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Short Term High Quality Studies to Support Activities under the Eastern Partnership

HiQSTEP PROJECT

STUDY ON THE ANALYSIS OF LICENSING AND FISCAL FRAMEWORKS FOR CONCESSION AGREEMENTS IN THE ENERGY SECTOR IN THE EASTERN PARTNER COUNTRIES

COMPONENT 1 REPORT:

ASSESSMENT OF THE PPP LEGAL FRAMEWORK AT EASTERN PARTNER COUNTRIES WITH EMPHASIS ON ENERGY RELATED CONCESSIONS AND PPP PROJECTS

September 2017

updated in October 2018

Preface

The present report is a deliverable of Component 1 of the **STUDY on Analysis of Licensing and Fiscal Frameworks for Concession Agreements in Energy Sector in the Eastern Partnership Countries,** carried out in the framework of the EU funded project **Short Term High Quality Studies to Support Activities under the Eastern Partnership – HiQSTEP, EuropeAid/132574/C/SER/Multi**'. The HiQSTEP Project is implemented by an international consortium under the leadership of Kantor Management Consultants. The present study supported the activities of Platform III "Energy security"– of the Eastern Partnership.

The EaP Platform III Work Programme 2014-2017 has identified Public Private Partnerships, including licensing and concessions for the energy sector as a priority area. The DG NEAR and DG ENERGY are the driving forces in cooperation with the EaP Countries on this theme.

The present study was implemented by a team of international and local experts under the leadership of **Vagn Bendz Jørgensen -** Study Team Leader and international energy expert; and composed of **Evangelia Vassilaki –** international legal expert and the following national experts: **Vardan Grigoryan** (Armenia), **Asya Chalabova** (Azerbaijan), **Maxim Shapelevich** (Belarus), **Tamta Nutsubidze** (Georgia), **Tatiana Vieru** and **Elena Stratulat** (Moldova) and **Vitaly Radchenko** (Ukraine).

Przemysław Musiałkowski, Team Leader of the HiQSTEP Project, was responsible for the overall supervision, quality check and management.

Sincere thanks go to the national experts and stakeholders in all six countries who provided information through interviews and responses to questionnaires and contributed to the practical implementation of the study.

September 2017

CONTENT

Abbreviations and acronyms

AM	Armenia
AZ	Azerbaijan
BOO	Build, Own, and Operate contract
BOOT	Build, Own, Operate and Transfer contract
BY	Belarus
CHP	Combined Heat and Power Production
CSI	Centre for Strategic Initiatives of the Government of Armenia
EaP	Eastern Partnership
EU	European Union
EUD	Delegation of the European Union
GE	Georgia
HiQSTEP	High Quality Studies for the Eastern Partnership
HPP	Hydro Power Plant
IICB	Inter-Ministerial Infrastructure Coordination Board
IPP	Independent Power Producer
MD	Moldova
ME	Ministry of Energy
MEAT	Most economically advantageous tender
MOE	Ministry of Economy
MOF	Ministry of Finance
PPA	Power Purchase Agreement
PPP	Public Private Partnership
PSA	Production Sharing Agreement
RES	Renewable Energy
STL	Study Team Leader
TA	Technical assistance
TFEU	Treaty on the Functioning of the European Union
TPES	Total Primary Energy Supply
UA	Ukraine

1. EXECUTIVE SUMMARY

The areas covered by the present Report are related to the observance of the principles of transparency, equal treatment, and non-discrimination in the Eastern Partner Countries. In this framework, targeted elements are the existence of a regulatory framework for concessions/PPPs, procurement of concessions/PPPs, and contract management (not covering monitoring, i.e. government's ability to monitor the project during contracting and operation phase).

As a general remark, it should be mentioned that the enacted or envisaged legal framework in the Eastern Partner Countries tends to take a more structured approach to entering into concessions or PPPs. Although in some countries (Belarus, Moldova, Armenia and Ukraine) PPP/concessions legislation is relatively recent, new revisions are currently under way in Belarus, Moldova and Ukraine. In Georgia, competent authorities are currently elaborating a PPP legal framework including concessions.

In most of the EaP Countries, the implementation of the envisaged or the existing PPP legislation is supported by the establishment of PPP Units which offer advice and, in some cases, quality control of the procedures. PPP Units are typically established centrally under the Government or within the Ministry of Economy. In Azerbaijan the approach is different, as the main focus has until recently been on oil and gas managed through production-sharing contracts (PSAs). However, a State Agency for Alternative and Renewable Energy Sources was established to promote alternative energy sources. In addition, the Government's programme foresees activities aiming to improve the regulatory framework for PPPs by 2020 including a support mechanism for the development of PPP, which could potentially evolve in a PPP Unit. The Ministry of Economy is responsible for this programme and few details are available to date.

So far, few projects in the energy sector are being implemented in accordance with the new legal frameworks. Typical areas of investor interest are independent power projects and especially renewable energy projects, such as hydropower, photovoltaic and a few wind projects. In spite of the fact that transmission in the electricity sector is typically under government control, some distribution companies have been privatised. In addition, at local level, there are projects emerging on waste management and incineration.

In the oil and gas sectors (exploration/production) Production Sharing Agreements (PSAs) are the most common form of contracting.

As it is highlighted in the following chapters, each of the Eastern Partner Countries adopts its own approach concerning regulation of concessions and public private partnerships. As a result, in order to capture a general understanding of each country's regulations and their assessment thereon, a rather detailed review is required in order to cover not only the relevant legal acts and secondary legislation but also relevant practices as well as the broader energy market environment. Therefore, as the whole inception phase relies on consultation with local experts and local authorities as well as research on PPP law and practices, the measurement of such practices does not allow for a **short** overview of the situation in the Eastern Partner Countries. More specifically, in Section 5 (Energy Environment), the applicable legal framework and forthcoming initiatives are presented along with an assessment of legislation per country, as well as identification of the gaps. In the Annexes (8-13) details of the legislation and status for concessions and PPPs are presented.

1.1 PPP regulatory framework

The legal systems of the six Eastern Partner Countries vary in terms of regulating PPPs and concessions, while in most of the six EaP Countries the definition of "concession" is not in line with the EU criteria.

In some of the countries, PPP law is supplemented by a concession law, which is again supplemented by public procurement legislation (Moldova, Ukraine and Armenia). It should be underlined that PPPs/concessions are rarely regulated by a single legal document, but rather by various legal texts of different hierarchy (laws, decrees, governmental decisions, policies etc.). In three Eastern Partner Countries, PPP laws coexist with concession laws (Belarus, Moldova, Ukraine). In Armenia, concessions constituted part of the procurement law and recently a combined PPP/Concession law was approved. A general procurement law is also in force in Armenia. In Georgia and Ukraine old concession laws exist, however, they have never been applied in practice and an ad hoc special framework has been elaborated by the Ministries of Energy of both countries for all PPP projects in the field of energy. At present new legislation on PPP and Concessions is being drafted in Georgia and Armenia

None of the EaP countries' legislation includes a law specific to PPP/concessions for the energy sector, although according to a specific provision in the Ukrainian law the sectors eligible for PPP are gas distribution and supply, generation, distribution and supply of electricity.

In Azerbaijan, there is no PPP law. However, procurement is conducted according to the Subsoil Act and the Energy Law as well as according to the Law on Implementation of Construction and Infrastructure Facilities under Special Funding of 2016. In practice, any Production Sharing Agreement (PSA) for oil and natural gas is approved by a law and overrules any other potential conflicting law. The details of a PSA have to be negotiated with the line Ministries involved. Azerbaijan has considerable resources of oil and natural gas, and emphasis on this is to be expected. The Government's programme for 2020 foresees the elaboration of a PPP legislative framework.

Regarding Procurement of PPPs; in most of the Eastern Partner Countries the selection of the private partner is, in principle, carried out through a tender process following either the general public procurement rules or specific rules especially adopted for PPPs or concessions. The mandatory elements which have to be included in the tender documentation cover bidders' access to procurement related information, a minimum period for the preparation of bids, answers to bidders' requests for clarification and the contents of the bidding documentation. Often a draft contract and the bid selection criteria are included. The next steps are negotiation during the award phase and the publication of award notice.

In this respect, Armenia and Moldova seem to perform closer to generally recognised good practices. In Belarus certain law deficiencies have been identified, whereas in Georgia low compliance with international practice is observed. However, in Georgia efforts have been initiated for the establishment of a new legal framework ensuring the observance of detailed procedures. In Ukraine there is no uniform tender procedure neither for PPPs nor concessions.

Indicatively, according to the data collected:

- The legal system in Armenia, Georgia (in PPP Policy), Moldova and Ukraine Principles of transparency, non-discrimination should be applied according to the Law;
- A minimum period for the preparation of bids is specified which is not shorter than 30 days in the following EaP Countries:
  Armenia, Belarus (PPP), Moldova and Ukraine;
- Public procurement notice is included in the bidding documentation in the following EaP Countries: Armenia, Belarus, Moldova, Ukraine;

- Clarifications on bidding documents are provided in the following EaP Countries: Armenia and Moldova;
- Draft contracts can be produced by the PPP units in the following EaP Countries: Armenia, Belarus, Georgia and Ukraine;
- Publication of award notice is part of the procurement procedure in the following EaP Countries: Armenia, Belarus, Moldova (PPP) and Ukraine.
- As regards Azerbaijan there is no information available on timeframes concerning tender notifications. But it could be developed according the Government's programme for improving the regulatory framework related to PPP.

While some of these remarks might be considered sceptical, it should not be overlooked that a great deal of efforts was made in recent years, in order to establish adequate legislation and practices and the work is ongoing.

Table 1: Legislation in Eastern Partner Countries and PPP units.

	PPP Law	**Concession Law**	**PPP Unit**
Armenia	New law in June 2017	Included in the new PPP law	Planned to be established, delayed due to Government change
Azerbaijan	Envisaged by 2020	None, could (or will) be included in imminent PPP law	None (Bid commission has some functions) PPP Unit an option by 2020
Belarus	Yes, 2015	Yes, 2013	Yes
Georgia	Approved in 2018	To be included in PPP law. Old concession law not functioning	Established in October 2018
Moldova	Yes	Yes, re-drafting during 2017	Yes
Ukraine	Yes, at MoE Currently under revision	Yes, currently under revision	Yes

The existing PPP Units have been very recently established. In this respect, there are only few examples of how procurement and contract management for energy projects is conducted in practice.

1.3 PPP contract management

Eastern Partner Countries handle renegotiations and early termination differently: either by addressing it in the regulatory framework (Belarus, Moldova, Ukraine), or by considering it to be solely a contractual matter (Georgia). In Armenia, the existing law does not foresee special provisions. No information on contract management is available for Azerbaijan.

As regards compensation, in Armenia general provisions of the Civil Code apply; in Belarus and Ukraine the law foresees the specific cases where compensation may be sought; in Georgia compensation is treated as a contractual matter ; in Moldova and Azerbaijan no such legal provisions exist.

1.4 Existence of a PPP unit

Several institutions involved with PPP management and/or advice have been identified in the EaP countries, as mentioned in detail and per country below:

- In Armenia there is no such institution**,** but it is planned to be established, probably within the Ministry of Economy or within the Strategic Agency. In Autumn 2017 establishment of a PPP Unit was on the Governments programme but has been delayed due to change of Government. Since then the Strategic Agency has been dissolved and the PPP Unit is still to be established.
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- In Azerbaijan the Bid Commission at MoF constitutes such an institution. It has some relevant functions, but cannot be considered a PPP unit. The establishment of support mechanisms for PPPs has been scheduled for 2020 and could include a dedicated PPP Unit.
- In Belarus there is the Public Private Partnership Centre of Belarus. MoE and MoF have some functions related to coordination of PPPs
- . In October 2018 the PPP Unit was established with direct reference to the Prime Minister.
-
- In Moldova, the Public Property Agency within MoE has a key role and an inter-ministerial council on PPPs is established.
- In Ukraine, a PPP unit operates within MoE.

1.5 Main recommendations

Detailed assessments ,the summary of assessments and gaps identified can be found throughout the report (e.g. in the Country Reviews in Section 5-7). The following table contains the main recommendations for the Eastern Partner Countries as a whole and per country.

The EaP countries are expected to benefit at a regional level from a more transparent and homogeneous regulatory framework , as it will attract investments from abroad and among member countries. In Table 2 below, recommendations with a specific regional impact are marked with an (R).

Table 2. Main legal recommendations and potentially responsible body

Country	Main legal recommendations and potentially responsible body
All Eastern Partner Countries	1. A supportive institutional, legal and regulatory framework that would encourage long-term development of the countries' resources in accordance with international practices should be created. (Governments supported by donors) (R). 2. Consistency of PPP projects with investment priorities should be ensured. (Governments) 3. Enforcement of practices related to disclosure of information on PPP/concessions, as there is a considerable scope for improvement (Line ministries and local authorities, PPP Units could assist) (R). 4. A transparent information system should be developed, as it is essential during the contract management phase of PPP/concessions. (Could be performed by the PPP Units) (R).
Armenia	1. Enactment of a legal framework supportive of PPP/concessions (including settlement of disputes though international arbitration). (The PPP law incl. concession was approved in June 2017, but details are not yet known.) (R)). 2. Enhancement of the identification, selection and procurement stages of infrastructure projects. (Government) 3. Elaboration of an Infrastructure Plan. (Government and line ministries). 4. Establishment of a PPP Unit. (In progress) (R).

Azerbaijan	1. Enactment of a legal framework supportive of PPP/concessions entailing the modern understanding of PPP/concessions. (In the Government programme by 2020) (R). 2. Establishment of a clear procurement process suitable for PPP/concessions structures upholding the principles of transparency. (Government). (R). 3. The foundations of the contract should be provided by the law and not agreed occasionally on an *ad hoc* basis. (Government) (R). 4. Establishment of a PPP Unit. (Government) (R)
Belarus	1. Enactment of a single law regulating both concessions and PPPs. (Government) (R). 2. Introduction of clear definitions for “PPP” and “Concession”. (Min. of Justice) 3. Legal provision for the award criteria and balancing of the obligations between the State and the concessionaire. (Government and donors). (R). 4. More concrete provisions as regards the management phase of the contract. (Government and donors). (R).
Georgia	1. Establishment of legal environment for PPP/concessions that creates a sufficiently solid legal basis for the development of PPPs. (In progress. Government and Min. of Economy). (R). 2. A transparent competitive process is essential to be initiated for achieving better outcomes for projects and efficiency gains in infrastructure. (Min. of Economy). (R). 3. Establishment of a PPP Unit. (Min. of Economy) (R).
Moldova	1. Enactment of a clear framework on Concessions. (Government) (R). 2. More detailed elaboration of provisions as regards management phase of the contract (e.g. compensation issues, modification during contractual period etc). (Min. of Economy/PPP Unit) (R). 3. There is considerable scope to improve practices related to procedures followed. (All authorities) (R). 4. Uniform application of the PPP Law avoiding unjustified deviations. (All authorities) (R).
Ukraine	1. Introduction of a simple definition of the concept of “PPP” in the law in accordance with international practices. (In progress. Min. of Economy) (R). 2. Introduction of a single systematic legal framework for all PPP projects. (Min. of Economy) (R). 3. Application of a unified tendering procedure for all PPP contracts. (Min. of Economy, PPP Unit) (R). 4. Improvement of practices related to information published regarding rejected offers. (PPP Unit) (R).

2. BACKGROUND AND PURPOSE

The global objective of the "Study on the analysis of licensing and fiscal frameworks for concession agreements in the energy sector in the Eastern Partner Countries" under the **HiQSTEP** project is to provide support to the beneficiaries in rationalizing and streamlining their PPP frameworks in the energy sector, with particular emphasis on concession agreements. The project is divided into four components:

Component 1: An assessment of the PPP legal framework at Eastern Partner Countries

Component 2: Identification of PPP units established in Eastern Partner Countries, assessment of the tasks entrusted to them as well as their decision-making and enforcement capabilities

Component 3: Development of a standardized proposal for procurement procedure and award of concession agreements.

Component 4: Development of an online portal specifically for PPPs in Eastern Partner Countries

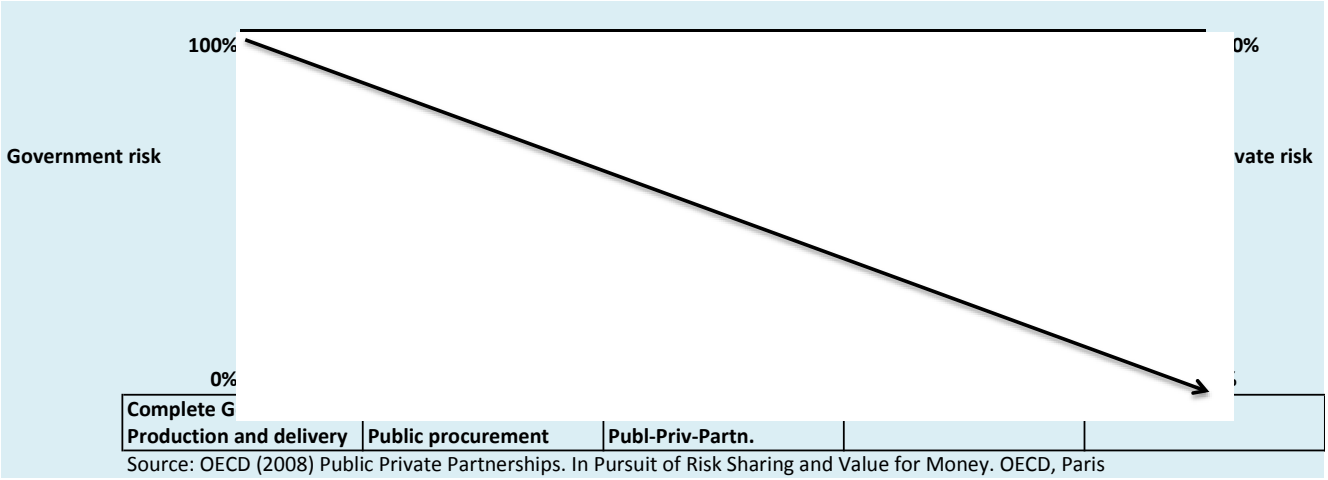
In general, a concession is defined as the right to undertake and profit by a specified public activity over a longer term and being subject to economic risks of the activity. In some cases, the concessionaires obtain an exclusive right to develop the activity within an area, but there could also be more concessionaires working in the same field.

In the Terms of Reference of this study under HiQSTEP, a concession is defined as a "long term (25-30 years) complex public-private partnership (PPP) where the concessionaire assumes responsibilities and risks traditionally borne by the contracting authorities and normally falling within their remit. The main feature of a concession, is that the right to exploit the works and/or services, always implies the transfer to the concessionaire of an operating risk of economic nature involving the possibility that the concessionaire will not recoup the investments made and the costs incurred in operating the works or services awarded under normal operating conditions, even if a part of the risk remains with the contracting authority or contracting entity".

Concessions are normally implemented when a public owned natural monopoly outsources the activity to an economic operator. A concession is a sub-category of public private partnerships and can have various forms. Public Private Partnerships involve a combined effort by both the public and the entrepreneur with a larger risk for the public compared to concessions.

In Figure 1 the relation between the public monopoly and ultimately complete privatisations is illustrated with emphasis on the risk distribution.

Figure 1. Public and private participation classified according to risk and mode of delivery.



Source: OECD (2008) Public Private Partnerships. In Pursuit of Risk Sharing and Value for Money. OECD, Paris

In Europe, concessions are normally issued for projects comprising activities, either publicly or privately operated which would benefit from absence of direct competition; the so-called “natural monopolies” such as railways, ferry routes, postal services, electrification, highways and exploration for oil and natural gas. During the 70’s, focus shifted on exposing the natural monopolies to competition, which to a high degree has taken place. The electricity sector is an example.

Postal service is an example of a traditional natural monopoly challenged by technological development. Internet and E-mail have reduced the need for traditional letters, and delivery services by private operators such as DHL/UPS and local bicycle deliveries have challenged the traditional postal service where important letters and parcels are concerned.

The liberalisation of the electricity and gas markets in the European Union started with a complete restructuring of these markets in the 90’s. Before that, an end user was tied to the one and only supplier. The licensed distribution company often has the duty to supply consumers of “last resort”, i.e. consumers not able to select an alternative supplier. The distribution company must also open the networks to alternative suppliers. Today the end users (enterprises and households) are free to select any supplier operating in their market. Transmission operations have been distinguished from generation and distribution, and the intention is that the transmission system operators are neutral in relation to commercial interests of generators and distributors. The transmission companies within the EU have to be certified. The EU regulations have been revised by the 3rd Energy Market Package of 2009. Also, the concept of an energy regulator has been introduced to secure control of the market developments and the tariffs.

Implementation of these principles has caused a tremendous change in the structure of electricity supply within the EU and has been completed with various models in the member countries.

In 2014, the European Union approved three directives on concessions and public procurement regulations:

1. Directive 2014/25/EC on coordinating the procurement by entities operating in the water, energy, transport and postal services sectors, repealing directive 2004/17/EC. The deadline for the implementation of this directive was 18 April 2016.
2. Directive 2014/23/EU on the award of concession contracts. The deadline for the implementation of this directive was 18 April 2016.
3. Directive 2014/24/EU on public procurement, repealing the directive 2004/18/EC. The deadline for the implementation of this directive was 18 April 2016.

These directives and their most important features will be presented in Section 3.

The overall objectives of these directives are to achieve:

- A fair procurement practice without discriminating or eliminating relevant candidates during the tender process.
- Reasonable timeframes for reacting to the procurement notice (after being published in the EU Official Journal).
- Transparency in the evaluation criteria for the candidates’ offers and qualifications
- Competition among candidates
- Same level of information to all tenderers
- Provision of information / justification concerning the contract award to all tenderers, within reasonable timeframes.

2.1 Description of the assignment, objectives and expected results

2.1.1 Objectives

The **Objective of Component 1** is to present an updated assessment of the PPP legal framework in Eastern Partner Countries with particular emphasis on energy related projects.

Component 1 activities consist of a detailed and updated assessment of the PPP framework in each of the six Eastern Partner Countries. The assessment has been carried out by taking into consideration at least the following criteria (according to the ToR):

- The availability of laws regulating concessions in general and energy concessions in particular and whether they allow easy access to a clear, fair, predictable and stable environment for projects with private sector participation ("PSP").
- The availability of laws and regulations providing for the selection of a concessionaire on a transparent and, as a rule, competitive basis and with clear and non-discriminatory rules on eligibility.
- The availability of laws and regulations ensuring non-discriminatory, transparent and stable terms and conditions for concession agreements that would promote new investments and rehabilitation of existing infrastructure.

The present report is the output of the Component 1 of the study and, as foreseen in the ToR, includes a gap analysis with the aim to identify differences between the PPP frameworks in the EaP Countries and best practices applicable to them.

The World Bank, EBRD, EIB and OECD have carried out comprehensive work on guidelines and examples which has been reviewed. Unfortunately, there are few cases for energy. To this end, the study team focused its research on the energy sector and the cases are presented in the following chapters.

The team performed a review of EU practices with respect to the procurement procedure of PPP contracts for oil/gas exploration and production, transmission and distribution of electricity or gas, gas storage and/or generation capacity if applicable, including the tendering process, the terms and conditions of PPP agreements as well as a review of the relevant fiscal policy.

As part of Component 1, a gap analysis has been performed and practices of Eastern Partner Countries have been compared and contrasted to current and forthcoming (as a result of Directive 2014/23/EU) EU practices, with the aim to identify best practices applicable to Eastern Partner Countries. Focus has been strictly placed on energy related concessions.

2.2 Method

2.2.1 EU legislation and cases

The relevant EU legislation has been reviewed and explained in detail and the most important requirements have been underlined. The case studies from the EU are selected mainly through desk analysis and interviews with the stakeholders. Unfortunately, most of the cases identified/described by international organisations are mainly focusing on water, sanitation, transport, telecommunication, healthcare, education, ports, airports and roads (mainly highways) and few, if any, examples are related to energy. The cases presented in this report have been reviewed by the international expert assisted by the national legal experts of the study and the authorities/enterprises involved.

2.2.2 Legislation in Eastern Partner Countries

The present legislation and trends in the Eastern Partner Countries have been identified and analysed by the national legal experts of the study. As most of the national legislation is only available in the respective national languages, the report is based on the delivered input from the local experts. The feedback from the Eastern Partners is presented together with an assessment and gap-analysis. The first round of information was collected through a structured questionnaire. A second round followed involving clarifications, while further information was gathered during the missions to the EaP Countries. The information collection phase was concluded on the 28th of April 2017. However, later developments until October 2018 have been included in the report.

3. EU LEGISLATION AND CASE-STUDIES

3.1 EU directives on Concessions and PPPs

3.1.1 The EU Directive on Concessions (2014/23/EU)

A. Introduction

Public authorities conclude contracts to ensure the supply of works and delivery of services. These contracts, concluded in exchange for remuneration with one or more operators, constitute public contracts and represent an important part of the EU's GDP.

Legal basis: Articles 26, 34, 53(1), 56, 57, 62 and 114 of the Treaty on the Functioning of the European Union (TFEU).

Following the adoption of various normative acts since the 1960s, the Community decided to simplify and coordinate public procurement legislation and adopted four directives to this end (92/50/EEC, 93/36/EEC, 93/37/EEC and 93/38/EEC). Three of these directives were merged, with the aim of simplification and clarification, into Directive 2004/18/EC on public works contracts, public supply contracts and public service contracts (amended by Directive 2005/75/EC) and Directive 2004/17/EC on the water, energy, transport and postal services sectors. Some annexes to both directives were amended by Directive 2005/51/EC. Directive 2009/81/EC introduced specific rules for defence procurement, which should make it easier for companies to access the defence markets of other Member States.

A new public procurement package was adopted in 2014 by the Parliament and the Council with the aim of simplifying procedures and making them more flexible in order to encourage access to public procurement for SMEs, and to ensure that greater consideration is given to social and environmental criteria. The legislative framework includes **Directive 2014/24/EU** of 26 February 2014 on public procurement (repealing Directive 2004/18/EC) and Directive **2014/25/EU** of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors (repealing Directive 2004/17/EC). The new public procurement package is completed by a new directive on concessions (**Directive 2014/23/EU of 26 February 2014 on the award of concession contracts**), which sets up an appropriate legal framework for the award of concessions, ensuring that all EU economic actors have effective and non-discriminatory access to the EU market, and provides greater certainty as to the law in place. Please note that for oil and natural gas exploration and production concessions the Directive 94/22/EC on the Conditions for Granting and using Authorisations for the prospection, exploration and productions of hydrocarbons is still in force and is explicitly excluded from the Concessions Directive. (Source: http://www.europarl.europa.eu/atyourservice)

B. The introduction of a new legal framework on Concessions

The following elements of the new Directive are worth noting:

A) It is not limited to a traditional codification of general principles deriving from the TFEU, applicable on concession contracts, but, basically, it sets new rules that will govern the new externally financed projects to be completed within the EU through concession contracts. Thus, the new provisions are not confined to a simple presentation of these principles but to the introduction of a new legislative policy adopted for this important sector of economy.

B) The obvious innovative concept of the European Legislator regarding new concession contracts. More specifically:

   i. Introduction of a legal framework, covering not only works but also services, considering concessions to have a single character - not only during the procurement stage, but also during the execution of the contract.

   ii. The expansion of the policy as regards the corresponding contracts of the exempted fields (except water).

C) The Directive includes a comprehensive definition of concession and a more logical framework.

New Definition of "Concession"

1. According to article 5 of the Directive :

"Concessions' means works or services concessions, as defined in points (a) and (b):

(a)'works concession' means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the execution of works to one or more economic operators the consideration for which consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment;

(b)'services concession' means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works referred to in point (a) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment.

In Preamble (11): Concessions are contracts for pecuniary interest by means of which one or more contracting authorities or contracting entities entrusts the execution of works, or the provision and the management of services, to one or more economic operators. The object of such contracts is the procurement of works or services by means of a concession, the consideration of which consists in the right to exploit the works or services or in that right together with payment. Such contracts may, but do not necessarily, involve a transfer of ownership to contracting authorities or contracting entities, but contracting authorities or contracting entities always obtain the benefits of the works or services in question.

In light of the above, the directive clearly states that irrespective of who maintains ownership and to whom the ownership of the facility is transferred, at the end, the works and services that the contracting entity promotes, are destined to cover of public needs of the society e.g. civilians, habitants, users etc.

2. The same article also stipulates that

"The award of a works or services concession shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both. The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, <u>it is not guaranteed to recoup</u> the investments made or the costs incurred in operating the works or the services, which are the subject matter of the concession. The part of the risk transferred to the

concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible;"

To better understand the new definition of the concession contract, it is important to note the following passage in the Preamble (18): "*Difficulties related to the interpretation of the concepts of concession and public contracts have generated continued legal uncertainty among stakeholders and have given rise to numerous judgments of the Court of Justice of the European Union. Therefore, the definition of concession should be clarified, in particular by referring to the concept of operating risk. The main feature of a concession, the right to exploit the works or services, always implies the transfer to the concessionaire of an operating risk of economic nature involving the possibility that it will not recoup the investments made and the costs incurred in operating the works or services awarded under normal operating conditions even if a part of the risk remains with the contracting authority or contracting entity. The application of specific rules governing the award of concessions would not be justified if the contracting authority or contracting entity relieved the economic operator of any potential loss, by guaranteeing minimal revenue, equal or higher to the investments made and the costs that the economic operator has to incur in relation with the performance of the contract. At the same time, it should be made clear that certain arrangements which are exclusively remunerated by a contracting authority or a contracting entity should qualify as concessions where the recoupment of the investments and costs incurred by the operator for executing the work or providing the service depends on the actual demand for or the supply of the service or asset".*

Thus, the main feature of a concession, namely the exploitation right of the works and services, always implies the transfer to the concessionaire of an operating risk of economic nature which may entail the possibility that it will not recoup the investments made and the costs incurred in operating the works or services awarded under normal operating conditions even if a part of the risk remains with the contracting authority or contracting entity. At the same time, certain arrangements which are exclusively remunerated by a contracting authority or a contracting entity should qualify as concessions where the recoupment of the investments and costs incurred by the operator for executing the work or providing the service depends on the actual demand for or the supply of the service or asset.

It should also be noted that where sector-specific regulation eliminates the risk by providing for a guarantee to the concessionaire on breaking even on investments and costs incurred for operating the contract, such contract should not qualify as a concession within the meaning of this Directive (Preamble 19). On the other hand, the fact that the risk is limited from the outset should not preclude the qualification of the contract as a concession. This can be the case for instance in sectors with regulated tariffs or where the operating risk is limited by means of contractual arrangements providing for partial compensation, including compensation in the event of early termination of the concession for reasons attributable to the contracting authority or contracting entity or for reasons of force majeure *(See Preamble (19)).*

Further, an operating risk should stem from factors, which are outside the control of the parties. Risks such as those linked to bad management, contractual defaults by the economic operator or to instances of force majeure are not decisive for the purpose of classification as a concession, since those risks are inherent in every contract, whether it be a public procurement contract or a concession. An operating risk should be understood as the risk of exposure to the vagaries of the market, which may consist of either a demand risk or a supply risk, or both a demand and supply risk. Demand risk is to be understood as the risk on actual demand for the works or services, which are the object of the contract. Supply risk is to be understood as the risk on the provision of the works or services, which are the object of the contract, in particular, the risk that the provision of the services will not match demand. For the purpose of assessment of the operating risk the net present value of all the investment, costs and revenues of the concessionaire should be taken into account in a consistent and uniform manner *(See Preamble (20)).*

Public Authorities

According to article 6, '*contracting authorities'* means State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law other than those authorities, bodies or associations which pursue one of the activities referred to in Annex II and award a concession for the pursuit of one of those activities.

"Bodies governed by public law' means bodies that have all of the following characteristics:

(a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) they have legal personality; and

(c) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those bodies or authorities; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

According to article 7 *'contracting entities'* means entities which pursue one of the activities referred to in Annex II and award a concession for the pursuit of one of those activities, and which are one of the following:

(a) State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law;

(b) public undertakings as defined in paragraph 4 of Article 7;

(c) entities other than those referred to in points (a) and (b) of this paragraph, but which operate on the basis of special or exclusive rights, granted for the exercise of one of the activities referred to in Annex II.

In Annex II referred hereunder, concessions awarded by contracting entities shall apply to the following activities:

As far **as gas and heat** are concerned

(a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas or heat;

(b) the supply of gas or heat to such fixed networks.

The supply by a contracting entity referred to in points (b) and (c) of Article 7(1) of gas or heat to fixed networks which provide a service to the public shall not be considered to be a relevant activity within the meaning of paragraph 1 where all of the following conditions are met:

(i) the production of gas or heat by that contracting entity is the unavoidable consequence of carrying out an activity other than those referred to in this paragraph or in paragraphs 2 and 3 of Annex II;

(ii) the supply to the public network is aimed only at the economic exploitation of such production and amounts to not more than 20 % of that contracting entity's turnover on the basis of the average for the preceding three years, including the current year.

For the purposes of this Directive, "supply" includes the generation/production, wholesale and retail sale of gas. However, production of gas in the form of extraction falls within the scope of paragraph 4 of Annex II.

As far as **electricity** is concerned:

(a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity;

(b) the supply of electricity to such fixed networks.

For the purposes of this Directive, "supply of electricity" includes generation/production, wholesale and retail sale of electricity.

The "supply by a contracting entity" referred to in points (b) and (c) of Article 7(1) of electricity to networks which provide a service to the public shall not be considered to be a relevant activity within the meaning of paragraph 1 where all of the following conditions are met:

(a) the production of electricity by that contracting entity takes place because its consumption is necessary for carrying out an activity other than those referred to in this paragraph or in paragraphs 1 and 3 of this Annex;

(b) supply to the public network depends only on that contracting entity's own consumption and has not exceeded 30 % of that contracting entity's total production of energy, on the basis of the average for the preceding three years, including the current year.

Activities relating to the exploitation of a geographical area for the purpose of:

(a) extracting oil or gas;

(b) exploring for, or extracting, coal or other solid fuels.

Rules for the assignment of concession contracts

a. GENERAL PRINCIPLES

i. General Principles, notices and publications

The contracting authority or the contracting entity may organize freely the procedure, which leads to the selection of concessionaire, under the reservation of compliance with competition principle. This procedural flexibility is justified based on the fact Concessions are usually long-term, complex arrangements where the concessionaire assumes responsibilities and risks traditionally borne by the contracting authorities and contracting entities and normally falling within their remit. For that reason, subject to compliance with this Directive and with the principles of transparency and equal treatment, contracting authorities and contracting entities should be allowed considerable flexibility to define and organise the procedure leading to the choice of concessionaire. However, in order to ensure equal treatment and transparency throughout the awarding process, it is appropriate to provide for basic guarantees as to the awarding process, including information on the nature and scope of the concession, limitation of the number of candidates, the dissemination of information to candidates and tenderers and the availability of appropriate records. It is also necessary to provide that the initial terms of the concession notice should not be deviated from, in order to prevent unfair treatment of any potential candidates *(Preamble 68).*

However, for the selection and formation of the concession award process the principles of **equal treatment, non-discrimination and transparency** should be observed, in particular during the concession award procedure, the contracting authority or contracting entity shall not provide information in a discriminatory manner which may give some candidates or tenderers an advantage over others (see article 30). **These principles are expressly provided in article 3 of the Directive, according to which, contracting authorities and contracting entities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner. The design of the concession award procedure, including the estimate of the value, shall not be made with**

the intention of excluding it from the scope of this Directive or of unduly favouring or disadvantaging certain economic operators or certain works, supplies or services. Contracting authorities and contracting entities shall aim at ensuring the transparency of the award procedure and of the performance of the contract, while complying with Article 28. Observance of the obligations referred to in Article 30(3) by subcontractors shall be ensured through appropriate action by the competent national authorities acting within the scope of their responsibility and remit (article 42 para 1).

Notices:

(1) The basic rule in order to secure sufficient publicity of the concession of works and services is that contracting authorities and contracting entities wishing to award a concession shall make known their intention by means of a concession notice. In order to ensure adequate advertising of works and services concessions equal to or above a certain threshold awarded by contracting entities and by the contracting authorities the award of such concessions should be preceded by the compulsory publication of a concession notice in the Official Journal of the European Union (Preamble (50)). Concession notices shall contain the information referred to in Annex V and, where appropriate, any other information deemed useful by the contracting authority or entity, in accordance with the format of standard forms. According to Article 39 the minimum time limit for receipt of applications for concession shall be 30 days from notice. If the procedure takes place in successive states the minimum time limit can be reduced to 22 days. The time limits can be reduced by 5 days if electronic means is applied.

Regulation 2015/1986 includes standard forms of publication notices referred to in articles 31, 32 and 42 of the Directive to be used by contracting authorities and entities.

The Directive refers specifically to the cases where no notice is required. This exception should be limited to cases in which it is clear from the outset that a publication would not trigger more competition, in particular because there is objectively only one economic operator who can perform the concession. The impossibility of awarding the concession to any other economic operator should not have been created by the contracting authority or contracting entity itself in view of the future award procedure. Furthermore, the availability of adequate substitutes should be assessed thoroughly *(Preamble (51)).*

(2) Concession award notices. Another notice obligation is provided in article 32, according to which, not later than 48 days after the award of a concession, the contracting authorities and contracting entities shall, in accordance with the procedures laid down in Article 33, send a concession award notice on the results of the concession award procedure. For social and other specific services listed in Annex IV, such notices may however be grouped on a quarterly basis. In that case they shall send the grouped notices within 48 days of the end of each quarter. Concession award notices shall contain the information set out in Annex VII, or in relation to concessions for social and other specific services listed in Annex IV, the information set out in Annex VIII, and shall be published in accordance with Article 33.

(3) Provision of Information According to Article 40, the contracting authority or contracting entity shall as soon as possible inform each candidate and tenderer of decisions taken concerning the award of a concession, including the name of the successful tenderer, the grounds for any decision to reject his application or tender and the grounds for any decision not to award a contract for which there has been publication of a concession notice or to recommence the procedure.

Moreover, on request from the party concerned, the contracting authority or contracting entity shall as quickly as possible, and in any case within 15 days from receipt of a written request inform any tenderers that have made an admissible tender of the characteristics and relative advantages of the tender selected.

The contracting authority or contracting entity may decide to withhold certain information referred above, regarding the contract, where the release of such information would impede law enforcement,

would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of economic operators, whether public or private, or might prejudice fair competition between such.

