



Gide Loyrette Nouel



## Kyrgyz Republic

### ASSESSMENT OF THE QUALITY OF THE PPP LEGISLATION AND OF THE EFFECTIVENESS OF ITS IMPLEMENTATION 2011

<b>I- PPP Legislative Framework Assessment (LFA)</b>	<b>Compliance of the PPP legal framework with PFI Guide recommendations<sup>1</sup> and Best Practice</b>		
<b>Core Area</b>		<b>Rating</b>	<b>Assessment</b>
<b>1- PPP Legal Framework</b>	Existence of specific PPP law or a comprehensive set of laws regulating concessions and other forms of PPP and allowing a workable PPP legal framework	10/15	
<b>2-Definitions and Scope of the Law</b>	Existence of a clear definition of the boundaries and scope of application of the concession legal framework (e.g. definition of "PPP", sectors concerned, competent authorities, eligible Private party) limiting the risk of a challenge to the validity of PPP contracts, irrespective of whether the act is specifically targeted at PPP	13/24	
<b>3-Selection of the Private Party</b>	Mandatory application of a fair and transparent tender selection process. Limited exceptions allowing direct negotiations, competitive rules for unsolicited proposals and the possibility to challenge illegal awards.	24/42	
<b>4-Project Agreement</b>	Flexibility with respect to the content of the provisions of the Project agreements which should allow a proper allocation of risks without unnecessary or unrealistic/not bankable/compulsory requirements/interferences from the Contracting Authority (obligations, tariff, termination, compensation).	10/27	
<b>5-Security and Support Issues</b>	Availability of reliable security instruments to contractually secure the assets and cash-flow of the Private Party in favour of lenders, including "step in" rights and the possibility of government financial support, or guarantee of, the Contracting Authority's proper fulfilment of its obligations.	12/21	

<sup>1</sup> UNCITRAL *Legislative Guide on Privately Financed Infrastructure Projects*, 2001 (hereinafter the "PFI Guide")

Checklist: Kyrgyz Republic



2.

<b>6-Settlement of Disputes and Applicable Laws</b>	Possibility to obtain proper remedy for breach under the applicable law through international arbitration and enforcement of arbitral awards.	13/15	
<b>General LFA Rating</b>	82/144	<b>58,3%</b>	<b>Medium Compliance</b>
<b>II-Legal Indicators Survey (LIS)</b>	<b>Effectiveness Assessment : How the PPP law works in practice</b>		
<b>Core Area</b>		<b>Rating</b>	<b>Legal Indicator Survey</b>
<b>7- Policy Framework</b>	Existence of a policy framework for public private partnerships	5/24	
<b>8 Institutional Framework</b>	Existence of an institutional framework for public private partnerships	2/27	
<b>9- PPP Law Enforcement</b>	Award and implementation of PPP projects in compliance with the Law	1/6	
<b>General LIS Rating</b>	8/57	<b>15%</b>	<b>Very low Effectiveness</b>
<b>OVERALL RATING</b>		<b>37,4%</b>	<b>Low Compliance/ Effectiveness</b>

**Local Expert<sup>2</sup>: Kalikova & Associates Law Firm : Gulnara Kalikova, Senior Partner - Murat Madykov, senior lawyer -**

<sup>2</sup> The Local Experts in charge of each country have been consulted for the elaboration of the responses to the Checklist in their capacity of well recognized established law firm in the country but the Local Experts as well as EBRD are in no way responsible for the responses given to any question in this Checklist as the Consultant was free to use any other sources of information for its final determination.



3.

**RATING:** Key for assessment of Each Question

✓ ✓ ✓	Yes	3 points
✓ ✓	Yes, with reservations	2 points
× ×	No, with Limited compliance / redeeming features	1 point
× × ×	No	0 point
N/A	Not applicable	0 point/ Not included in total

## Key for Assessment of Each Core Area and for Overall Assessment

≥ 90%	Very High Compliance/Effectiveness
≥ 70%-89%	High Compliance/ Effectiveness
50%-69%	Medium Compliance/ Effectiveness
30%-49%	Low Compliance/ Effectiveness
< 30%	Very low Compliance/ Effectiveness

**TERMINOLOGY**

*So as to keep answers consistent and avoid ambiguity, we set out below some brief definitions of the terminology used in this questionnaire. Any definition is provided solely to clarify some of the terminology used below. The reader should note that any such definition does not correspond with any given definition under best international practice (which does not provide for any standardised PPP legal definitions recognised worldwide) neither should it be interpreted that we recommend the adoption of such definitions under actual documentation, but they are included in the interests of clarity for the completion of this questionnaire, and we should be grateful if you could adopt such definitions for the purposes of completing the questionnaire.*

**Checklist Kyrgyz Republic**



4.

- **"Public Private Partnership" - "PPP" or "PPP project"** includes all types of long-term arrangements between public authorities and private institutions, including but not limited to; Concessions, BOT and derived forms, PFI and Institutional PPP. For the purposes of this questionnaire, PPP excludes the sale of public assets or of public company shares which are part of a privatisation process and also excludes public works, services or supply contracts which are subject to public procurement rules.

The following types of Public - Private Partnership Agreements may be adopted by a Contracting Authority for undertaking infrastructure projects. These are solely indicative in nature and the Contracting Authority may seek to adopt a combination of the different contractual arrangements, which incorporate some of their elements or combine elements.

- **"BOT"** - (Build-Operate-and-Transfer)- and derived forms : a contractual arrangement whereby the Private Party undertakes to finance, design, construct under a turnkey risk basis, operate and maintain an Infrastructure project for a specified period after which period the project facilities are transferred to the Granting Authority usually without payment of any compensation.

