PUBLIC PRIVATE PARTNERSHIPS IN ROMANIA VERSUS ALBANIA: THE CHALLENGES TO IMPROVE LEGISLATION FOR ATTRACTING MORE FINANCIAL RESOURCES

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Abstract

Having in mind the current international economic context and the economic crisis without precedent, implementing public-private partnerships represents an essential tool for developing the emerging markets and for finalizing large scale infrastructure projects, with a great positive impact on the long term. Major focus is being put on private-public partnerships during the last years, as the world economy is growing and also turbulent times were passed through starting with 2008, when the international financial crisis started.

Various countries around the world in general, and around Europe, in particular, apply different type of private – public partnerships: even though the partnership applied is a concession or a institutional PPP, the expected result is the same: the goal of attracting money and finishing important projects, of national interest should be achieved either way.

Still, some countries manage to finish successful PPPs, other pass through permanent legislative changes and no final results are encountered. What is the path towards success? Trying to answer the above question, the elements that make the difference between applying different kind of partnerships, following different legislation are analyzed. Albanian and Romanian legislation applied during 2012 are discussed through comparison, starting with the EBRB classification and ranking among less compliant towards most compliant legislations. Improvement solutions are proposed for both countries in the attempt to attract as many financial resources as possible.

Keywords: Public-private partnerships (PPPs), concessions, institutional and contractual PPP, competitive dialogue, open procedure

Introduction

Having in mind the current international economic context and the economic crisis without precedent, implementing public-private partnerships represents an essential tool for developing the emerging markets and for finalizing large scale infrastructure projects, with a great positive impact on the long term. Major focus is being put on private-public partnerships during the last years, as the world economy is growing and also turbulent times were passed through starting with 2008, when the international financial crisis started.

Different types of private – public partnerships are applied all over the world and all over Europe. Considering the fact that some countries are more successful than others in applying PPPs, the lessons of international ways of PPP legislation and implementation should be learnt for the improvement of the success rate.

This article will discuss and analyze through comparison the Albanian and Romanian legislation applied during 2012, using the European Bank for Reconstruction and

Development ("EBRD") classification and ranking among less compliant towards most compliant legislations as the starting point.

The focus is put on the legal framework and main legislative enforcements that can make the difference. The characteristics of both legislations are discussed.

The main research question is: ***What could each of the two countries learn from the other, what could be changed, stated or defined differently in order to improve the PPP/ concession legislation so that the EBRD scoring in terms of compliance is also improved?***

Having in mind the fact that EBRD uses the researches and analyses they perform in order to decide what are the countries where money should be invested into and what are the possible obstacles and risks in case such projects are launched, improving the legislation so that the EBRD rating shall also be improved may lead to extra financial resources being invested in these countries, therefore reaching the targeted goal: attracting more money into the economy and finalizing important systemic projects for the country.

The article does not attempt to judge either the EBRD rankings or the legislation of Albania or Romania, but to propose improvement solutions.

Compliance and effectiveness of law

EBRD performs constant surveys and reports regarding the compliance and effectiveness of laws in the private-public partnership sector, in all affiliated countries. Focused studies address PPP area considering the fact that, in many countries, the public measures applied after the financial crisis focus on public investments and PPP is a very powerful and resourceful instrument to perform these investments. There is an increased demand for infrastructure, while the resources are scarce and the competition for state budgetary allocations is high.

When dealing with compliance, the following are being analyzed: existence of specific PPP/ concession law and comprehensive regulations regarding PPP/ concessions, existence of a clear definition of scope and limitations of the PPP/ concession law, selection criteria for the Private Party, flexibility of the contractual framework, risk allocation, instruments for cash flow securization (including "step-in" rights, possibility for government financial support, or guarantee), clear settlement of remedies in case of breach and arbitration in case of conflicts.

Effectiveness of the law means in fact evaluating if a policy framework at the state/ local level exists, if an institutional PPP framework exists and if the awarded PPP projects have actually been implemented in compliance with the law.

As a general remark, significant improvements have taken place in many EBRD's countries of operation regarding policy and legal framework of PPPs and concessions. (*The legal framework for public private partnerships (PPPs) and concessions in transition countries: evolution and trends*, Alexei Zverev, Senior Counsel, EBRD, 2012)

Considering the latest EBRD assessment (May 2012), Albania is labeled to be both high compliant and high effective, while Romania is medium compliant and only low effective.

