

**EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT**

**CONCESSION/ PPP LAWS ASSESSMENT 2011**

**COVER ANALYSIS REPORT**

**FINAL REPORT  
MAY 2012**

## ***PROVISIONAL REPORT***

The purpose of this report (the "**Report**") is to present and analyse the 2011 Concession Law and public private partnership ("**PPP**") legal framework assessment results (the "**2011 Assessment**"), as well as the evolution of such assessments from the past concession law assessments. The Report will be set forth in the following order of analysis: (i) firstly, a presentation of the project components, background and methodology (Section 1); (ii) secondly, the results of the assessment process, presented by core area and by country (Section 2); and (iii) thirdly, a discussion of the evolution and trends identified during the assessment process (Section 3).

*All defined terms shall have the meaning given to them in the section entitled "Terminology used" unless otherwise defined herein.*

### **1. SECTION I -PRESENTATION OF THE PROJECT COMPONENTS, BACKGROUND AND METHODOLOGY**

#### **1.1 Introduction**

Enabling fair and transparent concession legislation is vital to the development of a market economy and as such this sector is recognised by the EBRD as a "Core Area of its Legal Transition Program". Concession legislation sets the framework for overcoming limitations of public budget for infrastructure building by making use of the resources of the private sector, including financing and know-how. Many of the EBRD countries of operations have major deficiencies in their concession framework and this often acts as a barrier to investment and further economic development.

#### **1.2 2011 Concession Law Assessment project**

The 2011 Assessment is part of the EBRD Legal Transition Team's (the "**LTT**") efforts to improve the legal environment in its countries of operations. The LTT's ultimate objectives are to encourage and provide guidance to policy and law makers while developing the concessions and PPP related legal reform in the region. The 2011 Assessment analyses the concession legislation in each of the EBRD countries of operations and will benchmark it to international best practice, including UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, European Union concession *acquis* and related materials, and others. The results will serve as an important tool to measure the investor's risk in each country and it will also identify reform needs and possible technical assistance.

This 2011 Assessment combines the two approaches of law assessment that LTT has undertaken in previous years: studying (i) extensiveness of sector-related laws (which refers to the laws on the books) and (ii) effectiveness (which analyses the way the laws actually work in practice). This 2011 Assessment is contemplated as an upgrade to the 2008 Concession Law Assessment and as such it applies a similar, and thus compatible, methodology in order to measure each country's progress in improving their concession legislation compared to international best practice. At the same time, the 2011 Assessment will take account of the methodology of the latest Legal Indicators Survey (LIS 2006), which assessed the way concession laws work in practice by studying actual case scenarios and analysing practical issues that come up in the application of the laws.



### 1.3 Scope of work

To perform successfully the work on the 2011 Assessment (the "**Project**"), the Consultant has had to complete in particular the following tasks:

- (a) research, identify and gather up-to-date materials necessary for the 2011 Assessment, including, *inter alia*, texts of concession laws for the EBRD countries of operations and of the relevant best international standards and principles (including recently published best practice materials in both civil and common law countries);
- (b) 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 2011 Assessment are up-to-date and complete. The list of the selected law firm and lawyers involved for each countries is attached as Exhibit 1.<sup>1</sup> ;
- (c) based on the research undertaken, personal knowledge and expertise, to review, adjust and refine the 2007/2008 Concession Law Assessment methodology and the Concession Checklist, in particular;
- (d) based on the research undertaken, personal knowledge and expertise, to review, adjust and refine the 2006 LIS methodology, including the corresponding preliminary questionnaire, in order to collect information about the way in which a particular concession legal and institutional framework functions in practice;
- (e) present to the OL a comprehensible Methodology Memorandum that would incorporate, *inter alia*:
  - (i) the methodology from 2007/2008 Concession Law Assessment and the 2006 LIS, updated and revised as necessary with a view to making the 2011 Assessment consistent and compatible with previous assessment work on the sector and sufficient in its own right to produce complete and informative conclusions, both on the effectiveness and on the extensiveness of the concession laws in each EBRD country of operations;
  - (ii) 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, policies and institutional framework related to concessions in all EBRD's countries of operations;
- (g) tabulate the results for each country assessed in an accessible database available for future use by the Bank; and
- (h) compile the results of the 2011 Assessment and present them in a comprehensive Final Report that should, at the very least, include a general section describing the update on the international best standards and practice regarding concession legislation, the assessment methodology, a

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<sup>1</sup> EBRD and Gide Loyrette Nouel express their sincere thanks and gratitude to all the selected law firms and lawyers involved for their extremely valuable contribution to this Assessment with their own legal expertise and personal experience in the field of PPP and concession of their respective countries.

cross-country overview, a detailed analysis of each country, individual country and comparative charts and general conclusions.

It is further to be noted that the scope of the 2011- 2012 Assessment has extended to include a wider spectrum of PPP arrangements is the focus area compared to just Concessions in previous assessment to reflect the current trend toward diversification of Public Private Arrangement in addition to the traditional concession model as further described under Section IV "Evolution and trend".

For the first time also the countries of the southern and eastern Mediterranean (SEMED) region which became recently members of EBRD (Jordan, Egypt, Tunisia, Morocco) have been assessed.

It was further provided for in the terms of reference that, by way of a trial, three (3) countries with preferably different levels of PPP practice development will be selected within this Project for a more detailed assessment, involving, as necessary, a visit for interviews of, and meetings with, key players within their PPP sector. It has been determined that the three (3) countries selected for such an assessment are Russia, Bulgaria and Morocco and the summary of the interviews will appear as Exhibit 4 to this report .

The Laws approved after 31.12.2011 were not evaluated for the purposes of this Assessment.

The summary of the results of such evaluation constitute Exhibit 2 to this Report and the detailed Checklist are attached as Exhibit 3..

#### **1.4 Team**

The proposed team for the Project includes Alexei Zverev, the OL, and Vesselina Haralampieva from EBRD.

In the role of the Consultant, a team from Gide Loyrette Nouel was selected, led by Bruno de Cazalet, senior counsel, with the involvement of Gide Loyrette Nouel offices in France, Russia, Hungary, Poland, Romania, Ukraine, Turkey, Tunisia and Morocco and aided by the assistance of local law firms in other countries, a list of which is attached hereto as Exhibit 1 and deserve much gratitude for their pro bono excellent contribution in most cases.

#### **1.5 The "Checklist": Explanation of the main differences between 2007/2008 Legal Assessment and LIS 2006**

It was firstly determined to regroup the two questionnaires to present an overall picture of: (i) the existing legal statutory framework (Part I); and (ii) the effectiveness of the law, the way it is implemented and the result achieved thus far (Part II). All questions are, as previously, drafted in such a way that a positive answer to any question is considered as a positive sign of compliance with best practices.

As a consequence of this restructuring of the Checklist the Core area N°1 of the former Assessment of the law concerning the "Policy framework", and including the Institutional framework, were transferred to the second part of the questionnaire, as it has been considered that PPP policy, and the institutional framework with respect to the means to be put in place in order to implement PPP policy, belong more to the effectiveness part of the assessment than to the first part of the assessment which concentrates on the content of the law itself.



## **1.6 Part I - Compliance of the legal framework with best international practices:**

- Core area N°1- "**PPP Legal Framework**" of the new Checklist, which deals with the compliance of the law, and as an introduction core area the new Checklist concentrates on the "PPP Legal Framework" and on the existence of specific PPP law or a comprehensive set of laws regulating concessions and other forms of PPP, allowing a workable PPP legal framework. Few more precise questions on the form of PPP and the related existing legal framework have been introduced. In particular, we would note that a distinction has been made between the traditional form of concession or delegated management of the public service itself, the build operate transfer (BOT) type of project financing and its multiple derivative forms such as BOOT, BOO and others, the Private Finance Initiative (PFI) type of partnership agreement or the construction of public facilities and the services to such facilities, and not directly to the public, and finally Institutional PPP under the form of joint venture or mixed companies.
- Core area N°2- "**Definitions and Scope of the Law**" which deals with the 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 parties), limiting the risk of a challenge to the validity of PPP contracts, irrespective of whether the act is specifically targeted at PPP;
- Core area N°3- "**Selection of the Private Party**" deals with the mandatory application of a fair and transparent tender selection process, with limited exceptions, allowing direct negotiations, the application of competitive rules for unsolicited proposals and the possibility to challenge illegal awards;
- Core area N°4- "**Project Agreement**" which intends to measure the 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);
- Core area N°5- "**Security and Support Issues**" which concentrates on the 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 fulfillment of its obligations; and
- Core area N° 6- "**Settlement of Disputes and Applicable Laws**" which evaluates the possibility of obtaining a proper remedy for breach under the applicable law, through international arbitration and enforcement of arbitral awards.

Each Core area N°2 to 6 have remained largely unchanged, including very similar questions to those used in the previous 2007/2008 Checklist, but with clarification, where needed, to allow for a comparison against the previous assessments.



## **1.7 Part II - Effectiveness and the application of the legal framework work in practice:**

Instead of the development of a new case law or simply updating the one used in respect of the latest Legal Indicators Survey (LIS 2006), the approach taken was to develop a questionnaire which included the following three core areas:

- Core area N°7- "**Policy Framework**", which evaluates the existence and the extent of a PPP policy framework at the State and local level;
- Core area N°8- "**Institutional Framework** ", which evaluates the existence of a PPP institutional framework, and in this case in more detail than previously evaluated; and
- Core area N°9- "**PPP Law Enforcement**" which examined the effective statistical implementation of PPP project and if such projects have been awarded and implemented in compliance with the Law.

This new approach of evaluating the effectiveness of the law through a questionnaire is intended to be more objective than case law/ precedent but nevertheless remains necessarily subjective in the evaluation of certain questions by local professional lawyers, by way of example, they will have real experience upon which to determine the likely chance of success of challenging a decision in court, which will of course depend on the legal, social and political environment of the relevant country, and for which no statistics are available, even in the most developed countries.

## **1.8 Terminology used**

In order to keep the responses set out herein consistent and to avoid ambiguity, a terminology section has been set forth below with brief definitions of certain terms used in this questionnaire. Any definition is provided solely to clarify the terminology used in this document and thus the reader should note that any such definition does not correspond with any given definition for such term under best international practice (which does not provide for standardised PPP legal definitions which are recognised worldwide) and neither should it be considered that we recommend the adoption of such definitions under actual documentation; they are included solely in the interests of clarity for the completion of this questionnaire, and we would be grateful if you could adopt such definitions for the purposes of completing the questionnaire.

### **1.8.1 Public-Private Partnership**

"**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.

### **1.8.2 Public-Private Partnership Agreements**

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 on 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 (and any such possible combination shall, for the purpose of this questionnaire, be hereafter referred to as BOT for simplification purposes, 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 aims 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 undertakes the financing and the construction of an infrastructure project and after its completion transfers 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 on an agreed schedule with the payment starting from the date of commencement of operation and payment made for the services rendered to the facility on a performance basis.

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

### **1.8.3 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 to enter into Project Agreements.

**"PFI Law"**: a law regulating a PFI forms of PPP.

**"PPP unit"**: specialised institution/agency/ministerial department established to promote and take care of PPP.

**"Private Party"**: a private party or other entity in the form of a special purpose company to which a Project Agreement in general has been awarded. [NB: The word Private Party will be used for the sake of this study even in those cases where the PPP regulation allows a PPP business partner to be a mixed 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.

#### **1.8.4 Updated references to best practice**

With respect to the necessary benchmarking with best international practices, the following major documents have been taken into account and principally the "PFI Guide", as hereinafter described:

- 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 on the application of Community law on Public Procurement and Concessions to institutionalised PPP (IPPP) [2008/C 91/02]; This Assessment does not take into account the proposals of the European Commission published on 20 December 2011 for new procurement directives to replace the current directives on public and utilities nor the proposal for a directive on the award of concession contracts (partnerships between the public sector and mostly private companies, where the latter exclusively operate, maintain and carry out the development of infrastructure (e.g. ports, water distribution, parking garages, toll roads) or



provide services of general economic interest (e.g. energy, water and waste disposal) as such documents came too late in the Assessment process and are not yet in force.

- 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.

**1.8.5 Rating Methodology**

**1.8.5.1** Key for assessment of Each Question

In order for the answers to be clear, visible and uniform, the following symbols, keys and point system were applied in the 2011 Assessment:

✓ ✓ ✓	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

The above symbols and keys are consistent with those used in the EBRD Secured Transactions Regional Survey and past concession assessment, the only difference is that for the questions "Not Applicable"(N/A), the total possible mark has been reduced by three (3) points. The same symbols apply for Compliance and for Effectiveness.

**1.8.5.2 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

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.



### **1.8.5.3 Non Weighting of Questions and Core Areas; non Weighting of Compliance/ Effectiveness**

It was decided to neither weight the questions nor to weight the Core Areas (i.e. to consider that every question and Core Area is of equal importance). The same principle was applied as between Compliance and Effectiveness, and it was further decided to give, in the OVERALL RATING, the same weight to both and the total is therefore the average percentage between the two areas.

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, which is why the Overall Assessment of the Law refers to the existence of such difficulty, where applicable.

## **1.9 The implementation of the Project**

### **1.9.1 Implementation arrangements for the Assessments**

The 2011 Assessment has been conducted under the close supervision of the EBRD team and, in particular, its Operation Leader (the OL). The Consultant has reported regularly to the OL on the progress of the work. The OL has provided guidance on the main features of the 2011 Assessment, particularly with respect to the expected structure, methodology and deliverables. The OL has further provided the Consultant with certain available research materials (including the laws for some countries), the report of the previous assessments and has assisted the Consultant in identifying local law firms in each country with recognized concession and PPP expertise able to provide the envisaged pro bono advice, as appropriate. The list of the selected law firms in each country which have contributed to the assessment is attached as Exhibit 1.

The Local Experts in charge of each country have been consulted for the elaboration of the initial responses to the Checklist question in their capacity of well recognized established law firm in their respective 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 and in order to ensure better objectivity for country.

The 2011 Assessment started in July 2011, following the award of the Consultancy Contract N° C22302 (through competitive bidding) to Gide Loyrette Nouel. A thorough documentation and information collection process was performed during the third quarter of 2011 and January, in parallel with the finalisation of the update of the Concession new Checklist in collaboration with EBRD. It is to be noted that unlike the past assessments, and with very few exceptions, English translations of the laws have been made available, or could be found on the internet.

Based on the reviewed legislation, translations and responses to the questions and information collected from local experts, the Consultant reviewed the Checklist filed by local experts based on the available applicable laws or prepared Initial Assessments of Part I of the concession/PPP laws, which was provided to local experts for verification and completion of Part II. Local experts were in all cases required to pay particular attention to the questions directly related to the effectiveness of the law (Part II), for which their



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professional experience and knowledge of the country was absolutely necessary, but in some cases information from other relevant sources has had to be used to ensure objectivity of the responses.

The local experts in charge of each country were consulted for the elaboration of the responses to the Checklist in their capacity as a well recognised and established law firm in their relevant country, but the local experts as well as EBRD are in no way responsible for the final responses given to any questions in this Checklist, as the Consultant was free to use any other sources of information for reaching a final determination.

Initial assessments were conducted between October 2011 and December 2011, with a few exceptions resulting from difficulties in the selection of local experts or the late transmission of information by local experts. The majority of the verified final Checklists were received by December 2011. The results of the 2011 Assessment are valid as at January 1<sup>st</sup> 2012.

### **1.9.2 Implementation arrangements for the interviews**

For the three (3) selected countries, the visit to those countries took place after the completion of the corresponding checklist for such country, with the assistance of the local lawyers involved.

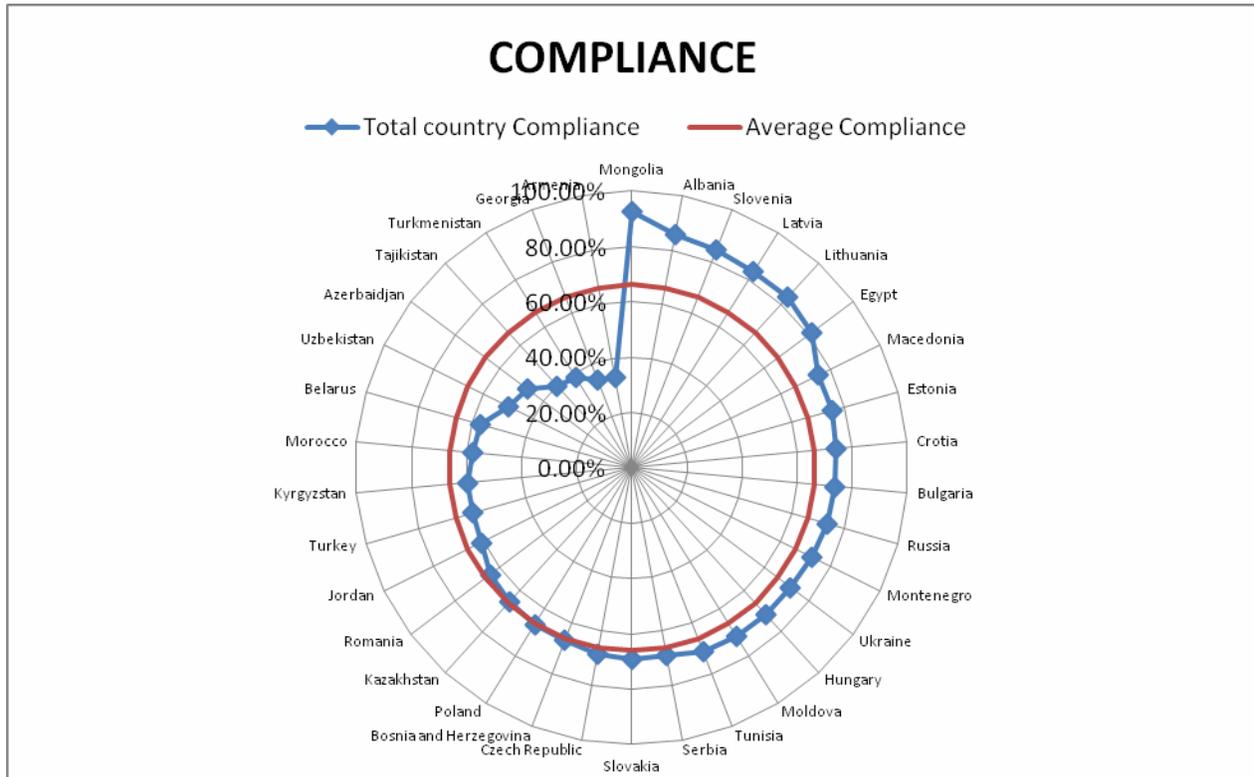
The concessions and PPP specialists or the persons in charge in the governments of concession and PPP matters were identified and a meeting was organized with the participation of the OL as team leader for the interviews.

A list of all persons met in each selected country and the minutes of such meetings and interviews are attached hereto as Exhibit 2.



## 2. SECTION 2: GENERAL RESULTS OF THE ASSESSMENT

### 2.1 Part I: Compliance



The average compliance status for all relevant countries falls between "High compliance" and "Medium compliance", with the larger category now being "highly compliant" (seventeen (17) countries).

The average compliance status in the 2007- 2008 assessment was clearly within the "Medium compliance" range and the average in the first 2004 assessment was "Low compliance", which demonstrates the progress made in recent years, with only one country with very high compliance (Mongolia) and no country with very low compliance.

There are however still seven (7) countries with low compliance, which suggests that there is still room for improvement of legal framework for PPP in these countries. We would note that these seven (7) countries are mainly countries with no specific Concession or PPP laws. However among these countries at least two (2) (Belarus and Tajikistan) are presently working with international organizations on constructing a draft PPP law.

It is also worth to notice that among the seventeen (17) highly compliant countries, most have recently adopted a new concession or PPP law.



Very High Compliance	High Compliance	Medium Compliance	Low Compliance	Very Low Compliance
MONGOLIA	ALBANIA BULGARIA CROATIA EGYPT ESTONIA HUNGARY LITHUANIA LATVIA MOLDOVA MONTENEGRO RUSSIA SERBIA SLOVAKIA SLOVENIA TUNISIA UKRAINE	BOSNIA AND HERZEGOVINA CZECH REPUBLIC JORDAN MACEDONIA MOROCCO POLAND KAZAKSTAN KYRGYZSTAN ROMANIA TURKEY	ARMENIA AZERBIJAN BELARUS GEORGIA TAJKISTAN TURKMENISTAN UZBEKISTAN	

Looking in more detail as the results for each core area, it can be noted as follows:

**2.1.1 PPP Legal Framework:**

*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*

Only seven (7) countries are below a medium range status and those seven (7) correspond largely to those countries which do not have specific PPP or Concession law.

**2.1.2 Definitions and Scope of the Law:**

*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.*

Very few countries have a definition problem as even in the event that the relevant country has no Concession or PPP law the definition of concession can be found in their Civil Code or in their Investment Code.

**2.1.3 Selection of the Private Party**

*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.*



For nearly all PPP and Concession law a transparent tender procedure is provided, with limited exceptions and with, in most cases, the possibility for parties to challenge the awards. However the ability to actually challenge an award in the normal courts is often not very effective, as illustrated in Part II.

#### **2.1.4 Project Agreement**

*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).*

This core area appears not to be a problem for most of the countries which have adopted a recent Concession or PPP law.

#### **2.1.5 Security and Support Issues**

*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 fulfillment of its obligations.*

As shown in the Checklist attached as Exhibit 3 seventeen (17) countries are below the medium range status, which demonstrated that serious improvement is required to this core area with respect to the security instruments available and the possibility of government support, which is necessary for the private financing of public infrastructure or service projects. Very few countries have a law which provides for "step in" rights for lenders or for direct agreements between the lenders and the Granting authority, which are considered standards provisions in project financing, without which it will be difficult, if not impossible, to arrange for the financing of a project.

