Policy, Legal and Regulatory Frameworks

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PPP Policy

• A policy describing the adoption of PPP schemes within the infrastructure implementation process and the public services provision, reflecting and defining its different phases along the whole procurement cycle;

• not mandatory, is not compulsory but aimed to strongly affect all institutional levels of Government, Public Administration, the general public and the private sector coordinate and legitimise their future activities and decision making processes over their ordinary and project/temporary activities
PPP Policy

- A key objective is to capture the entrepreneurial skills of the private sector
- Essential to ensure these skills generate:
  - benefits for the community
  - profits for the concessionaire
- PPP projects must be consistent with public policy and plans
- No project should be accepted only to provide a commercial return to its developers

PPP Policy

- Government must:
  - maintain control over policy, and
  - Ensure that private capital balances social benefits with the returns to investors
- PPP projects should be subject to full social cost-benefit assessment:
  - to ensure public as well as private benefits
  - to establish need, and provide basis, for public participation in financing
- Public Sector Comparator may be used to test “Value-for-Money”
PPP Policy

• A Policy Framework brings together the elements of promotion and control by Governments to:
  – Encourage PPP Investment
  – Inform widely within Government
  – Inform widely Stakeholders including consumers/users

• Benefits:
  – Facilitates planning and implementation
  – Instils confidence and understanding
  – Provides an enabling environment for PPP
  – Defines the role of the Government in the support and regulation of PPP

Establishing a National PPP Program

• The launch of a national PPP program is a major policy initiative, whether it is for a single stand-alone project or a pipeline of potential PPP projects.

• Three key steps are required:
  1. Establish institutional structure for PPP
  2. Develop and articulate a PPP policy framework
  3. Identify initial projects and assess PPP option
Content of a PPP Policy

- PPP policy framework should include:
  - Overall Policy, objectives, direction, benefits, costs, etc.
  - Legal and Regulatory framework
  - Risk Management Framework
  - Procurement guidelines & Model PPP contracts
  - Financial guidelines (inc. tolls and public sector support)
  - The Project Cycle and the role of Advisors
  - Technical design and service standards
  - Approvals Framework (inc. dispute resolution)

Institutional Structure for PPP

- Central/National Level: (Ministry of Planning, Economy or Finance) responsible for:
  - Policy, Regulations, Guidelines, Studies, Finance, Knowledge, Monitoring
- Implementation Level (Line ministries, Agencies, etc) responsible for:
  - Sector Planning, Project Selection, Studies, Finance, Contracting, Monitoring
- Joint/Combined (Separate PPP Unit)
  - PPP Framework, Studies, Funding, Monitoring
- Importance of advisors
  - PPP Project Development Transaction Specialists
Regulatory Framework

• Market forces should be preferred to regulation, however ...

• Regulation is important when:
  – The transport infrastructure or service involved is a natural monopoly (e.g. bridge or tunnel with no effective alternative)
  – There is significant market power (e.g. highway with alternatives that are congested or in very poor conditions)
  – The rights and obligations in a PPP concession agreement rely on regulatory interpretation.

• Typically, the functions of a regulator include:
  – Establish standards for the terms and conditions for supply of services
  – Regulate rates (tariffs) and other service charges
  – Establish market rules for the sector (issue, review and cancel licenses)
  – Monitor performance of the regulated entities
  – Arbitrate and settle disputes within the sector

Legal Enabling Environment

• The legal enabling environment for a PPP project is the whole system of laws, regulations and law enforcement of that country and/or region that may be relevant to, or have an impact on, a PPP project and on how the project is implemented and enforced

• It is distinct from other external factors which will be of concern to the private sector such as the political environment and political and environmental stability of a country or region
Legal Enabling Environment

- The legal enabling environment is critical as it:
  - Provides the framework under which PPPs are structured, procured, implemented and enforced
  - Defines the responsibilities of the government parties and it defines the actions required by each party to implement a PPP, including who is authorized to approve and execute the PPP contract
  - Provides the framework for specific provisions under the PPP contract
  - Impacts the private sector’s ability to engage in PPP projects in a country or region

Legal Enabling Environment:
Questions to ask:

