EMERGENCY ORDINANCE No. 39/2018 of 10 May 2018
on public-private partnerships

Consolidated version following the adoption of the following acts amending and supplementing Emergency Ordinance No. 39/2018:
Emergency Ordinance No. 114/2018,
Emergency Ordinance No. 43/2019,
Emergency Ordinance No. 7/2020,
Act No. 7/2024,
Government Emergency Ordinance No. 31/2024

Having regard to the need to fulfil the provisions of the 2018–2020 Government Programme, approved by Decision No. 1/2018 of the Romanian Parliament on the vote of confidence in the Government, concerning the objectives of economic growth and the consolidation of fiscalthrough a significant increase in investment, taking into account the commitment to launch public investment projects with a significant impact on the economy and to stimulate private investment, in accordance with the Government Programme, the period 2018–2020 will be one in which the focus will be on increasing investment, both that financed from the budget or through the accelerated absorption of European funds, and through the stimulation of private investment. Macroeconomic consolidation will be achieved through a combination of fiscal, budgetary and monetary policies so that, whilst maintaining macroeconomic balances, an increase in the level of well-being can be achieved.

Given that the stimulation of private investment is proposed to be achieved through two cross-sectoral approaches involving the active participation of the state, namely by expanding public-private partnership projects and through state aid granted by the Government – measures which may affect budgetary balances if not implemented very rapidly, so that the second-round macroeconomic and budgetary effects become visible – in view of the fact that these measures are in the general public interest and constitute urgent and extraordinary circumstances whose regulation cannot be postponed,

pursuant to Article 115(4) of the Constitution of Romania, as republished,

the Government of Romania hereby adopts this Emergency Ordinance.

ART. 1

(1) This Emergency Ordinance regulates the conclusion, implementation and termination of public-private partnerships.

(2) The purpose of a public-private partnership is the construction or, where applicable, the refurbishment and/or extension of one or more assets that will form part of the public partner's assets and/or the operation of a public service, subject to the provisions of this Emergency Ordinance.

ART. 2

The provisions of this Emergency Ordinance shall be applied by the public partner to justify the initiation of a procedure for the award of a public-private partnership contract and the implementation of the project, subject to the prior approval of the project feasibility study, which shall demonstrate, in addition to the main elements set out in Article 19, that more than half of the revenue to be generated by the project company from the use of the asset(s) or the operation of the public service forming the subject matter of the project derives from payments made by the public partner or by other public entities for the benefit of the public partner.

ART. 3

The public-private partnership mechanism is characterised by the following main elements:

a) cooperation between the public partner and the private partner with a view to implementing a public project;

b) the relatively long duration of the contractual relationship, exceeding 5 years, which allows the private partner to recoup its investment and make a reasonable profit;

c) the financing of the project, mainly from private funds and, where appropriate, through the pooling of private and public funds;

d) the achievement of the objective pursued by the public partner and the private partner;

e) the allocation of risks between the public partner and the private partner, depending on each contracting party's ability to assess, manage and control a particular risk.

ART. 4

(1) The forms of public-private partnership are as follows:

a) contractual public-private partnership – a public-private partnership established on the basis of a contract concluded between the public partner, on the one hand, and the private partner, on the other hand, the contract to be implemented through a project company wholly owned by the private partner;

b) institutional public-private partnership - a public-private partnership established under a contract concluded between the public partner and the private partner, whereby the public partner and the private partner set up a new company, which will act as a project company and which, following its registration in the Companies Register, becomes a party to the relevant public-private partnership contract.

(2) In the case of both contractual public-private partnerships and institutional public-private partnerships, if another public entity intends to support the implementation of the project by assuming one or more payment or guarantee obligations towards the private partner, for the benefit of the public partner, it may do so only where the payment or guarantee obligation has been provided for in the feasibility study and in the tender documentation for the procedure, in a clear, precise and unambiguous manner, specifying the conditions under which it may be fulfilled.

