D3.1: PPP Contract Guidance

Methodology and Guidance for PPP Preparation and Procurement

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PPP CONTRACT GUIDANCE

1. Introduction

1.1 Contents and structure of this document

This document sets forth a set of guidelines and commentaries concerning the main substantive clauses that are expected to be contained in Romanian PPP contracts (hereinafter, the "**Contract Guidance**"). This *Contract Guidance* is intended to assist Romanian contracting authorities and entities understand the purpose and effect of the substantive clauses contained in PPP contracts as well as to understand if/how to use, complete or adapt them in the context of specific PPP projects.

The *Contract Guidance* is accompanied by a set of standard PPP contract clauses which reflect international best practice and have been adapted (as necessary/appropriate) to the Romanian PPP context (hereinafter, the "**Standard Provisions**"). The *Standard Provisions* are intended for use as a starting point for drafting PPP contracts in Romanian PPP projects and are designed to be replicable across key PPP sectors. It is not intended that the *Standard Provisions* serve as a mandatory model.

The *Contract Guidance* is intended to be read in conjunction with the relevant clauses of the *Standard Provisions*. As such, the various sections of the *Contract Guidance* include *direct references to the relevant sections/articles of the Standard Provisions*, as necessary for such cross-referencing.

Certain clauses included in the *Standard Provisions* are highlighted in grey. These clauses may be kept or removed (or amended), as needed, depending on the characteristics of each PPP project.

Given the importance of the statistical treatment of PPPs (*e.g.*, whether a PPP contract will be considered as being on the Public Partner's balance sheet or not), this *Contract Guidance* includes references to relevant sections of the *Statistical Guide*. Contracting authorities/entities are encouraged to consult the *Statistical Guide* in conjunction with this *Contract Guidance* in order to develop an adequate understanding of statistical matters. It is important to note that the *Statistical Guide* may be updated periodically by its publishers[1]. Therefore, contracting authorities/entities are also advised to ensure that they are consulting the most recent edition of the *Statistical Guide* and that any modifications that may be made by the *Statistical Guide*'s publishers do not invalidate any assumptions made in this *Contract Guidance*.

1.2 Definitions and abbreviations

Unless indicated otherwise, the definitions and abbreviations used in the *Contract Guidance* are those set out in Article 1 of the *Standard Provisions*, which are supplemented, for the purpose of this *Contract Guidance*, with the definitions and abbreviations listed below:

"**2018 PPP Law**"	means the *Government Emergency Ordinance no. 39/2018 on the public-private partnership*, as further amended.
"**2019 WB Guidance**"	means the 2019 Edition of the *Guidance on Public-Private Partnership Contractual Provisions* published by the World Bank.
"**Award Legislation**"	has the meaning set out in Section 2.1.2 of this *Contract Guidance*.

[1] At the date of finalization of this *Contract Guidance*, the most recent update of the *Statistical Guide* has taken place in 2016. Additionally, please be aware that a list of Frequently Asked Questions on the *Statistical Guide* has recently (June 2022) been published by Eurostat and may be consulted online at the following weblink: https://ec.europa.eu/eurostat/documents/1015035/12618762/Clarification+to+the+PPP+Guide+Q%26A.pdf/e928cb53-a0ae-e73f-11de-083bda4b096c?t=1655738471492

"**Direct Agreement**"	has the meaning set out in Section 6.2 of this *Contract Guidance*.
"**EU**"	means the European Union.
"**Standard Provisions**"	means the model PPP contract clauses referenced in Section 1.1, which are included in a separate document
"**PIMU**"	means the Public Investment Management Unit.
"**PPP**"	means public-private partnership.
"**Contract Guidance**"	means the set of guidelines and commentaries contained in this document.
"**Romanian Companies' Law**"	means the *Law no. 31/1990 on companies*, as further amended.
"**Statistical Guide**"	means the 2016 Edition of the *Guide to the Statistical Treatment of PPPs* published by Eurostat and by the European PPP Expertise Center (EPEC)[2].

2. PPP contracts

2.1 Romanian legislation applicable to PPPs

2.1.1 Main legal framework

At present, the 2018 PPP Law is the key legal enactment governing PPPs in Romania.

The provisions of the 2018 PPP Law cover most (but not all) of the matters concerning PPP contracts. Therefore, its provisions are supplemented by more general legal enactments governing various matters related to the implementation of PPPs (such as the awarding of the PPP contract, the project's financing etc.).

2.1.2 The awarding of PPP contracts

The 2018 PPP Law does not provide special rules for the awarding of PPP contracts. Instead, PPP contracts must be awarded according to the provisions set forth by the laws applicable to public procurement[3], to sectoral procurement[4] or to works and services concessions[5] (the "**Award Legislation**"). The law governing the award procedure and the type of procedure that will be used are determined based on the conclusions of the substantiation study and, more specifically, on whether a significant portion of the economic operating risk (as defined in Article 6 of Law no. 100/2016) is transferred or not to the Project Company. Consequently:

- If a significant portion of the operating risk is transferred to the Project Company, the PPP contract must be awarded according to the rules applicable to works and services concessions.
- If a significant portion of the operating risk is not transferred to the Project Company, the PPP contract must be awarded according to the rules applicable to public/sectoral procurement.

2.2 The concept of PPP under Romanian law

According to the 2018 PPP Law, the PPP contract is a long-term "*cooperation between the Public Partner and the Private Partner for the purpose of implementing a public project*" and involves a distribution of risks between

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[2] The document can be freely consulted online at the following weblink: https://www.eib.org/en/publications/epec-a-guide-to-the-statistical-treatment-of-ppps

[3] *Law no. 98/2016 on public procurement* and the relevant secondary legislation.

[4] *Law no. 99/2016 on sectoral procurement* and the relevant secondary legislation.

[5] *Law no. 100/2016 on works and services concessions* and the relevant secondary legislation.

the Public Partner and the Private Partner. Its subject matter may consist in: *(i)* the building or, as the case may be, the refurbishing and/or the extension of an asset (or assets) that will be the property of the Public Partner, and/or: *(ii)* the operation of a public service. The direct beneficiary of the use of the asset or public service can be the Public Partner, another public entity, or the public (*i.e.*, Users) in general.

The following cumulative conditions must be met in order for a contract to qualify as a PPP:

- The project must be financed for the most part or exclusively from private funds (privately raised finance being key to ensuring that the Project Company is financially exposed and therefore incentivized to perform); Any participation of the Public Partner in the financing of the project impacts the statistical treatment of the PPP contract (*see: Theme 14.4 of the Statistical Guide*);
- Over 50% of the revenue obtained by the Project Company from the use of the asset(s) or from the operation of the public service must derive from payments made by the Public Partner/by other public entities (*i.e.*, "government" payments).

Note that the *Statistical Guide* sets forth additional conditions for a contract to be treated as a PPP from a statistical point of view that should be carefully verified (*see, for instance: amount of capital expenditure by the Private Partner – page 23 of the Statistical Guide, revenues received by government from the project – page 25 of the Statistical Guide*).

The *Contract Guidance* and the *Standard Provisions* cover: (1) PPPs based exclusively on availability payments, as well as: (2) PPPs based on a mix of availability payments and user tariffs (provided that the value of user tariffs in such contracts does not exceed half of the Project Company's revenue).

2.3 The parties to a PPP contract

See: The introductory section of the Standard Provisions.

All PPP contracts are ultimately concluded between three parties: (1) the Public Partner, (2) the Private Partner, and (3) the Project Company. The 2018 PPP Law distinguishes between two types of PPP contracts, depending on the Project Company's shareholding structure (*see: Section 2.3.3 for more information*).

2.3.1 The Public Partner

The 2018 PPP Law defines the Public Partner by reference to the legislation governing the award of the PPP contract (*see: Section 2.1.2 for more information*). Therefore, any of the contracting authorities/entities defined in the public procurement legislation and in the works and services concessions legislation (or an association between such contracting authorities/entities) may act as Public Partner in a PPP contract. If the Public Partner is an association of contracting authorities/entities, the association agreement must cover at least the topics listed in Article 31 (1) of the 2018 PPP Law.

From a statistical perspective, the Public Partner must be classified in the general government sector in order for Eurostat to treat the contract as a PPP. This can be relevant with respect to certain categories of contracting entities, which Eurostat might consider as non-government entities (such as company that is owned by government but, in statistical terms, considered a "*market producer*") (*see: page 19 of the Statistical Guide*).

2.3.2 The Private Partner

The 2018 PPP Law defines the Private Partner as the private investor (or the association established between several private investors) that signed the PPP contract with the Public Partner. In other words, the Private Partner is the private investor selected by the Public Partner further to the PPP contract's award procedure. It is worth noting, however, that international best practice (in contrast to the 2018 PPP Law) does not require the Private Partner to sign the PPP contract with the Public Partner alongside the Project Company. **An alignment with the**

international best practice may therefore be taken into consideration as a future amendment to the 2018 PPP Law.

The definition set out in the 2018 PPP Law needs to be read in conjunction with the laws which apply to the PPP contract's award procedure (*see: Section 2.1.2 for more information*). It follows that the private investor(s) would need to qualify as "*economic operator(s)*" within the meaning of the law governing the PPP contract's award procedure in order to be eligible to act as Private Partner under the 2018 PPP Law.

Although the Private Partner is a party to the PPP contract, it must be noted that PPP project financings are typically structured as "*non-recourse*" (in which Senior Lenders can be paid only from the Project Company's revenues, without recourse to the Private Partner) or as "*limited recourse*" (in which Senior Lenders rely primarily on the Project Company's revenues to repay their loans and have certain additional limited recourse to the Private Partner).

The Private Partner's obligations under a PPP contract are limited *(see: Clause 40 (Warranties and Disclaimers) from the Standard Provisions)* as the project, with all related rights and obligations, is carried out by the Project Company.

2.3.3 The Project Company

According to the 2018 PPP Law, the Project Company:

- must be set-up for the sole purpose of implementing the PPP contract; consequently, the law requires that the Project Company's purpose of business consist only of those activities that are necessary for the Project Company to carry out the PPP contract; this requirement provides comfort to financers by ensuring that their financing will be used only for the project and for no other purpose;
- must be a company regulated by the Romanian Companies' Law; usually, this means that the Project Company will be set-up either as either a joint stock company or as a limited liability company.

When setting-up the Project Company, the Private Partner will typically take into consideration the advantages and constraints typical to each type of company regulated by the Romanian Companies' Law (*e.g.*, minimum shareholder number, minimum share capital (if any), corporate governance structure, the rules applicable to the transfer of shares). This is the Private Partner's concern, however, and is of no interest to the Public Partner.

The 2018 PPP Law distinguishes between two types of PPPs, depending on the shareholder structure of the Project Company: *(i)* "*contractual PPPs*", in which the shares in the Project Company are owned entirely by the Private Partner, and: *(ii)* "*institutional PPPs*", in which both the Private Partner and the Public Partner own shares in the Project Company. In contractual PPPs, the Project Company is set-up by the Private Partner in advance and signs the PPP contract together with the Private Partner and the Public Partner. In institutional PPPs, the Private Partner and the Public Partner agree in the PPP contract to set-up a Project Company and the Project Company becomes a party to the PPP contract after the incorporation formalities with the Trade Registry are finalized.

Conflicts of interests and decision-making processes at the level of the Project Company are two essential elements to be given due consideration when opting for an institutional PPP structure. In emerging markets with no established PPP track record (such as Romania), contractual PPPs are the preferable option. Note that the degree of control exercised by the Public Partner over the Project Company can impact the statistical treatment of a PPP. Such control may however exist even if the Public Partner has no share in the ownership of the Project Company (*e.g.*, due to a right of the Public Partner to veto important decisions of the Project Company in a contractual PPP) (*see: page 20 and Theme 15 of the Statistical Guide*).

2.4 The term of the PPP contract

2.4.1 Introduction

See: Clause 1.4 of the Standard Provisions.

The PPP contract usually enters into force on the Date of Contract and remains in force until the Expiry Date (or the Termination Date, if the latter occurs prior to the Expiry Date). This time interval (referred to as the Contract Period) consists of several successive sub-intervals: (1) the Pre-Commencement Period, (2) the Works Period, (3) the Services Period, and (4) the hand-back stage. Note that the Termination Date may occur during any of these sub-intervals. It is also possible to stipulate for certain obligations included in the PPP contract (*e.g.*, certain confidentiality obligations) to survive, for a limited time period, even after the Contract Period has ended.

The Contract Period should be established based on the conclusions of the substantiation study and take into account at least the criteria and requirements set forth in the 2018 PPP Law, namely:

- The period of amortization of the investments made by the Project Company and the means of financing such investments (e.g., the availability of long-term financing);
- Avoiding any artificial restrictions on competition (e.g., too long a Contract Period can result in the creation of a quasi-monopoly in favor of the Project Company);
- Ensuring that the profit derived by the Project Company from the exploitation of the asset(s) and the operation of the public service is reasonable, relative to the Project's sector;
- Ensuring that the prices paid by the direct beneficiaries of the services that constitute the Project's subject matter (*i.e.*, the Unitary Charge and the User Tariffs) are reasonable and affordable;
- Ensuring that the duration of the PPP contract is long enough for an appropriate transfer of risks from the Public Partner to the Project Company to take place.

According to the 2018 PPP Law, the Contract Period may not be shorter than 5 years. Nevertheless, for statistical purposes, Eurostat is likely to treat contracts with a duration of less than 10 years as conventional government expenditures instead of PPPs (*see: page 24 and Theme 13.2 of the Statistical Guide*).

2.4.2 The Pre-Commencement Period

The Pre-Commencement Period commences on the Date of Contract and ends on the Effective Date (or on the Termination Date, if the latter occurs prior to the Effective Date). Although the PPP contract is in force during this period, its actual performance is limited to the Parties' obligations that are required to satisfy the conditions precedent stipulated for the occurrence of the Effective Date (*see: Clauses 2.2-2.3 of the Standard Provisions*).