The Private Party has the right to collect contract or market based tariffs or fees from the users of the infrastructure project, as specified in the PPP agreement, to recover its investment and operating and maintenance expenses for the project. A BOT type of PPP arrangement may provide for all the implementation and operational efficiencies of the private sector, together with new sources of infrastructure capital. Derived forms of BOT contractual arrangements exist such as Build-Own-Operate-and-Transfer (BOOT) similar to the BOT agreement, except that the Private Party owns the Infrastructure project during the specified term before its transfer to the Contracting Authority or its designee, or such as Build-Own-and-Operate (BOO) which is a contractual arrangement similar to the BOT agreement, except that the Private Party owns the Infrastructure project and no transfer of the project to the Contracting Authority or its designee at the end of the fixed period is envisaged. Derived forms incorporating Lease right rather than Ownership or dealing with rehabilitation or extension rather than construction which extend the possible combination which for the purpose of this questionnaire will all be hereafter referred to as BOT for simplification purpose except where legal specificity requires specific treatment.

- **"Concession"**: is an act attributable to the State whereby a Contracting Authority entrusts to a third party the total or partial management of public services for which that authority would normally be responsible and for which the third party assumes all or part of the risk.
- **"PFI"** (Private Finance Initiative) : a form of cooperation and partnership between public authorities and Private Parties which aim to ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of service to the infrastructure without the delegation of the public service itself. It is a contractual arrangement whereby the Private Party



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undertakes the financing and the construction of an infrastructure project and after its completion transfer it to the Contracting Authority or its designee. This arrangement may be employed in the construction of a public service facility for which the public service must be operated directly by the contracting authority for whatever reason but the operation and maintenance of the facility remain the responsibility of the Private Party for the entire duration of the PPP agreement. The contracting authority will reimburse the total project investment on the basis of a rent based of an agreed schedule with the payment starting from the date of commencement of operation and pay for the services rendered to the facility on a performance basis.

- **"IPPP"**(Institutional PPP): a structural or corporate form of PPP which provide for the cooperation between public authorities and a Private Party through a joint venture or mix (publid- private shareholding) company in which case all reference to the selection process refers to the selection of the Private Party.

Other definitions:

- The **"Law"** or **"PPP Law"**: a law regulating any form of PPP including but not limited to Concession, BOT, PFI, IPPP and including, for the purpose of this questionnaire, the set of rules applicable to any PPP in the absence of a specific PPP law. The Law for the purpose of this questionnaire also includes any implementing regulation and any form of governmental act regulating PPP.
- **"BOT Law"**: a law regulating a BOT type of PPP in their multiple forms.
- **"Concession Law"**: a law regulating a Concession form of PPP.
- **"Contracting Authority"**: a public authority empowered to award a PPP and enter into Project Agreements
- **"PFI Law"**: a law regulating a PFI form of PPP.
- **"PPP unit"** : specialized institution/agency/ministerial department established to promote and take care of PPP.
- **"Private Party"**: Private Party or other entity in the form of a special purpose company to which a Project Agreement in general has been awarded. [*The word Private party will be used for the sake of this study even in case the PPP regulation allows PPP business partner to be a mix company or even a public entity.*]
- **"Project Agreement"**: an agreement(s) between the Contracting Authority and the Private Party regulating their respective rights and obligations with respect to the PPP project.



### **REFERENCE TO BEST PRACTICE**

- UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, 2001 (hereinafter the "**PFI Guide**") and UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects, 2003 (UNCITRAL Model Legislative Provisions).
  
- EC - Commission Interpretative Communication on Concessions Under Community Law dated 12 April 2000; together with additional EU major documents/decision /recommendation on concessions including Directives 2004/18/EC and 2004/17 EC of 31 March 2004; Green Paper on Public Private Partnerships and Community Law on Public Contracts and Concessions dated 30 April 2004; Report on the public consultation on the Green Paper (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)); European Commission Guidelines for Successful Public-Private Partnerships (2003).Commission Interpretative Communication Brussels, 05.02.2008 C (2007)6661on the application of Community law on Public Procurement, and Concessions to Institutionalised Public-Private Partnerships (IPPP);
  
- EBRD Core Principles for a Modern Concessions Law – selection and justification of principles Prepared by the EBRD Legal Transition Team.2005;
  
- UNIDO Guidelines for Infrastructure Development through Build Operate Transfer (BOT) Projects, 1996 (UNIDO BOT Guidelines); and
  
- OECD Basic Elements of a Law on Concession Agreements, 1999-2000.



## **OVERALL ASSESSMENT 2011 : KYRGYZ Republic**

The Law of the Kyrgyz Republic on Public-Private Partnerships, which was adopted on May 11, 2009 (the “PPP Law”), as well as the Procedure for competitive selection and direct negotiations for concluding agreements on public-private partnerships establish the legal framework for undertaking PPP projects in the Kyrgyz Republic. It shall be, however, noted that neither the Law on Concessions, nor the Procurement Law can be applicable to relations associated with the projects implemented on the basis of PPP mechanism.

The PPP Law is the first legal act in the country that defines the “PPP”, however, the given definition, i.e. “*mutually beneficial medium or long term cooperation between the state and private partner in the sphere of investment relations*”, does not coincide with the traditional meaning of public-private partnerships in developing and upgrading infrastructure projects.

Besides the PPP Law either too vague or silent as far as the majority of Core Areas are concerned. For instance, the PPP Law does not specify the sector and modalities of PPPs, which leaves much room for interpretation of its scope of application. Accordingly, PPP mechanism can be used not only for the development of infrastructure projects, but also for a number of projects in different sectors or spheres of economy, which certainly fall beyond the traditional meaning of PPPs.

Additionally the PPP Law states that the Government of the Kyrgyz Republic and/or local state executive authorities are in charge with determining the list of investment projects that can be implemented through PPP mechanism. However, to date no such list has been adopted or envisaged to be adopted either by the Government of the Kyrgyz Republic or by the local state executive authorities. Besides, it is not clear how both the Government of the Kyrgyz Republic and/or the local state executive authorities will develop such list of investment projects, as the Kyrgyz PPP law neither defines the procedure nor refers to any regulation under which the prospective list of investment projects will be defined.

Last, but not least, the PPP Law excludes most of the important areas (such as, mandatory provisions of the projects agreement, rights and obligations of the parties, term of the agreement, grounds for termination and right to compensation, establishment of project company, etc.) and leaves them open-ended by referring to PPP agreements or to be determined by the Government, which certainly does not provide any surety for potential investors.

