Harmonisation of public-private partnership legislation: regional and international context of the Model Law on Public-Private Partnerships for the CIS Countries

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The objective of this article is to examine the key features of the recently adopted Model Law on Public-Private Partnerships for the CIS Countries (the "Model Law"), which the authors helped to develop, as an example of model regional legislation in the PPP sector, in the context of its potential role in the upgrading of PPP legal and regulatory frameworks of the CIS region and beyond and contributing to the promotion of harmonisation of approaches to the PPP regulation across countries and regions. The study looks into the state of PPP practices and regulation in the CIS countries and offers views on their enhancement in connection with the implementation of the Model Law's principles and key provisions.

I. Introduction

There is no right answer to the question of whether a given sector legislation will benefit from harmonisation. On the one hand, there is some positive experience related to the development of EU *acquis communautaire* and model legislative instruments. Such mechanisms have stimulated the convergence of legal regulation across many countries, especially in those that are part of interstate associations and unions, and ensured implementation of common regulatory principles in certain areas – the result that cannot be underestimated. On the other hand, the idea of development of a model law raises a number of well-grounded objections – including that it is impossible, as a matter of principle, to construct a benchmark law for different countries with different legal systems, history, level of development and mentality. Even if a model law is developed, it might not bring positive results, which will make all the efforts worthless.

For countries with highly developed regulatory and institutional frameworks model laws might be indeed useless and even constraining to move forward to develop and implement new and innovative practices. At the same time, for countries in their early stages of implementation of principles and mechanisms to be set forth by model legislation, there will be a temptation to "copy and paste" the model law, which will only formally ensure compliance with the relevant principles. This is also harmful since it can lead to disappointment by society in the implementation of "model" system of regulation – high-quality legislation is in place but it is not effective.

Perhaps the truth is somewhere in between.

The discussion of the importance of model legislation in public-private partnership sector has additional peculiarities, which should be considered separately.

The phenomenon of public-private partnership (PPP), though far from being novel, is still being actively developed, with many conceptual issues remaining subject to discussion. These include, among others, understanding of the nature of PPPs, terminology, classification of the forms and types of PPPs, determination of the PPP parties, criteria of feasibil-

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ity of PPP structures from the point of view of society and various stakeholders, mechanisms for fulfilling the responsibilities of public authorities (in particular, if relevant facilities are owned, temporarily or permanently, by the private partner), and many more. With positions on these key issues varying significantly around world, it is extremely difficult to think about the development of a universal model law that would become the basis for the legal regulation of PPPs – at least now. It would be also difficult to assess the potential of such an instrument for enhancing private sector participation in the infrastructure development and provision of public services, development of international cooperation, fighting corruption, increase in the rates of employment and, as a consequence, poverty reduction.

It is no surprise then that the aspirations of the United Nations Commission on International Trade Law (UNCITRAL) to develop a universal (eg, relevant for all countries of the world) model law on public-private partnerships as part of revisiting adopted at the outset of 2000s Legislative Guide on Privately Financed Infrastructure Projects[1] (the "UNCITRAL Legislative Guide") and related Model Legislative Provisions on Privately Financed Infrastructure Projects[2] with a view to aligning them with the modern realities, have not yet been successful. The matter has been put on the UNCITRAL agenda twice, in 2013[3] and 2014[4] but could not get enough support from the member states.

It is difficult for us to assess why the idea of a model law has not been supported – we can only express some thoughts.

First of all, differences between the countries – in the level of economic development, education, mentality, attitude to private business, building relationships between public authorities and business and infrastructure needs – are too significant. On the one hand, there are countries such as Australia, France and the United Kingdom with a long history of private sector involvement in the infrastructure development and provision of public services, extensive experience in the implementation of PPP projects and utilisation of sophisticated mechanisms and complex financial and legal structures in that respect. On the other hand, in a large number of countries, including for instance Africa and the Commonwealth of Independent States ("CIS"), public authorities and the society in general are still very cautious about the private sector participation in the infrastructure development and perhaps are not quite ready yet for dialogue of public and private sectors as well as of business and civil society on equal terms. Public authorities in these countries still have a very poor understanding of their responsibility for the quality of public services, infrastructure development and particularly of structuring PPP projects, and therefore, are not yet able to assess the consequences of ill-considered decisions in this respect. It would be hard to imagine that a single document can meet the needs of both groups of countries.

In times of broadening globalisation, it is impossible not to think about the convergence of positions and understanding of infrastructure development and provision of public services, including through the use of PPP structures, even among such very different groups of countries. After all, the countries at the lower levels of economic development have the greatest infrastructure needs. Without closing these infrastructure gaps, the world is determined to face exacerbated political conflicts, problematic migration, higher risk of terrorist attacks, increased incidence and deterioration of environment. At the same time, the development of infrastructure, in particular through the use of PPP mechanisms, calls for significant amounts of funding and key financial resources are still concentrated in developed countries. It is from there, as well as from international financial institutions, that the investment into infrastructure of developing countries can flow. To ensure the efficiency of this investment clear, transparent and investor-friendly regulatory and institutional frameworks enabling PPP development must be created in the recipient countries. Otherwise, the private sector (particularly from the developed countries) cannot be expected to become eager to take on the high risks associated with the infrastructure development in

1 Available at <http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2001Guide_PFIP.html> accessed on 9 February 2015.

2 Available at <http://www.uncitral.org/pdf/english/texts/procurem/pfip/model/03-90621_Ebook.pdf> accessed on 9 February 2015.

3 A/CN.9/779 - Possible future work in the area of public-private partnerships (PPPs): Report of the UNCITRAL colloquium on PPPs (Vienna, 2-3 May 2013) <http://www.uncitral.org/uncitral/commission/sessions/46th.html> accessed on 9 February 2015.

