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Main Findings and Recommendations

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Table of Contents

PREFACE	9
EXECUTIVE SUMMARY.....	11
I. PUBLIC INVESTMENT MANAGEMENT FRAMEWORK	25
A. Legal and Regulatory Framework for Public Investment Management.....	26
B. Organizational Responsibilities and Capacity.....	29
C. Public Investment Management Cycle.....	31
D. Strategic Framework and Prioritisation	32
E. Project Identification and Initial Screening.....	34
F. Project Appraisal, Preparation and Approval	35
G. Investment Project Selection and Budgeting.....	42
H. Investment Program Implementation and Monitoring.....	45
I. Completion Review and Ex-Post Evaluation.....	51
J. Reform Strategy and Change Management	52
II. PERMITTING PROCESSES	58
A. Introduction	58
B. The works authorization procedure.....	59
C. The Urbanism Certificate.....	60
D. The Archeological Permit.....	60
E. Environmental Permitting	66
F. Utility Permits.....	71
G. Land Acquisition.....	76
E. Common Themes Affecting the Quality of Regulation and Implementation	79
III. OVERVIEW OF THE ENVIRONMENT SECTOR	87
A. Programs and their interface with the Project Cycle in the Environment Sector	90
B. Environment projects preparation and implementation flow diagram	91

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C.	Project Preparation, Appraisal and Independent Review	93
D.	Permitting and Challenges in the Sector.....	94
E.	Implementation Phase.....	95
F.	Summary of Recommendations.....	98
IV.	OVERVIEW OF THE ROAD SECTOR.....	99
A.	Institutional Challenges.....	100
B.	Project Cycle and Process Mapping in the Sector.....	101
C.	Project Identification, Planning, and Preparation Phases.....	104
D.	Specific Challenges to the Sector.....	109
E.	Contract Award and Construction Phases	111
V.	OVERVIEW OF THE RENEWABLE ENERGY SECTOR	118
	Background	118
A.	Institutional, Regulatory and Legal Framework	121
B.	Project cycle, permitting and procedures	124

List of Abbreviations

AA	Appropriate Assessment
ANKO	Austrian Register of Tenders
ANRE	National Regulatory Authority in Energy
ANRMAP	National Authority for Monitoring Public Procurement
ARACO	Romanian Association of Construction Entrepreneurs
ATR	Technical Connection Avis
BP	Building Permit
CBA	Cost Benefit Analysis
CCS	Carbone Capture and Storage
CF	Cohesion Fund
CfD	Contract for Difference
CNSC	Council for Solving Complaints
DC	Communal Roads (Drumuri Comunale)
DJ	County Roads (Drumuri Județene)
DOD	Department of Public Domain
DPFC	Delegated Preventive Financial Control
DS	Municipal Roads (Drumuri Sectorale)
DTD	Detailed Technical Design
EA	Environmental Authorization
EIA	Environmental Impact Assessment
EMP	Environmental Management and Monitoring Plan
EP	Environmental Permit
E-RES	Electricity from Renewable Energy Sources
EU	European Union
FBRL	Fiscal and Budgetary Responsibility
FBS	Fiscal and Budgetary Strategy
FIDIC	International Federation of Consulting Engineers
FiT	Feed in Tariff
FMA	Financial Management Agent
FS	Feasibility Study
GC	Green Certificate
GD	Government Decision
GEO	Government Emergency Ordinance
GO	Government Ordinance
IDAs	Inter-Communitarian Development Associations
IFI	International Financial Institutions
IMC	Inter-Ministerial Council
IPPC	Integrated Pollution Prevention and Control
JASPERS	Joint Assistance to Support Projects in European Regions
LEPA	Local Environmental Protection Agency
MA	Management Authority

MBT	Mechanical Biological Treatment
MC	Ministry of Culture
MECC	Ministry of Environment and Climate Change
MO	Monitor Official (The Official Gazette)
MOPF	Ministry of Public Finance
MOTI	Ministry of Transport and Infrastructure
MRDT	Ministry of Regional Development and Tourism
NEPA	National Environmental Protection Agency
NES	National Energy System
NGO	Non-Governmental Organization
NREP	National Renewable Energy Plan
NRF	National Road Fund
NSRF	National Strategic Reference Framework (in Slovenia)
OP	Operating Program
OP - ETID	Operational Program of Environment and Transport Infrastructure Development
OPFC	Own Preventive Financial Control
PA	Procurement Agent
PFiT	Premium in Feed Tariff
PFL	Law 500/2002 on Public Finance
PFS	Pre-Feasibility Study
PIFC	Public Internal Financial Control
PIM	Public investment Management
PIUs	Project Implementation Units
PPA	Purchasing Power Arrangements
PPA	Purchasing Power Agreements
PSA	Primary Spending Authorities
RAS	Reimbursable Advisory Service
RC	Road Company
RDA	Regional Development Agency
REPA	Regional Environmental Protection Agency
RES	Renewable Energy Sector
RNCMNR	Romania National Company for Motorways and National Roads
RO	Renewable Obligation
ROCs	Regional Operating Companies
SEA	Strategic Environmental Assessment
SOP	Sector Operational Program
SOP - T	Sector Operational Program - Transport
TEC	Technical and Economic Committee
TOC	Total Organic Components
TORs	Terms Of Reference
TSO	National Transmission and System Operation
UC	Urbanism Certificate
UCVAP	Central Unit for Public Procurement Verification

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PREFACE

Why this study is important

Improving public investment is critical to Romania's future economic growth. Romania made huge strides in catching up with the rest of Europe between 2000 and 2008. During that period average incomes for Romanians almost doubled (from 26% to 47% of the EU average) as markets opened and institutions reformed in preparation for EU accession. Infrastructure development is key to Romania's continued growth. In order to continue growing at its maximum potential Romania will need to improve its infrastructure. To date, it has not managed to absorb the full allocation of European Structural Funds (ESF) that has been available in the current programming period. As the next EU programming period 2014-2020 will begin shortly, it is vital that changes are made to the current system to allow for greater prioritization and selectivity, increased efficiency and effectiveness and greater quality control.

Who is the audience for this study?

The Ministry of European Funds requested the World Bank's assistance to review the Romanian Public Investment Framework. This review looks at how to improve public investment from two perspectives:

- (i) Management of the overall public investment program; and
- (ii) Management of individual projects by the primary spending authorities (PSAs) or line ministries. This includes:
 - a. Permitting related procedures, and
 - b. Other project implementation steps.

Examining both macro and micro level perspectives is important to develop an accurate view of the principal challenges to improving the timeliness and quality of public investment.

How has this study been undertaken?

The report examines the legislation as well as seeking to understand the roles and behaviors of key stakeholders in the public investment process. It draws on the expert assessment of three key groups of stakeholders:

- (i) *Project proponents:* Those who hold the responsibility to prepare and implement the projects, usually on behalf of the Romanian state or county government;
- (ii) *Regulatory authorities:* institutions who carry responsibility to give approvals or permits for public investment projects; and
- (iii) *Private sector:* contractors or economic operators who execute one or more stages of the project on behalf of the beneficiary.

Extensive interviews were conducted with individuals from each stakeholder group focusing on their experience with specific projects or specific approval processes. To take into account potential differences in project requirements, stakeholders were asked specifically about projects in roads, environment, and renewable energy sectors. This sectoral level analysis is important because the project cycle can vary substantially by the size and type of project.

How is the Report Organized?

The report is divided into three volumes. Volume 1 contains the main findings and conclusions. Volume 2 contains supplementary details on sector-specific processes, details on two of the more complex permitting procedures, and three country case studies for three distinct sectors. Volume 3 contains matrices which consolidate the recommendations found in volume 1 and provides guidance on the potential timing, impact, and institutional responsibility for each.

EXECUTIVE SUMMARY

What are the findings of this report?