Usual conditions precedent include: site delivery, the execution of the project documents (such as the *Design and Construction Contract* and the *Operating Contract*), the obtaining of required permits and consents, the issuance of insurance policies and the execution of the Direct Agreement. It is not unusual to allow for a period of between six months and one year to fulfil these conditions precedent.

An important condition precedent to the occurrence of the Effective Date is also the entry into force of the Senior Lenders' obligation to make available the funds necessary for the financing of the Project (*i.e.*, the Financial Close). It should be kept in mind that Senior Lenders will usually not commit to finance a PPP project (by entering into a Senior Loan Agreement with the Project Company) until after the PPP contract has been signed. The Financial Close is, in turn, subject to a separate set of conditions precedent set forth in the Senior Loan Agreement, including the Senior Lenders being satisfied with the PPP contract and the project documents.

In order to limit material comments from the Senior Lenders on the draft PPP contract during the Pre-Commencement Period, the Public Partner should carry out market sounding activities (which are essential for a bankable PPP) during the project preparation stage (*i.e.*, prior to the launch of the award procedure). This

approach ensures that, by the time the PPP contract is signed and the Pre-Commencement Period begins, the Public Partner will have already had the chance to receive some Senior Lenders' comments on the draft PPP contract and to implement those changes in order to secure the Senior Lenders' satisfaction with the PPP contract. Senior Lenders will still have comments prior to Financial Close, however, as they will have engaged legal counsel and technical experts to review the PPP contract and the project documents.

The Pre-Commencement Period ends with the execution of a Closing Notice in which the Parties acknowledge and confirm: *(i)* the full and unconditional fulfilment and/or waiver of the conditions precedent related to the PPP contract, and: *(ii)* the date of occurrence of the Effective Date (*see: Clause 2.8 of the Standard Provisions*).

2.4.3 The Works Period

The Works Period commences on the Works Commencement Date and ends on the Works Completion Date (or on the Termination Date, if the latter occurs prior to the Works Completion Date).

The Works can commence only after the Independent Engineer issues the Works Commencement Certificate. Prior to doing so, the Independent Engineer ensures that all relevant conditions precedent stipulated in the PPP contract (*see: Clause 9.1 of the Standard Provisions*) have been satisfied. In performing the Works, the Project Company must comply with the Works Program (*see: Clause 13 of the Standard Provisions*).

It is worth noting that, between the Effective Date and the Works Commencement Date, there exists an interval that may be referred to as the "mobilization period". During the mobilization period, the Project Company usually carries out certain activities that are necessary for the commencement of the Works (e.g., obtaining the Consents that are within its responsibility, project management activities, preparing the utilities diversion program with the Relevant Authorities, identifying works interfaces with Interested Parties etc.). These activities are defined in the *Standard Provisions* as Mobilization Works and Duties. It is worth noting that it is international best practice for the Public Partner to arrange the development of utilities networks up to the Site's Boundaries, further to which the connection to such networks is the Project Company's responsibility.

After the successful completion of the Works, the Project Company must notify the Independent Engineer in order for the latter to inspect the Works. If the Works are deemed satisfactory, the Independent Engineer then issues the Works Completion Certificate (*see: Clause 18 of the Standard Provisions*). The Works Completion Date must be acknowledged and confirmed in the Works Completion Certificate. Furthermore, the Works Completion Certificate is a condition precedent to Services Commencement (*see: Clause 19.1 of the Standard Provisions*).

2.4.4 The Services Period

2.4.4.1 Timing of the Services Period

The Services Period commences on the Services Commencement Date and ends on the Expiry Date (or on the Termination Date, if the latter occurs prior to the Expiry Date).

The Services can commence only after the Independent Engineer issues the Services Commencement Certificate, which is subject to the satisfaction of a number of conditions precedent stipulated in the PPP contract (*see: Clause 19.1 of the Standard Provisions*). In providing the Services, the Project Company must comply with the Annual Programs (*see: Clause 21 of the Standard Provisions*).

The Expiry Date occurs upon the expiry of a period of time set out in relation to the Effective Date (*e.g.*, 30 years from the Effective Date). In establishing the Expiry Date, the criteria and the requirements mentioned in Section 2.4.1 with respect to the Contract Period must be taken into account.

2.4.4.2 Importance of the Planned Services Commencement Date

The Public Partner is entitled to expect the Services Commencement Date to occur on the Planned Services Commencement Date, the latter being set in relation to the Works Commencement Date.

In light of the above, the Project Company has the following obligations:

- To keep the Independent Engineer and the Public Partner informed with respect to any expected delays with the performance of any of its obligations that must be completed prior to the Planned Services Commencement Date, as well as:
- To take all reasonable steps to mitigate the consequences of any such delay.

If, in the Project Company's reasonable opinion, an anticipated delay with the performance of such obligations is the result of a Compensation Event, of a Relief Event or of a Force Majeure Event and, additionally, the Project Company duly notifies the anticipated delay to the Independent Engineer (as well as to the Public Partner), then the aforementioned delay shall be treated as a Compensation Event, as a Relief Event or as a Force Majeure Event, as applicable (*see: Clause 14 of the Standard Provisions*).

Note that the Project Company may not commence the provision of the Services before the Planned Services Commencement Date without the Public Partner's prior approval (*see: Clause 19.3.3 of the Standard Provisions*).

2.4.4.3 Consequences of late Services commencement

If the Services Commencement Date occurs after the Planned Services Commencement Date:

- An Original Services Period Extension is added to the duration of the Services Period (and, implicitly, to the duration of the Contract Period). The duration of the Original Services Period Extension is equal to the period between the Planned Services Commencement Date and the Services Commencement Date, but subject to a limit (or "*Long Stop Date*") that should be set out in the PPP contract (*e.g.*, 12 months in the *Standard Provisions*) (*see: Clause 19.4.2 of the Standard Provisions*).
- The Public Partner may be entitled to apply Delay Liquidated Damages (*see: Clause 15.2 of the Standard Provisions and Section 8.2 of this Contract Guidance*).

Moreover, failure by the Project Company to achieve Services Commencement by the Long Stop Date constitutes an event of default and entitles the Public Partner to terminate the PPP contract (*see: Clause 42.2 of the Standard Provisions*). Note that this remedy is not mutually exclusive with the application of Delay Liquidated Damages for the period between the Planned Services Commencement Date and the Termination Date.

2.4.5 The hand-back stage

The *Standard Provisions* aim to ensure that the provision of the Services can continue uninterrupted upon the end of the Contract Period. For this reason, the hand-back procedures are expected to commence prior to the end of the Services Period, at which time the Public Partner should be able to secure the continuation of the Services' provisions independently from the Project Company. The hand-back is a complex procedure involving not only the Assets' transfer itself (*see: Clause 45 (Effects of termination) of the Standard Provisions*), but also preliminary surveys aimed at ensuring the appropriate condition of the Assets being transferred to the Public Partner (*see: Clause 23 (Surveys on termination) of the Standard Provisions*).

3. The Contractual Documentation

See: Clause 3 (Documentation) of the Standard Provisions.

The Project Documents should be listed in a schedule to the PPP contract and usually consist of:

- The *Design and Construction Contract* to be entered into between the Project Company and the Construction Contractor for the design and construction of the Works and of any other works;

- The *Operating Contract* to be entered into between the Project Company and the Operator for the operation and maintenance of the Project Facilities (although operation and maintenance may be carried out directly by the Project Company); and
- Other contracts may also be entered into depending on the type of PPP (*e.g.*, supply contracts, offtake contracts).

The Financing Agreements are the agreements or instruments entered into between the Project Company and financial institutions in relation to the financing or refinancing of the PPP. The Financing Agreements include:

- The *Senior Finance Documents* entered into between the Senior Lenders and the Project Company for the purpose of financing the PPP (including the *Senior Loan Agreements* and related hedging and security arrangements); and
- The *Subordinated Finance Documents*, under which the Private Partner makes subordinated debt available to the Project Company.

The Public Partner should approve the Project Documents and the Financing Agreements, as well as any material amendments thereto. The purpose of this approval is to ensure that the Project Documents mirror the requirements for construction and operation contained in the PPP contract (the so called “back-to-back” or “pass through” principle) and, in the case of the Financing Agreements, to allow the Public Partner to be aware of the amount, tenor and terms of the financing (as it will have to take this into account in relation to refinancing and termination compensation).

4. The Independent Engineer

See: Clause 6 (Independent Engineer) of the Standard Provisions.

4.1 Who is the Independent Engineer?

The Independent Engineer is an external consultant selected and engaged jointly by the Public Partner and by the Project Company (often with the cost of its services shared between them to ensure its neutrality). The terms of engagement of the Independent Engineer, as well as the mechanism for the payment of the services provided by the Independent Engineer should be summarized in the tender documentation relative to the PPP contract.

The Independent Engineer must not be confused with other technical consultants that may be engaged by the Parties. For example, the Public Partner typically engages an “*owner’s representative*”, which is an engineering consultant assisting the Public Partner in its interaction with the Project Company on technical matters during the Works Period (e.g., design reviews, construction progress and compliance monitoring, change orders). Moreover, the Project Company is typically required to engage a “*Lenders’ technical advisor*” which has a duty towards the Senior Lenders to monitor construction activities and progress and to certify monthly construction drawdown/funding requests. The “*Lenders’ technical advisor*” does not have an explicit duty to the Public Partner, however it provides an additional level of scrutiny and therefore comfort to the Public Partner.

4.2 What is the role of the Independent Engineer?

The Independent Engineer’s role is relevant primarily during the Works Period (and this is how it is set out in the *Standard Provisions*). In more complex projects, technical support may also be needed during the Services Period (or at least at its very beginning (*e.g.*, the first year of the Services Period) to oversee transition activities and ensure that is the Works are fully completed and the Services Period can commence), in which case the scope of the Independent Engineer’s role can be broadened as required by the Public Partner. The Public Partner may also engage a consultant who is not the Independent Engineer to support it with contract monitoring during the Services Period. The scope of the Independent Engineer’s role is for the Public Partner to decide, depending on the given project’s characteristics and on the capacities of the Public Partner to manage that project.

In order to carry out its tasks, the Independent Engineer should benefit from unrestricted access to the Site at all reasonable times (*see: Clause 50 of the Standard Provisions*).

The Independent Engineer's functions should be summarized in a schedule to the PPP contract and set out in detail in the Independent Engineer's Agreement). Naturally, these functions must be compliant with the terms of the tender documentation relative to the PPP contract.

4.2.1 Functions related to the supervision of the Works' performance

The Independent Engineer's primary role is to certify "*substantial completion*" or "*occupancy readiness*" at the end of the Works Period (*see: Clause 18 of the Standard Provisions*). This is an important milestone that moves the PPP project from the Works Period into the Services Period and also triggers a number of financial consequences (*e.g.*, release of the Performance Bond (*see: Clause 15.1 of the Standard Provisions*), Works completion / milestone payment(s) (where relevant), commencement of availability payments or, as the case may be, of availability payments and User Tariffs).

During the Works Period, the Independent Engineer is typically expected to performs tasks such as:

- Reviewing and approving the Technical Design, the Detailed Design and other Design Data and issuing instructions to the Project Company concerning the Works' performance, completion, commissioning and testing (*see: Clauses 12 and 13 of the Standard Provisions*);
- Reviewing the Works Program (and any revision or variation thereof) prior to its implementation (*see: Clause 13 of the Standard Provisions*) and monitoring progress against the Works Program;
- Approving the Quality Documentation concerning the Works (and any change, revision or addition made to such documentation) (*see: Clause 26 of the Standard Provisions*);
- Issuing the Works Commencement Certificate and the Works Completion Certificate (according to the *Standard Provisions*, the Works Completion Certificate is issued after completion of the mandatory process for the Works' reception *(See: Clause 18.1 of the Standard Provisions)*, which should be carried out in accordance with the provisions of the *Regulation on the reception of construction works*[6]);
- Issuing instructions to the Project Company in relation to Archaeological Finds (*see: Clause 16 of the Standard Provisions*);
- Determining whether a Compensation Event (*see: Clause 37.1 of the Standard Provisions*) or a Relief Event (*see: Clause 37.2 of the Standard Provisions*) has occurred or not, as well as the consequences of the occurrence of such event;
- Approving the Reinstatement Plan (*see: Clause 24.2 of the Standard Provisions*);
- Advising the Parties on any matters related to the Works and making Determinations whenever these are required under the PPP contract (*see: Clauses 6.4 and 6.5.1 of the Standard Provisions*).

4.2.2 Functions related to the supervision of the Services' provision

As stated above, it is not typical for the Independent Engineer's role to cover the full length of the Services Period (except sometimes at the very beginning (*e.g.*, the first year of the Services Period), in order to oversee transition activities and ensure that Works are fully completed and the Services Period can commence).

Under the *Standard Provisions*, the Independent Engineer's role during the Services Period is limited to the initial Annual Program's review and approval (*see: Clauses 19 and 21 of the Standard Provisions*) and to the Services Commencement Certificate's issuance (*see: Clause 19.3 of the Standard Provisions*).

[6] Adopted by Government Decision no. 273/1994.

5. The Review Procedure

See: Clause 49 (Review Procedure) of the Standard Provisions.

5.1 Purpose of the Review Procedure

The purpose of the Review Procedure is to establish a set of rules that will govern the submissions made by the Project Company, whenever such submissions are required by the PPP contract. Under the *Standard Provisions*, this is the case, for example, with respect to the approval of the Project Documents (*see: Clause 3.2 of the Standard Provisions*), the approval, revision and enforcement of the Works Program (*see: Clauses 9.1 and 13 of the Standard Provisions*), the approval, revision and enforcement of the Annual Program (*see: Clause 21 of the Standard Provisions*), the approval of the Services Monitoring Plan (*see: Clause 22.1 of the Standard Provisions*), the approval of the terms and conditions of insurances (*see: Clause 24.1 of the Standard Provisions*), the approval and revision of the Quality Documentation (*see: Clause 26 of the Standard Provisions*), the review of Project Company Notices of Change (*see: Clause 35.2 of the Standard Provisions*), the appointment and dismissal of certain subcontractors (*see: Clause 47.5 of the Standard Provisions*)).

