

Romania

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General PPP framework

1 How has the concept of public-private partnership (PPP) developed in your jurisdiction? What types of transactions are permitted and commonly used in your jurisdiction?

Under Romanian law, a PPP contract can be utilised for the realisation, rehabilitation or extension of an asset to be part of the patrimony of the public party and or operation of a public service.

2 What categories of public infrastructure are subject to PPP transactions in your jurisdiction?

PPP contracts may be used for relevant activities in the public utility sectors as defined under the sectoral public procurement law as well as for community services to be rendered by a private operator. As such, PPPs can be concluded for a large number of sectors of the public infrastructure, including public administration, transportation, energy, oil, water, telecom and social infrastructure.

3 Is there a legislative framework for PPPs in your jurisdiction, or are PPPs undertaken pursuant to general government powers as one-off transactions?

Yes. In May 2018, Government Emergency Ordinance No. 39/2018 was enacted, which regulates PPPs and repeals the provisions of previous Law No. 233/2016 as amended in December 2017. Government Emergency Ordinance No. 39/2018 is yet to be approved through a law to be passed by parliament. Implementation norms are expected to be issued for the new PPP legislation to be fully functional.

4 Is there a centralised PPP authority or may each agency carry out its own programme?

There is no specifically designated PPP authority. Any entity that is a contracting authority under Law No. 98/2016, Law No. 99/2016 or Law No. 100/2016 may undertake PPP projects.

5 Are PPPs procured only at the national level or may state, municipal or other subdivision government bodies enter into PPPs?

PPPs may be procured at both national and local level, as the new legislation allows for any entity that is a contracting authority or a contracting entity under the classic and sectoral public procurement to be able to initiate PPPs. However, the Romanian government may decide if some projects can be considered strategic, in which case the PPP contracts shall be concluded by the National Commission for Strategy and Prognosis.

6 How is the private party in a PPP remunerated in your jurisdiction?

The current PPP legislation is silent as regards remuneration for PPP contracts. It is expected that such an aspect is clarified by the methodological norms soon to be enacted.

7 May revenue risk or usage risk be shared between the private party and the government? How is risk shared?

Yes. Government Emergency Ordinance No. 39/2018 provides that one of the specific features of the PPP mechanism shall be the allocation

of risks between the private party and the government, depending on the capacity of each contracting party to assess, manage and control a certain risk.

8 In situations where the private party is compensated in whole or in part through availability or other periodic payments from the government, are the payment obligations of the government subject to the relevant legislative body approving budgetary funding in the future?

Because no provisions relevant to this matter exist to date, it is expected that such an aspect will be clarified in the methodological norms.

9 Is there any cap on the rate of return that may be earned by the private party in the PPP transaction?

No.

10 Is the transfer of direct or indirect ownership interests in the project company or other participants restricted?

Yes. Generally, the private party will only be able to assign its participation into the project company if consented to by the public party and the financing party.

Procurement process

11 What procedures normally apply to a PPP procurement? What evaluation criteria are used to award a PPP transaction?

The procedures for the award of PPP contracts are those provided under the specific laws governing the respective type of contract (ie, Laws Nos. 98/2016, 99/2016 and 100/2016 on classical and sectoral procurement and on public concessions).

12 May the government consider proposals to deviate from the scope or technical characteristics of the work included in the procurement documentation during the procurement process, without altering such terms with respect to other proponents? How are such deviations assessed?

Alternative technical concepts may only be considered if allowed under the award documentation.

13 May government parties consider unsolicited proposals for PPP transactions? How are these evaluated?

No. The initiative of a PPP contract is only reserved to the government party. However, the law does not prohibit third parties to propose PPP transactions. The government would initiate PPP projects based on a substantiation study and we do not exclude such an initiative to be the result of third-party proposals.

14 Does the government party provide a stipend for unsuccessful short-listed proponents or otherwise bear a portion of their costs?

No. Costs incurred in making the offer and generally participating in a PPP procedure are to be borne by the private proponents.

