



Ukraine

**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 recommendations¹ 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	12/18	Medium Compliance
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	21/24	High Compliance
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.	30/45	Medium Compliance
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).	18/27	Medium Compliance
5-Security and Support Issues	Availability of reliable security instruments to contractually secure the assets and cash-flow of the Private Party in favour of lenders, including "step in" rights and the possibility of government financial support, or guarantee of, the Contracting Authority's proper fulfilment of its	10/18	Low Compliance

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

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	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.	13/15	High Compliance
General LFA Rating		71,83%	High 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	5/24	
8 Institutional Framework	Existence of an institutional framework for public private partnerships	7/27	
9- PPP Law Enforcement	Award and implementation of PPP projects in compliance with the Law	7/24	
General LIS Rating		25%	Very Low Effectiveness
OVERALL RATING		41%	Low Compliance/Effectiveness

Local Expert²: Gide Loyrette Nouel (Kiev)

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 which as been the case for Ukraine.



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RATING: Key for assessment of Each Question

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

Key for Assessment of Each Core Area and for Overall Assessment

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

TERMINOLOGY

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

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

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

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

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

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



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

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

Other definitions:

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



REFERENCE TO BEST PRACTICE

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



UKRAIN OVERALL ASSESSMENT

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

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

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

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



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

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

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

ASSESSMENT & LEGAL INDICATOR SURVEY

1. LEGAL FRAMEWORK

Checklist Ukraine



1.1 Existence of different forms of PPP legal framework

QUESTION	ANSWER	ARTICLE	COMMENTARY
<p>1. Does the country have a single act dealing specifically with Concessions or a generalised act incorporating the legal framework for PPP, including Concessions?</p>	<p>✓ ✓ ✓</p>		<p>The Law "On State-Private Partnership" No. 2404-VI on 1st July 2010 provides for the general legislation framework for every PPP project (the "PPP Law").</p> <p>On 28 March 2011 new regulations for the provision of state support to public-private partnerships ("PPPs") took effect. This is connected with the publication of Resolution of the Cabinet of Ministers of Ukraine (the "CMU") No.279, dated 17 March 2011, approving the Procedure for Providing State Support for Realization of Public-Private Partnership (the "Procedure").</p> <p>More specific regulation of concessions is set by the Law of Ukraine "On Concessions" dd. 16.07.1999 N° 997-XIV and there are sector specific legislation providing for the peculiarities of the concession in particular field of activity: the Law of Ukraine "On Peculiarities of Leasing Out or Giving in Concession of Communal Facilities of District Water and Heat Supply and Sanitation" No. 2624-VI dated October 21, 2010, Law of Ukraine " (the Law "On Concession and Lease of Infrastructure") and "On Concessions for Construction and Operation of Motor Roads" dd. 03.04.2003 N° 662-IV, etc.</p>



<p>2. Does the country have an act that allows BOT or derived forms such as BOOT, BOO or other forms either as part of a specific act or as part of a general PPP Law?</p>	<p>✓ ✓</p>	<p>Articles 5 and 7 of the PPP Law</p>	<p>The PPP Law provides for a non-exhaustive list of types of PPP agreements which may be concluded. The Ukrainian legislation does not expressly provide for a possibility to conclude a BOT agreement. The equivalent of the BOT agreement is a 'lease and operate' agreement. The Ukrainian legislation does not provide for a possibility to conclude BOO and BOOT agreements because the property transferred to the private partner and the property constructed under the project remains in the ownership of the public partner.</p>
<p>3. Does the country have an act that allows PFI, either as part of a specific act or as part of a general PPP Law?</p>	<p>✓ ✓</p>	<p>Article 4 of the PPP Law</p>	<p>The PPP may be initiated in sectors like health care; culture and sports; real estate management which imply the possibility to develop PFI form of PPP in the non merchant sector without delegation of the public service management ..</p>
<p>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?</p>	<p>N/A</p>		

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

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



The Ministry of Economic Development and Trade (the "MOEDT") and the Committee of the Verkhovna Rada for Industrial and Regulatory Policies and Entrepreneurship (the Ukrainian Parliament) are preparing the modification into the PPP legislation, notably in PPP law, related to harmonisation of all adopted legislative acts. The amendments are supposed to be submitted to the Parliament before the end of September.

1.2 Specificity and integration of PPP the legal framework

<p>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?</p>	<p>✓ ✓</p>	<p>Articles 6-17 of the PPP Law</p>	<p>Public private partnership-based government procurements shall be made in line with the laws governing state-funded purchases of goods, works and services.</p> <p>The Public Procurement Law does not apply to PPP despite no explicit reference to that effect in the PPP Law or the Concession law. . However, should a PPP project be partially financed by the State or a municipality there is a risk that subsequent purchase of works and services by the PPP company may be done on the basis of public procurement without any specific provision allowing subcontracting to affiliated companies and limiting the obligation of tender to third party .</p>
<p>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?</p>	<p>✓ ✓</p>	<p>Articled 1 the Regulation No. 384 The Order of the Ministry</p>	<p>The PPP law provides for the general description of initiation of a PPP project, tender procedure and selecting the winner and entering into the PPP agreement. More precise regulation of the tender procedure is set forth by the Regulation of the Cabinet of Ministers of Ukraine "On Certain Issues of</p>



