



Bosnia and Herzegovina

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

2011

I- PPP Legislative Framework Assessment (LFA)	Compliance of the PPP legal framework with PFI Guide recommendations ¹ and Best Practice		
Core Area		Rating	Assessment
1- PPP Legal Framework	Existence of specific PPP law or a comprehensive set of laws regulating concessions and other forms of PPP and allowing a workable PPP legal framework	6/19	
2-Definitions and Scope of the Law	Existence of a clear definition of the boundaries and scope of application of the concession legal framework (e.g. definition of "PPP", sectors concerned, competent authorities, eligible Private party) limiting the risk of a challenge to the validity of PPP contracts, irrespective of whether the act is specifically targeted at PPP	17/24	
3-Selection of the Private Party	Mandatory application of a fair and transparent tender selection process. Limited exceptions allowing direct negotiations, competitive rules for unsolicited proposals and the possibility to challenge illegal awards.	29/45	
4-Project Agreement	Flexibility with respect to the content of the provisions of the Project agreements which should allow a proper allocation of risks without unnecessary or unrealistic/not bankable/compulsory requirements/interferences from the Contracting Authority (obligations, tariff, termination, compensation).	22/30	
5-Security and Support Issues	Availability of reliable security instruments to contractually secure the	13/21	

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

Checklist Bosnia and Herzegovina



2.

	assets and cash-flow of the Private Party in favour of lenders, including "step in" rights and the possibility of government financial support, or guarantee of, the Contracting Authority's proper fulfilment of its obligations.		
6-Settlement of Disputes and Applicable Laws	Possibility to obtain proper remedy for breach under the applicable law through international arbitration and enforcement of arbitral awards.	15/15	
General LFA Rating		66,2/%	Medium Compliance
II-Legal Indicators Survey (LIS)	Effectiveness Assessment : How the PPP law works in practice		
Core Area		Rating	Legal Indicator Survey
7- Policy Framework	Existence of a policy framework for public private partnerships	14/24	
8 Institutional Framework	Existence of an institutional framework for public private partnerships	17/27	
9- PPP Law Enforcement	Award and implementation of PPP projects in compliance with the Law	21/28	
General LIS Rating		65,3/%	Medium Effectiveness
OVERALL RATING		66,2/%	Medium Compliance/Effectiveness

Local Expert²: MARIĆ & CO LAW FIRM (Emin Hadzic) - Sarajevo

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

Checklist **Bosnia and Herzegovina**



3.

RATING: Key for assessment of Each Question

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

Key for Assessment of Each Core Area and for Overall Assessment

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

TERMINOLOGY

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

Checklist Bosnia and Herzegovina



4.

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

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

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

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

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



5.

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

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

Other definitions:

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



REFERENCE TO BEST PRACTICE

- UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, 2001 (hereinafter the "**PFI Guide**") and UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects, 2003 (UNCITRAL Model Legislative Provisions).
- EC - Commission Interpretative Communication on Concessions Under Community Law dated 12 April 2000; together with additional EU major documents/decision /recommendation on concessions including Directives 2004/18/EC and 2004/17 EC of 31 March 2004; Green Paper on Public Private Partnerships and Community Law on Public Contracts and Concessions dated 30 April 2004; Report on the public consultation on the Green Paper (SEC(2005) 629- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions (Brussels, 15.11.2005.COM(2005) 569) European Parliament resolution on public-private partnerships and Community law on public procurement and concessions (2006/2043(INI)); European Commission Guidelines for Successful Public-Private Partnerships (2003).Commission Interpretative Communication Brussels, 05.02.2008 C (2007)6661on the application of Community law on Public Procurement, and Concessions to Institutionalised Public-Private Partnerships (IPPP);
- EBRD Core Principles for a Modern Concessions Law – selection and justification of principles Prepared by the EBRD Legal Transition Team.2005;
- UNIDO Guidelines for Infrastructure Development through Build Operate Transfer (BOT) Projects, 1996 (UNIDO BOT Guidelines); and
- OECD Basic Elements of a Law on Concession Agreements, 1999-2000.



Bosnia and Herzegovina. OVERALL ASSESSMENT OF THE QUALITY OF CONCESSION LEGISLATION:

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

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

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

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

- Law on Concessions of Bosnia and Herzegovina (Official Gazette of BiH no. 32/02);
- Law on Concessions of the Federation of Bosnia and Herzegovina (Official Gazette of FBiH, no. 40/02);
- Law on Concessions of Republika Srpska (Official Gazette of RS, no. 25/02);
- Act koncesijama Brcko District (Official Gazette of BD no. 41/06);
- Cantonal Laws on Concessions;
- Law on Public Procurement (Official Gazette of BiH no. 49/04);
- Law on Public Private Partnership of Republika Srpska (Official Gazette of RS, no. 59/09);
- Law on Public Private Partnership of Brcko District (Official Gazette of BD, no. 10.07);

These laws relatively clearly define there's scope of application: regulate the selection procedure and provide flexible framework for the project agreement, contain clear references to the principles of transparency, non-discrimination, proportionality and refer to consumers' rights.