4 A/CN.9/819 - Possible future work in Public-Private Partnerships (PPPs) Discussion paper - Part I, A/CN.9/820 - Possible future work in Public-Private Partnerships (PPPs) Discussion paper - Part II, A/CN.9/821 - Possible future work in Public-Private Partnerships (PPPs) Report of the UNCITRAL colloquium on PPPs <http://www.uncitral.org/uncitral/en/commission/sessions/47th.html> accessed on 9 February 2015.

emerging economies. Without addressing the issues of creating such an enabling, investor-friendly environment, the divergence between developed and developing countries will inevitably grow, leading to increased poverty and sharpening global conflicts, which cannot bypass prosperous countries as well.

Arguably, there can hardly be a better and more easily implementable way of bridging the infrastructure gaps of emerging economies and bringing these countries closer to the developed ones than harmonisation of legal regulation in the PPP sector.

In our view, such a harmonisation is easier to start with the development of regional model laws. Regional laws can create favorable conditions for the convergence of approaches to legal regulation of public-private partnerships in neighbouring countries with already similar legal regimes, history and mentality and, as a consequence, will help establishing single space for infrastructure investment within an entire region. As a next step, analysis of regional model laws can help assessing divergence between the regions in their state of PPP development as well as attractiveness of their regimes for domestic and foreign investors. Comparative analysis of regional model laws can also allow to formulate specific tasks that need to be fulfilled in order to harmonise PPP legislation in the international context, to determine the required human, intellectual and financial resources and then to systematically follow the formulated action plan (see Chart 1).

For now, there is one regional model law on PPPs – the Model Law on PPPs for the CIS countries (the "Model Law")[5]. The Model Law has been developed and adopted by the Inter-Parliamentary Assembly of the CIS Member States ("CIS IPA"), with the assistance of the European Bank for Reconstruction and Development ("EBRD") and other international and regional experts. The CIS IPA is a CIS interstate body created on 27 March 1992 and consisting of national parliamentary delegations of the member states. Currently nine CIS countries are members of the CIS IPA: Azerbaijan, Armenia, Belarus, Kazakhstan, Kyrgyz Republic, Moldova, Russia, Tajikistan and Ukraine. The CIS IPA is vested by its mandate with the task of harmonising commercial legislation within its member countries and has been carrying out such task by drafting and enacting model legislative acts and other instruments, including in various commercial law sectors, taking into account national, regional and international experience, and recommending their implementation in the national legislation of the member states.

Work on the Model Law started even before the UNCITRAL Secretariat approached the idea of a universal model law on PPPs. At some point there might have been questions whether such work has been premature and whether there would be any duplication of expert efforts in preparation of both a universal and a regional model law on PPPs. It is clear today that the idea of developing a regional model law for the CIS countries was appropriate and timely. The Model Law has now been adopted and starts its own journey. We hope that it will have a significant positive impact on the convergence of views on PPPs not only among the CIS countries, but also among other countries that are at the same starting point with respect to PPPs.

The Model Law could also serve as an example and, to certain extent, a model for the development of such acts for the rest of the world (or other groups of countries that are close to each other on the matter). This could help launching the process initiated by the UNCITRAL Secretariat on harmonisation of PPP regulation at an international level, though now the process may take a different path, taking into account the experience of regional model laws. This path will be longer and more difficult but certainly more successful and predictable than developing a model law applicable to all countries from scratch.

II. PPP regulation and practice in the CIS countries

CIS countries have much in common in their approaches to legal regulation, mainly due to a long period of co-existence within the same country. And even though legislation governing private sector participation in infrastructure modernisation in those days was not developed in any of the countries which are now part of the CIS, its origination in the recent years was based on the already existing legal frameworks and, therefore, has a lot of common principles and rules. At the same time, the pace of development

5 Available at <http://www.iacis.ru/upload/iblock/18e/prilozhenie_k_postanovleniyu_9.pdf> (in Russian) accessed on 9 February 2015. It is expected that an English version of the Model Law will soon become available at <http://www.iacis.ru/eng/> accessed on 9 February 2015.

