THE LEADING GUIDE TO THE COMMERCIAL LAW MARKET

GOVNET
Romania's Business News Gate

WHICH LAWYER IN ROMANIA

14th edition

2021

www.whichlawyer.ro

contents

Tel: +40 722 829 497, E-mail: office@govnet.ro, www.govnet.ro, www.whichlawyer.ro

GOVNET
Romania's Business News Gate

Publisher
Adrian Ion

Project Coordinator
Ileana Georgescu

Business Development Manager
Magda Ion

Marketing Executive
Mihaela Dumbrava

Business Development Associate
Diana Nicolescu

Design by
Silvia Furnea

All rights reserved. No part of this publication may be reproduced or transmitted by any means without the prior permission of Govnet Mediacom. Copyright 2021
The content of this publication is compiled based on publicly available information. The transactions presented are sourced from press coverage and press releases issued by the respective companies as well as other statements publicly released or obtained by the editorial staff of the publication. Any views or opinions presented in this publication are solely those of the author and do not necessarily represent those of the law firm unless directly quoted in the material.

PPPs
a long-expected option for Romania

Romanian authorities have been struggling with kicking off PPPs in Romania for more than a decade, with the first piece of dedicated legislation being adopted in 2010[1], consequently further on amended, repealed[2] and restated in 2016[3] and then 2018[4].

Although the current legal framework - constituted by Government Emergency Ordinance no. 39/2018 on public private partnership, with subsequent amendments ("GEO no. 39/2018") - has been better adapted to the economic realities and specific technical implementation principles of PPPs, there are still no successfully implemented PPPs. This stall might not be due to lack of interest from either private or public sector, but rather to lack of know-how in the public sector (proven by recent unsuccessful attempts to initiate large PPPs projects[5]), causing reluctance for "breaking the ice in uncharted territory" on both sides.

What to know about PPPs under Romanian Law

First, the scope of a PPP project is set forth to encompass (i) the construction, rehabilitation and/or extension of assets that shall eventually become property of the public partner, or (ii) operating a public service.

This scope also enforced by the requirement that, within a PPP project, more than half of the income to be obtained by the project company is to come from payments made by the public partner or other public entities in the benefit of the public partner.

Thus, the law sets the framework for a classic public-private cooperation, which might exclude certain types of projects. Nevertheless, at this stage of development of PPPs in Romania, this framework might be justified and later amendments could come once PPPs prove their benefits.

Within this framework, two types of PPP projects are regulated: (i) the Contractual PPP, which entails setting up the public private partnership throughout a contract concluded between the public partner, the private partner and a new vehicle, entirely owned by the private partner, which shall act as a project company, and (ii) the Institutional PPP, which entails that the setting up is done throughout a contract concluded between the public partner and the private partner, wherein both partners set up a new vehicle, which shall act as a project company and which shall also become part of the PPP contract after incorporation.

Secondly, an important improvement brought on by the current legal framework, consists in eliminating the previous unrealistic limitations to the public partners' contribution in what concerns investments to be made within a PPP project, as well as the option for implementing a "*blended*" project.

Thus, the public partner may contribute to the investments required for setting up the PPP with public funds, including external non-reimbursable funds (i.e. European funds) and co-financing, within maximum 25% of the total value of the investment.

The public partner may also contribute to the PPP project by: constituting rights (such as concession rights or rights derived from renting public property, superficies, easement or use rights over private property; the right to collect and use tariffs from the final beneficiaries of the project); performing cash contribution to the share capital of the project company; undertaking payment obligations towards the private partner or project company or payment obligations related to the investments; and last but not least, granting guarantees in favor of the financing partners of the PPP contract which are constituted as credit or financial institutions.

However, although the option for a more substantial contribution of the public partner is available, the extent of such contribution is relevant even from the initial stage of setting up a PPP, as the relation between the project and the public deficit and public debt is a key criteria for the decision to initiate a PPP.