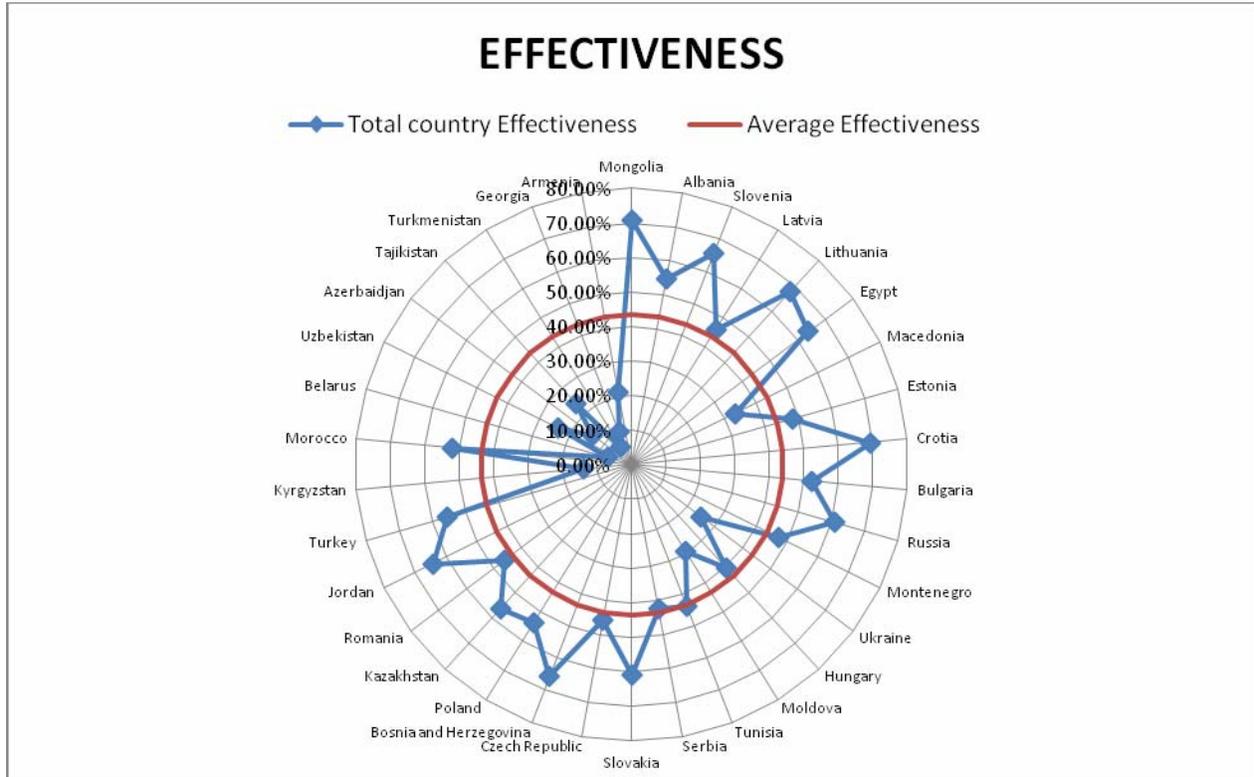
#### **2.1.6 Settlement of Disputes and Applicable Laws**

*Possibility to obtain proper remedy for breach under the applicable law through international arbitration and enforcement of arbitral awards.*

This core area does not appear to be a serious problem as all countries, with one exception, appear to be above the medium range status, but it has to be taken into account that some of the questions in this core area, such as the possibility of foreign arbitration, appear to be deal breaker issues, without which no Concession or PPP could be financed in these countries.

The absence of ratifications of the New York Convention on the recognition and enforcement of foreign arbitral awards (1958) and/or of the Washington ICSID Convention on the Settlement of Investment Disputes (ICSID) (1965), is not a good signal to the international business community and multilateral financing institutions ( and this absence still applies to each of Poland, Belarus and Tajikistan.).

## **2.2 Part II: Effectiveness**



As a consequence of the recent legislative changes in numerous countries it is challenging for these countries to evaluate the effectiveness of the laws which have just entered into force and to provide substantial and reliable statistics and opinions as to project implementation. With respect to the "Effectiveness", how the law works in practice, the average country status appears to be much lower than for "Compliance" and for all relevant countries the scores fall between "Low effectiveness" and "Medium effectiveness" with three (3) notably large categories applying: Very low (8), Low (10) and Medium (10). Only three (3) countries were rated with High effectiveness and no country with Very high effectiveness.

We have presented the above spider graph for Effectiveness according to the same order used for Compliance and we can note that there is some relationship between the compliance of the legal framework and its effectiveness in a number of countries and in particular in the less compliant countries which also not well placed with respect to Effectiveness.

It is further significant to note that, compared to the Compliance schedule of Part I, numerous countries have been downgrade by two (2) categories and even one (1) by three (3) categories, and no one country has a better Effectiveness score than its Compliance score.

One of the explanation for such a gap in scores is certainly the effect of the recent improvement trend in the legal framework for PPP/ Concessions, which has not always been followed by the proper or corresponding implementation of local government policy towards the development of PPP and Concessions and furthermore has been effected without the putting in place of specialised PPP institutions. In addition, such improvements are very recent and it is thus understandable that it cannot yet be translated into experience of project implementation and better statistics in respect of project completion. As a result of the non effectiveness of their legal PPP/Concession framework, it is likely that many



countries have decided to improve their laws, or sometimes it has been prompted at the initiative of international institutions, without any real governmental will or initiative to translate the new laws into reality. Another possible explanation is also that the statutory laws are not all that are required for the selection of PPP projects and thus only constitute an enabling legal framework, with other factors such as country risk as well as the business environment and governance, being a determining factor in respect of the appetite of sponsors and lenders for long term PPP/Concession investment in any specific country.

**It should be worthwhile for** the next EBRD Concession/PPP law assessment will probably determine whether or not the improvement of the legal environment in any specific country has resulted in a significant increase of PPP / Concession project completion, as was the case in many western European countries just a few years after the enactment of their PPP laws.

Very High Effectiveness	High Effectiveness	Medium Effectiveness	Low Effectiveness	Very Low Effectiveness
	ALBANIA  MONGOLIA	BOSNIA AND HERZEGOVINA BULGARIA CROATIA EGYPT JORDAN MOROCCO POLAND RUSSIA SLOVAKIA SLOVENIA TURKEY	CZECH REPUBLIC ESTONIA HUNGARY LATVIA LITHUANIA MONTENEGRO ROMANIA SERBIA TUNISIA	ARMENIA AZERBIJAN BELARUS GEORGIA KYRGYZSTAN MOLDOVA TAJIKISTAN TURKMENISTA N UKRAINE UZBEKISTAN

Looking in more detail at the results for each core area, it can be noted as follows:

**2.2.1.1 Policy Framework**

*Existence of a policy framework for public private partnership*

The lack of proper policy framework affects twenty (20) states which are below the Medium range for this core area. It affects many States where a new compliant legislation has been recently enacted but for which the government has not yet adopted a proactive policy toward the private financing of public infrastructure or services but has nevertheless put in place an enabling legislation creating a proper instrument to legally implement a Concession or a PPP, but without the necessary State support there is little chance that numerous PPP projects will occur and the effectiveness of the law will therefore be limited to exceptional projects which, for whatever reason, will gain the support of the government.

**2.2.1.2 Institutional Framework**

*Existence of an institutional framework for public private partnership*

The lack of a proper institutional framework is even more evident in the 2011 Assessment, with twenty seven (27) countries all falling below the Medium range, and with some having no specific institutional



framework for PPP and Concessions at all. This first statistic reflects of the lack of PPP policy, as obviously where a state has a proper PPP policy with a modern PPP law the creation of the PPP unit is just a matter of time, as it will be necessary to implement the policy and to make the law effective.

In other cases, the results just the reflect of the absence of a real PPP policy for the promotion of PPP, even if following the recommendation of any international institution or as a matter of legal fashion they have adopted a PPP law which seeks to follow best international practice.

### **2.2.1.3 PPP Law Enforcement**

#### *Award and implementation of PPP projects in compliance with the law*

Without a compliant law, and in the absence of a proper PPP policy and institutional framework, there is little chance that that many projects take place as reflected by the statistics. Only Uzbekistan seems to be an exception. Much to the contrary a compliant law with at least an active PPP Policy or a dedicated institutional framework always appears to provide a good result in respect of enforcement. We would note a number of exceptions where PPP has developed with only an acceptable legal framework but without a clear PPP policy and in addition in the absence of a dedicated institution, such as in Albania, Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Montenegro, Poland, Romania, Russia and Turkey.

### **2.1.3 OVERALL ASSESSMENT: Compliance + Effectiveness**

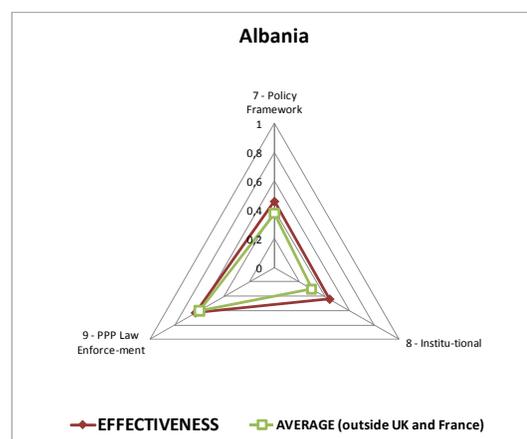
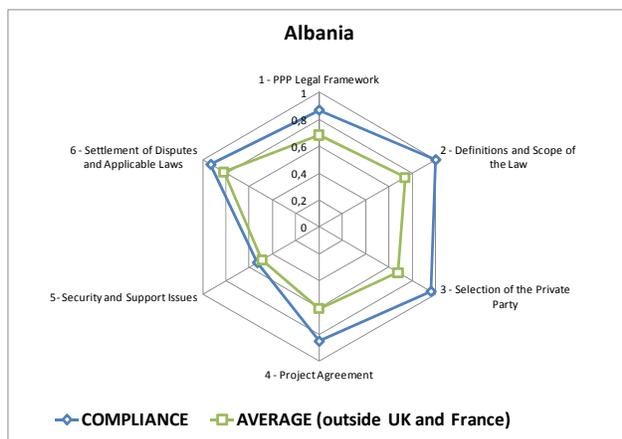
The schedule incorporating the overall rating, which is just the average between Compliance and Effectiveness and reflects the downgrading resulting from the lower ratings for Effectiveness compared to the Compliance of the law. As a consequence, a majority of countries will have an overall assessment rating in the Medium category, with only six (6) countries deserving a higher rate and six (6) countries a lower rate.



Very High Compliance/ Effectiveness	High Compliance/ Effectiveness	Medium Compliance/ Effectiveness	Low Compliance/ Effectiveness	Very Low Compliance / Effectiveness
	<p>ALBANIA CROATIA EGYPT LITHUANIA MONGOLIA SLOVENIA</p>	<p>BOSNIA AND HERZEGOVINA BULGARIA ESTONIA CZECH REPUBLIC HUNGARY JORDAN KYRGYZSTAN LATVIA POLAND ROMANIA MOLDOVA MONTENEGRO MOROCCO RUSSIA SERBIA SLOVAKIA TUNISIA TURKEY</p>	<p>AZERBIJAN BELARUS TAJIKISTAN UKRAINE UZBEKISTAN</p>	<p>ARMENIA GEORGIA TURKMENISTAN</p>

### 3. SECTION 3 - ASSESSMENT BY COUNTRY

#### 3.1 ALBANIA - (High compliance /High Effectiveness)



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 remuneration considerations. It

also requires a value for money analysis. Reference to "management contract" in article 2 of the Law is however unclear. Entities involved and concerned sectors are clearly identified. Sectors eligible for PPP include inter alia transport, electricity, water, waste water, solid waste, education, health care and prison sectors as well as any other sector approved by government resolution.

The Law contains provisions ensuring 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, etc.).

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

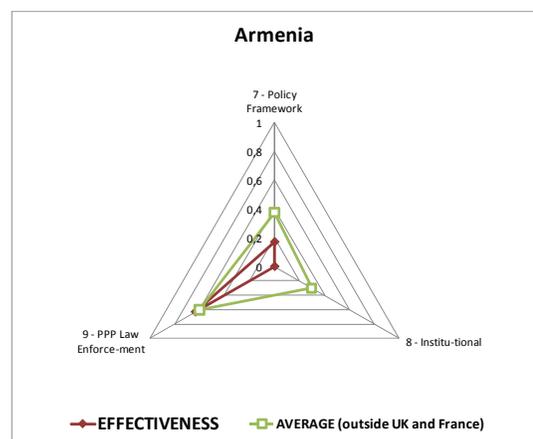
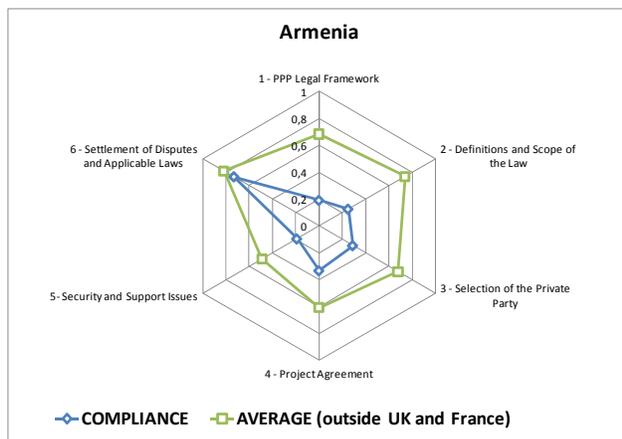
However, the Law is rather silent on security and support issues. We understand that this comes from the fact that the country is particularly concerned with the degree of public debt and potential consequences on the public budget of PPP projects.

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 be an obstacle for investors at this stage.

The Law was further amended back in 2009 and 2010, and a new review body for hearing complaints was introduced, namely the Public Procurement Commission. The new amendments details the procedure of administrative review in front of the Public Procurement Commission by setting clear provisions, timeframes and procedures to be followed during the review process.

The local advisor strongly believes that the proposed amendments to the Concessions Law allowing "step in" rights will significantly improve the bankability of private investments in the infrastructure area and also serve to minimize collateral financing of such investments (in order to help sponsors that are in difficulty of finding external collaterals to secure their loans). A proposed set of amendments has been already submitted to the Government of Albania.

### 3.2 ARMENIA: (Low compliance /Very low Effectiveness)



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

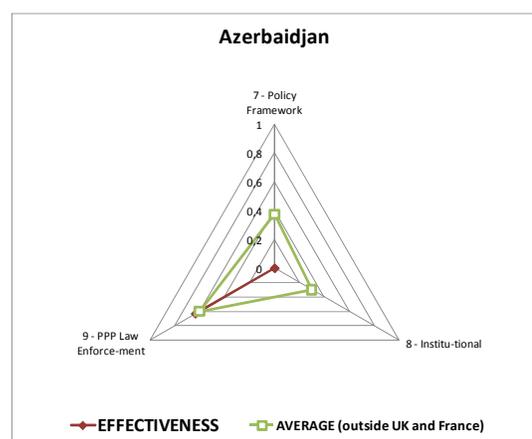
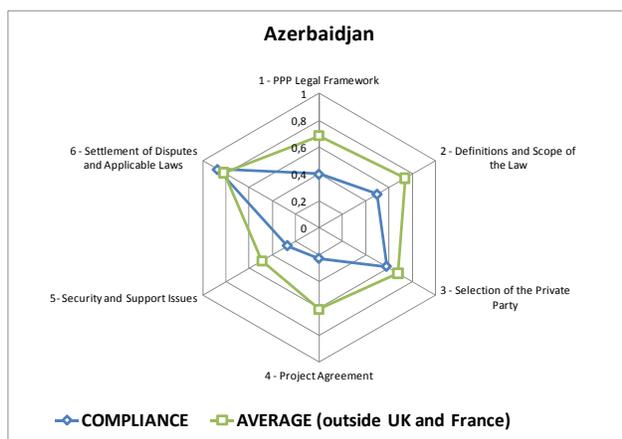
Two sector-specific laws regulate concessions, in the mining and water sectors. However, such laws do not contain clear definitions and need to be improved regarding the selection procedures (even though the general rule is that concessions are granted based on a tender/auction). In the water sector, the use of a model concession agreement is optional. A recently adopted Republic of Armenia Law "On Railway Transport" contains just specific reference to concessions 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 for in privatisation contracts in Armenia. Despite certain positive features, the general legal framework for PPP needs to be elaborated in Armenia.

While sector laws and regulations are enforced more or less properly, there are some corruption, bureaucracy (insufficient governance) and institutional risks to be considered. As of 2008, no new laws or amendments were adopted regarding the PPP/Concession legislation and the regulation of such relations remains at the same effectiveness level in Armenia. However, at this stage, the Government of the Republic of Armenia envisages the elaboration of new general PPP/concession law which will provide legal grounds and general framework for regulation of PPP projects.

### 3.3 AZERBAIJAN (Low compliance /Very low Effectiveness)



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

No real changes have occurred since the last assessment in 2008



Azerbaijan does not have a general concession Law. The Civil Code and the Law on Protection of Foreign Investments recognize 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 with relation to concessions and seems to be limited to concessions in respect of natural resources and the concept of concessionaires to foreign investors.

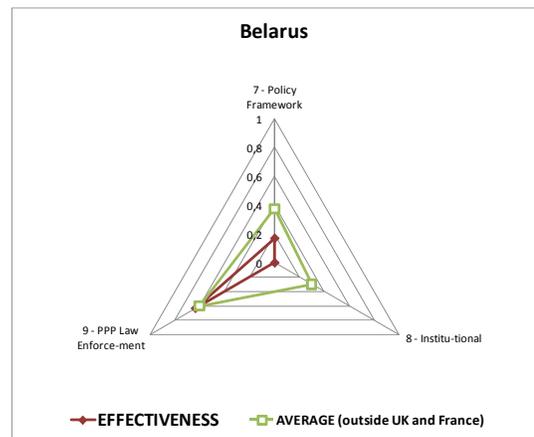
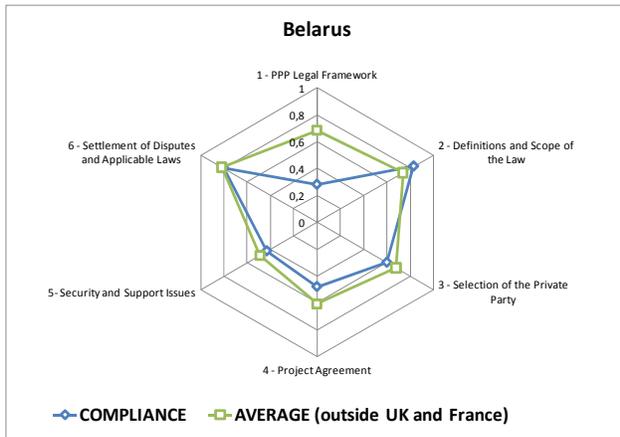
The Law on State Purchase dated 2001 sets the basis for public procurement, organization and rules of tenders and other methods of public procurement, selection of the contractor and complaints procedures.

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 privatization. Such contracts are awarded on a competitive basis.

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

In the absence of a general legal framework for PPP, Azerbaijan has still to adopt a favourable legal basis for PPP.

### 3.4 BELARUS (Medium compliance /Very low Effectiveness)



A general policy framework for improving the legal environment and promoting PPP has not been identified in Belarus. 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). However, we would note that only in 2008 was the first list of concession object specified by the Decree of the President, and it is mostly development of mineral deposits that was offered for concession. Roads and roadside service are likely to be offered, too.

Another proposal being discussed is the opening of concessions for historic monuments and architecture, like old Belarusian castles. Belarus now has some elements of a governmental policy for promoting Public Private Partnership and improving its legal environment.



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 (introduction of the possibility of pre-qualification procedure, not allowing only domestic or foreign concessions, except possibly for "small concessions", existence of a preferential right of the initial concessionaire to extend can be questionable). However, certain positive elements are to be noted (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. Despite certain favorable elements, the Investment Code does not constitute a sufficient legal basis for the development of PPP in Belarus. The issue of PPP has been touched upon in Belarus several times.

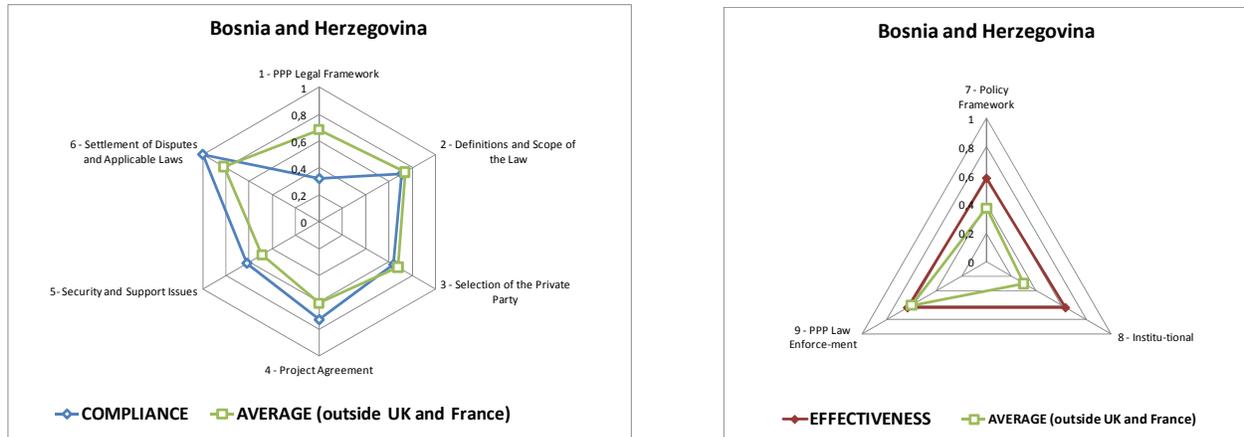
At one time the UNDP tried to launch a special project on PPP but to date it has not been successful in doing so. The legislators drafted a decree and a law on PPP which have been discussed and evaluated by state authorities (including the Ministry of Economy which prepared the draft of the law), scholars and practitioners.

Pursuant to the draft law, the Ministry of Economy would be the state authority in charge of PPP under the financial supervision of the Ministry of Finances. One of the weak provisions of the draft, which is widely criticised, is that although the public associations were vested with the authority to monitor the concession projects, there is no actual mechanism for implementation of their authority, so this provision is just a declarative one. Other interesting provisions proposed in the draft include the right of an investor to lease a land plot without an auction (the general rule is that the most wanted land plots are granted under a lease, based on the results of an auction process and payment of a fee (which equals the market price of the land)). The draft law specifies the list of objects where PPP projects can be developed, and lists all forms of PPP which are still quite different from those commonly used in the general world practice.

Regulations on concessions first appeared in the Investment Code of Belarus in 2001. However, to the best of our knowledge, no concession agreements have yet been signed. It is planned that the authority to draft the concession agreements will be vested in the State Property Committee. The estimated term of the concession agreements will be forty five to fifty (45-50) years but ninety nine (99) years (the maximum term) will be offered, if necessary. Having said that, there are some ideas being discussed now that are likely to be transformed into tangible concession projects, for example, a Russian company "Itera" is interested in the Dobrush chalk deposit, and there is a draft concession agreement for this project. The concession is said to attract investments in the amount of five to seven hundred (500-700) mln. EUR "Triple" *negotiates possibility* of concession for Khotislav chalk deposit. "Polar Stars Group" was offered a concession to develop deposits of brown coal and shale, which will attract investment of four billion US Dollars (US\$4,000,000,000,000). The most recent concession project announced by the Ministry of Transportation is Qatar's interest in the construction and development of roads, electrification of certain sections of railway lines and even the creation of a Belarusian Navy. These projects, and certain others announced in mass media, are likely to be launched (and, consequently, the concessionaire will be chosen) without an auction, although auction is one of the requirements of the Investment Code.

