

**NEWSLETTER**  
**October 2010**

**LEGEA PARTENERIATULUI PUBLIC-PRIVAT (PPP)**

Parteneriatul public-privat este considerat drept o unealta importanta in sectorul public in scopul de a asigura mai mult capital pentru investitii in maniera cea mai eficienta. Parteneriatele publice-privat sunt bine organizate la nivel mondial si vin intr-o varietate de forme. Legea Parteneriatului Public-Privat a fost de curand adoptata in Romania – Legea nr. 178/2010, publicata in Monitorul Oficial al Romaniei, (partea 1) nr. 676 din data de 5 Octombrie, 2010.

Avand in vedere cele de mai sus, subliniem in cele ce urmeaza principalele prevederi ce reglementeaza parteneriatului public-privat si beneficiile aduse de aceasta.

**1) Scopul Legii; Principii de baza; definitia PPP**

- A) Parteneriatele publice-privat sunt forme de cooperare intre autoritati publice si operatori economici, cu scopul de a implementa proiecte avand ca obiectiv proiectarea, finantarea, constructia, reabilitarea, modernizarea, operarea, intretinerea, devoltarea si transferul unui bun sau serviciu public, dupa caz. Scopul prezentei legi il constituie reglementarea initierii si realizarii de proiecte PPP in diverse sectoare de activitate, prin utilizarea exclusiva a mijloacelor de finantare private.
- B) Principiile de baza aplicabile PPP sunt urmatoarele: transparenta, tratamentul egal, proportionalitatea, eficienta utilizarii fondurilor publice si asumarea responsabilitatii.
- C) PPP-ul este definit ca fiind actul juridic care stipuleaza drepturile si obligatiile partenerului public si ale investitorului pe intreaga perioada de desfasurare a proiectului PPP, acoperind una sau mai multe dintre etapele proiectului de

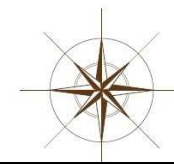
**PUBLIC-PRIVATE PARTNERSHIP LAW (PPP)**

PPP is considered an important tool for the public sector to secure more capital for investments in the most efficient manner. PPPs are well set-up worldwide and come in a variety of forms. The PPP law was recently adopted in Romania – Law no. 178/2010, published in the Official Gazette of Romania, (part 1) no. 676 dated on 5<sup>th</sup> of October, 2010, and will enter into force within 30 days as of the publishing date.

Considering the above, we underline herein below the main provisions regulating PPP and the benefits brought by this needed law.

**1) The Scope of the Law; Main Principles; PPP definition**

- A) Public-private partnerships (PPPs) are forms of cooperation between public authorities and economic operators, with the aim of carrying out projects having as object the design, finance, construction, refurbishment, renovation, operation, maintenance, development and transfer of a public good or service, as the case may be. The scope of the law consists in regulating the launch and performance of PPPs projects in distinct activities areas by using exclusively private finance.
- B) The main principles applicable to PPPs are the following: transparency, equal treatment, proportionality, efficiency of using public funds, and undertaking the responsibility.
- C) PPP is defined as being the legal deed laying down the rights and obligations of both public partner and investor for the entire period of PPP progress, acting in one or more stages of PPP project, set-out for a determined period of time.



parteneriat public-privat, pe o durata determinata.

## 2) Domeniul de aplicare

Prezenta lege se aplica cu privire la urmatoarele: (i) derularea unui proiect PPP, incheiat in conformitate cu prevederile legale, intre partenerul public si investitorul privat, ca urmare a aplicarii uneia dintre procedurile de desemnare a partenerului privat prevazute de prezenta lege; (ii) incheierea acordului de proiect (un acord de principiu, premergator contractului PPP in vederea pregatirii contractului PPP).

O caracteristica importanta se refera la transferul in patrimoniului autoritatii publice, a bunului public, liber de orice sarcina sau obligatie, la finalizarea PPP-ului.

