

LEGAL & TAX ALERT, May 14th, 2018

The government has adopted a new legal framework for public-private partnership (PPP)

Law no. 233/2016 on public-private partnership, substantially amended by Government Emergency Ordinance no. 104/2017 on amending and supplementing Law no. 233/2016, was repealed by a new Government Emergency Ordinance which constitutes the new legal framework on PPPs (“**GEO**”) and which was adopted by the Romanian Government on May 10th, 2018. The GEO shall become effective on its publication date in the Official Gazette of Romania, which is expected to occur in short time. The application of the GEO shall not depend on the adoption of any methodological norms, the Government’s intention in this respect being to publish a guide at a later date.

The new legal provisions are applicable to projects regarding the construction, rehabilitation and extension of assets designed to be used for supplying and/or operating a public service. The provisions of the GEO shall apply to project which, according to the assessment study (in Romanian: *Studiu de fundamentare*), demonstrate that more than half of the incomes to be obtained from the operation of the project shall be paid by the public partner or by such other public entity in the benefit / on behalf of the public partner. Should the assessment study conclude that such condition is not met, the project shall be developed pursuant to the provisions of the public acquisitions law, to the sectorial acquisitions or to the provisions of the concession law – as the case may be. The GEO shall be applicable to projects having a duration of at least 5 years.

Types of structure

The provisions of the GEO are general and flexible enough to accommodate various types of PPP projects. The GEO explicitly provides for the possibility of PPP projects to be implemented through:

1. *a contractual PPP* – based on a PPP agreement to be concluded between the public partner, the private partner and the project company fully held by the private partner, or through
2. *an institutionalized PPP* – based on a PPP agreement to be concluded between the public partner and the private partner which shall jointly incorporate a project company which shall become also a party to the PPP agreement.

The GEO also allows for other public authorities to undertake (on behalf of the public party) payment or guarantee obligations, provided that such obligation was mentioned in the assessment study and in the awarding documentation. In such cases, such third public entity is entitled to become a signatory party to the PPP agreement (even if it did not participate to the tender procedure). The GEO sets forth that such public entities shall conclude an association agreement by means of which shall regulate the manner of allocating between each other the rights and obligations from the PPP agreement, during the performance and operation of the project and upon the termination thereof.

In line with the relevant international practices, the GEO provides for the allocation of risks among the partners to be performed in accordance with their actual possibility to assess, manage and control such risks (contrary to the principle from the concessions' legislation according to which the private entity shall develop and operate a project at its own risk).

Preparation of the project and of the PPP agreement

One of the main amendments brought by the GEO compared to the previous law consists of the stages for the conclusion of the PPP agreement. For the conclusion and performance of a public-private partnership agreement, the following stages have to be carried out:

1. preparation by the public partner of an assessment study;
2. approval of the assessment study by the Government, in case of projects run by the central public administration, or, as the case may be, by the deliberative authorities, in case of projects run by the local public administration;
3. awarding procedure of the public-private partnership agreement;
4. approval by the Government of the public-private partnership agreement resulted following the completion of the negotiations and ascertained by the parties, in case of projects run by the central public administration, or, as the case may be, by the deliberative authorities, in case of projects run by the local public administration;
5. execution of the public-private partnership agreement;
6. fulfilment of all the conditions precedent set forth by the public-private partnership agreement, including of the financial closing.

Considering the novelty and also complexity of the PPP projects, as well as in order to replace the public authorities' lack of experience in this sector, the GEO provides for the possibility of the Government to adopt decisions so that certain projects it considers as being strategic are to be prepared and awarded by the National Commission for Strategy and Forecast on behalf of the public partners who are going to implement such projects.

In view of assessing the effects of the agreement by reference to the public deficit and public debt, as per the Eurostat recommendations, the public partner is under the obligation to transmit to the National Statistics Institute, within 30 days as of the execution, a certified copy attesting its conformity with the original counterpart of the public-private partnership agreement.