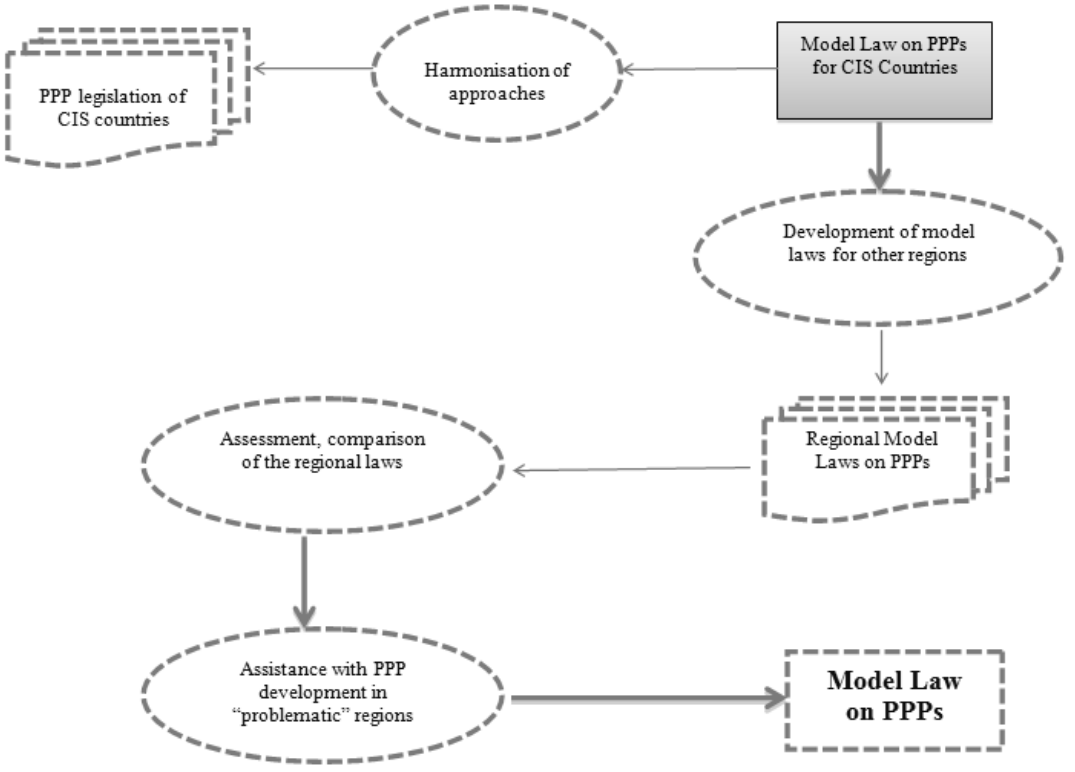

Chart 1

of PPP legislation and, as a consequence, its depth and breadth vary significantly across the region.

In terms of development of PPP regulation and the number and scale of infrastructure projects, the Russian Federation and Kazakhstan are taking the leading positions in the region. Even though PPP legislation in these countries started actively developing only recently (2005-2007), both now have quite advanced PPP legal and regulatory frameworks – which are not free from issues and problems, of course. Such development has its roots in a large number of projects implemented as PPPs (mainly concessions) in several sectors: roads, utilities (heat, water and wastewater, recycling of household waste), and "social" or "non-commercial" infrastructure (schools and kindergartens).

Ukraine embarked on the PPP path very early – a specialised concessions law was adopted in 1999 and a law on the application of concessions to road construction in 2000. Unfortunately, this was followed by a long period of stagnation, both in terms of development of PPP regulation and application of the already adopted rules in practice. In 2010, the topic was revived with the adoption of a PPP law and defining certain features of concession agreements in several sectors. However, the laws of this "second wave" were of poor quality, and numerous concession-based projects in the utilities sector employing the rules of this "second wave" were far from being perfect.

In the past 3-4 years, Moldova and Belarus have been actively developing their PPP legal and regulatory frameworks. Very different already and having chosen different vectors of economic development (one with a focus on the association with the European Union while the other, on the Eurasian Customs Union rules), both countries are actively cooperating with the United Nations Economic Commission for Europe ("UNECE") and rely on international cooperation to align their PPP frameworks with internation-

al standards and sound practices. PPP practices are more complicated – so far, only Moldova has started few projects.

The Kyrgyz Republic is confidently moving towards enhancing its PPP sector – a PPP law was adopted few years ago and several projects were launched. Many projects with private sector participation have been successfully implemented in water and wastewater sectors in Armenia. However, the country still has no PPP or concession law. On the contrary, Tajikistan does have a PPP law but for various reasons it is not applied in practice. Azerbaijan has neither PPP legislation nor true PPP projects.

As we can see, CIS countries have very different starting positions in the PPP sector, both in terms of regulation and practice, and the majority of them have a good amount of work to ahead of them to adapt of their legal frameworks to the Model Law.

III. History of the development of the Model Law

Fulfilling its mandate of harmonising legislation of its member states, the CIS IPA looks into strengthening legal and regulatory frameworks of its member states in key areas of commercial laws that are of significant relevance for the region. Infrastructure remains ones of the key priorities on the development agenda of the CIS countries, particularly now, in the context of scarce financial resources and competition for funds and expertise. Attracting private sector resources such as funding, efficient management and know-how is becoming one of the most popular ways of overcoming limitations of the public budget for infrastructure development and public services provision. It is no surprise then that the PPP sector has long been on the CIS IPA agenda before included in the CIS IPA's official legislative plan for 2013 -2015.

To develop an initial draft of the Model Law, a group of commercial law experts from St Petersburg State University Law School was invited, headed by Prof V.F. Popondopulo and Dr V.V. Kilinkarov. The draft Model Law was then subjected to review by the EBRD specialists and regional and international experts engaged by the EBRD as part of technical cooperation project with the CIA IPA.

The EBRD has been extensively cooperating with the CIS IPA over the past decade, having sponsored the CIS Model Securities Market Law, the CIS Model Investor Protection Law, the CIS Model Bank Insolvency Law, and the CIS Model Company Law. A. Zverev, who has headed the EBRD's cooperation with the CIS IPA since its inception, was the operation leader for the Model Law, this time assisted by A. Rodina. Among the experts engaged by the EBRD for the review of the Model Law were Prof. I. Zapatrina, Chairman of the Board of the Ukrainian PPP Center, A. Dolgov and K. Makarevich of Hogan Lovells, V. Bortkevicha and S. Kabanov of Clifford Chance, T. Stubbs, K. Chichkanova, A. Haragovitch and T. Suleymanov of Dentons as well as I. Ivanov and F. Teselkin of Freshfields Bruckhaus Deringer. Key focus of the EBRD experts' review was to align the Model Law with the modern sound practices, taking into account the regional specifics, and to ensure its "implementability" – ie that the Model Law provides for an enabling environment for efficient development and implementation of PPP projects and their "bankability", ie affordability of the projects from the financing viewpoint.

Per request of the CIS IPA, the assistance provided by the EBRD and invited experts included not only an extensive review of a number of the Model Law drafts and their open discussions, but also provided for the development of a number of supporting legislative materials to assist the parliaments of the CIS countries with implementation of the Model Law into the national legislation. These materials include a comprehensive commentary to the Model Law (the "Commentary") (currently under development by the CIS IPA, the EBRD and engaged experts), an explanatory memo on state support measures and mechanisms, a summary of the lessons from the most recent PPP project experience (both positive and negative) in CIS countries, and a recommended policy document sample supporting PPP in a given country. The latter three documents are included in the Commentary.

An extensive discussion of an interim draft of the Model Law took place in October 2013 at the roundtable organised by the CIS IPA and attended by a significant number of PPP officials and experts from the region and beyond. On 28 November 2014, the Model Law was formally adopted by the CIS IPA and officially recommended for implementation in the national legislation of the CIS member countries.