## **Checklist Kyrgyz Republic**



## ASSESSMENT & LEGAL INDICATOR SURVEY

### 1. LEGAL FRAMEWORK

#### 1.1 Existence of different forms of PPP legal framework

QUESTION	ANSWER	ARTICLE	COMMENTARY
<p>1. Does the country have a single act dealing specifically with Concessions or a generalised act incorporating the legal framework for PPP, including Concessions?</p>	<p>✓ ✓ ✓</p>	<p>Article 1 of the PPP Law</p> <p>Article 382 of the Civil Code</p>	<p>The Law of the Kyrgyz Republic “<i>On Public-Private Partnerships in the Kyrgyz Republic</i>” (the “<u>PPP Law</u>”) was adopted on May 11, 2009, which along with the <i>Procedure for competitive selection and direct negotiations, for concluding agreements on projects for public private partnerships</i> dated May 27, 2009 (the “<u>Procedure for Competitive Selection</u>”) establishes a general legal framework for PPPs in the Kyrgyz Republic.</p> <p>The Civil Code of the Kyrgyz Republic establishes the legal framework for different civil law contracts in the Kyrgyz Republic, including those concluded between the public and private sectors. Although the term PPP is not defined in the Civil Code, the concept of “freedom of contract” allows the parties to enter into any type of contract event if they are not directly mentioned in the Civil Code, provided that such contract do not contradict the legislation of the Kyrgyz Republic.</p> <p>The country also has the Law of the Kyrgyz Republic “<i>On Concessions and Concessionary Entities in the Kyrgyz</i>”</p>

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			<p><i>Republic</i>” (the “Law on Concessions”), which was adopted on March 6, 1992 As amended by the Laws of the Kyrgyz Republic No. 58 of March 8, 2003, No. 7 of June 11, 2004, No. 188 of December 9, 2004, and No. 231 of October 17, 2008)</p> <p>However, it shall be noted that the definition of concessions differs from the definition given to it in this questionnaire, as it is defined as “a permit to run certain kinds of entrepreneurial activities connected with the leasing of property, land and underground mineral resources”. Accordingly, the Law on Concessions cannot be referred to as a legal act providing legal framework for PPPs in the country.</p>
2. Does the country have an act that allows BOT or derived forms such as BOOT, BOO or other forms either as part of a specific act or as part of a general PPP Law?	✓ ✓	<p>Article 5 of the PPP Law</p> <p>Article 382, Section IV of the Civil Code</p>	Although the PPP Law does not define the list of applicable PPP forms, the general provisions of the Civil Code allow their implementation.
3. Does the country have an act that allows PFI, either as part of a specific act or as part of a general PPP Law?	✗ ✗	<p>Article 5 of the PPP Law</p> <p>Article 382, Section IV of the Civil Code</p>	The PPP Law does not specify PFI and there are no any cases of its practical implementation in the Kyrgyz Republic, the general provisions of the Civil Code allow its implementation.
4. If the answer is <i>No</i> to any of the three first	N/A		

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questions concerning a specific form of PPP does the Constitution or other general act (ex: the Civil Code, sectoral law) recognise the basic principles of the concerned PPP and regulate its granting?			
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**For our general information: Is a new PPP Law or an amendment to the existing Law being prepared, or considered, in the country?**

**If so, at what stage of the legislative process is such new PPP Law or amendment to the existing Law?**

The new draft PPP Law is being considered by Kyrgyz Parliament. On June 17, 2011 the draft PPP Law was approved on the first parliamentary reading. The second reading of the new draft PPP Law was scheduled for December 22, 2011.

## 1.2 **Specificity and integration of PPP legal framework**

5. If the country has a Public Procurement Law, is it clear to what extent does the Public Procurement Law apply or not to the granting of a PPP?	✓ ✓	Article 2 of the Law on Public Procurement	The Law of the Kyrgyz Republic “On Public Procurement” was adopted on May 24, 2004 and establishes the legal framework for supply of goods, works and services for state needs. Although the terms “works” and “services” include a maintenance of buildings, management of sewage system, the Law on Public Procurement does not refer to applicability of PPP mechanism, as the procurement of goods, works and services are purely based on a supply contract between the public authorities and private suppliers.
6. If the country has sectoral laws regulating PPP in specific sectors, is it clear which law is applicable to the granting of PPP for each particular sector?	N/A		The Kyrgyz Republic does have any sectoral laws regulating PPP in specific sectors.

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<p>7. Does the country have a Law allowing the Institutional form of PPP (IPPP) which regulates IPPP participation to PPP?</p>	<p>✓ ✓</p>	<p>Article 6 (6) of the PPP Law</p>	<p>The parties to the PPP agreement may stipulate the establishment of one or several legal entities with the participation of the parties to implement the project on PPP.</p>
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## 2. DEFINITIONS AND SCOPE OF THE PPP LAW(S)

### 2.1 PPP definition<sup>3</sup>

QUESTION	ANSWER	ARTICLE	COMMENTARY
<p>1. Does the Law define one or several term(s) (<i>i.e.</i> "PPP", "Concession", "BOT", "Partnership" etc. and/or respective agreements) for the arrangements to be regulated by the Law which specify the limits of application of the Law?</p> <p><b>For our general information,:</b> <i>please provide the given definition(s), if any.</i></p>	✓ ✓	Article 1 of the PPP Law	The PPP Law provides for general definition of PPP as PPP is a mutually beneficial medium or long term cooperation between the state and a private partner in the sphere of investment relations. The PPP Law does not provide for definitions of other key terms that could more decently specify the limits of application of the PPP Law.
<p>2. Does the Law apply to all contracts entered into that fall under the definition(s) given above, irrespective of the name given to such contract</p>	× × ×	Preamble and Article 6 (4) of the PPP Law	The PPP Law applies only to agreement with a specific reference to the term of "public-private partnership".

