

# **Government Emergency Ordinance no. 39 of May 10<sup>th</sup>, 2018 on public-private partnerships**

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*Consolidated version including the amendments enacted by:*

*G.E.O. no. 114/2018*

*G.E.O. no. 43/2019*

*G.E.O. no. 7/2020*

*Law no.7/2024*

*G.E.O. no. 31/2024*

*In light of the need to fulfil the provisions of the 2018-2020 Government plan, approved via Decision no. 1/2018 of the Romanian Parliament on enabling the Government, concerning the objectives related to economic development and consolidation of the fiscal-budgetary sustainability employing a significant increase in investments,*

*Taking into account the commitment to initiate public investment projects with a significant impact on the economy and to stimulate private investments,*

*Under the Government plan, 2018-2020 shall be a period where emphasis shall be put on increasing investments, both those financed from the budget or the acceleration of the absorption of European funds, as well as through the stimulation of private investments. The macroeconomic consolidation will be realizable by using a mix of fiscal-budgetary-monetary policies to increase, the level of well-being while preserving the macroeconomic balances.*

*In light of the proposal to stimulate private investments by two intersectoral means with the active involvement of the state, namely by amplifying the public-private partnership projects and by granting Government state aid, which might impede the budgetary balances unless implemented very rapidly, so that the second round macroeconomic and budgetary effects become visible,*

*Taking into account the fact that these elements concern the general public interest and constitute emergency and extraordinary situations the regulation of which cannot be postponed,*

*On the grounds of article 115 para. (4) of the Romanian Constitution, republished,*

**The Romanian Government** passes this emergency ordinance.

## **ART. 1**

(1) This emergency ordinance governs the conclusion, performance and termination of public-private partnerships.

(2) The object of the public-private partnership is the execution or, as the case may be, the rehabilitation and/or extension of an asset or assets which shall pertain to the estate of the public partner and/or the operation of a public service, under the conditions set forth hereunder.

## **ART. 2**

The provisions of this emergency ordinance are applied by the public partner to substantiate starting a procedure for awarding a public-private partnership contract and implementing the subsequent project, subject to the prior approval of the project substantiation study which shall establish, in addition to the main elements set out in art. 19

para. (1), the fact that more than half of the income to be obtained by the project company from the use of the asset(s) or the operation of the public service constituting the object of the project is generated as a result of payments made by the public partner or other public entities for the public partner's benefit.

### **ART. 3**

The mechanism of public-private partnerships features the following main elements:

- a) cooperation between the public partner and the private partner, to implement a public project;
- b) the relatively long duration of contractual relationships, of over 5 years, allowing the private partner to obtain a return on investment and to attain a reasonable profit;
- c) project financing that comes mainly from private funds and, as the case may be, by pooling private and public funds;
- d) achieving the goals pursued by the public partner and the private partner;
- e) distributing risks between the public partner and the private partner, depending on each contracting party's capacity to assess, manage and control a particular risk.

### **ART. 4**

(1) The types of public-private partnerships that can exist are the following:

- a) contractual public-private partnerships – a public-private partnership created pursuant to a contract concluded between the public partner, on the one hand, and the private partner, on the other hand, where the contract shall be implemented through a project company which is fully owned by the private partner;
- b) institutional public-private partnerships – a public-private partnership created according to a contract concluded between the public partner and the private partner, according to which the public partner and the private partner establish a new company, designed to act as the project company and which, after its registration in the companies register, obtains the status of a party to the respective public-private partnership contract.

(2) Both in the case of contractual public-private partnerships and in the case of institutional public-private partnerships, if another public entity intends to support the execution of the project by committing to the private partner to fulfil one or several payments or guarantee obligations in the public partner's benefit, such entity may do this only if the payment or guarantee obligation has been set out in the substantiation study and the awarding procedure documentation, in a clear, accurate and unequivocal manner, which indicates the conditions of its fulfilment.

