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FINANCING PUBLIC-PRIVATE PARTNERSHIP PROJECTS ON CAPITAL MARKETS. POTENTIAL SOLUTIONS UNDER ROMANIAN LAW

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FINANCING PUBLIC-PRIVATE PARTNERSHIP PROJECTS ON CAPITAL MARKETS. POTENTIAL SOLUTIONS UNDER ROMANIAN LAW

Simona GHERGHINA [1]

Abstract

Considering the alternative solutions to public procurement offered by the public-private partnership structures, this study analyzes the main choices for financing such projects, as the access to financial resources tends to be a significant challenge in the current economic context generated by the financial crisis. Starting from the legal texts in the special Romanian law recently enacted to regulate institutional public-private partnerships, the study pleads for the recognition of potential implication of public funds in the financing structure of PPP projects, including here structural funds and other forms of public support available at European level. Further, such public support, at least by public guarantees, should be addressed to both bank debt and bonds financing. The potential success of a bond issuance by project companies would largely depend on public guarantees.

Keywords:

public-private partnership, public funds, capital markets, bonds, public guarantees, state aid

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GHERGHINA, S., (2011) FINANCING PUBLIC-PRIVATE PARTNERSHIP PROJECTS ON CAPITAL MARKETS. POTENTIAL SOLUTIONS UNDER ROMANIAN LAW, Jurnalul de Studii Juridice, Year VI, Supplimentary Issue, pp: 429-444

Introduction

Welcomed in October 2010 as a major opportunity for re-launching the long waited list of infrastructure projects of both national and local importance, the Law on Public-Private Partnership (enacted under no. 178/2010 and further referred to as the "PPP Law") is still presented, almost one year after its enactment, as a solution for future projects. The enactment of PPP Law was followed by mid-December 2010 by the publication of the methodological norms for its application (approved by the Government Decision no. 1239/2010 further referred to as the "Methodological Norms") and by March 2011 by a Government-approved list of projects to be completed by using these regulations. On April 21, 2011 the PPP Law was amended by Emergency Government Ordinance no. 39/2011, mostly to reflect certain procedural provisions meant to ensure compliance with the general procurement principles stated in the Public Sector Directive (*Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, Official Journal L 134, 30.04.2004*), as further transposed in the Romanian law by the Emergency Government Ordinance no. 34/2006 concerning the award of public supply contracts, of public works concession contracts and of services concession contracts. Since then, periodic changes are made to the projects' list, not only by adding major national interest projects, but also smaller projects envisaged by the local public authorities.

Yet, to our knowledge, up to date (September 2011), no private partner selection procedure for such project was made public. The enthusiasm of public authorities in respect of the PPP Law, which seemed to announce an outburst of projects in various domains, received a silent replica from both potential investors and potential financiers.

As one of the major issues and challenges of a PPP project is structuring an appropriate financing, such task is significantly more difficult in the actual context of credit and liquidity crisis, including the problems generated by the sovereign debts crisis, which entailed a serious reduction in the public funds financing (György, Câmpeanu, 2011, p. 119). Consequently, one may expect that designing the financing structure of a PPP project is a major component of its overall construction and exploitation mechanism.

Considering the "classic" choice between the principal options for debt finance of the PPP projects, i.e. bank loans and bonds (Marty, Trosa,

GHERGHINA, S., (2011) FINANCING PUBLIC-PRIVATE PARTNERSHIP PROJECTS ON CAPITAL MARKETS. POTENTIAL SOLUTIONS UNDER ROMANIAN LAW, Jurnalul de Studii Juridice, Year VI, Supplimentary Issue, pp: 429-444

Voisin, 2006, p. 70 et seq), we will attempt an analysis of the current availability of such financing options under the Romanian PPP Law. Notwithstanding the vagueness of the legal provisions, we believe both options may be followed and even combined when structuring the financing of a PPP project, although the potential success of a bond issuance would largely depend on provision of a state or local guarantee for such debt.