(3) The public entity's assumption of the obligation(s), in accordance with the provisions of paragraph (2), may take place under the conditions set out in the tender documentation, as applicable:

a) after the public partner has designated the successful tenderer in the public-private partnership contract award procedure, but before the contract is signed, in which case the public entity thereby becomes a party to that contract from the moment it is concluded; or

b) after the public-private partnership contract has been signed, during its performance, in which case the public entity concludes an addendum with the parties to that contract, setting out the mutual rights and obligations, and the public entity becomes a party to the contract in question from the moment the addendum is concluded.

ART. 5

Public-private partnership contracts may also be concluded for the purpose of carrying out a relevant activity in the public utility sectors provided for in Law No. 99/2016 on sectoral procurement, as subsequently amended and supplemented, as well as for the provision by a private operator of community public utility services as set out in the Law on Community Public Utility Services No. 51/2006, as republished, as subsequently amended and supplemented, in accordance with the provisions of Articles 1 and 2.

ART. 6

For the purposes of this Emergency Ordinance, the terms and expressions set out below shall have the following meanings:

a) affiliate – any person over whom a dominant influence may be exercised, directly or indirectly, or who may exercise a dominant influence, or who, as a result of an association with a person, is under the dominant influence of another person. A controlling influence is presumed to exist where a person, directly or indirectly, holds the majority of the subscribed share capital or controls the majority of the voting rights attached to the issued shares or partnership interests, or is able to appoint more than half of the members of the administrative, management or supervisory body;

b) financiers of the public-private partnership contract – natural or legal persons who make available to the project company the financial resources necessary for the private partner to fulfil the obligations assumed under the public-private partnership contract, including sovereign development and investment funds and privately managed pension funds; notwithstanding the provisions of Government Emergency Ordinance No. 32/2012 on undertakings for collective investment in transferable securities and investment management companies, as well as amending and supplementing Law No. 297/2004 on the capital market, approved with amendments and supplements by Law No. 10/2015, as subsequently amended and supplemented, open-ended investment funds and investment companies may participate in the financing of public-private partnership contracts;

c) the financing of a public-private partnership contract – involves the financing of investments made under the contract and the financing of the use of the asset(s) or the operation of the public service that forms the subject matter of the contract;

d) private investor – any legal person or association of legal persons, whether Romanian or foreign, falling within the categories set out in Article 8, which has expressed an interest in participating in the procedure for the award of the public-private partnership contract;

e) investments made under the project – investments aimed at the construction or, where applicable, the refurbishment and/or extension of an asset or assets under the public-private partnership contract;

f) private partner – the private investor or consortium of private investors designated as the successful bidder in the procedure for the award of a public-private partnership contract;

g) project company – a company established and operating in accordance with the provisions of the Companies Act No. 31/1990, as republished, with subsequent amendments and additions, for the purpose of implementing the public-private partnership contract;

h) financial close – a stage defined in the public-private partnership contract and in the financing contract or contracts concluded with the financiers of the public-private partnership contract, representing the date on which all the conditions precedent for the entry into force of the financiers' obligation to make available the funds necessary to finance the public-private partnership contract have been fulfilled-private partnership contract.

ART. 7

For the purposes of this Emergency Ordinance, a 'public partner' means any of the entities which are contracting authorities or contracting entities within the meaning of Article 4 of Law No 98/2016 on public procurement, as subsequently amended and supplemented, of Article 4 of Law No 99/2016, as subsequently amended and supplemented, and Articles 9 and 10 of Law No. 100/2016 on works concessions and service concessions, as subsequently amended and supplemented.

ART. 8

Any legal person or association of legal persons may participate in the procedure for the award of a public-private partnership contract, provided that it does not fall within the categories of public partners set out in Article 7.

ART. 9

The private investor designated as the successful bidder in the award procedure shall, in the case of a contractual public-private partnership, establish the project company with which the public-private partnership contract is concluded; and, in the case of an institutional public-private partnership, shall establish, together with the public partner, the project company which shall become a party to the public-private partnership contract.

ART. 10

The financing of investments carried out under public-private partnership contracts may be provided, as appropriate:

a) in full, from financial resources provided by the private partner from its own sources or raised by the private partner from the financiers defined in accordance with Article 6(b);

b) from financial resources provided by the private partner, together with the public partner;

c) from financial resources provided by sovereign development and investment funds, privately managed pension funds, as well as investment funds and investment companies, subject to the conditions of this Emergency Ordinance;

d) through the issue of corporate bonds by the project company for the purpose of implementing the public-private partnership project.