Table 1 – comparative assessment regarding compliance and effectiveness of PPP legislation based on the EBRD study

Assessment	**ALBANIA**	**ROMANIA**
1. COMPLIANCE		
General Rating[56]	***85.7%***	***64.2%***
	High compliance[57]	Medium compliance

[56] For both categories (compliance and effectiveness) special symbols were used for each type of answer, specific points being assigned (Yes – 3 points, Yes with reservations – 2 points, No, with limited compliance/ redeeming features – 1 point, No – 0 point, Not applicable – 0 point or not included in total).

[57] The following correspondance was established between the score and the final qualifications:

2. EFFECTIVENESS		
General Rating	***55%***	***45.3%***
	Medium effectiveness	Low effectiveness
OVERALL RATING	**70.3%**	**54.8%**
	High compliance/ effectiveness	**Medium compliance/ effectiveness**

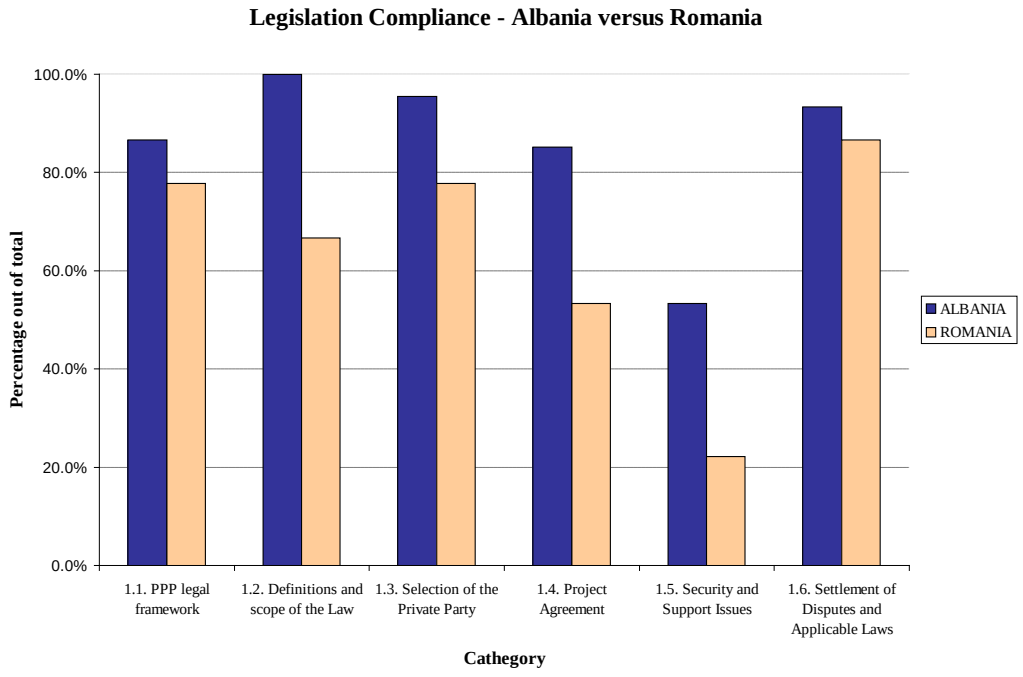
(Source for data: EBRD, Gide Loyrette Novel, Romania – Overall Assessment of the Quality of the PPP legislation and of the effectiveness of its implementation; EBRD, Gide Loyrette Novel, Albania – Overall Assessment of the Quality of the PPP legislation and of the effectiveness of its implementation)

Considering the latest EBRD study and the EBRD proposed scoring for all categories, a comparative analysis between Albanian 9663/ 2006 Law and Romanian 178/2010 Law was performed regarding the assessment of the compliance, pointing out the elements that could be improved in one country or the other, so that the EBRD scoring to be improved.

What makes the difference?

Figure 1 below underlines the EBRD scoring differences between Albania and Romania in terms of legislation compliance, according to the last assessment performed, mentioning and analyzing each sub-category.

Figure 1 – legislation compliance considering EBRD scoring in Romania versus Albania



It is easily visible that Albania scored better than Romania in all existing categories. Still, the highest differences are added regarding definitions/ scope of the law, project agreement and security, support issues. All these categories shall be analyzed and described below.