Checklist Bosnia and Herzegovina



Aforementioned laws represent a step towards the introduction of a modern legal system in this area. It is important to point out the fact that the BiH authorities relied on international experts in the preparation and drafting of these laws, and that took into account international legal sources. The fact is that these laws are presented the intention to create a reliable legal basis for granting a concession that could attract foreign investors.

ASSESSMENT & LEGAL INDICATOR SURVEY

1. LEGAL FRAMEWORK

1.1 Existence of different forms of PPP legal framework

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Does the country have a single act dealing specifically with Concessions or a generalised act incorporating the legal framework for PPP, including Concessions?	✓ ✓ ✓		Several act regulate Concession and PPP in BiH: -Concession Law of Bosnia and Herzegovina, 30/09/2002, <i>(the reference to Law Article in the column on the left refer to article of this main law)</i> -Concession Law of Federation of Bosnia and Herzegovina 2002, -Concession Law of Republika Srpska 2002, Public Private Partnership Law of Republika Srpska 2009, -Concession Law of Distrikt Brcko 2006, -Public Private Partnership Law of Distrikt Brcko 2010,



9.

			Cantonal Concession Laws,
2. Does the country have an act that allows BOT or derived forms such as BOOT, BOO or other forms either as part of a specific act or as part of a general PPP Law?	✓ ✓		BOT and BOOT are foreseen by the Concession Law of Bosnia and Herzegovina.
3. Does the country have an act that allows PFI, either as part of a specific act or as part of a general PPP Law?	× × ×		
4. If the answer is <i>No</i> to any of the three first questions concerning a specific form of PPP does the Constitution or other general act (ex: the Civil Code, sectoral law) recognise the basic principles of the concerned PPP and regulate its granting?	N/A		

For our general information: Is a new PPP Law or an amendment to the existing Law being prepared, or considered, in the country?

If so, at what stage of the legislative process is such new PPP Law or amendment to the existing Law? Public Private Partnership Law of Federation of Bosnia and Herzegovina. It is in the passing procedure.



1.2 Specificity and integration of PPP the legal framework

5. If the country has a Public Procurement Law, to what extent does the Public Procurement Law apply or not to the granting of a PPP?	××		Public Procurement Law at BiH level adopted in November 2004 only refers to procurement of goods, services and works but it is not quite clear whether it applies to the awarding of the concession.
6. If the country has sectoral laws regulating PPP in specific sectors, is it clear which law is applicable to the granting of PPP for each particular sector?	N/A		No specific sectoral law
7. Does the country have a Law allowing the Institutional form of PPP (IPPP) which regulates IPPP participation to PPP?	×××		



2. DEFINITIONS AND SCOPE OF THE PPP LAW(S)

2.1 PPP definition³

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Does the Law define one or several term(s) (<i>i.e.</i> "PPP", "Concession", "BOT", "Partnership" <i>etc. and/or respective agreements</i>) for the arrangements to be regulated by the Law which specify the limits of application of the Law?	✓ ✓ ✓	3	Concession is the right awarded by the grantor for the construction of infrastructure and/or performance of services, exploitation of natural resources within a time-frame and under conditions agreed between the concessionaire and the grantor
2. Does the Law apply to all contracts entered into that fall under the definition(s) given above, irrespective of the name given to such contract (<i>concession, license, usufruct right, lease, etc.</i>)?	✓ ✓ ✓	33.3	Each Concession Contract concluded contrary to this Law is null and void.

³ PFI Guide, Consolidated Legislative Recommendations, Recommendation 3 and Commission Interpretative Communication on Concessions Under Community Law dated 12 April 2000; together with additional EU major documents/decision /recommendation on concessions including Directives 2004/18/EC and 2004/17 EC of 31 March 2004; Green Paper on Public Private Partnerships and Community Law on Public Contracts and Concessions dated 30 April 2004; Report on the public consultation on the Green Paper (SEC(2005) 629- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions (Brussels, 15.11.2005. COM(2005) 569) European Parliament resolution on public-private partnerships and Community law on public procurement and concessions (2006/2043(INI))



3. Does the Law make a clear distinction between a PPP agreement (<i>such as a Concession</i>) and a license (<i>i.e. an authorisation to operate by a public authority</i>)?	× × ×		
---	-------	--	--

2.2 Contracting Authority

QUESTION	ANSWER	ARTICLE	COMMENTARY
4. Does the Law identify (<i>or allow clear identification by reference to other laws or regulations</i>) the public authorities ("Contracting Authorities") that are empowered to select projects, prepare for, and award PPPs and enter into Project Agreements ?	✓ ✓ ✓	4	<p>The Council of Ministries of Bosnia and Herzegovina (hereinafter: Council of Ministries) makes the decisions on type and subject as well as volume of the concession to be granted which is subject to ratification by the Bosnia and Herzegovina Parliamentary Assembly.</p> <p>In case of joint competence of Bosnia and Herzegovina and/or the Federation of Bosnia and Herzegovina and/or Republika Srpska and/or Brčko District of Bosnia and Herzegovina for concession granting, the competent authorities harmonize the conditions and form of concession granting.</p>

