



Gide Loyrette Nouel

# **UN-ECE ASSESSMENT and EVALUATION**

## **BELARUS PPP draft Law 2011**

### **Compliance of the PPP legal framework with UNCITRAL Legislative Guide and recommendations and International Best Practice**

**(Based on EBRD Checklist model)**

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PPP Legislative Framework Assessment (LFA)	Compliance of the PPP legal framework with PFI Guide recommendations <sup>1</sup> and Best Practice		
Core Area		Rating	Assessment
<b>1- PPP Legal Framework</b>	Existence of specific PPP law or a comprehensive set of laws regulating concessions and other forms of PPP and allowing a workable PPP legal framework	11/15	High Compliance (Need some polishing work and parallel review of Concession provisions of the Investment Code which would still apply )
<b>2-Definitions and Scope of the Law</b>	Existence of a clear definition of the boundaries and scope of application of the concession legal framework (e.g. definition of "PPP", sectors concerned, competent authorities, eligible Private party) limiting the risk of a challenge to the validity of PPP contracts, irrespective of whether the act is specifically targeted at PPP	15/18	High Compliance Need to make sure that the draft will apply to PFI in the non merchant sector as well)
<b>3-Selection of the Private Party</b>	Mandatory application of a fair and transparent tender selection process. Limited exceptions allowing direct negotiations, competitive rules for unsolicited proposals and the possibility to challenge illegal awards.	38/42	High Compliance (Need provision on unsolicited proposal)
<b>4-Project Agreement</b>	Flexibility with respect to the content of the provisions of the Project agreements which should allow a proper allocation of risks without unnecessary or unrealistic/not bankable/compulsory requirements/interferences from the Contracting Authority (obligations, tariff, termination, compensation).	23/27	High Compliance
<b>5-Security and Support Issues</b>	Availability of reliable security instruments to contractually secure the assets and cash-flow of the Private Party in favour of lenders, including "step in" rights and the possibility of government financial support, or guarantee of, the Contracting Authority's proper fulfilment of its obligations.	10/18	<b>Medium Compliance</b> (Need of reliable security instruments to contractually secure the assets and cash-flow of the Private Party in favour of lenders, including "step in" rights)
<b>6-Settlement of Disputes and Applicable Laws</b>	Possibility to obtain proper remedy for breach under the applicable law through international arbitration and enforcement of arbitral awards.	13/15	High Compliance
<b>General LFA Rating</b>	110/135	<b>81,5/%</b>	<b>High Compliance</b>

## Local Expert: Gide Loyrette Nouel - Bruno de Cazalet

<sup>1</sup> UNCITRAL *Legislative Guide on Privately Financed Infrastructure Projects*, 2001 (hereinafter the "PFI Guide")

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### **RATING:** Key for assessment of Each Question

✓ ✓ ✓	Yes	3 points
✓ ✓	Yes, with reservations	2 points
× ×	No, with Limited compliance / redeeming features	1 point
× × ×	No	0 point
N/A	Not applicable	0 point/ Not included in total

### Key for Assessment of Each Core Area and for Overall Assessment

≥ 90%	Very High Compliance/Effectiveness
≥ 70%-89%	High Compliance/ Effectiveness
50%-69%	Medium Compliance/ Effectiveness
30%-49%	Low Compliance/ Effectiveness
< 30%	Very low Compliance/ Effectiveness

### **TERMINOLOGY**

*So as to keep answers consistent and avoid ambiguity, we set out below some brief definitions of the terminology used in this questionnaire. Any definition is provided solely to clarify some of the terminology used below. The reader should note that any such definition does not correspond with any given definition under best international practice (which does not provide for any standardised PPP legal definitions recognised worldwide) neither should it be interpreted that we recommend the adoption of such definitions under actual documentation, but they are included in the interests of clarity for the completion of this questionnaire, and we should be grateful if you could adopt such definitions for the purposes of completing the questionnaire.*

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- **"Public Private Partnership" -"PPP" or "PPP project"** includes all types of long-term arrangements between public authorities and private institutions , including but not limited to; Concessions , BOT and derived forms, PFI and Institutional PPP. For the purposes of this questionnaire, PPP excludes the sale of public assets or of public company shares which are part of a privatisation process and also excludes public works, services or supply contracts which are subject to public procurement rules.

The following types of Public - Private Partnership Agreements may be adopted by a Contracting Authority for undertaking infrastructure projects. These are solely indicative in nature and the Contracting Authority may seek to adopt a combination of the different contractual arrangements, which incorporate some of their elements or combine elements.

- **"BOT"** - (Build-Operate-and-Transfer)- and derived forms : a contractual arrangement whereby the Private Party undertakes to finance, design, construct under a turnkey risk basis, operate and maintain an Infrastructure project for a specified period after which period the project facilities are transferred to the Granting Authority usually without payment of any compensation.

The Private Party has the right to collect contract or market based tariffs or fees from the users of the infrastructure project, as specified in the PPP agreement, to recover its investment and operating and maintenance expenses for the project. A BOT type of PPP arrangement may provide for all the implementation and operational efficiencies of the private sector, together with new sources of infrastructure capital. Derived forms of BOT contractual arrangements exist such as Build-Own-Operate-and-Transfer (BOOT) similar to the BOT agreement, except that the Private Party owns the Infrastructure project during the specified term before its transfer to the Contracting Authority or its designee, or such as Build-Own-and-Operate (BOO) which is a contractual arrangement similar to the BOT agreement, except that the Private Party owns the Infrastructure project and no transfer of the project to the Contracting Authority or its designee at the end of the fixed period is envisaged. Derived forms incorporating Lease right rather than Ownership or dealing with rehabilitation or extension rather than construction which extent the possible combination which for the purpose of this questionnaire will all be hereafter referred to as BOT for simplification purpose except where legal specificity requires specific treatment.