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		of Energy and Fuels of Ukraine “On Approval of the Procedure of Consideration of Projects for Development of the Fuel and Energy Industry that are owned by the State under Lease or Concession”	Implementing PPP" No. 384, April 11, 2011 (the " Regulation No. 384 "). In addition, additional regulations are established for concession projects by the Concession Law, the Law on Concession of Infrastructure. The tender procedure for Highway concession projects is established by a CMU regulation. A separate tender procedure is established for the PPP projects in fuel and energy industry by the Order of the Ministry of Energy and Fuels of Ukraine. ³ Under the general principle, sector specific laws prevail over the general regulations set forth by the PPP, Concession Law or Regulation 384. However, with regards to the sector specific procedures set by the regulations and orders there is a risk that the results of the tender will be disputed on formalistic grounds because these procedures are not established by the PPP Law and, therefore, the rules set in Regulation No. 384 should apply. Under regulation No. 384 it should apply to all tenders except when the law requires otherwise.
7. Does the country have a Law allowing the Institutional form of PPP (IPPP) which regulates IPPP participation to PPP?	XX	Article 1 of the PPP Law	The PPP law does not provide for the possibility to implement the PPP project under the institutional form because it is clearly stated that PPP is <u>a contractual</u> form of cooperation with private partner. Moreover, under the information received from the MOEDT the amendments to the PPP legislation should not introduce the possibility to use the institutional option for



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			<p>implementation of the projects.</p> <p>At the same time the Ukrainian legislation does not prohibit 'mixed-type' companies (where are both private and public shareholders) to participate in PPP as private partners..</p>
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2. DEFINITIONS AND SCOPE OF THE PPP LAW(S)

2.1 PPP definition⁴

QUESTION	ANSWER	ARTICLE	COMMENTARY
<p>1. Does the Law define one or several term(s) (<i>i.e.</i> "PPP", "Concession", "BOT", "Partnership" etc. and/or respective agreements) for the arrangements to be regulated by the Law which specify the limits of application of the Law?</p> <p>For our general information,: <i>please provide the given definition(s), if any.</i></p>	<p>✓ ✓ ✓</p>	<p>Article 1 of the PPP Law</p> <p>Article 1 of the Law On Concessions</p>	<p>The PPP Law defines PPP as <i>cooperation between the State of Ukraine, the Autonomous Republic of Crimea, or territorial communities, as represented by respective state or local self-government authorities, (public partners) and legal entities, other than state or municipally owned companies, or individual entrepreneurs (private partners) implemented on a contractual basis in the manner prescribed by this Law and other laws</i></p>

⁴ 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))



			Concession under the Concession Law is the right of a legal entity or a natural person to construct and/or manage (operate) the object of concession granted by an authorised executive or local self-administration authority on a paid and temporary basis (temporary paid possession), in order to satisfy public needs, subject to the taking of obligations by the business entity (concessionaire) to establish (construct) and/or manage (operate) the object of concession and assuming the property liability and possible business risk
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>)?	✓ ✓	Article 1 of the PPP Law	The PPP definition is very broad and, therefore, any contractual cooperation between governmental authorities and private investors could be considered as PPP, including public procurement. Such an ambiguous definition of PPP leads to the misconception of the aim and nature of the projects, and results in the lack of public and political support.
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>)?	✓ ✓ ✓		Yes. The PPP agreement does not automatically provide for the right to operate the infrastructure if the Ukrainian legislation requires prior receipt of a license or permit.



		<p>Art 11 of Concession Law</p> <p>Article 4 of the On Lease and Concession of Infrastructure</p>	<p>Should a concessionaire engage in business activities, which are subject to licensing under the legislation of Ukraine, the requirement to the concessionaire to obtain the appropriate license according to the established procedure shall be included into the essential conditions of the concession contract.</p> <p>The PPP Law does not provide for any regulation of the licensed activity. The sector specific legislation provides for obligation of the concessionary to receive a license to operate the infrastructure after concluding the concession agreement within 3 month. Moreover, the Law of Ukraine "On Licensing of Certain Types of Business Activity" provides for the exhaustive list of types of activity that may be done only after receiving a respective license irrespective of the ground for performing such activity (e.g. availability of the PPP agreement).</p>
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2.2 Contracting Authority

QUESTION	ANSWER	ARTICLE	COMMENTARY



<p>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 ?</p>	<p>✓ ✓ ✓</p>	<p>Article 10 of the PPP Law</p>	<p>All decisions with regard to the state-owned property should be adopted by the Cabinet of Ministers of Ukraine (CMU) or its authorised body, with regard to the municipally property shall be adopted by the self-governance authorities or their authorised bodies, with regard to the property belonging to the Autonomic Republic of Crimea - by the Council of Ministers of Autonomic Republic of Crimea.</p> <p>Such decisions should be adopted during, respectively, a session of the CMU or that of the appropriate council. At the same time, the legislation provides for obligation of the public partner to receive various authorisations, approvals from other governmental authorities in order to receive financial support, state guarantees, etc.</p>
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For our general information: *If yes, which of the following authorities are identified:*