<sup>3</sup> PFI Guide, Consolidated Legislative Recommendations, Recommendation 3 and Commission Interpretative Communication on Concessions Under Community Law dated 12 April 2000; together with additional EU major documents/decision /recommendation on concessions including Directives 2004/18/EC and 2004/17 EC of 31 March 2004; Green Paper on Public Private Partnerships and Community Law on Public Contracts and Concessions dated 30 April 2004; Report on the public consultation on the Green Paper (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))



<i>(concession, license, usufruct right, lease, etc.)?</i>			
3. Does the Law make a clear distinction between a PPP agreement ( <i>such as a Concession</i> ) and a license ( <i>i.e. an authorisation to operate by a public authority</i> )?	× ×		The PPP Law does not make any distinction between a PPP agreement and a license. Meanwhile, the Law on Licensing provides for a clear definition of license which makes it distinct from PPP agreement.

## 2.2 Contracting Authority

QUESTION	ANSWER	ARTICLE	COMMENTARY
4. Does the Law identify ( <i>or allow clear identification by reference to other laws or regulations</i> ) the public authorities ("Contracting Authorities") that are empowered to select projects, prepare for, and award PPPs and enter into Project Agreements ?	✓ ✓	Articles 4 and 8 of the PPP Law  Chapter III of the Procedure of Competitive Selection	Under the PPP Law the Government of the Kyrgyz Republic and/or local state executive authorities are in charge with determining the list of investment projects that can be implemented through PPP mechanism.  However the PPP Law is silent on the criterion for differentiating the type of PPP project to be executed by the Government of the Kyrgyz Republic and the local state executive authorities, as well as on the issues of coordination of these authorities with each other.  In addition under the PPP Law a supervisory council shall be established for each PPP project, whereas the functions of such council will be determined by the PPP agreement.  As for the selection of private partner, it is carried out by a



			selection (bid) committee established either by the Government of the Kyrgyz Republic or the local state executive authorities.
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**For our general information:** *If yes, which of the following authorities are identified:*

- *National authorities (e.g.: the government, ministries, and independent agencies); The Government of the Kyrgyz Republic and the local state executive authorities of the Kyrgyz Republic.*
- *Regional/state-level authorities; N/A*
- *Local or municipal authorities; or State owned companies? N/A*

### 2.3 Private Party and Project Company

QUESTION	ANSWER	ARTICLE	COMMENTARY
5. Is it possible for a PPP be awarded to a foreign company, a Private Party or to a domestic company with foreign participation in the share capital and/or management ( <i>without discrimination</i> )?	✓ ✓ ✓	Article 6 of the PPP Law	The PPP Law does not differentiate to whom the PPP shall be awarded (domestic or foreign companies). Accordingly, the PPP can be awarded to a foreign company, a Private Party or to a domestic company with foreign participation in the share capital and/or management.

**For our general information:** *can a PPP be awarded to public entities or to entities jointly owned by private and public entities (IPPP)? Are there restrictions imposed on such contracts? PPP agreements can be concluded between the contracting authorities and private sector individuals and/or legal entities. However, neither the PPP Law nor does the Procedure of Competitive Selection Regulation stipulate for any details with regard to any threshold of public ownership at project companies.*



## 2.4 Concerned sectors<sup>4</sup>

QUESTION	ANSWER	ARTICLE	COMMENTARY
6. Does the Law identify ( <i>or allow identification by reference to other laws or regulations</i> ) the sectors and/or types of infrastructure and/or services in respect of which a PPP may or may not be granted?	× ×	Article 1 of the PPP Law	The Kyrgyz PPP law does not specify the sectors in which PPP projects can be awarded, nor does it identify the activities, which may not be the object of PPP agreements. However, according to the definition of PPP one can assume that PPP mechanism can be applied to a wide range of projects in the Kyrgyz Republic.
7. Do the list of sectors eligible for PPP correspond to an open-ended one ( <i>as opposed to being exhaustive</i> ) allowing ( <i>or at least not preventing</i> ) PPP to be granted in numerous sectors”?	✓ ✓	Article 1 of the PPP Law	See comments for 6 above.

<sup>4</sup> For further information on the concerned sectors please refer to: PFI Guide, Consolidated Legislative Recommendations, Recommendation 3 and 4.



8. Do the sectors eligible for PPP includes non commercial activities such as the provision of government services (such as <i>schools, hospitals, prisons, defence and housing</i> ) in addition to the merchant sectors of the economy ( <i>energy, transport, water, oil and gas</i> ).	✓ ✓	Article 1 of the PPP Law	See comments for 6 above.

**For our general information:** Please indicate the restrictions if any imposed by the Law on the sectors eligible for PPP: N/A



### 3. SELECTION OF THE PRIVATE PARTY<sup>5</sup>

#### 3.1 General Considerations

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Does the Law require, in principle, the Contracting Authority to select Private Parties through a competitive tender process?	✓ ✓	Article 6 (1) of the PPP Law  Chapter I of the Procedure of Competitive Selection	The private partners for PPP projects can be selected either through a competitive selection or direct negotiations.
2. Is there reference in the Law to the principles of transparency, equal treatment and proportionality?	✓ ✓ ✓	Article 2 of the PPP Law	The PPPs are based on the principles, such as, lawfulness, mutually advantageous cooperation, effectiveness and the transparency in investment project management, voluntary participation, goodwill, feasibility of ensuring the performance of obligations, reciprocity in establishing rights and obligations, equal access to participate in public-private partnerships.
3. Is there a provision in the Law concerning the publication of information related to the	✓ ✓	Chapter II (3) (4) of the Procedure of	The Procedure of Competitive Selection requires publication of information related to the competitive procedures in the country media and official web-site of

<sup>5</sup> For further information on the selection of the Private Party, please refer to: PFI Guide, Consolidated Legislative Recommendations, Recommendations 14 to 39 included.