- >= 90%: Very High Compliance/ Effectiveness
- >= 70% - 89%: High Compliance/ Effectiveness
- 50% - 69%: Medium Compliance/ Effectiveness
- 30% - 49%: Low Compliance/ Effectiveness
- < 30%: Very Low Compliance/ Effectiveness

PPP legal framework

Regarding the legal framework, the weakest point for Romania is represented by the fact that the country does not have only one clear act dealing specifically with PPP/ concessions, while Albania has only one act. On the other hand, the legislation of the both countries allows BOT or other derived contracts.

While both countries have clear and distinct public procurement laws, Romania loses points due to the fact that sectorial specific laws apply and no clear distinction is being stated in any law regarding the law applicable – PPP law or specific industrial law. On the other hand, Albania has no sectorial laws to regulate the PPPs therefore no confusions can be produced.

Still, Romania gains points for this category considering the fact that the law is in fact a law which regulates the institutional PPP, the private and public partners settling a new SPV company for developing the project. On the other hand Albania regulations do not specify anything regarding the members of the consortium – therefore, not clearly defining, but also not prohibiting either.

PPPs in Albania started to be implemented since 1992, after post-communist period and the first law on concessions and participation of the private sector in public infrastructure was released in 1995 (7973/1995).

Still, the reference law was released during 2006 – Law "On concessions" (9663), which was further improved and amended during 2007 / 2010.

In 2013, a new law was released – "On Concessions and Public Private Partnership" no. 125/2013 (24.04.2013), entering into force on 25th of May 2013, which is further called "The New Law". It is still debatable whether a new law was really needed.

Romania has also a concession law – dated 2006, which was further updated many times from 2006 until 2013. Furthermore, a PPP law was also launched in 2010 (Law 178/2010), further updated two times during 2011 addressing institutional PPPs. No clear line is drawn between the concession law applicability and the PPP law. It is worth mentioning that the initial version of the 178/2010 PPP law was extremely controversial regarding its compliance with the European Union rules and principles, rising the risk of infringement procedures by the European Commission against Romania.

Contractual and institutional partnership

In Albania, the partnership is in fact contractual – specific to concession contracts: the "Contracting Authority", which is a public authority that has the power to enter into a concession contract enters into an agreement ("Concession") with the "Concessionaire", under which the latter performs the following:

(a) Carries out an economic activity which would otherwise be carried out by Contracting Authority related to a concession project, management contract or other public services;

(b) Assumes all or substantial part of risks related to such economic activity;

(c) Receives a benefit by way of:

(i) Direct payments paid by or on behalf of contracting authority;

(ii) Tariffs or fees collected from users or customers;

(iii) A combination of such direct payments and tariffs.

(Law no 9663, dated 18.12.1006)

In Romania, considering the provisions of the 178 Law, the partnership is institutional, as the project is developed by a "Project Company" – a commercial company, Romanian legal person, whose shareholders are both the public partner and the private partner, that are represented proportionally according to their involvement in the public-private partnership project, the public partner's part being in kind and the private partner providing the financing.

(Law No. 178 from 1 October 2010)

Proposed improvements

- Albania: legislation changes could be proposed so that the implementation of institutional PPPs to be also allowed
- Romania: one single law which regulate all possible types of public private partnerships should be applied or a clear distinction should be made between the sphere of appliance of the PPP Law and of the Concession Law. Also, it should be clarified to what extend the specific regulations applicable to particular laws (example: energy, oil, gas) apply and which specifications prevail

Definitions and scope of the Law

This is the category that significantly differentiates the two countries.

The applicable legislations for each of the two countries define the main terms of the law and the contracting authority. It is also specifically mentioned under the laws of Romania and Albania that both local and foreign companies can be awarded with the contracts, so no discrimination is applied.

Please find detailed below the basic principles of appliance mentioned under both laws (Table 2):

Albania	**Romania**
Transparency	Transparency
Fairness	Non-discrimination
	Equal treatment
Efficiency	Efficient use of funds
Long-term sustainability	Assumption of responsibility
	Proportionality

The sectors under which the law applies are the differential factors.