Legal definition of financier – possible interpretations

One of the most obscure and therefore difficult to interpret definitions provided by the PPP Law is that of the "financier" (art. 4 lett. n), being "a natural or a legal person that makes available to the project company the financial means necessary for their participation to the public-private project." Beyond the general terms of this definition, several particular questions may further arise.

First, the utility of such definition is to be questioned. The term "financier" as such is not used within the text of the PPP Law (Gherghina, Rațiu, 2011, p. 103). Formally, a defined term that is not further used becomes irrelevant for the understanding of the text, as it lacks any interpretative value. Still, we believe a secondary value for such definition may be revealed, meaning a value of interpretation other than that of instrument for clarity. In this case, although not used as such within the text of the PPP Law, the definition may be used for better describing the financing obligations assumed by the private partner.

This secondary value brings in the second question, concerning the relation between the "financier", as the person or the persons providing at least some partial financing and the "private partner", the person on which the PPP Law distributes the burden of providing financing to the project company. According to the legal definition in art. 4 lett. e^1, the private partner is the private investor who signed a public-private partnership contract, whilst the private investor is defined (in art. 4 lett. e) as "any legal person or association of legal persons, Romanian or foreign, which expressed an interest in attending the procurement procedure and is willing to ensure financing for one or more phases of a public-private partnership project." It is to be noticed that the definition of the private investor, whilst describing in fact any bidder attending a PPP procurement procedure, refers to a specific characteristic, namely its willingness to ensure financing.

GHERGHINA, S., (2011) FINANCING PUBLIC-PRIVATE PARTNERSHIP PROJECTS ON CAPITAL MARKETS. POTENTIAL SOLUTIONS UNDER ROMANIAN LAW, Jurnalul de Studii Juridice, Year VI, Supplimentary Issue, pp: 429-444

Such direct link between the private partner(s) or the sponsor(s) (as shareholders to the private partner, if the latter is a special purpose company) to the project and the financing of the project is backed and emphasized by other texts in the PPP Law, such as article 2, casting the general statement that "*the aim of this law is to regulate the initiation and completion of public-private partnership projects for public works in various activity sectors, with private financing*" or article 3(2) par. b), stating that "*the project's financing modality is private*". More specific references to private financing of the PPP projects are contained in the Methodological Norms, with article 2(1) stating that the public-private partnership project is "*made entirely with private financial resources*" and article 31(2) providing that "*in all cases the financing obligation is transferred to the private investor*".

Still, given the effects and interpretation of the texts in the Methodological Norms are subordinated, as secondary legislation, to those in the PPP Law, as primary legislation, the latter will have priority and will draw the line for defining investor's obligation to provide financing to the project. In any case, such obligation or its extent will not be based on the texts in Methodological Norms, which are merely meant to organize and provide the details for application of the primary legislation texts, but on those in the PPP Law.

Private partner's financing obligation

The analysis of these texts referring to the financing of the PPP projects, comprised both in the PPP Law and the Methodological Norms, raises two questions: first, will the financing of the project be entirely private, or public funds may be used alongside? and second: which is the nature, and consequently, the extent, of the private partner's financing obligation? Does it imply an obligation to provide equity (cash contribution, as per the terminology of the Romanian company law) or quasi-equity (shareholder's loans) and/or to ensure the overall financing of the project, i.e. to make all necessary arrangements for providing the project company with the funds for completing the project?

The answer to the first question, concerning the potential implication of public funds in PPP projects, is hard to be found directly in the texts of the PPP Law, as any literal interpretation may be confusing due to the vagueness of such texts. In fact, the drafting of the legal texts seems to suggest that the lawmaker was not very interested in answering this question, or at least the issues addressed by the relevant texts referring to the financing of the project are completely different. Given that, the

GHERGHINA, S., (2011) FINANCING PUBLIC-PRIVATE PARTNERSHIP PROJECTS ON CAPITAL MARKETS. POTENTIAL SOLUTIONS UNDER ROMANIAN LAW, Jurnalul de Studii Juridice, Year VI, Supplimentary Issue, pp: 429-444

absence of an explicit legal statement that excludes any implication of public funds from PPP projects may have intrinsic interpretative value.