<p>competitive procedures in the country media and in the international media (<i>for large projects</i>)?</p>		Competitive Selection	<p>the customer. There is no requirement to publish the information in the international media.</p>
<p>4. Are there provisions within the Law or any special manual or recommendations governing in detail the selection of the Private Party (<i>i.e.: the pre-selection of bidders, the procedure for requesting proposals or other procedure such as competitive dialogue/two stage procedure</i>)?</p>	<p>✓ ✓ ✓</p>	<p>Chapter VI and VII of the Procedure of Competitive Selection</p>	<p>The Procedure of Competitive Selection stipulates for detailed procedure on undertaking competitive selection and direct negotiations with a private partner.</p> <p>The procedure for competitive selection of private partners consists of two stages, namely, (1) pre-qualification/pre-selection and (2) bidding.</p> <p><u>The pre-qualification</u> shall be undertaken within the terms defined in the bidding documents, but shall not exceed 14 business days from the date of opening the envelopes with applications. The pre-qualification is carried out on the matter (i) whether the bid applications comply with established requirements in the bidding documents; and (ii) whether the bid applicants comply with the requirements of the pre-qualification as provided in the bidding documents.</p> <p><u>The bidding</u> or the evaluation of the bidding applications is carried out by a selection or bid commission by ranking bid proposals based on the result of their comprehensive assessment and comparison of degree or profitability of their terms and conditions. The bid commission rates each of the evaluated bid proposals and awards the bid to a bid participant with the best offered terms. If two or more bid proposals contain equal best terms/conditions (same rating), the bid shall be awarded to the applicant or bidder who was the first among those bidders to submit his/her bid proposal to the bid commission.</p>



			The period for review and evaluation of bid proposals by a bid commission is set in the bidding documents and cannot exceed 60 days from the date of opening the envelopes with bid proposals.
5. Does the Law provide that if the Contracting Authority rejects an applicant at the time of pre-selection or disqualifies a bidder, it must make public the reasons for the decision ( <i>or inform the rejected bidder thereof explaining the reasons for rejection</i> )?	✓ ✓ ✓	Chapter VI (34) of the Procedure of Competitive Selection	The applicants, who fail the pre-qualification stage shall receive a copy of the minutes of the selection committee with a copy of the decision with explaining their reasons for rejection.

### 3.2 Award of PPP

QUESTION	ANSWER	ARTICLE	COMMENTARY
6. Does the Law provide that all proposals are ranked solely on the basis of a predefined evaluation criteria set forth in the pre-selection documents/ request for proposals?	✓ ✓	Chapter VI (26) and Chapter VII (36) of the Procedure of Competitive Selection	The pre-qualification is carried out on the matter (i) whether the bid applications comply with established requirements in the bidding documents; and (ii) whether the bid applicants comply with the requirements of the pre-qualification as provided in the bidding documents.
7. Does the Law provide for the publication of a notice of the award of the project, identifying the Private Party and including a summary of	✓ ✓ ✓	Chapter VIII and Chapter IX of the Procedure of	After undertaking the selection, the results of the competition with the name of the private party shall be published either on state mass media and web-site of the contracting authority within 10 business days. Additionally



the essential terms of the project agreement?		Competitive Selection	within 20 days from signing the PPP agreement, the contracting authority shall publish the PPP agreement in full on its website.
8. Does the Law provide that the Contracting Authority or any other public authority maintain records of key information pertaining to the selection and award proceedings?	XXX		
9. If the answer to the previous question is <i>Yes</i> , does the Law provide that such record is accessible to the public, or at least to interested parties?	N/A		

### 3.3 Final negotiations

QUESTION	ANSWER	ARTICLE	COMMENTARY
10. Does the Law contain provisions regulating final negotiations (i.e. post contract award) so that transparency, equal treatment and competition are preserved?	XXX		
11. Does the Law provide that the Contracting Authority has the authority to terminate negotiations with the invited bidder if it	XXX		

### Checklist **Kyrgyz Republic**



becomes apparent that the bid will not result in an agreement and start negotiations with the second ranked candidate?			
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### 3.4 PPP Award without competitive procedure

QUESTION	ANSWER	ARTICLE	COMMENTARY
12. Does the Law provide that the Contracting Authority has the authority to award a PPP without a competitive process? Is this only in limited/ exceptional circumstances?	✓ ✓ ✓	Chapter X of the Procedure of Competitive Selection	The Law allows direct negotiations. No limited/ exceptional circumstances are provided.
13. Does the Law provide for a procedure, set of rules or principles to be respected when awarding a PPP without a competitive process?	✗ ✗ ✗	Chapter X of the Procedure of Competitive Selection	No detailed rules or principles are provided by law.

**For our general information, please specify the conditions which would allow such direct negotiations? No special conditions are established.**



### 3.5 Special case of unsolicited proposals

QUESTION	ANSWER	ARTICLE	COMMENTARY
14. Does the Law provide for an adequate framework for the Contracting Authority to manage unsolicited proposals/private initiatives (i.e. a proposal relating to the implementation of a PPP that is not submitted in response to a request or solicitation by the Contracting Authority) that ensures transparency and equal treatment and does not distort competition?	× ×		<p>Individuals or legal entities may initiate PPP projects by approaching either the Kyrgyz Government or the local state executive authorities with their application, which needs to comply with the requirements established for the bidding stage under the Kyrgyz PPP law.</p> <p>If the Kyrgyz Government or the local state executive authorities finds that a feasibility study, as well as the legal, technical and financial characteristics of the application are appropriate, the Kyrgyz Government or the local state executive authorities undertakes negotiations. If the latter succeed, the parties execute the PPP agreement.</p>

### 3.6 Review procedures

QUESTION	ANSWER	ARTICLE	COMMENTARY
15. Does the Law allow the bidders who claim to have suffered, or that may suffer loss or injury, to seek review of the Contracting Authority's actions or failure to act?	✓ ✓	Articles 15, 356 of the Civil Code	Not specified, however under the general provisions of the Civil Code the suffered party has a right to challenge Contracting Authority's actions or failure to act as well as claim damages.



