

**COMMERCIAL LAWS OF
BELARUS**
August 2013
AN ASSESSMENT BY THE EBRD

Office of the General Counsel



European Bank
for Reconstruction and Development

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Basis of Assessment: This document draws on legal assessment work conducted by the Bank (see www.ebrd.com/law) and was last updated during the preparation of the 2013 EBRD Strategy for Belarus, reflecting the situation at that time. The assessment is also grounded on the experience of the Office of the General Counsel in working on legal reform and EBRD investment activities in Belarus, it does not constitute legal advice. For further information please contact ltt@ebrd.com.

1. Overall Assessment

In recent years, Belarus has adopted several legal acts and strategies to improve its legal framework and increase business activity. Nevertheless, significant reforms are still required in a number of key areas.

In furtherance of the governmental program to support small and medium-sized businesses in the country for 2010-2012, laws were passed to facilitate financial, property and information assistance for SMEs, through the creation of business promotion centres, small business incubators, financial support for businessmen, mutual credit extension and other similar measures. The efficacy of the support programmes remains to be assessed.

Reforms of the corporate sector remain overdue. The existing system falls short of relevant international standards. State-owned enterprises (fully or significantly controlled by the government) dominate the economic landscape, strengthening corporate governance of state companies should be a priority, particularly in light of the government's plans for eventual privatisation.

Although quite extensive, the existing insolvency legislation requires further reforms to facilitate reorganisations and reduce protectionism towards state-owned assets and interests in an insolvency scenario.

In the area of secured transactions, Belarus has made progress towards adopting modern principles of mortgage lending. However, significant improvements of the existing pledge legislation (in particular, creation of a unified collateral registry for movable assets) are still needed to satisfy the requirements of modern financial transactions and facilitate access to finance for businesses.

Belarus has shown progress in formulating its policy for developing new forms of cooperation between the government and the private sector. A draft law "On Public-Private Partnerships" was developed to set out principles, mechanisms and areas of partnerships and regulate activities of business unions and associations in this field. Although substantial legislative and regulatory work remains to be done in order to create an enabling environment, the government appears willing to attract private capital in the area of public infrastructure and services.

Belarus' energy sector, both gas and energy, remain weak, dominated by the vertically-integrated monopolies which characterise the electricity and gas sectors and lacking an independent regulatory authority as well as a market opening time frame.

Belarus has set high policy objectives in promoting energy efficiency and developing the renewable energy sector. In furtherance of the Strategy for the Development of the Energy Potential of Belarus, a number of key programmes and laws were passed to facilitate energy efficiency improvements across all sectors of the economy. To move onto the implementation stage, the regulatory framework needs to be further developed (through, inter alia, the adoption of secondary legislation).

2. The Legal System and Investment Climate

2.1 *Constitution and courts*

The Republic of Belarus emerged as an independent state in 1991. The Constitution was adopted in 1994 proclaiming the Republic of Belarus a unitary, democratic, and social state based on the principle of the separation of powers and protection of rights and liberties of citizens. The Constitution was amended twice (in 1996 and 2004) by national referenda initiated by the President of the Republic.

The President is the Head of State. According to the Constitution, the President is elected for a five-year term by popular vote. The President has wide authority in the sphere of law-making and is authorised to issue decrees which have the power of law. The President also conducts significant appointments to the legislative, executive and judicial branches.

The legislative branch is represented by a bi-cameral parliament comprised of the House of Representatives and the Council of the Republic. Members of the House of Representatives are elected by popular vote every four years, and those of the Council of the Republic are appointed by local councils and by the President according to territorial divisions.

Executive power belongs to the Council of Ministers headed by the Prime-Minister. The Prime-Minister is appointed by the President with the consent of the House of Representatives.

The judicial system is based on the principles of territorial division and specialisation and is comprised of the courts of general jurisdiction, commercial courts and the Constitutional Court. The Supreme Court of the Republic of Belarus is the highest court of general jurisdiction. The Supreme Court judges are appointed by the President. The Constitutional Court decides on the constitutionality of normative acts of the Republic. It consists of 12 judges, six of whom are appointed by the President and six elected by the Council of the Republic. On the President's suggestion, the Constitutional Court may also make decisions on any violations of the Constitution by the parliament. According to EBRD country strategy for Belarus¹

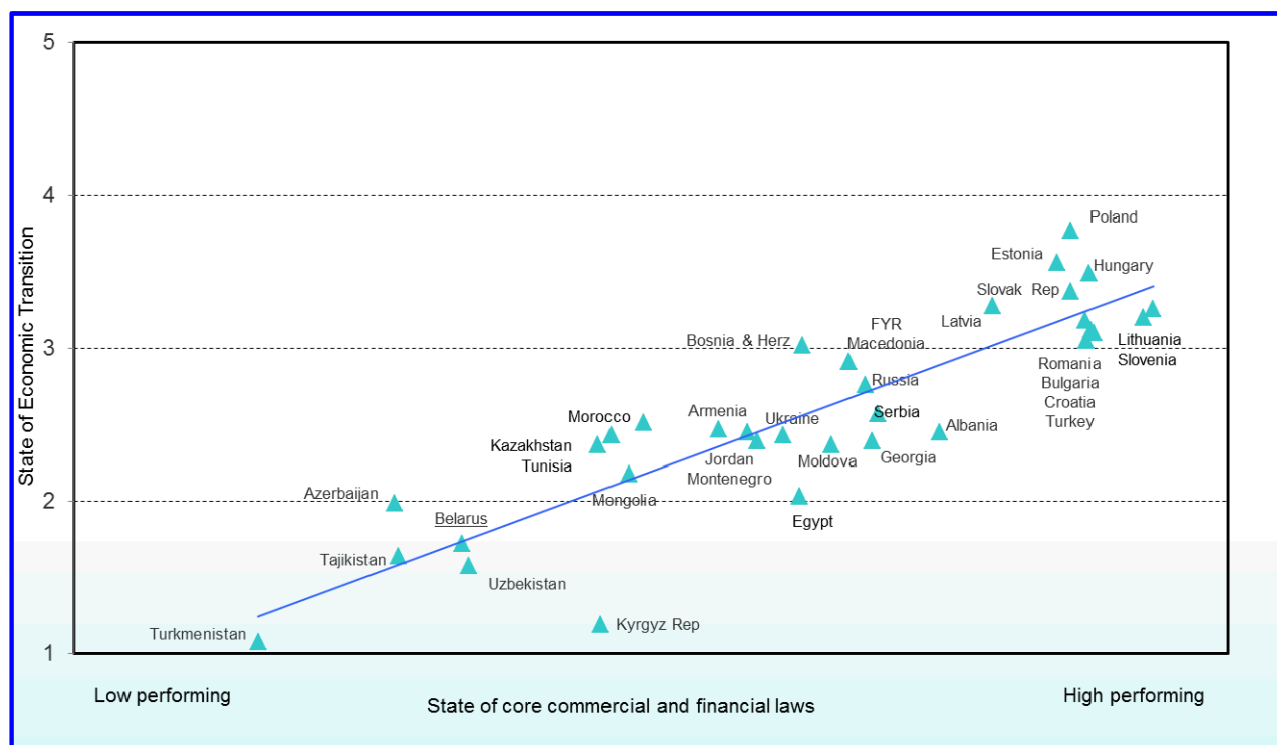
'The Belarusian judiciary is not independent from influence from the executive branch of political power'.

2.2 *Relationship between legal transition and economic progress*

Experience in the EBRD's countries of operations suggests that overall economic progress goes hand in hand with respect for the rule of law and well-functioning democratic institutions. Because there is a positive correlation between legal transition and overall economic progress in EBRD countries of operations (see Chart 1), the future success of the transition process in Belarus will depend on proactive government action in eliminating corruption and improving relevant legislative frameworks.

¹ <http://www.ebrd.com/downloads/country/strategy/belarus.pdf>

Chart 1 – Rule of law and progress in transition in the EBRD countries of operations



Source: EBRD Transition Report 2012 Table 1.1; EBRD Composite Country Law Index, Dec 2012

Note: The horizontal axis measures the performance of commercial and financial laws. The vertical axis displays the EBRD transition index as an average of transition indicators between 1997 and 2012 with 1 referring to very early transition stages, and 4 referring to an advanced transition level.

2.3 Recent developments in the investment climate

As recently stated in the EBRD Transition Report² Belarus has undergone macroeconomic adjustment following a policy-induced balance-of-payments crisis. After generating very large external imbalances during and after the presidential election campaign in late 2010 and introducing various administrative measures in the spring-summer of 2011 to delay adjustment, the authorities devalued the rouble. Investment activity decelerated as directed lending programmes were curtailed, negatively affecting the construction sector. However, as real wages declined, households switched from imported to domestically produced products and exports increased. As a result, overall output growth has remained positive, at 2.9 per cent in the first half of 2012, with industry being the largest contributor. The government reversed some, but not all, administrative measures implemented during the crisis. Many price controls introduced and expanded in the last year remain, and goods subject to controls now cover around 40 per cent of the consumer basket. Restrictions on exports of consumer goods by individuals, introduced as a response to the balance-of-payments crisis, were eliminated in February 2012. The export limits had been applied to goods and commodities with regulated prices, including cereals, pasta, cigarettes and domestic appliances. Although fuel prices were brought closer to their level within the Eurasian customs union, restrictions on fuel exports remain in place.