Under the Albanian law, in article 4, a clear distinctive list of sectors under which concessions may apply is defined. Furthermore, the list is not exhaustive, as the Council of Ministers can authorize exceptions of concession implementation in other sectors also, upon the proposal of the Minister responsible for economy. (Albania, Law no 9663, dated 18.12.1006, Art. 4, par. (2).) On the other hand, regarding Romania, there is no clear list of industries of applications, and even more, many restrictions and limitations are defined (Art. 5)

Table 3 – industries of application of PPPs in Albania vs. Romania

Albania **(clearly defined under the law)**	**Romania** **(incorporation from various articles and interpretations of law provisions)**
Management contract or provision of public services	Contracts which are assigned to carry out a relevant activity in the public utility sectors: gas, heat and electricity, water, transport, postal services, exploration or extraction of oil, gas, coal or other solid fuels, as well as ports or airports.
Transport (railway system, rail transport, ports, airports, roads, tunnels, bridges, Parking, public transport)	Provision or operation of networks providing a public service in transport by rail domain, through automated systems, with tramway, trolley, bus or cable.
Generation and distribution of electricity and heating	Production, transport or distribution of electricity
Production and distribution of water, treatment, collection distribution and administration of waste water, irrigation, drainage, cleaning of canals, dams	Production, transport or distribution of drinking water; Evacuation or treatment of sewage; Hydraulic engineering projects, irrigation or drainage Evacuation or treatment of sewage
Recycling projects, rehabilitation of land and forests, in industrial parks, housing	a) Exploration or extraction of oil, gas, coal or other solid fuels;

	b) Making available to carriers by air, sea or inland waterway, airports and maritime or inland ports or other transport terminals.
Natural gas distribution	Production, transport or distribution of gas or heat;
	Postal services; Management of courier services; Services with added value related to electronic mail and provided entirely by electronic means; Postal financial services; Logistics services.
Collection, transfer, processing and administration of solid waste	
Telecommunication	
Education and sport	
Health	
Tourism and culture	
Prison infrastructure	
Governmental buildings, service of maintenance of IT and data base infrastructure	

Proposed improvements

For this section, Romania could follow the Albanian example stated in the law: define under the law a clear list of industries of application and should also propose a waiver mechanism and responsible authority bodies that could grant the waivers of application.

Selection of the private party

Both laws regulate the aspect of the selection procedure to be applied, a competitive process being assured.

Regarding Albania, the steps for the selection of the private party are briefly detailed below:

1. The contracting authority announces the pre-selection procedure and pre-qualifications documents needed, by publishing the invitation, according to the legislation;
2. The procedures shall take place in one or two stages.
3. In case a pre-qualification procedure applies, the prequalified bidders must be provided with the proposal and related documents. Otherwise, the request for proposal shall be issued to all potential bidders.
4. For the two stages procedure, the interested bidders are required to send their financial and technical proposals, they can meet the contracting authority to discuss and clarify all documents sent on the both sides. After all proposals are examined, the contracting authority might adjust the bidding documentations;
5. For the second stage of the procedure, bidders are invited to send their final offers/ proposals
6. After evaluating all offers and disqualifying the ones that do not fulfill the necessary criteria, the remaining offers are ranked and results are notified to the companies.
7. If no claims are presented, the contracting authority invites the bidder with the best rating for the final negotiations (not on elements which were announced from the beginning as “non-negotiable”)
8. If the contracting authority is convinced after a period of time that the negotiations will not have a positive outcome, the negotiations can be stopped and the next qualified bidder is called for negotiations.
9. The final winner is announced, and detailed information has to be released.

All in all, the procedure which applies is in fact competitive dialogue, for the extended version of the formalities and, in case there is only one step, this is in fact an open procedure.

When referring to Romania, under the first version of the 178/2010 law it was stated that the negotiation procedure applies for the selection of the contracting party. Still, the law had to be changed as it was not compliant with the European Union directives and with the changes from 2011, both the open procedure and the competitive dialogue may apply, being specifically defined:

a) "open procedure – it is a selection procedure of the private partner which takes place in only one stage, in compliance with the provisions of the present law, and within which any private investor can submit a tender";
b) „competitive dialogue - it is a selection procedure of the private partner by the public partner, procedure in which any private investor can take part, which takes place in two stages, the assessment stage and the negotiation stage, within which the public partner leads a dialogue in compliance with the provisions of the present law".

According to article 18, for complex projects (from technical and financial standing point) the competitive dialogue can be applied, as long as the open procedure would not be appropriate for establishing the winning party. This is also the case for the French legislation and statistically, the main part of the contracts is attributed using the competitive dialogue procedure.

