

The Brief

October 2010

Romania

A new Public-Private Partnership Act dedicated legal framework

A new PPP dedicated legal framework is being enacted in Romania aiming at facilitating private funding for the public sector and thus meeting the Government's needs to undertake infrastructure projects and create employment.

Public-Private Partnership Act No. 178/2010 (the "PPP Act") was published in the Official Gazette on October 5th, 2010 and will enter into force on November 4th, 2010.

The new PPP legal framework will be completed with implementation norms that should be approved by the Romanian Government within thirty (30) days as of the entry into force of the PPP Act.

Romania benefited from a PPP Act which was repealed in 2006 by Government Emergency Ordinance No. 34/2006 on the award of public procurement contracts, of public works concession contracts and of public services concession contracts (the "GEO on Public Procurement and Concessions"), which implemented the European *acquis* (i.e. Directives 17/2004/EC, 18/2004/EC, 89/665/EC and 92/13/EC).

Further to the abrogation of the former PPP Act, concessions of public works and services, regulated mainly as "purely contractual" PPPs, have been the only form of PPPs regulated under Romanian law.

Although setting-up a project company with or without the participation of the concession grantor was provided as an option for carrying out a project, the Romanian legal framework included no detailed provisions in this respect, which, in practice, made it difficult for the public and private partners to make this option.

The PPP Act aims at regulating "institutionalized PPPs" as partnerships involving the creation of an ad-hoc entity held jointly by the public sector and the private sector. This new piece of legislation outlines the rules and principles to be complied with throughout the carrying out of a PPP project, including the award proceedings, the negotiation and execution of the PPP contract and the creation of the project company.

However, the provisions of the PPP Act are rather general and need to be further detailed, completed and clarified.



Gide Loyrette Nouel

Abu Dhabi
Tel. +971 (0)2 667 6972
gln.abudhabi@gide.com

Algiers
Tel. +213 (0)21 23 94 94
gln.algiers@gide.com

Beijing
Tel. +86 10 6597 4511
gln.beijing@gide.com

Belgrade
Tel. +381 (0)11 30 24 900
gln.belgrade@gide.com

Brussels
Tel. +32 (0)2 231 11 40
gln.brussels@gide.com

Bucharest
Tel. +40 21 223 03 10
gln.bucharest@gide.com

Budapest
Tel. +36 1 411 74 00
gln.budapest@gide.com

Casablanca
Tel. +212 (0)5 22 27 46 28
gln.casablanca@gide.com

Dubai
Tel. +971 (0)4 445 6500
gln.dubai@gide.com

Hanoi
Tel. +84 4 3946 2350
gln.hanoi@gide.com

Ho Chi Minh City
Tel. +84 8 3823 8599
gln.hcmc@gide.com

Hong Kong
Tel. +852 2536 9110
gln.hongkong@gide.com

Istanbul
Tel. +90 212 385 04 00
gln.istanbul@gide.com

Kyiv
Tel. +380 44 206 0980
gln.kyiv@gide.com

London
Tel. +44 (0)20 7382 5500
gln.london@gide.com

Moscow
Tel. +7 495 258 31 00
gln.moscow@gide.com

New York
Tel. +1 212 403 6700
gln.newyork@gide.com

Paris
Tel. +33 (0)1 40 75 60 00
info@gide.com

Prague
Tel. +420 222 871 111
gln.prague@gide.com

Riyadh
Tel. +966 1 217 77 54
gln.riyadh@gide.com

Saint Petersburg
Tel. +7 812 303 6900
gln.saintpetersburg@gide.com

Shanghai
Tel. +86 21 5306 8899
gln.shanghai@gide.com

Tunis
Tel. +216 71 891 993
gln.tunis@gide.com

Warsaw
Tel. +48 (0)22 344 00 00
gln.warsaw@gide.com



Scope of the PPP Act

The PPP Act regulates public-private partnership projects where financing is provided by a private investor and which may have as object the design, financing, construction, refurbishment, modernisation, operation, maintenance, development and transfer of public assets or services, as the case may be.

Within the framework of a PPP project, the public partner and the private partner selected further to a specific award proceeding enter into a PPP contract and further set-up a project company to carry out the project.