² <http://www.ebrd.com/downloads/research/transition/tr13.pdf>

The authorities made further steps to reduce the regulatory burden on new companies. Over the past year, the government implemented numerous laws to implement the Presidential Directive No. 4, approved in December 2010. Access to land for certain business purposes were streamlined and may now be granted without the need for an auction. Legislative reforms are expected to increase access to credit by small and medium enterprises. Since the middle of 2011 the President has signed several decrees to stimulate entrepreneurial activity in the regions.

The country's customs union with Kazakhstan and Russia has brought benefits, but also market pressures. The customs union became fully operational in July 2010. Since then, the country has enjoyed an improvement in terms of trade after Russia eliminated export duties on oil and oil products exported to Belarus and reduced the natural gas price. Access of Belarusian products to the Russian and Kazakh markets was also simplified. At the same time, various manufacturing enterprises have suffered from the lowering of the effective rate of protection of their output in Belarus. The pressures are expected to rise as Russia further opens its market and the common external tariff is reduced to comply with Russia's commitments under its recent WTO accession. There is also evidence that labour is migrating from Belarus to Russia to benefit from higher wages and a more competitive market environment.

2.4 Freedom of Information

Civil rights, including the right to access information and freedom of expression, are guaranteed by the Belarusian constitution, although they remain severely restricted in practice. The legal framework for access to information is primarily governed by the Law of the Republic of Belarus "On Information, Informatisation and Protection of Information" 2008 (the Law). In 2011 The National Centre for Legislation and Legal Studies prepared a bill on "Access to Information about the Activity of State Bodies", the bill was discussed but a decision was later made to withdraw it as it was not expedient at the time. A new draft version of the law was later submitted to the House of Representatives in October 2012 and the bill was adopted at first reading on 30 May 2013.

A positive element of this bill was the reduction in the list of reasons to refuse access to information, in theory this amendment makes it easier to request information, how this works in practice may be very different. A critical aspect of the bill is the attempt to cover both data protection and access to information within the same law, an approach no longer accepted as best practice due to the sophistication of both areas.

3. Evaluation of selected commercial laws

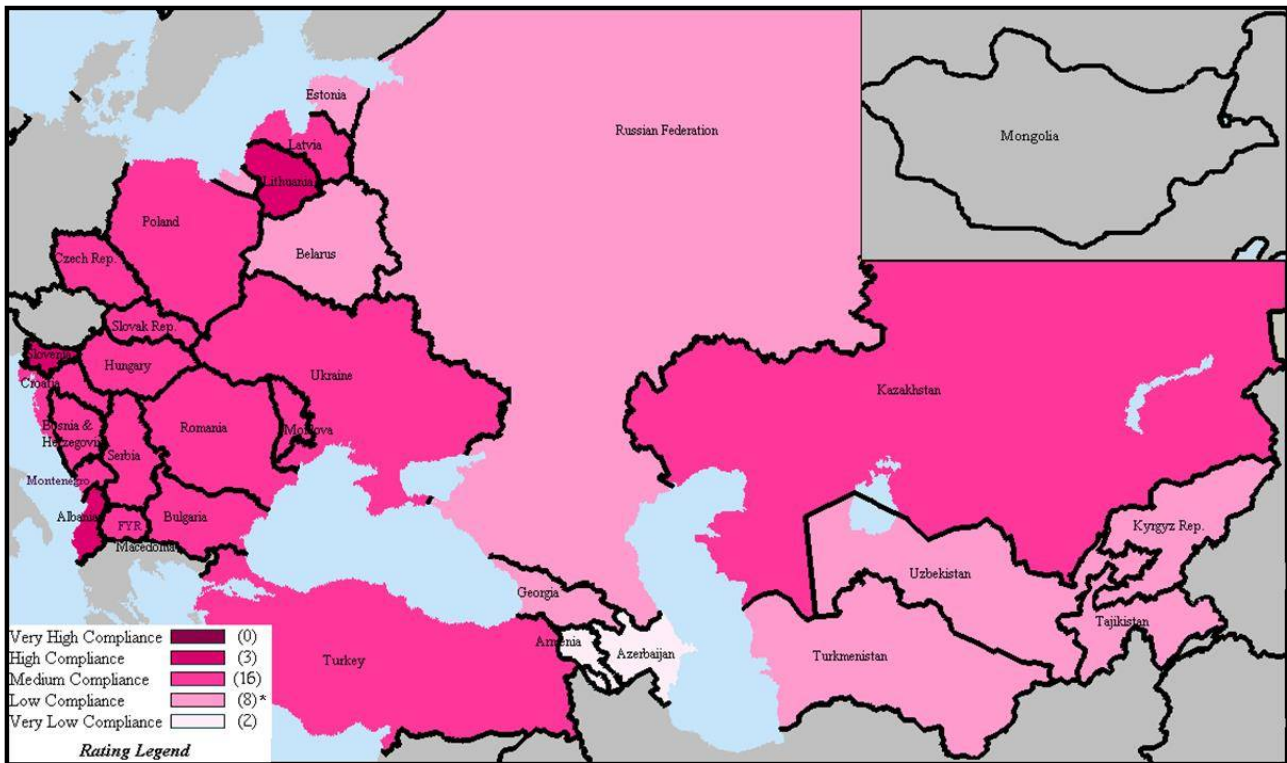
The EBRD has developed and regularly updates a series of assessments of legal transition in its countries of operations, with a focus on selected areas relevant to investment activities: concessions, corporate governance, energy, energy efficiency, insolvency, judicial capacity and contract enforcement, public procurement, secured transactions, securities markets and telecommunications/electronic communications. The existing tools assess both the quality of the laws "on the books" (also referred to as "extensiveness") and the actual implementation of such laws (also referred to as "effectiveness"). This section presents a summary of the results accompanied by critical comments of the Bank's legal experts who have conducted the assessments.

All available results of these assessments can be found at www.ebrd.com/law.

3.1 Concessions

Belarus now has some elements of a governmental policy for promoting Public Private Partnership and improving its legal environment. In the recent EBRD PPP Legislative Framework Assessment, Belarus’s legal framework was ranked as being in “low compliance” with international standards (see Chart 2), with the dimensions of definitions and scope of the law and settlement of disputes and applicable laws having been identified as the main strengths of the country’s concessions legislation, while the other dimensions have shown significant shortcomings, in particular, the dimension relating to the PPP legal framework (see Chart 3).

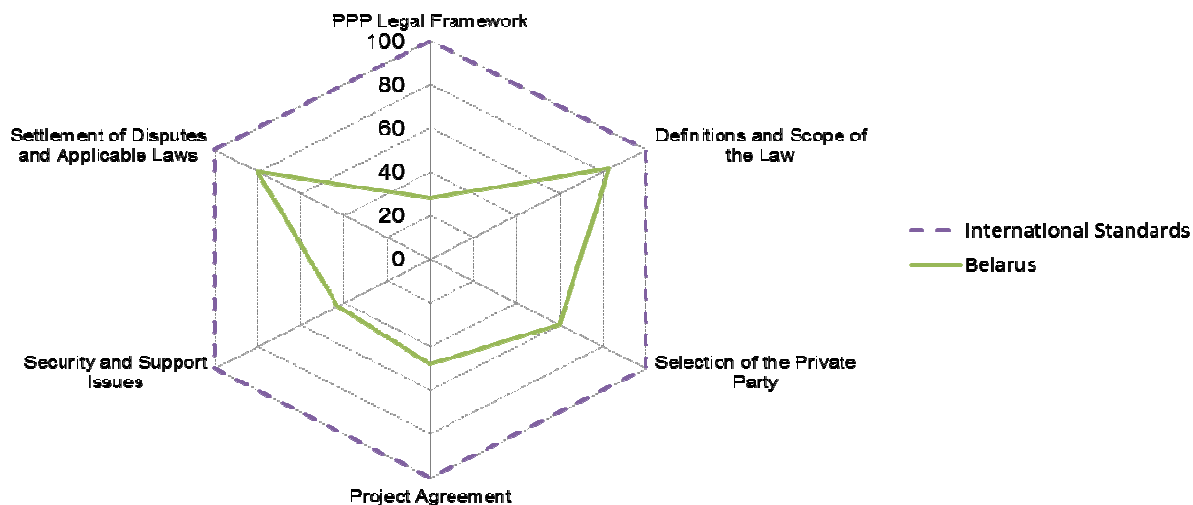
Chart 2 – Quality of concessions legislation in the EBRD countries of operations



Source: EBRD PPP Legislative Framework Assessment (LFA) 2011/12

Note: The various categories represent the level of compliance of a given country’s legislation (“the laws on the books”) with international standards such as the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects. The asterisk indicates in which category Belarus ranks.