- **"Concession"**: is an act attributable to the State whereby a Contracting Authority entrusts to a third party the total or partial management of public services for which that authority would normally be responsible and for which the third party assumes all or part of the risk.
- **"PFI"** (Private Finance Initiative) : a form of cooperation and partnership between public authorities and Private Parties which aim to ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of service to the infrastructure without the delegation of the public service itself. It is a contractual arrangement whereby the Private Party undertakes the financing and the construction of an infrastructure project and after its completion transfer it to the Contracting Authority or its designee. This arrangement may be employed in the construction of a public service facility for which the public

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service must be operated directly by the contracting authority for whatever reason but the operation and maintenance of the facility remain the responsibility of the Private Party for the entire duration of the PPP agreement. The contracting authority will reimburse the total project investment on the basis of a rent based of an agreed schedule with the payment starting from the date of commencement of operation and pay for the services rendered to the facility on a performance basis.

- **"IPPP"**(Institutional PPP): a structural or corporate form of PPP which provide for the cooperation between public authorities and a Private Party through a joint venture or mix (publid- private shareholding) company in which case all reference to the slection process refers to the selection of the Private Party.

Other definitions:

- The **"Law"** or **"PPP Law"**: a law regulating any form of PPP including but not limited to Concession, BOT, PFI, IPPP and including, for the purpose of this questionnaire, the set of rules applicable to any PPP in the absence of a specific PPP law. The Law for the purpose of this questionnaire also includes any implementing regulation and any form of governmental act regulating PPP.
- **"BOT Law"** : a law regulating a BOT type of PPP in their multiple forms.
- **"Concession Law"**: a law regulating a Concession form of PPP.
- **"Contracting Authority"**: a public authority empowered to award a PPP and enter into Project Agreements
- **"PFI Law"**: a law regulating a PFI form of PPP.
- **"PPP unit"** : specialized institution/agency/ministerial department established to promote and take care of PPP.
- **"Private Party"** : Private Party or other entity in the form of a special purpose company to which a Project Agreement in general has been awarded. [*The word Private party will be used for the sake of this study even in case the PPP regulation allows PPP business partner to be a mix company or even a public entity.*]
- **"Project Agreement"**: an agreement(s) between the Contracting Authority and the Private Party regulating their respective rights and obligations with respect to the PPP project.

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**REFERENCE TO BEST PRACTICE**

- UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, 2001 (hereinafter the "**PFI Guide**") and UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects, 2003 (UNCITRAL Model Legislative Provisions).
- EC - Commission Interpretative Communication on Concessions Under Community Law dated 12 April 2000; together with additional EU major documents/decision /recommendation on concessions including Directives 2004/18/EC and 2004/17 EC of 31 March 2004; Green Paper on Public Private Partnerships and Community Law on Public Contracts and Concessions dated 30 April 2004; Report on the public consultation on the Green Paper (SEC(2005) 629- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions (Brussels, 15.11.2005.COM(2005) 569) European Parliament resolution on public-private partnerships and Community law on public procurement and concessions (2006/2043(INI)); European Commission Guidelines for Successful Public-Private Partnerships (2003).Commission Interpretative Communication Brussels, 05.02.2008 C (2007)6661on the application of Community law on Public Procurement, and Concessions to Institutionalised Public-Private Partnerships (IPPP);
- EBRD Core Principles for a Modern Concessions Law – selection and justification of principles Prepared by the EBRD Legal Transition Team.2005;
- UNIDO Guidelines for Infrastructure Development through Build Operate Transfer (BOT) Projects, 1996 (UNIDO BOT Guidelines); and
- OECD Basic Elements of a Law on Concession Agreements, 1999-2000.

### **OVERALL ASSESSMENT OF THE BELARUS DRAFT LAW**

Belarus does not have a specific concession Law, but the Investment Code dated 2002 as amended in 2006 do contain detailed provisions regulating concessions (Section III-articles 49 to 76). However, only in 2008 the first list of concession objects was specified by the Decree of the President, and it is mostly development of mineral deposits that was offered for concession.

The enactment of a proper PPP law will therefore constitute a substantial improvement of the legal framework for concessions and PPP.

We understand that the Ministry of Economy has prepared the draft of the law which have been discussed and evaluated by state authorities, scholars and practitioners but without at this stage the involvement of international institutions or specialists from the international PPP field. As a result the law as drafted give a formal impression quite different from the draft laws commonly used in the world practice and contains some provisions which may appears as strange or at least non common compared to best international standards and some polishing work may need to be done to make the draft law appear more friendly to the investors and lenders.

Pursuant to the draft law, the Ministry of Economy will be the state authority in charge of PPP under the budgetary control of the Ministry of Finance at the national level and the competent local authority will be in charge of PPP at the local level in compliance with national financial interest.

Unfortunately the law do not contain any provision creating the necessary institutions, PPP units and experience task force as it is the case in most PPPs successful countries and which are necessary to assist the national and local governments in the selection of project, in their development process, in the drafting of the proper instruments and documentation and the building of the capacity of the contracting authorities, the selection of investors process all in order to make PPP to happen.

One of the weak provisions is that although the public associations were vested with the authority to participate to and monitor the PPP development and concession projects, there is no actual mechanism for implementation of their authority, so this provision is just a declarative one and the unusual involvement of such public associations may also be considered by the sponsors and lenders as an additional risk despite the fact that the public acceptance of any PPP project is always a very positive factor.

The draft law specifies a large list of objects where PPP projects can be developed, and lists all forms of PPP which are available. The estimated term of the concession agreements will be from 5 to 50 years but a duration over 50 years will be offered, if necessary, without however a direct link between the duration and the required amortization period.

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One interesting provision is the property backing which includes the right of the investor to lease or to use the necessary land plot in accordance with the land protection and utilization laws which suppose that no separate auction will have to take place.

Another interesting provision concerns the financial backing of agreements by the State or local communities under various different forms. Conversely the draft is extremely weak with respect to security and lenders rights which are absolutely necessary for the PPP deals to be bankable.

Surprisingly the total result of the assessment of the draft law (not including the institutional framework and without regard to other piece of relevant legislation) is "Highly compliant" (81,5%) with international best practice compared to the medium compliance (57,3%) of the 2011 evaluation which show that the draft can be used as a starting point for improvement of the law itself but what is even more important is to make sure that the proper institution will be created (PPP Unit) and the right PPP policy will be implemented in order to ensure the high effectiveness of the new Law and to make it work in practice which is not presently the case.