(3) The public entity can commit to performing its obligation(s), following the provisions of para. (2), under the conditions outlined in the awarding documentation, as the case may be:

- a) after the public partner has designated the winner of the public-private partnership contract awarding procedure, but before the contract is signed, in which case the public entity becomes a party to the respective contract as of its conclusion; or
- b) after the public-private partnership contract has been signed, during its performance, in which case the public entity along with the parties to said contract concludes an addendum which sets forth their mutual rights and obligations, the public entity thus becoming a party to the contract on the date on which the addendum is concluded.

### **ART. 5**

Public-private partnership contracts may also be concluded to carry out relevant activities for the public utility sectors as outlined in Law no. 99/2016 on sectorial procurements, as subsequently amended and supplemented, as well as to allow a private operator to perform the

community public utility services as outlined in Law no. 51/2006 on community public utility services, republished, as subsequently amended and supplemented, as per the provisions of art. 1 and 2.

#### **ART. 6**

For this emergency ordinance, the terms and phrases below have the following meanings:

a) affiliate – any person upon whom a dominant influence can be directly or indirectly exerted or who can exert a dominant influence or who, following the association with a person, is under the dominant influence of another person. The dominant influence is assumed when a person, either directly or indirectly, owns the majority subscribed registered capital or controls the majority of votes associated with the issued shares or who can designate more than half of management, executive or supervisory body positions;

b) financiers of the public-private partnership contract - natural or legal persons who provide the project company with the financial means necessary to fulfil the obligations that the private partner undertook as per the public-private partnership contract, including sovereign development and investment funds and pension funds privately administered; by exemption from the provisions of Government Emergency Ordinance no. 32/2012 regarding collective investment bodies in securities and investment management companies, as well as for the amendment and completion of Law no. 297/2004 on capital market, approved with amendments and additions by Law no. 10/2015, with subsequent amendments and additions, open-ended investment funds and investment companies may participate in financing public-private partnership contracts;

c) public-private partnership contract financing – it entails funding the investments carried out as part of the project and funding the use of the asset(s) or the operation of the public service which constitute the object of the contract;

d) private investor – any Romanian or foreign legal entity or association of legal entities, covered by the categories set out in Art. 8 that has expressed its intention to take part in the public-private partnership contract awarding procedure;

e) investments made as part of the project –the object of these investments is to execute or, as the case may be, to rehabilitate and/or extend an asset or assets as part of the public-private partnership contract;

f) private partner – the designated private investor or the association of private investors selected winner(s) of the public-private partnership contract awarding procedure;

g) project company – a company that is set up and operates following the provisions of Law no. 31/1990 on companies, republished, as subsequently amended and supplemented, with the purpose of implementing the project;

h) financial close—a stage defined in the public-private partnership contract and in the financing contract or contracts concluded with the financiers of the public-private partnership contract that represents the date on which all the conditions precedent related to the entry into force of the financiers' obligation to provide the funds necessary to finance the public-private partnership contract have been met.

#### **ART. 7**

A public partner, in the sense of this emergency ordinance, is the contracting authority or contracting entity as defined by Art. 4 of Law no. 98/2016 on public procurement, as subsequently supplemented, by Art. 4 of Law no. 99/2016, and Articles 9 and 10 of Law no. 100/2016 on works and services concessions.

## **ART. 8**

Any legal person or association of legal persons may take part in the public-private partnership contract awarding procedure, provided that it is not included in the public partner categories set out in Art. 7.

## **ART. 9**

The private investor designated as the winner of the awarding procedure will set up the project company with which the public-private partnership contract is concluded, and in the case of the institutional public-private partnership, shall set up, together with the public partner, the project company that will become part of the public-private partnership contract.

## **ART. 10**

Investment funding within public-private partnership contracts may be provided, as follows:

- a) in full, from financial resources made available by the private partner from its resources or acquired by the private partner from the financiers defined under Art. 6 Letter (b);
- b) from financial resources provided by both the private and the public partner;
- c) from financial resources taken from the sovereign development and investment funds, privately managed pension funds, as well as investment funds and investment companies, under the conditions set out in this emergency ordinance.
- d) by using corporate bonds issued by the project company to implement the public-private partnership project.