For ensuring the funds necessary for the availability payments or for the contributions of the public partners aimed at financing the performance of the investments afferent to the PPP projects approved by the Government, the GEO sets forth the incorporation of a special financing fund, within one year as of the entry into force of the GEO. The special law on the incorporation of the fund shall establish the financial fiscal and non-fiscal resources which will credit the budget of such fund. The provision aims at setting out a more predictable framework based on which, for the projects approved by the Government, the interested private partners may be provided with the public resources available for the respective projects.

The main document based on which a PPP project will be initiated and awarded is the assessment study. Such assessment study shall be prepared by the public partner based on a feasibility study. The assessment study must mandatorily highlight among others:

1. the economic efficiency of the project;
2. the sustainability of the project in comparison with the alternatives;
3. the allocation of risks between the two partners for each alternative option;
4. the financing options for the project;
5. the classification of the project as being “on” or “off” the government’s balance sheet under ESA10 rules and the identification of the obligations which may be undertaken by the public authority without affecting the limits of the public debt and of the budgetary deficit;
6. the duration of the PPP agreement.

The economic efficiency of the project shall be determined as per the *value for money* principle, by including in the assessment study a cost-benefit analysis based on a comparison of the estimated costs throughout the entire duration of the agreement (adjusted by the value of the risks), should the project be performed by the public partner from public funds, by reference to the performance of the project by public-private partnership. The benchmarking shall consider the updated project-related net costs.

Based on the conclusions of the assessment study and depending on the manner in which the transfer of a significant part of the operation and economic risk is performed, the PPP agreements shall be awarded in accordance with the awarding procedures regulated by the public acquisitions, sectorial acquisitions or concessions legislation - as the case may be.

Upon determining the duration of the PPP agreement, the public partner shall take into consideration the period required for the recovery of the investments, the need for a reasonable profit to be obtained and the need for avoiding any artificial restriction of competition. Similar to the legislation regarding concessions of public works, no maximum period is established as regards the duration of the PPP agreement.

Given that there is no expertise in the field of PPP projects, the GEO requires for the PPP agreement to contain at least certain mandatory provisions, among which:

1. the terms and conditions regarding the incorporation and functioning of the project company;
2. the deadlines for the finalization of the works;
3. the rights to be granted to the project company or to the private partner over the assets of the public partner;
4. the duration of the contract;
5. the financing model;
6. the allocation of the risks;
7. the calculation method and payments to which the private partner is entitled;
8. the performance requirements for the project as well as the method of evaluating the fulfilment of such performance requirements;
9. the guarantees to be granted; and

10. the conditions for termination, including for the early termination and the method by which and the cases in which the private partner may be replaced by other investors.

According to the GEO, the public partner may grant in favor of the project company or of the private partner concession rights and rights deriving from the lease of publically held assets and superficies rights and other rights of use over privately owned assets, without the need for carrying out certain awarding procedures different from the awarding of the PPP agreement.

In terms of replacing the private partner with other investors, the GEO is compliant with the national and European legislation regarding the concession of services and public acquisition by establishing similar provisions in this respect. As an additional possibility, the GEO allows the contracting authority to enter into direct agreements with the financiers of the projects (in case such possibility was explicitly permitted by the awarding documentation) and to consult with them in relation to the awarding of the contract to a new investor. The GEO also allows for the PPP agreement to provide for takeover or termination modalities with respect to the guarantees granted to the financiers, in case the agreement is terminated before the expiry of the term for which it was concluded. Even though it is not expressly provided for, the regulation of such situations is also allowed in direct agreements with the financiers, together with the means of replacing the private partner.

Financing

An element of novelty brought by the GEO is represented by the definition of financial closure (concept used in practice, without being referred to by the law). As per the GEO, financial closure is the (*i.e.* final) stage of the closure procedure of a PPP agreement, representing the date upon which all the conditions precedent have been complied with for the enforcement of the financiers' obligation to provide the funds necessary for financing the public-private partnership agreement. Financial closure shall be regulated by the public-private partnership agreement and by the financing agreement(s) concluded with the financiers of the public-private partnership project.