- *The Council of Ministries of Bosnia and Herzegovina;*
- *Competent Cantonal Ministry, Competent Ministry of Federation of Bosnia and Herzegovina, Competent Ministry of Republika Srpska;*

2.3 Private Party and Project Company

Checklist **Bosnia and Herzegovina**



QUESTION	ANSWER	ARTICLE	COMMENTARY
5. Is it possible for a PPP be awarded to a foreign company, a Private Party or to a domestic company with foreign participation in the share capital and/or management (<i>without discrimination</i>)?	✓ ✓ ✓	2, 3	Under the Law a "Concessionaire" is a legal person founded pursuant to the laws of Bosnia and Herzegovina, owned by a local and/or foreign legal person who is granted a Concession and executing a concession contract pursuant to the Concession Law.

For our general information: *can a PPP be awarded to public entities or to entities jointly owned by private and public entities (IPPP)? Are there restrictions imposed on such contracts? Yes, a PPP can be awarded to such entities. There are no restrictions imposed on such contracts.*

2.4 Concerned sectors⁴

QUESTION	ANSWER	ARTICLE	COMMENTARY
6. Does the Law identify (<i>or allow identification by reference to other laws or regulations</i>) the sectors and/or types of infrastructure and/or services in respect of which a PPP may or may	✓ ✓	1	The Law sets forth the conditions under which local and foreign legal persons may be granted concessions in the sectors that are under jurisdiction of Bosnia and Herzegovina, pursuant to the Constitution and laws of Bosnia and Herzegovina and in case it concerns the

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



not be granted?			representation of international subjectivity of Bosnia and Herzegovina, as well as in the cases where concession property extends to the Federation of Bosnia and Herzegovina and the Republika Srpska for providing infrastructure and services, exploitation of natural resources and facilities used for their exploitation, financing, design, construction, rehabilitation, maintenance and/or operation of such infrastructure and all accompanying facilities thereto.
7. Do the sectors eligible for PPP correspond to a large extent to those listed below, or if not, is the list of eligible sectors an open-ended one (<i>as opposed to being exhaustive</i>) allowing (<i>or at least not preventing</i>) PPP to be granted in numerous sectors”?	✓ ✓	1,4	Not specified, but may be implied (reference to infrastructure, services, natural resources).
8. Do the sectors eligible for PPP includes the merchant sectors of the economy (<i>energy, transport, water, oil and gas</i>) eligible for PPP in addition to non commercial activities such as the provision of government services (such as <i>schools, hospitals, prisons, defence and housing</i>).	× ×	1,4	Not specifically and the experience prove that no such PFI type of contract have been considered..

For our general information: Please indicate the restrictions if any imposed by the Law on the sectors eligible for PPP: Restrictions are not specified.



3. **SELECTION OF THE PRIVATE PARTY**⁵

3.1 **General Considerations**

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Does the Law require, in principle, the Contracting Authority to select Private Parties through a competitive tender process?	✓ ✓ ✓	21.5	
2. Is there reference in the Law to the principles of transparency, equal treatment and proportionality?	✓ ✓ ✓	2, 5.2	
3. Is there a provision in the Law concerning the publication of information related to the competitive procedures in the country media and in the international media (<i>for large projects</i>)?	✓ ✓	21.5, 22	Upon approval of the project the authority in charge shall organize a public invitation, i.e. a tender and invite the persons that have qualified. The invitation shall be sent to the biggest possible number of addressees and if the Commission requires so, an international invitation shall be sent as well.

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



4. Are there provisions within the Law or any special manual or recommendations governing in detail the selection of the Private Party (<i>i.e.: the pre-selection of bidders, the procedure for requesting proposals or other procedure such as competitive dialogue/two stage procedure</i>)?	✓ ✓	21.5, 21.6, 22, 23	
5. Does the Law provide that if the Contracting Authority rejects an applicant at the time of pre-selection or disqualifies a bidder, it must make public the reasons for the decision (<i>or inform the rejected bidder thereof explaining the reasons for rejection</i>)?	✓ ✓	13.2	The Commission shall forward without delay a certified copy of its decision to the participants and the competent Minister (hereinafter: Minister) and upon request from the Minister, the copies of other documents as well.