Ramona Pentilescu
Managing Associate,
Popovici Nitu Stoica & Asociatii

This specific criteria – impact on the public deficit and public debt – might lead to a strict selection of PPPs and might also lean the balance in favor of PPPs initiated by those local authorities which have a lower debt status.

Thirdly, as already anticipated from the scope of the PPP, it is, in essence a public project. This means that a PPP contract may be unilaterally terminated by the public partner at any time, if the public interest requires. It also means that the public-private collaboration is limited in time, such as to allow the private partner to recover its investment and make a "reasonable" profit. Therefore, at the end of the PPP contract, regardless of reason – including early termination, the investment shall become property of the public partner.

Therefore, compensation mechanisms shall be key negotiating factors when entering a PPP contract.

What's next

Up until now, the authorities have focused mainly on the design of the legal framework applicable to PPPs. However, while the legal framework applicable to PPPs may not perfect, it allows for initiation and set up of PPPs. The real "road block"

in kicking off such projects remains in the administrative capacity to design and manage PPPs.
This lack of know-how was shown, in the previous attempts, by the authorities' tendency to think too big, by promoting big infrastructure projects as PPPs, without proper prior analysis of the economic feasibility of such projects and with the only aim to cover lack of or to replace financing options.
Nevertheless, central authorities seem to have learned their lesson from the 2018-2020 failed attempts at PPPs and the PPP strategy is now being more carefully analysed. Also, there has been increasing interest in PPPs from the local authorities, which might prove to be better equipped at kicking off the first PPP pilot projects, proving the benefits of public-private collaboration.
At the current stage, we might say PPP projects are brewing, especially given the option for implementing blended projects, under the new financing frameworks (the National Recovery and Resilience Fund, new 2021-2027 European funds programming). A renewed express of interest from the private sector for PPPs might prove to be the wind in the sales that PPPs need in Romania, giving the Romanian authorities a much-needed insight on the actual input that a private partner may bring, as well as on the benefits of public-private cooperation.

---

1 Law 178/2010 on public private partnership.
2 Law 178/2010 on public private partnership was repealed throughout Law. No. 100/2016 on works and services concessions.
3 Law no. 233/2016 on public private partnership, repealed throughout Government Emergency Ordinance no. 39/2018 on public private partnership.
4 Government Emergency Ordinance no. 39/2018 on public private partnership.
5 For example the PPP project initiated for the construction of the Ploiesti - Comarnic – Brasov Highway, which was initiated, awarded and cancelled before signing the contract. Other similar award procedures have been initiated and cancelled.

Access to the EU Modernization Fund is a true opportunity for the Romanian Energy Sector

Opinion by Florian NITU, Managing Partner, Popovici Nitu Stoica & Asociatii

On September 14, 2021, the Romanian Ministry of Energy ("ME") has publicly announced[1] that it has submitted the first applications to the European Investment Bank for attracting financing from the EU Modernisation Fund.
Under EU Regulation no. 100/2020, by 30 November of each year, each beneficiary member state shall provide to the European Investment Bank (EIB) and the Investment Committee with an overview of investments in respect of which it intends to submit investment proposals in the next two calendar years. Although the beneficiary member states may submit investment proposals to the EIB and the Investment Committee at any time during a calendar year, the EIB and the Investment Committee asses the investment proposals submitted by the beneficiary member states only on a biannual basis.
With this in mind, one should however consider that the Modernization Fund is being set to operate under the responsibility of the beneficiary member states, as per article 10d paragraph 3 of the ETS Directive. As such, each jurisdiction is expected to prepare local regulations transposing the ETS Directive.
While in Romania there is currently a tremendous interest in both public and private sectors for getting access to the Modernization Fund, the ETS Directive is not yet transposed. In fact, there is not even a draft official regulation released for public consultation or available under the decisional transparency section of the Ministry of Economy. We found though one remote media reference of a draft in progress[2].