- 15 Does the government party require that proposals include financing commitments for the PPP transaction? If it does not, are there any mechanisms during the procurement process to ensure that the applicable PPP transaction, once awarded, is financeable?**

No. The mechanism provided under the draft law to ensure the financing of the PPP project is the financial closing at the final stage of the preparation of the PPP project. The financial closing is the moment when the project and financing agreements are signed following the fulfilment of their respective conditions, so that project implementation can begin. However, prior to engaging in a PPP, a feasibility study will be prepared in order to assess the bankability of the project.

- 16 May the government ask its counsel to provide a legal opinion on the enforceability of the PPP agreement? May it provide representations as to the enforceability of the PPP agreement?**

There are no provisions in this regard in Law No. 233/2016. Because no project has yet been developed in Romania under the PPP regime, there is no practice on provision of a legal opinion on the enforceability of the PPP agreements.

- 17 Are there restrictions on participation in PPP projects by foreign entities? May foreign entities exercise control over the project company?**

No. Any legal entity or association of legal entities may participate in PPP projects except for public entities or parties.

Design and construction in greenfield PPP projects

- 18 Does local law mandate that any particular form of contract govern design and construction activities? Does it mandate the choice of governing law?**

Currently, there is no particular form of contract prescribed for the design and construction activities but the minimal elements of the PPP contract are prescribed by the law. The PPP contract can only be governed by Romanian law.

- 19 Does local law impose liability for design defects and, if so, on what terms?**

Yes. For hidden flaws there is a decennial liability set by the law while for the structural flaws the liability is for the whole duration of the construction. The designer, constructor and other specialists involved in the construction process are each individually liable for the process associated with them.

- 20 Does local law require the inclusion of specific warranties? Are there implied warranties in cases where the relevant contract is silent? Does local law mandate or regulate the duration of warranties?**

Yes. Legal warranties constitute a minimum and can only be exceeded if so agreed by the parties in the contract. The duration of warranties is set by the construction law depending on the importance category of the various construction and installation works concerned and varies between one and five years.

- 21 Are liquidated damages for delay in construction enforceable? Are certain penalty clauses unenforceable?**

Yes. The parties may agree on liquidated damages for a delay in construction. Penalty clauses are generally valid and will only be rendered null and void if the underlying agreement is rendered null and void. However, a null penalty clause will not render the main obligation in the underlying agreement null and void.

- 22 What restrictions are imposed by local law on the contractor's ability to limit or disclaim liability for indirect or consequential damages?**

There is no restriction imposed by local law on contractors' ability to limit or disclaim liability for indirect and consequential damages; however, limitation of liability is accepted under Romanian law if agreed by the parties and only if the limit is not so low that one could say the contractor would not want to oblige itself under the contract at all.

- 23 May a contractor suspend performance for non-payment?**

Yes. The contractor is, however, obliged to notify the beneficiary first and grant a cure period, during which period it may suspend the performance of its own obligations and ask for corresponding damages.

- 24 Does local law restrict 'pay if paid' or 'paid when paid' clauses?**

No.

- 25 Are 'equivalent project relief' clauses enforceable under local law?**

No.

- 26 May the government party decide unilaterally to expand the scope of work under the PPP agreement?**

The government party may unilaterally alter the content of the PPP contract in exceptional cases and in certain conditions only. Where the amendment brings damage to the private party, such party is entitled to a just compensation. Where the amendment is favourable to the private party (eg, by reducing the volume of works), the law provides that an adjustment mechanism needs to be agreed in the contract.

- 27 Does local law entitle either party to have a PPP agreement 'rebalanced' or set aside if it becomes unduly burdensome owing to unforeseen events? Can this be agreed to by the parties?**

The local law does not provide for this rebalancing mechanism but nothing prevents the parties from setting it in their contract.

- 28 Are statutory lien laws applicable to construction work performed in connection with a PPP agreement?**

No.