The report concludes that improving public investment in Romania will require:

- (i) **Stronger prioritization of public investment spending:** The Ministry of Public Finance needs to play a greater role to assure prioritization of the overall investment portfolio and its alignment with the budgetary and technical resources that are available to project beneficiaries.
- (ii) **More robust project planning in order to reduce delays in implementation:** Project risks must be identified up-front and not postponed until the implementation has begun. Review of project readiness must be strengthened to assure that scope and quality of the feasibility studies are appropriate for the size and complexity of the project.
- (iii) **Increased capacity for project management -** Technical capacity within project promoters and the regulatory bodies needs to be enhanced so that the current regulatory framework and project procedures can be implemented effectively (in substance and as well as in form).

Stronger prioritization of public investment in the Center of Government

The current planning and budgetary processes do not lead to an effective prioritization of projects. As a result, the number of projects in the public investment portfolio far exceeds the available resources. The Ministry of Public Finance (MOPF) should assume a more prominent role in public investment management. The primary responsibility for planning and implementation of projects should continue to rest with the primary spending authorities, but MOPF should be empowered to exercise a “challenge” function, especially for large or high-risk projects. The Fiscal Responsibility Law and recently approved amendments to the Public Finance Law may help strengthen project selection by imposing a resource constraint on the planning process. Other complementary actions are needed though. Finally, MOPF should also be able to enforce transparency and accountability regarding the results achieved by budget holders through their public investment projects.

Creating a stronger culture of project preparation

The regulatory and institutional framework for public investment management should give project promoters the incentives and the guidance needed to execute sound projects, including the ability to anticipate and manage risks. Feasibility studies are a critical first step in project planning, but good feasibility studies can take considerable time and financial resources. Too often in the Romanian system, rushed or inadequate feasibility studies have led to lengthy delays and wasted resources later on. Institutional incentives appear to undermine the quality of the feasibility study. Feasibility study work is awarded to consulting firms in an open competitive process, but the decision to award on the lowest cost (and short completion time) does not always result in a well-qualified firm winning the work. Projects are started based on feasibility studies that cost less than 1% of construction cost – much lower than the norm in other countries. Better terms of reference must be developed for feasibility studies that are specific to the type of project, and institutional checks are needed to assure that projects are indeed ready to move forward and

that the project promoter will have the expertise to oversee the project – otherwise savings on the front end will be paid on the back end.

Increasing capacity for a more effective regulatory framework

Weaknesses in institutional capacity affect public investment on several levels. First, some project promoters lack sufficient technical capacity to manage contractors effectively and to assure the quality of work done – including those preparing feasibility studies or submitting bids for certain types of contracts. Secondly, low institutional capacity affects how regulations are implemented. In some cases the regulation gives the appearance of managerial control/oversight but in practice adds little value. One manifestation of this is the wide-spread use of “in principle agreements” which means that permit approvals are deferred to later stages of the project cycle. Principle agreements give the illusion of speeding up project start-up, but only at the cost of significant and protracted delays during implementation because information that could be used to inform project design and costing is missing. Third, control institutions and control mechanisms could be better aligned to support sound project management, as poorly applied controls and inconsistent interpretation undermine managerial initiative and effective risk management.

How is the remainder of the Executive Summary organized?

The rest of the executive summary provides an overview of the entire report. It is structured around the following headings:

- I. The Public Investment Management System
- II. Management at the Project Level:
 - a. The Permitting Process
 - b. Challenges in Renewable Energy
 - c. Environmental Permitting
 - d. Other implementation procedures
- III. Priority Actions to be Considered

I. The Public Investment Management System

Greater selectivity and prioritization in decision-making is urgently needed

The planning and budgetary processes do not lead to an effective prioritization of projects. As a result, the number of projects in the public investment portfolio far exceeds the available resources. This is particularly evident in the transport sector, where it is estimated that under current funding levels it would take eight years to complete the projects currently in the portfolio, even as still more projects are being added.

The Fiscal Responsibility Law and the recently amended Public Finance Law, provide a framework for strengthening project selection by imposing a resource constraint on the acceptance of new projects into the public investment program. However, some important components will need to be put in place to achieve this objective:

- (i) The strategic planning documents of line ministries are generally insufficient to guide project prioritization. Further work is needed to translate strategies into concrete, prioritized investment programs that are consistent with the resource constraints.
- (ii) MOPF's medium term expenditure framework (MTEF) does not constitute a sufficient resource programming tool for public investment projects. While some capital expenditures conveniently fit within the three-year MTEF window, others require much longer implementation time frames with commitments extending well beyond three years. It is important to capture the long-term total project cost in the government's investment plan to ensure that, once approved, funds are set aside to allow for timely completion.
- (iii) Investment programming is not realistic. Large volumes of commitments are pushed into the outer-years. The amounts allocated in each of the years are not linked to contractual commitments undertaken by the projects or what would be considered economically efficient project implementation schedule. Finally, there are far too many projects both in the pipeline and under "implementation", far beyond the resources available to the government for project implementation. This has negative effects on implementation of projects, including dilution of scarce project management skills, the uncertainties over annual financing, and extended implementation schedules.

To improve the prioritization and planning projects, the authorities should:

1. Develop and implement a plan for strengthening the sectoral expenditure and investment strategy elements of the Fiscal and Budgetary Strategy (FBS) and for building necessary capabilities in the MOPF.
2. Develop a longer term (6-10 year) resource constrained programming perspective to guide sectoral investment master planning.
3. Develop and adopt improved procedures for project identification and initial screening that focus on consistency with sector priorities and resource limits.
4. Further clean up the portfolio of on-going projects in the Budget to eliminate those that are no longer a priority or on which little progress can be made at current levels of funding.

Project appraisal requirements can be significantly strengthened

Cost-benefit analysis should not be required for every investment. On paper, the regulatory framework is well-organized and has many features that one would expect to find in the appraisal stage of a sound PIM system. However, there are problems in the way that these procedures are implemented. Some of the approval requirements do not appear to add value. For example, the practice of requiring cost-benefit analysis (CBA) for all projects -not just major ones - is unnecessary, especially for maintenance related projects such as road rehabilitation. These requirements also heavily challenge the limited institutional capacity that exists to review such analysis. As a result CBA is often carried out in a perfunctory manner to comply with the regulations and is not really used as an aide to decision-making.

Project approvals have become perfunctory due to limited capacity. For example, the inter-ministerial committee that is charged with reviewing the feasibility studies is limited to performing a conformity review to assure that the feasibility study complies with the regulation. It does not have the mandate or the technical competence to question either the content of the feasibility study or the economic rationale of the project. While MOPF is a member of the committee, it is unable to veto or amend project plans that do not comply with the strategies and priorities underlying the public investment program or that lack adequate economic and financial justification. . The new Investment Evaluation Directorate in MOPF should build up the necessary technical expertise to perform this role. Criteria that should be factors in assessing the suitability of a project – such as risk mitigation strategies and project management arrangements – do not figure into the current assessment. In general, feasibility studies have been undertaken as a first step toward getting a project into the budget, but too many feasibility studies have been done for which there is little prospect of financing project implementation.

Project appraisal and selection could be strengthened by revising the technical requirements for feasibility studies and by increasing the capacity within the center of government to review such studies. More specifically, the authorities should:

1. Limit CBA to those projects where the size and complexity justify it and using alternative evaluation methodologies (cost effectiveness or multi-criteria methods) in other cases;
2. Require an assessment of the proposed project management arrangements, including a skills gap analysis of the implementing authority, and whether they are adequate for the size and complexity of the project;
3. Establish capacity within the MOPF to exercise a “challenge” function and to oversee the independent review (by technical specialists) of feasibility studies for a few selected large or complex projects.

The quality of feasibility studies needs to improve

Institutional incentives appear to undermine the quality of the feasibility study. Feasibility study work is awarded to consulting firms in an open competitive process, and mostly to the firm offering the lowest (lump sum) price, sometimes in combination with the shortest completion time. The offered price for undertaking a full feasibility study is typically less than 1% of construction cost. This is very low: the norm in other countries is 3-4% of project costs for some sectors. The focus on lowest cost and short completion time affects the quality of the consulting work; it reduces the quality of technical investigations, the number of alternatives being analysed, and optimization of project designs. The Terms of Reference for consultants undertaking feasibility studies are not always specific to the project or sector. The extent of investigations required for detailed designs and tender documents can be missing in the terms of reference.