- *National authorities (e.g.: the government, ministries, and independent agencies);*
- *Regional/state-level authorities;*
- *Local or municipal authorities; or State owned companies?*

2.3 Private Party and Project Company

QUESTION	ANSWER	ARTICLE	COMMENTARY
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<p>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>)?</p>	<p>✓ ✓ ✓</p>	<p>Article 6.2 and 19 of the PPP Law</p> <p>Final provision 4 to the Concession law</p>	<p>The PPP Law explicitly provides that foreign and Ukrainian business entities shall enjoy equal rights concerning participation in PPP procurements. However, under the other legislative acts it is impossible for the foreign company to receive the licenses and permits for operating the infrastructure due to particular requirement of the licensing legislation (e.g. to provide documents issued after registration of the legal entity in Ukraine, etc)</p> <p>For the purposes of the PPP project the legal entity with foreign participation registered in Ukraine is considered to be a Ukrainian legal entity.</p> <p>Changes shall be introduced in the following laws of Ukraine:</p> <p>1) Article 22 of the Law of Ukraine "On Procedure for Foreign Investments" (Vidomosti Verkhovnoyi Rady Ukrayiny, 1996, issue 19, page 80) shall be set forth in the following wording: "Article 22 Concession Contracts "Granting foreign investors the right to engage in economic activities related to the use of the state or community owned objects and transferred on concession shall take place on the basis of the relevant legislation of Ukraine by means of the conclusion of a concession contract";</p>
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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?*

2.4 Concerned sectors⁵

QUESTION	ANSWER	ARTICLE	COMMENTARY
6. Does the Law identify (<i>or allow identification by reference to other laws or regulations</i>) the sectors and/or types of infrastructure and/or services in respect of which a PPP may or may not be granted?	✓ ✓	Article 4 of the PPP Law Art 3 Concession Law	In the PPP law the sectors and activities available to PPP are not listed exhaustively. The PPP projects may not be implemented only in business activities which, under the law, may only be carried out by state enterprises, institutions, and organizations (i.e. national security, defence enterprises, etc). Such an exception also encompasses privatization that may not be subject to any PPP arrangements. The Concession law give a list of the objects capable of being granted on concession and such list is regularly updated.
7. Do the sectors eligible for PPP correspond to a large extent to an open-ended one (<i>as opposed</i>	✓ ✓ ✓	Article 4 of the PPP	The PPP Law provides for a non-exhaustive list of sectors where PPP implementation may occur.

⁵ For further information on the concerned sectors please refer to: PFI Guide, Consolidated Legislative Recommendations, Recommendation 3 and 4.



<p><i>to being exhaustive) allowing (or at least not preventing) PPP to be granted in numerous sectors”?</i></p>		Law	Consequently, PPP implementation may happen in any sector of activity, except for those mentioned in the previous clause.
<p>8. Do the sectors eligible for PPP includes the provision of works and services for the non commercial sector (such as <i>schools, hospitals, prisons, defence and housing....</i>) in addition to the merchant sectors of the economy (<i>energy, transport, water, oil and gas...</i>)</p>	✓ ✓	Article 4 of the PPP Law	<p>Despite the fact that the PPP Law provides for a non-exhaustive list of fields where PPP may be implemented including some non-commercial activities,</p> <p>However, from the practical point of view the implementation of the PPP project in hospitals schools and prisons seems to be rather problematic because under the Constitution of Ukraine secondary education and medical services are free of charge and are financed from the state budget.</p>

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



3. SELECTION OF THE PRIVATE PARTY⁶

3.1 General Considerations

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Does the Law require, in principle, the Contracting Authority to select Private Parties through a competitive tender process?	✓ ✓ ✓	Article 14 of the PPP Law Article 5 of the Law On Lease and Concession of Infrastructure	The general rule is that a private partner should be selected on a competitive basis through a tender procedure. A tender is not required for lease and concession agreements over heating or water supply infrastructure if the project is held within one village. The same rule applies to leases if the private partner is an entity created by former employees of a municipal company. Such entity has a pre-emptive right for entering into lease agreements.
2. Is there reference in the Law to the principles of transparency, equal treatment and proportionality?	✓ ✓ ✓	Article 3 of the PPP Law	
3. Is there a provision in the Law concerning the publication of information related to the	✓ ✓ ✓	Article 15 of the PPP Law	<i>"The public partner shall publish the announcement of a tender being held to select a private partner in the</i>

⁶ For further information on the selection of the Private Party, please refer to: PFI Guide, Consolidated Legislative Recommendations, Recommendations 14 to 39 included.



