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New attempt to facilitate use of public-private partnerships in Romania

As of 18 May 2018, Romania has a new legal framework on public-private partnership ("**PPP**") enacted through the Government Emergency Ordinance no. 39/2018 ("**New PPP GEO**"). The New PPP GEO replaces the former Law no. 233/2016 on PPP ("**Former PPP Law**") after less than 2 years of its enactment – no projects have been implemented under the Former PPP Law, in particular, due to lack of application norms.

Further, the Government has recently approved Government Decision no. 357/2018 on the list of strategic investment projects which will be developed under the PPP structure, which includes (i) Ploiești-Brașov Highway (approx. 110 km), (ii) București - Craiova - Calafat - Drobeta-Turnu Severin - Lugoj Highway (approx. 550 km), (iii) Târgu-Neamț - Iași - Ungheni Highway (approx. 100 km), (iv) operation of healthcare services in PPP in 15 CFR hospitals, (v) construction of medical complex "Carol Davila - University Medical City" (hospital, R&D center, medical campus, with an area of 300 hectares)

Key changes under the New PPP GEO

The New PPP GEO bring several good improvements to the Former PPP Law – key changes include:

1. clarification that the public partner may grant certain rights in relation to public assets to the private partner or the project company based on the PPP agreement, without being necessary to carry out separate public procurement procedure;
2. extension of the PPP's applicability to operation of a public service;
3. limiting the participation of the public partner to the financing of the investments with public funds to 25% of the initial investment amount;
4. set out of a Special Fund for financing strategic PPP agreements to facilitate and avoid delays in payments to be made by the public partner;
5. elimination of overlapping provisions with the laws on public acquisitions and public concessions;
6. faster and easier implementation of PPPs by elimination of ex-ante approvals in local city administration - based on its decision, the local councils may proceed directly to the PPP procedure.

Extended scope for PPPs

A PPP is a mechanism designed to facilitate building, refurbishment or development of assets which will belong to the patrimony of the public partner and / or operation of 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 more than half of the project company's income** resulting from the use of the developed assets or operation of the public service **is generated by payments received from the public partner** (or other public entities in the benefit of the public partner).

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) 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.

Steps for concluding a PPP

In view of concluding a PPP agreement and developing a Public Project, the following steps are to be followed:

(a) preliminary study carried out by the public partner and approved by the Government or local councils;

(b) public procurement procedure for awarding the PPP agreement to a private partner;

(c) negotiation of the final version of the PPP agreement with the selected private partner, approval of the PPP agreement by the Government or local councils, and execution of the PPP agreement;

(d) fulfilment of the conditions precedent set out in the PPP agreement.

Financing of PPPs

The objective of the Former PPP Law to make PPPs bankable and more attractive to financiers has been maintained under the New PPP GEO, by provisions regulating public guarantees, security interests, direct agreements between the public partner and step in rights for financiers.

As before, the private partner may arrange the financing from its own resources or from financiers. The New PPP GEO expressly allows that rights and receivables under the PPP agreement and / or shares in the project company be mortgaged in favour of banks and financial institutions. Further, the public partner may also directly provide guarantees to and undertake obligations towards such financiers.

The public partner may support the Public Project including with non-reimbursable EU funds (together with the contribution of the Romanian State related to such funds). As a novelty, the financing by the public partner through other means than non-reimbursable EU funds and the corresponding national contribution is permitted up to a cap of 25% of the value of the Public Project.

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 – now without being necessary to carry out separate public procurement procedure;
- undertake payment obligations towards the private partner or payment obligations relating to the execution of the investments for the Public Project. Such payments may be made from public funds - now to be facilitated by a Special Fund for financing strategic PPP agreements, which will be set up by 17 May 2019.

The PPP agreement

The PPP agreement represents an administrative contract and its contents are outlined by the New PPP GEO.

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). In such case, the private partner shall be entitled to receive appropriate damages.

The New PPP GEO 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

The New PPP GEO is the result of the Government's undertaking under the Government Program 2018-2020 to commence public investment projects with significant impact in economy and to stimulate private investments.

According to statements issued by the Romanian Prime-Minister, the New PPP GEO is ready to be put in practice, as application norms will not follow (as such are not necessary, since the New PPP GEO provides the entire legal framework). However, a good practice guide will be prepared for easier implementation of PPPs, with recommendations that are not mandatory.