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**ASSESSMENT & LEGAL INDICATOR SURVEY**

**1. LEGAL FRAMEWORK**

**1.1 Existence of different forms of PPP legal framework**

QUESTION	ANSWER	ARTICLE	COMMENTARY
<p>1. Does the country have a single act dealing specifically with Concessions or a generalised act incorporating the legal framework for PPP, including Concessions ?</p>	<p>✓ ✓ ✓</p>		<p>The enactment of a law on PPP should constitute a significant improvement of the Belarus legal framework for concession and PPP as Belarus does not have until now a specific PPP law. The Investment Code dated 2002 as amended in 2006 do contain detailed provisions regulating concessions (Section III-articles 49 to 76). However, only in 2008 the first list of concession objects was specified by the Decree of the President, and it is mostly development of mineral deposits that was offered for concession. Roads and roadside service are likely to be offered, too.</p>

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<p>2. Does the country have an act that allows BOT or derived forms such as BOOT, BOO or other forms either as part of a specific act or as part of a general PPP Law?</p>	<p>✓ ✓</p>	<p>Article 8</p>	<p>Forms of Public-Private Partnership</p> <p>1. The public-private partnership may be exercised in the following forms:</p> <p>public-private partnership agreement;</p> <p>concession agreement;</p> <p>investment agreement;</p> <p>other agreements that do not conflict with the laws and comply with the aims and objects of partnership, as well as conform to the attributes stated in Article 7 of this Law.</p> <p>However the concession agreements and investment agreements shall be concluded in accordance with the existing laws which mean that The Investment Code dated 2002 as amended in 2006 and its detailed provisions regulating concessions (Section III-articles 49 to 76) still apply and that the draft law mainly concern PPP agreements.</p>

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<p>3. Does the country have an act that allows PFI, either as part of a specific act or as part of a general PPP Law?</p>	<p>✓ ✓</p>	<p>Article 2.1 Article 6</p>	<p>It is difficult to say if the draft law as proposed would apply to PFI. The definition of PPP under Article 2.1 seems to exclude the non commercial activities by reference to the sharing of earned income but the list of sector concerned under article 6 includes the following sectors which imply that PFI which is well adapted to non merchant sector without operation of the concerned public service itself may be concerned. (public infrastructure systems; facilities intended for safety and law enforcement; the facilities used for the activities in the fields of public health and psychological support; educational, upbringing, cultural and social service facilities)</p>
<p>4. If the answer is <i>No</i> to any of the three first questions concerning a specific form of PPP does the Constitution or other general act (ex: the Civil Code, sectoral law) recognise the basic principles of the concerned PPP and regulate its granting?</p>	<p>N/A</p>		

**For our general information: Is a new PPP Law or an amendment to the existing Law being prepared, or considered, in the country?**

**If so, at what stage of the legislative process is such new PPP Law or amendment to the existing Law?**

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1.2 Specificity and integration of PPP legal framework

<p>5. If the country has a Public Procurement Law, is it clear to what extent does the Public Procurement Law apply or not to the granting of a PPP?</p>	<p>✓ ✓ ✓</p>	<p>Art 3</p>	<p>The laws on public purchases expressly do not cover the legal relationship resulting from this Law.</p>
<p>6. If the country has sectoral laws regulating PPP in specific sectors, is it clear which law is applicable to the granting of PPP for each particular sector?</p>	<p>N/A</p>		
<p>7. Does the country have a Law allowing the Institutional form of PPP (IPPP) which regulates IPPP participation to PPP?</p>	<p>XX</p>	<p>Article 8.1 Article 15.4</p>	<p><i>(8.1) Institutional partnership may be a form of public-private partnership: Agreement of entrusted administration of property, agreement of society in participation (agreement on cooperation), share holding in authorized capitals of legal entities in the form of the economic entity or commercial joint organization, which procedure is governed by the civil legislation.</i></p> <p><i>(15.4). The Agreement shall fix the shares of the public and private partners in ownership for the object of the Agreement. Such shares may be fixed both under the separate stages of execution of the Agreement and on the expiration of the Agreement. If the private partner's share is preserved at the end of the last stage, the Agreement may provide for the public partner's right to buy the private partner's share.</i></p>

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		IC 53 54 55 56	a particular form of activity on which the state has an exclusive right, or to use Republic of Belarus property.  Distinction between the “entire concession”, “concession contract on production sharing”, “concession contract on service performance”.
2. Does the Law apply to all contracts entered into that fall under the definition(s) given above, irrespective of the name given to such contract ( <i>concession, license, usufruct right, lease, etc.</i> )?	N/A		(8.3) The form of public-private partnership is established by the authority taking the decision on exercise of public-private partnership at the stage of initiation of public-private partnership, subject to its facilities, specific character and reasonability.  The Law apply only if the agreement has been acknowledged as a PPP since its inception
3. Does the Law make a clear distinction between a PPP agreement ( <i>such as a Concession</i> ) and a license ( <i>i.e. an authorisation to operate by a public authority</i> )?	N/A		

### 2.2 Contracting Authority

QUESTION	ANSWER	ARTICLE	COMMENTARY
4. Does the Law identify ( <i>or allow clear</i>	✓ ✓	Article 9 Article 10	<b>The President of the Republic of Belarus shall:</b>