<p>competitive procedures in the country media and in the international media (<i>for large projects</i>)?</p>			<p><i>official government news bulletins Uryadovyi Kuryer or Holos Ukrayiny or in another official printed media run by the respective local self-government authority or the respective authority of the Autonomous Republic of Crimea, provided that such authority acts as the public partner, and shall post it on its official website"</i></p> <p>The same provision is introduced into the sector specific legislation.</p>
<p>4. Are there provisions within the Law or any special manual or recommendations governing in detail the selection of the Private Party (<i>i.e.: the pre-selection of bidders, the procedure for requesting proposals or other procedure such as competitive dialogue/two stage procedure</i>)?</p>	<p>✓ ✓</p>	<p>Articles 14-17 of the PPP Law Regulation No. 384</p>	<p>The PPP Law provides for the general framework for the tender procedure. More detailed regulations are set forth in the Regulation No. 384 which is regulating each step of the tender procedure in detail. However, the issue of applicability of this Regulation to all PP projects is rather questionable.</p> <p>Certain peculiarities of the tenders are set by the sector specific legislation.</p> <p>It is also expected that the first pilot project implemented under the PPP Law will be considered as a <i>manual</i> for implementation of subsequent projects.</p> <p>In addition, municipal authorities have the right to prepare their own rules of holding tenders. In practice, due to absence of guidelines they tend to use Regulation No. 384 as a "cook book"</p>



<p>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>)?</p>	<p>✓ ✓ ✓</p>	<p>Article 16 of the PPP Law</p>	<p><i>The authority, which conducts the tender, shall publish respective information, together with substantiated explanations as to how the winning bidder has been selected and why the other bids have been rejected, within 10 days after the winning bidder is selected.</i></p>
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3.2 Award of PPP

QUESTION	ANSWER	ARTICLE	COMMENTARY
<p>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?</p>	<p>✓ ✓ ✓</p>	<p>Article 15 of the PPP Law</p>	<p>The tender announcement should contain among other information: <i>"basic qualification requirements for the bidders; and basic criteria for selecting a winning bidder."</i></p>
<p>7. Does the Law provide for the publication of a notice of the award of the project, identifying the Private Party and including a summary of the essential terms of the project agreement?</p>	<p>✓ ✓</p>	<p>Article 15 of the PPP Law Regulation No. 384</p>	<p>In general, the essential term of the contemplated PPP agreement should be clearly indicated in the tender documentation under which the bidders should prepare their tender proposals. Under Regulation No. 384 the information about the</p>



			winner should be published in the printed media and posted on the web-site of the public partner. This information should include " <i>substantiated explanations as to how the winning bidder has been selected and why the other bids have been rejected.</i> " However, as it was previously noted, municipal authorities are not obligated to follow the procedure set forth in Regulation No.384 and, therefore, in practice may ignore its requirements.
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?	✓ ✓	Art 14 Concession Law	No specific provision with respect to the recording of agreement and project in the PPP law. The Concession law however provide for Registration of Concession Contracts (If the concession object is state owned, the body authorised to conclude the concession contract according to the procedure specified by the Cabinet of Ministers of Ukraine shall notify the State Property Fund of Ukraine),
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	✓ ✓	Article 15 of the PPP Law	All the information related to tenders should be published by the public partner in " <i>the official government news bulletins Uryadovyi Kuryer or Holos</i>



parties?		Regulation No. 384	<i>Ukrayiny or in another official printed media run by the respective local self-government authority or the respective authority of the Autonomous Republic of Crimea, provided that such authority acts as the public partner, and shall be posted on the public partner's official website"</i>
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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?	×××		
11. Does the Law provide that the Contracting 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?	×××		The tender procedure shall be recommenced from the very beginning.



3.4 PPP Award without competitive procedure

QUESTION	ANSWER	ARTICLE	COMMENTARY
12. Does the Law provide that the Contracting Authority has the authority to award a PPP without a competitive process only in limited/ exceptional circumstances?	✓ ✓ ✓	Article 14 of the PPP Law	"A private partner for entering into a public private partnership agreement (agreements) shall be selected on a competitive basis only, except when otherwise provided for by law". For instance. The Law of Ukraine On Lease and Concession of Infrastructure provides that a tender is not required for lease and concession agreements over heating or water supply infrastructure if the project is held within one village. The same rule applies to leases if the private partner is an entity created by former employees of a municipal company. This entity has a pre-emptive right for entering into lease agreements
13. Does the Law provide for a procedure, set of rules or principles to be respected when awarding a PPP without a competitive process?	× × ×		

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



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?	✓ ✓ ✓	Article 14 of the PPP Law	It is provided that tenders are required notwithstanding who initiated the project (private or public partner). The procedure does not change if the project was initiated by the public partner, the tender is still required.

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?	XX		The PPP Law does not specify this right of the bidders except under article 20 , however, it is provided by other laws



4. **PROJECT AGREEMENT**⁷

4.1 **Model or list of provisions**

QUESTION	ANSWER	ARTICLE	COMMENTARY
<p>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>)?</p>	<p>✓ ✓ ✓</p>		<p>The PPP Law does not provide for a list of mandatory material provisions which must be included in the agreement or the model agreement.</p> <p>The list of the material conditions to be included in a concession contract are stated in the Concession Law</p> <p>The sector specific legislation also provides for the list of essential conditions which are required to be present in the agreement otherwise there is a risk that it may be considered to be invalid (See Article 8 of the Law of Ukraine "On Lease and Concession of Infrastructure").</p> <p>The Model concession agreements were approved by the CMU:</p> <p>The Cabinet of Ministers approved two models (general and special):</p> <ul style="list-style-type: none"> - Resolution of the Cabinet of Ministers of Ukraine on approval of the Model Concession Contract # 643, 12 April 2000. - Resolution of the Cabinet of Ministers of Ukraine on

