



FRESHFIELDS BRUCKHAUS DERINGER



# Public Private Partnerships in Germany

An overview



## Contents

Key points	1
Framework for PPPs	1
Risks for potential investors	5
Current PPP projects	5
Recent developments	6
Outlook	7

## Contacts

Michael Schäfer  
Alsterarkaden 27  
D-20354 Hamburg  
T +49 40 36 90 61 26  
E michael.schaefer@freshfields.com

Thomas Voland  
Alsterarkaden 27  
D-20354 Hamburg  
T +49 40 36 90 62 85  
E thomas.voland@freshfields.com

[www.freshfields.com](http://www.freshfields.com)

This material is for general information only  
and is not intended to provide legal advice.

© Freshfields Bruckhaus Deringer LLP 2009

## Key points

In Germany, there is no single body of laws governing Public Private Partnerships (PPPs). Instead, a plethora of acts, rules and regulations applies. However, the federal and state legislators now appreciate the importance of PPPs for future development in the public sector. They have enacted a series of laws to facilitate PPPs in Germany, the most notable being the PPP Acceleration Act. The federal government has also created institutions that are responsible for co-ordinating and facilitating the development of PPPs in Germany.

Currently, more than 100 PPP projects are in the planning or implementation phase in Germany. They range from big infrastructure projects such as the extension of motorways worth billions of euros to smaller projects such as the extension and renovation of schools, hospitals and prisons.

To facilitate the planning and implementation of PPPs, the federal government and some federal states have passed legislative measures ranging from rules and obligations for the co-operation of public and private partners to the specific promotion of such a co-operation.

We expect, especially in the face of the current financial crisis, that both the number and the value of PPPs in Germany will increase. Additional legislation to facilitate the planning and implementation of PPPs is in the making.

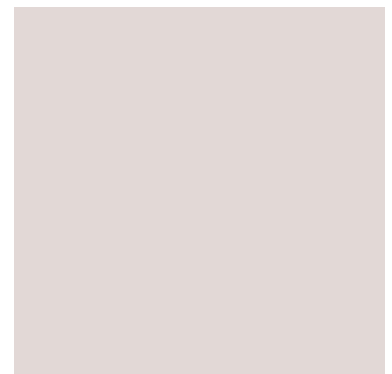
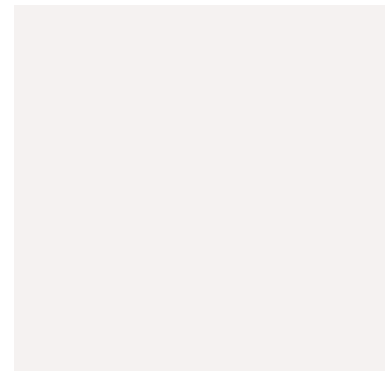
## Framework for PPPs

### Legal framework

In Germany, PPPs are usually based on an agreement governed by private law and concluded between a public partner and a private entity. The public partner can be the Federal Republic, a federal state or one of its authorities or a local community. In general, the private partner is a legal entity or consortium consisting of several companies as shareholders.

There is no specific law providing a comprehensive framework for PPPs. Instead, PPPs are subject to a number of legal regimes in federal and state laws. These include constitutional and administrative law, the law of public procurement, budget law, tax law, investment and finance law, the law on public subsidies, contract law and corporate law.

The first step towards a more comprehensive regulation on PPPs was made when the federal PPP Acceleration Act (ÖPP-Beschleunigungsgesetz) was enacted in 2005. This act is a framework law, which has changed a number of previously existing provisions relevant to operating PPPs, including the Act Against Restraints of Competition, the Public Procurement Ordinance, the Federal Budget Law, the Federal Law on Investment and tax laws.



## Phases of a PPP project in Germany

The laws described below apply during the typical phases of a PPP project.

### Phase I: identification of possible projects

In phase I, the public partner needs to identify possible projects and to assess the economic demand for PPPs, as well as the economic, technical and legal feasibility of a project.

Federal or state constitutional law may necessitate full public authority over a certain institution or service, or at least certain levels of public control over the process. For example, article 33 paragraph 4 of the Basic Constitutional Law stipulates that only civil servants may exercise administrative authority. Therefore the constitutional and administrative framework of a PPP may require a certain corporate structure for the private partner.

Tax, budget and investment laws and the laws on public subsidies may have an important effect on a project's financial feasibility.

