



Public-Private Partnerships
in the Context of Public
Investment Management
in Ukraine

AN ASSESSMENT

PUBLIC-PRIVATE PARTNERSHIPS
IN THE CONTEXT OF PUBLIC
INVESTMENT MANAGEMENT
IN UKRAINE:

AN ASSESSMENT

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ABBREVIATIONS

GDP	Gross Domestic Product
GoU	Government of Ukraine
IFI	International Financial Institutions
IMF	International Monetary Fund
LA	Local Authorities
LM	Line Ministries
MECI	Ministry for Energy and Coal Industry
MEDT	Ministry of Economic Development and Trade
MOF	Ministry of Finance
MOI	Ministry of Infrastructure
MORD	Ministry of Regional Development, Construction and Housing and Communal Services
PEFA	Public Expenditure and Financial Accountability
PIM	Public Investment Management
PPP	Public Private Partnership
PSC	Public Sector Comparator
SOE	State Owned Enterprise
SPF	State Property Fund
STU	State Treasury of Ukraine
TIP	Traditionally Implemented Project
VFM or 'vfm'	Value For Money
WB	World Bank

EXECUTIVE SUMMARY

This Report captures the position of the PIM for PPP framework in Ukraine at the time of the Assessment - between February and August 2015. Its mandate is to report on the situation at that time rather than to make an estimate of potential implementation impacts of current or planned reforms.

Ukraine's vast needs in infrastructure coupled with a constrained fiscal space require concerted efforts in strengthening public investment management. Investments in infrastructure are important for fostering economic growth. Translating public investments into assets crucially depends on how efficiently all types of public investments are managed.

The structure to handle PPPs is currently inadequate to access the global PPP market. Since a PPP system needs to be built on the foundations of a workable PIM system, the prospects for Ukraine attracting international standard investments from the global PPP market may appear to be out of reach for the time being.

Recent reforming legislation aimed at fixing some of the issues highlighted in the 2012 PIM Assessment is encouraging but much will depend on the effectiveness of the implementation and the capacity of the institutional actors to understand and absorb them. This Assessment must by its very nature capture the situation at the time of the Assessment rather than an expectation of future potential.

Public Investment Management in Ukraine is missing a number of the key elements that would otherwise classify it as a good practice country in an international context. It lacks a strategic view on public investment priorities; clarity about the definition of what private company project proposals can be considered as public investments; a consistent legal framework for PPPs; and clear criteria for selection and capacity for effective management of traditional public investments and PPPs. In addition, when building the overall PIM system to access the global PPP market, it is critical to recognize that PPPs often involve fiscal risks and the Government needs to create capacity to manage them. Thus Ukraine should continue wide-ranging and deep reforms in this area. Further reform needs are expressed in the Priority Action section of this Assessment.

The Government of Ukraine needs to set out a national strategy with clear economic and social infrastructure priorities and aspirational targets for the resulting service improvements. Realistic affordability should be factored in to the program set against macro predictions as well as targets for attracting domestic and foreign private sector capital. This document should outline a credible pipeline of projects over a timescale of not less than 10 years and should be broken down into sectoral programs. This document will then provide a useful basis against which all project proposals can be assessed.

The Ministry of Economic Development and Trade has considered project proposals that according to legislation could be eligible for State support but some of these proposals would not be classified as public investment projects in some country contexts. Sectors such as mechanical engineering and food are usually more appropriate for the private sector and would normally be classified as private rather than public investment. In 51 investment projects and project proposals that the MEDT considered (including one that was rejected) there were 35 local heating projects, 7 projects in mechanical engineering, 3 in the food industry and 6 in other sectors.

Many private company project proposals seek State financial support despite the fact that there is no easily identifiable benefit to the public from these projects. Many of these should really be treated as subsidies to enterprises. This makes it difficult to assess the true scale and nature of public investment activity in the country¹.

Perhaps the most fundamental issue that needs to be addressed is the fragmentation of the legal and institutional framework that surrounds the subject of PIM/PPP and Concessions. Despite recent legislative moves, public entities that were promoting their projects at the time of the Assessment could 'shop around' for the most expedient implementing legal basis. The fact that the PPP Law requires the most strict appraisal regime may explain why only two such projects have been implemented² so far. There are abundant Concession projects in Ukraine which are subject to their own legal status allowing them entry onto the funding queue without any form of appraisal. Whilst the majority of these are in the form of 'service Concessions' which are not PIM projects there are also 'works' based Concessions that have all the characteristics of Public Investment Projects and more specifically PPPs. Furthermore

1 Schedule 2 explains further.

2 The team for this Assessment reviewed only one such project.

projects are allowed to be categorized as 'construction projects' through a separate legal instrument in order to avoid appraisal and scrutiny. Whilst there is now a clear legal definition of a public investment project in the Budget Code and there has been recent legislation aimed at removing these anomalies, there is still some confusion arising from conflicting legislation. This fragmentation has to be replaced with a single legal and institutional framework.

The scrutiny and approval of all PIM/PPP projects should be centralized further on the central agencies of government regardless of the proposing entity and regardless of the proposed method of implementation and funding. Encouraging moves which have been backed by a government Resolution on the Selection of Public Investment Projects in this direction were evident at the time of the Assessment but it remains to be seen whether implementation will be effective and complete. In addition, similar requirements would need to be provided for other project modalities than traditional public investment projects.

Since the capacity to assess, appraise, negotiate and manage PPP projects in Ukraine is currently very weak, a substantial program of capacity building will be needed, particularly in the central government entities with special responsibilities in the field. This in turn needs to be supported by government commitment to the necessary reforms and to improving stability in the workforce of these central agencies. The government of Ukraine has no chance of developing capacity in the field of PIM or PPP and developing an institutional memory if the present level and frequency of staff rotation continues.

All project proposals should be subject to pre-screening through a standard framework. This will allow the limited financial and human resources available to be targeted on those projects that are of most interest to the nation and to those that show the most realistic prospects of being implemented. This will mean project ideas that are not able to demonstrate their value are rejected at an early stage and are not allowed to clog up the system later downstream. This idea can only be effective if officials in line ministries and other public entities are shown how to identify credible entry points for government intervention through problem analysis and root cause analysis. Such a training and awareness program should be considered an essential supporting measure in the roll-out of the pre-screening template.

Proper project appraisal has until now been almost entirely neglected. The fact that the extant PPP Law demands appraisal and other legal instruments do not, is a powerful incentive not to use the PPP Law to implement a project. Projects that bear the same characteristics as a PPP can arrive at the Ministry of Economic Development and Trade and the Ministry of Finance in a number of different guises. They can present themselves as TIPs with some basic form of Appraisal or as PPPs or Concessions. A road project may present itself under the Concession law with no requirement for appraisal or international level feasibility studies. A Concession may be presented under the PPP Law and require compliance with the Assessment requirements of the PPP Law 2010 or under the Concession law with no formal requirements. All of this makes it impossible to have a national overview of the full scale and impact of the PIM system including PPPs. It also makes a rational selection strategy impossible. In July 2015 the Cabinet adopted a Resolution on the Selection of Public Investment Projects outlining the process for preparation, appraisal and selection of traditional public investment projects for financing from the central government budget – its implementation, backed with adequate capacity to do so, is key to making further progress in PIM reform. The same process needs to apply to all forms of PPP projects.

PPP implementation only makes sense when the costs of doing so are understood when compared to other more conventional methods. Guidance and tools for assessing value-for-money are required. This guidance should require assessment of the full impact of the whole life cost of ownership of a building during the selection process. Information supplied in project proposals should cover upfront costs and future operations and maintenance costs, sufficient to maintain the asset to an adequate standard.

There is a need for clear guidelines and transparent selection criteria that are published for different project implementation methods. The lack of selection criteria also opens the way for politically inspired projects to secure funding arena without adequate analysis, pre-feasibility or appraisal and on the most basic form of justification. The adoption of selection criteria for traditional public investment projects is a move in the right direction.

There is an urgent need to develop capacity to assess, manage and monitor the fiscal risks that arise through the majority of PPP contracts. Currently, there appears to be no capacity to do so and little awareness of the subject matter. The GoU should view this as an integral ingredient of a future PPP program since without it, there would be no chance of taking a view on the sustainability of these risks. It is not wrong for the government to take on fiscal risk through PPP contracts if there is a good value case for doing so. To accept these risks without understanding them and without taking a strategic view of their collective potential impact could seem like an irresponsible approach to PPP projects.

Finally the PIM system in Ukraine could benefit from an early start in gathering some basic data on projects at the point of their completion. For the time being this might be a simple report on the under-spend

or over-spend of the project and the timeliness in completion against initial estimates. It will remain very difficult to properly assess the value for money credentials of PPP projects unless some basic completion review is undertaken on all projects. The MEDT's development of a simple database with basic project implementation information is an important step for establishing an institutional learning mechanism that could potentially feed back into better project design and preparation of future projects

This Assessment report culminates in 11 urgent Priority Action Areas for improving and strengthening the PIM and PPP system that the government needs to address if it is to continue the process of reform in Public Investment Management and improve the prospects of attracting external investment into its infrastructure sector through PPPs. If implemented correctly and with the right level of political and institutional support, these measures would transform Ukraine's capacity to design, prepare and implement efficient and effective projects that would stimulate economic performance and enhance social conditions. This would also boost Ukraine's attractiveness to both domestic and foreign investors in infrastructure.

1. INTRODUCTION

1.1 Objectives of a PIM for PPP Assessment

The World Bank has been working on the development of its existing PEFA Assessment tool and the associated PEFA-PIM Assessment tool to take into account the commonalities between PIM and PPP and the need to ensure both are harmonised within a cohesive budget planning system.

They are two inherently related processes. Both support the creation of infrastructure and provide services with an important public good component or address market failures that prevent fully private provision. Both entail financial obligations for the public sector, either as direct fiscal commitments or contingent liabilities. However, the management of these processes is often undertaken separately, potentially undermining appropriate selection of projects; hindering efficient and effective application of scarce public resources; and creating unnecessary fiscal risk and so threaten fiscal sustainability.

The PIM for PPP product aims to create a drill-down Assessment tool which will cover the whole investment cycle, from policy and screening through ex-ante appraisal to ex-post review, under a unified framework for effectively managing both traditional PIM and PPPs.

Work on this Assessment Tool reached a Final Draft stage and in order to test it in the field, trials were undertaken in Jamaica, Sierra Leone and Ukraine shortly afterwards. This report presents the findings of the trial in Ukraine. The main goals of this Assessment are to encourage the integration of PPP into PIM primarily but also to encourage improvements to the PPP system in the country. In this respect the emphasis in the report is towards the current use of PPP – without doing this it would simply be a PIM Assessment

1.2 Why Ukraine?

The Government of Ukraine (GoU) already has active engagement with the World Bank in the area of public investment management and has recently deepened collaboration in the area of public-private partnerships (PPPs). Following the 2012 Public Investment Management Assessment in Ukraine, the Bank team has been supporting the GoU in developing a new public investment management system in collaboration with the Ministry of Economic Development and Trade (MEDT). The new system is aimed to enhance and operationalize the existing institutional structure for managing public investments, including PPPs, in the MEDT.

In particular, the Bank has assisted in the harmonization of public investment planning through the establishment of the Inter-Agency Commission for Public Investment Projects that reviews and selects project proposals and can recommend an implementation modality.

This made Ukraine a suitable candidate for the trial Assessment to test the Tool. This PIM for PPP report builds on the PIM report entitled *“Ukraine: Public Investment Management Assessment”* carried out by the World Bank in 2012. That report focussed purely on a PIM Assessment rather than the PPP context to be found in this current Assessment.

Box 1 provides the main findings of the PIM Assessment.³

Box 1

MAIN FINDINGS FROM THE PUBLIC INVESTMENT MANAGEMENT ASSESSMENT – UKRAINE 2012

1. There is no coherent holistic system of Public Investment Programming and Management.
2. There is no strategic national development plan setting out a list of prioritised capital projects.
3. There is no clear institutional understanding of the fundamentals of public investment management, the benefits of a well-functioning system and the costs/risks attached to the current system.
4. There is no agreed legal definition of a public investment project leading to institutional confusion about the subject matter. This results in arbitrary and subjective classifications creating a parallel budgeting system for public investment projects.
5. The strategy and direction of the government changes too frequently making it difficult for implementing entities to plan their projects and programs with any degree of certainty.
6. There is almost no concept of clear output based / performance based objective setting and economic option appraisal.
7. The selection process is overly politicized and under appraised for economic value.
8. Corruption contributes to the erosion of efficiency in executing public investment projects with construction costs being higher than the EU average even though it must be acknowledged that the Public Procurement Law 2010 is a huge stride in the right direction.
9. The current dynamic nature of the civil service creates institutional instability that limits the creation of real capacity in the near future.

The PIM for PPP Assessment team in 2015 (this report) found that those nine statements still summarised the basic position in Ukraine until the adoption of an amendment to the Budget Code defining a public investment project in April 2015 and a Cabinet of Ministers Resolution on the Selection of Public Investment Projects implemented through traditional public procurement in July 2015. The Resolution has introduced a requirement for setting an objective and conducting economic appraisal of a project as well as a clear process for the project selection. This PIM for PPP Assessment will build on the PPP / Concession aspects of the PIM system and assess their use.

1.3 Ukraine – Background and Motivation for PPP

In recent years, Ukraine has experienced rising macroeconomic imbalances and economic stagnation.

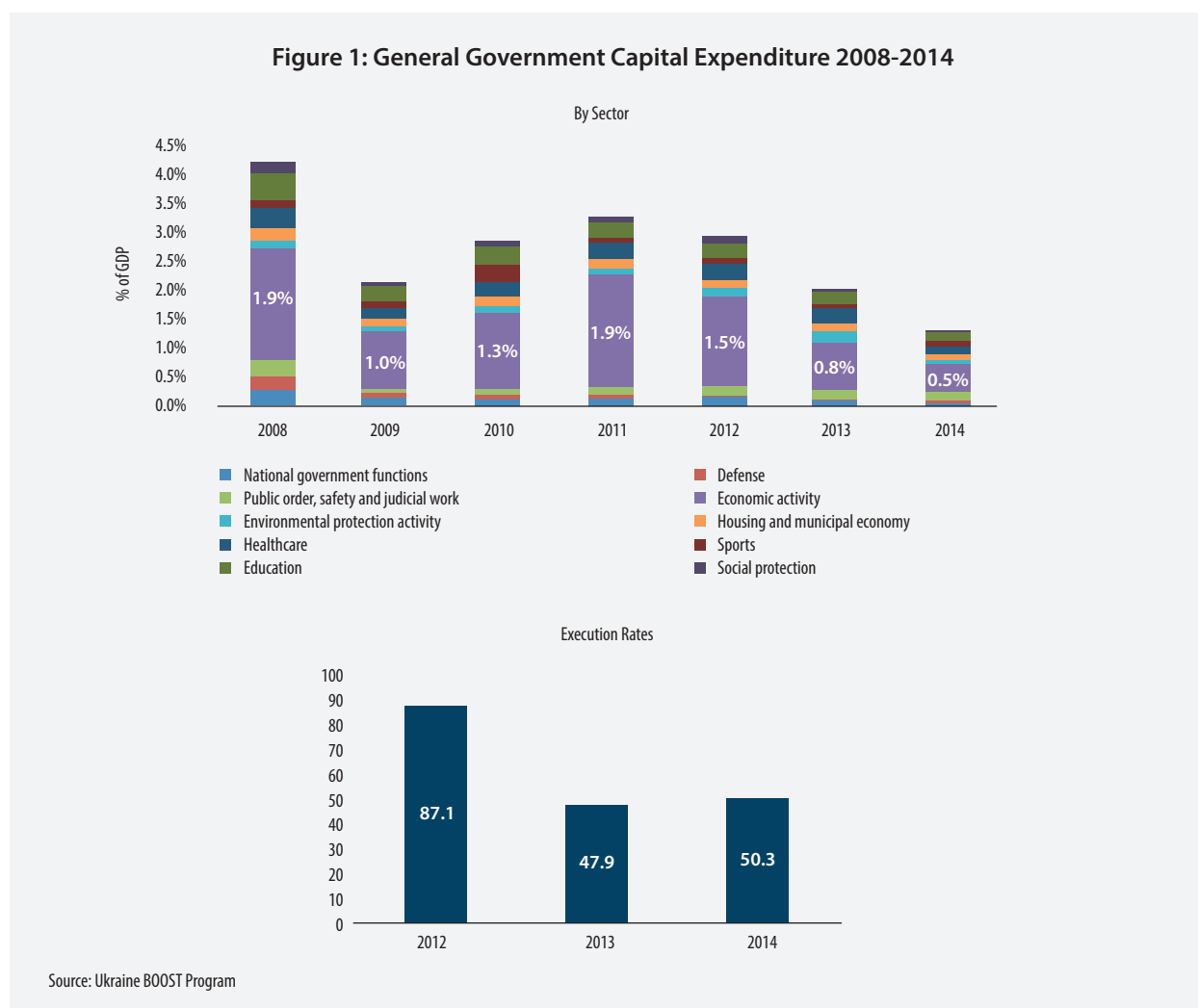
This has stemmed from poor macro-fiscal management and declining investment and external demand. Poor governance and corruption have resulted in wasteful public spending, undermined government capacity to manage public policies and programs, and eroded public trust in government institutions. At the same time, corruption and deterioration in the protection of property rights and contract enforcement and an inhibiting regulatory and tax burden have significantly weakened the investment climate and deterred both foreign and domestic private investment.

Despite a difficult security situation, the Government of Ukraine has started to implement important fiscal and structural reforms to contain unsustainable fiscal imbalances that emerged. It adopted a fiscal adjustment program, supported by the International Monetary Fund (IMF) and introducing both revenue and expenditure measures. The GoU remains committed to achieve the programmed general government deficit of 4.3 percent of GDP and the targeted primary surplus of 1.1 percent of GDP to ensure debt sustainability once public debt restructuring is complete (IMF, 2015). The Government has also undertaken steps to improve transparency and accountability of the public sector, including among others putting in place a robust anti-corruption legal framework, strengthening governance and oversight of state-owned enterprises, and adopting a more transparent public procurement law.

Ukraine's immediate reconstruction and long-term infrastructure development needs are vast. Currently, such needs exceed \$100 billion over the next 10 years estimated by a 2011 Public Finance Review carried out by the World Bank. According to an Economic Strategy "A Way to Prosperity" prepared by the MEDT, Ukraine needs at least

³ Ukraine: Public Investment Management Assessment, pages vii-ix.

\$8 billion annually starting from 2015 for infrastructure reconstruction and development.⁴ Due to fiscal consolidation, the Government of Ukraine had to curtail central government capital expenditure to about 1 percent of GDP (GoU Letter of Intent for IMF) and local government capital expenditure to less than 2 percent of GDP. However, the actual level of capital spending declined to only 0.4 percent of GDP for the central government and 0.9 percent of GDP for local governments.⁵ This represents the largest decrease in the level of capital expenditure since 2008 (Figure 1). At the same time, the situation in the country has adversely affected execution rates for capital spending which dropped to 50 percent of the budget including in-year adjustments. With a view to enhancing the overall public investment management system and reducing the financing gap, the GoU is keen to establish sound foundations for PPPs as a possible mechanism for procuring and financing infrastructure projects and services in the public sector.



Thus the MEDT, a leading agency responsible for public investment management including PPPs, requested the World Bank to assess the system for managing PPPs in the context of PIM. The Assessment is intended to provide a benchmark against which further reforms and capacity development could be measured in the country. The PIM-for-PPP Assessment complements the 2012 Public Investment Management Assessment by examining the performance and institutional foundations of PPP management in the context of public investment management in Ukraine.

1.4 Assessment Methodology

In applying the PIM for PPP Assessment Framework, it is essential to define PPP in a way that makes comparisons with conventional PIM meaningful. For the purpose of consistency in an Assessment, it is necessary to use a consistent definition that is relevant to the PIM context. Without this agreed definition, the comparative value of a range of Assessments might be diluted. A broad, rather than narrow definition is likely to be most useful. There is

⁴ A Strategy for Economic Development "A Way to Prosperity" July 2015. http://issuu.com/mineconomdev/docs/me_st_pdf_ukr_print__1_

⁵ Data provided by the Ukrainian Ministry of Finance.

no doubt that PPP is a vogue and fashionable expression in many countries. Projects, policies and other interventions within line ministries and other public sector entities are often cloaked in it in order to gain initial support. Box 2 illustrates the variety of PPP definitions used. This can also involve procurements such as outsourcing contracts or short term management contracts. There have been countless attempts by numerous entities to define PPP and there is no point in repeating them here⁶. The IMF has recognised that there is no clear agreement on what constitutes a PPP⁷.

Box 2

NO-ONE AGREES ON A COMMON DEFINITION OF PPP

There is no overarching definition for public-private partnerships. PPP is an umbrella notion covering a wide range of economic activity and is in constant evolution.

Source: Speech by Commissioner Frits Bolkenstein, DG Internal Market, European Commission

Public private partnerships (PPPs) are arrangements between government and private sector entities for the purpose of providing public infrastructure, community facilities and related services. Such partnerships are characterized by the sharing of investment, risk, responsibility and reward between the partners. The reasons for establishing such partnerships vary but generally involve the financing, design, construction, operation and maintenance of public infrastructure and services.

Source: Canadian Public Private Partnerships: A Guide for Local Government

A Public Private Partnership (PPP) is a partnership between the public and private sector for the purpose of delivering a project or service traditionally provided by the public sector. Public Private Partnership recognises that both the public sector and the private sector have certain advantages relative to the other in the performance of specific tasks. By allowing each sector to do what it does best, public services and infrastructure can be provided in the most economically efficient manner.

Source: Ministry of Finance, Czech Republic

The definition used in the PIM-for-PPP Assessment Framework therefore incorporates the following elements:

1. The project should be initiated by a Public Authority in order to create or renovate economic or social infrastructure⁸
2. The project involves the design, construction (or renovation), financing, operation and maintenance of a physical asset by the private sector
3. The project is not being entirely funded via the State or Local Budget or Donor Funds
4. The project involves meaningful risk transfer from the public to the private entity.

However, this Assessment is based on a slightly broader definition of a PPP given Ukraine's context.

Ukraine's PPP portfolio includes only two small local heating projects signed under the 2010 Law on Public-Private Partnerships⁹ and several hundred Concessions signed under the general Concessions Law and sectoral Concessions Laws. Due to a fragmented registration system for projects in Ukraine, it proved difficult to get an accurate number for the signed Concessions. Hence, this report refers to PPPs as defined in the PPP Law and Concessions as defined in the general Concessions Law and the sectoral Concessions laws.

1.5 PIM for PPP Assessment Tool

The Assessment Tool is based on a set of high-level indicators that measure the performance of the PIM-PPP legal and institutional framework and practices in a country. The scoring system comprises A, B, C and D. Scores are calculated in a range between A which represents 'Excellent' or 'Good Practice' to D which is taken to mean 'Poor' or 'Not Fit for Purpose'. Dimensions used within Indicators are usually expected to score in a similar way but they are scored individually in order to reflect the nuances that can occur within the Indicators. Once the Dimensions have been scored they are considered together to arrive at a single score for the Indicator. The Assessment Tool only describes the minimum requirements necessary to merit scores A, B, C or D, so this leaves sufficient flexibility to award

6 For an overview see: European Institute of Public Administration (EIPA). (2007) *Public Private Partnerships (PPP) - A Decision Maker's Guide* ch.1

7 IMF Fiscal Affairs Dept. 2004. *Public Private Partnerships* p.6

8 Unsolicited Proposals will be considered separately in this draft

9 The team for this Assessment reviewed only one such project that has been implemented in the City of Malyn, Zhytomyrska oblast.

D+, C+ or B+ scores in cases where it is judged that performance exceeds the minimum standard required but not by enough margin to qualify for the next score upwards. Each of the 21 Indicators in the Assessment Tool are given an individual score. Table 1 lists all the Indicators used in the PIM-for-PPP Assessment.

Graphical Representation of Findings facilitates drawing attention to the individual areas of strengths and weaknesses through a simple traffic light system. In addition to being identified specifically in the narrative, the traffic light system is shown for all Dimensions rather than just the overall Indicators. The correspondence between the traffic light and scores is the following:

- Dimensions that scored 'A' merit a Green light,
- Dimensions that scored 'B' or 'C' are denoted by an Orange light.
- Dimensions scoring 'D' automatically justify a Red light.

Identified issues that have merited a red light have been perceived as natural candidates for reform initiatives. The graphical summary, including the Traffic Light section is found in the summary at Section 5. Section 6, entitled 'Priority Action Areas', highlights the Red Light issues and provides recommendations for reform initiatives.

Table 1: PIM for PPP Indicators used in the Report

PIM for PPP	Subject area
Policy	
1	Consistency in Project Identification and Initial Development
2	Screening of Projects against Policy Priorities
3	Effectiveness of the Relevant Legal Framework
4	Effectiveness of the Relevant Institutional arrangements
5	Stakeholder management / engagement/Role of advisers
Project Appraisal	
6	Appraisal rules, guidance and practice
7	Public Sector Comparator (PSC) or value for money Assessment
8	Comprehensiveness of the appraisal process
Independent Review of Appraisal	
9	Quality and practices
Selection and Budgeting	
10	Fiscal Risk
11	Transparency and accounting treatment
The PPP Contract	
12	Quality and comprehensiveness of contracts based on standard pre-agreed positions
13	Comparison of key contractual terms with international good practice
Project Implementation	
14	Implementation rules and practices
15	Effectiveness of Procurement Process in PPP projects
16	Timeliness of implementation
Project Adjustment	
17	Renegotiation and Adjustment Practices, Effectiveness and Efficiency
18	Refinancing
Facility Operation	
19	Contract management practices
20	Asset Registers
Completion Review and Evaluation	
21	Ex-post Evaluation

1.6 Data Collection

The principle means of gathering evidence, in addition to an analysis of documents, was through face to face interviews and data collection. The line of questioning was guided by the Assessment Tool itself. However, at times this level of questioning had to take into account the country context as Ukraine has not yet implemented a PPP in the international sense of a design/build/finance/maintain/operate project.