The Review Procedure is typically set forth in a schedule to the PPP contract. Moreover, given the involvement of the Independent Engineer, the contents of the Review Procedure must be compatible not only with the clauses of the PPP contract, but also with those of the Independent Engineer's Agreement.

The main elements that are typically covered by the Review Procedure are discussed below.

5.2 The Reviewing Entity

Submissions provided in the PPP contract are made by the Project Company to the "**Reviewing Entity**". The Reviewing Entity is either the Independent Engineer or the Public Partner, as set forth, on a case-by-case basis, in the clause of the PPP contract that requires the submission.

Regardless of the person that acts as Reviewing Entity with respect to a given submission, the other person (*i.e.*, the Independent Engineer or the Public Partner) should be provided with a copy of the submission. The person not acting as reviewing entity with respect to a given submission may comment on such submission but (unless the PPP contract provides otherwise) the Project Company should be allowed to disregard such comments at its own discretion. In any case, the Reviewing Entity should be entitled to refer matters to and/or to consult with the person that doesn't act as Reviewing Entity with respect to a given submission.

5.3 The handling of submissions

After the receipt and review of a submission, the Reviewing Entity returns a copy of the submission to the Project Company with one of the following mentions: (a) "approved", (b) "approved with comments", or (c) "comments". The Project Company's further actions depend on the mention received on the submission, as follows:

- Submissions that receive the mention "approved" can proceed to implementation;
- Submissions that receive the mention "approved with comments" can be implemented provided that: *(i)* the submission is amended beforehand by the Project Company in order to account for the Reviewing Entity's comments and that: *(ii)* a report on how the comments are handled is submitted by the Project Company to the Reviewing Entity prior to the submission's implementation.
- Submissions that received the mention "comments" may not be implemented. In such cases, the Project Company must amend the submission and re-submit it to the Reviewing Entity.

The Reviewing Entity should be entitled to request additional information before providing its answer.

The most substantial section of the Review Procedure will contain the grounds entitling the Reviewing Entity to comment on the submission. Typically, the Review Procedure includes a detailed list of such grounds, as follows:

(i) a general list of commenting grounds (applicable in any situation in which the PPP contract refers to the Review Procedure) and: *(ii)* separate lists of commenting grounds relative to each situation in which the PPP contract refers to the Review Procedure. While the commenting grounds (and especially those mentioned under point *(ii)* above) will vary from project to project, the list of general commenting grounds should include at least: (1) the grounds expressly provided in the PPP contract; (2) the ground that the submission's approval would not be consistent with the Public Partner's statutory duties, or with the clauses of the PPP contract, or with the applicable Law; (3) the ground that the Project Company has failed to provide all information necessary for the submission's review; and (4) the ground that the submission relates wholly or substantially to a previous submission which received the mention "comments" and that no significant changes have been made to it. If the Project Company considers that the answer to its submission is made on grounds other than those permitted by the Review Procedure, it should be entitled to refer the matter to the Disputes Resolution Procedure.

The Review Procedure should provide a general deadline for answering submissions that would apply whenever the PPP contract does not set forth a specific deadline. Failure by the Reviewing Entity to respond to a submission within the applicable deadline (whether it is the general one or a specific one) should be deemed to constitute an answer with the mention "approved".

6. Senior Lenders' step-in rights

6.1 Reason for Senior Lender's step-in rights

As stated above, most PPP projects are financed on the project finance model which is non-recourse or limited recourse lending based upon projected cash flows generated by the PPP project (*i.e.*, the revenues obtained from the Unitary Charge as well as, in mixed funding mechanisms, User Tariffs). These revenues result from the PPP contract entered into by the Public Partner and the Project Company.

The Senior Lenders are not a contracting party to the PPP contract, but the PPP project could not be carried out without them. Accordingly, Senior Lenders will seek to obtain comfort by regulating the right of the Public Partner to terminate the PPP contract in the event of a Project Company default (because such default would stop the flow of revenues the Project Company would use to repay the loans granted by the Senior Lenders).

Step-in rights should be seen as beneficial by Public Partners, as they provide a right (but not an obligation) to the Senior Lenders to "save" a PPP project that is in difficulty and facing possible termination, with potential negative impact on public service and the risk to pay termination compensation.

6.2 International best practice

Senior Lender's interests are typically addressed by means of an agreement (the "**Direct Agreement**") entered into between the Public Partner, the Project Company and the Senior Lenders, under which Senior Lenders will typically require certain rights: (1) information rights in the event of a Project Company default under the PPP contract which could allow the Public Partner to terminate the PPP contract; (2) a standstill period, pursuant to which the Public Partner will undertake to notify the Senior Lenders of its intention to terminate the PPP contract, and will commit not to terminate for a given period of time; (3) appointment of an additional obligor to "step-in" and become jointly liable with the Project Company to cure any grounds which gave rise to the Public Partner's right to terminate; (4) consent to the security to be granted to the Senior Lenders over the revenue flows in the PPP contract (i.e., the Unitary Charge and, in mixed funding mechanisms, of the User Tariffs), as well as a consent to assignments to insurers and guarantors upon payment of claims; and (5) the right of the Senior Lenders to novate the Project Company's rights and obligations under the PPP contract to a substitute Project Company.

The terms of the Direct Agreement are generally heavily negotiated, and Senior Lenders will generally insist on relying on their own standard forms. Accordingly, it is usually not necessary to extensively set out the terms of

the Direct Agreement in the PPP contract. However, Senior Lenders will still want to see a clear undertaking from the Public Partner to agree and enter into a Direct Agreement and a recognition of their step-in rights.

Step-in rights (and the corresponding Direct Agreement) will generally be required by the Senior Lenders as a condition precedent to drawdown under the Senior Finance Documents. It should be emphasized that the Direct Agreement is not a state guarantee, but rather a contractual method to give the Senior Lenders certain limited rights vis a vis the Public Partner and the PPP contract.

6.3 Romanian context

According to the 2018 PPP Law[7], the Public Partner may replace the Private Partner at the Senior Lenders' request, provided that the following cumulative conditions are met:

- The Project Company (or the Private Partner) has failed to fulfil its obligations set out in the PPP contract and/or its obligations towards the Senior Lenders, and:
- The possibility to replace the Private Partner in the above-mentioned scenario was provided in the award documentation and in the PPP contract.

The new Private Partner is designated further to consultations between the Public Partner and the Senior Lenders, provided that the Public Partner and the Senior Lenders have a direct contractual relationship (this will be achieved by means of the Direct Agreement).

The clause establishing the possibility to replace the Private Partner at the Senior Lenders' request must comply with the conditions applicable to revision clauses according to the law regulating the PPP contract's award procedure (*see: Section 2.1.2 of this Contract Guidance*)[8].

Law no. 100/2016 on works and services concessions provides for the possibility to include a revision clause stipulating a right in favor of the Senior Lenders to assign the concession contract to another concessionaire provided that the new concessionaire meets the qualification and selection criteria set out in the award documentation.[9]

It is worth noting that *Law no. 100/2016 on works and services concessions* refers explicitly to the Senior Lenders' right to assign the concession contract to a substitute concessionaire.

An alignment of Articles 28 and 39 of the 2018 PPP Law (that provide for the Public Partner's right to replace the Private Partner further to consultations with the Senior Lenders) with the international best practice in a manner similar to Law *no. 100/2016 on works and services concessions* may be taken into consideration as a future amendment to the 2018 PPP Law.

7. Refinancing

See: Clause 3.4 (Refinancing) of the Standard Provisions.

PPP contracts and Senior Finance Documents are long term. Changes in market conditions and the evolution of the risk profile of the PPP project over the term may lead a Project Company to the conclusion that it could obtain better financing conditions than under the original financing documents. This is especially true after the

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[7] Article 39, read in conjunction with Articles 25 and 28.

[8] According to Article 39 of the 2018 PPP Law and to the provisions of the Award Legislation governing the regime of revision clauses, a revision clause must be drafted in clear, precise and unequivocal terms, indicate the subject matter, the limits and the nature of the potential revisions and the terms under which the revision mechanism can be relied upon. Furthermore, the application of the revision clause must not affect the general nature of the PPP contract under any circumstances.

[9] Article 105 of Law no. 100/2016 on works and services concessions.

commissioning of the PPP project has reached the point at which the main construction risks will have been passed. Better refinancing terms may be available for many reasons. Some of them are under the Project Company's control such as good performance of the PPP project. Others could be seen as driven by the public authorities of Romania (improving regulatory environment, reduced country risk). Finally, some cannot be attributed to any Party, such as changes in market conditions or increasing appetite of financial institutions for certain sectors. As a result, the PPP market has increasingly acknowledged that it may not be fair for the Project Company to enjoy the full benefits of debt refinancing gains for which it is not fully responsible.

The Public Partner should closely monitor any changes to the financing structure and to any refinancing, since the termination compensation payable by the Public Partner to the Project Company will be based on the amounts payable under the Senior Finance Documents – and the amount of compensation could be adversely affected by a refinancing (*e.g.*, the Public Partner's liabilities may increase, the risk profile of the PPP contract may change, the capacity of the new financing partner may be limited). Refinancing provisions are fairly complex and their implications should be carefully considered by the Public Partner and its advisors. The key points to consider are: (i) what should be considered a "refinancing" in order to ensure that the Public Partner can properly assess a refinancing proposal, including its value for money (*see: the definition given to Qualified Refinancing in Clause 1.1 of the Standard Provisions*), (ii) the right of the Public Partner to provide its prior approval (*see: Clauses 3.4.2 and 3.4.3 of the Standard Provisions*), (iii) how the refinancing gain should be calculated (*see: the definition given to the Refinancing Gain in Clause 1.1 of the Standard Provisions*), (iv) in what proportion the refinancing gain is to be allocated between the Parties, noting that this may impact the statistical treatment of the PPP contract (*see: Clause 3.4.4 of the Standard Provisions and Theme 14.6.2 of the Statistical Guide*), and (v) how the Public Partner should receive the payment of its share (*see: Clause 3.4.5 of the Standard Provisions*). Enforcing the Public Partner's rights under refinancing provisions will only be possible if the Public Partner is fully familiar with the terms and structure of the Senior Finance Documents entered into by the Project Company for the purpose of the PPP project.

Given the complexity involved, it is recommended that the Public Partner appoint external advisers in relation to any Refinancing (or potential refinancing) and the calculation of the Refinancing Gain.

8. Guarantees for Works completion

8.1 Performance Bond

See: Clause 15.1 (Performance Bond) of the Standard Provisions.

The 2018 PPP Law does not contain express provisions with respect to performance bonds, aside from a mention that the regime of performance bonds provided by the Project Company must be covered in the PPP contract.

The Award Legislation (which regulates the PPP contracts' awarding (*see: Section 2.1 of this Contract Guidance*)) does contain provisions concerning performance bonds. The extent to which such provisions can be considered as being part of the contract awarding rules and thus applicable to PPP contract should be clarified with the National Agency for Public Procurement.

If the provisions of the Award Legislation on performance bonds are deemed inapplicable to PPP contracts, then the Performance Bond will be governed solely by the clauses of the PPP contract. If, instead, the aforementioned provisions of the Award Legislation are deemed to apply to PPP contracts, then the clauses of the PPP contract will need to comply with the relevant provisions of the Award Legislation. Such relevant provisions vary based on the specific law governing the PPP contract's award procedure:

- For PPP contracts awarded according to the rules applicable to works and services concessions, the legal regime does not set forth special requirements concerning performance bonds and, consequently, contracting authorities/entities may enjoy an increased margin of freedom in establishing and/or in negotiating the regime of the performance bond;

- For contracts awarded according to the rules applicable to public or sectoral procurement, the legal regime is more restrictive and covers, *inter alia*, the provision of the performance bond (*i.e.*, the circumstances when the bond is/is not mandatory, the term for its provision, the means for its provision and its amount), the enforcement of the performance bond and its release.

Clause 15.1 (Performance Bond) of the *Standard Provisions* contains all essential elements necessary for this clause to operate and its contents should not require amendments if the PPP contract is awarded according to the rules applicable to works and services concessions. If the PPP contract is awarded according to the rules applicable to public procurement/sectoral contracts, then the clause should be read in conjunction with the legal provisions governing the regime of performance bonds in such contracts[10].

8.2 Delay Liquidated Damages

See: Clause 15.2 (Delay Liquidated Damages) of the Standard Provisions.

Delay Liquidated Damages may be applied by the Public Partner for the Project Company's failure to achieve Services Commencement by the Planned Services Commencement Date (*see: Clause 15.2 of the Standard Provisions and Section 2.4.4.3 of this Contract Guidance*). Delay Liquidated Damages are designed to be a reasonable pre-estimate of the loss incurred by the Public Partner as a result of the delay. Project Companies will often argue against the imposition of Delay Liquidated Damages in PPP contracts, claiming that it is in their best interest to complete on time so that they may begin to receive revenues. Indeed, liquidated damages are not common in availability-based PPP contracts in Europe. However, the *Standard Provisions* do provide for Delay Liquidated Damages and the use of this remedy should be decided on a project-by-project basis.

9. Site Conditions and Archaeological finds

The *Standard Provisions* provide that site conditions are the Project Company's risk. This implies, of course, that the Project Company has been given adequate time and access to the site to comfortably take this risk. In many projects, such as health or education, the site will be in an urban area where ground conditions will be already well known. In motorway PPPs, on the other hand, where the site extends over many kilometers and may involve tunneling, consideration should be given to the possibility of the Public Partner retaining some site risk if is unforeseeable to a prudent contractor. If not, the Public Partner can expect that the tolls or charges will be higher, as the Project Company will factor in a "premium" for taking this risk.