Current political circumstances in the country and the government's lack of trust in the private sector may be one of the obstacles to effective PPP.

### 3.5 BOSNIA and HERZEGOVINA (Medium compliance /Medium Effectiveness)



A general policy framework for improving the legal environment and promoting PPP has been identified through the Policy Paper on Granting Concessions in BiH from year 2006. This Document from the Concession Commission of BiH includes the statement that there are still many issues to be resolved in order to improve the business climate in Bosnia and Herzegovina.

The legal framework that regulates concessions in Bosnia and Herzegovina consists of several similar regulations. Among them is the Law on Public Procurement for which is not quite clear whether it applies to the awarding of the concession, bearing in mind the fact that there are separate laws on concessions in BiH. It is important to note that the definition of a concession in the laws on concessions in Bosnia and Herzegovina includes other forms of agreements on public-private partnership: the harmonization of laws is therefore an imperative in order to avoid overlaps, inconsistencies and loopholes.

There are additional efforts needed in order to achieve a coherent legal framework for concessions and public-private partnerships. Furthermore, the Law on Public Procurement refers to the awarding of public contracts by Contracting authorities of Bosnia and Herzegovina, both entities - Republika Srpska and the Federation of Bosnia and Herzegovina, Brcko District, cantonal and municipal levels), while the granting of concessions by these authorities is regulated by similar laws on concessions and related laws and decisions that are both effective at state, entity and cantonal levels.

The laws that govern the granting of concessions in Bosnia and Herzegovina are:

- Law on Concessions of Bosnia and Herzegovina (Official Gazette of BiH no. 32/02);
- Law on Concessions of the Federation of Bosnia and Herzegovina (Official Gazette of FBiH, no. 40/02);
- Law on Concessions of Republika Srpska (Official Gazette of RS, no. 25/02);
- Act koncesijama Brcko District (Official Gazette of BD no. 41/06);
- Cantonal Laws on Concessions;

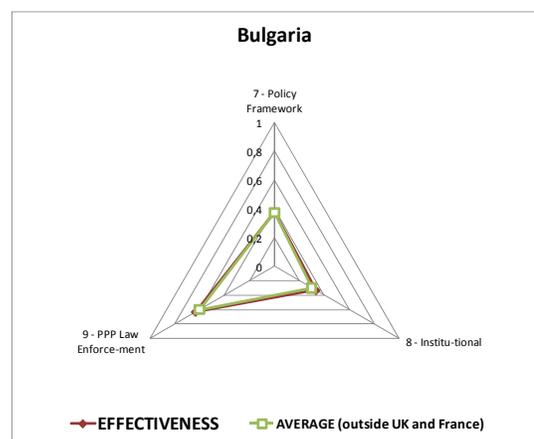
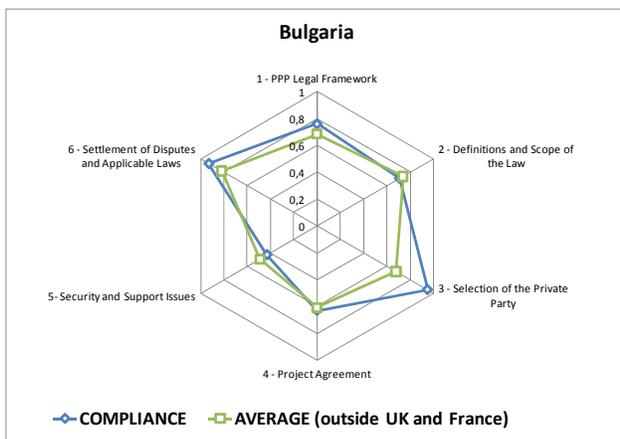


- Law on Public Procurement (Official Gazette of BiH no. 49/04);
- Law on Public Private Partnership of Republika Srpska (Official Gazette of RS, no. 59/09);
- Law on Public Private Partnership of Brcko District (Official Gazette of BD, no. 10.07);

These laws relatively clearly define the scope of application, regulate the selection procedure and provide flexible framework for project agreements. They contain clear references to the principles of transparency, non-discrimination, proportionality and refer to consumers’ rights. The aforementioned laws represent a step towards the introduction of a modern legal system in this area. It is important to note that the BiH authorities relied on international experts in the preparation and drafting of these laws, and thus took into consideration international legal sources.

Essentially, these laws demonstrate the intention to create a reliable legal basis for granting a concession that could attract foreign investment.

### 3.6 BULGARIA (High compliance /Medium Effectiveness)



The main legislation under Bulgarian law governing PPP projects is the Concessions Act. The Act sets forth a comprehensive regulation of concessions, and allows for BOT and some of its derived forms, including BOO and BOOT, to be implemented in Bulgaria. Bulgaria thus 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. Application of a fair and transparent tender selection process is mandatory under the law, and in addition proper remedies for breach are available. However, the existing concessions legislation does not allow for PFI projects to be implemented. In this respect a new PPP Act is currently in the process of consideration by the Bulgarian Parliament which will further extend the scope of possible PPP forms in the country.

A clear and specific framework should be created for the PPP bidding process in Bulgaria. This should include not only laws, which are largely adequate, but a public-sector comparator, model contracts for complex projects and steps to ensure that the actors in the playing field in Bulgaria are brought to a sufficiently high level of PPP professionalism and that the public itself is more open to PPP projects, to avoid the type of social and political resistance experienced in France in Portugal and in many other civil law countries where all change to the status of public service or public wealth is politically very sensitive.

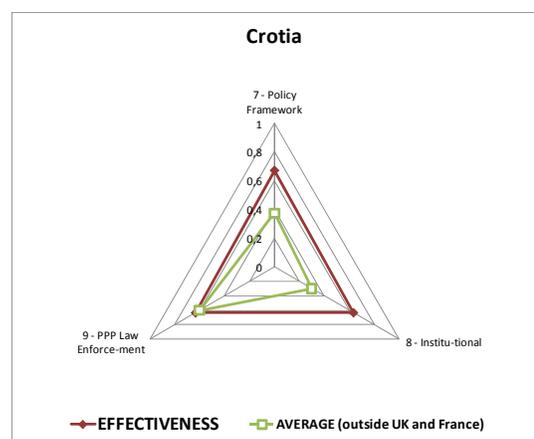
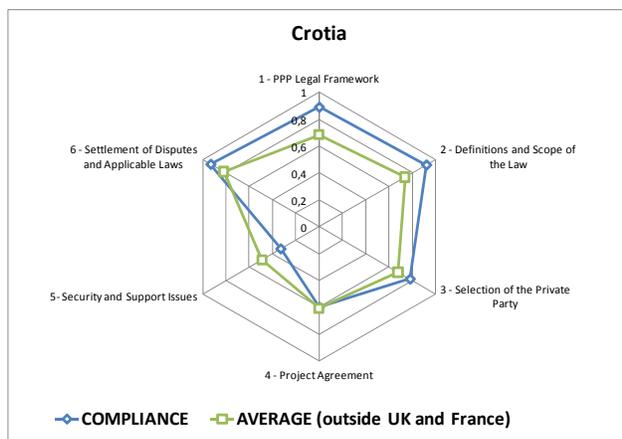


A PPP unit must be created at the national level to monitor, oversee and review projects, to ensure that their potential benefits are realised and communicated to the public. The public sector must accept its management or "governance" role in PPP, along the lines envisaged by the UNECE or demonstrated by the governments of the UK and other countries that have utilised PPP.

A strategic vision for PPP should be proposed by the government and communicated clearly to citizens, this would ensure continued support for projects and give security to potential investors into the long term.

There are no major legal obstacles to implementing concessions in the country. One of the factors impacting the successful completion of concession tender procedures is the heavy process of project preparation and the insufficient, in certain cases, capacity of the Bulgarian administration. Furthermore, the existence of concessions only as a form of PPP limits the options for use of PPP projects in specific sectors, where the concession form is not the most appropriate one.

### 3.7 CROATIA (High compliance /Medium Effectiveness)



Firstly, it is important to note that the legislative horizon has changed drastically since 2008, when the last survey and assessment was submitted.

The Concessions Act has been thoroughly reworked so that where there had been largely a legal void there is now a relatively well-rounded legislation. The outdated and insufficient Croatian Concessions Act (Official Gazette 89/92), which was reviewed at the time of the submission of the last survey, has been replaced by the modern Concessions Act (Official Gazette 125/08). The Municipal Utilities Act that still has an impact on the PPP regulation has been amended three times (Official Gazette 38/09, 79/09, 49/11), and the Public Procurement Act, itself twice amended (Official Gazette 110/07, 125/08) is about to be replaced entirely.

Here it would be appropriate to note that the EU negotiations on Chapter 5 (Public Procurement) were provisionally closed at the tenth meeting of the Intergovernmental Conference with Croatia at Ministerial level held on June 30, 2011 in Brussels, as the Council confirmed that Croatia satisfied the closing benchmarks. These included, *inter alia*, the alignment of its national legislative framework, covering all areas of public procurement, including concessions and public private partnerships, in conformity with the EC Treaty and EU procurement legislation and other relevant provisions of the acquis.



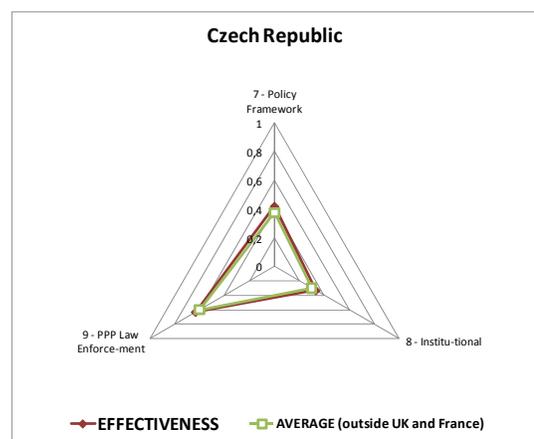
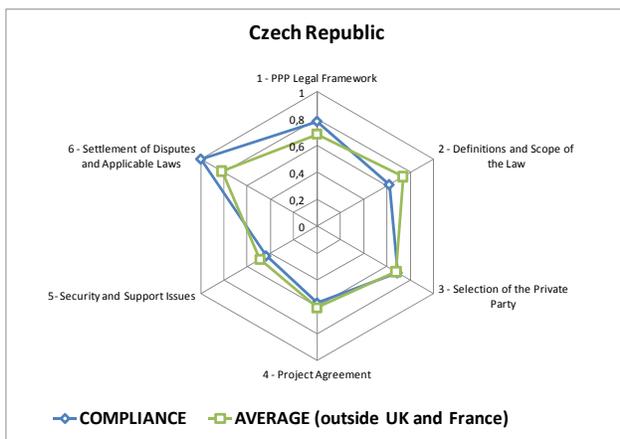
However some important provisions which are generally necessary for the financing of such projects are still absent. No reference is made in the Concession Act or in the PPP Act as to possible government support or the provision of guarantees and financial securities, and some clarification on the possibility to apply International arbitration would be welcome.

While conformity with the EU regulation is certainly a factor in precipitating the developments, it is also likely that the necessity of being able to achieve a practical application, and the result of the difficulties encountered in practice, led the way in influencing this "overhaul".

While the impact that the new Public Procurement Act will have cannot yet be gauged, as it became legally effective on January 1, 2012, it can be expected that the administrative hurdles and obstacles have been more adequately cleared away. Most importantly for the purposes of this survey, and from the point of view of the PPP legislation, the introduction of the Public Private Partnerships Act and the establishment of the Agency for PPP's, is the key indicator of the awareness of the importance, seriousness and, indeed, the necessity of a comprehensive approach towards this matter.

Similar to the observations and comments made in the 2008 assessment, when the situation became different from the situation assessed during the period of the previous assessment before, it was noted that the effectiveness of the laws pertaining to PPP's (i.e. their practical implementation), are very difficult to gauge. The primary reason for this is that there has been a plethora of recent legislative developments that bear direct impact on public private partnerships – the PPP Act itself as well as the founding of the administering Agency. Projects listed on the Agency's website would be quite meaningless (construction and repair of municipal buildings), if it were not for one major project, which is the construction of the Zagreb Airport terminal. This project should be held as a very strong indicator of how the executive will manage the new legislation and, consequently, what practical improvements can be expected in the future. However, because this project is still in its very early stages, it is not yet possible to make any firm judgment.

### 3.8 CZECH REPUBLIC (Medium compliance /Low Effectiveness)



Currently there are two separate acts regulating PPP related issues, the Concession Act and the Public Procurement Act. The only amendment to the Concession Act, which was adopted following the 2008



assessment, was through the establishment of Act no. 30/2008, and which became effective on 27 February 2008.

Granting of PPP contracts are generally awarded through a competitive tender process, with principles of transparency, non-discrimination and equal treatment clearly stipulated in the PPP Laws.

There is a joint-stock company owned by the State, called PPP Centrum, which was established to promote and provide professional support to Contracting Authorities in respect of PPP projects.

Generally, although the legislation could be improved, the legal framework is not the biggest issue for PPPs in the Czech Republic.

The Czech Republic has used models similar to PPPs in public service contracting since the early 1990s in some sectors. However, more recent attempts to use PPPs, for example, in sectors such as roads and highways, have been less successful. Nevertheless, there has been active interest in the use of PPPs in the Czech Republic in sectors such as health and prisons.

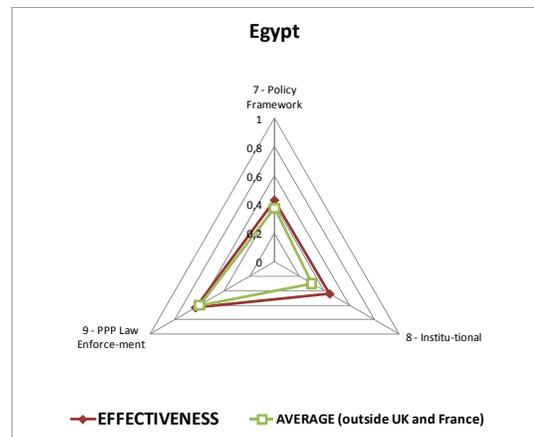
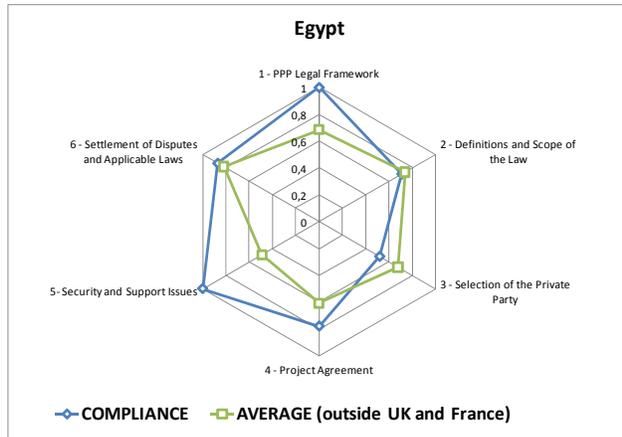
Based on resolution 7/2004, which approves the PPP policy in the Czech Republic, the *Department for Regulation and Methodology of PPP Projects* was established at the MoF in 2004. In addition a PPP Centrum was established. In 2005 (3 march 2005) the PPP Centrum issued a draft document “PPP Governance Guidance”. This document describes the procedural aspects of PPP projects in the Czech Republic. It should be noted that the current status of this document is not clear to the experts, as it is stated on the document that was provided that it is only a draft. It seems that parts of the document are being applied to the selected PPP pilot projects. Other parts of the document are seemingly not being applied or fulfilled.

Currently there seems to be a lack of political support of PPPs in the Czech Republic and there is a lot of negative publicity around PPPs. A number of pilot projects collapsed during their preparation phase and other projects have been criticised for being overpriced or awarded under suspicious conditions.

The private sector often criticises the public authorities for the lack of transparency and inconsistency in communicating of its priorities. Moreover, a number of projects collapsed due to the inappropriate balance of risks and the lack of credit support from public authorities, which resulted in situations where the projects were not bankable.



### 3.9 EGYPT (High compliance /Medium Effectiveness)



The PPP program in Egypt commenced in 2006. A special unit in the Ministry of Finance, the PPP Central Unit, was established in June 2006. The PPP Central Unit is the main entity responsible for the initiation and implementation of PPP Projects in Egypt. Under the growing interest of both the public sector and private sector **in the PPP different scheme**, issuing a new law governing this scheme became very important. Hence, a new law governing PPP projects was issued on 2010. This law was designed to adopt and localise the international successful PPP models and to ensure that established PPP principals and Standard Operating Procedures (SOPs) are followed. Also the law is intended to avoid most of the legislative gaps that used to paralyse the PPP schemes in the past. Historically the concessions BOTs and BOOs were granted based on the general public utilities legislation (law 129 of 1947 and law 61 of 1958) or the sector specific laws; i.e. laws which were issued to govern the concessions granted in relation to each sector (e.g. electricity, ports, etc) (the "Sector Specific Laws"). Although the new Law is drafted in a way that would suggest that the PPP Law is applicable to all PPP projects, the Law did not abolish existing laws which regulate government concessions and therefore, administrative entities may still grant concessions, BOTs and BOOs based on the old scheme. In light of this, and aside from the PPP Law, there are three (3) approaches to granting concessions under Egyptian Law:

The first approach is to issue a concession according to the provisions of the general public utilities legislation (law 129 of 1947 and law 61 of 1958). These laws are relatively old and include restrictive requirements, such as limitation on the investor’s profit and setting a maximum duration for the concession of thirty (30) years. Thus, in practice, this method is not applied on modern PPP projects.

The second approach is for the government to pass a specific law for each project/concession. This is the practice in oil and gas concessions. Passing a concession or a specific law for the project by the parliament is a relatively lengthy and complex method and therefore, save for projects in the oil and gas sector, this approach is generally not used on PPP projects.

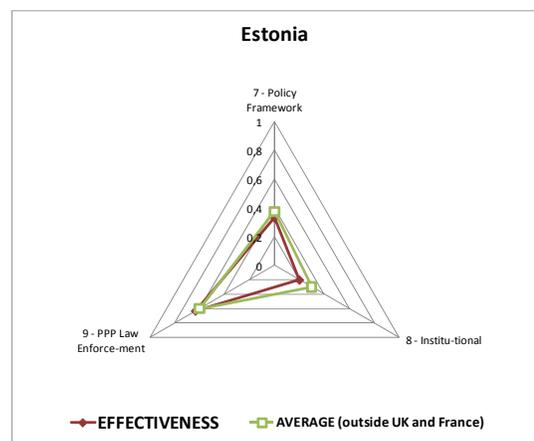
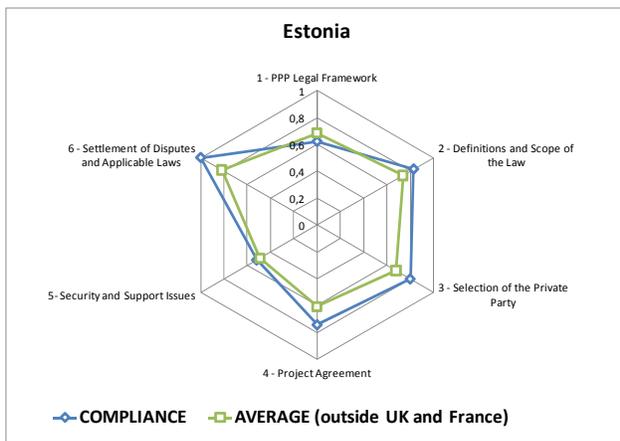
The third approach is for the government to issue the concession project under the provisions of a sector-specific law. These laws typically exclude the application of the general public utilities legislation and set forth the legal basis for concessions in a particular sector. Sector-specific laws have been issued for various sectors in Egypt, including electricity, specialised ports, airports, trains and roads. This approach is expected to be used in the future for the power sector.



To date, there has been only one PPP project successfully awarded under the new Law, which is the New Cairo Wastewater Treatment Plant. This project was offered and awarded before the new law was issued and therefore is not subject to this law. Currently, there are several tenders open and in preparation; however it can be expected that they will be on hold until a new elected government comes to power.

Because the PPP Law is relatively recent and no projects have been granted under this Law, the law is not yet tested and therefore it is not clear yet what kind of practical shortcomings might result from the law or what kind of obstacles might result from the implementation thereof overall under the present political circumstances following the revolution.

### 3.10 ESTONIA (High compliance /Low Effectiveness)

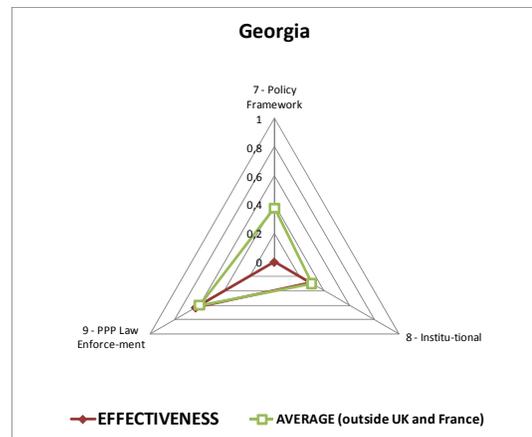
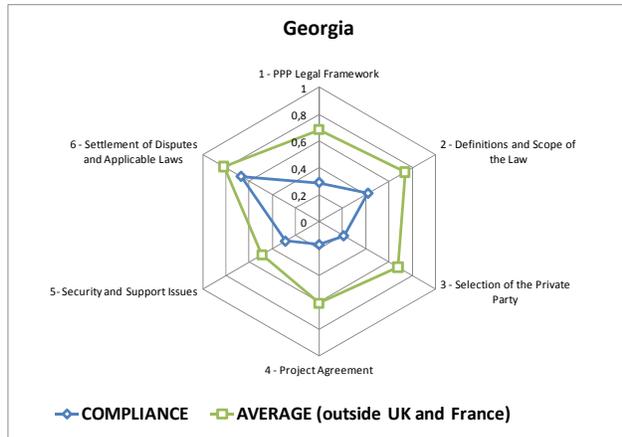


In Estonia there is no one single act dealing specifically with PPP projects or concessions. These matters are mainly regulated by the Public Procurement Act. In addition, the Competition Act in conjunction with the Government of Estonia decree "Procedure for organising a public competition for the grant of special or exclusive rights" prescribes the procedure for the organisation of public competitions for granting special or exclusive rights. Besides the Guidelines on the Public Procurement Proceedings issued by the Ministry of Finance, no PPP administrative guidance, framework or policy has unfortunately been adopted.