There is no Romanian oversight body or technical advisory group that assures appropriate standards are met for project feasibility studies. In most cases there is no requirement for independent appraisal of these studies. For many projects, the ministries and inter-ministerial technical committee are simply endorsing the findings of the proposing agency. The exception to this is with EU-financed projects over EUR 50 million, where the EC and JASPERS carry out a full appraisal of each project. For complex environmental and highway projects quality assurance arrangements and independent appraisal of the feasibility study would be particularly beneficial. This would help identify mistakes or gaps in information that are otherwise found by contractors at the tendering stage or in project implementation. Technical reviews are best undertaken by parties that have no interest in the project outcome and can therefore be more objective.

The feasibility study is the basis for the preparation of tendering documents for design-build works contracts. Poorly prepared feasibility studies lead to delays and cost overruns in project implementation. This is especially the case in the transport sector with motorway projects using design-build contracts.

To enhance project preparation in selected sectors the authorities should:

1. Require specific TORs for the feasibility/preliminary engineering stage of new investments to be used as basis for all projects.
2. Strengthen quality control of feasibility studies and (design-build) tender documents by developing independent quality assurance reviews and establishing detailed operational manuals covering preparation of all types of projects.

Learning lessons from past projects requires better monitoring and evaluation

Monitoring of project implementation by the MOPF could be enhanced through changes in legislation and capacity building within the relevant directorates. PSAs are required to submit to the MOPF monthly monitoring reports on the implementation of public investment projects. The reports are required to explain any issues that have arisen in the implementation of the investment program and the remedial actions to be taken. The monthly monitoring reports contain little qualitative information on investment project and program performance or of any remedial actions being taken. The frequency of the reporting is also excessive and can be contrasted with the practice elsewhere of requiring quarterly or half-yearly monitoring reports. Monitoring could also be enhanced by the ex-post evaluation of projects that have been completed. The establishment of the new Public Investment Evaluation Directorate could provide an opportunity for strengthening procedures for monitoring investment program implementation and evaluation of results.

To strengthen MOPFs value-added in project monitoring and the accountability of project promoters, the authorities should:

1. Reduce the frequency of reporting from monthly to quarterly or half-yearly where appropriate, while adding requirements for meaningful information on project performance and remedial actions.
2. Introduce a regulation requiring PSAs to undertake completion reviews for all projects above a specified threshold size.
3. Carry out independent ex-post evaluations of major and complex investment projects to be funded from the MOPF Budget.

II. Management at the Project Level

(A) The Permitting Process

Permitting regulations require clarification and supporting information systems rather than tighter deadlines

The general legal framework for permits is reasonably complete. While there are some gaps and inconsistencies in the relevant laws (see the discussion of archaeological permits and land acquisition), for the most part the legal framework is complete and reasonably consistent. Law no. 50/1991 allows permits to be obtained at the Feasibility Study stage, based on the list included within the Urbanism Certificate. More typically, a permit provides a list of specific constraints that the project promoter should take into account and comply with in order to obtain the Construction Authorization. In addition to general legislation, most permitting related procedures are regulated by specific legislation (environmental, water management, archaeology, public utilities such as electric, gas or water supply, etc.). Most of this legislation is complete and does not impose onerous or unreasonable requirements for permitting.

There are a wide variety of permitting symptoms that affect project implementation. Some of the most common permitting related problems that have affected projects' implementation include the following:

- Poor quality, incomplete and inconsistent information provided through permits, with the same permit issuer providing contradictory information in various stages of the project approval, or failing to identify uncharted underground assets that may subsequently be discovered during works implementation;
- Some permits include excessive information in respect of the project's physical characteristic. Consequently, any further modification at works implementation stage could affect the validity of the permit itself. This is identified as a particular challenge with regard to environmental permits;
- Unexpected and unwarranted conditions are sometimes imposed by permit issuers, such as a promoter's obligation to replace/renew assets which are not directly affected by the project;
- Unjustified rejection or unreasonable bureaucratic delays in the permit issuing process, mostly the case of permits issued by local authorities but not exclusively so.

There are two underlying causes of these problems. First, the *incomplete cadastre*, incomplete mapping of utility networks, and the lack of consolidated geographical data at the level of the local authorities mean that permit-issuing institutions do not have the information they need to fulfil this function and pass this responsibility and risk on to the project proponent and to contractors. Second, *ambiguity in the legal provisions* with respect to the type and limits of conditions that might be imposed by a permit issuer can lead to different interpretations in permitting requirements and obligations.

Improving the permitting process will require action on the underlying causes. Progress in project implementation is more likely to be achieved through dedicated actions targeting the underlying causes of the identified problems, rather than by introducing tight deadlines or procedural exemptions. In the past efforts have been made to streamline the construction authorization process by reducing deadlines and

introducing various procedural exceptions for priority projects and sectors (mainly road infrastructure).¹ This has had limited success because it focused on procedural aspects (such as deadlines for responding) rather than on the quality and effectiveness of the permitting process. In practice, the three-stage works authorization procedure (Urbanism Certificate, subsequent permits and approvals, Construction Authorization) is neither excessive nor bureaucratically burdensome in and of itself.

A successful system will ensure that contractors are provided with as much information as possible. The challenge for the authorities is to create incentives for those that should have access to the information needed to issue permits to gather this information and provide it to those requesting permits. In the short-term, the permitting-related requirements for the Consultants preparing Feasibility Studies should be amended to also include an obligation to carry-out detailed field investigation in order to detect any possible uncharted underground/buried utilities.

Government should restrict the use of “in principle” permit agreements

Wide-spread use of “in principle agreements” means that permit approvals are deferred to later stages of the project cycle. The current practice in Romania is not to issue a complete, detailed permit at the Feasibility Study phase when the information can be used to inform project design and costing. Instead permits are often issued as an “in-principle agreement” at the time of the Feasibility Study. Sometimes this is simply a checklist indicating the various procedures that must eventually be undertaken by the promoter in order to get the final approval, i.e. the permit itself. The “in-principle agreement” is renewed/re-confirmed at Detailed Design phase. Construction Authorizations can be applied for and issued on the basis of these “principle agreements”. Consequently, final permits may only be issued when the project is already in the detailed design or construction phases. This is particularly common for two types of permits – the archaeological permit issued by the Ministry of Culture, and the utility permits issued by utility providers.

Location of underground utility infrastructure is a major issue for road projects. The wide recourse to “in principle” agreements gives the illusion of speeding up project start-up, but only at the cost of significant and protracted delays during implementation. The task of obtaining the final permit is being left either for the entity responsible for project design or for the design-build contractor. Problems arise when the utility owner grants its agreement based on the assumption that the project proposal is not affecting its assets, only for these assets to be discovered during the Detailed Design stage or during construction. This can lead to contract disputes, since bidders have no reliable means of assessing the cost of potential works to protect or relocate utilities when tendering for contracts. In some cases, this risk is reflected in higher tender prices. In others, contractors may seek to recoup costs through alterations in quantities and specifications. When the actual cost to relocate utilities ends up higher than anticipated, it generates claims and disputes between the contractor and the project promoter. In some cases, the unexpected utility relocation work may even result in a need to acquire supplementary land, which in turn may trigger additional delays. The underlying problem is that utility owners lack the information needed to issue permits because many of the underground networks are not mapped. However, they have little incentive to locate them as long as the risks/costs can be easily passed on to project promoters and contractors. In reality these risks and costs are being ultimately borne by the taxpayer.

¹ Law no. 184/2008, Law no. 255/2010 and GEO no. 27/2003 on silent approval are typical examples of actions taken in this respect.

To enhance the value of utility permits, the authorities should:

1. In the short-term, require the Terms of Reference for Consultants carrying out the Feasibility Studies to include field investigations necessary to identify un-charted underground utility infrastructure.
2. Allow for a time-frame (and, possibly, dedicated financial resources) for utility owners and local authorities to provide complete mapping of existing underground assets.
3. Make utility companies legally responsible for providing exact location of their above and below ground utilities, thereby shifting the risk from the contractor to the utility, the entity that should have access to the information needed for permitting.
4. Include a provisional sum in contracts to provide payment for relocation of utilities not identified in the tender documents using the offered day-work rates.

