environment for the negotiation of such an agreement (e.g. priority of the State to purchase concession production, "necessary cases for concession extension).

Finally, the Law is silent as far as government support, financial securities and lenders' rights are concerned. Provisions regulating disputes favour domestic courts.

We note however certain positive elements such as the reference to "mutual benefit".

The Law does not constitute a sufficiently solid legal basis for the development of PPP in the infrastructure and utility services in Uzbekistan.

7. EVOLUTION OF ASSESSMENT RESULTS AND TREND

7.1 Evolution in the EBRD's region

Since the last concession law assessment in EBRD's countries of operations made in 2004 and 2005, roughly half of the 28 concerned countries have experienced significant changes with respect to their concession legal framework, either through the enactment of a new concession or PPP law or as a result of changes in their public procurement law affecting works or service concessions.

This represents a very significant development in such a short period of time and so many changes could be deemed as detrimental to the stability of the legal framework for such long -term projects.

One of the main reasons for such a rapid evolution of the legal framework in such a short period of time was the imperative need for EU accession countries to reach the required level of harmonisation and compliance with EU basic principles applying to all forms of public procurement and concession laws.

As noted in the EU PPP Green Paper, as of today Community law does not lay down any special rules covering the phenomenon of concessions or PPPs but it sets out as a minimum the principles of transparency, equality of treatment, proportionality and mutual recognition.

There are only few provisions of secondary EU legislation which coordinate the procedures for the award of contracts designated as concession contracts in Community law and such provisions are included in more general Directives concerning the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

Under Community secondary legislation, any contract for pecuniary interest concluded in writing between a contracting body and an operator, the object of which is the execution of works, the execution of a work or provision of a service, is designated as a "public works or public services contract". The concept of "concession" is defined as a contract of the same type as a public contract except for the fact that the consideration for the works to be carried out or the services to be provided consists either solely in the right to exploit the construction or service, or in this right together with payment.

In the case of works concessions, there are only certain advertising obligations, intended to ensure prior competition by interested operators, and an obligation regarding the minimum time-limit for the receipt of applications. The contracting bodies are then free to decide how to select the private partner, although in so doing they must nonetheless guarantee full compliance with the principles and rules resulting from the Treaty above recalled. It should be noted that it is the criterion of the right of exploitation and its corollary, the transfer of the risks inherent in the exploitation, which distinguish public contracts from concessions under EU legislation.

As a result of this limited legal requirement concerning concession and PPP and of some confusion as to the specificity of concessions compared to public works under EU legislation the EU acceding countries which have been compelled to adapt their entire legislation in an extremely short period of time have not given much consideration apparently to the improvement of the concession or PPP legal

framework at the time of this urgent and huge legislative exercise.

Most of the concerned acceding countries, as well as the countries candidate for future accession to the EU, have tried to transpose the European Union Directives regarding public procurement (Directive 2004/17/EC, Directive 2004/18/EC, Council Directive 89/665/EEC, Council Directive 92/13/EEC, and Commission Directive 2005/51/EC) into their legislation through a new public procurement Act..

However as a result of the attempt by several countries (Slovakia, Slovenia, Romania) to regroup all these Directives in a single procurement Act, usually an extremely long and complex piece of legislation was published and such new text not directly related to concessions and PPP may appear to be detrimental to their promotion and development and even confusing as far as enabling provisions are concerned like for Slovakia for instance.

The fact that the former Slovakian Concession Law (adopted in 1996) has been cancelled at the time of enactment of the new Public Procurement Law and that reference to concession is now part of the general Public Procurement Law but only with respect to Work Concession (not Service Concession) and for operation in sectors other than excluded activities (water, energy, transport, and postal services) means that the new Procurement law does not cover all types of concession and PPP and is not sufficiently specific to concessions and PPPs, In such cases we can consider that the trend has not been towards an improvement of the concession legal framework but just the opposite.

One tendency which has recently arisen and which becomes more and more common is for the Governments awarding authorities and investors to consider now that PPP are generating too complex, onerous and time consuming deals which will obviously not be contradicted by the reading and analysis of such set of new regulations based on EU public procurement directives and to be completed by implementing regulations.

One of the very few positive results of the transposition of the of EU public procurement Directives as far as concessions and PPP are concerned may have been the adoption of a new procedure known as “competitive dialogue” which allows the public authorities to hold discussions with the applicant businesses in order to identify the solutions best suited to their needs when awarding particularly complex contracts provided that the use of such competitive dialogue is well understood and only applied when effectively required.

The competitive dialogue procedure should provide the necessary flexibility in the discussions with the candidates on all aspects of the contract during the set-up phase, while ensuring that these discussions are conducted in compliance with the principles of transparency and equality of treatment which is not so obvious and may create some governance problem.