The *Standard Provisions* also contain a risk allocation regime for unforeseen pre-existing environmental conditions (so called "Contaminations"). If such Contaminations are discovered by the Project Company, it is under an obligation to carry out remediation, but (subject to an agreed threshold) at the expense of the Public Partner. Such Contaminations are thus classified as "Compensation Events" giving the Project Company the right to claim time and money.

The Project Company will of course be responsible for all pollution that occurs during the PPP contract period.

Archeological Finds discovered on the Site are by Romanian law the property of the State. As such, the *Standard Provisions* provide that, if discovered, the Project Company shall notify the Ministry of Culture, the Public Partner and the Independent Engineer. It shall preserve and protect the finds and allow the relevant public authorities to enter the site for purposes of removal or disposal according to law. Such discoveries are classified as "Compensation Events" giving the Project Company the right to claim time and money.

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[10] At the time of drafting of this *Contract Guidance*, the relevant legal framework on performance bonds in public procurement/sectoral contracts is in the process of being amended. Contracting authorities/entities are advised to always consult the most recent version of Law no. 98/2016 (or Law no. 99/2016, as the case may be) as well as the most recent version of the secondary legislation implementing these laws.

10. Records and Reports

10.1 Records

See: Clause 28 (Records) of the Standard Provisions.

PPP contracts typically provide the Project Company's obligation to maintain records relating to the Project, although the contracts themselves do not contain an exhaustive list of such records. Instead, the complete list of records is ideally included in a schedule to the PPP contract (*see: Clause 28.1.4 of the Standard Provisions*). The schedule should also establish the term(s) for the retention of each category of record (*see: Clause 28.4 of the Standard Provisions*).

The records schedule should list the required records separately for each phase of the Project:

- *records relative to the Works Period*: (1) records concerning the design Works, such as the Technical Standards used in the Permanent Works' design, design files and records of design parameters and assumptions, design drawings, certificates concerning the design, safety audits, changes and others, as appropriate, and: (2) records concerning the Works, such as Method Statements, construction-related consents, site diaries and other documented records (including test results, instructions issued by the Independent Engineer, site level changes etc.), progress photographs, as-built drawings, details concerning the manufacturers of any proprietary products used in the Permanent Works (including warranties and renewal plans), certificates concerning the Works as appropriate (including commencement and completion) etc.
- *records relative to the Services Period*: maintenance records and manuals on structural inspections, maintenance manuals and renewal schedules, major maintenance and repair schedules (including as-built drawings and other documentary records), Monthly Reports, Quality Management Systems and project management systems etc.

10.2 Reports

See: Clause 27 (Reports) of the Standard Provisions.

The types of reports and the number of copies thereof that the Project Company must provide under the PPP contract is best detailed in a schedule to the contract. The list of required reports will vary depending on the nature of the PPP, but it will usually distinguish between the reports that must be submitted during the Works Period and those that must be submitted during the Services Period.

11. Surveys on Termination

See: Clause 23 (Surveys on Termination) of the Standard Provisions.

PPP contracts typically involve the provision of a service through the construction ("greenfield") or rehabilitation ("brownfield") of a major infrastructure asset.

The remaining life of the infrastructure asset often exceeds the contract term and the Public Partner wants the asset to be handed back to it in a good condition when the PPP contract expires or terminates, so that the asset can continue to be operated and/or relevant service provided.

The circumstances around handback will vary from one PPP contract to another and will depend on the Public Partner's intentions with regard to post-PPP usage, the nature of the asset (*e.g.*, roads and most buildings are usable for much longer than the initial PPP project duration), the stage at which the PPP contract comes to an end (early or on natural expiry) and whether termination occurs during construction or operation. Ultimately, the PPP contract provisions should be tailored to take account of the specific nature of the relevant PPP project and any requirements under the 2018 PPP Law.

In civil law jurisdictions, such as Romania, assets built on publicly owned land and/or used for a public service will often be subject to particular restrictions. For example, mandatory handback at termination may be embedded in underpinning administrative law principles or legislation and there may be mandatory access or rights of use for third parties. Ownership will remain with the Public Partner throughout the duration of the PPP contract, with assets built on such land automatically becoming Public Partner property as soon as they are built, and the assets are handed back for free at natural expiry. Despite this, the PPP contract should set out the specific accompanying detail about asset condition and cooperation obligations, taking into account the underlying mandatory law provisions. Parties will want to set out the requirements and process regarding hand-back to ensure clarity and avoid unexpected consequences. Current experience suggests that the Public Partner should start to prepare for handback 5-7 years in advance of contract expiry.

The *Standard Provisions* set forth: (a) a clause aimed at ensuring the Project Company's compliance with quality standards over the course of the Contract Period (*see: Clause 22 (Quality control and checks) of the Standard Provisions*), as well as: (b) a clause designed to ensure that the assets comply with the Transfer Requirements at the Expiry Date and that the Public Partner is able to secure their operation after such date (*see: Clause 23 (Surveys on Termination) of the Standard Provisions*).

The procedure for the transfer of the Project Facilities from the Project Company to the Public Partner involves:

- The Project Company's obligation to collaborate with the Public Partner (both prior to, as well as after the Expiry Date, but only for a limited time) for the purpose of ensuring that the operation of the Services continues without interruption, as well as a transfer of the "knowledge" necessary for the Public Partner to take over the operation of the Services after the Expiry Date;

- Periodic inspections of the Project Facilities during the last decade of the Contract Period, including a Guarantee Inspection taking place between 2 and 3 years prior to the Expiry Date and the final inspection taking place during the last 6 months of the Contract Period; The inspections are carried out by an independent and impartial expert tasked with identifying any maintenance works necessary in order for the assets to meet the Transfer Requirements at the Expiry Date; The Project Company is under the obligation to provide the Public Partner with a guarantee covering the costs of the maintenance identified by the expert as being necessary further to the Guarantee Inspection;

- A "*transfer*" inspection carried out immediately prior to the Expiry Date which, if successful, gives rise to the obligation of the Public Partner to issue the Transfer Certificate on the Expiry Date. The purpose of the Transfer Certificate is to confirm that the Transfer Requirements are met and that the Project Company has fulfilled all of its obligations related to the assets' transfer (*see: Clause 23.4.6 of the Standard Provisions*); If the Transfer Certificate is not issued on the Expiry Date (due to the relevant conditions not being satisfied), the PPP contract terminates on the Expiry Date, as scheduled, with the exception of the Project Company's obligations that still require fulfilling before the Transfer Certificate can be issued.

The Transfer Guarantee can be released only after the delivery of the Transfer Certificate.

12. Insurance

12.1 Introduction

See: Clause 24 (Insurance) of the Standard Provisions.

Insurance is a highly specialized area unto itself. Thus, the Public Partner will need advice from a qualified insurance advisor, on a project-by-project basis, in order to set out and negotiate the insurance requirements.

Both the Public Partner and the Senior Lenders have an interest in requiring the Project Company to insure the assets of the PPP during both the Works Period and the Service Period. Thus, in case of accident, the asset can

be repaired or rebuilt and the public service can continue. Although the interests of the Public Partner and the Senior Lenders will usually be aligned, in certain circumstances involving destruction of a majority or all of the asset, there may emerge a conflict between Senior Lenders, who may prefer to use the insurance proceeds to repay outstanding debt, and the Public Partner, who would wish for the asset to be rebuilt.

The types of insurance coverage required will vary from project to project and the Public Partner should seek independent advice from experienced insurance experts. Typical coverage will include: *(i)* "all risk" for physical loss or damage to infrastructure and equipment during the Works Period (including marine cargo) and Services Period, *(ii)* delay in start-up (covering loss of revenue/or profit during the Works Period) and business interruption (covering loss of revenue or profit during the Services Period) and: *(iii)* third-party liability. These details will be set out in a schedule to the Standard Provisions (*see: Clause 24.1.1 of the Standard Provisions*).

The PPP contract should set out, for each category of insurance, the policy's key features, *i.e.*, the minimum level of coverage, the principal exclusions, the maximum deductibles, the acceptable insurers (*see: Clause 24.1.2 of the Standard Provisions*). The proposed terms and conditions of any insurance must be approved by the Public Partner in advance (*see: Clause 24.1.2 of the Standard Provisions*). Furthermore, the Senior Lenders will typically insist upon specific requirements in the insurance policies – *e.g.*, being named as additional or co-insured parties (*see: Clause 24.1.4(a) of the Standard Provisions*), their consent to any changes in policy terms, waivers of subrogation – until the Senior Lenders are fully repaid.

Sometimes, the Public Partner can get a better Value for Money by retaining responsibility for certain types of insurance (*e.g.*, a Public Partner may get more favorable terms than the Project Company due to insuring a large portfolio of public assets – economies of scale – or self-insuring a large pool of risk). Moreover, in times of high uncertainty, the insurance market may not be stable and, thus, the cost of insurance over the course of a long-term PPP (e.g., 20-30 years) may not be sufficiently predictable. In such situations, bidders are likely to resort to including very large contingencies in their bids in order to account for the long-term uncertainty. A case-by-case assessment of the terms, cost and availability of insurance for the Project Company compared to the coverage and cost of that insurance if maintained by the Public Partner is therefore necessary.

The Public Partner should be aware that insurance benchmarking mechanism regimes, while conceptually simple, might prove very difficult to implement in practice. This is because it is highly subjective and beyond a formulaic approach to distinguish whether/to which extent an increase in insurance premiums is attributable to the general market forces or, alternatively, to actions/faults of the Project Company.

12.2 Uninsurability

See: Clause 24.3 (Uninsurable Risks) of the Standard Provisions.

The concept of "uninsurability" covers: *(i)* situations in which insurance is unavailable for a given risk, as well as: *(ii)* situations in which insurance is available, but only at a prohibitive cost. Both types of uninsurability events are of concern to the Public Partner, who typically takes (or at least shares in) the impact of uninsurable risks.

Under the *Standard Provisions*, the Project Company does not have the obligation to take out insurance against uninsurable risks, unless the Project Company is responsible for such risk(s) becoming uninsurable.

The *Standard Provisions* set out the procedure to be followed if, without any fault on the part of the Project Company, a risk that is typically insured for (*see Section 12.1 of this Contract Guidance*), or for which insurance is required under the Law or the Agreement, becomes uninsurable. Depending on the circumstances and further to discussions between the Parties, the Agreement may continue under the terms set out in Clause 24.3.3 of the *Standard Provisions* or (if the risk that has become uninsurable relates to third party liability) the Public Partner may become entitled to terminate the Agreement (with compensation payable to the Project Company).

12.3 Insurance Premium Risk Sharing

See: Clause 24.5 (Insurance Premium Risk Sharing) of the Standard Provisions.

The insurance premium risk sharing regime is typically detailed in a schedule to the PPP contract. The schedule is expected to set out a review procedure used to determine whether an exceptional insurance cost increase or an exceptional insurance cost saving exists in relation to the value of the base relevant insurance cost (calculated as per the method set out in the aforementioned schedule). If this is found to be the case, then the Public Partner will share in the exceptional cost increase/saving, to the extent provided in the schedule. If the insurance cost increase/saving does not qualify as exceptional, the difference is borne exclusively by the Project Company. It should be noted that, under certain circumstances, the risk sharing mechanism may influence the statistical treatment of the PPP contract (*see: Theme 9.3 of the Statistical Guide*).

13. Monitoring of Performance

13.1 Deductions

See: Clause 29 (Monitoring of performance) of the Standard Provisions.

Performance measurement is an activity carried out by the Public Partner in compliance with the performance management system set forth in the PPP contract. Deductions made by the Public Partner from the payment of the Unitary Charge stipulated in the PPP contract serve as an incentive against poor performance by the Project Company. The performance parameters used by the Public Partner in order to measure the Project Company's performance (and apply deductions, as the case may be) should be set out in a clear, measurable and objective manner (preferably, in the schedule containing the payment mechanism). Failing this (*e.g.*, if the deduction(s)'s calculation or application requires further negotiation between the Parties), the PPP contract is included automatically on balance sheet for government (*see: Theme 4 of the Statistical Guide*). The Project Company must notify the Public Partner (and, whenever the Works are concerned, the Independent Engineer) of the occurrence of any breach of its contractual obligations (*see: Clause 29.1.1 of the Standard Provisions*).

The Public Partner cannot cumulate Deductions applied for multiple breaches by the Project Company (in such cases, only the breach that attracts the largest amount of Deductions will be taken into account), with the exception of Deductions applied for safety-related breaches, which can be cumulated with other categories of Deductions (*see: Clause 29.2.4 of the Standard Provisions*). In any case, failure by the Project Company to fulfil its contractual obligations after the application of Deductions entitles the Public Partner to resort to an increased monitoring of the Project Company's activities (*see: Clauses 29.4 and 29.5 of the Standard Provisions*). Finally, the accumulation of a level of Deductions within an agreed period of time will give rise to a right of the Public Partner to terminate the PPP contract for Project Company default.

13.2 Public Partner step-in rights

See: Clause 29.6 (Public Partner Step-in Rights) of the Standard Provisions.

13.2.1 The concept of step-in

A common description of "step in" in a contractual context is that it allows one party to "step into the shoes" of another party and exercise rights and, in some cases, carry out contractual obligations in certain circumstances. This could be when the other party is in serious default or where an event has occurred or is subsisting which necessitates such action. Step-in is usually for a limited timeframe and the aim is to give the party stepping in the opportunity to manage and rectify the situation without termination of the relevant contract.

13.2.2 Purpose of Public Partner step-in rights

Circumstances may arise during the life of a PPP contract where it is appropriate for the Public Partner to be able to take swift action itself in relation to the Works or Services. Such situations would typically involve some form of genuine emergency and/or threat relating to the structure of the Project Facilities or to the Works, to the health and safety or the environment or to national security, or where the Public Partner has to ensure discharge of a statutory duty (*see: Clause 29.6.1 of the Standard Provisions*). This may be as a result of an external event outside the Project Company's control or, alternatively, result from the Project Company's significant poor performance and/or breach of its contractual obligations. By stepping in, the Public Partner effectively takes over some or all of the Project Company's contractual obligations to run the PPP project for a period with the aim of fixing or managing a short-term serious issue.