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<p><i>identification by reference to other laws or regulations</i>) the public authorities ("Contracting Authorities") that are empowered to select projects, prepare for, and award PPPs and enter into Project Agreements ?</p>		<p>Article 11 Article 12 Article 13 Article 14</p>	<p>-establish the main lines of the national policy in the field of public-private partnership;</p> <p>-exercise general management of public bodies in the field of public-private partnership;</p> <p><b>The Council of Ministers of the Republic of Belarus shall:</b></p> <ul style="list-style-type: none"> <li>- ensure implementation of the unitary national policy in the field of public-private partnership;</li> <li>-coordinate and control the public authorities of the Republic of Belarus;</li> <li>-approve the programs of public-private partnership development;</li> <li>-approve the regulations on maintenance of the State Register of Public-Private Partnership Agreements;</li> </ul> <p><b>The Ministry of Economy of the Republic of Belarus shall:</b></p> <ul style="list-style-type: none"> <li>-implement the unified national policy in the field of public-private partnership;</li> <li>-participate, under the established procedure, in development of draft normative legal instruments concerning public-private partnership;</li> <li>-develop the programs of public-private partnership development for the facilities being the state property only, and property of the Republic of Belarus;</li> <li>-make the public complex examination of draft public-</li> </ul>
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		<p>private partnership agreements;</p> <ul style="list-style-type: none"> <li>-promote protection of legal rights and interests of public and private partners in the course of execution of the Agreements, as well as pre-trial settlement of disputes between public and private partners;</li> <li>-maintain the State Register of Public-Private Partnership Agreements for the facilities being the state property only, and property of the Republic of Belarus;</li> <li>-monitor the Agreements;</li> </ul> <p><b>The Ministry of Finance of the Republic of Belarus shall:</b></p> <ul style="list-style-type: none"> <li>-examine matters concerning participation of the national budget in implementation of the Agreement for the facilities being the state property only, and property of the Republic of Belarus;</li> <li>-ensure the active use of the finance with the purpose of execution of the Agreement;</li> <li>-control over compliance with the national finance interests in the course of implementation of the Agreement for the facilities being the state property only, and property of the Republic of Belarus;</li> </ul> <p><b>The local executive and regulatory authorities of the Republic of Belarus shall:</b></p> <ul style="list-style-type: none"> <li>-examine matters concerning participation of the local budget in implementation of the Agreement for the facilities being the municipal property;</li> <li>-develop and implement programs of public-private</li> </ul>
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		<p>partnership in the territory of the correspondent administrative-territorial units;</p> <p>-control over compliance with the national finance interests in the course of implementation of the Agreement for the facilities being the municipal property;</p> <p>-maintain the register of public-private partnership agreements of the correspondent administrative-territorial unit;</p> <p>-monitor the Agreements;</p> <p>Regional (Minsk City) Executive Committee –is in charge of the facilities being the municipal property.</p> <p><b>The public united organizations (associations and unions) shall:</b></p> <p>-represent the interests in the social consultative and (or) councils established under the public authorities, on the matters of public-private partnership;</p> <p>-participate in the development of draft normative legal instruments on the matters of public-private partnership;</p> <p>-conclude a Agreement with the public bodies, other organizations subordinate to the Council of Ministers of the Republic of Belarus, on cooperation in settlement of the matters of development of public-private partnership, implementation of programs in this field;</p> <p>-find potential private partners for participations in the Agreements and simplify contacts between them and</p>
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			<p>potential public partners;</p> <p>-render consultant, procedural and information services to the partners;</p> <p>-arrange and carry out forums, conferences, other events on the matters of development of public-private partnership in the Republic of Belarus and abroad;</p> <p>-submit offers on improvement of normative regulations in the field of public-private partnership;</p>
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**For our general information:** *If yes, which of the following authorities are identified?*

- *National authorities (e.g.: the government, ministries, and independent agencies);*
- *Regional/state-level authorities;*
- *Local or municipal authorities; or State owned companies?*

**2.3 Private Party and Project Company**

QUESTION	ANSWER	ARTICLE	COMMENTARY
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<p>5. Is it possible for a PPP to be awarded to a foreign company, a Private Party or to a domestic company with foreign participation in the share capital and/or management (<i>without discrimination</i>)?</p>	<p>✓ ✓ ✓</p>	<p>General Provision Article 39</p>	<p>Not specified but it is most likely the intention of the government to open concessions and PPP to foreign investors as the main objective of the law is to promote inflow of investments into the national economy.</p> <p>Article 39. Guarantees for the Private Partner</p> <p>The government guarantees equality of the rights granted to the partners, as well as equal, without any discrimination, protection of the rights and legal interests of the partners.</p>
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**For our general information:** *can a PPP be awarded to public entities or to entities jointly owned by private and public entities (IPPP)? Are there restrictions imposed on such contracts?*

### 2.4 Concerned sectors<sup>3</sup>

QUESTION	ANSWER	ARTICLE	COMMENTARY
<p>6. Does the Law identify (<i>or allow identification by reference to other laws or regulations</i>) the sectors and/or types of infrastructure and/or services in respect of which a PPP may or may not be granted?</p>	<p>✓ ✓ ✓</p>	<p>Article 6</p>	<p>Objects of the Agreement</p> <p>The Agreement may be concluded in relation to the following objects and (or) a part thereof:</p> <p>motor roads, road service buildings and structures, transport infrastructure buildings and</p>

<sup>3</sup> For further information on the concerned sectors please refer to: PFI Guide, Consolidated Legislative Recommendations, Recommendation 3 and 4.

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			<p>structures, including bridges, overpasses, tunnels, vehicle parking places, vehicle passage points,</p> <p>vehicle toll points;</p> <p>aviation, railway, motor vehicle, water, pipeline transport facilities and other types of</p> <p>public transport facilities;</p> <p>ports, hydraulic structures and other facilities of inland waterway transport organizations;</p> <p>facilities for energy generation from renewable sources;</p> <p>civil engineering public infrastructure;</p> <p>public infrastructure systems;</p> <p>facilities intended for safety and law enforcement;</p> <p>facilities intended for management of natural resources and their usage;</p> <p>mobile and fixed communication and telecommunication facilities;</p> <p>the facilities used for the activities in the fields of public health and psychological support;</p> <p>educational, upbringing, cultural and social service facilities;</p> <p>facilities used for tourism, recreation and sports.</p>

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<p>7. Do the list of sectors eligible for PPP correspond to an open-ended one (<i>as opposed to being exhaustive</i>) allowing (<i>or at least not preventing</i>) PPP to be granted in numerous sectors”?</p>	<p>✓ ✓</p>		<p>The list appears to be exhaustive but large</p>
<p>1. Do the sectors eligible for PPP includes non commercial activities such as the provision of government services (such as <i>schools, hospitals, prisons, defence and housing</i>) in addition to the merchant sectors of the economy (<i>energy, transport, water, oil and gas</i>).</p> <p>2.</p>	<p>✓ ✓</p>	<p>Article 6</p>	<p>Not expressly specified but seems to be included in the list of eligible sectors:</p> <ul style="list-style-type: none"> <li>-facilities intended for safety and law enforcement;</li> <li>-educational, upbringing, cultural and social service facilities;</li> </ul>