As the international practice of such projects, including the experience registered in Member States of the European Union, provides for the possibility of using public funds, via grants, lending or public guarantees, any contrary option of the Romanian law would have had to be explicit. Moreover, since the outburst of the financial crisis, one of the remedial actions envisaged for mitigating its negative impact on the PPP projects was expanding the existing forms of making available public funds to such projects. These measures even took an institutional form, such as the Infrastructure Finance Unit of the UK Treasury, created in 2009 for advancing public loans on commercial terms to PPP (Private Finance Initiative) projects, alongside commercial and multilateral lenders. Another debt instrument was organized in France as part of a crisis mitigation policy, by setting aside a EUR 8 billion loan facility administered by the Caisse des Dépôts and funded from the saving accounts (*fonds d'épargne*). Starting 2009, several European states – France, Belgium (Flanders), Portugal, Spain - have put in place state guarantee schemes for priority PPP projects.

Also, the European Commission has developed together with the European Investment Bank (EIB) financial instruments designed for credit enhancement. Such instruments apply if difficulties are encountered when establishing the financing structure of the project. The most visible example is the Loan Guarantee for TEN-T projects (LGTT), which was set up in 2008 and works like a loan guarantee provided via the EIB to lenders providing stand-by facilities to the project company for the early period of operation, after the construction completion. The mechanism aims to support transport infrastructure projects having revenue-risk to obtain financing at lower rates, as it transfers important elements of the demand risk.

Several grants are available from the European Commission for projects of European importance, such as trans-European transport networks, environment, and competitivity. Funds may be provided also by the EU to PPP projects by means of Structural Funds grants made to the public sector entity that is the public partner within the project and further made available to the project company, provided the EU rules, mainly those concerning public procurement and state aid are complied with. Alongside such direct grants that may cover a certain portion of the project costs, a special instrument named JESSICA was put in place by

GHERGHINA, S., (2011) FINANCING PUBLIC-PRIVATE PARTNERSHIP PROJECTS ON CAPITAL MARKETS. POTENTIAL SOLUTIONS UNDER ROMANIAN LAW, Jurnalul de Studii Juridice, Year VI, Supplimentary Issue, pp: 429-444

the European Commission and the EIB, that can provide financing to PPP projects in the form of loans, equity or guarantees.

Given this context that valorizes the public support offered to PPP projects by various means – from direct loans to guarantees of different grades – as a measure able to mitigate the negative impact of the global financial crisis on the financing structure of such projects, it would be hard to find reasonable arguments for formally including a complete ban on use of public funds in the Romanian PPP Law. A significant side effect of any such limitative and extreme interpretation of the legal texts would be the impossibility of the Romanian public authorities to use European funds for PPP projects, as such funds are directed to public authorities that may be further allowed to make them available to the project company.

In all cases, over such sensible issue there should be no interpretation effort at all, as any option of the lawmaker in this respect should be clearly expressed by the relevant legal texts. Considering the current status of the text, we believe that their most appropriate interpretation is in the sense of limiting the direct use of public funds for funding construction costs. This conclusion is the result of a mere literal interpretation (Gherghina, Rațiu, 2011 p. 90) that still leaves enough room for using public funds in supporting PPP projects via direct financing or public guarantees.

The current sovereign debt crisis and the subsequent (envisaged) deficit and debt reduction measures shall most probably act as a further limitation at least to direct use of public funds for financing major projects. Nevertheless, the benefits of engaging significant public works cannot be neglected, as well as the risk balancing that is specific for the PPP projects. A coherent risk structuring shall have to be reflected in a specific, adapted to circumstances, dimensioning of the financial impact of the risks undertaken by the public authorities. Most probably, direct use of public funds will be organized around grants from EU funds, including national co-financing, but public guarantees, both direct and indirect, will be the usual form of using public money for enhancing credit to PPP projects.