However, it should be emphasised that the relevant regulations have gone through some noteworthy amendments and improvements. For instance, on 01.01.2011 the stipulations containing the definition of PPP and the conditions for the transfer of the rights and obligations deriving from a public procurement contract or a concession to a third person in PPP projects were incorporated by the Public Procurement Act. The developments in the PPP sector are also demonstrated by the fact that a number of PPP projects have already been initiated and implemented. Moreover, the adjudicative practice with regard to PPP projects is in the process of evolving, as some court decisions can already be distinguished clarifying the respective legal field in Estonia.

Practice has thus demonstrated that successful execution of PPP projects is possible in the framework of current legislation but more detailed PPP specific legislation and institution (lack of PPP Unit) would be welcome as well as clearer provisions concerning security and government potential support.

### 3.11 GEORGIA (Low compliance /Very low Effectiveness)



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 and nothing has changed in respect thereof since the last assessment in 2008.

The Law needs to be improved regarding the scope of application (for example, 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.

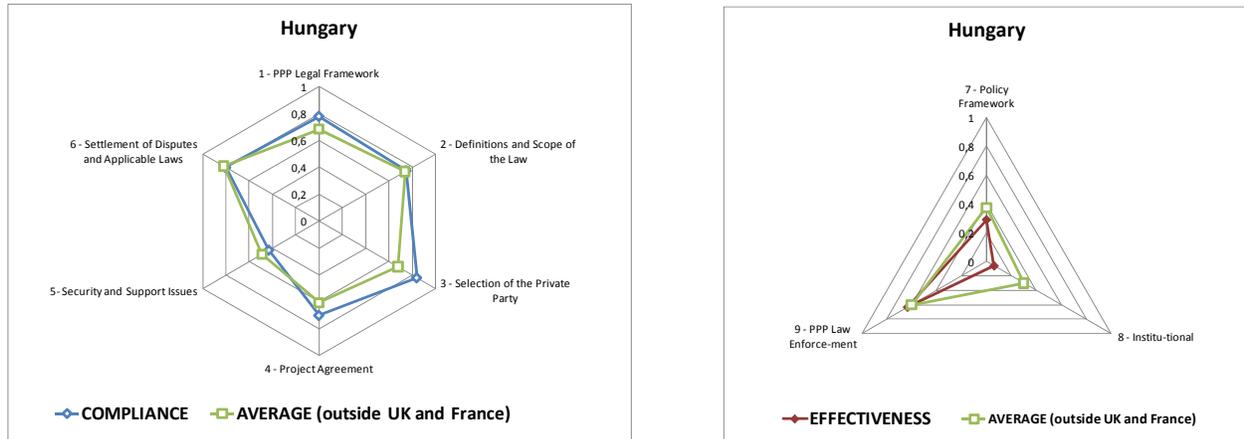
Moreover, the Law contains very few provisions regarding the selection of the concessionaire and provides for the adoption of regulations in this respect. No such regulations could be identified. In addition, the law refers to the establishment of a special register of concession agreements, but no such register could be identified. Thus, the selection procedure is (at this stage) insufficiently regulated. We note, however, a certain 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.

In conclusion, despite the existence of numerous positive elements, 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 concession definition and sectors concerned

### 3.12 HUNGARY (High compliance /Low Effectiveness)



The Hungarian PPP legislative system is a rather complicated one. To start with, there is no generalised PPP law. The two principal sources of law are the Concession Act (for assets in the exclusive ownership of the state or local municipalities) and the Public Procurement Act, addressing the tendering rules for all concessions and otherwise unregulated PPPs/PFIs.

The Concession Act is an old and simple piece of legislation which gives a great degree of "maneuvering" space and provides flexibility to the Contracting Authorities in setting the terms of the Project Agreement. Because of the absence of a framework legislation covering non concession type projects, with other PPP projects, such as school, prison, entertainment and sports facility PFIs, the freedom to contract is even more extensive, relying mainly on the Civil Code as the background legislation.

The actual tendering process of the procurement of all PPP projects involving construction, however, is governed by the Public Procurement Act and as such, is regulated in a very detailed manner. The system, therefore, is very much a combination of two extreme approaches: the detailed and mandatory regulation on the procurement process and the almost total freedom of contracts as regards the Project Agreements. The EUROSTAT rules and the relevant EU legislation are of guidance if in doubt. Having said that, professional support of smaller projects is not too good and the EUROSTAT and EU sources of information are often overlooked or just ignored until it is too late.

With the aim of simplifying the procurement procedure, enforcing the transparency and decreasing corruption in public procurement procedures, a new Public Procurement Act was recently been adopted. The new act entered into force on 1st January 2012, and it consists of 175 articles, as opposed to the existing law it replaces which consists of more than 400 articles. There will be no fundamental changes with respect to procedures relative to "building concessions" compared to the existing legislation.

There are over one hundred (100) PPP projects in the operating phase, ranging from motorway DBFOs (concessions) to small municipal sports facilities PFIs. PPPs started as early as 1991 in the form of toll road concession projects.

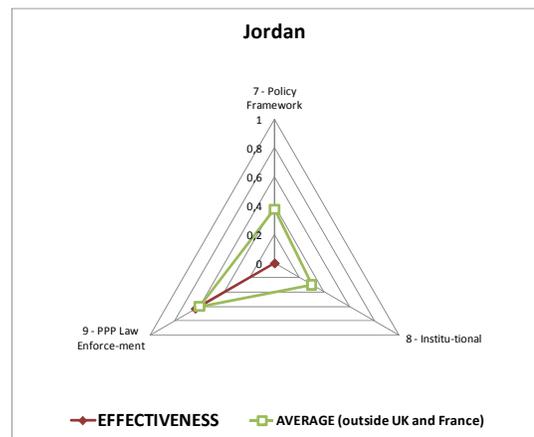
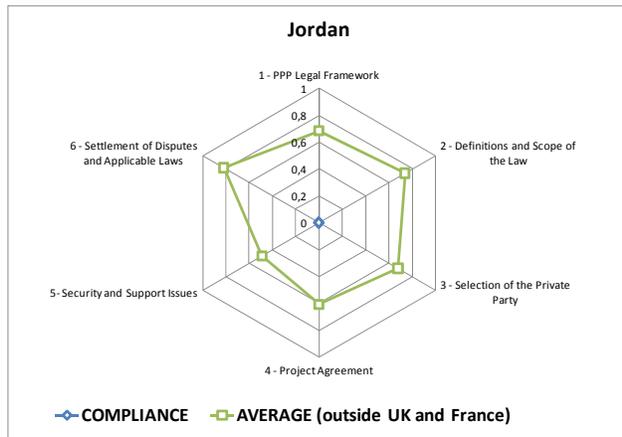
Currently there are major political obstacles before PPPs, as there is a lack of political will to launch new projects. From 2009, onwards the then newly elected Hungarian government began reviewing the ongoing



PPP projects in order to renegotiate and to put an end to the "disadvantageous, disproportionately high risk-taking and/or economically unviable" projects. Projects that are "on balance sheet" items under the EUROSTAT rules will be very much in the focus in this respect and there will be no new PPPs within the next two (2) years.

There could however be a number of legal disputes launched if Private Parties are dissatisfied with the result of the revisions of their Project Agreements and the steps taken by the Contracting Authorities.

### 3.13 JORDAN (Medium compliance /Medium Effectiveness)



The legal framework for PPP and Concession in Jordan is based on the provisions of the Privatization Regulation Number (80) of 2008 for Implementing Privatization Transactions Issued in pursuance of Article (20) of The Privatization Law Number (25) of 2000. Privatization means according to the Law the adoption of an economic methodology which enhances the role of the private sector in the economy to include public sector enterprises the nature of which requires that they be managed on commercial bases.

It is therefore the privatization law which was designed for the development of the private sector participation in public services and infrastructure and not specifically for PPP which has provided the legal framework for PPP.

Jordan officially launched its PPP Program on June 23rd 2008, and assigned its implementation to the Executive Privatization Commission (EPC) as a way of continuation of its Privatization Program.

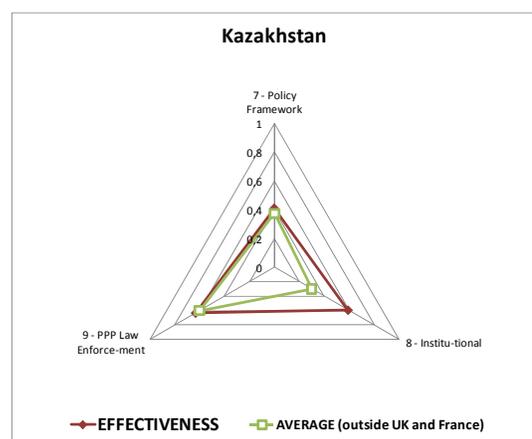
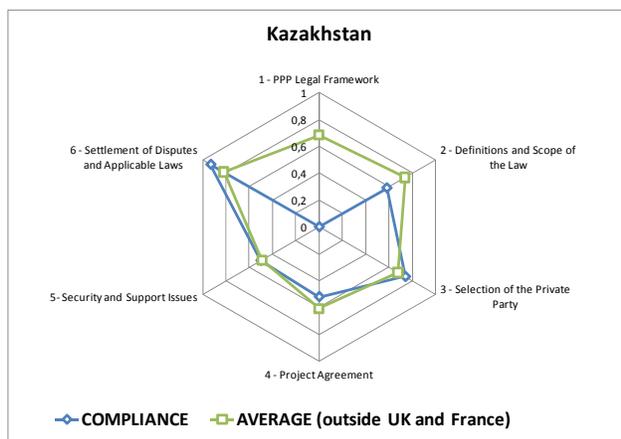
The Privatization Regulation defines PPP as "A relatively long-term written agreement between the public and private sectors for the purpose of providing a service of a general nature or implementing a project or performing a certain task whereby project financing and allocation of risks arising therefrom shall be pursuant to the contract."

The Privatization Law (Article 4) provides that the restructuring and privatization of public institutions or enterprises owned by the public sector can be carried out by adopting in addition to classical privatization methods the following type of agreement or license : BOT, BOO,BOOT, as well as granting the private sector the right to build a particular enterprise with a monopolistic and exclusive right to exploit it pursuant to a license or an agreement signed with the Government for this purpose or any other method not specified in the Law as decided by the Council of Ministers.

The current legislation does enable for all types of PPP, but there is no specific legislation or regulation dealing with PPP procurement in detail and no regulation at all concerning PFI or PPP applicable to the non merchant sector.

The experience of successful project but also of the withdrawal of several projects which could not be achieved on a project finance basis have conducted the government to enlarge the scope of PPP and to follow the PFI route to be opened to smaller project on a PFI type of project. A new PPP law is now under consideration for some time and when enacted possibly in the near future will become the specific legal framework for the concession and PPPs in Jordan but there are however currently social and political obstacles to implementing PPP.

### 3.14 KAZAKHSTAN (Medium compliance /Medium Effectiveness)



While 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 2006 According to the document "STRATEGY FOR KAZAKHSTAN" as approved by the EBRD Board of Directors on 21 November 2006. However, Kazakh commercial laws was fallen short in certain respects of standards that are generally acceptable internationally and the law has been largely adapted since then with the assistance of international institutions.

In particular on July 5, 2008 the Law on Concessions and other legislative acts has been amended and on July 17, 2008 took place the adoption of the resolution of the Government on setting up the Kazakhstan Public-Private Partnership Center (PPP Center) in the form of joint-stock company and on August 12, 2008 the legal registration of the Kazakhstan Public-Private Partnership Center occurred.

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).

The Concession Law states that the President of Kazakhstan may define a list of assets/facilities which may not be transferred into concession and appears to be presently too restrictive in its scope. The Concession law is very much concentrated on BOT type of project and excludes various type of Concession (BOO, BOOT) and overall PFI and the activities related to the non merchant sector are



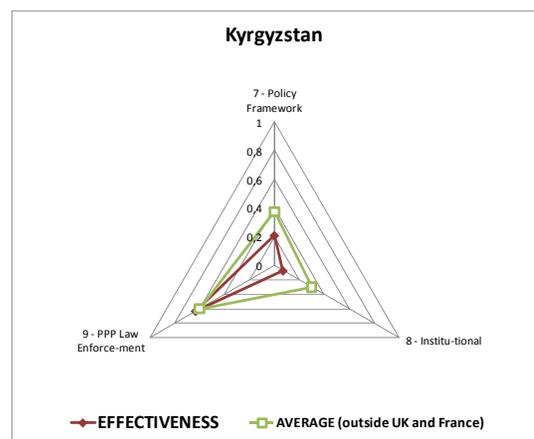
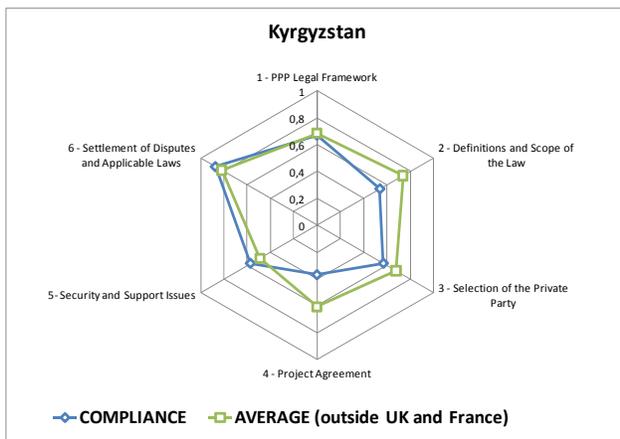
excluded and would require a specific PPP law allowing relatively small project to be implemented in a more flexible way.

The Law despite its numerous revisions since 2006 which creates uncertainty still have a number of shortcomings and certain provisions are somewhat ambiguous. It appears as fairly rigid and its lacks flexibility will have to be corrected. Security issues may also be significant obstacles for the bankability of potential projects as well as the absence of provisions concerning step in right and direct agreement with lenders.

The law has however some positive aspect such as the provisions concerning financial government support and international arbitration and overall the creation of the PPP Center may provide the require expertise and determination for the proper development of the PPP projects.

The Government has selected pilot projects as the State keep an overall close control to all step of the selection of project to be handled under the Concession law and on all stages of the awarding process and it is not yet clear whether the political will is sufficient to overcome some social and political apparent resistance and to make the law a success which is not yet the case.

### 3.15 KYRGYZ Republic (Medium compliance /Very low Effectiveness)



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 should however be noted that neither the Law on Concessions, nor the Procurement Law is applicable to the projects implemented on the basis of a PPP mechanism.

The PPP Law is the first legal act in the country that defines "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 correspond with the traditional meaning of public-private partnerships in developing and upgrading infrastructure projects.

In addition, the PPP Law is either too vague or silent as far as the majority of the 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, the PPP mechanism can be used

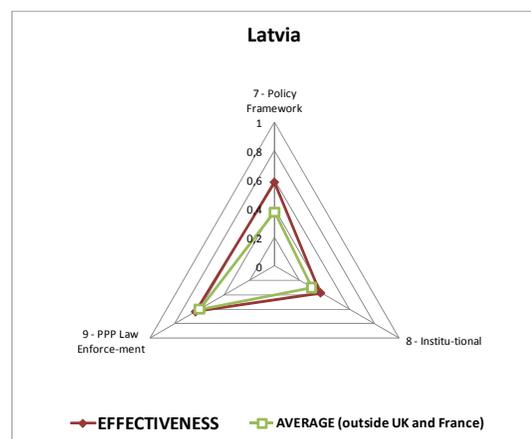
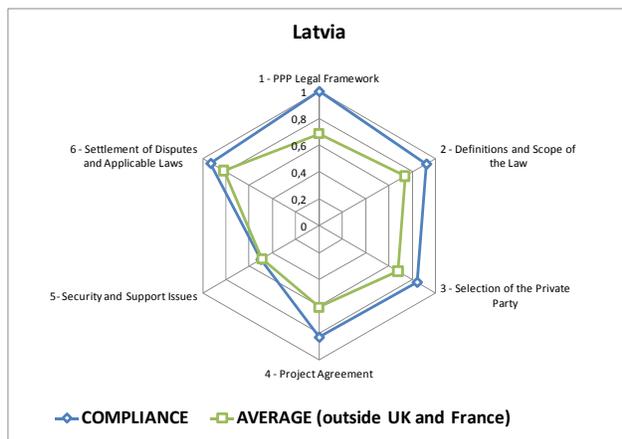


not only for the development of infrastructure projects, but also for a number of projects in different sectors or spheres of economy, which certainly fall beyond the traditional meaning of PPPs.

Additionally, the PPP Law states that the Government of the Kyrgyz Republic and/or local state executive authorities is responsible for determining the list of investment projects that can be implemented through the PPP mechanism. However, to date no such list has been adopted or is 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 a 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 to be determined by the Government, which certainly does not provide any certainty for potential investors.

### 3.16 LATVIA (High compliance /Low Effectiveness)



There is a single generalised act – the Law on Public-Private Partnership – was has been in force in Latvia since 1 October 2009, incorporating the legal framework for PPP, including Concessions.

The Law on Public-Private Partnership is relatively new, modern and intended to be flexible, and it encompasses multiple forms of PPP. The two main types of PPP are contractual PPP (where public and private partner enter into a partnership procurement agreement or a concession agreement) and institutional PPP (where a joint venture is established with which the public partner enters into a partnership procurement agreement or a concession agreement).

However, since the new law came in force on 1 October 2009 no PPP projects have been awarded. The letter of intent of 9 May 2011 that the Latvian Government addressed to the International Monetary Fund (IMF) lays down the policies that Latvia undertakes to implement in exchange for financial support. *Inter alia*, the letter contains a commitment by public authorities not to conclude long-term agreements (with the exception of concessions). Despite the formal inhibition, which in any event expired on 22 December 2011, public authorities are free to prepare PPP projects. The Ministry of Finance is of the opinion that



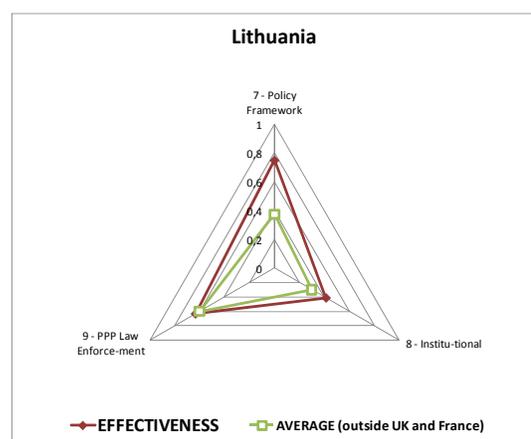
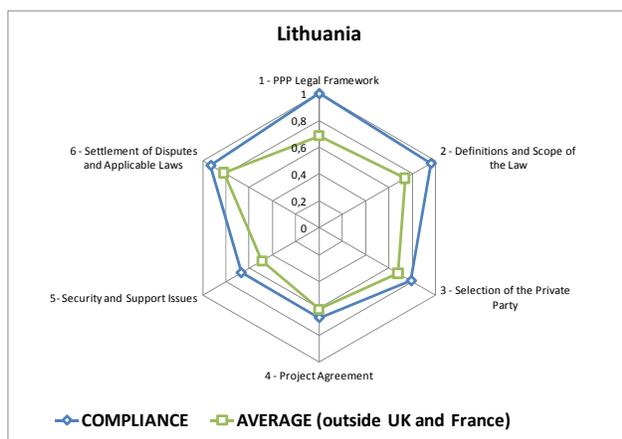
these undertakings towards the IMF are not the true reason to blame for the rarity of PPP projects in Latvia, it is rather the economic crisis and lack of experience that places obstacles to implementation of PPP policy rather than any political reasons.

We understand that there are a number of PPP projects pending which are currently at the stage of planning or initial preparation, where use of funding from the EU funds is planned or the conclusion of a partnership procurement contract is intended by attracting additional funding from the government or municipal budget. According to the information provided by Ministry of Finance, it is also planned to establish economic sectors of strategic importance which would be priority sectors for the purpose of implementation PPP. However, presumably, development of PPP will also depend on fiscal policy of the government, including contents of the planned Law on Fiscal Discipline.

The Ministry of Finance of Latvia runs a website [www.ppp.gov.lv](http://www.ppp.gov.lv) where all the latest information, including government guidelines, research projects, surveys and informative brochures on PPP can be found. The website provides links to documents published by other public authorities and organizations, such as the Investment and Development Agency of Latvia, the Baltic Institute of Social Sciences, the PPP Association to name a few.

The law is however extremely long (118 articles) and much more detailed in relation to all types of situations compared to best international practice, which may thus affect the flexibility necessary to accommodate various situations and lenders requirements. The involvement of numerous different institutions also implies a risk of unnecessary complexity for the proper development of PPP. It will only be at the time of negotiation and award of the first PPP projects under the new PPP Law that a definite judgment will be possible as to the compliance of the Law and overall of its effectiveness. It can be regretted that, with the exception of step in provisions and the creation of possible security interests over immovable property within the period of validity and effectiveness of the PPP agreement, the security aspects as well as the possibility of government support for PPP financing has not been dealt with.

### 3.17 LITHUANIA (High compliance /Low Effectiveness)



Lithuania has further improved the legal framework for PPP and created a system which now regulates both concessions and general government and private entities' partnership (similar to PFI model used in United Kingdom, "GGPEP"). This makes the Lithuanian Law even closer to the PFI Guide recommendations than it was a few years ago.



Even though the Law on Concession has not had any significant amendments since 2006, the legal framework of PPP has been changed by recent significant amendments to the Law on Investments and the introduction of the Rules on Preparation and Implementation of the Public – Private Partnerships.

The Law on Investments introduced definitions of the PPP and the GGPEP. It set forth the concepts, principles and peculiarities of the GGPEP project agreement, as well as its contents (which are similar to those set in the Law on Concessions to the concession agreements) and defined who can be the general government entities.

The Law on Investments also introduced the principles that the GGPEP agreement shall be concluded in accordance with the Law on Public Procurement and the duration of any agreement shall be more than three (3) but not more than twenty five (25) years.

In addition to the above mentioned provisions, the Law on Investments sets out the legal base to establish a Central PPP Unit, which is responsible for the methodological help and consultations regarding preparation and implementation.

The Rules on Preparation and Implementation of the Public – Private Partnerships set out the definition of partnership agreement and specify the process of preparation and implementation of the PPP. The Rules clarified which institutions are responsible for preparation, approval, implementation and control of PPP, as well as processes thereof.

Furthermore, the Rules defined the main risks of PPP and the principles of allocation of risk between public and private parties and its impact on the ratios of the public sector deficit and debt.