**For our general information:** Please indicate the restrictions if any imposed by the Law on the sectors eligible for PPP:

3. **SELECTION OF THE PRIVATE PARTY**<sup>4</sup>

3.1 **General Considerations**

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Does the Law require, in principle, the Contracting Authority to select Private Parties through a competitive tender process?	✓ ✓ ✓		Yes except in exceptional circumstances
2. Is there reference in the Law to the principles of transparency, equal treatment and proportionality?	✓ ✓ ✓	Art 4 Article 20	(4) principle of legality – adherence by the partners to the existing laws of the Republic of Belarus, ensuring of rights and legal interests of the partners in accordance with the laws and the public-private partnership agreement concluded;  principle of partnership – joint economic activities of the public and private partners under equal conditions;  principle of incentive – support and encouragement of development of the public-private partnership by the President of the Republic of Belarus, Government of the Republic of Belarus and other public bodies, development of public-private partnership programs;

<sup>4</sup> For further information on the selection of the Private Party, please refer to: PFI Guide, Consolidated Legislative Recommendations, Recommendations 14 to 39 included.

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			<p>principle of equality and voluntariness – ensuring of equal access to participation in public-private partnership for partners, inadmissibility of compulsion to act as a partner against its will;</p> <p>principle of efficiency – effective use and consolidation of the financial, material, organizational resources of the partners;</p> <p>principle of transparency – information to the private partners and the public at all stages of the public-private partnership agreement, subject to its purpose, nature and significance;</p> <p>principle of environmental friendliness – implementation of the public-private partnership agreements subject to the requirements of sustainable development, environment protection.</p> <p>(20.5) Principle of proportionality</p> <p>The competition documentation should not contain requirements to the competition participants unreasonably restricting access of any competition participant to participation in the competition and (or) creating the favourable conditions of participation in the competition for any participant of the competition.</p>
<p>3. Is there a provision in the Law concerning the publication of information related to the competitive procedures in the country media</p>	<p>✓ ✓ ✓</p>	<p>Art 20.8</p>	<p>(20.8). In the case of the open competition the information and minutes of the competition</p> <p>commission stipulated by the Articles 21 – 23, 25, 26, 28, 30</p>

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<p>and in the international media (<i>for large projects</i>)?</p>			<p>– 32 of this Law are subject to placement on the official Internet site of the Republic of Belarus for placement of the information about the tenders defined by the Government of the Republic of Belarus (hereinafter – placement on the official Internet site).</p>
<p>4. Are there provisions within the Law or any special manual or recommendations governing in detail the selection of the Private Party (<i>i.e.: the pre-selection of bidders, the procedure for requesting proposals or other procedure such as competitive dialogue/two stage procedure</i>)?</p>	<p>✓ ✓ ✓</p>	<p>Chapter 5</p>	<p>Much detail of the procedure in the law</p>
<p>5. Does the Law provide that if the Contracting Authority rejects an applicant at the time of pre-selection or disqualifies a bidder, it must make public the reasons for the decision (<i>or inform the rejected bidder thereof explaining the reasons for rejection</i>)?</p>	<p>✓ ✓ ✓</p>	<p>Article 27</p>	<p>27.5. The notification about denial of admission to participation in the competition with enclosed copy of the mentioned minutes shall be sent to the applicants who have not been admitted to participation in the competition</p>

**3.2 Award of PPP**

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QUESTION	ANSWER	ARTICLE	COMMENTARY
<p>6. Does the Law provide that all proposals are ranked solely on the basis of a predefined evaluation criteria set forth in the pre-selection documents/ request for proposals?</p>	<p>✓ ✓ ✓</p>	<p>Art 22.1</p>	<p>22.1. The evaluation criteria of competition offers shall be established by the decision on conclusion of the Agreement and shall be used for evaluation of competition offers under the procedure stated by Articles 30 and 31 of this Law.</p>
<p>7. Does the Law provide for the publication of a notice of the award of the project, identifying the Private Party and including a summary of the essential terms of the project agreement?</p>	<p>✓ ✓ ✓</p>	<p>Art 20 Art 33</p>	<p>(20.9) In the case of the open competition the minutes of the competition commission stipulated by Articles 25, 26, 28, 30 and 31 of this Law shall be placed on the official Internet site within three days after signing them.</p> <p>(20.10) The Government of the Republic of Belarus shall specify the official Internet site where information about all open competitions shall be placed. Article 33. Publication and Placement of Announcement about Competition Results, Notification about Competition Results to Participants of Competition</p> <p>(33.1) Within fifteen business days from the date of conclusion of the Agreement or the decision taken by the public partner to declare the competition failed, the competition commission should place the announcement about the competition results with indication of the name (for a legal entity) or surname, name, patronymic (for an individual entrepreneur) of the winner of the competition or decision to declare the competition failed with justification of this decision, on the official Internet site.</p>

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			33.3. Any participant of the competition may ask the public partner for explanation of the competition results, and the public partner should provide the appropriate explanation in writing within thirty days from the date of receipt of such request.
8. Does the Law provide that the Contracting Authority or any other public authority maintain records of key information pertaining to the selection and award proceedings?	✓ ✓ ✓	Art 11	The Ministry of Economy maintain the State Register of Public-Private Partnership Agreements for the facilities being the state property only, and property of the Republic of Belarus;
9. If the answer to the previous question is <i>Yes</i> , does the Law provide that such record is accessible to the public, or at least to interested parties?	✓ ✓		Not specified but much detail of the transaction are to be available on Internet

### 3.3 Final negotiations

QUESTION	ANSWER	ARTICLE	COMMENTARY
10. Does the Law contain provisions regulating final negotiations (i.e. post contract award) so that transparency, equal treatment and competition are preserved?	N/A		(34.1) If the winner of the competition fails to submit the documents stipulated by the competition documentation and (or) the draft Agreement mentioned and proving security of execution of the obligations under the Agreement, to the public partner by the date of signing of the Agreement fixed by the competition documentation or the draft Agreement, the public partner shall take the decision on refusal of conclusion of the Agreement with this person for the reason

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			of evasion of the competition winner of signing of the Agreement at the time fixed.
11. Does the Law provide that the Contracting Authority has the authority to terminate negotiations with the invited bidder if it becomes apparent that the bid will not result in an agreement and start negotiations with the second ranked candidate?	✓ ✓ ✓	Art 34	34.5. In the case of adoption of the decision on denial of conclusion of the Agreement in relation to the winner of the competition the public partner may suggest conclusion of the Agreement to the competition participant which competition offer contains the best conditions next to the conditions offered by the competition winner, under the results of examination and evaluation of the competition offers.