Certain Fundamental Options

It is now the time for the Romanian authorities to make a number of fundamental choices in connection to the use, scale and effect of access to the Modernization Fund for the Romanian Projects.
First, the Government shall establish a clear-cut line of allocation of projects to the Modernization Fund and to the National Recovery and Resilience Program (PNRR). While it is not yet decided, one should expect that given the PNRR statements related to the energy storage and energy efficiency driven projects, projects eligible for the Modernization Fund shall rather consist in renewables, cogeneration or extension and rehabilitation of network investment.
This likely allocation should however remain informed of the rather poor status of the grid facilities and network, and a synergy between projects with PNRR vocation and projects with Modernisation Fund vocation shall be maintained. That is why we do think that the Romanian Government shall assume the effort to create the secondary legislation, rules and regulations, for both instruments – Modernisation Fund and the PNRR – in the same time, potentially using the same team of experts or at least ensuring that there is project integration in place.
There is a certain experience at the Ministry of Energy level in multiple projects that require integration and the Government's previous effort in relation to the Program of Large Infrastructure Projects should be of course fructified. Alternatively, secondary legislation for the two programs could be prepared independently and successively, with the transposal of the ETS Directive first, as the deadline is actually reached, and integration to be achieved with the PNRR related guidelines.
Secondly, there will be of course public procurement kind of rules applicable to projects under both umbrellas of the PNRR and the Modernization Fund. However, given the specifics of the Modernization Fund framework, one could expect that an alternative set of rules, other than the standard Romanian legal public procurement provisions, shall apply. This critical point shall also be assessed by reference to the nature of projects, hybrid, serial or stand alone, independent ones. It is common for the EIB funded or only managed projects to be submitted to the EIB specific procurement and award procedures, but that rule of thumb is not necessarily the most efficient one when projects are viewed in a larger context.
The key challenge in matters of parameterization of the project procurement and award procedures relies in making sure that by means of secondary local regulations the framework remains flexible so that constraints, requests, conditions are not added to those already applying by effect of the EU regulations.
Thirdly, dealing with the state aid related difficulties, in both programs, is critical. There is of course a solid experience achieved in Romania during the past 15 years since accession and one should expect that all state aid guidelines relevant for the Modernization Fund and the PNRR will be prepared based on the existing state aid regulations and known system of assessment and review.
However, our strong view here is that certain objective higher clearing thresholds shall be set, based not only per project value, where figures of €25 million for example shall be deemed cleared, but also by reference to special situations or conditions, such as the former disadvantaged zones, or regions, etc. Geography and industrialization level could also be considered as key factors.

Next Steps

Time is of the essence.
Romania's action for transposing legislation for the Modernisation Fund is already late. Adoption of the project application guidelines should be done during November, latest by year end 2021; same applies to the project procurement and award regulations. In what regards the state aid component, time pressure is even higher since knowing the parameters for state aid clearance affects any strategic decision in project planning, projects proposal and submission for assessment to the EIB. Add here that the EIB assesses projects only twice a year.
The situation in relation to the PNRR is no different, there is possibly a couple of months more to use for preparative, but not more, since at the latest by mid of 2022 most of the projects should already be called for.
Against the current background of political instability and institutional weakness, there is no other better option to get these very high objectives achieved in due time than to call for support, out of social responsibility, but equally for proper consideration, the private sector, the professional consultants.

1 http://energie.gov.ro/sute-de-milioane-de-euro-din-fondul-de-modernizare-pentru-finantarea-unor-proiecte-strategice-in-sectorul-energetic-din-romania/.
2 https://e-nergia.ro/fondul-de-modernizare-va-avea-10-miliarde-de-euro-pentru-romania-secretar-de-stat/.

The era of internal investigations:

how attorney-client privilege protection can make it or break it

Opinion by Alexandru Ambrozie, Partner and Ana Stoenescu, Senior Associate, Popovici Nitu Stoica & Asociatii

Internal investigations may be old news, but they will steal the spotlight again with the approach of the deadline for the implementation of the Whistleblowing Directive (December 2021).