As for the second question proposed for this analysis, it refers to the nature and the extent of the private partners' obligation as concerns the financing of the project. Once assuming that public funds may be used in various forms for a PPP project, but not for covering construction costs, the consequence derived from this interpretation of the legal texts is that such public financial support will also be ancillary to the private

GHERGHINA, S., (2011) FINANCING PUBLIC-PRIVATE PARTNERSHIP PROJECTS ON CAPITAL MARKETS. POTENTIAL SOLUTIONS UNDER ROMANIAN LAW, Jurnalul de Studii Juridice, Year VI, Supplimentary Issue, pp: 429-444

financing. The state will provide funds only for covering certain financial gaps within the financing structure of the project or will support the structuring of the private financing by issuing guarantees or other types of contractual undertakings (Lignières, 2005, p. 243 *et seq*).

The main portion of funds for the project will be provided by the private partner (Pârvu, Voicu-Olteanu, 2009, p. 191), and such role within a PPP project is indirectly deriving from various legal texts in the PPP Law and in the Methodological Norms. As described above, the legal definitions of "*public-private project*" and of "*private investor*" refer to an obligation or at least the willingness of the investor to provide or to obtain financing for the project. As the private partner and the public authority (as public partners) will be the only shareholders of the project company, their respective quotas from the share capital shall be determined by their respective contributions (art. 27 lett. f of the PPP Law).

When describing the five types of PPP contracts, starting from the extent of the private partner's undertakings, the relevant texts in the Methodological Norms (art. 15 to 31, especially art. 16 (2), 19 (2), 22 (2), 25 (2), 28 (2)) state that, on a regular basis, the private partner shall hold a majority stake. Although the legal texts are silent in this respect, such majority stake will most likely result from a financial contribution to the company's share capital. This may mean that indirectly, the legal texts are thus providing for an equity contribution of the private partner that will have to be higher than that of the public partner.

In addition to such equity financing, the private partner will be entitled to provide shareholder's loans to the project company (quasi-equity) and will have to ensure the main portion of the financing to the project, presumably by following one of the two major choices available: bank loans or financing by bonds issued on the capital market. Although historically bank debt was preferred to bonds in most states as a source of financing PPP projects, a significant place was retained for bond financing in the United Kingdom. Since the start of the Private Finance Initiative programs, bonds were issued on large scale for financing major projects, becoming even the dominant solution in the United Kingdom in the last decade prior to the financial crisis. Since 2008 no bonds have been issued to finance UK PPP projects.

GHERGHINA, S., (2011) FINANCING PUBLIC-PRIVATE PARTNERSHIP PROJECTS ON CAPITAL MARKETS. POTENTIAL SOLUTIONS UNDER ROMANIAN LAW, Jurnalul de Studii Juridice, Year VI, Supplimentary Issue, pp: 429-444

Financing solutions: bank loans and bonds

The financial crisis has impeded on the availability of both financing solutions. The bank loans for PPP projects were significantly affected by the liquidity problems the banking market is generally facing. A recent survey conducted by EPEC has indicated that the bank market for PPPs may have shrunk by over 50% in 2009 compared to previous years. The role of the capital market in financing the PPP projects was also severely diminished following the downgrading in November 2009 of the financial guarantees (insurance) companies (the so-called "monolines") that issued financial guarantees for the bonds of the project company.

Before the crisis, the choice between bank debt and bonds financing was based on several elements that included a comparison of costs (interest rates, other costs associated to the financing, such as commitment fees for undisbursed credit facilities or negative carry for funds obtained from bonds issuance before their actual use in the project, costs related to bond issuance or to loan arrangements, hedging costs, prepayment or refinancing costs etc.) and risks (certainty of financing, deliverability, refinancing risk, inflation risks, control of decisions within the project etc.). In general terms, it was assumed that bond financing was less flexible than bank financing, but could be less expensive in terms of financing costs and eliminated the refinancing risk by providing financing over longer terms than banks.

Currently, bank financing to a PPP project will not generally cover the entire term of the project, but much smaller terms, usually up to 7-10 years, thus implying a (even repeated) refinancing operation at the end of the initial maturity and a subsequent refinancing risk. Such risk has usually been divided between the public and the private partners generally with the public partner accepting to cover the additional costs generated by refinancing and the private partner assuming the risk of failure to refinance and subsequent termination of the project. In case the refinancing operation generates gains due to lower costs of the new financing, these are usually shared by the partners as agreed in the PPP contract.