**3.4 PPP Award without competitive procedure**

QUESTION	ANSWER	ARTICLE	COMMENTARY
12. Does the Law provide that the Contracting Authority has the authority to award a PPP without a competitive process only in limited/ exceptional circumstances?	✓ ✓ ✓	Article 20 Article 27.8 Article 30 Article 35	Only in very limited circumstances:  (20.1) The competition for the right to conclude the Agreement (hereinafter – the competition) may be open (applications for participation in the competition may be submitted by any persons) or closed (applications for participation in the competition may be submitted by the persons whom the invitations to participate in this competition have been sent to in accordance with the decision on conclusion of the Agreement).  (20.2) The closed competition shall be carried out in the case when the Agreement is to be concluded in relation to the object of the Agreement information about which is a public

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			<p>secret.</p> <p>(27.8) ;(30.6) If only one competition offer has been submitted to the competition, upon recognition of this competition as failed, the public partner may examine such offer. If such offer complies with the requirements of the competition documentation, including the competition criteria, as well as provided that the competition offer is recognized as advantageous for the public partner, the competition commission may take the decision on conclusion of the Agreement with such participant in accordance with the conditions contained in the competition offer submitted by it,</p> <p>(35.3)The Agreement may be concluded without competition with a person whose rights of</p> <p>ownership and use of the property that may be used as the object of the Agreement in accordance</p> <p>with this Law and is necessary for the activities stipulated by the Agreement, appeared of the</p> <p>grounds of the lease Agreement, provided that the following conditions are met simultaneously</p>
<p>13. Does the Law provide for a procedure, set of rules or principles to be respected when awarding a PPP without a competitive process?</p>	<p>✓ ✓</p>	<p>Article 18 Article 20 Article 35</p>	<p>(18.3) If the decision provides for conclusion of the Agreement without a competition, the decision shall fix the Agreement conditions, Agreement conclusion procedure and requirements to a private partner.</p> <p>The public partner, competition commission and competition</p>

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			<p>participants shall comply with the requirements of the laws of the Republic of Belarus concerning public secrets, in the course of the closed competition.</p> <p>(20.7) The closed competition shall be carried out under the procedure stipulated by this Law in relation to the open competition regarding the provisions which do not conflict with the clauses 2 – 7 of this Article.</p> <p>(35.2) If the Agreement is concluded without the competition, the public partner shall hold negotiations with the potential private partner for the purpose of discussion of the Agreement conditions, on the grounds of the decision on conclusion of the Agreement.</p>
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*For our general information, please specify the conditions which would allow such direct negotiations?*

**3.5 Special case of unsolicited proposals**

QUESTION	ANSWER	ARTICLE	COMMENTARY
<p>14. Does the Law provide for an adequate framework for the Contracting Authority to manage unsolicited proposals/private initiatives (i.e. a proposal relating to the implementation of a PPP that is not submitted in response to a request or solicitation by the Contracting Authority) that ensures transparency and equal treatment and does not distort competition?</p>	<p>✓ ✓</p>		<p>17.3. Legal entities and natural persons may initiate preparation of the Agreements by means of submission of the offers to the appropriate public bodies.</p> <p>Procedure not specified.</p>

**3.6 Review procedures**

QUESTION	ANSWER	ARTICLE	COMMENTARY
<p>15. Does the Law allow the bidders who claim to have suffered, or that may suffer loss or injury, to seek review of the Contracting Authority's actions or failure to act?</p>	<p>✓ ✓</p>		<p>31.4. The decision on acknowledgement of the participant of the competition may be appealed against under the procedure stipulated by the laws of the Republic of Belarus.</p>

4. **PROJECT AGREEMENT**<sup>5</sup>

4.1 **Model or list of provisions**

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Does the Law give flexibility to the negotiation of most terms of the Project agreement and if it contain (or refer to): (i) a model PPP agreement it is an optional template agreement for guidance only or (ii) a list of mandatory material provisions which must be included in the agreement, the content of such provisions is left for negotiation)?	✓ ✓ ✓	Article 36	(36) Conditions of the Agreement

4.2 **Duration and extension of the Project Agreement**

QUESTION	ANSWER	ARTICLE	COMMENTARY
2. Does the Law provide that the duration of the	XX	Art 7	the Agreement period is from 5 till 50 years;

<sup>5</sup> For further information on the project agreement definition, please refer to: PFI Guide, Consolidated Legislative Recommendations, Recommendations 12 and 40 to 68 included.



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<p>Project Agreement should depend on the length of time taken for the amortisation of the Private Party's investment and an appropriate return on the capital?</p>			<p>7.2. The public-private partnership agreement shall be concluded for the period over 50 years, only if such necessity is caused by the Agreement purpose and the results to be achieved, which is subject to rationale with financial and economic estimates.</p>
<p>3. Does the Law provide that the renewal or extension of the Project Agreement should be limited and depend on exceptional circumstances (<i>such as Contracting Authority default or an event of force majeure</i>)?</p>	<p>✓ ✓ ✓</p>	<p>Article 39</p>	<p>(39.3) If a new normative legal instrument altering the state of the private partner, including imposition of additional obligations on the private partner as compared to the normative legal instruments existed as of the moment of conclusion of the Agreement, is adopted within the period of the Agreement, it may be the grounds for alteration of the conditions of the Agreement, <b>prolongation</b> of its period and (or) payments aimed at security of the property interests of the private partner which existed at the date of conclusion of the Agreement.</p> <p>(39.5) The conditions of the Agreement may be altered (including by means of <b>prolongation</b> of its period) for the purpose of security of the property interests of the private partner existed as of the date of signing of the Agreement, in the following cases:</p> <p>by agreement of parties;</p> <p>breach or improper execution of the Agreement condition;</p> <p>decision or action taken by the public authority, preventing from execution of the obligations under the Agreement by the private partner, including unreasoned interference in the economic activities of the private partner;</p> <p>detection of incompliance of the actual information with the information stated in the competition documentation, as well</p>