In article 33 the form and Form and manner of publication of notices is provided.

ii. Electronic availability of concession documents

Article 34, following the main direction of the new public procurement package regarding electronic procurement, provides for the electronic availability of concession documents *(for electronic availability see Dir.2014/24/EU article 53 and Dir.2014/22/EU, article 73).* More specifically, contracting authorities and contracting entities shall offer by electronic means unrestricted and full direct access free of charge to the concession documents from the date of publication of a concession notice or, where the concession notice does not include the invitation to submit tenders, from the date on which an invitation to submit tenders was sent. The text of the concession notice or of these invitations shall specify the internet address at which the concession documents are accessible.

Provided that it has been requested in good time, the contracting authorities and contracting entities or competent departments shall supply to all applicants or tenderers taking part in the concession award procedure additional information relating to the concession documents not later than six days before the deadline fixed for the receipt of tenders (para3).

However, according to Art 34 where, in duly justified circumstances, due to exceptional security, or technical reasons or due to the particularly sensitive nature of commercial information requiring a very high level of protection, unrestricted and full direct access free of charge by electronic means to certain concession documents cannot be offered, contracting authorities or contracting entities shall indicate in the notice or the invitation to submit a tender that the concession documents concerned will be transmitted by other means than electronic means and the time limit for the receipt of tenders shall be prolonged

Moreover, in article 29 of Chapter II (Principles) the rules applicable to communication are provided, according to which: Except where use of electronic means is mandatory pursuant to Article 33(2) and Article 34, Member States or contracting authorities and contracting entities may choose one or more of the following means of communication for all communication and information exchange:(a) electronic means;(b) post or fax; (c) oral communication, including telephone, in respect of communications other than the essential elements of a concession award procedure, and provided that the content of the oral communication is documented to a sufficient degree on a durable medium; (d) hand delivery certified by an acknowledgement of receipt.

The means of communication chosen shall be generally available and non-discriminatory and shall not restrict economic operators' access to the concession award procedure.

In all communication, exchange and storage of information, contracting authorities and contracting entities shall ensure that the integrity of data and the confidentiality of applications and tenders are preserved. They shall examine the content of applications and tenders only after the time limit set for submitting them has expired (article 29 para3).

iii. Combating corruption and preventing conflicts of interest

As it is well-known that corruption cost in public procurement in our society is very high, as well as conflict of interests and illegitimate practices undermine the application of the rules, article 35 provides that the Member States shall require contracting authorities and contracting entities to take appropriate measures to combat fraud, favours and corruption and to effectively prevent, identify and remedy conflicts of interest arising in the conduct of concession award procedures, so as to avoid any distortion

of competition and to ensure the transparency of the award procedure and the equal treatment of all candidates and tenderers.

The concept of conflicts of interest shall at least cover any situation where staff members of the contracting authority or entity who are involved in the conduct of the concession award procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the concession award procedure.

With regard to conflicts of interest, the measures adopted shall not go beyond what is strictly necessary to prevent a potential conflict of interest or eliminate a conflict of interest that has been identified.

Reference is made to ECJ jurisprudence judgments: C-21/03 and C-34/03 Fabricom S.A.(point 34), C-49/07 MOTOE.

Further, according to the European Competition Law ECJ jurisprudence, conflict of interest exists when the same entity concentrates not only regulatory competences but also business commercial competences, situation where articles 106 and 102 TFEU are infringed *(C-260/89 ERT (22 and 37) vs DEP, 91/94 Tranchant (25))*.

B. Procedural guarantees

i. Technical and functional requirements

Article 36 regulates technical and functional requirements. Those requirements shall define the characteristics required of the works or services that are the subject matter of the concession. They shall be set out in the concession documents. Those characteristics may also refer to the specific process of production or provision of the requested works or services provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives (e.g. quality levels, environmental and climate performance levels, design for all requirements, including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, terminology, symbols, testing and test methods, marking and labelling, or user instructions.

As correctly stated by the Directive, unless justified by the subject-matter of the contract, technical and functional requirements shall not refer to a specific make or source, or a particular process, which characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific production with the effect of favouring or eliminating certain undertakings or certain products. Such a reference shall be permitted, on an exceptional basis, where a sufficiently precise and intelligible description of the subject- matter of the contract is not possible. Such reference shall be accompanied by the words ‘or equivalent’.

ii. Procedural guarantees

Directive expressly provides for procedural guarantees in article 37, which are important for the way of performance of the procurement. More specifically:

Concessions shall be awarded on the basis of the award criteria set out by the contracting authority or contracting entity in accordance with Article 41, provided that all of the following conditions are fulfilled: (a) the tender complies with the minimum requirements set, where applicable, by the contracting authority or contracting entity; (b) the tenderer complies with the conditions for participation as referred to in Article 38(1); and (c) the tenderer is not excluded from participating in the award procedure in accordance with Article 38(4) to (7), and subject to Article 38(9).

The minimum requirements referred to in point (a) shall contain conditions and characteristics (particularly technical, physical, functional and legal) that any tender should meet or possess.

The contracting authority or contracting entity shall provide**: (a)** in the concession notice, a description of the concession and of the conditions of participation; **(b)** in the concession notice, in the invitation to submit a tender or in other concession documents, a description of the award criteria and, where applicable, the minimum requirements to be met.

As regards exclusion, on condition that this is done in a transparent manner and on the basis of objective criteria, the contracting authority or contracting entity may limit the number of candidates or tenderers to an appropriate level. The number of candidates or tenderers invited shall be sufficient to ensure genuine competition.

The contracting authority or contracting entity shall communicate the description of the envisaged organisation of the procedure and an indicative completion deadline to all participants. Any modification shall be communicated to all participants and, to the extent that they concern elements disclosed in the concession notice, advertised to all economic operators.

The contracting authority or contracting entity shall provide for appropriate recording of the stages of the procedure using the means it judges appropriate, subject to compliance with Article 28(1).

The contracting authority or contracting entity **may hold negotiations with candidates and tenderers. The subject matter of the concession, the award criteria and the minimum requirements shall not be changed during the course of the negotiations.**

iii. Selection and qualitative assessment of candidates

Extremely important provisions are included in article 38 on selection and qualitative assessment of candidates. More specifically:

Contracting authorities and contracting entities shall verify the conditions for participation relating to the professional and technical ability and the financial and economic standing of the candidates or tenderers, on the basis of self-declarations, reference or references to be submitted as proof in accordance with the requirements specified in the concession notice that shall be non-discriminatory and proportionate to the subject-matter of the concession. The conditions for participation shall be related and proportionate to the need to ensure the ability of the concessionaire to perform the concession, taking into account the subject-matter of the concession and the purpose of ensuring genuine competition.

With a view to meeting the conditions for participation laid down above, (a) an economic operator may, where appropriate and for a particular concession, rely on the capacities of other entities, regardless of the legal nature of its links with them. Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority or the contracting entity that it will have at its disposal, throughout the period of the concession, the necessary resources, for example, by producing a commitment by those entities to that effect. With regard to financial standing, the contracting authority or the contracting entity may require that the economic operator and those entities are jointly liable for the execution of the contract, b) Under the same conditions, a group of economic operators as referred to in Article 26 may rely on the capacities of participants in the group or of other entities *(see also Preamble (63)).*

The approach as regards exclusion of an economic operator are detailed enough and accepts exemptions and in general adopts a more flexible policy and reinforces the role of the contracting authorities and entities.

Contracting authorities and contracting entities as referred to in point (a) of Article 7(1) shall exclude an economic operator from participation in a concession award procedure where they have established that that economic operator has been the subject of a conviction by final judgment for one of the following reasons:

(a) participation in a criminal organisation, as defined in Article 2 of Council Framework Decision 2008/841/JHA (28);

(b) corruption, as defined in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (29) and Article 2(1) of Council Framework Decision 2003/568/JHA (30), as well as corruption as defined in the national law of the contracting authority or entity or the economic operator;

(c) fraud within the meaning of Article 1 of the Convention on the protection of the European Communities' financial interests' (31);

(d) terrorist offences or offences linked to terrorist activities, as defined in Articles 1 and 3 of Council Framework Decision 2002/475/JHA (32) respectively, or inciting, aiding or abetting or attempting to commit an offence, as referred to in Article 4 of that Framework Decision;

(e) money laundering or terrorist financing, as defined in Article 1 of Directive 2005/60/EC of the European Parliament and of the Council (33);

(f) child labour and other forms of trafficking in human beings as defined in Article 2 of Directive 2011/36/EU of the European Parliament and of the Council.

The obligation to exclude an economic operator shall also apply where the person convicted by final judgment is a member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control therein.

Contracting entities other than those referred to in point (a) of Article 7(1) may exclude an economic operator from participation in a concession award procedure where they are aware that that economic operator has been the subject of a conviction by a final judgment for any of the reasons listed in the first subparagraph of this paragraph.

Contracting authorities and contracting entities as referred to in point (a) of Article 7(1) shall exclude the economic operator from participation in a concession award procedure where it is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions and where this has been established by a judicial or administrative decision having final and binding effect in accordance with the legal provisions of the country in which it is established or with those of the Member State of the contracting authority or contracting entity.

Furthermore, contracting authorities and contacting entities as referred to in point (a) of Article 7(1) may exclude or may be required by Member States to exclude from participation in a concession award procedure an economic operator where the contracting authority or entity can demonstrate by any appropriate means that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions.

This paragraph shall no longer apply when the economic operator has fulfilled its obligations by paying or entering into a binding arrangement with a view to paying the taxes or social security contributions due, including, where applicable, any interest accrued or fines.

Member States may provide for derogation from the mandatory exclusion provided for in paragraphs 4 and 5, on an exceptional basis, for overriding reasons relating to the public interest such as public health or protection of the environment.

Member States may also provide for a derogation from the mandatory exclusion provided above, where an exclusion would be clearly disproportionate, in particular where only minor amounts of taxes or social security contributions are unpaid or where the economic operator was informed of the exact amount due following its breach of its obligations relating to the payment of taxes or social security contributions at such time that it did not have the possibility to take measures as provided for in the third subparagraph of paragraph above before expiration of the deadline for submitting its application.

In para 7 of the article 38 of Directive the cases where the contracting authorities or contracting entities have the discretion are also presented. However, the Directive does not prevent the Member State to render those reasons for exclusion as mandatory, and automatically exclude the participants from the procurement process.

In article 39 the time limits for receipt of applications and tenders for the concession are provided.

When fixing the time limits for the receipt of applications or of tenders contracting authorities or contracting entities shall take account in particular of the complexity of the concession and the time required for drawing up tenders or applications without prejudice to the minimum time limits set out in Article 39

Where applications or tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the concession award documents, the time limits for the receipt of applications for the concession or for the receipt of tenders, shall be fixed so that all economic operators concerned may be aware of all the information needed to produce applications or tenders and, in any event, shall be longer than the minimum time limits set out in paragraphs 3 and 4.

The minimum time limit for the receipt of applications whether or not including tenders for the concession shall be 30 days from the date on which the concession notice was sent.

Where the procedure takes place in successive stages the minimum time limit for the receipt of initial tenders shall be 22 days from the date on which the invitation to tender is sent.

The time limit for receipt of tenders may be reduced by five days where the contracting authority or contracting entity accepts that tenders may be submitted by electronic means in conformity with Article 29.

iv. Award criteria

In article 41 the award criteria are provided on the basis of which the concession is awarded. More specifically:

Concessions shall be awarded on the basis of **objective criteria** (Not necessary purely economic) which comply with the principles set out in Article 3 and which ensure that tenders are assessed in conditions of effective competition so as to identify an overall economic advantage for the contracting authority or the contracting entity.

However, the award criteria shall be linked to the subject matter of the concession and shall not confer an unrestricted freedom of choice on the contracting authority or the contracting entity. They may include, inter alia, environmental, social or innovation-related criteria.

Those criteria shall be accompanied by requirements, which allow the information provided by the tenderers to be effectively verified.

The contracting authority or the contracting entity shall verify whether tenders properly meet the award criteria.

Those criteria may not be subject to the criterion of most economically advantageous tender (MEAT), as the latter includes smaller in portion of evaluation factors. From the legal point of view the creation

of a new criterion for concessions seems to be consistent with the transfer to the concessionaire of an operating risk.

Further, as the inclusion of environmental and obligation on the basis of labour law, we refer to the Preamble (64) according to which a view to the better integration of social and environmental considerations in the concession award procedures, contracting authorities or contracting entities should be allowed to use award criteria or concession performance conditions relating to the works or services to be provided under the concession contract in any respect and at any stage of their life cycles from extraction of raw materials for the product to the stage of disposal of the product, including factors involved in the specific process of production, provision or trading of those works or services or a specific process during a later stage of their life cycle, even where such factors do not form part of their material substance. Criteria and conditions referring to such a production or provision process are for example that services being the object of the concession are provided using energy-efficient machines. In accordance with the case-law of the Court of Justice of the European Union, this also includes award criteria or concession performance conditions relating to the utilisation of fair-trade products in the course of the performance of the concession to be awarded. Criteria and conditions relating to trading and its conditions can for instance refer the requirement to pay a minimum price and price premium to subcontractors. Concession performance conditions pertaining to environmental considerations might include, for example, waste minimising or resource efficiency.

Moreover, according to Preamble (64), measures aiming at the protection of health of the staff involved in the process of performance of the concession, the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the concession or training in the skills needed for the concession in question can also be the subject of award criteria or concession performance conditions provided that they relate to the works or services to be provided under the concession. For instance, such criteria or conditions might refer, amongst other things, to the employment of long-term job-seekers, the implementation of training measures for the unemployed or young persons in the course of the performance of the concession to be awarded. In technical specifications contracting authorities can provide such social requirements, which directly characterise the product or service in question, such as accessibility for persons with disabilities or design for all users.

Article 24 should also be mentioned in this context**: "**Member States may reserve the right to participate in concession award procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons or may provide for such concessions to be performed in the context of sheltered employment programmes, provided that at least 30 % of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers. The concession notice or, in the case of services concessions as defined in Article 19, prior information notice shall make reference to this Article"

Further, according to Preamble (73), contracting authorities and contracting entities can be faced with external circumstances that they could not foresee when they awarded the concession, in particular when the performance of the concession covers a long period. In those cases, a certain degree of flexibility is needed to adapt the concession to the circumstances without a new award procedure. The notion of unforeseeable circumstances refers to circumstances that could not have been predicted despite reasonably diligent preparation of the initial award by the contracting authority or contracting entity, taking into account its available means, the nature and characteristics of the specific project, good practices in the field in question and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value. However, this cannot apply in cases where a modification results in an alteration of the nature of the overall concession, for instance by replacing the works to be executed or the services to be provided by something different or by fundamentally changing the type of concession since, in such a situation, a hypothetical influence on

the outcome may be assumed. For concessions awarded for purposes of pursuing an activity other than those referred to in Annex II, any increase in value not requiring a new award procedure should not be higher than 50 % of the value of the original concession. Where several successive modifications are made, that limitation should apply to the value of each modification. Such consecutive modifications should not be aimed at circumventing this Directive.

Relevant case law ECJ: C-513/99 Concordia Bus Finland, C-448/01 EVN and Wienstorm, C-532/06 Lianakis.

C. Rules for the execution of the concession contracts

The European Legislator introduces provisions for the execution stage, which cover: Subcontracting, modification of concession contracts during their term, duration and termination of the concession**.**

i. Subcontracting

According to article 42, the obligation of the competent national authorities is provided to safeguard the observance by subcontractors of the obligation in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions (see article 30 para 3 and Preamble (72)) In accordance with the case-law of the Court of Justice of the European Union, this also includes award criteria or concession performance conditions relating to the utilisation of fair trade products in the course of the performance of the concession to be awarded. Criteria and conditions relating to trading and its conditions can for instance refer the requirement to pay a minimum price and price premium to subcontractors. Concession performance conditions pertaining to environmental considerations might include, for example, waste minimisation or resource efficiency (see Preamble (64)).

The Directive also underlines that it is necessary to ensure some transparency in the subcontracting chain, as this gives contracting authorities and contracting entities information on who is present at building sites on which works are being performed for them, or on which undertakings are providing services in or at buildings, infrastructures or areas, such as town halls, municipal schools, sports facilities, ports or motorways, for which the contracting authorities are responsible or over which they have an oversight. (see Preamble (72)). It is provided that the concession documents**,** the contracting authority or the contracting entity may ask or may be required by a Member State to ask the tenderer or the applicant to indicate in its tender any share of the concession it may intend to subcontract to third parties and any proposed subcontractors. This paragraph shall be without prejudice to the question of the main concessionaire's liability (article 42 para 2).

Further, in the case of works concessions and in respect of services to be provided at the facility under the oversight of the contracting authority or the contracting entity, after the award of the concession and at the latest when the performance of the concession commences, the contracting authority or the contracting entity shall require the concessionaire to indicate to the contracting authority or the contracting entity the name, contact details and legal representatives of its subcontractors, involved in such works or services, insofar as known at that point in time. Also, the contracting authority or the contracting entity shall require the concessionaire to notify it of any changes to that information during the course of the concession as well as of the required information for any new subcontractors which it subsequently involves in such works or services.

Contracting authorities and contracting entities may extend or may be required by Member States to extend the obligations provided for in the first subparagraph to for instance: (a) services concessions other than those concerning services to be provided at the facilities under the oversight of the contracting authority or the contracting entity or to suppliers involved in works or services concessions; (b) subcontractors of the concessionaire's subcontractors or further down the subcontracting chain. It

should be clarified that the obligation to deliver the required information is in any case incumbent upon the concessionaire, either on the basis of specific clauses, that each contracting authority or contracting entity would have to include in all award procedures, or on the basis of obligations which Member States would impose on the concessionaire by means of generally applicable provisions (See Preamble (72)).

With the aim of avoiding breaches of the obligations referred to in Article 30(3), appropriate measures may be taken, such as: (a) Where the national law of a Member State provides for a mechanism of joint liability between subcontractors and the concessionaire, the Member State concerned shall ensure that the relevant rules are applied in compliance with the conditions set out in Article 30(3). (b) Contracting authorities and contracting entities may verify or may be required by Member States to verify whether there are grounds for exclusion of subcontractors pursuant to Article 38(4) to (10). In such cases, the contracting authority or the contracting entity shall require the economic operator to replace a subcontractor in respect of which the verification has shown that there are compulsory grounds for exclusion. The contracting authority or the contracting entity may require or may be required by a Member State to require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are non-compulsory grounds for exclusion. (see also Preamble 72).

Member States may provide for more stringent liability rules under national law. Member States having chosen to provide for measures as described above shall, by law, regulation or administrative provisions and having regard to Union law, specify the implementing conditions for those measures. In so doing, Member States may limit their applicability, for instance in respect of certain types of contracts, certain categories of contracting authorities, contracting entities or economic operators or as of certain amounts.

ii. Modification of concession contracts during their term

Article 43 contains very important rules, dictating where a new bidding procedure is required during the term of a concession contract. The rule is that a new concession procedure is required in the case of material changes to the initial concession, in particular to the scope and content of the mutual rights and obligations of the parties, including the distribution of intellectual property rights. Such changes demonstrate the parties' intention to renegotiate essential terms or conditions of that concession. This is the case in particular if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure (Preamble 75, ECJ C-91/08 Wall AG)).

Concessions may be modified without a new concession award procedure in accordance with this Directive in any of the following cases:

(a) Where the modifications, irrespective of their monetary value, have been provided for in the initial concession documents in clear, precise and unequivocal review clauses, which may include value revision clauses, or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the concession;

(b) For additional works or services by the original concessionaire that have become necessary and that were not included in the initial concession where a change of concessionaire: (i) cannot be made for economic or technical reasons such as requirements of interchange ability or interoperability with existing equipment, services or installations procured under the initial concession; and (ii) would cause significant inconvenience or substantial duplication of costs for the contracting authority or contracting entity. However, in the case of concessions awarded by a contracting authority, for the purposes of pursuing an activity other

than those referred to in Annex II, any increase in value shall not exceed 50 % of the value of the original concession. Where several successive modifications are made, that limitation shall apply to the value of each modification.

(c) In case all of the following conditions are fulfilled, namely: (i) the need for modification has been brought about by circumstances which a diligent contracting authority or contracting entity could not foresee; (ii) the modification does not alter the overall nature of the concession; (iii) in the case of concessions awarded by contracting authority, for the purposes of pursuing an activity other than those referred to in Annex II, any increase in value is not higher than 50 % of the value of the initial concession. Where several successive modifications are made, this limitation shall apply to the value of each modification. Such consecutive modifications shall not be aimed at circumventing this Directive; Contracting authorities or contracting entities having modified a concession as above, shall publish a notice to that effect in the Official Journal of the European Union. Such notice shall contain the information set out in Annex XI and shall be published in accordance with Article 33.

(d) Where a new concessionaire replaces the one to which the contracting authority or the contracting entity had initially awarded the concession as a consequence of either: (i) an unequivocal review clause or option in conformity with point (a); (ii) universal or partial succession into the position of the initial concessionaire, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive; or (iii) in the event that the contracting authority or contracting entity itself assumes the main concessionaire's obligations towards its subcontractors where this possibility is provided for under national legislation;

(e) When the modifications are not substantial, according to para 4 of article 43.

Modifications of the concession resulting in a minor change of the contract value up to a certain level value should always be possible without the need to carry out a new concession procedure. To that effect and in order to ensure legal certainty, this Directive should provide for minimum thresholds (articles 1 and 8 of Directive), for which a new award procedure is not required (Preamble 75).

Furthermore, and without any need to verify whether the conditions set out under points (a) to (d) above are met, concessions may equally be modified without a new concession award procedure in accordance with this Directive being necessary where the value of the modification is below both of the following values:

(i) the threshold set out in Article 8; and

(ii) 10 % of the value of the initial concession.

However, the modification may not alter the overall nature of the concession. Where several successive modifications are made, the value shall be assessed on the basis of the net cumulative value of the successive modifications.

For the purpose of the calculation of the value referred to in paragraph 2 and points (b) and (c) of paragraph 1, the updated value shall be the reference value when the concession includes an indexation clause. If the concession does not include an indexation clause, the updated value shall be calculated taking into account the average inflation in the Member State of the contracting authority or of the contracting entity.

A modification of a concession during its term shall be considered to be substantial within the meaning of point (e) of paragraph 1 of article 43, where it renders the concession materially different in character from the one initially concluded. In any event, without prejudice to paragraphs 1 and 2, a modification shall be considered to be substantial where one or more of the following conditions is met: (a) the modification introduces conditions which, had they been part of the initial concession award procedure, would have allowed for the admission of applicants other than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the concession award procedure; (b) the modification changes the economic balance of the concession in favour of the concessionaire in a manner which was not provided for in the initial concession; (c) the modification extends the scope of the concession considerably; (d) where a new concessionaire replaces the one to which the contracting authority or contracting entity had initially awarded the concession in other cases than those provided for under point (d) of paragraph 1.

A new concession award procedure in accordance with this Directive shall be required for other modifications of the provisions of a concession during its term than those provided for under paragraphs 1 and 2.

iii. Duration and termination of the concession

(a) Duration - article 18

The duration of concessions shall be limited. The contracting authority or contracting entity shall estimate the duration on the basis of the works or services requested.

For concessions lasting more than five years, the maximum duration of the concession shall not exceed the time that a concessionaire could reasonably be expected to take to recoup the investments made in operating the works or services together with a return on invested capital taking into account the investments required to achieve the specific contractual objectives.

The investments taken into account for the purposes of the calculation shall include both initial investments and investments during the life of the concession.

The duration of a concession should be limited in order to avoid market foreclosure and restriction of competition. In addition, concessions of a very long duration are likely to result in the foreclosure of the market and may thereby hinder the free movement of services and the freedom of establishment. However, such duration may be justified if it is indispensable to enable the concessionaire to recoup investments planned to perform the concession, as well as to obtain a return on the invested capital. Consequently, for concessions with a duration greater than five years the duration should be limited to the period in which the concessionaire could reasonably be expected to recoup the investment made for operating the works and services together with a return on invested capital under normal operating conditions, taking into account specific contractual objectives undertaken by the concessionaire in order to deliver requirements relating to, for example, quality or price for users. The estimation should be valid at the moment of the award of the concession. It should be possible to include initial and further investments deemed necessary for the operating of the concession in particular expenditure on infrastructure, copyrights, patents, equipment, logistics, hiring, training of personnel and initial expenses. The maximum duration of the concession should be indicated in the concession documents unless duration is used as an award criterion of the contract. Contracting authorities and contracting entities should always be able to award a concession for a period shorter than the time necessary to recoup the investments, provided that the related compensation does not eliminate the operating risk (Preamble 52).

(b) Termination of concessions - article 44

Member States shall ensure that contracting authorities and contracting entities have the possibility, under the conditions determined by the applicable national law, to terminate a concession during its term, where one or more of the following conditions is fulfilled:

(a) a modification of the concession has taken place, which would have required a new concession award procedure pursuant to Article 43;

(b) the concessionaire has been, at the time of concession award, in one of the situations referred to in Article 38(4) and should therefore have been excluded from the concession award procedure;

(c) the Court of Justice of the European Union finds, in a procedure pursuant to Article 258 TFEU, that a Member State has failed to fulfil its obligations under the Treaties by the fact that a contracting authority or contracting entity belonging to that Member State has awarded the concession in question without complying with its obligations under the Treaties and this Directive.

See also Preamble (80).

3.1.2 Directive 2014/24/EU on public procurement

Introduction

The **new Public Procurement Directive (**Directive 2014/24/EU) replaced the **old Public Procurement Directive** (Directive 2004/18/EC) in March 2014. It regulates a wide range of procurement issues applicable to all public procurements over specific thresholds. The new Directive sets out rules on general procurement procedures and issues that are also relevant to PPP procurement, such as:

- sector exclusions;
- the use of electronic procurement and framework agreements;
- publication, deadline and transparency standards;

and

- the governance of public procurement as a whole.

It should be mentioned that much of the new Public Authorities Contracts Directive (2014/24/EU: the “Classical”) and the Utilities Directive (2014/25/EU: Utilities), reflect the existing framework of procurement law. The reforms across both Directives are designed to improve the effectiveness of the regime and to codify recent procurement case law.

The incremental changes in these regulations are intended to help streamline public procurement processes and embed more simplified and flexible rules for the selection of suppliers. This should allow public bodies to carry out procurement faster and with less “red tape”.

Changes intended to improve efficiency and effectiveness in the procurement process include the following:

- electronic methods of communication are now mandated in parts of the award process;
- use of a self-declaration (European Single Procurement Document) of compliance with selection and exclusion criteria by suppliers to reduce red tape;
- reduction in the time limits for receipt of tenders by 30%;
- explicitly allowing prior discussion with suppliers and independent experts, with safeguards against distorting competition or violating transparency and non-discrimination principles;

Reforms of the Procurement Procedures

The old Directive 2004/18/EC provided for the following public procurement procedures:

The open procedure provided the broadest scope for competition as any entity can tender for the contract. Any entity interested in the contract was invited to tender through an OJEU notice in order to ensure maximum competition.

The restricted procedure was used for quite straightforward public sector procurements where many suppliers may be able to meet the requirements of the tender. The advantage of this procedure over the open procedure was that it enabled the public sector buyer to limit the number of suppliers that were invited to tender.

The negotiated procedure was used for procuring more complex requirements but could only be used in exceptional circumstances. Public sector buyers must be in a position to justify their decision to use this procedure. The number of suppliers invited to tender could be limited but, in contrast to the restricted procedure, the public sector buyer was permitted to negotiate the tenders offered by bidders.

The competitive dialogue procedure was usually used for “particularly complex” supplies, services and works contracts where the best solution is not pre-known. This procedure was often available for procuring PPP contracts. The number of suppliers invited to tender could be limited and the procedure gave the public sector buyer the opportunity to engage in dialogue with bidders on proposed solutions before inviting final tenders

Under the new Public Procurement Directive 2014/24/EU, the open and restricted procedures remain relatively unchanged. In addition, a new procedure, the innovation partnership, has been introduced but its usefulness to the PPP community is unclear at this stage.

The key features of this new procedure are:

Procuring Authorities can identify a need to be met by a product, service or works not currently available on the market, stating minimum qualitative requirements. One or more successful bidders can then try to develop the product, service or work that best meets the original specification (with cost negotiations continuing through the project's various phases) prior to the Procuring Authority deciding whether or how to continue with the project. The ability to engage with bidders in this way has previously been discouraged until contract award criteria and technical specifications are published. Therefore, whilst maintaining core requirements, such as the need to publish clear evaluation criteria for bidders at the outset, the new procedure offers Procuring Authorities greater flexibility where the means to deliver the product, service or works are not initially certain. The procedure is most likely to be utilised in research and technology projects where there is uncertainty about the final product.

Of greater interest for PPPs is the introduction of the competitive procedure with negotiation, which replaces the negotiated procedure and removes some of the previous restrictions on its use. At face value, this procedure looks attractive for PPPs as it is relatively flexible and gives Procuring Authorities greater scope to design their own procurement processes. It contains elements of negotiation without the more prescriptive aspects of the competitive dialogue procedure, but there are some potential drawbacks.

Selection of procedure

Both the competitive procedure with negotiation and competitive dialogue procedure have therefore been made more widely available for Procuring Authorities to use in procuring their contracts. The **new Public Procurement Directive** 2014/24/EU now lays down four grounds on which either of these procedures may be used:

– the absence of readily available solutions that do not require adaptation;

– the need for design or innovative solutions;

– the complex legal and financial make-up of solutions; and

– technical specifications cannot be established with sufficient precision (see article 24(a)of Dir2014/24/EU).

The new Public Procurement Directive states that *"Member States shall provide that contracting authorities may apply a competitive procedure with negotiation or a competitive dialogue [procedure]…"* on any of the above grounds (see article 24 (a) of Dir. 2014/24/EU).

Therefore, compared to the old Public Procurement Directive, the new one offers the Procuring Authorities considerably more scope to use a negotiated solution for their procurements, rather than the more traditional open and restricted procedures.

Changes during Procurement Process

In the new competitive procedure with negotiation, tenders can be submitted, negotiated and then re-submitted as a final tender. Procuring Authorities are permitted to conclude the procurement process after the initial tender stage if they find a bidder that closely meets their requirements (and they have given themselves this possibility in the initial tender documentation). The new Public Procurement Directive 2014/24/EU is clear, however, that this procedure does not anticipate changes being made once final tenders have been submitted.

On the other hand, under the competitive dialogue procedure, there is arguably more flexibility for Procuring Authorities at this late stage of the process. After final tenders have been submitted, tenders can still be:

The competitive dialogue procedure then goes further in allowing further clarification and improvement once the winning bidder has been appointed.

"At the request of the contracting authority, negotiations with the tenderer identified as having submitted the tender presenting the best price-quality ratio may be carried out to confirm financial commitments or other terms contained in the tender by finalising the terms of the contract provided this does not have the effect of materially modifying essential aspects of the tender or of the public procurement, including the needs and requirements as set out in the contract notice or in the descriptive document and does not risk distorting competition or causing discrimination" (see article 30(7) of Dir. 2014/24/EU).

The competitive dialogue procedure should remain useful for relatively complex projects where the Procuring Authority is less sure what is available in the market to meet its needs and is seeking to maximise the experience available in the market. This procedure has the added flexibility of allowing the Authority to confirm and optimise final details and other terms after tender selection[1].

Contractual amendments

A body of CJEU (Court of Justice of the European Union) case law, developed since the introduction of the old Public Procurement Directive, has sought to regulate the ability of Procuring Authorities to make modifications to public contracts during their lifetime without retendering them *(Case C-454/06 Pressetext).* The objective of this is to ensure that bidders are treated fairly during the original

[1] EPEC PPPs and Procurement Impact of the New Directives

procurement process (i.e. that all bidders and potential bidders know the full anticipated scope of the project that they may bid for through the original tender documentation)[2].

The new Public Procurement Directive consolidates provisions from the old Public Procurement Directive and CJEU case law and sets out the various circumstances in which the modification of contracts is permitted without the requirement for a new procurement procedure (see article 72 of Dir. 2014/24/EU).

One such circumstance is where the modification is not *"substantial"* (see article 70(4) of Dir. 2014/24/EU). In line with the above, a modification will be considered "*substantial"* if, either (a) had it been known during the initial procurement, the modification would have encouraged other candidates to bid or caused a different bid to be chosen or (b) it changes the economic balance of the contract in favour of the contractor, or (c) it extends the scope "considerably", or (d) it sees a new contractor replace the contractor initially awarded the contract." (see article 72 (4c) of Dir. 2014/24/EU).

There is a specific exemption permitting modifications to contracts if these have become necessary due to circumstances, which were unforeseeable by a diligent Procuring Authority. Such modifications must not change the overall nature of the contract and, as under the old Public Procurement Directive, the value of such modifications must not exceed 50% of the value of the original contract. The new Public Procurement Directive clarifies that, where several successive modifications are made to a contract, the 50% limit will apply to the value of each modification (but, implicitly, not to the aggregate value of successive modifications). However, successive modifications to the same contract must not be aimed at circumventing the new Public Procurement Directive (see article 72 (1b) of Dir. 2014/24/EU). On these grounds, a notice confirming that the contract has been modified must be published in the OJEU.

Relevant to PPPs is that there are now further protections for Procuring Authorities faced with having to restructure a consortium or replace a private partner. Such changes are explicitly permitted under both the new Public Procurement Directive (and the Concession Directive) in the event of an insolvency or corporate restructuring (see article 72 (1d) of Dir. 2014/24/EU). In another new provision, which adds considerable additional flexibility, modifications of any kind and irrespective of their monetary value are permitted where they have been: "*provided for in the initial procurement documents in clear, precise and unequivocal review clauses…"* (see article 72 (1a) of Dir. 2014/24/EU).

Finally, a modification will be permitted where the value of the change falls below the minimum threshold (10% of the original contract value for service and supply contracts and 15% of the original contract value for works contracts). This exemption applies when the modification does not change the overall nature of the contract and it is important to bear in mind that (in contrast to the 50% limit applying to unforeseeable or necessary modifications referred to above) the minimum threshold will apply to the cumulative value of successive modifications to the same contract.

One key area of the new Public Procurement Directive that may have a more direct impact on PPPs is the set of new rules about splitting contracts into lots. Directive 2014/24/EU allows Procuring Authorities to refrain from splitting the contract into lots if they wish to do so. They merely have to state, in the OJEU documentation or in their report at the end of the procurement phase, "an indication of the main reasons for their decision not to subdivide into lots" (see article 46 (1) of Dir. 2014/24/EU), but they do not have to provide any further justification or analysis.

[2] EPEC PPPs and Procurement Impact of the New Directives

3.1.3 Directive 94/22/EC on the Conditions for Granting and using Authorisations for the prospection, exploration and productions of hydrocarbons

Directive 94/22/EC complements the Directive on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (initially Directive 90/531/EEC, which was repealed and replaced by Directive 93/38/EEC, which was itself then repealed and replaced by Directive 2004/17/EC).

National governments have control over the oil and gas in their territories. They determine the areas in which companies can search for and produce these resources. When granting licenses for these areas, they must follow a set of common EU rules to ensure fair competition.

The licensing rules for oil and gas, which are set out in the EU's Prospection, Exploration, and Production of Hydrocarbon Directive:

- at least 90 days before the application deadline for a new license, an EU country must publish all relevant information about the license in the Official Journal of the European Union
- Licensing must be open to all interested companies and EU countries must grant licenses in a fair, competitive, and unbiased way. Companies from outside the EU can also apply if the country they come from allows EU companies to compete for licenses in its territory
- when granting licenses, EU countries can take into account issues such as national security, public safety, public health, security of transport, the protection of the environment, the protection of biological resources, or the planned management of hydrocarbon resources

Some analytic requirements are mentioned in the preamble:

Preamble (21): "*every year, EU countries are required to provide an annual report on the reserves available in their territories, the geographical areas they have opened to exploration, the licenses they have granted, and the companies holding these licenses".*

Preamble (22): "*It is appropriate to define 'exclusive rights' and 'special rights' as these notions are crucial to the scope of this Directive and the notion of contracting entities. It should be clarified that entities which are neither contracting entities pursuant to point (a) of Article 7(1) nor public undertakings are subject to its provisions only to the extent that they exercise one of the activities covered on the basis of such rights. However, they will not be considered to be contracting entities if such rights have been granted by means of a procedure based on objective criteria, in particular pursuant to Union legislation, and for which adequate publicity has been ensured. That legislation should include Directive 2009/73/EC of the European Parliament and of the Council (6), Directive 2009/72/EC of the European Parliament and of the Council (7), Directive 97/67/EC of the European Parliament and of the Council (8), Directive 94/22/EC of the European Parliament and of the Council (9) and Regulation (EC) No 1370/2007 of the European Parliament and of the Council (10). It should also be clarified that that listing of legislation is not exhaustive and that rights in any form, which have been granted by means of other procedures based on objective criteria and for which adequate publicity has been ensured are not relevant for the purposes of determining the contracting entities covered by this Directive".*

3.2 Case studies from the European Union

3.2.1 Concessions for oil and gas exploration and production in Denmark

1. Overview
2. Licensing rounds and open door
3. Legal background
4. Fiscal regulation
5. Assessment

3.2.1.1 Overview

Denmark is one of the leading oil producers in the EU. UK is still the largest oil producer among EU member states while Norway which is a non-EU member state is even bigger. It should be noted that oil production is internationally of a limited scale.

Concerning natural gas, the Danish production is among the 6 largest in the EU. Production commenced from the North Sea fields in 1972 and gradually increased until it reached its peak in 2004, following which, production has been on the decline. Today there are 19 producing fields of which Maersk Oil operates 15, DONG operates 3 and Hess operates 1. In 2016, the Danish Energy Agency (DEA) recorded an oil production of approximately 150,000 bbl/d and a gas production of 3.9 billion Nm^3, or approximately 71,000 boe/d. The DEA is expecting a full re-haul of the Tyra field (the Natural gas centre), however, with a temporary suspension of production from 2019 leading to a drop-in gas production in 2019–21 and a subsequent increase. Maersk Oil had announced that unless an economically viable solution for continued operations was agreed upon, production would cease on 1 October 2018. The case was negotiated between the Ministry of Energy and the DUC Consortium and continued production from the Tyra field has been secured. In 2018 the Maersk activities for oil and gas were sold to Total, France.

The five largest oil producing fields are Halfdan, Dan, Gorm, and Skjold, owned by the DUC consortium (Maersk, Shell and Chevron) and operated by Maersk (Total), and the South Arne field owned primarily by Hess and operated by Hess. These five fields alone represent approximately 80% of the total oil production.