Approval of the Model Law coincided with a high-profile international conference organised by the CIS

IPA in its headquarters on 26 November 2014. The conference brought together some 70 delegates from both public and private sector, including members of parliaments and other top politicians, heads of national PPP units and senior PPP officials, representatives of private sector and international organisations, UNECE, UNCITRAL and the World Bank, as well as independent experts – all of whom unanimously confirmed their approval of the Model Law.

IV. Brief overview of key provisions of the Model Law

1. Definition of a PPP

Numerous definitions of a PPP exist, including those recommended by international organisations as well as contained in various studies and reports. However, there is not yet any definition officially approved at the intra-state level. Well, there has not been – until the Model Law adoption. The Model Law defines PPP as "mutually beneficial cooperation of public and private partners which is legally documented for a specified period of time, based on their pooling of resources (including monetary funds and other property, professional and other knowledge, expertise, and skills) and allocation of risks among them (including financing and construction risks, risks associated with ensuring of accessibility of or demand for a public-private partnership object or respective public services as well as other related risks) in order to achieve any governmental, municipal or other public interest goals within the area of public interests and control".

What is important in this definition?

Firstly, we have finally moved from the "state-private" to "public-private" partnerships, which means an expansion in the nature and the scope of the phenomenon on the legislative level. What seems to be a simple solution has been preceded by a very long discussion prompted mainly by the fact that in all CIS countries where relevant laws have been enacted, PPP is referred to as "state-private" partnership. In most cases, the term has been chosen unconsciously, mainly due to misunderstanding and underestimation of the role of municipalities,[6] as well as the possibility of conflicts of interest between the government authorities and municipalities within the development of PPP projects, or as a result of blind borrowing of experience of other countries who were the first ones to adopt relevant laws. At the same time, the term "state-private partnership" has already become so entrenched in the legal frameworks of many countries and in the minds of the public authorities that the title of the Model Law in the initial plan was set as "on state-private partnerships". The engagement of regional and international experts has helped to change the attitude and reflect the more appropriate term in the title.

Secondly, the definition emphasises that one of the key criteria for identifying a project as a PPP is the existence of public interest and the need for public control over assets transferred to the private sector, due to the high importance of these assets to society.

Thirdly, the Model Law does not limit the scope of the PPP projects exclusively to infrastructure, which is a negative side of PPP legislation of almost all CIS countries. Under the Model Law, the so-called "service" PPPs, when public services are fully outsourced to the private sector of maintenance services, become possible. This opens up opportunities to improve the efficiency of public authorities in the countries where a lack of available funding might be particularly acute – namely, when the private investor does not want to provide funds due to high perceived risks and the public sector simply does not have budgetary funding for a PPP.

2. Partnership parties

Broadening the definition of PPP by the Model Law is not just limited to a change in the terminology ("public-private"). The Model Law contains a good number of rules governing involvement in the PPP projects not only for public and private sectors, but also for civil society, population, development institutions and financing organisations. This is extremely important, especially for the emerging economies, where there is a high level of distrust of the society towards the government and private sector and no experience of their effective cooperation in achieving public goods, but many examples of corruption.

What does the Model Law provide in this respect?

6 In the legal tradition of the CIS countries, municipalities are viewed as one of the forms of public authorities but separate from the state/government.

Firstly, it provides for public and transparent procedures regarding the preparation and implementation of PPP projects. Secondly, it provides for mandatory public hearings upon the completion of the project's feasibility study. Thirdly, it means a requirement to provide for in the national legislation instances when an independent expertise of projects is needed and a set up of relevant procedures. Fourthly, the Model Law fosters government support regarding the establishment and operation of PPP units – organisations are created to provide informational, consulting, methodological, organisational and other support to the PPP projects (see "Institutional framework" below).

The Model Law also governs the interaction between the public and private partners and financing organisations, including by specifically providing for a possibility to conclude direct agreements among them. The Model Law offers some guidance as to the contents of the direct agreement, which is important for the countries at the early stages of their PPP frameworks development, but importantly, let the parties define their relationships freely.

The definition of a public partner is broad enough to include not only state, municipal or other public authority, but also any other organisation with the mandate to act as a public partner by law or other legal act. At the same time, the definition is tailored to the realities of the region and to avoid any abuses, any entity acting as a public partner has to be specifically mandated to do so – in case of a pubic authority, in accordance with its competence and in case of another organisation, by law or another legal act.

Responding to the challenge often encountered in practice of the CIS regions (for instance, in case of roads spreading though territories of several responsible authorities), the Model Law expressly provides for a possibility for a public partner to be represented by several public authorities or organisations. Rights and obligations of these entities in connection with their joint representation of the public partner are to be set out in a separate contract to be concluded during the preparation of the project. It is also important that the Model Law calls for qualification requirements for public officials involved in the PPP decision-making process to be set up on the legislative level. Such requirements will allow to increase the number of successful and useful projects as well as to avoid severe consequences of inadequate, unqualified decisions.

The Model Law opens new opportunities for the private sector to initiate PPP projects, providing for key rules governing unsolicited proposals. Importantly, the Model Law provides that such a proposal might be rejected by an authorised entity only in cases provided by law. Balancing public interest in ensuring competition and transparency in selecting the private partner to a PPP project with the private sector's stimuls to come up with innovative solutions, the Model Law entitles the initiator of the project who did not win the tender to be fully compensated for its reasonable expenses incurred in preparation of the project. Such compensation is to be paid by the public partner or, if provided so by tender documentation, by the winning bidder. Legislation of several CIS countries, including Ukraine and Russia, already contains some rules regarding unsolicited proposals. However, the experience, in particular, of Ukraine, shows that successful implementation of this practice calls not only for high-quality PPP (and not only PPP) regulation, but also developed institutional framework, appropriate corporate culture and professionalism among public sector officials – which is all relevant for the broader PPP practice implementation. Still, the Model Law rules in this respect are progressive and should provide a helpful guidance to the implementing countries, PPP officials and the private sector.