The main steps of the 2 procedures are detailed below, as a comparison (Table 4):

Open procedure	**Competitive dialogue**
1. project initiation by publishing the selection announcement and initial information regarding the project	1. project initiation by publishing the selection announcement
2. submitting the initial offers by the private investors interested in the project	2. submitting the intention letters by the private investors
3. evaluation of the offers and corresponding documents	3. evaluation of the intention letters and corresponding documents
4. announcement of the winning bidder	4. negotiation through dialogue
5. signing the PPP contract	5. submitting the final offers
	6. announcement of the winning party
	7. signing the PPP contract

When selecting the winning private party, multiple principles have to be applied and both regulations mention clear provisions regarding the principles, steps and recommendations to be used for selecting the private partner. Also, the decision to disqualify or reject an applicant has to be sustained by written arguments.

Another aspect covered under this category is the level of notoriety achieved when announcing the launch of a PPP contract. Clear provisions regarding the publication of the bidding procedure are enclosed in both legislations.

In Albania, the invitation for participation must be published into the Public Announcements Bulletin, as well as in the international and local press, while in Romania notices must be published in SEAP ("Sistemul Electronic de Achizitii Publice" – Electronic System of Public Procurement) as well as in the Official Journal of the European Union, according to certain thresholds. It should be underlined that until the end of 2012, SEAP was not fully developed and integrated in order to fulfill all publishing regulations for the announcement of PPPs.

The award of the project is very similar between the two countries: for both, the Law clearly states that all proposals must be ranked on predefined evaluation criteria, that information regarding the winner has to be made public and track record of the evidences must be kept.

The Romanian law offers no explicit details regarding post award negotiations, while the Albanian law has clear provisions in this respect. However, the Romanian law mentions under article 18 that in case a competitive dialogue procedure was applied and the

negotiations with the first ranked cannot lead to a final contract, negotiations can be started with the second ranked investor. This aspect is also clearly stated under the Albanian law.

Proposed improvements

For the Romanian case, in order to ensure full transparency, it should be allowed the public access, at least for the interested parties, to the records kept by the Authority regarding the selection procedure and corresponding documents.

Also, clear provisions regarding post award negotiations should be made under the Romanian law, "borrowing" the Albanian model: to what extend the contracts can be negotiated, what are the limitations over which no concession can be made and what are the decision makers.

Project agreement

The embedded provisions and possible interpretations of the contractual clauses are the most important aspects for the success of this type of projects. Being self-liquidating projects, the contracts are highly important and the flexibility granted by the legislation for the transcription of the contracts is the ground on which the project is further constructed.

When talking about the contracts, both legislations state a minimum list of information and aspects that are mandatory to be dealt with under the public-private partnerships/ concessions.

Regarding the provisions for duration of the contract, even though Romania was disqualified with one point at this section, as no clear references are made to both investment amortization and return on the capital, Albania legislation does not mention as well the necessity to take into account the return on the capital when deciding regarding the maturity of the concession contract. It is only mentioned that the maturity can be adjusted according to project specifics, and can not exceed 35 years.

The Albanian contract can be terminated in specific cases and also following mutual agreement between the two parties. The Romanian legislation leaves the termination clauses to the mutual agreement and negotiations of the two parties.

Still, in case the contract is terminated by the public authority, the investors are not explicitly entitled to receive compensations for losses, not in Albania, nor in Romania.

Collection of tariffs by the private party is explicitly mentioned under both legislations. The main difference comes from the fact that the Romanian legislation lacks details regarding the possibility for the private party to receive both fixed and / or consumption-based payments from the contracting authority or other public authority.

Proposed improvements

Romanian law:

1. It should be mentioned that no extension of the Project Agreement is allowed, only in special circumstances, in order to limit possible abuses and to establish clear final deadlines.

2. Compensations for the private party should be defined for works already executed under the contract – this would add extra comfort to the financing institutions.

Both the Romanian and the Albanian laws should clearly make distinctions and propose guidelines and interactions between the state authorities responsible for PPP award and for tariffs and services standards, if there are different institutions.

Security and Support Issues

For the success of a PPP and for assuring the necessary funds for such a project, this is a section that can make a high difference between a successful or a failed project.

Securities and support issues are important for any financing institution who may consider the financing of such project.

The Romanian regulator has considered the financing institutions and has provided the possibility of mortgaging the assets of the project, except the public property goods. On the other hand, there are no provisions under the Albanian law regarding guarantees that can be assured for a potential financer.

No financial or guarantee support can be granted by the contracting authority or by the state under the Romanian legislation, this being one of the main flows of the 178/2010 PPP law. The public partner can provide capital to the SPV to be constituted between the public partner and the private partner only in kind, with no other support.