Chart 3 – Quality of the PPP/concessions legislative framework in Belarus (2012)

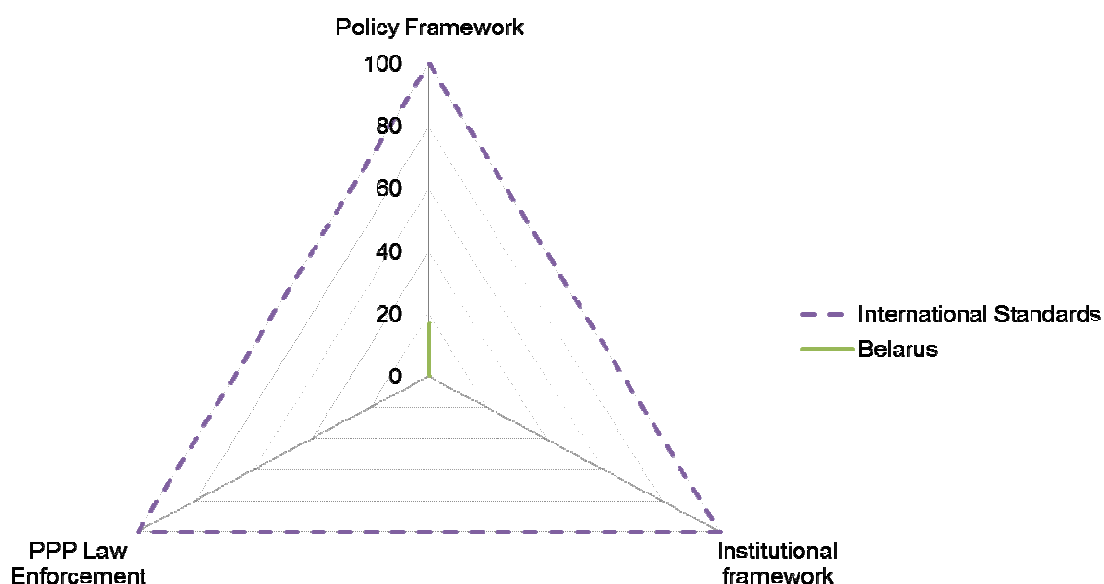


Source: EBRD PPP Legislative Framework Assessment (LFA) 2011/12

Note: The extremity of each axis represents an ideal score in line with international standards such as the UNCITRAL Legislative Guide for Privately Financed Infrastructure projects. The fuller the ‘web’, the more closely concessions laws of the country approximate these standards.

According to the Assessment, implementation of the PPP/concessions laws has been rated as achieving “low effectiveness” as compared to international standards, with significant shortcomings in all pillars of the assessment (see Chart 4).

Chart 4 – How the PPP/concession law is implemented in practice in Belarus (2012)



Source: EBRD PPP Legislative Framework Assessment (LFA)

Note: The extremity of each axis represents an ideal score, that is, a fully effective legal framework for concession / PPP.

Belarus does not have a specific concession law, but the Investment Code dated 2002 as amended in 2006 does contain detailed provisions regulating concessions (Articles 49 to 76). In 2008 these were complimented with the Decree of the President listing assets/objects that may be subject to concession. The President’s Decree lists assets mostly in the area of mineral deposits that were offered for concession. Roads and roadside services are expected to be included at a later stage too. The other sectors under discussion include culture with the possibility for concessions of historic buildings, architecture and monuments, e.g. old castles.

The Investment Code needs serious improvement concerning regulation of the project agreement: it is silent on certain major elements in this respect (in particular termination/compensation provisions). In addition, it contains very few elements regarding government support and securities. Moreover, the scope of application (possible sectors, relation with the Public Procurement Law) and the provisions on the selection procedure need to be improved (by introduction of the pre-qualification procedure; while the existence of a preferential right of the incumbent concessionaire to extend can be questionable).

However, we do note certain positive elements (e.g. a reference to “equal rights and obligations” of all participants, publicity of the concession award, registration, review procedures, etc.). International arbitration is possible for foreign investors.

However, despite certain favourable elements, the Investment Code does not constitute a sufficient legal basis for the development of PPP in Belarus.

Although substantial legislative and regulatory work remains to be done to enable an effective environment for private sector involvement in public utilities works and services, clear signs are

evident of the Government's intent to attract private sector investment into some municipal services as well as renewable energy projects.

The Ministry of Economy has drafted a PPP Law that has been discussed and evaluated by state authorities, scholars and practitioners and international commentators.

Pursuant to the draft Law, the Ministry of Finance will be the state authority in charge of PPP. In addition to that, the law provides the establishment of the Foreign Investments Advisory Council and the Investments and Privatisation Agency, as the specialist agencies to handle PPP. The draft Law still specifies the list of objects where PPP projects can be developed, and lists possible forms of PPP.

In addition to legal and regulatory risks PPP investors will still be assessing the political risks when considering investment in the country. The Ministry of Transport recently announce a possible concession in the road and railway sector adding that Qatar is interested in construction and rehabilitation of roads and electrification of certain sections of railway lines. There is speculation that these and some other projects announced in the mass media might be launched without competitive procedures, although competitive procedures are one of the requirements of the Investment Code.

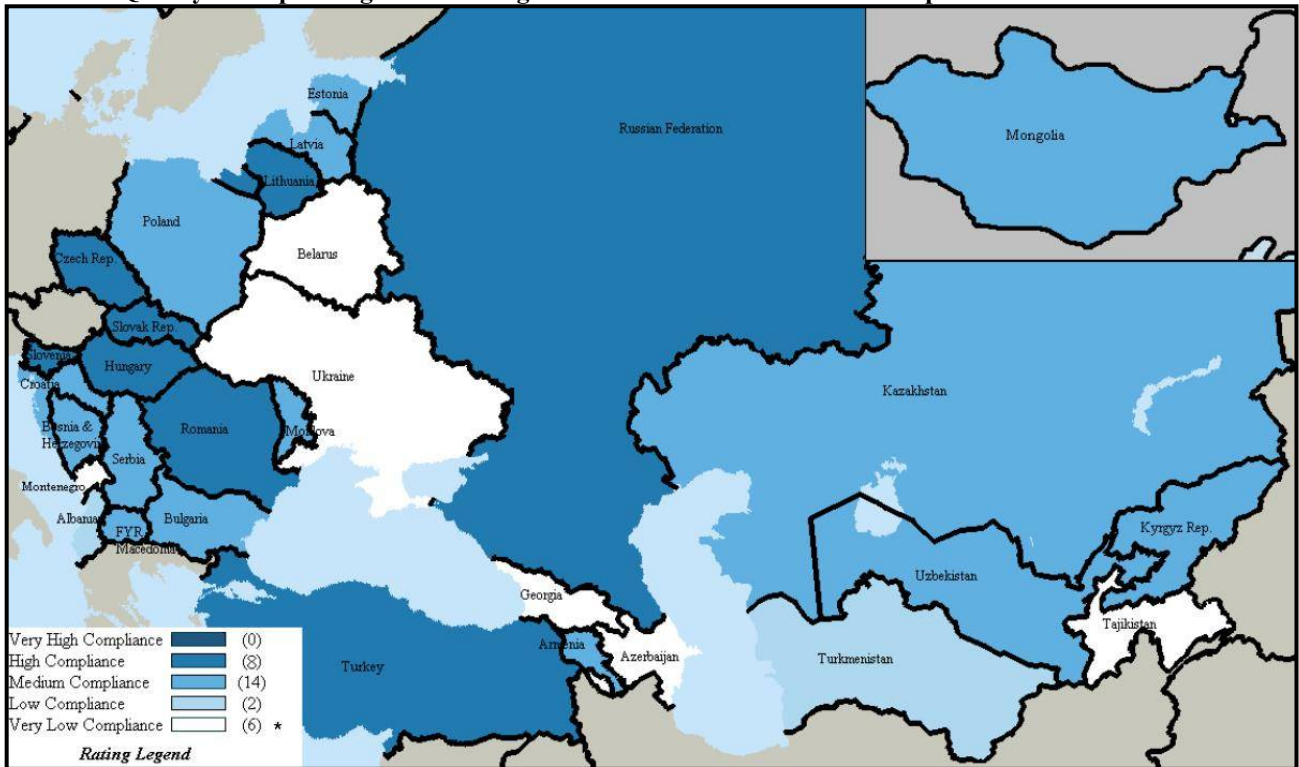
3.2 Corporate governance

The corporate governance framework is essentially regulated by the Law on Companies, which entered into force on 1 August 2006, as amended. The Law on Companies sets out the basic framework for the formation and operation of companies in Belarus. It covers joint stock companies, limited liability companies, non-limited liability companies and other types of commercial entities. The Law on Accounting and Financial Reporting (1994) broadly sets out the main principles of financial reporting and accounting, including the basis of their regulation and responsibilities. The Law on Auditing Activity (1994) defines the legal basis for auditing activities and establishes the rights and responsibilities of external auditors and regulated them.

