

December 2016

New PPP Law in Romania to jump-start the use of public-private partnership

The highly anticipated new Romanian law on public-private partnership ("**New PPP Law**") has been finally enacted and will enter into force on 25 December 2016. It replaces the former Law no. 178/2010 on public-private partnership, which due to significant legislative inconsistencies has failed to accommodate any public-private partnership ("**PPP**").

PPPs under the New PPP Law

A PPP is a mechanism designed to facilitate building, refurbishment or development of assets destined to provide and / or operate a public service ("**Public Project**") by a project company, by joining the efforts and resources of a public partner (public authority or institution) and a private partner, where the source of income of the project company consists mainly or entirely in payments received from the public partner or other public entities, during the exploitation of the Public Project.

The key difference between PPPs and concessions is actually the main source of income, as, for the latter, the concessionaire (private partner) recovers its investment (and makes profit) mainly by receiving payments from the third parties users of the object of the concession.

Types of PPP and award of PPP

In view of the shareholding structure of the project company, there are two types of PPPs: (i) contractual PPPs, where the project company is owned entirely by the private partner; and (ii) newly introduced institutional PPPs, where the project company is owned both by the private partner and the public partner.

A PPP should be initiated by the public partner and awarded based on public procurement rules - depending on the object of that PPP, the legal regime applicable to general public procurement, public procurement regarding sectorial utilities, or works and services concessions, as well as to remedies in connection therewith, will also apply.

Financing of PPPs

One of the objectives of the New PPP Law has been to make PPPs bankable and more attractive to financiers, by introducing specific provisions on public guarantees, security interests, direct agreements between the public partner and financier and step-in rights for the financier.

The private partner may arrange the financing from its own resources or from financiers. The New PPP Law expressly allows that rights and receivables under the PPP agreement and / or shares in the project company be mortgaged in favour of the banks and financial institutions. Further, the public partner may also grant guarantees to the benefit of such financiers.

As a novelty, the PPP Law sets out that the public partner may support a Public Project with non-reimbursable EU funds (together with the contribution of the Romanian State related to such funds). In addition to procuring funds in the form of participations in the share capital of the Project Company, the public partner may also grant concession rights over the assets related to the Public Project (including over assets in the public domain) or, depending on the assets, superficies rights.

The PPP agreement

The PPP agreement constitutes an administrative contract and its contents are outlined by the PPP Law.

A key aspect covered by a PPP agreement refers to the ownership of the assets developed or used for the Public Project. Upon expiry of that PPP agreement, the assets created or acquired by the project company, the assets necessary for the public service and the shares of the private partner in the project company for that Public Project are transferred to the public partner, free of charge. However, in case of termination of the PPP agreement before its



expiry, these assets and shares are transferred to the public partner with compensation for the benefit of the private partner.

Unilateral termination or amendment of a PPP agreement by the public partner is only permitted for exceptional reasons regarding public interest (such as public health, environment protection, safety and quality standards, affordability of the tariffs for the consumers of the public service, unhindered access to the public service) and the private partner shall be entitled to receive appropriate damages.

The New PPP Law also deals with a potential replacement of the private partner in case of its or the project company's default under the PPP agreement or the financing arrangements. This replacement can be initiated by the public partner (on its own or at the request of the financiers) if such option was included in the award documentation and the PPP agreement, and is subject to the public procurement award rules.

Final remarks

There are high expectations that the New PPP Law constitutes a key legal development which will ultimately allow successful structuring of PPPs in Romania. In fact, the Government officials have already announced specific projects envisaged to be implemented through the use of PPP in the New Year, such as the development of three completely new regional hospitals in three major cities in Romania.

This material is for general information only and is not intended to provide legal advice. For further information on this topic please contact us at: office@volciucionescu.com. The Volciuc-Ionescu website can be accessed at www.volciucionescu.com.