3.2 Award of PPP

QUESTION	ANSWER	ARTICLE	COMMENTARY
6. Does the Law provide that all proposals are ranked solely on the basis of a predefined evaluation criteria set forth in the pre-selection documents/ request for proposals?	✓ ✓ ✓	24.1	
7. Does the Law provide for the publication of a	✓ ✓ ✓	13.4	

Checklist **Bosnia and Herzegovina**



notice of the award of the project, identifying the Private Party and including a summary of the essential terms of the project agreement?			
8. Does the Law provide that the Contracting Authority or any other public authority maintain records of key information pertaining to the selection and award proceedings?	✓ ✓	13.3	The Secretary of the Commission shall have custody of the records
9. If the answer to the previous question is <i>Yes</i> , does the Law provide that such record is accessible to the public, or at least to interested parties?	× × ×		

3.3 Final negotiations

QUESTION	ANSWER	ARTICLE	COMMENTARY
10. Does the Law contain provisions regulating final negotiations (i.e. post contract award) so that transparency, equal treatment and competition are preserved?	× ×		Despite the fact that the law does not contain any specific provision concerning final negotiation These principles are clearly stated in the Law and apply to all stage of the negotiation
11. Does the Law provide that the Contracting	× × ×		

Checklist **Bosnia and Herzegovina**



<p>Authority has the authority to terminate negotiations with the invited bidder if it becomes apparent that the bid will not result in an agreement and start negotiations with the second ranked candidate?</p>			
---	--	--	--

3.4 PPP Award without competitive procedure

QUESTION	ANSWER	ARTICLE	COMMENTARY
<p>12. Does the Law provide that the Contracting Authority has the authority to award a PPP without a competitive process? Is this only in limited/ exceptional circumstances?</p>	<p>✓ ✓</p>	<p>25</p>	<p>The law leave quite open the possibility of direct negotiation in case of unsolicited proposal however under restrictive conditions: In case of an unsolicited proposal, the competent ministry evaluates whether there is a "public interest" for the concession award. Such evaluation is based on (i) existence or not of the exclusive rights and (ii) the urgent need for the infrastructure/service;</p> <ul style="list-style-type: none"> - If there is a "public interest" for the concession, the ministry requests from the Commission the authorization to start negotiations with the author of the proposal; In Republika Srpska, the government has approved a Regulation regulating the assessment of the "public interest" in case of unsolicited proposals. - The Commission informs the competent ministry of its decision; - The Ministry cannot conclude a concession



			agreement on the basis of an unsolicited proposal without the Commission's authorization and in "such case" a concession is awarded in accordance with the procedure provided in the Law.
13. Does the Law provide for a procedure, set of rules or principles to be respected when awarding a PPP without a competitive process?	✓ ✓	25.2.a), b)	

For our general information, please specify the conditions which would allow such direct negotiations?

In the event that a bidder submits to the competent Ministry) a proposal for concession for which there was no public invitation, the Ministry shall evaluate whether there is public interest for such a concession. In evaluation of proposal particular attention shall be paid at:

a) the fact that the project subject to proposed concession can be achieved only with process, design, methodology or concept of engineering for which the bidder owns exclusive rights;

b) urgent need for providing services or for existence of infrastructure for public use.

The Ministry shall submit a request to the Concession Commission for obtaining of authorization to negotiate with bidder if it estimates that there is public interest for the Concession.

The Concession Commission shall as soon as possible inform the Ministry whether the granting of authorization is approved or not. The authorization given by the Concession Commission may prescribe the right of the Concession Commission to monitor the process and/or review the documentation.

The Ministry may not conclude a Concession Contract based on unsolicited proposal unless granted the authorization by the Concession Commission, and in that case the Concession is granted according to the procedure set by the Concession Law.



3.5 Special case of unsolicited proposals

QUESTION	ANSWER	ARTICLE	COMMENTARY
14. Does the Law provide for an adequate framework for the Contracting Authority to manage unsolicited proposals/private initiatives (i.e. a proposal relating to the implementation of a PPP that is not submitted in response to a request or solicitation by the Contracting Authority) that ensures transparency and equal treatment and does not distort competition?	✓ ✓	25	See the commentaries above.

3.6 Review procedures

QUESTION	ANSWER	ARTICLE	COMMENTARY
15. Does the Law allow the bidders who claim to have suffered, or that may suffer loss or injury, to seek review of the Contracting Authority's actions or failure to act?	✓ ✓	18	Upon request for reexamination of the decision of the Commission submitted within 60 days from the day of making of decision or ex officio, after the reexamination of the decision, the Commission may revise or revoke the same if: a) a new fact is established which would have influenced the making of a different decision had it been known at that time, b) interested party was justifiably unable to present the



		<p>observations concerning the decision for sufficient cause.</p> <p>Prior to the reexamination of a decision, the Commission shall enable the interested parties to state their opinion on the decision.</p> <p>The Commission may correct a decision if it contains an error in writing or calculation or any clerical error, upon its own initiative or upon a request of interested party.</p> <p>The Commission or any interested person may keep a certified copy of a decision or order made under this Law with the registry office of the relevant court, with which the Concessionaire is registered according to the laws of Bosnia and Herzegovina.</p> <p>The decision or order kept pursuant to paragraph 4 has the same force and effect as the decision of the relevant court with which the Concessionaire is registered according to the laws of Bosnia and Herzegovina.</p> <p>No appeal shall be permissible against the decision of the Commission. However, administrative proceedings might be initiated before the Court of Bosnia and Herzegovina.</p>
--	--	---



4. **PROJECT AGREEMENT**⁶

4.1 **Model or list of provisions**

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Does the Law contain (or refer to) a model PPP agreement (which is an optional template agreement for guidance only) or a list of mandatory material provisions which must be included in the agreement (<i>the content of such provisions being left for negotiation</i>)?	✓ ✓ ✓	26	The list of provisions, as stipulated, are rather general. Reference to the obligation to “supply with sure service to customers at the lowest price, taking into consideration the conditions”.