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			<p>as detection of other errors or inaccuracies preventing from execution of the obligations under the Agreement by the private partner;</p> <p>detection of encumbrances on the property transferred to the partner, that were not and could not be known to the partner at the moment of conclusion of the Agreement;</p> <p>breach by the public body of the registration and other administrative procedures resulted in adverse consequences for the private partner;</p> <p>in other cases stipulated by the existing laws.</p>
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*For our general information, please provide the given minimum and maximum duration (if any)*

### 4.3 Termination of the Project Agreement

QUESTION	ANSWER	ARTICLE	COMMENTARY
4. Does the Law leave open to the Project Agreement negotiations the list of possible ground for termination and the content of to the termination provision?	✓ ✓ ✓	Article37	<p>(37) Early Termination of the Agreement</p> <p>(37.1). The public partner may terminate the Agreement unilaterally, ahead of schedule, by the written notification to the private partner in the following cases:</p> <p>as stipulated by the Agreement;</p> <p>when it is needed for the interests of the national security, public order, protection of rights and freedoms, morality,</p>

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			<p>public health and environmental protection;</p> <p>if under the procedure stated by the Law of the Republic of Belarus On Economic Insolvency (Bankruptcy) the decision has been made to initiate the bankruptcy procedure in relation to all legal entities being the private partner.</p> <p>(37.2) The private partner may terminate the Agreement unilaterally, ahead of schedule, by the written notification to the public partner in the cases stated by the Agreement.</p>
<p>5. If the answer to the previous question is <i>No</i> does the Law provide for a list of grounds of termination which does not affect the balance between the parties rights and obligations (<i>one sided provisions</i>) or the stability of the contractual relation under the Project Agreement (e.g.: <i>too large or non exhaustive list</i>)?</p>	N/A		
<p>6. Does the Law provide for (<i>or at least does not prevent</i>) compensation of the Private Party for losses incurred as a result for termination on the grounds of public interest for losses incurred as a result of public authority acts?</p>	✓ ✓ ✓	<p>Article 38 Article 36</p>	<p>(38) Compensation in Case of Early Termination of Agreement</p> <p>The partners shall fix the procedure for determination and payment of the compensation in the Agreement in the case of early termination of the Agreement, if it does not conflict with the provisions of this Law and existing laws of the Republic of Belarus.</p> <p>(36.2)the draft Agreement, subject to the specific features of the object of the Agreement, may contain other provisions</p>

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			<p>what do not conflict with the existing laws, in particular:</p> <p>procedure for alteration of the Agreement, early termination of the Agreement, procedure for compensation determination in such cases;</p> <p>reasons and results of termination of the Agreement, including force majeure circumstances;</p> <p>compensation in the case of early termination of the Agreement;</p>
<p>7. Does the Law provide for (<i>or at least does not prevent</i>) compensation of the Private Party for all cases of early termination (<i>including in case of serious breach or failure by the Private Party</i>), for fair value after depreciation of the assets financed by the Private Party?</p>	<p>✓ ✓</p>	<p>Article 36 Article 39</p>	<p>Not specifically provided for but not prohibited.</p> <p>(36.2)the draft Agreement, subject to the specific features of the object of the Agreement, may contain other provisions what do not conflict with the existing laws, in particular:</p> <ul style="list-style-type: none"> <li>- early termination of the Agreement, procedure for compensation determination in such cases;</li> </ul> <p>(39.2) If the private partner has incurred losses resulting from illegal actions (omission) of officials of the public bodies, compensation for the losses incurred are guaranteed to it in accordance with the existing laws of the Republic of Belarus.</p>

**4.4 Tariff setting, service standards**

QUESTION	ANSWER	ARTICLE	COMMENTARY
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<p>8. Does the Law provide clear guidance on all aspects of interaction between the bodies that have the power to award PPP and the bodies that regulate tariffs and service standards?</p>	<p>✓ ✓</p>	<p>Article 21</p>	<p>(21.3) If in the course of the activities stipulated by the Agreement, made by the private partner the manufactured goods are sold, works are fulfilled and services are rendered at the prices (rates) stated in the Agreement and (or) subject to the mark-ups fixed for the prices (rates), and the long-term parameters of regulation of the private partner's activities are established under the decision of the public partner, the competition documents is to include such parameters.</p>
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**4.5 Financial responsibilities of the Private Party and Contracting Authority**

QUESTION	ANSWER	ARTICLE	COMMENTARY
<p>9. Does the Law provide that the Private Party can collect tariffs or fees for the use of the facility or its services?</p>	<p>✓ ✓ ✓</p>	<p>Article 36.2</p>	<p>(36.2) the draft Agreement, subject to the specific features of the object of the Agreement, may contain other provisions what do not conflict with the existing laws, in particular:</p> <ul style="list-style-type: none"> <li>- the right of the private partner to collect payments from end users for rendering the services stated by the Agreement;</li> </ul>
<p>10. Does the Law provide for the possibility of fixed and/or consumption-based payments to the Private Party by the Granting Authority or other public authorities (<i>in the case of Power Purchase Agreement , shadow tool or PFI for instance</i>) ?</p>	<p>✓ ✓ ✓</p>	<p>Article 16.2</p>	<p>The agreement may provide for the:</p> <ul style="list-style-type: none"> <li>-purchase of output of the private partner's activities or co-financing of the private partner's activities out of the funds of the national, local budgets, including for the purpose of ensuring the minimal income from the private partner's activities for operation of the object of the Agreement;</li> <li>-payment for the certain volume of goods (works, services)</li> </ul>

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			<p>produced by the private partner, at the rates (prices) fixed by the Agreement;</p> <p>-compensation to the private partner of the minimal consumption volume, under the Agreement conditions, in case if such conditions can not be met otherwise.</p>
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5. **SECURITY AND SUPPORT ISSUES<sup>6</sup>**