Subsequent to the difficulties related to reduced liquidity and increased financing costs, it may be quite difficult for bidders in an award procedure organized for a PPP project to structure and present as part of their bid a fully committed financing package. Before the credit crisis, the significant funds needed for financing large projects were usually provided

GHERGHINA, S., (2011) FINANCING PUBLIC-PRIVATE PARTNERSHIP PROJECTS ON CAPITAL MARKETS. POTENTIAL SOLUTIONS UNDER ROMANIAN LAW, Jurnalul de Studii Juridice, Year VI, Supplimentary Issue, pp: 429-444

through syndicated loans (Lyonnet du Moutier, 2006, p. 202 *et seq*), with a limited number of banks underwriting the loan for the entire project and the entitlement to further co-opt additional banks in the syndicate. Most PPP projects were funded in the last two years through "club deals", whereby each lending bank undertakes it will not transfer its participation.

Given the constraints of the market, the obligation to provide funds that the lenders are willing to assume is generally subject to conditions precedent, which may come against the requests related to the financing of the project inserted by the public authority in the award procedure documentation. Also, when including in the award documentation strict requirements relating to the financing structure proposed by the bidders, the public authority has to consider the relative limited number of potential financiers available to all potential bidders and therefore, considering the additional market limitations described above, the increased difficulty for bidders to provide long-term fully committed offers at least in terms of financing structure, especially for large projects which require significant financing.

Considering such constraints, the latest years' practice has moved from definitive financial offers to conducting a preliminary offer review procedure, with an uncommitted (merely intentional) financial component and then allowing the preferred bidder to access the banking market, under the control of the public authority. This approach is generally named "post preferred-bidder book-building", "competitive book-building" or "funding competition" and implies that once it is selected after the review of all elements of its offer, the preferred bidder may access the existing funding market, including lenders that previously expressed an intention to finance other (unsuccessful) bidders, under close control by the public authority. The downside of this approach is related to the absence of real incentives for the preferred bidder to obtain better terms than its initial offer as well as of the power for the public authority to force such improvement of financing terms. The potential risk of litigation by rejected bidders and the risk of further changes required by the preferred bidder as a consequence of available financing terms obtaining during the book-building stage are also to be considered by the public authority.

GHERGHINA, S., (2011) FINANCING PUBLIC-PRIVATE PARTNERSHIP PROJECTS ON CAPITAL MARKETS. POTENTIAL SOLUTIONS UNDER ROMANIAN LAW, Jurnalul de Studii Juridice, Year VI, Supplimentary Issue, pp: 429-444

The role of public sector support in bond financing of PPP projects

Current difficulties in accessing capital markets

Recent analyses that have described the difficulties with which the bond financing of the PPP projects is currently faced are also proposing certain measures for addressing them and thus reviving the use of the capital market as an alternative financing model to bank financing especially for large PPP projects. Amongst such measures, a special place is reserved to those that may be undertaken by the public sector, as, in the words of one of these papers, "it stands to lose the most from the absence of an active financing market for PPPs, as it implies a shortage of funds to deliver their key infrastructure and a lack of competition in the finance markets, leading to high prices and monopoly positions for banks".

For supporting funds' accession from the capital markets for PPP projects, public policies have not only to allow for direct public support measures, as public guarantees for bonds issued by the project company or fiscal incentives, but also for adequate procurement procedures, designed to allow bonds to compete with bank loans.

Significant initiatives for enhancing access to capital markets as a new source of funds for financing PPP projects are currently developed at both EU and national levels. The European Commission has launched public consultation for the Europe 2020 Project Bond Initiative, whose declared objective is to attract private sector financing for specific projects (mainly infrastructure) by using the mechanism of the capital markets. The public support provided by this Project Bond Initiative may take the form of a subordinated debt or of a EIB-issued guarantee, any of them being meant to reduce the risks assumed by the bondholders and increase the rating of the bonds issued by the project company. Such credit support is expected to amount to a maximum of 20% of the project company's obligations under its bonds, as the initiative aims to create a mechanism allowing projects to be financed entirely by bonds.