ART. 11

The private partner shall provide the funding necessary to carry out the investments from its own resources and/or from resources raised from financiers.

ART. 12

(1) The public partner may contribute to the financing of the investments with public funds, including post-accession non-repayable external funds and the corresponding national contribution, subject to the conditions laid down in national and European Union legislation.

(2) Repealed

(3) The public partner's share of the funding for the implementation of the investments may also include contributions from public investment funds or companies.

(4) Repealed

ART. 13

(1) The public partner may contribute to the implementation of the public-private partnership project in one or more of the following ways, subject to the conditions specified in the tender documentation and in the public-private partnership contract, as follows:

a) the granting, without the need to undergo award procedures other than those provided for in Article 25, of certain rights in favour of the private partner, subject to the terms of the public-private partnership contract;

b) cash contributions to the share capital of the project company;

c) the assumption of payment obligations towards the private partner or of payment obligations relating to the implementation of the investments provided for in Article 12(1);

d) the provision of guarantees in favour of the financiers of the public-private partnership contract who are credit institutions or financial institutions.

(2) The public partner may make payments from public funds to the private partner exclusively during the operation and maintenance of the project carried out under the public-private partnership, with the exception of contributing to the financing of investments carried out within the framework of the project, under the conditions set out in paragraph (1) and in Article 12.

(3) With a view to the establishment and use of the public funds necessary to make payments to the private partner in accordance with the provisions of paragraph (2), in accordance with the law, budgetary funds shall be allocated to finance public-private partnership contracts within the budgets of the chief authorising officers of public authorities acting as public partners or which have public partners under their subordination, authority or coordination in the public-private partnership contract.

(3^1) Projects funded under a public-private partnership contract shall be set out in a separate annex within the budgets of the chief authorising officers of public authorities acting as public partners or which have public partners under their subordination, authority or coordination in the public-private partnership contract.

(3^2) In order to secure the funds necessary for the implementation of the public-private partnership, relating to preparation and investment costs, proposals for commitment appropriations and budgetary appropriations from public sources shall be set out in the feasibility study and approved as follows:

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

b) by the adoption of a decision by the deliberative authority approving the feasibility study, in the case of local public administration projects, where the funds are provided exclusively from the budgetary resources of the local public administration;

c) by the adoption of a Government decision, based on the decision of the deliberative authority approving the feasibility study, in the case of local public administration projects requiring contributions from the State budget.

(3^3) With a view to the establishment and use of public funds for participation in the financing of investments, in accordance with paragraph (3^2), public funds shall be provided for in the public partner's budget as the final component of the financing of investments carried out under the public-private partnership contract, following the provision of financing by the private partner.

(3^4) Contributions from public resources to be made during the operational phase shall be approved by the adoption of:

a) a Government decision approving the public-private partnership contract, in accordance with Article 17(1)(d), for central government projects;

b) a decision by the deliberative authorities, in accordance with Article 17(1)(d), for local public administration projects, where the sums are provided exclusively from the budgetary resources of the local public administration;

c) a Government decision, based on the decision of the deliberative authority approving the public-private partnership contract, in accordance with Article 17(1)(d), in the case of local public administration projects, for projects requiring contributions from the state budget.

(3^5) The amounts allocated from the state budget for local public administration projects shall be included in the budget of the Ministry of Development, Public Works and Administration, on the basis of requests from the chief authorising officers of public authorities acting as public partners or which have public partners under their supervision, authority or coordination in the public-private partnership contract, subject to compliance with the provisions of paragraph (3^2)(c) and, respectively, paragraph (3^4)(c). (3^6) Where, for public-private partnership projects, there is an opinion from the National Institute of Statistics or, where applicable, an opinion from Eurostat classifying the projects in government accounts, the chief authorising officers of public authorities acting as public partners or having public partners under their subordination, authority or coordination in the public-private partnership contract, or the Ministry of Development, Public Works and Administration, in the case of public-private partnership projects of local public administration that include a component of investment funding from the state budget, shall be obliged to complete the annex provided for in paragraph (3^1) with data relating to the annual impact on the budget deficit and public debt.