The project must also comply with the provisions on state aid in articles 87 and 88 of the EC Treaty. For example, it has to be determined whether public contributions to the financing of a PPP project, either in the form of direct payments or as state guarantees, constitute illegal state aid.

According to the Federal Budget Law and state budget laws, the economic efficiency of a project has to be substantiated. This requires an economic analysis of the PPP project and its comparison with the implementation of the project on a 'conventional' procurement basis. Moreover, budget laws may set certain limits for the sale or use of public property and require a clearance procedure. Since such limits and provisions may impede the implementation of PPPs, a couple of federal states have introduced special legal provisions to promote the development of PPPs. For examples, please see 'Recent developments' below.

### Phase II: preparation and planning

In phase II, the public partner has to develop a contract as well as performance-related specifications. It needs to determine a project's fundamental characteristics – for example, the duration, the suitable contract model and the level of public control. In this phase, contract and corporate law play an important role. This concerns, inter alia, the applicable type of contract, which defines the parties' mutual rights and obligations, various models of financing and the project's corporate design. In Germany, a variety of contract types may apply to PPP projects (eg concession agreements or leasing agreements) and models include supply-and-management contracts, turnkey projects, various lease and concession models, models of private ownership or use of assets. For example, in the case of concession models, legal advice is

required to ensure that the fees charged by a private entity comply with laws and regulations on taxes and public fees.

#### Phase III: award procedure

In phase III, the public partner usually carries out a contract award procedure and invites the submission of applications from interested private entities. According to section 2 of the Procurement Ordinance, the PPP project is subject to a formal award procedure if its volume exceeds a certain threshold (eg in 2008 €412,000 for supplies and services for drinking water, energy or transport; €133,000 for general supplies and services for federal government institutions; €206,000 for all other supplies and services; and €5,150,000 for construction projects). Budget laws may require a tender even if the project remains below the thresholds in the Procurement Ordinance. Procurement law often requires a Europe-wide tender and entitles the applicant to seek legal remedies before a public procurement tribunal under section 107 et seq of the Federal Act on Restraints on Competition. The public partner needs to prepare and publish an award notice and performance-related specifications and conduct an awards procedure in accordance with procurement law. At this stage, legal advice is regularly needed to ensure that the procedure complies with all applicable laws and that the bidders' rights are duly observed.

#### Phase IV: implementation and controlling

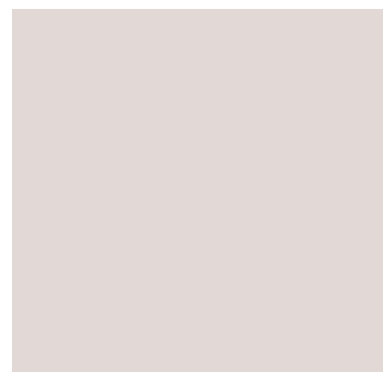
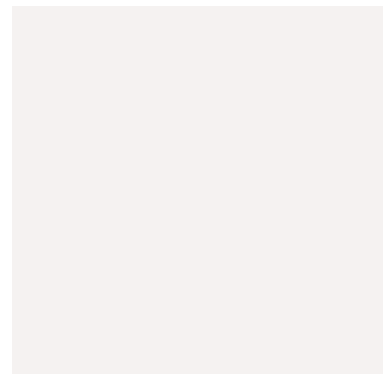
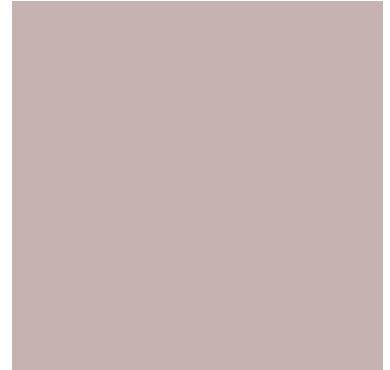
In phase IV, the project is implemented. Depending on the subject matter, a significant range of laws may apply during this phase – eg in the case of a construction or transport project, the provisions of public and private building law, transport law, environmental law, civil law and other laws. If the project needs to take over a service that has so far been publicly run, the private entity may be obliged to employ public servants. This requires the application of public service law and the relevant provisions of individual and collective labour law.