- What laws within the legal enabling environment specifically authorize the government’s use of PPPs?
- What requirements or restrictions apply to the government’s use of PPPs?
- How does the legal enabling environment promote transparency and due process in a PPP project?
- How does the enabling environment promote and protect public interests (social equity and responsibility) and private sector interests (a stable environment to invest and conduct business)?
Legal Enabling Environment

Questions to ask:

- How the PPP development, procurement and contracting approaches are established within the government’s broader legal and policy frameworks
- What other laws or policies impact the PPP development, procurement and implementation stages?
  - For example: project feasibility and approvals, public procurement laws, Budget Law arbitration and dispute resolution laws, accounting and taxation laws, land acquisition laws, foreign investment laws, labor laws
- How do these laws affect the risk allocation profile for a PPP project?

Main Legal Requirements for successful PPP’s

- Public authority must have the power to enter into the PPP agreement
- Procurement processes – whether fair, transparent and efficient
- Protection for project revenues – tariff setting – can tariffs be set in contract? If projected baseline revenues not achieved, what is remedy?
- Dispute resolution procedures available to the parties and capacity and impartiality of local courts: international arbitration?
Main Legal Requirements for successful PPP’s

- Separation of government regulatory and service delivery functions
  - Is there a regulator in one or more sectors that would regulate PPP projects? Is it clear who it is?
  - How are the regulatory functions established for PPP projects that require regulation? (i.e. is it established under the contract or separately?)
  - What are the regulator’s powers and what is the source of these powers?
  - What are the key functions and duties of the regulator and how are these different from the sector agency?
  - What recourse is there for private operators and/or consumers against regulatory decisions?

- Lender issues –
  - security over assets (property, buildings, equipment, insurance proceeds, bank accounts and receivables
  - step-in rights
  - direct agreements

- Restrictions on foreign investment + currency restrictions
  - Can foreign companies invest?
  - Can profits be repatriated?
Main Legal Requirements for successful PPP’s

– Tax issues;
  • Adequate stability in the system
  • Ability to deduct construction and other operational expenses
  • Adequate double tax treaties
  • No withholding tax on interest and dividend payments

– Company Law: are there reliable provisions in law for:
  • Company establishment
  • Corporate Governance
  • Issue of shares (and sale and transfer)

Main Legal Requirements for successful PPP’s

– Land issues + environmental liability
  • No restrictions on foreign or private ownership
  • Effective mechanism for enforcement of property rights
  • Ability of the government to compulsorily purchase
  • Risk of planning failure
  • Certainty of ownership free of hidden third party rights
  • What are the liabilities for existing contamination?
  • Ability to grant security
  • Limited liability
Main Legal Requirements for successful PPP’s

– Intellectual Property Laws-
  • appropriate provisions are needed addressing possible concerns in the areas of:
    – privacy,
    – security of information,
    – confidentiality,
    – piracy will they protect investors rights in advanced technology etc.? 

Main Legal Requirements for successful PPP’s

– Commercial Contract Law/Civil Code
  • Should be sufficiently clear, flexible robust and reliable to permit the full range of commercial contracts needed to deliver a PPP:
    – establishment procedures,
    – corporate governance,
    – issuance of shares and their sale or transfer,
    – the ability to borrow and grant security,
    – accounting and financial statements,
    – protection of minority shareholders
PPP Law?

• Why have a PPP Law?
  – Different countries have different legal systems:
    • Common Law (e.g. UK)
    • Civil Code Law (e.g. Continental European Countries)
  – UK does not have a PPP Law
  – PPP arrangements in many civil law countries governed by administrative law, which sets out fundamental principles that, in many cases, cannot be derogated from or overridden by agreement of the parties. As such, it provides the framework within which PPP contracts must be negotiated.

PPP Law?

• Civil Law:
  – Authority often unable to renounce a right conferred upon it by Law, e.g.:
    • Right to cancel a contract early,
    • the right of an provider to compensation following an unexpected rise in the cost of operations,
    • or the right of an authority to make unilateral changes to the notice periods which must be observed before termination for breach of contract (by either party) can be invoked.
    • direct agreements with lenders or step-in rights are not possible or they are limited in scope.
    • PPP contracts not allowed to be transferred to a replacement PPP company without going through the whole re-tendering process
What should be in a PPP Law?
EBRD 10 Principals:

- **Principle 1: A PPP law should be based on a clear policy for Private Sector Participation.**
  - A clear government policy/strategy for Public Private Partnerships (PPP) is important for signaling the commitment of the government to develop a stable and attractive investment environment and to reflect its efforts in improving the legal environment.

