

Cover article: "Public-Private Partnership Returns as a Form of Cooperation between the Public Sector and the Business Environment"

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With only two weeks left before the coming into effect of the recently adopted law on public-private partnerships, this month's cover article is aimed at identifying some of the benefits and shortfalls of the latest regulations, while providing you with a brief comparison between the old and the new legislative frameworks regarding this means for the public sector to attract private financing.

Drafts in Laws

In the ever changing economic environment, action rather than reaction is a key answer to your business. So why wait for legal amendments to come into effect, when you can anticipate their impact? Get ahead changes with our guide on legislative projects and find out which one of the turmoil of legislative amendments is more likely to affect your business and how.

In this issue, read in *Drafts in Laws*, our newsletter's quarterly special feature, about the draft law for the prohibition to cultivate genetically-modified organisms and to label products containing such organisms, as well as the envisaged actions for speeding up lawsuits.

Legislative Retrospective

Voicu & Filipescu is a full service law firm, covering all legal areas relevant to your company's activity. This issue of our monthly newsletter provides you with a brief description of some of the recent legal amendments on **employment**.

+ VF News

- Voicu & Filipescu has recently assisted the lenders in connection with a series of term facilities in a total amount of USD 200 million.
- Over the past year, Voicu & Filipescu has provided clients with legal assistance on public procurement procedures aimed at awarding contracts in a total amount of approximately EUR 150 million.

PUBLIC-PRIVATE PARTNERSHIP RETURNS AS A FORM OF COOPERATION BETWEEN THE PUBLIC SECTOR AND THE BUSINESS ENVIRONMENT

In the context of the world crisis, which generated budgetary restrictions in all fields, the legislative authorities are looking for new conditions for the cooperation between the public sector and the business environment, expressly regulating public-private partnerships aimed at attracting private financing in the public sector.

The purpose of the contracts is to allow for important investments to be achieved by means of private financing, while at the end of the public-private partnership contract the public good is transferred to the contracting public authority.

LEGISLATING THE PUBLIC-PRIVATE PARTNERSHIP

Public-private partnerships are expressly regulated in the recently adopted Law no. 178/2010 (which shall come into force on November 6, 2010).

Law no. 178/2010 sets out a special procedure of selection of the private investor, as well as of accomplishment of the public-private project, which derogates from the regulations regarding the awarding of contracts for the concession of publicly owned goods, provided for by Government Emergency Ordinance no. 54/2006, as well as those referring to the concession of public works and services, set out by Government Emergency ordinance no. 34/2006.

However, currently there are controversies with respect to precisely setting out the projects that are subject to Law no. 178/2010.

CHARACTERISTICS OF THE PROCEDURE FOR THE SELECTION OF THE PRIVATE INVESTOR. DIFFERENTIATION FROM THE PROCEDURES REGULATED BY THE EXISTING LEGISLATION

The new legislation sets out a simplified procedure for the selection of private partners. The main aspects that differentiate the procedure set out by Law no. 178/2010 from the procedure provided for under the existing legislation are as follows:

- (i) Public-private partnership projects that fall under Law no. 178/2010 are financed exclusively by the private partner.
- (ii) The public-private partnership project is carried out through a newly-established entity – *the project company*. This is a Romanian resident company, having as shareholders the public entity and the private entity, represented on a pro-rata basis, in accordance with their respective participation in the project, having the accomplishment of the public-private project as its sole purpose.

- The project company is managed by a board of directors, in which the two partners are represented pro-rata to their respective participations.
- (iii) The obligatory nature of the public and the private partner's conclusion of a project agreement, in view of preparing the public-private partnership contract.
 - (iv) The investor accomplishing the public-private project is selected by the public authority that initiated the project without organizing a public tender.
 - (v) The manner of accomplishment of the public-private project is set out by direct negotiation between the public authority and the private investor.
 - (vi) The public partner is obligated to publish the contract notice referring to the public-private partnership projects in the electronic public procurement System ("**SEAP**") and, in the event that the project value should exceed EUR 5 million, in the European Union Official Journal.
 - (vii) The risks of the public-private partnership project are borne in a pro-rata and equitable manner by the public and the private partner.
 - (viii) The assignment of the duties, of the financing value and of the risks is agreed upon under the contract.

Advantages of this procedure

Waiving the public tender procedure and adopting the selection procedure simplifies the process of designating the private investor to carry out the project.

Also, an important advantage of the private investor selected in the new procedure consists in the fact that, prior to the conclusion of the contract for the accomplishment of the project, the private investor holds a direct negotiation with the public authority initiating the project, during which they agree upon the term and the optimal conditions for the accomplishment of the project.

Another advantage of the private investor consists in the fact that it participates in the management of the project company pro-rata to its own contribution, thus having the possibility to control the manner of accomplishment of the project. Also, the two partners proportionally bear the risks of the project.

Drawbacks of the procedure

In consideration of the fact that the public authority exclusively sets out the criteria for the selection of the private investor, the risk exists for the procedure to be sometimes perceived as discriminatory or aimed at favoring certain private investors.

Furthermore, the replacement of the tender with the direct selection procedure may generate suspicion

and may give rise to numerous appeals, which in the end may result in rendering the project award procedure more difficult to complete.

The obligation to deposit a guarantee of 2% of the estimated project value in the event that an investor should contest the selection procedure renders the appeal procedure extremely costly and may be even considered as a limitation of the access to justice. Most likely such provision is to be shortly objected to in front of the Constitutional Court.

