



Privatisation & Public Private Partnership

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Legal overview on private sector participation in Romania

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In the broader context of Romania's efforts to join the European Union (EU) by the year 2007, the private sector participation in the national economy has grown significantly. Unlike the first years of the transition to the free market economy when privatisation played the key role in transferring the ownership and responsibility to the private sector, other instruments such as public private partnership (PPP) and private finance initiative (PFI) are currently developing with a view to modernising Romania's infrastructure.

Background

For nearly half a century Romania experienced the communist political system accompanied by the state controlled economy, both imposed by the former Soviet Union. After the old system collapsed in 1989, Romania faced the challenges of a long and difficult transition to a democratic system and to a free market economy. The communist inheritance consisted of a bankrupt economy, a bureaucratic state apparatus and a population in poverty.

The newly elected authorities had to deal with difficult tasks, such as the huge industrial complexes built in the heavy industry which were inefficient, lacking in débouchés and energy consuming; an agriculture developed on concepts contrary to the country's traditions; and a poor and underdeveloped infrastructure.

The first decade of the post-communist period was characterised by incoherent and sometimes unrealistic reform measures, social convulsions and the reluctance of the old state bureaucracy to change.

Nevertheless, after Romania started the negotiations for joining the European Union, a comprehensive reform programme was implemented by the state authorities, with a view to opening, restructuring and modernising the economy, to implementing EU institutions and to developing the infrastructure and the administrative capacity to manage the European funds.

A new legal framework was adopted, comprising regulations in privatisation, PPP, concessions and public procurement fields. Although the legislation enacted in these domains is still characterised by conflicting interpretations in enforcement by the governmental authorities, the private sector participation in the economy, especially via privatisation, has increased dramatically. The largest operators in telephony and telecommunications, the main manufacturers and distributors in steel, oil,

textile and pharmaceutical industries, are currently private entities, as well as most of the gas and energy distributors, the shipyards and all car manufacturers.

In the context of steady growth in the economy and significant pressure of foreign capital, 2005 recorded the privatisation of Banca Comercială Română - the largest Romanian commercial bank. The bank passed into the portfolio of Austrian Erste Bank, one of the most important banks in Central and Eastern Europe.

Nevertheless, the development of the infrastructure and of public utilities is still far behind the general trend. Therefore, as Romania's economy became significantly linked to foreign investment and foreign trade and, especially, to European partners, new approaches had to be taken into consideration with a view to covering the needs in this field. The solution was the implementation of PPP and concession, as well as PFI-like concepts.

Development of the private sector

Besides the greenfield private investments, several major projects, which reached closing in recent years or are still ongoing, mark the development of the private sector in the main branches of the Romanian economy, in cooperation with public entities or by transfer of ownership from state to private sector.

Car industry

All former state-owned car factories are now in private hands. Among them, Dacia, the largest Romanian car manufacturer, was acquired by Renault, while another Romanian car brand initially produced in the communist period under Citroen licence is currently developed by Daewoo.

Telephony and telecommunication

The first major privatisation in Romania took place when the majority shareholding in Romtelecom, the former national fix telephony operator in Romania,

was acquired by OTE - the national Greek telephony operator.

Heavy industry

Better days have finally arrived for the Romanian heavy industry, known in the past as the economy's "black hole". Sidex, a huge complex of steel plants held by the Romanian state was transferred to, and has now been run for six years, by Mittal Steel, which is currently the world's largest steel manufacturer. Other steel factories were also acquired by private investors, as well as Alro, the sole aluminium producer in Romania.

Banking

Most of the Romanian banking sector is now part of the private sector. Beside Banca Comercială Română, other state-owned banks were subject to privatisation, among them Banca Română pentru Dezvoltare transferred to the French Group Société Générale, and Banca Agricolă was acquired by Austrian Group Raiffeisen.

Energy, oil and gas

One of the largest oil companies in Central and Eastern Europe, Romanian National Oil Company Petrom is now held by Austrian Group OMV. Petrom owns major refinery, transport and distribution facilities and it was also granted with the exploitation of the oilfields that were held in the past by the Romanian state in Romania and abroad.

Another group of private investors now owns Petromidia - the largest refinery plant at the Black Sea that was built before 1989 by the Romanian communist authorities.

Several energy and gas distributors held by the Romanian state were also privatised during the last two years with German, Italian, French and Czech investors.