The Assessment team met with key central government agencies, some private sector entities and donor organizations involved in PPPs in Ukraine. The government bodies included the Ministry of Economic Development and Trade, the Ministry of Finance, the Ministry of Infrastructure, the State Road Agency, the Ministry of Energy and Coal Industry, the State Property Fund and the Ministry of Regional Development, Construction, Housing and Communal Services. The Assessment team also carried out interviews with a state-owned enterprise 'Administration of Sea Ports' and private audit/consulting companies, such as Egis-Ukraine and Clifford Chance, and with the US Agency for International Development. The Assessment relied on direct questioning of officials and where possible corroborating the answers with other related interviewees.

The data collection involved gathering information on the number and types of projects and project documentation. The Assessment team analysed a sample of appraisal documentation for both public investment and PPP projects except for Concessions. Documentation proved difficult to source for Concession projects partly due to the fragmentation of responsibilities for Concessions and the lack of clarity what government agency has the authority to provide it. In addition, the Assessment team reviewed several Concession agreements that were made available. The scoring therefore sometimes reflects the paucity of documented evidence particularly in the appraisal and selection indicators.

2. PPPS IN THE PUBLIC INVESTMENT MANAGEMENT CONTEXT

2.1 Legal Framework

Multiple laws guide the preparation and implementation of capital investment projects in Ukraine with different requirements. A list of key legislation is presented in Box 3. Whilst much of this legislation is internationally acceptable in principle, the legislation is inconsistent and the choice of which route a project takes is arbitrary. The laws provide for different feasibility, approval and procurement processes. Classification of a project is ad-hoc and at the sole discretion of a line ministry and thus the line ministry determines how a project is managed. Budgetary funding and considerations about the strictness and scope of requirement influence how a project is classified and thereby what law will be used for its implementation. No formal analysis is done in advance of categorising the project regarding the optimal method of procurement, or the optimal legal and financial structure of the deal.

Box 3

KEY PROJECT LEGISLATION IN UKRAINE

The key legislation that can be used to carry out PIM/PPP projects in Ukraine are as follows:

- The Law on Investment Activities (1991)
- The Law on Public-Private Partnerships (2010) ('PPP Law')
- The Law on Concessions (general) (1999) ('General Concessions Law')
- The Law on Concessions in Construction and Operation of Motorways (1999) ('Roads Concession Law')
- The Law on Leasing and Concession of Municipal Assets in Heating, Water Supply and Sanitation (2010) ('Heat and Water Concession Law')
- The Law on Leasing and Concession of State Assets in Fuel and Energy (2012) ('Energy Concession Law')
- The Law on State and Communal Property Leasing (1992)
- The Law on Production Sharing (1999)

For each capital investment project with private participation, there are at least two or more different implementation routes depending on the applicable laws. For instance, a national motorway project with hard tolls will most probably be carried out under the Law on Concessions and the Law on Concessions in Construction and Exploitation of Motorways and not under the PPP Law. It can legally be carried out under either law. Similarly, a PPP for a large new port will most probably be carried out under the Law on Concessions (general) or by way of a lease with commercial conditions and not under the PPP Law but again could be carried out under any of these laws. The same stands for a municipal water project which will most probably be carried out under the Law on Concessions and the Law on Leasing and Concession of Municipal Entities in Heating, Water Supply and Sanitation with user charges to end users. Again this could technically be carried out under the PPP Law²⁰¹⁰. The PPP Law tends to be thought of as a mechanism to use only when the state budget support is required for a project and is seen as introducing an increased level of bureaucracy and therefore time.

Expediency rather than economic rationale has driven the application of laws in practice. The PPP Law requires a more rigorous project approval process and therefore is considered burdensome. As noted earlier, if the Government wants to build a motorway, it has two options: follow a procedure under the Law on Concessions in Construction and Exploitation of Motorways (1999) or, alternatively, initiate the project as a PPP under the PPP Law 2010 in which case the project must comply with both the PPP Law 2010, the Law of Concessions and the Law on Concessions in Construction and Exploitation of Motorways (1999). If it chooses the first route, the Law on Concessions in Construction and Exploitation of Motorways sets out the process pertaining to feasibility Assessment, approval, tender and implementation. Whilst the law is perfectly acceptable as a basic Concession law, it does not contemplate the type of risk sharing approach inherent in a PPP and does not explain how to implement such a project. It contemplates risk transfer to the private sector in return for their right to collect tolls for a period of time.

Table 2: Project Proposals: Legal Compliance

	TIP	PPP	Concessions: Fuel & Energy State Property	Concessions: Heating, Water, & Sanitation Municipal Property	Other Concessions, incl. Motorways
Laws/ regulation	Law on Investment Activity (1991) Procurement Law (2014)	PPP Law (2010) Concession legislation (1999) - for concessions	General Concession Law (1999), Leasing and Concession of Fuel and Energy State Property Entities (2012)	General Concession law (1999), Transfer in Leasing and Concession of Heating, Water Supply and Sanitation Municipal Property Entities	General Concession Law (1999), Concessions on construction and exploitation of motorways (1999)
Project Proposal Initiator	Private Business, Central or Local Authorities	Private Business, Central or Local Authorities	Private Business, MECI	Private Business, Local Authorities	CPA or Local Authorities
Obligatory Project Proposal Assessment	Yes	Yes	No	No	No
Institution Preparing Project Proposal	Project Proposal Initiator	Project Proposal Initiator	MECI	Local Authorities	CPA or Local Authorities
Institution Approving Project Implementation	Government if registered by MEDT ¹⁰	State Property: Government or Line Ministry designated by Government; Municipal Property: Local Authorities	MECI	Local Authorities MORD – approval of tender conditions	State Property: Government or Line Ministry designated by Government; Municipal Property: Local Authorities
MOF's role	Obligatory if State support considered	Obligatory for economic and technical appraisal for state property and when State support considered	Approval of any State support, including state guarantees	Approval of any State support, including state or municipal guarantees	Approval of any State support, including state or municipal guarantees

The PPP law involves a full feasibility and risk Assessment process and therefore has been underutilized.

If the Government chooses an alternative route, there will be conflicts between the three laws that should be followed. This is because the PPP Law does not provide for a list of priorities of laws. It only says that, in the case of Concessions, it is necessary to also take into consideration the Concession legislation. Nevertheless, using the PPP Law 2010 as the initiating law will ensure a full feasibility and Assessment process that presumably, due to the demands set out in the PPP Law, will necessitate the appointment of external PPP advisers. The Law contemplates a full risk Assessment

¹⁰ After the adoption of amendments to the Budget Code and a Cabinet's Resolution on the Selection of Public Investment Projects, the selection of a project proposal for financing is the responsibility of the Inter-Agency Commission for Public Investments.

and allocation and a contract that reflects that risk allocation. In short, the choice of law and initial characterisation of the project is critical to the level of assessment, feasibility, due diligence, preparation, risk assessment, procurement process, contract conditions, and implementation. The choice is made entirely by the line ministry, municipality or other implementing body without recourse to any other ministry and that decision is not reviewed. The PPP route is seen as bureaucratic and little understood - only two projects have been signed using it since 2010 - the Malyn Heating Project and the Oster Heating Project. Furthermore the decision to grant guarantees for PPP project (under the PPP Law) is taken after concluding an agreement on PPP¹¹.

Nevertheless, the PPP law defines PPPs widely and in a way that allows many infrastructure projects to fall within its scope. Therefore, if the government were to give guidance as to its use and eliminate contradictions in it and other legislation, this could quickly become the focal legislation for PPP projects. Furthermore it could easily incorporate Concessions into this one law thereby eliminating the need for many different often contradictory laws. Table 3 provides a summary of key provisions of the PPP Law.

Table 3: PPP Law Key Provisions

Article	Provisions
1	Defines the key features of a PPP contract as being: <ul style="list-style-type: none"> • Improved technical and economic effectiveness compared to a traditional public investment project • 5-50 year term • partial risk transfer to private sector • investment by private sector
2	Provides that PPPs shall be carried out within the legal framework of the PPP Law, the Constitution, the Civil Code, the Economic Code, other Ukrainian laws and International Agreements. This is not helpful as it is essential to establish the priority of the laws where there are contradictions between them.
4	Sets out the sectors to which the PPP Law applies: <ul style="list-style-type: none"> • Mining • Heat production and supply • Gas • Roads, Railways, Airport Runways, Bridges and Tunnels • Ports • Machine Building • Water • Waste • Health • Tourism/recreation/culture/sport • Irrigation • Electricity • Real estate management.
	There is also a catch-all provision saying that it may be applied to other sectors not within the exclusive remit of a public enterprise. Article 4 also provides that PPP contracts may cover one or more of Design/Construction/Renovation/Finance/Operation/Prospecting/Maintenance and related functions. Therefore, very few projects fall outside this definition.
5	Provides that PPPs may take different forms of contract: <ul style="list-style-type: none"> Concession Joint Cooperation Other Agreements In other words, it is confirming that a Concession under the Law on Concessions (general) (1999) can comply with both laws. In practice however this leads to issues of contradiction and it is necessary to say which law prevails in the case of conflict.
6	Provides that the Law on Public Procurement shall apply by private partners in framework of PPP contracts and that there shall be no discrimination against foreign bidders.
7	Provides that the asset which is the subject of the PPP shall remain in the ownership of the State and shall be used by the private contractor for the duration of the PPP agreement. This avoids many of the complexities of property law.
8	Provides that the State shall obtain "land management documents" which presumably includes planning and other consents granted by organs of the State.
9	Provides that PPPs may be funded by way of corporate finance, private debt, partial public funds and any other legal means of funding.
11 & 12	Deal with feasibility analysis and this is supplemented by way of Regulation including in particular the Cabinet of Ministers Resolution No. 384 dated November 4, 2011. ¹² In theory, if these were used and developed into more detailed guidance, they would cover all the key risks. However, the law is high level and gives no indication of the depth of analysis needed.
14	Provides that the PPP Agreement should be awarded by way of a competitive tender and Article 15 and 16 provide the detail of the tender process requirements. Whilst this attempts to ensure transparency and non-discrimination the process is too simplistic for complex infrastructure projects.

¹¹ In accordance with the Cabinet of Ministers Resolution dated March 17, 2011 No. 279 (sub point 2, point 9), for requesting SG its potential recipient or CPA/LA (initiator of PPP project) have to present MOE a lot of documents among those: copy of PPP agreement, report on this PPP agreement implementation for the last year. So due to this regulation SG could be requested only after signing PPP agreement.

¹² See Indicator 6 below

Article	Provisions
18	Provides that the State may give support for PPP projects including State Guarantees ¹³ .
3 & 20	Set out principles as to how the private partner shall be treated in law and is an attempt to alleviate fears that the PPP contract will not be honoured going forward.
22	Sets out the role of PPP Authorised body. ¹⁴ In accordance with the Resolution of the Cabinet of Ministers of Ukraine dated August 20, 2014 No. 459 ¹⁵ , the Ministry of Economic Development and Trade is Authorised body in with regards to PPPs.

2.2 Recommended Legislative Amendments to the PPP Law 2010

Whilst overall the PPP Law 2010 is reasonable, it requires certain amendments as recommended in Table 4.

Table 4: Reform Recommendations – PPP Law 2010

Issue	Reform Required
Compensation on Termination	<p>PPPs necessitate the payment of compensation by the public authority in the event of early termination of the PPP Agreement, for any reason, including the default of the PPP Contractor.</p> <p>The amount of compensation varies but to varying degrees guarantees the repayment of senior debt and sometimes junior debt. This prevents the State getting a windfall and encourages commercial investors and lenders. Whilst the concept of paying compensation in the event of PPP Contractor default can be a difficult one to accept philosophically, the alternative is simply unpalatable. If a bank lends \$100 Million as senior debt to fund a motorway and the PPP Contractor defaults in year 2, the motorway reverts or remains in the ownership of the State and if the State did not pay off the debt this could be viewed as expropriation by the State.</p> <p>The Law on Leasing and Concession of Municipal Entities in Heating, Water Supply and Sanitation (2010) and the Law on Concession (general) permits compensation but the language is not so clear that international investors would rely on it.</p> <p>The Law on State and Communal Property Leasing does not permit compensation on termination. Given that an infrastructure project must comply with the sector specific laws even if commenced under the PPP Law, this issue must be addressed in the Budget Code and in each law or an amendment made to the PPP Law to say that compensation on termination shall be dealt with in the PPP Law and this shall take priority over the other laws.</p>
Multi Annual Payment Approval/ Budget Code	<p>Article 48 of the Budget Code read literally means that state authorities and municipalities cannot commit themselves to making payments other than debt service, beyond that approved in the annual budget. In other words, a contractual commitment in a PPP contract cannot technically be enforced.</p> <p>In practice municipalities make contractual commitments that run beyond the annual approved budgets all the time. However, they have no assurance that there will be budget allocations for such commitments in the future years. For PPPs, this means that there will be no allocations for payments under a PPP contract. The Budget Code needs to be overhauled to ensure that technical obstacles to PPPs and contradictions with the PPP Law 2010 and the sector specific laws are removed or resolved.</p>
Step in rights	<p>Neither the PPP Law 2010 nor any of the other laws under which infrastructure is carried out, permit step in by the lenders or indeed by the public authority in the event of default by the PPP Contractor or in the event of a public emergency. Both need to be provided for in the PPP Law. The lenders require step-in rights in the event of Contractor default so that they can avoid Project default by appointing a new Contractor (with the consent of the public authority).</p> <p>The public authority should have step in rights for emergency situations such as an outbreak of disease or a security situation.</p>
Licence over land	<p>The PPP Law provides that the land/asset shall remain in the ownership of the State for the duration of the PPP project and the PPP Contractor is permitted to use it for the duration of the PPP Agreement only. This is typical of a project finance deal and used in many other jurisdictions¹⁶</p> <p>However, it is not clear how this contractual right is dealt with in Ukraine. It seems that the PPP Contractor must still follow the usual procedure of title registration in order to be able to use the land and this is a lengthy process which can delay the project. The PPP Contractor cannot commence construction until the property registration is done. This process needs to be streamlined by amendments to the law on property registration.</p>
Dispute Resolution	<p>The PPP Law and other laws used in the case of infrastructure need to be amended to put beyond doubt that international arbitration can be agreed between the parties.</p>

13 At the same time there are no acting mechanisms of the State Support including State Guaranties for PPPs. See Overview of the Legal System (point 2/1 of this Report).

14 See below at Indicator 4.

15 The Resolution of the Cabinet of Ministers of Ukraine dated August 20, 2014 N459 "Issues of the Ministry for Economic Development and Trade".

16 In Ireland, all PPP projects are carried out on this basis. The PPP contractor is given a bare contractual licence which is co-terminous with the PPP Agreement. Therefore, the PPP Contractor receives no property rights, only contractual ones and the property issues and planning issues are dealt with by the public authority.

Issue	Reform Required
Unsolicited Proposals	One unhelpful provision is that of allowing unsolicited proposals as a matter of course. This is set out in Article 10 and can also be found in the Law on Leasing and Concession of Municipal Entities in Heating, Water Supply and Sanitation and the Law on Leasing and Concession of State Entities in Fuel and Energy allows for unsolicited proposals of PPPs by private sector entities. In particular, according to these legislative acts, private sector firms can initiate PPPs and concessions by submitting a proposal to a respective central government agency or municipal body. However, according to the Law on Concessions (general) and the Law on Concessions in Construction and Exploitation of Motorways, only public sector entities can initiate concession projects.
Permit subcontracting under relevant licences	Currently a concessionaire under Ukrainian law cannot pass a licence to operate infrastructure granted to the Concessionaire. A project finance deal will require an SPV with an operating subcontractor so legislation needs to be amended to permit this.
Legal powers in PPPs	The legislation has not provided explicit legal powers of State Public Authorities to award PPP projects – there are different approaches for different types of objects. MECl is responsible authority for fuel and energy state property, for other types of state property it should be defined by the Cabinet of Ministries resolutions

A significant number of projects have been signed under the general Concession law and a number of sectoral Concession laws. The Ministry of Economic Development and Trade has 210 registered Concessions, the State Property Fund has 138. However, there may be many more. Municipal projects do not have to register with the State Property Fund on obligatory basis. One of the key problems arises from the fact that these Concession laws sit alongside the PPP law and the other “project” laws already referred to and where there is a contradiction between the laws, there is no mechanism in place for resolving this conflict. It is therefore unclear which law takes precedence. Concession legislation includes the following: the general Law on Concessions 1999, the Law on Concessions in Construction and Exploitation of Motorways 1999; the Law on Leasing and Concession of Municipal Entities in Heating, Water Supply and Sanitation 2010; and the Law on Leasing and Concession of State Entities in Fuel and Energy 2012. Table 5 provides an overview and analysis of the main provisions / issues in the Concession laws.

Table 5: Summary of Key Issues with Concession Laws

Issue	Key Provisions
Definition of Concession	The key difference between a PPP and a Concession in most EU countries is that, in a Concession the private contractor takes the demand or exploitation risk in full or in part. For example, in the case of a motorway, the private contractor may take the traffic risk in which case the contract is defined as a Concession under EU law. If the public sector takes the traffic risk, it is a PPP. No such distinction exists under the laws of Ukraine and therefore it is arbitrary as to what legislation applies. There is nothing specific in the Concession laws that set them apart from other contracts.
Concession Payments	The Concession laws contemplate a payment from the Concessionaire to the State. This may be appropriate for a mining or hunting Concession but will very often be inappropriate for large infrastructure projects where the Concessionaire is investing large sums of money constructing an asset and needs to receive significant income to repay this investment. These laws were not drafted with the latter type of infrastructure construction in mind and whilst they accommodate them, they do not do so in such a way as to give great comfort to funders that their long term investment is secure.
Sectors Covered	Article 3 of the general Concession Law provides that Concessions can be granted in a wide number of sectors including: <ul style="list-style-type: none"> • water / waste water • transport • waste • heat • roads / motorways / service stations • seaports and airports • telecommunications and postal services • gas • electricity • public catering • public housing construction / servicing • social and cultural facilities • parking • ritual services • hotels / tourist complexes, campsites Sector specific laws then add greater detail in the case of roads, heat, water, waste water or energy.
Length of Concession	Concessions may be between 10 and 50 years. The length of the Concession is not tied to the amount of investment by the Contractor which is out of step with international law and may be very poor value for money for the State. In most European countries a Concession may only be granted for more than 5 years if this is necessary to pay back an investment by the Concessionaire.
Register of Assets / Liabilities	None of the government agencies in Ukraine registers direct and contingent liabilities inherent in Concession Contracts. The State Property Fund keeps a register of all Concession Contracts (not mandatory for municipal property) and simply records the Concession payment to the State or region. However, this is insufficient for supporting fiscal sustainability.

Issue	Key Provisions
Compensation on Termination	<p>Article 15 General Concessions Law</p> <p>This provides that where a Concession is terminated early, the Concessionaire must be compensated for his investment. However, the language is vague and would certainly not be enough to give international investors or banks comfort that their investment is protected.</p> <p>Furthermore Article 12 allows the grantor of the Concession to terminate for breach of contract which makes the lack of clear provisions or compensation all the more relevant.</p>
Miscellaneous	<p>Many of the issues that are set out in relation to the PPP law apply equally in the case of the Concession laws:</p> <ul style="list-style-type: none"> • lack of multi-annual payment approval • sub-contracting of licences • technical issues with Budget Codes • Step-In rights

In brief, these Concession laws would not give an international investor the comfort needed to invest in a large infrastructure project.

Some projects involving the private sector that would be categorised as PPPs or Concessions in other countries are carried out as leases in Ukraine. They are implemented under the Law on State and Communal Property Leasing. The ports sector so far has favoured the use of the lease even for projects where there is significant capital investment by the private sector contractor. Whilst these contracts seem to work commercially, they are not optimal in terms of recording a project finance deal and add another layer of confusion to the area of infrastructure and the stock of contingent fiscal liabilities that may be bound up in these contracts. Ideally these projects should be brought within the ambit of one PPP / Concession law.

3. INSTITUTIONAL MAPPING OF PIM AND PPP FUNCTIONS

This section provides a brief overview of the different actors involved in broader public investment management in Ukraine. This includes traditional public investment projects and PPPs with emphasis on the central government level.

During the early stages of this assessment, public investment management of traditional investment projects had the same major weaknesses—overlapping and non-transparent processes—as documented in the 2012 PIM assessment. In particular, there was no coherent holistic system of public investment programming and management in place. This was mainly due to the lack of a clear definition of a public investment project leading to arbitrary and subjective project classifications which effectively created a parallel budgeting system. The MEDT provided an independent review of project proposals for those projects that line ministries and agencies classified as public investments. But they constituted only a fraction of capital investment projects seeking budget financing. The majority of public investment projects were classified as constructions as this did not require undergoing through any project appraisal. The line ministries and agencies submitted such projects directly to the MOF for inclusion in the state budget. The MOF reviewed project proposals and performed basic checks for project costs, including for those projects that the MEDT had already reviewed and recommended. This effectively created duplication of functions between the MEDT and MOF and sustained parallel streams for selection of public investment projects.

However the Government of Ukraine, with World Bank support, has recently prepared and the Verkhovna Rada (Parliament) adopted important reforms that are aimed at establishing a better functioning PIM system. As noted earlier, in April 2015 it provided a clear definition of a public investment project in the Budget Code which would eliminate the practice of discretionary classifications of public investment projects. To enhance the PIM institutional setup, the Budget Code established an Inter-Agency Commission for Public Investments that would select public investment projects based on a review of project appraisals carried out by the Public Investment and State Support Unit in the MEDT's Department for Attracting Investments. In addition, in July 2015 the Cabinet adopted a Resolution on the Selection of Public Investment Projects outlining the process for preparation, appraisal and selection of public investment projects for financing from the central government budget. The Resolution also establishes value thresholds for projects and requires cost-benefit analysis only for projects above 30 million Hryvna. For appraisal of projects below this value, it requires cost-effectiveness analysis.

The new system provides for clear roles and responsibilities between the MEDT, MOF and the Inter-Agency Commission on the one hand and budget users sponsoring public investment projects and project executors on the other hand. Table 6 summarizes the main roles and responsibilities of these central government agencies in performing the PIM function. The Inter-Agency Commission for Public Investments is chaired by the Minister of Economy and comprises 18 members, including key ministers such as the Minister of Regional Development, Building and Housing and Communal Services, Minister of Finance, Minister of Environment and Natural Resources, Minister of Energy and Coal Industry, Minister of Health, Minister of Social Affairs and nine members of the Parliamentary Budget Committee. The MEDT has received 31 proposals for public investment projects of which 16 meet the requirements and are recommended for consideration at the first meeting of the Inter-Agency Commission for Public Investments.

A significant constraint remaining to undermine the PIM system in Ukraine is the lack of an overarching national strategy that would guide prioritization of public investments. As at the time of the 2012 PIM Assessment, Ukraine still has no national policy document as well as underpinning sector strategies with clearly defined priorities that could be translated into concrete public infrastructure projects. The President's Strategy for Sustainable Development '*Ukraine 2020*' provides some indication of sectoral priorities, such as energy, roads, health and others, but would require more detailed sector strategies for guiding prioritization of public investments projects. The MEDT which has responsibility for national strategic planning has developed and published a national strategy '*The Way to Prosperity: Fundamental Principles for Economic Reform*' in July 2015. The document outlines reform priorities in different areas but it has not been approved following the established procedure and falls short of providing directions for public investment projects across sectors. At the same time, multiple sector strategies that have been prepared over the recent years lack coherence and thus can hardly be used for prioritization of public investments.

The Budget Code of Ukraine designates a special Fund for Regional Development¹⁷ as the main source of financing for public investment programs and projects supporting regional development, including local public investments. Such programs and projects should finance local infrastructure facilitating development of regions as well as industrial and innovation parks and should be in line with priorities defined in a Regional Development Strategy and individual regional strategies. The Fund comprises one percent of the state budget which is allocated annually. The Ministry of Regional Development, Building and Housing and Communal Services is responsible for managing this Fund and hence reviewing and pre-selecting investment program and project proposals for local public investments seeking financing from the state budget. The Ministry then submits the pre-selected projects to the Cabinet of Ministers for final selection. As of July 2015, the Cabinet of Ministers has approved only 165 local public investment programs and projects for financing in 2015 which comprises about 15 percent of total expenditure available under the Fund. Such a low level of disbursement is due to the poor quality of project proposals by local governments.

However, the creation of a separate track for selecting and financing local public investment projects from the state budget is likely to contribute to fragmentation of the PIM system and dilute capacity building efforts in this area in the long term. The Ministry of Regional Development, Building and Housing and Communal Services informed the Bank Assessment team that they had plans to institute a Regional Development Strategy that would be underpinned by individual regional strategies and lists of investment project proposals prepared by local governments. In the absence of a national strategy, this might assist in the prioritization of local public investment projects but care is needed to avoid a separate track for local public investment projects. This would require more resources and staff with relevant skills and would make an existing capacity problem even worse. All local projects should be considered in the context of national strategies.

¹⁷ The Budget Code was amended to include article 24-1 concerning the establishment of this Fund based on the law dated December 1, 2012 No. 4318-VI.