3.2.1.2 Oil reserves and production

In 1962, Danish shipping company Maersk was awarded an exclusive concession for oil and natural gas exploration and production. The concession covered all areas of Denmark including offshore and was valid for 50 years. As at that time few in the Government believed there would be any discoveries at all in Denmark, the concession was granted for only 8 EUR (the price of the stamp).

However, in the late 1960s discoveries were made in the North Sea area of UK, Norway and Denmark. The first oil from the Danish oilfields came on stream in 1972. The production fields were further developed and in 1993, Denmark became a net exporter of oil. In the 1970s, negotiations between the Government and the Concessionaire (Maersk) were taken up with the aim of relinquishing part of the area of the original concession. As the most prospective area in the most Western part of the Danish Area (off-shore) is the Central Graben, the final agreement with Maersk stated that the Maersk (Danish Underground Consortium) would keep the developed area in the Central Graben until 2012. In 2012, the license was renewed on new terms for the area - also called the Contiguous Area according to the

original concession - and the remaining area will be tendered in regular tendering rounds. The Contiguous Area is still the most important in terms of production.

3.2.1.3 Regulation

A. National Law

The Danish upstream oil sector - as well as natural gas exploration and production – is governed by the Danish Subsoil Act (Act No. 960 of 13th September 2011 as amended by Act No. 535 of 29 April 2015). Under the Act, all hydrocarbons in the Danish subsoil are the property of the State, which grants licenses for investigations, exploration and production to the licensees. Licenses are regulated by the State under the Subsoil Act, which means that all substantial activities in all phases of investigation, exploration and production require a separate approval from the government and a detailed work programme.

Licenses are awarded through licensing rounds, via open door procedures, adjacent area procedures or mini-rounds. Since 1984, seven licensing rounds have been held. The 6th licensing round in 2005 resulted in 14 licenses being issued in 2006. In the 7th licensing round, sixteen licenses were awarded in April 2016. The DEA has been planning to carry out licensing rounds every second year from 2017 onwards, but the present low oil prices have reduced interest. By October 2018 the licensing line has still not been opened. Licenses awarded are exclusive licenses for both oil and natural gas exploration and production. The Subsoil Act is supplemented by Model Licenses for tendering rounds and open-door procedures as well as model Joint Operating Agreements (JOAs).

The purposes of the Danish Subsoil Act are to ensure appropriate use and exploitation of the Danish subsoil, in a manner that is safe and preventative regarding waste, and furthermore to ensure that the accumulation of oil and gas contributes to the Danish energy supply in an expedient manner.

This is a framework act; thus, licensees require a new license for each phase of the process. A license is granted on the basis of a Model License, which contains detailed terms and conditions and is an integrated part of licensing rounds. The DEA, supervised by the Ministry of Energy, is the responsible authority for granting licenses . The Parliament Energy Committee must approve the licensing. The licence must be signed by the Minister of Energy. .

Other principal legislation includes the Offshore Safety Act and the Marine Environment Act.

A license will not be sufficient to carry out work in developing hydrocarbons. Several permissions are required for the operative work in connection with the licenses.

According to the Subsoil Act, it is necessary to obtain permissions for every significant step of the offshore development Furthermore, permissions in relation to drilling, environment matters, health, safety and security, residence permits for the workers, flight permits, etc are considered mandatory. Some of the relevant authorities are the DEA, the Danish Maritime Authority, the Environmental Protection Agency and since 2015 the Danish Working Environment Authority in matters of health and safety.

Onshore, it is necessary to obtain construction permits for processing plants, transportation, transmissions, etc. The Danish municipalities are the key responsible for construction and other onshore operational permits outside of the DEA's responsibility. Subsoil onshore issues are generally governed by the DEA whereas above-surface onshore issues are governed by the local municipality. The Danish Working Environment Authority handles health and safety matters.

In 2015, 19 oil/gas fields were in production. After a period of very high production the output is now declining, and the status of net exporter is expected to end in the 2020s, unless new discoveries are made. In the 1990s, it was realised that although the most prospective area was in the Western part of the territory, the other less prospective parts of the Danish subsoil could be tendered on the basis of an "open door" policy according to which the tenderers were welcome to apply for license at any time as opposed to the tendering rounds.

B. Implementation of EU Directives

As previously mentioned in Section 3.1.1., the EU legislative framework includes Directive 2014/24/EU of 26 February 2014 on public procurement and Directive 2014/25/EU of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors. Also, a new directive on concessions (Directive 2014/23/EU of 26 February 2014 on the award of concession contracts), which sets up an appropriate legal framework for the award of concessions, ensuring that all EU economic actors have effective and non-discriminatory access to the EU market, provides greater certainty as to the law in force.

In Denmark, the EU legislation has been incorporated into national law. Normally, the line ministries, regions and municipalities are responsible for tendering and procurement but in some cases the control of public shareholding companies is vested within the Ministry of Finance. This was the case when the former 100% state-owned company DONG (Danish Oil and Natural Gas company) was put on the stock market and up to 49% was sold. The Ministry of Energy is responsible for oil and gas licensing and the Danish Energy Agency (which is part of the ministry) is responsible for their practical execution.

The licensing procedures are enacted in the Danish Subsoil Act 889/2011 as well as the general Public Procurement Law of 2016. The Danish Competition and Consumer Authority operates as a **PPP Unit** as it incorporates all advisory and regulatory functions associated with PPPs and concessions. The PPP unit primarily functions as an advisory body and the executive power is within the line ministries, regions and municipalities according to their mandate. The Danish Competition and Consumer Authority is an autonomous agency under the Ministry of Industry, Business and Financial Affairs, which is also home to the Energy Regulatory Office.

The two laws fulfil the formal requirements of the EU Directives.

For oil and natural gas, the requirements of the EU Directive 94/22/EC are implemented through the Subsoil Act.

The period for submitting tenders for licenses is minimum 90 days from publication of the invitation (more than in the Concessions Directive). In practice, the period is longer; typically 180 days from publication of the notice.

An applicant is granted a license according to the requirements and criteria set out in the Subsoil Act. In order to be eligible for a license, an applicant should have the necessary technical expertise and financial resources ,as well as submit a proposed working programme. The 2015 amendments to the Subsoil Act introduced a new chapter 7a, which provides for new technical and financial capacity requirements to be assessed and documented at each stage (e.g. seismic, drilling, development, production) and for licensees to provide adequate financial security in the form of insurance or financial guarantee.

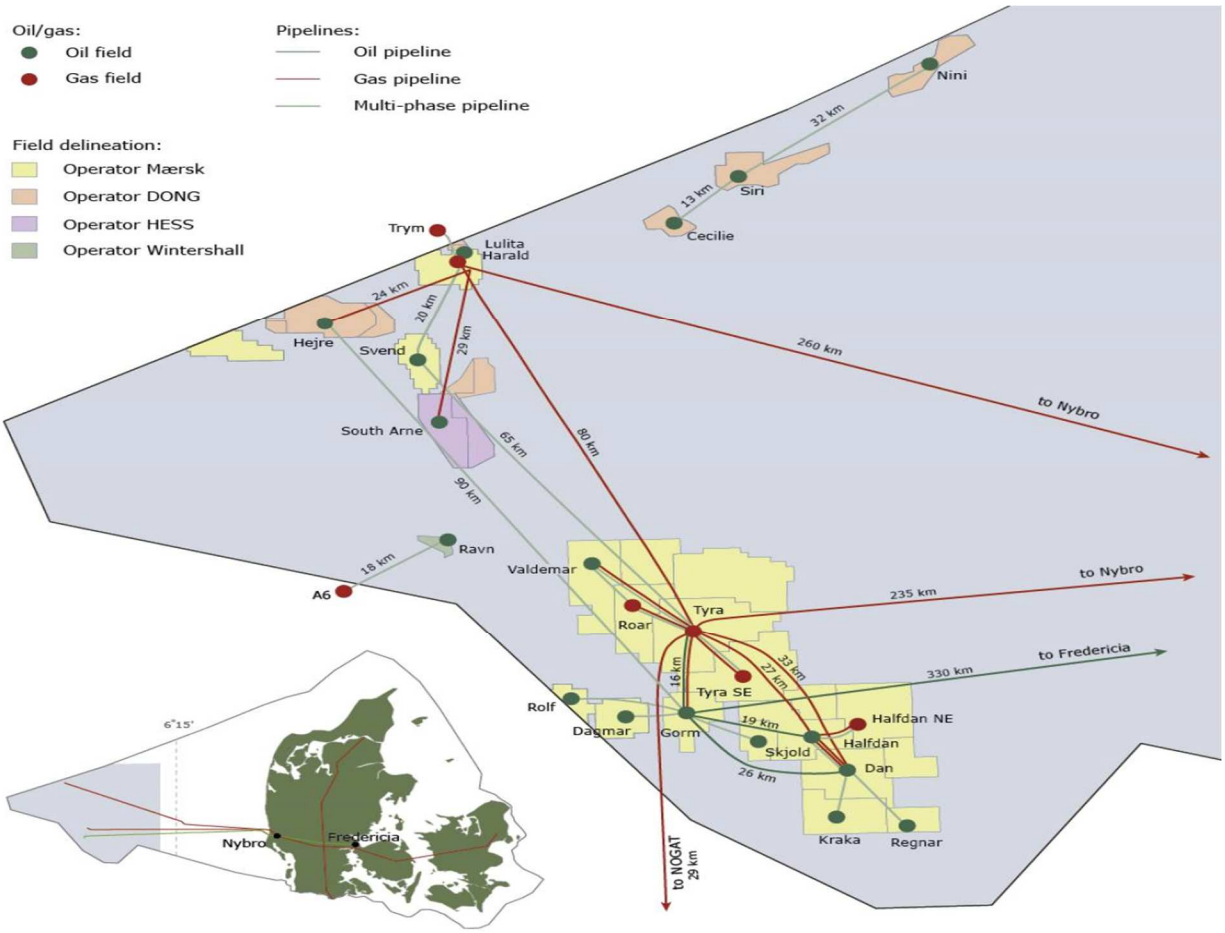
Normally, an exploration license is in force for six (6) years but can be extended. If there is evidence that production is feasible, a production license can be issued for 30 years maximum. For the exploration license the applicant must issue a bank guarantee covering the agreed exploration programme (seismic analyses, test drilling, appraisal drilling and geological/geophysical analyses).

When the submission of tender bids is completed, the applicants are invited for negotiations, which mainly concentrate on the work programme. It is in the Government's interest to have a comprehensive exploration programme, so that an area being reserved for later use or sale is prevented.

The Danish Energy Agency performs research on the oil and gas market regularly in order to have competitive licensing regulations. The idea of royalty is now abandoned and has been replaced by general company taxation and a windfall tax. In addition, a mandatory state participation of 20% on fully commercial terms has been enforced.

It should be noted that an exploration programme is extremely costly and risky. For example, an offshore oil rig operating for 100 days drilling up to 4 km into the underground will cost approximately 10 Million EUR.(without including various machinery, supplies and analytical works to be done). The chance of discovering oil or gas is lower than the risk of a dry hole. Therefore, exploration is best suited to commercial enterprises, as among a large portfolio of projects at least some result in a discovery (and hopefully with a large upward potential).

Figure 2. Danish Oil and Gas Fields



Source: Danish Energy Agency, 2017

3.2.1.4 Fiscal regulation

If the exploration results in producing an oil or gas field, the enterprise involved will pay a corporate tax of 25% and if oil/gas prices are high (approx. more than 100 USD/bbl) a windfall tax of 52% will be added (the Hydrocarbon Tax). The oil/gas field will be ring fenced for taxation purposes.

Before the DONG company was privatised, it undertook the role of a state operator. as After the privatisation of the DONG company, the State took over the assets in the oil/gas licenses and transferred them to the state-owned North Sea Fund. With the minimum share of 20% of the licenses, the fund participates on fully commercial terms, in contradiction to a former arrangement according to which the participation could be on a “carried” basis, i.e. without economic risks. There is a rule that the North Sea Fund cannot exercise majority power together with another member of the consortium in commercial matters.

3.2.1.5 Assessment

The Danish regulations fully comply with the EU requirements on fair, transparent, competitive and non-discriminative regulation of the business of oil and gas exploration and production. The successful candidate will always be selected based on criteria of professionalism and economic ability. Although, the tax rates are not discussed herein, State participation as well as the work programme may be negotiated.

Often fiscal regulations are discussed in public and the viewpoint is based on the traditional “left/right” policies.

In other sectors, authorities are sometimes criticised for selecting the cheapest PPP solution regardless of quality and financial strength. The cheapest offers might result is bankruptcy for the operator with considerable extra costs to the responsible authority and lack of service to the affected public. Examples of this are elderly care and ambulance service.

Source: Annual Report on Oil and Gas, Danish Energy Agency. Interviews with geologists Flemming Ole Rasmussen, Danish Energy Agency and Søren Frederiksen, Danish North Sea Fund.

3.2.2 Germany - case on a distribution grid for electricity

Stadtwerke Flensburg obtains new electricity distribution concession in Harrislee – Case study

3.2.2.1 Background

Flensburg is a German municipality situated in Northern Germany close to the Danish boarder. The city itself has 92,000 inhabitants. Harrislee is a small municipality with 11,000 inhabitants right next to the German - Danish border.

Flensburg Stadtwerke is functioning as electricity, heat and small natural gas distribution company and operates a CHP plant located at the harbour. The company is also involved in electricity distribution activities in other districts. In Germany, the EU requirements for electricity liberalisation are fully implemented, and end users connected to the existing distribution grid, are free to select any supplier available.

Stadtwerke Flensburg was established in 1854 as a municipally owned supplier of town gas (by coal) and electricity from 1894. In 1969, a comprehensive district heating system was developed in Flensburg city, now connecting 98% of the households. For electricity grid operations, there are 64,000 connections in Flensburg and now 6,600 more in Harrislee municipality. In total, Flensburg Stadtwerke is now servicing 200,000 connections with electricity as an electricity supplier.

The power plant was originally equipped with coal fuelled turbines, but in 2014 the process of converting to natural gas-fuelled combined cycle power generators operating in CHP mode was started and resulted in the total capacity of 75 MWe and 75 MW_h. The conversion to natural gas reduced CO_2 emissions by 40% in case of equal power output.

Figure 3. Stadtwerke Flensburg

Source: Stadtwerke Flensburg

3.2.2.2 The tender

In 2009, following the expiry of the former concession operated by Schleswig-Holstein Netz AG (daughter company of EON Hanse AG), the municipality of Harrislee published a tender for procurement of an electricity distribution concession. The procurement encompassed operations of the distribution grid and Stadtwerke Flensburg got the new concession

The call for tenders allowed a period of 2 years before an existing concession being terminated for the expression of interest by new potential concessionaires. Apart from the required professionalism and experience, a maximum distribution fee was an important parameter for consideration. The tender was published on the German network "Energieausschreibungen.EU" and the Official Journal of the EU. Technical parameters were available.

Flensburg Stadtwerke was invited for negotiations with the municipality as well as with Schleswig-Holstein Netz AG. The negotiations with Schleswig-Holstein Netz AG focused on the price Stadtwerke Flensburg should pay to Schleswig-Holstein Netz for their former investments into the network (the salvation value) and a deal was reached.

In 2014, the new concession for Stadtwerke Flensburg entered into force.

At the time of the negotiations, the EU directive 2004/17/EC on coordinating the procurement by entities operating in the water, energy, transport and postal services sectors was in force (subsequently replaced by directive 2014/25/EU).

An assessment carried out by experts confirmed that the procedure of the concession award was conducted according to the EU directives.

The case could be typical for smaller concessions for gas and electricity in Germany. Competition exists even among publicly owned utilities. , Municipalities or regions mainly established the major energy utilities, such as RWE and EON. Therefore, they are strongly represented in the international market for concessions. Part of the shares is available to the public on the stock exchange.

The utilities function similarly to pure commercial companies. The Swedish 100% state-owned utility Vattenfall is also a key player in Germany. .

According to the tender notice bureau "Energieausschreibungen.EU", there are often 3-4 applicants for distribution concessions in local areas.

The main law of relevance to distribution licenses is the Law on Electricity and Gas supply (EnWG) of 2005. In the most recent projects the proposed prices are close to the level of conventional energy producers and therefore Feed in Premiums might not be necessary.

Source: Stadtwerke Flensburg, Dr. Eng. Karsten Müller-Janssen and team.

3.2.3 Off Shore Wind Generators

Wind power has been an important electricity source for Denmark through years. The country was among the forerunners in the development of wind power. Denmark is blessed (or cursed) with wind of which the strongest is at the seaside and predominantly from North – West. Establishment of offshore wind farms started at a modest level in 1991 and has now reached a size comparable to larger fossil fuel power plants. With the latest concessions for off shore wind parks, the total capacity is around 2271 MW, which is close to 5 Danish traditional larger CHP power plants. Wind energy now contributes with more than 1/3 of the total demand for electricity. However, wind is changeable, and a balancing reserve must be available in case of less wind. And it also costs as the reserve capacity cab be bought through

the Nordpool auction system. In spite of the windy climate there is still a need for subsidies in addition to the market price of electricity. However, the need for subsidies is decreasing.

Conditions and practices concerning concessions for offshore wind parks have changed over the years. Following the latest revision of the Law on Promotion of Renewable Energy (2016), new offshore wind parks should compete on the lowest feed-in premium offered (a premium added to the market price of electricity - spot price at Nordpool). Before the new law, a fixed feed-in tariff was applied. These feed-in tariffs are still in force, but new concessions receive the feed-in premium.

Figure 4. Offshore Wind Parks in Denmark

Source: Danish Energy Agency, 2017.

Table 3. Established and approved off Shore Wind Parks, Denmark

No	Location and year	Number of generators	Total Power
1	Vindeby (1991)	11	4,95 MW
2	Tunø Knob (1995)	10	5,00 MW
3	Middelgrunden (2000)	20	40,00 MW
4	Horns Rev 1 (2002)	80	160,00 MW
5	Rønland (2003)	8	17,20 MW

6	Nysted (2003)	72	165,60 MW
7	Samsø (2003)	10	23,00 MW
8	Frederikshavn (2003)	3	7,60 MW
9	Horns Rew II (2009)	91	209,30 MW
10	Avedøre Holme (2009)	3	10,80 MW
11	Sprogø (2009)	7	21,00 MW
12	Rødsand II (2010)	90	207 MW
13	Anholt (2013)	111	399,60 MW
14	Horns Rev 3 (2020)		400,00 MW
15	Kriegers Flak (tendered 2016)		600,00 MW
16	Northsea North and South (2016)		350,00 MW

Source: Danish Energy Agency, 2017

As it clearly derives from the table above, there is an increasing trend in capacities established. For the single generators, a capacity increase from 0,5 MW to 8 MW is now realistic.

Tendering

There are two different types of tender procedures for off-shore wind parks: A) Restricted tendering for areas prioritised by the Ministry of Energy addressed to selected development companies. B) An open-door principle is applied for other areas.

For the prioritised areas, a tendering round is announced. The invited parties are examined on technical competence and financial strength. If those prerequisites are fulfilled, the winner will be selected on the basis of the lowest feed in premium offered. For the latest tenders (2018) the applicants are offering to deliver electricity at actual market prices, without premiums.

A concession normally includes a research phase and a development/production phase. The production phase is normally set to 25 years, after which the installations must be dismantled or taken over by the State following negotiation.

The concessions are awarded according to the Law on Renewable Energy Promotion (2016) and Law on Electricity Supply (2013). The tendering procedure complies with the EU Directive on Procurement, following consultation with the State Attorney. In addition, the laws stated in the model contract (available to all tenderers) should be observed and requirements for a comprehensive environment assessment plan, wildlife influence, radar interference and several others should also be covered. For a larger wind farm, investment can easily be around 50 million EUR and a bank guarantee is also required.

Concerning the Krieger Flak and the Horns Rev projects, announcements for an upcoming tender were made in due time at international homepages and the EU Journal. Following the expression of interest, a few bidders were invited for negotiations a year after the announcement. Key factors were professionalism of the applicant, guarantees and the lowest feed in premium offered.

The transmission system operator (ENERGINET.DK) will provide connection to the transmission grid but the costs to the connection point are to be borne by the developer. The parks are now under development.

Source: Danish Energy Agency, homepage, Energinet Denmark homepage, and principal Charlotta C. Laursen, Danish Energy Agency.

4. LEGISLATION AND CASES FOR EASTERN PARTNER COUNTRIES

4.1 Methodology for Assessment of Partner Countries' legal framework

The stakeholders in the EaP Countries, (particularly the local legal experts and authorities, such as Ministries, regulators and autonomous institutions) were asked to provide information on concessions and/or procurement procedures, emphasising on the following key areas:

- A fair procurement practice without discriminating or eliminating relevant candidates during the tender process.
- Reasonable timeframes for the procurement procedure.
- Transparent evaluation criteria of the candidates' offers
- Equal competition among candidates
- Same information available to all tenderers
- All the candidates should be informed about the result and reasons for selecting the successful tenderer within reasonable timeframes from the award decision.

The following 17 specific issues were addressed:

1) Existence of a specific PPP law or a comprehensive set of laws regulating concessions and other forms of PPP constituting a PPP legal framework.
2) Existence of mandatory application of a fair and transparent tender selection process
3) Existence of a clear definition of "concession" within the law and provisions forthe boundaries and scope of application of the concession legal framework (e.g. sectors concerned, competent authorities, characteristics of concessionaire).
4) Flexibility with respect to the content of the provisions of the project agreements, which should allow a proper allocation of risks without unrealistic interferences from the Contracting Authority (obligations, tariff, termination, compensation).
5) Clarify if the law makes a clear distinction between a PPP agreement (such as a Concession) and a license (i.e. an authorisation to operate granted by a public authority).
6) If the law identifies the sectors and/or types of infrastructure and/or services in respect of which a PPP may or may not be granted.
7) If the sectors eligible for PPP include sectors of the economy, such as energy, oil and gas.
8) If the law identifies the public authorities (Contracting Authorities) that are empowered to select projects, prepare for, and award PPPs and enter into project agreements.
9) If the law requires, in principle, the contracting authority to select private parties through a competitive tender process.
10) If provisions in the Law exist, concerning the publication of information related to the competitive procedures in the country media and in the international media (for large projects).
11) If it is possible for a PPP to be awarded to a foreign company, a private party or to a domestic company with foreign participation in the share capital and/or management.
12) If there is reference in the law to the principles of transparency, equal treatment and proportionality.
13) If the law provides that if the contracting authority rejects an applicant at the time of pre-selection or disqualifies a bidder, it must make the reasons for decision public.
14) If the law provides for the publication of the award of concession and record keeping.
15) If the law contains provisions regulating final negotiations (i.e. post contract award) so that transparency, equal treatment and competition are preserved.

16) If the law provides for (or does not prevent) 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.
17) If the law provides for (or does not prevent) compensation of the public private party for all cases of early termination (including in case of serious breach or failure by the private party), for compensation for fair value after depreciation of the assets financed by the private party.

All six Eastern Partners provided varying responses. It should be noted that even in the case of "old" EU member states, implementation of the six "commandments" is complex and realised through national regimes, which differ considerably. In an assessment carried out in 2011, the EU identified the absence of concession rules as well as cases of lack of transparency and direct awards of concessions in several member states.

It is even more difficult for the Eastern Partners to uphold the requirements of the EU directives, due to different legal traditions and the fact that their laws and regulations have been drafted based on national needs. Furthermore, the countries have been through a tough transition period where standards of living, national independence and decisions on the best way to accommodate to the new challenges have been revised. Even after 25 years this is still a reality.

Therefore, it has been a major task for the Study Experts even to identify the relevant regulations for concessions and PPPs in the EaP Countries. Given the relatively short time available for data collection and analysis, the EaP countries have had difficulties getting hold on their national laws compared to the EU requirements. This should be borne in mind when reviewing the feedback. However, the overall target as stipulated on the six "commandments" should be universally acceptable.

4.2 Evaluation Parameters

Component 1 is structured using comparable data among the six EaP countries, thanks to the use of standardised questionnaires. By compiling data in a comparative manner, the report highlights relevant regulatory aspects in concession/PPP projects and helps identify possible actions in agendas for imminent reforms. The majority of the data and information was acquired during the missions in each country. However, the data collection for Component 1 **was finalised on 12th April 2017**, with the last mission to the Eastern Partner Countries. Consequently, any regulatory reforms enacted, and any practice adopted since that date have not been taken into account, except in a few cases, such as Armenia and Azerbaijan where a short update is provided. Supplementary questions were sent to the Eastern Partner countries and replies were received by 12th of March 2017 from five countries – only one failed to respond in time. During the mission to the EaP Countries in March/April 2017, more information was gathered, and the report was updated accordingly. However, the regulations of PPPs and concessions in the Eastern Partner Countries are under active development and changes to the situation as of April 2017 are registered. When available the information is updated with the latest information as per 18th June 2017.

It is obvious, that this report cannot cover all the regulatory issues related to concession/PPP procurement, as it mainly focuses on existence of laws and regulations on concessions/PPP and the availability of rules providing for the selection of a concessionaire on a transparent, competitive and non-discriminatory basis. The present report does not address certain aspects of PPP frameworks, such as, for example, preparation phase of PPPs and their approval, assessment of risks, affordability, bankability etc., and does not attempt to capture a number of dimensions, such as perception of corruption in the economy, despite their importance.

4.2.1 Availability of laws

The availability of laws regulating concessions in general, and energy concessions in particular, provides projects with private sector participation ("PSP") easy access to a clear, fair, predictable and stable legal environment . It is vital that a strong legal and regulatory framework is established to govern concessions/PPP, as without it, it would be very difficult to create incentives and attract prospective investment, especially in the energy sector in which investments can be huge as well as risky. In view of the nature and long life of such projects, it is imperative, that the interests of both the public and private sector are protected by the Law. For most of the countries, relatively new laws on PPP as well as supporting PPP-units have been elaborated or are in the process of being elaborated.,.

4.2.2 Assessment of transparency, non-discrimination, equal treatment

The selection procedure in the context of a PPP infrastructure project is crucial for the success of the concession/PPP. The selection of the private partner is usually conducted through a tendering process applying the general procurement rules or through procurement rules especially adopted for concessions/PPP.

Given the complexity and long-term nature of the PPP, the relevant projects require a more thorough evaluation of the bidder's qualifications and proposals to ensure successful transaction not only as regards value for money, financial strengths, professionalism, experience, but also as regards the creation of a trusting relationship.

4.2.2.1 PPP Procurement-Period granted to submit Bids

As a rule, the bidders should be granted enough time to prepare proposals following publication of the call for tender. Short periods for bid preparation may deter potential bidders from participating in the PPP procurement process, if it is unlikely that they will be able to carry out the due diligence necessary to prepare high quality proposals. The time granted to present proposals is usually defined in the tender notice or other tender documentation. Regulatory provisions setting a minimum period of time in which to present the proposals ensure that the procuring authorities do not have absolute discretion on the matter, creating a fairer system for all bidders (*see EBRD benchmarking PPP procurement)*[3].

4.2.2.2 Transparency, open publication, fair competition and reasonable timeframes for the steps in the procurement process.

In the EU, there is a clear tendency towards publishing information about PPP/concession tenders and award notices with the use of online means of publication., The following provisions in the national legislation of each Beneficiary Country are considered to help ensure fair competition and transparency during the PPP tendering procedure:

- The procuring authority publishes the public procurement notice online;
- The procuring authority grants at least thirty (30) calendars days to potential bidders to submit their proposals; (see article 39 of Directive 2014/23/EU).
- The tender documents detail all the stages of the procurement process. (article 40)
- Potential bidders are able to submit requests for clarification concerning the public procurement notice and/or the request for proposals and the answers are disclosed to all potential bidders (article 30 Directive 2014/23/EU).
- Bidders prepare and present a financial model with their proposal.
- The procuring authority evaluates the proposals strictly and solely in accordance

[3] EBRD PUBLIC PROCUREMENT ASSESSMENT EBRD 2011 PUBLIC PROCUREMENT ASSESSMENT Review of laws and practice in the EBRD region EBRD 2011

with the evaluation criteria stated in the tender documents (articles 37, 41 of Directive 2014/23/EU).
- The procuring authority publishes the award notice online (articles 32, 33 of Directive 2014/23/EU).
- The procuring authority provides all bidders with the results of the PPP procurement process including the grounds for the selection of the winning bid;
- Any negotiations between the selected bidder and the procuring authority after the award and before the signature of the PPP contract are restricted and regulated to ensure transparency;
- The procuring authority publishes the signed PPP contract online.

4.2.3 PPP Contract

4.2.3.1 Renegotiation and modification of PPP contract.

“Renegotiation” refers to changes in the contractual terms. However, the use of renegotiation and modification should be restricted, so as to avoid rendering the contract into an opportunistic tool. According to the EU Directive, as a general rule, if material changes are required, a new concession procedure has to be initiated. Further, according to EU legislation a new procurement procedure is not required in case the need for modification has been brought about by unforeseen circumstances; if the modification does not alter the overall nature of the concession and in the case that any increase in value is not higher than 50 % of the value of the initial concession. There are also provisions for additional works and replacement of concessionaire (see in detail 3.1.1. above).

It should be noted that dispute resolution provisions may constitute a mechanism to agree on necessary changes and thus to limit the risk of tender having to be relaunched. Fairness and efficiency in dispute settlement may facilitate participation in PPP projects.

C.2. Termination of the PPP contract

Given the long-term nature of the PPP contract and the fact that the stakes are high in PPP projects, it is crucial to ensure that the grounds for such termination are foreseen by the Law. In certain national legislations, compensation is provided due to early termination. Such compensation solutions should aim at reimbursement of the private partner's reasonable loss (depending on the grounds for termination) and at avoiding the situations of unjust enrichment of either party following such termination.

Successful implementation and delivery of the PPP project are dependent on the following key factors:

- Reasons for modification and renegotiation of the contract are expressly regulated.
- Specific circumstances (force majeure, material adverse government action, change in the law, refinancing) that may arise during the life of the contract are expressly regulated;
- Dispute resolution mechanisms are in place.
- Grounds for termination of the PPP contract and its associated consequences are well defined.

5. OVERVIEW OF THE EAP COUNTRIES

5.1 Introduction

The following sections present the data and information provided by the national experts in the EaP Countries along with any clarifications and information received during the missions in these countries.

Annexes 8-13 include the Questionnaires used for the purposes of the present study. Questions are marked in Italics and the feedback is in normal fonts. The same applies to the sections covering the practical implementation and examples of coming projects. In Sections 5.2-5.7, the status of each EaP country is described through a brief yet concise overview of the current regulations in each country.

Each country section is accompanied by an assessment performed by the experts which includes a gap identification and recommendations. An overview of the energy situation in each country is also provided. As the situation in each country differs widely and many details of laws, bylaws and other regulations are mandatory to be included in this report, it has been considered preferable to present the information from each country separately in the Annexes 8-13. Please note that the appendixes consist mainly in the direct reporting from the local experts with a few secondary observations.

Section 6 presents an assessment summary while Section 7 a brief overview of the gaps identified.

5.2 Armenia

5.2.1 Overview

Table 4: Armenia Energy Balance 2014

Armenia Energy Balance 2014 (ktoe) Population 3 million (est).											
	Coal	**Crude oil**	**Oil products**	**Natural gas**	**Nuclear**	**Hydro**	**RES**	**Biofuels**	**Electricity**	**Heat**	**Total**
Own production	0	0	0	0	642	171	0	34		0	848
TPES	**0**	**0**	**368**	**1881**	**642**	**171**	**0**	**34**	**-95**	**0**	**2959**
Transformation a.o.			3	-703	-642	-171			556		-958
TFC	**0**	**0**	**328**	**1179**	**0**	**0**	**0**	**34**	**460**	**0**	**2001**
Industry			31	207	0	0	0	0	127	0	365
Transport			262	282					10		555
Residential			1	520				34	165	0	720
Service				170					86		255
Other			5						72		78
Non energy			27								27
Own production % of TPES:		28,7									
Source: IEA databases											

From the energy balance, it appears that own production amounts to 28,7% of the total primary energy supply. However, Armenia processes only few dispersed resources of uranium and the majority is imported. Therefore, the share of own production could be as low as 7% (hydro and biofuels).

The nuclear power plant, operational since 1979/1980, covers most of the base load electricity consumption (rehabilitation is planned). A life extension programme is in progress and is expected to prolong the operations of the nuclear power plant until 2027. For peak load, natural gas/hydro is used. All fossil fuels have to be imported. For households, being the major consumer, natural gas, biofuels and electricity are used. District heating has generally been abandoned. It is expected that future HPP and PV can make up for the lack of electricity by 2027 (due to the closure of the nuclear plant). Future PPP projects concern a natural gas combined cycle plant, hydropower and solar PV as well as a high voltage transmission line from the Hrazdan substation.

In June 2017, a law on PPPs including concessions was put into force. Until then there was no specific PPP law. However, in practice several laws were used for the regulation of PPPs/concessions; mainly procurement laws/regulations, as well as several sectorial laws that are the legal bases of PPP regulations.

EBRD recently assisted in the elaboration of the PPP law and the legal framework for a PPP-unit.

For the purpose of analyses of the main features and peculiarities of the PPP and concession agreements in the legislation in force in Armenia, the following laws and bylaws have been examined before the new PPP law:

- Civil Code
- Law on Procurement
- Law on Energy
- Law on Foreign investments
- Government Programmes (which include the priority areas that are of interest of the present document)
- Government decisions on regulating and approving the PPP/ Concession agreements.

It should be stated that the core regulations of the PPPs and Concession agreement before the new law was laid down in the **Law on Procurement**. This was the base for the further implementations of the presently discussed agreements, which of course go hand in hand with other, already mentioned sets of laws.

We will refer to the more concert and applicable clauses of the mentioned laws throughout each point of this document. Please find these in the Annex 8 on Armenia. Please note that this section is made before the new PPP law was enacted.

Law on Procurement states that procurement process should be unified, competitive, transparent, public and not discriminative.

5.2.2 Existence of a PPP unit

In Armenia, there is no PPP Unit yet. The new Law on PPP/concession, enacted in June 2017 with assistance from EBRD, provides for the establishment of the Unit. However, earlier than that, in January 2017, the new Centre for Strategic Initiatives of the Government of Armenia (CSI) was inaugurated, which served to promote key reforms, contribute to the growth of exports, as well as attract long-term foreign investments. Its main focuses included public administration, information and high technologies, tourism, agriculture and processing industries, education, tax and customs sectors.

The activity of the Centre was managed by the Board of Trustees, which was composed of the representatives of both the state and the private sector.

The main goals of the Centre were:

1. Revision of the PPP legal framework.
2. Revision of the Investment legislation.
3. Creation of PPP Unit, the competences of which will be included in the PPP/concessions law.

However, in September 2018 the CSI was dissolved and the Government prepared a new draft PPP law.

5.2.3 Assessment

The assessment is based on the situation before the enactment of the new PPP law in June 2017.

Existence of Legislation PPP/Concession

1. Until June 2017 Armenia did not have a general Concession or PPP law. The only reference to Concessions could be found in the Law on Foreign Investments providing that concessions are one of the forms of foreign investments. Armenia today performs PPP by applying the Law on Procurements, dated 22.12.2010 (hereinafter the "PP Law"), Resolution of the Government 168-N *"On Organization of the Procurement Process",* dated 10.02.2011 (hereinafter "Resolution No. 168"), Regulation No. 1241 on *"State private-partnership Assessment and Approval of Programs"* of 09.2.2012, (hereinafter "Decision No. 1241").
   Relevant legislation can be found at *http://gnumner.am/en/home.html.*

Procuring Authorities

2. Pursuant to Article 2 of the PP Law, the procuring authorities are: state governance bodies and local self-government bodies, state or community agencies, Central Bank, state or community non-profit organizations and entities with over fifty per cent of shares owned by the state or communities envisaged by the Constitution and laws. PPP projects must be approved by the Government according to a programme on priorities, in which the energy sector is mentioned.

Tendering process

3. Pursuant to Article 24 (1) of the PP Law, the tender announcement and invitation is published in the *Bulletin* in order to attract bidders to an open procedure. The procurement notice is published also online ***www.azdarar.am.***
4. Pursuant to Article 24 (2) of the PP Law, in the case of an open procedure, the deadline for bid submission shall be at least **forty (40) calendar** days from the publication of the announcement and the invitation in the *Bulletin.*
5. Pursuant to Article 27 (g) of the PP Law, the request for proposal shall contain **the draft procurement contract.**
6. Pursuant to Article 24 (3) of the PP Law, the tender invitation contains the following information: 1) Name and location of Client; 2) Rules of the open procedure; 3) Brief and clear summary of the content of contract and procurement subject descriptions; 4) Announcement about the right of bidders to participate in the open procedure; 5) Conditions for obtaining a hard copy of the invitation, including charges and payment procedure thereof; 6) Language(s), in which the bids must be submitted; 7) Summary of bidder qualification criteria; 8) Criteria to be used for establishing the winning bidder; 9) Procedure, venue and deadline for bid submission; 10) Name and location of the body responsible for appeal and precise information concerning deadlines for lodging appeals; 11) Procedure, venue, date and time of bid opening; 12) Other information, if necessary.
7. Pursuant to Article 21 (1) of the PP Law, in case a prequalification procedure is arranged: 1) A prequalification announcement is published; 2) The deadline for submission of prequalification application cannot be less than 25 calendar days after publishing the announcement on prequalification.
8. Pursuant to Article 21 (2) of the PP Law, the prequalification announcement in Armenian, English and Russian is published in the *Bulletin* and contains: the requirements set out for applicant's eligibility to bid and qualification and the procedure for their evaluation.
9. Pursuant to Article 26 (1) of the PP Law, the bidder has the right to request a clarification about the invitation at least five (5) calendar days prior to the deadline for submission of bids. The clarification to the inquirer is provided within three (3) calendar days of receiving such request.