3. Parties' obligations

Defining the nature and purpose of PPP projects, the key objective of the Model Law is to provide guidance to the parties in structuring their relations in the most efficient way, at the same time allowing for a maximum of flexibility. In line with this approach, the Model Law broadly defines possible obligations of the parties to a PPP project, allowing them to choose necessary elements from the offered open list of types of obligations in order to build up a model tailored to a project's specific needs. (See also "Classification of PPP forms and types" below.) For instance, obligations of a private party may include, separately or in any combination, designing, building, reconstructing or otherwise improving a facility, carrying out works or providing services, with or without transferring the ownership to the facility to the public partner. Public partner's obligations may include the provision of relevant rights to the land

plots or intellectual property, assumption of certain project expenditures or provision of appropriate guarantees. The Model Law further provides for a flexibility of financing structures based on availability payments, toll fees or any combination (hybrid projects) (see also "Classification of PPP forms and types" below).

Such an approach reflects the accepted international standards, in particular, the UNCITRAL's Legislative Guide, which notes the usefulness of legislative guidance in respect of the definition of the nature and purpose of privately financed infrastructure projects but advises against an exhaustive list of any types of projects.[7] Importantly, the Model Law provides that a PPP contract would reflect the agreement of the parties and their relevant allocation of risks and responsibilities in a PPP project. This is particularly relevant to the countries where, such as in Russia and Ukraine until recently, there is a mandatory form of a project agreement which obviously hinders the investment appetite of the private sector.

4. Assessment of feasibility of private sector participation in the infrastructure development and provision of public services

The experience of countries with successful PPP practices shows that the assessment of the feasibility of private sector participation in the infrastructure development and the provision of public services has to be a mandatory stage in PPP projects preparation. At the same time, in practice of many CIS countries, even if this step is provided in the legislation, it is mostly ignored or underestimated and performed formalistically. For instance, Ukraine's concession law, which is widely used in practice does not provide for such a requirement. At the same time such a requirement is provided for in the PPP law, but since its enactment in 2010 only one small project has been implemented based on its procedures. The Model Law's requirement of holding public hearings upon completion of the feasibility study is not yet part of Ukrainian legislation.

In our view the recommended key parameters (criteria), which need to be considered when developing specific assessment methodologies will be the most important issue for the CIS countries of the Model Law provisions relating the feasibility assessment. Among others these include: the demonstration of comparative benefits of implementation of a PPP project in a particular form against other possible arrangements which can be used by a public partner to perform relevant public function; ensuring continuous provision of public service at an appropriate quality level; project costs and expected social and economic effects; budgetary implications, including the effect on the amount of revenues and long-term expenditure commitments of the state (local) budget; innovations brought in by the project, including its use of knowledge-intensive, energy-saving or resources-saving technologies as well as environmental implications.

From our experience the above mentionned criteria have not been frequently used in feasibility assessments of projects implemented as concessions (the most frequently used form of PPP in the CIS countries). However, these criteria would be particularly important in projects based on availability payments, since the public authority's capability of providing this payment in the most efficient for the society way will be particularly important, both in terms of costs and time period upon which quality and reliability of services on a given territory can be improved or access to services be secured that were previously unavailable.

5. Property and ownership matters

The Model Law contains some innovative rules regarding ownerships of facilities being subject to PPPs. What is this innovation about?

In almost all countries of the CIS, the prevailing opinion has been that the PPP facilities should necessarily be in state or municipal ownership – which is what separates PPP from privatisation. To say that these facilities may be in private ownership is, in a way, a revolt – the level of distrust to the private sector in the region is already very high. So far, resentment towards the private sector involvement in infrastructure development was only possible to lower with assurances that developed or upgraded facilities will remain in the ownership of the state or territorial community. And here goes the Model Law with its flexibility of PPP forms and proclamation

7 UNCITRAL Legislative Guide, Chapter I, Paragraph 19.

that facilities developed and even upgraded by the private sector can be temporarily or permanently in their ownership. We can expect that there might be resistance in the CIS region in implementing these provisions into the national laws – not only from the population, but also from public authorities.

Then why was it necessary to include this provision into the Model Law?

Investment climate, social and political situation as well as mechanisms for fulfilling the public authorities responsibilities to the private sector are far from being perfect in almost all CIS countries. As a result the private sector is willing to invest into expensive and long-lasting infrastructure projects in those countries only under "concrete" – ie, state – guarantees. At the same time, developing countries with the largest infrastructure gaps have very limited possibilities to provide government guarantees, incomparable with financing needs. In such circumstances, there are two options – to abandon implementation of infrastructure projects altogether, thereby setting back economic development, or to find other mechanisms of provision to private investors of appropriate guarantees regarding public sector obligations. One of such mechanisms could be allowing the private sector to own, permanently or until the fulfillment of public sector commitments, the PPP facility. In this case the private partner indeed obtains a serious leverage towards the public partner in case the latter defaults under its obligations – it may just stop providing services using the PPP facility and thereby reducing its risks.

The provision can be deemed risky, but in countries with a low investment grade rating, where public sector obligations cannot be adequately secured with state guarantees, it may be well justified.

The most contentious issue during the discussion of this provision was whether the private sector shall be entitled to own the facility that already exists and only needs to be modernised. Indeed, at first glance this might look like privatisation. However, upon long discussions it was determined that the benefits of using the norm appropriately would outweigh it negative effects and the commentary would need to point out to use the norm carefully.

Why? The benefits of transferring the PPP facility into private ownership would outweigh the risks only if the PPP contract is of significant duration and comparable with the length of the PPP facility's life cycle (eg 50-60 years). In this case public interest will be met in full – during this period a private partner will have to provide services to the public with the reliability and quality requirements being set in the PPP contract – otherwise, the contract will be terminated by the public authority with all the relevant consequences.