⁷ For further information on the project agreement definition, please refer to: PFI Guide, Consolidated Legislative Recommendations, Recommendations 12 and 40 to 68 included.



			approval of the Model Concession Contract for construction and operation of motoring roads # 1519, 4 April 2000
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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 of time taken for the amortisation of the Private Party's investment and an appropriate return on the capital?	XX		The PPP Law indicated that the PPP agreement should be a long-term one. The sector specific legislation clearly sets forth the minimum and maximum duration of the respective agreement. For instance: the minimum effective term of the lease agreement is 2 years and the maximum term is 10 years; for concession the minimum term is 3 years and maximum is 50 years. The PPP legislation does not provide for any obligation for the public partner to keep the contract effective for amortisation of investments or return of the capital. Moreover, the Law on Concession and Lease of Infrastructure expressly states that the investments of the private partner which were not compensated through the derived income shall not be compensated by the public partner after expiration of the respective contract.
3. Does the Law provide that the renewal or extension of the Project Agreement should be	✓ ✓		The PPP Law does not provide for any possibility to prolong a PPP agreement.



limited and depend on exceptional circumstances (<i>such as Contracting Authority default or an event of force majeure</i>)?			The sector specific legislation provides for the limited list of cases when it is possible, for instance, Articles 13 and 17 provide for the possibility to prolong the effective term for 3 months if the expiration of the contract may lead to termination of water, heating supply and/or sewerage services.
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For our general information, please provide the given minimum and maximum duration (if any)

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?	✓ ✓	Art 10 PPP Law Art 15 Concession Law	The PPP Law do not provide for the list of cases under which the agreement could be terminated, however the partners should state the procedure for termination in the contract.. Restrictive list of termination events under the Concession Law and only upon requirement of either party, the concession contract may be terminated by the decision of a court of law in case of the parties' failure to fulfil their obligations and for other reasons envisaged by the laws of Ukraine.



5. If the answer to the previous question is <i>No</i> does the Law provide for a list of grounds of termination which does not affect the balance between the parties rights and obligations (<i>one sided provisions</i>) or the stability of the contractual relation under the Project Agreement (e.g.: <i>too large or non exhaustive list</i>)?	N/A		
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?	✓ ✓ ✓	Article 20 of the PPP Law	<i>"Private partners shall have the right to the reimbursement of losses incurred by them as a result of acts, failure to act or improper performance by state authorities, local self-government authorities, or their officers, of their respective duties as prescribed by the laws of Ukraine, such reimbursement to be provided according to the procedure set forth by the laws of Ukraine."</i>
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?	✓ ✓	Concession Law (Part 3 of Article 15 changed and amended according to Law of Ukraine #1023-VI of February 19, 2009)	In case of improvement of the property taken into concession, which was effected for the account of the concessionaire, or if the concessionaire created the property in compliance with terms and conditions of the concession contract, the principal shall be obliged to reimburse the concessionaire for the expenses incurred in connection with substantial improvements or for the value of the created property to the extent, which was not recovered by the concessionaire in the result of concession activities in accordance with conditions of the concession contract.



		<p>Concession Law art 15</p>	<p>The PPP Law does not provide for such a possibility, however, it is provided in the sector specific legislation. In most cases there is an exhaustive list of cases under which the private partner may receive the compensation of introduced investments.</p> <p>The Law on concession provides that in case of improvement of the property taken into concession, which was effected for the account of the concessionaire, or if the concessionaire created the property in compliance with the terms and conditions of the concession contract, the principal shall be obliged to reimburse the concessionaire for the expenses incurred in connection with substantial improvements or for the value of the created property to the extent, which was not recovered by the concessionaire in the result of concession activities in accordance with conditions of the concession contract.</p> <p>Under the Law on Concession and Lease of Infrastructure the public partner is not obligated to compensate any investments of the private partner that were not compensated through the derived income notwithstanding the reason for termination of the PPP agreement.</p>
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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?	XX		In some cases the authority responsible for setting the tariffs is the public partner. The PPP legislation does not provide for any guidance for interaction of the public partner and the authority responsible for setting the tariffs.

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?	✓ ✓		The PPP law does not provide for such a possibility, however, it is clearly set by the other sector specific legislation, for example, Article 18 of the Law On Concession provides for a possibility to receive the income from the end user. The same possibility as provided by the Law "On Concessions for Construction and Operation Of Highways"
10. Does the Law provide for the possibility of fixed and/or consumption-based payments to the	✓ ✓		The law does not prevent any form of payment which is left to the agreement itself.



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>) ?			
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5. SECURITY AND SUPPORT ISSUES⁸

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?	XX	Articles 3 and 7 of the PPP Law	<p>The <u>project assets</u> are not subject to privatisation, therefore, they may <u>not be subject to any security interests</u> which provide for the possibility for them to be alienated.</p> <p>However, the property owned by the private partner as well as its receivables may be subject to all sorts of securities as available under Ukrainian law.</p>
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)?	N/A		

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

⁸ For further information on support and financial securities, please refer to: PFI Guide, Consolidated Legislative Recommendations, Recommendations 13, 49, 57 and 60.