A French initiative envisages the creation of a fund which will issue long-term bonds for the financing of specific PPP projects (*Fonds Commun de Titrisation*). Such financing raised on the capital markets will be used to refinance the bank loans that financed the construction phase of the project. This means the all risks during the construction will remain with the banks. For the operation phase, the bonds will be guaranteed with the portion of the service charge due by the public authority to the

GHERGHINA, S., (2011) FINANCING PUBLIC-PRIVATE PARTNERSHIP PROJECTS ON CAPITAL MARKETS. POTENTIAL SOLUTIONS UNDER ROMANIAN LAW, Jurnalul de Studii Juridice, Year VI, Supplimentary Issue, pp: 429-444

project company that is not depending on the performance by the latter. Such mechanism is expected to eliminate the refinancing risk associated with the bank loans for the construction phase of the project, and thus reduce their costs for the project, and also to attract new funding sources from the private sector by enabling a sovereign debt rating for the bonds issued by this fund and guaranteed by a payment obligation of the public sector (as an implicit public guarantee).

The common element of these initiatives for reviving the role of the capital markets in the financing of the PPP projects is the presence of a public guarantee, which is aimed to reduce the risks of holders of the bonds issued by the project company. The public sector is thus regarded as a "catalyst" for re-starting the capital markets mechanism for financing PPP projects, either by bond issuance or by private placements of bonds (Lyonnet du Moutier, 2006, p. 210 *et seq*.).

Public support by public guarantees under Romanian law. State aid and statistical treatment

Within this status of the current and potential sources of funds for major projects, the Romanian PPP Law provides for merely general solutions, with scarce and almost irrelevant references to the financing structure of these projects. A potential acceptance of a bond issuance by the project company, as a financing method for the project, may be derived from the legal definition of the financier in the PPP Law, which includes in this category both natural and legal persons. A general potential is thus generated especially by the explicit reference to "natural persons", which is more likely to refer to potential bondholders rather than to "classic" money lenders.

Once this potential is created, allowing in principle total or only partial financing of a PPP project by issuance of bonds by the project company, the real issue, before its success on the capital market, will be its insertion in the procurement procedure for the selection of the private partner. Before analyzing the procedural changes that may be entailed by this type of financing method, a practical overview of the current capital markets, as described in various analyses, leads to the conclusion that the success of a bond issuance by the project company is almost necessary linked to it being backed by a financial guarantee or any other guarantee having similar effects. In the current economic and financial environment, a major role is expected to be played by guarantees issued by the state or

GHERGHINA, S., (2011) FINANCING PUBLIC-PRIVATE PARTNERSHIP PROJECTS ON CAPITAL MARKETS. POTENTIAL SOLUTIONS UNDER ROMANIAN LAW, Jurnalul de Studii Juridice, Year VI, Supplimentary Issue, pp: 429-444

by local authorities, any of them acting as public partners in such projects, therefore having a direct interest in supporting their financing.

Public guarantees may be issued by the state either on an individual project basis, in the form of letters of guarantee issued by the Ministry of Public Finances, in accordance with the provisions in the Emergency Government Ordinance no. 64/2007 regarding public debt, as further amended, and its subsequent regulations, or within the frame of a guarantee scheme, administered by a public institution or by a public undertaking, such as the Romanian EximBank. Local public authorities are also entitled to issue guarantees according to the Law no. 273/2006 regarding local public finances, as amended, provided they are for the purpose of supporting public investments.

When issuing such public guarantees, specific attention is to be paid to compliance with the rules regarding state aid, as detailed in the Commission Notice on the application of articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/02). When describing the applicability domain of article 87(1) of the EC Treaty, art. 2(1) of the Commission Notice makes some clear statements regarding the implication of public resources by means of risk undertaking by public authorities and the existence of a potential implication of such resources irrespective of any payment made by the issuer under such guarantee. The third paragraph of this article 2(1) states that "In order to avoid any doubts, the notion of State resources should thus be clarified as regards State guarantees. The benefit of a State guarantee is that the risk associated with the guarantee is carried by the State. Such risk-carrying by the State should normally be remunerated by an appropriate premium. Where the State forgoes all or part of such a premium, there is both a benefit for the undertaking and a drain on the resources of the State. Thus, even if it turns out that no payments are ever made by the State under a guarantee, there may nevertheless be State aid under Article 87(1) of the Treaty. The aid is granted at the moment when the guarantee is given, not when the guarantee is invoked nor when payments are made under the terms of the guarantee. Whether or not a guarantee constitutes State aid, and, if so, what the amount of that State aid may be, must be assessed at the moment when the guarantee is given."