(3^7) The Ministry of Finance, through its specialist unit, the Public Investment Management Unit, shall prepare half-yearly reports for the Government on the medium- and long-term impact on the budget deficit and public debt of public-private partnership projects classified both within and outside the government accounts, in accordance with the opinion of the National Institute of Statistics or, where applicable, Eurostat, based on reports received from the chief authorising officers for central government projects and from local government authorities for the public-private partnership contracts they have concluded.

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

(5) Repealed

(6) Repealed

(7) Repealed

ART. 14

(1) Under the public-private partnership contract, the public partner may transfer or grant to the private partner the right to collect and use, for the purposes of carrying out the project, charges from the beneficiaries of the public good(s) or service that form the subject matter of the public-private partnership contract. The types of charges and their levels are governed by the provisions of the law.

(2) The project's revenue arising from the collection of charges by the project company shall be supplemented by the public partner's payment obligations to the private partner, where applicable, in accordance with the provisions of the public-private partnership contract.

ART. 15

The direct beneficiary of the use of the asset(s) or public service forming the subject matter of the public-private partnership may be, under the conditions laid down in the public-private partnership agreement, either the public partner or another public entity, or the general public.

ART. 16

(1) The private partner may provide security in respect of the claims and rights held under the public-private partnership contract, exclusively in favour of the financiers of the public-private partnership contract who are credit institutions, financial institutions, or sovereign development and investment funds, investment funds or investment companies or privately managed pension funds, and only for the duration of the public-private partnership contract.

(2) The private partner may provide security over the shares or equity interests held in the project company, exclusively in favour of the financiers of the public-private partnership contract who are credit institutions, financial institutions or privately managed pension funds, and only for the duration of the public-private partnership contract.

(3) The public-private partnership contract shall specify the procedure for the assumption or discharge of the guarantees referred to in paragraphs (1) and (2), in the event of the contract's termination prior to

the expiry of the term for which it was concluded, with a view to protecting the public interest and the interests of the contract's financiers.

(4) The public partner may provide guarantees and assume obligations under contracts establishing direct legal relationships between the public partner and the financiers of the public-private partnership contract; such contracts may also be signed by the private partner.

ART. 17

(1) In order to conclude and commence the performance of the obligations under a public-private partnership contract, the following steps must be taken:

a) the public partner must carry out a feasibility study;

b) approval of the feasibility study by the Government for central government projects or, where applicable, by the deliberative authorities for local government projects; the feasibility study shall conclude with a signature page, whereby the contracting authority/entity responsible for carrying out the feasibility study endorses the proposed data and solutions, and which shall contain at least the following details: contract no. / date, the

and first names in full of the consultants/consultancy firms, and of the person responsible for the project – project manager/project director; the feasibility study may be approved together with the main technical and economic indicators set out in Government Decision No. 907/2016 on the stages of preparation and the framework content of the technical and economic documentation relating to investment objectives/projects financed from public funds, as subsequently amended and supplemented, indicators drawn up on the basis of the feasibility study;

c) completion of the procedure for awarding the public-private partnership contract; the supporting study shall be resubmitted to the Government for approval whenever substantial amendments to the main elements set out in Article 19 are required;

d) approval by the Government of the public-private partnership contract resulting from the conclusion of negotiations and initialled by the parties, in the case of central government projects, or, where applicable, by the deliberative authorities in the case of local government projects;

e) the signing of the public-private partnership contract;

f) fulfilment of all the conditions precedent set out in the public-private partnership contract, including financial close;

g) where the contracting authority/entity, at the time of approval of the feasibility study, has also drawn up the feasibility study relating to the proposed investment, the project justification study may be approved together with the main technical and economic indicators set out in Government Decision No 907/2016, as subsequently amended and supplemented, which indicators are drawn up on the basis of the feasibility study.

(2) The public partner is obliged to submit to the National Institute of Statistics, within 30 days of signing, a certified copy of the public-private partnership contract.

(3) Any amendment to the public-private partnership contract during its term shall be made with the approval of the Government or the deliberative authority that approved the conclusion of the contract, as the case may be.