10. Pursuant to Article 26 (2) of the PP Law, on the day following the date when the clarification is provided to the inquirer, an announcement on the content of request and of provided clarification is published in the Bulletin, without disclosing the data on the inquirer.
11. Pursuant to Article 18 (2) of the PP Law, a competitive dialogue procedure could be used, if the Client: 1) Is not objectively able to specify the description of procurement subject in accordance with the provisions of this law; and 2) Gives the bidders an opportunity to propose possible alternative descriptions of procurement subject; or 3) There is a need to negotiate with the bidders to clarify some specific features of the procurement subject description. 4) In cases of concluding public-private partnership, including asset management and concession contracts.
12. Pursuant to Article 5 (3) (4) of the PP Law, the bidder must satisfy the qualification criteria set out in the invitation. The bidder shall meet the following criteria set out in the invitation and required to fulfil contractual obligations, including: financial resources.
13. Pursuant to Article 31 (1) of the PP Law, the bids are evaluated following the procedure specified in the invitation. The bids compliant to the conditions specified in the invitation are rated as satisfactory; otherwise the bids are rated unsatisfactory and rejected. Furthermore, Article 31 (2) of the same law stipulates or provides directions on how the winning bid is chosen.
14. Pursuant to Article 36 (1) (1) of the PP Law, negotiations between the evaluation commission, the bidder and the bidders is prohibited unless if there was one bidder, who participated in the open procedure and submitted a bid compliant to the requirements of the invitation, or there was only one bid evaluated – as a result of bid evaluation - as compliant to the requirements of the invitation. The negotiations can lead only to the offered price reduction and/or changes payment conditions.
15. Pursuant to Article 9 (1) of the PP Law, in case of open bidding, prior to contract signature, the Client publishes an announcement on contract award decision. It can be announced: 1) At the meeting on finalization of bidding results through a public debriefing to which all the bidders in the procurement process have been invited; or 2) Such announcement can be sent to all bidders involved in the procurement process by electronic means, fax or registered mail; or 3) Such announcement can be posted at the **website** of the Authorized Body and, if possible, also at the website of the Client.
16. Pursuant to Article 9 (2) of the PP Law, the contract award decision shall contain brief information on evaluation of bids and relevant reasons for the selection of this bidder and a statement on standstill period. The standstill period is the period from the day following the date on which the contract award decision is announced to the day of contract signature.
17. Pursuant to Article 36 (1) of the PP Law, negotiations between the evaluation commission, the Client and the bidders are prohibited, except: 1) If there was one bidder, who participated in the open procedure and submitted a bid compliant to the requirements of the invitation, or there was only one bid evaluated as a result of bid evaluation as compliant to the requirements of the invitation. The negotiations under this paragraph can lead only to the offered price reduction and/or changes payment conditions; 2) Other cases specified in the PP Law.

Contract Management

. Compensation was regulated by the Civil Code.

Main points revealed from data provided

A. As regards PPP/concession legislation:

- Until June 2017, there was no specific Concession or PPP law and Armenia was resorting to general procurement law to govern its PPP contracts. At present, there is no PPP Unit. The Centre for Strategic Initiatives of the Government of Armenia (CSI), created in January 2017

and which might play a key role in the promotion of foreign investment and capacity building related to PPP projects, was dissolved in September 2018.

Public procurement in Armenia operates close to recognised good practices, although in practice it is not applied extensively as regards PPP. Minimum period for preparation of bids is 40 days, which is considered adequate.

- As regards transparency (public availability of all information to ensure a competitive process), the following steps are implemented:
  (a) Publication of the tender (website).
  (b) Publication of an announcement on contract award decision (website).
  (c) Publication of the draft procurement contract.
- It should be noted that no information is made public during management of PPP contract.
- Re-negotiation of contracts, subcontracting disputes are not foreseen by the Law. Compensation is provided according to general provisions of Civil Code.
- The 5th point of the Annex of N 153-A, February 21, 2017 Decision of the Prime Minister "*On Approval of the action list for ensuring the implementation of the law on Procurements*" states the following action which has to be completed by the Ministry of Economic Development and Investments: "*To present to the Government Staff the draft decision of the Government "On the types of the Public-Private Partnership transactions, the requirements to the characteristics of those transactions, as well as the procedure on formation and approval of those characteristics*". **Note:** The new RoA Law on Procurements was signed on the 14.01.2016 and will enter into force on the 25.04.2017. No information was provided.

B. As regards energy environment

- The power market remains a monopoly under a single-buyer market structure. There is only one power distribution company (DISCO), and customers do not have a choice of a power supply company. Distribution was not unbundled into a Distribution System Operator (DSO) and suppliers and there are no clear rules guaranteeing third party access to transmission and distribution networks. There are no Market Rules for settling deviations between contracted and delivered amounts of power. Balancing is accomplished by an Independent System Operator (ISO) in cooperation with the DSO on an annual basis. Moreover, the GoA, the Ministry of Energy and Natural Resources of Armenia (MoENR) and the Regulator authorize new generating capacities that may include concessions. There is no Market Operator (MO) because the existing regulations are not systemized into the Market Rules, and the Network Rules (Grid Code) are not yet developed.[4]
- Tariffs are regulated using rate of return methodology, which does not provide sufficient incentives for optimizing costs of regulated monopolies. Distribution tariffs are not yet determined. The absence of a proper legal framework artificially restricts consumers' rights to import electricity from neighbouring countries. End-user tariffs are differentiated by voltage levels for day and night time tariffs, and there are no capacity charges, peak tariffs, or service fees. As a result, customers have no responsibility for defined capacity charges for large generation. The average difference between day and night tariffs is insignificant: for high voltage customers (i.e., 35 to 110 kilovolts (kV)), it is only 12 per cent and, for middle (6 to 10 kV) and low voltage (0.22 to 0.4 kV) customers, it is only 26 per cent. These differences do not support load management efforts. Future development plans for the rehabilitation of the Armenia nuclear power plant (NPP), construction of a new combined cycle gas turbine (CCGT) units and hydropower plants (HPPs), and transmission system upgrades will bring new challenges and opportunities to the Armenia power market.

[4] ARMENIA GAP ANALYSIS WITH LIST OF MARKET CHALLENGES AND LEGAL BARRIERS USAID June 2016.

Large generation tariffs are differentiated by capacity charge and energy price. The difference of monthly average generation prices is about 20 per cent. RES is regulated by a price cap tariff methodology with an annual recalculation formula that adjusts for inflation and exchange rates. Currently, PSRC has not yet set solar tariffs. It is expected to identify solar tariffs through tendering of solar photovoltaic (PV) projects under the World Bank Scaling-up Renewable Energy Programme (SREP). It is expected this programme will help finance the country's first 40 to 50 MW of utility scale solar PV projects through private investors while minimizing the tariff impact by using SREP funds.

C. Projects mentioned as PPPs:

1. During our mission in the country the following PPP projects were identified:

a) Agreement with Italian RENCO company on construction of a combined-cycle unit at the Yerevan TPP thermal power plant. The purchase of the whole electricity generated is guaranteed for 20 years.

b) The deal between Contour Global (Contour Global Hydro Cascade, is the owner of Vorotan cascade of hydropower plants in the southern region of Syunik) and the Armenian government was closed in 2015 August. It is the largest US investment in Armenia. The total installed capacity of the cascade is 404.2 MW. The cascade consists of three hydropower plants - Spandaryan (installed capacity - 76 MW), Shamb (171 MW) and Tatev (157.2 MW). Vorotan Cascade of HPPs is one of the three largest taxpayers of Armenia. The cascade accounts for about 15% of Armenia's generating capacity.

c) Solar energy is a sector with high growth potential. Introduction of feed-in tariffs coupled with availability of subsidized financing in the sector is expected to make solar energy projects feasible in Armenia. Solar photovoltaic power plants (PVPP) with the installed capacity of 60 MW are planned to be commissioned.

2. "Investors' club of Armenia" is the first non-public contractual investment fund registered by the Central Bank of Armenia which through involvement of domestic and foreign private financial resources aims at developing prioritized economy sectors, such as alternative energy sources, energy and tourism infrastructure, mining industry, food production, light industry, etc. Investors Club of Armenia was created by initiative of Prime Minister Karen Karapetyan and businessman Samvel Karapetyan. Projects to be envisaged undertaken by the Fund are the following:

A) Shnogh HPP /about 75 MW capacity and around 300 million kWh annual electricity generation/ on Debet River
B) Replacement of high-voltage transmission line from Hrazdan substation (in the north-east of Armenia) to Shinuhair substation (in the south of the country) to enhance the reliability and capacity of the transmission network and to close the power supply gap in Armenia.
C) Waste-to-energy (WtE) or energy-from-waste (EfW) (the process of creating energy in the form of electricity or heat from the incineration of waste source)

5.2.4 Gaps/Recommendations

1. PPPs and concessions were not specifically regulated until June 2017. The absence of a clear legal and regulatory framework was an obstacle to the funding of projects. Apart from the need for an adequate legal framework there is also a need for elaboration of a National Infrastructure Plan. The

activities on elaboration of the new PPP law could be a welcome progress. The PPP Unit is still at the planning stage.

2. Government support and financial securities are defined in the general legislation such as the Civil Code and Law on Budgetary System, which recognise and provide for such elements. No clear reference is made to international arbitration for concession arrangements.

3. The unavailability of laws (until June 2017) regulating concessions in general and energy concessions in particular and the associated lack of a stable legal environment for projects with private sector is identified.

5.3 Azerbaijan

5.3.1 Overview

Table 5, Energy Balance 2014

Azerbaijan Energy Balance 2014 Population 9,8 million (est).											
	Coal	**Crude oil**	**Oil products**	**Natural gas**	**Nuclear**	**Hydro**	**RES**	**Biofuels**	**Electricity**	**Heat**	**Total**
Own production	0	42343	0	16189	0	112	0	153		0	58777
TPES	**0**	**6915**	**-2474**	**9648**	**0**	**112**	**0**	**153**	**-31**	**0**	**14332**
Transformation a.o.		-6915	6175	-6370	0	-112	0	-68	1486	120	-5684
TFC	**0**	**0**	**3702**	**3279**	**0**	**0**	**0**	**85**	**1454**	**120**	**8640**
Industry			69	888	0	0	0	0	272	0	1229
Transport			2533	0				**0**	46		2580
Residential			42	2162				58	1136	94	2983
Service			10	161				24	425	26	647
Other			330	41				2	84	0	457
Non energy			717	25							742
Own production % of TPES:		410,1									
Source: IEA databases											

Azerbaijan possesses large reserves of crude oil and natural gas and is an important exporter of oil (both crude oil and oil products) and natural gas. The Trans Adriatic Pipeline for natural gas is under construction and will connect Southern Europe (and thereby all Europe) to the reserves in mainly the Shah Deniz natural gas field. The field is developed as a joint venture with a production sharing agreement between the developers and Azerbaijan. The major energy consumers in the country are residential areas which are mainly supplied with natural gas, closely followed by the transport sector.

Concessions contracts for production sharing are applied for oil and natural gas. These contracts overrule other legislation, but the contractor must negotiate details with the involved Ministries.

The Law of the Republic of Azerbaijan on “Special financing of the investment projects connected with construction and infrastructure facilities” of 2016, foresees general requirements for the agreements concluded on the basis of the “Build-Operate-Transfer” model. Although BOT is the name of the internationally recognized model aiming public-private partnership , the Law of the Republic of Azerbaijan on “Energy” only provides for the conclusion of energy agreements.

In order to bring the legislative acts on concession contracts and PPP in line with international standards, 3 regulatory acts such as the Law of the Republic of Azerbaijan on “Public-Private Partnership”, “The Procedures for Preparation of bids and conducting bids on the Public-Private Partnership Projects in the Republic of Azerbaijan” and “The Regulations on the Tender Commission for Selection of Business Partners in the Public-Private Partnership Projects in the Republic of Azerbaijan” have been drafted.

The Ministry of Economy was assigned to improve the regulatory framework related to PPPs and develop a PPP concept up to 2020. In addition, the prioritisation of projects falling under the Law on Special financing of investment projects as well as the development of support mechanisms for PPPs

including assessment of the feasibility of establishment of a PPP investment fund are due to be concluded by 2020.

A PPP Unit does not exist in Azerbaijan; however, its establishment is possible by 2020 according to the Government's work programme.

5.3.2 Assessment

Existence of Legislation PPP/Concession

1.Legal and institutional framework for PPPs/concessions was not identified in the country, as Azerbaijan does not regulate or even provide for public works, or services concessions, or PPP. However, relevant drafts are in the process of elaboration, but are not yet approved.

2. As regards energy projects:

The Subsoil Law No 439-IQ/1998), the Energy Law No 541-IQ/1998) and the Energy Resources Law No 94-IQ/1996 constitute the basic laws and regulations governing oil and gas industry in Azerbaijan. Decree No 310/28.3.2000 on "Measures to Improve the Issuance of Special Permits", was subsequently amended. According to information provided, in practice, the aforementioned Decree is obsolete, and its amendment is planned in the near future *(see clarification provided by local law firm ACE Group Consultants, LLC)*

The Subsoil Law governs the exploration, use, protection, safety and supervision of the use of subsoil resources, including oil located within Azerbaijan and on the Azerbaijani sector of the Caspian Sea's continental shelf.

3. Under the Law "*On Licenses and Permits"*, dated 15 March 2016, which is in force form 1 June 2016 and the Presidential Decree No.176-VQ/20.4.2016 "On the Implementation of the Law on Licenses and Permits, permits are required for the following:

•production of gas and processing of natural gas;

•transportation of gas;

•distribution of gas;

•exploration of oil and gas fields;

•development and production from oil and gas fields;

•processing of oil and oil products; and

•transportation of oil and oil products by pipelines. (*source INTERNET)*

The Law provides the legal basis for permits. The concept of a "permit" is an official document issued by the relevant body (permission, approval, certification, authorization, accreditation, etc.) for carrying out certain specific business activity.

4. The Energy Law is intended to complete the legal framework for the use of subsoil resources, including oil and gas. Article 5 of the Law reads: "*The exclusive rights of natural and legal entities other than the State, may result only from an Energy Contract concluded pursuant to the provisions of Chapter 5 of the present Law or from rights granted to enterprises in the Energy Sector by legislation."* According to the data provided, the State of Azerbaijan is planning amendment excluding the "agreement part", so that energy relations shall be regulated by permits granted by the Ministry of Energy *(see clarification provided by local law firm ACE Group Consultants, LLC).*

5. Also the Law of March 2016 on "*Specialised financing of the investment projects connected to construction and infrastructure facilities"* includes the requirement of agreements concluded on the basis of Build-Operate-Transfer" model[5].

The BOT model is defined in the Law (in accordance with agreements with the Ministry of Industry) as the payment from the consumers for goods and services produced by investors (i.e. resident and non-resident legal entities, their branches or permanent establishments) or the payment from the Ministry of Industry of investment expenses (including income earned) to investors in respect of certain investment projects listed in the Law. Financing under the BOT model will apply to the construction (including current and capital repair, renovation and restoration), the operation and the transfer, inter alia, of the following facilities:

•bridges, tunnels;

•water reservoirs, water purification facilities, irrigation, drinking and household and sewage systems, main gas pipelines, underground gas storage facilities, intracity gas networks;

•press and conference centres, as well as educational, health, culture and tourist facilities;

•commercial buildings, wholesale markets, factories and industrial sites;

•sports centres, hostels, rest and entertainment parks;

•industrial, high technology and agricultural parks, automated management systems based on high technologies and other systems in the area of information technologies;

•enterprises on electricity generation, distribution and sale;

•highways and railways, bus station complexes, logistics centres, underground and surface parking lots, metro lines and stations;

•special economic zones, seaports and airports used for civilian purposes, complexes consisting of cargo, passenger transportation, and yacht ports.

A state guarantee will be provided with regard to the contractual obligations undertaken by the investor. If the investor terminates the agreement at his initiative , the Ministry of Industry will not be responsible for obligations undertaken by the investor in respect of the investment project.

The investor will be exempted from state duties and charges in connection with the BOT investment project and the law On State Procurement shall not apply to investment projects carried out on the basis of the special financing rules provided by the Law. *(source: INTERNET/Linkedin).*

[5] Investors will be responsible for the design, financing, construction (including current and capital repair, renovation and restoration), and use of the BOT project. The President of Azerbaijan will determine the conditions for carrying out investment projects, the requirements to be met by investors, depending on the type of construction and infrastructure facilities, the terms and conditions of agreements to be concluded with investors and the rules for the determination of the value of goods and services obtained as a result of investments. A BOT agreement may be concluded for a term of up to 49 years. The term of the agreement will be determined depending on the period for the repayment of loans taken for the purpose of incurring investment expenses (including income earned), as well as the characteristics of the project, the investment amount and the principles for the management of the project. The value of the goods and services produced under the BOT agreement (except for the value of goods and services regulated by the state) will be determined based on an agreement of the parties, taking into account their nature, amount of consumption or use, quality, safety and other criteria. Based on an agreement of the parties, the Ministry of Industry may provide a guarantee for the purchase of goods and services up to a certain limit.

Procuring Authorities

No such Authority was identified (see page 3 of the initial report of local law firm).

Further to Presidential Decree 149/2014, the Ministry of Energy assists in the implementation of state policy and the administration in the fuel and energy sector. In addition, the State Oil Company of the Republic of Azerbaijan plays an important (in fact, a leading) role in such matters – especially in relation to the practical implementation of oil and gas projects.

Tendering Process

No information as to Procurement law and its ambit was provided.

Exploration, development and production of hydrocarbons are done through the PSAs concluded between major oil companies and Azerbaijan. All major oil and gas projects to date have been undertaken on the basis of PSAs.

No data was provided as to the process followed for the conclusion of concession projects assigned so far.

Main points revealed from data available

1. Azerbaijan does not have any specific Law dealing with PPPs or concessions. The Civil Code and the Law on Protection of Foreign Investments, recognise concessions, yet neither of the two refers to the modern understanding of PPP/Concession[6]. The Law on Protection of Foreign Investments contains only one article related to concessions. However, this law is limited to concessions in the natural resources sector and is restricted in its application to foreign investors[7].

2. Concessions are perceived as permits or licenses and are in distance with the common understanding of modern concessions of public works or services. Sector-specific laws do not regulate concessions either.

3. The 2001 Law on State Purchase sets the basis for public procurement, organisation and rules for public procurement procedures as well as selection of the contractor and complaints procedures. Yet, this law is silent on PPP[8].

4. During the EBRD 2011-2012 PPP Legislative Framework Assessment the quality of PPP/Concessions legal framework in Azerbaijan was rated as being in "Low compliance" with international best practices, the key weaknesses being Project Agreement and Security and Support Issues. The practical implementation of the legal framework received a "Very low effectiveness" score.

5.3.3 Gaps/Recommendations

1. The country lacks a single PPP/concession policy. The introduction of a legal framework for PPPs/concession in Azerbaijan is considered useful given the increasing scarcity in natural resources

6 "Concession is the general agreement between a company and a State in the oil and gas industry that gives the company the right to operate, explore and develop the energy sector within the government's jurisdiction, subject to certain conditions".

"PPP is between a State and private-sector company to implement certain tasks under equal or similar conditions".

7 CONCESSION/ PPP Laws assessment 2014 EBRD

8 CONCESSION/ PPP Laws assessment 2014 EBRD

and the need to optimise the costs of investment projects, . To this end the elaboration of certain drafts has already taken place.

2. Although the complete abolishment of licenses might not be possible, clear procurement processes suitable for PPP structures upholding the principles of transparency, fairness and equality to all bidders, are expected to establish effective competition regarding PPP projects which is considered to the benefit of public authorities (by achieving better value for money).

3. The fact that a concession in practice constitutes a concrete deal potentially overruling any other law is another argument for introducing a concession law or energy law foreseeing the foundations for agreements.

5.4 Belarus

5.4.1 Overview

Table 6. Energy Balance 2014

Belarus Energy Balance 2014											
Population 9,5 million (est).											
	Coal	**Crude oil**	**Oil products**	**Natural gas**	**Nuclear**	**Hydro**	**RES**	**Biofuels**	**Electricity**	**Heat**	**Total**
Own production	359	1653	0	184	0	10	1	1460		0	3668
TPES	**842**	**22427**	**-14234**	**16954**	**0**	**10**	**1**	**1460**	**285**	**0**	**27746**
Transformation a.o.	-139	-22427	20784	-12254	0	-10	-1	-739	2314	5089	7385
TFC	**702**	**0**	**6550**	**4700**	**0**	**0**	**0**	**721**	**2599**	**5089**	**20361**
Industry	487		181	1193	0	0	0	56	1109	1499	4525
Transport	9		3520	471				3	110	0	4113
Residential	144		89	1526				380	550	2230	4919
Service	39		122	51				219	695	1195	2321
Other	3		686	84				63	135	165	1136
Non energy	20		1952	1376							3348
Own production % of TPES:		13,2									
Source: IEA databases											

Belarus possesses some minor oil and gas fields in the Gomel area and a large refining capacity. Therefore, Belarus performs large imports of crude oil and exports of oil products. The main energy consumers are the residential sector (which relies heavily on natural gas)and the industry. District heating is widespread but in need for rehabilitation and thereby reduction of losses. A nuclear power plant established with Russian capital is planned to be operational by 2019 and will operate as a state company.

There are plans to offer two areas for oil exploration. However, due to the currently low oil prices, the Authorities do not expect a considerable interest from the side of the investors. A production-sharing scheme is considered more likely to be offered to potential investors.

According to IEA Statistics for 2014, TPES of crude oil is 22,4 Mtoe and most of the oil is refined by the national petrochemical industry. Only 8.2% of domestic oil demands are covered through domestic production. TPES of natural gas is 17 Mtoe (of which domestic production is only 1%).

Since 1990, there has been a tendency towards decreasing the share of oil and increasing the share of natural gas, biofuels and wood waste in TPES. Thus, one can note a disparity in the Belarusian energy sector in which the largest part of TPES is provided by imported oil and gas (more than 90% in total), while domestic resources (primarily peat, wood and wood waste) only provide about 8% of TPES.

At present, there are no completed PPP energy projects in Belarus, but establishment of a HPP at the Western Dvina River is considered, as well as, a waste incineration plant.

A revised PPP law is expected to be adopted soon.

The PPP and concessions legal framework of the Republic of Belarus mainly consists of the following two laws:

a) The Law of the Republic of Belarus dated July 12, 2013 No. 63-Z “On Concessions” (hereinafter - “the Law on Concessions”);
b) The Law of the Republic of Belarus dated December 30, 2015 No. 345-Z “On the Public-private Partnership” (hereinafter - “the Law on PPP”).

. Since 2013, investment and concession legal relations have been governed separately. Before that, the Investment Code of the Republic of Belarus regulated legal relations in the concessions field.

The first legal frameworks concerning PPP were set up in 2015.

Laws constitute the base of the regulation which is further developed in the subordinate legal acts (primarily in the acts of the Government and relevant ministries).

According to the Regulations of the Council of Ministers of the Republic of Belarus dated January 22, 2014 No. 54 “On the approval of the Requirements of the setting up and holding of the competitive tenders (auctions) for choosing the investor to conclude the concession agreement” (Regulations No. 54) a concessionary has to be chosen via a tender or an auction which can be either open or closed competitive tender (auction).

The information on setting up the open competitive tenders (auctions) has to be published in the open sources.

The information on closed competitive tenders (auctions) is sent directly to potential participants.

The committee within the concession authority is responsible for organizing and holding competitive tenders (auctions).

During the competitive tender procedure, the committee performs the following:

- Opening of the tender offers received;
- Evaluation of the competitive offers;
- Drawing up a decision on the award.

During the opening of the tender offer (upon the decision of the committee), representatives of the tender participant whose offer is being opened are allowed. Representatives of all the tender participants are allowed while the decision on the provided offers is being made.

The tender results notice (including the case in which the tender is declared unproductive) is sent to all participants. The law does not stipulate the content of the notice.

The Law on PPP stipulates the principle of tender transparency (art. 18).

The committee set up within the authorized body is responsible for organizing and holding competitive tenders (auctions).

Information on holding the open tender is open access (through the Internet, media), whereas information on holding the closed tender is sent to potential tender participants.

Information (i.e. the committee minutes of meetings) on preliminary selection of tender participants, the choice of the tender winner and declaration of the tender as abandoned (unproductive) is required to be posted on the Internet and media.

Opening a letter contained in the tender offer is executed in the presence of tender participants. The order of consideration and assessment of the offers is specified in the tender documentation.

5.4.2 Existence of a PPP unit

The PPP Unit was established in 2014 and became operational in 2015. One legal expert and four economists constitute the officers of the Unit. However, there is a need for capacity building, as the PPP unit staff lack international experience, especially in terms of conducting feasibility studies.

The development of the PPP institutional environment continued through the education and training of the PPP Unit Staff and the members of the Inter-Ministerial Infrastructure Coordination Board (IICB).

The Unit is responsible for capacity building on PPPs and risk management and mainly in the fields of transportation, healthcare, energy and kindergartens. EBRD is helping with the potential PPP for the road connection between Poland and Moscow.

The Ministry of Economy is working on an amendment to the PPP law with the support of the PPP Unit. At the time of information collection by the Study Team a revised the PPP law was expected.

The following state bodies are involved in concession and PPPs for energy:

1) The President of the Republic of Belarus, regarding concessions only:

- determines the single state policy;
- approves the list of objects proposed for transfer in concession, determines type of concession contract and order of selection of the concessionaire;
- determines the order of formation of and approves the lists on concession objects the data about which constitute state secrets and on concession objects having strategic importance for the Republic of Belarus, determines the grantor, concession body, type of concession contract, order of selection of the concessionaire and the order of establishing the initial amount of a one-time payment.

2) The Government of the Republic of Belarus, regarding concessions only:

- ensures the implementation of the single state policy;
- determines the order of organization and conducting of competitive biddings (auctions);
- determines the concession bodies on concession objects of the Republic of Belarus;
- determines, unless otherwise established by the President of the Republic of Belarus, the order of establishing the initial amount of a one-time payment on concession objects of the Republic of Belarus;
- introduces, for the consideration of the President of the Republic of Belarus, the drafts of legal normative acts on the approval of the list on concession objects of the Republic of Belarus, on introducing changes and (or) additions;
- determines the order of maintaining the state register of concession contracts.

3) The Ministry of Economy of the Republic of Belarus:

- Implements the unified national policy in the field of public-private partnership;
- coordinates the activity between republic authorities of state management and other state organizations subordinated Council of Ministers and also local executive and administrative authorities;
- makes the public complex examination of draft public-private partnership agreements;
- examines and coordinate of tender documentation;
- participates in the work of commission on conducting the tender through sending its representatives;
- establishes requirements for technical and economic explanation of proposals on realization of a public-private partnership;

- develops a methodology for assessing proposals on realization of a public-private partnership project;
- provides explanation on questions related to implementation of the law of the Republic of Belarus on public-private partnership;
- cooperates with foreign and international legal entities, foreign organizations which are not legal entities;
- provides with methodological assistance, consult and develop recommendations;
- exercises other powers in accordance with the laws.

3) The Ministry of Finance of the Republic of Belarus:

- makes the public complex examination of draft public-private partnership agreements;
- examines and coordinate of tender documentation;
- participates in the work of the commission on conducting the tender through sending its representatives;
- exercises other powers in accordance with the laws.

5.4.3 Assessment

Existence of Legislation PPP/Concession

1.As mentioned above, in Belarus, concessions are regulated by Law No 63-Z *"On concessions"* and cover investment in respect to subsoil, water, forests, land and facilities that are owned only by the state or activity over which there is exclusive right of the state (by conclusion of concession contract). In accordance with the Law on concession, the concession contract is a written agreement by virtue of which, one party undertakes to provide another party with the right to possession and use of the concession object or the right to perform a type of activity on a payment or gratuitous basis for a certain time period.

2. Law No 345-Z "*On the public-private Partnership"* (the "PPP Law") foresees that PPP may be selected in respect of infrastructure in the fields of roads and transport activities, public utilities and public services, energy etc.

Procuring Authorities

Public Authorities responsible for procuring PPP projects are:

a) The Republic of Belarus, on behalf of which a state body or another public organization authorized by the President of the Republic of Belarus, the Republican state administration body authorized by the Council of Ministers of the Republic of Belarus or another state organization subordinated to the Council of Ministers of the Republic of Belarus;

b) Administrative territorial unit, on behalf of which acts the local executive and regulatory body (executive committee).

Tendering process

The PPP Law stipulates **four (4) stages for the implementation of the PPP** projects:

1) Preparation of proposals for the implementation of the PPP project;

2) Decision regarding the implementation of the PPP project;

3) Conduct of a tendering process on the selection of the private partner, for the conclusion of the PPP agreement;

4) Conclusion and execution of the PPP agreement.

In principle, selection of the private partner for the conclusion of the PPP agreement is conducted on a competitive basis. In this case, the PPP Law stipulates that the competition will consist of two stages:

- preliminary selection of participants and

- choice of concessionaire.

In principle, the concession process includes **(4) four stages**:

1. Formation, approval, publication in the media and on the Internet of the lists of concession objects of the Republic of Belarus and concession objects of administrative-territorial units, determining the type of the concession contract and the way of choosing the concessionaire according to them;

2. Determining the concession authority, development, agreement and approval of candidate concessionaires' offers;

3. Organizing and conducting a tender, for the purpose of deciding on the concessionaire;

4. Conclusion of the concession contract.

As regards notifications in case of concessions:

- Notification on conducting a tender should be published in the media and on the Internet, not later **than sixty (60) calendar days** before the day of the invitation to tender.
- Notification should contain the following information: (a) subject of the competition (auction); (b) general characteristics of the concession object and the period for which the concession object granted is in concession; (c) type of competition (auction); (d) an indication of the concession authority, its location, bank details, contact numbers, e-mail address (if available); (e) the size of the deposit to be included for the competition (auction) (not more than ten per cent of the amount of starting single payment), the procedure and terms of its submission; (f) starting amount of single payment; (g) the list of documents attached to the application for participation in the competition (auction), and the requirements for their registration; (h) conditions of the competition (during the competition) and a description of the criteria for determining the concessionaire; (i) requirements for the participants of the competition (auction); (j) date and time of completion of applications and documents for participation in the competition (auction); (k) the procedure for obtaining competitive (auction) documentation by individuals applied for participation in the competition (auction); (l) terms and procedure for submission of documents to the concession authority in accordance with the bidding documentation, as well as the proposals of the participants to implement the conditions of the competition (during the competition); (m) date, time and place of the tender; (n) the procedure of the tender; information in case there is a need for compensation of costs for the organization and conduct of the tender, including the costs associated with bidding documentation.
- The competitive bidding documentation must contain: (a) information about the time limit of submission and requirements to documents that must be submitted by the participants of the competitive bidding (auction) to confirm compliance with the requirements established for the

participants; (b) concession proposal; (c) draft of the concession contract; (d) reference to the right of the participant of the competitive bidding (auction) to modify or withdraw its application for participation in the competitive bidding (auction) before the date of conducting competitive bidding (auction); (e) information on the order of obtaining explanations on the content of the competitive bidding (auction) documentation.

Participants of the competitive tender are entitled to request clarifications by the concession body not later than (30) thirty calendar days prior to the end of the time limit for submission of the offers in accordance with the bidding documents. The concession body is obliged to provide the clarification requested without naming the sender, by publishing it within five (5) calendar days from the date of the request*(article 16 of Law No 63-Z/2013).*

- The concession body is entitled to modify the competitive bidding (auction) documentation by means of approval of respective changes and (or) additions not later than twenty (20) days prior to the day of conducting the tender (article 16 of Law No 63-Z/2013).
- Changes and (or) additions introduced into competitive bidding (auction) documentation are binding and shall be brought to the attention of all participants of the competitive bidding (auction) to whom the concession body has provided the competitive bidding (auction) documentation within seven calendar days from the date of their approval, . In this case, the date of the competitive bidding (auction) is postponed for a period of not less than thirty calendar days.
- Requirements for tender participants: Participants should be legal entities of the Republic of Belarus or foreign and international legal entities, which is solvent, not in the process of liquidation or reorganization (with the exception of a legal person which takes over another legal person); their property should not be confiscated; their financial and economic activity should not be suspended in accordance with the legislation of the Republic of Belarus or the law of the country of their establishment; they should not be brought to liability for non-fulfilment or inappropriate fulfilment of their obligations under concession contracts or investment contracts concluded with the Republic of Belarus on the basis of a court's judgment which has entered into legal force; they should confirm the availability of their own funds or a contract (preliminary contract) with the bank or other credit financial institution concerning the provision of monetary means to the participant of the competitive bidding (auction) at the amount of not less than seventy-five per cent of the required amount of investments.
- The procedure foreseen by the law is an open tender or a closed tender (article 13 of Law No 63Z/2013). Concessions may also be granted without conducting a tender (article 13 and 20 paras 4 and 7 and 33 of Law No 63 -Z/2013).
- Determining the concessionaire: The participant whose proposal contains better conditions compared to those included in the other participants' proposals, including the suggested amount of single payment as per the committee's decision(see article 20).
- Conclusion of the concession contract: Concession contracts can be concluded for a period up to 99 years unless a shorter term is foreseen in legislative acts.
- According to article 23 on the Law on Concession, the procuring authority shall notify all participants of the result within not more than five (5) calendar days after the signing of the protocol on the results of a tender.

Management of Contract

1.The law on concession foresees that *"If during the validity period of the concession contract there is a change in the legislation affecting the concessionaire to a considerable extent it is stipulated in the concession contract that the parties involved will change the conditions of the concession contract so that the rights of the concessionaire are guaranteed. In case of a failure of the parties to reach consent on changing the conditions of the concession contract, the dispute is considered, at the initiative of one of the parties, in accordance with Article 35 of the present Law".*

2. The Law 63-Z/2013 foresees the conclusion of a new contract, amendment, termination and rescission of the concession contract, settlement of disputes and liability[see gaps and recommendations below paras 5 (a) and (b)].

Main observations according to data available

A. As regards PPP/concession legislation

1. Although Concession law coexists with PPP law, on the basis of the data provided it could be argued that the features (part from the sectors covered in its case) that could distinguish the two regimes are focused on the specific features of the contract concluded. According to article 24, 25 and 26 of Law 63-N/2013, Concession contracts include:

- Full concession contract *("The full concession contract means an agreement stipulating the origin and preservation of the right of ownership of the concessionaire to production manufactured by him"*).
- Concession contract on production sharing *(" The concession contract on production sharing is understood to be an agreement in accordance with which the manufactured production is shared between the concessionaire and the grantor in the amounts and order determined by the concession contract. A part of the manufactured production, which constitutes the share of the concessionaire in accordance with the conditions of the concession contract, belongs to him. The order and proportion of production sharing between parties to the concession contract are determined by the concession contract. In case of selection of the concessionaire at a competitive bidding, the proportion of production sharing may constitute a condition of the competitive bidding.*
- concession contract on rendering services (performing works). *("The concession contract on rendering services (performing works) is understood to be an agreement by virtue of which the right of ownership on the production manufactured, processed under the concession contract is transferred to the grantor. The concessionaire received remuneration for the services rendered (works performed) by him. Under a concession contract on rendering services (performing works), the concessionaire bears the risk of accidental loss or accidental damage of the concession object transferred to him for processing, and also of production manufactured, processed under the concession contract till its transfer to the grantor. At conclusion of the concession contract on rendering services (performing works) with a risk, remuneration to the concessionaire is paid only when the concessionaire achieved the result stipulated by the concession contract. At conclusion of the concession contract on rendering services (performing works) without risk, the remuneration to the concessionaire is paid regardless of the result achieved" article 27 of Law 63N/2013*).

  The features of the contract to be concluded under PPP Law is not clear so far.

- Introduction of the notion of *"one -time payment"* by the concessionaire (article 31 of Law 63Z/2013).

2. Belarusian legislation foresees **sixty (60) days** as the minimum period for the preparation of bids, which is considered adequate according to good practices in PPP procurement. However, the concession body is entitled to modify the competitive bidding (auction) documentation by means of approval of respective changes and (or) additions, not later than twenty (20) days prior to the day of conducting the tender. Changes and (or) additions introduced into competitive bidding documentation are binding and shall be brought to the attention of all participants of the competitive bidding (auction) to whom the concession body has provided the competitive bidding (auction) documentation not later than seven (7) calendar days from the day of their approval. In this case, the date of the competitive bidding is postponed for a period of **at least thirty (30) calendar days.**

3. Although the Law 63-Z/2013 does not make any reference to the observance of transparency (i.e. publicly available information to ensure a competitive process) the above law provides for:

(a) Publication of the tender on the mass media and the internet: Invitation to participate in a closed competitive bidding (auction) is not subject to publication on the Internet (see article 15 of Law 63-Z). However, it seems that direct access to concession documents is not free of charge (article 34 of Dir 2014/23), as according to article 15 of Law 63-Z/2013, the tender notice includes: "*information on necessity to reimburse the costs for organizing and conducting the competitive bidding (auction), including expenses related to the production and provision of the documentation required from participants of the competitive bidding (auction).".*

(b) Concession award notice: Publication of an announcement on contract award decision, although the means of publication are not specified (see article 23 of Law 63-Z).

(c) Publication of the draft procurement contract.

4. PPP law as it stands could not be applied in practice without the enactment of secondary legislation.

5. The Ministry of Economy with the support of PPP Unit is working on an amendment of the PPP law. A revised PPP law is expected to be adopted within 2017.

B. As regards energy sector

1. In general, domestic energy sources of Belarus are divided into two main categories:

• Mineral sources such as crude oil and oil shale, natural gas, peat;

• Renewable energy sources (wood, wood chips and waste wood, biomass, hydro and wind energy, etc.)

Belarus cannot cover its demand for energy from domestic sources because its mineral resources and RES are quite limited. The country has to import fuels and energy, mainly from the Russian Federation. The share of the net import of total primary fuel and energy consumption is about 85%.

C. Projects mentioned as PPPs

Except from the projects mentioned in the Annex, according to information gathered during our mission, the only existing project as regards energy concerns energy efficiency standards (for household appliances). Also, EBRD is involved in a project regarding communal system of energy generation. The EBRD contributes to the reform of tariffs and negotiation with local authorities. Establishment of a large wind farm with private investors failed due to distortions of a radar system. In reality, there are no on-going PPP projects in the energy sector.

5.4.4 Gaps/Recommendations

In the absence of a single law regulating concessions and PPP (which would be advisable), the following are noted:

1. As derived from the data provided, there is not a clear definition of PPP or concession.

In general, PPPs could be defined as an alternative form of public contract concerning the development of public infrastructure, through public procurement of works and/or public services awarded to private-sector contractors, who will undertake the project financing *(see Yescombe E., Principles of Project Finance Academic Press 2014)* and risk for its completion for a long contracting period. The contractors are paid either directly from contracting authorities on availability basis (PFI model), or from third users who will make use of the provided (by the private entity) goods or services through fees or tolls (concession model) (usage-based or user -pay payments) or through a combination of the above payment mechanisms. However, it should be mentioned that the differences between the above self-financed models are not exhausted to the way of payment of private entity, as there is a different conception as to the manner of realization of the investment plan which is characterised by different, qualitatively and quantitatively financial-entrepreneurial risks and basically a different plan for their evaluation and allocation.