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

QUESTION	ANSWER	ARTICLE	COMMENTARY
2. Does the Law provide that the duration of the Project Agreement should depend on the length	✓ ✓	26.2	The Concession Contract shall have a definite term, which may not exceed 30 years. In event of exceptional circumstances requiring a longer-term investment, the

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



of time taken for the amortisation of the Private Party's investment and an appropriate return on the capital?			term may be extended but may not exceed 50 years. The principle of the relationship between the duration and the time necessary for the recovery is however not expressly specified.
3. Does the Law provide that the renewal or extension of the Project Agreement should be limited and depend on exceptional circumstances (<i>such as Contracting Authority default or an event of force majeure</i>)?	× ×	26.2	The Concession Contract may be subject to renewal for a period not exceeding half of the original term. The conditions under which such renewal is to be granted is not specified.

For our general information, please provide the given minimum and maximum duration (if any) - up to 30 or 50 years (i.e. 45 or 75 years). See the commentary above.

4.3 Termination of the Project Agreement

QUESTION	ANSWER	ARTICLE	COMMENTARY
4. Does the Law leaves open to the Project Agreement negotiations the list of possible ground for termination and the content of to the termination provision?	✓ ✓ ✓	27	<ul style="list-style-type: none"> • Concessionaire insolvency or bankruptcy; • Breach of concessionaires' or grantors' obligations.
5. If the answer to the previous question is <i>No</i> does the Law provide for a list of grounds of termination which does not affect the balance	✓ ✓		Apply both for breach of concessionaires' or grantors' obligations.

Checklist **Bosnia and Herzegovina**



between the parties rights and obligations (<i>one sided provisions</i>) or the stability of the contractual relation under the Project Agreement (e.g.: <i>too large or non exhaustive list</i>)?			
6. Does the Law provide for (<i>or at least does not prevent</i>) compensation of the Private Party for losses incurred as a result for termination on the grounds of public interest for losses incurred as a result of public authority acts?	✓ ✓		The Law does not prevent
7. Does the Law provide for (<i>or at least does not prevent</i>) compensation of the Private Party for all cases of early termination (<i>including in case of serious breach or failure by the Private Party</i>), for fair value after depreciation of the assets financed by the Private Party?	✓ ✓		The Law does not prevent

4.4 Tariff setting, service standards

QUESTION	ANSWER	ARTICLE	COMMENTARY
8. Does the Law provide clear guidance on all aspects of interaction between the bodies that have the power to award PPP and the bodies that regulate tariffs and service standards?	✓ ✓ ✓	16 b), c) 30.3	The invitation to tender contains provisions on principles and methods for the calculation of the fee. Standard contracts with users are approved by the Commission.

Checklist **Bosnia and Herzegovina**



--	--	--	--

4.5 Financial responsibilities of the Private Party and Contracting Authority

QUESTION	ANSWER	ARTICLE	COMMENTARY
9. Does the Law provide that the Private Party can collect tariffs or fees for the use of the facility or its services?	✓ ✓	16.a)	
10. Does the Law provide for the possibility of fixed and/or consumption-based payments to the Private Party by the Granting Authority or other public authorities (<i>in the case of Power Purchase Agreement , shadow tool or PFI for instance</i>) ?	✓ ✓	16 b), c) 30.3	The invitation to tender contains provisions on principles and methods for the calculation of the fee. Standard contracts with users are approved by the Commission.



5. SECURITY AND SUPPORT ISSUES⁷

5.1 Security Interests

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Does the Law provide for (<i>or does not specifically prevent</i>) a Private Party to create security interests over the project assets, rights and proceeds or other valuable guarantees related to the project?	✓ ✓	26 e), k)	Reference in the provisions to be contained in the concession agreement to “incentives” and “measures for project financing”.
2. If the answer to the previous question is <i>Yes</i> , does the Law clearly state which types of security can be provided and include some of the most common type of guarantees in project financing (such as those listed in the request for general information below)?	✗ ✗		Not specified, not excluded, correspond to normal security package available under BiH applicable laws

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

- *the proceeds and receivables arising out of the PPP; Not specified.*
- *the assets for which it has rights of use under a project agreement; Not specified.*

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



27.