The legal framework created by the Law on Investments, the Law on Concessions, the Rules on Preparation and Implementation of the Public – Private Partnerships, and the Law on Public Procurement provides with comprehensive and clear regulation and guidance what is PPP, who can prepare, approve and implement the PPP projects, what shall be included into the partnership agreements and how the risks between public and private sectors should be allocated. Even though the rules are comprehensive, they still provide sufficient flexibility to allow the parties to negotiate the terms of a private partnership agreement.

However, it should be noted that the Lithuanian Law still does not refer to unsolicited proposals and does not provide for the establishment of a record of the key information pertaining to the selection and award of the partnership agreement in concession type PPPs.

The situation for implementation of PPP projects is favourable in Lithuania. Currently there are no political or social obstacles to the implementation of PPP. Indeed, because of the current financial situation and lack of funds to improve or expand the public infrastructure, the government is in favour of PPP.

Concessions are granted by municipalities for a period of approximately ten (10) years and currently forty (40) concession agreements are in operation in various sectors, such as energy, health care, transport, waste treatment, etc. But the government also actively promotes the recently introduced GGPEP model – currently one project in the transport sector is being implemented and five (5) more pilot projects are pending and about to be implemented.

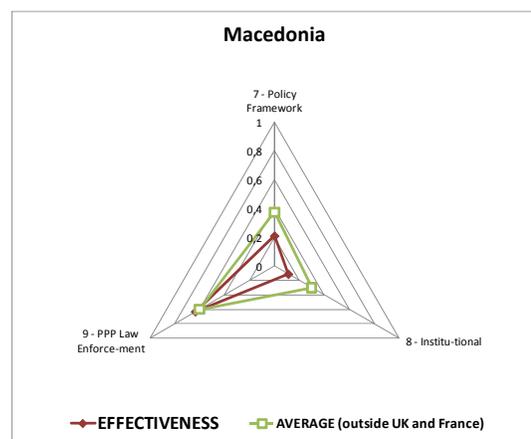
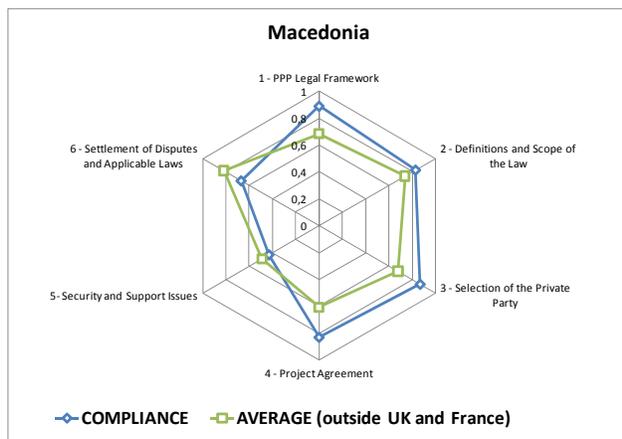


Promotion of PPP is supported by a good defense of bidders' rights and legitimate interests. In the event that GGPEP projects or PPPs are awarded as a work concession, remedies under the Law on Public Procurement are applicable, which are in conformity with the Directive 2007/66/EC (the Remedies directive). In the event that a PPP is awarded as a service concession, the same principles are applied by the courts. The courts itself have sufficient experience in disputes regarding acts or decisions taken by contracting authorities and follows precedents in the case law of General Court (Court of Justice of the EU).

An obstacle for wider use of PPP could be the relatively small size of the projects, which currently do not exceed 200 mil. LTL (approx. 58 mil. EUR) and are not very appealing for large foreign investors / financial institutions.

Another obstacle for wider use of PPP is that even though there is the Central PPP Unit, it is not a "task force" assisting the development of PPP projects in general, but rather limited to the promotion of PPP while providing methodological assistance. There is no PPP unit/ agency or department of Central PPP Unit at the municipal level and therefore smaller municipalities lack competence and assistance to prepare and implement PPP projects, even if they have a need for them.

### 3.18 MACEDONIA (High compliance / Low Effectiveness)



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

A Law for Concession and other types of Public Partnership was adopted by the Government of the Republic of Macedonia published in the Official Gazette of the Republic of Macedonia No. 7/2005) as of 15 of January 2008 (the "Law") just after the publication of a new Public Procurement law. A new Law on Concession and other types of public private partnership has been passed on January 11<sup>th</sup> 2012. The Law enters into force the eight day as of the day of its announcement in the Official Gazette of the RoM and shall be applicable as of March 15<sup>th</sup> 2012. From the day of application of this Law, the Law on concessions and other types of public private partnership (Official Gazette of the RoM no. 7/2008, 139/2008, 64/2009 and 52/2010) shall cease to be valid.



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 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 private partner and legal protection in procedure for granting of the agreements for public private partnership.

The Law, however, applies to "possessions of common interest", an ambiguous phrase and much rely on specific sectorial law for implementation purpose. Also, the law does not contain clear provisions concerning government support and financial security and overall the possibility of international arbitration remains questionable except with respect to ICSID arbitration.

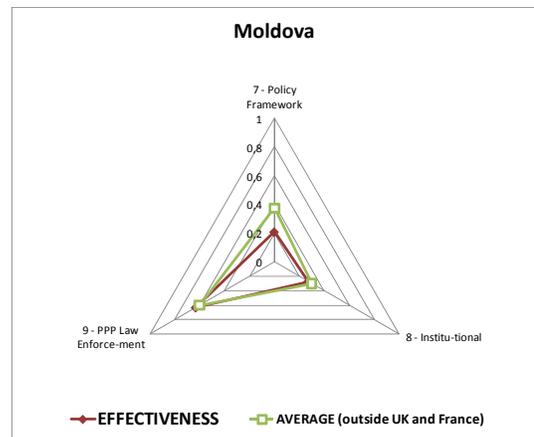
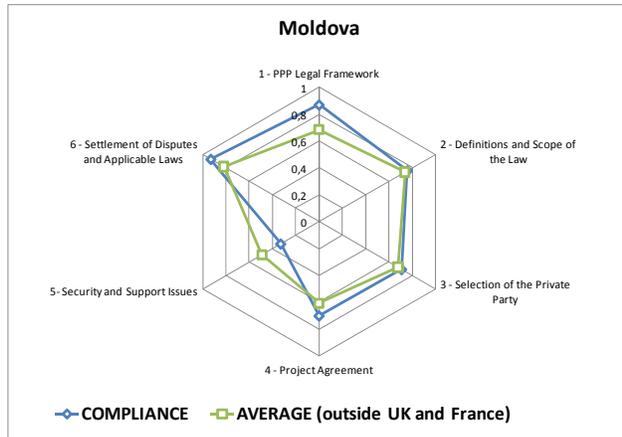
Thus, the Macedonian Law is quite well drafted and constitutes a solid basis for the development of PPP in the country provided the financing and arbitration issue can be solved in accordance with international best practice for PPP. The Law is however quite recent and has been criticized in particular as non compliant with EU rules and not facilitating project financing.

The SIGMA Assessment 2010 for Macedonia considers the lack of positive developments in the PPP and concessions Law as a main area of serious concern. Legislation on concessions and PPPs remains unsatisfactory, and several amendments to the concessions law will be needed to bring it in line with EU requirements. For the law to be successfully implemented in practice, clear and strong leadership will be needed. A centre of expertise is also needed to support contracting authorities in preparing projects, conducting contract award procedures, and preparing contract management for PPPs and concessions. In its 2008 assessment, SIGMA pointed out the need for significant modifications to the then newly adopted Concessions Law if it is to comply with EU requirements and good international practice. However, the Concessions Law, which falls under the responsibility of the Ministry of Economy, has still not been amended.

On Sept-6 2011, the Government of Macedonia and its private partner in the PPP airport concession, TAV Airports (Turkey), inaugurated the newly reconstructed "Alexander the Great" Airport in Skopje, the country's capital which is the first achievement of concession under the new Law and two hydropower plant of Cebren and Galiste are being adjudicated on a PPP basis.



### 3.19 MOLDOVA (High compliance /Very low Effectiveness)



In 2008 Moldova passed its first PPP targeted Law, and in 2011 the first PPP projects starting to be awarded, in sectors like healthcare or infrastructure.

There is a clear policy shift in the Moldovan Government to depart from traditional concessions and focus on the improvement of various public projects or public services via PPPs. Concession is seen merely as a form of PPPs. The PPP Law is preferred over the concessions law because it has a liberal approach and gives effect to the principle of freedom of contract. A PPP division with the Public Property Agency was set up under the law to overview PPPs and register awarded PPP contracts.

The incentives to PPPs include a set of amendments to legislation under which certain public assets/services could only be transferred in use to private entities solely under PPPs.

The PPP Law is a short framework law which gives full control to the concerned public authority in conducting the tender process, negotiating the PPP contract and monitoring its implementation. The Government or local council, depending on type of public asset/service, just needs to approve a summary of the PPP project in principle.

The law clearly allows the public authorities to develop any type of project, not necessarily in the forms specified by the law. Indeed, some early projects have not fully matched any form of PPP described by the law, but the law still allows them.

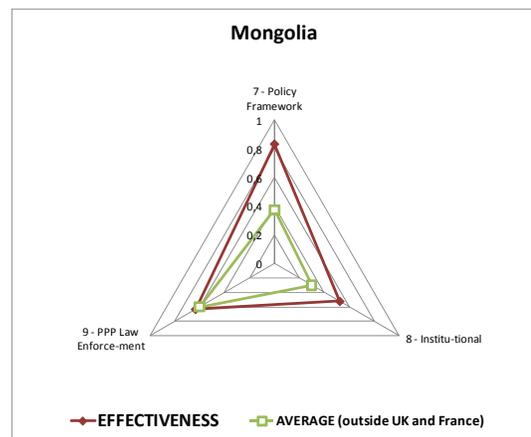
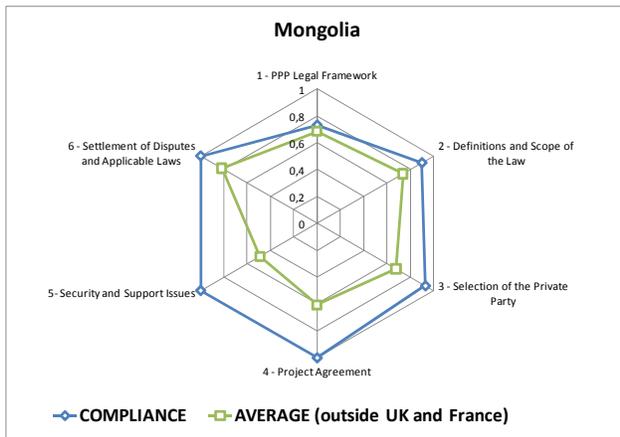
One of the challenges at this point is the adoption and implementation of secondary legislation by the Government and various forms for procedures (tenders, template documents). A practical challenge met by international bidders is the short duration of the tender process: the law allows for a fixed, inflexible sixty (60) calendar days' period between publication of the request for proposals to designation of the winning bidder. An additional thirty (30) days' period is granted for contract negotiation with the winning bidder.

Another sensitive issue, to which the PPP law gives no clear solution, is the amount of compensation which the public authority should pay to the private partner in the event of early termination of the PPP contract (for either party's fault; or for external reasons, like change of laws or force majeure).



Arbitration clauses are allowed in the PPP contract but so far public authorities have resisted them, mainly for two reasons: (1) the high perceived cost of international arbitration; and (2) the fact that an arbitral procedure would not give immediate relief to public authorities, e.g. they will not have immediate access to the local law mechanism of application of interim measures (such as "step-in rights") in order to avoid the disruption of a core public service. However, and this is a very positive sign sent to the International Business community, Moldova ratified the ICSID in June 2011

### 3.20 MONGOLIA (Very high compliance / High Effectiveness)



The Concession Law of Mongolia 2010 (the "**Concession Law**") was formulated by taking guidance from UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects, OECD Basic Elements of Law on Concession Agreements, EC Green Paper on Public Private Partnerships and Community law on Public Contracts and Concessions as well as considering recommendations of UNDP, ADB, USAID and in line with EBRD Core Principles.

The Concession Law which is the first adopted by this country without any past experience on concession except in the mining sector is one of the very few legislation of all EBRD Countries of operation which explicitly provides for a full range of PPP deal as well as for all sort of security instrument and for the possibility of Government support and guarantee together with specific chapter on Lenders rights providing for the possibility of direct agreement as well as step in right all in accordance with Lenders expectation to ensure the bankability of project finance deals.

The Law has been drafted has eight (8) chapters and thirty six (36) articles providing legislative and institutional frameworks, including scope of the law, determining but not limiting concession types, list of concession objects, granting concession rights, concession agreements, powers of the concessionaire and the concession financier, guarantees for the implementation of concessions and dispute settlement.

The main legislative framework of PPP are the Concession Law, Constitution of Mongolia, Civil Code, Law on Government, Law on State and Local Property, and Law on Foreign Investment.

In accordance with Article 11.1 of the Concession Law, the Government has adopted procedures on the selection of the private party (Regulation on the Tender of Concession Provision, Resolution No. 177, dated 07 July 2010). Following this regulation, Model Prequalification Document on Granting



Concessions, Model Request for Proposal Document for Tender and Tender Evaluation Guidelines was adopted by Annexes to the Resolution of State Property Committee no 342, dated 22 July 2010.

With respect to procedures on the selection of the private party, there is a room for further clarity and transparency in connection to relationships among State Property Committee/Governors of aimg or capital city, Chairman, Secretary and members of the tender committee.

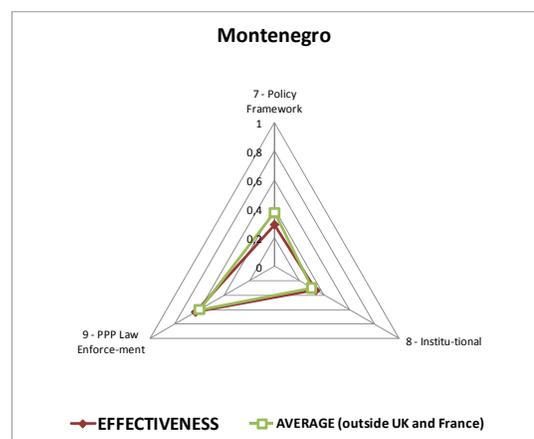
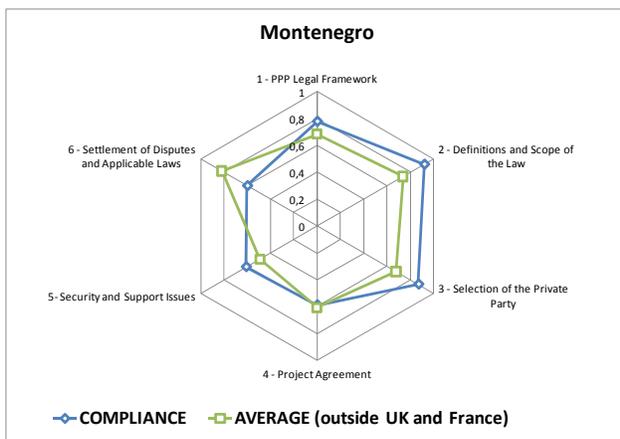
The main policy framework of PPP is the State Policy on PPP as adopted by the Parliament Resolution No.64, dated 15 October 2009. It expresses the strong will of the State to promote the private sector and to reduce the burden of the government to develop infrastructure and social services with limited funding and human resources.

With respect to institutional framework, institutional capacity and human resourcing of the PPP central unit (PPP and Concession Department and, to a greater extent, the State Property Committee itself) needs to be improved.

At this stage, it is not possible to provide views on PPP law enforcement. The Concession Law has the potential to improve the management of state-owned, as well as local, properties and to enhance transparency at the central government and local level.

The future will say if such copy and paste PPP new regulations even inspired by the best international standards will be sufficient to allow the rapid take off of PPP projects in Mongolia without any prior concession expertise and without the full revision of their existing legal framework and business environment.

### 3.21 MONTENEGRO (High compliance /Low Effectiveness)



Montenegro has a single act dealing with concessions, enacted in 2009 (the "Concession Law"). The public procurement laws are not applicable to concessions, therefore awarding PPP projects are regulated by the Concession Law and other sectoral laws relating to the "product" of the PPP in question. Currently there is no special PPP Law incorporating all forms of PPP.

Granting of concessions are generally awarded through a competitive tender process, with principles of transparency, non-discrimination and competitiveness clearly stipulated in the Concession Law. An

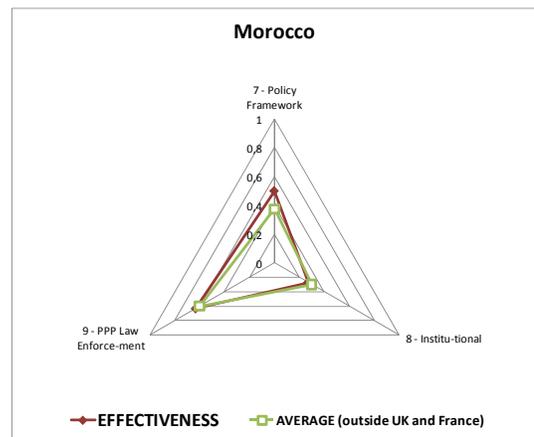
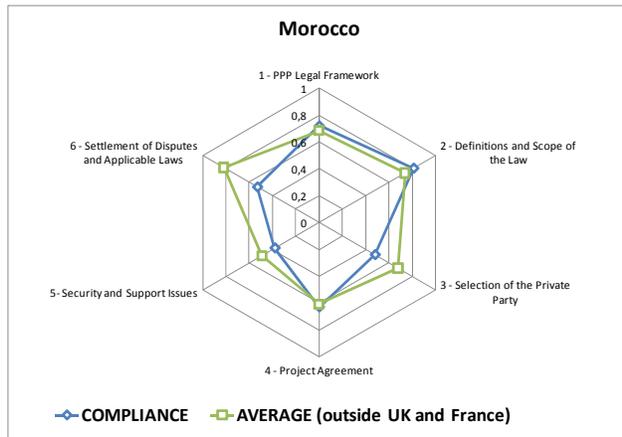


approval of the Government and/or Parliament is required in the exceptional cases of awarding a concession without a public tender process. The obstacles that can be detected in the process of awarding concessions mainly relate to the control of the project’s implementation and to the overlaps of competencies between the institutions participating in the projects.

Montenegro is one of the very few countries in the region (if not the sole following the recent ratification by Serbia and Moldova) not to have ratified the Washington Convention (ICSID) which is not a positive sign to investors.

Although currently there is no PPP agency in Montenegro, there is a Commission of Concessions within the Ministry of Economy. To date concessions have been successfully implemented in the field of mining and geology and in October 2010 a BOT concession was awarded in relation to a PET/CT health centre.

### 3.22 MOROCCO (Medium compliance /Medium Effectiveness)

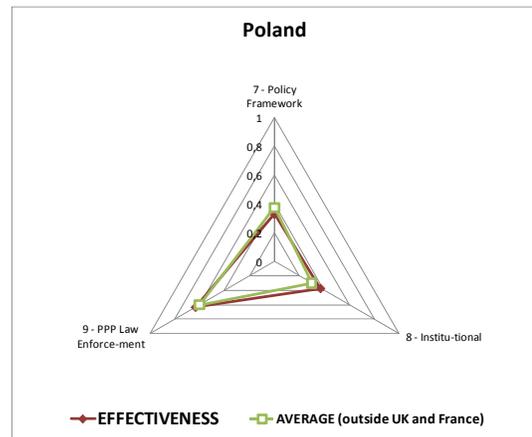
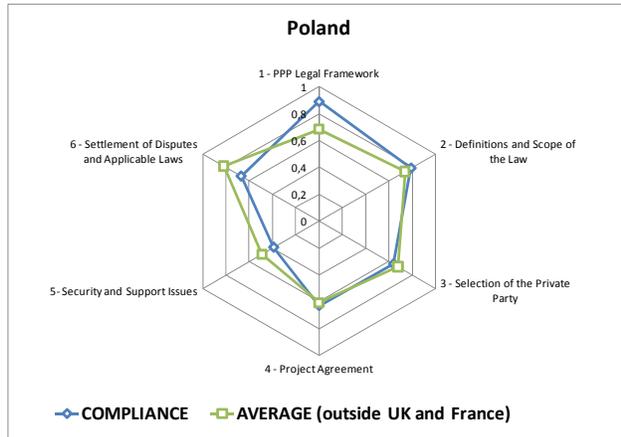


Morocco’s has a long tradition of PPP projects in particular of delegation of Public Service and its legal framework based on the past experience was enacted in 2006 by the law n° 54-05 concerning the contract of delegated management of public services or infrastructure concluded by municipal authorities or public enterprises. The scope of the law is however very restricted and does not apply to concession by Ministries or other government entities. It does not apply also to companies fully own by the State which are no longer considered as public enterprise.

The Law allows carrying out different form of PPP but major international institutions working on PPP development agree that the Moroccan legal framework for Concession and PPP would benefit from a number of improvements by adopting a new specific PPP law and by the putting into operation of the new PPP unit which has just been created within the Ministry of Economy and Finances last September 2011 and which is already in operation in close cooperation with some international institutions such as EIB and IFC for the development of pilot PPP projects.

Morocco despite the absence of a specific PPP government policy is developing PPP in many different fields and is adopting institutional changes while moving ahead in the development of PPP by trying to draw lessons from international experience and the expertise of the DEPP and the DRSC. The enactment of specific PPP law which is presently at its final study stage would further contribute to the development of PPP in Morocco.

### 3.23 POLAND (Medium compliance /Medium Effectiveness)



The PPP Act resolved by the Parliament on the 19 December 2008 and the Concession Act resolved by the Parliament on the 9 January 2009 and which both came into force in February 2009, have drastically changed the existing legal framework for Concession and PPP in Poland since the last 2007 EBRD assessment.

A first general PPP Law was introduced in Poland in October 2005 but this widely criticised law has had to be replaced by the Act on Public-Private Partnership (the "**PPP Law**") in 2009. The new act was intended to improve the public-private partnership system in Poland, in particular by harmonising with other laws which may apply in the scope of concessions/PPP.

Concessions are also regulated by the new Act of 9 January 2009 on Concession for Works or Services (the "**Concession Law**").