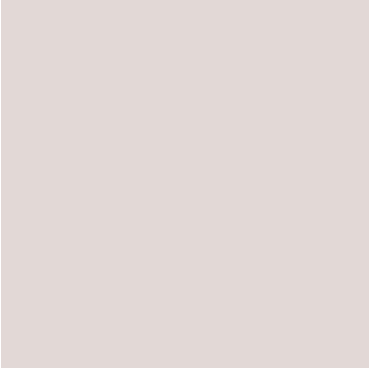
#### The PPP Acceleration Act

Some of the above-mentioned laws have been modified by the PPP Acceleration Act to facilitate PPPs. For example, the meaning of 'public contracts' has been clarified to facilitate the determination of applicable law.

Moreover, a new procedure for public procurement called 'competitive dialogue' (*Wettbewerblicher Dialog*) has been introduced. This is a procedure for the award of particularly complex contracts by public contracting entities. An invitation to participate is made and selected persons or companies are invited to negotiate all the details of the contract.

Furthermore, the Federal Budget Law has been modified. The amended section 7 paragraph 2 allows entities to take into account the assumption of risk in assessing the economic efficiency of a project



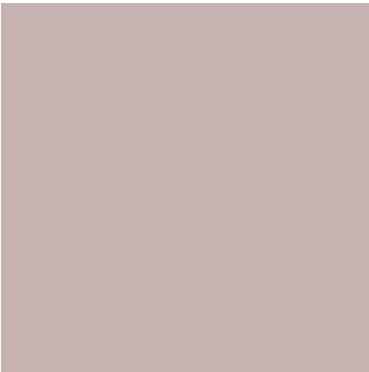


as a condition for compliance with the Federal Budget Law. This is particularly relevant for PPPs because the risk allocation can be a major element of a PPP's economic balance. Section 63 paragraph 2 of the Federal Budget Law now allows the sale of federal real estate even though there is a public demand for such property. Before this amendment, the prohibition of sale rendered sale-and-leaseback contracts impossible.

Other amendments concern inter alia tax laws and the Federal Law on Investments. The latter one allows mutual real estate funds to hold a number of shares in a PPP project company.

#### PPP institutions in Germany

- A number of institutions have been established to facilitate PPPs. They include the Federal PPP Task Force, which is a part of the Federal Ministry for Transport, Building and Urban Affairs in Berlin. A number of federal states have their own PPP commissions or task forces. These institutions have advisory and information functions and are not involved in the decision-making processes for individual PPP projects. They serve as knowledge databases and offer assistance to communities considering setting up a PPP. They also play an important role in informing the public and in developing common standards on the treatment of PPPs. The Federal PPP Task Force publishes a database of all PPP projects in Germany ([www.ppp-projekt Datenbank.de/](http://www.ppp-projekt Datenbank.de/)).
- In December 2007 the federal government decided to establish a corporation called 'Partnerships Germany' (Partnerschaften Deutschland; PDG) to provide qualified and neutral advice on PPP-related issues to all public entities. PDG shall pool significant expertise and knowhow in the field. It will offer remunerated advice to public partners on specific projects, especially during the early stages of a PPP. For this purpose, PDG concludes framework agreements with public partners interested in receiving advice from it. PDG will also be involved in basic groundwork with regard to the development of the legal framework for PPPs in Germany. It plans to employ approximately 50 members of staff from sectors such as finance, industry, consulting and public service. PDG merely aims to cover its costs but is not profit-oriented. It complements the market for PPP consulting in Germany. Its shares are held by the federal government, 10 federal states and 82 municipalities (approximately 70 per cent) and private investors from various countries and all sectors dealing with PPP (approximately 28 per cent). PDG began its operational activity in early 2009. Freshfields Bruckhaus Deringer acted as a principal adviser to the government in the process of establishing PDG.



## Risks for potential investors

The German parliament has recently adopted a reform of the German procurement law. In particular, the new law tightens the obligation to procure large quantities of goods and services in several lots rather than in one comprehensive package. It was argued that this reform could have negative effects on future PPPs by forcing the contracting authority to split PPP contracts, which could reduce the projects' efficiency. However, the new law allows public authorities to award several lots in a single package if economic or technical reasons necessitate this. This provision gives ample room for manoeuvre to preserve the implementation of comprehensive PPP projects in Germany. Moreover, there are various cases in which a separation into 'vertical' quantity lots may be reasonable. For example, if 60 school buildings in one region are to be renovated and operated, a separation into two or three lots of 30 or 20 buildings may be efficient.