Only some of the concerned countries during this period from 2005 to 2007 have created specific tools to coordinate and promote PPPs along the lines advocated by the PFI Guide. Such tools were aimed, *inter alia*, at disseminating expertise and “good practice” for PPPs at national level based on past successful experience in other countries like for example the Task forces in the United Kingdom or in Italy.

Even for such countries where specific legislation was enacted with the intention to

promote PPPs, such as Slovenia, the fact that the PPP Act wishes to cover every type of public private partnership both contractual and institutional with a broad definition of partnership including all public private type cooperation from Public Procurement to quasi privatisation is certainly an interesting intellectual exercise which inevitably results in considerable confusion.

Based on our experience, a PPP law is usually designed to provide remedies to specific problems or issues deterring the development of private sector participation in the delivery of infrastructure and public services. Consequently, the primary objective of such legislation is usually about removing private sector investment bottlenecks or disincentives in the targeted sectors or activities. While some new PPP legislation has done a good job in defining the main objectives of the PPP programme for their countries, it does not seem in many cases to provide appropriate solutions to the urgent need to streamline the preparation and approval and procurement procedures for privately sponsored infrastructure projects.

Finally, one main objective in order to promote PPP is to promote a change in mentality of the public administrations from owner position to provider of services. This can only be achieved if the law is really part of a PPP general policy.

Few new laws are really oriented by a PPP policy toward the satisfaction of a specific need for PPP following best practice and PFI Guide and much progress remains to be done to ensure that such laws contain sufficient enabling provisions and remain flexible enough not to become a deterrent to the development of PPP projects.

7.2 International Trend

From looking at other distinctive and developed jurisdictions outside the perimeter of operations of EBRD for which a parallel assessment has been made, using the same methodology and checklist tool, it is plain to see that where there is a dynamic policy toward PPP and where the legal framework and institutions have been adopted, significant progress toward PPP and private financing of public infrastructure have been experienced. This is not the case for countries where no such public interest and new legislation have been experienced.

If we look at France and Portugal, countries in which concession projects have been implemented for centuries by the State, Municipalities and local authorities in different sectors without much specific legislation and mainly based on administrative court cases, a new wave of PPPs can be discerned (since 2002 in Portugal and since 2004 in France) as PPP projects have been implemented under new specific laws or ordinances. These new PPPs are supported by an explicit policy and a new PPP legal framework which highly compliant with the PFI Guide and in line with the UK Private Finance Initiative policy.

This new trend based on the successful British experience aims to enlarge the scope of traditional concessions which usually included a delegation of a public service with some investment commitment. The new PPP legislations compared to concessions allow the financing and construction of public facilities by the private sector even without the delegation of the management of the public service itself to which the facility concurs but with service to the facilities being operation, utilisation

or only maintenance during the life of the contract. Mainly the services provided and the availability of the facility will be remunerated to allow the repayment of the investment within a sufficient period of time and such remuneration will partly be performance based and depend on the quality of the service to be provided to the granting authority or to the public.

Other countries like Argentina which are sticking to the sole concept of French traditional concession and to the delegation of public services and have not adopted new PPP legislation offering the possibility to the private sector to participate in the financing of construction and operation of public facilities or in the provision of services to the public authorities without necessarily performing the public service by itself, are not making much progress with respect to the private financing of public infrastructure.

Countries such as Sweden do not even have a traditional concession heritage. Sweden has not yet recognised PPP as a way of delivering infrastructure nor has it made any changes to its legislation to enable or facilitate PPPs. Nevertheless, a small number of PPP-type projects have been initiated based on basic commercial and administrative legislation.

7.3 General Conclusion

There is no doubt that countries like UK followed by many other European states like Ireland, the Netherlands and Germany but also Italy and more recently by Portugal, Spain and France which have decided to adopt a voluntary PPP policy and have settled the appropriate new legal framework and proper institutions to promote and facilitate the development of PPP, have experienced large and rapid progress in the private financing of public facilities and services despite some difficulties and bad experiences inherent to any change, particularly in the public sector, and to the launching of all such new financial instruments.

This trend, which has been adopted in a limited number of countries in recent years, should undoubtedly be favoured as one of the ways to provide for the financing of badly needed public infrastructure and services required or the development of the country.

It has however to be taken into account that such new PPP-type contracts for the financing of public facilities without commercial risk for the benefit of a public entity, it is not so much the cash flow that the project can generate which will constitute the main guarantee for the lenders and investors but rather the creditworthiness of the public contracting authority and the financial guarantees which will be offered.

This requirement for financial capacity and guarantee for such forms of private financing of public infrastructure can obviously be problematic for some contracting authorities and some countries. In such cases, the proceeds from a sound profitable project may appear as a better guarantee and together with a favourable compliant legal framework for concessions it may allow more traditional concessions, BOT or similar type of financing and operation of public infrastructure and services.
