



**European Bank**  
for Reconstruction and Development

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Volume I



# Chapter 16.

## Model public-private partnership policy

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**Outline of example document for CIS member countries<sup>1</sup>**

<sup>1</sup> Note: This document is a direct, non-professional translation from Russian into English.

## 1. Introduction

### General part

1.1 [The Government / Cabinet / Council / other name of the highest executive authority] of [name of the country] (the “Government”) intends to develop and maintain the uniform approach to prepare and implement public-private partnership projects<sup>2</sup> (“PPP”) [as well as PPP assessment] in [name of the country].

1.2 The objective of the Government regarding PPP is to provide the private sector with opportunities to participate in the economic and social development of the state, attract investments in the creation of new infrastructure and the reconstruction of existing public infrastructure facilities, as well as other goals specified in section 2 below.

1.3 PPP is just one of the arrangements or approaches which may be used to develop and implement public infrastructure, provide socially significant public services or attract private investment to the infrastructure sector. This Policy does not automatically prioritise PPP over any other such arrangements and approaches which may be available within the territory of [name of the country].

1.4 The Government intends to develop and maintain PPP arrangements in those spheres, where they can most benefit the economy and the public compared with traditional state or municipal procurements.

1.5 This Policy shall apply to all the models and forms of PPP, including [concessional and non-concessional PPPs and any other available structures (the terminology may be modified to reflect the name of the relevant forms of PPP in the relevant country)].

### Policy objectives

1.6 This document specifies the policy framework of [name of the country] in the sphere of PPP. The Government intends to comply with all the requirements of international best practice and generally accepted standards in this sphere, taking into consideration the regulatory framework of [name of the country], and its economic and social priorities.

1.7 The Government agrees that, to accomplish the task set before it in this Policy, it is required to create the conditions for attracting private investments from legal entities registered in the territory of [name of the country] and resident individuals of [name of the country], as well as from foreign legal entities and persons, together with associations of the same (consortia).

1.8 This Policy may also be deemed a signal of official support for PPP projects in [name of the country] at the country level for the benefit of potential investors and financing institutions.

1.9 Developing PPPs is one of the priority tasks for [name of the country]. The Government acknowledges that, in connection with PPP project implementation, private sector participants may be primarily interested in protecting their investments and commercial and ownership interests and providing adequate legal assurances for that purpose. This Policy therefore determines the political and institutional basis for PPP project implementation and the protection of the interests of the state and the public in the course of such implementation. For this purpose, the Government shall implement transparent procedures for developing, implementing, monitoring and managing PPP projects.

1.10 This Policy is also designed to provide a framework for implementing certain PPP pilot projects, subject to international best practice, which it is hoped shall become templates for the further development of PPP in [name of the country] in future years.

## 2. PPP objectives

2.1 The primary objectives of PPP development and implementation shall include the following:

- (a) Creating new, and modernising existing, infrastructure;
- (b) Attracting additional infrastructure investments;
- (c) Reducing the cost and improving the quality of infrastructure construction and operation;
- (d) Improving the efficiency of infrastructure management and technical maintenance within its whole life cycle;
- (e) Facilitating the public’s access to public (socially significant) services;
- (f) Improving the quality of public services;
- (g) Harnessing the experience, skills, technologies and know-how of private sector companies.

2.2 Other supporting objectives to be achieved with PPP development and implementation include the following:

- (a) Increasing the predictability and transparency of

<sup>2</sup> The term “PPP” used in this policy document for [name of the country] in the field of PPP (the “policy”) has the same meaning as in the Model Law of the CIS Member States “On Public-Private Partnership”.

the budgetary expenses and liabilities of [name of the country], of the [constituent entities of [name of the country]] and of the municipal authorities

(b) Establishing of a more client-oriented culture in the provision of public services

(c) Stimulating innovation

(d) Fostering conditions for the accelerated development of business activities

(e) Giving the state greater flexibility in the disposal of budget funds

(f) Increasing the transparency and reliability of the public sector in the course of procurement works and services provided by private individuals

to [create/reconstruct and operate, and/or technically maintain<sup>4</sup>/operate, and/or technically maintain<sup>5</sup>] PPP project

(d) Allocation of risks between public and private partners

(e) [Full or partial financing by a private partner (equity and/or debt) for the implementation of the project]<sup>6</sup>

3.3 [In most PPP projects, a private partner provides the major part of the financing for the project. However, provision of financing by a private partner shall not be deemed a necessary criterion of PPP.]<sup>7</sup>

3.4 The PPP agreement shall be fee-based. The private partner shall earn revenues and a return on its investments from payments made by the final consumers of the public services/users of the public infrastructure (either directly or indirectly), or from payments made [by the public partner] from the budget, [and/or funding received from non-budgetary funds] or cumulatively from several sources.