On the level of each individual PPP project, the question of who is going to bear the risk of a reduction in demand is probably the most controversial issue within the negotiation leading towards a PPP contract. The public partner often attempts to shift the risk to the private investor. This can force the private investor to bear the negative consequences if the actual demand does not meet the expectations. For example, the current economic crisis could lead to a reduction in heavy goods vehicle (HGV) traffic on motorways. The revenue generated by the HGV tolls could therefore be lower than expected. Or the number of patients frequenting a medical institution run under a PPP scheme could be lower than estimated. This could bring the private investor into dire straits because it relies heavily on the revenues generated by the project in order to finance the project. If the numbers do not add up, the result could be the investor's insolvency. It is therefore vital for the private investor to insist that the public partner bears the risk of a reduction in demand. The private investor should bear this risk only if the reduction in demand can be directly attributed to its own performance – eg if a comparable facility attracts more customers than the one run by the private investor simply because it is better maintained or offers a better deal to customers.

## Current PPP projects

### Extension of motorways (so-called 'A-models')

Some of the most important PPP projects in Germany concern the extension of parts of German motorways (*Autobahnen*). In these so-called A-models ('A' as an abbreviation for *Autobahnausbau*; motorway extension), the private partner takes over responsibility for extending the number of lanes as well as for paying the costs of maintenance and operation of both the existing and new lanes in certain parts of existing motorways. In return, the private partner gets the revenues from the HGV tolls (tolls paid for the use of the motorways by HGVs).

Additionally, the federal government may pay an initial subsidy to get the project started. The details of these A-models are governed by a concession contract. Currently, the following A-models are in the process of being executed:

- A1 between Bremen and Buchholz in Lower Saxony: extension from two to three lanes in each direction (72.5km long); contract period for maintenance and operation: 30 years;
- A4 in Thuringia: construction of a 22.5km-long section of the motorway as well as extension of existing sections; contract period for maintenance and operation: 30 years;
- A5 between Malsch and Offenburg in Baden-Württemberg: extension from two to three lanes in each direction for a 41.5km-long section of the motorway as well as maintenance and operation of a 59.7km-long section of the motorway for 30 years; the contract volume amounts to approximately €600m; and
- A8 between Munich and Augsburg in Bavaria: extension from two to three lanes in each direction for a 37km-long section of the motorway as well as maintenance and operation of a 52km-long section of the motorway for 30 years.

#### Other PPP projects

Additionally, approximately 100 other PPP projects are in the planning or implementation phase. Most of these concern the renovation, extension or construction of public buildings ranging from schools, hospitals, barracks and prisons to castles and gardens. For example, the city of Nuremberg awarded the contract to renovate and rebuild some of its schools to a private consortium within a PPP scheme. The overall worth of this contract is €50m. Similar projects for renovating and reconstructing schools in PPP schemes can be found in numerous cities and administrative districts all over Germany.

PPPs in the health sector are increasing, too. For instance, the university hospital of Schleswig-Holstein is building a new centre for particle therapy for curing cancer patients in Kiel. This new centre, worth €250m, is the largest PPP project in the health sector in Germany.

#### Recent developments

In the past few years, both the federal and the state legislators have passed – or are still working on – a number of legislative measures that directly concern the feasibility and implementation of PPPs in Germany. On the federal level, the most important developments are the reform of the public procurement law and the new Investment Act.

Furthermore, the reform of the Federal Investment Act in 2007 (the *Investmentänderungsgesetz*) introduced a new class of funds, the PPP funds. Investment companies can now invest in PPP project companies. Thus, this new act enables the use of private capital for PPP

projects. Even individual private investors can now participate in the opportunities offered by the PPP market.

At the same time, the federal states have developed legislative measures to further the development of PPP projects.

One example is section 35a of the law on hospitals of the federal state of Hesse. This section extends the eligibility of state-owned hospitals for subsidies. Under the new scheme, hospitals can obtain state subsidies not only for construction or renovation projects run by themselves, but also for those implemented within a PPP. As long as the PPP is economically efficient, it gains the same rights of access to state funding as completely state-run hospital extension, renovation or reconstruction projects.