## **ART. 11**

The private partner provides the funding required to carry out investments from its own resources and/or resources acquired from certain financiers.

## **ART. 12**

(1) The public partner may contribute to financing investments with public financial resources, including from post-accession non-reimbursable external funds and their related national contribution, under the conditions foreseen by both national and EU law.

(2) Repealed.

(3) The public partner's participation share in financing investments may also include the contribution of public investment funds and companies.

(4) Repealed.

## **ART. 13**

(1) The public partner may contribute to the execution of the public-private partnership contract under the conditions stipulated in the awarding documentation and the public-private partnership contract by one or several of the following means:

- a) setting up certain rights in favour of the private partner, according to the public-private partnership contract, without having to pursue other awarding procedures than the ones set out in Art. 25;
- b) cash contributions to the share capital of the project company;
- c) undertaking payment obligations towards the private partner or payment obligations related to the financing investments set out in Art. 12 para. (1);
- d) providing guarantees to credit institutions or financial institutions that finance the public-private partnership contract

(2) The public partner may make payments from public funds to the private partner, exclusively during the performance and maintenance of the project conducted as part of the public-private partnership, but not for participating in funding the investments carried out as part of the project, under the provisions of para. (1) and art. 12.

(3) To set up and use the public funds necessary for performing payments to the private partner as per para. (2), under the law, budgetary funds are provided to fund the public-private partnership contracts within the budgets of the main credit authorising officer of the public authorities that have the role of public partner or that have under their subordination, authority or coordination public partners within the public-private partnership contract.

(3<sup>1</sup>) Projects financed based on a public-private partnership contract are highlighted in a separate annex within the budgets of the main credit authorising officers of the public authorities having the role of public partner or that have under their subordination, authority or coordination public partners in the public-private partnership contract.

(3<sup>2</sup>) To conclude the public-private partnership, the necessary funds needed for supporting the costs related to preparation, investment and also for commitment and budget appropriations proposals, can be obtained from public sources if such funds are foreseen in the substantiation study and approved as follows:

a) by adopting the Government decision approving the substantiation study, in the case of central public administration projects;

b) by adopting the decision of the decision-making authority approving the substantiation study, in the case of local public administration projects, if the amounts are provided exclusively from the budgetary resources of the local public administration;

c) by adopting the Government decision, as per the decision of the decision-making authority approving the substantiation study, in the case of local public administration projects requiring contributions from the state budget.

(3<sup>3</sup>) To set up and use public funds to participate in financing investments, according to para. (3<sup>2</sup>), public funds shall be provided in the budget of the public partner as the final financing component of the investments to be made under the public-private partnership contract, after the private partner has secured financing.

(3<sup>4</sup>) The contributions from public resources to be made in the operating stage shall be approved by adopting:

a) the Government decision approving the public-private partnership contract, under the conditions of Art. 17 para. (1) letter d), for central public administration projects;

b) the decision of the decision-making authorities, under the conditions of Art. 17 para. (1) letter d), for projects of the local public administration, if the amounts are provided exclusively from the budgetary resources of the local public administration;

c) the Government decision, as per the decision of the decision-making authority approving the public-private partnership contract, under the conditions of Art. 17 para. (1) letter (d), in the case of projects of the local public administration, for projects requiring contributions from the state budget.

(3<sup>5</sup>) The amounts provided from the state budget for projects of the local public administration shall be included in the budget of the Ministry for Development, Public Works and Administration, as per the requests of the main credit authorising officer of the public authorities having the role of public partner or which have under their subordination, authority or coordination public partners in the public-private partnership contract, under the conditions of observing the provisions of para. (3<sup>2</sup>) letter c) and para. (3<sup>4</sup>) letter c), respectively.