Table 6: Institutional Mapping of Central Government PIM Functions in Ukraine

Institution	Main Roles and Responsibilities	Comments
Line ministries and central government bodies	Preparing projects that directly affect their central functions and implement those that receive funding Reviewing and deciding on project concept notes submitted by agencies and other entities under their control for development of project proposals Performing technical and economic appraisal of proposals for public investment projects from agencies and entities under their control (state appraisal) Submitting selected project proposals for public investments to the MEDT Monitoring preparation and implementation of public investment projects	Excludes sub-national governments and SOEs
Ministry of Economic Development and Trade	National strategic planning Screening projects for consistency with strategic priorities and reviewing economic appraisals for public investment projects seeking financing from the state budget Providing projections for total public investments to be financed from the state budget to the MOF Submitting pre-selected project proposals for public investments to the Inter-Agency Commission for final selection (as well as information on estimates of capital expenditures for the annual budget and two outyears based on indicative capital expenditure ceilings provided by the MOF) Monitoring the effectiveness of implementation of public investment projects Maintaining database of public investment projects	
Ministry of Finance	Providing indicative ceiling for capital expenditures for the next three years to the MoE Allocating the state budget capital expenditures Control over capital expenditure (State Financial Inspection)	
Inter-Agency Commission for Public Investments	Selecting public investments for financing from the state budget Recommending an alternative implementation modality for public investment projects if relevant (PPPs or state guarantees)	
Ministry of Regional Development, Building and Housing and Communal Services	Selecting project proposals for local public investments for financing from the Fund for regional Development Allocating capital expenditures for local public investment projects from the Fund for Regional Development	Includes only local public investment programs and projects
State Property Fund	Maintains a single register of state assets	Weak assurance of accuracy and currency of information in the register
Accounting Chamber (Supreme Audit Institution)	Performing external audit	Limited performance based audit
Anti-Monopoly Commission	Receiving and administering complains about public procurement procedures	
State Financial Inspection	Checking compliance with rules, controls/financial and administrative norms	Under the MOF

The institutional setup for managing public-private partnerships is generally conducive to a future harmonized approach to PIM but the roles and responsibilities of key agencies involved still lack clarity.

The Ministry of Economic Development and Trade is the leading government body for developing PPP policy and managing PPPs. At the same time, according to legislation the MEDT is responsible for promotion of PPPs. It should be noted that ‘promoting’ PPPs in the first place implies a bias of one implementation over another. The concentration of all PPP functions in one unit constitutes an apparent conflict of interest in the context of an independent review of PPP project appraisals. Hence, it would be appropriate to separate the tasks of appraisal and independent review and re-assign one of them elsewhere. The scope of the MEDT’s responsibility includes PPPs as defined in the PPP Law. However, it does not involve a review of ‘works’ concession project appraisals since the general Concession Law and sectoral concessions laws lack such a requirement. The MEDT therefore has the legislative authority to become a centre of expertise for PPP projects in Ukraine. However, this role only applies when the project is initiated via the PPP Law.

The Ministry of Finance’s role in PPPs lacks focus as it has no central PPP division and tasks related to PPP are dispersed across different units.

The Division for Financial Aspects of Privatisations and Proprietary Relations (DFAPPR) within the MOF deals with PPP policy and legislative change required as well as financial payments arising from PPPs, for instance concession payments to the state. But it is entirely ad hoc whether a PPP project comes to this division. A PPP project may be submitted to a respective sectoral division and the DFAPPR will be unaware of the project unless a particular legislative or policy PPP issue arises. The MOF is also the institution with responsibility for state support and state guarantees in PPPs as well as traditional public investments but, at the time of this Assessment there was no clear assignment of the responsibility for the assessment and management of fiscal risks arising from PPPs

within the MOF. All of this means that currently PPP expertise is required in each sectoral division of the MOF to properly assess PPPs as well as in DFAPPR. To achieve an appropriate level of capacity building to properly fulfil the necessary tasks adequately would take significant resources and is not an efficient way to capture PPP expertise which takes time and financial investment. At the same time there is no clear procedure for cooperation on these issues between MEDT, MOF and line ministries. Table 7 summarizes the role of each key agency in Public Private Partnerships.

Table 7: Institutional Mapping of Central Government PPP Functions in Ukraine¹⁸

Institution	Main Roles and Responsibilities	Comments
Line ministries/ central government entities and local governments	<ul style="list-style-type: none"> Preparing projects that directly affect their central functions and implement those that receive funding Reviewing and deciding on project concept notes submitted by agencies and other entities under their control for development of PPP project proposals Performing technical and economic appraisal of PPP proposals Submitting selected PPP project proposals to the MEDT Monitoring preparation and implementation of PPPs 	<ul style="list-style-type: none"> MEDT reviews only PPP project proposals prepared following the procedure of the PPP Law Concession legislation does not require appraisal for concession projects
Ministry of Economic Development and Trade	<ul style="list-style-type: none"> Review and approval of technical and economic appraisal of PPP projects for state property and municipal property (if State support is sought) Audit of compliance with PPP contracts Development of proposals on government PPP policy Monitoring activities of the central government and local government authorities on PPP issues Development of concepts and drafts of Special Government Programs aimed to support the development and implementation of PPPs Assistance in the protection of rights and interests of public and private partners in PPPs Assistance in dispute resolution between public and private partners Monitoring, systematization and dissemination of PPP projects results, including on the level of risks of public partners in PPP agreements Monitoring of compliance in with PPP related legislation, including the organization of tenders for PPP projects Information and advice on PPP issues within the scope of its responsibilities Training on PPP issues Registration of PPP contracts Filing of claims for the termination of PPP contracts for state entities in cases of violation of agreements by private partners 	
Ministry of Finance	<ul style="list-style-type: none"> Reviewing economic appraisal for PPP projects involving state property or local government property if State support is considered Pre-approval of a draft decision by the Cabinet of Ministers on implementation of PPPs involving state property Allocating capital expenditure for state support for PPP projects in the budget for next years Calculation and monitoring of concession payments 	No clear role in managing / recording fiscal risks in PPP and works Concessions
Cabinet of Ministers of Ukraine	<ul style="list-style-type: none"> Decision on implementation of PPP projects for state property and on State support for PPP projects for municipal property 	
State Property Fund	<ul style="list-style-type: none"> Register of central government concessions and concession payments payable by private partners Register of local government concessions (optional registration) 	Does not record assets related to PPP and works Concession projects
Ministry for Regional Development, Building and Housing and Communal Services	<ul style="list-style-type: none"> Register of concession projects for municipal property heating, water supply & sanitation objects 	
Ministry for Energy and Coal Industry	<ul style="list-style-type: none"> Register of concession projects for fuel and energy 	

Multiple processes and requirements depending on a type of a PPP is another major weakness of the current institutional setup for PPPs. As noted earlier, the main difference in process and requirements pertains to the appraisal stage of projects. The PPP Law provides for a robust process for the project preparation and evaluation involving a full technical and economic appraisal of PPP projects, including concessions. However, the general Concession Law and sectoral concession laws do not require technical and economic appraisal and thus the majority of projects are

¹⁸ The MEDT's role in PPPs is provided in the PPP Law and the MEDT's Order for the PPP Unit activity.

developed and implemented using this less strict route. Charts 1-3 below depict the general institutional processes for the different routes. However, there are many sectoral anomalies: for example, the Minister of Infrastructure is responsible for approving the concession tender documentation for a road project carried out by the State Road Agency (Ukravtodor). Furthermore, the role of the Ministry of Finance varies depending on the level of state finance or guarantee requested.

The GoU seeks to facilitate PPPs at the local government level but this requires institutional support.

There are no PPP units at the local level. If a Municipality wants to carry out an infrastructure project it needs to prepare and implement the project itself with little or no PPP experience, in the absence of standard documentation and most probably without the budget to engage external advisers.

The MEDT's capacity for managing PPP and traditional public investments varies. Some reasonable capacity for assessing proposals for traditionally implemented public investments has been developed however the MEDT currently lacks capacity for assessing and managing PPPs, partly due to a high turnover of staff in the PPP Unit. Capacity in PPP assessment is unlikely to develop unless some level of stability in staff turnover is achieved

Ukraine has a fragmented system for registering PPP projects which would benefit from consolidation.

As explained in Table 7, the MEDT and the State Property Fund hold registers of PPP projects and Concession projects, respectively. However, the registration of PPPs at the local government level at the SPF is not mandatory. In addition, line ministries such as the Ministry of Regional Development, Building and Housing and Communal Services and the Ministry of Energy and Coal Industry maintain registers of PPP projects in their sectors.

**Chart 1: Preparation and Selection of PPPs (including Concessions)
for State Entities Based on the PPP Law**

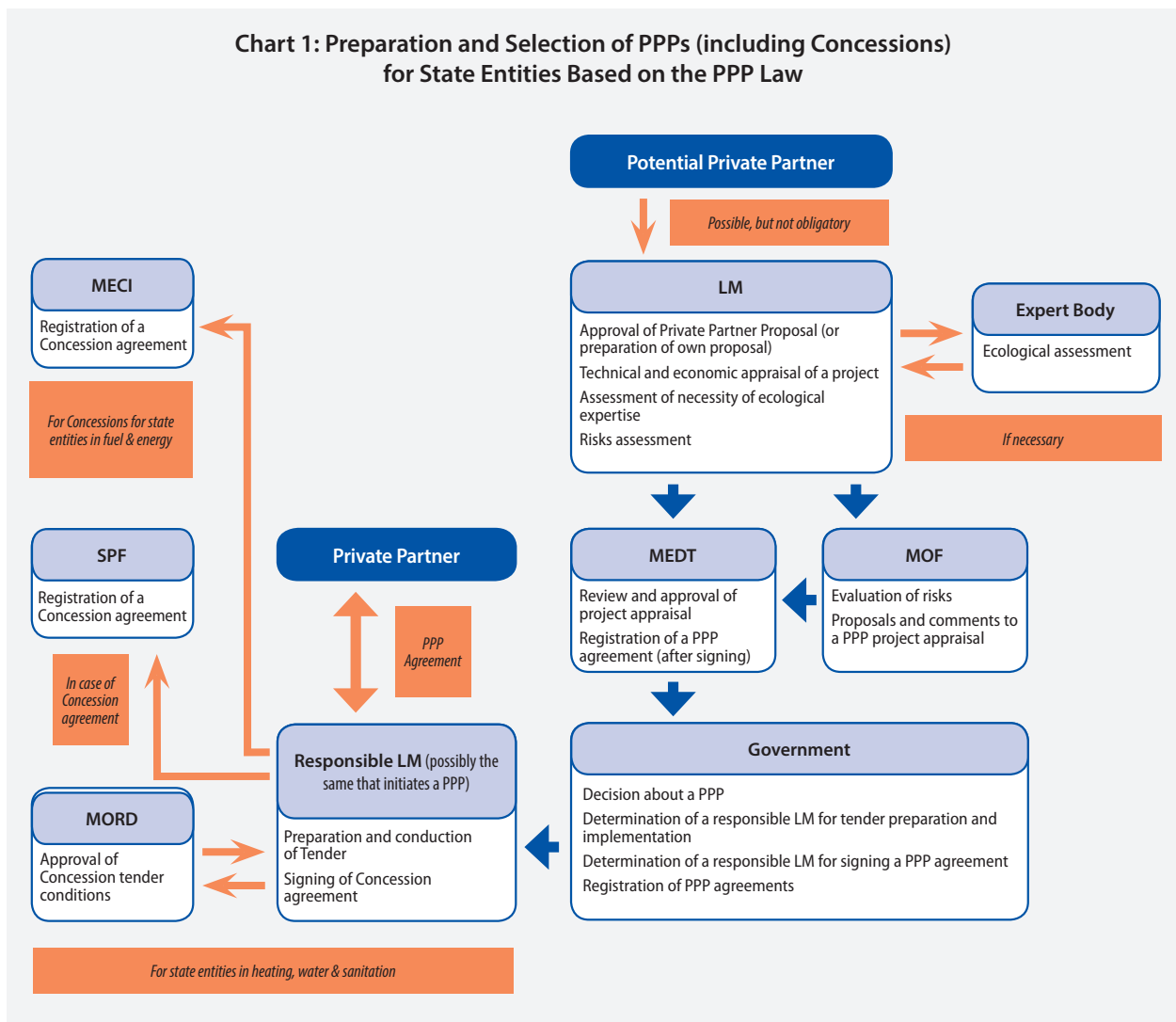


Chart 2: Preparation and Selection of Concessions for State Entities (Ex Fuel and Energy)

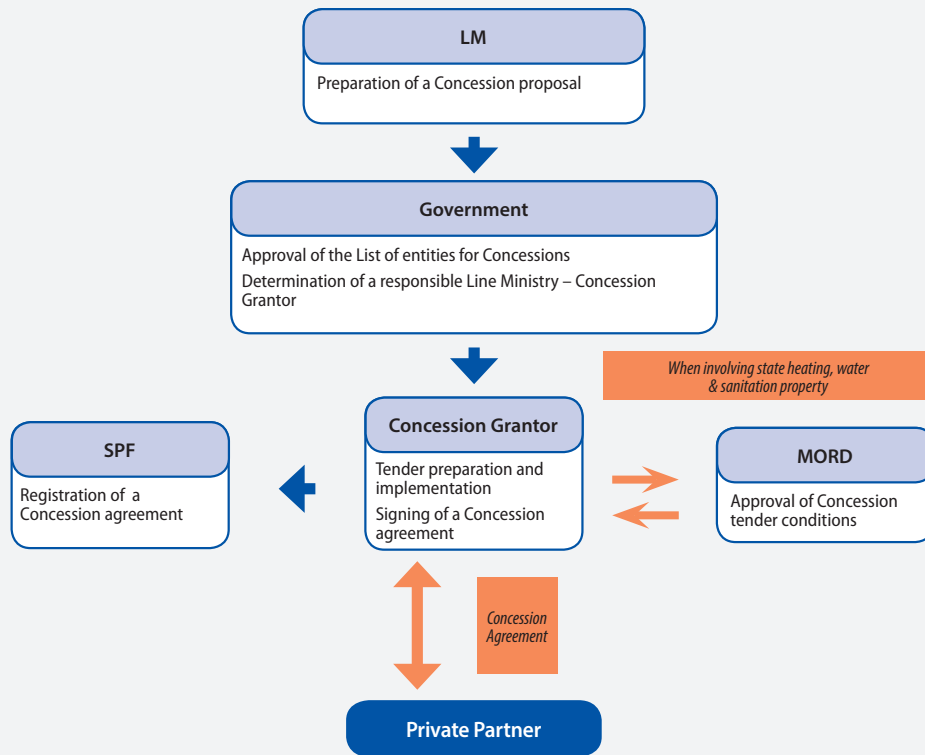
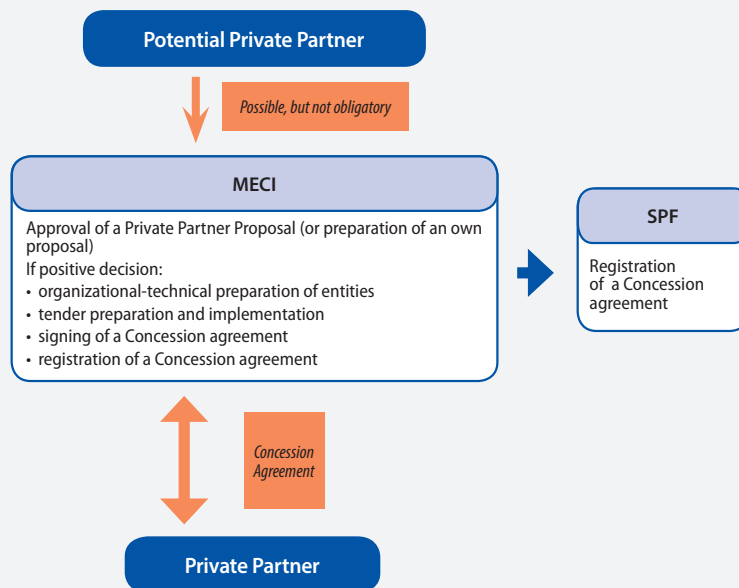


Chart 3: Preparation and Selection of Concessions for State Entities in Fuel and Energy



4. PORTFOLIO OF PPP PROJECTS

Due to multiple registers it proved difficult to ascertain an accurate number of the current PPP portfolio in Ukraine. According to the MEDT's information¹⁹, there are 243 PPP agreements (210 concession and 33 joint activity agreements) in Ukraine as of 2014. These include nine Concessions for the state property, three of which have been terminated. All concession agreements have been concluded on the basis of special concession legislation. According to the SPF's information,²⁰ there are 146 concession agreements in Ukraine (8 – for the state property and 134 – for communal property). There is no information about concession and leasing agreements in the area of heating, water supply and sanitation²¹ but the MORD's website reports about agreed tender conditions for five heating municipal projects in 2014. Table 8 shows available information on the current PPP portfolio.

Table 8: Current PPP Portfolio in Ukraine

Indicators	MEDT	SPF	MORD
Available on website	Yes	Yes	No
Information format	Short description as of September, 2014	Table of concession projects. Some cancelled projects still listed as active.	No information. MORD's data based on interviews in February 2015.
All Projects			
PPPs	2	Not applicable	Not applicable
Concessions	210	138	
Joint Activity Agreements	33 (no list of projects)	No information	No information
State property			
Concessions	7	8 (2 cancelled concession agreements still listed)	Not applicable
Joint Activity Agreements	15 (no list of projects)	No information	Not applicable
Municipal property			
Total Concessions	203	138 (including 2 cancelled indicated and at least 2 cancelled not indicated in the list)	Not applicable
Total Joint Activity Agreements	18 (there are no list of the projects)	No information	Not applicable
Heating Concessions	7	5	2
Heating Joint Activity Agreements	No information	No information	1
Water & Sanitation Concessions	79	14	26
Water & Sanitation Joint Activity Agreements	No information	No information	3

As noted earlier, just two municipal heating PPP projects, the Malyn Heating Project and the Oster Heating Project, have been signed in Ukraine since the PPP Law came into effect. The MEDT reviewed and approved appraisals for two other PPP projects, such as the Simferopol City Park PPP and the Vinnitsa Landfill Gas Utilization and Electricity Production PPP. However, the former was not implemented due to the situation in Crimea and the latter has been re-appraised due to depreciation of the exchange rate. The MEDT rejected one project, namely Morshin Heating Project.

There is no formal pipeline of PPP projects in Ukraine; instead there are lists of future potential projects.

There are several such lists, including a general list for the state property and a separate list for fuel and energy projects²² and other assets²³. A list of concession projects for municipal property is a compilation of lists adopted by each local council. There are no requirements for financial and economic appraisal of projects to be included in any of these lists,

19 <http://www.me.gov.ua/Documents/Detail?lang=uk-UA&id=fc354c59-cb8f-4660-b7d5-1acdf35f0ab7&title=InformatsiiaSchodoStanuZdiisnenniaDerzhavnoprivatnogoPartnerstva>

20 http://www.spfu.gov.ua/_layouts/SPFUSiteDefinition/ConcessionsRegister.aspx

21 MORD is responsible for maintaining the register of these projects according to Article 10 of the Law on Leasing and Concession of Municipal Entities in Heating, Water Supply and Sanitation

22 The Cabinet of Ministries of Ukraine Resolution dated January 11, 2012 No. 71 "On Adoption of the List of State Owned Fuel and Energy Entities Which Could be Transferred into Concessions".

23 The Cabinet of Ministries of Ukraine Resolution dated December 11, 1999 No. 2293 "On Adoption of the List of State Owned Entities Which Could be Transferred into Concessions".

but in some cases (mostly for state property) public authorities conduct a preliminary analysis of such projects. The pipelines sit separately within each public body responsible. They are uncoordinated and there is no central registry. The details for these concession projects and other known lists of projects are provided in Annex 1.

Some private sector projects seeking state support could potentially be considered as PPP projects. The analysis of investment projects proposals at MEDT shows that some of the private sector projects applying for state budget support or state guarantees are public infrastructure projects. Such projects include the modernization of a power plant and a water treatment system and schools and kindergartens. At the same time, most of the private sector projects seeking state support are purely commercial projects and thus they do not represent a public interest. Annex 4 includes the analysis of investment project proposals reviewed by the MEDT.

5. ASSESSMENT SCORING – INDIVIDUAL INDICATOR ASSESSMENT

5.1 Policy

PIM-PPP-1: Consistency in Project Identification and Initial Development

Rationale:

A key element of a cohesive and integrated PIM system is a common starting point that requires use of a standard methodology for examining the need for government intervention. This should aim to answer questions such as: *'Why should the government do anything at all?'* *'What is the nature of the problem that requires action?'* and *'Can we address the cause of the problem as well as the symptoms?'* All of these questions are an important point of genesis for all actions that, if they are developed further, go on to become projects. The way in which these issues are handled can dramatically affect the way in which the government allocates precious resource effectively and efficiently. The future trajectory of value for money begins here.

The way in which these initial procedures are managed should be laid down in guidance and represents an initial form of appraisal. Importantly, at this stage, the initial analysis should be devoid of any consideration of means of implementation. This emphasises the point that intrinsically there is no such thing as a PPP project. Identifying the need for intervention with a clear elucidation of the nature of the problem and a number of options for resolving the problem should pre-date thoughts on whether a PPP or TIP form of implementation makes sense or not.

Dimensions for Assessment:

- i. *Are suitable projects identified through a consistently applied procedure regardless of potential implementation route?*

Comments: There is no consistency in project identification and initial development; the initial screening process that applies to a project depends on the characterisation of the project by the implementing line Ministry and the legislation applicable to that type of project.

Score: D

- ii. *Is there an effective published national policy on PPP explaining the government's motivations to pursue the involvement of the private sector, what sectors are priorities and how it aims to avoid expensive mistakes?*

Comments: The PPP Law and Resolutions issued under it, explain how to carry out the appraisal and feasibility study for a PPP project and how to implement the project, but does not give any guidance as to the rationale for choosing PPP over another form of implementation in the first place. There is no effective national policy document or guidance on the rationale for PPP, when to implement it or how it sits within the PIP/PIM framework.

Each Line Ministry has its own strategic PIM programme but these are not project specific. They tend to be unrealistic in terms of financial capacity and planned development consistently outstrips execution.

This is partially as a result of frequent changes in government. Political instability means a lack of focus on long-term strategic planning. That was the position in 2012 and has obviously been considerably exacerbated by recent political events.

There are a number of relevant laws in this area but they do not provide a central consistent set of guidelines that allow strategic project identification, prioritisation and planning.

Presidential Decree No. 5 titled 'On the Strategy of Sustainable Development Ukraine – 2020'²⁴ specifies reform of almost all Programs of Development until 2020. It contains a list of 63 reforms that need to be implemented nationally, among those: reform of the transport infrastructure; reform of the telecommunications infrastructure; reform of the energy sector; program of energy efficiency; reform of housing and communal services; program to attract investment; reform of the management of state property. **PPP is not included in these reform priorities.**

Resolution of the Parliament of Ukraine No. 26 of 2014²⁵ indicates the policies that need to be followed but each Line Ministry developing their own within that. There is no provision in this program which provides an insight as to the relationship to potential projects.

Score: D

Overall Indicator Score: D

PIM-PPP-2: Screening of Projects against Policy Priorities

Rationale:

Perhaps the most fundamental starting point for a PIM system that wants to add PPP to its implementing options is to make a statement of intent. A policy document is the most likely means of communication to do that. Done well, a policy document should lay out the rationale for PPP implementation in the context of economic and development settings in the country concerned. It should explain to its citizens why PPP might benefit them, whilst at the same time reaching out to potential partners to fund and operate such schemes. The best motivation for implementing public investment projects through PPP is to seek out greater effectiveness in output and greater efficiency in implementing and operating the project.

A policy document should set out a number of basic considerations such as the type of projects that would be considered for PPP implementation, with perhaps some exclusions²⁶. It should lay out a plan for realising the first few projects including any reforms, legal adjustments and institutional arrangements necessary. Most policy documents on PPP are reactive, in other words, some PPP activity is already underway and the policy document is written to explain what is going on. The numerous examples of this include South Africa, Morocco and Slovakia.

Given the need to persuade investors, lenders and operators of the government's intent it is not uncommon for these documents to be prefaced by a senior politician, usually a Finance Minister and sometimes a Prime Minister. For more mature PPP markets, policy statements need to be updated over time as conditions change and progress (or otherwise) becomes apparent (for example the UK).

Also important is the degree to which policy is implemented and followed. The best policy document in the world is meaningless without the will to implement it. In countries with little or no previous experience of PPP, risk-averse officials may want to resist attempts to investigate a means of implementation that they don't understand. Furthermore, policy statements are often considered to be aspirational rather than instructional. Many countries require a legal intervention to direct specific actions.

Dimensions for Assessment:

- i. *Is there an effective published national policy on PPP explaining why the government wishes to pursue the involvement of the private sector, what sectors are priorities and how it aims to avoid expensive mistakes?*

Comments: In Ukraine there is the lack of a single coherent strategic national plan for Public Investment Programming and Management. This was also the finding in the PIM Assessment for Ukraine carried out in 2012. The same issue applies to PPP implementation. The document 'Conception of PPP Development 2013 – 2018' explains the rationale for PPPs and defines priorities in their implementation, but this document was adopted under the former President and Government of Ukraine and today would unlikely to be considered as a valid document.

Score: D

24 Decree of the President of Ukraine from 12 January 2015 Nr. 5/“On a Strategy for Sustainable Development” Ukraine – 2020” – <http://www.president.gov.ua/documents/18688.html>

25 Resolution of the Verkhovna Rada of Ukraine dated December 11, 2014 No. 26-VIII “On the Cabinet of Ministries’ Program of Activities” <http://zakon2.rada.gov.ua/laws/show/26-19>

26 The most common exclusion is Defence related activities, although some allow this sector too.

ii. *To what extent are the motivations for PPP made clear in this document or other communications?*

Comments: Motivations for PPP style implementation are implicit rather than explicit – ie that the alternative capital budget resources are highly constrained – there is no explicit mention of **how** PPP implementation might be delivered in a more efficient and effective way than TIP implementation and to do so within the constraints of fiscal responsibility. These core subjects of value for money and fiscal responsibility need extensive attention.