2. The definition provided by the Belarusian law on concession does not seem to be in line with the European definition of "concession", basic criterion of which is the payment mechanism of the private entity, based on the exploitation of the work or service entailing an operating economic risk (*see above in detail Section 3.1.1.B*).

3. The law should expressly foresee the award criteria. It should be mentioned that concessions could be awarded not necessarily based on purely economic criteria but also the principle of non-discrimination and proportionality. The latter provides an overall economic advantage for the contracting authority in conditions of effective competition. The law(s) could also foresee that the contracting authority may hold negotiations with candidates and tenderers. It is suggested to state explicitly that the subject matter of the concession, the award criteria and the minimum requirements shall not be changed during the course of negotiations.

4. Specific reference should be made within the law(s) that Contracting authorities shall verify the conditions for participation relating to the professional and technical ability and the financial and economic standing of the candidates or tenderers on the basis of self-declarations, or references to be submitted as proof, as specified in the tender (non-discriminatory and proportionate to the subject-matter of the concession) requirements . The conditions for participation shall be related and proportionate to the need to ensure the ability of the concessionaire to perform the concession, taking into account the subject matter of the concession and the purpose of ensuring genuine competition.

5. Revision of articles 29 and 30 of Law 63-Z/2013 should take place as a rearrangement of the obligations and risks between the parties should not focus on the private partner only. Government should not limit itself to transfer land for construction etc.

6. The revision of article 33 of Law 63-Z/2013 should also be examined as:

(a) It provides that *"Upon the expiration of the maximum validity period of the concession contract provided by part one of Article 32 of this Law, unless otherwise established by legislative acts, the concessionaire who has bona fide carried out the conditions of this contract has the right to conclusion of a new concession contract in regard to the same concession object without conducting a competitive bidding (auction) on the conditions agreed with the grantor".*

Given the long contracting period (99 years), non -existence of transparency and clarity as to the criteria on the basis of which *"bona fide"* is defined, conclusion of extension without a tender should not be allowed. Clearer rules on subcontracting should also be included.

(b) It is very vague especially as regards amendments during contractual period *(*the law reads*: "Changes in the concession contract are introduced by means of conclusion by the parties of additional agreements in a written form. Such additional agreements are subject to be agreed with the state bodies and other organizations whose sphere of competence includes the issues regulated by the concession contract and to registration in the state register of concession contracts").* According to EU jurisprudence, the rule is that a new concession procedure is required in the case of material changes to the initial concession, in particular to the scope and content of the mutual rights and obligations of the parties. Such changes demonstrate the parties' intention to renegotiate essential terms or conditions of that concession. The (new) law should define the cases when the concession may be modified without a new concession award process i.e.: (a) when modifications are provided in the initial contract in clear, precise and unequivocal review clauses, (b) for additional works or services that have become necessary. In such case the increase in value will not exceed a certain percentage. (c) under certain conditions when the new concessionaire replaces the one to which the contracting authority had initially awarded the concession, (d) when modifications are not substantial.

7. Law contains contradictory provisions: "*If the competitive bidding is declared as having not taken place due to the fact that an application for participation in it was submitted by only one participant or only one participant has appeared for participation therein (hereinafter - the only participant of the competitive bidding), the commission on conducting the competitive bidding shall consider the proposals of this participant and give the conclusion on the compliance or non-compliance of his proposals with the conditions of the competitive bidding. In case of compliance of the proposals of the only participant with the conditions of the competitive bidding, the concession contract is concluded with him on conditions proposed by him."*

Where on the other hand:

"If the auction is declared as having not taken place due to the fact that an application for participation therein was submitted by only one participant or only one participant has appeared for participation therein (hereinafter - the only participant of the auction), the concession contract is concluded with this participant upon his consent to pay one-time payment in its initial amount increased by five percent".

(article 20 of Law 63Z/2013)".

5.5 Georgia

5.5.1 Overview

Table 7. Energy Balance 2014

Georgia Energy Balance 2014 Population 4,6 million (est).	Coal	Crude oil	Oil products	Natural gas	Nuclear	Hydro	RES	Biofuels	Electricity	Heat	Total
Own production	121	43	0	9	0	717	17	465		0	1372
TPES	**842**	**0**	**1046**	**1833**	**0**	**717**	**17**	**465**	**21**	**0**	**3222**
Transformation a.o.	0	0	0	-556	0	-717	-2	0	820	0	-455
TFC	**290**	**0**	**1046**	**1278**	**0**	**0**	**15**	**465**	**842**	**0**	**3935**
Industry	289		66	80	0	0	0	0	242	0	677
Transport	0		855	293				**0**	23	0	1171
Residential	0		18	499			5	457	212	0	1191
Service	1		7	186			9	8	221	0	432
Other	0		6	3			1	0	144	0	154
Non energy	0	0	93	216					0		309
Own production % of TPES:		42,6									
Source: IEA databases											

Georgia has few utilised domestic resources of energy except hydropower, being the major source for electricity. Biofuel is the second most important inland source. Coal, Natural gas and oil products are imported. The residential sector is the major consumer tightly followed by the transportation sector. There is a very large potential for further development of the hydro power plants with an estimated capacity of more than 4000 MW.

During the past few years, growing demand for new public infrastructure in Georgia has contributed to raising pressure for private sector participation, including private funding. Public-Private Partnerships arrangements are driven by limitations in public funds to cover investment needs as well as by efforts to increase the quality and efficiency of public services. Given the shortage of public funds in Georgia, the obvious solution is to invite greater private sector participation and to expand the use of public-private partnerships, which will reduce risks and raise profitability. This process is slowed down due to lack of relevant legal and institutional framework.

Unfortunately, there is currently no clear picture of Public Private Partnerships (the "PPP") and Concessions in Georgia. In particular there is no single regime governing PPPs and concessions. On the one hand, the Law of Georgia "On the Procedure for Granting Concessions to Foreign Countries and Companies"[9] (the "Concessions Law"), dating back to 1994, still remains as the only piece of specialised legislation in this area to date and on the other hand, there is a newly adopted Policy Paper on Public-Private Partnerships, approved by the Government of Georgia on 6 June, 2016 which provides for an absolutely different regime from the Concession Law and provides the guidelines for new PPP/Concessions law (including specific guidance for regulations of legal and institutional framework of PPPs). The drafting of this law is in progress with assistance from EBRD. Along with these regulations, there are some PPP projects, which fit into the existing legal framework, without application of Concession Law or PPP policy.

It is worth mentioning that the Government of Georgia remains determined to conduct the necessary legal reform in this field in order to match investment needs, modernise and improve the economy and

9 Law of Georgia No. 616-IS on the Procedures for Granting Concessions to Foreign Countries and Companies dated 21 December 1994.

thus meet public needs and facilitate and foster economic growth. Further, Georgia has assumed obligations with the EU Association Agreement to unify its legal framework to EU directives within the next couple of years.

To address the existing concerns, the Ministry of Economy and Sustainable Development of Georgia has approached the European Bank for Reconstruction and Development with a request for technical assistance in developing a modern public-private partnership policy framework and PPP / concession legislation in Georgia. It is within this framework that the new PPP policy has been adopted. New PPP law is being drafted, but certain regulations are still unclear. However, as the Ministry of Economy and Sustainable Development assures, the law which will be adopted shortly, will foresee clear regulations for PPPs and Concessions and, according to their statement, the new law will correspond to the adopted PPP policy.

At the time this Study was implemented, there was no dedicated PPP authority (PPP Unit) in Georgia. Some functions, which according to international best practices are usually transferred to a PPP Unit, were split among several bodies. Other functions simply did not exist (there was no authority responsible for training the public employees in order to boost their PPP knowledge, etc.) Also, there was no list of authorities entitled to enter into PPP/concession agreements.

Considering the previous ineffective co-ordination mechanism between the government bodies, the PPP policy offered a whole new institutional framework which determined their functions. However, the Study Team could not have a clear picture about the new institutional framework introduced by PPP policy until we have a new PPP law, and such new units practice their rights. After the finalisation of the Study Report, in 2018, the Ministry of Energy was merged with the Ministry of Economy and Sustainable Development. Further on, in October 2018, a PPP Unit was created with direct responsibility to the Prime Minister. As the Study was completed before these developments, they are simply mentioned as an update but cannot be analysed.

Although it was apparent that not only significant legislative, but also institutional changes need to be undertaken for PPP development, there have been a few PPP projects starting from 2006 (Tbilisi international Airport/BOOT Project) and the number of PPP projects (in particular PPPs in the Energy sector) are rapidly increasing. 14 successful energy projects with BOO model have been executed by the Ministry of Energy of Georgia and there are 7 on-going energy projects (some of them with BOO model) prepared by the Ministry of Energy which will become operational this year. Considering the lack of legal framework for granting PPPs and concessions, the Ministry of Energy has elaborated certain procedures , which correspond to this type of energy projects.

The Ministry of Energy of Georgia is the authority responsible for approval of all projects involving construction and operation of new power plants in Georgia. Such projects are awarded to investors either through (a) tender or (b) directly, by virtue of an individual administrative-legislative act of the Ministry. These procedures will be discussed in more detail in section 2.

We should also note that there has been no practice of establishing public-private partnerships in the field of gas and oil. The Law of Georgia on Gas and Oil governs very strictly the gas and oil industry[10]. In particular, Law of Georgia on Gas and Oil stipulates that oil and gas resources existing in the subsoil within the territory of Georgia shall be owned by the State, and Georgia shall have the exclusive and sovereign right of prospecting and exploration of oil and gas resources existing on its land and on its continental shelf. As for the right of ownership of extracted oil and gas, it is determined in accordance with the Production Sharing Contracts where the government of Georgia is represented by Georgian Gas and Oil Corporation (“GOGC”), (Partnership Fund owns 100% of the corporate shares).

[10] Law of Georgia on Gas and Oil dated 16 April 1999.

The Partnership Fund itself is owned by the state. 100% GOGC's shares are transferred to the Ministry of Energy with management rights). There are no other mechanisms of exploitation of gas and oil in practice and all existing gas and oil projects are governed by Production Sharing Contracts executed between GOGC and gas and oil operating companies.

5.5.2 Existence of a PPP and Risk Management Unit

As already noted, although the Concessions Law provides that there has to be established government body supervising entire process of granting concessions, no such body have ever been determined and neither such functions have been assumed by any government body, which would correspond to the regulations and scope of existing Concessions law.

As for the Policy, it has introduced a new institutional framework for concessions and PPPs. In particular, for the promotion and efficient handling of PPP projects, the Government aimed to establish a responsible PPP Unit under its umbrella (which, as mentioned above was actually created in October 2018), which would perform key functions related to PPPs, *inter alia, to*:

- Assist the line ministries in identifying prospective PPP projects and conduct assessment of project concepts proposed by the line ministries, as well as evaluate unsolicited proposals approved by the line ministries;
- Identify, initiate, formulate PPP projects;
- Arrange selecting, hiring and supervising consultants at any stage of PPP, if necessary;
- Participate in negotiations with prospective investors;
- Coordinate actions, including project monitoring activities with the line ministries and other authorities responsible for PPP;
- Undertake awareness creation activities and support line ministries and implementing agencies to build capacity on PPP affairs;
- Create and manage a database on all PPP projects in Georgia.

For the purposes of identifying and analysing potential fiscal risks related to PPP projects, the Government aims to establish the Risk Management Unit, subordinated to the Ministry of Finance of Georgia.

The Risk Management Unit shall, *inter alia,* carry out the following functions:

- Budget affordability Assessment: Evaluation of budget affordability for budget financing/co-financing of PPP project;
- Fiscal risk identification: identifying all fiscal risks attributable to different stages of the PPP project;
- Fiscal risk assessment: determining the likelihood of identified fiscal risks materialising and the magnitude of their consequences on the state budget;
- Fiscal risk mitigation: provide mechanisms to reduce the likelihood of the fiscal PPP risk occurring and the degree of its consequences on the state budget;
- Fiscal risk accounting, monitoring and review of fiscal risks.

For the successful implementation of PPP projects, the respective line ministries shall, *inter alia,* carry out the following functions:

- Identify, initiate, formulate PPP project;
- Conduct evaluation of the unsolicited proposals submitted by the private sector;
- Participate in negotiations of the PPP contracts with prospective investors;

- Monitor the implementation of PPP contracts.

The Study Team strongly believes that for energy projects the Ministry of Energy of Georgia will assume these functions, and for the purposes of perfection this process, additional obligations of the Ministry will be determined by new law and secondary legislation of the Ministry of Energy of Georgia.

Finally, it is stipulated in the Policy that an ad hoc Government Council will be formed for the approval of initiation of PPP projects. The PPP project may be submitted to the ad hoc Government Council at any stage of the Project as required by the PPP legislation to be adopted. The procedure and criteria of submitting the PPP project to the ad hoc Government Council at different stages shall be defined by the respective legislation.

The respective Georgian legislation shall define detailed functions and responsibilities of the PPP Unit, the Risk Management Unit, the ad hoc Government Council and other line ministries. It is guaranteed by the Policy that the PPP Unit, the Risk Management Unit and line ministries will work together in order to ensure the development and execution of rationally structured, financially viable PPP projects that meet public needs and deliver value for money.

As mentioned in previous section, currently the Ministry of Energy is in charge of approving and granting all energy projects in Georgia, including PPP projects in energy sector. Although none of the legal acts stipulate that Ministry has capacity to grant PPP projects, the ministry is arranging granting of PPP projects, in particular with BOO model projects within existing legal framework.

Awarding of Projects through Tender

From time to time, the Ministry approves a list of the power plants, which can be potentially constructed by investors and publishes it on its website (www.minenergy.gov.ge) ("the List"). Conducting of a tender is mandatory in respect of any power plant on the aforementioned List. The Ministry announces the tender either at its own initiative or on the basis of a request by an interested investor. In the Expression of Interest participation of legal entity or consortium of such legal entities is possible. An announcement is made through an individual administrative-legislative act, which is published on the Ministry's website. Among other, the announcement contains the conditions for technical and economic studies to be conducted in respect of the power plant in question, conditions of its construction, ownership and operation, the amount of the investment required as well as the draft of the project implementation agreement to be entered into between the Government of Georgia ("Memorandum") and the winner of the tender. Usually, Government of Georgia is represented by the Minister of Energy in such memoranda.

It is as a mandatory requirement that, throughout a period of 15 years starting from the date of commercial operation of the plant, the winner of a tender sells full volume of electricity generated in the months of January, February, March, April, September, October, November and December of every year to Electricity System Commercial Operator JSC ("ESCO") on the basis of a guaranteed purchase agreement executed in advance with ESCO. – The investor, which offers the lowest price for such sale of electricity in the tender application, will be given preference over other tender participants. The guaranteed price for sale to ESCO is a risk because if ESCO cannot pay the amount the State guarantees final payment.

The aforementioned requirement will be reflected in the Memorandum, which is entered into between the Government of Georgia, the winner of the tender and ESCO (and if required, with additional parties)

after the tender. The Memorandum consists of pre-construction and construction sections, regulating the pre-construction and construction phase of the project accordingly.

Awarding of Projects without Tender

As mentioned above, projects can be awarded to investors without tender in respect of the power plants not included into the List. For this purpose, a potential investor shall submit to the Ministry an application together with information and documents described in detail in Order # 40 of the Ministry referred to above. Upon completion of the review by the Ministry it shall submit the proposal for approval to the Government of Georgia. If the Government approves the proposal, it may enter into a Memorandum with the Investor. It is a mandatory condition of the Memorandum that every year during the first 10 years from the date of commencement of operations, 20% of annual generation of the power plant is sold on the local market.

It shall be noted that the regulations (both, with or without tendering) are silent regarding rejection of applicant at the time of pre-election process. With this regard, it is stated that in case if the application and attached documents does not include information foreseen in the Order and/or is submitted by violation of the requirements foreseen therein, for the submission of complete documentation the Ministry shall determine for the interested legal entity reasonable time. If interested legal entity fails to submit relevant documentation within the specified time, the Ministry shall not consider the application. In addition, the Ministry shall review submitted applications, which comply with the requirements foreseen by the Order, within the period of 3 months. If necessary, this period may be extended by no more than 3 months.[11] Award of the project is proved by the administrative legal act issued by the Government of Georgia, which is always public.

In addition, all existing regulations are silent regarding compensation of the Private Party for losses incurred as a result for termination on any grounds. In practice, the Memorandum signed by Project Company and Government governs matters of compensation.

In the section below, the institutions involved in PPPS/Concessions are listed. In the Annex on Georgia – Section 11 - the institutions are described in more detail together with cases for PPPs/Concessions:

- National Investment Agency of Georgia
- The Partnership Fund
- The Municipal Development Fund
- The National Agency of State Property

PPP Unit to be enacted

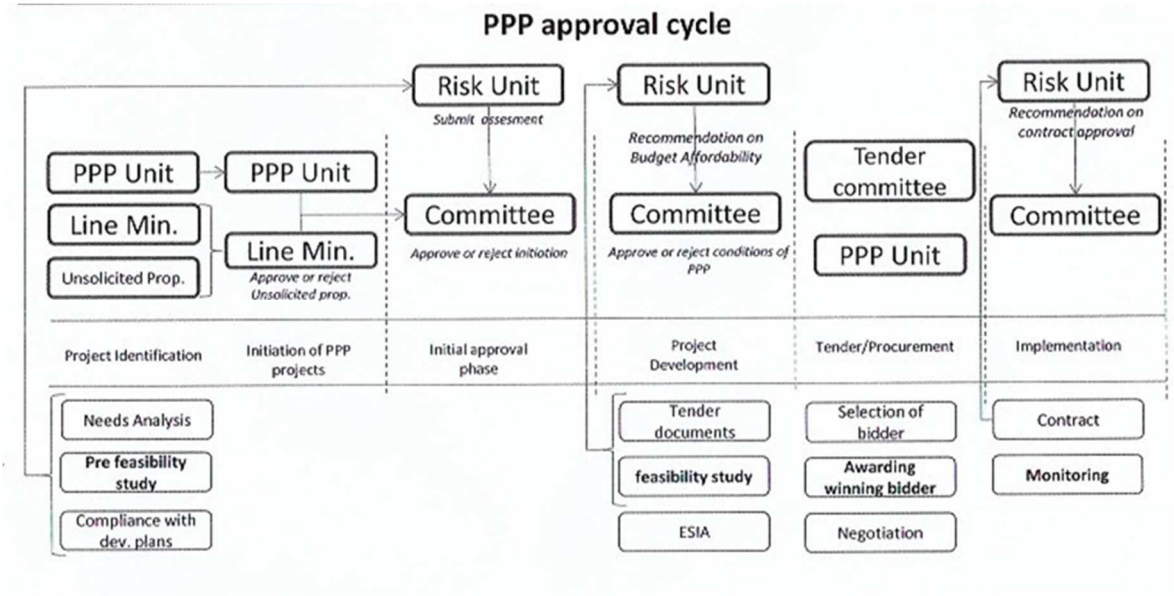
As stated above, at present there is no PPP Unit. The formation of a PPP Unit will be provided by the new Law on PPP, established directly under the Government. The proposed structure so far is as follows[12]:

The PPP Unit is envisaged to employ up to 15 persons comprising lawyers, economists and technicians. Line ministries are finally responsible, but the PPP-unit and the Risk Management Unit will have a crucial function.

11 Articles 3.2 -3.3 of the Order N40 of the Ministry of Energy.

12 Data provided during our mission

Figure 4. PPP approval cycle Georgia



5.5.3 Assessment

Existence of Legislation PPP/Concession

1.Since the adoption of Law of Georgia *"On the Procedure for Granting Concessions to Foreign Countries and Companies"* in 1994 seems that nothing has changed, except from the issuance of a resolution of the Government of Georgia regarding PPP policy which is considered to be legally binding. However, PPP policy is silent regarding the tender documents, as it basically includes guidelines and regulations, which can only be enforceable by enactment of the PPP law. Further, although it includes certain provisions on institutional and legal framework of PPPs, there are plenty of gaps not able to be covered until the enactment of PPP Law.

2. There is no specific law on PPP/concession on energy, but drafts are in the process of being made.

3. As regards the imminent PPP Law, it should be mentioned that Parliament regularly adopts laws following three hearings. During such hearings provisions of the law are likely to be amended. Parliament has two annual sessions - Spring and Fall. Currently, PPP law is not in the list of Parliament hearings. By current estimation, the Bill will be submitted to the Parliament on fall session unless the process is expedited by Ministry of Economy.

4. According to existing legislation *"Concession means long term lease agreement executed by the State related to exploitation of renewable and non-renewable natural resources and associated business activities for the purposes of receiving foreign investments. Specific terms of concessions shall be determined in the agreement."*

According to article 2 (a) of the Policy, PPP is a form of long-term contractual cooperation between the public and private partner aimed at providing public infrastructure and/or services. The main criteria for a project to be deemed as a PPP are as follows: (a) provision of a public service or operation and/or construction/reconstruction/rehabilitation and maintenance of the public facility by the private partner. (b) sharing risks between the public and private partners; and (c) full or partial private financing of PPP project. Policy stipulates that the PPP projects will be undertaken through any PPP model, including concessions.

Thus, there is different treatment of the notion of "PPP/concession" in two national legal instruments, having the law superseding Government resolution.

Procuring Authorities

In practice, there is no PPP procuring authority today.

Tendering process

Tendering process is not specifically regulated by the Law. The PPP policy refers to transparency and non-discrimination, however, details on the tendering process and selected of bidders cannot be identified.

However, it should be mentioned that the Ministry of Energy of Georgia is the authority responsible for approval of all projects involving construction and operation of new power plants in Georgia. Such projects are awarded to investors either,

(a) Through tender by virtue of an individual administrative-legislative act of the Ministry. Awarding projects through tender is governed by virtue of the Resolution # 214 of the Government of Georgia dated 21 August 2013 on *"The Rules for Expressing of Interest in Construction, Technical and Economic Study, Ownership and Operation of the Electrical Plants in Georgia",* or

(b) Without tender. Relevant procedures are regulated by virtue of the Order of the Minister of Energy of Georgia # 40 dated 10 April 2014 on *"Approval of the Rules for Submission, Revision and Approval of Conditions of the Proposal on Technical and Economic Study, Construction, Ownership and Operation of Power Plants not Included into the List of the Power Plants to be Potentially constructed in Georgia."*

Management of contract

Concession agreement shall determine:

Subject of the agreement; term of the agreement and concession fees; subject of concession, property to be transferred to concessionaire and mechanics of such transfer; limitations for concession agreement, including environmental protection; obligation of concessionaire to comply with the laws of Georgia; obligations of concessionaire regarding building and equipping the facilities and keeping them in good workable condition, as well as production quality requirements, work and environmental safety obligations; terms for facilities to go online; general organisational plan of processing the natural resources; rules of returning the land plots to State; matters on development of progressive technologies, infrastructure and training of staff, minimum capital requirements; share participation of the parties in the profit received from implementation of the project; rules of reimbursement of concessionaire's expenses on amortized property; liabilities of parties for breach of concession agreement; terms on transferring the facility to State; guarantees of the parties, legal addresses and bans requisites. "

In article 15 (concessionaire fees) it is stipulated that the fees payable by concessionaire shall be determined in the concession agreement. Such fees shall include concession fee, lease fee, royalty,

and taxes as per the effective legislation. It is further determined that concession fee can be paid in moneys or by transferring shares in the concession's facility to the state, or a combination of the above.

Further, article 12 of the Concession law stipulates the rights of concessionaire. In particular, concessionaire is authorized to perform business activities on the territory of Georgia as per the effective regulations and concession agreement, solely dispose its production and profit after applicable taxes, transfer the profit outside of Georgia, hire residents and non-residents for performance of works. The said article envisages specific benefits for the concessionaire- concessionaire is allowed to import equipment, instruments, clothes and food for the purposes of project which shall be exempted from import duties. Further it is stipulated that concessionaire shall benefit from taxation benefits when reinvesting the profit. The government is obliged not to interfere with the activities of the concessionaire. Further the granting authority is responsible for damages caused by unlawful acts of state bodies (article

Main points revealed from data available

A. Regards PPP/concession legislation

1.There are various definitions as regards concessions in the legal texts. The law also identifies the sectors under concession/PPP law.

2. Tendering process as regards energy PPP is not generally applied in practice.

3. No clear rules of tendering process, award criteria, publication of notifications, publication of the contracts exist. At the same time, it is not clear if there is a Procurement Law to fill in the gaps.

4. No provision in the law as regards duration, extension without tender, early termination, subcontracting etc.

5. In addition the following should be mentioned. Georgia has a sizable hydroelectric power generation capacity, a factor that has become an increasingly important component of its energy supplies and policies. The country's topography and abundance of hydropower resources allow it to take the lead in the hydropower markets in the Caucasus region. The Georgian Ministry of Energy estimates that there are around 26,000 rivers within Georgian territory, with about 300 of them being significant in terms of energy production. The Ministry also says that investments in current projects for hydropower plants totally amount around $2.4 billion. The total theoretical capacity for HPP is more than 4000 MW.

The hydropower stations of Georgia produce 80-85 per cent of the electricity utilized within the country, while the remaining 15-20 per cent is produced by thermal power stations. According to the Ministry of Energy and Natural Resources, so far Georgia has been using only 18 per cent of its hydro resource potential. However, Georgia's reliance on hydropower could leave the country vulnerable to climatic fluctuations, which requires imports to meet seasonal shortages. Georgia still has the potential to increase generation of hydropower through refurbishing existing facilities, as well as constructing new hydropower plants.

There are 46 generating companies operating in the Georgian power sector, of which three are thermal power plants and the rest – hydro power plants (HPPs). All of them are privately owned except the major Enguri/Vardnili HPP cascade in the Russian controlled territory in Abkhazia. (The reservoir is on one side of the "border" and the generators on the other).

B. Projects mentioned as PPPs

After 2008 the BOO (build, operate and own) model was considered as the best way of concession for hydro projects (until when power plant tariffs were set by the Commission of Water generation). At present, there are 35 HPP prospects for which feasibility studies have been elaborated.

In order to support the construction of hydro power plants, the Georgian Government started the national programme “Renewable Energy 2008” which defines the principles and procedures for building new HPPs (big and small).

Under the abovementioned programme, the investors are allowed to build, operate and own (BOO) hydropower plants. For 10 years after the start-up of a power plant, during 3 months of every winter season, the plant output must be sold to the Georgian internal market to any buyer, at any price (defined in the agreement) or based on a Guaranteed PPA with the Commercial System Operator (ESCO), the PPA is maximum USD 0.10 per kWh but can be lower due to competition. During the remaining period, the HPP owner can sell (or export) the output without any restrictions. Investors are required to submit to the Georgian government a bank guarantee for every megawatt of prospective installed capacity. BOO rights are granted based on a tender with preference given to the lowest acceptable PPA, biggest financial guarantee or the shortest construction period. The Memorandums signed with the Georgian Government give the formal BOO right.

Before 1 September 2006 the Georgian electricity market was fully regulated by the Regulatory Commission, which was setting all tariffs based on cost of generation. Since September 2006, a Ministerial order introduced (partial) deregulation of the market. The Regulatory Commission sets the upper limit for the tariffs of all power plants; only Enguri and Vardnili have fixed tariffs

As mentioned in 7.1.2. above, from time to time, the Ministry of Energy approves a list of the potential power plants following a tendering procedure, which can be potentially constructed by investors and publishes it on its website (www.minenergy.gov.ge) (“the List”). The Ministry announces the tender either at its own initiative or on the basis of a request by an interested investor (open door policy for sites not mentioned on the list). An announcement is made through an individual administrative-legislative act, which is published on the Ministry’s website. Among others, the announcement contains as draft of the project implementation agreement to be entered into between the Government of Georgia (“Memorandum”) and the winner of the tender. Usually, the Minister of Energy in such memoranda represents Government of Georgia.

It is as a mandatory requirement that, throughout a period of 15 years starting from the date of commercial operation of the plant, the winner of a tender sells full volume of electricity generated in the months of January, February, March, April, September, October, November and December of every year to Electricity System Commercial Operator JSC (“ESCO”) on the basis of a guaranteed power purchase agreement executed in advance with ESCO.

Projects can be awarded to investors without tender in respect of the power plants not included into the List. For this purpose, a potential investor shall submit to the Ministry an application together with information and documents described in detail in Order # 40 of the Ministry of Energy. If the Government approves the proposal, it may enter into a Memorandum with the Investor. It is a mandatory condition of the Memorandum that every year during the first 10 years from the date of commencement of operations, 20% of annual generation of the power plant is sold on the local market.

For oil/gas tenders are organized by the Oil and Gas Agency. Normally production-sharing agreements are entered into. There are no major discoveries yet.

The Georgian State Electricity Corporation manages the transmission grid. Private investors are involved in the distribution sector.

ESCO is the market operator for electricity and is a fully government owned company being the final buyer of the PPA. If they cannot buy the Government guarantee the investor. ESCO is fully governmentally owned and functions like a power pool.

For Georgia, the HPP is the most important technology with and additional potential of up to 4.800 MW.

5.5.4 Gaps/Recommendations

The existing legal environment on PPP/concession does not constitute a sufficiently solid legal basis contributing to the development of PPPs. National legislation seems to be in low compliance with international good practices on transparency, open publication and reasonable timeframes for the steps in the procurement process, as it derives form data available that the rules are determined on an ad hoc basis. However, the legislative development of a PPP law incl. Concessions could eliminate these concerns.

New legislation should be passed including clear and specific rules for PPP/concessions such as:

- Definitions
- Authority to coordinate, award and conclude concession contracts
- Eligible infrastructure sectors
- Project risk and allocation
- Government support
- Rules governing the selection proceedings (selection of the concessionaire)
  (e.g. rules for pre-selection, for requesting proposal, negotiation of concession contracts etc.)
- Content and implementation of concession contract.
- Governing law.
- Ownership of assets, acquisition of rights related to project site.
- Financial arrangement
- Assignment of concession contracts.
- Substitution of the concessionaire
- Transfer of controlling interest of the concessionaire.
- Operation of infrastructure.
- Compensation for specific changes in legislation
- Revision of the concession contract.
- Takeover of infrastructure project by the contracting authority.
- Duration and extension

- Termination (by the contracting authority or by the concessionaire).
- Arrangement upon termination (i.e. compensation, transfer arrangement etc)
- Settlement of disputes.

5.6 Moldova

5.6.1 Overview

Table 8. Energy Balance 2014

Moldova Energy Balance 2014 Population 3,6 million (est).											
	Coal	Crude oil	Oil products	Natural gas	Nuclear	Hydro	RES	Biofuels	Electricity	Heat	Total
Own production	0	8	0	0	0	27	0	294	0	0	329
TPES	**93**	**9**	**772**	**2054**	**0**	**27**	**0**	**283**	**63**	**0**	**3301**
Transformation a.o.	-2	-9	-6	-1432	0	-27	0	-12	329	210	-949
TFC	**90**	**0**	**766**	**622**	**0**	**0**	**0**	**270**	**392**	**210**	**2350**
Industry	32	0	10	323	0	0	0	1	136	58	560
Transport	0	0	583	8	0	0	0	0	4	0	595
Residential	40	0	64	215	0	0	0	256	163	107	845
Service	18	0	4	74	0	0	0	12	85	44	237
Other	1	0	56	2	0	0	0	1	4	1	65
Non energy	0	0	48	0	0	0	0		0		48
Own production % of TPES:		10,0									
Source: IEA databases											

Moldova has few indigenous energy resources. Except of biomass, all energy has to be imported. Residential sector is the biggest consumer while industry and transportation have close to equal shares.

For oil and gas, the Ministry of environment is the procuring authority according to the Subsoil Code. A former concession for almost half of the Area of Moldova has expired, without any commercial discoveries. A recent concession for 50% of the territory has been entered into force. The EU Directive on oil/gas concessions, was applied as well as the recent PPP Directive.

Other energy projects are either planned or considered. A project under state control (PPP or Concession), must be on a priority list organised by the government, in order to be privatised . Line ministries can suggest projects to be privatised.

Of prioritised projects are the privatisation or concession of the generator in Chisinau for heating and electricity; there is a need for rehabilitation incl. the networks. Also, an extension of a gas pipeline from Romania to Chisinau is considered as well as a power connector for Chisinau. For the interconnectors finance from EBRD and EIB is planned.

According to the PPP Law the steps to be followed are:

1. Government decides to prioritise the project
2. Line ministry arrange feasibility study and draft contracting procedures
3. Public Property Agency (PPA) reviews the proposal
4. If the review is positive, the line ministry initiates the procurement process
5. The Government approves the project and proposed process
6. Line ministry starts the procurement
7. A Committee is established with approx. 10 experts for evaluation. MoE, MoF and PPA are always participating.
8. Evaluation, decision on award and notice to all involved
9. When implemented the line ministry will report back to PPA on an annual basis.

The PPA is mainly an advisory institution and represents the PPP Unit.

During the last years Moldova developed key legislation on public-private partnership (PPP) in line with the requirements of the EU directive. Currently, there are complex legal documents regulating PPP both at the level of primary and secondary legislation. It's worth to be mentioned, that Concession is seen as a form of PPPs and the Law on **PPP No. 179 from 10 July 2008** is applied in conjunction with the Concessions Law No. 179 from 1997. A new Concession law is in progress.

The details of the laws and secondary legislation are available in Section 12.

The Law on Public-Private Partnerships and the regulatory acts that enforce it.

The Law No. 179-XVI of 10.07.2008 on Public-Private Partnerships (hereinafter the Law on PPP) was adopted in 2008 and substantially amended twice in order to ensure a favourable environment for the development of public-private partnerships in the Republic of Moldova.

This Law establishes the basic principles of private-public partnership, the forms and means to achieve it, the procedure of starting and implementation, the competence of public authorities, the rights and obligations of the public and private partner

The public-private partnership shall be based on the following principles: equal treatment to all bidders, impartiality and non-discrimination; transparency; proportionality; balance between the interest of the public and of the private partner; competition; freedom related to contracting and cooperation.

The object of the public-private partnership may be any asset, work, public service or position hold by the public partner, except for those expressly prohibited by law.

To assess the state policy on public-private partnership and to define the priorities and strategies for the implementation of public-private partnerships, the Government of the Republic of Moldova has established the *National Council for Public-Private Partnership*, a functional body with general competence without legal personality. The National Council for Public-Private Partnership works under the Government Decision No. 245 of 19.04.2012.

To ensure political support for the implementation of PPP projects at government level, all major issues related to PPP in Moldova must obtain direct approval from the Government.

Under the Law on PPP, the Government shall approve *the list of goods, works and services of national interest being in public property, which may be the object of a PPP project*[13]. At the same time, the Government approves the list of objectives thereof and the public partners designated, establishes the general requirements to select the private partner, approves the regulatory acts and the policy documents on the scope of PPP.

The specialized public administration bodies shall prepare PPP project proposals and submit them for review to the Public Property Agency; subsequently, after generalization, they are submitted to the Government for approval.

Under Art. 15 of the *Law on PPP*, the list of property belonging to the administrative-territorial unit and the list of public works and services of local interest proposed for public-private partnership shall be approved by the local or district council.

Under the *Law no. 136 on the Statute of the Chisinau Municipality*, the Chisinau Municipal Council shall ensure the development of feasibility studies and submit for approval the lists of goods and services of municipal interest for the implementation of public-private partnership projects; and shall ensure the monitoring and control of implementation of public-private partnership projects in which the municipal government is a public partner;

The methodological issues on the implementation of public-private partnerships and the standard implementation documents in line with the good practices on standard procedures to launch and

[13] The Government Decision no. 419 of 18 June 2012 on approval of the list of public property and the list of public works and services of national interest proposed for public-private partnership.

achieve the public-private partnerships, and to monitor and close them, are established in the *Regulation on Standard Procedures and General Conditions for the Selection of the Private Partner*, approved by the Government Decision no. 476 of 04.07.2012.

In order to coordinate the activities on public-private partnerships between the central public authorities and the unit for public-private partnerships of the Public Property Agency, it was established an inter-ministry network; its activity is regulated by the *Government Decision no. 255 of 11.04.2013 on the establishment of the inter-ministry network for public-private partnership.*

The Law on Concessions and the regulatory acts that enforce it.

The legal regime of concessions is regulated by *the Law on concessions no. 534-XIII of 13.07.1997* with further amendments, which establishes the manner of awarding the contracts on works and service concession, the applicable legal regime and certain issues related to the awarding and execution of such contracts.

Concession is seen as a form of PPPs and the Law on PPP No. 179 from 10 July 2008 is applied in conjunction with the Concessions Law No. 179 from 10 July 2008. Specifically, Article 18 (5) of the PPP Law stipulates that the implementation of PPP through a concession agreement is regulated pursuant to the legislation on concessions.

Under the Law on Concessions, the Government has the power to approve:

- the list of public property and the list of public works and services of national interest proposed for concession;
- the concession of objects of national interest, the general requirements to select the concessionaire and the concession terms;
- the policy documents on the concession development;

Pursuant to Art. 2 (5) of the *Law on Public Procurement*[14], this Law shall be applied appropriately to public-private partnerships and in the case of awarding contracts on public works concession. This provision is general and does not explain how the PPP tender procedure and the public procurement tender procedure should be combined.

The provisions of the Law on Concessions do not transpose the principles set out in the Directive 2014/23/EU on awarding the concession contracts. Based on this, it is necessary to enact a new law.

Conclusions: The vulnerable point of the Law on PPP is the insufficient coverage by secondary regulatory acts approved by the Government of all issues that will enforce this Law. For this reason, we believe that the Law on Public-Private Partnership would limit the enforcement process and the Government Decision no. 476 of 04.07.2012 approving the Regulation on Standard Procedures and General Conditions for the Selection of the Private Partner involves several risks, including related to the public interest protection.

The slow development of the regulatory and institutional framework for proper implementation of PPP projects, on the background of weak public management and low transparency, endangers the public interest. At the same time, it is necessary to develop a new Law on Concessions.

Moldova is not required directly to transpose in its legislation the provisions of the EU Directives[15]; however, the directives mentioned in the Energy Community Acquis must be implemented, and some

[14] The Law no. 181 of 15.07.2010, OG 155-158/03.09.2010 art. 559

[15] The Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts;

The Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC;

The Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

principles and concepts of these Directives have been incorporated both in the Law No. 179-XVI of 10.07.2008 on Public-Private Partnerships and in the Law No. 534-XIII of 13.07.1997 on Concessions (see the table below).