## 3) Activitati excluse din domeniul de aplicabilitate a legii privind PPP:

Prezenta lege nu se aplica unui contract PPP care ar putea avea ca scop: (i) incheierea de contracte de concesiune de lucrari publice si concesiune de servicii reglementate de OUG nr. 34/2006 privind atribuirea contractelor de achizitie publica, a contractelor de concesiune de lucrari publice si a contractelor de concesiune de servicii; (ii) indeplinirea contractului necesita impunerea unor masuri speciale de siguranta si securitate nationala, potrivit prevederilor legale in vigoare; (iii) protectia unor interese de stat impune inaplicabilitatea legii; (iv) incheierea de contracte de concesiune de bunuri publice reglementate de OUG 54/2006 privind atribuirea contractelor de concesiune de bunuri proprietate publica; (v) incheierea contractelor de asociere in participatiune; (vi) contractul a fost declarat ca avand caracter secret.

De asemenea, aceasta lege nu se aplica contractelor PPP care: (i) au ca obiect cumpararea/inchirierea, prin orice mijloace financiare, de terenuri, cladiri existente, alte bunuri imobile sau a drepturilor asupra acestora; (ii) se refera la cumpararea, dezvoltarea, productia sau

## 2) Applicability area

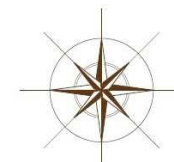
The new law applies to the following: (i) the carrying-out of a PPP project concluded in accordance with the legal provisions, between the public authority and private investor, and following the selection procedure of the latter; (ii) the conclusion of the project agreement (a kind of MOU previously concluded to the PPP contract, in the aim of preparing the PPP contract).

An important characteristic refers to the transfer to the public authority's patrimony, of the public good, free of any encumbrances or obligations, at the PPP termination.

## 3) Activities excluded from the applicability of PPP law

The new law is not applicable to a PPP contract which might have as scope: (i) the conclusion of public works/services concession contracts regulated by the GEO no. 34/2006 regarding the award of public procurement contracts, public services concession contracts and public works concession contracts; (ii) the performance of the contract implies special measurements of national security and safety, in conformity with the legislation in force; (iii) the protection of national interests imposes the inapplicability of the law; (iv) the conclusion of concession contracts of public goods regulated by GEO no. 54/2006 on the award of concession contracts of public goods; (v) the conclusion of joint ventures agreements; (vi) the contract was declared as having secret character.

Likewise, the present law is not applicable to the PPP contract which: (i) has as object, the purchase/rent, by any financial means, of existent lands, buildings, other real estate goods or rights derived from those goods; (ii) refers to the purchase, developments, production or co-



coproductia de programe destinate difuzarii, de catre institutii de radiodifuziune si televiziune; (iii) se refera la prestarea de servicii de arbitraj si conciliere; (iv) se refera la prestarea de servicii financiare in legatura cu emiterea, cumpararea, vanzarea sau transferul valorilor mobiliare ori al altor instrumente financiare; (v) se refera la angajarea de forta de munca, respectiv incheierea de contracte de munca; (vi) se refera la prestarea de servicii de cercetare-dezvoltare remunerate in totalitate de catre partenerul public si ale caror rezultate nu sunt destinate, in mod exclusiv, acestuia pentru propriul beneficiu; (vii) in cazul in care contractul PPP este incheiat ca urmare a unui acord international incheiat conform conditiilor detaliate de legea PPP sau ca urmare a unei proceduri specifice unei organizatii internationale.

#### **4) Regulile aplicabile contractului PPP:**

Etapetele necesare pentru incheierea unui contract PPP sunt urmatoarele:

- Publicarea de catre partenerul public a anuntului de intentie privind initierea proiectului;
- Analiza si selectia preliminara a unor investitori privati, premergatoare incheierii acordului de proiect;
- Etapa de negocierea cu investitorii privati selectati a clauzelor contractului, inclusiv valoarea investitiei si perioada de derulare;
- Incheierea contractului PPP;
- Constituirea companiei de proiect avand ca asociati/actionari partenerul privat si partenerul public.