#### 4. **PROJECT AGREEMENT**<sup>6</sup>

##### 4.1 **Model or list of provisions**

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Does the Law give flexibility to the negotiation of most terms of the Project agreement and if it contain (or refer to): (i) a model PPP agreement it is an optional template agreement for guidance only or (ii) a list of mandatory material provisions which must be included in the agreement, the content of such provisions is left for negotiation)?	✓ ✓	Article 6 of the PPP Law	<p>The PPP Law does not elaborate on the content of a PPP agreement in detail, but states that it shall be executed in a manner/procedure stipulated by the Government of the Kyrgyz Republic, which is yet to be defined. In addition, PPP agreements cannot be executed with private partner, if the latter receives only economic benefits and does not assume any obligations or risks in return.</p> <p>As of today there is no a model PPP agreement.</p>

##### 4.2 **Duration and extension of the Project Agreement**

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<sup>6</sup> For further information on the project agreement definition, please refer to: PFI Guide, Consolidated Legislative Recommendations, Recommendations 12 and 40 to 68 included.



QUESTION	ANSWER	ARTICLE	COMMENTARY
2. Does the Law provide that the duration of the Project Agreement should depend on the length of time taken for the amortisation of the Private Party's investment and an appropriate return on the capital?	× × ×	Article 1 of the PPP Law	The PPP Law is silent about the term of the agreement, but refers to it as a medium or long term cooperation.
3. Does the Law provide that the renewal or extension of the Project Agreement should be limited and depend on exceptional circumstances ( <i>such as Contracting Authority default or an event of force majeure</i> )?	× × ×	Article 10 of the PPP Law	The PPP Law is silent about the terms of renewal or extension of the PPP agreement, but, states that the terms and conditions with regard to its extension shall be stipulated in the PPP agreement.

For our general information, please provide the given minimum and maximum duration (if any) N/A

### 4.3 Termination of the Project Agreement

QUESTION	ANSWER	ARTICLE	COMMENTARY
4. Does the Law leaves open to the Project Agreement negotiations the list of possible ground for termination and the content of to the termination provision ?	✓ ✓ ✓	Article 10 of the PPP Law	The PPP Law is silent about the terms of termination of the PPP agreement, but, states that the terms and conditions with regard to its termination shall be stipulated in the PPP agreement.



<p>5. If the answer to the previous question is <i>No</i> does the Law provide for a list of grounds of termination which does not affect the balance between the parties rights and obligations (<i>one sided provisions</i>) or the stability of the contractual relation under the Project Agreement (e.g.: <i>too large or non exhaustive list</i>)?</p>	N/A		
<p>6. Does the Law provide for (<i>or at least does not prevent</i>) compensation of the Private Party for losses incurred as a result for termination on the grounds of public interest for losses incurred as a result of public authority acts?</p>	✓ ✓	Article 15 of the Civil Code	Not specified, however under the general provisions of the Civil Code the Private Party has a right to seek compensation for losses incurred as a result of public authority acts.
<p>7. Does the Law provide for (<i>or at least does not prevent</i>) compensation of the Private Party for all cases of early termination (<i>including in case of serious breach or failure by the Private Party</i>), for fair value after depreciation of the assets financed by the Private Party?</p>	✓ ✓	Articles 15, 305 of the Civil Code	Not specified, however under the general provisions of the Civil Code the Private Party has a right to seek compensation for early termination of the agreement and for fair value after depreciation of the assets financed by the Private Party in the case of termination.

#### 4.4 Tariff setting, service standards

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QUESTION	ANSWER	ARTICLE	COMMENTARY
8. Does the Law provide clear guidance on all aspects of interaction between the bodies that have the power to award PPP and the bodies that regulate tariffs and service standards?	XXX	Chapter VII (367 of the Procedure of Competitive Selection	The PPP Law does not provide any guidance on interaction between the bodies, however, according to the Procedure of Competitive Selection the tender documentations may include the marginal prices (tariffs) for produced goods, performed work, and rendered services, as well as markups to such prices (tariffs) for undertaking the activity stipulated in the PPP agreement.

#### 4.5 Financial responsibilities of the Private Party and Contracting Authority

QUESTION	ANSWER	ARTICLE	COMMENTARY
9. Does the Law provide that the Private Party can collect tariffs or fees for the use of the facility or its services?	XX		The PPP Law is silent about the right of the Private Party to collect tariffs or fees. See comments provided in 8 above.
10. Does the Law provide for the possibility of fixed and/or consumption-based payments to the Private Party by the Granting Authority or other public authorities ( <i>in the case of Power Purchase Agreement, shadow tool or PFI for instance</i> ) ?	XXX		



## 5. SECURITY AND SUPPORT ISSUES<sup>7</sup>

### 5.1 Security Interests

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Does the Law provide for ( <i>or does not specifically prevent</i> ) a Private Party to create security interests over the project assets, rights and proceeds or other valuable guarantees related to the project?	✓ ✓	Article 10 of the Law on Investments  Article 319 of the Civil Code	Neither allowed nor prohibited.  However, investors under the Law on Investments are entitled to attract finance into the Kyrgyz Republic through loans, securities and debt; and they may use their property, including proprietary and non-property rights to secure his/her obligations.  According to the Civil Code of the Kyrgyz Republic the performance of one's obligations can be secured by the following means, such as penalty, pledge, retention of a property, surety, guaranty, down payment and other means, stipulated by legislation and agreement.
2. If the answer to the previous question is <i>Yes</i> , does the Law clearly state which types of security can be provided and include some of the most common type of guarantees in project financing (such as those listed in the request for general information below)?	✓ ✓		Please see the comment above.

<sup>7</sup> For further information on support and financial securities, please refer to: PFI Guide, Consolidated Legislative Recommendations, Recommendations 13, 49, 57 and 60.



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**For our general information**, please can you confirm whether a Private Party may pledge or assign by way of security:

- *the proceeds and receivables arising out of the PPP;*
- *the assets for which it has rights of use under a project agreement;*
- *its property;*
- *shares of the Project Company;*
- *the project agreement; or*

*obtain other valuable guarantees (please specify)?*

Please see the comment above.