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

5.6.2 Assessment

Existence of Legislation PPP/Concession

1. Law No. 534/13.7.1997 on Concessions ("Concessions Law").
2. Law No. 179/10.7.2008 on public-private partnership ("PPP Law).
3. Government Decision No 476/4.7.2012 on approving the Regulation on standard procedures and conditions for selection of the private partner ("Government Resolution No. 476") referring to Law 179/2008 (article 1 para 2).
4. Law No. 131/3.7.2015 on Public Procurement ("Public Procurement Law").
5. Order No. 143/ 2.8.2013 of the Ministry of Economy on approving the Preliminary Matrix of the Project Risk Allocation ("Order No. 143")

Pursuant to Article 18 (5) of the PPP Law, the concession contract as a legal form for public private partnership fulfilment represents a contract concluded in conformity with the legislation on concessions. There is no specific legislation on PPP in energy sector.

Procuring Authorities

1. The Government of the Republic of Moldova (the "Government"):

   http://www.gov.md/ro
2. The Ministry of Economy of the Republic of Moldova (the "Ministry of Economy"):

   http://www.mec.gov.md/
3. The Ministry of Finance of the Republic of Moldova (the "Ministry of Finance"):

   http://www.mf.gov.md/
4. The Public Property Agency: http://www.app.gov.md/
5. The National Council for Public - Private Partnership
6. Local Public Administration

Within the Public Property Agency, there is a PPP Unit, which coordinates the PPP projects. http://www.app.gov.md/. Furthermore, in addition to the Public Property Agency, a specialized government entity, the National Council for Public-Private Partnership is formed under the Government in order to assess the state policy on PPPs to develop priorities and strategies for implementing PPPs in the Republic of Moldova**.**

Pursuant to Article 15(1) (b) of the PPP Law, the competences of the local and district public administration includes approval of the objectives and conditions of the PPP projects, the general requirements concerning the selection of the private partner.

Pursuant to Article 15(1) (f) of the PPP Law, the competences of the local and district public administration also include approval of projects of PPP contracts in the negotiated form.

Tendering process

1. The public partner shall provide to the publication of releases in Monitorul Oficial Republicii Moldova. The contents of other documents and information referring to the private partner selection procedure are published on the website of the Agency for Public Property at the Ministry of Economy and other websites pursuant to the public partner's decision (see article 5 (2) of the PPP Law).The public procurement notice is published online http://monitorul.md/, http://app.gov.md/

2. Pursuant to Article 25 (d) of PPP Law, the necessary documentation for the tender for the selection of the private partner includes the description of the subject of the public-private partnership, the conditions of the public-private partnership; the sample contract of the public-private partnership.

A draft contract is included in the request for proposal (see article 25 (d) of the PPP Law): The necessary documentation for the tender for the selection of the private partner include: description of the subject of the public-private partnership, the conditions of the public-private partnership; the sample contract of the public-private partnership). For standardised PPP model contract, see Government Decision No. 476/2012.

3. The procuring authority grants the potential bidders a minimum period of sixty (60) days to submit their bids *(see article 26 of the Law on PPP).*

4. The tender documents include reference to the stages of the procurement process *(see article 47 (5) of Government Resolution No. 476, the notice should include information on the private partner selection procedure and article 26 (1) (e) of the PPP Law, the notice should include information on the procedures for the private-partner selection).*

5. The selection of the private partner is performed with prequalification in case the project is complex and public partner wants to establish the criteria for pre-qualification and subsequent awarding of the PPP contract *(see article 144 of the Government Resolution No. 476 /2012).* The public partner applies the competitive dialogue procedure for awarding a contract for PPP, where the project of PPP is considered to be particularly complex and the procedure of competition with pre-qualification would not lead to the award of the PPP contract *(see 178 of Government Resolution No. 476/2012),*

Within the framework of standard documents of prequalification, the public partner is obliged to specify the criteria for prequalification subject to which the selection of participants will be conducted. Such criteria are related only to the economic and financial situation of the participants and to their technical and/or professional potential *(see article 153 of Government Resolution No. 476/2012).*

The public partner should inform all the bidders about the outcome of the prequalification in the competitive dialogue procedure. *(See article 210 of Government Resolution No. 476)*.

6. Potential bidders may submit questions to clarify the public procurement notice and/or the request for proposals. Any interested economic operator is entitled to ask the public partner for clarification as regards the manner according to which, the competition will be conducted and/or documentation which has to be presented. Answers should be given within specific time period (*see articles 57, 58 of Government Resolution No. 476),*

The public partner is obliged to forward the answers, along with the questions asked, to all economic operators who received the tender documentation, in accordance with the terms hereof, keeping confidential the name of the inquiring party *(see article 59 of Government Resolution No. 476).*

The public partner may impose the payment of a sum of money for the participation in the tender *(see article 61 of Government Resolution No. 476).*

7. The submitted offers are evaluated according to the criteria stipulated in the press release. Each member of the board shall submit a reasoned opinion on each to the chairman in writing, taking account of compliance with the established criteria *(see article 29 (2) of the PPP Law).*

The meetings of the private-partner selection commission are public, and the final results of the selection process are made public by publication in the Official Gazette of the Republic of Moldova and the Agency's website *(see article 5 (4) of the PPP Law).*

The Commission should publish the competition results and the winning bidder, in the Official Gazette, within five (5) calendar days from the date the contract is signed. *(See article 113 of Government Resolution No. 476).* The public procurement award notice is published online in the Official Gazette of the Republic of Moldova http://monitorul.md/ Public Property Agency: http://www.app.gov.md/.

The public partner should notify, in writing, all bidders about the outcome of the competition, not later than 3 working days after the signature of the minutes by the members of the Commission *(see article 112 of Government Resolution No. 476).*

The public partner should conclude the contract for public-private partnership with the bidder whose offer was chosen as the winning offer by the Commission. The price stipulated in the offer cannot be changed as it will be an integral part of the public-private partnership contract. The draft of the contract shall be negotiated not more than thirty (30) calendar days from the date of receipt by the bidder designated as the winner. During the negotiation of the contract, additional conditions can be included therein by mutual agreement of the parties, as long as these conditions do not change the substantial terms/conditions laid out in the bid documents and the winning bid *(see article 39 of Section 8 of Government Resolution No. 476).*

Management of Contract

Modification or renegotiation of the PPP contract following its execution

Pursuant to Article 33 (1) of the PPP Law, if during the active period of the public - private partnership contract, legislative and / or standard acts are adopted, which deteriorate the situation of the private partner to the extent that it remains deprived of what it was supposed to obtain by signing the contract, the parties may amend the terms of the contract to ensure existing property interests of the private partner on the day of signing the contract**.**

However, according to Article 33(2) of the PPP Law, the provisions of Article 33(1) do not apply if the technical regulations or normative acts regulating the relations of protection of subsoil resources, the environment and human health, were changed.

Termination

The law provides 3 grounds for termination of a PPP contract:

1. expiry of the fixed term stipulated by PPP contract itself;
2. mutual consent of both parties;
3. other grounds set forth in PPP Contract.

The law also provides for the termination of PPP contract, upon the respect of 3-month termination notice, in the event where one of the signatory parties breaches its own contractual obligations, or when the party is in impossibility to fulfil such obligations. Otherwise the usual grounds for termination of contracts apply (such as fundamental breach of contract or anticipatory fundamental breach).

Main points revealed for data provided

A. As regards PPP/concession legislation

(1) PPP Law of Moldova is a framework law, which allows the public authorities to develop projects in nearly **all types of PPP models and** although it provides for BOT and related forms, it does not restrict the application of any other form of PPP. It regulates the tender process, negotiating the PPP contract and monitoring its implementation. The PPP Law refers to the Concession Law for PPPs in the form of concession agreements and to Public Procurement Law for procedures involving public funds. It is underlined in the law that a competitive process is a must and that the contracting model can comprise a wide range of BOT contracts such as; DBO and BOOT. It is also mentioned in the law that clear performance criteria shall be established and a fair and transparent procurement process.

- According to PPP law, the principles applied within the public-private partnerships are: transparency, compensation, cooperation, contractual freedom, equality treatment, impartiality and non-discrimination
- As regards publication practices, Moldova seems to fulfil international good practices to a great extent. However, it is not clear if secondary legislation covering PPP applies also to concessions.
- International experience is such that the mere existence of PPP laws, without clear government commitment to PPPs, is often not sufficient for a robust PPP programme.
- PPP law as it stands, could not be applied in practice without the enactment of secondary legislation, as its provisions are very general.
- A new law on concession is drafted in co-operation with Development Partners.

B. As regards energy sector

1. Gas represents 36%[16] of total energy balance of the country, where Moldovagaz (and, indirectly, the Russian gas producer Gazprom) holds a de facto monopoly on supply, transport and distribution. New players cannot easily enter the market because they lack access to transport and distribution infrastructure connecting the main consumers

The Russian holding Gazprom has a de facto monopoly over the natural gas market in Moldova. It owns 50% (and another 13%, indirectly, through shares controlled by Transnistria) of the shares of the Moldovan-Russian joint stock company Moldovagaz, set up in 1999. Moldovagaz is the founder of the Moldovatransgaz transmission system operator4. In addition, Moldovagaz controls about 70% of distribution networks in the country (12 subsidiaries)

The major structural problem of the gas sector in Moldova thus has two sources. On one hand, the threat that Gazprom will not extend the gas contracts as long as Moldova is willing to fully implement EU rules favouring competition with other gas suppliers from Romania. On the other hand, Moldovan consumers are not able to pay in full, at market prices, for the gas supplied to Moldovagaz. It is important to note that debt for gas reflects also the consumption of electricity produced by the Cuciurgan power plant and the electricity and heat produced in the CHPs in Chisinau, which form the larger share of the historical debt of 4.8 billion USD.

A World Bank study shows that to fully recover costs, electricity prices should increase by 73-113% cumulatively between 2014-2020 and heat prices should increase by 21-80% by 2016 and 30-78% by 2020. This would create many social problems because of the "energy poverty" and the total social

[16] https://www.energy-community.org/portal/page/portal/ENC_HOME/DOCS/3872267/EnC_IR2015WEB.pdf

assistance expenditures should increase from 0.5% of GDP to 1.9-2.2% of GDP in 2016 and 1.3-1.7% in 2020[17].

It is obvious that there is a need for diversification of supply sources. The diversification of supply sources was included in the list of Moldova's commitments for the accession to the Energy Community (October 2010). Thus, Moldova has undertaken effective transposition of European energy legislation, including gas, in order to integrate Moldova into the European energy market. Efforts to diversify sources of gas supply increased as Moldova committed to implement the Third Energy Package.

Gas market and electricity interconnections. Moldova depends 100% on Russian gas and 80% on electricity from Cuciurgan power plant in Trans-Dniester, controlled de facto by Russia. Energy policy decisions in Moldova could be influenced by threats to stop supplies both of gas and electricity.

The adoption of the Electricity Law in compliance with the Third Energy Package was the major achievement in this reporting period.

The regulator adopted the long-awaited access tariffs to distribution networks unbundled from the regulated supply tariffs. The settlement with Gas Natural Fenosa over the loss of revenues from regulated supply tariffs due to currency devaluation has averted the consequences of an international arbitration. Moreover, ANRE ensured that cost-reflectivity is respected so that future investments in energy infrastructure become financially viable.

Following the adoption of the Electricity Law in May 2016, Moldova must finalize the process of adopting new implementing legislation or revise the existing regulations to align with the new legal framework. This includes the certification of the transmission system operator and updating the rules for the electricity market, including balancing and imbalance settlement rules[18].

The creation of a common electricity market between Ukraine and Moldova would enable wholesale suppliers in Moldova to be given non-discriminatory access to Ukraine’s more competitive supply market as well as market-based access to capacities on interconnections for cross-border trade. Rules for capacity allocation of cross-border capacities and transparency requirements have to be adopted and implemented by Moldelectrica and Ukrenergo in accordance with Regulation (EC) 714/2009. The Ministry of Economy, as the sole shareholder of Moldelectrica, needs to strengthen the institutional capacity for the implementation of electricity market rules as amended and ensure the company lives up to its designated role in a liberalised electricity market.

The decision on the most suitable electricity interconnections with Romania still needs to be taken. The future projects aim at increasing security of electricity supply in Moldova, reducing the dependence on

[17] World Bank, Report on District Heating and Electricity Tariff and Affordability Analysis, October 2015

[18] Source Energy Community Moldova 2016-2017

very few sources of electricity supplies and providing increased competition to push the electricity prices even lower for the benefit of the customers in Moldova.

The Electricity Law transposes the ownership unbundling model for the transmission system operator and the conditions for its certification in compliance with provisions of Directive 2009/72/ EC. However, the state-owned transmission system operator is currently only legally unbundled from generation and supply activities.

The three electricity distribution companies are also legally separated from supply activities. Rebranding and appointment of the compliance officers has not been completed for both incumbent supply companies. Requirements for accounting unbundling for regulated and non-regulated supply activities and per category of customers, are transposed by the law. Implementation of the requirements for unbundling of transmission and distribution system operators is pending.

C. Projects mentioned as PPPs

a. In a joint effort to strengthen Moldova's energy security, the EU, EBRD and the EIB are providing a €92 million financing package for the construction of a natural gas pipeline from Romania to Chisinau. The funds will be extended to Î.S. Vestmoldtransgaz, a state-owned company, which will build and operate the gas pipeline and the Romania-Moldova interconnector. The project will complete the connection of the gas transmission systems of Romania and Moldova by linking Chisinau, a major area of gas consumption in the country, to the interconnector between the eastern Romanian city of Iasi and Ungheni, a Moldovan town on the Romanian border. It was built in 2014 to enable Moldova – being more than 90 per cent dependent on energy imports – to diversify its energy sources. The EU provided a €7 million grant for the interconnector. As part of the new financing package, the Moldovan government has agreed to implement a comprehensive reform package to promote the liberalisation of the energy market and strengthen competition in the sector.

b. South electricity interconnection or Isaccea (Smardan)-Vulcanesti-Chisinau (cost estimated at around EUR 194 million, the entire amount in Moldova) - 600 MW.

c. Frontera Resources Corporation, is an independent oil and gas exploration and production company. In January 2017, Frontera Resources International LLC, a fully-owned subsidiary of the Company, signed a Concession Agreement with the Government of Moldova regarding the exploration, production and development of hydrocarbon resources in Moldova. Frontera has the exclusive right to explore, produce and develop hydrocarbon resources within an area comprising approximately 3 million acres situated in the southern portion of the country. The overall term of the Concession Agreement is 50 years from the date of its execution, including an initial exploration phase of up to ten years. The bidding was announced by the Government of the Republic of Moldova in July 2016 and was organized and conducted by the Agency of Geology and Mineral Resources at the Ministry of Environment. However, there is an ongoing debate as to the procedure followed.

5.6.3 Gaps-Recommendations

1. A clear framework as regards Concessions should be enacted.

2. Although the PPP law is in force the award and implementation of PPP projects seems not to be in compliance with the Law. For example, the concession of Chisinau International Airport was based on an ad hoc governmental decision.
3. PPP law gives no clear picture as to the amount of compensation, which the public authority should pay to the private partner in case of early termination of the PPP contract.
4. Further elaboration is required, on provisions about modifications during the term of the contract, about subcontracting and termination.

5.7 Ukraine

5.7.1 Overview

Table 10, Energy Balance 2014

Ukraine Energy Balance 2014 Population 42,5 million (est).											
	Coal	**Crude oil**	**Oil products**	**Natural gas**	**Nuclear**	**Hydro**	**RES**	**Biofuels**	**Electricity**	**Heat**	**Total**
Own production	31891	2817	0	15022	23191	729	134	2399	0	745	76928
TPES	**35576**	**3043**	**7645**	**33412**	**23191**	**729**	**134**	**1934**	**-725**	**745**	**105684**
Transformation a.o.	-26396	-3035	2497	-12458	-23191	-729	-134	-732	11766	8188	-44224
TFC	**9180**	**8**	**10141**	**20955**	**0**	**0**	**0**	**1201**	**11041**	**8933**	**61460**
Industry	8408	0	921	3324	0	0	0	48	4678	3192	20571
Transport	7	0	7312	2273	0	0	0	**41**	694	0	10327
Residential	290	0	32	11743	0	0	0	1070	3352	3897	20384
Service	73	0	107	836	0	0	0	28	2016	1604	4664
Other	9	0	1322	129	0	0	0	15	302	239	2016
Non energy	395	8	447	2650	0	0	0		0		3500
Own production % of TPES:		72,8									
Source: IEA databases											

Ukraine has abundant reserves of coal mainly located in the eastern industrial Donets area, which for the moment are not accessible. Therefore, coal has to be imported. The table above could be misleading with regard to security of supply for this reason. There is also a not so negligible natural gas production and some crude oil reserves. The main part of the natural gas production is provided by the state-owned company Nafta Gaz, but there are also 3 private developers. There are plans to expand the natural gas extraction so that Ukraine can be self-sufficient with natural gas by the year 2020. It is considered to involve private investments for 30% of this potential. Concession contracts for oil/gas are planned to be production-sharing contracts. Electricity from nuclear energy, is an important element. In addition, comes the main natural gas pipeline system delivering from Russia to Europe. Industry and residential sector are the main end-users. Main fuel for industry is coal while residential sector is dependent on natural gas of which 50% today has to be imported. District heating is used in many cities and is in need for rehabilitation.

The PPP law originates from 2010, currently a revision of the existing legal framework is taking place. The concession law from 1999, is in the process of being rewritten with assistance from EBRD.

The present PPP/concession legislation is rather chaotic and inconsistent. For example, there is no clear distinction between a PPP and a concession (which is considered to be one of the forms for PPP project) and therefore it is arbitrary as to what legislation applies.

A major problem for Ukraine is that the end use tariffs for heat, gas and electricity do not cover the full cost and therefore investments are less attractive. Heat and gas supply for Kiev is considered to be tendered for but is plagued by the low coverage of real costs.

A new gas market law was approved in 2015 and will bring Ukraine closer to the 3rd Energy Market Package, but there are still challenges with the unbundling of the gas system.

5.7.2 Existence of a PPP unit

Ministry of Energy and State Property Fund have some functions on registering and monitoring.

There is a recently established PPP Unit at Ministry of Economy, which mainly functions as advisory centre. The PPP Unit consists of 5 people and is in need of capacity building.

5.7.3 Assessment

Ukraine has several laws that are applicable to PPPs. The most important are a) Law of Ukraine "On Public Private Partnership" No. 2404-VI/1.7.2010; b) Resolution of Cabinet of Ministers of Ukraine "Certain Issues of Organization of Implementation of Public-Private Partnership" and c) Law of Ukraine "On Concessions" No. 997-XIV.

The Ukraine PPP Law establishes the organizational and legal framework of the interaction of public partners with private partners and the basic principles of the public-private partnership on a contractual basis, while Resolution No. 384 regulates each step of the tender procedure. The Concession law regulates the implementation of concession projects.

There is no regulatory framework explicitly prohibiting or restricting PPPs in energy.

Procuring Authorities

1. State authorities are empowered to manage state or municipal properties and may be regarded as PPP procuring authorities. Any governmental authority may act as a PPP procuring authority with respect to the property which it is managing. More specifically, the Ministry of Infrastructure of Ukraine or other authorized governmental bodies may act as a PPP procuring authority in case that the PPP objects are state owned and the local councils if the PPP objects belong to communal property.
2. The Cabinet of Ministers of Ukraine is the principal authority for PPP purposes. The Cabinet of Ministers of Ukraine may also designate to other authorities the power to consider and make decisions on PPP projects.
3. The PPP division in the Department of Investment and Innovations of the Ministry of Economic Development and Trade[19] may be regarded as the specialized government entity that facilitates the PPP programme (PPP Unit).

Tendering process

4. According to Article 13 of the “Competition Procedure No 384”/11.4.2011, competitive documentation includes: Instructions for applicants; Conditions of competition; **Draft agreement** indicating the essential terms and conditions; that may be changed during the competition; Opinion on the results of analysing the effectiveness of the implementation of public-private partnership for the object that is exposed to competition; List of risks identified by the results of the analysis of the efficiency of public-private partnerships and methods/strategies for mitigating such risks;
5. Competitive documentation is published on **the website not later than three** (3) days after its approval by the authority.

[19] Benchmarking PPP procurement World Bank Group

6. PPPs may be formalized using the following types of agreements: (i) concession contract; (ii) cooperation agreement (joint activities); (iii) other agreements. It seems that so far only a standard form of concession agreement has been adopted by the Resolution No 643/2000 of the Cabinet of Ministers of Ukraine *"On Approval of Standard Concession Agreement".* Therefore, development of standardized contracts is envisaged only in the sphere of concessions (see article 9 (4) of the Law of Ukraine "On Concessions"). The CMU Regulation No. 1519/4.10.2000 *"On Approval of the Standard Concession Agreement on Construction and Exploitation of a Motor Road*" contains the regulations that are applicable to highways.

7. The procuring authority issues a **public procurement notice of the PPP.** The information for potential bidders about the tender should be posted on the **web-site** of the public partner and the Ministry of Economy or other responsible authority and in local media and newspapers "Golos Ukrainy" and "Uryadovyi Kuryer". This should take place at least one (1) month prior to the deadline for the submission of tender applications by bidders. The announcement should include general information about the tender (type of agreement, PPP object, deadlines for submitting proposals, etc); (*see article 15 of the PPP Law and Regulation of the Cabinet of Ministers No 384 /11.04.2011, "On Certain Issues Related to PPP).*

8. According to article 15.3 of the PPP Law, the announcement of the competition to determine the private partner shall be published in the newspaper "Governmental Courier" or "Voice of Ukraine" or official press of the relevant local authority.

9. As regards minimum period of time provided to the bidder to submit their bids, paragraph 6 of the CMU No. 384, provides for a bidding period of **at least thirty (30) calendar days** starting from the date of issuance of a public procurement notice and this must be included in the decision to launch a public call for tenders.

10. The tender documents detail the stages of the procurement process. More specifically, tender documentation includes: (1) instructions for bidders including: procedural information (deadline for applications and bid proposals; conditions of registration and denial of application; negotiation procedure with the winner to conclude a PPP contract) (Para. 14 of CMU No. 384/2011). (2) conditions of competitive bidding procedure including: criteria and order of bid evaluation and rendering an award (Para. 15 of CMU No. 384).

11. As the result of the pre-qualification stage, the following bidders are to be excluded from the competition: (1) bidders which were declared bankrupt or are under bankruptcy proceeding; (2) bidders which are undergoing liquidation; (3) bidders which are controlling one another, have a common controlling entity or are related persons pursuant to the Law of Ukraine *"On the Protection of Economic Competition"*; (4) bidders which do not meet qualification requirements; (5) bidders which submitted improper application. (Para. 23 of Resolution of the CMU No. 384 as of 11.04.2011 "On some aspects of PPP realization"). Pursuant to Paragraphs 13 and 15 of CMU No. 384/2011, pre-qualification criteria shall be included in the tender documents.

12. According to paragraph 10 of Resolution of the CMU No. 384/ 11.04.2011 "On some aspects of PPP realization", the bid evaluation committee provides respective clarifications with regard to proposal preparations. According to paragraph 14 of the same Resolution "On some aspects of PPP realization, instruction for bidders shall include a clarification procedure. The procuring authority does not disclose those questions and clarifications to all of the potential bidders.

13. Paragraphs 28-31 of the Resolution No. 384/2011 provides the evaluation criteria and the procedure of evaluation for/of the bidders' proposals. After reviewing the data presented in the statements of evaluation and assessment report, the commission determines the winner whose bid has the most points.

14. The procuring authority publishes the award notice. According to article 16 of the PPP Law: the results of the competitive bid evaluation to designate a private partner for the implementation of public-private partnership, shall not be subject to disclosure prior to the date of the bidding winner designation, except as prescribed by law. The body, which has held the bidding, shall, within **ten (10) days from the date of the winner designation, publish information and substantiated explanation on the reasons for designating the winner and rejection of other bidders**. Regulation No. 384 also provides for the obligation of the tender committee to publish the information concerning the propositions that were adopted as well as the propositions that were rejected. The information should also contain the reasoning that justified such decision-making. The publication shall be made in such newspapers as Uryiadoviy Kurier (newspaper of the Cabinet of Ministers of Ukraine) or in Golos Ukrainy (newspaper of the Ukrainian Parliament).
15. The public procurement award notice is published online http://www.kmu.gov.ua/, http://www.me.gov.ua/?lang=uk-UA, http://www.dzo.com.ua/.
16. The procuring authority shall, within five days after the date of the decision on the results of the tender, send to the participants a notice with the results. A copy of the committee's minutes detailing the results of the tender may be provided to each participant upon the participants request. (see article 35 of Resolution of the Cabinet of Ministers of Ukraine No 384/11.04.2011).
17. The contract is published, pursuant to paragraph 39 of Cabinet of Ministers U No 384/2011, the governing body shall, within three days, send the contract (copy of partnership) to MEDTU by registered mail (with a return receipt). The MEDTU is then obliged to publish the contract on its website within three working days of the receipt of the agreement. It should be noted 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 the entity created by the former employees of a municipal company. This entity has a pre-emptive right for entering into lease agreements[20]

Management of Contract

Modification or renegotiation of the PPP contract following its execution

According to paragraph 4 of article 17 of the Law of Ukraine "On public-private partnership", in the event of a significant change in circumstances, a contract may be altered, amended or terminated by the **mutual consent of the** parties involved or by a court order, unless otherwise specified in the contract or due to the essence of commitment**.**

According to article 20 paragraph 5 of PPP Law, if state or municipal authorities adopt decisions to violation of the rights of private partners, the losses incurred by such decisions must be compensated in full.

According to article 20 paragraph 4 of PPP Law, the rights and obligations of the parties under the PPP contract shall be governed by laws effective as of the date of the execution of the contract (date of signing of contract). Such guarantees shall apply to any changes in civil and commercial legislation but shall not apply to any changes in the legislation which regulates defence, national security, civic order, environmental protection, quality standards, tax, currency, customs law, licensing law and other spheres where public and private partners are not legally equal.

[20] Public Private Development Programme 2011

Termination

1. Article 15 Concession Law expressly establishes the grounds for termination of concession agreement. A concession agreement can be terminated on the following grounds: -

- Mutual consent of the parties;
- Expiration of the contractual term;
- Liquidation of the concessionaire by a court decision, including the declaration of its bankruptcy;
- Annulment of the concessionaire's license;
- Loss of the concession object.

2. According to article 15 of Concession law, the PPP object should be returned to the public partner upon termination of the PPP contract. The private partner must vacate the land plot granted thereto for the purposes of the PPP project.
3. In case of termination of the concession contract, the concessionaire is entitled (i) to demand the reimbursement of costs in connection with substantial improvements of property which were approved by the public partner; (ii) to demand reimbursement of costs in connection with creating property to the extent which was not recovered by the concessionaire as a result of concession activities.

Main points revealed from data available

A. As regards PPP/concession legislation

1. In accordance with its article 5, the PPP Law applies to all forms of PPP, including concession agreements, joint venture agreements, product sharing agreements, and other agreements (in particular leasing or property management agreements). A separate law regulates each of the said agreements.

2. PPP Law, having prevailing force, refers to other laws for rules and regulations. Therefore, while considering a form of PPP for the project's implementation, usually reference has to be made to numerous legislative acts. Further, it is not clear from the data provided, which legal framework local level PPP projects are subject to.

3.Ukrainian legislation does not provide for any single authority responsible for support of PPP projects. Several authorities at the State and municipal levels are empowered to control, issue authorisations, and verify the implementation of PPP projects.

4.Resolution No. 384 and the PPP Law provide that the established procedure is not applicable to PPP projects where a separate procedure is established by the law. The main steps of the separate procedures are provided by the Concession Law (general tender regulation with regard to all concession agreement) and Law on Lease and Concession of the Infrastructure (tender procedure applicable only to lease and concession of the heating, water supply and sewage infrastructure).

B. As regards energy sector

Further the following should be mentioned in an attempt to capture the overall institutional arrangements for PPPs/concessions:

1.The adoption of the Natural Gas Market Law on 9 April 2015 was a major breakthrough that enabled Ukraine to move closer towards compliance with EU energy legislation – the Third Energy Package and its obligations under the Energy Community Treaty. The Gas Market law, which came into force on 1 October 2015, created the legal basis for a new market model based on principles of liberalization and competitiveness, ensuring equal access of third parties to the market, eligibility of consumers to choose a supplier and introducing a market-based approach for setting gas prices.

2.Ukraine also adopted the Law on the National Commission for State Regulation in the Energy and Utilities of Ukraine (NEURC) on 22 September 2016. (The purpose of the law is to strengthen the independence of the regulator in the fields of energy and utilities and to extend its competences to the complete set of regulatory powers and objectives provided under the Third Energy Package.

3.The vast majority of the legal acts necessary to implement the Natural Gas Market Law were adopted by the Cabinet of Ministers, the Ministry of Energy and Coal Industry and the National Energy and Utilities Regulatory Commission of Ukraine (NEURC). The Cabinet of Ministers under public service obligations raised gas prices to a market level and launched the subsidy reform to support vulnerable consumers. The adoption of secondary legal acts by NEURC linked to compliance programmes and unbundling of transmission and storage system operators is still pending.

4.Among the biggest challenge faced by Ukraine is the enforcement of the secondary legal acts. This particularly concerns the application of the transmission tariffs at all points and the application of the transmission code. No capacity allocation took place since the last version of the code was adopted. The balancing rules proved to be unsustainable and the operator of Ukraine‘s gas transmission system, Ukrtransgaz, is currently developing new balancing measures as part of the transmission code.

At present, the biggest obstacle towards successful gas market reform is the unbundling of transmission and distribution system operators. The significant delay exists as for now in the unbundling of natural gas transmission and storage activities of the state owned gas incumbent Naftogaz. Since the adoption in July 2016 by the Cabinet of Ministers of the restructuring plan on Naftogaz, limited progress has been achieved in drafting and submitting to Parliament the necessary legal amendments to ensure unbundling is implemented as per the approved Gas Market Law.

5.The Naftogaz unbundling sets out concrete steps for the company restructuring in line with the chosen ownership unbundling model to separate the natural gas transmission activities from natural gas storage. The Plan foresees the establishment of two new entities in charge of transmission and storage operation: Main Gas Pipelines of Ukraine (MGU) and Underground Storage Facilities of Ukraine (UGS) to fall under the management of the Ministry of Energy and Coal Industry. A set of preparatory actions have been agreed to be put in place prior to the final decision on the on-going cases with Gazprom at the Stockholm Arbitration Court. As for now, the Main Gas Pipelines Company has been established on the basis of approved Charter and headed by an acting chief. However, the company exists so far only on paper. The existing challenge is the efficient transfer of assets and staff to the Main Gas Pipelines and setting up necessary legal basis for the effective and independent separation between the public bodies in charge of supervision and management of the state-owned transmission and supply entities pursuant to Third Energy Package criteria.

At present, the wholesale and retail market indicators do not bear the evidence that competition is at a satisfactory level.

The above background has a negative effect on any government’ s decision on concessions/PPP, as major issues such as Naftogas Arbitration and tariff settings are still pending.

6. The Ministry of Economy has established a working group supported by EBRD to prepare a new law on concessions.

5.7.4 Gaps/Recommendations

1. It should first be noted that there is no simple definition of the concept of PPP as the term "Public-Private Partnership" is itself very broad and may cover many kinds of partnership between the private sector and the public sector. In this framework, the concept of PPP in Ukrainian law seems to be unclear as to its exact meaning and some would include privatizations and public procurement of goods and services in the scope of PPP.[21]
2. A unified procedure is recommended, for private party selection (tendering procedure), for all PPP agreements irrespective of the legislation under which they fall.
3. The simplification of the general PPP framework by abolishing/amending the Concession Law and by abolishing the sector-specific laws would be beneficial, so that a single PPP Law applies to all PPP projects.
4. The information regarding the accepted offers, as well as these rejected during tendering process, should be justified by a relevant decision.
5. As regards early termination of the PPP agreement, the possibility of equitable compensation could be envisaged so as (i) reimbursement of the private partner's reasonable loss (depending on the grounds for termination) to be provided and (ii) the situations of unjust enrichment of either party following such termination be avoided.

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[21] 1. See definition of Concession 3.1.1.B above

2. The European Commission Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions (the "EU PPP Green Paper") published in 2004 defines PPP as different *"forms of cooperation between public authorities and the world of business which aim to ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of a service."*

The EU PPP Green Paper lists four elements which usually characterise PPPs:

(i) The relatively long duration of the relationship, involving cooperation between the public partner and the private partner on different aspects of a planned project;

(ii) The method of funding the project, in part from the private sector, sometimes by means of complex arrangements between the various players. Nonetheless, public funds - in some cases rather substantial - may be added to the private funds;

(iii) The important role of the economic operator, who participates at different stages in the project (design, completion, implementation, funding). The public partner concentrates primarily on defining the objectives to be attained in terms of public interest, quality of services provided and pricing policy, and it takes responsibility for monitoring compliance with these objectives; and

(iv) The distribution of risks between the public partner and the private partner, to whom the risks generally borne by the public sector are transferred. However, a PPP does not necessarily mean that the private partner assumes all the risks, or even the major share of the risks linked to the project. The precise distribution of risk is determined case by case, according to the respective ability of the parties concerned to assess, control and cope with this risk.

The UNCITRAL definition includes different forms of contracts which are well known to international PPP players, such as concessions, licenses, leases ("affermage"), Build-operate-transfer (BOT), Build-transfer-operate (BTO), Build-rent-operate-transfer (BROT), Build-own-operate-transfer (BOOT), Build-own-operate (BOO), etc.

Due to the fact that public works do not imply the performance of a public service, they are generally not included in the definition of PPP and their regime is subject to specific public procurement legislation.

Privatisation, meaning the sale of shares or assets of publicly owned companies, is also not a form of PPP as it amounts to divestiture by the State, rather than partnership.

Furthermore, UNCITRAL expressly excludes projects for the exploitation of natural resources, such as mining, oil or gas exploitation projects even if they are performed under license or concession issued by public authorities. The rationale is that mining, oil or gas exploitation projects do not imply the performance of a public service, as defined above. Further, such projects are generally subject to a distinct legislation with specific provisions governing tender, exploration phase, operation phase, terms of the contract, revenues, tariffs etc.

6. GENERAL ASSESSMENT OF THE STATUS

On the basis of the overall feedback presented in the sections above, an overview is provided in the Table 11 below:

Table 11. Overview on status of concessions and PPPs

	PPP unit	Law on PPP	Law on Concessions	Definition of concession	Statement for fair procurement process
Armenia	None, but planned	Approved in June 2017. Formerly regulated by public procurement law	Pt. Regulated by public procurement law, and now included into PPP law.	Yes, in PPP law.	Yes, (law on procurement)
Azerbaijan	No, but the Bid Commission at MoF has some functions, could be result of plans for 2020	No, planned for 2020	No. planned for 2020	Yes (obsolete)	No
Belarus	Yes	Yes (enacted 2015)	Yes (enacted 2013)	Yes	Yes, partly (PPP law)
Georgia	Established in October 2018	No, (being drafted)	Yes (obsolete) 2004	Yes, (obsolete)	In PPP Policy
Moldova	PPA (MoE)	Yes, (enacted 2008)	Yes (enacted 1995)	Yes	Yes (PPP law)
Ukraine	Yes as, MoE	PPP law (2010) Being redrafted	Yes (1999) Being redrafted to be included into the PPP law.	Yes, in PPP law	Yes (PPP law)

7. SUMMARY OF GAP ANALYSES

As it appears from the country assessments and gaps analysis, in some jurisdictions there is considerable room to improve practices related to transparency and competitive process. Furthermore, a transparent system during the contract phase of PPP/concession is essential, given the long duration of the contracts. In most of the cases, provisions on renegotiation and termination do not exist at all or are not compliant with the EU Directive. Regulatory and institutional frameworks of the Eastern Partner countries present alternative approaches, in some cases not in line with EU or in common understanding of modern concessions of public works or services. In most of the cases, instead of adopting a single law regulating PPP/concession, EaP countries often distinguish between two regimes, depending on the specific features of the contract. In the majority of cases, there is no sector-specific

law e.g. for energy. Also, countries in which PPP projects are regulated on an *ad hoc* basis and no tendering procedure is followed have been identified.

It should also be mentioned that new laws on concessions and/or PPPs are under way; however, no clear picture of the imminent introduction could be established.

Finally, most of the existing PPP units have capacity building needs.

It should be mentioned that most of the counties have made significant efforts in order to establish a legal framework for concessions and PPPs that corresponds to recognised best practices. Moreover, as there is a growing demand for infrastructure, PPPs/concessions are expected to continue to play a crucial role in improving public service delivery. Moreover, a more insisting adherence of the relevant legislation to the quality of procurement process (transparency and fairness of process etc.) will constitute a key element for a better policymaking decision process and increased PPP efficiency.

8. ANNEXES.

8.1 Armenia - details of regulations

Details of regulations of concessions and PPPs in Armenia

1. Mandatory application of a fair and transparent tender selection process.

As it was already mentioned above, the Law on Procurement is the one that regulates the key aspect of the PPPs and this particular statement may be found in the law. Namely, the Law states that procurement process should be unified, competitive, transparent, public and not discriminative.[22]

2. A clear definition of "concession" of the Law and of the boundaries and scope of application of the concession legal framework (e.g. sectors concerned, competent authorities, characteristics of concessionaire).

There is no clear definition of "concession" and boundaries and scope of application of the concession legal framework as referred in the first point, but the comprehensive legislative analyses show that first of all this notion is known in the AM legislation and it has its practical utilisation as well. Hence, the Law on Procurement explicitly states the exhaustive list of purchases and one of them is the purchase via PPP and concession transactions.[23] It goes further with more specific regulation and states that the Government approves the PPP types and the requirements of the main characteristic for those transactions and the procedure of forming and approving these characteristics.[24] The other article of the said law stipulates that the procurements that are made via PPPs and concession agreements should be performed in the form of competitive negotiations[25] (this is one of the procedures of realizing the procurements in accordance with the mentioned law)[26]. There is also the Government decision[27], which has a detailed regulation on the PPP and concession agreements from the beginning to the final approval, including the state authorities that are eligible to represent their projects to the Government, the role of the latter in the assessment and final approval process of the said projects.

3. Mandatory application of a fair and transparent tender selection process.

As it was described in the 2nd point of this document the Law on Procurement states that procurement process should be unified, competitive, transparent, public and not discriminative.[28]

4. Is there any flexibility with respect to the content of the provisions of the Project agreements, which should allow a proper allocation of risks without unrealistic interferences from the Contracting Authority (obligations, tariff, termination, compensation)?