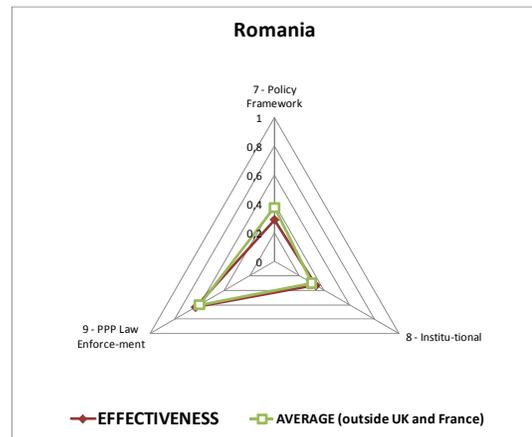
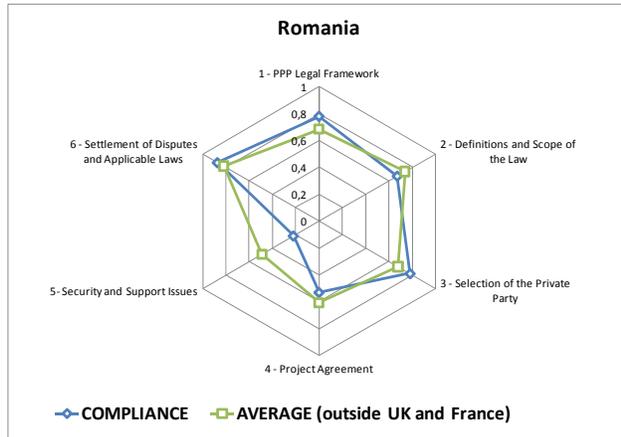
Poland has also a few sector-specific laws regulating the granting of concessions in specific sectors: the Toll Motorways Law and the "EURO 2012 Law" in particular

Regrettably, there is no real Central PPP Unit or government institutions specialising in the promotion and development of PPP in Poland. However private initiatives like the Centrum PPP, a newly established unit (since 10 July 2008.), with the primary purpose of promoting public-private undertakings in Poland on a non-profit basis, may help to perform the role of a government agency in preparation of the best practice standards and PPP promotion in Poland.

There is no explicit PPP policy either except the new law itself. The situation is still quite bad with respect to the security issues necessary for the financing of projects as well as with respect to the uncertainty prevailing with respect to the possible application of international arbitration provisions, aggravated by the absence of ratification of the ICSID Convention (which could have imposed the validity of an international arbitration provision backed up by the Washington International Convention

Despite the relative novelty and instability of PPP regulations in Poland, PPP has been applied in practice in recent years. There were currently (as at October 2011) nineteen (19) projects being implemented on the basis of the PPP Law.

### 3.24 ROMANIA (Medium compliance /Low Effectiveness)



Romanian Law underwent important changes at the end of 2010, following the enactment of a new legal framework dedicated to PPPs, comprising the PPP Act No. 178/2010 (the "**PPP Act 178/2010**") and the Government Decision No. 1239/2010, approving the Norms for the implementation of the PPP Act No. 178/2010, as well as certain measures for the reorganisation of the Central Unit for the Coordination of Public-Private Partnership within the Ministry of Public Finances (the "**PPP Norms**"). Please note that important amendments have been made to the PPP Act 178/2010 as of 17 October 2011, further to the enactment of Government Emergency Ordinance No. 86/2011, and to the PPP Norms as of 20 October 2011, further to the enactment of Government Decision No. 1000/2011.

The amendments made to the PPP legal framework in October 2011 aim to make the procedures for the award of a PPP contract compliant with the European Union Directives on public procurement.

Among the important amendments to the PPP regulations, the following should be noted:

- contracts awarded for the purposes of carrying out relevant activities in public utility sectors: gas, heat and electricity, water, transport, postal services, exploration and extraction of oil, gas, coal and other solid fuels, ports and airports are expressly included among the PPP contracts;
- detailed provisions on the qualification and selection criteria included;
- provisions on subcontracting: right for Contracting Authorities to ask potential investors, without prejudice to the question of the private investor's liability, to indicate in the offer any share of the contract they intend to subcontract to third parties, as well as any proposed subcontractors; contracts entered into with the subcontractors indicated in the offer must be submitted to the Contracting Authority upon execution of the PPP contract and attached thereto; the replacement of subcontractors throughout the performance of the PPP contract is allowed only subject to the approval of the Contracting Authority and to such replacement not resulting in any modification of the initial technical or financial offer;
- possibility of submitting variants (alternative offers) if expressly allowed in the contract notice;



- detailed provisions on technical specifications including: definitions of certain technical specifications, rules to be complied with by Contracting Authorities when establishing technical specifications;
- the price of the PPP contract may be modified throughout the performance of the contract only in limitative circumstances expressly provided by the PPP Norms;
- detailed rules on the publishing and content of notices of award of PPP agreements;
- the possibility for the public partner to resort to a negotiated procedure without having published a contract notice only in exceptional circumstances; and
- enhancement of the role of the Central Unit for the Coordination of Public Private Partnership.

Romania benefited from a PPP Act which was repealed in 2006 by Government Emergency Ordinance No. 34/2006 implementing the European acquis (i.e. Directives 2004/17/EC, 2004/18/EC, 89/665/EEC and 92/13/EEC). Concessions, regulated as contractual PPPs, thus became the only form of partnership between public authorities and private operators that benefited from a dedicated legal framework. This approach did not have the results expected, as a limited number of Concessions of works and services have been granted under GEO 34/2006.

In this context, the enactment of a new legal framework dedicated exclusively to institutionalised PPPs was deemed necessary in 2010 as a possible solution for attracting private funding in the public sector. The new PPP Act did not repeal or amend the pieces of legislation regulating Concessions enacted in 2006. As a result, Romanian Law currently includes the following main sets of rules:

- Public-Private Partnerships implemented as IPPPs governed by the PPP Act 178/2010 and the PPP Norms; and
- Concessions of works and services governed by GEO 34/2006 and the relevant Norms for the implementation thereof.
- Concessions of assets that are public property are governed by GEO 54/2006 and the Norms of implementation thereof.

It is worth noting that the legal texts currently in force are the result of several amendments. Thus, the initial version of the PPP Act 178/2010 raised serious doubts as to its compliance with the European Union rules and principles, triggering the risk of infringement procedures being started by the European Commission against Romania. Major amendments have therefore been brought to the PPP legislation in order to render it compliant with the EU legal framework and to enable its implementation.

Although these amendments have better defined the scope of the regulation and have considerably detailed the award procedures, the current Romanian legal framework still lacks a certain degree of clarity, in particular as regards the line between PPPs and Concessions, which makes it difficult to determine whether a particular project will be governed by one or the other set of rules.

Further difficulties might result from the fact that recent amendments to the PPP Act 178/2010 have included within its scope of application relevant activities that also benefit from sector-specific regulations, among which are gas, energy, water and post. The Law is not very clear as to when the general regulation on PPPs and when the sector-specific regulations are applicable.

In any event, the current legal framework on PPPs is broad enough to allow the implementation of different types of Public-Private Partnerships, such as Concessions, PFIs, BOTs and its respective forms, in both merchant sectors of the economy and in sectors related to the provision of Government service.

The PPP Law provides criteria for identifying the entities having the capacity to act as Contracting Authorities, while both Romanian and foreign investors may have the capacity to act as Private Parties under the PPP legal framework, without discrimination.

Selection procedures, governed by basic principles among which transparency, non-discrimination, equal treatment, proportionality are detailed by the relevant regulations, providing for obligations of Contracting Authorities among which: publishing notices in respect of the award procedure, applying the same criteria made public through the contract notice and the relevant documents to all the candidates/bidders, keeping a record of the key stages and information regarding the award procedure.

PPP agreements may be awarded without a competitive procedure only in limited circumstances.

There is no standard Project Agreement to be complied with; the Law sets forth lists of clauses to be included in the Project Agreement but the content thereof is to be determined in each case based on the requirements of the Contracting Authority and the offer submitted by the Private Party.

The Law also provides for the right of the Private Party or the IPPP to collect tariffs or fees for the use of facilities or provision of services. Availability payments are also allowed under the Romanian legislation.

Review procedures are provided by the Law granting private investors the possibility to challenge a decision or a failure to act by a Contracting Authority, as well as to obtain appropriate compensation for the damages incurred. The Norms on Concessions expressly refer to the possibility of resorting to arbitration for settling a dispute related to a Concession Agreement.

The Law includes very few indications as far as financial and security issues are concerned, it does not provide for step-in rights in favour of lenders or for Government financial support or guarantee for PPP projects.

As regards the implementation of the legal framework, official statements of members of the Romanian Government have repeatedly emphasised the importance of PPPs.

Strategies involving the partnership between the public sector and the private sector have been enacted in several sectors among which energy, infrastructure and municipal services. Furthermore, in April 2011, the Romanian Government announced a list of seventeen (17) projects to be carried out on a PPP basis under the PPP Act 178/2010 in sectors which include: infrastructure, energy, health, housing, prisons.

Entities acting as Central PPP Units have been set up with key functions of promoting PPPs and providing counsel and guidance to both Contracting Authorities and private investors, especially the newly reorganised Central Unit for Coordinating Public Private Partnership.

However, as a general remark, the Romanian experience in implementing successful PPPs is very limited.

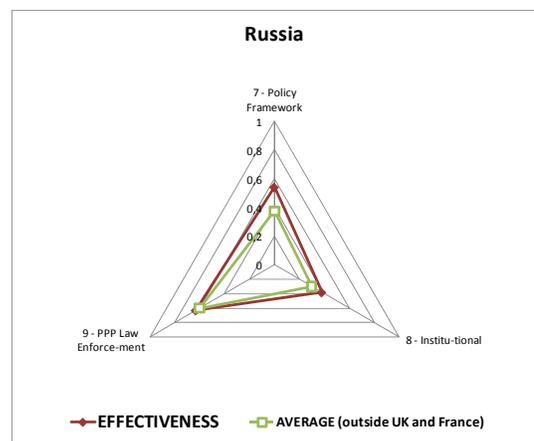
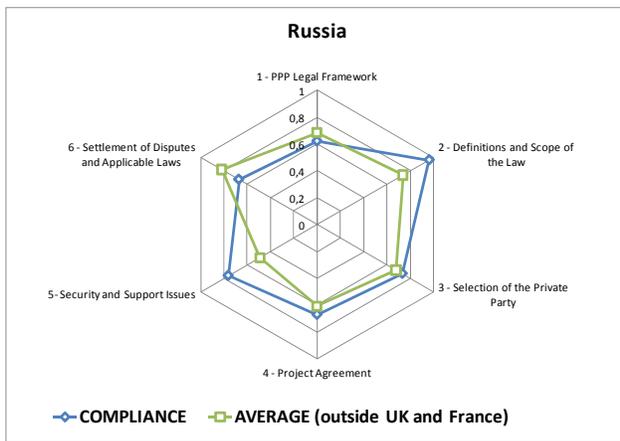


Thus, to this day, the Electronic Public Procurement System (SEAP) has published a number of 194 notices for the award of Concessions of works and services, the vast majority thereof being awarded by local and county authorities in the field of municipal services. Nevertheless, in absence of official statistics, it is difficult to assess how many of them have been implemented successfully.

No award procedure has been started yet under the PPP Act 178/2010.

Among possible obstacles to PPP noted are the following: insufficient training of civil servants, insufficient awareness as regards the PPPs, lack of clarity of the legal framework and no clear lenders' rights.

### 3.25 RUSSIA (High compliance /Medium Effectiveness)



The Federal Law No. 115-FZ "On Concession Agreements" was adopted in 2005 (the "Concession Law"). It was completed with Model Concession Agreement regulations and with the Amendments and Additions of 8 November and 4 December 2007, 30 June 2008, 17 July 2009, 2 July 2010, and 19 July 2011). It is not supported by a general policy framework for PPP but various government representatives have announced on many occasions that concessions and PPP in general, are acknowledged and welcome in Russia.

The Concessions Law operates under the general Russian statutory framework, meaning that it is intended to cover concession-specific aspects of a project only, and does not create a special (more favorable or straightforward) legal regime for concessions.

The Concessions Law expressly refers back to the existing land, subsoil, budgetary, tax, environmental and other legislation. Another key feature of the Russian concession legislation is that it is enacted exclusively at the federal level but applies to all federal, regional and municipal concession projects. Regional and municipal authorities are not allowed to pass concession-related laws and regulations, they may, however, enact laws and regulations on other non-concession forms of PPP.

The Concession Law regulates only one specific form of PPP, i.e. BTO, which can be utilised in particular to benefit from the Federal Investment Fund. Otherwise it is possible to use an alternative legal framework established by more flexible and investor-friendly regional PPP laws for similar projects providing for the private ownership of the PPP facilities on the basis of non-concession forms of PPP.



The Concession Law is a relatively long piece of legislation (thirty eight (38) articles) covering in detail numerous aspects that are important to be covered under a general concession law, including among others, entities involved in the concession granting process, concerned sectors, selection procedure, concession agreement, as well as certain financial security and government support issues. It also contains a number of positive elements (guarantee of non discrimination, open tender procedure, etc.).

There are no fundamental omissions in the Concession Law, but it is not a self standing piece of legislation which could allow any foreign investor or financier to have access to the entire regime applicable to a concession project in one single document. Also, the Concession 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 ambiguous articles which create legal uncertainty. In particular, the Concession Law is very restrictive in respect of security instruments, too prescriptive regarding concessionaire's obligations and selection procedure, does not allow international arbitration and provides for a case-by-case institutional scheme.

Numerous amendment made since its inception in 2005 and since the latest EBRD Assessment have added to the complexity and brought very little clarification except with respect to the compensation in the event of early termination of the concession agreement and the possibility expressly given to the granting authority to contribute to the expenses for the creation / renovation/ operation of the concession facility.

Generally speaking, the Concession Law and regional PPP laws may constitute a solid basis for the development of PPP in the country, but need some significant improvement compared to international standards as well as increased predictability and reliability to become more attractive to lenders and sponsors.

A number of amendments to the Concession Law are currently under discussion. The RF Ministry of Transport prepared and submitted to the State Duma in September 2011 a new set of amendments to the Concession Law and some other federal laws for the purposes of implementing of long-term contracts in the sphere of road construction on the basis of concession agreements. Some of the contemplated amendments are positive (for example: (i) making model concession agreements in respect of some types of infrastructure not mandatory; and (ii) allowing assignment of rights and transfer of debt by the concessionaire at any time (subject to the grantor's consent) and not only upon completion of the construction stage, as currently provided by the Concession Law).

As of September 2011, the PPP laws, regulating BOT and other non-concession PPP forms existed in more than half of all the regions of the Russian Federation. Their quality and importance are increasing. A few PPP projects have already been awarded in accordance with the regional PPP laws (with only Pulkovo Airport having headed the financial close in St. Petersburg so far) and some PPP projects are at the bidding stage (e.g. in St. Petersburg, Perm, Nizny Novgorod, Ekaterinburg).

At the same time a draft federal PPP law is being prepared by the Ministry of Finance. Hopefully, it will give a definition of PPP at the federal level, providing more comfort to sponsors and financiers, but without strangling the regional PPP initiative.

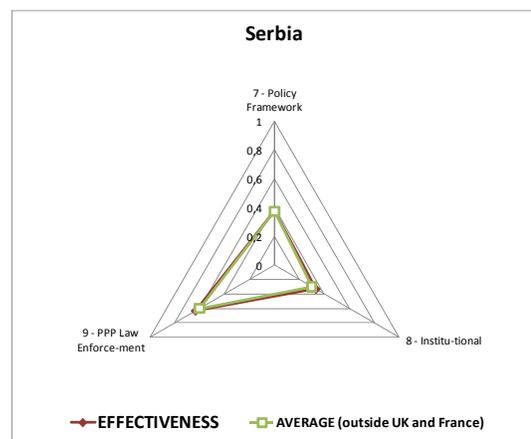
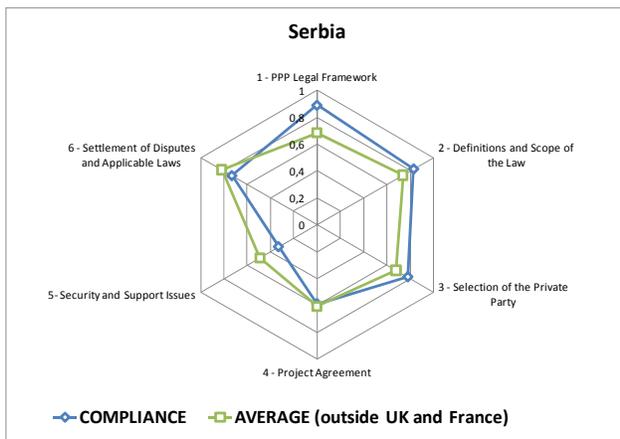
In comparison with the situation at time of previous EBRD PPP Assessment, the institutional base of PPP in Russia has also been improved. A number of PPP departments have been established in the federal and



regional governments and its sub-divisions. PPPs are also noted in some of the regional strategy policy documents.

There is, however, a risk that the Russian PPP market, having just recovered from a significant set-back during the recent economic downturn while many concession and PPP projects were either broken, or abandoned altogether, may yet plunge into another prolonged period of standstill due to the global markets turmoil which arguably may again hit the Russian raw materials-based economy rather hard.

### 3.26 SERBIA (High compliance /Low Effectiveness)



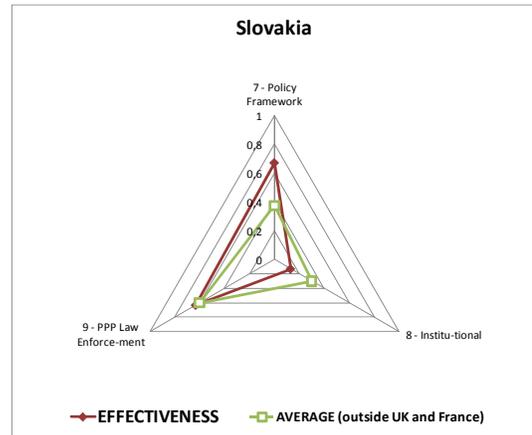
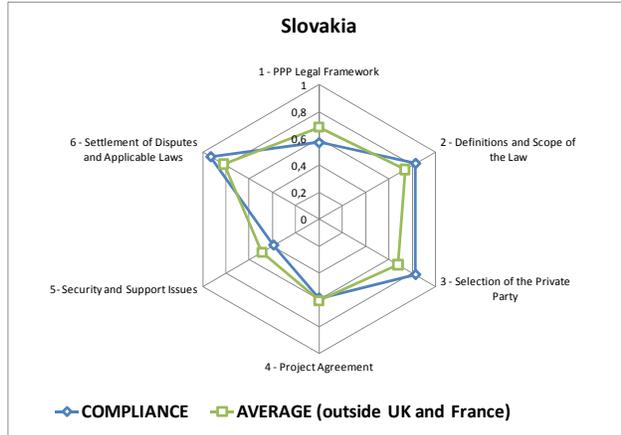
Serbia enacted very recently, in November 2011, an act incorporating the legal framework for PPP, including Concessions – the PPP Law (Official Gazette of RS no 88/2011). There was no general PPP Law in Serbia before the new law governing the realization of PPP projects, which was mainly governed by the Law on Concessions, the Law on Communal Activities and indirectly by other Serbian sectoral laws and by-laws. By adoption of this Law, the previous act dealing specifically with concessions, the Concession Law (Official Gazette RS no 55/2003) is no longer in force.

The PPP law appears to address the majority of the PPP related questions raised in the questionnaire.

Although the PPP law, as well as other applicable laws, provide for the respect of principles such as equal legal treatment, fair competition and the "autonomy of the will", and despite the fact that the publicity and the competitive character of the project award procedure, as well as remedies, are fairly granted by the law, only sporadic projects have been implemented so far at municipality level (even though the sectors where PPPs may be implemented were not restricted by the law). In addition to the overlapping regulation which is difficult to apply, the lack of PPP model agreements and the institutionalised form of economic and consulting support of PPP projects may have also contributed to the absence of more important projects in the past and the new PPP regulation as well as the new institution of PPP Central Unit which has just been created may assist in this respect.

As for requirements in respect of future legislation in order to improve the new PPP law, it will be necessary to adequately regulate the scope of application of the legal framework (including the definition of cooperation between public authorities involved in the procedure). It is also considered desirable to provide improved regulation with respect to the creation of reliable security interests over the assets and the cash-flow of the project, thereby enhancing the bankability of a PPP project.

### 3.27 SLOVAKIA (High compliance /Medium Effectiveness)



Under Slovak law, PPP projects are governed by a complex legal framework where concessions and PPP projects are regulated by a number of different laws and government resolutions. Although such fragmentation is not an obstacle to the implementation of PPP projects, the logic of the legal framework is not always cohesive, which may cause practical difficulties in their application.

Although the different types of PPPs are not explicitly named by the applicable laws, they would fall under the scope of the public procurement law and relevant sectoral regulation. However, the law applicable to PPP projects is rather short and does not provide for concrete basic rights and obligations in respect of the parties participating in the PPP. This may be an obstacle to the realisation of smaller PPP projects (especially at municipal level).

In addition to the above mentioned points, the Public Procurement Act (which is the main source of law for the award of PPP projects) ensures the enforcement of the principles of non-discrimination, transparency, economy and efficiency during the selection process in a sufficient manner. It is also to be noted that the award of projects (especially the restriction of awards without a competitive tender), the publicity of the award proceedings and the available legal remedies are adequately regulated as well.

*De lege ferenda*, the possibility of creating reliable security interests over the assets of the project, thereby enhancing the bankability of a PPP project is being considered. One could consider the current legislation to be refined, permitting more flexibility for the conclusion of project agreements that would allow for the proper allocation of risks between the contracting authorities and the private sector participants.

Evidently the main, if not sole, objective of the Public Procurement Act enacted in 2006 has been to comply with the EU harmonization requirements by duplicating parts of the relevant Directives, and not to promote PPP or concession in any way.

The fact that the former Concession Law (adopted in 1996) has been repealed and that reference to concessions are now part of the general Public Procurement Law means that the law 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



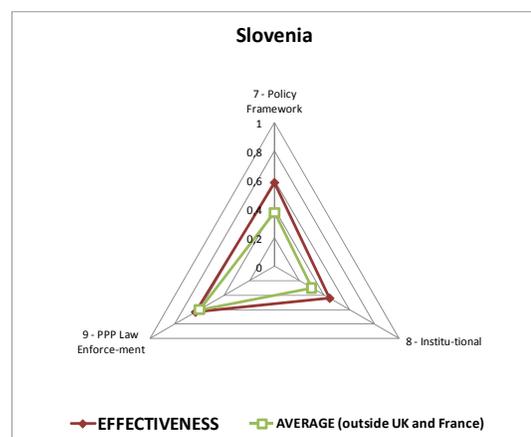
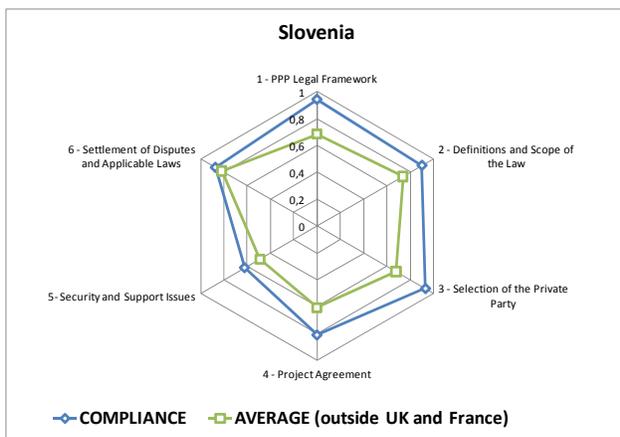
Republic requires the adoption of a specific PPP law or substantial expansion of the existing part of the Public Procurement Law, in particular with respect to a PFI type of PPP.

