

## PPP & concessions - legal changes published in December 2017

**Government Emergency Ordinance no. 104/2017 for amending and supplementing the Law no. 233/2016 regarding public-private partnerships** was published in the Official Gazette, Part I no. 1037 of 28 December 2017, entering into force on the same date.

The amendment of the Law on Public-Private Partnerships was considered necessary in the view of the introduction of new elements requiring an urgent correlation of certain provisions in the text of Law no. 233/2016 with public procurement law, seeking to include new concepts specific to public-private partnership contracts reflecting good international practices, as well as simplifying the steps to be taken by public authorities intending to implement projects in public-private partnership regime.

The main amendments and additions to the Public-Private Partnerships Law are as follows:

- the concept of "public-private partnership" is redefined, as having the subject of realization of an asset or, as the case may be, the carrying out of some interventions and / or expansion of an asset or assets belonging to the public partner's patrimony, destined for public service and / or operation of a public service; if the subject of the public-private partnership contract is the execution of intervention works and / or the extension of an asset, the work carried out must represent more than 50% of the value of the asset at the completion of the investment;
- it is established that the mechanism of the public-private partnership is characterized by the following elements: (i) cooperation between the public partner and the private partner, in order to implement a public project; (ii) the length of the contractual relationship sufficient to enable the private partner to recover the costs of the investment made, the operating costs and the realization of a reasonable profit; (iii) financing over 50% of the investment from private funds; (iv) sharing the risks between the public partner and the private partner, depending on the ability of the public partner to manage and control a certain risk;
- as regards the forms of public-private partnership, both the institutionalized and the contractual ones are defined as being made under long-term contracts (a non-existent mention in the previous form of Law No. 223/2016); in the case of both types of partnerships, if the public partner is subject to a reorganization measure, regulated by a normative act, the new entity that takes over its attributions and activity will also assume the quality of public partner in the public-private partnership contract;
- it regulates definitions of new terms such as "public project", "financial closure", "public-private partnership contract", "intervention works";
- the range of authorities that can be public partner is extended; thus, beside the contracting authorities / entities provided by the Laws no. 98/2016, 99/2016 and 100/2016, a public partner may also be authorities, institutions and entities referred to in art. 2 point 30 of the Law no. 500/2002 on public finances, respectively art. 2 point 39 of the Law no. 273/2006 on local public finance and art. 67 of Law no. 273/2006, as well as other entities classified in the public administration according to Chapter 20 of Annex A to Regulation (EU) No. 549/2013 of the European Parliament and of the Council of 21 May 2013 on the European System of National

and Regional Accounts in the European Union, published in the Official Journal of the European Union, L series, no. 174 of June 26, 2013;

- it is stipulated that through the awarding documentation and subsequently through the public-private partnership contract, the public partner may transmit or establish, subject to the state aid rules, but without having to undertake a procedure other than the regulated procedure by Law no. 233/2016, in favor of the project company, the right to collect and use fees for the implementation of the project from the users of the public good or service which form the subject of the public-private partnership contract;
- the stages necessary for concluding and executing a public-private partnership contract are modified and detailed;
- the authorities responsible for the approval of the central public administration projects and the local public administration are provided;
- it is now possible that the public partner can contract legal, technical and financial consulting services in order to prepare the substantiation study;
- in the case of transport infrastructure projects, the award documentation made by the public partner for the award of the public-private partnership contract must be drawn up on the basis of the technical execution design, in accordance with art. 12 paragraph (1) of the Government Decision no. 907/2016 regarding the development stages and the framework content of the technical and economic documentation related to the public-financed investment objectives / projects;
- it is specified that upon assessing the submitted financial bids and, implicitly, the awarding documentation, the financing costs for the project will be taken into account;
- it is also envisaged to ensure the continuity of the project by regulating the situations of replacement of the private partner; in this context, some mechanisms are available to allow the replacement of the private partner in case of non-performance, without redoing the contract award procedures;
- the essential aspects that the public-private partnership contract should contain are extended;
- it is specified that the public partner may constitute, under the law, in compliance with the state aid regulations, but without having to undergo another award procedure than the one regulated by Law no. 233/2016, for the benefit of the project company, in respect of the assets intended for the realization of the project and to which it has the right to dispose of: (i) concession rights on public property or rights arising from the letting of public property; (ii) superficies, easement or usage rights over private property;
- a new chapter on misdemeanors and sanctions is introduced.

After the Emergency Ordinance enters into force, the Law on Public-Private Partnership will be republished, and the texts will be renumbered.

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Also, within 60 days from the date of entry into force of the hereby Ordinance, the methodological norms for the application of Law no. 233/2016 shall be drawn up.