(4) Upon the proposal of the public authorities referred to in Article 13(3), the Government may decide by resolution that certain projects which it considers strategic shall be prepared and awarded by those authorities for the sector in which public-private partnership investments are to be implemented.

ART. 18

(1) The initiative to carry out a project under a public-private partnership lies with the public partner.

(2) To prepare the feasibility study, the public partner may contract the necessary consultancy services depending on the specific nature of the project, including technical, financial and legal services.

(3) The costs incurred in carrying out the feasibility study and conducting the award procedure shall be borne by the public partner.

ART. 19

The feasibility study must highlight the following key elements, which justify, from an economic perspective, the implementation of the project under a public-private partnership:

a) the project's financial viability and a comparison of alternative contractual options/arrangements for implementing the project;

b) the risk allocation structure for each alternative option for implementing the project;

c) a characterisation of the project in relation to the public deficit and public debt, calculated in accordance with the methodology applicable under European Union legislation;

d) the project's financial viability;

e) the economic efficiency of the project;

f) the feasibility study shall contain minimum conceptual technical solutions for the implementation of the investments;

i) for investment projects of national interest in the transport sector, by way of exception to the provisions of Government Decision No 907/2016, as subsequently amended and supplemented, the technical and economic documentation approved in accordance with Article 42 of Law No. 500/2002 on public finances, as subsequently amended and supplemented, in the form of a pre-feasibility study or feasibility study, shall be deemed equivalent to the approval of the feasibility study in accordance with the provisions of Article 13((3^2)(a).

ART. 20

(1) The project's financial viability represents the project's general ability to mobilise the financial resources necessary to cover its costs.

(2) The project's financial viability relates to the financial capacity of the public partner and any other public entities involved, necessary to fulfil the financial obligations assumed under the public-private partnership contract, and, where applicable, the financial capacity of the direct beneficiaries of the use of the asset(s) or public service that forms the subject matter of the public-private partnership.

ART. 21

The feasibility study shall include an identification of the categories of risk associated with the implementation of the project, a quantification of such risks, and a presentation of alternatives for the allocation of risks between the contracting parties, depending on each party's capacity to manage the risk assumed.

ART. 22

The feasibility study must demonstrate the extent to which the obligations to be assumed by the public partner under the public-private partnership contract affect the public debt and budget deficit limits, calculated in accordance with the methodology applicable under European Union legislation.

ART. 23

(1) The feasibility study must analyse and determine the financial viability of the project under a public-private partnership arrangement.

(2) A project is considered eligible for funding if its technical, financial and legal structure enables it, under market conditions, to attract loans and/or other financial resources, with a view to securing funding for the project throughout its duration.

ART. 24

(1) The economic efficiency of the project is demonstrated by the preparation and inclusion, as part of the feasibility study, of a cost-benefit analysis setting out the arguments justifying the implementation of the project under a public-private partnership.

(2) The analysis of the project's economic efficiency shall compare the estimated costs over the entire duration of the contract, adjusted for the value of the risks involved in the scenario where the project is carried out by the public partner using public funds, with the costs of carrying out the project under a public-private partnership. This comparative analysis shall take into account the net discounted costs associated with the implementation of the project.

ART. 25

(1) Public-private partnership contracts shall be awarded in accordance with the provisions of Law No. 98/2016, as subsequently amended and supplemented, Law No. 99/2016, as subsequently amended and supplemented, or Law No. 100/2016, as subsequently amended and supplemented, as appropriate, in accordance with the conclusions of the feasibility study drawn up on the basis of the subject matter of the contract and the manner in which a significant part of the economic operating risk is transferred in connection with the operation of the works and/or services in question.

(2) Notwithstanding Article 10 of the Methodological Rules for the application of the provisions relating to the award of public procurement contracts/framework agreements under Law No. 98/2016 on public procurement, approved by Government Decision No. 395/2016, as subsequently amended and supplemented, Article 10 of the Methodological Rules for the implementation of the provisions relating to the award of sectoral contracts/framework agreements under Law No. 99/2016 on sectoral procurement, approved by Government Decision No. 394/2016, as subsequently amended and supplemented, and Article 8 of the Methodological Rules for the application of the provisions relating to the award of works and services concession contracts under Law No. 100/2016 on works and services concessions, approved by Government Decision No. 867/2016, as subsequently amended and supplemented, the award procedure shall commence with the submission of the tender documentation in accordance with the legislation laid down in paragraph (1) and shall be finalised upon the signing of the report on the award procedure and its annexes; the conclusion of the public-private partnership contract shall then take place in accordance with this Emergency Ordinance.