- *the proceeds and receivables arising out of the PPP; Yes, the private partner may freely dispose its property and revenues arising from the PPP.*
- *the assets for which it has rights of use under a project agreement; No. Under the Ukrainian legislation it is not possible to pledge or mortgage something which is not subject to privatisation. Under the PPP law the project assets may not be privatised.*
- *its property; Yes.*
- *shares of the Project Company; Yes.*
- *the project agreement; or Yes, however it may be subject to the new tender procedure.*

obtain other valuable guarantees (please specify)? Yes, any guarantees that are agreed with the public partner and are not prohibited by the Ukrainian legislations.

5.2 Government support

QUESTION	ANSWER	ARTICLE	COMMENTARY
3. Does the Law provide for (or does not specifically prevent) the public authority to provide support to the Contracting Authority and a guarantee for the proper implementation of the PPP by the Contracting Authority?	✓ ✓	Article 18 of the PPP Law	The governmental support may be provided "in the form of financing to be provided using funds from the state or local budgets and from other sources under national and local programs". Under the Law On Concession the public partner may provide the private partner of loss-making and low-profit objects which serve important public needs with any type of privileges required for implementation of the project.



		<p>On 28 March 2011 new regulations for the provision of state support to public-private partnerships ("PPPs") took effect. This is connected with the publication of Resolution of the Cabinet of Ministers of Ukraine (the "CMU") No.279, dated 17 March 2011, approving the Procedure for Providing State Support for Realization of Public-Private Partnership (the "Procedure").</p> <p>In accordance with Law of Ukraine "<i>On Public-Private Partnership</i>" of 1 July 2010 and the Procedure, e definition under question 1 §1 above) state support may be provided to PPPs in relation to objects of state and municipal ownership in the following forms:</p> <ul style="list-style-type: none"> • provision of state guarantees or local guarantees; and • financing from state or municipal budget. <p>The Procedure governs provision of state support to PPPs in relation to objects owned by the State. Provision of support in relation to objects held in municipal ownership is subject to regulations adopted by respective municipal authorities.</p> <p>In practice, this option is hardly implementable because of the peculiarities of the local budget process which foresees a possibility to budget any financial support only for one year. Due to the fact that the budget should be voted annually there is a risk that the financial support will not be included into the</p>
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			respective budgets for subsequent years and thus will not be paid.
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?	✓ ✓	Article 18 of the PPP Law	The Public Authority may provide any type of financial support which is not prohibited by the Ukrainian legislation. In practice it is rather complicated for the private partner to receive such support due to peculiarities of the budget process.
5. If the answer to the previous question is <i>Yes</i> , does the Law clearly state which public authorities may provide such support and which types of support can be provided? (i.e. <i>tax and customs benefits; foreign exchange protection (convertibility and transfer guarantees; subsidies; equity or loan participation)</i>)?	✓ ✓	Article 18 of the PPP Law	<p><i>"Depending on who holds title to the respective public private partnership facility, the decision on providing government support for the public private partnership shall be made either by the Cabinet of Ministers of Ukraine or the executive authority designated by it, or by a respective local self-government authority, or by the Council of Ministers of the Autonomous Republic of Crimea, in line with the law."</i></p> <p>The support may be provided in any form that is not prohibited by the Ukrainian legislation. The Ukrainian tax legislation does not provide for any tax privileges to be granted to the private partner. The Budget Code of Ukraine provides only for the following types of support: loans, state/municipal guarantees, partial financing of the project. Due to absence of the clear definition of other types of support that may be given to the private partner this issue is subject to negotiation and public partners tend to refuse to provide any support which increase their financial obligations.</p>



5.3 Lenders' rights

QUESTION	ANSWER	ARTICLE	COMMENTARY
<p>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>)?</p>	<p>✓ ✓</p>	<p>Final provision PPP law</p>	<p>The final provision of the PPP law provide for the addition of a new provision under article 8 of the Concession law as follows:</p> <p>"The concession agreement shall be signed with the winning bidder, not later than within three months of the day when the tender results are announced, according to the procedure and on the terms set forth in this Law. These times frames may be extended upon the winning bidder's written application".</p> <p>Such a provision give limited time for reaching ficial closing but with a possibility of extension of time.</p>
<p>7. Does the Law provide, in the event of the default of the Private Party for the lenders to "step-in" or substitute the Private Party with a qualified new Private Party without initiating a</p>	<p>✗ ✗</p>		<p>Not specified by the PPP Law</p>



new tender process?			
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6. SETTLEMENT OF DISPUTES AND APPLICABLE LAWS⁹

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?	✓ ✓	Art 16 Concession Law	<p>Disputes arising from concession contracts with the participation of non-residents shall be settled according to the procedure provided for by the legislation and can be considered by an international court of arbitration in the location specified in the contract.</p> <p>No specific reference to International Arbitration in the PPP law.</p> <p>Disputes arising from concession contracts with the participation of non-residents shall be settled according to the procedure provided for by the legislation and can be considered by an international court of arbitration in the location specified in the contract.</p> <p>No reference is made to arbitration in the PPP law.</p> <p>Under the Ukrainian legislation all disputes where one of the parties is a foreign legal entity or a foreigner may be considered by international arbitration unless the</p>

