

Presentation of the study on extending the Energy Community Treaty to include the rules on public procurement

15.09.2016



Presentation of the study – Assessment Reports

- ◆ Task 1 Assessment of the existing practices in procurement of energy by public bodies and public service providers and their impact on the functioning of the energy markets in the Energy Community Contracting Parties
- ◆ Task 2 Proposal of necessary changes in the legislation and associated costs and benefits for the power and gas sector utilities and for customers
- ◆ Task 3 Assessment of the relevance Directive on concession contract (Directive 2014/23/EU) for the gas and power market in the Energy Community
- ◆ Task 4 EnC Treaty amendments and their implementation

Task 1 Comparative presentation and identification of diverging provisions for rules on PP in the Contracting Parties

Rokas - Mira Todorovic Symeonides

- ◆ Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC ("**Classic Directive**")
- ◆ Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC ("**Utilities Directive**")
- ◆ Directive 89/665/EC and Directive 92/13/EEC as amended with 2007/66/EC ("**Remedies Directives**")

Question 1: Do public procurement rules apply to contracting entities (contracting authorities, public undertakings and entities operating on the basis of special or exclusive rights), as defined in the Utility Directive?

Level of compliance with the EU Directives	CPS	Comments
Full Compliance	Albania	Definitions in the respective legislation and regulation are substantially in compliance with the UD
	Bosnia and Herzegovina	
	FYR of Macedonia	
	Montenegro	
	Serbia	
	Kosovo*	
	Ukraine	
Partial compliance	Moldova	The PP Law does not apply to the energy sector and there are no other PP law which would apply. Definitions of the entity with exclusive rights should be harmonised
No compliance		

Question 2.a: Do public procurement rules apply when contracting authorities purchase electricity or gas for their own needs (as consumers)?

Level of compliance with the EU Directives	CPS	Comments
Full Compliance	FYR of Macedonia	General rules on PP apply and the contracting authorities fully apply it in practice
	Serbia	
Partial compliance	Ukraine	General rules should apply but in practice it is not regularly applied (often it is negotiated procedure)
	Bosnia and Herzegovina	Although the law explicitly does not require the application of the PP rules, it is evidenced that some authorities started to apply them in practice
No compliance	Montenegro	Contracting authorities are not obliged and do not apply these rules in practice
	Moldova	
	Albania	
	Kosovo*	

Question 2.b: Do public procurement rules apply to the selection of the PSO provider or purchase of electricity or gas in order to provide the PSO (if there is no PP for the selection of the PSO provider)?

Level of compliance with the EU Directives	CPS	Comments
Full Compliance	Montenegro	Not applied in practice yet, the first PP procedure will be organised within 12 months from the enactment of the Energy Law (i.e. by the end of 2016)
	Serbia	Procedures are organised both for electricity and gas in accordance with law
Partial compliance	Albania	PP rules are partially in compliance. The Albanian Energy Authority (ERE) chooses the Last Supplier Resort (LSR) according to a specific provision that allows auction after a public notification
No compliance	Kosovo*	No competitive procedure for the selection of the provider nor for the procurement of energy
	Bosnia and Herzegovina	
	Moldova	
	FYR of Macedonia	
	Ukraine	

Question 2.c: Do public procurement rules apply to the granting of the support scheme for renewable energy (to meet the 2020 targets and to comply with State Aid Guidelines 2014-2020)?

Level of compliance with the EU Directives	CPS	Comments
Full Compliance		
Partial compliance		
No compliance	All CPs non compliant	

Question 2.d: Do public procurement rules apply to TSOs when obtaining balancing and ancillary services

Level of compliance with the EU Directives	CPS	Comments
Full Compliance	Serbia	For gas the law only states that it is a transparent procedure while for electricity the PP procedures clearly apply
	Albania	Offers are collected from the market participants in order to select the best offer
	Kosovo*	
Partial compliance	Montenegro	The law regulates only that it should be a transparent procedure; Need to be more precisely regulated
	Moldova	The law provides only that the rules used by the operator for such purposes shall be objective, transparent and non-discriminatory. The terms and tariffs shall be established in non-discriminatory ways by the operator and shall be approved by the Agency
	Bosnia and Herzegovina	Applicable for electricity not for gas
No compliance	FYR of Macedonia	They are neither obliged by the law nor apply in practice
	Ukraine	The application of the PP rules is excluded by law for these procedures

Question 2.e: Do public procurement rules apply to the construction of new production facilities?