(3<sup>6</sup>) If for public-private partnership projects there is an opinion of the National Statistics Institute or, as the case may be, an opinion of Eurostat for the classification of projects in government accounts, the main credit authorising officer of the public authorities

having the role of public partner or which have under their subordination, authority or coordination public partners in the public-private partnership contract or the Ministry for Development, Public Works and Administration, in the case of public-private partnership projects of the local public administration that have a component of financing investments from the state budget, shall have the obligation to supplement the annex referred to in paragraph (3<sup>1</sup>) with data on the annual impact on public deficit and sovereign debt.

(3<sup>7</sup>) The Ministry of Finance, through its specialized structure, the Public Investment Management Unit, shall prepare half-yearly memos to the Government on the impact on public deficit and medium and long-term sovereign debt related to public-private partnership projects classified in and outside government accounts, according to the opinion of the National Statistics Institute or, as the case may be, Eurostat, based on the reports received from the main credit authorising officers for central public administration projects and the local public administration authorities for the public-private partnership contracts concluded by them.

(4) Public-private partnership projects of local public authorities requiring contributions from the state budget for the investments to be made under the project and/or for the payments to be made during the operation period shall be established by Government decision approving the List of strategic investment projects to be prepared and awarded in a public-private partnership.

(5) Repealed.

(6) Repealed.

(7) Repealed.

#### **ART. 14**

(1) As per the public-private partnership contract, the public partner shall be able to assign or set up, in favour of the private partner, the right to collect and use, in order to carry out the project, fees from the users of the asset(s) or the public service representing the object of the public-private partnership project. The types and amounts of the fees shall be regulated by law.

(2) The income related to the projects, that results from the collection by the project company of the fees shall be supplemented with the public partner's payment obligations to the private partner, as the case may be, as per the provisions of the public-private partnership contract.

#### **ART. 15**

The direct beneficiary that uses the asset(s) or the public service representing the object of the public-private partnership may be, under the conditions set out in the public-private partnership contract, the public partner, another public entity or the general public.

#### **ART. 16**

(1) The private partner may constitute guarantees on the receivables and rights held according to the public-private partnership contract, exclusively in favour of the public-private partnership project lenders which are credit institutions, financial institutions, sovereign development and investment funds, investment funds or investment companies or privately managed pension funds, respectively, and only during the performance of the public-private partnership contract.

(2) The private partner may set up guarantees for shares held in the project company, exclusively in favour of the public-private partnership contract financiers namely credit institutions, financial institutions or privately managed pension funds and only during the performance of the public-private partnership contract.

(3) The manner of discharging or taking over the guarantees set out in para. (1) and (2), in the event of an early termination of the contract, shall be outlined in the public-private partnership contract to protect the public interest and the interest of the project financiers.

(4) The public partner may set up guarantees and may undertake obligations under contracts that create direct legal relationships between the public partner and the public-private partnership contract lenders, contracts that may also be signed by the private partner.

#### **ART. 17**

(1) To conclude and perform the obligations under a public-private partnership contract, it is necessary to go through the following stages:

a) the public partner must draft the substantiation study;

b) The Government must approve the substantiation study for projects of the central public administration or, as appropriate, the decision-making authorities for projects of the local public administration; the substantiation study shall have as end page the signatures page, whereby the contracting authority/entity responsible for carrying out the substantiation study endorses the data and the proposed solutions and said page shall contain at least the following data: contract number... /date, surname and forename in print of the consultants/consultancy companies, of the person responsible for the project - project leader/project manager; the substantiation study can be approved together with the main technical and economic indicators set out in Government Decision no. 907/2016 on the stages of elaboration and the framework content of the technical - economic documentation related to the objectives/investment projects financed from public funds, as subsequently amended and supplemented, indicators developed as per the feasibility study;

c) going through the public-private partnership contract awarding procedure; the substantiation study shall be subject to reapproval by the Government whenever necessary to make essential changes over the main elements foreseen under Art. 19.

d) the approval of the public-private partnership contract resulting from the finalization of the negotiations and initiated by the parties and by the Government for the projects of the central public administration or, as the case may be, by the deliberative authorities, for the projects of the local public administration; The Government must approve the public-private partnership contract resulting after negotiation and put in place by the parties for projects pertaining to the central public administration or, as appropriate, the decision-making authorities for projects of the local public administration

e) signing the public-private partnership contract;

f) all conditions precedent set out in the public-private contract, including the financial close of the project.

g) If the contracting authority/entity has already completed the feasibility study for a proposed investment at the time of approving the substantiation study, then the substantiation study may be approved alongside the main technical and economic indicators outlined in Government Decision no. 907/2016, which were developed according to the feasibility study.