[22] Law on Procurements, a. 3, p.2, s.1

[23] Law on Procurements, a. 2, p.2, s.3

[24] Law on Procurements, a. 4, p.4, s.4

[25] Law on Procurements, a. 18, p.2, s.4

[26] Law on Procurements, a. 17, p.1

[27] Government Decision of September 20, 2012 № 1241-N "On Assessment and Approval of Public-Private Partnership Projects".

[28] Law on Procurements, a. 3, p.2, s.1

According to the Law on Procurement, in the scope of the procurement conducted through competitive negotiations (which is the case for PPPs) it is forbidden to change the character of the goods, work and services prescribed by the agreement.[29]

Another provision of the same law holds that there could be changes in the agreement before its conclusion, but it may not lead to changes of the character of the agreement subject and of the increase of the agreement price[30].

The price of the agreement may be conditional, so it can be changed under certain conditions set by the agreement. Otherwise the agreement price is stable, and the parties must fully comply with the contractual obligations within the scope of the agreement price[31].

As for the termination for example, the said Law does not set a rule of early termination, which means, that this kind of relations could be regulated by the parties of the agreement. (The Law on Procurement stipulates that the cases not prescribed by the law may be settled by the parties according to the agreement)[32].

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

Although the term "concession agreement" is not used, and the Civil Code does not prescribe the concession agreement as such, it provides, that there is a freedom of contract and the parties may conclude a contract provided for or not provided for by a statute or other legal acts.

Article 437 of the Civil Code reads as follows:

"Citizens and legal persons are free in the conclusion of a contract. Compulsion to conclusion of a contract is not allowed with the exception of cases when the obligation to conclude a contract is provided by the present Code, a statute, or a voluntarily accepted obligation".

The parties may conclude a contract that contains elements of various contracts provided for by a statute or other legal acts (a mixed contract). The rules on contracts whose elements are contained in the mixed contract shall be applied to the relations of parties under the mixed contract unless otherwise follows from an agreement of the Parties or the nature of the mixed contract"[33].

As for the licensing, the Civil Code refers to t specific cases where laws may require certain kind of permission or license to conduct those activates that a legal person may conduct only on the basis of special permission (or a license) [34] and the Law on Licensing enlists activities subject to licensing[35].

In the light of the above mentioned, one may conclude that there is a distinction between concession agreements and licenses;

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[29] Law on Procurements, a. 25, p.1, s.2

[30] Law on Procurements, a. 36, p.4

[31] Law on Procurements, a. 39, p2., s.1

[32] Law on Procurements, a. 10, p.6

[33] The RA Civil Code, a. 437, p.2

[34] The RA Civil Code, a. 52,

35 The RA Law on Licensing, a.43

6. Does the Law identify the sectors and/or types of infrastructure and/or services in respect of which a PPP may or may not be granted?

The Government decision № 1241-N "On Public-Private Partnership Project Assessment and Approvals" of 20 September 2012, which along with the Law on Procurement draws the main concept of the PPPs, does not specify the sectors or types of the PPPs that are or could be granted or not. It depends on the Government priorities and the programmes that are approved by the Government. The initiating state authority presents the Project to the Government for assessment and, if the project is prioritised and coincides with the Government's goals, it may be approved for privatisation.

7. Does the sectors eligible for PPP include sectors of the economy, such as energy, oil and gas.

There is no oil/gas production in Armenia. However, the mentioned resources may be used for power generation. As for the energy sector, there is no exact ban on it (as mentioned in the point 7) and we may infer that from legal point of view, it is possible and realistic. Moreover, a Decision has been adopted by the Government "On Approval of the Republic of Armenia Government Programme"[36] stating the following:

> "To increase the competitiveness of the country's infrastructure requires continuous investment. the Government of Armenia is targeting economic growth based on **close Partnership of Public and Private sectors**. To have a modern infrastructure it is essential to widespread introduction and application of information technology, which significantly increases the efficiency and quality of service management".

In the sub point 2.2.8.1 of the same Government Programme, the Energy sector is highlighted as one that needs to prosper and find new framework of actions.

8. Does the Law identify the public authorities ("Contracting Authorities") that are empowered to select projects, prepare for, and award PPPs and enter into Project Agreements?

The Government Decision № 1241-N "On Assessment and Approval of Public-Private Partnership Projects" provides that state and local municipal bodies are entitled to initiate the PPP process, however as it was already mentioned the award of the PPPs mainly depends on the Government priorities rather than only the said bodies' interest.

9. Does the Law require, in principle, that the Contracting Authority should select Private Parties through a competitive tender process?

As already discussed in the points 2 and 4, the whole procurement process should be conducted within the competitive tender procedure in line with a number of key principles.

10. Are there any provisions in the Law concerning the publication of information related to the competitive procedures in the country media and in the international media (for large projects)?

Within two working days after the approval of the invitation and the procurement announcement or pre-qualification announcement (to select the Private Partner for the Project the supposed candidates should go through the pre-qualification procedure), the secretary publishes the invitation and the procurement announcement or pre-qualification announcement texts at the web page www.gnumner.am as prescribed by the procedure of Minister of Finance.[37].

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[36] The RA Government Decision of May 19, 2014, № 511-A "On Approval of RA Government Project" , point 2.2.8, 2.2.8.1

[37] Government Decision of February 11, 2011, № 168-N "On Organization of the Procurement Process", p.37, s.1

11. Is it possible for a PPP to be awarded to a foreign company, a Private Party or to a domestic company with foreign participation in the share capital and/or management?

The Law on Foreign Investments states that foreign investors shall be entitled to implement investments through attainment of the right to use land independently or with the participation of legal entities or unincorporated enterprises of the Republic of Armenia as well as citizens of the Republic of Armenia and procurement of concessions to use natural resources in the territory of the Republic of Armenia.[38]

12. Is there a reference in the Law to the principles of transparency, equal treatment and proportionality?

The Law on Fundamentals of Administrative Action and Administrative Proceedings provides principles that the state authorities have to adhere to during administrative proceeding and are the guarantee of transparency, equal treatment and proportionality towards the participants of the administrative proceedings. In this case, the PPP project initiation selection and final approval are supposed to course through administrative proceeding taking into account the public nature of the PPP and concession agreements.

Those principles (along with others) are as follows:

> **Proportionality** of carrying out administrative action and prohibition of arbitrariness.[39]
>
> "Administrative bodies shall be prohibited from displaying unequal approach towards similar factual circumstances, where there are no grounds for their differentiation. Administrative bodies shall display individual approach towards essentially different factual circumstances.
>
> If the administrative body has exercised any discretionary power in a certain manner, it shall be obliged to exercise that discretionary power **in the same manner in similar cases in the future as well.** The administrative body may waive that restriction if, due to the existence of a paramount interest, it intends to consistently adopt another discretionary decision in the future".[40]
>
> "Administrative action must be directed at an objective pursued under the Constitution and laws of the Republic of Armenia and the measures for achieving that objective must be suitable, necessary and proportional".[41]

13. Does the Law provide for an obligation for the Contracting Authority to make public the reasons of a rejection of an applicant at the time of pre-selection or disqualification of a bidder?

The Law on Procurements provides that the contracting body shall submit the statement of grounds for annulling the procurement procedure to the authorized body (the Ministry of Finance) to publish the statement in the official bulletin within five calendar days after being annulled. The statement is not disclosed if it contains state and bank secret[42].

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[38] Law on Foreign Investments, a.4, .p.(c)

[39] Law on Fundamentals of Administrative action and Administrative Proceedings, a.6, p.2

[40] Law on Fundamentals of Administrative action and Administrative Proceedings, a.7

[41] Law on Fundamentals of Administrative action and Administrative Proceedings, a.8

[42] Law on Procurements, a.35, p.3.

14. Does the Law provide for an obligation of the publication of the award of concession and record keeping?

The Law on Procurements provides that if the contract price exceeds the base unit (which is one million AMD[43]), the contracting body within 7 calendar days after the date of conclusion of the contract, represents the announcement to the authorized body for publication in the official bulletin, except for the state or banking secrets.[44]

It is also published on http://www.azdarar.am official web page[45].

15. Does the Law contain provisions regulating final negotiations (i.e. post contract award) so that transparency, equal treatment and competition are preserved?

As stated above in the points 2,4,13.

16. Does the Law provide for compensation (or not preventing) 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 PPP, as previously stated goes through administrative proceedings and the legal norms of those proceeding prescribed by law are applicable in this case as well.

The Law on Fundamentals of Administrative action and Administrative Proceedings states:

"A lawful favourable administrative act may be repealed, if the administrative body would have the right not to adopt the administrative act as a result of change of factual circumstances after adoption of the act, and if paramount public interest may be violated in case the administrative act is not repealed"[46].

The same law also comprises the compensation clause for the above-mentioned situation, which states that:

"If a favourable lawful administrative act has been repealed, as a result of which damage has been caused to its addressee or a third person, the damage shall be subject to compensation based on the application of the latter, to the extent that the person has, having legitimate expectation as to the existence of the administrative act, suffered damage as a result of its adoption or execution".[47]

17. Does the Law provide for compensation (or not preventing compensation) of the Private Party for all cases of early termination (including in case of serious breach or failure by the Private Party), for compensation for fair value after depreciation of the assets financed by the Private Party?

Due to the variety of the cases of the early termination, there probably won't be a unified legal reference: it depends on each case. One of the cases is the one stated above, and the legal consequences are already represented.

As for the compensation in general we may refer again to the Law on Fundamentals of Administrative action and Administrative Proceedings states, holding that compensation shall be carried out by means

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[43] Law on Procurements, a. 2, p.23.

[44] Law on Procurements, a. 10, p.2., s.1

[45] Law on Procurements, a. 10, p.2., s.3

[46] Law on Fundamentals of Administrative action and Administrative Proceedings, a.66, p.3 (d)

[47] Law on Fundamentals of Administrative action and Administrative Proceedings, a.109, p.2

of elimination of the consequences caused by administrative action or by means of compensation by monetary means[48]. The other clause of the said law states that in cases provided for in Articles 106-108 and Article 109(1) of this Law, the lost benefit shall not be subject to compensation[49]. This means that there would be cases where, for example, lost benefit shall not be subject to compensation and vice versa (as in the case represented above).

8.2 Azerbaijan - details of regulations

Details of regulations of concessions and PPPs in Azerbaijan

Law of the Republic of Azerbaijan on "Special financing of the investment projects connected with construction and infrastructure facilities" (March 15, 2016) prescribes the requirements for the agreements concluded based on the "Build-Operate-Transfer" model (Responsibility and reimbursement for damages, Period, determination of Value, Transfer, Government guarantees, Benefits).

The Procedures on the conditions of implementation of the investment projects in the construction and infrastructure facilities to be provided to the investors within the "Build-Operate-Transfer" model, to be approved by Decree No.1149 of the President of the Republic of Azerbaijan dated December 7, 2016. The Decree includes the requirements made to the investors according to the types of construction and infrastructure facilities, the terms and conditions of the concluded agreements, and determining the value of the goods and services to be acquired a result of investment"

Regulations on giving the public enterprises (facilities) for management based on the agreement" approved by Decree of the President of the Republic of Azerbaijan dated February 9, 1996.

Law of the Republic of Azerbaijan on "Energy" (November 24,1998)

- **Energy agreement** — a written agreement concluded between the parties and stipulating the conditions on the implementation of types of activities in the field of energy.
- Chapter V of this Law (ENERGY AGREEMENTS)

Existence of a PPP unit

The is at present no PPP-unit in Azerbaijan.

The first concession agreements of the Republic of Azerbaijan have been resulted in Production Sharing Agreements and letting "Bakielectricshebeke" Joint-Stock Company to "Barmek Holding A.S." for management:

1. According to Article 50 of Chapter V "Obtaining the right of land use and other property rights by foreign investors" (Concession agreements) of the Law of the Republic of Azerbaijan "On Protection of Foreign Investment", No.57, dated January 15, 1992, rights of the foreign investors for development, exploration and production of mineral fields and use of other natural resources were the concession agreements approved by Milli Majlis (Parliament) of the Republic of Azerbaijan and concluded with them by the of the Cabinet of Ministers of the Republic of Azerbaijan.

[48] Law on Fundamentals of Administrative action and Administrative Proceedings, a.97

[49] Law on Fundamentals of Administrative action and Administrative Proceedings, a.95, p.4

Order of the President of the Republic of Azerbaijan "On exploration and development of the Azerbaijani sector of the Caspian Sea "Shah Deniz field", No.222, dated October 4, 1995, and Decree "On Finalizing the negotiations with foreign oil companies on exploration, development and production sharing of Shah Deniz perspective field of the Azerbaijani sector of the Caspian Sea" No. 461, dated June 2, 1996, were signed.

On June 4, 1996 the Agreement and its 10 addendums "On exploration, development and production sharing of Shah Deniz perspective field of the Azerbaijani sector of the Caspian Sea" was signed between the State Oil Company of the Azerbaijan Republic ("SOCAR") and the SOCAR Commercial Joint Oil Company ("CJC"), BP Exploration (Azerbaijan) Limited ("BP"), Elf Petroleum Azerbaijan BV ("Elf"), Lukoil International LTD ("Lukoil"), Oil Industries Engineering and Construction ("OIEC"), Statoil Azerbaijan AS ("Statoil"), Turkish Petroleum Overseas Company Limited ("TPAO"), and upon ratification by Milli Majlis (Parliament) were signed by the President.

2. Other concession agreement – 25-year management agreement was signed between the Ministry of Economic Development of the Republic of Azerbaijan and the Turkish company on letting "Bakielectricshebeke" Joint-Stock Company to the Turkish company – "Barmek" from January 01, 2002 based on the bid conducted at the end of 2001 within the framework of the REGULATIONS on giving the public enterprises (facilities) for management based on the agreement" approved by Decree of the President of the Republic of Azerbaijan No.437,dated February 9, 1996. The said concession agreement provided by the Cabinet of Ministers of the Republic of Azerbaijan was approved by Decree of the President of the Republic of Azerbaijan No.597, dated November 2001.

The competent authority has the following powers to implement PPP model:

- carry out activities related to the development of the PPP model;
- monitor and evaluate the performance of contracts;
- coordinate the investors' activities with the public and local self-government bodies, legal entities and individuals;
- In conjunction with the Ministry of Finance of the Republic of Azerbaijan, for allocation of the funds set out in paragraph 3.16 of this document to take actions as well as calculate the state's financial obligations with regard to investors and evaluate risks and their division;
- in order to control the supporting documents required during the cost transactions according to legislation, and according to this document, to send the documents submitted by the candidate companies to the Bid Commission to the Ministry of Finance of the Republic of Azerbaijan its representative who is a member of the Bid Commission the Ministry of Finance of the Republic of Azerbaijan;

agree the draft investment agreements of the winners, a feasibility study developed by the winner, and cost estimate documents with the Ministry of Finance of the Republic of Azerbaijan and submit them to the Ministry of Finance of the Republic of Azerbaijan within five (5) working days after signing.

Cases

As stated in the Strategic Road Map on the development of the utilities (electric and thermal energy, water and gas) in the Republic of Azerbaijan, the transmission, distribution, separation and liberalization of energy production as a value chain have been already tested in the world practice and currently being developed further. This experience shows that the liberalization of the electricity sector is realized in various ways, including: 1) "Build-Operate-Transfer" (BOT model); 2) full privatization; 3) giving for management; 4) becoming open joint stock company, or 5) on the basis of concession agreement. The privatization of this sector mainly covers manufacturing (except strategic facilities)

and sales areas. Strategic Road Map 2020, targets the implementation of the above-mentioned activities upon the development of legislative acts in these spheres.

8.3 Belarus - details of regulations

Details of regulations of concessions and PPPs in Belarus

Under the Law on Concessions the concession is the right to possess and use a concession object or the right to carry out a certain kind of activity based on the concession agreement.

Concession objects may be objects that are considered to be in the exclusive ownership of the state (subsoil, water, forests) under the Constitution of the Republic of Belarus as well as objects owned only by the state. These objects and kinds of activity are listed in the Law of the Republic of Belarus dated July 15. 2010 No. 169-3 “On objects owned only by the state and kinds of activity carrying out of which is covered by the exclusive right of the state”.

Law on Concessions stipulates distribution of risk(s) between the parties in general. Mainly this issue is decided dependent on the type of the concession agreement. In particular, under the concession agreement on rendering services (performing works), the concessionaire bears the risk of accidental loss or accidental damage of the concession object transferred to him for processing, and also of production manufactured, processed under the concession contract till its transfer to the grantor. At conclusion of the concession agreement on rendering services (performing works), remuneration to the concessionaire is paid when the concessionaire achieved the result or regardless of the result achieved. In the first case, the risk is born by the concessionaire, in the second case – by the grantor.

Under the concession agreement grantor may have the following rights:

- right to the production manufactured by the concessionaire upon conclusion of the concession agreement on rendering services (performing works) or on a part of the production manufactured by the concessionaire upon conclusion of the concession agreement on production sharing;
- right to demand elimination of violations committed by the concessionaire when carrying out the conditions of the concession agreement;
- right to demand the rescission of the concession agreement in the event of essential breach of its conditions by the concessionaire.

The grantor is obliged to provide the concessionaire with the concession object free of third party rights under the conditions and within the time limits stipulated by the concession agreement, to register the concession agreement in the state register of concession agreements.

The concession agreement may stipulate the right of the grantor to unilateral refusal to fulfil the concession agreement and/or unilateral changing its conditions. In this instance, the concession agreement must contain an exhaustive list of grounds for realization of these rights by the grantor. At the same time, the grantor is obliged to reimburse to the concessionaire additional costs related to the termination (change) of the concession agreement and also to reimburse actual damages suffered by the concessionaire in connection with the rescission (change) of the concession contract.

A concession agreement must stipulate the following rights of the concessionaire:

- right of possession and use of property being the concession object or right to carry out activity in accordance with the conditions stipulated by the concession contract;
- right to use the benefits and privileges provided in accordance with the legislation;

- right to fulfilment of the concession contract on its own and (or) with engagement of other persons. In this case, the concessionaire is responsible for the actions of other persons as for his own;
- right to receive land plots in accordance with the legislation on protection and use of lands, required for the realization of the concession contract;
- right of ownership to the manufactured production upon conclusion of a full concession contract or to a part of manufactured production upon conclusion of the concession contract on production sharing;
- right to obtained profit (incomes);
- right to export from the Republic of Belarus the production belonging to him, manufactured as a result of carrying out activity at realization of the concession contract, and the obtained profit (incomes).

A concession agreement must stipulate the following duties of the concessionaire:

- to use the property being the concession object or to carry out activity being the concession object with the aims and in the order, established by the concession contract;
- to comply with the legislation;
- to provide financing of activities at the realization of the concession agreement;
- to bear costs related to the maintenance of the concession object;
- to transfer the concession object to the grantor in a proper condition in accordance with the conditions of the concession agreement after the end of the period for which the concession agreement was concluded.

The concessionaire is not entitled to transfer concession objects in sub concession, to transfer its rights and duties under the concession agreement to another person, to provide concession objects in lease, including financial lease (leasing) and gratuitous use (loan), as well as pledge its rights under the concession agreement, to contribute to the statutory fund of a legal person and to burden them otherwise with rights of third persons.

Among common reasons for termination of the agreement it is necessary to highlight the right of the grantor on unilateral refusal to fulfil the concession agreement in the case of refusal by the concessionaire to come to the agreement on change the owner of the property or change in the composition of its participants by more than 50%, or such changes occurred without notification of the grantor.

The Law on PPP has framework nature and does not stipulate the issue of distribution of risk(s) between the parties.

The Law on PPP establishes main rights and duties of the state and private partners.

So, the state partner is entitled to undertake the following duties:

So, the state partner is entitled to undertake the following obligations:

- in accordance with the legislation of the Republic of Belarus on protection and use of land for rent to provide the private partner with permanent or temporary use of land plots, on which the infrastructure facility is located or placed, for the fulfilment of obligations under the PPP agreement;
- to transfer to the private partner in the possession, use, including for free use, the infrastructure facility, intended for the fulfilment of obligations under the PPP agreement;
- to transfer to the private partner exclusive rights on results of intellectual activity which are necessary for the fulfilment of the obligations under the PPP agreement;

- to transfer to the private partner in the possession, use, including for free use, other immovable and (or) movable state property for the fulfilment of the obligations under the PPP agreement;
- to take ownership of the infrastructure facility built by the private partner on terms and conditions, in the manner and within the time limits stipulated by the PPP agreement;
- to send to the private partner means from republican and (or) local budgets in accordance with budget law of the Republic of Belarus and terms and conditions of the PPP agreement.

Under the PPP agreement the private partner is entitled to undertake obligations on design, construction and (or) reconstruction, restoration, repair, modernization and maintenance, and (or) operation of the infrastructure facility.

The private partner provides with full or partial financing of the obligations assumed under the terms and conditions and in the manner stipulated by the PPP agreement.

The Law on Concessions clearly defines that the concession objects are objects that are considered to be in the exclusive ownership of the state (subsoil, water, forests) under the Constitution of the Republic of Belarus as well as objects owned only by the state, kinds of activity which are covered by the exclusive right of the state (as it was mentioned above, the list of them are stipulated by the specific law).

The Law on Concessions does not distinguish the concession agreement from other forms and means of using objects that are in the state ownership, kinds of activities, covered by the exclusive right of the state.

Various branch regulations stipulate, for instance, how to use the radio frequency spectrum, external trade of particular categories of goods (alcoholic or tobacco goods).

Law on PPP stipulates open list of spheres where PPP projects may be realised:

Of energy project, specifically:

- energetics;
- processing, transportation, storage and supply of oil;
- transport, storage and supply of gas, the gas provision;

The Law on PPP does not identify the public authorities that are empowered to select projects, prepare for, and award PPPs and enter into Project Agreements. It contains the definition of the «State partner», that is the Republic of Belarus represented by state authority or other public organization empowered by the President of the Republic of Belarus, republican authority of state management or other public organization empowered by the Council of Ministers and subordinated to the Council of Ministers of the Republic of Belarus, administrative territorial units represented by the local executive and regulatory body (executive committee) which has entered into the PPP agreement.

The State authorizes the authority or organisation, which represents it in PPP projects or concession projects. Also, these bodies and organizations undertake obligations on choosing the second party to the contract – concessioner in the concession projects or private partner in PPP-project.

In accordance with par. 48 Regulation on the procedure of organizing and conducting competition for selection of the private partner for conclusion an agreement on public-private partnerships established by the Decree of Council of Ministers of the Republic of Belarus dated 06.07.2016 No. 532 during 10 working days from signing the report on competition results or the report on consideration of the tender offer of the only participant or the report on declaration of the abandoned competition (unproductive)

the Committee shall publish results of the competition conducted on the official website of the organizer in the Internet.

Under the Law on PPP, a private partner is a legal entity (excluding state unitary enterprises, state enterprises and state associations, and also economic organizations 50% shares hereof are owned by the Republic of Belarus or its administrative and territorial unit), foreign organization which are not legal entity, self-entrepreneurs which entered into a PPP agreement. So, it is 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.

Under art. 3 of the Law on PPP, PPP is based on the following principles:

- supremacy of law;
- regulation of economic activities in accordance with social orientation;
- priority of the public interest;
- publicity;
- fair competition;
- the effectiveness of PPP projects;
- to balance the interests and risks between public and private partners;

  equality between public and private partners;
- freedom of contract;
- environmental protection.

Despite the principles mentioned in art. 3 above according to article 18 of the Law on PPP there are principles on conducting the tender:

- transparency and openness;
- equality of rights and legitimate interests of participants;
- unity of requirements to the participants of the contest;
- impartiality of evaluation of competition offers by the tender commission.

The Law on Concession does not refer to the principles of transparency, equal treatment and proportionality directly.

Under the Regulation on the procedure of organizing and conducting competition for selection of the private partner for conclusion an agreement on public-private partnerships established by the Decree of Council of Ministers of the Republic of Belarus dated 06.07.2016 No. 532 on the basis of the results of the preliminary selection the Committee shall decide on the admission of the participant for further participation in the competition and prepare the decision report on the preliminary selection.

The report should contain the surname, first name, middle name (if any) of an individual entrepreneur, the name of a legal entity, an organization that is not a legal entity pre-selected and admitted to further participation in the competition, as well as the surname, first name, middle name (if any) of the individual entrepreneur, the name of a legal entity, an organization that is not a legal entity which are not pre-selected and admitted to further participation in the competition, with the decision taken by the Committee, the place, date and time of submission of the tender offer and conduction of the Committee meeting to determine the winner of the competition.

When conducting the open competition, the report on the preliminary selection or the report on deflation the competition abandoned must be published on the official website of the organizer in the Internet within 3 working days from its signing.

In accordance with the Belarusian law there are two specific registers for record keeping of agreements in the sphere of PPP and concession. The first one is the State register of concession agreements which is regulated under the Decree of Council of Ministers of the Republic of Belarus dated 28.09.2001 No. 1430 «On the order of conducting the state register of concession contracts». The aim of this register is registration and systematization of concession agreements.

The second one is the State register of PPP agreements which is established by the Regulation on conducting State register of PPP agreements approved by the Decree of Council of Ministers of the Republic of Belarus dated 06.07.2016 No. 532.

Article 23 the Law on Concessions stipulates provisions regulating final negotiations stated. According to this article concession authority should notify the winner of the competition on the procedure and the place of conducting negotiations on preparation of signing the draft concession agreement during 5 calendar days.

The Law on PPP does not stipulate provisions regulating final negotiations. However, the bill on making Law on amendments and changing in the Law on PPP establishes such provisions.

But both laws do not provide with preserved guarantee of transparency, equal treatment and competition.

Compensation (or not preventing) 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 is not stipulated by the Law on PPP directly, however, it can be established by the particular agreement.

The current edition of the Law on PPP does not stipulate compensation (or not preventing compensation) of the Private Party for all cases of early termination (including in case of serious breach or failure by the Private Party), for compensation for fair value after depreciation of the assets financed by the Private Party. But under the bill on making amendments and changing in the Law on PPP there is such offer to include this issue in the Law on PPP.

In accordance with the Law on Concessions liability of parties to the concession agreement is regulated by art. 37. It is stated that parties to the concession agreement are liable for any failure to perform their obligations or other terms of the concession agreement according to the law and the concession agreement. Real damage affected by the other party to a party of the concession agreement shall be compensated in full.

In the Republic of Belarus, the PPP and concessions legal framework include two basic laws:

The Law of the Republic of Belarus dated July 12, 2013 No. 63-Z “On Concessions”;

The Law of the Republic of Belarus dated December 30, 2015 No. 345-Z “On the Public-private Partnership”.

There is a draft plan for amendments in the Law of the Republic of Belarus dated December 30, 2015 No. 345-Z “On the Public-private Partnership” and certain laws which are about transport infrastructure (motorways, railways, waterways and line tubes). The main goal of the amendments is to improve the legal framework in the sphere of the public-private partnership.

Cases

1.There is the only pilot PPP project, which is started from May of 2016 *“Reconstruction of the road section of M10 highway”*. Nowadays the President adopts it by the singing of the agreement between the Government of the Republic of Belarus and European Bank for Reconstruction and Development on financing the consulting services for infrastructure project “Reconstruction of the road section of M10 highway”.

There are following concession projects in Belarus:

1) The Poznyakevichskaya area, Elsk district of Gomel region – it is planned to hold the recurrent bidding in March 2017 to define the concessionary for the mineral research.

2) The Akoulicheskaya area, Narovlyz district of Gomel region – it is planned to hold the recurrent bidding in March 2017 to define the concessionary for the mineral research.

3) The tar pit of the bentonite clays Otrozhanskoe, Lelchitsy district of Gomel region, the tar pit of gyps Brinevskoe, Petrikov district of Gomel region, the tar pit of iron ore Okolovskoe, Stolbtsy district of Minks region and Novoselkovskoe, Korelichi district of Grodno region, the tar pit of chalk Dobrushskoe, Dobrush district of Gomel region – the last biddings were held on 2009.

PPP PILOT PROJECTS IN BELARUS № Project title

1. Reconstruction of a group of buildings of the health care facility “City Clinic No. 3” in Grodno into “Grodno Regional Clinic Oncologic Dispensary”.

Preliminary Cost Estimates – 100 Million USD.

4. Construction of pre-school education institutions in districts of Minsk region Preliminary Cost Estimates – 12,4 Million USD.

5. Design and construction of the emergency medical facilities in the city of Baranovichy (KUIBYSHEV Str., 96). Preliminary Cost Estimates – 4,3 Million USD.

7. Construction of incineration plant in Bobruisk in Mogilev region. Preliminary Cost Estimates – 30 Million USD.

8. Construction of an arterial road in Gomel 41.35 km long taking into account construction of a bridge over the Sozh river and five crossovers. Preliminary Cost Estimates – 199,3 Million USD.

9. Construction of Beshenkovichi Hydroelectric power plant (33 MW-130 mil Kw/h) on the Western Dvina river in Vitebsk region. Preliminary Cost Estimates – 186 million USD.

In order to improve the supply situation, the Government of the Republic of Belarus has decided to concentrate efforts on the construction of a nuclear power plant (NPP). In 2011, its construction started near the town of Astravets in the Hrodna region. The Belarusian NPP will consist of two units with VVER-1200 type reactor each. The combined capacity of the two reactors will be 2400 MW. The first reactor of the NPP is expected to be operational by 2018, and the second one by 2020.

8.4 Georgia - details of regulations

Details of regulations of concessions and PPPs in Georgia

As mentioned in Section 1 there is no single piece of law governing concessions and PPPs for energy sector.

Firstly, we'll discuss the only effective piece of law: The **Law of Georgia "On Procedures for Granting Concessions to Foreign Countries and Companies**" which is rather deviated from the international best practice. According to the Concession Law, concession means exploitation of the "recoverable and non-recoverable natural resources and doing business related thereto". It is further stipulated that concession can be implemented exclusively in a form of the long-term leasing agreements. Concessions are restricted to the specific business of natural resources, where it overlaps with other laws (Law of Georgia on Natural Resources[50], Law of Georgia on Licenses and Permits[51], Law of Georgia On Gas and Oil[52]). Another crucial point where the Concessions Law strongly deviates from the best international practice is that he party to the concession agreement (other than state) can be only foreign legal entities or individuals, foreign states and international organizations. The fact that foreign states and international organizations are allowed to be parties to concession agreements encourages such legal relationships to fall under the domain not of civil law, but rather international law.

In addition, in numerous cases, the clauses of Concession Law give reference to inexistent legal acts. In particular, according to the Article 4 of the Concessions Law, it is provided that the "Georgian Laws determine the objects, fields and types of businesses which is prohibited to be granted via concessions". Further Article 7 of the Law provides that "the Government bodies determined under the laws of Georgia within its competence determine and publish the list of objects subject to transfer on the basis of concession agreements to the foreign concessionaries". We failed to identify such lists in existing databases of Georgian laws and regulations that include above said prohibitions or list determining the objects subject to further concession agreements.

As for the institutional framework, the Concessions Law is rather ambiguous regarding the determination of government bodies authorized to coordinate concessions processes. For instance, Article 6 of the Concessions Law states that "coordination of the activities related to execution of the concession agreements shall be performed by the body determined by the Georgian legislation", but such body have never been determined by any legal act. Further, according to the Article 7 of the Concessions Law, the state bodies designated by the laws of Georgia shall prepare the preliminary terms of the concession agreement and the list of organizations, which will be working on the project agreement with the investors. As already mentioned, although this regulation is in place, there is no state body designated by the law to perform such obligations. Vagueness of the Concessions Law increases when such non-existent government bodies have obligations to be fulfilled in order to ensure proper functioning of concessions. For example, Article 10 of the Concessions Law provides that the government body authorized by the laws of Georgia establishes the special registry for registration of the concession agreements. There has never been a concession registry in Georgia, although the idea of having unified registry of concessions in the country seems fairly progressive.

Finally, the Concessions Law gives practically no regulations for application and selection processes of the bidders: no authority determined for supervision of selection process and extremely limited

[50] Law of Georgia on Natural Resources adopted by the Parliament of Georgian on 17.05.1996

[51] Law of Georgia on Licenses and Permits adopted by the Parliament of Georgian on 24.06.2006

[52] Law of Georgia on Gas and Oil adopted by the Parliament of Georgian 16.04.1999

regulations for selecting the concessionaires, which threatens the transparency of the entire procedures.

It is worth mentioning that the Concessions Law have never been applied in Georgian reality.

Due to the drawbacks of the Concessions Law described above, as already mentioned the PPP Policy (hereinafter "the Policy") has been adopted by the Government of Georgia. As we are aware, it is intention of the Government of Georgia to adopt the new PPP law corresponding to the EU directive on Concessions.

The Government of Georgia has a political determination to conduct the necessary legal and economic reforms in order to create an enabling environment for attracting private investments and participation, to benefit from the private sector's experience, technologies, innovation and efficiency, to match investment needs, to modernise the economy and thus, meet public needs and facilitate economic growth. As per the Policy reforms shall entail the development of a modern legislative and institutional framework for PPPs, including adoption of the PPP Law. The PPP reform will also cover the municipalities and state-owned enterprises as defined by the PPP legislation to be adopted.

Policy serves to create new and enhancing existing public infrastructure and services. It spells out the key principles for PPPs and defines an institutional framework, which is conductive and efficient in handling the PPP projects as well as effective to protect public interests.

According to the Article 5 of the Policy, Government plans to use PPP mechanisms in Georgia in respect to multiple sectors of public infrastructure and services. In the Policy energy sector is included in the list of sectors, which are deemed to have most potential for using private funding. It is stipulated that the PPP legislation may define the sectors and/or areas that will not fall under the PPP purview, as well as spell out priority areas for the country.

As per the Article 2 (a) of the Policy, PPP is a form of long-term contractual cooperation between the public and private partner aimed at providing public infrastructure and/or services. The main criteria for a project to be deemed as a PPP are as follows:

Provision of a public service or operation and/or construction/reconstruction/rehabilitation and maintenance of the public facility by the private partner.

Sharing risks between the public and private partners;

and

Full or partial private financing of PPP project.

Policy stipulates that the PPP projects will be undertaken through any PPP model, including concessions and states that PPP legislation might establish some carve-outs for certain PPP models. Otherwise, it is governed that the PPP Law will treat all PPP models including concessions on an equal basis.

Further, the Policy sets out and defines each of the fundamental principles applicable to PPP projects in Georgia, which are: transparency, foreseeability, non-discrimination, value for money, adequate risk allocation, fiscal responsibility and environmental and social sustainability principles.

As for the public support of PPP projects, the Policy does not set clear guidance and states that the Government will decide on public sector support, including financial participation measures based on the nature and model of a particular PPP project after its proper assessment and subject to all required approvals. It is provided that the main forms of public financial support for PPPs in Georgia might be: direct government financing or co-financing, funding from a variety of non-budgetary funds and state

entities, budget guarantees, non-budgetary guarantees / contractual obligations, contingent compensatory payments. The Government intends to adopt a separate regulation on public sector support; inter alia, financial participation, including its forms and provision methodology.

Policy states that for accelerating identification, formulation, appraisal, approval, monitoring and financing of PPP projects, a dedicated institutional framework shall be established. According to the Policy, the following institutions will be in charge of coordination of PPPs in Georgia: PPP Unit, Risk Management Unit (subordinated under the Ministry of Finance of Georgia), Line Ministries (for energy sector –Ministry of Energy of Georgia) and ad hoc Government Council. Policy sets out some of the obligations of these bodies and states that, the PPP law will determine remaining obligations. The details of institutional framework of the PPP policy are discussed in next section.

Further, it is governed that, the PPP projects will be developed through a defined process, that will entail various stages, including project Initiation, project preparation, procurement through tendering or direct negotiations, project implementation. The stages will combine the project identification; Project assessment and evaluation, including affordability, bankability, risk allocation, value for money analysis, feasibility studies; Preparation of the detailed project plan and timetable, finalization of the PPP contract draft and other relevant documentation; Negotiations with preferred bidder/investor and contract award; Contract management, including monitoring implementation of the PPP project, etc. It is stated that PPP projects are determined to be the part of the country's overall investment strategy.

The Policy is quite laconic with regards to selecting private partner. It provides that any legal entity registered in Georgia or abroad is eligible to participate in PPP projects. However, at the time of contract awarding, the foreign entity is required to register a legal entity in Georgia.

It is promised that detailed eligibility requirements will be specified for each partnership on a case-by-case basis.

According to the Policy, the Government will adhere to transparency and non-discrimination principles during private partner selection. Consequently, the tendering will be a rule and direct negotiations will be the exception allowed in limited cases. Unfortunately, there are no additional details regarding tendering or selecting the bidders.

Finally, the Policy is promising relevant PPP legislation as well as clear-cut procedural guidelines to be set in place for the sake of encouraging PPP projects.

Considering deficiency of general PPP/Concessions specific regulations, it is clear that there are no specific regulations for PPPs and/or concessions in energy sector, but notwithstanding of such deficiency, there have been some successful PPP projects in energy sector in Georgia. Ministry of Energy of Georgia have elaborated specific scheme for development of all energy projects. Although none of legal acts elaborated with regard to energy projects by Ministry of Energy and Government of Georgia applied through this process outline that PPP projects fall within the scope of these regulations, but practice have proved that PPP Projects are accomplishable within this framework.

Ministry of Energy of Georgia is the authority responsible for approval of all projects involving construction and operation of new power plants in Georgia. Such projects are awarded to investors either through (a) tender or (b) directly, by virtue of an individual administrative-legislative act of the Ministry. Awarding projects through tender is governed by virtue of the Resolution # 214 of the Government of Georgia dated 21 August 2013 on *"The Rules for Expressing of Interest in Construction, Technical and Economic Study, Ownership and Operation of the Electrical Plants in Georgia".* As for awarding of energy project without tender, such procedures are regulated by virtue of the Order of the Minister of Energy of Georgia # 40 dated 10 April 2014 on *"Approval of the Rules for Submission, Revision and Approval of Conditions of the Proposal on Technical and Economic Study, Construction,*

Ownership and Operation of Power Plants not Included into the List of the Power Plants to be Potentially constructed in Georgia." Details of tendering of energy projects are discussed in next section.

Further, it shall be noted that PPP agreement and its derived forms cannot be mixed with the licenses or permits. Matters related to licenses are governed by the specific of regulations- the law of Georgia on Licenses and Permits adopted on 24 May 2005. Exhaustive list of the types of licenses and permits of the areas of licensed activity and permitted action are defined by this law and it is forbidden to introduce other license and permit by other legislative or bylaw act on an activity and action not provided for under this law. Administrative authorities are forbidden to introduce an obligation under the bylaw normative act, which per se implies introduction of license or permit regime on any activity or action or need of the approval by administrative authority in any manner. Existing energy projects cover certain licenses and this process is never mixed with granting of PPP project, i.e. after company qualifies as private party, the second step is to meet the criteria for licenses required by said law. The project companies are applying the required licenses after they are awarded with the project.