3.5 As a rule, a public partner in PPP projects consists of government authorities/ministries or local government agencies. [State and municipal enterprises, state-owned companies and municipal agencies, state-owned companies and corporations, as well as other legal entities, mainly controlled by the state or municipal entity]<sup>8</sup> may also act in the name, and on behalf, of a public partner.

3.6 Private partners may [only be legal entities (corporations or partnerships) registered in accordance with the laws of [name of the country]. This restriction shall apply only at the moment of conclusion of the PPP agreement, that is, foreign legal entities or consortia may also participate in the tender and, in case of award of the contract, shall establish a project company under the legislation of [name of the country], which shall act as the private partner.]<sup>9</sup> [either legal entities registered under the laws of [name of the country] or foreign legal entities.]<sup>10</sup>

### 3. PPP definition and characteristics

#### PPP criteria

3.1 No single definition of PPP is universally accepted. In some states, the term “PPP” has a narrow definition in the legislation, and it is used only with respect to strictly determined projects. In other jurisdictions, PPP is the general term used with respect to any and all kinds of cooperation between the public and private sector on a contractual and institutional basis. [Name of the country] adheres to the compromise approach: the PPP definition is not unduly narrow, however, a project may be deemed a PPP project only subject to compliance with certain criteria.

3.2 PPP criteria shall include:

(a) provision by a private partner of the public infrastructure and/or public services, that is, the infrastructure or services traditionally created and provided by public authorities

(b) Long-term nature of the partnership (that is, term of the PPP agreement – from [three/five] years [and up to [\*\*\*] years])<sup>3</sup>

(c) Fulfilment by the private partner of its obligations

<sup>3</sup> Optional limitation shall apply at the discretion of the authorised body of the member country.

<sup>4</sup> The first variant (more severe restriction) shall apply at the discretion of the authorised body.

<sup>5</sup> The second variant (less severe restriction) shall apply at the discretion of the authorised body.

<sup>6</sup> Optional limitation shall apply at the discretion of the authorised body of the member country.

<sup>7</sup> At the discretion of the authorised body of the member country.

<sup>8</sup> The list shall be subject to adjustment/specification in accordance with the provisions of the legislation of the member state.

<sup>9</sup> The first variant (more severe restriction) shall apply at the discretion of the authorised body.

<sup>10</sup> The second variant (less severe restriction) shall apply at the discretion of the authorised body.

3.7 [State and municipal enterprises, state-owned companies and corporations, as well as other legal entities [controlled by the state or municipal entity]<sup>11</sup> may not own more than [49 per cent] of shares/interests in a private partner.]<sup>12</sup>

#### PPP term of validity

3.8 Each PPP agreement shall specify the PPP term of validity [(up to [\*\*\*] years)]<sup>13</sup> based on the following criteria:

- (a) The life cycle of the infrastructure created, reconstructed, operated and/or serviced by a private partner
- (b) The period required for the anticipated return on the investments made by a private partner (including the cost of funds raised or borrowed)
- (c) The period required for the [public][?] partner to achieve the applicable performance levels determined in the PPP agreement, the achievement of which is the objective of the project (for example, certain levels or volume of public services)
- (d) The [characteristics] of the industry or sub-industry, in which the PPP project is implemented

#### Spheres of PPP application

3.9 The spheres of PPP application in [name of the country] shall include:

- (a) Transport
- (b) Housing maintenance and utilities
- (c) Energy industry
- (d) State and municipal management
- (e) Provision of defensive capacity, safety and security
- (f) Communications and data transmission
- (g) Scientific activities, education, upbringing and culture
- (h) Social services
- (i) Public health services, physical training and sports
- (j) Tourism
- (k) Agriculture
- (l) Other spheres, [but only subject to receipt of a preliminary consent of a competent state or municipal authority,]<sup>14</sup> unless the laws stipulate any restrictions in respect thereof.