Level of compliance with the EU Directives*	CPS	Comments
Full Compliance	Bosnia and Herzegovina	The concession law should apply to the production plants using hydro or some other resources also in projects of public interest, particularly if there are no sufficient applicants or there are several of them.
	Montenegro	
	FYR of Macedonia	
	Serbia	Application of the Concession Law will be further elaborated as part of the Task 4;
	Ukraine	In case of Kosovo* there is no Concession Law but the PP law applies in all cases of procurement of new facility by public / in public interest.
	Kosovo*	
Partial compliance	Albania	Clear application to the energy sector in case of public interest for the project is missing.
	Moldova	It seems that the rule does not apply to the energy sector until the new Utilities PP law is passed; however it is the matter of interpretation of the current provisions of the law. Auctions would apply if there are no interested party for a plant which the CP intends to construct. Clear application to the energy sector would be preferable.
		Auctions would apply if there are no interested party for a plant which the CP intends to construct and general if there is public interest for such construction. It seems however such application is optional.
No compliance		

Question 2.f: Do public procurement rules apply to the construction of interconnections or extension of the grid?

Level of compliance with the EU Directives	CPS	Comments
Full Compliance	Bosnia and Herzegovina	<p>The concession law should apply to the production plants using hydro or some other resources also in projects of public interest, particularly if there are no sufficient applicants or there are several of them.</p> <p>Application of the Concession Law will be further elaborated as part of the Task 4;</p> <p>In case of Kosovo* there is no Concession Law but the PP law applies in all cases of procurement of new facility by public / in public interest.</p>
	Montenegro	
	Serbia	
	FYR of Macedonia	
	Ukraine	
	Albania	
	Kosovo*	
Partial compliance		
No compliance	Moldova	There is no application of the PP rules

Question 3: Are there general principles (transparency, equal treatment, free competition and non-discrimination) applicable to all public procurements (regardless to value or subject matter)?

Level of compliance with the EU Directives	CPS	Comments
Full Compliance	All CPs compliant	
Partial compliance		
No compliance		

Question 4: What are the main exclusions and including thresholds?

Level of compliance with the EU Directives	CPS	Comments
Full Compliance	Montenegro, Serbia, Ukraine, Albania, Bosnia and Herzegovina, Moldova	<ul style="list-style-type: none"> - lower thresholds - less exceptions than in the UD - additional exceptions with minor effect
	FYR of Macedonia	<ul style="list-style-type: none"> - the same thresholds - only a few exceptions in accordance with UD
	Kosovo*	<ul style="list-style-type: none"> - except socially owned enterprises
Partial compliance		
No compliance		

Question 5: What types of procurement procedures are available and what are the prescribed time limits?

Level of compliance with the EU Directives	CPS	Comments
Full Compliance	Bosnia and Herzegovina	To consider introducing Innovation Partnership (art. 49 of the UD).
Partial compliance	Albania	Advise to increase some of than deadlines from 20 to 30 and to introduce possibility for the periodic indicative notice and electronic procurement in order to reduce the deadlines for the submission of offers; also to consider introducing the rest of the UT types of the procedures.
	Montenegro	Advise to increase some of than deadlines from 12 and 22 to 30 and to introduce possibility for the periodic indicative notice and electronic procurement in order to reduce the deadlines for the submission of offers; also to consider introducing the rest of the UT types of the procedures.
	Moldova	The deadlines should be increased for the high value provided in the Directives. Additional types introduced in accordance with the UD.
	FYR of Macedonia	In the negotiated and simplified competitive generally the procedures should be increased to 15 days when the high value procedures (above the EU thresholds) should be increased to the UD minimums. to introduce possibility for the periodic indicative notice and electronic procurement in order to reduce the deadlines for the submission of offers.
	Serbia	The deadlines should be harmonised with the UD. Any deadline below 15 days should be increased. Deadlines may be reduced in case of electronic procurement.
	Ukraine	There is no restricted procedure and Innovation Partnership; No deadlines for negotiated procedures causing breach of the transparency principle and inconsistency of the application by different authorities and lack of predictability.
No compliance	Kosovo*	The deadlines should be significantly increased in both for low and high value; there should be no deadlines of 5 and 1 days; to introduce possibility for the periodic indicative notice and electronic procurement in order to reduce the deadlines for the submission of offers; further diversification of procedures in compliance with the UD.

Question 6: What techniques and instruments are available (framework agreements, dynamic purchasing systems, electronic auctions, electronic catalogues, centralized purchasing activities/bodies)?

Level of compliance with the EU Directives	CPS	Comments
Full Compliance	Serbia	Only electronic catalogues are not available
	Bosnia and Herzegovina	
Partial compliance	FYR of Macedonia, Kosovo* and Moldova	They provide for several instruments, advise to develop more instruments
	Albania, Montenegro and Ukraine	Provide only for two instruments each

Question 7: What rules apply to contracts between contracting authorities or entities and their affiliated entities?