- *its property; It is always possible to guarantee with the property of guarantor.*
- *shares of the Project Company; Not specified.*
- *the project agreement - not specified, or*

obtain other valuable guarantees (please specify)? e.g. bank guarantee, mortgage, pledge;

5.2 Government support

QUESTION	ANSWER	ARTICLE	COMMENTARY
3. Does the Law provide for (<i>or does not specifically prevent</i>) the public authority to provide support to the Contracting Authority and a guarantee for the proper implementation of the PPP by the Contracting Authority?	✓ ✓	26 e), k)	
4. Does the Law provide for (<i>or does not specifically prevent</i>) the Public Authority to provide financial or economic support for the implementation of PPP?	✓ ✓	26 e), k)	Reference in the provisions to be contained in the concession agreement to “incentives” and “measures for project financing”
5. If the answer to the previous question is <i>Yes</i> , does the Law clearly state which public	✓ ✓	22.i)	Only the possibility of tax allowances attached to the project, if any, are referred to

Checklist **Bosnia and Herzegovina**



<p>authorities may provide such support and which types of support can be provided? (i.e. <i>tax and customs benefits; foreign exchange protection (convertibility and transfer guarantees; subsidies; equity or loan participation)</i>)?</p>			
--	--	--	--



5.3 Lenders' rights

QUESTION	ANSWER	ARTICLE	COMMENTARY
6. Does the Law provide for the Parties to arrange the financing with reasonable flexibility under the Project Agreement without strict time constraints or other constraints (<i>except with respect to security package and government support</i>)?	✓ ✓	26.1-K) 30.1	Measure to facilitate project financing left opened to the concession agreement The fact that. not more than 15% of voting rights can be transferred, directly or indirectly, without approval of the Commission may be a constraint for the financing
7. Does the Law provide, in the event of the default of the Private Party for the lenders to “ <i>step-in</i> ” or substitute the Private Party with a qualified new Private Party without initiating a new tender process?	✓ ✓	26.5	Implicit reference: “the new concessionaire takes the obligations of the previous”.



6. SETTLEMENT OF DISPUTES AND APPLICABLE LAWS⁸

6.1 Settlement of disputes

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Does the Law permit the Contracting Authority to enter into a Project Agreement that is subject to international arbitration?	✓ ✓ ✓	26.1 j)	
2. Has the government of the country ratified the Washington Convention on the Settlement of Investment Disputes (ICSID) (1965)?	✓ ✓ ✓		
3. Has the government of the country ratified the New York Convention on recognition and enforcement of foreign arbitral awards (1958)?	✓ ✓ ✓		

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



6.2 Applicable laws

QUESTION	ANSWER	ARTICLE	COMMENTARY
4. Does the Law permit (<i>or does not prevent</i>) the Contracting Authority) to enter into side agreements to the Project Agreement (such as <i>a direct agreement with the lenders to the project or a support and guarantee agreement in respect of the Project Agreement</i>) that is governed by foreign law.	✓ ✓ ✓	26.6	Concession contract is entered into and performed in accordance with the principles of commercial law of Bosnia Herzegovina. No specified restriction for other project and finance documents.
5. Has the country ratified any international convention for the protection of foreign investments?	✓ ✓ ✓		BIH has concluded bilateral agreements for the protection of foreign investments with Austria, Czech Republic, Egypt, Finland, Croatia, Qatar, China, Kuwait, Hungary, Macedonia, Moldova, Netherlands, Portugal, Romania, Slovenia, Sweden, Ukraine, Great Britain, Greece, Germany, Spain, Turkey.



II- EFFECTIVENESS ASSESSMENT: HOW THE LAW WORKS IN PRACTICE:

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

7. POLICY FRAMEWORK

7.1 Existence of PPP Policy Framework

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Is there a general/national policy framework (explicit or implicit) for PPPs for infrastructure or public services?	✓ ✓ ✓		Policy Paper on Granting Concessions in Bosnia and Herzegovina. Pursuant to Article 17, paragraphs 1 and 2 of the Law on Concessions of BiH (Official Gazette of BiH, no. 32/02 and 56/04), a paper was drafted by the Commission on Concessions of BiH and it was adopted at the 109th session of the Council of Ministers of BiH held on 21 February 2006 and at the 61st session of the House of Peoples of the Parliamentary Assembly of BiH held on 27 July 2006.
2. Is there any administrative guidance or printed information edited by the government or the PPP Unit concerning the legal framework for PPP projects in the country?	✓ ✓ ✓		The site of Commission for Concessions of Bosnia and Herzegovina: http://www.koncesijebih.ba/home/index.php?option=com_frontpage&Itemid=1

Checklist **Bosnia and Herzegovina**



3. Is there a municipal/regional policy framework (explicit or implicit) for PPPs in infrastructure or public services?	× × ×		
---	-------	--	--

7.2 PPP Awareness and Sustainability

4. Is there a national and/or municipal /regional long term programme for PPP promotion and awareness?	✓ ✓		Part of the Policy paper
5. Are there PPP training programmes on a national and/or municipal/regional level for public servants and other PPP concerned people?	× ×		The Regional Cooperation Council (“RCC”) and the Agency for Public Private Partnerships of the Republic of Croatia acting as an initial Secretariat (“Secretariat”) of the Southeast Europe Public-Private Partnership Network (“SEE PPP Network” or “Network”) co-organized the first working meeting of the SEE PPP Network in Sarajevo, on November 30, 2009. The meeting was attended by the representatives of PPP units or institutions tasked with dealing with PPPs from Albania, Bosnia and Herzegovina, Croatia, Greece, UNMIK/Kosovo according to UNSCR 1244, FYR Macedonia, and Serbia. Representatives of the RCC and the Agency for PPP of the Republic of Croatia were present in the capacity of meeting co-organizer. No real training program for civil servants organized yet.