• What types of projects may fall under the scope of the PPP Act?

A wide variety of projects may fall under the scope of the PPP Act.

Thus, projects regulated under the PPP Act may concern any stage of development of a project, including design, financing, construction, refurbishment, modernisation, operation, maintenance, development of public assets or services.

The parties may use any type of contract for the implementation of a PPP project, depending on the particularities of the project, as well as on the involvement of the private investor.

Certain categories of contracts are explicitly excluded from the scope of the PPP Act, among which:

- concessions of public goods, works and services falling under the scope of specific regulations (*i.e.* : the Government Emergency Ordinance No. 54/2006 on concessions of publicly owned assets and the GEO on Public Procurement and Concessions);
- partnerships regulated by other legal provisions;
- contracts concerning the acquisition or lease of land, buildings or other immovable assets or rights thereon;
- contracts concerning financial services for the issuance, acquisition, sale or transfer of securities or other financial instruments;
- contracts concerning arbitration and conciliation services;
- secret contracts and contracts requiring special security measures;
- where the protection of state interests require the exception;
- contracts concluded pursuant to an international agreement concluded, according to the European Union Treaty, with one or more third countries and covering supplies or works intended for the implementation or operation of a common project and only inasmuch as a specific award proceeding has been provided for in such international agreement;
- contracts concluded further to a proceeding which is specific to an international organization etc.

• Who may be the public partner?

The following categories of entities may qualify as public partners for the purposes of a PPP project:

- any state body, public authority or institution, whether central, regional or local;
- any other body with legal personality established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial purpose and which is in one of the following situations :
 - * is financed, for the most part, by a state body, a public authority or a public institution, whether central, regional or local, or by another body governed by public law; or
 - * is subordinated or subject to the control of a state body, a public authority or a public institution, whether central, regional or local, or of another body governed by public law; or
 - * more than half of the members of its board of directors/ managing or supervisory body are appointed by a state body, a public authority or a public institution, whether central, regional or local, or by another body governed by public law;
- any association of the above-mentioned entities.



The Basic Principles

The PPP Act provides for the following basic principles, to be complied with throughout the award proceeding and the carrying out of the PPP project:

- non-discrimination;
- equal treatment;
- transparency;
- proportionality;
- efficient use of public funds;
- accepting responsibility.

Further, a PPP project is governed by the following key rules:

- cooperation between the public partner and the private partner;
- the financing of the project is private, whether from the private partner's own resources, or from resources made available to the latter by a financier;
- a proportional and equitable distribution of risks between the public partner and the private partner;
- the rights and obligations of the partners may not be assigned throughout the carrying out of the PPP contract.

A Specific Award Proceeding based on Negotiations with Investors

As one of the purposes of the PPP Act is to avoid an excessively long duration of the award proceedings, a specific award proceeding based on negotiations with interested investors is provided for.

This proceeding that should be clarified and detailed in the implementation norms seems to include the following main steps:

- **publication of notice**, inviting interested investors to submit letters of intent, in the Romanian Public Procurement Electronic System (SEAP) and, for projects whose value exceeds EUR 5 million, in the Official Journal of the European Union;
- **preliminary selection** of private investors based on letters of intent;
- **negotiation and execution of a "project agreement"** with the selected investors;
- **negotiation of the PPP contract** (including the value of the investment and the term) with the signatories of the project agreement;
- **submission of final offer**, including the list of affiliated undertakings which must be permanently updated by the private partner until the end of the PPP contract;
- **execution of the PPP contract** with the preferred investor;
- **publication of the PPP contract** executed with the preferred investor.

Minimum timeframes are provided for some of the stages - extremely short in certain cases: for instance 5 (five) business days for negotiations and 8 (eight) business days for the preparation and submission of the final offer.

If the PPP contract cannot be executed with the investor who was ranked first, the public partner may carry out negotiations with the investor who ranked second and in case of failure, with the investor who ranked third and so on, until an agreement is reached and the PPP contract can be executed. The public partner is entitled to restart the whole award proceeding only if the PPP contract cannot be executed with neither of the selected investors.



A PPP contract may be concluded even if only one investor participates to the award proceeding, inasmuch as he meets the minimum requirements set forth in the notice.