A voluntary Corporate Governance Code was enacted on 18 August 2007 by the Ministry of Finance, which is the financial services regulator. The Code includes recommendations tackling the general shareholders' meeting; supervisory board; company secretary; material corporate transactions; disclosure of company's information; control over economic and financial activities; shareholders' dividends, and corporate conflicts. There is no information on the level of implementation of the codes' recommendations by companies.

The latest EBRD assessment on corporate governance highlighted a framework in "very low compliance" with the relevant international standards (the OECD Principles of Corporate Governance) (see Chart 5), showing a framework in urgent need of reform in all areas under consideration (see Chart 6).

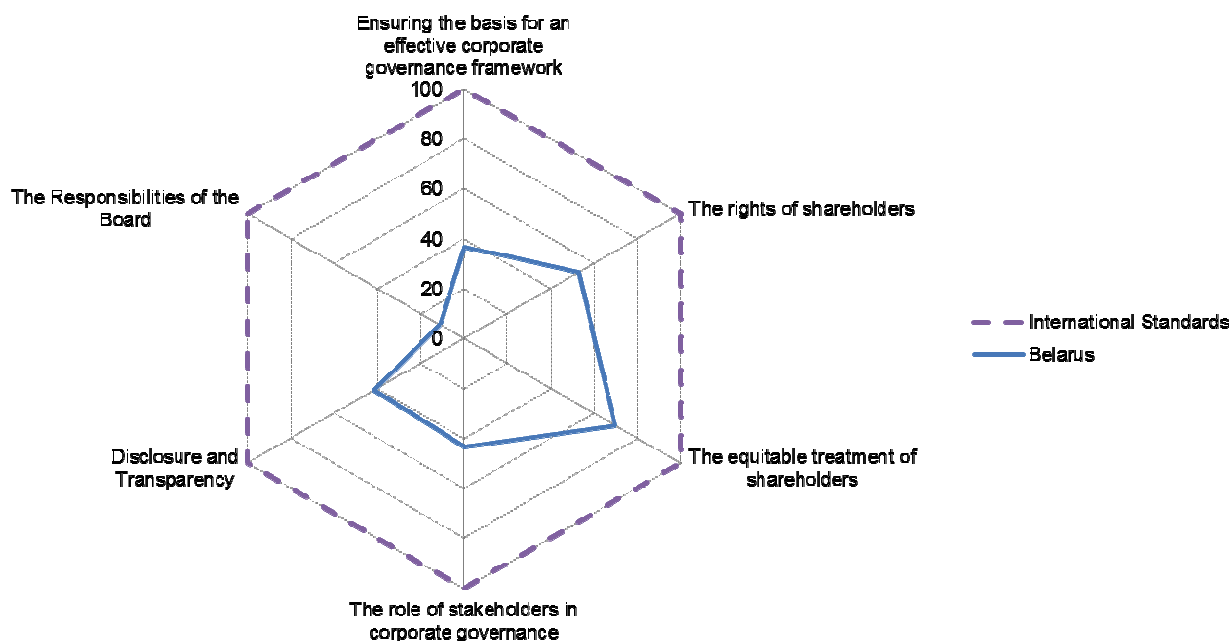
Chart 5 – Quality of corporate governance legislation in the EBRD countries of operations



Source: EBRD Corporate Governance Sector Assessment 2007

Note: The various categories represent the level of compliance of a country’s legislation (the “laws on the books”) with international standards as set out in the OECD Principles of Corporate Governance. The asterisk indicates in which category Belarus ranks.

Chart 6 – Quality of corporate governance legislation in Belarus (2007)



Source: EBRD Corporate Governance Sector Assessment 2007

Note: The extremity of each axis represents an ideal score, i.e., corresponding to OECD Principles of Corporate Governance. The fuller the ‘web’, the more closely the corporate governance laws of the country approximate these principles.

The weaknesses in the corporate governance framework are relevant for the EBRD direct investment in the country, but there are no reported cases or pending law suits directly related to corporate governance. During 2011, the LTT performed a review of an EBRD investee company in Belarus. The review revealed poor corporate governance practices especially in the area of internal control and internal audit, lack of strategic direction by the board, lack of proper qualification by non-executive directors, no clear oversight of the parent over the subsidiaries and extremely poor financial and non-financial disclosure. These issues have been addressed in a corporate governance action plan. It appears that the outlined issues are common in the majority of companies in the countries, especially SOEs.

State owned enterprises (SOEs) represent the bulk of the economy and the government exercises considerable control over them. Strengthening the corporate governance of SOEs is a priority. In particular, the government’s rights as an owner should be clearly delineated and the government and SOEs should have an arms-length relationship. The government should not delay the implementation of its plan to move to international accounting standards and should develop a time-bound program for SOEs’ transitioning to IFRS. Companies, including SOEs, should be required to publish their annual audited accounts.

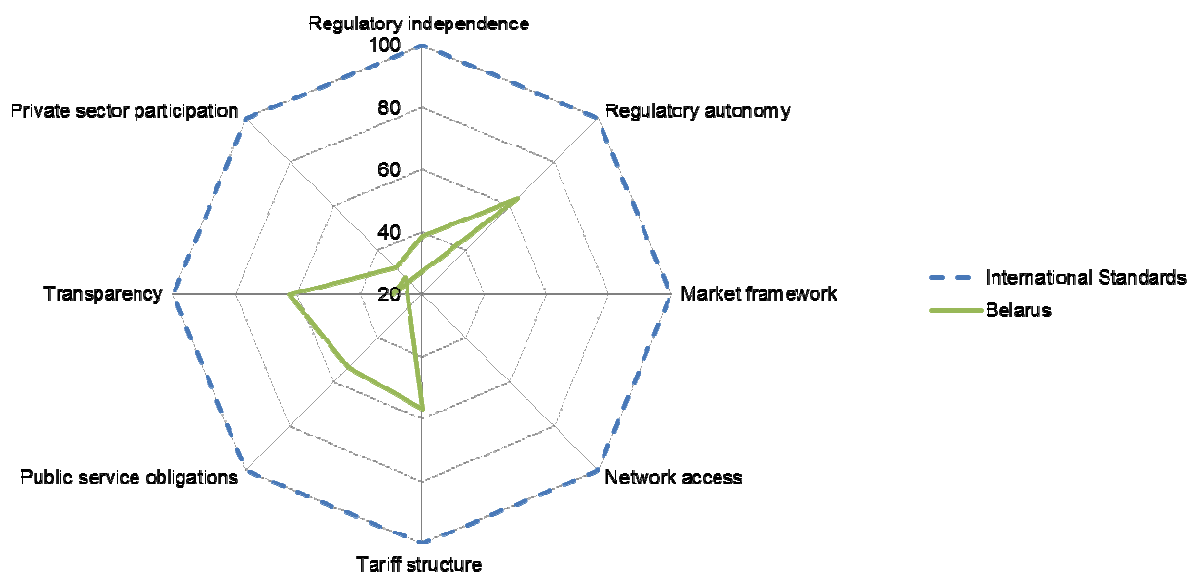
Real sector reforms are overdue in Belarus. The country has made less progress in market reforms than most Eastern European and Central Asian economies. Little has been done to harden SOEs’ budget constraints; promote competition or strengthen corporate governance. The delay in economic

restructuring, including enterprise reform, further weakens the economy’s fundamentals and needs to be addressed without delay.

3.3 Electricity and gas regulation

Overall, Belarus performs poorly with respect to both electricity and gas sectors. The recent EBRD energy law reform dimensions assessment has shown significant shortcomings with regards to all dimensions of the country’s electricity legislation (see Chart 7), with values being zero in all dimensions of the gas sector legislation.

Chart 7 – Quality of energy (electricity) legislation in Belarus (2009)



Source: EBRD Energy, law reform dimensions assessment project, 2009

Note: The extremity of each axis represents an ideal score i.e., corresponding to the benchmarks and indicators identified in the assessment model. The fuller the ‘web’, the more closely the energy laws of the country approximate these principles.

The absence of an independent regulatory authority and the prominent role of the state-controlled Belenergo and Beltopgaz in the tariff setting process for electricity and gas contribute largely to reduce the performance of the institutional infrastructure and regulatory framework. Similarly, the vertically-integrated monopolies which characterise the electricity and gas sectors, as well as the absence of a market opening time frame, penalise the score given to market structure.

The Belarusian electricity market is a vertically integrated monopoly run by the state-owned Belenergo. Transmission and dispatch through the Unified Electricity System of Belarus is performed by RUE “ODA” (Operation and Dispatching Administration), which is part of Belenergo. At the regional level, generation, transmission, distribution and supply are carried out by integrated regional utilities, which are part of Belenergo. The electricity system is mostly gas fired and provides the country with approximately 90% (2008) of its electricity usage while the remaining 10% is imported from Russia, Ukraine and Lithuania. There are no wholesale transactions due to the market structure.