ART. 26 Repealed

ART. 27

If, during the selection procedure, it is not possible to sign the public-private partnership contract, in accordance with the law, with any of the private investors who have submitted tenders, the public partner shall be entitled to launch a new procedure.

ART. 28

(1) Where the provisions of Article 39 apply, the selection procedure for the new private partner shall be conducted in accordance with the provisions of Article 25.

(2) Where, under the applicable public-private partnership contract, the public partner has direct legal relations with the project's financiers, the public partner's appointment of the new private partner shall be made following consultation with the project's financiers, in accordance with the provisions of the public-private partnership contract in question.

(3) Where it is not possible to conclude a contract with a new private partner, the public partner shall terminate the public-private partnership contract in question.

ART. 29

The provisions of Law No. 101/2016 on remedies and appeals in relation to the award of public procurement contracts, sectoral contracts and works and services concession contracts, as well as on the organisation and functioning of the National Council for the Settlement of Appeals, as subsequently amended and supplemented, shall apply mutatis mutandis.

ART. 30

A public-private partnership contract concluded in accordance with the provisions of this Emergency Ordinance is an administrative contract.

ART. 31

(1) Where public entities form a consortium for the purpose of awarding and concluding a public-private partnership contract, they must set out in the consortium agreement:

a) the manner of allocation amongst the partners and the conditions for exercising the rights and obligations arising from the status of public partner, throughout the performance of the public-private partnership contract, in compliance with the legal provisions governing public property;

b) the manner in which the asset(s) are to be used and the public service forming the subject matter of the public-private partnership is to be operated;

c) the manner of distribution amongst the partners upon termination of the contract, and the subsequent conditions for exercising rights over the asset(s) forming the subject matter of the public-private partnership, in accordance with the legal provisions governing public property.

(2) The project company shall be established for the sole purpose of carrying out all activities necessary, directly and indirectly, to fulfil the objective of the public-private partnership project.

ART. 32

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

a) the scope of the public-private partnership project;

b) the conditions for the establishment and operation of the project company;

c) the deadlines for the completion of the works;

d) the rights conferred on the private partner, including in respect of the assets with which the public partner contributes to the implementation of the public-private partnership project;

e) the rights and obligations of the public partner and the private partner throughout the duration of the public-private partnership project, designed to ensure compliance with the intended use of the assets involved in the public-private partnership project and the conditions for the provision of the public service;

f) the legal regime governing the assets involved in the project, including those created or acquired during the course of the project, and the procedure for transferring these assets upon termination of the contract, in accordance with the legal provisions governing public property;

g) the duration of the contract;

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

i) the remuneration of the private partner, setting out in detail the method of calculation and payment, including the possibility of offsetting or deducting amounts due to the private partner against any damages or other sums owed by the private partner;

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

k) the characteristics and performance targets of the asset or assets to be delivered under the project, as well as the performance indicators for the public service that is the subject of the project;

l) the arrangements for the public partner to monitor and verify compliance with the private partner's obligations;

m) the procedure for the public partner's approval of contracts entered into by the private partner with the private partner's affiliates;

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

o) the insurance policies to be taken out and maintained throughout the duration of the public-private partnership project;

p) procedures for the assumption of the private partner's rights and obligations by the project's funders and/or a new private partner;

q) contractual liability, including sanctions and penalties applicable to the private partner in the event of non-performance of its obligations, in particular where performance targets or indicators are not achieved or maintained, as well as, where applicable, the possibility of offsetting the sums thus owed by the private partner against payments due from the public partner under the public-private partnership contract;

r) the public partner's right to unilaterally amend certain parts of the contract and the public partner's right to unilaterally terminate the contract, as well as the conditions for exercising these rights in accordance with the provisions of Article 35, including the method for determining and paying any compensation due to the private partner;

s) mechanisms for sharing the profit from refinancing;

t) the procedure and limits on subcontracting;

u) the grounds for termination of the contract and the conditions under which the continuity of the public service provided under the public-private partnership is ensured;

v) clauses governing the compensation payable by the parties in the event of early termination of the contract;

w) any other matters which, in accordance with the provisions of this Emergency Ordinance, form part of the public-private partnership contract.