Score: D

iii. *Does this document lay out an effective means of screening out unsuitable projects?*

Comments: There is no current means of screening out unsuitable project proposals. There is no common starting point that requires the use of a standard methodology for examining the need for government intervention. Project initiation is ad hoc, with parallel approval systems depending on the legislation and type of project classification used. This leads to a lack of central recording of project data making meaningful analysis at a micro or macro level extremely difficult.

Any consistency in initial screening for suitability is coincidental rather than planned. This is shown in Table 13. The same applies in the case of the general and sector specific Concession laws.

Score: D

Table 13: PPP in Government Policy Documents

Policy Documents	Rationale for PPP Implementation	PPP Benefits to Citizens	PPP as Priority of State Policy	Areas Considered for PPPs
Coalition Agreement (2014) ²⁷	No	No	No	Increasing energy efficiency of public buildings; port infrastructure development; motorway modernization
Sustainable Development Strategy "Ukraine-2020" ²⁸	No	No	No	No
Government Program 2015 ²⁹	No	No	No	No
Concept for PPP Development in 2013 - 2018 ³⁰	Yes	Yes	No	Transport, energy sector, industry, construction, agriculture infrastructure, housing & communal infrastructure (heating, water & sanitation, waste treatment etc.), health, education, culture, tourism infrastructure, science etc.

iv. *To what extent has a policy on PPP been implemented in priorities / projects?*

Comments: Policy on PPP cannot be said to have been implemented in priorities and projects. So far only two small projects have been implemented through this methodology.

Score: D

Overall Indicator Score: D

PIM-PPP-3: Effectiveness of the Relevant Legal Framework

Rationale:

The most essential element of an overall framework for implementing projects through PPP is a legal framework that supports the policy. This is most often taken to mean that there should be a PPP Law in place. However this is not necessarily the case. The UK for example does not have a PPP Law.

'Legal Framework' means the overall legal context that permits (or prevents) PPP forms of implementation or creates the conditions which either encourage or discourage private sector partners to engage with the government.

²⁷ Agreement about Coalition of Parliamentary Fractions "European Ukraine" dated November 27, 2014. <http://zakon1.rada.gov.ua/laws/show/n0001001-15>

²⁸ Decree of the President of Ukraine from January 12, 2015 No. 5/2015 "On a Strategy for Sustainable Development "Ukraine – 2020" <http://www.president.gov.ua/documents/18688.html>

²⁹ Resolution of the Verkhovna Rada of Ukraine dated December 11, 2014 No. 26-VIII "On the Cabinet of Ministries' Program of Activities" <http://zakon2.rada.gov.ua/laws/show/26-19>

³⁰ Resolution of the Cabinet of Ministries of Ukraine from August 14, 2013 No. 739-p "On Adopting Concept Development of PPPs for 2013 – 2018" <http://zakon1.rada.gov.ua/laws/show/739-2013-p>

The most obvious evidence for assessors is the existence of a number of PPP projects but checks should be made to establish whether negotiating these required time consuming legal adjustments in order for the projects to be agreed.

Some important areas include:

Definition – does everybody have the same understanding of what a PPP represents?

A clear definition of what PPP means in a country context is important. **Less important is the actual definition itself**, as long as it is consistently applied and understood. In India for example the term 'PPP', according to some officials is often taken to mean ANY interplay between the public and private sectors, including buying pencils and paper. The same appears to apply in Ukraine (see Box4).

Box 4

CHARACTERISTICS OF PPP / CONCESSIONS IN UKRAINE

PPP / Concessions in Ukraine would not all be considered as classical PPP projects in an international context.

Concessions in Ukraine are often just lease relationships: they usually do not provide investment in infrastructure. Public authorities transfer to a Concession objects such as bus stops, residential houses, cinemas and garages³¹. Concession agreements and tender conditions do not focus on results Most of agreements have no fixed requirements for quality of services etc .

To deal with this subject properly it is important to understand that there are two principle types of Concessions:

1. A Concession that involves works and services (the capital and management of the private company - for example to build and operate a new airport) - this is definitely PIM/PPP
2. A Concession that involves services only (the management only of the private company - it could include for example a Concession to run a food outlet in a public place) - this is basically considered public procurement.

It is only really possible to consider the **first type** as a project - the second type is just a service contract; a public procurement. Ukrainian law does not provide any distinction between the two types and therefore it is not possible to know how many of these Concessions might be considered as falling in to the subject area of the Assessment.

Dimensions for Assessment:

- i. *The permissiveness and flexibility of the legal framework in order to meet the needs of project designers, investors and lenders.*

Score: B

Comments:

A detailed analysis of the legal framework is set out at Section 3 so will not be repeated here. The fundamental problem does not lie with the 2010 PPP Law but instead with the fact that **the PPP model is still little understood in Ukraine**. The problems are exacerbated by the **lack of knowledge about overall PIM planning and early identification of potential projects**.

The concept of risk sharing requires a program of capacity building. Infrastructure projects that involve the state and private sector tend to transfer much of the risk to the private sector by way, for example, of a Concession with payment to the State, lease with commercial conditions and a payment to the State, joint investment activity or other contractual structure without much idea of the trade-off in risk premium charged by the private company for managing it.

31 SPF official site: http://www.spfu.gov.ua/_layouts/SPFUSiteDefinition/ConcessionsRegister.aspx

Whilst there is a PPP Law in Ukraine from 2010 that permits PPPs i.e. design, build, finance, operate and maintain projects of 5-50 years, with risk transfer to the private sector and private corporate or debt financing, only two small projects have been signed under this law.

The Availability payment form of PPP is provided for in The Law on Concessions in Construction and Exploitation of Motorways³² but until now there are no Availability based PPP projects in Ukraine³³. Almost all projects proceed as Concessions or by way of State or IFI funding.

- ii. *Clear interpretive guidelines leading to a good understanding of the legal framework amongst practitioners.*

Score: D

Comments: Clear interpretive guidelines is absent.

Overall Indicator Score: C

PIM-PPP-4: Effectiveness of the Relevant Institutional Arrangements

Rationale:

The roles that ministries of finance play in the PPP area is crucial to the smooth functioning of the overall PIM system, the avoidance of parallel capital budgeting exercises and the awareness and management of fiscal risk. Therefore the performance of the ministry of finance in these areas and in co-ordinating others should be at the heart of the Assessment.³⁴ Whilst other indicators deal with the consequences of this performance (such as PEFA-PIM-PPP-11 on Fiscal Risk) the overall effectiveness of the ministry of finance and the other relevant institutional connections is of vital importance to PPP implementation that it deserves special consideration.

Assessors should also look at the role of dedicated PPP Units for the potential to create distortions in the overall PIM system and inherent conflicts of interest such as having a role to 'promote' PPP forms of implementation whilst at the same time reviewing the suitability and quality of project proposals. Such potentially conflicting roles may point to less than effective outcomes.

Box 5

EVOLVING INSTITUTIONAL ARRANGEMENTS IN THE UNITED KINGDOM

The UK's institutional development to support the PPP form of implementation has adapted to changing circumstances since the mid 1990-s (these have been given various names over the years, most recently Partnerships UK). Throughout it all though, it has been clear that HM Treasury (UK Finance Ministry) has been in charge.

The perceived role of these bodies in acting as a 'gateway' independent assessor of PPP project proposals and at the same time being seen as 'principle salesman' for the PPP form of delivery raised questions about impartiality.

Therefore in 2010 the government merged its activities with the existing TIP based activities under the umbrella of Infrastructure UK (IUK) in order to recognise the essential need to assess and appraise project proposals as objectively as possible regardless of means of implementation.

Managing PPP implementation holistically with other forms of implementation remains the UK government's preferred means of managing the PIM cycle to the present day.

32 Article 4 of the Law. For implementation of this provision the Resolution of the Cabinet of Ministers of Ukraine No. 493 "On Adoption of Methodology for Calculation of Fees for Exploitation Readiness of Motorways Constructed under Concessions" was adopted on July 11, 2013 - <http://zakon4.rada.gov.ua/laws/show/493-2013-n>

33 _The Cabinet of Ministries of Ukraine recently adopted tender conditions for the Motorway "Lviv-Krakovets" construction, which based on availability payments; but until now there are no appropriate documents in open space.

34 See also: PEFA-PIM-PPP-10 on Independent Review of Appraisal and PEFA-PIM-PPP-11 on Fiscal Risk

Dimensions for Assessment:*i. Effectiveness of the Ministry of Finance in identifying and managing issues that PPP raises*

Comments: Activities on State Guaranties approval and accounting, PPP and Concessions Assessment Approval are spread out between different divisions of MOF without any coordination from a single point. The final decisions about approval of PPP/Concession projects evaluation are taking by different MOF divisions depending on their responsibility (social infrastructure, housing and communal services, transport etc.). There is no single division in MOF which is responsible for management of PPP/Concession fiscal risks.

Therefore, PPP expertise is required in each sectoral division of MOF to properly assess PPPs as well as in the Division for Financial Aspects of Privatisations and Proprietary Relations. This level and type of capacity building takes significant resources and is not an efficient way to capture PPP expertise in any country.

Score: D*ii. Absence of any conflicting rules, incentives or behaviours built into the PPP Institution eg promotional role and also an appraisal role which lead to distortion in option selection*

Comments: MEDT has been given the role of PPP policy implementation in Ukraine. A division of the MEDT called the Department for Attracting Investments comprises 21 staff, and includes the State Investment and State Support Unit (5 staff), the PPP Unit (5 staff), as well as the Investment-Innovation Policy Unit (5 staff) and the Unit for Attracting Foreign Investments (t5staff). The Department for Attracting Investments is the former Department for Investments, Innovations and PPPs which was downsized from 42 staff by 50 percent. The number of staff was reduced in all Units of this Department except for the PPP Unit.

The State Investment and State Support Unit is responsible for the review of technical and economic appraisals of traditional public investment projects and projects proposed by the private sector seeking the state support.

The roles and responsibilities of these two units are provided in the PPP Law and the Investment Law respectively. Also, the functional roles and responsibilities of these units are in the process of being stipulated in detail in regulations.

The PPP Law sets out the role of the PPP Unit, which has been delegated to MEDT, in Article 22 as per Table 14:

Table 14: Role of the MEDT in PPP Projects

1.	Review and approval of technical and economic appraisal of PPP projects for state property and municipal property (if State support is sought)
2.	Audit of compliance with PPP contracts
3.	Development of proposals on government PPP policy
4.	Monitoring of activities of the central government and local government authorities on PPP issues
5.	Development of concepts and drafts of Special Government Programs aimed to support the development and implementation of PPPs
6.	Assistance in the protection of rights and interests of public and private partners in PPPs
7.	Assistance in dispute resolution between public and private partners
8.	Monitoring, systematization and dissemination of PPP projects results, including on the level of risks of public partners in PPP agreements
9.	Monitoring of compliance in with PPP related legislation, including the organization of tenders for PPP projects
10.	Information and advice on PPP issues within the scope of its responsibilities
11.	Training on PPP issues
12.	Registration of PPP contracts
13.	Filing of claims for the termination of PPP contracts for state entities in cases of violation of agreements by private partners

The MEDT therefore has the legislative authority to become a centre of expertise for PPP projects in Ukraine. However, this role only applies when the project is initiated via the PPP Law 2010.

Furthermore, the PPP Unit in the MEDT's Department for Attracting Investments reviews project appraisals and approves projects (Item 1 in the Table above) as well as performs the role of the champion of PPPs in Ukraine (Item 10 in the Table above) which appears to be a conflict of interest.

Score: C*iii. The effectiveness of governance and decision making arrangements in PPP projects*

Comments: Projects are prepared by the proposing body i.e. LM or municipality that wants to carry out the project. They decide how to characterise the project and therefore what law, process and implementation route

it will follow. It then goes to the MEDT for Assessment³⁵ in which the MOF takes part if it concerns state property and municipal property if any State support needed.³⁶.. At the same time there are no budget mechanisms for providing budget support for PPP and Concession projects. As a result there are approximately 200 Concession/PPP project proposals in Ukraine with no budget support. Given the lack of planning at a strategic level, the whole system of PIM and PPP appears to be a 'bottom up' approach with very little guidance at a central level to LMs and other governmental entities.

There is a strong need for capacity building at all levels but most crucially within the MOF.

Score: D

Overall Indicator Score: C

Table 15: Central PPP Unit and Other Institutions in PPP/PIM Projects

Powers	TIP ³⁷	PPP Law	Concessions: Fuel & Energy State Property Entities	Concessions: Heating, Water & Sanitation, Municipal Property Entities	Other Concessions
Project Identification & Initial Development	LM	Private Partner or LM	Private Partner or MECI	Private Partner or LA	LM for state property; LA for municipal property
Screening for Policy Priorities	LM	LM for state property; LA for municipal property	MECI	LA	LM for state property; LA (for municipal property)
Stakeholder Management	LM	LM for state property; LA for municipal property	MECI	LA	LM for state property; LA (for municipal property)
Project Appraisal	LM,/MEDT (Unit)	LM/MEDT –for state property, LA – for municipal property (MEDT if State support)	LM/MECI	MORD: tender conditions	
Review of Project Appraisal	MEDT (TIP Unit)	MEDT	MECI		
Decision on Project Implementation	MOF	Government for state property; LA for municipal property	MECI	LA	Government for state property; LA for municipal property
Fiscal Risk Evaluation	MOF	MOF if State support	MOF if State support	MOF if State support	MOF if State support
State Support Approval	Government	Government	Government	Government	Government
Tender	MEDT	LM for state property; LA for municipal property	MECI	LA	LM for state property; LA for municipal property
PPP/TIP Contract Approval (or some provisions)	LM,MEDT, MOF	LM for state property; LA for municipal property	MECI	LA	LM for state property; LA for municipal property
Signing of Contract	LM or MOF	LM for state property; LA for municipal property	MECI	LA	LM for state property; LA for municipal property
Contracts Registration	MEDT	MEDT (PPP Unit), SPF (in the case of Concessions)	MECI, SPF	MORD, SPF	SPF
Monitoring	LM/MEDT	MEDT: PPP Unit; LM for state property; LA for municipal property	MECI	MORD, LA	LM for state property; LA for municipal property
Current Review and Evaluation	LM/MEDT	MEDT: PPP Unit; LM for state property; LA for municipal property	MECI	LA	LM for state property; LA for municipal property
Ex-post Evaluation	No demands	No demands	No demands	No demands	No demands

35 Only in the case of applying the PPP Law procedure

36 For municipal property if they the State support is needed

37 After the establishment of an Inter-Agency Commission for Public Investments, this Commission carries out the final review of project appraisals and selects projects for implementation.

PIM-PPP-5: Stakeholder Management and the Role of Advisers

Rationale:

Stakeholder Management: The concept of stakeholder management is not a new one to PIM; it is considered good practice to engage fully with a whole host of public and private entities that may be affected by a proposed project. The word 'affected' can be taken to mean anyone from public officials that may end up working in a new building in another location, to displaced citizens whose property is 'in the way of' the proposed project. There is little point in repeating that which is considered good practice in TIP but it is worth drawing out the differences between stakeholder management in TIP and in PPP.

In the case of PPP implementation there are two principal areas to consider that are different to TIPs:

- i. Potential private partners (investor, lenders and operators) are key stakeholders. Inherently a PPP project requires the private party to undertake more risk than it might otherwise be used to under TIP. This often includes the requirement to finance the asset development and execution. This requirement changes the market profile of the companies prepared to engage in such projects. Certainly the number of potential candidates will be limited as some candidates may not be prepared even to bid in a PPP environment. It is therefore of vital importance for the public authority to test its ideas out in a consultation process or 'soft market test' as it is sometimes known. Without viable competition, the likelihood of a good value project diminishes markedly.

Before committing to a PPP form of implementation, authorities should assess the market appetite for bidding such a project. This should be a matter of course for public authorities and the way in which this is conducted (openly, transparently, without bias and using the same framework of questions and discussion for all participants) should be assessed also. If, after this process of engagement, there is insufficient interest in the project being implemented as a PPP project then either the authority can adjust its ideas to make the project proposal more attractive or they may conclude that a PPP form of implementation is not viable.

- ii. Public officials and employees of the state or public authority are potentially affected more by PPP than TIP. In the case of a PPP form of implementation, it is often the case that the operating contract involves the transfer of sometimes large numbers of staff employed by the state over to the employment of the private sector. This may bring about great concern and distress for those involved and even be the cause of labor disputes. It is therefore important to fully engage with those affected under these circumstances.

Role of Advisers

It is often the case that project implementers need to take on external advisers in order to assist them with the preparation and execution of a project whether it is to be implemented as a TIP or a PPP.

Whilst practically all countries engage in public investment projects on a regular basis and retain some basic capabilities in TIP, not all countries engage in PPP projects and even those that do may do so on a non-regular basis. It might be expected then that governments and their line ministries rely more heavily on external advisers for PPP than for TIP. This is a two-edged sword with the potential for distortions on either side.

On one side it might be that the lack of understanding of PPP creates an underlying nervousness and reluctance amongst officials to engage in them in the first place.

On the other side, external advisers may be tempted to distort the appraisal in order to make the case for PPP more appealing than it otherwise might be. **The incentive for doing this is that advisers make more money out of PPP implemented projects than through TIP implemented projects.** There is little hard statistical data to support this widely held belief but many reports, particularly from national audit bodies point to the fact that advisory fees come in significantly above budget for PPP projects³⁸. This points to two probable reasons: firstly that budgets are set too low in the first place based on expectation. It might reasonably be assumed that these expectations are based on experience from previous TIP projects. In the UK only a third of PPP project managers go on to a second project – most PPP projects managers are therefore new to the field.³⁹ Secondly that the extraordinarily high overspends cannot be entirely related to specific project issues but are more likely to be related to systemically higher costs for advisory services in PPP projects than TIP.

There are however good reasons why adviser costs are higher in PPP projects than in TIP projects. The allocation and pricing of project risks, the development of the Public Sector Comparator (PSC) and supporting the legal elaboration

38 The UK's first large scale healthcare project procured through Private Finance estimated adviser costs at £300k. The final bill was £2.4m.

39 A review by the private finance practice – National Audit Office October 2009 p.31

of these matters is complex, time consuming and therefore expensive. Procurement lead times are therefore longer with the associated costs to support it.

Regardless of the weakness of hard statistical evidence it should be considered that it is possibly **the expectation or perception of gaining higher fees that may be a motivating force in distorting objective appraisal choices.**

Therefore a reasonable question might be: Do project advisers have an implicit interest in the outcome of the preparation and appraisal phase?

Consultants firms are often engaged near the outset of development work on a project proposal. They are often required to do the feasibility study and economic appraisal. If their engagement spans from preparation through to implementation, there is a strong motivation for them to seek approval for the project - an inherent conflict of interest. Furthermore since PPP forms of implementation require more preparatory and transactional work, there is an in-built motivation to prefer a PPP form of implementation – the fee earning potential is significantly greater.

'the payment of the transaction advisors for the work they do to the end of the feasibility study phase..... should not depend on the outcome of the study' (Institute for Public-Private Partnerships, 2012, p5)

Particularly at sub national levels of government and smaller line ministries, the capacity of officials to implement a project through PPP is severely constrained. Indeed for larger projects that may come round once in a generation, there is no justification for having those skills in the first place. Governments should try to avoid preparing and implementing projects on behalf of these entities at a centralized level with advisers that appear to be imposed on them since misunderstandings, disagreements and even resentment can easily take hold⁴⁰. Therefore the level of capacity of sub national authorities to implement projects through TIP and PPP on their own might indicate a tendency for officials to 'prefer' one form of implementation over another.

Dimensions for Assessment:

- i. *Do guidelines exist at a national level to assist public officials in the task of managing the stakeholders in a possible PPP implementation?*

Comments: No such guidelines exist. The type of market analysis carried out in many countries in order to test the market appetite for risk transfer in a particular project, is simply not carried out in Ukraine because there is no focus on making the project attractive for the private sector.

Score: D

- ii. *The degree to which public authorities when planning a project are able and willing to respond to legitimate ideas and/or concerns of stakeholders*

Comments: Stakeholder consultation is entirely ad hoc and dependant on the Ministry in question. Obviously, different sectors engage to a greater or lesser extent with the private sector stakeholders but there is no systematic approach or policy of government in this regard.

For example, MECI, the Ministry that deals with the energy sector, is extremely sophisticated in dealing with the private sector players in that markets and there is a very healthy level of private sector participation and investment in the sector. However, this is not a systematic policy led position it is just how one Ministry does business.

Similarly, the ports division of MOI could be successful in attracting private sector participants in the ports sector who tend to enter into leases with commercial conditions. But now lease contracts under SPF authority. However, the ports sector is in need of heavy investment and given the private sector's participation and knowledge of the assets and industry, this seems exactly the type of area that would benefit from consultation as to how the government might improve the legal/financial/contractual risk profile of the deals on offer to encourage the private sector to invest more heavily.

Score: C

- iii. *The extent to which project development is actually influenced by advisers who stand to gain from one implementation method over another.*

Comments: It is difficult to assess this in the absence of a pipeline of projects. However, it is apparent that expertise in the private sector far outstrips capacity building in the public sector and this puts the private sector adviser in a powerful position to influence.

40 This was a key finding of the Bank's PIM Assessment of Romanian implementation of EU funded regional water projects (2012-13).

The appointment of external advisers to infrastructure projects seems to be ad-hoc and budget driven. Regardless of whether it is a TIP, a Concession, a PPP, Joint Activity Company etc., there seems to be no policy on the appointment of advisers and it will depend on whether the budget is available. When a project is financed by an IFI, they will insist on advisers but this is not a government position.

The Project Commission can involve expert PPP consultants if necessary but there is no obligation to do so. Therefore, in the case of a municipal project, there will almost certainly be only local representatives on the Tender Commission who will almost certainly have no PPP experience or expertise, and for whom no training or guidance is available. Given that municipal projects can be as large as State Projects, this is an unacceptable position and the level of capacity building in PPP based on this structure would be extremely expensive and inefficient.

There are examples of international experts producing comprehensive feasibility studies such as that produced by Egis-Ukraine for the Lviv-Krakovets project, but this seems to be the exception rather than the rule.

Ukraine has a good selection of legal, financial and technical advisers who are part of local or international firms with PPP experience. Therefore, local experience of traditional and Concession projects, supplemented by international PPP divisions, should mean that advisers are available without having to import them.

The problem of advisers to PPP projects being biased in favour of recommending PPP projects rather than a different form of implementation has not manifested itself as there have been so few PPP Projects.

Score: C

- iv. *The extent to which government entities manage their advisers or conversely the extent to which the advisers appear to manage them.*

Given the comments at (iii) above it is likely that advisers are in a strong position to influence the outcome of appraisals on project proposals.

Score: C

Overall Indicator Score: C

5.2 Formal Project Appraisal

PIM-PPP-6: Quality of and Compliance with Appraisal Rules and Guidance

Rationale:

It is increasingly recognized that PPP is merely an alternative form of implementation for a project concept. The means of implementation should have little bearing on whether the proposed project is a good one or a bad one. A PPP implementation cannot magically transform a bad idea into a good idea.

The Bank's Policy Research Working Paper: *A diagnostic Framework for Assessing Public Investment Management* makes it clear that: *'Projects involving non-standard procurement, such as Public Private Partnerships (PPP)...should be subject to the same appraisal processes as standard public investment, and the costs and benefits of such projects should be compared against a public sector comparator.'*⁴¹

General Comments: Existing appraisal rules are based mostly on the evaluation of financial feasibility of projects at their outset. In most cases it is impossible to understand the potential outcomes of a project from Feasibility Studies or such outcomes not formalised (for example, to improve the quality of services – without mentioning to which level). It leads to distortions and subjective decision making not only at the stage of selecting the most effective form of project implementation and on evaluation of efficiency of the choice of project implementation. To date only one PPP project has gone through this formal process, been approved and then signed and implemented.

The degree of appraisal (in case the PPP Law utilization) does not relate to the scale of the project as it should do. However this is not the weakest part of existing approach to appraisal. There is a more important point, which should be improved. Assessments don't evaluate projected outcomes of project proposals. As a consequence, PPP project proposals are evaluated simply as public procurements. To change this approach it is necessary to increase the understanding among public authorities and society about the nature of PPP (as well as Concessions) and its place in a wider functioning PIM system.

There are no detailed requirements for the Assessment of PPP projects initiated under the Concessions laws and the level of Assessment appears to vary widely depending on the desire of public authorities to do this.

The Law on Investment Activities requires State Investment Programs to be subject to economic appraisal. Whilst the Law clearly defines the contents of appraisal documentation, it does so only in list form and there are no supporting regulations to help officials in proposing entities to make a meaningful attempt to fulfil the requirements. Instead the responsibility for preparing economic appraisals is left to the MEDT using inputs provided by the proposing entities. Without formal appraisal guidance, it becomes relatively easy for officials to propose and accept form instead of substance.

Dimensions for Assessment:

- i. *Appraisal Guidelines clearly state that they apply to all forms of project implementation, including PPP.*

Comments: There are no common appraisal guidelines that require the use of a standard methodology for examining the need for government intervention in the PIM system generally nor for PPPs. Project initiation and appraisal appears ad hoc, with parallel approval systems depending on the legislation and type of project classification used.

Score: D

- ii. *No special dispensations or stated preferences are given for projects with a PPP 'label'*

Comments: PPPs initiated under the PPP Law are subject to a formal PPP feasibility Assessment pursuant to the Cabinet of Ministers Resolution No. 384 of April 11, 2011 and the MEDT Order No. 255 of February 27, 2012⁴². There are no legislative requirements to provide feasibility Assessment in the case of Concession projects even if they may be entirely similar to PPP projects.

This is a comprehensive Assessment of the proposed project but only within the parameters of suitability as a PPP project. The wider considerations as to whether the project is necessary or well-conceived to begin with appear to be overlooked.