Archaeological permits can be a significant obstacle in the road sector

Archaeological permits can be issued without an assessment, leading to problems later on. The “in-principle agreement” granted by the Ministry of Culture consists of a simple statement that the issuer is not opposing the project, subject to all relevant archaeological research procedures being undertaken as per the legal provisions in force. This agreement is sometimes based on a preliminary archaeological desk study, but it may be issued with no assessment whatsoever. The “in-principle agreement” can be used by the project promoter for obtaining the Environmental Permit and the Construction Authorization despite the legal provisions formally requiring archaeological research and EIA to be carried out in parallel. The overlapping of the archaeological research with the works execution stage has led to various problems:

- (a) the total projects costs and benefits are inaccurately assessed because the archaeological related costs and externalities are not quantified during the Feasibility Study phase,
- (b) insufficient financial resources are available to the contractor within the works contract budget for the archaeological research, which leads to cost overruns and delays,
- (c) inadequate management of the archaeological process by the contractor, and
- (d) costly delays in the execution of the works while the archaeological related procedures are being complied with.

To improve the archaeological permitting, government can look to the environmental legislation. The challenges with archaeological permitting stem from three sources: lack of clarity in the legislation itself; capacity constraints among project promoters; and institutional incentives related to the financing of such work. While the archaeological and the environmental related procedures are equally complex, the two differ greatly with respect to consistency and clarity. The environmental legislation defines a coherent institutional framework with associated obligations and responsibilities, and clearly sets forth the steps to be undertaken by a project promoter, from the filling-in of the initial application up to the issuing (or rejection) of the environmental permit. In the archaeological protection legislation, in contrast, there is no clear, integrated and detailed description of the procedure to be followed by a project promoter, from the issuance of the Urbanism Certificate up to the granting of the permit allowing execution of construction works.

Project promoters lack specific knowledge of the archaeological protection legislation and procedures. The services contracts for Feasibility Studies preparation usually include little or no reference to the designer’s specific obligations in this respect, and often do not include appropriate financial allowances. For example, the terms of reference for the revision of the Feasibility Study of a road bypass project, currently

under tendering, makes no specific reference to any archaeological related obligation, but only mentions the Ministry of Culture's territorial unit as the last of a longer list of stakeholders from whom the designer should get a permit. Financing of archaeological research is also problematic because archaeological research is not recognized as a category within the General Estimate of the investment framework content approved through GD no. 28/2008. There are no general cost standards for archaeological research. Furthermore, the law unnecessarily restricts archaeological research to history museums only, and consequently, to a closed list of qualified archaeologists. The incentives do not favor a fair allocation of risk. Rather, the incentive is for the project promoter to transfer the risk to the works contractor.

To make archaeological permitting more effective the authorities should:

1. Revise sectoral legislation to provide clear and detailed procedures for the archaeological related permitting process, including clearly-defined compulsory stages, institutional responsibilities and approval timelines.
2. Feasibility Studies should include, at a minimum, theoretical and field evaluation of the archaeological potential, so that potential bidders may assess the time and potential costs associated for archaeological research.
3. Where there is a high level of uncertainty with respect to archaeological potential, allow financing of the related activities under a cost reimbursement approach so that financial risk is borne by the project developer.
4. Modify GEO no. 34/2006 in order to allow preventive archaeological research being also undertaken by other specialized bodies, such as research institutes and universities.

(B) Challenges in Renewable Energy

Timely issuing of connection permits of appropriate validity is critical for the energy sector

Permits for connecting to the power grid are a particular issue for renewable energy projects and can create disincentives for investment. Renewable energy projects require a permit to connect to the grid. This requires payment of a non-reimbursable fee even before a connection contract is signed or before financing is obtained. There are cases when a connection permit was awarded, but a connection contract could not be signed, during which time the capacity of the grid in that particular location was exhausted.

Expiration of permits is a challenge in the renewable energy sector (RES). For EU financed projects, promoters often find that permits expire due to the frequent delays in processing the project files. The main permits required for a project in the renewable energy sector are the Construction Permit, the Connection Contract, the Environmental Permit and the 'Licence to operate a power installation', issued by the regulatory authority (ANRE). In order to prove the maturity of a potentially EU financed-project and to get a higher score during project evaluation, a potential investor needs to present certain permits required when implementing a their project (e.g. construction permit, ATR). Given the limited validity of these permits as well as the delays and the extended procedures in the public administration for EU-financed projects, in most cases these permits needed to be re-issued several times, incurring additional non-eligible expenditures for the potential beneficiaries of EU funds. This issue was partially addressed with amendments of the respective legislation prolonging the validity of some permits. However, given the lengthy times involved, it remains a problem in the sector.

Beneficiaries and investors in the renewable energy sector complain that the regulation and permits governing the sector are complex and non-transparent. The primary and secondary legislation governing a RES project issues from various institutions (Ministry of Economy, Ministry of Justice, Transelectrica, ANRE, OPCOM etc.) and covers various stages of a project separately (connection to the grid, authorisation, energy production, certification of RES energy, supporting scheme, energy trading, GC trading, etc.). Most potential investors claim it is difficult to have access *a priori* to all information needed for a RES project, because the relevant legislation is too vast, too poorly organized, and not transparent enough.

The lack of long term power purchase agreements is a serious handicap for renewable energy projects. Forecasting the future price of energy is highly uncertain and speculative: this uncertainty increase project risk and thereby increases project costs. Most projects must sell their power on short-term contracts. However, wind and solar PV projects usually require finance of at least 10 years. As no PPAs are legally allowed at present, banks require higher equity contributions to projects to increase their bankability. This is an especially large impediment to small generators of renewable energy.

To enhance the regulatory environment for successful renewable energy projects the authorities should:

1. Develop a comprehensive Code for renewable energy projects to map primary and secondary legislation, permits, and procedures applicable to RES projects, in order to make relevant legislation more transparent for potential beneficiaries in a timely manner
2. Align the expiration dates for the permits required during the respective phases in order to avoid appearance of unjustified increase of non-eligible expenditures for the beneficiaries.
3. Allow standard power purchase agreements for renewable energy projects, which would allow long term purchase contracts on standardized terms and format, at least for smaller producers. A system similar to the UK Contract for Difference may be considered.

(C) Environmental Permitting

Environmental permitting is lengthy but the procedures are well-understood by stakeholders

Environmental permitting in Romania is complex, but the procedures are well-defined and aligned to EU legislation. Environmental permitting actually involves five main, distinct permitting procedures, at the core of which is the Environmental Impact Assessment (EIA). From a project design point of view, the EIA is a major investment of time and energy. An EIA can take well over a year, especially if Natura 2000 areas are involved. EIAs lie on the critical path in the overall project preparation phase; that is, any delay to an EIA's completion will probably represent a delay to the Feasibility Study and to the entire project cycle. On the positive side, the EIA can be carried out in parallel with most other permitting activities. Furthermore, the EIA is relatively "final" compared to other permits. Once an EIA is completed, it usually does not need to be done again or significantly amended (unless the project plan is itself amended). An EIA, once completed, is not usually a major source of further cost, delay, or uncertainty as long as there are no significant modifications of the project.

The main challenge is managing the high volume of reviews that are needlessly required of the public authorities. Modifications of the Construction Law (no. 50/1991) introduced to ensure better participation by the public in the environmental permitting procedures has led to a de facto equal treatment of all economic and development activities in terms of EA process, irrespective of scope and severity of their

environmental impacts. According to NEPA officials this has resulted in NEPA and its local structures having to undertake over 100,000 reviews in 2011. This has led to considerable delays of the entire permitting process, as well as impacting the quality of the review and decision process. At the end of 2011, about 90,000 environmental decisions were issued, of which more than 90% did not require an environmental assessment procedure.

A second challenge in environmental permitting is that the quality of EIAs is considered uneven and in some cases inadequate. This directly impacts investment projects seeking EU funding. This is in part because of a lack of quality assurance of environmental reports. This, in turn, stems from a shortage of qualified individuals to carry them out, and an accreditation system that does not clearly distinguish between qualified and under-qualified individuals.