In light of this, here is a handbook on designing and conducting internal investigations and why attorney-client privilege protection is a key aspect.

Although companies and organizations have had enough reasons so far to conduct internal investigations, such as (a) receiving search warrants, subpoenas, or other requests for information from authorities; (b) employees called as witnesses by the criminal authorities; (c) audit findings; (d) red flags in acquisition due diligence; (e) complaints from vendors, business partners, customers, or competitors, we can expect the number of internal investigations to increase. As a consequence of the protection to be provided to whistleblowers, more internal reports will be filed and they will have to be handled properly by the company and as soon as possible, in order to avoid external reports or, even, media exposure.

You might be thinking ***this will not happen to my company***, but the bad news is that, despite implementing the most proper and effective compliance and training programs, companies and organizations still encounter allegations of wrongdoings or misconduct which call for some level of inquiry.

However, we should not forget the many advantages that conducting an internal investigation can bring: limiting potential exposure, retaining customers, preventing or significantly reducing sanctions imposed by the regulatory or criminal authorities, possibly avoiding intrusive criminal investigations. Furthermore, knowledge is power, so gathering information on the matter will ensure some level of control over any possible outcomes.

A company's trump card in internal investigations is the attorney-client privilege; from the outset of any investigations, we should bear in mind that it is impossible to anticipate what could actually be discovered. Thus, it is best to protect your business and the investigations process and findings by benefitting from the protection of the attorney-client privilege.

The attorney-client privilege protects confidential communications between an attorney and its client for purposes of giving or receiving legal advice. In order to preserve the confidentiality of the information, documents and discoveries of an investigation, external counsels should be engaged to provide legal advice on the alleged wrongdoing and obligations of the company based on the outcomes of the investigations and in light of the applicable law, and for such reasons should conduct an investigation to determine the facts.

To cover all aspects of the internal investigation, counsels will also instruct recipients and employees involved not to forward or disclose privileged or confidential communications and will limit distribution of information only to need to know personnel. Also, whenever non-attorneys will participate (e.g. auditors, experts), it will be made clear that such persons are acting under the direction of the attorney for the purpose of providing legal advice to the company and, therefore, will be subject to confidentiality.

The extent of an investigation is also one of the first steps. At a minimum, enough information should be gathered as to make an informed decision on the need of solely an informal inquiry or an extended internal investigation. In this regard, we should remember that there is a tendency for the government authorities to expect companies to monitor their own conduct and report any potential wrongdoings in their activity. Otherwise, whenever wrongdoings are discovered by the authorities using other means, the company is off to a rocky start and risks higher fines and more intrusive investigations.

The lengthy part of any investigation is collecting and reviewing documents, conducting witness interviews, summarizing the background facts and evidence gathered and determining the applicable law to the evidence.

Afterwards, when drafting and implementing the conclusions and recommendations of the investigations, it comes to the company, shareholders and/or managers to take the most important decisions based on the legal advice provided by the attorney.

Then, in most cases, there is a need to draft a remediation plan and implement it as soon as possible, to be able to prove to any authority that the company is making efforts to remove and prevent any wrongdoings in its activity.

Secondly, depending on the outcome of the investigation, there can be an obligation to disclose the findings to a prosecutor, or, in any case, it should be assessed whether to voluntarily disclose the contents of the investigation and if there are any benefits in doing so (e.g. showing cooperation, good faith and proactive behavior, presenting the company's version of the facts first).

It has been a global common practice for criminal cases to be opened based on a whistleblowing report and, although we expect this trend to increase starting with 2022, conducting proper internal investigations will keep companies, employees and shareholders as far away as possible from prosecuting offices.

It may seem like there are many ***sink or swim*** situations, but, fortunately, companies can find those saving life vests with a proactive approach and proper internal investigations, all under the protection of attorney-client privilege.