## 4. Organisational structure

### Authority responsible in the sphere of PPP

4.1 In accordance with [\*\*\*], [\*\*\*] is the authority [with overall administrative responsibility] in the sphere of PPP (the “PPP authority”). The main functions of the PPP Authority are provided for hereinafter in Clauses 4.2–4.12.

4.2 Further development and improvement of the policy in the sphere of PPP.

4.3 Provision of mandatory requirements for the procedures and methodological recommendations in the sphere of PPP.

4.4 Assessment of individual PPP project proposals and making decisions on the basis of implementation thereof.

4.5 Provision of general recommendations [and guidance?] to public authorities and other interested parties with respect to application of the laws in the sphere of PPP and development of PPP projects.

4.6 Collection and analysis of information on PPP projects and the results of their implementation. Provision of relevant reports thereon.

4.7 Development and distribution of the manuals recommended for application in the sphere of PPP.

4.8 Fostering conditions for the successful implementation of PPP projects, including qualified personnel training.

4.9 Coordination of and support for PPP projects (in different forms).

4.10 Refinement of PPP project financing and funding techniques.

4.11 Maintenance of the PPP projects register (database).

4.12 Provision of interdepartmental coordination of the activities of higher-level executive authorities relevant to the implementation of a PPP project.

<sup>11</sup> The list shall be subject to adjustment/specification in accordance with the provisions of the legislation of the member state.

<sup>12</sup> Optional limitation shall apply at the discretion of the authorised body of the member country.

<sup>13</sup> Subject to the decision made by the duly authorised body of the member country, in accordance with Clause 3.2 (b) above.

<sup>14</sup> Optional limitation shall apply at the discretion of the authorised body of the member country.

## Obligations of the authority carrying out the functions of a public partner

4.13 Authorities carrying out the functions of a public partner (the “authorised bodies”) include the agencies authorised by the state to fulfill the obligations of a public partner in a PPP project. Such authorities shall be liable for the services and infrastructure provided within the scope of PPP projects for which they are responsible. In some cases, authorised bodies may delegate their authorities to others, such as state-owned or municipal enterprises.

4.14 The PPP Authority shall support the authorised bodies in the course of the initial [qualification] [preparation?] of PPP projects, as well as in the course of [the examination and discussion of promising project decisions and ideas], and the selection of consultants and the conclusion of contracts with them.

4.15 Consultants may play a significant role (inter alia) in developing feasibility studies for a PPP project.

4.16 The PPP Authority shall, if necessary, offer recommendations to the authorised bodies on the selection and coordination of the consultants.

## 5. PPP project development stages

5.1 The [Government] shall monitor the implementation of the PPP project through the following main stages:

(a) Identification of the project (including development of the project source idea and its preliminary feasibility study, if necessary). This stage is required to understand the applicability of PPP to the project, which helps to avoid any unnecessary use of resources (including financial resources) to develop the project which may in the end not be implemented as a PPP.

(b) Development of the source concept and technical feasibility studies for the PPP project

(c) PPP project assessment. Among other things, a decision shall be made at this stage about the form of PPP project implementation (in the form of concession or any other PPP model).

(d) The stage of award to a private partner, which shall be completed in the form of commercial close

(e) Financial close

(f) Monitoring of implementation of the PPP project

(g) Further PPP project assessment

## 6. PPP project assessment

6.1 All PPP projects in [name of the country] shall undergo the assessment procedure prior to the first stage of award to a private partner.

6.2 Assessment of a PPP project includes a complex analysis of all aspects of the project [carried out by the team of specialists not directly involved in development of the project].

6.3 The PPP project assessment at [federal/national] level shall be carried out by the sectoral ministry and then by the PPP Authority. For PPP projects at a municipal level, the assessment shall be carried out similarly to federal projects, save that it shall initially be carried out not by the ministry, but by the municipal executive authority. If a PPP project includes some measures of state support, the PPP authority shall carry out its final assessment.

6.4 The main criteria that the Government shall use to assess PPP projects are:

(a) Compliance with the national development plan, as well as the development plans and strategies of certain industries or sectors of the economy

(b) Economic [and technical] feasibility of the project

(c) Feasibility of implementing the project as a PPP (compared with traditional government procurement)

(d) Allocation of the duties and risks of the project parties

(e) Acceptability of rights and benefits provided to a private partner

(f) Investment potential of the project for financing institutions

(g) Sufficiency of the funds of the state or municipal budget (if applicable)

(h) The basis and amount of the private partner's fees for the project and their affordability for end-users of the infrastructure (if applicable)

(i) Acceptability of the ecological and social consequences of the project

(j) Acceptability of the tax consequences of the project

(k) Acceptability of the private partner award procedure

6.5 Evaluation of PPP projects will be made on the basis of the Methodology for evaluating the effectiveness of PPP projects in Commonwealth of Independent States (CIS) member countries.