6. Are there PPP courses as part of university curriculum or specialist departments and faculties in universities teaching PPP?	× × ×		
---	-------	--	--



7.3 Obstacle to implementation of PPP Policy

<p>7. Are you of the opinion that there are no social/political obstacles to implementing PPP in the country (e.g. grass roots opposition, policy measures against private sector participation in public infrastructure/services, etc.)?</p>	<p>✓ ✓ ✓</p>		
<p>8. Are you of the opinion that there are no legal obstacles to implementing PPP in the country (e.g. non-publication of a decree provided under the Law and necessary for such law to become effective, etc.)?</p>	<p>✓ ✓</p>		<p>Bearing in mind the fact that there are separate laws on concessions in BiH the harmonization of laws is therefore an imperative in order to avoid overlaps, inconsistencies and loopholes.</p> <p>There will be additional efforts needed in order to achieve a coherent legal framework for the concessions and public-private partnerships</p>



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

8. INSTITUTIONAL FRAMEWORK

8.1 Existence and role of PPP Central Units/Agency

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Is there a specialised institution/agency/ministerial department established to promote PPP and to serve as Central PPP Unit?	✓ ✓ ✓		Commission for Concessions of Bosnia and Herzegovina
2. Is such Central PPP Unit composed mainly of specialists recruited from the business community and not exclusively composed of civil servants coming from different public ministries?	✓ ✓ ✓	8, 31.2	The Commissioners shall be appointed by the Parliamentary Assembly of Bosnia and Herzegovina upon proposal the Council of Ministers out of eminent experts in the field of law, economics and engineering. In the initial composition, the President of the Commission referred to in Article 7, paragraph 1, shall be a foreign citizen
3. Is the role of such Central PPP Unit comparable to a "task force" assisting in the development of projects in general and not limited to promotion of PPP?	✓ ✓	16	It is the exclusive competence of the Commission to: a) monitor the entirety of activities of Concessionaire in order to ensure that the consumers are adequately provided with services and charged fair and reasonable rates; b) approve the terms and conditions of a standard contract on provision of services to the customers referred to in Article 30 (3);

Checklist **Bosnia and Herzegovina**



			<p>c) examine the complaints filed by consumers concerning the amount of fee or conditions for supply of services by the Concessionaire;</p> <p>d) decide on any claim filed or request for revision filed pursuant to this Law.</p> <p>e) conduct the proceedings in case of violation referred to in Article 33.</p> <p>The Commission however is not involved as a task force in concession negotiation</p>
<p>4. Is the consent or recommendation of such Central PPP Unit necessary for the development and granting of most PPP projects (<i>except small or local PPP</i>)?</p>	<p>✓ ✓ ✓</p>	<p>21, 23</p>	<p>The Conceding Party shall prepare a feasibility study on any project to be granted as a Concession prior to public invitation of potential bidders. The feasibility study shall be submitted to the Commission for consideration and approval.</p> <p>The Commission shall inform the relevant body on the approval of project within one month from the day of receiving of the study.</p> <p>In rendering its decision the Commission shall have due regard to:</p> <p>a) impact of project on the supply of services to the customers;</p> <p>b) impact of project on the fee charged against the customers;</p> <p>c) whether the project falls within the objectives set in the Policy Paper;</p> <p>d) whether the project is of net benefit to Bosnia and Herzegovina.</p> <p>In case the Commission does not approve the project, it</p>



		<p>may suggest or recommend such changes as would render the project acceptable.</p> <p>Upon approval of the project pursuant of paragraph 2, the authority in charge shall organize a public invitation, i.e. a tender (hereinafter: tender) and invite the persons that have qualified. The invitation shall be sent to the biggest possible number of addressees and if the Commission requires so, an international invitation shall be sent as well.</p> <p>Subject to the approval of the Commission the request for qualification may be issued by the Conceding Party prior to public invitation. The request for qualification shall be published and distributed to persons recognized for their expertise as well as business practices and financial strength. Request for qualification shall contain also the criteria to be used in the process of selection.</p> <p>The Conceding Party shall submit to the Commission a proposal of public invitation and related documents for consideration and approval.</p> <p>Within 21 days from the day of receiving of proposal of public invitation, the Commission shall inform the Conceding Party whether the invitation is approved.</p> <p>In considering the proposal of public invitation the Commission shall take into account all relevant elements, including:</p>
--	--	---



