



## FORMAL OPINION

### On the draft of Law on the public-private partnership

By analyzing the *draft of Law on the public-private partnership*, submitted by the Romanian Government, the Department for Infrastructure projects and Foreign Investments, by the address no. 1614/DPIIS/11.04.2013, registered at the Competition Council with no. RG 5244/12.04.2013,

## COMPETITION COUNCIL

Based on art. 20 recital (4) letter c) and on art. 26 recital (1) letter l) of the *Competition Law no. 21/1996, republished* with the subsequent amendments and completions, during the Plenum meeting from 15.04.2013,

**Issues a favorable formal opinion** on the *draft of Law on the public-private partnership (hereby named Draft of Law)*, with the following proposals and recommendations:

**1.** Completing art. 5 with a new recital having the following text:

“(2) the adjudgement and carrying out of the public-private partnership contracts must fulfill the principles and rules set-up by the European and national legislation in the competition field.”

The motivation of this proposal is justified by the need to ensure the prevail of the competition rules over the adjudgement and performance of the public-private partnership.

**2.** Amending the art. 13 as follows:

“art. 13 – the public partner may contribute to the financing of the investments with public financial resources coming exclusively from Community non-reimbursable funds and from the national contribution to co-financing, under the specific conditions stipulated in the implementing rules of the present law.”

**3.** Completing art. 16 with the following provisions:

“art. 16- [...] if the project company carries out services for other persons than the public partner or other public authorities or institutions, the net incomes obtained from these ancillary activities shall be used to finance the main activity.”

This proposal is based on the need not to grant to the company a financing exceeding its needs, namely to cover the costs induced by the partnership project's performance and a reasonable profit margin.

**4. Introducing after recital (7) of art. 35 of a new recital with the following text:**

“(8) the negotiation of the contract's clauses must not lead to more favorable conditions for the winner, as compared to those brought to the attention of all possible bidders through the selection notice”

This proposal is based on the need to avoid the granting of an un-justified economic advantage to the winner, by applying a more favorable treatment in comparison to the other possible bidders.

**5. Completing art. 47, by introducing after the letter u) of the following provisions:**

“ v) the manner in which the dividends shall be distributed between the public partner and the private one, if they own together the project company, shall be proportionally with each party's contribution;

w) the manner to determine the price, namely the compensations that must be honored by the public partner in accordance with art. 51, 53 and 55 in the Law, so that it is ensured that the private partner does not receive a price higher than the market price;

x) to determine the moment when the public contribution shall be made available to the project company, namely after the allocation of the private contribution or at the same time with it.”

This completion is advisable in order to avoid the granting of an un-justified economic advantage to the private partner during the performance of the public-private partnership or at the moment when it ceases.

At the same time, taking into account that some of the provisions of the *Draft of Law* regarding the financing of the investments and the procedure on the selection of the private partner shall be detailed within the implementing rules of the Law, we consider as necessary that the act setting them up to be submitted for assessment to the Competition Council, during the drafting phase.