Moreover, a public guarantee, whether individual or issued within a guarantee scheme, shall be qualified as a state aid only if it provides an advantage to its beneficiary, the Commission Notice referring expressly to the application of the "market economy investor principle" (Colson, Idoux, 2008, p. 294) when assessing the existence and extent of such

GHERGHINA, S., (2011) FINANCING PUBLIC-PRIVATE PARTNERSHIP PROJECTS ON CAPITAL MARKETS. POTENTIAL SOLUTIONS UNDER ROMANIAN LAW, Jurnalul de Studii Juridice, Year VI, Supplimentary Issue, pp: 429-444

advantage, as this standard of the decision that would be made by a private investor operating in a market economy was formulated and justified by the Court of Justice in its jurisprudence (such as Case C-482/99, France v Commission (*Stardust*) 2002). The Commission Notice lists the conditions ruling out the existence of aid, for both individual guarantees and guarantee schemes. Amongst these conditions, a maximum guarantee coverage of 80% of the outstanding loan or other financial obligation, but this limit shall not be applicable for guarantees covering debt securities, as defined by article 2(1)(b) of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (OJ L 390, 31.12.2004, p. 38), as such Directive was last amended by Directive 2008/22/EC (OJ L 76, 19.3.2008, p. 50).

This means that any public guarantees issued for securing bonds of the project company within a PPP project will not be subject to the 80% limit and will be able to secure the full value of the obligations assumed thereunder, without having such full coverage leading to the identification of a state aid element.

Another important condition for the absence of a state aid element qualification within the structure of a public guarantee refers to the payment by its beneficiary of a market-oriented price (premium) to the issuer of the guarantee (articles 3.2(d) for individual guarantees and 3.4(d) for guarantee schemes). A project company whose bonds are secured by a public guarantee will have to pay an adequate premium, calculated based on market indicators, for benefiting from such security that enhances the rating of its bonds and thus the chances of a successful financial closing for the project.

Besides ensuring the absence of the state-aid element or its compatibility with the common market (Craig, de Búrca, 2008, p. 1110), the structuring of a bond issuance secured by public guarantees has to consider the potential effect that such guarantee may have on the debt and deficit treatment of the project assets. According to the accounting rules in the European System of Accounts (ESA rules, in their latest 1995 form, further referred to as "ESA95"), as approved by Council Regulation no. 2223/1996 and detailed by the Eurostat Manual on Government Deficit and Debt (its 2010 version), any risk-undertaking by the public sector that changes the balance of project risks may trigger the treatment of the project assets as government assets, further considered for the

GHERGHINA, S., (2011) FINANCING PUBLIC-PRIVATE PARTNERSHIP PROJECTS ON CAPITAL MARKETS. POTENTIAL SOLUTIONS UNDER ROMANIAN LAW, Jurnalul de Studii Juridice, Year VI, Supplimentary Issue, pp: 429-444

calculation of government debt and deficit values. Under article 104 of the EC Treaty, the Member States have to comply with budgetary discipline in terms of deficit and public debt, whose ratios to GDP have to be kept under the reference values of 3% and 60% respectively. In the actual context when Member States envisage stricter rules and even enforcement procedures and penalties in case the above ratios are exceeded, it is important for any government to take appropriate decisions that would keep its deficit and debt under the thresholds.

Therefore, the structuring of public support to PPP projects in a manner allowing the project assets to be recorded as "non-government assets", whose value is not considered for calculation of public debt and deficit, becomes a significant element of the overall design of the project.