5.1 **Security Interests**

QUESTION	ANSWER	ARTICLE	COMMENTARY
<p>1. Does the Law provide for (<i>or does not specifically prevent</i>) a Private Party to create security interests over the project assets, rights and proceeds or other valuable guarantees related to the project?</p>	XX	<p>Article 15 Article 40</p>	<p>(15.2) A private partner may not alienate, pledge or otherwise encumber the property stated in clause 1 of this Article, or make any other actions as a result of which this property may become ownership of other person</p> <p>(40.1) Guarantees for the Public partner :</p> <p>Until execution of all conditions of the Agreement, the private partner may not alienate, pledge or take any other actions in relation to the object of the Agreement without consent of the public partner.</p>
<p>2. If the answer to the previous question is <i>Yes</i>, does the Law clearly state which types of security can be provided and include some of the most common type of guarantees in project financing (such as those listed in the request for general information below)?</p>	N/A		

**For our general information, please can you confirm whether a Private Party may pledge or assign by way of security:**

<sup>6</sup> For further information on support and financial securities, please refer to:PFI Guide, Consolidated Legislative Recommendations, Recommendations 13, 49, 57 and 60.

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- *the proceeds and receivables arising out of the PPP;*
- *the assets for which it has rights of use under a project agreement;*
- *its property;*
- *shares of the Project Company;*
- *the project agreement; or*

*obtain other valuable guarantees (please specify)?*

**5.2 Government support**

QUESTION	ANSWER	ARTICLE	COMMENTARY
<p>3. Does the Law provide for (<i>or does not specifically prevent</i>) the public authority to provide support to the Contracting Authority and a guarantee for the proper implementation of the PPP by the Contracting Authority?</p>	<p>✓ ✓ ✓</p>	<p>Article 16</p>	<p>(16) Financial Backing of Agreements</p> <p>(16.1) The Agreements are financed out of the funds of public and private partners, in the scope and at the times fixed by the Agreement.</p> <p>(16.2) The public partner shall ensure implementation of the Agreements out of the funds of the national, local budgets, in accordance with the laws of the Republic of Belarus, including the following forms:</p> <p>subsidies for the works to prepare the competition for conclusion of the Agreement;</p> <p>guarantees of the Government of the Republic of Belarus,</p>

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		<p>local executive and regulatory authorities for the credits (loans) used by the private partner for execution of the obligations stipulated by the Agreement;</p> <p>compensations to the private partners, if the Agreement provides for the social consumer support measures to private partners;</p> <p>changes in the times fixed by the laws for payment of taxes, fees (duties) and fines, normative distribution of proceeds;</p> <p>purchase of output of the private partner's activities or co-financing of the private partner's activities out of the funds of the national, local budgets, including for the purpose of ensuring the minimal income from the private partner's activities for operation of the object of the Agreement;</p> <p>payment for the certain volume of goods (works, services) produced by the private partner, at the rates (prices) fixed by the Agreement;</p> <p>compensation to the private partner of the minimal consumption volume, under the Agreement conditions, in case if such conditions can not be met otherwise.</p> <p>(16.3) The financial backing of the Agreement in the forms listed in clause 2 of this Article may also be made out of the funds of investment programs.</p> <p>(16.4) Within the Agreement one or several forms of financial backing may be used.</p> <p>(16.5) The Agreement conditions may provide for combination of different forms of property and financial backing.</p>
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			(16.6) Scopes and times of participation of the public partner in financing of the objects of the Agreement may be altered under the established procedure in cases stipulated by the laws and the Agreement.
4. Does the Law provide for (or does not specifically prevent) the Public Authority to provide financial or economic support for the implementation of PPP?	✓ ✓ ✓	Article 16	See above
5. If the answer to the previous question is Yes, does the Law clearly state which public authorities may provide such support and which types of support can be provided? (i.e. tax and customs benefits; foreign exchange protection (convertibility and transfer guarantees; subsidies; equity or loan participation)?	✓ ✓ ✓	Article 16	See above

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5.3 Lenders' rights

QUESTION	ANSWER	ARTICLE	COMMENTARY
6. Does the Law provide for the Parties to arrange the financing with reasonable flexibility under the Project Agreement without strict time constraints or other constraints ( <i>except with respect to security package and government support</i> )?	XXX		
7. Does the Law provide, in the event of the default of the Private Party for the lenders to “ <i>step-in</i> ” or substitute the Private Party with a qualified new Private Party without initiating a new tender process?	XXX		

**6. SETTLEMENT OF DISPUTES AND APPLICABLE LAWS<sup>7</sup>**

**6.1 Settlement of disputes**

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Does the Law permit the Contracting Authority to enter into a Project Agreement that is subject to international arbitration?	✓ ✓	Article 42  67 IC	42.if agreement is not reached, the disputes shall be settled in accordance with the conditions stipulated by the Agreement and existing laws of the Republic of Belarus.  67 IC: If a foreign investor is a party to a Project Agreement
2. Has the government of the country ratified the Washington Convention on the Settlement of Investment Disputes (ICSID) (1965)?	✓ ✓ ✓		.
3. Has the government of the country ratified the New York Convention on recognition and enforcement of foreign arbitral awards (1958)?	✓ ✓ ✓		

<sup>7</sup> For further information on the settlement of disputes, please refer to: PFI Guide, Consolidated legislative Recommendations, Recommendations 57, 69 and 71.

6.2 Applicable laws

QUESTION	ANSWER	ARTICLE	COMMENTARY
<p>4. Does the Law permit (<i>or does not prevent</i>) the Contracting Authority) to enter into side agreements to the Project Agreement (such as <i>a direct agreement with the lenders to the project or a support and guarantee agreement in respect of the Project Agreement</i>) that is governed by foreign law.</p>	<p>✓ ✓</p>		<p>Does not prevent. Only if a foreign investor is a party to the Agreement.</p>
<p>5. Has the country ratified any international convention for the protection of foreign investments?</p>	<p>✓ ✓ ✓</p>		<p>Convention on the Protection of Investors' Rights (Moscow, March 28, 1997) Numerous bilateral agreements.</p>

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