

## 2018 GOVERNMENT EMERGENCY ORDINANCE REGARDING PUBLIC- PRIVATE PARTNERSHIPS

A new regulation regarding public-private partnership projects ("PPPs") was adopted by the Government and published in the Official Gazette on 18 May 2018, by means of the Government Emergency Ordinance no. 39/2018 (the "GEO 39"). GEO 39 entered into force upon the date of publication in the Official Gazette.

GEO 39 repeals Law 233/2016 regarding public-private partnerships, as further amended ("Law 233") and is intended to create a new legislative framework under which PPP projects to be developed.

As a general note, GEO 39 follows the structure established by the former legal framework created under Law 233 but intends to regulate in less detail certain aspects. One important change from Law 233 is that GEO 39 does not make any reference to future application norms to be adopted, suggesting that PPP projects may be launched immediately, based solely on GEO 39.

### **Main changes from the framework of Law 233**

#### **Scope of the PPP legal framework**

As was the case also with Law 233, GEO 39 provides that in case of PPP projects, the majority of the revenues of the private partner are generated by contribution from the public partner, unlike in the case of a concession of works/services agreement, where all/the majority of the project's revenues are generated by the market from tolls and tariffs.

GEO 39 brings more clarity on what type of projects can be structured as PPPs, stating that projects which concern only the long-term operation of a public service by a private investor are also qualified as PPPs under GEO 39 (and not only those projects which involve both the construction of a public asset and the long-term operation of the public service).

#### **Financing of PPP projects**

- as novelty from Law 233, GEO 39 expressly introduces the concept of "**financial closing**" as one of the mandatory milestones for implementation of PPP contracts; the concept of financial closing will be defined in the PPP agreement and in the loan agreement(s) with the lenders of the project;

- the public partner can now contribute with financial resources to the financing of investments during the works phase of a PPP project, **up to 25% of the investment value**, such amount being on top of EU funds and national contribution related to such funds; under the Law 233, the contribution of the public partner for financing the investment (i.e. during the works phase of the project) was prohibited, unless it originated from EU funds and the national contribution related thereto;
- GEO 39 expressly provides the possibility for the public partner to enter into **direct agreements** with the lenders of a PPP project whereby the public partner can undertake certain obligations or create security interests/guarantees; under Law 233, the possibility of concluding direct agreements was only implied and might have triggered divergent interpretations in practice;
- similar with Law 233, there are several provisions dealing with **consequences in case of early termination of a PPP agreement**; while some of these provisions expressly require the protection of the lenders' rights, GEO 39 is not consistent in this respect; however, as a positive development, the GEO 39 only sets the principles and provides that the actual and detailed consequences of early termination would be finally regulated by the tender documentation and the PPP agreement, on a case by case basis;
- GEO 39 provides that both the public and the private partner can create security in favour of the financing parties, subject to such financing parties being either credit institutions or financial institutions; however, **the concept of "financial institution"** is not defined in the GEO 39 and therefore it should be interpreted under the general legal framework; thus, certain types of potential lenders to a PPP project might be excluded from the financing of PPP projects to be structured under the GEO 39.

### **Central projects and strategic projects**

GEO 39 provides that the Government should approve the substantiation study in case of PPP projects initiated by central public authorities.

Moreover, the Government may classify as "**strategic**" certain projects in which case, such projects will be prepared and launched by the National Commission of Strategy and Prognosis, on behalf of the relevant public partners. The National Commission of Strategy and Prognosis is organised as a specialised body of the central administration, acting under the coordination of the Ministry of Public Finance.

### **Special Fund for Financing PPP contracts**

According to GEO 39, a special fund will be created for the purposes of establishing and using public funds needed for financing the public-sector contributions to PPP projects which are approved by the Government (i.e. PPP projects initiated by central public authorities). The special fund is yet to be established and will operate according to a special law to be approved within 1 (one) year since the entry into force of the GEO 39 – this may delay the implementation of the large PPP projects that would be initiated by central public authorities.

## **Conclusions**

While GEO 39 creates a clearer and more flexible legal framework for the implementation of PPP projects, it remains to be seen how the first projects will be implemented as successful implementation of such complex projects would depend on several other factors and not only on the legal framework.

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