

PPP & concessions - legal changes published in May 2018

Government Emergency Ordinance no. 39/2018 regarding public-private partnerships was published in the Official Gazette, Part I no. 427 of 18 May 2018, entering into force on the same date.

Government Emergency Ordinance no. 39/2018 (hereinafter referred to as "GEO 39/2018" or "*Emergency Ordinance*") repeals and totally replaces Law no. 233/2016 on public-private partnerships, the framework law in force in this field until 18 May 2018.

EGO 39/2018 regulates the conclusion, performing and termination of public-private partnerships, establishing that the public-private partnership has as its object the realization or, as the case may be, the rehabilitation and/or extension of a good or assets belonging to the public partner's patrimony and/or operation of a public service. The provisions of the Ordinance shall be applied by the public partner for the implementation of a project, if the project's substantiation study proves, in addition to the main elements provided in Art. 19 that more than half of the revenue to be obtained by the project company from the use of the good or goods or the public service operation that is the subject of the project comes from payments made by the public partner or other public entities to the benefit of the public partner.

According to the Emergency Ordinance, the mechanism of public-private partnerships is characterized by the following main elements: (i) cooperation between the public partner and the private partner in order to implement a public project; (ii) the relatively long duration of contractual relationships, over 5 years, to allow the private partner to recover the investment and achieve a reasonable profit; (iii) financing of the project, mainly from private funds and, where appropriate, by sharing private funds with public funds; (iv) achievement of the public partner's and private partner's goal; (v) risk-sharing between the public partner and the private partner, depending on each contracting party's ability to assess, manage and control a particular risk.

EGO 39/2018 maintains the distinction regulated by the old Law no. 233/2016 regarding the forms of public-private partnerships, these being the contractual public-private partnership (concluded under a contract between the public partner, the private partner and a new company whose share capital is wholly owned by the private partner acting as project company), and the institutional public-private partnership (achieved on the basis of a contract between the public partner and the private partner, whereby a new company is set up by the public partner and the private partner to act as a project company and, after being registered in the Companies Register, becomes a party to the public-private partnership contract in question).

The Emergency Ordinance provides that public-private partnership contracts (expressly classified as administrative contracts, according to Article 30 of the Ordinance) may also be concluded for the purpose of carrying out a relevant activity in the public utility sectors provided in Law no. 99/2016 on sectorial procurement, as well as for the performance by a private operator of the community services of public utilities stipulated in the Public Utilities Community Services Law no. 51/2006.

In relation to the parties of a public-private partnership contract, EGO 39/2018 mentions the following:

- a public partner can be any of the entities that are contracting authorities or contracting entities within the meaning of Art. 4 of Law no. 98/2016 on public procurement, art. 4 of Law no. 99/2016 on sectorial procurement, as well as art. 9 and 10 of Law no. 100/2016 on works concessions and concessions of services;
- on the other hand, any legal person or association of legal persons may participate in the public-private partnership contract award procedure, provided that it does not belong to the categories of public partners as mentioned above. In this way, the private investor designated as the winner of the award procedure which concludes a public-private partnership contract acquires the status of private partner;
- the direct beneficiary of the use of the public goods or public service representing the object of the partnership can be, under the terms of the public-private partnership agreement, either the public partner or another public entity, or the public in general.

The steps to be taken to conclude and start fulfilling the obligations of a public-private partnership contract are: (i) the public partner's performance of a substantiation study; (ii) endorsement of the substantiation study by the Government for central public administration projects or, where appropriate, by decision-making authorities for local government projects; (iii) conducting the award procedure of the public-private partnership contract; (iv) approval of the public-private partnership contract resulting from the finalization of the negotiations and initiated by the parties - by the Government for central public administration projects or, as the case may be, by the decision-making authorities for local public administration projects; (v) the signing of the public-private partnership contract; (vi) meeting all the conditions precedent set out in the public-private partnership contract, including financial closure.

Public-private partnership contracts are concluded in accordance with Romanian law, irrespective of the private partner's nationality and are awarded according to the provisions of Law no. 98/2016, of Law no. 99/2016 or Law no. 100/2016, as the case may be, according to the substantiation study elaborated according to the object of the contract and the way in which the transfer of a significant part of the economic risk of operation is realized. If, during the selection procedure, the public-private partnership contract can not be signed under the law, with any of the private investors who have submitted bids, the public partner has the right to launch a new procedure. At the same time, the provisions of Law no. 101/2016 on remedies in respect of the award of public procurement contracts, sectorial contracts, works concession contracts and services concession contracts, apply accordingly.

Also, EGO 39/2018 regulates (i) the minimum aspects that must be included in the public-private partnership contract, (ii) the elements according to which the duration of the contract is determined, (iii) the possibility of unilateral amendment/termination given by law to the public partner for exceptional reasons related to the public interest, (iv) issues related to the termination of the public-private partnership contract.