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EBRD PPP regulatory guidelines collection
Volume I



Chapter 3.

Introduction and executive summary to model regulatory outlines

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The attached documents, which are divided into six modules, contain an extensive set of guidance notes on regulations and guidelines (the **Guidance Notes**) to support the EBRD/UNECE Model Law on PPP/Concessions¹ (referred to in the Guidance Notes as the **Model PPP Law** or simply the **Model Law**). The Model Law was developed and drafted over the past five years as a joint project between the EBRD and the UNECE² Working Party on PPPs (the **Working Party**) and approved and adopted by the former in 2021. Following some further minor drafting and structural changes to it in 2021-22, on behalf of the Working Party, it was formally adopted and published (in December 2022) by the United Nations³ as a standard, forming part of the suite of standards and guidance notes commissioned and published by the Working Party over the past few years on the subject of PPPs. The EBRD has also published the Model Law on its website and included it, along with an accompanying commentary (the **Commentary**) in its PPP Regulatory Guidelines Collection. The Working Party continues to focus and carry out valuable work on the subject of how to make PPP projects as compliant as possible with the SDGs, based on its novel concept of **SDG PPPs** and the **SDG Guiding Principles**⁴, including its PPP Evaluation Methodology for the SDGs (the **Evaluation Methodology**, also published in 2022).⁵

These Guidance Notes are designed to provide guidance to governments, regulators, PPP units and others involved in developing or refining the subsidiary documents that often support and accompany PPP laws, on how to prepare and draft them. Supporting documents of this kind will typically fall into two broad categories, namely regulations and guidelines. Both are defined in the Model Law, the former as legally binding secondary legislation, covering the detailed procedures and mechanisms necessary to give effect to a PPP Law, the latter as guidance documents which describe, explain and advise on their application.

Some countries make clear distinctions between these two categories, treating the former as consisting only of legally binding provisions, while the latter is made up of documents which may be persuasive but do not have the force of law. The Model Law also makes that distinction. Other countries, however (particularly in certain former Soviet Union jurisdictions, at least at a regional or municipal level), are arguably somewhat less precise and clear-cut about the distinction, sometimes lumping them together in one broad category and referring to them with the collective title “regulations and guidelines”. Some of these countries tend to treat this broad category as essentially or largely binding anyway, and to refer to them generally as simply regulations.⁶

In the former case, countries which make definite distinctions between the two categories, different drafting approaches should be taken to the two types of **supporting documents**. The regulations will have to be written as legal provisions and contain only clauses which are appropriate for legal documents. The guidance documents, by contrast, can be descriptive and discursive, written in whatever style is considered most helpful, with explanations, notes, descriptions of procedures, examples, precedents, pro formas and so on. In the latter category, countries which do not make such a clear-cut distinction, there tends to be rather less concern about exact style and content, as the broad category of “regulations and guidelines” is often thought (as we have said) to be largely mandatory anyway.



¹ Sustainable Development Goals.

² United Nations Economic Commission for Europe.

³ With the (slightly different) full title of UNECE Legislative Standard on PPP/Concession Laws for the SDGs. For internal organisational reasons, only the United Nations Commission on International Trade Law is allowed to publish model laws on behalf of the United Nations, which means that a different title had to be adopted for the document by the Working Party. Nevertheless, a model law it is, and the EBRD accordingly prefers to give it that title in the version published as part of its PPP Regulatory Guidelines Collection.

⁴ For further information about the SDG PPP concept, please see the Preamble to the Model Law and the accompanying commentary.

⁵ The evaluation methodology is referred to repeatedly in these Guidance Notes and discussed in more detail in the relevant chapter on the PPP Legal Framework.

⁶ See, for example, Chapter 10, Volume I of the EBRD PPP Regulatory Guidelines Collection, containing a set of detailed model regulations in support of the Commonwealth of Independent States Model PPP Law.

In preparing the Guidance Notes, it was thought unnecessary to distinguish clearly between the two categories. We refer to them all, both regulations and guidelines, without distinction in these Guidance Notes as simply the supporting documents. The Guidance Notes do not consist of model provisions. They offer compressed descriptions of what the supporting documents might aim to cover and contain, the issues that typically arise as they are developed and the key objectives of the provisions concerned. They could be thought of as a set of principles and guidelines for preparing such documents.

This approach is especially appropriate given that countries may decide to adopt legislation that diverges in some ways from the Model Law. Providing broader guidance for supporting documents (regulations and guidelines) rather than model text to fit under the Model Law permits greater flexibility. It therefore did not seem necessary or appropriate to explain which category each document or provision might fall into – regulation or guideline – but to leave that to the draftsmen in each jurisdiction, who would have to work anyway within their legal and jurisprudential traditions and craft appropriate documents accordingly in an appropriate style.

In any event, legislators in host countries preparing these documents should always be mindful of the exact conceptual differences in their local jurisprudence between primary and secondary legislation, between governing laws and decrees, on the one hand, and supporting regulations, on the other (whichever terms are used for them; there are many). There will be internal rules about what exactly the latter are permitted to do in relation to the former, in terms of applying, completing or interpreting them – and what they must not do. The relevant limits will always have to be scrupulously respected. The usual practice (if such a statement can legitimately be made about different jurisdictions around the world, with their widely differing legal traditions and principles) is that the former – the governing legislation, acts and decrees – should be relatively immutable, once they have been finalised by the legislature and passed into law, while the latter – supporting regulations – should be relatively easy to modify and refine over time, as need dictates. The former should create the stable legal framework, embodying the principles underlying it, while the latter can be used as a more flexible device to apply that framework in practice, supplying many of the details that need to be completed for it to have operational effect.

However, for that reason, it is usually important that the regulations should operate entirely within that legal framework and subject to its constraints, or they may risk coming into conflict with the proper legislative and constitutional channels and procedures that apply to the law-making process. Nothing in the Model Law is intended to suggest otherwise. As a general rule, regulations should be used to complete the details of their governing laws, not rewrite or make significant changes to them. Each host country should have this distinction very much in mind, based on the way the jurisdiction approaches it, as it draws up its PPP laws and regulations.

Regulations and guidelines, then, always need a context, as they are supporting documents “fleshing out” or explaining the workings of the primary legislation or legal framework they support. They may be difficult to interpret outside that context, and the same is true of a set of precedents for them, or guidance on how to prepare them. Their contents will depend very much on the structure and contents of the wider framework. In the case of PPP systems, that context would be the PPP law (if there is one) or the legal principles that make up the framework (if there is not). The context we have used in this case is the Model Law. Many of the articles of the Model Law refer to the regulations and guidelines to be drawn up under its aegis. We felt that the Model Law would therefore be a somewhat incomplete precedent for governments to draw on when developing their PPP legislation, in the absence of guidance as to what those supporting documents might cover or address, or how they might be approached and structured. Rather than trying to prepare model documents of this kind, then, we thought it best just to describe their typical or likely contents, in a way which avoided this question of whether regulations, guidelines or a mixture of the two should be used. The Guidance Notes have been drafted accordingly.



The Guidance Notes cover six main categories that represent the areas in which the supporting documents are likely to have their principal focus.

These are:

- PPP Criteria and Requirements
- Forms of Government Support
- Tendering Procedures and Requirements
- Unsolicited Proposals and Direct Negotiations
- Appraisal and Approval Procedures
- Review and Challenge Procedures

A short explanation of the contents of each can be found in their introductory sections (those contents should, in any case, be fairly self-evident from their titles). More detailed guidance and discussion then follows in each one.