(2) The public partner must send a certified copy of the public-private partnership contract to the National Statistics Institute, within 30 days after conclusion.

(3) Any amendments to the public-private partnership contract during its execution may be made only with the approval of the Government or decision-making authorities that approved the contract, as appropriate.

(4) Upon recommendation by public authorities as stated in Article 13, paragraph (3), the Government has the power to issue a decision that certain projects, deemed strategic, will be prepared and awarded by those public authorities responsible for the field in which public-private partnership investments will be implemented.

#### **ART. 18**

(1) The decision to carry out a project as a public-private partnership lies with the public partner

(2) To prepare the substantiation study, the public partner may hire consulting services that are necessary depending on the project's specificities, such as technical, financial, and legal services.

(3) The public partner shall bear the costs related to the substantiation study and awarding procedure.

#### **ART. 19**

The substantiation study should highlight the key economic elements that justify the implementation of the project as a public-private partnership:

a) The level of affordability for the project and a comparison of alternative contractual options for implementing the project.

b) The risk distribution structure for each alternative option for implementing the project.

c) The project's characterization concerning public deficit and sovereign debt, calculated according to applicable European Union laws.

d) The project's capacity to attract funding.

e) The project's value for money.

f) The substantiation study shall contain minimal conceptual technical solutions for implementing investments;

i) Investment projects of national importance in the field of transport shall be exempted from the provisions of Government Decision no. 907/2016, as subsequently amended and supplemented. The technical and economic documentation, including pre-feasibility and feasibility studies, approved under Article 42 of Law no. 500/2002 on public finances, as subsequently amended and supplemented, will be considered equivalent to the approval of the substantiation study under the provisions of Article 13, paragraph (3<sup>2</sup>), letter a).

#### **ART. 20**

(1) The project's level of affordability represents the generic possibility of the project to mobilise the financial resources required to cover costs.

(2) The affordability of a project depends on the financial capacity of the public partner and any other public entities involved in fulfilling the financial obligations as part of the public-private partnership contract. Additionally, the entities that benefit directly from the asset(s) or the public service provided through the partnership should also have sufficient financial capacity.

#### **ART. 21**

The substantiation study entails identifying the categories of risks related to project execution, quantifying them, and proposing alternatives for distributing the risks among the parties involved based on their ability to manage the risks.

#### **ART. 22**

The substantiation study involves identifying the categories of risks related to project execution, quantifying them, and proposing alternatives for distributing the risks among the parties involved based on their ability to manage the risks.



### **ART. 23**

(1) The substantiation study shall determine the project's public-private partnership fund-drawing capacity.

(2) A project is considered fundable if it can secure financial resources through credits or other means to fund the project throughout its lifespan, given the technical, financial, and legal structure, following market conditions.

### **ART. 24**

(1) The cost-benefit analysis included in the substantiation study demonstrates the project's value for money and justifies its execution through a public-private partnership.

(2) To determine the project's value for money, there will be a comparison of the estimated costs of the project throughout its entire duration, adjusted for the value of risks. This analysis will consider completing the project through either public procurement or public-private partnership. The net updated costs of the project for the comparative analysis shall be taken into account.

### **ART. 25**

(1) Public-private partnership contracts are awarded under Law no. 98/2016, supplemented by either Law no. 99/2016 or Law no. 100/2016, depending on the specifics of the case. The awarding of these contracts is based on a substantiation study, which takes into account the nature of the contract and how the transfer of a significant part of the economic operating risk is carried out concerning the operation of the works and/or services involved.