To enhance the effectiveness and efficiency of environmental permitting the authorities should:

1. Revise the Construction Law (no 50/1991), to reduce the heavy burden on environmental authorities (NEPA, EPA) related to the permitting process. Initial evaluation for low/no risk activities should be delegated to local authorities as part of the development authorization process, but with appropriate safeguards to avoid conflict of interest. Such safeguards could include use of specialized independent experts to undertake the initial screening.
2. Ensure adequate professional requirements for the companies and individuals that elaborate technical documentation necessary for environmental permitting.

(D) Other implementation procedures

Legislative changes can accelerate land acquisition in some sectors but improvements in the cadastre are urgently needed

Land acquisition has been a problem in the past for road projects, but this situation has improved with the recent legislation supported by the Road Company. Under Law 2010/255, written with the road sector in mind, both public and private land can be quickly acquired with limited opportunity to appeal. A court can review the description of the land or, a bit later, the price paid for it. But the act of expropriation is almost unstoppable. Some delays still occur in land acquisition, but this is usually attributable project planning weaknesses rather than the legislation.

Land acquisition is a relatively minor issue for environmental projects. These projects have relatively small footprints compared to road projects, so it is usually straightforward to assemble a plot of land for them. Solid waste and sewage treatment plants may attract a range of regulatory and legal challenges from neighbours who contest the location, but these are usually separate from, and subsequent to, the process of acquiring land.

Land acquisition is a major problem for RES projects because the legal framework for acquiring land or land rights for transmission lines is inadequate. Although Law 2010/210 was prepared to ease the process of land acquisition (similar to the one used for roads) it was never promulgated by the Ministry of Justice. Therefore, Transelectrica (which is solely responsible for land acquisition) must act under an older law – Law 94/33. This law has a number of problems. For example, it requires an expert analysis to assess and establish the value of land *before* the land can be condemned and acquired. This is in contrast to Law

2010/255, which allows the road company to acquire the land immediately, leaving valuation issues to be resolved after the fact. The lack of a clear legal framework is adding to time, costs, and uncertainty.

Even where a facilitating legal framework is in place, land acquisition is hampered by the lack of an accurate, updated, and easily searchable cadastral system. Land acquisition is clearly more difficult when there is not a complete record of who owns the land, who has easements or other rights on land, and where exactly the land boundaries lie. This is a universal problem that affects all types of projects.

To improve land acquisition the authorities should:

1. Improve the cadastre. This is a general recommendation with broad application beyond land acquisition. Romania desperately needs a modern, accurate, updated, and easily searchable cadastral system. Although a long term activity, the priority in cadastral development could be given to those locations where major public investment projects are anticipated.
2. Adopt regulations to Law 2010/255 for Transelectrica. Given that Law 2010/210 may never be promulgated, it may be possible instead to draft regulations to law 2010/255 that would cover land acquisition for Transelectrica. Although Law 2010/255 was drafted by the road company for purposes of acquisition of land for road construction, its wording is sufficiently broad that it could support such regulations.

The payment process should be expedited

During the execution phase of road projects, there are some regulations and practices that contribute to delays in payment and may in turn affect project timeliness or quality. Contractors and consulting firms expressed concern that the RC has reduced the role and authorities of the Resident Engineer (RE) and the supervision consulting firm as defined in the FIDIC contract documents. The REs powers to certify interim payment certificates and recommend actions to the employer on variation orders, requests for extension of time and claims of the contractor have been reduced considerably by the RC. This slows down reviews and approval by the RC and now such reviews can take up to 6 months or more according to one contractor. In addition, the RC and MOTI are reported to be slow in processing payments to contractors, allowing in about 120 days for review and approval and only after 120 days can the contractor claim interest on the outstanding amount. Delays in payments to contractors appear to be a function of cashflow management by the project promoter and not to any specific regulatory obstacles.

In the case of EU-financed projects, in contrast, cash rationing is less of an issue given that resources for such projects is ring-fenced by the MOPF. When there are delays it is generally related to the speed at which reimbursement claims are being processed.

The facilitate contract management the authorities should:

1. Restore the role of the Resident Engineer in technical supervision of works contracts and in facilitating timely processing of contractual payments, variation orders and extensions of time.
2. Clarify the role of the State Inspectorate for Construction in the quality control phase and also the role of the Engineer in the actual legislation (Law 10/1995 – related of quality in construction) where the Engineer is not mentioned.

The control environment discourages appropriate risk management

Concerns about the control environment and a fear of personal liability for errors contribute to delays in decision-making at all levels. Project promoters seeking guidance on the interpretation of specific regulations often find that the regulatory bodies are unable or unwilling to give a definitive opinion that would protect them in the face of an audit. The regulatory framework does not provide an avenue for project managers to get clear interpretations of the law, and therefore, they pursue actions that may be inefficient for the project but that might reduce their exposure to risk. This is particular the case in procurement decisions.

Procurement practices affect all stages of the project cycle. A series of procurement-related issues have been identified by EC representatives and are currently being addressed by Romanian authorities. Speedy action to reform procurement practices are needed, as many project promoters complained that effective procurement of services is their single biggest challenge in project preparation and implementation. Unqualified firms have frequently won tenders with deleterious consequences for the projects. Hesitation to engage in public tenders can also discourage project promoters from obtaining the specialized advisory services they need to supplement their own technical capacity.

III. Priority Actions to be Considered

To improve the PIM framework, the Government may wish to consider combining actions that strengthen the strategic and budgetary framework for management of public investment as a whole, as well as regulatory changes that could enhance preparation and execution at the project level. A comprehensive and detailed set of recommendations are included separately as draft action plans. Among the actions that could have the biggest impact, the Government should consider the following:

Project Appraisal and Budgeting

- Reduce the portfolio of existing projects until it is consistent with projected funding levels, and prohibit any new projects from being funded where the feasibility study is more than 5 years old (depending on the scale and complexity of the project).
- Strengthen the guidance on feasibility studies by providing sector specific requirements and guidance, and including an assessment of the project management arrangements, including how the implementing body will fill any gaps in project management and other implementation skills that may be exist.

Project Preparation

- Assure that project risks are properly mitigated prior to project implementation by developing a check list for certifying project maturity which would be signed by the head of the implementing body (e.g., the Road Company) prior to works contract signature.
- Reduce the use of two-stage permitting (i.e. in-principle agreements) by requiring the TORs for consultants undertaking feasibility studies to include geotechnical studies to reveal underground utilities, and an acceptable level of archaeological research to identify potential risks, and by shifting some liability to utility companies if they fail to provide accurate information on underground assets

Project co-financed by the European Regional Development Fund through OPTA 2007 – 2013

Project Implementation

- Address the capacity deficit in implementing bodies by making it easier for them to contract a financial management agent and a procurement agent to help manage fiduciary aspects of project management.
- Improve quality control by requiring technical audits (as well as financial audits) to cover all stages of the project cycle beginning with the feasibility study
- Reduce the need for revalidation of permits by preventing regulatory authorities from including excessive detail in the permit and instead require that project specification be “fit to purpose”.

I. PUBLIC INVESTMENT MANAGEMENT FRAMEWORK

1. **This chapter reviews key elements of Romania's broader public investment management framework and how they affect the implementation of the public investment program.** It focuses on the core systems and procedures that are overseen principally by the Ministry of Public Finance (MOPF). The approach taken involves an assessment of public investment management including the (i) legal and regulatory framework, (ii) organisational responsibilities and capacities, and (iii) key stages of the investment management cycle including strategic prioritization, project preparation, selection, project implementation and evaluation. The analysis was conducted through interviews with officials in the MOPF. The analysis aims to provide inputs to the Government's plans to strengthen public investment management in Romania.