ART. 33

(1) The duration of the public-private partnership contract is determined, primarily, by the payback period for the investments to be made by the project company and by the method of financing those investments.

(2) The duration shall be determined in such a way as to:

a) artificial restrictions on competition are avoided;

b) ensure a reasonable profit for the sector in question, resulting from the exploitation of the asset(s) and the operation of the public service that forms the subject of the project;

c) to ensure a reasonable and affordable level of prices for the services covered by the project, to be paid by the service users.

ART. 34

(1) The public partner may, without undergoing a procurement procedure distinct from that provided for in Article 25, grant to the project company, in respect of assets intended for the implementation of the project and over which it has the right of disposal:

a) concession rights over public property or rights arising from the letting of public property; the operation of such public property shall be carried out without the collection of royalties or, where applicable, rent, by way of derogation from the provisions of Article 307 and Article 333 of Government Emergency Ordinance No. 57/2019 on the Administrative Code, as subsequently amended and supplemented;

b) superficies rights, easements or rights of use over privately owned assets.

(2) The private partner shall not be permitted to sub-concession, in whole or in part, the assets, services or works covered by the concession, nor shall it be permitted to entrust the performance of the subject matter of the contract to another person, except in the cases specifically provided for in this Emergency Ordinance.

ART. 35

(1) For exceptional reasons relating to the public interest, the public partner may unilaterally amend or, where appropriate, unilaterally terminate the public-private partnership contract, subject to the following conditions:

a) this possibility, including the categories of exceptional grounds relating to the public interest, has been included in the tender documentation in a clear, precise and unambiguous manner, as well as in the public-private partnership contract;

b) the amendment to the contract does not alter the general nature of the original contract;

c) subject to prior notification of the private partner and the funders of the public-private partnership project.

(2) For the purposes of this Emergency Ordinance, exceptional grounds relating to the public interest may include matters such as those relating to public health, environmental protection, safety and quality standards, the affordability of the tariff for service users, and the need to ensure unrestricted access to a specific public service.

(3) Where the unilateral amendment or termination of the contract causes the private partner to suffer loss, the private partner is entitled to fair compensation, determined in accordance with the provisions of the tender documentation and the public-private partnership contract.

(4) The public-private partnership contract must contain a mechanism for adjusting payments to the private partner in the event that a unilateral amendment to the contract by the public partner is favourable to the private partner, whether through a reduction in the works to be carried out or by any other means.

(5) In the event of a disagreement regarding the amount of compensation or adjustment, this shall be determined by the competent court or arbitral tribunal. Such a disagreement shall under no circumstances permit the private partner to fail to perform or to perform its obligations inadequately.

ART. 36

The public-private partnership contract may be amended only in the cases and under the conditions for amending the contract provided for by the law governing the award procedure, in accordance with the provisions of Article 25.

ART. 37

The public-private partnership contract must specify the assets or categories of assets which, during the term of the contract or upon its termination, are to become the property of the public partner or the private partner, respectively, including, where applicable:

a) assets created during the performance of the contract as a result of the investments undertaken by the private partner;

b) assets which the project company must transfer to the public partner upon the termination, for any reason, of the public-private partnership contract;

c) assets which the public partner has the option to purchase upon the termination, for any reason, of the public-private partnership contract;

d) the assets that remain the property of the project company upon the termination, for any reason, of the public-private partnership contract.

ART. 38

(1) Upon the termination, for any reason, of the public-private partnership contract, the rights conferred by the public partner in favour of the private partner shall cease, and the assets constructed or acquired by the private partner and constituting the subject matter of the public-private partnership contract, as well as those necessary for the provision of the public service which are to be transferred to the public partner, must be free of encumbrances, in good working order and capable of being operated in accordance with the standards applicable to the public service and/or similar assets, under the terms set out in the public-private partnership contract.