## 5.2 **Government support**

QUESTION	ANSWER	ARTICLE	COMMENTARY
3. Does the Law provide for ( <i>or does not specifically prevent</i> ) the public authority to provide support to the Contracting Authority and a guarantee for the proper implementation of the PPP by the Contracting Authority?	XXX		



<p>4. Does the Law provide for (<i>or does not specifically prevent</i>) the Public Authority to provide financial or economic support for the implementation of PPP?</p>	<p>✓ ✓</p>		<p>Neither specified nor prevented. Under PPP Law the Kyrgyz Government or the local state executive authorities may provide the following guarantees to the prospective private partner: (i) application of a special term of payment of customs fees and duties stipulated by the Customs Code and (ii) application of a special tax regime according to the Tax Code.</p> <p>In addition both the Kyrgyz Government and the local state executive authorities may provide other guarantees, provided that neither of them accepts any terms under the PPP agreement that may impose obligations on them that are inconsistent with the Kyrgyz laws on:</p> <ul style="list-style-type: none"> <li>- protection of law order and public safety;</li> <li>- ensuring safety of the state;</li> <li>- land, minerals resources and environmental protection;</li> <li>- protection of health of population;</li> <li>- sanitary and epidemiological welfare of the population;</li> <li>- security, mobilization training and mobilization base.</li> </ul>
<p>5. If the answer to the previous question is <i>Yes</i>, does the Law clearly state which public authorities may provide such support and which types of support can be provided? (i.e. <i>tax and customs benefits; foreign exchange protection (convertibility and transfer guarantees; subsidies; equity or loan participation)</i>)?</p>	<p>✓ ✓</p>		<p>Please see the comments above.</p>





### 5.3 Lenders' rights

QUESTION	ANSWER	ARTICLE	COMMENTARY
6. Does the Law provide for the Parties to arrange the financing with reasonable flexibility under the Project Agreement without strict time constraints or other constraints ( <i>except with respect to security package and government support</i> )?	✓ ✓	Article 382, Section IV of the Civil Code	Not specified, however the general provisions of the Civil Code provide the Parties with a right to arrange flexible financing.
7. Does the Law provide, in the event of the default of the Private Party for the lenders to “ <i>step-in</i> ” or substitute the Private Party with a qualified new Private Party without initiating a new tender process?	✓ ✓	Article 382, Section IV of the Civil Code	Not specified, however the general provisions of the Civil Code provide the Parties with a right to stipulate such conditions in the agreement.



## 6. SETTLEMENT OF DISPUTES AND APPLICABLE LAWS<sup>8</sup>

### 6.1 Settlement of disputes

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Does the Law permit the Contracting Authority to enter into a Project Agreement that is subject to international arbitration?	✓ ✓ ✓	Article 11 of the PPP Law	
2. Has the government of the country ratified the Washington Convention on the Settlement of Investment Disputes (ICSID) (1965)?	✓ ✓ ✓		
3. Has the government of the country ratified the New York Convention on recognition and enforcement of foreign arbitral awards (1958)?	✓ ✓ ✓		

<sup>8</sup> For further information on the settlement of disputes, please refer to: PFI Guide, Consolidated legislative Recommendations, Recommendations 57, 69 and 71.



## 6.2 Applicable laws

QUESTION	ANSWER	ARTICLE	COMMENTARY
4. Does the Law permit ( <i>or does not prevent</i> ) the Contracting Authority) to enter into side agreements to the Project Agreement (such as <i>a direct agreement with the lenders to the project or a support and guarantee agreement in respect of the Project Agreement</i> ) that is governed by foreign law.	✓ ✓		Not specified. Not prevented by law.
5. Has the country ratified any international convention for the protection of foreign investments?	✓ ✓		<ul style="list-style-type: none"> <li>– Convention on Legal Support and Legal Relations between the CIS Countries on Civil, Matrimonial, and Criminal cases of 22 January 1993, ratified by the Kyrgyz Republic in 1995. In 2004 the Kyrgyz Republic also ratified the Convention on Legal Support and Legal Relations on Civil, Matrimonial and Criminal Cases of 7 October 2002;<sup>9</sup></li> <li>– A number of bilateral agreements on mutual legal support with Azerbaijan, Iran, India, China, Latvia, Mongolia, Russia, Kazakhstan, Uzbekistan, and other nations.</li> </ul> <p>Currently the Kyrgyz Republic recognizes and enforces:</p>

<sup>9</sup> The 2002 Convention has superseded the 1993 Convention. However, the 1993 Convention continues to apply to the relations between the Kyrgyz Republic and a member state to this Convention, if the 2002 Convention has not been given effect to the latter.

### Checklist **Kyrgyz Republic**



			<ul style="list-style-type: none"> <li>– Decisions of other countries’ arbitration courts established under the arbitration rules of the UN Commission for International Trade Law (UNCITRAL);</li> <li>– Decisions of the courts of Armenia, Belarus, Kazakhstan, Latvia, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan on civil, matrimonial, and criminal cases;</li> <li>– Decisions of the arbitration, economic and business courts of Azerbaijan, Moldova, Kazakhstan, Russia, and Tajikistan.</li> </ul>
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## II- EFFECTIVENESS ASSESSMENT: HOW THE LAW WORKS IN PRACTICE:

(Please comment based on the previous 2006 effectiveness general assessment)

### 7. POLICY FRAMEWORK

#### 7.1 Existence of PPP Policy Framework

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Is there a general/national policy framework (explicit or implicit) for PPPs for infrastructure or public services?	XX		The Medium Term Development Program of the Kyrgyz Republic adopted by the Government on September 8, 2011 contains a number of general provisions on development PPP legislation and implementation of PPPs.
2. Is there any administrative guidance or printed information edited by the government or the PPP Unit concerning the legal framework for PPP projects in the country?	XXX		
3. Is there a municipal/regional policy framework (explicit or implicit) for PPPs in infrastructure or public services?	XXX		

#### 7.2 PPP Awareness and Sustainability

### Checklist **Kyrgyz Republic**



4. Is there a national and/or municipal /regional long term programme for PPP promotion and awareness?	×××		
5. Are there PPP training programmes on a national and/or municipal/regional level for public servants and other PPP concerned people?	×××		
6. Are there PPP courses as part of university curriculum or specialist departments and faculties in universities teaching PPP?	×××		