Reglementarile cuprinse in legea privind PPP se refera de asemenea la:

- Termenele minime de derulare a etapelor pentru incheierea contractului PPP;
- Conditiiile cu privire la demararea si terminarea unui proiect PPP;
- Principiile si regulile generale aplicabile in momentul atribuirii unui contract PPP;

production of programs intended for broadcast through television or radio-television institutions; (iii) refers to arbitration and conciliation services; (iv) refers to financial services provided in respect to issuance, purchase, sale or transfer of securities or other financial instruments; (v) refers to employment, respectively the conclusion of labor agreements; (vi) refers to research-development services remunerated in whole by the public partner but which are not exclusively designated for its own benefit; (vii) follows to an international agreement that complies with the conditions provided by the PPP law or as a result of a specific procedure of an international organization.

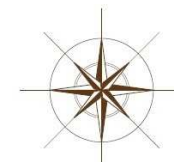
#### **4) PPP contract – applicable rules**

The stages for the conclusion of a PPP contract are the following:

- Publishing by the public partner of an intention notice regarding the launch of PPP;
- The analysis and preliminary selection of some private investors, preliminary to the conclusion of the project agreement;
- Negotiation procedure with the selected investors regarding the PPP contract – contractual clauses, value of the investments, duration of the contract;
- The conclusion of PPP contract;
- Setting-up the project company having as shareholders both the public and private investors.

The rules stated by the PPP law also refer to:

- Procedural terms due to the stages for the conclusion of a PPP contract;
- Conditions in respect with the launch and termination of a PPP project;
- Principles and general rules regarding the awarding of PPP contract;



- Reguli specifice constituirii companiei de proiect (spre exemplu, aceea conform careia contributia partenerului public poate fi doar in natura);
- Clauzele care trebuie incluse in contractul PPP.

#### 5) Consideratii finale:

Consideram necesar sa subliniem o dispozitie cuprinsa in noua reglementare si care mentioneaza urmatoarele: in situatia in care se indeplinesc conditiile unui proiect PPP si nu se incalca interese de ordin public, dispozitiile prezentei legi pot fi aplicate si in cazul activitatilor relevante definite prin OUG 34/2006 (energie, apa, transport, posta). Aceaste dispozitii nu stipuleaza inasa principiile conform carora legea PPP se va aplica si acestor activitati relevante; speram ca aceste lacune ale noii legi sa fie clarificate prin normele de aplicare ce urmeaza a fi adoptate in termen de 30 de zile din momentul in care legea va intra in vigoare.

Legea privind PPP aduce clarificari suplimentare necesare PPP-ului de tip institutionalizat, acesta din urma generand in ultimii ani multe controverse si interpretari neunitare si, de asemenea, separa regulile aplicabile acestuia de regulile aplicabile PPP-ului de tip contractual, cum ar fi contractele de achizitie de servicii/lucrari/bunuri, contractele de concesiune de servicii si lucrari si contractele de concesiune de bunuri publice.

- Special rules for setting-up the company project – it should be stated that the public shareholder’s contribution is solely in kind;
- Aspects related to the content of the PPP contract.

#### 5) Final considerations

We consider proper to highlight a provision inserted in the newly adopted law that states the following: in case the conditions provided for a PPP contract are met and the public interests are not breached, then the PPP law may be applicable for the relevant activities defined by GEO no. 34/2006 (energy, water, transport and postal services). Or, this regulation does not stipulate a clear rule of application of PPP law for relevant activities; we hopefully assume that this ambiguous legal disposition will be clarified by the norms of application that are going to be adopted within 30 days as of the date when the PPP law will come in force.

The PPP law comes to add the needed regulation for PPP of institutionalized type which have generated during the last years many controversies and discussions, and also comes to separate the rules applicable to PPP of institutionalized type from those rules applicable to PPP of contractual type, i.e. public services/works/goods contracts, public concession contracts of services and works, concession contracts of public goods.

Yours sincerely,  
Almaj & Albu, attorneys at law