The Policy is silent regarding the content of the provisions of project agreements and as we are aware of the will of Government, Government is not willing to hinder development of PPPs with unrealistic interferences from the government bodies, including obligations, tariffs, etc.

As for the publication of PPP projects, currently Ministry of Energy is in charge of maintaining database of all energy projects, but this is not statutorily required. The tender information is always accessible on Ministry's webpage. As per the Policy, PPP unit will be responsible for managing the PPP database.

Institutions Involved in PPPs/Concessions in Georgia

National Investment Agency of Georgia

On a legislative level, the monitoring and supervision of the investment sphere is charged to the National Investment Agency of Georgia. The Agency was established on the basis of special law on National Investment Agency of Georgia[53]. The organisational form of the Agency is a Legal Entity of Public Law (the "LEPL")[54]. The agency reports to the government of Georgia and semi-annually reports to the government concerning its activities. The main function of the Agency is facilitating the improvement of the investment environment and support of the investments. The Agency is authorised to monitor the governmental bodies in respect of activities related with the implementation of investment activities in Georgia.

The Agency's functions are as follows:

- conduct of researches on social, economic, business and investments issues and development of a relevant database;
- for the purposes of improvement of the investing environment and support of investments in Georgia, supply of recommendations to the Government of Georgia and other authorities of the executive power;
- providing persons interested in investments in Georgia with the relevant information and consulting and recommending services;
- support of growth of the global recognisability of investing environment in Georgia;
- support of the raising of investments, including the direct foreign investments in Georgia;
- transaction of representation powers of an investor in relation with the administrative authorities and other persons;
- conduct of researches focused on disclosure of potential investors;

53 Law of Georgia No 3123 on National Investment Agency of Georgia dated 4 March 2015.

54 Organisational and legal type of entity as defined by the Law of Georgia No 2052 on Legal Entities of Public Law dated 28 May 1999.

- consulting potential investors and identification of investments projects bearing the interests for the former;
- development and permanent update of a database of existing investors;
- assistance of investors in obtaining all licenses and/or permits necessary for the investment activity;
- for the purposes of support of investors in receipt of the state services, exercise of other powers.

Taking into consideration the above functions, the Agency is a major authority responsible for regulation of, and supervision over, the investment activity; however, when examining the statutory acts, we disclosed the other entities, which also are responsible for management and implementation of investment projects in Georgia. One such entity is a Partnership Fund.

Partnership Fund

The fund is established on the basis of a special parliamentary law on JSC Partnership Fund[55] ("PF"). The fund reports to the government of Georgia and annually reports to the president concerning its activity. The 100% shareholder of the fund is the state of Georgia, represented by its government. The PF was created on the basis of consolidating the ownership of the largest Georgian state-owned enterprises operating in transportation, energy and infrastructure sectors (Georgian Railway - 100% of shares, Georgian Oil and Gas Corporation (GOGC) - 100% of shares, Georgian State Electrosystem - 100% of shares, Electricity System Commercial Operator - 100% of shares, etc.)

PF's main objective is to promote investment in Georgia by providing co-financing (equity, mezzanine, etc.) in projects at their initial stage of development. One of the priorities of the PF is to invest in commercially viable energy projects, in particular HPP Nenskra, HPP Kasleti 2, HPP Lukhuni 2, etc. However, the tendering procedures applied by PF are not quite clear. For example, HPP Nenskra was tendered by JSC Georgian Railway (which is 100% owned by PF) in accordance with the public procurement regulations.[56]

The PF has a mandate to invest only in Georgia. The fund's strategy is aimed at attracting and supporting private investors. Energy is at the top of the priority list as this sector is largely untapped and has great potential for further development. The fund acts as financial partner for private investors and provides mid- to long-term financing. The Partnership Fund does not participate in the projects directly related to consumer services.

In accordance with the law, the major objectives of the Fund are as follows:

- raising investments;
- support of the completion of delayed projects and development and funding of new projects;
- the assessment of efficiency and sustainability of investment projects;
- monitoring the administration of on-going projects.
- As may be seen, the functions of the National Investment Agency of Georgia and that of the Partnership Fund in many cases overlap.
- In light of the above mentioned, we hereby recommend assigning the supervision, monitoring and administration functions related to the investment sectors to a single entity.

55 Law of Georgia No 4522 on JSC Partnership Fund dated 8 April 2011.

56 Law of Georgia on Public Procurement adopted by the Parliament of Georgia on 20 April 2005

Municipal Development Fund

The fund was established by Resolution No. 118 of the Government of Georgia[57]. The organizational form of the fund is the LEPL. The fund reports to the Government of Georgia and the Ministry of Regional Development of Georgia. The objective of the fund is to support strengthening the institutional and financial capacity of local government units, investing financial resources in local infrastructure and services, improving on a sustainable basis the primary economic and social services for the local population (communities), developing renewable energy (midget power plants and geothermal) sources, creating sustainable economic basis for refugees, rehabilitating irrigation and drainage systems, provision of low-interest loans to legal entities and physical persons of Georgia in the framework of the Government Programme, Technical Assistance for Foreign and Georgian physical bodies and legal entities for business development in Georgia, the liquidation of damage caused to the population and infrastructure during the conflicts in Georgia.

In order to attain the above objective, the Municipal Development Fund cooperates with the local self-government institutions and mobilizes funds from international organizations, donor agencies and foreign countries, the central and local self-government authorities and other bodies. Following a decision adopted by the Government of Georgia, the Fund may, through the state budget funds, implement certain infrastructural projects in the interests of the public and society.

The Municipal Development Fund shall:

- participate in the funding and implementation of local investment projects:
- assess investment projects in local infrastructure based on criteria identified by the supervisory board or other rules and instructions acceptable for relevant donors;
- fund investment projects in local infrastructure in accordance with procedures and conditions agreed by and between the Government of Georgia and relevant donors;
- supervise over the implementation of investment projects funded by the Fund;
- supervise the rehabilitation of the irrigation and drainage systems;
- supervise the recovery of irrigation and coast protective infrastructure damaged as a result of floods.

The National Agency of State Property

The National Agency of State Property was established on 17 September 2012. The Agency falls under the responsibility of the Ministry of Economy and Sustainable Development of Georgia and exercises the rights related to the privatisation of state property, the transfer with the right of use of state property and managing the companies established with government shareholdings.

The Agency of State Property is a legal successor of LEPL the Enterprise Management Agency. The Enterprise Management Agency was established based on Ordinance No. 203 of the President of Georgia dated 11 May 2003, following the liquidation of the Ministry of State Property Management.

57 Resolution No 118 of the Government of Georgia on Approval of Regulations and Appointment of Supervisory Board of Legal Entity of Private Law – Municipal Development Fund dated 23 July 2005.

Pursuant to its Statute, the National Agency of State Management is assigned to exercise the right of a partner / shareholder in companies established with government shareholdings.

The Agency is responsible for protecting (through government representatives) state interests held in the companies and support the increasing of dividends held by the government, as well as improve liquidity of companies and encourage and expedite privatisation.

The key areas of the agency's activities are:

- State Property Management;
- Disposal of State Property;
- Managing State Owned Enterprises.

Cases in Georgia

One of the milestones in the investment projects bearing the traits of PPP in Georgia, was the construction of the Tbilisi International Airport and the Batumi International Airport by Turkish investor TAV Georgia. TAV Georgia is a daughter company of TAV Airports Holding. It started its operation in Georgia in 2005 and will continue its activity until 2027 as per the agreement in effect. Having made the investment worth over 100 million USD in Georgia, new passenger terminals of Tbilisi and Batumi airport were commissioned in 2007. By its legal notion, this project fully falls under the concept of BOOT. Since the contracts with TAV Georgia are not publicly available documents, we are deprived of opportunity to go into greater detail of the abovementioned project.

Notwithstanding the absence of the PPP legal framework and regulations, back in 2007 the Ministry of Energy entered into a memorandum of understanding with foreign company Trans Electrica Limited**,** the purpose of which the MOU is construction and further operation of Khudoni Hydro Power Plant under a BOO model. Again, the documents and other materials of the deal are kept confidential. However, based on publicly available information the Memorandum is still in effect and the parties to it are in process of observing their obligations therein and are also in a process of negotiating the terms and conditions of BOO contract.

Starting from 2008 Georgia has liberalized and deregulated energy market. Renewable projects offered by the Ministry of Energy are based on Build-Own-Operate (BOO) principle. There are no tariffs sets for newly built HPPs, investor is free to choose market and negotiate price. No fee is required for the connection to transmission grid. No license is required for export and new HPPs have priority access to the capacity on the new interconnection to Turkey. Generation and export activities are exempted from VAT tax.

In consideration of above mentioned benefits Ministry have successfully implemented 14 Hydro Power Plant projects and 7 more are to go online this year. Majority of these projects have been tendered in accordance with the rules established under the Resolution # 214 of the Government of Georgia dated 21 August 2013 on "The Rules for Expressing of Interest in Construction, Technical and Economic Study, Ownership and Operation of the Electrical Plants in Georgia". Although all decisions of Government of Georgia regarding approval of project and participant are in place, additional details regarding tendering of these projects are not publicly known. Majority of BOO projects implemented by different companies in cooperation with the Ministry of Energy are hydro power plant projects. Examples of BOO projects are HPP Dariali (with installed capacity of 108.0 MW and with the investment of 105 Million USD), Paravani HPP (with installed capacity of 86.54 MW), Shuakhevi HPP (with installed capacity of 187 MW and with the investment of 400 million USD), Khelvachauri HPP, Kintrisha HPP,

Nabeglavi HPP. Unfortunately, we do not have possibility to assess the contracts, which are confidential. As mentioned above, there has been no practice of concessions of gas and oil projects.

As no PPP contract could be assessed, the agreement concluded back in July 2006 by and between the Ministry of Economic Development of Georgia and Batumi Port Holding Limited on Acquisition of the Exclusive Management Right of 100% of the State Owned Shares in Batumi Sea Trading Port Limited for 49 years. The competitive tender was conducted by the Ministry of Economic Development of Georgia on 12 May 2006 and Batumi Oil Terminal Limited which, in its part assigned all rights to its sister company Batumi Port Holdings Limited.

Based on very limited information available to the public domain, it is possible to assume that alienation of Poti Sea Port also falls under the PPP scheme. In 2007, the Ministry of Economic Development of Georgia invited letters of interest towards operating Poti Sea Port by leasehold and creating a Free Industrial Zone (400 ha) adjacent to the Port territory. Besides, there are several private companies operating terminals under the lease agreements.

In addition to BOO projects, recently the Nenskra HPP Project was signed, a major electricity construction project in the Svaneti region. The project is expected to go online in 2019, have a 280 MW capacity and will have the potential to produce an annual 1.2 billion-kilowatt/hour output. Construction of the HPP is based on a Build-Operate-Transfer Structure, in which the investor is obliged to build a hydroelectric plant, operate it for 35 years and then transfer ownership to Georgia at no cost. Nenskra HPP will be the first energy project in Georgia implemented through this model. The project is implemented as a joint venture between the state-owned PF and the Korean K-Water company under the BOT scheme (Build-Operate-Transfer). As has been the practice with other hydropower projects in Georgia, the Nenskra implementation agreement signed in August 2015 is confidential, so many details are unknown. As it was known to us at the time of tendering, HPP Nenskra has been tendered by JSC Georgian Railway (which is 100% owned by PF) in accordance with the public procurement regulations.

8.5 Moldova - details of regulations

Details of regulations of concessions and PPPs in Moldova

List of normative and legislative acts regulating PPPs:

****Primary Legislation***

- *Law on concessions* no. 534-XIII from 13.07.1995 (Official Gazette of the Republic of Moldova Nr. 67 art Nr : 752: 30.11.1995);
- *Law on public- private partnership* no. 179-XVI from 10.07.2008 (Official Gazette of R.M nr.165-166/605 from 02.09.2008);
- *Law on public procurements* no. 131 from 03.07.2015 *(*Official Gazette of R.M nr.197-205/402 from 31.07.2015);
- *Law on natural gas* no. 108 from 27.05.2016, (Official Gazette of R.M, 2016, nr. 193-203-24, art. 415);
- Law *on electricity* no. 107 from 27.05.2016, (Official Gazette of R.M, 2016 nr. 193-203-24, art. 415);
- Law *on the promotion of cogeneration and heating* no. 92 from 29 .05.2014, (Official Gazette of R.M, 2014, nr. 178-184, art. 415).
- *Tax Code* from 24 .04.1997 (Official Gazette of R.M nr.62/522 from 18.09.1997);
- *Law on entrepreneurial activity* no. 845-XII from 3.01.1992 (Official Gazette of the Republic of Moldova nr.2/33 from 1994);
- *Law on the promotion and use of renewable energy* no. 10 from 26.02.2016 Monitorul Oficial nr.69-77/117 din 25.03.2016 ;
- *Law on joint stock companies* nr. 1134- XIII from 02.04.1997 (Official Gazette of the Republic of Moldova nr.38-39/332 from 12.06.1997);
- *Law on public assets of the administrative- territorial units* no. 523-XIV from 16.07.1999 (Monitorul Oficial al R.Moldova nr.124-125/611 from 11.11.1999);
- *Civil Code* from 6.06. 2002 (Official Gazette of the Republic of Moldova nr.82-86/661 from 22.06.2002);
- *Law on investments in the entrepreneurial activity* no. 81-XV from 18.03.2004 *(Official Gazette of the Republic of Moldova nr.64-66/344 from 23.04.2004);*
- *Law on local public administration* no. 436-XVI from 28.12.2006 (Official Gazette of R.M nr.32-35/116 from 09.03.2007);
- *Law on management and privatization of public property* no. 121-XVI from 04.05.2007 (Official Gazette of the Republic of Moldova nr.90-93/401 from 29.06.2007);
- *Law on industrial parks* no. 182 from 15.07.2010 (Official Gazette of R.M nr.155-158/561 from 03.09.2010);
- *Law on normative pricing and land sale and purchase modality* no.1308-XIII from 25.07.1997*;*
- *Law on state owned lands and their delimitation* no. 91-XVI from 05.04.2007; Official Gazette of R.M nr.70-73/316 din 25.05.2007.

Law *on the public property of administrative territorial units* no. 523-XIV from 16.07.1999.

****Secondary Legislation***

- Government Decision No 419 of 18.06.2012 *on approving the list of state assets and public works and services of national interest proposed for Public Private Partnership*.
- Government Decision no. 245 from 19.04.2012 *on the National Council for Public and Private partnership* (Monitorul Oficial nr.82-84/281 from 27.04.2012);
- Government Regulation No 476 of 4.07.2012 *on standard procedures and general requirements for private partner selection* (Monitorul Oficial nr.143-148/530 from 13.07.2012);
- Government Decision no. 102 from 05.02.2013 *on R.Moldova energy strategy until 2030* (Official Gazette of R.M nr.27-30/146 from 08.02.2013);
- Government Decision no. 255 from 11.04.2013 *privind instituirea rețelei interminiterialede parteneriat public-privat* (Official Gazette of R.M nr.83-90/310 from 19.04.2013);
- Government Decision no.1008 from 10.09.2007 *on approving the staff-limit and the Regulation of the Public Proprety Agency under the Ministry of Economy*.

- Government *Regulation on giving into concession public utility services approved by the Government Decision* No 1006 of 13.09.2004
- Government decision No.675 of 06.06.2008 on Public Assets Register 14.
- Order No. 143 of the Ministry of Economy of 02.08.2013 *on approving the project risk distribution preliminary matrix.*
-

According to the *Energy Strategy of Republic of Moldova until 2030, approved by the Government Decision no. 102 / 02.05.2013*, one of the strategic objectives of the national energy policy is the full integration into the EU market (EU) and for its implementation the transposition of the Acquis Communautaire is needed. The energy sector of the European Union is governed, in particular by EU Directive 2009/72 / EC of the European Parliament and of the Council of 13 July 2009 concerning common **rules for the internal market in electricity** and repealing Directive 2003/54 / EC of Directive 2009/73 / EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive no. 2003/55 / EC.
Moreover, in order to transpose the EU Directives and implement the III Energy Package, Moldova has approved a new Law on electricity no. 107 of 27.5.2016, Law on natural gas no. 108 of 27.05.2016 and new Law on the promotion and use of renewable energy no. 10 of 26.02.2016. The Parliament adopted the Law on heating and promotion of cogeneration no. 92 of 29 May 2014 for the regulation of the heating sector.

The EU directives lay down a number of principles, including those related to promotion of competition in the electricity and natural gas markets by legal and functional unbundling of transport and distribution activities from production and supply, assuring non-discriminatory access to the networks; transparent and predictable regulated prices, promotion of production and use of renewables, effective assurance of consumer rights.

The regulated activities on the electricity, natural gas and district heating markets are conducted under conditions of natural monopoly because they are delivering through networks and are linked to public service obligation, quality of service and customer protection. These activities require licensing from the National Agency for Energy Regulation.

According to the *Register of public assets* owned by Public Property Agency the following state-owned energy companies operate on the market.

Electricity sector:

After privatizations that took place in 2000, state ownership remained for two companies providing electricity *distribution service*:

1) JSC. "Rețele electrice de distribuție Nord";

2) JSC " Rețele electrice de distribuție Nord -Vest".

Transmission of electricity is performed by state enterprise : SE "Moldelectrica"

Supply of Electricity: LLC "Northern Electricity Supply" and JSC. "Energocom".

Natural gas sector:

The state owns a 36.6% share in S.A. Moldovan-Russian "Moldovagaz" holding a license for the *supply of natural gas.*

Heating Sector:

State-owned companies are: JSC "CET-Nord" and JSC. "Termoelectrica" providing for the *supply and distribution* of heating.

According to the Energy Strategy until 2030 of the Republic of Moldova, approved by the Government Decision no. 102 / 02.05.2013, the Government has set the objective of financing the investigation of

domestic resources of natural gas in the south of Moldova and exploiting these resources via concessions and ensures flexible supply RM gas. Also, the Government encourages public-private partnerships and plans to attract private participants in the construction of power generation capacity.

Noted that, according to art. 7 of the Energy Law no. 1525 of 19.02.98 on power transmission grids and energy objectives of strategic importance are owned by the state and are not subject to privatization.

The state ensures the rights of investors and guarantees against expropriation of investments. *According to Law no. 81 of 18.03.2004 on investments in entrepreneurial activity,* investments can have the form of any right granted under law, contract, license or permit granted in accordance with the law, including concessions for research, cultivation, extraction or exploration natural resources.

R. Moldova does not have sectorial laws regulating PPP in the energy sector, however the existing special laws and regulations on PPP, allow the allocation and operation of PPPs.

Table 9. EU Directive 2014/23/EU and the provisions of the R.M national legislation. (Transposition):

Dir. 2014/23	Article 3. Contracting authorities shall treat economic operators (private companies) equally and without discrimination and shall act in a transparent and proportionate manner. The award procedures shall be transparent.	The Law on PPP	**Article 4.** Equality treatment, impartiality and non-discrimination 1. The public partner shall ensure **equal treatment** for all bidders within any element or stage of the private partner's selection process. In all cases the established selection criteria of the private partner will be clear and will **not carry any discrimination character**. 2. The technical requirements should permit the equal access of bidders and shall not create unjustified obstacles nor limit the competitiveness at the competition.
	Article 5. Concessions mean works or service concessions, in which an operating risk is transferred to an economic operator. The Concessions **may include an "exclusive" right for an activity** (i.e. exploration for oil in a specified area) or a "**special right**" where more economic operators can be involved.	The Law on PPP The Law on concessions	**Article 17.** Public-private partnership object (2) The public-private partnership object can refer to any good, work, public service or any function carried out by the public partner except for those directly prohibited by the law. (3) The public-private partnership can be set up on the basis of infrastructure objects and/or existing facilities or it is based on setting up new goods and/or public utility facilities. **Article 1.** Concession and undertaking concessional The concession is a contract by which, the State or the administrative territorial units give an investor (natural or legal person, including foreign) in return for a royalty, the right to conduct prospecting, exploration, recovery or restoration of natural resources Moldova, t**o provide public services** to operate movable and immovable assets of public property or the administrative-territorial units that the regulations **are removed or part of the civil circuit,** to carry out certain types of activity, including which is a state monopoly, taking over the management of concession object, presumptive risk and financial liability.
	Article 7 The directive includes activities referred to in Annex II: For natural gas and heat the provision and operations of		Moldova's legal framework does not prohibit taking in concession power plants, transmission and distribution networks for electricity, natural gas or heat. **Article 3**. Scope and object of the concession

	fixed networks, supply of gas and heat to fixed networks (with some minor exceptions). For electricity, the following applies: Provision and operation of fixed networks servicing the public, supply of electricity to fixed networks. Supply of electricity includes generation/production wholesale and retail sale of electricity. (Again, with some minor exceptions). According to Annex I oil and gas extraction is excluded from the directive and referred to Directive 94/22/EC.	Law on concessions no. 534-XIII din 13.07.95	(1) The concession is **allowed in all sectors of the economy and includes all kinds of activity if it does not contradict to law**. (2) Concession objects can be: a) land and other natural resources, prospecting, exploration and exploitation thereof; b) movable and immovable assets of public or private domain of the State or territorial administrative units; c) works and services of local and national public interest.
	Article 8. The concessions directive applies **to projects with a value greater than EUR 5186000** (2014).		The law does not stipulate any threshold values for works and services concessions. The law is proposed to be amended.
	Article 18 For concessions lasting more than five years **the duration shall not exceed the time to recoup the investments and services with a return on the invested capital.**		Law on Concessions in the current wording does not contain such a provision. The law is proposed to be amended.
	Article 31. Authorities shall issue a **concession notice** with information on the intended task with standard requirements.	Law on PPP Law on concessions Regulation on standard procedures and general requirements for private partner selection	▪ The informative memo is valid for at least 60 days since the day of its publication in the Official Monitor of the Republic of Moldova and shall contain the following data: – an indication of the fact that the memo constitutes an intention to establish a rapport of public-private partnership, as well as its objective; – public partner's name; – description of object, indication of object's geographical placement and the goal for the public-private partnership establishment; – public-private partnership duration; Starting with the day the informative memo is published in the Official Monitor of the Republic of Moldova, the public **partner allows all persons to access the** documentation of the private partner selection competition. 44. The public partner will publish in the Official Gazette of the Republic of Moldova of an informative notice to initiate of the selection of the private partner according with the form and content set out in the documentation for the realization of public-private partnership. The notice is valid 60 days after publication in the Official Gazette of the Republic of Moldova.
	Article 32 After the award the authority shall publish an **award notice** not later than 48 days of the award.	Law on PPP	**Article 29 (6)** The PPP Law provides that the selecting Commission shall publish its decision concerning the PPP award in (the Official Gazette of Republic of Moldova).
	Article 37. Award shall be based on criteria mentioned in the notification. The contracting	Law on PPP	**Article 29 (2)** The submitted bids are evaluated in accordance with the criteria stipulated in the informative notice; each member of the commission

	authority may limit the number of candidates in a transparent manner and based on objective criteria. All participants shall receive information on the organisation of the procedures and deadline. The contracting authorities may hold negotiations with candidates, but the award criteria shall not be changed.		presents to the Chairman of the Commission his/her substantiated opinion about every bid in writing bearing in mind its correspondence to each of the established criteria.
	Article 38 Candidates shall be selected on their ability to perform the purpose of the concession.	Law on PPP	**Article 29(2)** The submitted bids are evaluated in accordance with the criteria stipulated in the informative notice; each member of the commission presents to the Chairman of the Commission his/her substantiated opinion about every bid in writing bearing in mind its correspondence to each of the established criteria.
	Article 39 The **minimum time limit for receipt of applications shall be 30 days** from the tender notice. But can be longer for more complicated projects.	Law on PPP	**Article 26** The informative memo is valid for at least 60 days since the day of its publication in the Official Monitor of the Republic of Moldova and shall contain the following data: Starting with the day the informative memo is published in the Official Monitor of the Republic of Moldova, the public partner **allows all persons to access the documentation of the private partner selection competition.**
	Article 40. Candidates shall as soon as possible be informed on the decision of award. Within 15 days of a request by the unsuccessful tenderer	Law on PPP	**Article 29.** The participants at the tender whose bids have been rejected, **are entitled to contest the commission's decision within 15 days** from the publication in the Monitorul Oficial of the Republic of Moldova of the information regarding the selection of the private partner.

Existence of a PPP unit

The competences of the public authorities responsible for the allocation of the energy objectives under PPP concession contracts are stipulated in the Law on public private partnership **no. 179-XVI din 10.07.2008.** with subsequent amendments.

I. **The Government of RM** that is the main executive power in RM. All the major issues related to PPP in the Republic of Moldova must obtain direct approval from the Government, in order to ensure political support for PPP projects at government level.

The Government approves:

- *the policy documents* regarding the public-private partnership development;
- *the list of goods, works and services having national public interest under state and central public administration authority's ownership, suggested for the public-private partnership;*
- *the objectives* of public-private partnership of *national interest,*
- *the general requirements* regarding the selection of private partner,
- *the conditions* for the public-private partnership;
- *the set of standard documents* (samples of requests, offers, informative notes, etc.),
- *the standard procedures* for ensuring the public-private partnership functioning;

It is in Government's powers to appoint*/ nominate the* public authority with powers *to conclude the contracts with the private partners* in case of public-private partnerships initiated by the Government or the central public administration. This authority is responsible for the implementation and monitoring of

the project. In most cases, ministries are listed as public partner in a PPP contracts. According to the HG 255 in 11.04.2013

In 2012 the Government established the **National Council for Public-Private partnership** and approved its nominal composition (GD no.245 of 19.04.2012) and created an inter-ministerial network of public-private partnership (GD 255 in 11.04.2013).

II. The **Ministry of Economy** is responsible for elaboration of *policy documents* regarding the public-private partnership development, initiating of modification proposals in the legislative and normative acts regarding public-private partnerships. The ministry exercises control over the Agency of public Property. *In 2013 Ministry of Economy has approved the preliminary matrix roistering project risks.*

III. The matters under the competence of the **Ministry of Finance**:

a) examination of the issues regarding the participation of the state budget at the implementation of public-private partnership projects, initiated and approved by the Government;
b) monitoring the implementation process by the public partner of the expenses from the state budget for the implementation of public-private partnership projects of national interest.

III. Public Property Agency (PPA) is an Agency under the Ministry of Economy, has a key role regarding application and implementing PPP projects in the Republic Moldova. APA is the first point of contact for both public and private partners. The main competences of APA are:

- *coordination* of the initiation of the public-private partnerships at the national level;
- *identification of the objectives* of the public-private partnership projects of the national level
- *approval* of the *feasibility studies* carrying out the public-private partnerships at the national level;
- elaboration and application of the *general requirements* regarding the *selection of the private partner*;
- elaboration of the *general conditions* of public-private partnerships;
- terms of the concession based on feasibility studies, their submission to Government for approval;
- development and *enforcement of the standard documentation* regarding the procedures for private partners' selection;
- monitoring, evaluation and control of the way the public partners are complying with the selection procedures of the private partners, to the carrying out of the public-private partnerships;
- dissemination of best practices and recommendations in the field of public-private partnership fulfilment;
- registration and publication of informative memos and documents related to the procedures for private partners' selection;
- *keeping track of public-private partnerships* and *of risks related to the fulfilment* of each of the public-private partnership;
- *PPA offers a wide range of assistance, offering consultations* free of charge, upon request, coming from any interested person in the field of public-private partnership,
- organization public partners' personnel trainings;
- *identification of barriers and shortcomings* for the efficient implementation of public-private partnerships
- annual submission to the Government and to the public of the *statistical reports and analysis regarding the public-private partnership projects*;

***PPP Unit* – is a unit within PPA** with specific powers in the field, such as:

- To coordinate PPPs initiation at the national level;
- To assist the public in identifying the objectives for PPP projects of national interest;

- To identify gaps and barriers to efficient implementation of PPPs; submission of annual reports to the Government; publishing statistical analysis on PPP projects;
- To identify potential PPPs in the information submitted by the public partners and facilitate contacts between them and potential private partners;
- Approval of feasibility studies for PPPs of national and local interest;
- Dissemination of best practices and recommendations in the realization of PPP;
- Monitoring and evaluation of PPPs implementation;
- Providing assistance to public and private partners;
- Providing, at the request of any person, consultations in PPPs and delivery of trainings for public partners.
- Publishing advertisements and documents relating to the procedure for the selection of private partners on the website of the Agency;
- Keeping PPPs and risk implications in realization of each partnership

IV. Local public administration authorities' competence.

The ***local or rayon councils*** have the competence to approve the list of goods, works and services of public local interest suggested for public-private partnership, the objectives of PPP's and general requirements regarding the private partner's selection and of PPP's conditions.

- appoint he members of private partner's selection commission
- approve the contracts PPP projects in the negotiated form;
- public informative releases

The ***mayor's or rayon presidents*** are empowered to sign the PPP contracts and assure the monitoring and control of the PPP projects' fulfilment.

V. In 2012, the Government established the **National Council for Public-Private partnership** and approved its nominal composition (GD no.245 of 19.04.2012. T**he Committee** is a functional structure (not a legal entity) that has the purpose of assessing state policies and defining the priorities and strategies for public-private partnership field in RM.

Cases

After the adoption in 2008 of the PPP Law, the first PPP projects started to be awarded, in sectors like healthcare, social and utility infrastructure. The number of public-private partnerships increased in Moldova, as an effective way to engage and attract private capital to projects of public interest.

At national level, the following cases of concessions can be listed:

1. The concession of the deposits of natural gas from the settlement Victorovca;
2. The concession of oil fields in the town of Văleni;
3. The concession of SE "Chisinau International Airport".

According to the law on PPP, the Government sets the objectives for public-private partnership projects of national interest and the requirements for the selection of the private partner and the public-private partnership conditions.

As example, the concession of SE "Chișinau International Airport", was performed in accordance with *Government Decision no. 321 of 30.05.2013 "On approval of the concession assets SE "Chisinau International Airport".* By this decision, the conditions for the concession were set. All the procedures for the allocation of this concession agreement were closed. Moreover, the Commission for selecting the private partner admitted serious violations of the conditions for selection of the concessionaire.

Moldova has limited reserves of natural gas and oil and the Government set as a national objective the prospection of these areas in order to assure the flexibility of supply of natural gas. The main object of the concession of the deposits was conducting prospecting works and drilling and carry out necessary investments for extracting natural gas.

The concession agreement was originally concluded on 06.07.1995 with a US registered company. Later, in 10.10.2007, the concessionaire has been substituted by a company registered in the Republic of Moldova, the concession agreement being kept in the form that was signed in 1995. It is worth mentioning that the concessionaire was substituted following a Government Decision, avoiding any form of tendering.

Currently, the largest share of PPP contracts was concluded between local authorities and private partners.

- Producing biofuel from biomass;
- The construction of thermal power plants running on biofuel from public institutions (schools, kindergartens and public medical institutions);
- Construction of water and sewage networks etc.

In respect of the PPP contracts at local interest during the past years they have been implemented several projects financed by the EBRD for energy efficiency projects in the residential sector.

Due to the major cost of the thermal energy, most contracts for public-private partnership in the last few years were allocated by the local authorities, to build thermal power plants based on biofuels (biomass) for supplying social buildings with heating.

In most of the cases, the local authorities selected the private partners according to predetermined criteria in the context of Moldova Energy and Biomass Project, funded by the European Union and co-funded and implemented by UNDP, according to the procedures described above.

It is worth mentioning that in this respect there are some reserves in the transparency of the tenders and designation of the private partners. The tenders usually were closed, and the participation of interested parties was limited.

8.6 Ukraine - details of regulations

Details of regulations of concessions and PPPs in Ukraine

1. 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.

The Concession Law has been in effect since 1999, the PPP Law was adopted back in 2010.

2. Is there is a mandatory application of a fair and transparent tender selection process.

Article 14 of the PPP Law provides that selection of a private partner for execution of a PPP agreement must be conducted following the established tender procedure. However, this step may be skipped in the event that - after the relevant tender was duly announced - only one bid was qualified for participation.

3. Existence of a clear definition of "concession" of the Law and of the boundaries and scope of application of the concession legal framework (e.g. sectors concerned, competent authorities, characteristics of concessionaire).

As mentioned above the relevant Concession Law was adopted back in 2010 and it provides for definition of a concession, as a "*right to construct and/or manage (operate) the object of concession granted by an authorised body on a paid and temporary basis, in order to satisfy public needs, subject to taking of obligations by the concessionaire to establish (construct) and/or manage (operate) the object of concession and assuming the property liability and possible business risk"*. The Concession Law states that the main purpose of a concession agreement is to 'satisfy public needs', including by providing a public service. Concessions can be granted in a wide number of sectors (including energy). Ukrainian

law further develops to include further concession laws specific to each industry sector (for example – separate concession laws for motorways, for coalmines, for water supply, heat supply and waste water are currently effective).

4. Mandatory application of a fair and transparent tender selection process.

A Concession is considered to be a form of PPP under Ukrainian law and as a result, application of tender procedures is also mandatory for concessions. However, details of the procedure established by the Concession Law may slightly differ from the one provided in the PPP law.

5. Flexibility with respect to the content of the provisions of the Project agreements which should allow a proper allocation of risks without unrealistic interferences from the Contracting Authority (obligations, tariff, termination, compensation).

The PPP Law provides for certain requirements; however, it is rather flexible in terms of content of the PPP agreement, in general parties are free to agree upon any appropriate conditions of their cooperation subject to compliance with the general requirements of Ukrainian law. At the same time, the Concession law provides for a number of essential terms and conditions, which must be included in the concession agreement. In addition, the standard form of the concession agreement is approved by the Cabinet of Ministers of Ukraine

6. Does the Law makes a clear distinction between a PPP agreement (such as a Concession) and a license (i.e. an authorisation to operate by a public authority).

Yes, PPP is defined as cooperation between the state (i.e. public partner) and a private partner on the basis of the relevant agreement. Such cooperation shall meet the following requirements established by the PPP Law: (i) transfer of the operation or acquisition/construction of a facility for further performance of the operation functions by the private partner; (ii) 5-50 year term; (iii) partial risk transfer to private sector; and (iv) investments performed by private sector.

7. Does the Law identify the sectors and/or types of infrastructure and/or services in respect of which a PPP may or may not be granted.

PPP projects (including concessions) may be implemented in numerous sectors. There is also a catch-all provision saying that – subject to approval of the authorised state body – the PPP mechanism may be applied to other sectors except the commercial activities that may only be performed by the state enterprises (for example - production of ethyl alcohol, forensic medical and criminal examinations, etc.).

8. Does the sectors eligible for PPP includes sectors of the economy, such as energy, oil and gas.

Both the PPP Law and the Concession Law include mining; heat production and supply; gas distribution and supply, generation, distribution and supply of electricity in the list of sectors eligible for the relevant projects.

9. Does the Law identify the public authorities ("Contracting Authorities") that are empowered to select projects, prepare for, and award PPPs and enter into Project Agreements.

Under the PPP law, the decision on implementation of a PPP project, commencement of the tender process and determination of the winning bid shall be taken: (i) with respect to the state-owned facilities – either by the relevant Ministry, which is responsible for its management and operation (if any); or by the Cabinet of Ministers of Ukraine; (ii) with respect to the municipal facilities – by the local authorities. For example, for most of the energy facilities the authorised body is the Ministry of Fuel and Coal Industry The decision must be taken within 3 months (in case of local authorities – during the following session) following the date when the relevant offer was submitted by the investor or a public entity.

10. Does the Law require, in principle, the Contracting Authority to select Private Parties through a competitive tender process.

Yes, as discussed above application of the tender procedure is mandatory.

11. Is there are provisions in the Law concerning the publication of information related to the competitive procedures in the country media and in the international media (for large projects).

Details of the tender procedure and the applicable requirements are listed in the law and include inter alia the following: (i) publication of the announcement on the web-site of the public partner and in the printed national and/or local, but not international mass media at least 1 month prior to the deadline for the submission of tender applications; (ii) the announcement shall include general information about the tender (type of agreement, PPP object, deadlines for submitting proposals, etc); (iii) publication of the decision on the winning bid (including the relevant substantiation and grounds for dismissal of other bids) within 10 days following the date of such decision.

12. 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.

Yes, the PPP Law expressly provides that the national investment regime shall be provided to the foreign private partners. In addition, the successful bidders are expressly allowed to involve the so-called "special purpose vehicles" to deliver projects, subject to certain conditions and responsibility of the successful bidders for performance by their SPVs established by the PPP Law.

13. Is there reference in the Law to the principles of transparency, equal treatment and proportionality.

The PPP Law establishes the following principles for performance and implementation of PPP projects: (i) equality treatment of public and private partners; (ii) prohibition of discrimination; (iii) coordination of public and private partners' interests; (iv) stability of the relevant PPP agreements; (v) fair distribution between private and public partner of risks related to the project; and (vi) application of the tender procedures.

14. Does the Law provides 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.

Ukrainian legislation provides for a list of ground for rejection at the time of pre-selection of the potential bidders, however there is no requirement to make such decisions on disqualification public.

15. Does the Law provides for the publication of the award of concession and record keeping.

The PPP Law provides that the decision on the winning bid (including the relevant substantiation and grounds for dismissal of other bids) must be published within 10 days following the date when the relevant decision was adopted. The Ministry of Economy keeps record of the ongoing PPP projects and published the statistical data on its official web-site. In addition, the State Property Fund maintains the Register of the concession agreements.

16. Does the Law contains provisions regulating final negotiations (i.e. post contract award) so that transparency, equal treatment and competition are preserved.

No, as discussed above (please refer to question 9 above) the PPP Law only refers to the general principles for implementation of the PPP projects.

17. Does the Law provide for compensation (or not preventing) 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.

No, such compensation may be provided only in the event that: (i) the public authority acts infringe on the private partner's rights; (ii) such losses were incurred as a result of non-due performance of the obligations by the relevant state bodies.

18. Does the Law provides for compensation (or not preventing compensation) of the Private Party for all cases of early termination (including in case of serious breach or failure by the Private Party), for compensation for fair value after depreciation of the assets financed by the Private Party.

If a PPP agreement is terminated due to an action or inaction of the public partner, the latter will be required to reimburse the private partner for all investments made into the project, unless they have otherwise been compensated in the course of the project.