In Belarus there is no regulated Third Party Access (“TPA”) to the electricity transmission and distribution networks and no market opening time frame has been announced. In principle, for authorised consumers that seek access to the networks, and have complied with the national unified technical conditions established by Belenergo, the law establishes non-discriminatory conditions. Only all-inclusive end-user supply tariffs are set up; generation, transmission and distribution components are not itemised. Belenergo performs tariff calculations annually according to the methodology set by the Ministry of Energy and the Ministry of Economy (“ME”). Tariff levels are approved by the government for residential consumers and by the ME for all other consumers.

Belarus is largely dependent on gas imports, all of which currently come from Russia. Although gasification brought the benefits of using a relatively ecologically clean and efficient fuel, it also brought the burden of an increasing supply cost and the risk of facing supply cuts. The most important task that Belarus faces in the energy sector in the medium term is to prevent the growth of its gas consumption. This can only be achieved through an improvement in energy efficiency and conservation, particularly in the power sector. In this respect, the target set by the Government of 25% of total electricity and heat production by means of local fuels and renewable energy by 2012 seems to be a step in the right direction.

The Belarusian gas sector consists essentially of two companies: Beltransgaz, which owns the high-pressure transportation, transit and storage systems, and is responsible for new construction and maintenance; and Beltopgaz, which is responsible for gas distribution and domestic retail sales. Gazprom sells gas to Beltransgaz under contracts concluded annually; Beltransgaz resells gas to Beltopgaz, which through its subsidiaries (regional distribution companies) resells the gas to end users in all sectors.

In Belarus there is no TPA to the gas transmission and distribution networks and non-discriminatory access to transmission and distribution networks is required by legislation. No market opening time frame has been announced. Separate tariffs for transportation and distribution are not established. There are general tariffs instead. Gas tariffs are regulated by the government for the residential sector, and by ME for all other categories of consumers. More specifically, the Government defines the prices at which Beltopgaz and its subsidiaries sell gas to residential consumers; the ME regulates the remaining prices (sales of Beltransgaz to Beltopgaz and a limited number of other customers) and transportation tariffs.

3.4 Energy Efficiency / Renewable Energy

Law of the Republic of Belarus of 15.07.1998 № 190- Z “On Energy Conservation” (as amended) and Law of the Republic of Belarus of 27.12.2010 № 204-Z “On Renewable Sources of Energy” are the keys acts of the country’s sectoral regulation.

Overall, Belarus has limited domestic primary energy resources. Therefore, in order to meet national energy needs and ensure security of supply focus points in the country’s energy policy should be improvement of fuel and energy mix and upgrading of old and construction of new energy facilities including developing energy efficient technologies and renewable energy.

The basic principles for energy efficiency (“EE”) policy in Belarus are set out in the Law “On Energy Conservation”. Policy guidelines for the near term, on the other hand, are set out in more detail in the National Energy Conservation Programme for 2011-2015 (“the Programme”). The Programme is based on the Strategy for Development of the Energy Potential of Belarus (“the Strategy”). The Strategy sets a target of 50% energy intensity reduction in the GDP by 2015, and 60% by 2020, as compared to 2005.

The Programme calls for improvements in energy efficiency across all sectors through the introduction of modern energy efficient technologies and technical processes. The institution responsible for overseeing implementation of the Programme is the Department of Energy Efficiency, a division of the State Committee for Standardisation. The Programme envisages modernisation and the introduction of energy saving targets in all sectors. For example, in the electricity sector, the Programme plans the installation of combined cycle gas turbine generators, with efficiency no less than 57%; in the residential and municipal services sectors, the Programme calls for the reconstruction of boilers, installation of mini-CHP plants running on local fuel sources, modernisation of heating grids, installation of energy efficient lighting, and construction of biogas plants at waste-water treatment facilities. The Programme has set high goals for the energy efficiency of residential buildings, (i.e. over the next 5 years, the proportion of energy-efficient residential buildings constructed in Belarus should rise to 60%). Considering the lack of funding in the sector and deficient regulatory and institutional framework, reaching these targets is unlikely. Until now the promotion of energy efficiency has been basically carried out through grants and soft loans to energy inefficient companies which intend to implement energy saving projects. The Programme envisages that \$8.6 billion will be spent on the implementation of energy efficiency measures over the next 5 years.

Traditionally, renewable energy sources (“RES”) were not considered an independent regulatory area in Belarus but rather a sub-issue of broader topics such as energy conservation, energy security, and environmental protection. This has led to a very fragmented legal and policy framework concerning RES. However, this trend is now changing, as at the end of 2010, Belarus adopted a Law “On Renewable Energy Sources”. While the law has already come into force, it lays out only broad principles, and requires implementation through secondary legislation in order to have effect. This secondary legislation, however, is still in development, and many aspects are as of yet unregulated.

The Law provides for guaranteed connection to the grid for certified RES plants. It also requires the purchase by the state-owned suppliers of all energy produced by certified RES plants. Certification of RES plants is administered by the Ministry of Natural Resources and the Environment, and issued certificates are valid for 10 years. For 10 years following the commissioning of the plant, the tariff the supplier is obligated to pay the RES plant is to be established at the level of electricity tariffs for industrial and similar consumers with connected power up to 750 kVA, multiplied by an appropriate ratio. The value of the multiplying ratio depends on the type of RES and term of plant

use. For the next 10 years of operation from the end of this period, a lower, “stimulating” ratio is to be applied. However, the secondary legislation establishing the values of the multiplying and stimulating ratios has not yet been adopted.

The Tax Code of the Republic of Belarus provides several tax incentives for RES development. Equipment used in the production or reception, transformation, accumulation, or transfer of energy produced from RES shall be exempt from value added tax when imported into Belarus. Land plots housing RES plants are exempt from land tax. The ecological tax for waste-water discharged by RES plants is decreased by a reduction coefficient.

There is no national law on combined heat and power generation.

The Ministry of Natural Resources and the Environment is currently developing an online State Registry of Renewable Energy Sources in order to introduce more transparency to the sector and thus attract foreign investors. The registry will contain information on existing RES plants in Belarus – their locations, capacities, etc. The register will also contain data on potential land parcels suitable to building RES plants based on hydro, wind, and biomass. This latter data is primarily intended for potential investors, and will be available in English in late 2012.

As to main policy recommendations, a concentrated effort must be made to develop and adopt the secondary legislation needed to give effect to the Law “On Renewable Energy Sources”. Such action is crucial to energy security in Belarus, as the vast majority of its domestic energy resources are renewable or non-conventional by nature. Further reforms in the energy sources are needed, in particular modernisation of the sector, increasing sector transparency, promoting liberalisation and tariff reform. Belarus has set high policy objectives in promoting energy efficiency and saving as well as developing the renewable energy sector, which demands that a supporting legal, regulatory and institutional framework is put in place.

Overall, while issues of EE and RES are receiving attention by the government of Belarus, there appears to be a lack of the momentum needed to solidify national policy into a concrete and effective legal framework.