- **Principle 2: The law should create a sound legislative foundation for concessions and other PPP modalities.**
  - Effective PPPs require a sound enabling legal framework for establishing roles and responsibilities of all parties and for estimating ‘country’ risk by potential investors. It should foster a clear, fair, predictable and stable legal environment for concession projects.

What should be in a PPP Law?
EBRD Lists 10 Principals

- **Principle 3: The PPP law should provide clarity of rules.**
  - Law should:
    - be predictable in its application;
    - provide stability and validity of the concession agreement as well as for the prevention of ungrounded arbitrary actions by the contracting authorities;
    - provide an exhaustive definition of a “concession”, a list of sectors concerned, contracting authorities, and eligible concessionaires;
    - identify the bodies/officials at various levels of government empowered to act as contracting authorities;
    - identify sectors in which concessions may be awarded.
What should be in a PPP Law?
EBRD Lists 10 Principals

• **Principle 4: The PPP law should provide a stable and predictable legal framework**
  
  – PPP Projects are long term and factors influencing projects change over time, the state should avoid frequent changes to concession-related legislation
  
  – The PPP law should require the concession agreement to address the potential legal risk and provide a mechanism to amend the contract to deal with changes e.g. The OECD Basic Elements of a Law on Concession Agreements also contain a so-called “stability clause” that is meant to protect the concessionaire from the possible changes in legislation

What should be in a PPP Law?
EBRD Lists 10 Principals

• **Principle 5: The PPP law should promote fairness, transparency and accessibility of concession rules and procedures:**
  
  – Under this principle, the PPP law should outline a process, which would guarantee a transparent and competitive selection process (including exceptions from competitive procedure), equal treatment of potential investors, opportunity to challenge the rules and decisions of contracting authorities and competitive rules for unsolicited proposals.

• **Principle 6 PPP law should be consistent with the country’s legal system and particular laws.**
  
  – PPP law should be consistent with the rest of the country’s legislation so as to avoid unnecessary collisions of laws and inconsistency in their application. Appropriate amendments should be made to legislative acts to ensure the coherence and consistency of the legislative base.
What should be in a PPP Law?
EBRD Lists 10 Principals

• **Principle 7** The PPP law should allow for negotiability of concession agreements:
  - This allows the factoring in of a greater variety of circumstances while allocating risks between the parties and thus elaborating a more creative and financially efficient approach to risk allocation.
  - requires the clear identification in the concession law of the body authorised to negotiate the agreement, implement and monitor the performance under the agreement, including the clear division of powers between central and local authorities.

• **Principle 8** The PPP law should allow for enforceable court or arbitral determinations:
  - A PPP law should ensure the possibility to protect the rights and interests of both parties under an effective system of dispute resolution (including the possibility for international arbitration and enforcement of arbitral awards).

What should be in a PPP Law?
EBRD Lists 10 Principals

• **Principle 9:** The PPP law should allow for state undertakings (to support) and guarantee:
  - It is important that a PPP law contains provisions that allow the government a possibility to support the project financially or guarantee the contracting authority’s proper fulfillment of its obligation
  - Government support is often essential for:
    - increasing the level of comfort of potential investors;
    - enhancing the attractiveness of investment as well as for supporting the execution of projects.
  - It should also contain clear provisions with regard to both the type of authorities that may provide support and the type of support provided.
What should be in a PPP Law?
EBRD Lists 10 Principals

- **Principle 10 The PPP law should accommodate security interests.**
  - As a rule, the concessionaire itself finances approximately 30% of a concession project.
  - The other 70% is usually borrowed from the banks (lenders) under a security arrangement according to which the concessionaire gives to the lenders security over its rights under the concession agreement:
  - in order for this security to be effective, the state should also provide an assurance that in case of the security’s enforcement, the proper procedures would allow the concession to be carried out and the lenders to “step-in” to the concession agreement.
  - Thus, this mechanism guarantees the continuation and sustainability of the concession project and effectiveness of the investment.

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Thank You
Any Questions?

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