

cover article

Public-private partnerships. Will Romania have a functional law starting this fall?

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At a time when the business community is expecting the implementation norms to render law 233/2016 on public-private partnerships functional, the government comes up with a change in optics and announces amendment and simplification of the law and, eventually, issuance of the norms. The time horizon announced, when both the amended law and the implementation norms should be in force, is October 2017.

The amended law on public-private partnerships will differentiate projects that can be implemented locally (i.e. those for medium and small investments) from large ones (a threshold shall be set for them), and only the latter shall require Government approval regarding the main elements of the substantiating study, according to the Government officials. The differentiation should allow local authorities to faster implement public-private partnership projects that are prioritized under the governance program.

What does the new legislative package bring?

- *Several new definitions and concepts.*
 - (i) The public-private partnership contract as a concept covers three types of contracts already existing in the legislation, namely the classic public procurement contract, the sectoral contract or the concession contract awarded under Law no. 98/2016, of Law no. 99/2016 or Law no. 100/2016.
 - (ii) As a novelty, the project defines the financial closure, which is the moment when the project and financing agreements are signed following the fulfillment of their respective conditions, so that project implementation can begin. Financial closure is envisaged as an important milestone in the mechanism of public-private partnership projects.
 - (iii) The rights that can be transmitted or set up in favor of the private partner / project company are more clearly organized. Thus, art. 14 mentions, in addition to the right to collect and use fares from users of the public good or service for the execution of the project, the concession right on public or private assets of the public partner (without the need for another award procedure than the one regulated by Law 233/2016), and easement, rental rights and other such rights, as required under a specific project.

- *Several clarifications on guarantees which can be established by the partners and the beneficiaries thereof.*

Guarantees on receivables and rights held under the public-private partnership contract may be established by the private partner. Guarantees on the shares held in the project company can be established both by the private partner and the public partner. In all cases, guarantees must be set up

exclusively for the benefit of the project financiers. Additionally, in these cases, the contracts will establish direct legal relations between the public partner and the project financiers.

- *Different approval levels. A better structure of the stages prior to concluding a public-private partnership contract.*
 - (i) In addition to the stages stipulated by law 233/2016, the draft amendment to law 233/2016 requires approval at different levels, as we stated at the beginning of this article, depending on the size of the project, either by the Government or by central and local public authorities and institutions of the elements resulting from the substantiating study on the basis of which the project will be implemented. These approvals become a prerequisite for signing the contract in the case of classification of the public-private partnership contract in government accounts.
 - (ii) It also becomes necessary to submit the contract to the National Institute of Statistics for its analysis from the perspective of EU methodology.
 - (iii) A new final stage is introduced, namely the financial closing.
- *The possibility of instituting direct legal rapports between the public partner and the project financiers.*

The changes included in the draft create an increased role for the public-private partnership project financiers, both in terms of the guarantees they can receive, the right of consultation granted in the case of appointment of a new private partner and of the direct legal rapports with the public partner. In the latter case, the possibility of having a direct legal rapport must be mentioned in the award documentation and in the contract.
- *As a novelty, the regulation of a chapter on misdemeanors and sanctions*

The draft only punishes as misdemeanor the public partner's failure to comply with the provisions of law 233/2016, the amount of the fines being within a fairly low range, namely 500-30,000 RON (100-6,600 EUR), and the competency to apply them is with the Ministry of Public Finance. The principle is in line with the provisions of the implementation norms, according to which the public partner is responsible for the way of concluding and running the public-private partnership contracts.

What is the status of the new legislative package?

The legislative package draft (amendments to the law and implementation norms) was recently launched for public consultation and can be viewed at: <http://www.imm.gov.ro/proiecte-de-acte-normative-initiate>

The draft is under public consultation until August 31, 2017.

What can Voicu Filipescu do for you in this context?

According to Romanian officials, healthcare is one of the main beneficiaries of the new law, along with transport infrastructure, telecommunications, utilities and public administration.

Voicu Filipescu has already gained excellent experience working close to its clients in various projects involving creation of joint ventures between the Romanian state and private companies as well as in public procurement projects. We are ready to guide you in your endeavors to take benefit of the long awaited opportunities to arise under the amended legislation, expected to release the major infrastructure projects in Romania.

Please feel free to contact our lawyers and be prepared for the new opportunities.