Level of compliance with the EU Directives	CPS	Comments
Full Compliance	Serbia, Montenegro and FYR of Macedonia	Note that Moldova does not make exception for such procurement
Partial compliance	Ukraine	There is still no full compliance
No compliance	Albania, Bosnia and Herzegovina, Moldova and Kosovo*	The exemption from the procurement rules is too broad. The exception should be considered only as an exception when there is full control over such entity and when 80% of the services are provided by it

Question 8: What are the applicable award criteria? Is it possible to exclude a participant for abnormally low tenders?

Level of compliance with the EU Directives	CPS	Comments
Full Compliance	Albania, Bosnia and Herzegovina, Moldova, Kosovo*, Montenegro and Serbia	The award sub-criteria in Moldova should include environmental and social criteria
Partial compliance	FYR of Macedonia	The most economically advantageous offer is regulated to be an exception, not a rule
	Ukraine	Does not contain provisions on the abnormally low offers
No compliance		

Question 9: What are the grounds for amendments of a PP agreement?

Level of compliance with the EU Directives	CPS	Comments
Full Compliance	Albania, Bosnia and Herzegovina, FYR of Macedonia, Kosovo*, Moldova, Serbia	Minor and justified modifications are allowed exceptionally
Partial compliance	Ukraine	Significant number of permitted and regulated reasons for the amendments
No compliance	Montenegro	Modification of the agreement is not regulated or prohibited, leaving the space for different interpretation or even modification of agreements unrestrictedly

Question 10: What are the available remedies?

Level of compliance with the EU Directives	CPS	Comments
Full Compliance	Albania, Bosnia and Herzegovina, Montenegro, Serbia	Independent appeal body, automatic suspension of the procedure, pre-judicial procedure and judicial procedure
Partial compliance	FYR of Macedonia	No independent monitoring (the PP Bureau is part of the Ministry)
	Kosovo* and Ukraine	Deadlines for the submission of the appeal and for deciding are too short for complex matters
	Moldova	The appeal body (pre-judicial review) is subordinated to the Ministry
No compliance		

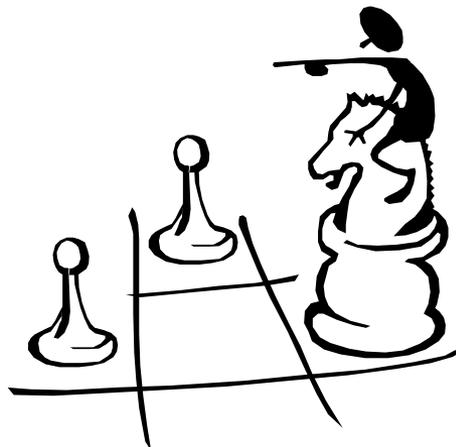
Task 2 Proposal of necessary changes in the legislation and associated costs and benefits for the power and gas sector utilities and for customers

PLANET S.A. - Anders Plejdrup Houmøller



- ◆ a) Specification of the applicable procurement rules in the Contracting Parties which create undue obstacles for cross border competition and market integration, in particular for network energy.
- ◆ b) – c) What to do about this.
- ◆ d) An overview of costs and benefits of proposed changes for the power and gas sector utilities and for customers.

The recommendation



The recommendation is that the Contracting Parties use the public procurement rules as prescribed in EU's Directives

Why this recommendation?

This presentation: answer from the perspective of Task 2.

Part 3 of this workshop will give you the overview:
an answer based on all the project's assessment reports.

Why are we doing this?

- ◆ Ultimately, the goal is to establish deep and liquid markets for networked energy.
- ◆ Thereby providing
 - ◆ Consumers with energy at market based prices.
 - ◆ Energy security.
- ◆ Concerning *market based prices*
 - ◆ Obviously, too high prices are unfair for consumers.
 - ◆ However, too low prices are also harmful, as this will either
 - ◆ Drain the state's coffers, or
 - ◆ Cause energy shortages as the suppliers will not invest.



Public Procurement (PP) rules – 1

- ◆ PP rules makes it easier for new entrants to establish themselves at the domestic markets.
- ◆ Assume a player from country A wants to establish himself as a supplier in a neighbouring country B.
- ◆ Participating in tenders for selling to big or medium-sized consumers is a nice way of establishing a first foothold in a new market
 - ◆ In contrast: trying to sell to households or other small consumers is a very hard way to enter a new market.
- ◆ Hence, public procurement rules lower the entrance barrier for new players.



Public Procurement (PP) rules – 2 (PSO Public Service Obligation)



- ◆ The same applies for the selection of the PSO provider
 - ◆ Or purchase of energy to the PSO provider.
- ◆ For all the Contracting Parties, in practice public procurement rules do not apply.
- ◆ This is unfortunate for the reason sketched above
 - ◆ Having PP procedures for this will create an path to the market for new players.
- ◆ In general, the public procurement rules should be applied as broadly as possible
 - ◆ For the reasons noted above
 - ◆ And other reasons to be discussed later.