On the opposite, the Albanian legislation mentions that the contracting authority or other relevant public authorities can have liabilities into the project (article 27 (j)), which can be interpreted as guarantees or support for the implementation of the project.

Even though the Romanian legislation allows mortgages, there are no major impact rights defined for the lenders, specifically referring to the "step-in" right, with a proper new Private Party, but without initiating a new tender process. This right was inserted under the Albanian law during 2008, when the amendments were approved, making Albania one of the first and few European countries to include this specific right.

On the other hand, the possibility to step in without organizing a new tender procedure might affect the principles announced for the legislation and can be debatable and subjective whether the new private party was properly selected or not.

Proposed improvements

- Albania: clear provisions should be included regarding the guarantees and mortgages that can be established for the financing of the project. Clear provisions should also be included regarding the ways and extend to which the public partner can offer guarantees and can financially support the project.
- Romania: no limitations regarding the contribution of the public partner should exist, therefore the possibility of the Contracting Authority to contribute in nature (not only in kind) should be proposed. Also, the limitations regarding the guarantee and support of the public partner should be excluded from the legislation. The introduction of the "step-in right" is extremely important for the comfort of the financing institutions, therefore this clause should be allowed and stated under the legal provisions.

Under both legislations, special provisions regarding project financing and special rights for the lenders might be added.

Settlement of Disputes and Applicable Laws

No major differences between the two countries are encountered for this section. Both legislations have a distinct chapter regarding appeals and contestations: for the Albanian law – article 26 and for the Romanian law – article 28.

The Albanian law establishes only the general framework regarding applicable legislation in article 30 and 31, mentioning that the concession contract is governed by the laws of Albania and in case there are any disputes between the two parties, the mechanisms for arbitration that apply are the one mentioned under the concession contract, therefore allowing the two parties to decide those mechanisms at the moment of contract signing. The only other law mentioned, with which a connection is being made is Law no. 9643 /2006 – "Law on Public Procurement".

On the other hand, the Romanian law makes many connections to other applicable laws as follows:

- Law no. 213/1998 regarding public property, when defining the public asset

- Description of postal services, according to Government Ordinance no. 31/2002 and amendments and completions by Law no. 642/2002
- Civil Law, regarding appeals solving and disputes as well as Law 146/1997 regarding judiciary stamp taxes
- Government Ordinance no 2/ 2001, amended and supplemented by Law 180/2002 regarding contraventions that apply

Proposed improvements

More flexibility could be added to the Romanian legislation in terms of governing laws and it could be clearly allowed to the parties to decide the applicable laws governing their relations. Making so many connections with other laws of Romania complicate the contractual provisions and may slow the implementation of the project.

Conclusions and recommendations

The ways Albania and Romania address public-private partnerships are different, starting with the contractual features and further analyzing the ways of implementation and control.

However, there are small changes that each country could make in order to attract more financing as EBRD is a major financing institution for large scale infrastructure projects. Considering the specific legislation of each country, EBRD performs periodic studies regarding the compliance and effectiveness of each country regulations, specific scorings are computed and considered when addressing the financing opportunities in each country.

Even though it is easily visible that Albania scored better than Romania in all existing categories, both countries can make specific changes in order to score even better.

The following brief improvements could be applied:

1. PPP legal framework: Albania could introduce also the concept of institutional PPP and Romania could centralize all PPP types under one single law or could make clear distinctions between appliances of each law.
2. Definitions and scope of the Law: Romania could define a clear list of industries of application for the law and a waiver mechanism
3. Selection of the private party: Romania could establish a procedure to offer unlimited access to the interested public for bidding documentation and also clear guidelines regarding contractual negotiation flexibility.
4. Project agreement: Romania should state clearly undertakings in case project maturity is not fulfilled and also compensations for the private party in case of defaults. Both legislations should propose guidelines and interactions between state authorities responsible for PPP award and for tariffs and services standards, in order to ensure consistency over the way the projects are addressed.
5. Security and support issues: clear provisions for guarantees and mortgages under the Albanian law and no limitations regarding the public partner contribution in the project under the Romanian legislation. Step in right for the Romanian legislation and special rights for the lenders to be addressed under both legislations.
6. Settlement of disputes and applicable laws: more flexibility and fewer references to other laws for the Romanian PPP law.

The governments should also investigate the examples offered by the other more successful countries which have a solid background in PPP implementations and should try to make the best they can in order to ensure a proper legal framework for all stakeholders, including top international financing institutions such as EBRD.

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