(2) As exemption from Article 10 of the Methodological Rules that govern the awarding of public procurement contracts or framework agreements as per Law no. 98/2016 on public procurement, which was approved by Government Decision no. 395/2016, as amended and supplemented, Article 10 of the Methodological Rules that apply to awarding sectoral contracts or framework agreements as per Law no. 99/2016 on sectoral procurement, approved by Government Decision no. 394/2016, as amended and supplemented, and Article 8 of the Methodological Rules that apply to awarding works and services concessions contracts as per Law no. 100/2016 on works and services concessions, approved by Government Decision no. 867/2016, as amended and supplemented, the award process starts with submitting the award documentation following the legislation provided in paragraph (1) and it ends with the conclusion of the award procedure report, along with its annexes. The public-private partnership contract shall be concluded under this Emergency Ordinance.

### **ART. 26**

Repealed.

### **ART. 27**

If none of the private investors who submitted tenders can sign the public-private partnership contract during the selection procedure as required by law, the public partner can initiate a new procedure.

### **ART. 28**

(1) If Art. 39 applies, the selection procedure for the new partner must comply with art. 25.

(2) If the public partner has direct legal relationships with the project financiers according to the relevant public-private partnership contract, then the public partner must select the new private partner by consulting with the project financiers, as specified in the said public-private partnership contract.

(3) If a new private partner cannot be contracted, the public partner may terminate the public-private partnership contract.

#### **ART. 29**

The regulations outlined in Law no. 101/2016 cover the procedures for challenging and appealing the decision-making process on awarding public procurement contracts, sectoral contracts, works and services concession contracts. Additionally, this law also lays out the guidelines for how the National Council for Solving Complaints is organised and operates.

#### **ART. 30**

The public-private partnership contract concluded under this present emergency ordinance is an administrative contract.

#### **ART. 31**

(1) If multiple public entities form an association to award and execute a public-private partnership agreement, they must outline the following in said association agreement:

a) The distribution method among associates and their related rights and obligations as public partners throughout the execution of the public-private partnership contract by complying with the legal provisions related to public property

b) the manner of using the asset(s) and operating the public service representing the object of the public-private partnership;

c) The distribution method among associates after the contract ends and the conditions for exercising rights over the assets that are part of the public-private partnership must comply with the relevant public property laws.

(2) The project company is established for the sole purpose of conducting all activities required to fulfil the object of the public-private partnership, both directly and indirectly.

#### **ART. 32**

The public-private partnership contract governs at least the following aspects:

a) the object of the project performed under a public-private partnership;

b) the requirements for setting up and operating the project company;

c) the deadlines for the execution of works;

d) the rights set up in favour of the private partner, including any rights regarding the assets the public partner uses as input in the execution of the public-private partnership project;

e) the rights and obligations of both the public and the private partner, during the execution of the public-private partnership project, meant to guarantee the observance of the intended purpose of the assets involved in the public-private partnership project and of the conditions for performing the public service.

f) The legal status of the assets involved in the project, including those executed or acquired during the project's performance, as well as the method of transferring these assets upon contract termination, must comply with the legal provisions regarding public property.

g) the contract term;

h) the funding method and the stages of the public-private partnership project;

i) the remuneration of the private partner, with details on the calculation and payment methods, including the possibility to set off/deduct between the amounts payable to the private partner and any possible damages or other amounts payable and due by the private partner;

j) the risk allocation method within the public-private partnership project;

k) the features and performance objectives of the asset or assets to be executed as part of the project, as well as the performance indicators of the public service as the object of the project;

l) the method through which the public partner monitors and controls the observance of obligations by the private partner;

m) the procedure used by the public partner to approve the contracts concluded by the private partner with the private partner's affiliates;

n) the performance bonds to be provided by the private partner;

o) the insurance policies to be concluded and maintained during the performance of the public-private partnership project;

p) procedures allowing the project financiers and/or a new private partner to take over the private partner's rights and obligations;