⁹ For further information on the settlement of disputes, please refer to: PFI Guide, Consolidated legislative Recommendations, Recommendations 57, 69 and 71.



			dispute falls under the exclusive competence of Ukrainian court
2. Has the government of the country ratified the Washington Convention on the Settlement of Investment Disputes (ICSID) (1965)?	✓ ✓ ✓		Ratification June 7, 2000
3. Has the government of the country ratified the New York Convention on recognition and enforcement of foreign arbitral awards (1958)?	✓ ✓ ✓		Ratification October 10, 1960



6.2 Applicable laws

QUESTION	ANSWER	ARTICLE	COMMENTARY
<p>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.</p>	<p>✓ ✓</p>		<p>Such possibility is not specified by the PPP Law but not prohibited</p>
<p>5. Has the country ratified any international convention for the protection of foreign investments?</p>	<p>✓ ✓ ✓</p>		<p>Ukraine ratified about 71 bilateral agreements for protection of foreign investments</p>



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

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

7. POLICY FRAMEWORK

7.1 Existence of PPP Policy Framework

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Is there a general/national policy framework (explicit or implicit) for PPPs for infrastructure or public services?	XX		The governmental authorities consider that implementation of the pilot PPP project under the newly adopted PPP legislation will be the best guidelines.
2. Is there any administrative guidance or printed information edited by the government or the PPP Unit concerning the legal framework for PPP projects in the country?	XXX		
3. Is there a municipal/regional policy framework (explicit or implicit) for PPPs in infrastructure or public services?	XXX		



7.2 PPP Awareness and Sustainability

4. Is there a national and/or municipal /regional long term programme for PPP promotion and awareness?	××		The PPP informative programme is, as a rule, done by NGOs and they are not related to government or self-governance authorities.
5. Are there PPP training programmes on a national and/or municipal/regional level for public servants and other PPP concerned people?	××		
6. Are there PPP courses as part of university curriculum or specialist departments and faculties in universities teaching PPP?	×××		



7.3 Obstacle to implementation of PPP Policy

<p>7. Are you of the opinion that there are no social/political obstacles to implementing PPP in the country (e.g. grass roots opposition, policy measures against private sector participation in public infrastructure/services, etc.)?</p>	<p>× ×</p>		<p>The lack of awareness about positive features of the PPP leads to the lack of the social support for the PPP in Ukraine.</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>The PPP legislation should be harmonised with other legislation because in most cases it contradicts other effective laws and does not supersede other not properly adapted legislation such as investment protection, taxation and other regulatory constraint., Moreover, a simplified mechanism of implementation should be designed for certain provisions of the PPP legislation (e.g. land issues, etc.)</p>



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

8. INSTITUTIONAL FRAMEWORK

8.1 Existence and role of PPP Central Units/Agency

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Is there a specialised institution/agency/ministerial department established to promote PPP and to serve as Central PPP Unit?	✓ ✓		There is no single PPP unit in Ukraine. There are several governmental authorities responsible for the PPP in Ukraine, including the Ministry of Economic Development and Trade, National Projects Agency, Ukrainian PPP Center etc. Ukrain is working on the creation of a Central PPP Unit with the assistance of UNECE
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?	× × ×		All people employed by above- mentioned agencies and authorities are state officials.
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?	XX		The role of the authorities mostly encompasses: advice on implementation of particular project, analysis of effectiveness as well as supervision over the implementation. The Agency for National Projects that



			closely follows up all projects they implement including negotiating receipt of permits by private partners, etc.
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>)?	✓ ✓		The Ministry of Economic Development and Trade is the authority responsible for approval of the final PPP agreement. Consents of other Ministries (Ministry of Infrastructure, Ministry of Housing and Utilities) are required at certain stages, e. g. approval of the tender documentation.
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?	XX		Ukrain PPP Center partly as a non governmental organization.

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?	XXX		No yet but Ukrain is working on Center PPP Unit with regional branch
7. Is there any specific PPP unit department in any ministry (other than the central PPP unit) or at sectoral level?	XXX		There are certain departments or officials in all Ministries responsible for PPP programmes. Only in Agency on National projects, but not formally



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?	XXX		
9. Is the <i>division of power</i> between different public authorities involved in the PPP granting process simple and coordinated?	XX		There is no clear division of powers between the state authorities on how the authorities should work on PPP projects. The division of powers between the Ministry of Economic Development and Trade and the National Projects Agency is subject to interpretation of these powers by the respective authorities.