There are currently no plans to make legislative changes to improve the PPP legal environment. The current Slovak government seems less inclined to promote PPP projects than the previous one. Unfortunately, some of the pilot PPP highway projects were terminated after the project award was granted to the preferred bidder, for reasons arising from the default of the private partner (such as financial closing having not occurred). In such a climate it is not surprising that there is currently no public authority in charge of providing economic and consulting support to potential contracting authorities of PPP projects.

The successful financial close of the first major PPP project in Slovakia related to the construction and operation of R1 expressway in 2010, and has given a positive sign of the possible success of project financing in Slovakia, despite the fact that several projects for which concessions were awarded could not reach financial closing. Instructive documents issued by the Ministry of Finance to facilitate the participation of International Institutions such as EIB and EBRD have improved the situation. However, the Ministry of Finance is no longer in charge of administrative and economic guidance of the Contracting Authorities, which means that the applicability of these documents is questionable.

The current government seems to be less inclined to PPP projects than the previous government. This is mainly due to the fact that the current government: (i) had cancelled two (2) of the three (3) pilot highway PPP projects; (ii) claimed that the three (3) pilot PPP projects related to the construction of highways were extremely expensive; and (iii) seems to support other forms of construction of highways (classical form of contract for work or EU funds).

### 3.28 SLOVENIA (High compliance /Medium Effectiveness)



Slovenia in 2007 modernised its Public Private Partnership (PPP) policy, institutional and legal frameworks, which compare favourably with those in other EBRD countries of operations. The Slovenian Public-Private Partnership Act (the "PPP Act"), enacted in 2007, is a fairly comprehensive piece of legislation, regulating both contractual and institutional PPPs. The PPP Act refers to contractual PPPs as relations based on either concessions or public procurement and applies to both services concessions and works concessions, including BOT ("build, operate, transfer") schemes. However, due to its expressly supporting nature the Act needs to be consulted in combination with other sector laws and general laws



(e.g. the Public Procurement Act or the Public Utilities Act) to ascertain exactly which rules should apply. This approach may not necessarily prove the most attractive for investors and the act remains complex and confused on many issues.

The PPP Act is applicable to commercially viable infrastructure assets and to public services based on social infrastructure. The law provides a degree of flexibility and a variety of instruments. The most favourable aspects of the PPP Act are that it provides a PPP framework that did not previously exist, and that it obligates the awarding authority to consider the results of a compulsory feasibility study before entering into any public procurement contract. Such studies list the advantages and disadvantages of a PPP for the deal.

The PPP Act is applicable to all forms of public-private partnerships: contractual partnerships such as concessions, BOT, BOO and similar forms, license authorizations and public contracting relationships (public works and public services), privatizations.

The fact that the law 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 will inevitably result in great confusion.

The laws intend to regulate concessions, public procurement and equity participation, where public and private interest coexist, and in each case try to incorporate EU Directives with respect to Work concession and Service Concessions (with special treatment for water, energy, transport and postal services). The further decision to give to the Law only a "subsidiarity" effect, thus applicable only for the procedures of establishing and operating public-private partnerships with regard to those issues that are not otherwise regulated by a special act or regulation (sectorial law or local government regulations), except for specific provision where primacy of applicability do apply, adds to the confusion.

In this context it is hard to corroborate the provisions of the Law with the PFI Guide as benchmark, and no doubt foreign investors will have difficulty understanding the legal framework applicable to concessions in a specific sector, and the risks associated with such uncertainties or complexities may further give the impression of bureaucracy and protectionism, which is just the opposite of the intended objective of the Law.

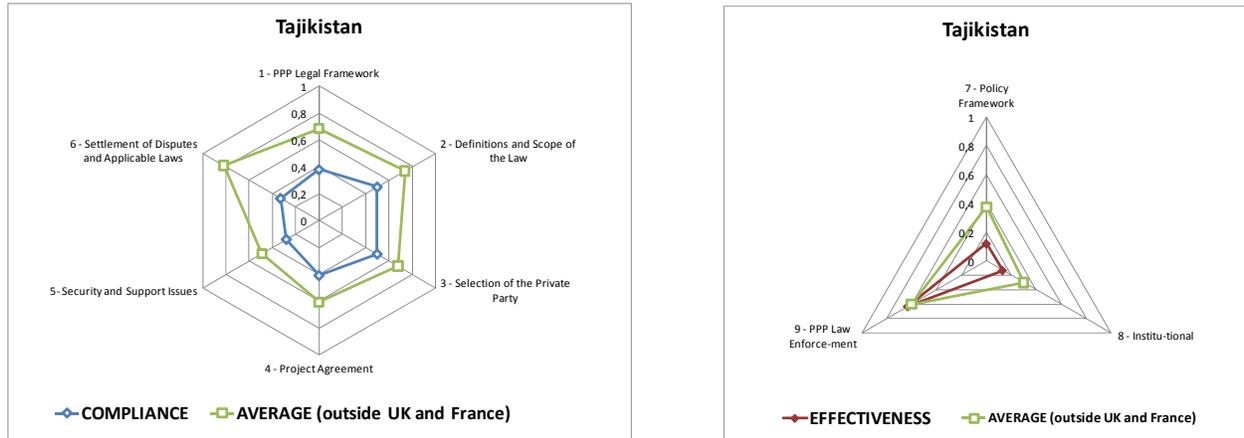
One of the most favourable elements of the PPP Act is that it designed a public private partnership framework for Slovenia which, until 2007, did not exist, with the innovative idea to force an awarding authority to consider prior to entering into any public procurement contract the possible advantages or disadvantages of a public private partnership for such deal (through a compulsory feasibility study).

The core issues which remain to be improved are those with respect to the: (i) content of the concession agreements and termination provisions; (ii) security package available to the lenders; and (iii) modalities of government support, which remains very unclear.

According to the PPP Act, the Ministry of Finance plays a major role in PPP implementation. Specifically, it is required to formulate PPP regulations, form a special organisational unit within its structure to develop and monitor the implementation of PPPs, draw up manuals for operating PPPs and undertake other measures in order to improve PPP practices.

The Minister of Finance is also required to lead the PPP Council, which formulates PPP policy.

### 3.29 TAJIKISTAN (Low compliance /Very low Effectiveness)



A new concession law was enacted on 26 December 2011, but the new law is very similar, if not identical to, the previous concession law. There are only few changes, for instance, under the new law both foreign and domestic investors (entities) may become concessionaires, while under the old law only foreign entities were formally allowed to enter into a concession with the Tajiki State.

The Tajik initial Concession Law was adopted in 1997 and was supplemented in 2000 by 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 but it establishes the closest to the PPP concept of public – private cooperation, where the state grants private partners with the right to use (explore, operate etc) its main material values and wealth, such as land, natural resources, water, aerial space, etc on a contractual basis.

There are additional regulations in the area such as the Production Sharing Agreement Law (**PSA Law**) which also address the issues of attracting private partners for exercising economic activity in the business areas, where the state is not [yet] capable of implementing necessary activities leading to accumulation of income through making heavy investments. Other laws, such as the Law on Education and the Law on Public Health Protection, allow private entities to assume part of the state's obligation to provide people with adequate standard of living. The fragmentary character of the regulation of PPP is one of its major deficiencies of the PPP legal framework in Tajikistan.

The scope of application of the Concession Law 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 and unclear definition of concerned sectors for example).



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 Agreements, 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). The possibility of unilateral termination by the Contracting Authority only in case of misrepresentation by the concessionaire is also noteworthy.

Finally, the Law is not substantially developed as far as support and financial securities are concerned. Also, international arbitration is limited and the dispute settlement mechanism of the Concession Law is a particular weakness in the absence of ratification of the ICSID Washington Convention and of the New York Convention on enforcement of arbitral awards.

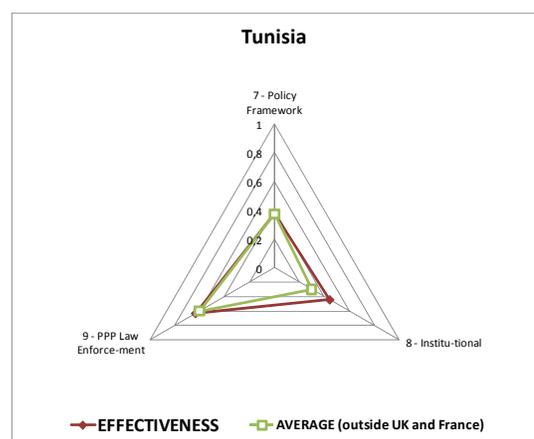
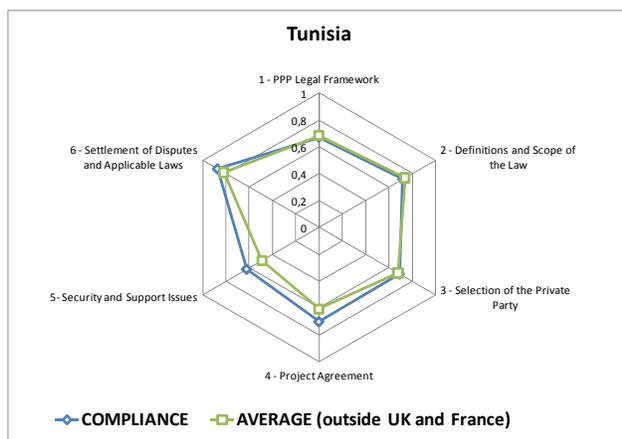
A policy framework for improving the legal environment and promoting PPP has not been identified in Tajikistan (even though the Concession Law provides that the Government shall draw up "priority investment programs").

However, a certain number of positive elements may be noted 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.

The Government of Tajikistan is trying to draft a PPP law – a specially established working group had to produce the first draft PPP law in December 2011. They work in close cooperation with international experts under the IFC project. The final draft PPP law is planned to be completed and submitted to the Parliament in spring 2012.

### 3.30 TUNISIA (High compliance /Low Effectiveness)



Tunisia has a history of user based concession projects and is a potentially attractive environment for PPP despite the economic and political uncertainties with respect to PPP following the Revolution.

The 2008 law on Concession based on previous experience (Enfidha Airport, Rades Power plant) and incorporating principles disseminated in the administrative law, with some noticeable advantages such as the "step in right" and the right of mortgage of construction on public land as well as the principle of revision of contract in case the financial / economic balance is disrupted by unforeseen conditions, is a great achievement toward facilitating the understanding of the existing legal framework for concession in Tunisia as such law is intended to be the general framework for the numerous sectorial laws which previously existed.

Whilst the domestic banking sector has limited capacity and expertise in PPP, long-term foreign currency funding may be a viable option for funding the projects currently being proposed in the water, renewable energies, electricity, and road sectors. A stronger strategic direction with the role of PPP being extended to PFI types of PPP projects, including the non merchant sector (hospital, schools, prisons, and public facilities) may be also envisaged which will require some amendment to the existing concession legislation or preferably a new specific law on PPP creating an additional instrument for such financing.

By leveraging current experience, the development of a formal PPP policy and the establishment of a PPP centre of expertise (in addition to the existing PPP follow unit with the Prime ministers office) could assure a co-ordinated and effective implementation of PPP programs in Tunisia on a larger scale, as acknowledged by the recent EIB PPP study of South Mediterranean countries.

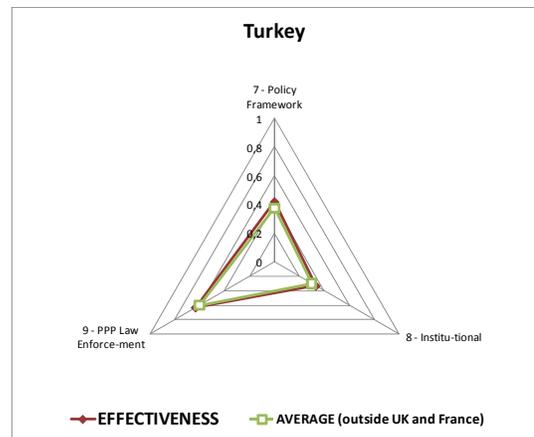
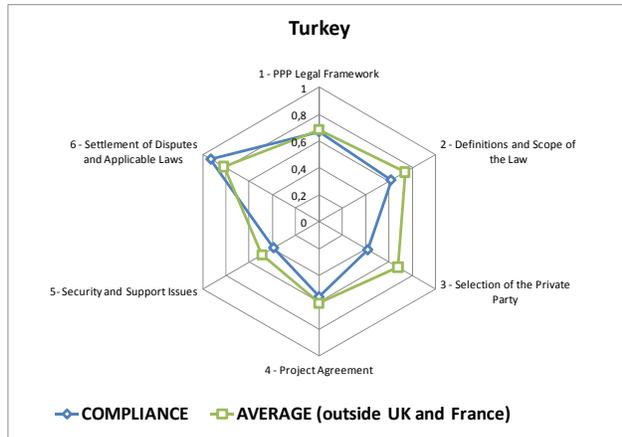
The procedure for the selection of concessionaire as provided by the 2010 Decree appears however, to be complicated, at least for PPP/PFI projects of a small size. The introduction of more provisions concerning the use of securities and government guarantees for the proper implementation of PPP by the granting authorities would also favour the development of PPP.

The reinforcing of local government/Municipality financial and decision autonomy is absolutely needed for the proper development of infrastructure around Tunisia, and in particular in the non coastal areas and for the preservation of the budget balance of the country, especially in view the construction efforts needed in various sectors, and in particular in the remote areas of the country, after the revolution.

Furthermore, the selection of an appropriate pilot project with a chance of success and acceptance by the population would also promote the starting of a significant trend of new private investment in public infrastructure. The challenge then would be to favour difficult and larger scale projects in remote areas for political considerations, without taking into account the limited appetite for risk of the financial community and foreign investors.



### 3.31 TURKEY (Medium compliance /Medium Effectiveness)



Turkey was one of the first countries to develop Public-Private Partnership (PPP) legal schemes for infrastructure projects. The Law No 3096 on the Generation, Transmission, Distribution and Trade of Electricity by entities other than Turkish Electricity Agency of 1984 was one of the first examples of PPP.

Turkish law embodies different legal models for PPPs. However, some of these models are based on legislation that does not directly govern PPPs, such as the Privatisation Law No 4046 of 1994.

Concessions are awarded on the basis of sector specific laws. By way of example, Transfer of Operation Rights of Airports and Ports are governed by Law No 5335 of 2005 and this law cross-refers to the Privatization Law for the selection of concessionaires for the Transfer of Operation Rights of Airports and Ports. Concessions related to construction, maintenance and operation of highways are governed by Law No 3465 Regarding the Construction, Maintenance and Operation of Highways by entities other than Turkish General Directorate of Highways of 1983.

Some projects are governed by the BOT Law which currently is dormant, as it is no longer used, or the BO Law. A new PPP law (the "**Draft Law**") was prepared in November 2007 and is currently pending a vote in a couple of years.

The Turkish legislation on PPPs is therefore very piece meal and is scattered through various pieces of legislation making it, to a certain extent, difficult to grasp for market participants and financiers. This also heightens the potential risks that may be faced by sponsors in implementing projects, as various government bodies may be involved in a project as opposed to a one-stop-shop policy.

Lack of specific legislation on various crucial matters such as creation of security interests is quite common. The relevant parties in these circumstances will need to resort to the general principles of Turkish law and case law. This often brings with it ambiguity due to concepts such as "*public policy*" and "*public interest*".

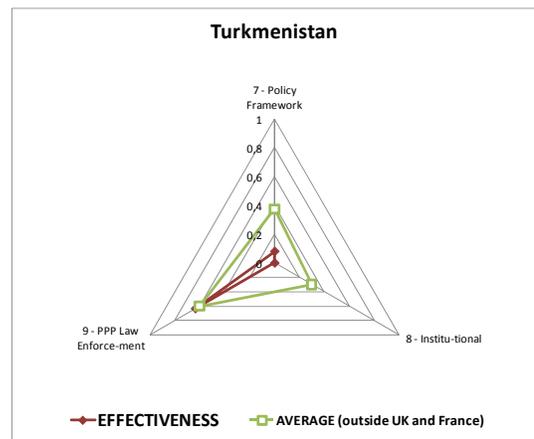
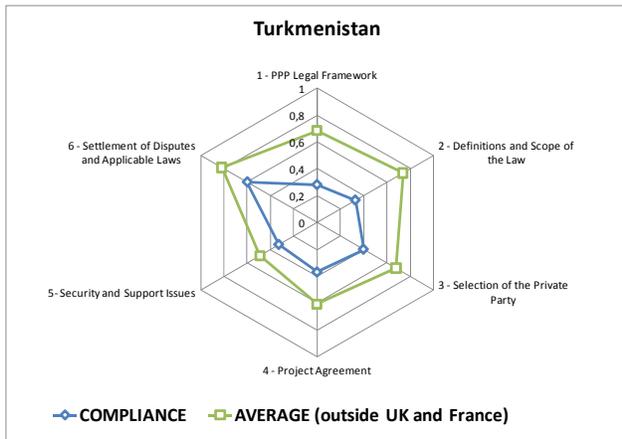
It appears clear that the legislator should take prompt action to remedy the various short falls under Turkish law that currently make PPPs unattractive. In this context, more flexibility in Concession contract negotiations as well as availability of more security instruments to the benefit of lenders are crucial to future development of PPPs.



There is no single definition of concession contracts under Turkish law. The types of concession contracts are not listed in an exhaustive manner under Turkish law. Administrative actions that are not of a unilateral nature may be qualified as "concession contracts" by the Council of State should certain criteria, as set in the various judgments of the Council of State, be met, thus regardless of the fact that an administrative contract is not identified by its parties as a concession contract, the Council of State may still qualify such contract as a concession if it meets the criteria set out by the Council of State. The approach of the Council of State is substance over form on concession contracts.

It is to be noted that the information provided in connection with the concession contracts in the questionnaire is based on the main relevant legislation and should not be considered as an exhaustive study on all concession contracts under Turkish law.

**3.32 TURKMENISTAN (Low Compliance/ Very Low Effectiveness)**



A policy framework for improving the legal environment and promoting PSP 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.

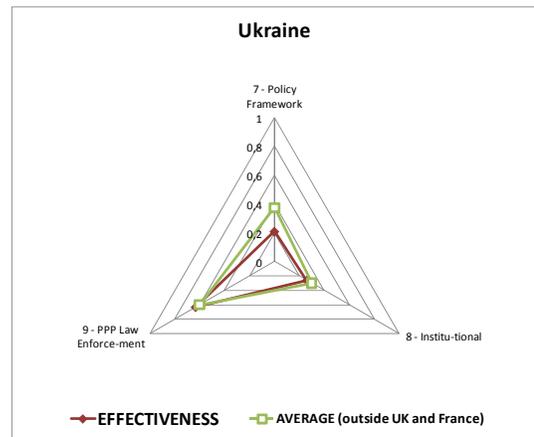
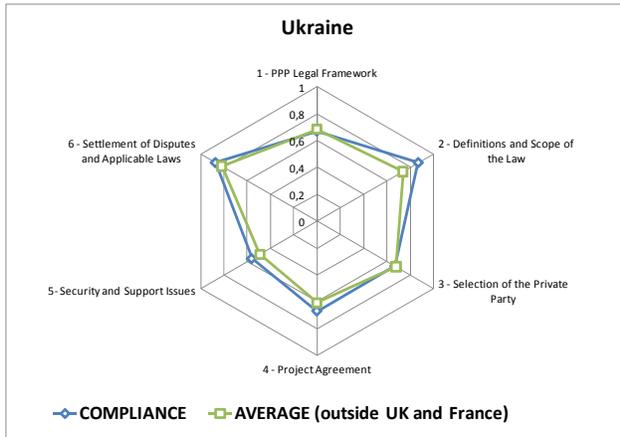
The selection procedure is not developed. The Law refers to the Cabinet of Ministers decisions in this respect. No such general public document was identified (except in the oil and gas sector) even though certain internal rules are used in this respect.

The settlement of disputes privilege 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 PSP in infrastructure and utility services in Turkmenistan.

### 3.33 UKRAINE (High compliance /Very Low Effectiveness)



In 2010 - 2011 the Ukrainian Parliament and Government adopted a considerable number of legislative acts regulating PPP. The first step forward was adoption of the Law of Ukraine "On Public Private Partnership" (the "PPP Law") in 2010. The PPP Law is a framework law, which rather than asserting the prevailing force of its provisions, refers interested parties to other laws for rules and regulations. Furthermore, the Parliament adopted a certain number of sector specific legislative acts (e.g.: concession and lease of water supply, sewage and central heating infrastructure, mining concessions, concession of motor roads, etc) which introduced an additional layer of regulation. Therefore, potential investors usually need to refer to numerous legislative acts and various decisions of responsible self-governing authorities which regulate PPP on the local level. Most experts consider that the complexity of Ukrainian legislation is one of the main obstacles for implementation of PPPs and underlines the need for a more clear and consistent legal environment.

In principle, the newly adopted Ukrainian PPP legislation provides for favourable conditions for implementing PPPs. Still, after more precise analysis of the specific legislation (e.g. the Land Code, the Budget Code, etc) it appears that some provisions of the PPP laws are not enforceable due to the absence of a necessary enforcement mechanism or because they contradict the specific norms provided for by other specific legislation.

Another important aspect is the absence of a PPP unit, as the single organisation responsible for preparation and implementation of PPPs. Currently, several authorities are responsible for controlling implementation, approving tender documentation, taking a decision about state or municipal support, which creates misunderstandings related to the number of approvals that should be received before launching a PPP project. The lack of particular approval may result in invalidity of the results of the tender as well as the PPP agreement. However, it is expected that these inconsistencies will be removed after the completion of administrative reform which is currently on-going in Ukraine. However, the Government and the Parliament have still not decided on the entity which would fill the role of "PPP unit".