(2) Upon termination of the public-private partnership contract following the expiry of the term for which it was concluded, the assets constructed or acquired by the project company and forming the subject matter of the public-private partnership contract, as well as those necessary for the provision of the public service, shall be transferred to the public partner free of charge.

(3) Upon termination of the public-private partnership contract for any reason, except where the contract has expired, the assets constructed or acquired by the project company and forming the subject matter of the public-private partnership contract, as well as those necessary for the provision of the public service, including assets for which acceptance has not been carried out upon completion of the works, shall be transferred to the public partner, subject to the conditions set out in the public-private partnership contract, with payment of compensation calculated in accordance with a mechanism provided for in the tender documentation and the public-private partnership contract.

(4) If the termination of the contract was due to the fault of the private partner, any sums owed by the private partner as damages, determined in accordance with the public-private partnership contract, shall be deducted from the amount of compensation owed by the public partner under paragraph (3) for the transfer of the assets.

(5) If the termination of the contract was due to the fault of the public partner, the amounts owed by the public partner as damages, determined in accordance with the public-private partnership contract, shall be added to the amount of compensation owed by the public partner under paragraph (3) for the transfer of the assets.

ART. 39

Where the private partner fails to fulfil its obligations under the public-private partnership contract or its obligations towards the project's financiers, the public partner may, on its own initiative or at the request of the project's financiers, replace the private partner if this clause has been included in the tender documentation and in the contract, subject to the conditions relating to the review clause, in accordance with the law governing the contract award procedure, as provided for in Article 25.

ART. 40

(1) Upon termination of the public-private partnership contract for any reason other than the expiry of the contract term, the public partner may acquire the shares or equity interests of the private partner in the project company, in exchange for a price determined in accordance with the provisions of the tender documentation and the public-private partnership contract, subject to the provisions of Article 38. If the termination of the contract was due to the fault of the private partner, any sums owed by the private partner as compensation, in accordance with the public-private partnership contract, shall be deducted from the aforementioned price.

(2) In the event of the termination of the public-private partnership contract upon its expiry, the public partner may take over, free of charge, the shares or equity interests held by the private partner in the project company, in accordance with the provisions of the public-private partnership contract.

ART. 41

The public partner shall have the right, throughout the term of the public-private partnership agreement, to monitor and supervise the manner in which the private partner fulfils its obligations arising from the public-private partnership agreement and/or from the applicable legal provisions.

ART. 42

(1) Except in the cases expressly provided for in this Emergency Ordinance, the private partner shall not be permitted to assign or encumber its rights and obligations arising from the public-private partnership contract.

(2) The private partner may not dispose of or encumber the shares or equity interests held in the project company, except with the express and prior consent of the public partner and the project financiers, save as expressly provided for in this Emergency Ordinance.

ART. 43

(1) The public-private partnership agreement shall be concluded in accordance with Romanian law, regardless of the nationality of the private partner.

(2) Jurisdiction over any disputes arising from the conclusion and/or performance of public-private partnership contracts is established by Law No. 101/2016, as subsequently amended and supplemented.

ART. 44

(1) Public authorities intending to carry out public-private partnership projects shall, by decision of the head of the public authority, organise and establish internal units for the coordination of public-private partnership projects, organised as internal structures without legal personality, dedicated to the preparation, award and implementation of public-private partnership contracts.

(2) In order to fulfil the duties set out in this Emergency Ordinance, the internal units for the coordination of public-private partnership projects may be assisted in their work by technical, financial and legal advisers, as appropriate, contracted in accordance with the law.

(3) Public-private partnership contracts concluded prior to the date of entry into force of this Emergency Ordinance shall be subject to the legal provisions in force at the time they were

concluded, in all matters relating to their conclusion, amendment, interpretation, effects, performance and termination.

ART. 45

On the date of entry into force of this Emergency Ordinance, Law No. 233/2016 on public-private partnerships, published in the Official Gazette of Romania, Part I, No. 954 of 25 November 2016, as subsequently amended and supplemented, shall be repealed.