- 29 Are there any other material provisions related to design and construction work that PPP agreements must address?**

The law only prescribes that the PPP contract provisions shall be inclusive of the good performance warranties brought by the private partner. Other than this and the legal warranties, currently, the aspects regarding the content of the PPP agreement related to design and construction works are left to the parties.

Operation and maintenance

- 30 Are private parties' obligations during the operating period required to be defined in detail or may the PPP agreement set forth performance criteria?**

The law requires for the performance objectives of the asset or the performance indicators of the service making the object of the PPP contract to be set in the contract.

- 31 Are liquidated damages payable, or are deductions from availability payments possible, for the private party's failure to operate and maintain the facility as agreed?**

Currently there is no deduction allowed. The expected changes to the law allow for the possibility that the amounts due by the private party, including penalties, be set off against payments due by the public party.

- 32 Are there any legal or customary requirements that facilities be refurbished before they are handed back to the government party at the end of the term?**

Upon conclusion of the PPP contract, the law only provides that facilities of return-type must be returned free of all liens, in good standing and able to be exploited according to standards specific to their nature. Other conditions for return are left to the parties to be agreed in the PPP contract.

Risk allocation

- 33 How is the risk of delays in commercial or financial closing customarily allocated between the parties?**

Romanian law does not prescribe how the risk of delays in commercial or financial closing is allocated between the parties. In relation to a

delay in closing, the risk is that the costs involved in delivery (eg, construction costs) will lead to a price increase. The risk allocation is not prescribed by law, but will be provided for in the relevant bid documentation and contract. When submitting its bid, the private sector will be required to hold the price it bids for a specified period. Thereafter, there may be an adjustment mechanism set out in the selected bidder's letter, which will specify how the bidder's costs are permitted to inflate beyond this fixed date. Typically, the bidder will not be allowed to inflate the costs and price where it has caused the delay; however, in practice, determining which party has been responsible for a failure to reach close by the programmed date will be difficult to determine and is likely to have been caused by both parties to some extent.

34 How is the risk of delay in obtaining the necessary permits customarily allocated between the parties?

The burden of obtaining some of the permits will be on the public party before awarding a contract to the private party (eg, planning permissions for land that will be sold, leased or concessioned to the private party). A number of permits, licences, authorisations and approvals are required to be obtained by the private party but the public party has the duty to facilitate their obtainment. When the public party causes delays, the contractor may be entitled to an extension in the conditions set forth in the PPP agreement.

35 How are force majeure and geotechnical, environmental and weather risks customarily allocated between the parties? Is force majeure treated as a general concept relating to acts outside the parties' control or is it defined with reference to specific enumerated events?

The private party is typically required to ascertain that it obtained from the public party all the information to assess the status and feasibility of a construction project (with specific exemptions on a case-by-case basis); however, the contractor is generally granted the opportunity to make site visits or be provided with technical documentation by the beneficiary based on which a diligent contractor may assess related risks. Force majeure is generally defined as an event beyond the control of the beneficiary or contractor, as the case may be, and that cannot be avoided, regardless of the injured party and include, without limitation:

- war, hostilities or belligerent operations;
- strikes, sabotage, blockage, embargo or import restriction;
- port congestion;
- lack of the usual means of transport and communication;
- earthquake, landslide, volcanic activity, fire or flood; and
- shortage of labour force, materials or public services, when caused by circumstances that are themselves force majeure.

36 How is risk for acts of third parties customarily allocated between parties to a PPP agreement?

Risks for action or inaction of third parties, such as failure by statutory undertakers, utility companies or local authorities to carry out works or provide services are generally treated as relief events (fortuitous case). Generally, in such cases, the performance of the contractor is suspended. Also, the contractor may be entitled to standstill costs if provided for in the PPP agreement.

37 How are political, legal and macroeconomic risks customarily allocated between the parties? What protection is afforded to the private party against discriminatory change of law or regulation?