While the Public Partner may have legislative powers to act in certain emergency scenarios, it is good practice where possible for the Public Partner to ensure that it also has the requisite contractual ability to manage the whole or affected part of the PPP project in the Project Company's place, whatever the step-in reason. The Parties will also want the PPP contract to be clear as to the responsibility for step-in costs and any consequent liabilities. Public Partners should note that step-in rights may not be appropriate for all types of PPP projects to the full extent outlined in this section (or even at all). This may be the case, for example, if the Public Partner has no relevant operating expertise for a type of PPP project and there is no scope for finding suitably qualified contractors to assist it, in which cases the Public Partner may instead prefer simply to rely on other contractual provisions.

13.2.3 Scope of step-in rights

The ability to step in should always be the Public Partner's right but not its obligation and the PPP contract should set out clearly the terms on which step-in is permitted. The Public Partner should not be under any contractual obligation under the PPP contract, any Project Document or its Direct Agreement with the Project Company's Lenders to remedy any breach or mitigate any risk in respect of which it is stepping in.

13.2.4 Public Partner liability for Project Company losses on step-in

The Public Partner should consider the extent to which it is contractually responsible for any liability for losses suffered by the Project Company as a result of Public Partner step-in and be aware of any pricing implications of its position on this risk allocation issue. The position usually differs according to the reason for its step-in (such as whether this is due to Project Company breach or not). Treatment will also depend on whether the reason for step-in is attributable to an event addressed elsewhere under the PPP contract (such as Force Majeure – *see Section 19 (Force Majeure) of this Contract Guidance*) – if this is the case, the treatment of such events should conform to the same principles as far as practicable.

13.2.4.1 Compensation/Payment in case of step-in not triggered by a Project Company breach

Where the Public Partner steps in for reasons which are not due either to Project Company breach or to a risk event for which the Project Company is liable, the basic principle is that the Public Partner should compensate the Project Company in respect of the effects of the step-in to leave the Project Company in the same position that it would have been had no step-in occurred. If the reason for step-in is attributable to events addressed elsewhere in the PPP contract (such as Force Majeure – *see Section 19 (Force Majeure) of this Contract Guidance*), then the principles agreed in respect of such provisions should apply to the extent practicable and step-in rights should not bypass such provisions.

An example approach in a step-in scenario not triggered by a Project Company default or risk event is as follows:

- when step-in occurs in the Works Period, the Project Company is entitled to an extension of time and compensation in respect of its costs and losses;

- when step-in occurs in the Services Period, the Project Company is entitled to payment in full (*i.e.*, in a "*government pays*" model, the full availability payment) as if the service had been fully performed by the Project Company, subject to: *(i)* deductions for operating cost savings the Project Company makes during the step-in period; *(ii)* unavailability or performance deductions to be made in respect of parts of the Service still provided by the Project Company and unaffected by the Public Partner's step-in: and
- the Project Company agreeing to provide reasonable assistance to the Public Partner during step-in (provided the Public Partner reimburses the Project Company for any extra costs it incurs).

If the PPP project involves a "*user pays*" model or other third-party revenue generation, the Parties will need to consider how to calculate compensation in respect of this form of revenue, but this is an issue which will also arise in relation to other types of compensation event. Such compensation is likely to be based on the Original Base Case or revenue generated over a certain time period prior to the step-in.

The mechanics for determining compensation will be similar to those for other "*no Project Company default*" events.

13.2.4.2 Compensation/Payment in case of step-in triggered by a Project Company breach

To the extent step-in is due to a Project Company breach or risk event for which the Project Company is liable, an example approach is as follows:

- when step-in occurs in the Works Period, the Project Company will not be entitled to an extension of time or compensation in respect of its costs and losses;
- when step-in occurs in the Services Period, the Public Partner should consider whether the Project Company ought to be entitled to payment: (a) in full (*i.e.*, in a "*government pays*" model, to the full availability payment) as if the service had been fully performed; or: (b) in part (*i.e.*, reflecting the Project Company's failure to perform the affected obligations) which may result in no payment being due (or a similar result if there are uncapped availability and performance deductions).

In each case, such payment should be subject to (without any double counting):

- deductions for any operating cost savings the Project Company makes during the step-in period as reasonably estimated by the Public Partner;
- deductions for any costs and liabilities incurred by the Public Partner;
- unavailability or performance deductions to be made in respect of parts of the service still provided by the Project Company and unaffected by the Public Partner's step-in; and
- the Project Company agreeing to provide reasonable assistance to the Public Partner during step-in at the Project Company's cost.

If in the Services Period the deductions applied to the Monthly Payments result in a negative figure, this will be a debt due and payable by the Project Company to the Public Partner (which may be set off against subsequent Monthly Payments or other amounts owed to the Public Partner, if applicable).

If the PPP project involves a "*user pays*" model or other third-party revenue generation, the Parties will need to consider how to calculate payment in respect of this form of revenue. It is likely that this will follow a similar approach to that agreed for a no breach/risk step-in in respect of such revenue, with appropriate reductions/amendments to reflect the breach/risk scenario.

13.2.5 Step-out

See: Clauses 29.6.10 and 29.6.11 of the Standard Provisions.

Whatever the trigger is for stepping-in, the Public Partner should always be entitled to "step out" at any time on reasonable notice to the Project Company and in respect of some or all of the PPP project. Once the Public Partner has served such notice, it should step out in accordance with such notice. The notice period should be the minimum time reasonable for the Project Company to re-mobilize to resume its contractual obligations.

14. Authorized Functions

See: Clause 30 (Authorized Functions) of the Standard Provisions.

The list of Authorized Functions will be strongly influenced by the nature of the project, as certain types of projects lend themselves to Authorized Functions more than others. Authorized Functions are particularly important in road projects and may include functions such as: (1) ensuring the maintenance of the public road and maintaining its appropriate condition for traffic safety; (2) installing and maintaining road signaling, marking etc.; (3) issuing special transport authorizations for abnormal load vehicles; (4) issuing temporary traffic restrictions in order to perform certain works; (5) taking all necessary measures so as to restabilize the traffic in emergency situations; (6) approving the installation and maintenance of advertising and publicity panels; (7) issuing endorsements for various events taking place on/in the Project Facilities (*e.g.*, sports competitions, concerts) etc. In contrast, school and hospital PPPs might lend themselves to Authorized Functions to a much lesser extent. Ultimately, the scope of the Authorized Functions will need to be agreed on a project-by-project basis, taking into account the specific needs of the Parties and the extent to which such needs can be satisfied through the establishment of Authorized Functions under the relevant laws.

15. The Payment Mechanism

See: Clause 32 (User Tariffs) of the Standard Provisions.

15.1 The concept of payment mechanism

15.1.1 What is the payment mechanism?

The payment mechanism lies at heart of the transfer of risk and performance-based approach for PPPs. In PPP projects, the Private Partner is only paid upon delivery of the Works (in the case of construction milestone payments) or delivery of the service during the period of the PPP contract. Through the performance-based character of the payments, the Private Partner is strongly incentivized to complete the facilities on time and deliver the services according to the contractually-specified output specifications and quality standards. In this way the PPP ensures timely delivery with consistent quality.

The payment mechanism establishes the contractual regime of the payments to which the Project Company will be entitled for the provision of the Services. The payment mechanism typically takes the form of a detailed set of clauses and, therefore, it is ideally set forth in a separate schedule to the PPP contract.

15.1.2 Types of payment mechanisms

The payment mechanism is strongly tied to the characteristics of the PPP contract. The sources of funding used in the PPP are particularly relevant in this respect, as the 2018 PPP Law distinguishes between:

- PPPs based exclusively on payments made by the Public Partner/by other public entities; and
- PPPs based on a combination of payments made by the Public Partner/by other public entities, on the one hand, and tariffs borne by the users of the provided service (*i.e.*, User Tariffs), on the other hand.

Payments made by the Public Partner/by other public entities are referred to as "*Unitary Charge*" due to the fact that they are not influenced by the Users' actual demand for the Project Company's service(s). Instead, Unitary Charges are influenced by the performance criteria stipulated in the PPP contract.

In contrast to Unitary Charges, the revenue resulting from the tariffs paid by Users is directly influenced by the demand for the Project Company's service(s), similarly to any other service provided on the free market (so called "*commercial risk*"). It should be noted that User Tariffs are not suitable for certain types of PPP projects (*e.g.*, prisons).

15.1.3 Role of payment mechanisms

The payment mechanism doesn't just set forth the amount and timing of the payments received by the Project Company. It is also essential for these payments to be tied to the Services' performance in compliance with the standards imposed by the Public Partner. The payment mechanism is thus an important tool to motivate the Project Company into providing the Services in compliance with the PPP contract (and, as the case may be, to sanction the Project Company's failure to perform) and should be accompanied by an efficient performance monitoring system (*see: Section 13 of this Contract Guidance)*).

Regardless of the type of payment mechanism used (availability payments or a mix of availability payments and User Tariffs), the Project Company should not be entitled to receive payments for Services that are not actually performed. Similarly, the Project Company should not be entitled to receive full payments for Services that are not performed at the standards stipulated in the PPP contract. In the latter case, deductions should apply to the payments received by the Project Company in proportion to the degree of failure, based on criteria that should be agreed in detail in the payment mechanism (*see: Section 13.1 of this Contract Guidance*).

15.1.4 Availability payment indexation

Construction cost escalation risk can typically be effectively managed and efficiently priced by the Project Company as the Works Period is typically relatively short. The Project Company will not, however, be able to manage the risk of long-term cost escalation and, given that a significant portion of the availability payment is allocated to services or materials – typically related to operations and maintenance – the costs of which are likely to change over time, transferring this risk to the Project Company would likely lead to unattractive pricing. Therefore, Public Partners usually retain part of this risk through an indexation formula applied to the availability payment. Because the Public Partner's revenues, consisting of taxes and fees, are typically linked to inflation, this at least partially hedges its exposure to inflation. For most PPP transactions, only the portion of the availability payment allocated to operations and maintenance is indexed to hedge this inflation risk associated with operating costs for the Project Company, whereas the portion associated with the financing of the capital investments remains constant over time.

15.1.5 Availability payment frequency

Both the Project Company and the Public Partner have an interest in the frequency of availability payments. For the Public Partner, the frequency of availability payments impacts the appropriations cycle. For the Project Company, availability payments will be used to cover interest payments to debtholders and payments to subcontractors.

There are trade-offs between less and more frequent availability payments. More frequent payments create higher transaction costs for the Public Partner, as the costs of invoicing and settling payments occur more frequently. On the other hand, more frequent payments can lead to better incentives, as the Project Company might be expected to address a potential issue more quickly.

Less frequent payments also create several challenges. First, a higher working capital facility is needed, leading to a slightly less efficient financing structure. Second, the relationship between performance and payment weakens the longer it takes for the Public Partner to pay the Project Company. This effect can be mitigated,

however, through monitoring systems that track the Project Company's performance in real time or several times throughout a given payment period. Additionally, issues can often be addressed before payment is due by scheduling more frequent meetings between project stakeholders. This can provide the Project Company with the information required to fix issues as they arise and maximize availability payments.

Monthly availability payments are most common in international practice. However, the Public Partner's preference and processes can be taken into consideration to use a different frequency. It is not recommended for availability payments to be made less frequently than quarterly for the reasons described above.

15.1.6 Performance deductions

A well-designed deduction mechanism incentivizes the Project Company to meet performance specifications (*see: Section 13.1 of this Contract Guidance*). The economic value of a failure should drive deductions; failures that are costly for the Public Partner should also be costly for the Project Company. Small performance shortfalls should result in relatively small penalties. Larger performance shortfalls or repeated small performance shortfalls should result in substantially larger penalties, whereas long-term critical underperformance can lead to default. To achieve this effect, sizing the penalties is critical. If penalties are too low, the Project Company may prefer to accept penalties rather than address the underlying issue. The goal of a penalty is to motivate the Private Partner to find a remedy, but if penalties are too high, the Project Company can be punished unfairly – and potentially default due to a minor breach.

15.1.7 Principle of zero payment for zero availability

In order for a PPP contract to be eligible for off-balance sheet treatment, the Monthly Payment must be set to zero in case of non-availability of the asset (*see: Theme 4.6.1 of the Statistical Guide*). This is also known as the principle of "*zero payments for zero availability*".

15.2 Impact of payment mechanisms on the PPP's financing

The payment mechanism should be strict, but fair on the Project Company, as the imposition of unreasonable terms may make it impossible for the Project Company to secure financing for the PPP (or result in the Project Company's bankruptcy should the Public Partner impose terms that preclude the project's economic viability). The "fairness" of the payment mechanism is, of course, a complex topic, to be carefully considered and calibrated by the Public Partner on a project-by-project basis (in consultation with potential financers and, if deemed necessary by the Public Partner, by employing specialized outside counsel).

As a rule, the costs effectively incurred by the Project Company should not constitute a criterion in calculating the payments made for the Services' provision (rather, as stated above, such payments should be tied to the Project Company's performance). Nevertheless, cost items that are outside the Project Company's control (*e.g.*, direct or indirect local taxes) could be reimbursed by the Public Partner on a "pass-through" basis.

15.3 Foreign exchange risk

See: Clause 34.3 (Payments) of the Standard Provisions.

Romanian foreign exchange regulations require that current payments between Romanian residents be made in RON. Since the amounts payable under the PPP contract are likely to be denominated in EUR, Clause 34.3 of the *Standard Provisions* sets out a contractual mechanism that addresses the potential variations in the EUR/RON currency exchange rates between the date of issuing of an invoice and the date of its payment.