Score: D

- iii. *Projects are not described as 'PPP projects' before they have been appraised*

Comments: Formally Ukraine has no pre-labelled PPP projects, but in practice the pre-selection of a form of private sector participation in infrastructure depends on the current vision of the Government and LMs on this issue. For example, in 2012 MOI included in the List of State Concessions 19 state sea and river ports (all ports, which could be suitable for modernization) and started the preparation of Feasibility Studies for four of them but now all ministries, including MOI, are oriented towards privatisation.

The proposer of the project, whether that is a Line Ministry, a Local Authority or a potential private partner, classifies the project from the start and that classification determines what legislation, appraisal and approval process will apply. In practice, the form of private sector participation in infrastructure is defined based on the current interests of public institutions (or their top management) instead of a project's economic value as a proposed intervention to improve social or economic advancement. This implies that the route of implementation is chosen before an appraisal has taken place and is likely to lead to numerous errors of judgement and expensive mistakes.

Score: D

- iv. *Appraisal leads to objective decision making and project selection regardless of implementation.*

Appraisal is ad hoc and depends on the classification of the project at the start. As noted earlier, the State Investment and State Support Unit reviews appraisals of traditional public investment projects and projects proposed by the private sector seeking state support. The PPP Unit reviews appraisals of PPP projects. Both MEDT's Units are part of the Department for Attracting Investments. Even though these Units collaborate when they review project appraisals, none of the projects has been considered for an alternative implementation method at the time of this Assessment. The line ministries and other government entities sponsoring projects pre-determine the modality of project implementation at the appraisal stage.

Score: D

Overall Indicator Score: D

42 Order of the Ministry of Economic Development and Trade of Ukraine dated February 27, 2012 No. 255, registered in the Ministry of Justice of Ukraine on March 15, 2012 No. 399/20712, "Some Issues Related to the Appraisal of Public-Private Partnerships".

PIM-PPP-7: Public Sector Comparator (PSC)

Box 6

PURPOSE AND DEFINITION OF A PSC**Purpose:**

“A Public Sector Comparator (PSC) is used by a government to make decisions by testing whether a private investment proposal offers value for money in comparison with the most efficient form of public procurement.”

Definition:

“The PSC estimates the hypothetical risk-adjusted cost if a project were to be financed, owned and implemented by government.”

Henry Kerali – Lead Transport Specialist, The World Bank⁴³.

Rationale:

A comparative Assessment of the respective costs of both TIP and PPP implementation routes is an essential element in assessing relative merits of each implementing option. However these exercises are riddled with potential distortions through their (necessarily) subjective nature. Skilled officials can manipulate the inputs to a comparative Assessment in order to achieve the results they prefer.

General Comments: A Public Sector Comparator is part of the Feasibility Assessment required to be carried out under Order 255⁴⁴ where a PPP project is initiated under the PPP Law. In the case of PPP this analysis is carried out by MEDT which is the central PPP body. However, whilst four formal PPP projects have gone positively through the formal Assessment process, only two projects have been approved for implementation.

Order 255⁴⁵ offers very little guidance on how to carry out a PSC and what detail is required.

In the case of Concession agreements there are no legislation requirements to compare Concession and TIP options of a project implementation before putting this project in the List of future Concession projects⁴⁶

As there have been so few PPP projects under the PPP Law there is very limited experience in Ukraine of Assessment of PPP type risks. This is a complex process and needs expert tuition and project experience to really grasp the subject in a way that will result in reliable financial comparisons. Ukraine is really at the start of this process.

Real risk Assessment, allocation and pricing are not core PIM or PPP skills in the public sector. There is no written guidance with a formalized procedure for pricing risks as for TIP and for PPP.

The use of Public Sector Comparators (or any form of vfm test) outside the sphere of the PPP Law seems to be well understood but is not formalised in central documentation which a good PIM system would require.

Analysis of four PPP Feasibility Studies showed PPP bias and a complete lack of pricing information. Risk analysis is theoretical and again is not priced.

Therefore the PPP Law envisages PSC as part of the process but training as well as guidelines of the MEDT and MOF are essential to make this a meaningful exercise.

43 <http://siteresources.worldbank.org/INTTRANSPORT/Resources/336291-1122908670104/1504838-1151587673078/PSCforHighwayPPPProjects-v2.pdf>

44 Order of the Ministry of Economic Development and Trade of Ukraine dated February 27, 2012 No. 255, registered in the Ministry of Justice of Ukraine on March 15, 2012 No. 399/20712, “Some Issues Related to the Appraisal of Public-Private Partnerships”.

45 Ibid.”

46 The Law on Concessions (general) , The Law on Concessions in Construction and Exploitation of Motorways, The Law on Leasing and Concession of Municipal Entities in Heating, Water Supply and Sanitation , The Law on Leasing and Concession of State Entities in Fuel and Energy (2012),

Dimensions for Assessment:

- i. *A comparative Assessment of vfm between PPP and TIP is formalised and the government offers centralized guidance for practitioners*

Comments: Whilst Public Sector Comparators seem to be widely understood and used PPP Appraisal process⁴⁷, there is no centralised guidance for capital expenditure projects generally. The level of PSC and the formality of the process depend on how a project is characterised at the outset (no requirement to compare costs of project implementation between PPP and TIP; and no methodology on how to do this) and therefore what legislation and approval process is followed.

For large infrastructure projects, whether they are PPPs, Concessions, joint activity projects etc, the requirement for a PSC is set out in the implementing legislation without any guidance. Therefore whilst the concept seems to be understood, it is not centralised.

Score: C

- ii. *The approach to risk Assessment and pricing is consistent regardless of the proposed procurement route.*

Comments: The concept of real risk sharing, where a risk is analysed, allocated and priced between public and private sector, does not seem to be a concept that is embraced in Ukraine. Transfer of risk to the private sector seems to be total or nearly total and where support is needed this comes in the form of a State Guarantee.

There is a 'Risk Evaluation Methodology' for projects, which are initiating due to the PPP Law⁴⁸. This methodology is complicated and supposed to use mathematic methods for calculations of Risks likelihood. At the same time, there are no demands for risk pricing. Positive feature of this methodology is the list of possible actions from the side of public and private partners in the case of different risks occurrence⁴⁹.

For example, if traffic forecasts are difficult to predict for a motorway project, availability based shadow tolling might be a better option for the government but this has not been done to date as all motorway projects have been carried out under the Concession laws when the private sector is involved and this law does not provide for availability based Concessions.

Box 7**SHARING AND PRICING RISKS IN PPPS IN UKRAINE**

Distribution of risks in PPP/Concessions in Ukraine is not widely understood.

In PPP Feasibility Studies provided for analysis by MEDT, some risks, which should be managed only by the State (for example, currency risks, political risks, requisition/confiscation, risk of termination by the public partner due to change of priorities, taxation risks), were allocated to the private partner. At the same time, some risks which usually belong to the private partner, were retained by the public authority (for example, ineffective assets management by a private partner). There are no Assessments of the cost of risks materializing in any of these Feasibility Studies.

Score: C

- iii. *The ease of which the comparative Assessment can be manipulated with subjective inputs in order to appear to favour PPP over TIP or vice-versa.*

The feasibility studies reviewed showed clear evidence of 'case-making'. A summary of those provided to the Assessment team is set out at Annex 4. If Line Ministries/Municipalities classify their project as a PPP subject to the PPP Law 2010, TIP is no longer considered – even if it makes sense to do so – and the choice of implementation method is not reviewed further.

47 Order of the Ministry of Economic Development and Trade of Ukraine dated February 27, 2012 N0. 255, registered in the Ministry of Justice of Ukraine on March 15, 2012 N 399/20712, "Some Issues Related to the Appraisal of Public-Private Partnerships".

48 Resolution of the Cabinet of Ministers of Ukraine dated February 16, 2011 N0. 232 "On Adoption of Methodology for Identification, Assessment and Management of PPP Risks".

49 Points 9-10 of the Methodology, adopted by the Resolution of the Cabinet of Ministers of Ukraine dated February 16, 2011 No. 232

Box 8**COMPARATIVE ASSESSMENT OF TIP AND PPP IMPLEMENTATION ROUTES IN UKRAINE**

Feasibility Studies in 4 PPP project proposals, 3 from which were adopted by MEDT, have comparative Assessment of TIP and PPP implementation routes. At the same time, analysis of different possible forms of project implementation in all these documents is rather formal and has no calculation of respective costs. In each feasibility study, the advantages of PPP utilization were made clear without any evidence to support the assertion. Absence of clear requirements to perform a comparative analysis/PSC allows the development of the results that the Initiator of the project prefers. In the case of initiating a project based on the PPP Law procedure, its initiator is interested in demonstrating comparative advantages of the PPP model, because in another case he would have to start from the beginning another procedure for preparing the project for TIP implementation. As a result, all the reviewed Feasibility Studies “confirmed” advantages of PPP compared to TIP.

Score: D

Overall Indicator Score: C

PIM-PPP-8: Comprehensiveness of Appraisals

Rationale:

Rules and guidelines related to Appraisal will satisfy policy makers to a limited extent but more is required in order to understand the issues that can place the implementation of projects in peril. Extra effort is necessary in order to make an appraisal meaningful. An appraisal is not merely a theoretical exercise in attributing an economic value to a proposal, it also needs to understand and manage the factors that can influence whether the outcomes will or will not be achieved: in other words a full feasibility study.⁵⁰ Therefore the appraisal process needs to be comprehensive in its assessment of the proposal.

Dimensions for Assessment:

- i. *The overall comprehensiveness of project appraisals seen with a broad Assessment of a wide range of implementing issues in addition to the financial and economic Assessment.*

Comments: The degree of assessment and feasibility tends to vary from almost none to international standards for those projects funded by external banks who demand such studies. Every type of project has its own requirements for assessment depending on its classification. However, appraisal in Ukraine appears to favour form over function.

The Methodology for Appraisal Assessment Analysis only applies to those projects, which are based on the PPP Law. There is no such methodology and there are no requirements to do Appraisals for Concessions, which are prepared in accordance with the special Concessions legislation.

The key tenets of Assessment are identified in the law⁵¹ and the Resolutions⁵² but guidance and detail is needed as well as investment in these key skills. These are not skills that can be self-taught and international expertise will have to be utilised to teach key skills such as how to carry out PSCs and how to assess, allocate and price risk.

50 It is good practice to conduct a ‘pre-feasibility study’ in advance to make a basic check on the fundamentals of the proposal. This screening process is useful in weeding out poor proposals before significant resource is wasted on them. See PIM-PPP1

51 Article of 11 and 12 of the Law of Ukraine “On Public-Private Partnership”(2010) <http://zakon2.rada.gov.ua/laws/show/2404-17>

52 Order of the Ministry of Economic Development and Trade of Ukraine dated February 27, 2012 No. 255, registered in the Ministry of Justice of Ukraine on March 15, 2012 No. 399/20712, “Some Issues Related to the Appraisal of Public-Private Partnerships”.

Table 16: Issues in Feasibility Studies from Four PPP Projects Provided by MEDT

1.	There is very apparent 'case-making' in these studies. The decision has already been made, in these cases by the municipal project proposer, that the project should be implemented as a PPP project under the PPP Law. It is possibly because a State Guarantee or support was being requested.
2.	The proposer classifies the implementation method as PPP and it is analysed as such. There is no analysis as to what the most suitable method of procurement for the project should be.
3.	The studies did not estimate pricing on a number of issues such as risk analysis and instead relied on principles that were generic and unconvincing. There is simply a lack of skills to carry out the analysis demanded by the PPP Law

Demanding PPP analysis for PPPs carried out under the 2010 Law will simply continue to encourage people to avoid this route as it is seen as bureaucratic and complex. It is essential that PPPs initiated under the other laws such as the various Concessions laws, are subject to the same system of appraisal.

Score: C

- ii. *The quality of the methodology including the assumptions and data sources used to make those assumptions.*

Same comment as above in (i). The quality of methodology varies widely.

Based on a sample of TIPs and PPP projects reviewed by the World Bank team, several findings emerge as to the quality of project appraisals prepared by sponsoring government entities (Annex 4). Most of the project appraisals involve only financial analysis while a few projects considered some economic costs and benefits. Demand analysis tends to be limited. Discount rates applied in the reviewed projects vary significantly. The sensitivity and risk analyses are rare and of variable quality. These findings indicate that project sponsors would benefit from sufficiently detailed guidelines on how to carry out the appraisal of public investment projects.

Box 9**DECLARATIVE PROVISIONS IN APPRAISAL ASSESSMENT ANALYSIS IN UKRAINE**

The existing Methodology for Appraisal s (in the case of the PPP Law procedure)⁵³ requires a project initiator to identify the all necessary permits including possible pre-applications already put in place. It also requires them to put in to the feasibility study full information about land acquisition issues including rights of access to perform works. At the same time, feasibility studies, which have been prepared due to the PPP Law procedure, have very limited information on these issues.

Score: C

- iii. *The integrity of the decision making related to implementation choice between TIP and PPP.*

Comments: The level of appraisal required in the case of PPP is comprehensive. At the same time the methodology of comparison between the TIP and PPP options is poor and needs significant improvement and capacity building⁵⁴. Feasibility studies showed clear evidence of 'case-making' where the project proposer has already classified the project as a PPP for the purposes of the PPP Law.

Score: D**Overall Indicator Score: D**

53 Order of the Ministry of Economic Development and Trade of Ukraine dated February 27, 2012 No. 255, registered in the Ministry of Justice of Ukraine on March 15, 2012 No. 399/20712, "Some Issues Related to the Appraisal of Public-Private Partnerships.

54 See also Box 9 of this Report.

5.3 Independent Review of Appraisal

PIM-PPP-9: Quality and Practices of Independent Review

Rationale:

Independent review and scrutiny of project proposals is an important means of screening out unsuitable projects, correcting mistakes and inaccurate assumptions and picking out the natural bias that comes with project promotion.

This independent review is particularly important when PPP is the chosen form of implementation as authorities often realize (perhaps through hearing discouraging feedback during a market Assessment) that they may be pitching their project to a sceptical private sector and try to over-compensate by painting a particularly rosy picture of the project's potential benefits or the costs and risks involved (Optimism Bias).

Box 10

OPTIMISM BIAS DAMAGES PPP HIGHWAY SCHEMES

Demand for highway projects remains strong with governments all over the world. They are seen as precursors to economic development and are often eye catching to voters. Faced with an inability to afford the larger schemes, governments have turned to the private sector to construct these highways asking them to use their own finance with the expectation that tolls could remunerate them.

This model of engagement was adopted for a number of years but a number of difficulties emerged, often leading to painful fiscal shocks when governments had to step in to rescue the projects (for example in Mexico and Hungary).

Many projects using this model often relied on **overly optimistic traffic forecasts** to predict future use of the proposed highway. This is critical given that the volume of traffic has a direct relationship to the volume of cash that the project would be able to generate to pay off the project debts of the private companies that got involved.

PPP theory might have led to an expectation that private sector due diligence would identify this optimism bias but it didn't. Transport ministries, eager to promote and win support for their projects have tended to be highly optimistic about future traffic levels, supported by specialist consultants eager to work on a lucrative project for many years. This optimism bias led to failures in level headed and balanced Assessments of the likely volumes of traffic in future years. Many mistakes were made and governments and taxpayers paid for these mistakes.

General Comments: MEDT is the main central government entity responsible for providing review of project proposals.

Since the MEDT also has the responsibility for promotion of PPPs, the potential for conflicts of interests needs to be managed carefully.

Such guidelines that exist to date appear to be a checklist of documents to be submitted e.g., Environmental Statement, Energy efficiency etc. Most projects that submit the correct documentation go onto the Registry after the MEDT has done its review even though the quality of appraisal may vary substantially. Therefore, it is perfectly possible for bad projects (but nonetheless compliant), scoring just 1 point to be on the same Registry, as good projects with 100 points. Good projects and bad projects go on the Registry together. The Registry is therefore not indicative of what projects are likely to be executed nor which projects should be executed. There is no prioritisation.

Appraisal and independent review capacity is one of the greatest challenges to short and medium-term improvements to the system, yet there is no strategy for rectifying this problem. The dynamic nature of the civil service presents additional obstacles with people being moved often frequently from one position to another.

Dimensions for Assessment:

- i. *The scope of the review in covering all aspects of the project that could adversely affect the outcome of the project.*

Comments: The MEDT is in a good position to fulfil this role but the lines of responsibility between the LMs (or other proposing entities) and the MEDT are blurred. Often the MEDT closely advises on appraisal work leaving an independent checking or 'gatekeeper' role missing or if it is carried out by the MEDT – an obvious conflict of interest.

The Scope of review is entirely dependent on:

- The classification in the law which applies to the type of proposal
- Budget considerations

In accordance with the Law on Investment Activities⁵⁵ (Article 15) investment projects, which are planning for implementation which would include state support, must pass a 'state expert review'. The procedure of such review set up by the Cabinet of Ministries of Ukraine.⁵⁶ At the same time, independent reviews of such investment projects are not obligatory – it could be recommended by public authorities.⁵⁷ According to the MEDT such independent examinations are not carried out. There are no requirements to provide independent review or scrutiny of PPP or Concession project proposals per se due to the legislation. However, if a proposed PPP involves a state property or needs the state support, then the MEDT and MOF review the project appraisal.

Score: D

- ii. *The degree to which the review process adds real challenge and improvement to the system. In other words not just a box-ticking administrative compliance test.*

Comments: Whilst MEDT is developing expertise in reviewing PIM and PPP projects they are also the centre of expertise and therefore the promoters of PPPs and there is therefore an inherent conflict.

Score: C

- iii. *Do appraised PPP projects have to pass the same scrutiny and challenge tests as TIPs?*

See comments on Dimension (i)

Score: D

- iv. *The ability and willingness of reviewers to reject unsuitable projects.*

There seems to be little hesitancy in rejecting ill-prepared PPP projects under the PPP Law 2010. In the case of TIPs, the MOF rejected many projects in 2012-2013 but seemed to be inundated with a very large volume of projects, many of which had not been altered before reaching them.

Score: C**Overall Indicator Score: D**

5.4 Selection and Budgeting: Project Selection and Budgeting

PIM-PPP-10: Fiscal Risk

Rationale:

Governments, when entering into PPP contracts can unwittingly expose themselves to significant fiscal risk by agreeing to explicit guarantees and contingent liabilities.

Shown below are the main types of instruments in Project Agreements that can create fiscal risks:

- State Guarantees on the debt raised against the project
- Guaranteed payments against minimum levels of demand (volume of traffic, MW of generated power through 'take or pay' agreements etc)

55 The Law of Ukraine "On Investment Activity" - <http://zakon2.rada.gov.ua/laws/show/1560-12>

56 The Resolution of the Cabinet of Ministers of Ukraine dated June 9, 2011 No. 701 "On Adoption of Procedure for Conducting State Expertise of Investment Projects" - <http://zakon2.rada.gov.ua/laws/show/701-2011-n>

57 Point 2 Article 12-1 of the Law of Ukraine "On Investment Activity" - <http://zakon2.rada.gov.ua/laws/show/1560-12>

- Minimum Revenue Guarantee System⁵⁸
- Viability Gap Funding (VGF)⁵⁹
- Termination provisions that require the state to buy back the assets at either 'market value' or write down value
- Other 'Buy back' clauses

It is not wrong for governments to accumulate contingent liabilities through PPP contracts. It is wrong, however, to fail to recognize them, manage them and monitor them along with changes in the conditions that might affect their realization. The information should be either collated by or at least made available to the Ministry of Finance and updated on a regular basis. Officials in spending ministries and their agencies should also monitor the situation at their own level of authority. An Assessment of the arrangements put in place to do this should be made.

By 2009, Chile with a long track record of implementing projects through PPP had a total stock of guarantees related to PPP of 3.72% of GDP⁶⁰

A large number of significant sized PPP contracts were agreed by the UK's Highways Agency in the late 1990s and early 2000s. The result of this was a belated realization that the accumulated explicit commitments and contingent liabilities would consume a significant slice of their expected annual budget allocation in future years. Subsequently a decision was taken to halt further implementation of highway projects by PPP – regardless of whether it was the most sensible option or not.

In summary, governments (usually meaning ministries of finance) need to fulfil four key roles with respect to fiscal risk in PPP projects:

- 1) Understand the risks and how they are incurred
- 2) Know how to measure these risks
- 3) Record the risks in individual projects and cumulatively
- 4) Monitor the risks for likelihood of them being realized.

The roles of ministries of finance are covered in PIM-PPP4 and mentioned also at PIM-PPP9.

Dimensions for Assessment:

- Explicit and contingent liabilities should be recorded and managed within the budget system. Both explicit and contingent liabilities in PPP contracts should be assessed and priced before commitments are made through signed contracts*

Comments: The fundamental skill set of risk allocation and pricing is almost non-existent in Ukraine. Almost all projects are Concession projects with most risk residing contractually with the private sector. Compensation on termination as a fiscal risk seems to be confined to PPP projects under the PPP Law 2010 and there are only two such projects.

Therefore it would appear that State Guarantees are the major exposure of the State. The rules on SGs are specified in the Budget Code⁶¹, Law on Investment Activities⁶² and Subsequent regulation⁶³.

In accordance with the Budget Code⁶⁴, a SG can only be given with a decision of the Cabinet of Ministers or if under an International treaty. All IFI loans are provided under International Agreements so get SGs⁶⁵. The

58 Examples: as in South Korea and Chile. In Chile this is targeted to cover 70% of the investment costs plus operation and maintenance costs.

59 As found in a number of Indian States

60 Knowledge Sharing on Infrastructure Public-Private Partnerships in Asia: Chile Day 1 Session 2: PPP Legal and Regulatory Framework; Jose Luis Guasch, Chairman of the World Bank Global Expert Team on Public- Private Partnerships Seoul, Korea, May 2009

61 Articles 17-18 of the Budget Code and see explanation in Section __2.1__ of this Report.

62 For public investment projects planned to be implemented with State Support

63 Resolution of the Cabinet of Ministries of Ukraine dated February 23, 2011 No. 131 "On Adoption of Regulation on Management of Risks Associated with Provision of State Guaranties and Distribution of Such Risks between the State, Creditors and Borrowers - <http://zakon2.rada.gov.ua/laws/show/131-2011-n>

64 Article 17 of the Budget Code

65 Decree of the Cabinet of Ministries of Ukraine dated November 26, 2008 "On the Procedure for Initiation, Preparation and Implementation of Economic and Social Development of Ukraine with Support from International Financial Insitutions " <http://zakon1.rada.gov.ua/laws/show/1027-2008-n>

procedure for getting an SG for a PPP is described in the Budget Code⁶⁶ and subsequent regulation⁶⁷ but in practice requires a sponsoring government entity to provide an implementation report after one year of signing a PPP agreement. This provision makes it impossible to receive an SG for a PPP.

The Ukrainian government should have a clearly defined policy with clear regulation and guidelines as to what PPP risks it is willing to guarantee. Currently there are none.

Many governments take the policy position that in place of State Guarantees they will agree to contractually buy out the project in the event of termination. Other countries give guarantees to bolster the credit rating of municipalities and therefore lower the cost of debt.

Currently no PPP/Concession projects provide for the granting of the state or municipality guarantees from the side of the public partner, which could protect a private partner from political risks, currency risks, risk of changing priorities in the state policy, risks of changing legislation etc.

Due to the absence of any legislative mechanism for providing State Guarantees for PPP /Concessions there are no such projects.

Score: D

- ii. *Accumulated fiscal risk related to increasing numbers of PPP commitments should be recorded, monitored and a consideration of the impact should be given in the selection process. The government should have a 'fiscal ceiling' for accumulated PPP payments as a safeguard.*

Comments: The PPP Law makes provision for a central registry of PPPs under that Law and subsequent regulation⁶⁸ (only those prepared under the PPP Law procedures). This means that it is currently a Registry of two projects – a long way from the reality of such obligations in Ukraine when considering the wider picture of Concessions and the like.

The SPF keeps a registry of Concession and lease commitments (only for state property on a mandatory basis)⁶⁹.

The MORD keeps a registry of Concession and lease agreement for Municipal projects concerning Heating Supply, Water Supply and Sanitation.⁷⁰

There is no central registry of State Guarantees for PPPs and other infrastructure projects⁷¹.

Overall there is no system for recording accumulated fiscal risks.

Score: D

- iii. *The Ministry of Finance should have final sign-off authority on PPP implemented projects.*

The MOF does not have final sign-off PPP and Concession projects and its role is not stipulated in the concession legislation. The MOF provides approval with respect to fiscal affordability and sustainability of PPP projects. Also the Cabinet of Ministers approves the eligibility of a state property for inclusion in a list of future concessions and grants a concession for a state property based on tender results which is contingent upon approval by the MOF as well as the MEDT, the Ministry of Justice and a responsible line ministry.

However, the MOF has final sign-off on all traditional public investment projects. At the time of this Assessment, many of these projects have been unscreened before they arrived and therefore the MOF has reviewed too many projects with bad projects getting the same chance as good projects.

Score: C

Overall Indicator Score: D

66 Article 18 of the Budget Code

67 Resolution of the Cabinet of Ministries of Ukraine dated March 17, 2011 No. 279 "On Adoption of the Procedure for Provision of State Support to Implementation of PPPs" <http://zakon0.rada.gov.ua/laws/show/279-2011-n>

68 Articles 21-22 of the PPP Law and Resolution of the Cabinet of Ministers of Ukraine dated February 9, 2011 No. 81 "On Adoption of the Procedure for Provision of Information on Fulfilment of PPP Contract by a Private Partners to a Public Partners" <http://zakon2.rada.gov.ua/laws/show/81-2011-n>

69 Resolution of the Cabinet of Ministers of Ukraine dated January 18, 2000 No. 72 "On Register of Concession Contracts" - <http://zakon4.rada.gov.ua/laws/show/72-2000-n>

70 Order of the Ministry of Regional Development, Construction and Housing and Communal Services of Ukraine dated February 14, 2012 No. 53, registered in the Ministry of Justice of Ukraine on March 1, 2012 No. 344/20657 "On Approval of the Procedure for Notification of the Registration of Lease or Concession Contracts for Centralized Water, Heating and Sanitation Facilities in Municipal Ownership"

71 See also explanation in 2.1 of this Report

PIM-PPP-11: Transparency and Accounting

Rationale:

The way in which different governments register their projects on national accounts can have a strong influence over the choice of implementation route – TIP or PPP. In the past, even in many government department meetings in the UK and Ireland, the principal topic of discussion has been the effect on ‘affordability’ not in cash terms but in accounting terms of whether a proposed project would be considered ‘on or off balance sheet’ if a PPP route was chosen. Indeed the UK’s National Audit office in a report to the House of Lords Economic Affairs Committee⁷² expressed its concern over the way in which the selection of procurement route was being distorted by such issues.