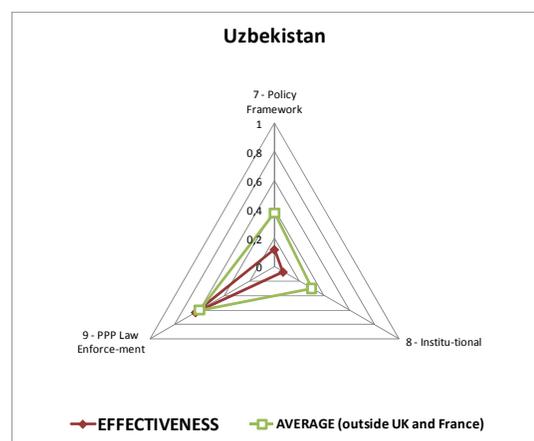
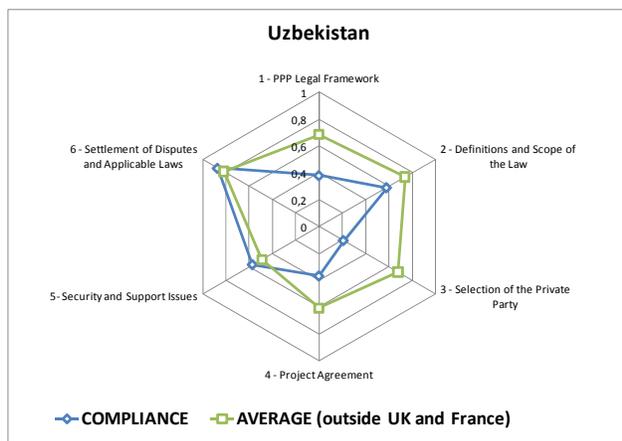
Moreover, at the date of preparation of the assessment no clear policy statement or strategy of Government support for PPP at the country level has otherwise been made. Nevertheless, officials of the Ministry of Economic Development and Trade (one of the authorities responsible for preparation of PPP legislation) have on numerous occasions underlined their intention to prepare a PPP strategy of the Government as well as amendments to the legislation.

Another important aspect is lack of awareness of state officials and the population in general about the meaning and benefits of PPP, which is reflected in the lack of support. However, most ministries and other governmental authorities have started preparing and introducing seminars for their officials in order to increase their understanding of PPP.

Among the positive innovations introduced by the newly adopted legislation, the clear tender procedure for definition of the private partner, as well as the possibility for the project to be initiated by the private investor, can be underlined. PPP legislation provides the principle of non discrimination for the private investor both in Ukraine and abroad which should considerably stimulate their investments in Ukraine. However, both the public and private sector have underlined the necessity to improve the general investment climate (amending licensing, land, budget and other legislation, etc).

In principle, the Ukrainian PPP legislation provides for a solid base for implementation of PPPs, however, other legislation should be brought into compliance with the provisions of the PPP legislation or the PPP legislation should clearly state that it prevails over all other relevant legislation.

### 3.34 UZBEKISTAN (Low compliance /Very low Effectiveness)



The Uzbek Law "On Concessions" 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 defined as an authorisation "for the performance of a certain kind of economic activity connected with the granting to such investor of property, plots of the land and subsoil on the basis of the conclusion of the concession agreement", discrimination against domestic investors, unclear definition of concerned sectors). In this respect, it can be noted that other general pieces of legislation do contain certain interesting provisions (in particular the Uzbek Civil Code of 1996 and the Law "On Guarantees and Measures for the Protection of Foreign Investor's Rights" of 1998).



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

Even though the Law "*On Concessions*" contains provisions on the Project Agreements, 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, or the necessary cases for concession extension).

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

However certain positive elements such as the reference to "*mutual benefit*" can be noted.

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

The Production sharing agreement is another form of PPP recognised by Uzbek law. This form of PPP is regulated by Uzbek Law "*On Production Sharing Agreements*" which defines a production sharing agreement as

*"an agreement according to which the Republic of Uzbekistan grants to a foreign investor exclusive rights for prospecting, exploration and mining operations on subsoil area indicated in the agreement and for performing works connected therewith on a reimbursable basis and for a certain time period and the investor in his turn undertakes to complete these works at his own risk and expense."*

Therefore, PPP in the form of a production sharing agreement' can be awarded only in oil-and-gas and mining sectors.

There are also certain gaps in the Law "*On Production Sharing Agreements*" (the selection procedure is not detailed; lack of provisions regarding compensation in case of termination of the production sharing agreement and the lenders' rights to "step-in" or substitute the private party under the agreement).

Nevertheless, this form of PPP appears to be most practical in Uzbekistan so far. There are several large-scale projects in the form of production sharing agreements launched and on-going in Uzbekistan.

However it should be noted that there is no specialised public authority designated or created by the government of the Republic of Uzbekistan to promote PPPs and to serve as central PPP unit in the country.

As a matter of practice, the Cabinet of Ministers of the Republic of Uzbekistan authorizes one of the existing public authorities to act as Contracting Authority in a PPP project on ad-hoc basis.

Although there is no general/national policy framework/program adopted in Uzbekistan for promoting PPPs, a policy framework for improving the legal environment and promoting PPP in the public utility services sector has been identified (Resolution "*On approval of the concept of deepening of the economic reforms in the public utility services system*", dated 1998).

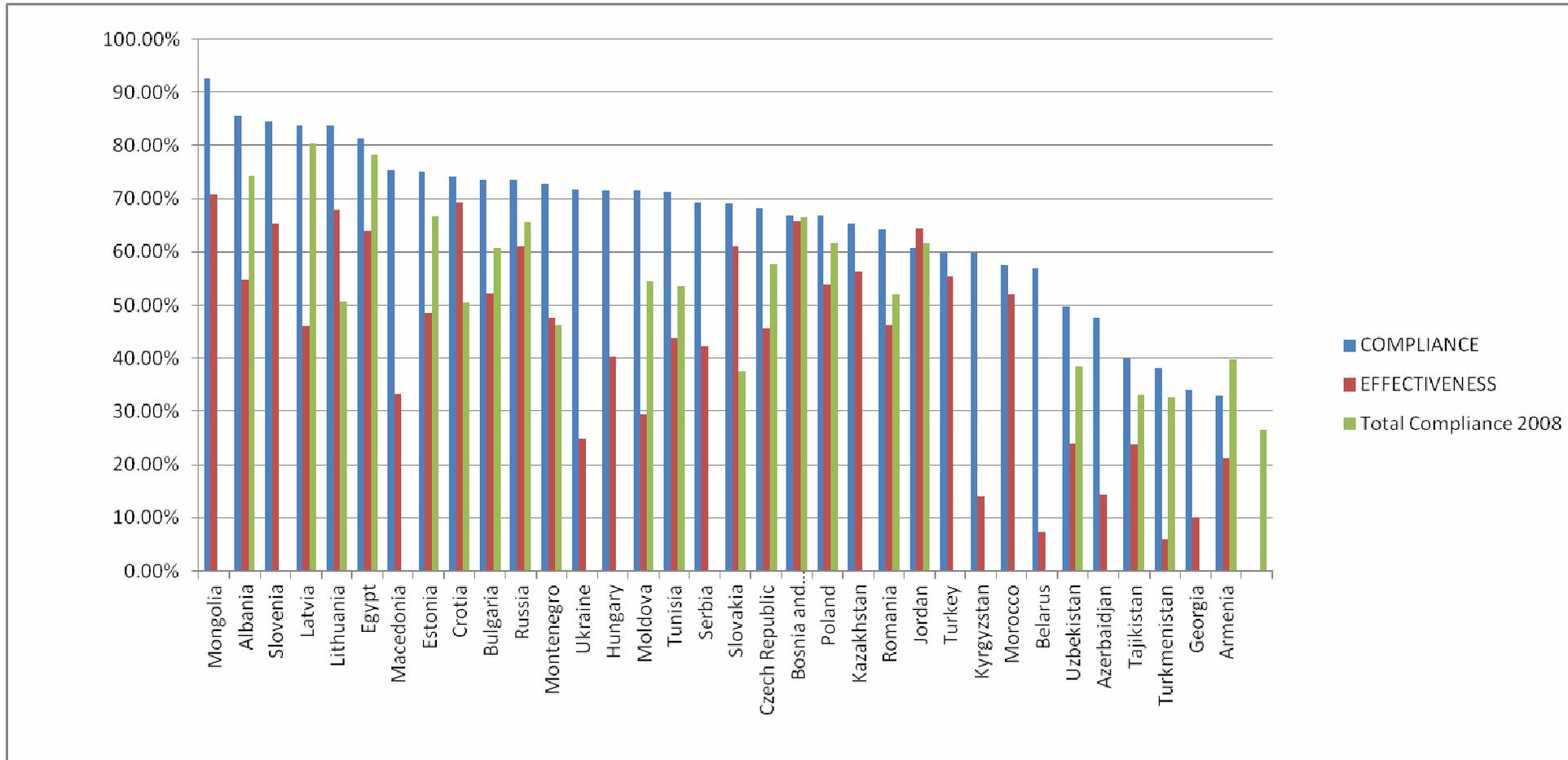
#### **¶ SECTION 4: EVOLUTION AND TRENDS**



Gide Loyrette Nouel



European Bank  
for Reconstruction and Development



## 4.1 The tremendous legislative activity

Within three (3) years, if we take as a starting point 2008 (the year of the last EBRD Concession assessment) no less than seventeen (17) EBRD countries, representing roughly half of the EBRD countries of operation, have enacted a new concession or PPP law: The Act of Public Private Partnership in **Croatia** (2008); the Law regulating Partnership in **Egypt** (2010); the Regulation for implementing Privatization transaction (including PPP) in **Jordan** (2008); the amendment of Concession law in **Kazakhstan** creating a PPP Center (2008); the law on PPP; the PPP law of the **Kyrgyz Republic** (2009); the **Latvia** law on PPP (2009); the **Macedonian** law on Concession and other type of PPP (2008); the **Moldova** Concession and PPP law (2008); the **Mongolian** law on Concession (2010); the law on Concession of **Montenegro** (2009); the **Polish** act on PPP (2008) and the Polish law on Concession of Works and Services (2009); the **Romanian** PPP act dealing with IPPP (2010); numerous regional **Russian** PPP laws; The **Serbian** Law on PPP (2011); the **Tajikistan** Concession law (2011); the **Tunisian** Concession law (2008) and the **Ukraine** law on State Private Partnership (2010).

During the same period numerous other countries have further adopted some significant amendments to their existing legislation, making them more compliant to international best practices.

Such a trend is even more remarkable in that it was noted in the 2007/2008 Assessment that since the previous concession law assessment in EBRD's countries of operations (made in 2004 and 2005), also roughly half of the twenty eight (28) concerned countries at the time 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 affecting most EBRD countries of operation, such geographical location remit having been extended in the mean time to include MENA countries such as Egypt, Jordan, Morocco and Tunisia. It is furthermore worth mentioning that, contrary to the first assessment in 2004-2005, there is no further need for special treatment for countries without a law on concession or PPP, which are now limited to only Armenia, Azerbaijan and Belarus - and even the few countries where no specific Concession or PPP law exist (such as Belarus) are presently working on the drafting of a law.

## 4.2 The Trend toward PPP in addition to Concessions

Many countries are now aware that they need a PPP law in addition to a Concession law. Most of the new laws refer to all types of PPP including, but not limited to, Concessions. Even in the very few case where the new law is limited to traditional Concessions and the BOT form of PPP the drafting of larger PPP law is under consideration (such as in Tunisia). Other countries with an older Concession or BOT law (like Turkey or Morocco) are also working on a new draft of general PPP law. Countries without concession laws (like Belarus) are also asking for assistance in this respect. This trend clearly shows that most countries today in the area of EBRD operations recognise the necessity to improve and enlarge their concession and PPP framework and to adopt the proper instruments necessary to develop PPP.

For the past decade legislative trends in the EBRD region of operation have slightly changed focus from regulating BOT-type concessions to wider range spectrum PPP arrangements including "lighter"



arrangements (those not necessarily involving a construction element or end-user payment) and management contracts of less duration. Procedure-wise, PPP requires a more flexible and effective mechanism than that of procurement and concessions.

Generally, until 2004/5 most countries used to regulate concessions in their national laws, with PPP remaining a matter of legal policy and structuring under the existing rules of the law on obligations, or similar, as opposed to a single act regulation. Accordingly, there have been virtually no definitions of PPP available on either national or international level. This has recently changed and we have witnessed a new trend whereby countries are developing a separate PPP Act, or an Act including Concessions as a type of PPP, among others.

While the majority of the EBRD countries of operations have Concessions Acts, not regulating PPPs, there are currently ten (10) countries that have PPP Laws/Acts including or not Concessions. These are:

- FYR Macedonia: Law on Concession and Public Private Partnership (no.7/2008),
- Kyrgyz Republic: The Law on PPP (2009),
- Latvia: Public Private Partnership Law (01.10.2009),
- Moldova: Law on Public-Private Partnerships (2008),
- Montenegro: The Law on Private Sector Participation in Performance of Public Services (2002),
- Poland: Public Private Partnership Act and the Act on Concession on Construction Works and Services (2009),
  
- Romania: Law no. 178/2010 concerning the Public-Private Partnership (4/11/2010),
  
- Slovenia: The Public Private Partnership Act (ZJZP) of 2007,
- Ukraine: Law on Public Private Partnership (31/10/2010),
- Serbia the PPP Law (November 2011).

A few of the above mentioned countries have enacted both a PPP Act and a Concession Act and it is therefore important to see what exactly the scope is of each law, and what arrangements are covered by what law.

### **4.3 The Trend toward the introduction of the PFI model**

Following this pragmatic trend many countries are now aware that they need to introduce the PFI model of PPP contracts, in particular for relatively small projects in the non merchant sector. They are looking for a proper framework, not only to allow the traditional large concessions and BOT projects (where financing is based on the proceeds expected from the actual operation of the project) but also to acquire new legal instruments allowing the financing of non commercial projects, as achieved successfully in most western European countries.

Contrary to the traditional concession with delegation of the associated public services, the PFI model contract is without delegation of the public service itself, even in the non merchant sector, such as schools, hospitals, prisons and public buildings or public facilities or non commercial services (what we have called for the purpose of this assessment the PFI type of PPP).



The remuneration for such a project is based on a rent and/or service fee to be paid by the Granting authority over the long term operation period and corresponds to the availability and performance of the new or rehabilitated public facilities or services rendered.

Such projects can be of a smaller size than the traditional BOT type of contract, for which a project finance based financing will hardly be available or even considered by financial institutions below one hundred million US dollars (US\$100,000,000) of investment. Such smaller projects under the PFI model would therefore be more affordable for the States or local communities but require full confidence in the creditworthiness of the signature of the granting authority or of any guarantee from the State or local government.

#### **4.4 Trend toward the creation of PPP Units**

It is interesting to note that many new laws provide for the establishment of a specialised institution for assistance in the realisation of PPPs, as well as for promotion, information and consultancy in the field of PPPs. This is the case for Albania, Bosnia and Herzegovina, Croatia, Mongolia, Poland, Romania, Serbia, Slovenia and Egypt.

It remains that in a majority of the countries assessed there is no such specialised body that would be engaged in all aspects of PPP projects, their development and promotion and to assist as a task force in the implementation of a PPP project. Often there is a department of the Ministry of Finance, or an institution in charge of promoting investment, being responsible for PPP's, often with a mission limited to policy matters or to monitor the enforcement of the law.

#### **4.5 The introduction of IPPP legislation**

It is further worth noting that some countries chose also to regulate Institutional Public-Private Partnerships ("**IPPP**") in their recent PPP laws. During the last three (3) years the emergence of IPPP legislation has resulted from the problems raised by the European Community on the application of Community law on Public Procurement, and Concessions to Institutionalised Public-Private Partnerships (IPPP);

IPPP is a co-operation between public and private parties involving the establishment of a mixed capital entity which performs public contracts or concessions. The private input to the IPPP consists, apart from the contribution of capital or other assets, in the active participation in the operation of the contracts awarded to the public-private entity and/or the management of the public-private entity. Simple capital injections made by private investors into publicly owned companies do not constitute IPPP.

The European Commission has published guidance on creating IPPP to be involved in the delivery of public services in order to clarify the rules applicable to the involvement of public and private partner through joint legal entities in the awarding of a PPP project - both to enhance legal certainty and to ensure fair competition through the tender selection of the private partner.



#### **4.6 The trend toward pragmatism**

It is to be further noted that a significant part of these new concession or PPP laws have been drafted in a more pragmatic way than before and are no longer oriented to the necessary requirements imposed on EU acceding countries, as was the case for the 2007/2008 Assessment.

Many of the new laws are now really oriented by a PPP policy toward the satisfaction of a specific need for PPP, following best practice and the PFI Guide, often with the assistance of international financial institutions and no longer in a too dogmatic way concentrating on the traditional concession models without any consideration for the financial requirements of potential lenders. Many of the new laws contain the enabling provisions necessary to enlarge the scope of available PPP forms, together with the proper security provisions necessary to make the deals "bankable" and furthermore, many of the new laws provide for the necessary support of specialised PPP institutions such as PPP Units.

As an example it is interesting to quote the case of Mongolia which did not even exist in the last 2008 Assessment as no concession legal framework could be identified at the time and which appears now with a Very High Compliance mark and High Effectiveness. The Mongolian Concession Law of 2010 which is the first adopted by this country without any past experience on concession except in the mining sector is one of the very few legislation of all EBRD Countries of operation which explicitly provides for a full range of PPP deal as well as for all sort of security instrument and for the possibility of Government support and guarantee together with specific chapter on Lenders rights providing for the possibility of direct agreement as well as step in right all in accordance with Lenders expectation to ensure the bankability of project finance deals.

This example illustrates that PPP is not a closed world and that any country with a sound determination to promote PPP can achieve a significant result in a short period of time. The future will say if such copy and paste PPP new regulations even inspired by the best international standards will be sufficient to allow the rapid take off of PPP projects in countries with no prior concession expertise and without the full revision of their existing legal framework and business environment.

#### **4.7 The reasons for such evolution**

Among the reasons for such changes, EBRD has identified the following consequences resulting from the changing environment:

- increased demand for infrastructure in the context of scarce financial resources, tougher competition for funds and expertise required modern innovative structuring of private sector participation in public infrastructure projects;
- dissemination of experience of the first PPP/PFI projects in the UK and Australia;
- establishment of specialist PPP institutional infrastructure (PPP Units/Centres in 1999/2001 to enable PPP implementation in the Netherlands, Belgium, Portugal, Italy, Ireland, etc); and
- the publication for public debate of an EU PPP Green Paper in November 2005 and an Interpretative Communication ruling out the developments of directives and instruments governing PPP on a supranational level (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);

The above factors accumulated to impact upon and, possibly trigger, the development of a series of new PPP Laws.

#### **4.8 How EBRD LTT could help**

EBRD Legal Transition Team (the "LTT") organises its work through the following activities in the area of PPP/Concession law and policy development that are interlinked and represent a systematic approach to promoting legal reform (see also Chart 1 below):

- (i) **Standard setting:** preparation and promotion of international standards of best practice, which can be used as benchmark to assess the countries' status of legal transition, and as a reference for reform;

Notable examples include:

- LTT Concessions/PPP specialist's membership in a Working Group and Experts Panel for the development of the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects (available on EBRD web site); and
- Development and publication of the EBRD Core Principles for a Modern Concessions Law (available on EBRD web site).

- (j) **Assessment work:** the assessment of both the quality of laws governing PPP/Concessions and the actual practice of their practical application throughout the EBRD countries of operations, thus enabling parties to identify the needs for reform

Notable examples include:

- 2008 check list based Concession Laws Assessment benchmarking laws on the books against the UNCITRAL PFI Guide; and
- 2006 Legal Indicators Survey, a case study based analysis on the extent to which laws are followed in practice.

Link to the 2007/8 Assessment results:

<http://www.ebrd.com/pages/sector/legal/concessions/assessments.shtml>

The present LTT initiates the new "*Concessions/PPP Laws 2011 Assessment of legal framework compliance combined with an Legal Indicators Survey*" which gives valid and updated, as of December 2011, data and information throughout all the EBRD countries of operations.

- (k) **Legal reform projects:** catering for legal reform needs through technical cooperation aimed at helping the countries' authorities establish sound, stable, predictable and investor-friendly legal systems and institutions.



Notable examples include:

*advising the Governments in the reform of local concession legal, policy, institutional framework as well as the development of standard documentation, procedures, contracts, training, etc. including the Czech Republic, Hungary, Latvia, Lithuania, Montenegro, Kazakhstan, Romania, Russian Federation, Serbia, Slovenia, Ukraine.*

- (1) **Outreach:** disseminating the experience acquired and the LTT products through various external activities (legal journal, website, conferences, etc.) to encourage further reforms.

Notable examples include:

*- the publication in 2009 and 2011 of two books in Russian on PPP legal and business issues involving lessons learned from the first Russian PPP projects negotiation and financial closing as well as practical aid materials.*

## 4.9 The way forward

The LTT has identified the following actions to be performed in the near future, or already under way, to satisfy its objectives of promoting legal PPP reform and the reduction of legal and institutional deficiencies identified in the 2011 Assessment:

- there is a growing demand for policy dialogue, this includes in particular support to national PPP policy formulation and strategic advice on sector development to the ministry in charge or other counterparts (national PPP Task Force or political committees, (e.g., the Russian State Duma's PPP Experts Council, the Serbian Ministry of Economy, etc.). The LTT has so far assisted in formulating specifically PPP Policy for the authorities in Hungary, Ukraine, and Serbia. Such demand is likely to increase with the recent trend for PPP regulation;
- jointly with EBRD Banking, and in support of their initiatives, in particular for pilot private infrastructure projects involving the assessment of, and recommendation for the improvement of, local PPP legal frameworks, LTT has recent and ongoing collaboration with the Transport Team in Ukraine, Russia, Kazakhstan; with MEI in relation to Russian procedures for the selection of private operators and the development of a regional PPP law and a private operator template agreement. Such requests are likely to increase in numbers and in geographical scope;
- LTT has been requested to take the lead in the development of the two Training Modules: "How to design the best legislative and regulatory frameworks for successful PPPs" and "Concession Agreement and Its Elements. How to negotiate a Concession Agreement" within the framework of the EN ECE led initiative aimed at increasing PPP capacity; once finalised these will be publicly available;
- LTT has been requested, and is considering, providing technical assistance to the CIS Inter-Parliamentary Assembly with the development of a CIS Model PPP Law;
- LTT has been collaborating with the UN ECE and, in particular, on the idea of the establishment of the International PPP Centre of Excellence for effective PPP delivery; a further potential involvement is a review of the UNCITRAL PFI Legislative Guide.



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