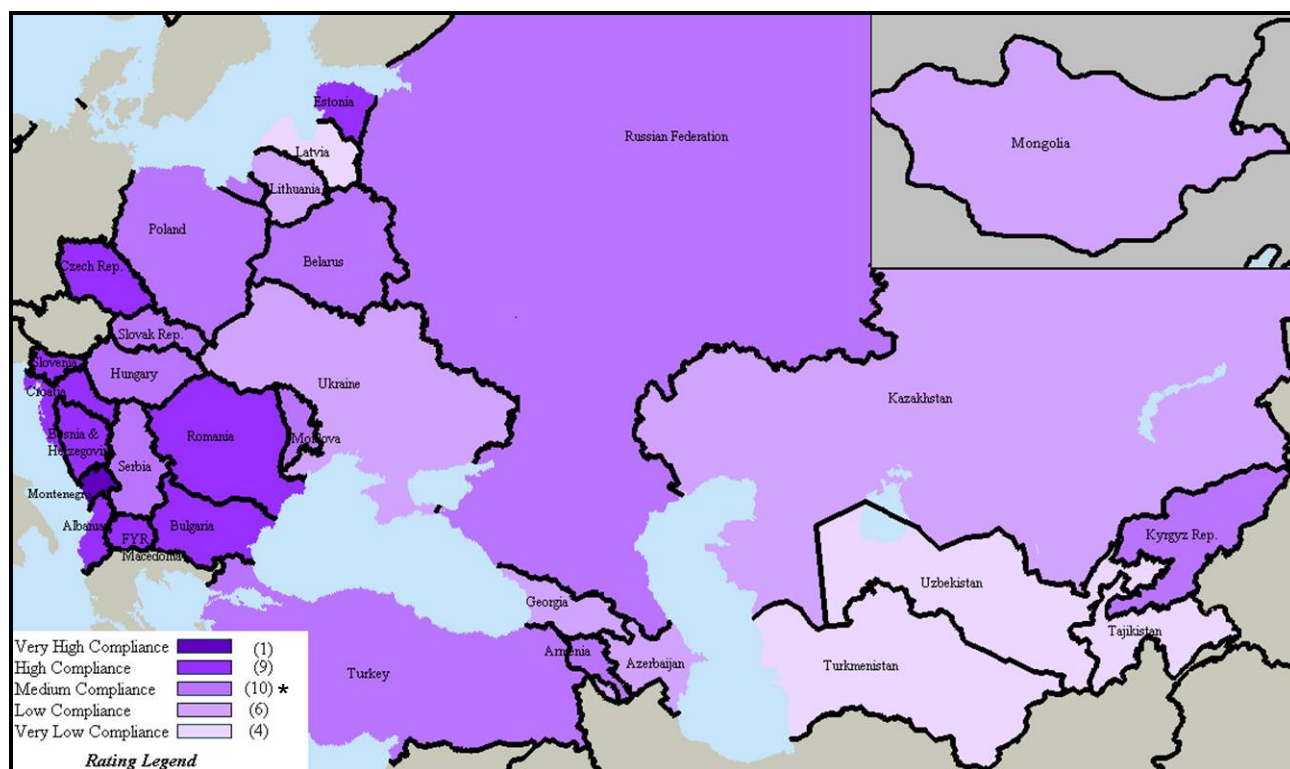
3.5 Insolvency

The 1991 Law on Economic Insolvency and Bankruptcy and the Edict of the President on Certain Issues of Economic Insolvency (Bankruptcy) No 508 of November 12, 2003 (as amended on April 6, 2009) regulate insolvency and restructuring procedures in Belarus (the “Insolvency Legislation”). The Insolvency Legislation covers all legal and physical persons carrying on economic activities on the territory of the Republic of Belarus.

In addition, Regulations on Liquidation (Termination of Activities) of Economic Entities, approved in 2009 and amended in 2011, provide the framework for liquidation of businesses. Special insolvency rules apply to individual entrepreneurs, debtors already in the process of liquidation, state and strategic enterprises, banks, insurance companies, and other financial institutions, as well as farming households. There is no regime for consumer bankruptcy.

The Insolvency Sector Assessment (the “Assessment”) completed in late 2009 concluded that the Belarusian insolvency law framework was of good quality, showing that it is in “medium compliance” with international standards (see Chart 8).

Chart 8 – Quality of insolvency legislation in the EBRD countries of operations

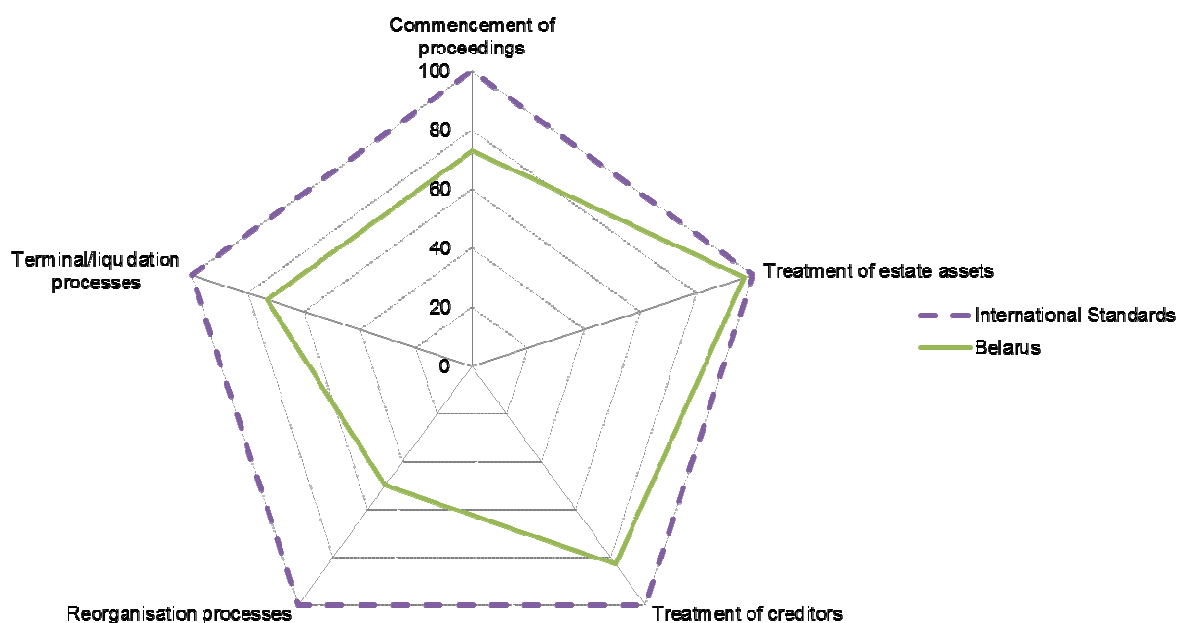


Source: EBRD Insolvency Sector Assessment 2009

Note: The various categories indicate the level of compliance of each country’s legislation (the “laws on the books”) with international standards, such as the World Bank’s Principles and Guidelines for Effective Insolvency and Creditor Rights Systems, the UNCITRAL Working Group on Legislative Guidelines for Insolvency Law, and others.

However, Belarus insolvency law framework remained weak as regards reorganisation (see Chart 9). For example, it did not contain an independent analysis of a proposed plan of reorganisation, nor provide for adequate material information to be provided to creditors in connection with the proposed plan. The Insolvency Legislation did not restrict voting by connected parties nor provide for the ability of majority creditor approval of the plan to bind dissenting creditors. The Assessment highlighted the lack of provisions with respect to new financing of ongoing business needs in insolvency. There appear to have been no reforms aimed at strengthening reorganisation or recognising the priority status of new financing under the Insolvency Legislation since the date of the Assessment.

Chart 9 – Quality of insolvency legislation in Belarus (2009)



Source: EBRD Insolvency Sector Assessment 2009

Note: The extremity of each axis represents an ideal score, i.e. corresponding to international standards such as the World Bank's Principles and Guidelines for Effective Insolvency and Creditor Rights Systems, the UNCITRAL Working Group's "Legislative Guidelines for Insolvency Law", and others.

The Insolvency Legislation requires the debtor to file for insolvency if it is over-indebted (where the value of its liabilities exceed the value of its assets) or illiquid (where it is unable to pay its debts as they fall due). Failure to file a petition in time may result in criminal or additional civil liability for management or shareholders. The Insolvency Legislation enables an economic entity to file voluntarily for insolvency, if it is able to demonstrate it will be incapable of meeting its payment commitments under its finance documents. State-owned companies are required to obtain appropriate approval from the owner or responsible authority in order to file for insolvency. Insolvency proceedings may also be initiated by the creditor, a public prosecutor, local divisions of the Ministry of Economy, or the tax authorities.

Upon filing for insolvency, the company can present a compromise to its creditors to settle its debts, apply for financial assistance from special economic funds and request a moratorium on the payment of its debts for a period of up to three years. Filing an insolvency petition triggers the preliminary insolvency procedure (protection period) to ensure preservation of the debtor's assets.

The Insolvency Legislation allows for the restructuring as well as the liquidation of companies. The insolvency administrator is required to provide a restructuring plan or straight liquidation plan to the creditors meeting within 70 days of his appointment. Upon approval of two thirds of creditors at the creditors' meeting, the plan should be submitted to the court. Based on the plan, the court decides whether to restructure or liquidate the debtor. Restructuring proposals may include providing the debtor with donations or subsidies, including from the debtor's shareholders, partial transfer of the debtor's assets and transfer of the debtor's business. If there is no prospect of recovery, the debtor

will be liquidated and a commission appointed oversee the liquidation. Creditors and their representatives have a right to participate in this process.

As noted by the Assessment during bankruptcy, transactions that resulted in preferential treatment of claims by creditors, contracts in which no consideration was paid, recovery of debts in favour of related persons and pledge agreements may be subject to claw back.

In general, insolvency legislation tends to be focused on public interests. Many exceptions exist in insolvency regulations in respect of natural monopolies (primarily state companies) and companies operating in defence or other strategically important areas. A supplier of goods, services, or works to the state may not be liquidated in insolvency proceedings and is only eligible for restructuring. Although the law contains an insolvency procedure for state enterprises, attempts are usually made to avoid liquidation of such companies.

The National Investment Agency of Belarus was appointed as temporary (anti-crisis) administrator in October 2009. The agency is responsible for evaluating the financial situation and solvency of indebted companies, as well as the possible consequences of selling an insolvent company. It is not clear how effective the agency has been in its role and when it might be disbanded.

Insolvency law is cross-sector and affects all sectors where the EBRD has either equity or a debt stake. Moreover, it impacts on the willingness of creditors generally to invest in the country and therefore also to enter into joint ventures with the EBRD. The EBRD invests in Belarus' corporate and financial sectors; however its activities have been strategically limited since December 2010.