6.6 The PPP authority or the government shall determine additional criteria of assessment for different projects in different economic sectors.



## 7. Selection of a private partner

### Procedure to select a private partner for PPP projects

7.1 Clauses 7.2–7.7 specify the most important aspects of a private partner selection procedure in PPP projects in [name of the country].

7.2 **Notification on tender.** Publication of a notification of the tendering procedure shall imply the beginning of the official procedure to select a private partner. At this stage, interested parties may obtain any additional documentation required for the following stages of qualification. The notification shall be published on the official website for publishing information on tendering procedures ([\*\*\*]) and in the official print media for the same [\*\*\*].

7.3 **Prequalification.** The objective of prequalification shall include assessment of the participants' compliance with certain criteria, which confirms that such participants are able to implement the PPP project. Invitations to prequalify shall include the criteria and methodology for assessing the prequalification requirements of the participants.

7.4 **Invitation to Tender.** Documentation included in an invitation to tender (the "Tender Documentation") shall contain all information tender participants require to prepare their tender proposals for the project. The invitation to tender shall also contain [a draft of the general terms and conditions of a PPP agreement/draft PPP agreement].<sup>15</sup> The invitation to tender shall specify clear criteria used to assess the proposals submitted by the tender participants, as well as the respective importance and weighting of each criterion.

7.5 **Tender Stage.** In the course of the procurement process, the public partner shall provide clarifications to the participants in the tender with respect to the terms and conditions of the Tender Documentation. Nevertheless, the PPP project may require more active dialogue with the tender participants in the course of the tender.

7.6 **Assessment of Tender Proposals and the Winner Qualification.** At this stage, the tender commission shall keep a detailed report of its assessment of the tender proposals, including a description of all its stages. This report shall describe the decision-making methodology used by the commission members, as well as the justification for all their decisions.

7.7 **Final Negotiation.** Typically, any PPP project requires additional negotiation with the winner of the tender with a view to agreeing on the final draft of the PPP agreement.

### Non-competitive (direct) negotiations

7.8 Non-competitive (direct) negotiations held for the purposes of selecting a private partner may be permitted only in certain circumstances, in circumstances where only one potential private partner can meet the requirements of the public partner.

### Publication of information about the results of the tender

7.9 Information on the results of the tender to select a private partner shall be published, with the exception of information constituting a state secret or other secret protected by law. Information is published on the official website for publishing information about tendering procedures ([\*\*\*]) and in the official print media for the same [\*\*\*].

### Private initiative/unsolicited proposals

7.10 Private investors may also initiate PPP projects through a so-called private initiative. A private investor may submit a private initiative at its own discretion and not in accordance with any request from the authorised body. Such private initiative arrangements can help the state benefit from the private sector's ideas, know-how and experience. However, using such arrangements requires special procedures and rules designed to maintain a balance between stimulating the implementation of PPP projects by private investors and maintaining sufficient transparency. [Competitive pressures should therefore be brought to bear wherever possible under these procedures.]

7.11 The investor's proposal to initiate the PPP project shall be published on the official website of the public partner. If no third party submits a competing tender proposal for the project within [45 days/another term], the public partner shall be entitled to conclude a PPP agreement for the project with its private initiator without any tender procedure. Should any other interested parties put forward competing proposals for the project, the public partner shall conduct the tender procedures as described above and [reimburse the private initiator of the project for all reasonable expenses incurred when preparing the project in case of its failure to win the tender/provide the project initiator with other privileges and benefits in the course of the tendering procedure].<sup>16</sup>

<sup>15</sup> At the discretion of the authorised body.

<sup>16</sup> At the discretion of the authorised bodies.

## 8. Financing PPP projects

### State financing and support

8.1 The public partner may participate in the financing of the project by providing loans and/or grants or participating in the share capital of a private partner as well as through other methods specified in this section below.