Public Procurement (PP) rules – 3 Harmonization

- ◆ Concerning undue obstacles for cross border competition and market integration:
- ◆ For a company wanting to operate in several countries, non-harmonization of market rules is a huge problem.
- ◆ Harmonized (and simple) PP rules are one way of eschewing this problem.
- ◆ For a given company, setting up shop in several countries in the region will be easier if the countries have the same (or almost the same) rules.
- ◆ Harmonizing the rules for market players will further market integration and competitive energy markets.



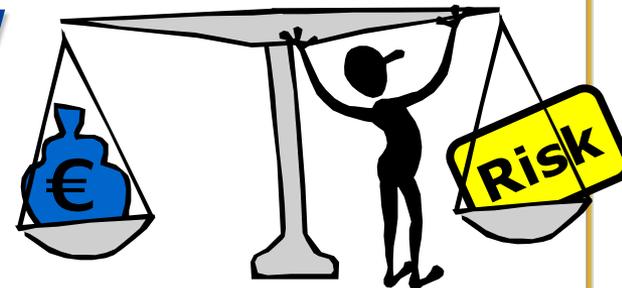
Public Procurement (PP) rules – 4 Harmonization



- ◆ Probably, the simplest way of achieving harmonization is to implement EU's Directives.
- ◆ For the Contracting Parties, to invent own common rules would correspond to re-inventing the wheel.
- ◆ Therefore, the recommendation is to implement the Directives eventually.

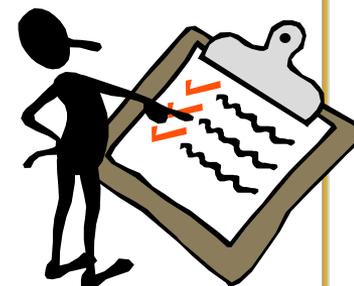
Using Public Procurement (PP) rules For purchasing electricity

- ◆ Electricity cannot be stored.
- ◆ This must be taken into account
 - ◆ Both by the current contracts and (future) PP contracts.
- ◆ As a starting point: a contracting party may take the terms in the current contract and use this in the PP process.
- ◆ However, one of the advantages of a PP process is that the contracting party is encouraged to consider:
 - ◆ *Which terms do we want in the contract with our electricity supplier?*
- ◆ Buying (and selling) electricity is basically a question of risk management.

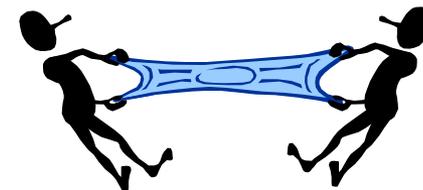


Three-thronged approach to deep a liquid markets for networked energy

- ◆ Concerning undue obstacles for cross border competition and market integration:
- ◆ This presentation has focused on PP rules, as this was Task 2.
- ◆ However, in order to get cross-border competition and market integration, a three-thronged approach is recommended:
- ◆ Harmonization of market rules for networked energy
 - ◆ For example, adopt EU's PP Directives.
- ◆ For new players at the market, secure low (a preferably harmonized) entrance barriers.
- ◆ Establish well-functioning cross-border trading systems.
- ◆ All three measures are necessary.



Costs and benefits for the power and gas sector utilities and for customers



- ◆ For the consumers: energy at market-based prices
 - ◆ Which may mean higher prices, in some cases.
- ◆ For the companies operating in the energy markets, it will launch the famous *creative destruction*
 - ◆ The competitive companies will flourish and grow, while the non-competitive will wither.
 - ◆ Naturally, the potential withering will create a lot of resistance towards the changes
 - ◆ This is a major source of the political obstacles we'll face on the route towards competitive energy markets.

Task 3 Assessment of the relevance Directive on concession contract (Directive 2014/23/EU) for the gas and power market in the Energy Community

Bird&Bird - Efthymios Bourtzalas

- ◆ Analysis of the relevant rules and practices applied to concessions in the EU and in the CPs; and
- ◆ Impact assessment of the incorporation of the CoD by the CPs – in particular an assessment of the benefits of such incorporation for the CPs and the required steps for implementation in each CP.

New legal framework in the EU: The EU Directive on concessions ("CoD")

- ◆ There is an express regulatory regime for concessions within the EU for the first time —→ The CoD filled a gap.
- ◆ Concessions contribute to the progress of competition in the internal market:
 - ◆ making it possible to benefit from private sector expertise; and
 - ◆ helping achieve efficiency and innovation.
- ◆ Why a separate directive on concessions? —→ Their specific nature.
- ◆ The CoD is intended:
 - ◆ to provide a minimum level of co-ordination of national procedures for the award of concession contracts —→ More flexible award procedures required; and
 - ◆ to ensure adequate judicial protection of candidates and tenderers in the award procedures.