Experts from both the IFC and the World Bank assisted the Belarus government with the development of a draft law on insolvency. It is reported that the Council of the Republic of the National Assembly approved a draft law "On economic insolvency (bankruptcy)" on 22 June 2012, which would provide a comprehensive reform of the Insolvency Legislation. The bill aims to streamline the current system of training of insolvency office holders and to regulate their activities. The bill also introduces stricter conditions for the commencement of bankruptcy proceedings and extends the term of the moratorium on insolvency to avoid unnecessary legal action. According to proponents of the bill, the reforms will ensure the economic security of the state and enable vital industries, which have become insolvent, to continue to operate on a going concern basis.

As to main policy recommendations, Belarus should consider balancing the interests of the private sector and the public sector in any insolvency law reform projects, to reduce the high level of protection afforded to public sector companies. Subject to the outcome of the new draft law, it should also consider ways in which reorganisation provisions may be strengthened.

Overall, Belarus' existing insolvency law framework is highly oriented to protection of state entities. Despite allowing for restructuring or liquidation, the Insolvency Legislation is in need of modernisation. It remains to be seen how effective the new draft law on economic insolvency will be in reforming the Insolvency Legislation.

3.6 Judicial capacity and contract enforcement

The court system in Belarus consists of economic and general courts that work on the territorial principle. Disputes between legal entities in the area of economic relations arising from civil, administrative, land, financial and other disputes are resolved by seven regional economic courts. Appeals lie to regional appellate instances of these courts, and to the Supreme Economic Court.

Certain types of economic cases fall within the sole jurisdiction of the Supreme Economic Court, and are heard by this court even at first instance. Such cases include disputes between the Republic of Belarus and political entities; disputes between political entities; disputes connected with ‘state secrets’; and challenges to the validity of legislative acts and executive decrees, where such instruments are said to violate a party’s legal interests in the field of its business activity. In addition, the Supreme Economic Court’s exclusive jurisdiction applies to cases involving foreign companies from outside the Commonwealth of Independent States (CIS).

The 2012 EBRD Judicial Decisions Assessment found that the outcome of commercial litigation in Belarus was reasonably predictable, and the time taken to resolve claims was comparatively speedy for the CIS. Litigation costs were generally considered reasonable, except in relation to property disputes, where state duty is payable at uncapped progressive rates. Enforcement of judgments posed a problem, as in many countries in the region. Only 45-50% of all writs of execution are enforced per year. Commercial judgments were generally perceived to be impartial, although cases involving state authorities were found to display deference towards state interests.

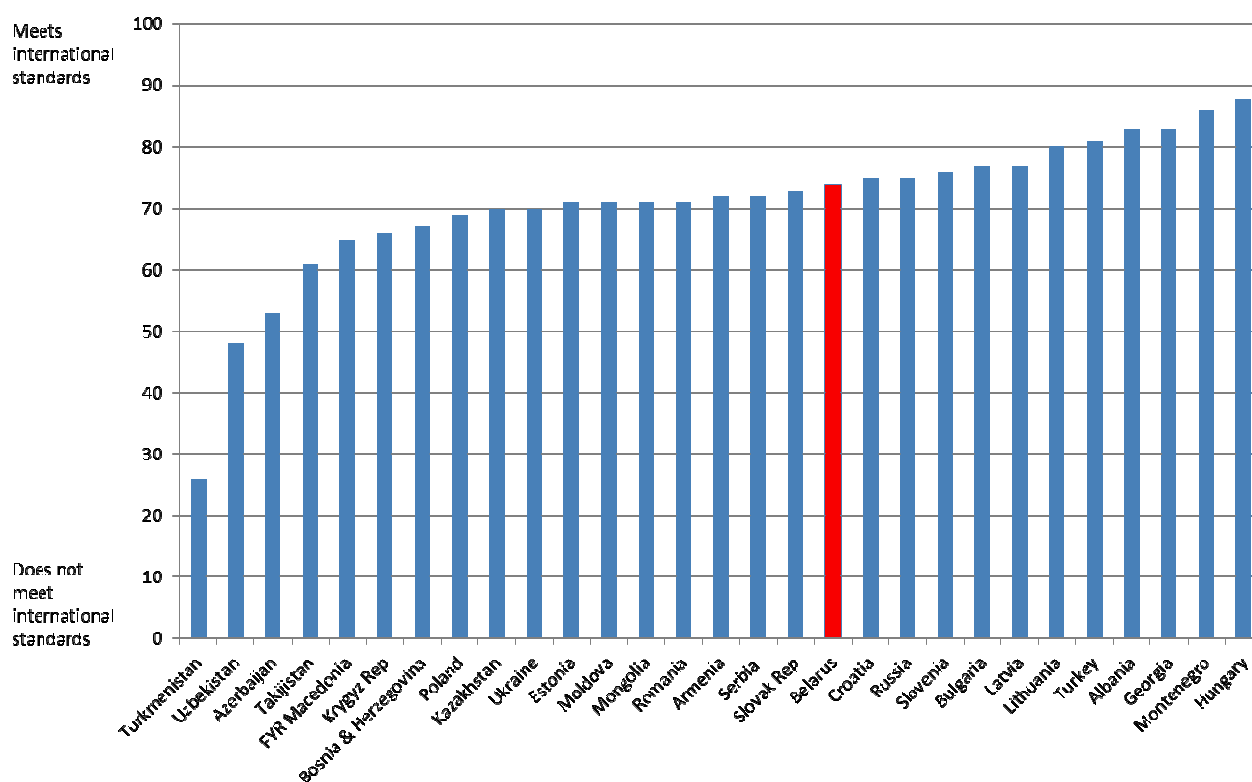
Recent reform activities include the introduction of new technology at the Supreme Economic Court (e.g. to support videoconferencing), alternative methods of dispute resolution, and increasing the number of publicly available judicial decisions. Further recommended reform initiatives including separating appellate instances from first instance courts, in order to minimise the potential for (and perception of) senior judges influencing decisions at the first instance level.

3.7 Public procurement

The effective date for the Law of the Republic of Belarus adopted on 13 July 2012, No. 419-3, “On Public Procurement of Goods (Works, and Services)” (“PPL”) is 1 January 2013. This is the first primary law passed on procurement in Belarus; currently, public procurement is governed by the Resolution of the Council of Ministers of the Republic of Belarus “On some issues of conducting Public Procurement,” enacted 20 December 2008, No. 1987.

In the EBRD 2010 assessment the Belarusian legal and regulatory procurement framework was determined to be minimally to moderately compliant with international standards and lacking any specific strengths (see Charts 10, 11 and 12).

Chart 10 - Quality of Public Procurement legal framework in Belarus as compared to other EBRD countries of operation



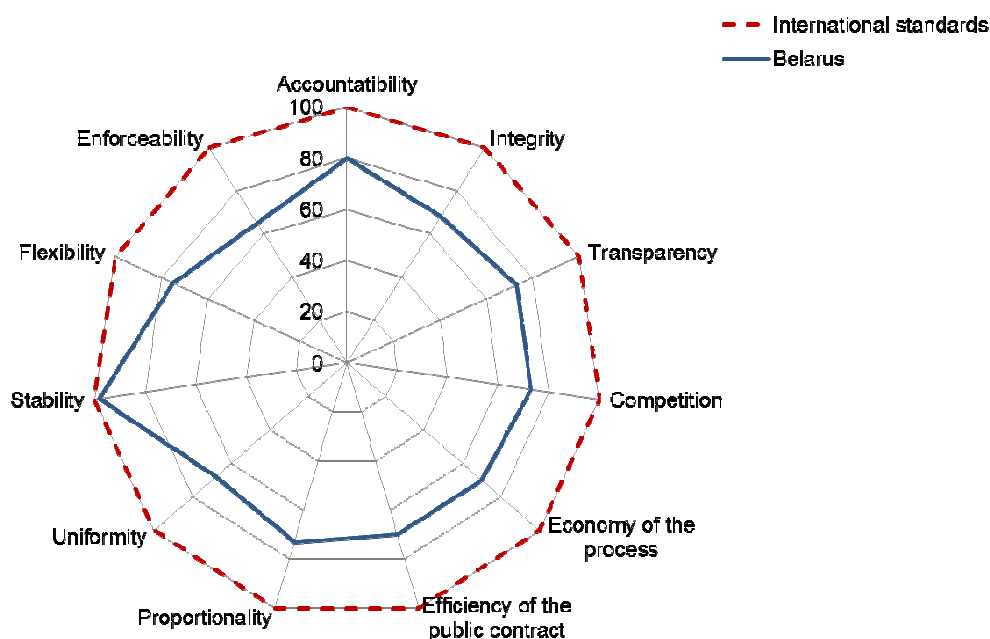
Source: EBRD Public Procurement Assessment 2010

Note: The score represents the level of compliance of the country’s legal framework with international standards such as the revised UNCITRAL Model Law on Public Procurements. Belarus is highlighted in comparison with other countries.