q) the contractual liability, including the sanctions and penalties applicable to the private partner if they fail to fulfil their obligations, particularly in the case of not fulfilling or not maintaining objectives or performance indicators, and, as the case may be, the possibility to set off the resulting amounts due by the private partner with the payments due by the public partner, under the public-private partnership contract;

r) the public partner's right to unilaterally amend certain parts of the contract, and the public partner's right to unilaterally terminate the contract, as well as the requirements for exercising these rights under Art. 35, including the method to determine and pay any possible compensation due to the private partner;

s) mechanisms for sharing refinancing profit;

t) the subcontracting procedure and limits;

u) the contract termination causes and the conditions in which the continuity of the public service provided as part of the public-private partnership is ensured;

v) provisions regulating the compensation owed by the parties as a result of the early termination of the contract;

w) any other aspects that are included in the public-private partnership contract under the provisions of this emergency ordinance.

### **ART. 33**

(1) The duration of the public-private partnership contract depends on the repayment period associated with the project company's investments and the method of financing those investments.

(2) The duration shall be set in a manner intended to:

a) avoid the artificial restriction of competitors;

b) ensure that the business sector earns a reasonable profit by capitalizing on the assets and operating the public service that makes up the project.

c) ensure reasonable pricing for project services, paid by beneficiaries.

### **ART. 34**

(1) The public partner may set up, pursuing a different awarding procedure than the one set out in Art. 25, in favour of the project company, in relation to assets intended to facilitate the implementation of the project and over which they are entitled to place, in compliance with the law:

a) concession rights over public property assets or rights derived from renting such public property assets. The use of public property assets will not involve any royalties or rent charges, despite the rules outlined in art. 307 and art. 333 of Government Emergency Ordinance no. 57/2019 on the Administrative Code, as amended and supplemented.

b) leasehold estate, easement right or rights to use the private property.

(2) The private partner who is assigned assets, services or works, is prohibited from entering into a subconcession contract, in whole or part, related to the assigned assets, services or works, and is also prohibited from delegating the implementation of the contract object to another individual or entity, except for specific cases outlined in this emergency ordinance.

#### **ART. 35**

(1) On exceptional grounds of public interest, the public partner may unilaterally amend or terminate the public-private partnership contract for convenience, subject to the following requirements:

a) this possibility, including exceptional grounds pertaining to the public interest, was included in the awarding documentation and the public-private partnership contract in a clear, accurate, and unequivocal manner.

b) any amendments to the contract shall not alter the generic nature of the original contract;

c) By providing advance notification to both the private partner and the project financiers of the public-private partnership.

(2) This emergency ordinance considers exceptional circumstances related to the public interest, including public health, environmental protection, safety and quality standards, affordability for service users, and the need to ensure unrestricted access to a particular public service.

(3) If the unilateral amendment or termination results in damage to the private partner, the partner is entitled to fair compensation, as stipulated in the awarding documentation and the public-private partnership contract.

(4) The public-private partnership contract must have a provision that allows for the adjustment of payments to the private partner if the public partner makes any changes to the contract that benefit the private partner. Such changes could include reducing the amount of work to be done or any other relevant factors.

(5) If no agreement can be reached as regards the compensation/adjustment amount, such amount shall be determined by the competent court of law. This disagreement shall in no way allow the non-fulfilment or the inadequate fulfilment of the obligations of the private partner.

#### **ART. 36**

The public-private partnership contract may be amended only as provided by the law which regulates the awarding procedure, according to Art. 25.

#### **ART. 37**

The public-private partnership contract must include the assets or categories of assets that, during the performance of the contract or upon its termination, are to become the property of the public partner or that of the private partner, as appropriate. Such assets include:

a) the assets resulting from carrying out the investments undertaken by the private partner during the execution of the contract;

b) the assets that the project company must transfer to the public partner upon the termination of the public-private partnership contract regardless of the grounds for such termination;

c) the assets that the public partner may opt to purchase upon the termination regardless of the grounds for such termination;

d) the assets kept in the property of the project company upon termination of the public-private partnership contract, regardless of the grounds for such termination;

### **ART. 38**

(1) Upon termination of the public-private partnership contract, regardless of the grounds for such termination, the rights set up by the public partner in favour of the private partner shall cease to exist, whereas the assets executed or acquired by the private partner, namely the object of the public-private partnership contract, as well as those required to run the public service, all of which are to be transferred to the public partner, have to be unencumbered, in good working conditions and usable as per the standards applicable to that public service and/or similar assets, under conditions outlined in the public-private partnership contract.