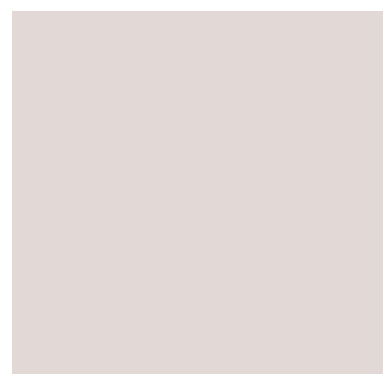
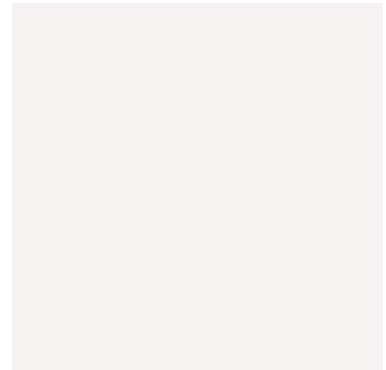
Another example for the promotion of PPP projects in the health sector is the 'lump-sum construction subsidy' for hospitals in the state of North Rhine-Westphalia (*NRW-Baupauschale*). Instead of approving and financing specific construction or renovation projects of state-owned hospitals, the state now gives each and every state-owned hospital a lump-sum subsidy of €460,000 per year. The individual hospital is able to choose the projects it wants spend the money on. It is also possible to use the money for acquiring private financing for larger projects or to pool the subsidies of several years and/or hospitals to realise larger projects. As a consequence, many hospitals are expected to use their newly gained freedom for renovating, reconstructing or extending their buildings and institutions with the help of PPPs.

## Outlook

### Legal developments

In 2006, a new parliamentary working group was established to draft a second federal framework law, the PPP Simplification Act (*ÖPP-Vereinfachungsgesetz*). This shall cover several economic sectors of relevance for the PPP market in Germany, including healthcare, social infrastructure, transport and defence. The act is still being debated within the working group and will presumably not enter into force before 2010.

In March 2009, the German parliament started the initiative 'Fair competitive conditions for PPP in Germany', which aims to increase the attractiveness of PPP solutions. As part of this initiative, the implications of value added tax (VAT) for PPP projects shall be assessed and potentially modified. So far, the provision of services by public authorities themselves is not subject to VAT. By contrast, VAT has to be paid if a private partner provides the same services in a PPP. Consequently, PPPs may be disadvantaged by comparison with the provision of services by public authorities. The new initiative shall serve to reduce or eliminate this disadvantage. Moreover, the parliament plans an amendment of the Federal Budget Law. This shall ensure





that projects are implemented by private entities or on the basis of PPPs if an economic assessment has proven the efficiency of such an implementation. Finally, the parliament has asked the government to amend the Act on the Private Financing of Long-Distance Roads (Fernstraßenbauprivatfinanzierungsgesetz) to facilitate the construction of special buildings on roads, such as bridges or tunnels.

#### New PPP projects

Various PPP projects will be executed within the next few years. In particular, the government's measures to support the German economy in the face of the financial crisis will probably lead to faster execution of planned projects. Among those projects are several extensions of motorways within the A-models scheme. The German Ministry of Transport has launched the planning and procurement process for the A8 between Ulm and Augsburg in Bavaria. This project worth €280m comprises a lane extension as well as maintenance and operation of a 58km-long section of the A8. Moreover, the A9-project between Hermsdorf and Schleiz in Thuringia has been launched. In a second wave, four other A-projects will be launched, probably in 2009 or 2010 at the latest: the A1 between Lotte and Münster together with the A30 Rheine-Lotte *autobahn* in North Rhine-Westphalia; the A6 between Wiesloch-Rauenberg and Weinsberg in Baden-Württemberg; the A7 between Bordesholm and Hamburg in Schleswig-Holstein; and the A7 between Salzgitter and Drammetal in Lower Saxony. Additionally, parts of the A45 near Gambach and the crossing of the A60 and A643 near Mainz shall be restored within PPP projects. No timeline has yet been set for these projects.

Partnerships Germany has become operative by advising the City of Dresden on a PPP project in the culture sector. Furthermore, it shall play an important role in providing advice on opportunities for PPPs under the 'rescue packages' for the German economy.