Infrastructure

The water and sewerage services in Romania's capital Bucharest were conceded to the French company Apa Nova. Private investments in construction, rehabilitation and extension of water treatment plants, water distribution networks and hydroelectric power plants were also carried out under ISPA, European Bank for Reconstruction and Development (EBRD) and European Investment Bank (EIB) funding.

A PPP project for the building and operation of the three sections of the Bucharest-Brasov highway was negotiated by the Ministry of Transport, Construction and Tourism with private road constructors and operators. After the general elections of December 2004, the project was suspended and it is expected to be re-launched. Other road and highway projects are currently at different stages of implementation under various

PPP-like schemes.

The overall picture is, nonetheless, that of poor road infrastructure and of defective road management by state authorities.

Real estate

Unlike infrastructure, the real estate sector faced an impressive growth in the last few years. The increase was determined by the highest financial yields in Europe in this field. Many real estate projects, including malls, business centres and industrial parks were developed in partnership with local authorities or on public land exploited by private owners under concession.

Legal structures

Due to the transition process, the Romanian legal framework was dominated by instability and many confusing regulations. The necessity of developing the private sector was gradually accepted by the Romanian politicians. In the end, there was a unanimous recognition that, in order to reduce Romania's underdevelopment, it was necessary to allow the private sector to participate in the financing, design, construction, operation and maintenance of public facilities.

The first and the most utilised instrument in attracting the private investors in the national economy was privatisation. This proved to be suitable in the case of industrial and banking assets held by the state. It was also used in the case of public services in telecommunications and energy and oil and gas distribution.

The legal framework for the privatisation field is currently well structured, covering all relevant aspects, spanning from methods of privatisation and privatisation agreement to post-privatisation.

Privatisation was applied for the permanent transfer of state-owned companies to the private sector. As far as public assets were concerned, the Romanian Constitution allows the private exploitation thereof only by means of concession.

Although a general regulation on concessions has already existed since 1998, a special law was enacted in 2002 with a view to regulating the concept of PPPs.

Privatisation

Relevant authorities

As it involves strategic decisions with significant impact on the economy, the privatisation process is carried out by the Romanian Government. Nevertheless, in order to facilitate the privatisation process, specialised bodies have been created, directly subordinated to the Romanian Government or to the ministries. Local communities also have

certain competencies in the field, but these are rather limited.

Methods of privatisation

The main privatisation methods are: (i) shares' sale; (ii) capital increase by private capital contribution; and (iii) sale of assets. The privatisation legislation also regulates the possibility of state-owned companies to establish with private entities joint-venture companies. Privatisation by shares' sale is the most common privatisation method.

Sale by public offering

The public offering sale consists mainly of a share sale public offering endorsed by the National Securities Commission, to be acknowledged by at least 100 undetermined persons, made by the relevant public authority, which has to be unconditionally accepted by the investors. Apart from the public offering sale, there are also other sale methods specific for the capital market.

Sale by negotiation

This method is commenced by publishing a sale notice and can be applied only in the following cases: (i) the public institution aims at transferring the controlling stock of shares in a company to strategic investors (i.e. investors who meet certain financial, technical and organisational requirements); or (ii) pursuant to a closed envelope tender for the selection of investors, only one purchase bid has been submitted, which scored less than 50% of the maximum score to be reached.

The law provides for special types of negotiation to be applied in the case of complex transactions: (i) negotiation based on final, improved and irrevocable offers - in such case, the investors submit at the beginning of negotiations a set of initial binding bids while, after the negotiations with the public institution, they present their final and improved binding bids; (ii) negotiation based on preliminary non-binding offers - in such a case the negotiation is based on the non-binding bids submitted by the investors; after the negotiations with the public institution, they shall submit the final binding bids; and (iii) negotiation based on selection of technical offers - such method is selected in case special technical requirements need to be met by the investors.

Sale by tender

Privatisation norms provide for the possibility of the public institution to choose an open call public tender or a public tender with bids submitted in a sealed envelope.

Both the above types of public tender involve a prior sale announcement and the preparation of a sale offer. The potential investors have to submit the required tender participation documents.

Privatisation agreements

Privatisation agreements regulate complex transactions where not only a competitive price is targeted by the public institution, but also the post-privatisation sustainable development of the privatised company. Therefore, investors, apart from paying the purchase price, regularly undertake to perform investments for improving the technological capabilities of the company and also for complying with the environmental protection legal requirements. Also, for a determined period of time, the privatisation agreements usually comprise employment-related clauses, prohibition of disposal of certain material assets, possibility to decide on the merger, spin-off or voluntary dissolution of the company only with the approval of the public institution.