2. **The scope of the analysis includes both State-financed and EU-financed investment projects, even though the later are generally ring-fenced within the public investment management framework.** Project identification and prioritisation for EU funded projects is based on a separate strategic document elaborated in the sector operational programs (SOPs) and takes place against an explicit financing framework. The national share of financing for EU funded projects is protected from the effects of budget cutbacks and cash flow restrictions. However, there are indirect impacts on EU funded investment that arise from an overcrowded investment program resulting in investment management resources being spread too thin, and from the absence of an effective appraisal challenge function that validates the quality of feasibility studies (FSs) and project appraisals carried out for the Primary Spending Authorities (PSAs). The impacts of national processes on EU financed projects are considered in the chapter.

3. **The MOPF is taking measures to reform and strengthen the public investment management framework.** Revisions to the Law 500/2002 on Public Finance (PFL) are currently before the Parliament. The revised law will strengthen aspects of the public investment management framework and incorporate provisions from a number of recent Government Decisions and Ordinances. The Government is also establishing a Public Investment Evaluation Directorate in the MOPF tasked with increasing the efficiency and effectiveness of public investment planning. The new unit will have the mandate for pre-screening new investment projects, and conducting a portfolio review for rationalization of on-going projects, for all projects partially or totally financed from the national budget.

4. **Public investment management practices can be strengthened to improve the effectiveness of public investments.** The analyses identified opportunities for improvement organized around three central themes, namely: (i) legal and regulatory; (ii) the investment management cycle; and (iii) role of the MOPF.

- **Legal framework:** Develop a comprehensive set of subsidiary public investment management regulations and supporting guidelines. In the medium-term a comprehensive revision of the public investment management related sections of the PFL should be undertaken so that the Law focuses on objectives principles and standards and the respective roles of the MOPF and primary spending agencies (PSAs). More detailed procedural requirements should be left to subsidiary regulations.
- **Investment Management Cycle:**
 - (i) *Strategic framework for investment planning.* Include in the Fiscal Budgetary Strategy (FBS) a clear statement of priorities to guide sectoral level investment choices and programming. Introduce

new procedures for the initial screening of investment projects that focus on consistency with sectoral priorities and resource limits.

- (ii) *Project preparation and appraisal.* Update the specification and guidance for the preparation of feasibility studies. Strengthen role of the MOPF in reviewing economic, financial and affordability aspects of projects proposals. Introduce independent appraisal reviews for major investment projects prior to their approval.
 - (iii) *Project selection and budgeting.* Eliminate from the Budget on-going projects that are no longer a priority or cannot be financed adequately. Only make funds available for FSs for projects that have undergone initial screening and which stand a realistic prospect of being funded. Major new investment projects to be financed in the Budget for the coming year to be approved as part of the FBS.
 - (iv) *Investment program implementation and monitoring.* Implement agreed reforms to the financial control framework and harmonise PSA internal control ceilings for domestically funded projects with those for EU funds. Establish a framework for monitoring payments delays and addressing their causes.
 - (v) *Project reviews and evaluations.* Require PSAs to carry out completion reviews for all projects above a threshold size. Initiate a program of independent ex-post evaluations of major projects.
- **Role of the MOPF.** Implementation of these measures will require a strengthened role for MOPF in overseeing the public investment management process and in providing an effective challenge function. The new Public Investment Evaluation Directorate within the MOPF should take the lead in determining standards and procedures for public investment management and in providing guidelines and technical support to PSAs. Technical assistance should be sought for the new unit to support its establishment and capacity building. A program for strengthening central public investment management capacities in the major sector PSAs should also be initiated.

A. Legal and Regulatory Framework for Public Investment Management

5. **The primary legal framework governing public investment management at State Level is provided by Romania's public finance legislation, specifically Law 500/2002 on Public Finance (PFL) and Law 68/2010 on Fiscal and Budgetary Responsibility (FBRL)².** This reflects the practice, common in most countries, of seeing public investment management as an element of the broader public finance management function instead of being regulated by separate primary legislation. This approach helps to emphasise the importance of treating the funding of public investment as part of the wider budgetary resource management function. However, Romania is unusual in the relatively detailed level at which the provisions relating to public investment are specified in the PFL. In other countries such detail would typically be specified in regulations issued by the finance ministry.

6. **The MOPF is responsible for preparing the medium-term Fiscal and Budgetary Strategy (FBS) for the next three years as outlined in the FBRL.** The FBS, which is presented provides the framework and resource ceilings within which the Budget is to be prepared. The strategy comprises: (i) the medium-term fiscal policy and forecasts; (ii) the medium-term expenditure framework; and (iii) a statement of fiscal

² Public Investment by local governments is regulated by Law 273/2006 on Local Government Finance

responsibility³. Specific requirements relating to the treatment of public investment in the FBS are detailed in Article 20 of the FBRL (Annex 1A at the end of this chapter).

7. Chapter III Section 3 of the PFL provides for the management of public investment linked to the budget process. The 2013 PFL revision, currently before Parliament, will strengthen some aspects of the public investment management framework and regularise a number of recent initiatives. The public investment management provisions set out requirements relating to: (i) information on public investment to be included in the Draft Budget; (ii) the role and responsibilities of the MoPF; (iii) approval of investment projects and their inclusion in the Draft Budget; (iv) investment project monitoring by PSAs; and (v) projects financed from external sources. These are outlined in more detail in Annex 1B.

8. Within the framework of the primary legislation a number of government ordinances and decisions cover different aspects of public investment management. Particularly important are the decisions relating to the procedures for the appraisal, preparation and approval of investment projects. These include ordinances on technical and economic documentation required to support the approval of public investments, establishment and organization of the Inter-Ministerial Council for Approving Public Works and Dwellings (IMC), and appraisal and selection criteria for inclusion of projects in the Draft Budget. Other government ordinances, emergency ordinances and decisions are aimed at addressing specific issues that have arisen in the management of public investment. These have been outlined in detail in Annex 1C.

9. The current legal and regulatory framework is fragmented and uneven, and can be strengthened to facilitate effective and efficient use of scarce public investment resources. While the framework does not in itself give rise to delays in the implementation of projects, it does little to ensure the quality of project appraisal and design or to prevent the investment program becoming heavily overloaded. The following key issues have been identified:

- Unlike budget systems legislation in many other countries Romania's PFL does not have the status of an organic law. This means that it can be overridden by other legislation and by Government Ordinances. This at times results in an inconsistent regulatory framework for public investment management that significantly undermines role and authority of the MOPF in managing and overseeing Romania's public finances, the budget process and the public investment program.
- The link between the provisions in the FBRL relating to investment strategy and priorities as part of the FBS and the procedures for public investment management elaborated in the PFL and related government ordinances and decisions should be strengthened. The FBRL contains a section specifying aspects of the budget process and covering preparation of the FBS that would more properly belong in the PFL.
- The PFL specifies in considerable detail a number of specific aspects, such as the structure of the public investment program, the approval of investment projects and the conditions for inclusion of investment projects in the draft Budget. In other countries such detail would be left to subsidiary regulations with the law focusing on the principles and main features of public investment management. A regulation based public investment management framework offers greater flexibility since regulations can be

³ The Statement of Fiscal Responsibility is signed by the Minister for Finance and the Prime Minister and attests to the reliability and completeness of the information in the fiscal strategy and its compliance with the fiscal rules and principles of responsibility set out in the FBRL.

more easily updated and revised to take account of adjustments in authorisations or the introduction of procedural changes and improvements. It also avoids the primary legislation becoming overly detailed.

- The role and authority of the MOPF in overseeing public investment management and in ensuring the quality of the public investment program can be clarified. Examples of this include the limited role of the MOPF in the project approval process and the absence of an appraisal challenge function. It reflects the wider issue, identified in the 2010 functional review of the public finance sector, that the MOPF's responsibility for ensuring sound public expenditure investment must be backed by sufficient authority to withstand political pressures that arise in the distribution in public funds⁴.
- While the current legal and regulatory framework sets out the procedures to be followed, the supporting guidelines and backstopping to support PSAs in the implementation of the procedures needs to be developed. This is normally an important function of a finance ministry and helps to ensure quality and consistency in public investment management across government.

