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A SUBSTANTIALLY BETTER NEW PPP LAW IN ROMANIA

A new PPP Law (i.e. Law no. 233/2016) entered into force on December 25, 2016 replacing the previous legislation in the field of PPP dating back to 2010, which failed to trigger the implementation of any PPP project. While still lacking certain implementation details, which we hope will be regulated shortly in the methodological norms, the new law is certainly substantially better than the previous legislation.

The new PPP Law is applicable to projects regarding the construction, rehabilitation, extension of assets designed to be used for supplying and/or operating a public service. The provisions of the PPP Law shall be applicable if, according to the assessment study (in Romanian: Studiu de fundamentare), all or the majority of incomes to be obtained by the project company during the operation of the project are covered through payments made 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 or to the provisions of the concession law – as the case may be.

In contrast with the previous PPP legislation, the elements which make the new law a functional law and with less chances of being criticized by the European Commission are:

- it implements recommendations published by the European PPP Expertise Centre;
- it observes the Eurostat's main requirements in relation to the classification of PPP being "on" or "off" the government's balance sheet under ESA10 (i.e. European System of Accounts) rules published in September 2014. The ex-ante control procedure is still to be further detailed by the methodological norms;
- it is a brief legal frame aimed at regulating only the main mechanisms under which a PPP could be implemented, accommodating various PPP structures, without overregulation;
- legislative parallelism was clearly avoided by separating the scope of the new PPP Law from the scope of the recently enacted (i.e. May 2016) new concession and public acquisitions legislation.

[1] Reference is further made to FIDIC 1999 edition.

The new PPP Law borrows certain definitions and legal concepts from such legislation (e.g. public partner, contracting authority) as well as the entire awarding procedures established by such laws. Thus, the PPP Law only contains a provision according to which the award of a PPP agreement shall follow the procedure established for the award of either a public acquisition contract

or a concession agreement depending on the scope of the agreement and the manner in which a significant part of the operating risk is being allocated between the partners.

PRINCIPLES

The PPP mechanism established by the new law shall be governed by 5 main principles which shall be further detailed in the methodological norms of the law. Part of such principles are applicable also to concessions, however, in addition to these, the PPP Law also establishes the following:

1. the allocation of risks among the partners in accordance with their actual possibility to manage and control such risk (contrary to the principle from the concessions' legislation according to which the private entity shall develop and operate a project on its own risk);
2. the financing of the development phase of a project may be developed mainly (but not exclusively) from private funds (contrary to the principle from the concessions' legislation according to which the financing of the development phase shall be made exclusively from private funds).

TYPES OF STRUCTURE

The provisions of the PPP Law are general and flexible enough to accommodate various types of PPP projects. The new law, 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 PPP law also allows for another third public party (i.e. other than the contracting authority) 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 tender book. 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). However, such guarantees must not result in the project being qualified on balance sheet of a public authority. The counsels nominated for the drafting of the assessment study must inform the public partner which obligations may be undertaken by the public authority without triggering the qualification of the project as being on balance sheet of the respective public authority.

PREPARATION OF THE PROJECT AND THE PPP AGREEMENT

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 types of obligations which may be undertaken by the public authority without triggering the qualification of the project as being on balance sheet of the respective public authority;
6. the duration of the PPP agreement.

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. According to the PPP law, the public partner may grant in favor of the project company concession rights and lease rights over publically held assets and superficies rights and other rights of use over privately owned assets. Such provisions contain only a general reference according to which such rights shall be granted "according to the law". It is not yet clearly established whether it would be possible for the public authorities to grant concession rights over publically held assets for periods in excess of 49 years given that such limitation exists under other provisions of law from which no explicit derogation has been established.

Given that there is no expertise in the field of PPP projects, as a helping hand for both partners of a PPP agreement, the law PPP law 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 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 based on which the availability payments will be calculated;
9. the securities 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.

In terms of replacing the private partner with other investors, the law is compliant with the European legislation (and case law) regarding the concession of services and public acquisition by establishing similar provisions in this respect. As an additional possibility, the PPP law permits for the contracting authority to enter into direct agreements with the financers of the projects (in case such possibility was explicitly permitted by the tender book) and based on such agreements to consult with the financers of the project in relation to the award of the contract to a new investor.

FINANCING

During the construction phase of the project the public partner can contribute to the financing of the project only by use of non-refundable European Funds (or other external non-refundable funds) and of the afferent national contribution. Such restriction is aimed at avoiding for public entities to cause excessive deficit by classification of the PPP as being "on" the government's balance sheet. The contribution of the public partner to the project shall be made by observing the conditions and regulations regarding: state aid, use of public funds, limitation of the public deficit and public debts.

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.

The private partner and the project company can grant securities over the revenues to which they are entitled (including over the availability payments), and over the shares of the project company, however, only in favor of the project's financers and only during the duration of the PPP agreement.

TERMINATION

Among other cases of modification and/or termination which are similar to the public acquisitions and concession legislation, the PPP agreement can be unilaterally modified or even terminated by the public partner due to exceptional reasons of public interest, however, only in case (i) such possibility was clearly included in the tender book, including a description of such exceptional reasons and only in case (ii) the modification does not alter the general nature, and (iii) the private partner and the project company have been notified in advance.

The private partner is entitled to compensations according to the general principles of law and according to the provisions to be included in the PPP agreement. Such agreement must also contain a mechanism of adjusting the payments towards the private partner and the project company in case such unilateral modification (i.e. by early termination) of the contract is favourable to them and was not caused by the fault of the private partner.

Upon the termination of the contract, the public assets used during the contract as well as all assets representing the scope of such agreement shall be handed over to the public entity free of charge and free of any securities and other encumbrances.

Given that the main structure of a PPP agreement is covered by the new PPP law we expect that various PPP structures can be accommodated by the legislation and that soon public authorities will be able to start both small and large PPP projects.