Such distortions are best avoided by adopting international accounting standards applying to PPP contracts. Examples include International Financial Reporting Standards (IFRS)⁷³ and the Eurostat⁷⁴ method used by many EU countries.

Without these rules, it is possible that the assets utilised in a PPP contract may appear on the balance sheet of the service provider, the financial institutions involved in the deal, the government or none of them.

Dimensions for Assessment:

- i. *The use of an internationally accepted accounting standard for reporting PPP transactions. (Assets employed in a PPP should be clearly designated on either government accounts or the private company’s accounts).*

Comments: According to the legislation utilised in Concession contracts, assets should appear on the balance sheet of the Concessionaire (service provider) on the special off-balance sheet for the purposes of accounting treatment.⁷⁵

For other PPP forms (which are implementing on the procedures of the PPP Law) this issue is not resolved. This situation appears to be based on the legal classification of the contract and not on an analysis of the content of the contract.

This situation is compounded by the fact that there is no central registry of projects and therefore no way of determining the State’s exposure.

Score: D

- ii. *The degree to which the accounting treatment of a project influences the choice of PPP or TIP implementation.*

Comments: Financial obligations for TIP are considered to be off-balance sheet of the State Treasury of Ukraine (STU) which is responsible for accounting state financial obligations in Ukraine (state debts and state guaranties).

Concessions contracts are on balance sheet of the private partner. For other PPP forms (which are implementing on the procedures of the PPP Law) this issue is not resolved. Therefore it is not possible to make an Assessment of how choices between TIP and PPP are influenced.

Score: N/A

- iii. *The degree of transparency with which PPP projects are reported to national assemblies, and presented to the media and citizens at large and the quality of the information provided.*

Comments: There is not enough transparency in the way PPP/Concession contracts are awarded. MOF, the national assembly is not presented with information on the future liabilities to make payments against PPP/Concession contracts. This information is not a part of the budget planning process and citizens have no way of accessing information about such projects.

Also see comments in relation to dimension (i)

Score: D

Overall Indicator Score: D

72 Private Finance Projects: a paper for the lords economic affairs committee October 2009

73 International Financial Reporting Council Interpretations Committee Interpretation 12 (IFRIC 12)

74 Council Regulation (EC) 2223/96 (25 June 1996) The European System of National and Regional Accounts in the Community

75 Article 24 of the Concession Law (general)

5.5 The PPP Contract

PIM-PPP-12: Quality and Comprehensiveness of contracts

Rationale:

A number of countries have adopted so-called Standard PPP Contracts over the years. Possibly the first of these was the UK. The creation of this document took at least two years to develop and consumed millions of GBP in external adviser costs in order to achieve it. It has also been modified a number of times since. Even so, this document⁷⁶ is essentially guidance with suggested drafting for various clauses, although derivations from the standard drafting need official agreement.

The New Zealand Treasury issued a draft Standard Form PPP Project Agreement in October 2013 (the PPP Project Agreement) which it describes as a guidance paper.

The Saudi government has a high level template but does not provide much in the way of drafting suggestions for individual clauses.

Ireland came much closer to an actual standard form of contract which is essentially a template requiring the insertion of key project parameters.

This indicator can also help highlight issues such as the skills of the public authority policy makers and individual negotiating teams in projects, the possibility of overall value for money and the likelihood of long term explicit and contingent liabilities.

Whilst professional transaction specialists take great pride in the way that they construct PPP Project Agreements, the technical 'jargon' used and the legalistic language may not lend itself to being readily understood by project users and contract managers in the future. It is now seen as good practice for the transaction team to produce a User Guide to overcome these issues.

Dimensions for Assessment:

- i. *The extent to which nationally agreed standard positions on a range of contractual issues are in place and used consistently*

Comments: There are no standard contract clauses for PPPs and there is inadequate experience to develop standard contract clauses. However, there is a basic standard Concession Agreement, which is mandatory. The regulation related to the PPP Law (Resolution No. 384⁷⁷) contains a list of those elements that should be contained in a PPP Contract. This is a somewhat simplistic approach. A list of clauses is meaningless without any guidance. Resolution No. 384 sets out a list of the key provisions to be included in the PPP contract⁷⁸. These are:

- 1) Name of parties and description of asset
- 2) Obligations of each party including financial obligations
- 3) Quantities and timelines for the contract
- 4) Specific quality of goods works and services
- 5) Distribution and management of risks
- 6) Procedure and conditions for obtaining a license over land (if needed) by a private partner
- 7) Payment provisions
- 8) Income sharing arrangements
- 9) Provisions on return of asset to State at end of contract
- 10) Reimbursement of Assessment costs
- 11) Contract renegotiation
- 12) Responsibilities of the parties for failure
- 13) Order of consideration of disputes

Term of contract

⁷⁶ Known as SOPC4

⁷⁷ The Resolution of the Cabinet of Ministries of Ukraine dated 11 April 2011 N 384 "Some questions of organization of public-private partnerships" - <http://zakon2.rada.gov.ua/laws/show/384-2011-n>

⁷⁸ These conditions apply only to Joint Activity Agreements. In the case of Concessions Agreement in the framework of the PPP Law, it is obligatory to use key agreement provisions as provided in the relevant Concession legislation and existing Standard Concession Contracts (Point 1 Article 5 of the PPP Law)

This list betrays a lack of understanding of what a PPP contract involves and would have the effect of discouraging any international investors.

No standard contractual terms have been provided in sub-legislation. Given the current level of knowledge of PPP this is logical. Standard contracts should only be drafted following a number of successful pilot projects when the government has worked out the best position for it to take on risks.

Sufficient conditions for Concession agreements are defined in the Concession Law (general)⁷⁹ and the Law on Leasing and Concession of Municipal Entities in Heating, Water Supply and Sanitation⁸⁰.

There are also two Standard Agreements, which have adopted by the Cabinet of Ministers Resolutions, - for Concessions⁸¹ and for Concessions on motorways⁸². These Standard Agreements are obligatory for parties (public and private).

The main problem in the standard clauses of Concession contracts is that they are designed on principles which are usually applied for traditional public procurement. They all underestimate risk sharing and risk pricing issues; they focus on inputs (rather than outputs) in the project; they don't focus on achieving clear results from the implementation and don't make payments to the private sector reliant on the services delivered. As a result, all existing PPP/Concession agreements are really not PPPs in an international context.

The skills of the public authority decision makers and individual negotiating teams in PPP/ Concession projects in areas such as long term explicit and contingent liabilities are insufficient.

User Guides on PPP Agreement Preparation, which would explain the principles of constructing the main provisions of such agreements, are absent.

Score: D

ii. *Is the apportionment of risk consistent with good practice*

Comments: In Concession contracts risk transfer tends to be to the private sector, wrapped where necessary with a State Guarantee. Proper assessed risk allocation is not the norm.

Score: D

Overall Indicator Score: D

PIM-PPP-13: Comparison of Key Contractual Terms with International Good Practice

Rationale:

A number of important contractual terms need special attention from assessors to check their consistency with international good practice. The four below are specifically chosen for their importance in determining outcomes through the operational period:

Payment Mechanism

Does the payment mechanism, in the sample of projects, reflect the availability and quality of services received? And are deductions made for poor performance?

At the heart of the contract and at the heart of the PPP form of implementation is the payment mechanism that should reflect the principle of the public authority only paying for what it receives both in terms of availability and also the quality of services received. The extent to which the payment mechanism is designed to do that should be assessed.

Early Termination Provisions

Early termination (regardless of cause) almost always entails significant outlay for the public authority concerned. This is because project funders will demand compensation payments to cover the costs of the early termination sometimes covering the entire value of an asset. On larger projects this might have serious budgetary consequences

⁷⁹ Article 10 of the Concession Law

⁸⁰ Point 1 of Article 8 of the Law

⁸¹ Resolution of the Cabinet of Ministers of Ukraine dated April 12, 2000 No. 643 "On Approval of a Model Concession Contract" - <http://zakon2.rada.gov.ua/laws/show/643-2000-n>

⁸² Resolution of the Cabinet of Ministers of Ukraine dated October 4, 2000 No. 1519 "On Adoption of a Standart Concession Agreement for Construction and Maintenance of a Motorway" - <http://zakon2.rada.gov.ua/laws/show/1519-2000-n>

for the government in the year that the termination occurs. Therefore the skill by which these obligations have been drafted and the extent to which they are understood, should form part of the Assessment.

Change mechanism

Over the course of a long term contract, change is inevitable. Unless there are clear procedures in the contract laying out the protocol for changes including how the changes will be priced, the public authority runs the risk of being held to ransom by the private operator which may consider itself in a unique position. Assessors should consider whether the change mechanisms employed are fit for purpose.

Dispute Resolution Procedures (DRP)

Private operators, investors and funders are often likely to have bases outside the country where the project is based. They will most often seek the possibility of international arbitration if things go wrong rather than the national courts who they might not perceive as being as independent as a third party entity. Preferably a structured DRP should form an integral part of a good Project Agreement. This should focus principally on non-legal recourse such as mediation, negotiation and binding independent expert Assessment.

Dimensions for Assessment:

- i. *Over these important contractual terms, the extent that the drafting solutions employed represent a good balance of protections for both the government and the private partner and the extent to which the positions arrived at represent international good practice.*

Comments: There are only two PPP projects⁸³ in Ukraine that might be suitable for comparative analysis with the standard clauses in a classic PPP agreement that might represent good international practice. Only one such project was reviewed by the Assessment team. For this reason the Assessment team decided it would not be appropriate to make an Assessment of this indicator based only on a single agreement.

However an analysis of the single agreement – the Malyn Heating Project – reveals some good and not so good practices. Some of the key contractual terms in that agreement are explained below in Table 17.

Table 17: Key Contractual Terms in PPP Agreement (Malyn Heating Project)

Payment Mechanism	Payments to the private partner reflect the availability of services (the private partner gets payment for real services rendered). At the same time, there are no any demands to quality characteristics and any deduction made for poor performance in the Agreement
Early Termination Provision	The Agreement provides for the compensation by the public partner of costs of the private partner due to the Agreement only in case of its termination as result of violation of the Agreement by the public partner. There is no mechanism of this obligation performance by the public partner in the framework of current budget regulation.
Change Mechanism	There is no change mechanism in Agreement (it is not provided by the legislation)
DRP	Article 16 of the Agreement says that disputes are solved by negotiation or in the court. There is no clear procedure of DPR in the Agreement

Overall Indicator Score: N/A

5.6 Project Implementation

PIM-PPP-14: Implementation Rules and Practices

Rationale:

Whilst public authorities may be used to TIP, they may not be used to PPP. The degree of involvement in the implementation phase in both varies markedly. In a TIP the asset under implementation will become the authority's property and the authority will naturally take a hands-on approach to monitoring progress – albeit often through an agent (consulting engineer for example).

With a PPP implemented project the asset under development belongs instead and is being funded by the private consortium and they are responsible for its correct and timely completion. Failure to do so may result in significant financial pain: they will not be receiving availability payments that they have budgeted for and at the same time will be accruing extra costs and extra interest payments.

⁸³ Only one PPP project was provided to the Assessment team.

Whilst the authority has a direct interest in the project – they want it to be available on time in order for it to deliver the services required – they should avoid the same hands-on approach that might be appropriate in a TIP. Indeed too much interference by the authority might be seen by the private entity as impairment. Over-fussiness or too much involvement around the implementation phase also runs the risk of inadvertently transferring risk back from the contractor.

The degree to which these differences and risks are understood and managed in practice should be assessed.

Whilst issues related to land acquisition might be adequately identified and partly addressed in the project preparation phase⁸⁴, the preparatory work is tested during the implementation, and should be assessed.

Dimensions for Assessment:

- i. *The degree to which the public authority adapts its role in implementing a PPP project from the role it adopts in a TIP.*

Comments: Not assessed as it was not possible to meet any public authority that had carried out a PPP project.

- ii. *The speed by which land acquisition is managed*

Comments: The PPP Law 2010 provides that the land/asset shall remain in the ownership of the State for the duration of the PPP project and the PPP Contractor is permitted to use it for the duration of the PPP Agreement only. This is typical of a project finance deal and used in many other jurisdictions⁸⁵.

However, it is not clear how this contractual right is dealt with in Ukraine. It seems that the PPP Contractor must still follow the usual procedure of title registration in order to be able to use the land and this is a lengthy process which can delay the project. The PPP Contractor cannot commence construction until the property registration is done. This process needs to be streamlined by amendments to the law on property registration.

Score: D

Overall Indicator Score: D (based only on the second Dimension)

PIM-PPP-15: Effectiveness of Procurement Process in PPP Projects

Rationale:

Procurement processes should be transparent and fair and should encourage open competition but they also need flexibility in the case of PPP implemented projects given the complexity of financial and legal documentation required to negotiate and implement such projects.

General Comments: There are different procurement procedures for TIP and PPPs/Concessions. Procurement procedures for TIP have defined by the Public Procurement Law. Procurements for PPPs, excluding Concessions, are regulated by the PPP Law and special Government Resolution⁸⁶. So far this procedure has only been used twice⁸⁷.

PPP Law

Article 14 of the PPP Law provides that the private partner must be selected following a competitive process.

Article 16 says that the award of PPP contracts must be published in Uryadovi or Golos Ukrainy or in the local government of the relevant municipality, as well as on the website of a public partner and provides for a 10 day standstill period during which the public authority must give reasonable information to unsuccessful bidders..

Resolution No. 384 was enacted on April 11, 2011 pursuant to the PPP Law. It is applicable only for Joint activity and other agreements (except Concession agreements) and sets out detailed provisions on the procurement process to be followed. That Resolution has been amended several times, the latest being 30 October 2014. The Resolution provides that PPPs must be awarded in a transparent, non-discriminatory competitive process and it is clearly attempting to meet these principles. It provides lists of all the areas to be covered in the tender documents but offers no detail or guidance on how to apply them.

84 Ref: PEFA-PIM-PPP-8

85 In Ireland, all PPP projects are carried out on this basis. The PPP contractor is given a bare contractual licence which is co-terminous with the PPP Agreement. Therefore, the PPP Contractor receives no property rights, only contractual ones and the property issues and planning issues are dealt with by the public authority.

86 Resolution of the Cabinet of Ministries of Ukraine dated 11 April 2011 N 384 "Some questions of organization of public-private partnerships" - <http://zakon2.rada.gov.ua/laws/show/384-2011-n>

87 Malyn Heating Project and Oster Heating Project

It provides that bidders must be given no less than 30 days to submit pre-qualification documents and 45 days to submit bids.

In terms of procurement process, it provides that the tender process will consist of the following stages:

- Submission of prequalification documentation (Optional stage)
- Shortlisting and issue of invitation to tender
- Submission of tenders
- Evaluation of tenders

This is a somewhat simplistic approach and not suitable for large scale PPP projects which of necessity involve lengthy and detailed interaction between bidders and the public body prior to and after bid submission. This is indicative of a lack of appreciation of what is involved in a PPP project.

Each PPP Project will have its own Project Tender Commission of not less than 7 persons whose identity will depend on whether it is a State or Municipal project. In the case of a State project there will be representatives from MEDT, MOF SPF, the State Agency of Land Resources and other entities if appropriate.

Local projects will set up a Commission consisting of local representatives only unless there is a particular reason to involve another party.

The Project Commission carries out the procurement, from advertising the project to evaluation and award of contract. The Resolution consists of many lists of matters that must be included at each stage of the procurement but it is difficult to follow and some appear relatively meaningless. There is a description of how the project Commission is to carry out the evaluation against pre-ordained criteria and the process is clearly designed to be transparent and objective.

Concession Contracts

Concession contracts are awarded on the basis of the tender process contained in the relevant Concession laws and by special Government regulations.⁸⁸ Again these provide for competitive tender.

Dimensions for Assessment:

- i. *Procurement processes that are flexible enough to deal with PPP implementation but are consistent regardless of the form of implementation*

Comments: The intention is to ensure transparency. However, the tender process in the PPP Law shows the lack of understanding of the complexity that private companies face in bidding a PPP project with short timeframes and a very simple process. In order to attract strong, competitive and attractive bids from potential private partners, they need time to prepare these bids and to analyse risks and potential pricing. The more time given to do this the better the understanding and the better will be the pricing. This would ultimately benefit the public authority through better thought-out and prepared bids.

Score: C

- ii. *The frequency that proposed award criteria for contracts are aligned with the objectives of the project*

Comments: Procurement processes for PPPs/Concessions are fairly transparent and formally encourage open competition. At the same time there are questions about the criteria to select winning bids. In many cases they don't reflect the requirements of the project implementation set out by the implementing authority in their rationale. Often the winning proposal was selected on the basis of a higher investment amount regardless of whether a higher amount was necessary or not. In some cases criteria of tenders are subjective and complicated to measure.

Score: D

- iii. *The level of participation in bidding for PPP implemented projects, ensuring best prospects for value for money outcomes*

Comments: According to the law the minimum number of bidders for TIP should be two.

⁸⁸ Resolution of the Cabinet of Ministers of Ukraine dated April 12, 2000 No. 642 "On Adoption of Regulation for Conduct of the Tender Process for Concessions of entities in State or Municipal Ownership" <http://zakon3.rada.gov.ua/laws/show/642-2000-n>;

Resolution of the Cabinet of Ministers of Ukraine dated October 4, 2000 No. 1521 "On Adoption of the Tender Procedure for a Concession for Construction and Maintenance of a Motorway" <http://zakon1.rada.gov.ua/laws/show/1521-2000-n>

There was no competition in most PPP/ Concessions tenders – only 1 participant in most tenders – and mostly all of them local. It reflects the low quality of projects, which are proposed as PPP/Concession projects, as well as the general framework for PPP in the country.

Score: D

- iv. *The degree to which unsolicited proposals are managed through a transparent system consistent with regulations and good international practice.*

Comments: Unsolicited proposals seem to be common in Ukraine and usually the proposer prepares the feasibility and Assessment documents. Unfortunately nobody from the interviewed public authorities could inform us about specific proposals that have been implemented in practice.

The PPP Law, the Law on Leasing and Concession of Municipal Entities in Heating, Water Supply and Sanitation⁸⁹, the Law on Leasing and Concession of State Entities in Fuel and Energy⁹⁰ as well as the Law on Investment Activity, all permit proposals to be submitted and developed by a private sector proposer. This seems to be a common occurrence and indeed the norm in some sectors.

Article 10 of the PPP law provides that PPP Projects may be proposed by the private or public sector and if a private body is the proposing body they also prepare the documents that go to government. It is impossible to see how this process can sit side by side with a detailed resolution advocating competitive tendering.

Score: D

- v. *The degree to which complaints about procurement procedures are well managed and avoid delays in implementation due to legal challenges.*

Score: Not assessed due to lack of projects and project documents.

Overall Indicator Score: D

PIM-PPP-16: Timeliness in Implementation

Rationale:

Gaining any information on this subject has intrinsic value to an Assessment but also might provide a source of empirical evidence for future studies on the comparative merits of PPP and TIP.

According to a study by the UK's National Audit Office there were numerous potential causes of delays in implementation⁹¹ as summarized in Box 9.

89 Article 5 of the Law

90 Article 5 of the Law

91 Report by the Comptroller and Auditor General HC 149 Session 2006-2007 | March 8, 2007

Box 9**COMMONLY CITED CAUSES OF IMPLEMENTATION PERIODS****Out of the control of the public sector**

- Unforeseeable events (such as the impact of the events of 11 September 2001 on the insurance markets and the financial collapse of private companies involved in PPP activity)
- Private sector administrative and approval processes

Could be partly mitigated by the public sector

- Negotiations surrounding changes to the bid proposed by the preferred bidder
- Delays caused by public sector administrative and approval processes
- Delays caused by planning procedures
- Delays caused by having to adapt to policy changes
- Reiterations of design, where these are caused by a poor response from bidders
- Lack of expertise, experience or resources within the public sector procurement teams

Could be avoided by the public sector

- Changes made by the public sector procurement team to the scope or specifications of the project
- Reiterations of design where these are necessary because of authority-led scope and specification changes or affordability issues
- Insufficient development of specifications prior to the project going to the market
- Poor process management
- Revisiting of affordability issues

Source: Views expressed by project managers of public sector teams, Departmental Private Finance Units, advisers and contractors

This is important because according to the same report the direct costs of delays in PPP projects between April 2004 and May 2005 was at least GBP67 million⁹².

This indicator should consider two distinct phases of the implementation:

1. Overall timescales from project selection and approval through to contract signature

The implementation phase of a project starts when it has been selected for implementation by the government. This first time period looks at what happens from the point of selection to the point where a contract (Project Agreement) has been signed and physical work can proceed. Delays in this period are often good indicators of weaknesses in the overall system such as a legal impediment or more specifically in the quality of project preparation. Delays might indicate weaknesses in the procurement system or lack of interest amongst bidders, which in turn might indicate a failure to ensure adequate preparation and a failure of the review and challenge function to identify such problems.

2. The extent of delays in the schedule between contract signature and availability of the completed assets for service

This second time period covers the activities between the moment the public authority signs the contract with the private company and the moment that the assets become available for use. Whilst most of these activities are construction related, this is not exclusively so as various permits may need to be obtained from utility companies etc. Delays here can be good indicators of poor preparation processes, including permits and land acquisition issues and poor review and challenge function that fail to identify such weaknesses.

92 Ibid, Page 22

Dimensions for Assessment:

- i. *Timescales between project selection and contract signature compared to schedule*
- ii. *Timescales between contract signature and availability of the assets compared to schedule*

The Assessment team felt unable to assess this indicator 16 as there was not enough information to evaluate delays in implementation PPPs/Concessions in Ukraine.

Overall Indicator Score: N/A

5.7 Project Adjustment:**PIM-PPP-17: Renegotiation and Adjustment Practices, Effectiveness and Efficiency****Rationale:**

Similar to the previous indicator, acquiring any statistical data on this subject has intrinsic value to an Assessment but also might provide a source of empirical evidence for future studies on the comparative merits of PPP and TIP.

Theoretically projects that are implemented through PPP should bring about fewer adjustments and changes because of the discipline of the preparation and Due Diligence processes. However when the need to adjust is apparent, the central PPP authority should monitor the changes and the reasons for them as they may indicate wider weaknesses in the project, the capacity of the implementing authority or the wider framework itself. Awareness of these issues may help avoid them in the future or help to develop guidance on how to resolve them in future projects.

There are likely to be written procedures for effecting change during implementation regardless of the fact that it is considered poor practice, particularly during the procurement phase. That is because the PPP contract must try to address every eventuality, not necessarily specifically but by general category of event. The contract should then try to identify a mechanism through which that change can be effectively brought about.

Any changes during the procurement process can fatally compromise a project leaving bidders concerned that the authority is not sure of its requirements and future commitment to the project. In some procurement regimes⁹³ a material change to the requirements of the project means that the whole procurement process is cancelled and re-started. Worse than that, such circumstances imply that either the authority has forgotten something or that political pressures are being brought to bear on what should or should not be included in the project. Either way, bidders and potential investors would be alarmed. Therefore anything more than isolated changes might indicate such issues as poor preparation, a failure of the review and scrutiny function as well as unwelcome political interference in the post selection phase.

Similarly changes during construction are considered poor practice and leave residual concerns in the minds of private partners. Changes by the authority inevitably lead to delays that are considered relief events in the contract, which add time and are likely to add significant cost to the authority since changes may involve re-design. Investors and lenders may also be concerned about the shift in the financial model that may result from changes. Any need to re-model or worse re-negotiate, can lead to substantial delay.

The subject of changes to a PPP contract also has significance during the operational period of the contract.⁹⁴

Overall the perception that it is more difficult to make adjustments to projects when they are implemented through PPP may lead to calls to avoid considering the PPP option, thus leading to future constraints on funding and implementation opportunities.

Re-appraising economic viability before major adjustments

Over long implementation periods in larger projects and that are typically found in PPP contracts, governments can (and often do) change, as do their priorities and policies. This might bring about change requirements of a substantial nature that severely affect the basis on which the project was first appraised and selected.

⁹³ For example: the 28 countries of the European Union.

⁹⁴ See also PEFA-PIM-PPP-20.

Whilst this might be seen as unfortunate in the case of TIPs, it might be seen as significant and damaging in the case of PPP as the balance of risk and reward may be adversely affected and the private partner may even dispute the change(s), refusing to carry it / them out without substantial financial reward.

Private partners too have the capacity to request substantial change or renegotiation of the contract. In Chile for example almost all PPP projects in the transport sector are re-negotiated alongside over 50% of additional investment⁹⁵.

Dimensions for Assessment:

- i. *The number and impact of changes during the procurement process*
- ii. *The number and impact of changes post procurement*
- iii. *The extent to which proposed major changes are re-appraised for continuing economic viability before they are agreed. This applies regardless of the point in the process at which the change is proposed*
- iv. *The disruption to services caused by adjustments when they are made during the operational phase of the project.*

General Comments: Renegotiation and Adjustment for PPPs/Concessions is legally possible. At the same time procedures for their initiation, criteria and principles for adopting changes are missing guidance and precedent. There are no requirements to re-appraise the economic viability before major adjustments to an agreement. At the same time, due to a lot of changes of state priorities and policies during last 10 years, this issue is becoming important for effective implementation of PPP/Concession projects in Ukraine.

