



Privatisation & Public Private Partnership

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Privatisation and public private partnership in Romania

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Following the fall of communism in Central and Eastern European countries, Romania went into a transitional period extending over more than a decade, with a view to adapt to its newly achieved status as a developing/emerging market. During such time, and while struggling to implement the reforms needed in order to ensure the mechanics of a fully functional market economy, it also had to face the legacy of an essentially state owned and controlled economy, characterised mainly by low productivity, out-of-date industry and a general lack of efficiency in all economic sectors. In addition to that (as proven nowadays), the existing infrastructure was unable to support the economic growth to come as a result of such reforms.

The deep structural changes which were essential to successfully transform the Romanian economic landscape into a market economy were not possible without the involvement of the private sector providing the expertise, the willingness and the financial resources required for the development of key sectors of the Romanian economy, which the authorities were inherently lacking. It is therefore understandable why the reforms initially focused on privatisation of state owned enterprises, while the interest for other means of getting the private sector involved in traditionally public areas (such as public private partnerships) was rather low and a suitable legal framework was only developed at a later stage.

Privatisation legal framework

Privatisation of state owned enterprises, representing most Romanian economy in the early 1990s, was a long process, yet to be fully finalised – notwithstanding the successful privatisation of major companies operating in key sectors, including utilities, communications, banking or automotive industry. Depending on various political and economical circumstances, the privatisation legal framework has suffered many changes in the course of time, especially in the context of privatisation of most important state owned companies.

The current legal framework on privatisation sets forth basic principles, such as transparency, sale at market price, equal treatment of bidders, pre-privatisation restructuring and settlement of outstanding debts, and provides a set of guidelines as to the methods and procedures relating to the privatisation process.

The transfer of control over state owned companies towards private investors may be

achieved by way of direct sale of shares, share capital increase, transfer of assets, or any combination of the above, all terms and conditions of the transaction to be included in a privatisation agreement. AVAS (the authority administering the state's participations in companies) is the main governmental authority involved in the privatisation process.

According to the transparency principle mentioned above, the sale of shares held by a state authority in a commercial company is subject to a public announcement and certain disclosure requirements. The intention/offer to sell has to be published for a period of time ranging between 30 and 180 days (or more, in certain cases). As a matter of principle, direct sale of shares has to be performed at market price (which does not exclude the possibility of selling the state's participation for as less as €1, in case of companies facing serious difficulties). While in case of public companies, disclosures are subject to the applicable regulation of the stock exchange, in case of non-listed companies, the board of directors must prepare a presentation file, including disclosures and information on the past and current status of the target company – such consideration file is made available to potential investors against payment of a price.

After the purchase of the presentation file, potential investors are granted full access to the target company in order to perform a full due diligence (investors may be granted limited access to the company even before purchasing the presentation file, in order to speed up the investor's decision making process). According to the current framework, privatisation may also be achieved by an increase of the company's share capital by the existing or new shareholders (provided that existing

shareholders have a right of first refusal). Furthermore, the direct sale of certain assets is also permitted.

In case the state holds a majority stake in the target company (or the target company is a subsidiary of such a state controlled company), the latter is subject to 'special administration and financial supervision'. The purpose of such procedure is to diminish, to the extent possible, the company's indebtedness, by making payments towards creditors according to a payments schedule, similar to reorganisation prior to insolvency. This is not the only similarity with such a procedure, taking into account that, during such period, the company's management is entrusted to a special administrator, whose mandate may include mergers, de-mergers, spin-offs, sale of assets, converting debt into equity, or personnel cut-offs. In case of a successful privatisation, the special administration is lifted upon the transfer of shares.

The privatisation agreement may include certain incentives for the investors (subject to competition law and state aid restrictions), as well as various representations and warranties meant to provide the

investor enhanced protection against certain risks, such as undisclosed liabilities of the target company, up to an amount not exceeding 50% of the amount of the share transfer price.

Development of public private partnerships (PPP) in Romania

Although a number of enactments provided specific regulations with regard to concessions (as of 1990) or public procurement (as of 1995), it was only in 2002 that the concept of PPP was formally acknowledged by the Romanian legislation, when the ordinance on public private partnership agreements came into force. The ordinance provided that a PPP could be established between a state authority and a private investor entering into a public works concession agreement, and specifically allowed for special purpose vehicles to be set up in order to develop and operate the relevant projects. The aforementioned legislation was repealed in 2006, when several other enactments on concession agreements, public procurement and PPP were replaced by a unified legal framework (Emergency Ordinance no. 34/2006 regarding public

procurement, concession of public works and concession of services agreements – the “PPP law”) in view of Romania joining the EU on January 1, 2007, and implementing the EU directives on the matter. However, the principles and mechanics set forth in 2002 were generally preserved in the new legal framework.

Even so, the newly enacted legislation, as well as the changes meant to synchronise the Romanian legal framework with the EU model, were, until present time, proven unable to boost the involvement of the private sector and attract private investments into major infrastructure projects, so that the list of successful PPP projects is extremely short.