8.2 State financing and support will be used [(among others)] in cases where projects are economically viable but have insufficient financial viability or strength, or are subject to risks beyond the sufficient control of a private partner, which (in each case) significantly diminishes the prospects of using private finance to fund them.

8.3 The Government will use the following types of state support if certain conditions are met in the circumstances established by the Government and/or the PPP Authority:

- (a) The public partner may provide the private partner with additional infrastructure assets.
- (b) The public partner may provide the private partner with a capital grant.
- (c) The public partner may provide the private partner with tax and customs privileges (or guarantee that the tax scheme will not be changed within a certain period of time).
- (d) In certain circumstances, the public partner may provide the private partner with periodic grants and subsidies to ensure the affordability of user fees.
- (e) The public partner may undertake obligations under the PPP agreement for making payments in favour of a private partner in certain circumstances as part of the risk allocation pattern, such as provision of a minimum revenue or return guarantee for the project.
- (f) The public partner may provide guarantees for the fulfilment of certain payment obligations, such as obligations connected with an early termination of the PPP agreement.
- (g) As a general rule (and subject to the preceding paragraph), the public partner does not provide any guarantees with respect to [any/material part of] debts of a private partner to its creditors. Should the public partner provide a guarantee with respect to the entire debts of the private partner to its creditors under the project, it would affect their incentive to help control the successful implementation of the PPP project.

### Rights and interests of creditors

8.4 With regard to PPP projects, the Government will ensure compliance with all procedures required by law to obtain the consent of the public partner to the granting of suitable security and similar interests in (or in relation to) all the assets of the project in favour of the lenders (including all contracts under the project), such that the senior creditors may (among others) take over the project if a private partner fails to implement it as required, and perform the responsibilities of the private partner prior to its proper replacement by another entity.

8.5 The Government will ensure, if this is necessary to attract debt financing for the PPP project, that a direct agreement is signed among the senior creditors, the public partner and the private partner which will include the terms and conditions governing the takeover by a creditor of the project and the replacement of the private partner, as well as other terms and conditions associated therewith. Direct agreements, depending on the requirements of the creditors, will include provisions governing the waiver of any outstanding breaches of contract by the private partner, the takeover of the project, relevant notifications and procedures, assignment or transfer of the parties' rights and obligations – in other words, all those terms and conditions which will provide senior creditors with the right to cancel or vitiate the consequences of any material breaches by the private partner, and assuring the further implementation of the PPP project.

## 9. Control of the agreement performance, reporting and further assessment

### Control and supervision

9.1 The authorised body shall remain liable to the public for the provision of services, even after conclusion of a PPP agreement, and will supervise the implementation of the PPP project. The Government will ensure that the authorised body the appropriate resources to do this.

9.2 PPP agreements will establish a systematic monitoring mechanism for the purposes of determining the level of performance by a private partner of its obligations under the PPP agreement. Such monitoring shall be of a systematic nature.

9.3 The government and/or the PPP authority will establish requirements for exercising control and supervision in the field of the PPP in accordance with the brief recommendations on monitoring the quality of services provided and the results of PPP projects in the CIS member countries.

## Transparency

9.4 All executed PPP agreements shall be available to the public, apart from where other or qualified arrangements are required to protect national security or maintain commercial confidentiality, including certain individual terms and conditions of such agreements which contain commercially classified information.

9.5 By providing requirements for the publication of PPP agreements, the Government demonstrates to the private partner its intent to conduct transparent and fair tendering procedures [and promotes a wider understanding of the workings of its PPP system and market on a transparent basis].

## Information relating to PPPs

9.6 The PPP Authority shall maintain a systematic and well-organised database with respect to all PPP projects. Maintenance of such database shall contribute to the transparency of tendering procedures [and data flow] and enable the state to trace its own obligations.

9.7 The Government and/or PPP Authority shall establish standard requirements for reporting with respect to the results of activities under all PPP projects (different types of key indicators) on the basis of the Methodology for introducing key performance indicators in PPP projects for CIS member countries. Such requirements shall describe the indicators to be measured, the service provision standards, measurement systems and the consequences of non-fulfillment by a private partner of its relevant obligations. The Government will also publish periodic reports in accordance with the standard forms to be registered and analysed in the course of implementation of any PPP project.

## Ex-post PPP projects assessment

9.8 A team of specialists independent of the PPP authority shall carry out ex-post assessment of each project after its completion, because the PPP Authority took part in the process of assessment and agreement of the project.