(2) When the public-private partnership contract expires, the assets executed or acquired by the project company, namely the object of the public-private partnership contract, as well as those required to run the public service shall be transferred free of charge to the public partner.

(3) If the public-private partnership contract is terminated on any grounds other than expiry, the assets executed or acquired by the project company, namely the object of the public-private partnership contract, as well as those required to run the public service, including the assets that were not handed over upon completion of works shall be transferred to the public partner as per the public-private partnership contract and compensation shall be paid, calculated as per the awarding documentation and the public-private partnership contract.

(4) If the private partner is responsible for terminating the contract, any amount owed by the private partner as reparations shall be deducted from the compensation owed by the public partner under para. (3), as per the provisions of the public-private partnership contract.

(5) If the public partner is responsible for terminating the contract then they shall pay reparations in addition to the compensation owed under para. (3) for transferring the assets, as per the provisions of the public-private partnership contract.

### **ART. 39**

Should the private partner fail to fulfil their obligations undertaken in the public-private partnership contract or their obligations to the project lenders, the public partner, either voluntarily or upon the project financiers' request, may replace the private partner if this clause was provided in the awarding documentation and the contract, with the observance of the requirements on the review clause, according to the law which regulates the contract awarding procedure, in compliance with the provisions of art. 25.

### **ART. 40**

(1) If the public-private partnership contract is terminated on any grounds other than expiry, the public partner can take over the private partner's shares in the project company, in exchange for a price outlined following the provisions of the awarding documentation, the public-private partnership contract and Art. 38. If the private partner is responsible for terminating the contract any reparations owed by the private partner shall be deducted from said price, as per the public-private partnership contract.

(2) If the public-private partnership contract expires, the public partner shall be able to take over, free of charge, the private partner's shares in the project company, under the provisions of the public-private partnership contract.

### **ART. 41**

The public partner is entitled to monitor and control, during the entire execution of the public-private partnership contract, the manner in which the private partner fulfils its

obligations under the public-private partnership contract and/or the applicable legal provisions.

**ART. 42**

(1) Except for the cases expressly provided in this emergency ordinance, the private partner shall not be able to assign or encumber its rights and obligations derived from the public-private partnership contract.

(2) The private partner cannot alienate or encumber the shares held in the project company only with the express and prior consent of the public partner and the project financiers, save for the cases expressly set out in this emergency ordinance.

**ART. 43**

(1) The public-private partnership contract shall be concluded under Romanian law, regardless of the private partner's nationality.

(2) The competence for settling any possible litigations resulting from the conclusion and/or performance of public-private partnership contracts is set under Law no. 101/2016, as subsequently amended and supplemented.

**ART. 44**

(1) Public authorities that intend to run public-private partnership projects shall organize and set up, via the decision of the head of the public entity, internal units designed to coordinate public-private partnership projects organized as internal bodies without legal personality dedicated to preparing, awarding and implementing the public-private partnership contracts.

(2) To fulfil the duties stipulated under this emergency ordinance, the internal units designed to coordinate public-private partnership projects may be supported in their activity by technical, financial and legal advisors, as appropriate, contracted following the law.

(3) The public-private partnership contracts concluded prior to this emergency ordinance entering into force are governed by the provisions in force when the contracts were concluded, as regards all matters concerning their conclusion, amending, interpretation, effects, performance and termination.

**ART. 45**

Upon the coming into force of this emergency ordinance, Law no. 233/2016 on public-private partnerships, published in the Official Gazette of Romania, Part I, no. 954 of November 25th, 2016, as subsequently amended and supplemented, is repealed.