There is not enough information to evaluate the efficiency and effectiveness of Renegotiation and Adjustment Practices in PPPs/Concessions due to the following reasons:

- There are only nine Concessions for state properties, three of them have been terminated and two of them suspended
- Absence of necessary information from LMs
- Weak PPP/Concessions monitoring process

Capacity of the line ministries and agencies on these issues is very poor. There is no guidance on how to resolve problems between parties regarding making changes to the agreement. There is no clear mechanism through which change can be effectively brought about even though this should be contained within each contract.

Due to these factors and the lack of PPP projects/PPP documentation the Assessment team felt unable to assess this Indicator.

Overall Indicator Score: N/A

PIM-PPP-18: Refinancing

Rationale:

When projects emerge from the higher risk period of construction, commissioning and early service delivery, it is common for the margins charged by lenders on any debt related to the project to be reduced to reflect that reduced risk post construction. In the early development period of PPP, refinancing resulted in some significant financial gains for the shareholders of the PPP Company. Whilst it might have been argued that this was nothing more than the reward for managing the risks of construction and early implementation well, it may also be argued that the gains came partially from factors outside the influence of the PPP Company such as favorable macroeconomic conditions or through greater confidence in PPP generally. Regardless of the reasons, private companies making huge windfall gains from the taxpayer, always leads to political difficulties. In turn this may lead to pressure to reduce or eliminate PPP as an implementation option. As a result, sharing the financial gains from a refinancing between the PPP Company and the Authority is often considered appropriate⁹⁶.

Current good practice is to include detailed provisions in the Project Agreement and associated financing documentation setting out the agreed method for assessing and sharing the gains from refinancing – rather than to rely only on broad principles and a resource consuming renegotiation of the contract when refinancing takes place.

⁹⁵ Knowledge Sharing on Infrastructure Public-Private Partnerships in Asia: Chile Day 1 Session 2: PPP Legal and Regulatory Framework; Jose Luis Guasch, Chairman of the World Bank Global

⁹⁶ The State of Victoria in Australia is typical of many governmental positions in requiring a minimum of 50% of any gain through a re-financing to be returned to the State.

The way in which this is formalized and the level to which the public authority is allowed to benefit should be assessed.

Dimensions for Assessment:

- i. *Clarity of rules to ensure that both public and private partners gain from re-financing arrangements in PPP contracts which are elaborated in the project agreements.*
- ii. *Evidence that the government benefitted in practice from any re-financing.*

General Comments: The PPP Law does not provide for refinancing and the Assessment team was not given information on any projects that had been refinanced.

At the same time, there is a good legislative mechanism for sharing the financial gains from a refinancing between the Private Company and the Public Authority in Production Share Agreements (PSA). This agreement was one of the forms of PPPs envisaged in the PPP Law, but 3 years ago was excluded from this Law.

There have not been sufficient qualifying projects to assess this Indicator.

Overall Indicator Score: N/A

5.8 Facility Operation

PIM-PPP-19: Contract Management Practices

Rationale

The entire point of a Public Investment Project is to contribute to the social or economic advancement of the investing nation. This over-arching objective remains true whether the project is implemented through TIP or PPP. This goal can only be achieved if objectives and targets are firstly well-elaborated and then secondly effectively achieved. Results are realised over the operational lifetime of a project – maybe in excess of 25 years. With a PPP form of implementation, with a contract linked to the useful lifetime of the project, the private sector takes on significantly more of the responsibility for achieving these objectives and targets – they are expressed as obligations in the contract and are detailed in performance indicators and service level agreements. A skilled contract manager representing the private company will need a skilled counterpart on the public side if the benefits are to be fully realised to their potential.

An effective PPP at an operational level relies on the teams on both public and private sides of the partnership. It needs to work at a human level with both parties having a common purpose, meaning they both have an intrinsic interest in the success of what they are doing. This requires knowledge of the contract, technical competence and perhaps above all practical experience. As well as assessing a range of projects where possible, assessors should look for evidence that contract managers are given the means to develop further capacity and competences.

Is it common practice to have a short-form version of the contract and schedules prepared as a working checklist for users of the services and managers?⁹⁷ The frequency or percentage of projects that have short-form working user guides for contract managers should be assessed.

One of the much lauded principles of PPP is that the public authority only pays for what it receives in terms of quantity (through an availability payment) and quality (through a service payment). Significant reductions are often envisaged in the contract for failure to meet these requirements.

Unless the public contract manager can monitor and enforce failures then the contract can be undermined and service standards can decline. Thus value for money can also be compromised. The Assessment of this indicator should therefore include evidence of how often payment deductions for availability or service charge have been made and how easy it is for these deductions to be made.

Since the operational period is the true manifestation of a Public Private Partnership, an Assessment should be made of the effectiveness of the working partnership. This might be based on the number of disputes between the parties over the course of the previous year for example. A further manifestation of the quality of the operational working partnership is the ease and competence through which necessary changes are made to the contract.

⁹⁷ See also PEFA-PIM-PPP-13.

Dimensions for Assessment:

- i. *The percentage of operational staff in a PPP project undergoing contract management training and induction courses.*

Comments: None of the MEDT, MOF, LM and LA staff who are involved in a PPP project undergoing contract management have enough skills, technical competence and practical experience to undertake the task. None of them have passed through sufficient training on PPP issues. Officers in charge of PIM/PPP issues often change their position making learning difficult and the accumulation of usable experience impossible. In these conditions it is very difficult to provide effective monitoring of project implementation on the public authority side. The necessity to provide effective monitoring is underestimated by the Government.

Score: D

- ii. *The number of operational contracts by percentage that have user guides for contract managers and users.*

Comments: There are no user guides for PPP/Concession contract managers and users in Ukraine.

Score: D

- iii. *Evidence that payments to contractors have been reduced fully in line with the contract in the event of poor availability or quality of services.*

Comments: There are no such provisions in the contracts which were reviewed during the Assessment. Project agreements have no clear indicators and service standards. As results, public authorities mostly monitor investments without Assessment of quality of services. There are no PPP/Concession agreements (among reviewed), which suppose payment deductions for availability or service charge. At the same time, concession payments for some of the signed concessions appear rather low.

Score: D

Overall Indicator Score: D

PIM-PPP-20: PPP component of an asset register

Rationale:

It is good practice to compile asset registers based on existing stocks of projects and newly completed ones. Where the projects are PPP implemented, they may not often be considered public assets. They are however assets in public use for the delivery of public services and should therefore be considered an integral part of the state's capacity to deliver social and economic services to the population. Also due to the capacity of these projects to incur substantial liabilities, a close monitor should be kept on the entire 'stock' of PPP projects. Whilst not logically forming an integral part of the asset register, the PPP projects should still be recorded - preferably as an Annex to the asset register of the state or the relevant public authority.

Dimensions for Assessment:

- i. *The existence and comprehensiveness of a register of commitments relating to PPP assets such as availability payments, the residual term of the contract and the contingent liabilities held under contracts with an estimate of the likelihood of their realization.*

Comments: The PPP Law envisages MEDT keeping records of PPP agreements and making these available for inspection. However, there is no register of commitments relating to PPP assets such as availability payments, the residual term of the contract and the contingent liabilities held under contracts given that only two contracts have been designed under the PPP Law.

The main Registry of State Assets in Ukraine is held by the State Property Fund which registers all forms of state assets, including Concession agreements, that pertain to state owned enterprises, government agencies and organizations, as well as state corporate rights and state assets that are not part of public enterprises.

Existing registers of Concessions in SPF and MORD contain no information about financial obligations of parties through contractual agreements. The register of PPPs in MEDT also does not include such information.

Score: C

- ii. *The level to which this is maintained and monitored*

Comments: Although the extent of coverage in these asset registers is limited, they do appear to be updated from time to time.

Score: C

Overall Indicator Score: C

5.9 Completion Review and Evaluation

PIM-PPP-21: Ex-post Review

Rationale:

It is quite common for governments to make a completion review on a TIP when the assets have been completed and they are ready to be handed over to the government. However essential this step may be, it is not what is meant by an ex-post evaluation.

There are two principal forms of ex-post review:

- 1) Financial compliance
- 2) Performance review

Whilst many public authorities claim to conduct ex-post evaluations, sometimes this amounts to little more than a financial compliance check, that is, control rather than performance. Most governments are keen to ensure financial compliance throughout the execution of the project but it is not as common to undertake a performance review. This indicator aims to re-enforce the importance of the latter.

Performance review matters at two levels:

- 1) At the level of the project – did the individual investment project fulfil its objectives? (or more likely: is it on course to fulfil its objectives?)
- 2) At a strategic level – TIP versus PPP – which option might perform better in future situations?

Given the relative novelty of PPP schemes, it is important to learn if PPP offers advantages over TIPs and if so in which ways and to what extent. Therefore, in the case of PPP implementation the government should seek out and assess data on whether the project has:

- achieved its objectives
- been realized on time (important for understanding whether PPP projects offer time advantages over more conventional means)
- been realized on budget (important for understanding whether PPP projects offer cost efficiency advantages over more conventional means)
- a better or worse overall performance than TIP

Dimensions for Assessment:

- i. *The extent to which ex-post review is used as a means of measuring the performance of the completed project against the original objectives*
- ii. *The extent that data is used to assess the strategic value of PPP to the nation's PIM system*
- iii. *Does the Government disseminate lessons learned?*
- iv. *Are similar mistakes on projects identified and strategies devised for avoiding them in the future?*

There are no legislative requirements to carry out ex-post reviews of Traditionally Implemented Projects or PPP projects in Ukraine, and no practice of preparing them.

Overall Indicator Score: D

6. PIM FOR PPP COLOUR CODED ASSESSMENT

PIM-PPP	Indicator	Sub Indicator	Indicator (or sub-indicator) Score (A-D)	Colour Code
POLICY				
1	Consistency in Project Identification and Initial Development	i. Are projects identified through a consistently applied procedure regardless of potential implementation route?	D	●
2	Screening of Projects against Policy Priorities	i. Is there an effective published national policy on PPP explaining why the government wishes to pursue the involvement of the private sector, what sectors are priorities and how it aims to avoid expensive mistakes?	D	●
		ii. To what extent are the motivations for PPP made clear in this document or other communications?	D	●
		iii. Does this document lay out an effective means of screening out unsuitable projects?	D	●
		iv. To what extent has a policy on PPP been implemented in priorities / projects?	D	●
		OVERALL INDICATOR SCORE	D	●
3	Effectiveness of the Relevant Legal Framework	i. The permissiveness and flexibility of the legal framework in order to meet the needs of project designers, investors and lenders.	B	●
		ii. Clear interpretive guidelines leading to a good understanding of the legal framework amongst practitioners.	D	●
		OVERALL INDICATOR SCORE	C	●
4	Effectiveness of the Relevant Institutional arrangements	i. Effectiveness of the Ministry of Finance in identifying and managing issues that PPP raises	D	●
		ii. Absence of any conflicting roles, incentives or behaviours built in to the PPP institution eg promotional role and also an appraisal role which lead to distortions in option selection	C	●
		iii. The effectiveness of governance and decision making arrangements in PPP projects.	D	●
		OVERALL INDICATOR SCORE	D	●
5	Stakeholder management / engagement / role of advisers	i. Do guidelines exist at a national level to assist public officials in the task of managing the stakeholders in a possible PPP implementation?	D	●
		ii. The degree to which public authorities when planning a project are able and willing to respond to legitimate ideas and/or concerns of stakeholders	C	●
		iii. The extent to which project development is actually influenced by advisers who stand to gain from one implementation method over another.	C	●
		iv. The extent to which government entities manage their advisers or conversely the extent to which the advisers appear to manage them.	C	●
		OVERALL INDICATOR SCORE	C	●
Project Appraisal				
6	Appraisal rules, guidance and practice	i. Appraisal Guidelines clearly state that they apply to all forms of project implementation, including PPP.	D	●
		ii. No special dispensations or stated preferences are given for projects with a PPP 'label'	D	●
		iii. Projects are not described as 'PPP projects' before they have been appraised	D	●
		iv. Appraisal leads to objective decision making and project selection regardless of implementation.	D	●
		OVERALL INDICATOR SCORE	D	●

PIM-PPP	Indicator	Sub Indicator	Indicator (or sub-indicator) Score (A-D)	Colour Code
7	Public Sector Comparator (PSC)	i. A comparative Assessment of vfm between PPP and TIP is formalized and the government offers centralized guidance for practitioners	C	●
		ii. The approach to risk Assessment and pricing is consistent regardless of the proposed procurement route.	C	●
		iii. The ease of which the comparative Assessment can be manipulated with subjective inputs in order to appear to favour PPP over TIP or vice-versa.	D	●
		OVERALL INDICATOR SCORE:	C	●
8	Comprehensiveness of the appraisal process	i. The overall comprehensiveness of project appraisals seen with a broad Assessment of a wide range of implementing issues in addition to the financial and economic Assessment.	C	●
		ii. The quality of the assumptions and data sources used to make those assumptions.	D	●
		OVERALL INDICATOR SCORE:	D	●
Independent Review of Appraisal				
9	Quality and practices	i. The scope and range of the review	D	●
		ii. The degree to which the review process adds real challenge to the system. In other words not just a box-ticking administrative compliance test.	C	●
		iii. Do appraised PPP projects have to pass the same scrutiny and challenge tests as TIPs?	D	●
		iv. The ability and willingness of reviewers to reject unsuitable projects.	C	●
		OVERALL INDICATOR SCORE:	D	●
Selection and Budgeting				
10	Fiscal Risk	i. Explicit and contingent liabilities should be recorded and managed within the budget system. Both explicit and contingent liabilities in PPP contracts should be assessed and priced before commitments are made through signed contracts	D	●
		ii. Accumulated fiscal risk related to increasing numbers of PPP commitments should be recorded, monitored and a consideration of the impact should be given in the selection process. The government should have a 'fiscal ceiling' for accumulated PPP payments and as a safeguard.	D	●
		iii. The Ministry of Finance should have final sign-off authority on PPP implemented projects.	C	●
		OVERALL INDICATOR SCORE:	D	●
11	Transparency and accounting treatment	i. The use of an internationally accepted accounting standard for reporting PPP transactions. (Assets employed in a PPP should be clearly designated on either government accounts or the private company's accounts).	D	●
		ii. The degree to which the accounting treatment of a project influences the choice of PPP or TIP implementation.	N/A	
		iii. The degree of transparency with which PPP projects are reported to national assemblies, and presented to the media and citizens at large and the quality of the information provided.	D	●
		OVERALL INDICATOR SCORE:	D	●
The PPP Contract				
12	Quality and comprehensiveness of contracts based on standard pre-agreed positions	i. The extent to which nationally agreed standard positions on a range of contractual issues are in place and used consistently	D	●
		ii. Is there a sensible apportionment of risk consistent with previous good practice	D	●
		OVERALL INDICATOR SCORE:	D	●

PIM-PPP	Indicator	Sub Indicator	Indicator (or sub-indicator) Score (A-D)	Colour Code
13	Comparison of key contractual terms with international good practice	i. Over a range of important contractual terms, the extent that the drafting solutions employed are fit for purpose and the extent to which the positions arrived at represent international good practice.	Was not assessed	
Project Implementation				
14	Implementation rules and practices	i. The degree to which the public authority adapts its role in implementing a PPP project from the role it adopts in a TIP. ii. The speed and efficiency by which land acquisition is managed. OVERALL INDICATOR SCORE:	Not assessed D D	
15	Procurement Process and Practices in PPP projects	i. Procurement processes that are flexible enough to deal with PPP implementation but are consistent regardless of the form of implementation ii. The frequency that proposed award criteria for contracts are aligned with the objectives of the project iii. The level of participation in bidding for PPP implemented projects, ensuring best prospects for value for money outcomes iv. The level of participation in bidding for PPP implemented projects, ensuring best prospects for value for money outcomes v. The degree to which unsolicited proposals are managed through a transparent system consistent with the law. vi. The degree to which complaints about procurement procedures are well managed and avoid delays in implementation. OVERALL INDICATOR SCORE:	C D Not assessed D Not assessed D D	
16	Timeliness of implementation	i. Timescales between project selection and contract signature compared to schedule ii. Timescales between contract signature and availability of the assets compared to schedule OVERALL INDICATOR SCORE:	Not assessed	
Project Adjustment				
17	Renegotiation and Adjustment Practices, Effectiveness and Efficiency	i. The number and impact of changes during the procurement process ii. The number and impact of changes post procurement iii. The extent to which proposed major changes are re-appraised for continuing economic viability before they are agreed. This applies regardless of the point in the process at which the change is proposed iv. The disruption to services caused by adjustments when they are made during the operational phase of the project.	Not assessed Not assessed Not assessed Not assessed	
18	Refinancing	i. Are there rules in place to ensure that both public and private partners gain from re-financing arrangements in PPP contracts? ii. Are these rules elaborated in to specific clauses in finalized Project Agreements and agreed by all parties to the Agreement? iii. Has the government benefitted in practice from any re-financing?	Not assessed - no re-financings	
Facility Operation				
19	Contract Management Practices	i. The percentage of operational staff in a PPP project undergoing contract management training and induction courses. ii. The number of operational contracts by percentage that have user guides for contract managers and users iii. Evidence that payments to contractors have been reduced fully in line with the contract in the event of poor availability or quality of services. OVERALL INDICATOR SCORE:	D D D D	

PIM-PPP	Indicator	Sub Indicator	Indicator (or sub-indicator) Score (A-D)	Colour Code
20	Asset Registers	i. The existence and effectiveness of a register of PPP assets (commitments) in capturing substantive information on the type, timing and scale of commitments.	C	●
		ii. The level to which this is maintained and monitored	C	●
		OVERALL INDICATOR SCORE:	C	●
Completion Review and Evaluation				
21	Ex-post Evaluation	i. The extent to which ex-post evaluation is used as a means of measuring the performance of the completed project against the original objectives and expected impacts ii. The extent that data is used to assess the strategic value of PPP to the nation's PIM system iii. Does the Government disseminate lessons learned? iv. Are similar mistakes on projects identified and strategies devised for avoiding them in the future?		
		OVERALL INDICATOR SCORE:	D	●

7. RECOMMENDATIONS AND PRIORITY ACTION AREAS

A comprehensive and cohesive framework for public investments covering a period of at least 10 years should be developed using a clear legal definition of the subject matter. This should analyse future sources of financing to deliver the plan whether they are governmental, donor or private sector sources. In order to frame this plan, the implementation of the recent legislative definition will need to be rigorous and thorough. Further clarity is required about which Concessions will be considered part of the PIM framework, and which are not. Consideration should also be given to further consolidation of the legal framework for PIM and PPP to add further clarity and to remove the potential for ambiguity and possible abuse. Work will need to begin immediately to build the capacity in project identification through clear problem analysis if the plan is to achieve effective use of resources.

A new system of identifying 'good' projects, and avoiding 'bad' ones, will need to be developed. This can start with a simple pre-screening mechanism that can be templated within a short period of time. Guidelines on project appraisal with a Step-by-Step Guidebook should be developed to support the new legislation and the publication of these can act as a spur for a major effort in capacity building across Ukraine's public administrations. This new system should incorporate PPP as part of the system – a means of implementing certain projects – rather than as a separate system. Specific elements of a PPP framework will need to be addressed such as guidance on 'vfm' or PSC and standard negotiating positions which in turn will lead to better understanding of fiscal risk in PPP contracts and the way in which those contracts are reported in the national accounts.

Institutional roles and responsibilities need further clarification so that there is a clear division between those who 'promote' PPP and those who appraise PPP based proposals. In the Ministry of Finance, expertise in PPP should be more focussed on the key roles of independent appraiser and, critically, its capacity to understand and manage the **fiscal risks** that come with PPP contracts. The subject of managing fiscal risks in PPP contracts is a specific area of capacity building that should be addressed before any meaningful PPP activity is progressed. The scope and the scale of capacity building in the area of PIM and PPP should not be under-estimated. It will require a concerted and sustained effort over a long period of time and should begin as soon as possible.

Most importantly, all of the capacity building required – and therefore the reforms themselves - will be ineffective unless there is greater stability amongst officials engaged in PIM and PPP in the key central ministries. A cadre of experts needs to be built into the system and to develop that expertise takes time. Constant changes of post and changes to the roles of key individuals only serve to undermine the whole system.

Basic ex-post evaluation should be introduced as a matter of course. It will remain very difficult to properly assess the value for money credentials of PPP projects unless completion reviews are undertaken on all projects. To begin with this needs only to report the completed cost versus the estimated cost and the completed time versus estimated time. A summary of the reasons for any variances will start the process of building an institutional memory.

The Priority Action Areas (Recommendations) that follow provide detail to the comments above. They do not appear in any order of importance or in any order of timing. Instead they are sequential according to the order they appear in the PIM for PPP indicator reference shown in the second column.

Action Ref:	PIM for PPP Ref:	Subject Areas requiring Urgent Attention	Recommended Actions
1	1	<p>Consistency in Project Identification and Initial Development</p> <p>i) There is no strategic national development plan setting out at central level a list of consistently appraised and prioritised projects. The lack of a centrally planned national development plan on capital spending is a fundamental issue that needs to be addressed as a matter of urgency. Currently projects can still gain access to different 'Pipeline' lists depending on the implementation route with little or no appraisal. Hence the large disparity between pipeline and execution of projects. There is an urgent need for a coherent, holistic system of Public Investment Programming and Management in Ukraine</p> <p>ii) There appears to be little clear institutional understanding of the fundamentals of public investment management, the benefits of a well-functioning system and the costs/risks attached to the current system.</p> <p>iii) The strategy and direction of the government changes too frequently making it difficult for implementing entities to plan their projects and programs with any degree of certainty.</p> <p>iv) There is almost no concept of assessing the need for government intervention with clear problem analysis. There is also the lack of clear output based / performance based objective setting and economic option appraisal.</p>	<p>a) A National Infrastructure Plan should be developed in full consultation with all LMs and other national and local public entities. It should envisage a costed and scheduled pipeline of projects over a period of 10 or more years and should identify possible sources of funding.</p> <p>b) An extensive and systematic program of awareness and education on PIM reform to approximate the Ukrainian system to good international practice is urgently required. It should include all public entities that propose projects on a regular basis. The program should demonstrate the benefits of a good PIM system and what reforms might be necessary. This should be seen as essential to laying the pathway to reform.</p> <p>c) Basic training in identifying potential interventions through projects is required. This should focus on root/cause analysis, problem analysis and high-level option appraisal. This could be achieved at the same time as the awareness program highlighted in b) above.</p>
2	2	<p>Screening of Projects against Policy Priorities</p> <p>There is no national policy document or guidance on the rationale for infrastructure projects including PPP. Whilst the PPP Law describes how to assess and implement a PPP Project, it does not examine the rationale for choosing PPP as an implementation method. In the absence of these documents it becomes very difficult to screen out unsuitable projects. However a start needs to be made urgently so that the current high volume of project proposals does not clog the system at a central level and that only targeted projects with a real prospect of funding through to completion are selected in the system.</p>	<p>All project proposals should undergo a pre-screening process before they are considered for further resource allocation including the internal resource required for further design and preparation. This pre-screening should be done on the basis of a common template that applies to all projects regardless of the potential implementation route.</p> <p>Any proposals that are potential candidates for PPP or Works based concession implementation should be subject to further Assessment for their suitability for that particular form of implementation.</p>
3	3	<p>Effectiveness of the Relevant Legal Framework</p> <p>The PPP Law facilitates the implementation of PPPs. The main issue is not with the PPP Law but with its lack of use and understanding of how it interacts with other sector specific laws. In order to carry out a project, the PPP Law says that a project initiated under the PPP Law must comply with the PPP law, the sector specific laws, the Constitution, Budget Code etc.</p> <p>These laws are contradictory and no one law takes priority in the event of conflict. The project proposers may be a line Ministry, a municipality or an SOE or other public body and that proposer decides how to classify the project and therefore what law it will be implemented under. The main route of selection is expediency and ease of passage through the system. Since the PPP Law is considered the most difficult it is hardly used. For example a Port project could be way of a Concession, Lease or PPP. The classification of the project and the law applicable is entirely arbitrary and determines the level of Assessment, feasibility, preparation, due diligence, risk analysis, procurement process, contract conditions and implementation.</p> <p>It is impossible to implement very complicated regulation without good guidance for public and private sector.</p> <p>Serious consideration should be given to harmonizing legislation related to PIM into a single legal framework. This would avoid the current distortions and provide clarity to all public entities as well as private partners. This would provide the basis of effective implementation of other necessary reforms such as project identification, pre-screening, appraisal, independent review as well as monitoring and evaluation.</p>	<p>The lack of cohesiveness of the legal framework is a major impediment to meaningful reforms in the PIM/PPP system in Ukraine. Without a single legislative focal point for the subject matter all other reforms may prove to be futile or remain impossible to implement.</p> <p>The government of Ukraine should consider a full legislative reform of all legal instruments – general and sectoral – related to the planning, appraisal, approval and approval of public investment projects whether they are funded by national or local governmental entities or funded on their behalf by the private entities in the form of works concessions and Public Private Partnerships.</p> <p>In time results of such reform could be transformational in terms of the quality, efficiency and effectiveness of these projects. International investors too would see a serious attempt to improve legal clarity and transparency which would engender greater confidence and an enhanced likelihood to invest in Ukraine's infrastructure.</p> <p>Such action requires political support at the very highest level.</p>