Potential adjustments to the procurement procedure

Once the above described conditions are verified and the project details inserted in the "attached document" prepared by the public partner based on the pre-feasibility study or, as the case may be, on the substantiation (feasibility) study prepared for the intended project allows for bond financing, at least as an alternative to bank loans, certain adjustments may be considered for the procurement procedure.

If the financing structure is pre-designed by the public authority, and it includes at least a bond element, if not full financing on the capital markets, then the public authority will maintain its choice amongst open tender and competitive dialogue as procurement procedures.

In the absence of such pre-designed financing structure, which will probably define most projects at least in the actual context of the financial crisis, the proposal of alternative structures for ensuring the financial close of the project will be a core element of the bids. This will mean that the most appropriate procurement procedure for such projects will be the competitive dialogue, leaving certain freedom to the bidders for designing what they believe to be the appropriate financing for their technical and commercial offer.

Amongst the procurement procedure rules listed by both the PPP Law and the Methodological Norms, none prevents the public authority from structuring the bid on uncommitted financial offers. Article 18(13) of the PPP Law states that the evaluation and negotiation criteria have to include at least the total cost of the bid, alongside other criteria. Of course, such total cost of the bid will have to be built by taking into consideration the debt financing costs.

GHERGHINA, S., (2011) FINANCING PUBLIC-PRIVATE PARTNERSHIP PROJECTS ON CAPITAL MARKETS. POTENTIAL SOLUTIONS UNDER ROMANIAN LAW, Jurnalul de Studii Juridice, Year VI, Supplimentary Issue, pp: 429-444

Notwithstanding the "most economically advantageous offer" award criteria imposed by art.18(10) of the PPP Law, the bids evaluation may be based on various criteria, excluding those related to the debt financing of the project, but possibly including the equity and quasi-equity financing that may be made available by each bidder. At this point, the public authority may consider expressing its support or other public authority's support for a bond financing of at least a portion of the project, thus allowing bidders to build their offers accordingly, by calculating the costs associated with the financing structure proposed within their offers.

Once the preferred bidder is selected on the basis of an uncommitted offer, it will further obtain binding financial offers under the control and supervision of the public authority. This post-award financial structuring may be constructed as a debt funding competition, requiring the selected bidder to organize a competitive procedure for selecting the financiers with the declared purpose of obtaining the best financing terms possible. Post-preferred bidder "book-building" may also be allowed, thus leading to a financing structure whereby may become lenders to the preferred bidder credit institutions that have supported another bid.

Conclusions

Public-private partnerships may be used for completing major works of national and local interest, being a viable alternative to public funds investments. This mechanism is still valued in Europe, as within the first semester of 2011 a number of 47 PPP transactions reached financial close having a total value of EUR 9.7 billion. More than half of these projects are to be completed in the transport sector, but a very active sector was also education (schools). When analyzing possible financing solutions for PPP projects, several elements are to be considered under the Romanian PPP Law combined with the international practice of this type of projects.

First, the vagueness of the texts in the PPP Law and the Methodological Norms addressing the financing issue is to be overpassed by new, improved, legal texts or at least by commonly accepted interpretation in line with the recommendations from EPEC and the international best practice. In our opinion, such interpretation should follow two consecutive levels: a general level given by the recognition of potential implication of public funds in the financing structure of PPP projects and a more specific level describing the forms of such

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implication. If the general principle of allowing the use of public funds in PPP projects is accepted, subject to the rules concerning state aid and debt and deficit statistic treatment, then the structuring of the forms for such use becomes a matter of legal and financial detail.

Second, the opportunity and efficiency of using public funds for supporting a specific project is to be analyzed in the initial stages of project preparation by the public authority. In case of a positive answer, the form of such use of public funds has to be structured in the most adequate manner, therefore public authorities need substantial input from qualified advisors.

Third, public support for PPP projects should be addressed to all potential financing structures, including access of bonds issued by the project company to capital markets. To allow bond financing competing with bank debt and address the current liquidity problems caused by the financial crisis, certain adjustments should be made to the procurement procedures for the selection of the private partner, ensuring the choice of the best available financial structure for the project.

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