16. Change procedure

16.1 Public Partner changes

See: Clause 35.1 (Public Partner changes) of the Standard Provisions.

The Public Partner should always be free to change or vary the terms of the Works or Services, subject to compliance with certain standards set forth in the *Standard Provisions*, including respect of applicable law, the possibility to obtain necessary consents and generally that such change does not so affect the basic nature of the Project (including the risk profile). Of course, the Public Partner must recognize that such Public Partner changes will require necessary compensation, time and relief from performance.

The Public Partner change mechanism contained in the *Standard Provisions* is by necessity complex to ensure that the Project Company is adequately protected and remunerated from what is essentially a change from the agreed contract. Consideration could be given to allowing a simpler approach (perhaps involving only approval of the Independent Engineer and/or including pre-agreed costs or pricing mechanisms) for certain "minor" changes (subject to a monetary threshold).

16.2 Project Company changes

See: Clause 35.2 (Project Company changes) of the Standard Provisions.

The Project Company may also propose changes, although the Public Partner is not required to accept them. It is in the best interest of the Public Partner to consider such changes, however, as they may reflect innovation and cost savings.

If a change initiated by the Project Company results in savings for the Project Company (due to a decrease in the costs of the Project Company or of a Sub-Contractor), the question that arises is who should be entitled to keep those savings. Although the Public Partner could retain the savings in their entirety, a mechanism that involves a sharing of the savings is likely to prove more desirable in the long run. This is because, from the point of view of the Project Company, having a share in the savings resulted from the changes that it initiates can constitute a strong driver to innovate and make possible the cost-reducing changes. Consequently, this is the approach that is reflected in the *Standard Provisions*.

17. Change in Law

See: Clause 36 (Change in Law) of the Standard Provisions.

Under the PPP contract, the Project Company will be required to comply with applicable Law at all times and will price its bid taking into account the cost associated with the applicable Law, as of the date of its bid. However, change in law is a political risk that cannot be controlled by the Project Company. Accordingly, most PPP contracts include provisions regulating the consequences of certain changes in law occurring after the bid submission date, as a result of which the Project Company incurs delays, additional costs, and/or is unable to perform any of its material obligations under the PPP contract. Such provisions may also cover the situation where the change in law is beneficial and, in such cases, the Public Partner should also benefit. The principle of protecting the Project Company against change in law is often resisted by many Public Partners since the Project Company will obtain rights that are generally not granted to investors other than investors in PPP projects. The justifications for including change in law protection in PPP contracts are: (a) protection against change in law allows the Project Company to rely on the legal framework applicable as of the time on which it has submitted its bid, and at which it has conducted due diligence – this, in turn will allow the Project Company to reduce the amount of contingency priced in its bid; (b) the Public Partner will generally be in a better position than the Project Company to control a change in law, although this will vary depending on the role of the Public Partner and: (c) Senior Lenders will generally require some type of protection against change in law, especially in

jurisdictions where change in law is considered as more likely (such as those in developing nations), and will not agree that this risk is borne by the Project Company, thus it becomes a "bankability" issue.

One point to keep in mind when considering change in law provisions is that these clauses do not (and could not) bind the public authorities into not changing the applicable Law, nor do they have the effect of freezing the framework applicable to the Project Company (as was sometimes the case in certain mining and oil projects in certain jurisdictions). These clauses solely have the effect of allocating the risk of such changes to one Party or the other by providing relief from their obligations, additional time and/or costs to the Project Company.

There are several approaches to allocating change in law risk but the ability for a Public Partner to share change in law risk with the Project Company will depend on the risk of legislative or regulatory volatility in the jurisdiction and sector concerned, as well as the maturity of the market. The extent to which any resulting increased costs can be passed on to third party users will also be relevant. In certain developing jurisdictions where change in law risk is perceived as high by investors and banks, it may be necessary for a change in law clause to cover all changes in law. However, given Romania is a European Union member, a more developed approach to sharing change in law risk as it has been seen in certain jurisdictions and has become part of standardized contract templates is taken in the *Standard Provisions* and is based on the following risk allocation:

- *Discriminatory Changes in Law* – these are changes in law which are discriminatory because they apply to the PPP project and not to similar projects, or to the Project Company and not to other persons, or to PPP operators and not to other parties;
- *Specific Changes in Law* – these are changes in law specifically impacting the provision of services the same as or similar to the PPP project services or the shareholders of businesses providing such services (the Public Partner will want to clearly define the nature of the services);

Discriminatory and Specific Change in Law risk is allocated to the Public Partner to address the Project Company's concern that laws may be passed that have the effect of singling out itself or private operators of infrastructure in a manner that has an adverse impact on expected equity return. For example, this could be the introduction of a tax or surcharge which only applies to its PPP project or that is only applicable to its business because it is being operated by the private sector, or the implementation of more significant environmental regulations that are not being imposed on public sector operators of similar assets;

- *General Changes in Law requiring capital expenditure in operating period* – these are general changes in law (*i.e.*, excluding Discriminatory Changes in Law and Specific Changes in Law) which require the Project Company to incur capital expenditure after Works completion during the operating period. The risk of these changes is also allocated to the Public Partner on the basis that, in the jurisdictions where this applies, the view is that this approach offers better value for money as the Project Company has no means of absorbing potentially significant costs once the PPP project is operational and the relevant asset built and may otherwise factor in contingency pricing; and
- *Any other Changes in Law* – these are all other changes in law including those which trigger capital expenditure during the Works Period (but excluding the categories above). The risk of these changes is allocated to the Project Company throughout the duration of the PPP contract on the basis that the Project Company is able to manage and absorb any price implications.

The ability to pass the risk of changes requiring capital expenditure in the Works Period will, however, depend on the length of the Works Period and the predictability of the legal regime. A particularly long period and/or less stable regime may make this unbankable and a different risk allocation might be needed. Under this more developed risk sharing approach, the Project Company will bear (some of) the general business risk that applies to all businesses.

Note that the allocation to the Public Partner of risks related to General Changes in Law may, under certain circumstances, impact the PPP contract's statistical treatment (*see: Theme 8 of the Statistical Guide*).

18. Compensation Events and Relief Events

Clause 37 of the *Standard Provisions* discuss the mechanism for "Compensation Events" and "Relief Events". The distinction is important for the Public Partner as Relief Events give the Project Company the right to a time extension while Compensation Events will give rise to monetary payments by the Public Partner in addition to extension of time. As discussed above, Contaminations and Archeological Finds may, under defined circumstances, constitute Compensation Events. Material Adverse Government Action also entitles the Project Company to compensation.

19. Force majeure

See: Clause 38 (Force Majeure) of the Standard Provisions.

19.1 Key aspects

Romanian Law defines force majeure as "*any event which is external, unpredictable, absolutely invincible and inevitable*". The legal regime of Force Majeure applies to the extent the parties do not agree otherwise. Thus, the PPP contract can (and should) contain its own force majeure wording adapted to the project-specific requirements.

In general, the purpose of a Force Majeure clause in a PPP contract is to: (a) define what events or circumstances the Parties agree should be construed as Force Majeure; (b) provide relief from liability to the Affected Party and excuse it from further performance of its obligations under the PPP contract while the Force Majeure Event is continuing; (c) provide for the obligations of the Parties in relation to the Force Majeure Event (typically, information and mitigation); (d) provide for termination rights in case of a Force Majeure Event lasting more than a certain period of time ; and (e) specify the allocation of costs resulting from the Force Majeure Event and determine termination payments.

The typical assumption when negotiating Force Majeure provisions is that the risk of occurrence of a Force Majeure Event is beyond the control of the Parties and should not be allocated to a single Party. Accordingly, the financial consequences resulting from the occurrence of a Force Majeure Event should be shared. Force Majeure provisions should also be distinguished from hardship clauses, which deal with unexpected circumstances under which performance becomes more onerous without being impossible.

The Project Company and its Senior Lenders will review Force Majeure provisions in detail and will want to ensure that the definition of Force Majeure Event, and its rights and obligations in relation to Force Majeure in the PPP contract, are mirrored in the other Project Documents and, in particular, the *Design and Construction Contract(s)* and any contractual arrangements relating to the operation and maintenance of the PPP project.

Broadly speaking, there are two approaches to drafting force majeure clauses:

- the "*open-ended*" approach, where a general contractual definition of force majeure is set out (such as unforeseeability, unavoidability and impossibility to perform), and a non-limitative list of the events or circumstances is provided as examples only, assuming that they meet the definition; and
- the "*limitative*" approach, where an exhaustive list of events is provided.

Most civil law jurisdictions use the open-ended approach (since it follows the civil code approach) and this approach may be also more appropriate in emerging markets (such as Romania), where it might be more of a challenge to expect the Project Company to manage (and price) all those risks not falling within a limitative list. It should be noted, however, that the "*open-ended*" nature of the Force Majeure definition would be an issue of high impact on the statistical treatment (*see: pages 74-77 of the Statistical Guide*).

The *Standard Provisions* have taken the limitative approach for the reasons set out above. The Public Partner and its advisers should discuss this issue early in the PPP contact drafting process to form a view.

19.2 "Political" Force Majeure in PPP contracts

In commercial contracts between private parties, events beyond the control of the parties will traditionally include "acts of God" (such as natural disasters, epidemics, etc.) as well as "political" events that may be controlled or influenced by governmental authorities (such as general strikes, nationalization, refusal to grant licenses, etc.). In considering this approach in PPP contracts, caution should be exercised, given that the Public Partner, being a government entity, has some control over such political events, and should arguably bear this risk. If there are political risk events allocated to the Public Partner, these events will require separate treatment. In this *Contract Guidance*, such events are treated as "Material Adverse Government Action".

19.3 The effects of Force Majeure Events

The occurrence of a Force Majeure Event allows the Project Company relief from its obligations under the PPP contract, to the extent that such relief is directly caused by the Force Majeure Event.

When the Force Majeure Event occurs during the Works Period, this will include, in particular, postponing the date on which the infrastructure should have been completed by the Project Company.

When the Force Majeure Event occurs during the Services Period:

- In those PPP contracts where the Project Company takes commercial risk on private users (such as toll roads), the occurrence of a Force Majeure Event which makes it impossible to perform will result in loss of revenues to the Project Company.
- In other PPP contracts, where the Public Partner has payment obligations to the Project Company for services provided or infrastructure made available, the occurrence of a Force Majeure Event may not give the Public Partner relief from its payment obligation, even if the Project Company is relieved from performance. However, to reflect the risk sharing principle set out above, the Public Partner may consider reducing the amount of such payments to an amount equal to the debt service and an amount sufficient to cover fixed operating costs of the Project (but not variable cost or profit).

Depending on the type of project, Public Partner should consider if any other specific relief should be considered (such as, for instance, relief from payment deductions). As the consequences of the Force Majeure Event should be shared between the Parties, the occurrence of a Force Majeure Event should not, however, allow the Project Company to claim for costs incurred as a result of a Force Majeure Event.

In many PPP contracts, a prolonged Force Majeure Event (typically in excess of 6 to 12 consecutive months) will trigger a right for both Parties to terminate the PPP contract. If the Project Company wishes to terminate on the basis of a prolonged Force Majeure Event, it could be argued that the Public Partner should have the option to require the PPP contract to continue, provided that the Project Company is adequately compensated.

It is not uncommon to specify events which are specifically excluded from the definition of Force Majeure or which only qualify if they occur to a sufficient degree. In this case, the drafting focus will shift to what is not Force Majeure as opposed to what is. For example, in countries where certain natural events regularly occur (such as seasonal rains resulting in floods) and which should have formed part of the Project Company's due diligence when formulating its proposed price, the degree of such events should be specified so that only "exceptional" occurrences qualify as Force Majeure (*e.g.*, floods of a scale that occur not more frequently than once in every [100] years or earthquakes over a specified seismic intensity). The same approach may be appropriate in respect of certain climate risk events (*e.g.*, only including heavy rains above a specified rate or temperatures outside a specified range). Given the general nature of the *Standard Provisions*, this approach is not included, but it may be considered by the Public Partner depending on a given PPP's characteristics.

20. Material Adverse Government Action

See: Clause 39 (Material Adverse Government Action) of the Standard Provisions.

20.1 Concept of MAGA and differences with Force Majeure

The concept of Material Adverse Government Action (or MAGA), which is also sometimes referred to as "political force majeure", is typically only found in contracts where one of the parties is a public entity, or government. The purpose of MAGA clauses is to allocate certain types of "political" risk to the Public Partner.

MAGA presents similarities with the occurrence of a Force Majeure Event. For instance, if a MAGA occurs, it is generally agreed that the Project Company may be able to claim relief from its obligations under the PPP contract. The procedure to be followed by the Project Company to establish that relief is needed is also very similar to the procedure followed after the occurrence of a Force Majeure Event. Finally, both Parties would typically have the right to terminate the PPP contract in the event of a MAGA lasting longer than a certain period of time (generally between 6 to 12 months). However, in PPP contracts, the risk of occurrence of a MAGA is allocated to the Public Partner, which has material consequences. Firstly, the Project Company will be entitled to claim for losses incurred as a result of the occurrence of the MAGA. Secondly, the amounts payable to the Project Company in case of termination further to a MAGA should, arguably, be similar to those payable upon default by the Public Partner.

20.2 Definition of MAGA

Since MAGA is a risk allocated to the Public Partner, its occurrence may result in the Public Partner paying substantial compensation amounts. Accordingly, the Public Partner should carefully consider the scope of MAGA, with a very limited list of MAGA events. Depending on the PPP project, the definition of MAGA should also be tailored to take into account the specific risks of a given PPP project (for instance, upstream water pollution in a water sector PPP project, or the building of a competing port or airport within a certain distance from the port or airport operated by the Project Company).

20.3 MAGA and "Change in Law" provisions

Change in Law is often included as one item of the MAGA definition. However, there is some benefit in treating the two subjects separately, as has been done in this *Contract Guidance*. Changes in Law may work to the benefit or detriment of either or both Parties, while MAGA – by definition – can only arise where there is an adverse impact upon the Project Company.