### 7.3 Obstacle to implementation of PPP Policy

<p>7. Are you of the opinion that there are no social/political obstacles to implementing PPP in the country (e.g. grass roots opposition, policy measures against private sector participation in public infrastructure/services, etc.)?</p>	<p>✓ ✓</p>		<p>Currently a number of state bodies, ministries, parliamentarians highly support the development of PPPs in the Kyrgyz Republic. However, citizens' low level of awareness about PPP mechanisms, no PPP Policy development, lack of knowledge of state officials in the area of PPP (identifying of PPP projects, selection of private partner, execution of PPP agreement, etc) can be considered as one of the social obstacles in launching PPPs in the country.</p>
<p>8. Are you of the opinion that there are no legal obstacles to implementing PPP in the country (e.g. non-publication of a decree provided under the Law and necessary for such law to become effective, etc.)?</p>	<p>✓ ✓</p>		<p>In general, the current legislation allows implementation of PPP projects however it has a number of deficiencies that make launching PPP projects impossible. The current PPP Law fails to meet a number of key international principles in terms of project identification, coordination of state authorities, selection of private partner, awarding project agreement, etc.</p>



For our general information, please describe the existing impediment and obstacles if any with respect to the two previous questions

## 8. INSTITUTIONAL FRAMEWORK

### 8.1 Existence and role of PPP Central Units/Agency

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Is there a specialised institution/agency/ministerial department established to promote PPP and to serve as Central PPP Unit?	XX		Although the Ministry of Economic Regulation has created a PPP and Investment Promotion Department it does not function as Central PPP Unit. In fact, the Department is run by one person.
2. Is such Central PPP Unit composed mainly of specialists recruited from the business community and not exclusively composed of civil servants coming from different public ministries?	XXX		The PPP and Investment Promotion Department under the Ministry of Economic Regulation composed of civil servants.
3. Is the role of such Central PPP Unit comparable to a "task force" assisting in the development of projects in general and not limited to promotion of PPP?	XXX		
4. Is the consent or recommendation of such	XXX		



Central PPP Unit necessary for the development and granting of most PPP projects ( <i>except small or local PPP</i> )?			
5. Is one of the roles of the Central PPP Unit to assist in building capacity namely of the public sector with respect to PPP?	××		

*For our general information, please name such establishment and specify its place in public hierarchy, format and key functions (regulatory, operational, know how collecting, etc. or a combination thereof).*

## 8.2 Other institutions concerned by PPP

6. Is there any PPP unit/agency or department of the Central PPP unit either at the municipal or regional level?	×××		
7. Is there any specific PPP unit department in any ministry (other than the central PPP unit) or at sectoral level?	×××		
8. Is there either a specific "one stop shop" for PPP authorisations and formalities or a "one stop shop" which services are available to the sponsors of PPP project as well as other	×××		



investors?			
9. Is the division of power between different public authorities involved in the PPP granting process simple and coordinated?	XXX		

## 9. PPP LAW ENFORCEMENT

### 9.1 Effectiveness of PPP enforcement and compliance with the Law

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Have any PPP projects in any form ever been awarded in the country on the basis of the Law discussed above ? ( <i>with or without specific reference to the Law</i> )	XXX		
2. Have such PPP projects, if any, been awarded generally following a transparent competitive selection procedure ( <i>and only through direct negotiation under exceptional legal circumstances as may be provided by the Law</i> )?	N/A		
3. Have any PPP projects or similar long term	N/A		

## Checklist Kyrgyz Republic



agreements ( <i>falling under the definition of PPP under this questionnaire</i> ) been awarded on any legal basis different from the Law since the Law has been in force?			
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*For our general information, please give example of legal instruments, or reasons used, to bypass the Law and establish a PPP.*

## 9.2 Statistics on PPP implementation under the Law

4. Have most of the awarded PPP projects been successfully implemented and put into operation in compliance with the Law?	N/A		
5. Has a PPP project ever been awarded and implemented in the country at the local /regional /municipal level in compliance with the Law?	N/A		
6. Have PPP project ever been awarded in the country in the non merchant sector ( <i>such as Hospital, School, prisons</i> ) and not exclusively in the merchant sector ( <i>energy, water, transport</i> )?	N/A		



**For our general information:**

- Approximately how many PPP projects are presently in operation (figure or order of magnitude) in the country and in what sectors have PPP projects been awarded (energy, water, education, health for example)? N/A
- Please give some examples of the most significant project awarded: N/A
  - under which legal form have such PPP projects been awarded (Concession, BOT, PFI, other):
  - have such PPP project been granted by (i) central, (ii) sub-sovereign/regional (if applicable) or (iii) municipal government as Contracting Authority;
- when did PPP begin to be awarded in the country: (i) in the last 10 years or before; (ii) in the last 5 years; or (iii) within the past few years only; and N/A
- *please give examples of any PPP projects awarded but not implemented (or not implemented under a PPP form)*
- are there any PPP/Project Agreements in discussion? N/A

**9.3 Challenge of PPP**

<p>7. Are you of the opinion that there is a reasonable chance for an unsuccessful bidder to successfully challenge in the country a PPP awarded under conditions contrary to the Law?</p>	<p>XX</p>		<p>Impossible to opine due to lack of practice.</p>
<p>8. If the answer to the previous question is <i>Yes</i>, are you of the opinion that there is a reasonable chance for the plaintiff to get some compensation or for such action to result in the</p>	<p>N/A</p>		<p>Please see the comment above.</p>



cancellation of the award?			
9. Have PPP project been implemented by the parties most generally without serious claims/arbitration by either Party concerning the performance of the Project Agreements under the Law?	N/A		There is no PPP experience in the country.
10. If any Project Agreement has been terminated prior to the end of the contractual period by the Contracting Authority, has fair compensation been paid to the Private Party in compliance with the Law?	N/A/		There is no PPP experience in the country.

**For our general information**, can you provide any examples of a successful legal challenge in the courts or otherwise of a PPP award in the country based on the PPP Law? Please describe the matter and, if known, the outcome of such matter. N/A