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>)	XX		No project has been implemented so far under the newly adopted Law of Ukraine "On Public Private Partnership". The potential for PPP was not used for the



			<p>construction of Stadium for the football Euro championship cup but nevertheless with some private financing</p> <p>However, there are several on-going lease and operating and concession projects that were implemented in various parts of Ukraine before the PPP Law entered into a force.</p>
<p>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>)?</p>	XX		<p>Pursuant to the mass media information the private partner in all projects was selected pursuant to the results of the tender. However, the tender documents, records and justification of the decision of the respective authority is not available in open sources.</p>
<p>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?</p>	✓ ✓		<p>Several long-term lease and operate agreements and concession agreements were concluded prior to entering into force by the newly adopted Law of Ukraine "On Public Private Partnership", The Lugansk concession agreement is effective for 25 years and the Odessa lease and operation agreement is effective for 49 years.</p>

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

<p>4. Have most of the awarded PPP projects been successfully implemented and put into operation in compliance with the Law?</p>	<p>XXX</p>		<p>All existing PPP projects were implemented before the PPP Law came into the force. In the past numerous PPP transaction even with special law did not achieved the financial closing and as a result failed to be performed as PPP transactions and ended up as traditional public procurement contracts.</p> <p>The projects listed below are on-going and for the moment there is no official information with regard to successfulness of their implementation. However, pursuant to mass media information despite practical problems all of the partners are complying with the established requirements but some of the projects awarded in the past have faced difficulties.</p>
<p>5. Has a PPP project ever been awarded and implemented in the country at the local /regional /municipal level in compliance with the Law?</p>	<p>XX</p>		<p>Most of the PPP projects awarded in the past as listed below are concluded on the municipal level, only projects related to see ports and roads are concluded with the State as a public partner. The mentioned projects were implemented before the PPP Law entered into a force.</p>



6. Have PPP project ever been awarded in the country in the non merchant sector (<i>such as Hospital, School, prisons</i>) and not exclusively in the merchant sector (<i>energy, water, transport</i>)?	×××		
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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)?
- Please give some examples of the most significant project awarded:
 - under which legal form have such PPP projects been awarded (**Concession**, BOT, PFI, other):
 - have such PPP project been granted by (i) central, (ii) sub-sovereign/regional (if applicable) or (iii) **municipal government** as Contracting Authority;
 - when did PPP begin to be awarded in the country: (i) in the last 10 years or before; (ii) **in the last 5 years**; or (iii) within the past few years only; and
 - *please give examples of any PPP projects awarded but not implemented (or not implemented under a PPP form) – for example production sharing agreement (VENCO)*
 - are there any PPP/Project Agreements in discussion? **YES**

As the examples of the PPP in Ukraine we may indicate the following:

- (a) Heating: 32 publicly owned heating structures were transferred into lease in Ukraine. There is also an example of successful heating concession project in Artemovsk (private partner - a Lithuanian company E-Energija), lease and operation of heating



producing facilities for 50 years_ContourGlobal (USA company) and the Kramatorsk City Council. Last two projects have a lot of problems now

- (b) Potable water supply and sewage: concession project in Lugansk (private partner – a Russian company Rosvodokanal) **it is very negative example**, lease and operate project in Odessa (private partner – a Russian company Infox), lease and operate project in Kirovograd.

Moreover, last year the Ministry of Housing and Utilities of Ukraine (**new name - Ministry of regional development, construction and housing and communal infrastructure**) received a loan from the World Bank for maintenance and development of municipal water supply and sewage infrastructure. Currently, Chernigiv, Ivano-Frankivsk, Mykolaiv, Novograd-Volynskyi already received financing and there are several on-going negotiations with other towns such as Berdyansk etc (**Not correct. The all enterprises and cities for this project were elected in 2009 – near 15**).

Currently the concession of water supply and sewage infrastructure is negotiated in Artemovsk.

- (c) Sea port construction. The most well-known projects are: increasing the cargo handling facilities in Berdyansk Sea Port and development of a logistics service centre on the territory of the Sea Port of Odessa. The details of legal structuring are not available.

Please note that there are several on-going PPP projects which have successfully undergone all preparatory stages including execution of agreements with the private partners. However due to different reasons, the private partners are currently experiencing certain financial difficulties. For instance, in the Lviv-Krakovets highway concession project, the Polish company won the tender and entered into concession agreement, however due to the failure of the private partner to provide expected financing (private partner is a bankrupt in Poland) the implementation of the project was terminated.

The public partners under the mentioned above projects are local self-governance authorities, however, the projects related to the sea ports are implemented in the cooperation with the Cabinet of Ministers of Ukraine represented by the former Ministry of Transport and Communications.



As a type of the PPP project we may indicate so-called National Projects which are implemented under the control of the President of Ukraine, however, as a rule they tend to be implemented on the basis of public procurement.

9.3 Challenge of PPP

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?	XX		The Ukrainian legislation provides theoretically satisfactory means to dispute the tender procedure results.
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?	XX		The compensation and its amount should be defined upon discretion of the judge. In principle, theoretically it is possible to receive a decision under which the compensation should be paid.
9. Have PPP project been implemented by the parties most generally without serious claims/arbitration by either Party concerning the performance of the Project Agreements under the Law?	N/A		The law is too recent No PPP project was implemented under the PPP Law. However, we are not aware of any disputes arising from the on-going PPP Projects under different contract form.
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		The PPP Law is too recent We are not aware of such cases under the Concession law or other law



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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.*