The new PPL is in part based on the 2011 UNCITRAL Model Law on Public Procurement and introduces a number of improvements. First, several institutional changes will take place: a public procurement regulatory body is established that coordinates other government entities in the area of procurement, monitors procurement procedures, and acts as a review and remedies body, and exchange-based tenders have been added as a procedure form. Second, access to competing for public tenders will increase through: the setting of a minimum tender submission period, the establishment of the open tender as the default procedure, and the capping of the tender security, the contract bond, and the cost of receiving documentation.

The procurement procedure has also been streamlined to some degree, with timing guidelines established for structuring the review of proposals; however, a time limit on choosing a contract winner is imposed only on electronic auctions. A remedy procedure is created by the PPL that gives participants the right to submit complaints directly to the procurement regulatory body acting as a remedies body and prohibits the contracting entity from contracting until a decision concerning the complaint is made (standstill period). There are, however, gaps and ambiguous provisions in the PPL. For example, though the PPL declares equal treatment of foreign suppliers, an exception is still made for domestic preferences and one of the general principles of the new law is to support domestic suppliers. Furthermore, the remedies procedure is underdeveloped and does not guarantee procedural fairness to complainants; for example, no timing guidelines are given for the review of a complaint. There are also no regulations for the planning phase of procurement, e.g. no provisions on needs assessment and estimating the value of the public contract. Finally, there is no mention of sustainability criteria in the PPL.

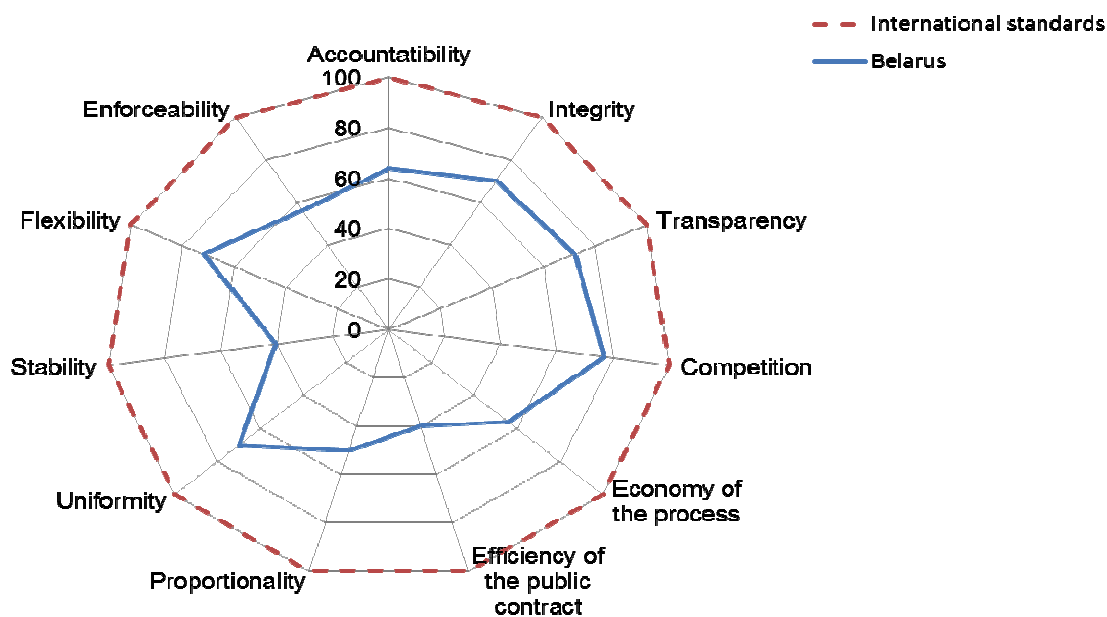
Chart 11 - Quality of Public Procurement legislation – Belarus (2010)



Source: EBRD Public Procurement Assessment 2010

Note: The extremity of each axis represents an ideal score in line with international standards such as the revised UNCITRAL Model Law on Public Procurement. The fuller the ‘web’, the more closely the public procurement laws of the country approximate these standards.

Chart 12 – Belarus - Quality of local procurement practice (2010)



Source: EBRD Public Procurement Assessment 2010

Note: The extremity of each axis represents an ideal score in line with international standards such as the revised UNCITRAL Model Law on Public Procurement. The fuller the ‘web’, the more closely the public procurement practices of the country approximate these standards.

The Belarusian government is currently focused on implementing the new procurement law, as this law was adopted in compliance with the requirements of the 2010 Agreement on Public Procurement between Belarus, Kazakhstan, and Russia, which calls for changes to be implemented by 1 January 2014. Belarus is covered by the EBRD UNCITRAL Initiative for Enhancing Public Procurement Regulation in the CIS countries and Mongolia, but due to the lack of a country strategy no transition project has been initiated.

The advancements in the new public procurement law of Belarus are applauded; however, further regulatory revisions are necessary, and the public procurement legal framework requires a significant review to incorporate up-to-date procurement policies ensuring competitiveness, transparency, and effective review and remedies procedures (including the creation of a dedicated independent remedies body). The current framework should be also supplemented by simplified procedures for small-value contracts to increase the efficiency of the Belarusian public procurement system and eliminate unnecessary regulatory burdens, and encourage the participation of local businesses in public tenders. Finally, the benefits of eProcurement tools should be captured by enabling tenders to be fully conducted electronically (current law enables only reverse e-auctions, but no online submissions or e-tendering).

Overall, the EBRD supports the advancements of the new public procurement law in Belarus, but would like to see further reform efforts on increasing open access and competition as well as efficiency of public procurements in the country through the creation of a dedicated independent remedies body, a simplified procedure for small-value contracts, and the launching of a fully-electronic tendering procedures, not just reverse e-auctions.

3.8 *Secured transactions*

Taking security is generally governed by the provisions of the Civil Code (Article 315 – 338). It sets general principles of taking mortgage and regulates pledge over movable property. In 2008, the Law on Mortgages was adopted, which provides a systematic regulation of mortgages (especially of residential real estate) and the legal basis for long-term mortgage lending. Under the Law, a loan, sale-purchase agreement, lease, construction and other agreements may be secured by a mortgage. Mortgage agreement must always take written form and notarial certification is only required if the underlying secured claim is also subject to notarial certification. Parties' rights may be certified by way of a mortgage bond (the 'mortgage note') as well. The mortgage bond is intended to be transferred and traded in order to encourage the development of a secondary mortgage market. It indicates the actual amount of the debt, the description and location of mortgaged real estates, and other material information. Both mortgage agreement and mortgage bond have to be registered in the Unified State Register for Real Estate which is a publicly accessible registry for rights over immovable property.

Almost conversely to the state of the development of the system of taking mortgages is the state of the system of taking security over movable property. Security over movable property is subject to the 1993 Pledge Law, which is meant to apply as far as it does not contradict the Civil Code provisions. Because both sets of provisions have not been harmonised, it creates considerable uncertainty for the market. The Civil Code generally allows taking non-possessory security over movables but there is no general registration system of such security in place. The borrower, if a legal entity, is required to keep a record of all pledges on its books. However, even this limited rule does not seem to be respected in practice. These limitations leave potential creditors without certainty of their priority rights when considering movable property as collateral. Furthermore, the system does not allow businesses to grant a security right in a single category of movable assets (without requiring a specific description of collateral), security right cannot extend to future or after-acquired assets and a general description of debts and obligations is not permitted in collateral agreements. Hence the system is not able to sufficiently support neither simple nor sophisticated financing transactions (relying on taking security over a fluctuating pool of assets or securing a changing amount of debt - credit line).

The most significant recent amendments in the field of secured transactions were introduced by the Decree of the President of the Republic of Belarus "On Certain Issues of Pledge" No. 3 of 1 March 2010. The Decree liberalised pledge enforcement procedures. In particular, the non-judicial enforcement of pledges and mortgages has been made possible upon fulfilment of certain conditions (notarisation of security agreement, etc.). This change should help in solving problems of debtor obstructions that were reported as the problem in the past.

Limitations on taking security over movable assets and non-existent registration system can negatively influence the access to credit in Belarus. This is particularly true for SMEs which usually have limited resources to offer as collateral. Introducing a modern system of taking and registering of non-possessory pledges would help the Bank in its support to the SME sector.

As part of IFC Belarus Regulatory Simplification and Investment Generation Project (August 2010 – January 2013) IFC is advising the Belarus government on reforms on secured transactions and debt resolution: consisting of: amending the legal framework for secured transactions, and creating a modern and unified collateral registry of movable assets to improve access to finance for businesses; improving insolvency legislation and designing a regulatory system for insolvency practitioners.

Belarus has made progress towards adopting modern principles of mortgage lending. However, significant improvements of system of taking pledge over movable assets are needed in order to create system that would satisfy the needs of modern financial transactions.

Overall, inefficient system of taking pledges over movables is a recurrent stumbling block for access to finance for SME.