Again, it might be expected that the provision allowing private ownership of the PPP facility might be difficult to implement in the national legislation of most CIS countries. Still, having it in the Model Law is a positive development for model regulation of PPPs, particular given that such regulation is aimed at providing legislative guidance for foreseeable future – public authorities and population will have to get used to the idea and will be ready for its implementation in practice when all relevant conditions are in place.

6. Classification of PPP forms and types

The Model Law does not provide for a list of PPP forms or types. Closest to any classification comes the norm distinguishing between a purely contractual PPP and a PPP involving establishment of a company with the participation of the private and public partners (see "Institutional PPPs" below). As noted above the key principle of the Model Law is to provide guidance to the parties in structuring their relations in the most efficient way, at the same time allowing for maximum flexibility. In line with this principle the Model Law provides for a great degree of freedom when it comes to the forms and types of PPP projects. The boundaries are set by the definition of PPP – it is critical that a project meets all the relevant criteria in order to be a PPP. Substantively it is also important that the relations of the parties within the development, preparation and implementation of a project comply with the principles and rules set in the Model Law.

At the same time, implementing the Model Law at the national level, the countries can adopt a recommended list of project types and forms. The absolute must is to keep this list open.

In the context of forms and types of PPPs, it is notable that the Model Law did not take up the common term of the CIS countries' current regulation – "concession fee". Why so?

Under current circumstances, when infrastructure development in emerging economies needs en-

hanced support to improve the quality of public services, in particular those provided to the poorer population (including in order to ensure their access to basic consumer goods), a private partner cannot be expected to recover its investment through end-user charges and still be able to pay to the public partner for its participation PPP. Such projects can be implemented only based on availability payments and where a project provides for an availability payment concession fee loses any relevance. Besides, in commercially attractive PPPs (concessions) based on a concession fee, financing by the public partner also does not make sense. Depending on the PPP model chosen for the project, the one or the other will be used. At the same time, a hybrid approach involving the private partner receiving both the end-user fee and availability payment is also possible.

7. Competitive procedures in selecting a private partner

In line with internationally accepted best practices the Model Law calls for tender as the default procedure for the selection of a private partner with direct negotiations allowed only in specially defined instances. The latter include relatively standard or expected situations of procuring of goods during emergency where the tender is impossible, implementing a short-term (defined as up to five years) PPP with a value below certain threshold to be set by national legislation, PPP in defense and state security sectors and exclusive rights to intellectual property, land or other assets that are unavoidable for a PPP project implementation. The list of the latter cases contains an "other cases" clause – however, this is reserved for the national legislators wishing to expand the list with the "exceptional" cases where the public interest prevails over competitiveness considerations, with the list to be intended as closed.

Implementing states, of course, might shorten or expand the list. However, in order to be responsive to the better standards, the list should only include "exceptional" cases, otherwise the procedure will inevitably lead to abuses by the authorities of public interests, one of which would be attaining best value for money in developing infrastructure and provision of public services, for which through transparency and competitiveness in choosing private partner serves.

A tender can be open (default) or closed. In a closed tender participation is by invitation only and a list of eligible persons must be set in the decision on the PPP project. Conditions for holding a closed tender must be defined in the national legislation. Those suggested by the Model Law include the PPP facility being of strategic importance for the defense and state security or containing state secrets.

In line with sound practices the Model Law acknowledges the need to tailor the selection procedure to the complexity of the project, specifying that more complex projects may involve a two-stage process, whereby the first stage bids would contain technical information and the second-state ones, the compete bids. For the most complex projects where the public authority is not in a position to define the required characteristics of a future project, the Model Law provides for an opportunity to conduct a competitive dialogue. A competitive dialogue is also an invitation-only procedure within which the public authority discusses characteristics of a future project with each participant individually, with a view to develop the most effective structure. Discussions continue until one or more suitable structures are developed. Thereafter the selection procedures commence, with the competitive dialogue participants being invited to bid.

The Model Law maintains flexibility in designing a tender procedure tailored to the characteristics of the project, which relates also to the selection criteria. The Model Law provides guidance at to the key criteria that can be set by the contracting authority – such as technical and economic parameters of the facility, timing, quality guarantees, tariff indications, financing, security mechanisms – but leaves to the contracting authority to define the criteria in the tender documentation.

8. Bankability issues

As noted earlier according to the expert review one of the key goals of the Model Law is not just the alignment of the document with international standards and best practices as such, but also to ensure that it can serve as the basis for the efficient and successful development and implementation of PPP projects. Being often of mega-size and long-term duration, the PPP projects inevitably call for a significant amount of external funding, thus making fi-

nancing organisations important participants of the PPP projects (see "Partnership parties" above). As already mentioned, direct agreements contain key contractual arrangements with the financing organisations. However, before the financing organisations can sign any agreement and even consider providing financing, the project will need to be "bankable", ie contain certain features that provide an appropriate level of security to the financing party. The Model Law provides for a wider range of such features including:

– flexibility in structuring projects per various forms and models including payment structures (including toll payments, availability payments or hybrid structures) (see "Parties' obligations" and "Classification of PPP forms and types" above);
– flexibility in setting the contents of the PPP agreement (see "Parties' obligations" above);
– flexibility in designing the tender procedure appropriately to the project characteristics, including flexibility in setting the selection criteria (see "Competitive procedures in selecting a private partner" above);
– variety of mechanisms available to the private partner to secure, at any stage of the project, performance of its obligations, including through creating an encumbrance over the PPP facility and/or over the private partner's rights under the PPP agreement. The Model Law fully takes on board the concept, listing these and other common security mechanisms among those available to the private partner, but most importantly leaving the list open. There is no timing restriction on establishing the security, ie it can be created at any stage of the project;
– step-in rights – ie, the right of the public partner and/or the financing organisation to intervene into the PPP project and replace the private partner in case of a material unremedied breach by the private partner. It is now universally accepted that step-in rights represent an extreme measure and the Model Law carefully defines the grounds on which such rights can be exercised, allowing the parties to set forth the relevant details in their agreements;
– unrestricted assignment of the rights under a concession agreement – this is important in the light of the tender requirements as a default rule as well as contained in the legislation of certain CIS countries timing restrictions on such an assignment. The Model Law provides that the parties can agree to exclude the assignment of the private partner from the tender provisions and does not set any timing restrictions. Any such assignment is subject to the consent of the public partner, which is logical given the importance of the qualification and other characteristics on the partner to the successful implementation of the project;
– "Unrestricted Lenders Direct Agreement concept" – in other words and similarly to the project agreement (see above) the parties have to be free in setting the contents of their arrangements. The Model Law provides guidance as to which aspects of their relations they might regulate in the direct agreement (eg a procedure for approval of a proposed new private partner and such partner's criteria, a procedure for consenting to the private partner encumbering the PPP facility in order to secure performance of its obligations, exercise of financing organisations' step-in rights, exceptional cases when a direct agreement can be changed unilaterally or repudiated, as well as a procedure for determining the amount of compensation to the private partner and financing organisation payable by the public partner in the event of early termination of the direct agreement). Such guidance is very important for the countries at the earlier stages of PPP development. At the same time it is a mere recommendation and the parties are free to adjust the contents of their agreement to their particular needs;
– the use of international arbitration – this is particularly important for foreign investors in case of developing countries whose court system (as well as mechanisms of alternative dispute resolution such as mediation) might not yet be as reliable. The Model Law expressly provides for the possibility of a resolution of the relevant disputes in the international arbitration tribunals. As per common rules designation of the tribunal and related elements have to be agreed by the parties;
– budgetary concerns – it is a common issue in several CIS jurisdictions that public partner's obligations under a PPP project require long-term provisioning in the budget (eg 15-20 years) but the state budget is often made up for a shorter time period (eg 1 - 3 years). This raises concerns with the private partners as to the enforceability of the public partner's commitments during the entire duration of the PPP project. While solution has to be nec-

essarily harmonised with the relevant budget laws, the PPP legislation may address it to a certain extent, as the Model Law does, by expressly providing that the lack of funds in the public budget does not relieve the public partner from its obligations under the PPP project. Another concern in some budget laws and rules in CIS states is the current constraint for a relevant entry line for public commitment on PPP projects (eg in Russia there is a provision for procurement and concession commitments but not for other non-concession forms of PPP), hence the neccesity to provide for a specific entry in the relevant state/sub-sovereign/municipal budget allowing for PPP commitments/obligations.

While the above are, in our practice, the key provisions being assessed by the financing organisations and private partners in deciding whether to invest in the project, it is always the entirety of the commercial and contractual arrangements as well as surrounding legal and regulatory environment that has to be taken into account for the project implementation.

9. Institutional PPPs

Institutional forms of PPP (also called "institutionalised PPPs" or "IPPPs") – understood as a co-operation between public and private parties involving the establishment of a mixed capital entity which undertakes the PPP project implementation – have perhaps first come to the attention of the wider international audience with the issuance by the European Commission in 2004 of the Green Paper on Public-Private Partnerships and Community law on public contracts and concessions,[8] followed by a public consultation, which showed the need for clarification on the application of relevant rules to IPPPs. Such a clarification came from the European Commission in its 2008 Interpretative communication on the application of Community law on Public Procurement and Concessions to institutionalised PPP (IPPP).[9] Not much has been happening in the international standards ever since and practice varies – some countries provide for separate regulation of IPPPs, while some prefer to keep rules generic. Such a variety of practices makes the Model Law's provisions on the matter subject to even closer look.

The Model Law chose to address IPPPs with several specific rules. Its key principle – to provide for a maximum of flexibility in structuring PPP projects – is fully reflected in the approach to regulation of IPPPs. In particular, the Model Law specifically provides for IPPP as one of the forms of the PPP implementation. At the same time, flexibility is maintained as to how to project participants can structure their contractual relations. Two sets of relations need specific attention in case of IPPPs: contractual relations in respect of the PPP project implementation and corporate relations between the public and private partners as participants in the IPPP venture. The Model Law allows the parties to conclude a project agreement that would only regulate the project implementation arrangements and therefore would be concluded between the public partner as the contracting entity and the IPPP venture as the contractor, or to choose any other model of the IPPP implementation, including, for instance, concluding a three-party agreement to regulate the project implementation as well as corporate relations among the private and public partners as participants in the IPPP venture. In case the former model is chosen the Model Law offers rules on structuring the parties' corporate relations.

The Model Law also clarifies that its general rules on selection of private partner apply in the IPPP structure, unless it's contradictory to the nature of IPPPs, thus conferring with the EU position that selection of private partner in case of an IPPP has to comply with principles of fairness and transparency in both

8 European Commission, Green Paper on public-private partnerships and community law on public contracts and concessions, COM (2004) 327 final, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004DC0327&from=EN> accessed on 10 February 2015.

9 Commission interpretative communication on the application of Community law on Public Procurement and Concessions to institutionalised PPP (IPPP), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:091:0004:0009:EN:PDF> accessed on 10 February 2015. One of the key regulatory challenges of IPPPs regulation addressed by the EU documents is that rules governing public contracts require that the entity performing the contract to be selected through a fair and transparent procedure. However, when such entity is owned by a public partner, considerations of fairness and transparency in the selection procedure are relevant for both selection of the private partner as the participant of the IPPP venture and award of the public contract itself. While a double selection procedure is not practical, combined procedure is perhaps a better way forward: the private partner of the IPPP is selected by means of a procedure, the subject of which is both the public contract or the concession which is to be awarded to the future public-private entity.

the selection of the private partner as the participant in the IPPP venture and the award of the PPP contract to the IPPP venture.

