

Briefing

1 October 2014

Upcoming transposition of the new EU Concessions Directive – a possible solution to unlocking Romania's major projects

Due to Romania's commitments to international financiers and the strict Maastricht criteria, many major projects (in particular, related to transport, energy or to social infrastructure) cannot obtain "classic" Romanian state funding and alternative financing structures need to be utilized. Concessions and/or PPPs have been on the agenda of the Romanian Government for several years as a solution to implement complex projects, but investors and practitioners have found that the current legal regime needs improvements.

Currently, Romanian works and services concessions are governed by Government Emergency Ordinance No. 34/2006 on the award of public procurement contracts, public works concessions and public services concessions ("**GEO 34/2006**"), which generally transposes EU legislation in this field, and the application norms approved by Government Decision No. 71/2007 ("**Application Norms**"). Romania has also put in place a special law on PPPs since 2010, but, due to its various requirements and uncertainties, this law has not been used and likely will not be used in practice in its current form.

Until 18 April 2016, this existing national framework will need to be aligned with the legislative changes which took place at EU level during the first quarter of 2014 as part of a wider process to reform public procurement and Romania will have to transpose the provisions of new Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts ("**Concessions Directive**"), which regulates concessions at EU level.

Similar to the ambitious target of the UK government to implement the new public procurement directives this year, the implementation of the Concessions Directive is already on the agenda of the Romanian government, which intends to debate the implementation measures still by the end of 2014. The key changes to the current concessions regime to be brought following transposition of the Concession Directive are set out below.

An improved definition of public works and services concession

While the current regime established by GEO 34/2006 and the Application Norms define concessions by reference to public procurement contracts, the Concessions Directive provides an improved specific definition of both works and services concessions. Under the new regime, a concession means "*a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities ("**Contracting Authority**") entrust (i) the execution of works, in case of works concessions or, in case of service concessions, (ii) the provision and the management of services other than the execution of works, to one or more economic operators ("**Concessionaire**") the consideration for which consists either solely in the right to exploit the works - in case of works concessions or, in case of service concessions - the services that are the subject of the contract or in that right together with payment*".

Transfer of risks to Concessionaire

Currently, there is an unclear risk allocation under the Application Norms, which only mention the transfer of most of the project risks to the Concessionaire as being the differentiator between concession contracts and public procurement contracts, without detailing what this transfer implies and significant questions have been raised in practice. According to the Concessions Directive, a concession will imply the transfer of an operating risk, such transfer being assumed in case, under normal operating conditions, the Concessionaire is not guaranteed to have its investment returned and the transferred risks expose the Concessionaire to the uncertainty of the market. Of course, it will still not be an easy exercise to determine the practical meaning of such transfer.



Turnover-based calculation of the estimated value of the concession

The Concession Directive provides that the estimated value of a contract will be calculated based on the total turnover of the Concessionaire, which is generated over the duration of the concession contract (net of VAT), while under GEO 34/2006 the estimation is performed based on all amounts payable for the execution of the concession contract, net of VAT.

Duration of a concession

While GEO 34/2006 and the Application Norms establish criteria to be taken into account by the Contracting Authority when determining the duration of a concession, the Concessions Directive establishes certain time-constraints for those concessions exceeding 5 years – such concessions will have to be limited to the time that a Concessionaire could reasonably be expected to take to recuperate the investments made together with a return on invested capital.

No specific award procedure

Under GEO 34/2006, Contracting Authorities have to award a concession contract through open or restricted tender, competitive dialogue and, under some conditions, negotiation with the publication of a participation notice. Some of these procedures can raise practical issues (*e.g.* limited duration of the negotiations and award procedure in case of competitive dialogue) in case of high-profile and complex projects, which require more flexibility.

The Concessions Directive does not set out any specific award procedure, Contracting Authorities having the freedom to organize the procedure leading to the choice of the Concessionaire, subject to compliance with the principles of equal treatment and transparency and the general rules concerning the selection and award criteria and procedural guarantees, as set out in the Concessions Directive.

Unlike the current provisions of GEO 34/2006, which set out a minimum time-limit for publication of the concession notice of 52 days before the deadline for submitting the applications, the Concessions Directive sets out a lower minimum time-limit of 30 days from publication of the concession notice.

No specific award criteria

The Concessions Directive does not impose any specific award criteria – Contracting Authorities may choose the criteria they consider most suitable to the award of the concession. However, such freedom of the Contracting Authorities in choosing the award criteria is limited by the requirements of objectiveness, non-discrimination and transparency and the award criteria must be linked to the subject-matter of the concession. From a practical perspective, it remains to be seen whether this freedom would adversely affect the award of concessions in spite of these general requirements.

Modifications of concession contracts during their term

The Concessions Directive seems to clarify the situations where no new award procedure is required when on-going concessions contracts are modified and also to clarify the meaning of a "substantial modification" to the concession contract, which would trigger a new award procedure. According to the European Commission, this situations mainly represent a codification of existing EU case law.

According to the Concessions Directive, the situations where concession contracts may be modified without a new award procedure include (i) existing review clauses or options in the concession contract, (ii) additional works or services to be provided by the original Concessionaire, (iii) the occurrence of the modification due to circumstances which could not have been foreseen by the Contracting Authority, (iv) the situations where the modifications are not

substantial and (v) replacement of the original Concessionaire by another Concessionaire, in case of review clauses or options, universal or partial succession into the position of the original Concessionaire or situations where the Contracting Authority assumes itself the obligations towards the subcontractors of the Concessionaire – from a practical perspective, the specific replacement of the original Concessionaire will probably enhance the bankability of the concession compared to the current regime.

On the other hand, as a general rule, a modification is considered substantial where the concession is materially different than the initial concession. The Concessions Directive also sets out specific modifications which are presumed to be substantial, such as changes to the economic balance of the concession in favour of the Concessionaire, extension of the scope of the concession or replacement of the original Concessionaire in other cases then expressly provided by the Concessions Directive.

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.