Analysis of the relevant rules and practices applied to concessions in the EU and in the CPs

- ◆ Through the use of a questionnaire, we considered whether:-
 - ◆ the CPs have introduced any legislation concerning concession regulation in the energy sector; and
 - ◆ the scope and content of such legislation compared to the provisions of the CoD focusing on the energy sector.

- ◆ Following the comparison and analysis of the applicable legislation in each CP in the context of the above assessment, we have drawn the following conclusions with regard to:-
 - ◆ the rules on concessions that reflect the standards introduced by the CoD; and
 - ◆ the main inconsistencies between the rules of certain CPs and the CoD.

Question 1: Is there a precise definition in the CP's legislation of what constitutes "*concession*", "*works concession*" or "*services concession*" as in the CoD? Is there any definition in the CP's legislation of what constitutes "*mixed contracts*"?

- ◆ The CoD provides for precise definitions of "works concession" and "services concessions" and sets out rules on how to deal with mixed contracts (i.e. in accordance with the main subject of the contract, if the different parts which constitute the contract are not objectively separable).

Level of compliance	CP	Comments
Full Compliance	Albania	Similar definition as in the CoD
	FYR of Macedonia	Similar definition as in the CoD
	Kosovo*	Similar definition as in the CoD – clarification of the definition of mixed contracts is required.
	Serbia	Similar definition as in the CoD – clarification on the rules applying to mixed contracts and introduction of a definition in the legislation on concessions is required.
	Ukraine	Similar definition as in the CoD – clarification on the definition of "mixed contracts" is required.
Partial compliance	Bosnia and Herzegovina	The definitions of concessions are sufficiently precise and there is no definition of mixed concessions.
	Moldova	Clarification on the definitions of "works concession" and "services concession" and the introduction of the definition of "mixed contracts" is required.
	Montenegro	The introduction of the definition of "mixed contracts" and the determination of the rules applying to such contracts is required.

Question 2: Is there a precise definition in the CP's legislation of what constitutes "contracting authorities" and "contracting entities" as in the CoD?

- ◆ The CoD adopted the definitions laid down in the CD and the UD for "contracting authorities" and "contracting entities" – Articles 6 and 7

Level of compliance	CP	Comments
Full Compliance	Kosovo*	The definitions are similar to the CoD and clear.
	Montenegro	
	Serbia	
Partial compliance	Albania	Narrow definition of contracting authorities and no definition of contracting entities.
	Bosnia and Herzegovina	Narrow definition of contracting entities as it does not include public undertakings.
	FYR of Macedonia	The definition of contracting authorities is similar to the definition of the CoD but more narrow as it does not include public undertakings. The definition of contracting entities refers to the "concessionaire" as a recipient of concession and not to the "grantor" of a concession – divergence with the CoD which can be confusing for contracting parties within the EU.
	Ukraine	Narrow definition of State authorities as it seems not to include contracting entities.
Non-compliance	Moldova	Definitions of what constitutes "contracting authorities" and "contracting entities" should be introduced.

Question 3: Is there any specific reference in the CP's legislation to activities that are covered by the rules on concessions related to gas and/ or electricity?

- ◆ The CoD provides a list of utility activities similar to those under the UD, namely (i) gas and heat, (ii) electricity, (iii) transport services, (iv) ports and airports, (v) postal services, (vi) extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels (Annex II)

Level of compliance	CP	Comments
Full Compliance	Albania	Specific reference exists in the CP's legislation
	Kosovo*	
	FYR of Macedonia	
	Montenegro	
	Serbia	
	Ukraine	Specific reference exists in the CP's legislation - similar to Annex II of the CoD.
Partial compliance	Bosnia and Herzegovina	Reference only to limited activities.
Non-compliance	Moldova	No reference is laid down in the CP's legislation.

Question 4: Are the principles of equal treatment, non-discrimination and transparency in procurement proceedings expressly laid down in the CP's legislation?

- ◆ The CoD provides that the contracting and entities must comply with general principles of law, namely equal treatment, non-discrimination, transparency and proportionality – in the spirit of CJEU case-law and soft law instruments.

Level of compliance	CP	Comments
Full Compliance	Albania	The above principles are laid down in the legislation of the CP.
	Bosnia and Herzegovina	
	FYR of Macedonia	
	Kosovo*	
	Montenegro	
	Serbia	
Partial compliance	Ukraine	It seems that the principles apply with regard to concession but are not included in the Law on Concessions.
Non-compliance	Moldova	The principles of equal treatment, non-discrimination and transparency should be introduced in the legislation.

Question 5: Does a threshold as the one of EUR 5,225,000 provided in the CoD apply? Are there any rules in the CP's legislation providing guidance as to the method of calculation of the value of a concession?

- ◆ The CoD applies to concessions which exceed the value of EUR 5,225,000 – Articles 8 and 9 and recital 23.