20.4 Materiality threshold

As with the Change in Law clause, the Public Partner should consider whether all MAGAs should trigger the contractual consequences provided therein (relief, compensation, termination) or if a "materiality" threshold should be specified. If a threshold is specified, only MAGAs having consequences above the materiality threshold would allow the Project Company to claim compensation and/or termination.

20.5 Why do PPP contracts contain MAGA provisions?

MAGA risks are not within the Project Company's control but the Project Company can be adversely affected by their occurrence. Because of the potential impact of MAGA events on the Project Company's ability to perform its contractual obligations and be paid, the Project Company and its Senior Lenders will carefully assess the risk of such events occurring and will expect any significant MAGA risks to be identified and allocated to the Public Partner under the PPP contract. Transferring any MAGA risks to the Project Company is likely to have two consequences because of the Project Company's lack of control over the occurrence or management of such events: (i) at a minimum, to attract a high pricing premium (which could render the PPP project unaffordable),

or: (ii) simply to make the PPP project unattractive to the private sector (with the risk that there will be no bidders) and unbankable. The purpose of a MAGA clause (and of inserting such a clause in the *Standard Provisions*) is therefore to allocate certain agreed types of political risk to the Public Partner, address the consequences of such risks occurring (including possible termination) and provide the Project Company with appropriate relief and compensation.

21. Termination of the PPP contract

21.1 Termination Events

See: Clause 42 (Project Company Default), Clause 43 (Public Partner Default) and Clause 44 (Other events of termination) of the Standard Provisions.

When Public Partners and Project Companies enter into PPP contracts, the goal is for these contracts to run their course and for rights and obligations to remain valid throughout the duration of the contract, often for multiple decades. However, as with any contract – and particularly for a long-term contract of this nature – there may be exceptional cases where one or both Parties may want or need to terminate the PPP contract early. Typically, this would be following events which have a very serious impact on the project or the Parties and which are not remedied or otherwise resolved to enable the project to continue, such as: (a) material Public Partner default, change in law or MAGA event, (b) material Project Company default, and: (c) instances of prolonged Force Majeure or unavailability of key project insurances. Under the 2018 PPP Law, the Public Partner also requires a unilateral right to terminate for public policy or other reasons.

In the absence of appropriate contractual termination provisions, the Public Partner may not be able to terminate the PPP contract or may be exposed to disproportionate claims for damages. It may even be unable to attract the desired level of competition to bid for the PPP project in the first place as private sector parties may feel unable to enter into a PPP contract without express termination provisions. This is because market practice has shown that, on the private sector side, professional, prudent equity investors are not willing to enter into PPP projects, and Senior Lenders are not prepared to lend, without reasonable assurance that the Project Company's rights under the PPP contract – and their investment (both equity and debt) – have reasonable protection from any unexpected or early termination of the PPP contract and will be fairly compensated if early termination occurs. It is in both Parties' interests that termination should only occur in expressly defined – and exceptional – circumstances and that comprehensive consequential provisions should also apply, including a clear compensation mechanism.

Typical early termination events expressly addressed in PPP contracts (and in the *Standard Provisions*) can be summarized as follows):

21.1.1 Public Partner default termination:

The Project Company will usually require the express right to terminate the PPP contract itself (and be compensated) for breaches by the Public Partner which have a material adverse effect on the project or the Project Company (such as failure to pay when the Project Company is not in breach). Specific action or inaction by the Public Partner (such as failure to build essential connecting infrastructure), or the occurrence of certain events for which responsibility lies with the Public Partner under the PPP contract (such as a change in law (*see: Section 17 (Change in Law) of this Contract Guidance*) or other events referred to in *Section 20 (Material Adverse Government Action) of this Contract Guidance*), which in each case have a material adverse effect on the project or the Project Company, may sometimes be addressed in separate specific provisions which also give rise to similar Project Company termination rights.

21.1.2 Voluntary termination

See: Clause 44.2 of the Standard Provisions.

The Public Partner will commonly seek to terminate the PPP contract, at its discretion, for convenience or for public policy reasons. This termination right can have various names, including unilateral termination, termination at will, or termination for convenience or for public policy. The Project Company does not have a reciprocal right.

The 2018 PPP Law expressly allows the Public Partner to unilaterally terminate the PPP contract for public policy reasons, provided that the following cumulative conditions are met:

- This right, including the categories of exceptional reasons relating to public policy that the Public Partner may rely on, was provided in the award documentation as well as in the PPP contract, in a clear, precise and non-equivocal manner; The aforementioned reasons may relate, for example, to public health, to the protection of the environment, to safety and quality standards, to the affordability of the User Tariffs, to the need to ensure unlimited access to a particular public service etc.; and
- The prior notice to the Private Partner, the Project Company and the Senior Lenders.

If the termination of the PPP contract by the Public Partner, for policy reasons, is detrimental to the Private Partner or to the Project Company, then the latter is entitled to a compensation. The mechanism for the calculation of the compensation is set forth in the PPP contract (*see: Clause 46 of the Standard Provisions*).

21.1.3 Project Company default termination

The Public Partner will wish to protect itself against being tied into a long-term contract which is not being performed to the agreed contractual standard by the Project Company. The Private Partner, the Project Company and the Senior Lenders will accept termination for default of the Project Company (subject to Public Partner and Senior Lender step-in rights discussed above) in case of an enumerated list of serious breaches. All parties will wish to avoid termination for minor ("technical" or "hair-trigger") breaches and for breaches which can be remedied with notice and appropriate time. The usual list of serious breaches (and that included in the *Standard Provisions*) would include: any breach which has a material and adverse effect on the Services to be provided in the PPP contract, the accumulation of numerous un-remedied breaches over time, abandonment of the project, the accumulation of penalties for non-performance above a threshold in amount and/or time, failure to achieve Works completion within an agreed period following the scheduled completion date (the "Long Stop Date"), bankruptcy and anti-corruption and health & safety breaches. Each economic sector and project will also have its own project-specific examples of breach.

21.1.4 Other cases of termination

Both the Project Company and the Public Partner will also want to protect against being tied in to a long-term contract which is incapable of being fully performed due to a particular occurrence which is typically neither Party's fault and where no solution has been agreed to continue with the PPP contract (*e.g.*, due to a Qualifying Change in Law situation (*see: Clause 36.3 of the Standard Provisions*), a prolonged Force Majeure situation (*see: Clause 38.3 of the Standard Provisions*), a prolonged MAGA situation (*see: Clause 39.8 of the Standard Provisions*) or the unavailability of a key insurance).

21.2 Effects of termination

See: Clause 45 (Effects of Termination) of the Standard Provisions.

Following the termination of the PPP contract:

- The rights established by the Public Partner in favor of the Private Partner or of the Project Company cease automatically (*see: Clause 45.1.1 of the Standard Provisions*);

- The Public Partner may take over the Private Partner's shares in the Project Company, in accordance with the clauses of the PPP contract (*see: Clause 45.2 of the Standard Provisions*); The Public Partner may take over the shares either free of charge (if the PPP contract has expired) or in exchange for a price established in accordance with the award documentation and the clauses of the PPP contract (if the PPP contract is terminated prior to its expiry) (*see: Clause 46 of the Standard Provisions*);
- The assets created or acquired by the Project Company and constituting the subject matter of the PPP contract, as well as the assets necessary to provide the public service are transferred to the Public Partner (for this purpose, the assets must be unencumbered, functional and usable, according to the standards applicable to the public service and/or to similar assets, according to the PPP contract) (*see: Clause 45.1 of the Standard Provisions*); The assets are transferred to the Public Partner either free of charge (if the PPP contract has expired) or in exchange for a compensation calculated according to a mechanism set out in the PPP contract (if the PPP contract is terminated prior to its expiry) (*see: Clause 46 of the Standard Provisions*);
- The regime of any other categories of assets upon termination may be set out in the PPP contract (for example, the *Standard Provisions* set out the Public Partner's right to request the novation towards it of the Operating Contract and the right to purchase from the Project Company (or any of the latter's Affiliates) all or any part of the Assets, stocks of material, spare parts and other movable property owned by the Project Company (or by any of its Affiliates) and that are reasonably required in connection with the Project (*see: Clause 45.1.5 of the Standard Provisions*)).

Moreover, under the *Standard Provisions* (*see: Clause 45.1.3 of the Standard Provisions*), if the PPP contract is terminated prior to the Works Completion Certificate's issuance, then:

- the Project Company must transfer to the Public Partner any Works already carried out but which do not yet form part of the Project Facilities; and
- the Public Partner is entitled to request: (1) the novation towards it of the *Design and Construction Contract* and: (2) that the Construction Installation, the Installations and the materials needed for completing the Works remain available to it for a limited period of time.

21.3 Compensation on termination

See: Clause 46 (Compensation on Termination) of the Standard Provisions.

21.3.1 Key aspects

Termination payments are a key element of the risk allocation in the PPP contract, and are crucial in determining whether the PPP project will be financeable by the Senior Lenders (or "bankable"). They cover cases in which the PPP contract may be terminated prior to the normal term of the PPP contract, either: (i) by the Public Partner in the event of failure by the Project Company to comply with its obligations or for public policy, (ii) by the Project Company in case of occurrence of a failure of the Public Partner to comply with its obligations, or: (iii) by either Party in the event of prolonged Force Majeure Event, MAGA or Change in Law (please see the relevant guidance in this respect above), as well as the amount which will be payable by the Public Partner to the Project Company.

21.3.2 Principles for the calculation of termination payments

The amount payable to the Project Company upon early termination of the PPP contract will depend on the grounds on which the PPP contract is terminated. The provisions set out in this Section are based on the following principles:

21.3.2.1 Termination upon Public Partner Default, MAGA, Change in Law or voluntary termination by the Public Partner

If the PPP contract is terminated upon Public Partner default, prolonged MAGA, Change in Law or termination by the Public Partner for public policy reasons, the Project Company should obtain repayment of the sums used to finance the PPP project (equity and debt), as well as expected returns for a determined number of years to be negotiated between the Parties and not exceeding the term of the PPP contract.

In order to be left in in the same position as if the PPP contract had not been terminated, the Project Company will also expect to be compensated for any redundancy payments incurred, as well as for costs payable as a result of the early termination of its subcontracts.

21.3.2.2 Compensation to cover the outstanding senior debt

The calculation of the payments to be made to the Project Company to repay Senior Lenders generally includes: (i) the principal outstanding under the Senior Finance Documents, as well as: (ii) any interest, penalties and fees, and: (iii) breakage costs arising under applicable hedging agreements.

Certain amounts should be deducted from the amounts paid to the Senior Lenders, such as: (i) any amounts credited to the bank account of the Project Company (which are secured to the benefit of the Senior Lenders), (ii) any profits arising from the termination of the hedging agreements, (iii) any insurance proceeds received and: (iv) generally any other sums recovered by the Senior Lenders before the date on which the termination amount is paid.

Accordingly, it is advisable for the Public Partner to review the terms of the Senior Finance Documents, in order to fully understand the amounts which may become payable in case of early termination.

21.3.2.3 Repayment of sums owed to the equity investors

Different options should be considered by the Public Partner for calculating the value of the compensation payable in addition to the outstanding senior debt, to make equity investors whole.

The following list describes a number of these options:

Original Base Case Approach [Option 1a]:

Under this approach, the compensation payable by the Public Partner to make whole the equity investors is determined by reference to the returns which were expected to be made based on the Original Base Case. Accordingly, the Public Partner will be required to pay the amount which, when taken together with all amounts already paid to the equity investors before the date on which the PPP contract is terminated, will ensure that the equity investors recover the internal rate of return contemplated in the Original Base Case.

The key benefit of this approach lies in its easy implementation and the fact that it leaves less room for disputes than the other approaches.

A material drawback, however, is that this option assumes that the Project Company has been performing as planned in the Original Base Case. In other words, it does not take into account the actual performance of the Project Company under the PPP contract. As a result, the amount paid by the Public Partner under this approach will be reduced if the Project Company has been performing better than expected, which could incentivize the Public Partner to terminate a PPP contract under which the Project Company is performing well. Similarly, if the Project Company has been performing worse than expected, there would be a strong incentive to ensure the PPP project is terminated as the termination compensation will be more “profitable” than the actual performance of the PPP contract.

Market value approach [Option 1b]:

Under this approach, the compensation payable by the Public Partner to make whole the equity investors is determined by assessing the price which third party investors would be willing to pay for: (i) the shares in the Project Company and: (ii) the receivables arising under subordinated debt, subject to certain assumptions (including that the event giving rise to the early termination had not occurred).

Compared to the Original Base Case Approach, this option allows taking full account of the actual performance of the Project Company under the PPP contract, ensuring that the compensation payable by the Public Partner will not be over or under estimated.

However, while being the fairest approach in theory, this method is complex to implement in practice and is very likely to result in protracted disputes over the valuation as a "market" may not exist.

Adjusted Base Case Approach [Option 1c]:

Under this approach, the compensation payable by the Public Partner to make whole the equity investors is determined by reference to the distributions which they would have expected to recover based on the Original Base Case, but only from the termination date. Accordingly, the amount payable under this method will be the aggregate amount of the distributions forecasted in the Original Base Case to be made after the termination date, discounted using the equity IRR set out in the Original Base Case.

This approach allows taking into account the performance of the Project Company under the PPP contract up to the termination date. It also provides greater certainty to determine the amount payable to make whole the equity investors, since it does not imply the use of market valuation mechanism.

However, it does not take into account the performance of the Project Company after the termination date. Accordingly, there is a residual risk of misevaluation of the compensation, especially if the PPP contract is terminated at an early stage.