The GEO has also repealed certain restrictions imposed before as regards the possibility of the public partner to finance the investments (during the construction phase of the project). Thus, as per the new legal provisions, the public partner can contribute to the financing of investments (during the construction phase of the project) not only by external non-refundable funds (*i.e.* EU funds) but also by financial resources of other kind, however, in the latter case, the financial resources may constitute at most 25% of the total value of the investment.

Save for the financing possibility mentioned above, the public partner can make payments to the private partner or to the project company exclusively during the operation and maintenance phase of the project, based on the provisions of the PPP agreement, and of the performance indicators for the respective asset or service subject to the agreement.

The private partner and the project company can grant guarantees over the incomes to which they are entitled (including over the availability payments and over the rights for collecting the tariffs from the end

users) and over the shares of the project company, however, only in favor of the project's financiers represented by credit or financial institutions and only during the PPP agreement. Such restriction was maintained from the previous legislation and might pose a negative impact on the bankability of the projects. However, in order to ensure an additional comfort to the financiers, the GEO allows the public partners, by means of the direct agreements to be concluded with the financiers of the project, to establish the conditions and the takeover or termination modalities in relation to the guarantees offered to the financiers, in case the agreement is terminated before the expiry of the term for which it was concluded. The GEO also provides for the possibility of the public partner to establish guarantees in favor of the financiers of the project.

The private partner cannot sell or encumber the shares held in the project company without the prior and express consent of the public partner and of the financier of the project.

Termination

Among other cases of modification and/or termination which are similar to the public acquisitions and concession legislation, the PPP agreement may be unilaterally modified or even terminated by the public partner due to exceptional reasons of public interest, however, only in case:

1. such possibility was clearly included in the awarding documentation and in the PPP agreement, including a description of such exceptional reasons;
2. the modification does not alter the general nature of the project;
3. the private partner, the project company and the financiers of the project have been notified in advance.

The payment of the tariff by the end users and the necessity for ensuring the unhindered access to a certain public service may constitute exceptional reasons, as per the GEO.

The PPP agreement must contain a mechanism for adjusting the payments to the private partner and the project company, in case a unilateral amendment of the agreement is favourable to them. If the amendment or unilateral termination of the agreement results in a prejudice for the private partner, the latter is entitled to a fair compensation, established according to the provisions of the awarding documentation and of the PPP agreement.

In case the agreement is terminated due to the fault of the public partner, the private partner is entitled to a compensation calculated based on a mechanism which must be provided for by the awarding documentation and by the PPP agreement, to which the compensations owed by the public partner shall be added.

In case the agreement is terminated due to the fault of the private partner, the latter is entitled to a compensation calculated based on a mechanism which must be provided for by the awarding documentation and by the PPP agreement, out of which the compensations owed to the public partner shall be deducted.

Upon the termination of the PPP agreement by the expiry thereof, the public assets used during the contract as well as all assets subject to such agreement and those necessary for the performance of the public service shall be handed over to the public entity free of charge and free of any guarantees and other encumbrances.

Upon the termination of the PPP agreement by the expiry thereof, the public partner can take over, free of charge, the shares of the private partner in the project company, in accordance with the provisions of the public-private partnership agreement.

Should you require any further information, please feel free to contact us:

Nicolae Ursu

Managing Associate

nicolae.ursu@bpv-grigorescu.com

bpv GRIGORESCU ȘTEFĂNICĂ

33 Dionisie Lupu Street

RO - 020021 Bucharest

Tel. +40 21 264 16 50

Fax +40 21 264 16 60

Web www.bpv-grigorescu.com

Disclaimer

*This is an information service provided by **bpv GRIGORESCU ȘTEFĂNICĂ**. This material is for information purposes only and does not constitute legal advice. We recommend that you seek legal advice before taking or implementing any decision on the basis of the information contained in this material. We welcome your feedback and suggestions for improving this publication at any of the contact details listed above.*