Level of compliance	CP	Comments
Full Compliance	Albania	Much lower threshold than the one in the CoD.
	Serbia	
Partial compliance	Kosovo*	Certain requirements apply to concession with a high value.
Non-compliance	Bosnia and Herzegovina	No threshold applies.
	FYR of Macedonia	
	Moldova	
	Montenegro	
	Ukraine	

Question 6: In case there are rules regulating the procedures for the award of concessions in the CP, is there any specific exclusion from the scope of these rules laid down in the CP's legislation?

- ◆ The CoD provides for a list of exclusions similar to the exclusions set out in the CD and the UD – e.g. exclusive or special rights

Level of compliance	CP	Comments
Full Compliance	Albania	Similar exclusions as in the CoD.
	Kosovo*	
Partial compliance	FYR of Macedonia	It seems that the scope of application is determined but the exclusions are not set out with precision in the concession legislation.
	Ukraine	Limited exclusions to the case of the application of international rules.
No compliance	Bosnia and Herzegovina	No exclusions apply.
	Moldova	
	Montenegro	
	Serbia	

Question 7: Is there any specific rule in the CP's legislation limiting the duration of concessions? Does the limit of five years provided in the CoD apply and, if not, what is the limit?

- ◆ The duration of a concession must be limited. If the concession has a duration of more than five years —→ indispensable to recoup investment plus a reasonable return on the invested capital.

Level of compliance	CP	Comments
Partial compliance	Albania	Maximum duration of 35 years - justification of such duration seems to apply.
	Bosnia and Herzegovina	Duration of 30 - 50 years – justification depending on the object of the concession and investments.
	FYR of Macedonia	Maximum duration of 35 years – justification on the basis of a feasibility study.
	Kosovo*	No maximum duration, but justification of the duration on a case by case basis.
	Montenegro	Duration of 30 - 60 years – justification on the basis of a feasibility study.
	Serbia	Duration of 5 - 50 years – justification of the duration and existence of the concept of "reasonable time".
	Ukraine	Duration of 10 - 50 years - three years in specific cases – no justification on the duration.
Non-compliance	Moldova	No maximum duration applies and no justification is provided.

Question 8: Does the CP's legislation lay down specific time limits regarding:

- (i) the submission of an application or tender?
- (ii) the duration of the procurement procedure?

Are there any rules on the selection of candidates and the award criteria laid down in the CP's legislation?

- ◆ Specific time limits set out in the CoD - e.g. submission of tenders: minimum of 30 days
- ◆ No specific procedures for the award of concessions set out in the CoD
- ◆ Award criteria: professional and technical ability and financial economic standing & environmental, social or innovation related

Level of compliance	CP	Comments
Full Compliance	Albania	Similar provisions apply as in the CoD.
	Bosnia and Herzegovina	
	FYR of Macedonia	
	Kosovo*	
	Serbia	
	Ukraine	
Partial compliance	Montenegro	No time limits are set in the legislation.
Non-compliance	Moldova	No time limits, no set selection criteria apply.

Question 9: Are there any rules on the performance of concessions laid down in the CP's legislation, in particular rules on: (i) subcontracting (ii) the modification of the contract during the contract term (iii) termination of concessions (iv) monitoring and reporting?

- ◆ The rules on the performance of concessions are similar to the rules set out in the CD and UD – Articles 42 – 45

Level of compliance	CP	Comments
Full Compliance	Albania	Similar provisions as in the CoD apply.
	Kosovo*	
	Serbia	
	Ukraine	
Partial compliance	Bosnia and Herzegovina	No rules on subcontracting apply – harmonisation of the rules at different levels of administration may be required.
	FYR of Macedonia	No rules on subcontracting apply.
	Montenegro	No rules on modification apply.
Non-compliance	Moldova	No specific rules apply.

Question 10: Are there specific rules in the CP's legislation on the judicial review of the decisions of the contracting authorities and/ or the judicial protection of unsuccessful bidders? Does the CP's legislation or decisional practice make any reference to the Remedies Directives?

- ◆ The Remedies Directives apply: the standstill rules and the rules putting an immediate halt to the procurement process following a judicial challenge

Level of compliance	CP	Comments
Full Compliance	Albania	Similar provisions as in the CoD apply.
	Bosnia and Herzegovina	
	Montenegro	
	Kosovo*	
	Ukraine	
	FYR of Macedonia	
	Serbia	There are references to the Remedies Directives in the CP's legislation.
Non-compliance	Moldova	No rules apply.