One key point to consider if choosing this approach is that there is a risk of double counting if the Project Company has taken on an additional amount of debt prior to the termination date. Accordingly, the amount of the payment should be adjusted to take into account the effect of any refinancing occurring before the date of termination, in order to avoid double counting. In any event, the choice between these three options should be carefully considered by the Public Partner to take into account the particulars of the asset, the market and the jurisdiction. The drafting in the *Standard Provisions* has used the Adjusted Base Case Approach.

21.3.2.4 Repayment for third party costs

The Project Company will likely incur certain costs as a result of the early termination of the PPP contract, including redundancy costs in relation to its own employees and its subcontractors, as well as other costs payable to its subcontractors in accordance with the terms of the relevant subcontracts. Where the termination is caused by the Public Partner, the Project Company should be made whole of any costs incurred in this respect. The Public Partner should however ensure that its liability incurred in relation to third party costs is limited, by:

- conducting due diligence over the key subcontracts;
- limiting the heads of costs for which it will offer compensation;
- capping the duration for which it will compensate any loss of profit to the subcontractors; and
- imposing an obligation on the Project Company to mitigate such costs (and to procure that its subcontractors will mitigate their own costs).

The principle and application of these provisions should be carefully considered depending on the local jurisdiction, especially with respect to the sums which may become due by the Public Partner in relation to redundancy payments.

21.3.2.5 Termination upon Project Company Default

If the PPP contract is terminated on the grounds of a default of the Project Company, the Senior Lenders should still be compensated, at least to some degree. This is because: (i) the Public Partner could otherwise benefit from the default of the Project Company (by, for instance, retaining the asset while paying no compensation) and would thus be incentivized to terminate the PPP contract, and: (ii) Senior Lenders would not agree to finance a PPP project where no compensation would be payable to them in case of Project Company default, (*i.e.*, the PPP project would not be "bankable").

Three options are generally considered for calculating the compensation in this case:

- *Debt-based compensation (the most common approach in emerging markets):* whereby the Project Company (or in reality the Senior Lenders) is compensated based on the amounts payable under the Senior Finance Documents. One major drawback is that, under this method, Senior Lenders have limited interest in ensuring that the PPP project performs, and can become less involved in monitoring and restructuring the PPP project. As a result, the level of compensation should be a percentage of the total debt (and not the full amount). This is commonly referred to as a "haircut".
- *Market value:* Where the asset is sufficiently liquid and can be reasonably expected to be retendered, the fairest approach is to calculate the compensation payable to the Project Company by reference to the market value of the infrastructure, as determined after a tendering procedure. This ensures, in theory, that the Public Partner will not pay to the Project Company more than the value of the infrastructure built by the Project Company. As a result, this calculation protects the Public Partner's interests while ensuring that the Public Partner does not unfairly benefit from the Project Company's default. However, it should be noted that Senior Lenders may, in certain jurisdictions or in relation to certain assets, be reluctant to rely on market-based valuation method for fear of undervaluation. This is particularly the case in emerging markets such as Romania. Public Partners should take a view as to whether market-based termination compensation could be contemplated, on a project-by project basis.
- *Book Value:* Although simpler, the calculation of compensation payments based on book value is not recommended, as the result may not accurately reflect the reality of the sums owed.

The choice between the aforementioned options constitutes an important policy issue for PIMU to consider. The *Standard Provisions* have used the debt-based compensation approach, which we consider the most appropriate for an emerging market such as Romania. Note that this option influences the statistical treatment of the PPP contract and needs to be assessed in combination with any other government financing provisions (*see: Theme 12.1.5 of the Statistical Guide*).

21.3.2.6 Termination upon prolonged Force Majeure

As discussed above, each Party should be able to terminate the PPP contract as a result of prolonged Force Majeure. It is generally considered that the risk of occurrence of a Force Majeure event should not be allocated to one single Party and that, accordingly, all financial losses should be shared. Although this may be adjusted on a case-by-case basis, the proposed provision is based on the principle that the Project Company is paid: (i) the amount of senior debt and: (ii) some or the entire amount of equity invested, but that it should not be compensated for future loss of revenues.

21.3.2.7 Method of payment

The method of payment of the termination compensation should also be considered by the Public Partner. The Public Partner would be paying any compensation due upon termination of the PPP contract as a lump sum, as it is generally not good practice for the Public Partner to pay compensation in several instalments (since the

Public Partner would in that case be paying interest on the default amount). The option to pay compensation in several instalments is not included in the *Standard Provisions*.

22. Assignment, change in control and subcontracting

22.1 Assignment and subcontracting

See: Clause 47.3 and 47.5 of the Standard Provisions.

With the exception of the cases expressly provided in the 2018 PPP Law: (a) the Public Partner and the Project Company may not assign or encumber their rights and obligations arising from the PPP contract, and: (b) the Private Partner is forbidden from transferring or encumbering its shares in the Project Company without the express and prior approval of the Public Partner and of the financing parties.

Moreover, except for the cases expressly provided in the 2018 PPP Law, the Private Partner and the Project Company are forbidden from: (a) concluding sub-concession agreements with respect to the assets, the services or the works awarded to them by the Public Partner by means of concession, as well as from: (b) assigning the performance of the PPP contract's subject matter to another person.

The clauses of the PPP contract must cover the procedure for the approval by the Public Partner of the contracts concluded by the Private Partner and the Project Company with affiliates of the Private Partner, as well as the procedure and limits applicable to subcontracting.

22.2 Change of control

See: Clause 47.4 (Change of Ownership and Change of Control) of the Standard Provisions.

The purpose of the Change of Control provisions is to restrict changes in the original shareholders/investors in a PPP project. Consequently, their drafting may need to be adapted to each specific corporate structure that the Private Partner creates for a PPP project.

The Public Partner should not refrain from expanding the scope of the Change of Control restrictions if this is appropriate on account of, *inter alia*, the nature of a given PPP project. For example, the Public Partner may consider prohibiting the transfer of control over sensitive PPPs (*e.g.*, school and hospital projects) to companies operating in sectors that might be considered controversial (*e.g.*, the tobacco and alcohol industries). Moreover, the Public Partner should expect proposals for additional Change of Control restrictions to be formulated by Senior Lenders (particularly by multilateral organizations) and for Senior Lenders to insist that such restrictions be included in the PPP contract.

23. Information and confidentiality

See: Clause 51 (Information and Confidentiality) of the Standard Provisions.

Traditionally, a confidentiality clause is a provision whereby the Parties undertake not to disclose information related to the PPP contract or the PPP project or at least certain commercially sensitive information contained therein. The modern approach of some governments, non-governmental organizations and international organizations is now moving towards more transparency towards the general public.

The purpose of a "transparent" confidentiality provision is to ensure that information on the PPP project and the PPP contract will be shared by the Project Company, to the fullest extent possible, with the Public Partner and, as appropriate, with the public at large. The underlying objectives can be multiple: (a) reducing the level of corruption; (b) reassuring the general public in regard to service standards and costs; (c) encouraging competition; (d) facilitating the monitoring of the PPP contract by the Public Partner; (e) having access to important commercial information etc.

Romania has laws or regulations imposing disclosure obligations on Public Partners and/or ensuring that citizens have full access to public procurement information[11]. This confidentiality clause has been drafted following an analysis of such provisions, and it is for the Public Partner to decide whether disclosing obligations should go beyond the obligations set forth by applicable Law.

PPP contracts typically include a schedule listing: (i) the information that will be treated as Commercially Sensitive Information, as well as: (ii) the period during which this treatment will apply. The PPP contract can include confidentiality terms for each category of Commercially Sensitive Information, or a general confidentiality term, or a combination between specific terms and a general term. The latter approach is the recommendable one, given that it allows Parties to customize confidentiality terms without having to establish an exhaustive list.

As a matter of principle, it is useful to distinguish between negotiated and non-negotiated clauses:

- Commercially Sensitive Information should not include clauses and schedules declared as non-negotiable by the Public Partner during the PPP contract's award procedure, given that the information contained therein is already known to the public (or, at least, to the other tenderers) and will have been reiterated without amendments in the signed PPP contract.
- By contrast, negotiated clauses (and schedules) may reiterate information contained in the Private Partner's tender or information negotiated and decided upon with the Public Partner, which may justify their declaration as confidential (naturally, subject to statutory obligations, such as the Public Partner's obligation to publish award notices at the end of successful award procedures). This does not mean that negotiated clauses (and schedules) should automatically be considered Commercially Sensitive Information, whether in whole or in part. The actual scope of the Commercially Sensitive Information will vary from project to project but, in any case, it should be limited to personal data, to technical or commercial secrets and to data that is protected by an intellectual property right, the disclosure of which could prejudice the legitimate interests of their rightful owner. The Private Partner must identify such Commercially Sensitive Information in all award documents originating from it and provide adequate evidence that the data in question qualifies as Commercially Sensitive Information.

24. Disputes Resolution Procedure

See: Clause 53 (Disputes Resolution Procedure) of the Standard Provisions.

24.1 Elements of a Dispute Resolution provision

PPP contracts are long and complex documents intended to run for many years where circumstances (and people responsible on the Public Partner and Project Company side) may change. There will inevitably be disputes (some minor, some major and some purely "technical" or financial) and a well drafted dispute resolution clause should include a method to encourage amicable settlement, a quick and cost-effective solution for technical issues and only if this fails moving to arbitration.

In a PPP contract, a dispute resolution clause typically specifies: (1) the governing law of the PPP contract (if not specified in a different clause); (2) an obligation to attempt to reach a quick and amicable settlement; (3) a specific dispute resolution mechanism for technical disputes which can be settled by an independent expert; (4) a recourse to international arbitration and precise procedural rules governing such process; (5) an obligation to continue performance of the PPP contract during the dispute; (6) a waiver of immunities; and (7) a joinder provision in the event of multiple related contracts. The clause should specify, at each step, if the decision is final and binding, and how the costs of the arbitrators or the experts should be allocated.

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[11] See: *Law no. 544/2001 on the free access to information of public interest*, as well as the various provisions concerning publicity contained in public procurement legislation.

24.2 Purpose of Dispute Resolution provisions

The purpose of a dispute resolution clause is to solve disputes: (1) in a cost-efficient manner; (2) in a time efficient manner; (3) following a clear process where the procedural rules have been agreed upon BEFORE the dispute and in a way that is the less damaging possible for the relationship of the Parties; and (4) pursuant to a procedure where the Project Company is certain that the process will be fair and that a favorable decision will be enforced. This final provision is crucial for investors and for bankability of PPP contracts as it is often feared that local courts might be unable to deliver an impartial judgment.

24.3 Rules of reputable (international) arbitration institutions

Instead of drafting an overly long dispute resolution clause, it is recommended to submit the PPP contract to the rules of an independent international arbitration institution (such as the International Chamber of Commerce ("**ICC**"), which is referred to as such in the *Standard Provisions* – *see: Clause 53.4 of the Standard Provisions*).

24.3.1 Mediation, dispute panels and dispute boards

The relevancy and the efficiency of mediation and dispute boards are much debated with fervent proponents and strong opponents. There are many ways to designate a dispute board or dispute panel. It can be composed of independent mediators or it can be part of an escalation process composed of senior executives of both Parties. The key issue is often whether the decision of the dispute board or dispute panel will be final and binding or if it is only advisory. In the event the decision of a board or panel is not final and binding, the process can risk being regarded as slowing down dispute resolution in a PPP contract of high importance for the economy of Romania. **We have not included this option in our recommended clause**.

24.3.2 Independent Experts for technical disputes

For purposes of time and cost efficiency, it is recommended that a clause be provided for dealing with "technical disputes". As the most important element of such clauses is the definition of what constitutes a technical dispute, and in order to avoid long pre-litigation discussions on this issue, there is a benefit in listing each clause of the PPP contract under which a dispute is considered to be technical. The process is, therefore, straightforward. Of course, the Parties may agree to submit to the technical dispute process a matter that is not on the list, and the PPP contract should allow them to do so. For this process of "technical dispute resolution" to be efficient, it is recommended that the determination of the technical expert should be final and contractually binding, except in the case of manifest error or fraud. This approach should, however, be confirmed by due diligence, as certain jurisdictions and international conventions will not allow the determination of an expert to be final and binding even if this is specifically agreed in the PPP contract.

24.3.3 Recourse to international arbitration and public policy

Submission to international arbitration is allowed under the 2018 PPP Law. Romania is subject to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. Moreover, according to the Romanian Code of Civil Procedure, any foreign arbitral award is recognized and may be enforced in Romania provided that: (a) the dispute forming the object thereof may be settled by arbitration in Romania and that: (b) the award does not contain any provisions which are contrary to public order under the Romanian private international law. The court hearing a claim for the recognition and enforcement of a foreign arbitral award may not reexamine the award on its merits.

24.3.4 Waiver of immunities

For many Project Companies and Senior Lenders, a "clean" waiver of sovereign immunity clause is a customary provision expected by the investor community when entering into commercial contracts with sovereigns. This approach is reflected in the proposed provision.

24.3.5 Consolidation

The PPP contract will be part of wider "network of agreements" between various parties. The Project Company may, for example, enter into a PPP contract with the Public Partner regarding the underlying facility, but all cash flows may be governed by a separate agreement between an off-taker and the Project Company. When this is the case, the Project Company may require that all the agreements of the PPP project contain a similar consolidation provision, whereby all parties to the related contracts agree to submit disputes to the same arbitral tribunal, under the same rules.

For greater efficiency, it is recommended that all agreements contain similar dispute resolution clauses. The same principle does not, however, apply in regard to agreements concluded with sub-contractors, as disputes arising under those contracts should be the sole responsibility of the Project Company.

25. Amendments

The PPP contract may be amended in accordance with the provisions of the law that governed its award procedure. The amendment must also be approved by the deliberating authority that approved the signing of the PPP contract initially. The reliance on contract revision clauses is permitted, provided that these clauses were included in the award documentation in a clear, precise and unequivocal manner.

26. Governing law and jurisdiction

See: Clause 60 (Governing Law and Jurisdiction) of the Standard Provisions.

The 2018 PPP Law requires that PPP contracts be governed by Romanian law.