Action Ref:	PIM for PPP Ref:	Subject Areas requiring Urgent Attention	Recommended Actions
4	4	<p>Effectiveness of the Relevant Institutional Arrangements</p> <p>Control over PIM should be centralized whilst the system is fully reformed and developed. Substantial reforms are required to bring the level of PIM practices in Ukraine to what might be considered international good practice. The embryonic cadre in the MEDT is aimed at fulfilling this role but it is currently constrained by the legal framework mentioned in 3 above.</p> <p>Whilst the MEDT has been designated by the Government as the Centre of Excellence for PPPs, it is playing a potentially conflicting role of being the champion body for PPPs and also assessing and approving PPPs.</p> <p>The Ministry of Finance has the final budgetary approval for state property and municipal property (in the case of State support), but PPP expertise in terms of its logical twin roles of analysing fiscal risks and assessing value for money is weak and also fragmented. For example, a roads project goes to the roads division of the MOF even if it is a PPP. A central PPP division is needed in MOF so that experience and expertise can be concentrated and one unit has a strategic view of its responsibilities towards PPPs within the system.</p> <p>The Division for Financial Aspects of Privatisations and Proprietary Relations within the MOF is responsible for PPP policy and legislative requirements however it is not the body in MOF actually assessing projects. It is necessary to bring the sectoral divisions and central PPP division in MOF together with one PPP division which assess and approves projects and recommends policy or legislative changes.</p>	<p>Whilst it is recognised that institutional reforms can only be successful if the supporting legal framework, capacity building in these central (MEDT, MOF) institutions would leave them in a capable position to implement reforms as they are brought forward.</p> <p>Far more stability in the positions that officials hold in the central institutions will ensure that capacity building sticks and is not wasted through excessive staff turnover. This is vital to developing an institutional memory in the country in the field of PIM.</p>
5	6	<p>Appraisal Rules, Guidance and Practice</p> <p>Project proposals are already aligned to a particular legal implementation before they are appraised. This is the opposite of what is generally considered good international practice. The PIM system in Ukraine does not have an objective way of appraising projects before they are labelled. A project is labelled on initiation by the proposer and then follows the Assessment and appraisal process dictated by the legislation governing the form of project. It is essential that a common system of appraisals is applied to all capital projects regardless of where they originate. The best method of implementing the project should be assessed as part of the appraisal process.</p> <p>There are no consistent appraisal guidance nor means of assisting project proposers on how to identify, design and prepare a good quality project.</p>	<p>Appraisal Guidance may appear to be somewhat futile in the absence of a harmonized legal framework but it is not too early to begin with a few simple rules based on good practice particularly in the area of project conception design and preparation. 'Doing the Simple Things Better' should deliver some early and useful improvements to the system.</p> <p>These guidelines should be developed and implemented as a matter of urgent priority and apply to all capital projects whether they are TIPs, Concessions, PPPs or any other form of Public Investment project.</p>
6	7	<p>Public Sector Comparator (PSC) or Value for Money Assessment</p> <p>Whilst PSCs seem to be relatively well-understood conceptually, greater understanding of the purpose and methodology to be employed should be developed. Their use should be standardised and incorporated into the common system of appraisal for all capital projects referred to at 6 above.</p>	<p>Standard guidance and procedures on the purpose and principles of Public Sector Comparators (or vfm test) should be developed and implemented as soon as possible.</p>
7	9	<p>Independent Review of Appraisal: Quality and Practices</p> <p>Whilst the MEDT has a review role for certain classifications of public projects, it depends on the classification given to the project by the promoter. However, the classification itself must be reviewed. There are no obligations to provide independent reviews during Projects Appraisal for Concessions. Currently, it is very easy to avoid a review by the MEDT by classifying a project as a concession project rather than a PPP.</p>	<p>The MOF should develop its capacity to critically review PPP project proposals in the role of 'gate-keeper' prior to admitting them onto any roster for funding eligibility. (the MEDT cannot fulfil this role at the same time as being a PPP promoter).</p> <p>The government should also provide strong support for them to reject proposals that are seen to be flawed or not necessary. The number of projects registered for potential funding support should be maintained at a sustainable and realistic level.</p>

Action Ref:	PIM for PPP Ref:	Subject Areas requiring Urgent Attention	Recommended Actions
8	10	<p>Fiscal Risk</p> <p>Concession Contracts are off-balance sheet for the purposes of accounting treatment. This appears to be based on the classification of the contract and not on an analysis of the content of the contract and the fiscal obligations contained within it.</p> <p>This situation is compounded by the fact that there is no central registry of projects and therefore no way of determining the State's exposure.</p> <p>It is not clear whether PPP projects under the PPP Law are considered on or off balance sheet but as the numbers of PPP projects are expected to grow in future years, the MOF needs to address its capacity weaknesses in this area as a matter of urgency.</p>	<p>The MOF needs to develop capacity in the area of identifying, quantifying and recording fiscal risks in public investment projects, particularly in works Concessions and PPPs. This can only be done if stability in staff turnover can be established.</p>
9	11	<p>Transparency and Accounting Treatment</p> <p>Concession Contracts are off-balance sheet for the purposes of accounting treatment but the situation regarding PPP projects is not fully resolved.</p> <p>There is not enough transparency in the way PPP/Concession contracts are awarded. The MOF and the national assembly are not presented with information on the future liabilities to make payments against PPP/Concession contracts. This information is not part of the budget planning process and citizens have no way of accessing information about such projects.</p>	<p>The Ministry of Finance should establish clear rules on how the assets of a PPP project are recorded in national accounts.</p>
10	12	<p>PPP Contract: Quality and Comprehensiveness of Contracts Based on Standard Pre-agreed Positions</p> <p>There are no common negotiating positions on key contractual issues. This not only leaves public sector entities in the dark but also leaves potential private investors wondering about the level of trust in the system. This might manifest itself as lack of interest in investing in PPP opportunities in the country.</p>	<p>New Guidance on the preparation and procurement of a project that has been selected for PPP implementation should be developed. These should include the government's standard negotiating position on a range of key contractual issues. This position should be developed in accordance with the expectations of international investors and lenders if the government is serious about attracting such funding to its projects.</p>
11	21	<p>Ex-post Evaluation</p> <p>There is no current form of ex-post evaluation in Ukraine.</p>	<p>It will remain very difficult to properly assess the value for money credentials of PPP projects unless some basic completion review is undertaken on all projects. This should as a minimum aim to establish a completed project's cost and time performance compared to original estimates and the principle reasons for variances. This should be considered a priority if the system is to establish an institutional learning mechanism that can feed back into better project design and preparation of future projects.</p>

ANNEX 1: PORTFOLIO OF CURRENT AND FUTURE CONCESSION PROJECTS IN UKRAINE

Table 1: Current and Pipeline State Property Concession Projects⁹⁸

Nr.	Name of Project	Partners: public/private	Comments
1	Motorway "Lviv-Brodu"	Ukravtodor / VNK	Concession agreement from 26.12.2002 for 49 years. Cancelled
2	Motorway "Lviv- Krakovets"	Ukravtodor / Transmagistral	Concession agreement from 23.12.1999 for 49 years. Cancelled
3	Mine "Sverdlovskantrasit"	Ministry od energy and coil industry / DTEC	Concession agreement from 30.12.2011 for 49 years In conflict zone (from 13.04.2014)
4	Mine "Rovenkiantrasit"	Ministry od energy and coil industry / DTEC	Concession agreement from 30.12.2011 for 49 years In conflict zone (from 13.04.2014)
5	Heating and Power Generation Utility "ESCHAR"	Ministry of energy and coil industry / Oil & Gas Company LLC	Concession agreement from 20.04.2012 for 49 years
6	Unfinished object of Novoasovska Wind Power Station	Donetsk State Administration / ?	Concession agreement from 14.01.2004 for 50 years
7	Unfinished object of Sivach Wind Power Station	Kherson State Administration / ?	Concession agreement from 26.07.2009 for 49 years
8	Palace of XIX century in village Tartakiv, Sokalskiy region of Lviv oblast	Lviv State Administration / Private person-entrepreneur	Concession agreement from 30.12.2009 for 49 years Cancelled in 2013
9	Palace of XVII century in village Stare Selo, Pustomitivskij Region of Lviv oblast	Lviv State Administration / ?	Concession agreement from 20.11.2010 for 49 years
IN PREPARATION			
8	Commercial Sea Port "Yuszhu"	Ministry of infrastructure	Preparing tender documentations for Concession
9	Building the new motorway Lviv-Krakovets - 84,4 km	Ukravtodor	Concession agreement for this property between Ukravtodor and Transmagistral Consortsium was signed on 14.11.2000. Cancelled in 2013 or 2014.

Table 2: Pipeline of Other State Property Concession Projects

(Resolution of the Cabinet of Ministries of Ukraine from 11 December 1999 No. 2293)

Sector	Total Objects	Inclusion Year / Number of Objects	Comments
Motorways	13	2000 – 6 2001 - 1 2003 – 2 2004 – 1 2009 - 3	One project completed in April 2015
Wind Power Generation	2	2000 – 1 2006 - 1	Under implementation
Palaces (tourism)	3	2007	Under implementation
Coal Mines	2	2011	Under implementation but temporary stopped due to unforeseen circumstances
Heating	1	2011	Under implementation
Airport	1	2012	Not started
Seaports	19	2012	Not started

Table 3: Pipeline of State Property Concession Projects for Fuel and Energy

(Resolution of the Cabinet of Ministries 11 January 2012 Nr. 71)

Region (Oblast)	Number of Objects for Concessions	Comments
Volynska	4	
Donetska	48	On territory affected by conflict
Luganska	23	On territory affected by conflict
Lvivska	7	
TOTAL	82	71 – in the regions affected by conflict

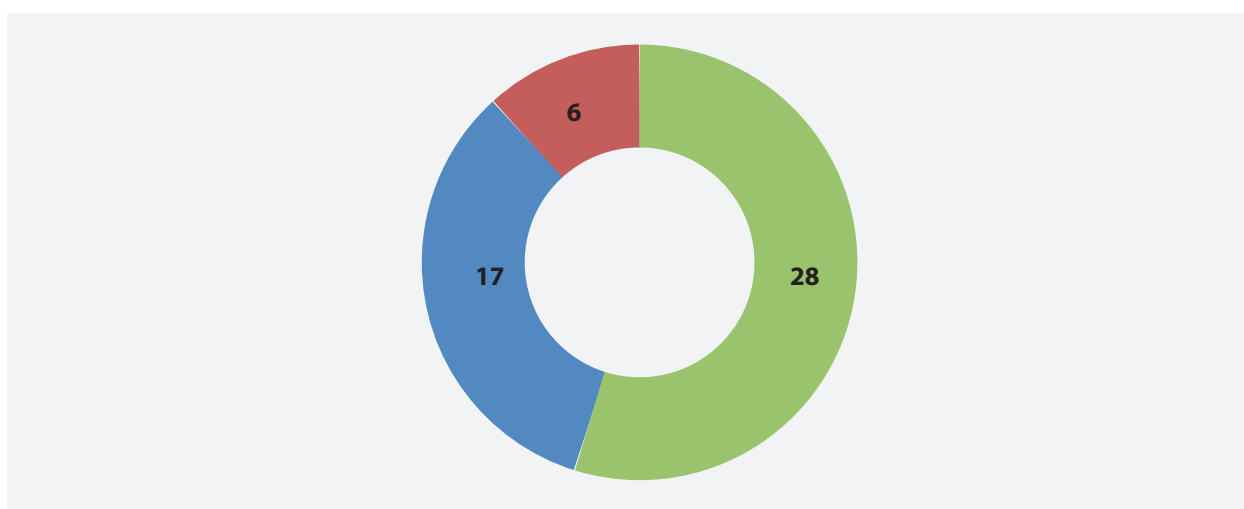
98 Official site of SPF - http://www.spfu.gov.ua/_layouts/SPFUSiteDefinition/ConcessionsRegister.aspx

ANNEX 2: INVESTMENT PROJECTS AND PROJECT PROPOSALS INCLUDED IN THE STATE REGISTER (2012-2014)

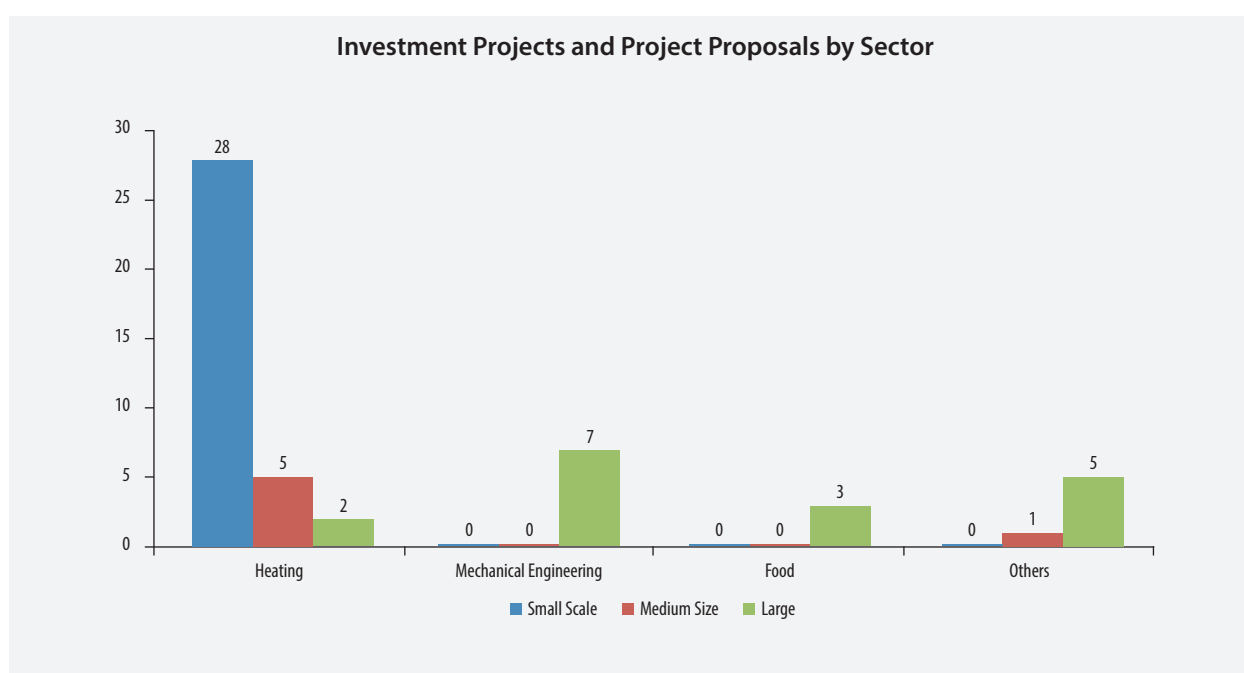
Among 51 investment projects and project proposals considered during this period, the MEDT approved 50 projects and rejected one project. The distribution of projects include: 7 projects in mechanical engineering, 35 (69%) – in heating, 3 – in food industry, 6 – others. 27 of all heating projects propose to improve heating systems (mainly boilers) for public buildings (23 – for schools and kindergartens and 4 – for hospitals). Beneficiaries of all these projects are communal enterprises. Most of requests for these projects support were prepared by the local state departments of education or health. All of them are small projects (from USD 50 thousand to 400 thousand).

Among these investment projects and project proposal there are:

- 17 large projects (from USD 20 to 4.297 million);
- 6 medium size projects (from USD 1 to 12 million);
- 28 small projects (up to USD 1 million).



All these projects are considered by the MEDT according to the same procedure.



11 projects and project proposals (approximately 22 percent) were initiated by the private sector companies⁹⁹.

There are three different mechanisms of state support requested by project initiators:

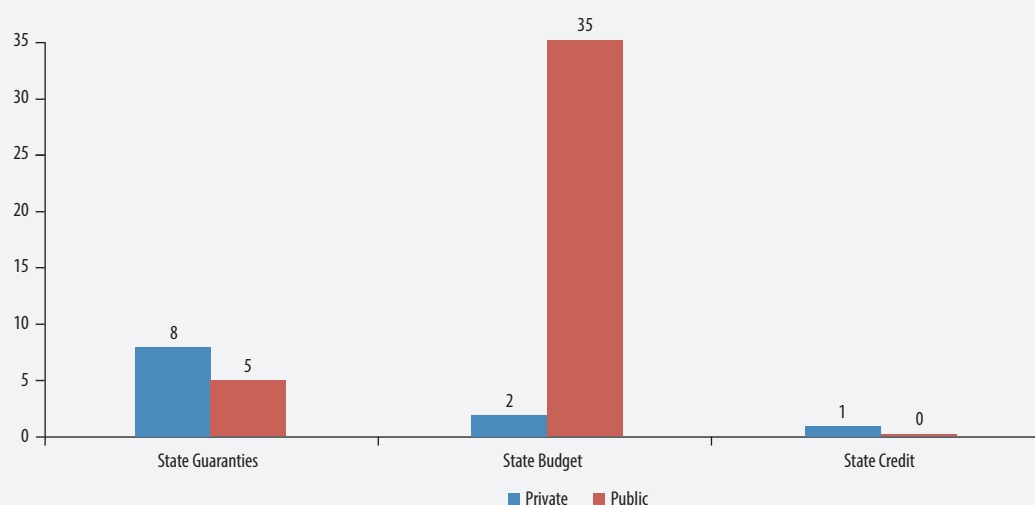
- state guarantees for the loans attracted by the project initiators (13);
- direct financing from the State budget (37);
- state loans (1 request from a private proposal was rejected by MEDT).

More than 60 percent of proposals, which request state guarantees, were initiated by the private sector companies. Their proposals include:

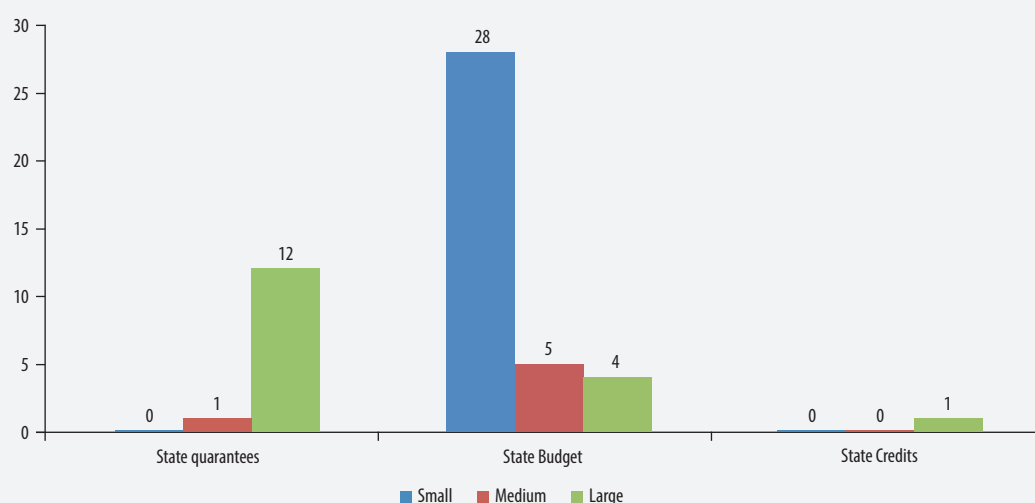
- A private company independently takes a commercial loan (even possibly in their own bank);
- Government provides a private company with the state guarantee without any public interest obligations.

The interest rates for loans in project proposals by the public sector and private sector initiators which were reviewed by the World Bank team included: 2%, 9.5%, 10%, 12%, 13% and 18%.

Investment Projects and Project Proposals by State Support and Initiator



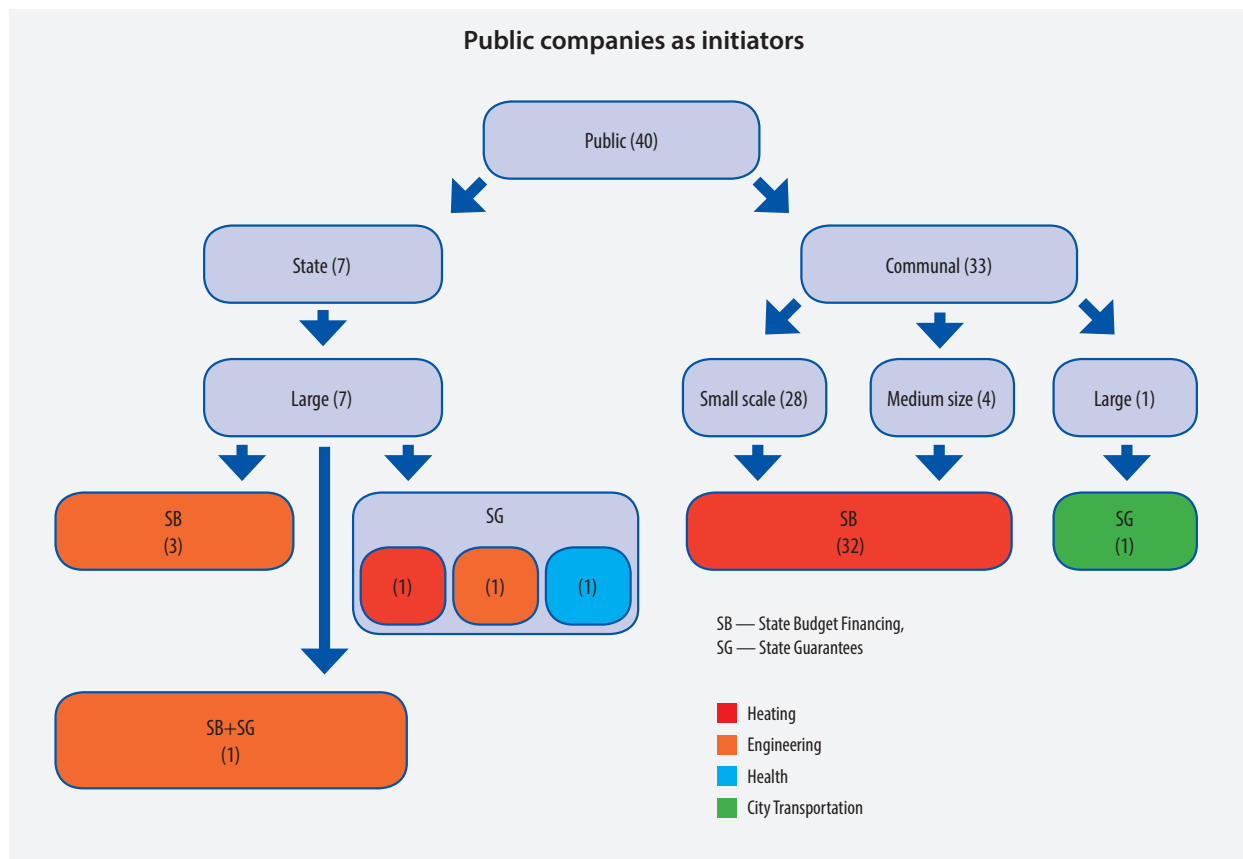
Investment Projects and Project Proposals by State Support and Size



⁹⁹ Mentioned private companies are LLC or Joint-Stock Companies (some of them with mixed participation of private and public entities)

Distribution of Project Proposals by an Initiating Entity (Public or Private)

Initiators of 11 of all investment projects and project proposals (approximately 22 percent) are the private sector companies. Initiators of the other 40 investment projects and project proposals are state or communal enterprises (public).



Private Companies as Initiators

Project Size	Value (US\$ million)	Type of State Support	Sector
Large	45,6	SB – 100%	Mushrooms cultivation
Large	851	SG – 74%	Heating (Modernization of Power Plant “Slovianska”)
Medium	1,95	SB – 24%	Construction of network of shops
Large	11,3	SG – 77,5%	Lighting system installation
Large	84	SG – 66%	Construction of the school and kindergarten
Large	1.318	SG – 85%	Modernization of petroleum refining
Large	143,5	SG – 75%	Processing of animal and plant products
Large	45,3	SG – 100%	Fish farming
Large	1.310	SG – 96,3% SB – 3,7%	Modernization of the Waste Treatment system
Large	391	SG – 63%	Design and production of electric vehicles and chargers for them
Large	211	State Credit – 51,5%	Design and production of helicopter ¹⁰⁰

	Commercial projects
	Could be considered as infrastructure projects

¹⁰⁰ This project was rejected by MEDT

ANNEX 3: SHORT ANALYSIS OF PROJECT APPRAISALS (FEASIBILITY STUDIES) REVIEWED

Traditional Public Investment Projects and Projects Seeking State Support

Dimension	Project 1 (Health)	Project 2 (Heating)	Project 3 (Heating)	Project 4 (Transport)	Project 5 (Heating)	Project 6 (Power Generation)
Property	State	Municipal	Municipal	Municipal	Municipal	Private
Cost, US\$ thousand	49,362.00	115.45	119.1	25,487.5	859.13	850,000.00
Type of State Support	SG for loan at 2% annual rate	SB	SB	SG for loans at 12% annual rate	SB	SG on 80% of investments for loan at 18% annual rate
Demand Analysis	Good	Limited	Limited	Good	Limited	Good
Financial Analysis	Good	Limited	Good	Good	Limited	Good
Economic Analysis	Weak	-	-	-	-	Weak
Discount Rate, %	6.5	19.5	19.5		12	Range from 10.3 to 30
Discount Payback Period, year	6.44	9.7	5.4	8.38	3.7	7.3

PPP Projects

Indicators	Project 1 (Waste Management & Electricity Generation)	Project 2 (Culture)	Project 3 (Water & Sanitation)
Property	Communal	Communal	Communal
Proposed form of PPP	Joint Activity Agreement	Joint Activity Agreement	Joint Activity Agreement
Prepared by	USAID P3DP project	USAID P3DP project	Local private partner jointly with Local Administration
Demand Analysis	Good	Good	Weak
Financial Analysis	Good	Good	Weak
Economic analysis	Limited	Weak	-
VfM analysis	Weak	Weak	-
Risk analysis	Weak	Weak	-
Valuation of risks	No	No	No
Risk distribution	Weak	Weak	Weak
Discount rate, %	10	10	