Conclusions (I) - Rules on concessions which reflect the standards introduced by the CoD

- ◆ The majority of the CPs' legislation:
 1. clearly defines the scope of the rules on concessions in an adequate and clear manner and in line with the definitions of concessions set out in the CoD;
 2. expressly applies in relation to activities in the gas and electricity sectors;
 3. expressly provides for the application of the general principles of equal treatment, non-discrimination and transparency in relation to the award of concession contracts;
 4. apply the rules with regard to the procedure for the award of concessions: (i) specific time limits for the award procedure, (ii) the duration of the procurement procedure; (iii) the application of specific criteria for the selection of candidates; and
 5. judicial guarantees apply in relation to concession contracts.

Conclusions (II) - Rules on concessions of CPs diverging from the CoD

- ◆ Inconsistencies in relation to the following key issues:
 1. definition of "*contracting authorities*" and "*contracting entities*" - e.g. narrow definitions;
 2. only two CPs (Albania and Serbia) apply the concession rules only to contracts whose monetary value is equal to or greater than a certain threshold;
 3. most CPs do not lay down exclusions from the scope of application;
 4. the vast majority of CPs have set a maximum duration for concession contracts (which fall within the range of 30-60 years);
 5. there are several aspects in the legislation of certain CPs concerning the performance of concessions that could be improved.

Impact assessment of the incorporation of the CoD by the CPs – Assessment of the benefits of that incorporation for the CPs

- ◆ Clear and simple framework for concessions above a certain threshold
- ◆ Minimum coordination of national procedures
- ◆ Wider cooperation between public authorities and the private sector leading to:
 - ◆ more private financing of projects;
 - ◆ less involvement of public authorities;
 - ◆ exploitation of experience and practices of the private sector; and
 - ◆ more efficiency.

Impact assessment of the incorporation of the CoD by the CPs – Required steps for implementation in each CP

- ◆ Based on the analysis of Task 3(a), the level of the currently applicable legislative framework on concessions in the CPs, both in general and in particular in the energy sector, is fairly in line with the CoD.

CPS	Albania	Bosnia and Herzegovina	FYR of Macedonia	Kosovo*	Moldova	Montenegro	Serbia	Ukraine
Question 1: definitions	Green	Yellow	Green	Green	Yellow	Yellow	Green	Green
Question 2: definitions	Yellow	Yellow	Yellow	Green	Red	Green	Green	Yellow
Question 3: scope/energy sector	Green	Yellow	Green	Green	Red	Green	Green	Green
Question 4: principles	Green	Green	Green	Green	Red	Green	Green	Yellow
Question 5: threshold	Green	Red	Red	Yellow	Red	Red	Green	Red
Question 6: exclusions	Green	Red	Yellow	Green	Red	Red	Red	Yellow
Question 7: duration	Yellow	Yellow	Yellow	Yellow	Red	Yellow	Yellow	Yellow
Question 8: time limits/ criteria	Green	Green	Green	Green	Red	Yellow	Green	Green
Question 9: rules on performance	Green	Yellow	Yellow	Green	Red	Yellow	Green	Green
Question 10: remedies	Green	Green	Green	Green	Red	Green	Green	Green

Required steps and associated costs – (I) : CPs

- ◆ **Albania** - Minor amendments to the existing legislation are required, namely:
 - ◆ The definition of "contracting authorities" and "contracting entities"; and
 - ◆ The limits to the duration of concessions.

- ◆ **Bosnia and Herzegovina** - Substantial amendments to the existing legislation are required, in particular:
 - ◆ The clear definition of "concession", "works concession", "services concession", "contracting authorities" and "contracting entities", with possible delimitation to the gas and/ or electricity sectors and relevant exclusions;
 - ◆ Setting of contract value thresholds (preferably the threshold defined by the CoD as well as the rules for the calculation of the contract value); and
 - ◆ The limits to the duration of concessions.

Required steps and associated costs – (II) : CPs

- ◆ **FYR of Macedonia** - Amendments to the existing legislation are necessary, specifically:
 - ◆ The clear definition of "contracting authorities" and "contracting entities";
 - ◆ Setting of contract value thresholds (preferably the threshold defined by the CoD and the rules for calculating the contract value);
 - ◆ The determination of exclusions;
 - ◆ The limits to the duration of concessions; and
 - ◆ The setting of rules for the implementation of concession contracts.

- ◆ **Kosovo*** – Minor amendments to the existing legislation are necessary, namely:
 - ◆ Setting of contract value thresholds (preferably the threshold defined by the CoD and the rules for calculating the contract value); and
 - ◆ The limits to the duration of concessions.

Required steps and associated costs – (III) : CPs

- ◆ **Moldova** – Implementation of a comprehensive legal framework on concessions is required. The CoD should be used as the basis for such framework.

- ◆ **Montenegro** - Substantial amendments to the existing legislation are necessary, in particular:
 - ◆ The clear definition of "concession", "works concession", "services concession";
 - ◆ Setting of contract value thresholds (preferably the threshold defined by the CoD and rules on calculating the contract value);
 - ◆ The determination of exclusions;
 - ◆ The limits to the duration of concessions; and
 - ◆ The clear definition of the procurement and contract implementation procedures for concessions.