ROLE OF EACH PARTNER. SPECIFIC ADVANTAGES

The role of the private partner consists in its participation with capital or other assets, as well as managerial knowledge, ensuring a modern management and competitive economic models for the public sector.

The role of the public partner consists in achieving the public interest objectives, ensuring legislative stability and the transparency of the procedure for the accomplishment of the project.

The advantages of the private partner consist in:

- (a) Profit-generating business opportunities. Thus, in such a partnership, the private investor undertakes the design and the completion of a good, on the one hand, and on the other hand has the possibility to charge certain tariffs that cover the costs for the accomplishment and the maintenance of the good, including a reasonable profit; also, the private investor may take over, by means of a leasing contract, an existing public good, in view of performing income-generating services.
- (b) The possibility to accomplish a project at a good quality – price ratio.

The advantages of the public partner are:

- (a) The possibility to optimize the quality of the public services by the initiative of the private partners to bring new solutions at low prices.
- (b) Relieving the budget of the public institutions from certain expenses generated by the supply of certain services by means of the transfer thereof to the private sector, where innovative solutions in budgeting a project may exist.
- (c) Compensating the lack of strategy and innovation, specific to the public sector.

CONCLUSIONS

The new regulation in the matter of the public-private partnership eliminates public tender from the procedure of selection of the private investor and implements direct negotiation between the selected

investor and the authority initiating the project. It also regulates the establishment of the project company as an entity carrying out the public-private project.

The new requirements do not apply to such projects that are subject to Government Emergency Ordinance no. 54/2006 and Government Emergency Ordinance no. 34/2006.

drafts in laws

Prohibition to cultivate genetically-modified organisms and to label products containing such organisms. The legislative proposal referring to the genetically-modified organisms has as an object the prohibition to cultivate such organisms for a period of five (5) years and sets out that the label of the products that contain such organisms must include the information: "this product contains genetically-modified organisms" or "this product originates from an animal which ingested genetically-modified organisms".

The implementing of the draft law achieves the prevention of the significant impact of the genetically-modified organisms upon the environment and upon the people's health.

The legislative proposal is undergoing debate in the permanent Commissions of the Senate, as the first Chamber that was notified.

Actions for speeding up the lawsuits. The Draft Law regarding certain actions for speeding up the settlement of lawsuits proposes legislative actions that mainly target the simplification and increase of the case solving speed, while also having a direct impact upon the decisions' enforcement.

The main rules and procedural mechanisms proposed by the draft refer to:

- (a) **Second appeal in the interest of the law:** it is proposed that the term for the judgment of the second appeal should be of a maximum of three months following the court notification date.
- (b) **Jurisdictional civil matter competence:** the claims that may be assessed in cash, having a value of up to RON 2,000 pertain to the competence of first and last instance of the court of law.
- (c) **Term acknowledgment:** an extension of the meaning of this notion takes place, including any circumstance in which one may presume that the party receiving the summons is aware of the term. This action's consequences are: (i) a shortening of the trials' duration; (ii) raising the litigants' awareness; (iii) the decreasing of the procedural costs.
- (d) **The regime of invoking the objection to jurisdiction:** the public objection to the material and territorial competence may be invoked by the parties or by the judge on the first day of appearance before the court of first instance, but no later than the commencement of the debates on the merits of the case. The private objection to competence may be invoked by the defendant by means of the defense statement or, when the defense statement is not mandatory, at the latest on the first day of appearance before the court.
- (e) **Enforcement:** the regulation of a short term, of a maximum of three days, both for the notification of the enforcement court and for the approval of the enforcement by such court.
- (f) **Decrease of the competence regarding the trial of cases in the court of first instance**

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by the High Court of Cassation and Justice.

- (g) **Rethinking the competences of the tribunal and the Courts of Appeals:** the tribunal is relieved from judging appeals or second appeals filed against the decisions passed by the Courts of Law, as well as the appeals filed against the decisions passed by the tribunals.

The legislative solutions proposed by the draft seek to increase the effectiveness of the judging activity and to decrease the duration of civil and criminal lawsuits.

The draft is recorded on the agenda of the plenum of the Chamber of Deputies, which is a decision-making chamber.

employment law- legislative retrospective

The amendment and the supplementing, by means of Government Decision no. 955/2010, of the methodological Norms for the implementing of Law no. 319/2006 on workplace safety and health, approved by Government Decision no. 1425/2006. The amendments brought to the methodological norms mainly refer to the following aspects:

- (1) They bring forth the employer's obligation to designate the worker/workers in order to handle the prevention and protection activities, solely by means of a written decision and solely from among the workers with whom an individual full-time employment contract was concluded.
- (2) They redefine one of the meanings of route work accident, as being an accident which resulted in the injury or the death, occurred on the normal route of circulation from the workplace to the location wherefrom the employee collects his/her salary, and vice-versa, if such location is organized by the employer outside the unit.
- (3) It is specified that the temporary work incapacity caused by an accident may be confirmed both by a medical certificate and by other medical documents.
- (4) They also amend the requirements for the performance of activities pertaining to the work safety field, which differ in accordance with the number of employees of the unit. To that effect, the new regulations set out that, in the case of enterprises with over 250 workers, the employer is obligated to organize one or several interval prevention and protection services, while in the previous regulation the performance of this obligation is entailed in the case of enterprises with over 150 employees.
- (5) Amendments are made to the minimum requirements regarding training in the field of workplace safety and health, and the following activities specific to the field of workplace safety and health are established: workplace safety and health technician and workplace safety and health expert, respectively.

Government Decision. 955/2010 was published in the Romanian Official Gazette, Part I, no. 661, of September 27, 2010.

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