

PPPs

a long-expected option for Romania

Romanian authorities have been struggling with kicking off PPPs in Romania for more than a decade, with the first piece of dedicated legislation being adopted in 2010¹, consequently further on amended, repealed² and restated in 2016³ and then 2018⁴.

Although the current legal framework - constituted by Government Emergency Ordinance no. 39/2018 on public private partnership, with subsequent amendments ("GEO no. 39/2018") - has been better adapted to the economic realities and specific technical implementation principles of PPPs, there are still no successfully implemented PPPs. This stall might not be due to lack of interest from either private or public sector, but rather to lack of know-how in the public sector (proven by recent unsuccessful attempts to initiate large PPPs projects⁵), causing reluctance for "breaking the ice in uncharted territory" on both sides.

What to know about PPPs under Romanian Law

First, the scope of a PPP project is set forth to encompass (i) the construction, rehabilitation and/or extension of assets that shall eventually become property of the public partner, or (ii) operating a public service.

This scope also enforced by the requirement that, within a PPP project, more than half of the income to be obtained by the project company is to come from payments made by the public partner or other public entities in the benefit of the public partner.

Thus, the law sets the framework for a classic public-private cooperation, which might exclude certain types of projects. Nevertheless, at this stage of development of PPPs in Romania, this framework might be justified and later amendments could come once PPPs prove their benefits.

Within this framework, two types of PPP projects are regulated: (i) the Contractual PPP, which entails setting up the public private partnership throughout a contract

concluded between the public partner, the private partner and a new vehicle, entirely owned by the private partner, which shall act as a project company, and (ii) the Institutional PPP, which entails that the setting up is done throughout a contract concluded between the public partner and the private partner, wherein both partners set up a new vehicle, which shall act as a project company and which shall also become part of the PPP contract after incorporation.

Secondly, an important improvement brought on by the current legal framework, consists in eliminating the previous unrealistic limitations to the public partners' contribution in what concerns investments to be made within a PPP project, as well as the option for implementing a "blended" project.

Thus, the public partner may contribute to the investments required for setting up the PPP with public funds, including external non-reimbursable funds (i.e. European funds) and co-financing, within maximum 25% of the total value of the investment. The public partner may also contribute to the PPP project by: constituting rights (such as concession rights or rights derived from renting public property, superficies, easement or use rights over private property; the right to collect and use tariffs from the final beneficiaries of the project); performing cash contribution to the share capital of the project company; undertaking payment obligations towards the private partner or project company or payment obligations related to the investments; and last but not least, granting guarantees in favor of the financing partners of the PPP contract which are constituted as credit or financial institutions. However, although the option for a more substantial contribution of the public partner is available, the extent of such contribution is relevant even from the initial stage of setting up a PPP, as the relation between the project and the public deficit and public debt is a key criteria for the decision to initiate a PPP.



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This specific criteria – impact on the public deficit and public debt – might lead to a strict selection of PPPs and might also lean the balance in favor of PPPs initiated by those local authorities which have a lower debt status.

Thirdly, as already anticipated from the scope of the PPP, it is, in essence a public project. This means that a PPP contract may be unilaterally terminated by the public partner at any time, if the public interest requires. It also means that the public-private collaboration is limited in time, such as to allow the private partner to recover its investment and make a "reasonable" profit. Therefore, at the end of the PPP contract, regardless of reason – including early termination, the investment shall become property of the public partner. Therefore, compensation mechanisms shall be key negotiating factors when entering a PPP contract.

What's next

Up until now, the authorities have focused mainly on the design of the legal framework applicable to PPPs. However, while the legal framework applicable to PPPs may not be perfect, it allows for initiation and set up of PPPs. The real "road block"

in kicking off such projects remains in the administrative capacity to design and manage PPPs.

This lack of know-how was shown, in the previous attempts, by the authorities' tendency to think too big, by promoting big infrastructure projects as PPPs, without proper prior analysis of the economic feasibility of such projects and with the only aim to cover lack of or to replace financing options.

Nevertheless, central authorities seem to

have learned their lesson from the 2018-2020 failed attempts at PPPs and the PPP strategy is now being more carefully analysed. Also, there has been increasing interest in PPPs from the local authorities, which might prove to be better equipped at kicking off the first PPP pilot projects, proving the benefits of public-private collaboration.

At the current stage, we might say PPP projects are brewing, especially

given the option for implementing blended projects, under the new financing frameworks (the National Recovery and Resilience Fund, new 2021-2027 European funds programming). A renewed express of interest from the private sector for PPPs might prove to be the wind in the sails that PPPs need in Romania, giving the Romanian authorities a much-needed insight on the actual input that a private partner may bring, as well as on the benefits of public-private cooperation.

¹ Law 178/2010 on public private partnership.

² Law 178/2010 on public private partnership was repealed throughout Law. No. 100/2016 on works and services concessions.

³ Law no. 233/2016 on public private partnership, repealed throughout Government Emergency Ordinance no. 39/2018 on public private partnership.

⁴ Government Emergency Ordinance no. 39/2018 on public private partnership.

⁵ For example the PPP project initiated for the construction of the Ploiesti - Comarnic – Brasov Highway, which was initiated, awarded and cancelled before signing the contract. Other similar award procedures have been initiated and cancelled.