Privatisation incentives

Following the negotiations regarding Romania's accession to the EU, most of the incentives previously granted to investors have been repealed. As of April 2005, measures such as exemptions, reductions, deferrals and/or rescheduling at payment of budgetary debts, or of the obligations to the Health Social Insurance Fund may no longer be granted.

However, the public institution has the ability to swap its receivables against the privatised company into shares to be subsequently transferred to the investor.

PPP structures

Alternative legal structures for the participation of the private sector to economical developments are offered by the PPP regulation. The private investors have the possibility of entering into PPP contracts with national or local authorities, having in view the development of projects of public interest.

The object of the PPP contracts mainly consist of designing, engineering and carrying out construction projects, the concessionaire being entitled to exploit the outcome of the partnership for a limited period of time.

Under a PPP project, the concession is commonly accompanied by various contractual arrangements, such as (i) BOT - build, operate, transfer; (ii) ROT - rehabilitate, operate, transfer; (iii) BOR - build, operate, rehabilitate; (iv) DBFO - design, build, finance, operate; (v) DBO - design, build, operate, etc.

Several stages have to be followed within the PPP procedure:

Pre-selection of bidders

A contract notice must be published in the Official Gazette of Romania and the Official Journal of

Our Extensive Expertise in Public-Private Partnerships (PPPs), Project Finance and Infrastructure (PFI), Concessions

Tuca Zbârcea & Asociații offers legal assistance in structuring and implementing project finance, including PPP projects of various structures. Our lawyers have gained experience in representing leading project sponsors, lenders, equipment suppliers, infrastructure funds, public sector entities in all phases of project finance, including green-field projects as well as existing facilities, concessions, operations and maintenance contracts.

Scope of Practice

Public-Private Partnerships (PPPs): advising on stages of procedure and on risks raised by legal framework; drafting specific PPP agreements; assisting in negotiation of PPP agreements with public authorities; assisting client in preparation of the bid; advising relevant public agencies in connection with the preparation of feasibility studies; advising on implementation of transaction structure.

Concession: advice on particularities of concession regulations in specific sectors; assisting concession grantor in preparation and performance of tender procedures; assisting private investors in preparation of bid; drafting and negotiating concession agreements; legal advice during concession development.

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European Communities and/or in a widely circulated international journal. In accordance with the terms set forth in the contract notice and based on the letters of intent submitted by the bidders, a pre-selection is made by the contracting authority.

Negotiations with pre-selected bidders

Each pre-selected bidder will sign a project agreement within 15 days following selection, regulating the relationship with the contracting authority during the period of negotiations.

At the same time, the contracting authority prepares the feasibility study comprising the main technical terms of the project.

Technical and financial offers

Based on the terms set forth in the feasibility study and based on the results of the negotiations, the contracting authority requires the bidders to submit technical and financial offers. A list of bidders placed in hierarchical order is made on the basis of the best technical, economic and financial terms of the submitted offers.

Competitive dialogue

The procedure of competitive dialogue aims, by the means of transparent consultations between the contracting authority and the bidders, at developing the most appropriate project version on the basis of which the investors are invited to submit their final offers.

Selection of the best offer

The public authority selects the best offer by assessing the compliance with the initial requirements, according to the contract notice and based on other criteria associated to the object of the project. The selection decision is published in both the Official Gazette of Romania and the Official Journal of European Communities.

Approval of the PPP contract

The draft agreed upon by the contracting authority and the selected bidder is submitted for approval to the Romanian Government or to the local public authority, as the case may be.

Prospects

The rehabilitation and modernisation of infrastructure remain a goal that still has to be achieved in the context of joining the European Union. Most transport, water, sewerage, heat and sanitation infrastructure is in a weakened state and needs urgent financing for the purpose of being in line with the European regulations.

The increasing infrastructure deficit puts both the public authorities and the public investors in the position to take into considerations the legal structures offered by the PPP regulation, rather than the old schemes of state financing. Furthermore, the EU funds could be easily accessed by using PPP-like structures. Consequently, the private investors will face many opportunities to be part of PPP schemes in the years to come, as the Romanian economy is "thirsty" for financing.

At the same time, although most of the economy is now already in private hands, there are still state-owned entities in banking, energy, gas, coal and utilities sectors that should be subject to privatisation.

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