10. The 2013 PFL revision address some of the weaker aspects of the public investment management framework. These include the wasteful use of resources on feasibility studies for investment projects that stand little chance of being financed, and the inclusion of new investments in the Budget at the expense of making adequate financing available for on-going projects. However, the revision should be seen as an interim measure prior to the wider review and revision of the Romania's public finance legislation. This will be required in order to establish a comprehensive, modern and robust framework for the management of public finances and also to incorporate changes that will be required with the implementation of the EU fiscal compact⁵.

Recommendations

11. A number of actions are required in order to strengthen the legal and regulatory for public investment management:

- As part of a wider revision of the PFL refocus the provisions covering public investment management on: (i) objectives, principles and standards; (ii) the respective responsibilities and authorities of the MOPF and PSAs; and (iii) the role of the MOPF in issuing regulations and guidelines detailing public investment management procedures and requirements.
- Develop a comprehensive set of public investment regulations covering all elements of the investment management cycle to replace existing resolutions and ordinances and prepare procedural guidelines to support the implementation of the regulations. Preparation and issuing of the PIM regulations can precede the wider revision of the PFL.
- Seek technical assistance to support the MOPF with the preparation of the public investment management regulations and guidelines and in developing capacities in the MOPF to provide related training and technical support to PSAs.

⁴ World Bank. 2010. *Romania, Functional Review – Public Finance Sector, Final Report*. Europe and Central Asia Region, The World Bank. (para 14, page 6).

⁵ Requirements for review and revision of Romania's public finance legislation are discussed in February 2012 IMF Fiscal Affairs Department report *Towards an Improved Budgeting, Accounting and Reporting Framework*.

B. Organizational Responsibilities and Capacity

12. **The Budget Department under the Secretary of State for Budget is responsible for both preparation of the FBS and for the management of the public investment program.** The General Directorate for Budget Policy Synthesis is tasked with coordinating the preparation of the FBS and has a particular role overseeing the expenditure policy implementation. Other units, principally the Directorate of Macroeconomic Analysis and Revenue Policy and the General Directorate of Budget Programming are responsible for the macroeconomic and fiscal framework and for overseeing preparation of the medium-term expenditure frameworks for the ten largest PSAs that is included in the FBS.

13. **The primary focus of the public investment management function in the MOPF has been on compiling, reviewing and reconciling budget requests from PSAs and on monitoring project implementation.** Responsibility for these tasks is assigned to the Directorate of Investment Programming which is part of the General Directorate for Budget Programming. The mandate of this unit does not include overseeing the processes of investment project identification, appraisal, preparation and approval. The existing team of 11 staff in the Directorate of Investment Programming are sufficient for its current programming role⁶.

14. **The MOPF has recently decided to establish a new Directorate in the MOPF responsible for evaluation of public investments that are partially or fully funded by the national budget.** The new Directorate will have 15 positions with one director. The MOPF will staff this unit by transferring civil servants from other departments including sector ministries. The new Directorate is seen as complementing the role of the existing Investment Programming Directorate which will continue to be responsible for coordinating and overseeing the preparation of public investment component of the Budget and for monitoring public investment expenditures.

15. **In the PSAs, public investment management is seen primarily as a function of the implementing authorities.** The PSA itself limited primarily to budgetary and financial oversight including the approval of projects below the RON 30 million threshold. This contrasts with other countries where the coordination and oversight of public investment planning and appraisal is a central ministry function and an integral part of the ministry's wider policy and program coordination and management role. While the technical and design aspects are the responsibility of the implementing agencies, the ministry itself usually retains lead oversight responsibility for the economic and financial appraisal of investment projects.

16. **The IMC is responsible for reviewing and approving the project feasibility studies for investment projects costing more than RON 30 million.** The Council, which is chaired by the Minister for Regional Development and Tourism⁷ comprises representatives of line ministries with a small technical secretariat. MOPF is represented in the IMC by the Secretary of State in charge of the budget or by the high civil servants in the unit for investment programming in the Ministry. The secretariat is responsible for ensuring that the required project documentations and permits are in place. It is not tasked with reviewing the technical

⁶ Prior to 1998 the Public Investment Directorate had a much a stronger role. All feasibility studies had to be approved by the Directorate which had an establishment of 34 posts including engineers and other technical specialists. One reason for the downsizing of the Department was that it was seen as "second-guessing" on technical issues for which the MOPF was not the lead agency in Government. However, this argument would not apply to economic and financial appraisal for which the MOPF is the lead agency.

⁷ Recently renamed as the Ministry of Regional Development and Public Administration. .

soundness of the proposals to assess the economic viability of the project which is supposed to be done by the relevant PSA. Projects which are endorsed by the IMC may be submitted to the Government for approval. However approval does not guarantee that a budget is allocated to the project.

17. Weaknesses in the PSA level public investment management function have contributed to absence of any real prioritisation in the projects forwarded to the IMC and submitted to the Government for approval. Consequently public investment management in the PSAs tends to be distorted by implementing agency interests rather than reflecting the priorities of the sector as a whole. The lack of quality control over project preparation and appraisal exercised by the PSA has led to a situation in which poor project preparation and inadequate design have become major causes of implementation delays and cost overruns.

18. Requirements for recruiting qualified staff into the new Public Investment Evaluation Directorate should be addressed. It will be important that the leadership of the directorate is experienced in economic and financial appraisal of public investment projects. Since staff in other line positions would have limited experience, the new Directorate could benefit from a program of technical assistance to support its establishment and related capacity building. Additionally, recognising that the existing Public Investment Programming Directorate will in future perform a more limited role, there could be scope for transferring some of its staff into the new Directorate. The Directorate will also require budget provision for engaging consultants to undertake major appraisal and ex-post evaluations.

19. Requirements and priorities for strengthening the public investment management in PSAs should be elaborated in a national framework for public investment management. Once this has been done PSAs should agree on necessary organisational changes and capacity building requirements. This should follow the establishment and operationalization of the new Public Investment Evaluation Directorate in MOPF, which should play a key role in advising on and guiding the organisational changes in the PSAs. Capacity of the MOPF directorates for policy analysis and expenditure strategy development should also be enhanced in order to support a strengthened initial strategic phase of the budget process and more generally in strengthening the policy focus of budget planning.

20. The new Public Investment Evaluation Directorate in MOPF should play a key role in addressing the weaknesses in the current framework and arrangements for public investment that are identified in this chapter. This will require the new Directorate to take on a broad role that in addition to its envisaged challenge function in appraising/evaluating major projects prior to their approval, that includes:

- taking the lead in elaborating proposals for a strengthened national framework for public investment management and in developing the comprehensive set of supporting regulations governing public investment management;
- assisting the General Directorate for Budget Policy Synthesis for preparing the investment policy and strategy section of the FBS;
- providing to the IMC validations of economic and financial assessments contained in feasibility studies submitted for endorsement; and
- together with the Investment Programming Directorate providing guidelines and advice to PSAs on strengthening their own internal procedures for public investment management.