			<p>a) whether the evaluation criteria, the procedure and selection of successful tender are satisfactorily based on clear, transparent and non-discriminatory principles accessible to all;</p> <p>b) whether the proposal of public invitation substantially deviates from feasibility study approved by the Commission.</p> <p>The Commission may give recommendations pertaining to each submitted invitation. Such recommendations are binding.</p>
5. Is one of the roles of the Central PPP Unit to assist in building capacity namely of the public sector with respect to PPP?	× × ×		

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

8.2 Other institutions concerned by PPP

6. Is there any PPP unit/agency or department of the Central PPP unit either at the municipal or regional level?	✓ ✓ ✓		Commission for Concession of Federation of Bosnia and Herzegovina, Cantonal Commissions for Concessions, Commission for Concession of Republika Srpska, Commission for Concession of Distrikt Brcko
7. Is there any specific PPP unit department in any	× × ×		

Checklist **Bosnia and Herzegovina**



ministry (other than the central PPP unit) or at sectoral level?			
8. Is there either a specific " <i>one stop shop</i> " for PPP authorisations and formalities or a " <i>one stop shop</i> " which services are available to the sponsors of PPP project as well as other investors?	× × ×		
9. Is the division of power between different public authorities involved in the PPP granting process simple and coordinated?	✓ ✓ ✓		

9. PPP LAW ENFORCEMENT

9.1 Effectiveness of PPP enforcement and compliance with the Law

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Have any PPP projects in any form ever been awarded in the country on the basis of the Law discussed above? (<i>with or without specific reference to the Law</i>)	✓ ✓ ✓		

Checklist **Bosnia and Herzegovina**



2. Have such PPP projects, if any, been awarded generally following a transparent competitive selection procedure (<i>and only through direct negotiation under exceptional legal circumstances as may be provided by the Law</i>)?	✓ ✓ ✓		
3. Have any PPP projects or similar long term agreements (<i>falling under the definition of PPP under this questionnaire</i>) been awarded on any legal basis different from the Law since the Law has been in force?	✓ ✓		We have no such information's.

For our general information, please give example of legal instruments, or reasons used, to bypass the Law and establish a PPP.

9.2 Statistics on PPP implementation under the Law

4. Have most of the awarded PPP projects been successfully implemented and put into operation in compliance with the Law?	✓ ✓ ✓		
5. Has a PPP project ever been awarded and implemented in the country at the local /regional /municipal level in compliance with the Law?	✓ ✓ ✓		
6. Have PPP project ever been awarded in the			

Checklist **Bosnia and Herzegovina**



country in the non merchant sector (<i>such as Hospital, School, prisons</i>) and not exclusively in the merchant sector (<i>energy, water, transport</i>)?	×××		
---	-----	--	--

For our general information:

- Approximately how many PPP projects are presently in operation (figure or order of magnitude) in the country and in what sectors have PPP projects been awarded (energy, water, education, health for example)? There are 10 unsolicited proposals for concessions in the energy sector.
- Please give some examples of the most significant project awarded: Construction of the highway 5c (corridor 5c).
 - under which legal form have such PPP projects been awarded (Concession, BOT, PFI, other): Concession.
 - have such PPP project been granted by (i) central, (ii) sub-sovereign/regional (if applicable) or (iii) municipal government as Contracting Authority; Yes, mostly in energy sector.
- when did PPP begin to be awarded in the country: (i) in the last 10 years or before; (ii) in the last 5 years; or (iii) within the past few years only; Year 2002.
- *please give examples of any PPP projects awarded but not implemented (or not implemented under a PPP form). Construction of the small hydro power plant Zeljeznica 4 in the Municipality of Fojnica.*
- are there any PPP/Project Agreements in discussion? Yes, the construction of the highway 5c, and 10 concession in energy sector.

9.3 Challenge of PPP

--	--	--	--

Checklist Bosnia and Herzegovina



7. Are you of the opinion that there is a reasonable chance for an unsuccessful bidder to successfully challenge in the country a PPP awarded under conditions contrary to the Law?	✓ ✓		
8. If the answer to the previous question is <i>Yes</i> , are you of the opinion that there is a reasonable chance for the plaintiff to get some compensation or for such action to result in the cancellation of the award?	✓ ✓		Such action could result in the cancellation of the award.
9. Have PPP project been implemented by the parties most generally without serious claims/arbitration by either Party concerning the performance of the Project Agreements under the Law?	✓ ✓ ✓		
10. If any Project Agreement has been terminated prior to the end of the contractual period by the Contracting Authority, has fair compensation been paid to the Private Party in compliance with the Law?	N/A		According to the information's obtained from the Concessions Commissions there were no such projects.

For our general information, can you provide any examples of a successful legal challenge in the courts or otherwise of a PPP award in the country based on the PPP Law? Please describe the matter and, if known, the outcome of such matter. According to the information's obtained from the Concessions Commissions there were no such examples.