Required steps for the incorporation – (IV) : CPs

- ◆ **Serbia** - Minor amendments to the existing legislation are required, specifically:
 - ◆ Setting of contract value thresholds (preferably the threshold defined by the CoD and rules on the calculation of the contract value); and
 - ◆ The limits to the duration of concessions.
- ◆ **Ukraine** - Substantial amendments to the existing legislation are necessary, namely:
 - ◆ The clear definition of "contracting authorities" and "contracting entities";
 - ◆ The clear reference to compliance with the principles of equal treatment, non-discrimination and transparency;
 - ◆ Setting of contract value thresholds (preferably the threshold defined by the CoD and rules for the calculation of the contract value);
 - ◆ The determination of exclusions; and
 - ◆ The limits to the duration of concessions.

Task 4 EnC Treaty amendments and their implementation

PLANET S.A. – Nicolas Manolopoulos

- ◆ (a) – Recommendations as regards the adoption of the EU Directives by the CPs
- ◆ (b) – Plan for implementation of legislative changes with time schedules and assignment of responsibilities
- ◆ (c) – Proposed adaptations of the respective provisions of the public procurement Directives to reflect the specific conditions and status of the Energy Community Contracting Parties

Recommendations as regards the adoption of the EU Directives by the CPs

- 1 ◆ Implementation of PP and Concession rules, in general, may contribute development of competition in electricity and gas markets.
- 2 ◆ An immediate practical effect on the competition in the CPs could be achieved by the application of their current PP and Concession rules to the selected energy related procedures pointed out in this Study.
 - ◆ The effect on competition may be achieved by a soft law approach; the EnC Secretariat or an other appropriate EnC authority may **issue a recommendation to the CPs** to implement the procurement rules to the selected energy related procurements

Recommendations as regards the adoption of the EU Directives by the CPs

- 3 ◆ Full implementation of the EU PP and Concession rules would a) support development of competition in the CPs electricity and gas markets and b) improve the implementation of the procurement procedures through the applicable PP techniques and instruments.
 - ◆ Harmonisation of PP and Concession laws and regulations on the Regional market would also be achieved by the **harmonisation of the CPs regulation with the EU Directives**.
 - ◆ **Publication of procurements on a joint portal would be a significant step forward for securing of Regional participation in energy related procurements.**
- 4 ◆ Securing of proper implementation of the PP rules is of most importance.
 - ◆ **Amendments of the EnC Treaty would be prerequisite for imposing the obligation to fully implement the 2014 Directives and provide for coordination and/or monitoring on the EnC level.**
 - ◆ The Final Report proposes the **articles of the EnC Treaty**, which could be amended.

Plan for implementation of legislative changes with time schedules and assignment of responsibilities

◆ FIRST STEP - RECOMMENDATION

- ◆ **The first step may be initiated without delay.** The Recommendation would leave the CPs to adjust the implementation of the Recommendation to their energy markets and would require the CPs to provide the Secretariat regular quarterly reports on the implementation.

◆ SECOND STEP – FULL IMPLEMENTATION

- ◆ **The second step** would to our understanding **require additional time** in regard to the consent of the CPs to include a new obligation and second in regard to duration of the respective amendments in the CPs regulation and the beginning of their implementation.

Plan for implementation of legislative changes with time schedules and assignment of responsibilities

◆ Time frame for Full Implementation:

Amendments of the Treaty finalized	T
Enacting of the respective adjustment of the CPs legislation	T +1 year
Independent Remedies Authority established	T +1,5 years
Passing of the secondary legislation, beginning of implementation	T +3 years

Total time estimated between 3 and 5 years.

Proposed adaptations of the respective provisions of the public procurement Directives to reflect the specific conditions and status of the Energy Community Contracting Parties

- 1) Difficulties in applying EU law by EnC's Contracting Parties**
- 2) Compliance with the general principles of public procurement law**
- 3) Transfer of 2014/25 directive to EnC legal framework**

Information sent to the European Commission → Notices sent to EnC

Replacement of terms: Member States → Contracting Parties

Articles of the directive, referring to EU member states relations excluded from application

Subsequent application of some articles (e-procurement)

No activation of the discretion awarded in EU member states → CPs allowed to differ in their national legislation

Publicity (EnC instead of EU Publication Office and SIMAP)

European Single Procurement Document (voluntary for CPs)

Proposed adaptations of the respective provisions of the public procurement Directives to reflect the specific conditions and status of the Energy Community Contracting Parties

4) Existing compliance mechanisms in the field of Public Procurement

a) Remedies directives

b) Right to complain before the European Commission

c) Preliminary rulings

5) Establishing a compliance PP mechanism within the framework of EnC

Thank you!