The risk allocation is not prescribed by law, but will be provided for in the relevant contract. Occurrence of political risks such as nationalisation or expropriation would usually be seen either as force majeure or as a default by the public party, allowing the private party to terminate and claim compensation on a default basis. Legal risks are contractually settled; usually, if, during the development of the PPP contract, any enforceable law, regulation, ordinance, order or decision is enacted, annulled or amended (which shall be deemed to include any change in interpretation or application by the competent authorities) that subsequently affects the costs and expenses of the private party or the completion term, or both, the contract price shall be increased or decreased accordingly, and the completion term shall be adjusted

reasonably, in turn, for as much as the private party shall be affected in the fulfilment of any of its obligations under the contract.

38 What events entitle the private party to extensions of time to perform its obligations?

Romanian PPP law does not provide for such events, leaving it for the parties to decide in the PPP contract. Usually, if the contractor is delayed or prevented from performing the PPP contract, owing to unforeseen physical conditions or artificial obstructions that would not have been foreseen before the date of the contract by an experienced contractor on the basis of the data examination of the facilities, provided by the beneficiary, then the contractor is entitled to extension of the completion term. Other events, typically contractually agreed, include the following:

- change in the facilities ordered by the beneficiary;
- force majeure events;
- suspension orders by the beneficiary;
- change in legislation and regulations;
- non-payment by the beneficiary of the invoices due to the contractor; or
- events where the data resulted from the detailed geotechnical study are different from the ones put at the contractor's disposal by the beneficiary and as a consequence lead to amendments during the performance of works (the contractor, therefore, having the right to adapt the schedule of the works without paying delay penalties).

39 What events entitle the private party to additional compensation?

Aside from contractually agreed situations where the private party receives compensation upon occurrence of certain events, as detailed above, Romanian PPP law gives entitlement to the private party to receive compensation in cases where the public party changes the PPP contract unilaterally, whose changes bring damages to the private party. As specified above, a unilateral change of the PPP contract is only allowed in exceptional situations in connection with public interest, such situations to include those related to public health, environment protection, safety and quality standards and the necessity to ensure unrestricted access to a certain public service.

40 How is compensation calculated and paid?

Currently, Romanian PPP law does not provide for how the compensation is calculated and paid. However, according to the expected changes to the PPP law, there will be set principles of determination of compensation only in the case where compensation is due for the unilateral or voluntary termination of the contract by the government party, leaving the other situations to the parties to decide through their agreement. The compensation, where determined by the law, is dependent upon the stage of the project. During the construction stage, the total value of the investments made up to the moment of communication of the unilateral termination decision shall be considered, as well as the effective loss (direct damage) suffered by the private party pursuant to unilateral termination by the public party. During the operation stage, the total value of the investments made up to the moment of communication of the unilateral termination decision shall be considered (but also payments already made by the public party), as well as the direct and consequential losses (such as lost profit, which is calculated on a pro-rata basis depending on the performance level during the effective operation period).

41 Are there any legal or customary requirements for project agreements to specify a programme of insurance? Which party mandatorily or customarily bears the risk of insurance becoming unavailable on commercially reasonable terms?

The private party will generally be required by the project agreement to take out insurance for specific risks, although Romanian PPP law does not mandate the type of insurance required. This is particularly the case with a special purpose vehicle structure and will be expected by both lenders and the public body, following the recommendations of the standardised documentation. While not mandatory, to obtain better value for money, the public body may agree to a mechanism whereby the risk of insurance becoming increasingly expensive or unavailable on commercially reasonable terms is shared between the parties.

Default and termination**42 What remedies are available to the government party for breach by the private party?**

If the private party defaults in its obligations under the PPP contract and the PPP contract is, therefore, terminated by the public party, the assets acquired under the contract by the special purpose vehicle, representing the object of the contract, as well as those necessary for the performance of the public service, may be transferred to the public party against compensation, which is set in reference to the undepreciated value of those assets; however, in this case, the damages produced by the private party will be deducted from the value of such compensation. Additionally, if such possibility is mentioned in the contract, the public party may replace the private party in case the latter defaults on its obligations under the contract, on its own initiative or the financing party's.