10. Institutional framework

It is now universally accepted that even a perfectly drafted legislation can never reach any effect if it is not supported by well-designed and efficient implementation mechanisms. These include, among others, appropriate regulatory framework (i.e., regulations implementing the primary law) and effectively functioning and sufficiently empowered institutions. In line with this approach, the Model Law sets forth the foundations of the institutional framework in the PPP sector. In particular, it defines the powers of the country's highest executive authority (eg the government) with respect to policy-making and regulation in the PPP sector, sets forth the competencies of the specialised executive body vested with the implementation of the PPP policy ("authorised PPP body"), provides for a controlling function and opens up a possibility of establishing development institutions responsible for providing policy and project support in the PPP sector (so-called "PPP units").

The key role of the country's highest executive authority with respect to the PPP sector is to define the sector policy and issue relevant implementing regulations. In particular, its functions include approval of long-term PPP programmes and lists of potential PPP projects (infrastructure plans), designation of the authorised PPP body as well as agencies and organisations authorised to enter into PPP agreements, training of public sector officials and overseeing implementation of PPP projects. The implementing regulations that the country's highest executive authority is competent to issue include procedures of preparation and implementation of public-private partnership projects, regulations on public hearings, tender procedures and direct negotiations, as well as model PPP agreements and guidelines on their implementation.

As noted the key role of the authorised PPP body is to implement the PPP policy, for which purpose its functions include the development of the PPP programme and implementing regulations that are to be then adopted by the country's highest executive authority (listed above). It may also act as a public partner and enter into PPP agreements where authorised and oversee the implementation of the projects.

As we see the Model Law suggests that a wide range of PPP matters should be regulated on the regulatory (rather than legislation) level, including in the form of guidelines and models. This switch from primary to secondary legislation in respect of many issues reflects one of the recent trends in the PPP regulation in the region and beyond, providing the participants with the maximum flexibility but also giving relevant guidance, particularly relevant in the countries at the earlier stages of development of their PPP frameworks and practices. This approach also provides for a greater flexibility in adjusting the implementing regulations to the rapidly changing practices, which is easier to undertake on the secondary rather than primary, legislation level.

The Model Law also provides for the control function in the sector. Specifically it defines that the country's highest executive authority appoints the authorities whose function is to oversee and control the preparation and implementation of the PPP projects with respect to compliance of the tender conditions and the efficient use of funds for their intended purpose. The two highlighted aspects – tender conditions and use of funds – are spelled out to reflect the most frequent abuses in PPP practices in the CIS region. The parties to a PPP agreement have to inform such controlling bodies of the progress in the PPP project implementation.

PPP Development Institutions are defined as non-profit organisations created to provide informational, advisory, methodological, organisational and other appropriate assistance to the authorised bodies, other organisations and individuals in the PPP sector, including in the form of expertise of PPP projects during their preparation as well as pre-trial and out-of-court dispute resolution using means of mediation and arbitration. By default such institutions can be created by public authorities, but the national legislators may allow private organisations and individuals to set up PPP units as well.

V. Implementation of the Model Law in the national legislation of CIS countries and further steps

Model legislative acts endorsed by the CIS IPA are recommendatory by nature and as such, are not ex-

pected to necessarily end up being implemented by the CIS IPA member states in their entirety. The primary purpose of such acts is different – to disseminate modern best standards to the member states and to serve as a reference and guiding point for the drafters of relevant national regulation. From this perspective, the Model Law, aligned with the modern sound practices and taking into account the region's specifics, is a good starting point for the CIS countries to revisit their legal frameworks for PPPs with a view to aligning them with better standards and eventually allowing for enabling PPP environment.

At the same time, with the adoption of the Model Law the efforts of the CIS IPA, in cooperation with the EBRD, on strengthening PPP standards and practices in the CIS region do not end. As noted earlier the CIS IPA and the EBRD are currently working on an extensive commentary to the Model Law with a view to providing guidance to the national legislators with the implementation of the Model Law into the CIS countries' national legislation. The initial draft of the Commentary was considered by the CIS IPA's Standing Commission for Economics and Finance in November 2014 and received strong support from the CIS countries. Suggestions to continue work on a more practical level – in particular, to develop guidance and template documentation – were made by a number of government representatives and national experts from Kazakhstan, the Kyrgyz Republic, Moldova and Ukraine. Furthermore, the CIS IPA requested the EBRD to provide support with dissemination events in the CIS countries to present the Model Law to the individual governments and discuss with the stakeholders its implementation into the national legislation. This should form a solid basis for continued efforts of the CIS IPA, in cooperation with the EBRD, on further strengthening, upgrading and harmonising of PPP standards and practices across the entire CIS region and even beyond.

VI. Conclusions

Approval of the Model Law is certainly an important step towards the harmonisation of PPP regulation and its development was appropriate and timely. Its approval has marked the establishment of a solid ideological and methodological platform for enhancing PPP legal, regulatory and institutional frameworks in the CIS countries on the basis of internationally recognised principles and sound practices, and not only so. We believe that this document can have a greater impact in the context of international harmonisation of approaches towards PPP regulation. High level of expertise attracted for the development of the Model Law and profound preparation and drafting work make it a high-quality document that will hopefully serve as a good model for the region and beyond, thus contributing to the convergence in the regulatory approaches in the PPP sector.

The Model Law can be useful for the other regions (or groups of closely related countries) as a model legislative experience, in the PPP and related sectors, as well as for the purposes of comparative analysis among the regions of the preparedness of their legal, regulatory and institutional frameworks for the development and implementation of PPP projects. We expect the Model Law to play a role in the harmonisation of PPP legislation in the worldwide context, including in the efforts initiated by the UNICTRAL Secretariat (currently in the exploratory phase), one option of which is that it is executed through a universal model law on PPPs.