It should also be noted that the negotiated form of the PPP contract must be approved by decision of the Romanian Government or of the relevant public authority, holder of an administration right over the asset that is subject to the PPP and any amendment to the final version of the contract is subject to such approval.

The PPP Contract

The PPP contract executed by the public partner and the private partner shall include the rights and obligations of the partners, as well as the conditions for setting-up the project company and shall be based on the following key elements:

- the negotiated value of the investment;
- the term, which shall be determined based on the final offer submitted by the preferred investor and on the final negotiations and should be such as to allow the private partner to recover its investment;
- performance schedule, deadlines;
- equity participations in the project company;
- distribution of risks between the public and private partners;
- financing;
- performance criteria; as well as
- withdrawal and penalties.

If the private partner decides to withdraw unilaterally from the PPP contract, the investment carried out up to that moment is deemed to be a contribution to the project, and neither the project company nor the public partner are under any obligation to return the value of such investment to the private partner.

The Project Company

The main features of a project company regulated under the PPP Act are the following:

- it is an ad-hoc entity, Romanian resident;
- it is held jointly by the public partner and the private partner, pro rata with their respective participations to the PPP project;
- the public partner contributes to the share capital with a contribution in-kind;
- the only purpose of business of a project company is the operation and the management of all the stages of a PPP contract;
- the project company may not change its purpose of business and may not carry out any business outside the purpose of the PPP project and it may not take any decisions in respect of the ownership right over the assets representing the contribution in-kind of the public partner to the project or the assignment of any rights received under the contract;
- the project company shall be liquidated upon the termination of the PPP contract.

The Legal Regime of Assets

Depending on the distribution of risks between the public and private partners, the assets and cash flows involved in a PPP project are to be classified as non-government assets and recorded off-balance sheet for the public partner.



The PPP Act explicitly provides for the project company's right to create security interests on the assets resulting from the project and on the land occupied by the project (other than assets that are public property) in favour of the financier of the project.

Upon the termination of a PPP contract, the public assets and the assets resulting from the PPP project are return assets that must be transferred to the public partner in a good condition and free of any charges or obligations. The technical conditions of such transfer should be defined in the PPP contract.

Other Provisions

- **Challenge procedures**

The PPP Act's provisions on challenge procedures are scarce and rather unclear.

Thus, the PPP Act provides that interested investors may challenge any decision taken by the public partner throughout the award proceeding (including the decision on the selection of the private partner) either before the public partner or in court.

In either case, the investor is under an obligation to provide a security amounting to 2% of the estimated value of the project. Such requirement of the PPP Act does not seem to be in line with European rules and principles on remedies against decisions of public partners in proceedings for the award of public contracts.

The award proceeding continues after the public partner or the court renders a decision on the claim.

- **Right of NARMPP to apply for the cancellation of a PPP contract in court**

The National Authority for Regulating and Monitoring Public Procurement (the "NARMPP") is entitled to ask the court to cancel a PPP contract entered into in breach of the PPP Act.

The conditions under which NARMPP may exercise such right are to be detailed in the implementation norms.



Gide Loyrette Nouel

10-12, Maior Gh. Sontu Street, District 1
Bucharest - Romania
Tel. +40 21 223 03 10
Fax +40 21 223 03 42
E-mail: gln.bucharest@gide.com

Contacts

Bruno Leroy
bruno.leroy@gide.com

Andreea Toma
toma@gide.com



Gide Loyrette Nouel

For further information:

www.gide.com

You can also find this Brief and other our newsletters on our website in the News/Publications section.

The Brief "Romania" (the "Newsletter") is a free, periodical electronic publication edited by the law firm Gide Loyrette Nouel (the "Law Firm"), and published for Gide Loyrette Nouel's clients and business associates. The Newsletter is strictly limited to personal use by its addressees and is intended to provide non-exhaustive, general legal information. The Newsletter is not intended to be and should not be construed as providing legal advice. The addressee is solely liable for any use of the information contained herein and the Law Firm shall not be held responsible for any damages, direct, indirect or otherwise, arising from the use of the information by the addressee.

In accordance with the French Data Protection Act, you may request access to, rectification of, or deletion of your personal data processed by our Communication Department (privacy@gide.com).