Overview of PPP law

The current legislation does not use the term ‘PPP’ anymore in order to designate the relationship between a public authority and a private investor; it does, nevertheless, refer to such collaboration in the form of special purpose companies. Moreover, the existing legal framework provides detailed regulations concerning the selection process, negotiation, approval, entering into and performance of either public works or services concession agreements (further referred to as PPP agreements), as forms of public private partnerships, closely related to public procurement agreements, and are governed by principles such as non-discrimination, mutual recognition, transparency and proportionality, as well as efficient use of public funds.

The distinction between public procurement agreements and concession agreements results mainly from risk allocation – to the extent operational, as well as other types of risks are transferred to the private entity executing public works or rendering the relevant services, the contract concluded with the public authority is deemed a concession rather than procurement. Concession procedures under the PPP law are subject to the supervision of the National Regulatory and Monitoring Public Procurement Agency.

Contracting authorities

PPP agreements may be concluded with any local or central public body or institution, as well as with several other types of entities in which the state is deemed to have special interest (such as state controlled institutions or certain public services providers), acting as ‘contracting authorities’. The decision making process of these contracting authorities is subject to certain conditions, including the appointment of committee responsible for preparing feasibility studies, draft documents and determining the applicable selection procedures.

Bidders

Any private entities, whether Romanian or from abroad, may participate in the concession granting procedure, either individually or in the form of a consortium. The contracting authority may establish, however, certain limitations on the types of private entities admitted to participate in the procedure.

Transparency

The contracting authority is obliged, for transparency purposes, to make a public announcement of the forthcoming concession granting procedure, which has to be published with SEAP (the Electronic Public Procurement System), the Romanian Official Gazette (in a special public procurement section) and, in certain cases (e.g. contract value exceeding €5m), in the EU Official Journal. The announcement must provide a minimum set of information, including, among others, details regarding the contracting authority, a presentation of the concession object, nature of the services/works to be rendered contact details and deadline for submitting applications, minimum requirements applicable to potential bidders, criteria to be used for granting the concession agreement, as well as information on dispute resolution procedures.

Any potential bidder may request a copy of the full tender file (to the extent such is not entirely included in the public announcement) and to ask the contracting authority for clarifications which might be necessary. In addition to the minimum information in the public announcement, the concession file provides detailed information on all aspects related to the contemplated PPP project, including a tender book setting forth the technical requirements for the project.

Bid bond

The contracting authority may require (such requirement to be mentioned in the tender file) each bidder to provide a bid bond, in the form of a bank letter of guarantee, for an amount not exceeding 2% of the concession contract value. The contracting authority is entitled to enforce the bid bond in case the bidder withdraws its offer during its availability period or in case the selected bidder does not execute the PPP agreement. Otherwise, the bid bond is returned to the selected bidder after the latter has provided a performance bond, while non-selected bidders are returned the bid bond promptly following the execution of the PPP agreement with the selected bidder.

Selection process

As a matter of principle, selection of the private counterparty for a PPP is based on a tender procedure, which, depending on the nature of the PPP project, may be organised either as an open tender (where any bidder interested in entering into the PPP agreement may submit an offer), or as a restricted tender (where only bidders selected from a pool of entities willing to enter into the PPP agreement are requested to submit an offer), in case the specifics of the envisaged project are clearly determined. If not, the contracting authority may choose to grant the PPP agreement based on a competitive dialogue procedure, where the contracting authority conducts negotiations with the admitted bidders, with a view to determine the best solution for the PPP project, while final offers are only requested at the end of the procedure in order to determine to whom the agreement should be granted.

Irrespective of the chosen procedure, the final assessment of each bidder's offer is made by a special committee appointed by the contracting authority, which is responsible for evaluating the offers against the criteria set forth in the tender file and determine the bidder whose offer is best suited for the contemplated PPP project. The committee's decision is documented by a report, also stating the grounds for selecting a certain bidder, as well as the grounds for dismissing other bidders' offers.

Dispute resolution

During the pre-contract phases, any interested party has the right to challenge the acts of the authorities involved in the concession procedures before a specialised dispute resolution body, i.e. the National Council for Dispute Resolution.

The PPP agreement

Depending on the contract value, the selected bidder is invited by the contracting authority to

execute the PPP agreement within a specified deadline. Although the PPP agreement is subject to negotiation between the parties, the terms and conditions thereof must match the requirements set forth in the tender file as well as the terms and conditions in the offer, while the tender book is attached to the agreement, thus becoming a part thereof.

The PPP agreement entitles (and, also, obliges) the private partner, acting as concessionaire, to efficiently and continuously render the relevant services, or, as the case may be, totally or partially exploit the assets resulting from the contemplated public works, according to the goals and standards and in the concession agreement, and cash-in revenues arising therefrom. The agreement must determine how the risks related to the project are allocated between the parties, provided that the concessionaire must undertake most of such risks. Other clauses, to be mandatorily inserted in the PPP agreement, relate, among other things, to the transfer of the concession assets from the contracting authority to the concessionaire, own assets and the return assets, authority's right of inspection, concession duration or dispute resolution clauses (arbitration permitted).

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