ABU DHABI  
The Makeen Building  
Office 202  
PO Box 129817  
Abu Dhabi  
T +971 2 6521 700  
F +971 2 6521 777

AMSTERDAM  
Strawinskylaan 10  
1077 XZ Amsterdam  
T +31 20 485 7000  
F +31 20 485 7001

Mailing address  
PO Box 75299  
1070 AG Amsterdam

BAHRAIN  
Bahrain World Trade Centre  
East Tower, 37th floor  
PO Box 20184  
Manama  
Bahrain  
T +973 1 713 4333  
F +973 1 713 4300

BARCELONA  
Mestre Nicolau 19  
08021 Barcelona  
T +34 93 363 7400  
F +34 93 419 7799

BEIJING  
3705 China World Tower Two  
1 Jianguomenwai Avenue  
Beijing 100004  
T +86 10 6505 3448  
F +86 10 6505 7783

BERLIN  
Potsdamer Platz 1  
10785 Berlin  
T +49 30 20 28 36 00  
F +49 30 20 28 37 66

BRUSSELS  
Bastion Tower  
Place du Champ de Mars/  
Marsveldplein 5  
B-1050 Brussels  
T +32 2 504 7000  
F +32 2 504 7200

COLOGNE  
Im Zollhafen 24  
50678 Cologne  
T +49 221 20 50 70  
F +49 221 20 50 79 0

DUBAI  
The Exchange Building  
5th floor  
Dubai International  
Financial Centre  
Sheikh Zayed Road  
PO Box 506 569  
Dubai  
T +971 4 5099 100  
F +971 4 5099 111

DÜSSELDORF  
Feldmühleplatz 1  
40545 Düsseldorf  
T +49 211 49 79 0  
F +49 211 49 79 10 3

Mailing address  
Postfach 10 17 43  
40008 Düsseldorf

FRANKFURT AM MAIN  
Bockenheimer Anlage 44  
60322 Frankfurt am Main  
T +49 69 27 30 80  
F +49 69 23 26 64

HAMBURG  
Alsterarkaden 27  
20354 Hamburg  
T +49 40 36 90 60  
F +49 40 36 90 61 55

Mailing address  
Postfach 30 52 70  
20316 Hamburg

HANOI  
#05-01  
International Centre  
17 Ngo Quyen Street  
Hanoi  
T +84 4 38247 422  
F +84 4 38268 300

HO CHI MINH CITY  
#1108 Saigon Tower  
29 Le Duan Boulevard  
District 1  
Ho Chi Minh City  
T +84 8 38226 680  
F +84 8 38226 690

HONG KONG  
11th floor  
Two Exchange Square  
Hong Kong  
T +852 2846 3400  
F +852 2810 6192

LONDON  
65 Fleet Street  
London EC4Y 1HS  
T +44 20 7936 4000  
F +44 20 7832 7001

MADRID  
Fortuny 6  
28010 Madrid  
T +34 91 700 3700  
F +34 91 308 4636

MILAN  
Via dei Giardini 7  
20121 Milan  
T +39 02 625 301  
F +39 02 625 30800

MOSCOW  
Kadashevskaya nab 14/2  
119017 Moscow  
T +7 495 785 3000  
F +7 495 785 3001

MUNICH  
Prannerstrasse 10  
80333 Munich  
T +49 89 20 70 20  
F +49 89 20 70 21 00

NEW YORK  
520 Madison Avenue  
34th floor  
New York, NY 10022  
T +1 212 277 4000  
F +1 212 277 4001

PARIS  
2 rue Paul Cézanne  
75008 Paris  
T +33 1 44 56 44 56  
F +33 1 44 56 44 00

ROME  
Piazza di Monte Citorio 115  
00186 Rome  
T +39 06 695 331  
F +39 06 695 33800

SHANGHAI  
34th floor  
Jinmao Tower  
88 Century Boulevard  
Shanghai 200121  
T +86 21 5049 1118  
F +86 21 3878 0099

TOKYO  
Akasaka Biz Tower 36F  
5-3-1 Akasaka  
Minato-ku  
Tokyo 107-6336  
T +81 3 3584 8500  
F +81 3 3584 8501

VIENNA  
Seilergasse 16  
1010 Vienna  
T +43 1 515 15 0  
F +43 1 512 63 94

WASHINGTON  
701 Pennsylvania Avenue, NW  
Suite 600  
Washington, DC 20004-2692  
T +1 202 777 4500  
F +1 202 777 4555

25990