Similarly, where shares in the special purpose vehicle were acquired by the public party from the private party upon termination of the PPP contract, the damages produced by the private party will be deducted from the value of the acquisition price provided, of course, the private party defaulted on its obligations.

43 On what grounds may the PPP agreement be terminated?

The typical grounds for termination are as follows:

- default by the PPP company (particularly default on attainment of the performance criteria or performance indicators);
- default by the government party;
- a voluntary decision by the government party; and
- termination in the event of prolonged force majeure.

44 Is there a possibility of termination for convenience?

The government party will include a termination right for convenience clause in all project agreements to enable it to terminate the contract. The law is silent on the possibility of the private party to unilaterally terminate the PPP contract so a potential termination right will be set in the PPP contract.

45 If the PPP agreement is terminated, is compensation available?

If a government party has unilaterally terminated the PPP contract, then the private party will be entitled to just compensation, as set in the awarding documentation of the PPP contract.

Financing**46 Does the government provide debt financing or guarantees for PPP projects? On what terms? Which agencies are responsible?**

No. Debt financing provisions by the public party are contained in Romanian PPP law.

47 Are lenders afforded privity of contract with the government party through direct agreements or similar mechanisms? What rights will lenders typically have under these agreements?

It is envisaged that lenders will typically enter into a direct agreement with the relevant governmental institution. According to expected changes to the PPP law, it is envisaged that such direct agreements will be inclusive of the warranties to be granted by the PPP parties, either public or private. It is also expected that direct agreements will provide for the right of consultation in favour of the financiers in the case of appointment of a new private partner, as permitted under the PPP law.

48 Is there a mechanism under which lenders may exercise step-in rights or take over the PPP project? Are lenders able to obtain a security interest in the PPP agreement itself?

According to expected changes to the PPP law, it is envisaged that such direct agreements will be inclusive of the warranties to be granted by the PPP parties, either public or private. Also, it may reasonably be expected for lenders to include provisions allowing them to exercise step-in rights or take over the PPP project.

49 Are lenders expressly afforded cure rights beyond those available to the project company or are they permitted to cure only during the same period and under the same conditions as the project company?

There is no practice nor case law on these aspects but it is expected that Romanian PPP contracts would go in line with the relevant international practice and customs.

50 If the private party refinances the PPP project at a lower cost of funds, is there any requirement that the gains from such refinancing be shared with the government? Are there any restrictions on refinancing?

There is no practice nor case law on these aspects but it is expected that Romanian PPP contracts would go in line with the relevant international practice and customs.

Governing law and dispute resolution**51 What key project agreements must be governed by local law?**

The PPP contract must be governed by local law, irrespective of the nationality of the private party.

52 Under local law, what immunities does the government party enjoy in PPP transactions? Which of these immunities can be waived by the government?

There are no immunities granted to the government party in PPP transactions.

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53 Is arbitration available to settle disputes under the project agreement between the government and the private party? If not, what regime applies?

No. Disputes are settled by courts of common jurisdiction. The PPP contract is an administrative contract, therefore, the settlement regime of disputes with private parties shall only be subjected to settlement by the common courts of jurisdiction.

54 Is there a requirement to enter into mediation or other preliminary dispute resolution procedures as a condition to seeking arbitration or other binding resolution?

No. There is no general requirement to enter into mediation or other preliminary dispute resolution procedure as a condition for seeking court settlement; however, there may be specific contractual obligations compelling parties to a project agreement to do so. Preliminary steps to resolve disputes through negotiation are often required in PPP contracts.

55 Is there a special mechanism to deal with technical disputes?

Such mechanisms shall be contractually agreed. Technical disputes are often subject to expert determination under PPP contracts. Expert determination is often favoured for highly technical matters and to enable disputes to be resolved quickly in order not to disrupt construction or operation of facilities.