Recommendations

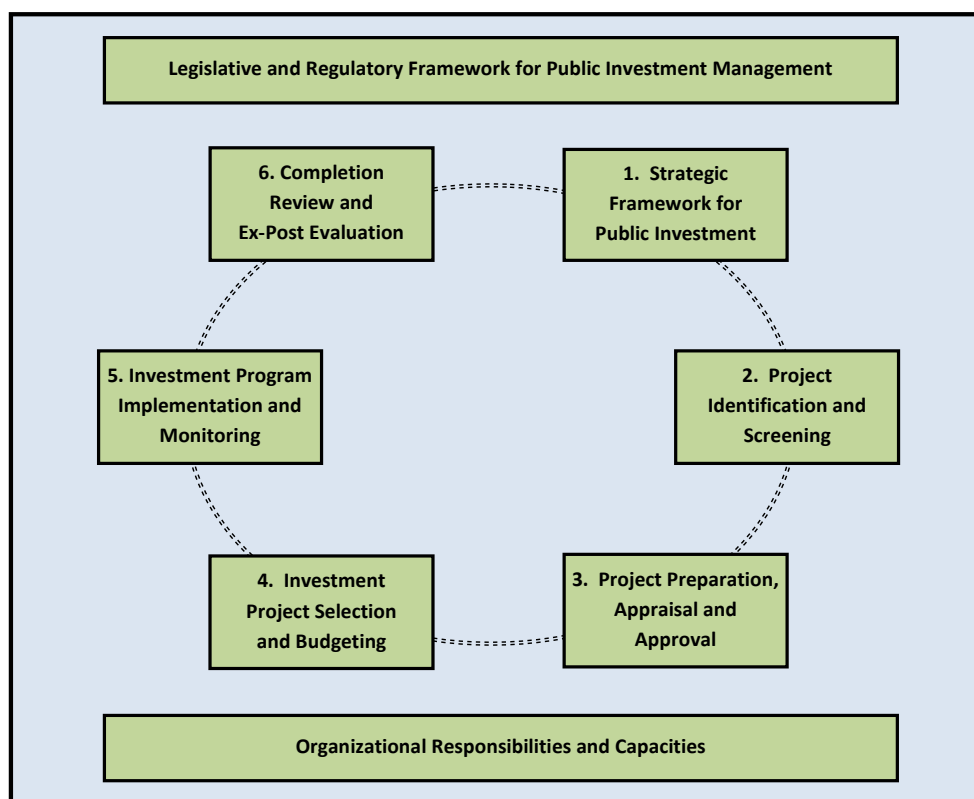
21. Required actions focus around supporting the establishment of the Public Investment Evaluation Directorate in MOPF, the elaboration of an improved framework for public investment management and related organisational and capacity strengthening:

- Prepare terms of reference (TORs) for the new Public Investment Evaluation Directorate in MOPF that give it a broad role and responsibility for setting standards and overseeing public investment management across government, including providing guidance and technical support to PSAs.
- Secure technical assistance to support the establishment of Public Investment Evaluation Directorate and associated capacity building.
- Develop a National Framework for Public Investment Management to be used in guiding the preparation of a comprehensive set of public investment management regulations and elaborate supporting institutional reform and capacity building requirements.
- Based on the new National Framework for Public Investment Management develop and implement a program for strengthening central capacities in PSAs for public investment management including reviewing and prioritising public investment choices across their sectoral area of responsibility.

C. Public Investment Management Cycle

22. Key elements of Romania's public investment management cycle are outlined in Figure 1.1 below. These include the strategic framework, the initial screening of projects, project preparation and appraisal, project selection and budgeting, investment programme implementation and monitoring, and completion review and ex-post evaluation.

Figure 1.1: Public Investment Management Cycle



D. Strategic Framework and Prioritisation

23. **A broad strategic framework for public investment that sets out sectoral priorities and related investment requirements consistent with a realistic forecast available financing should guide the identification and selection of public investment projects.** This framework should provide the basis for an initial screening at project concept stage thereby ensuring that investment choices are consistent with economic development priorities. It should also bring a focus to the planning of ministry investment programs that prevents resources being wasted on the preparation of the projects that stand little chance of financing.

24. **Currently in Romania, a number inter-sectoral and sectoral policy frameworks guide the identification of public investment priorities.** These include:

- PSA Strategic Plans. Since 2006, PSAs are required to prepare strategic plans that are updated annually and submitted to the General Secretariat of Government by July 1st.
- Sectoral Operational Programs (SOPs). The utilisation of EU funds takes place within the framework of the SOPs prepared for those sectors receiving EU Cohesion and Structural Funds. The current set of the SOPs covers the 2007-13 programming period. The SOPs include a strategy section and a financial plan. In the current fiscal situation in which the Government is only able to fund new projects for which EU

funding is available, the SOPs have effectively become the strategic investment plans in those sectors receiving EU funding.

- **Fiscal and Budgetary Strategy.** The FBRL specifies that the FBS should include with the medium-term expenditure framework “the public investment program, including Government priorities, their justification and details for the ten largest PSAs in the State Budget” [Law 69/2010 Article 20(3)(a)]. The 2012-14 FBS included a separate sub-section on public investment. This provided a short statement of public investment policy and the overall funding allocation for public investment covering the period 2012-14, and gave the total funding allocations for each of the ten largest PSAs backed up by a list of projects and expected implementation over the period.

25. Issues around the quality, realism and consistency of these individual strategic documents will need to be addressed if they are to provide a robust basis for investment programme planning and prioritisation. Specific challenges include:

- **Strengthening PSA Strategic Plans.** These currently provide little strategic direction to public investment planning due to the lack of policy analysis and the absence of any statement of expenditure priorities. There is also no link to PSA medium-term budgetary frameworks and as a result many of the proposals contained are unaffordable. A further issue is that the strategic plans are currently prepared too late to feed into the preparation of the FBS which is required to be submitted to the Government by 30th May. The 2010 Public Finance Sector Functional Review proposed that the PSA strategic planning exercise be revamped and better integrated with the budget planning cycle. However, this recommendation has not yet been implemented.
- **Improving integration between the SOPs,** which provide a more realistic assessment of what is feasible from a budgetary standpoint with the PSA Strategic Plans.
- **Strengthening the analysis of expenditure policies and priorities and their implications for medium-term budgetary allocations contained in the FBS to provide a more rigorous strategic policy framework within which public investment planning and management can take place.**

26. The FBS provides an appropriate mechanism for bringing about better linkage between PSA strategic and investment plans and medium-term budget allocations. However, achieving this will require the MOPF to take a more pro-active role in reviewing and consolidating sector level expenditure and investment strategies and in ensuring that the investment plans submitted by PSAs are realistic and consistent with the available resources. The specification of PSA strategic plans would also need to be reviewed and revised so that these are better integrated with the budget process. This should be accompanied by better coordination and collaboration between the MOPF and the General Secretariat of the Government in order to support a unified approach that brings together strategic planning, investment planning and resource allocation.

27. A longer-term perspective for public investment planning is also required. While the FBS can provide a medium-term framework for programming public investment expenditures, a more extended horizon is required to span the stages of investment project identification, appraisal, selection and implementation. Outside of the SOPs little information is available to PSAs on the likely available funding for public investment beyond the three-year medium-term expenditure framework. In some key infrastructure sectors updated sector master plans are similarly not available to guide investment prioritisation and choices.

28. The strategic framework should also be informed by periodic sector level public expenditure reviews to assess expenditure outcomes and identify measures to improve the effectiveness and

efficiency of spending programs. Such reviews, which cover both recurrent and investment expenditures, are a feature of modern budget planning systems and are carried out by the finance ministry or by sector ministries under the oversight of the finance ministry. For example, in the United Kingdom the Treasury (finance ministry) undertakes spending reviews of individual ministries every 2-3 years which then lead to the preparation of three-year expenditure programs. In Canada strategic reviews are undertaken by ministries of their major spending programs every four years linked to a requirement to reallocate funding from lower priority to higher priority programs. In Romania, introducing periodic public expenditures reviews would provide a firmer basis for updating PSA strategic and expenditure plans to take account of program performance and changing priorities.

Recommendations

29. To support the development of a strengthened strategic framework for public investment planning and management the following actions will be required:

- Develop and implement a plan for strengthening the sectoral and investment strategy elements of the FBS and building the required analytical capabilities in the Budget Department of MOPF. The plan should integrate existing sector level strategic planning exercises within a realistic medium-term funding framework.
- To support the expenditure strategy element of the FBS the MOPF should introduce an on-going program of periodic public expenditure reviews (initially 1-2 sectors per year) to be conducted for the MOPF and sectoral PSAs. The reviews should be led by the MOPF with consultants engaged to undertake analytical studies. External financing could be sought to fund the initial reviews.
- Introduce/develop a longer term investment programming perspective that provides a realistic indicative forward funding framework to guide sectoral master planning in the major infrastructure sectors.

30. These measures should be seen within the wider context of a strengthened analytical role for the MOPF's Budget Department⁸ in analysing overall government expenditure and investment strategy options and in reviewing and challenging PSA medium-term expenditure and investment strategies and plans. The capabilities in the MOPF to undertake this role are currently very limited and will need to be further developed as part of a wider program for strengthening budget analysis capabilities across government⁹.

E. Project Identification and Initial Screening

31. Procedures for the identification and initial screening of proposed investment projects are not sufficiently rigorous. There is a requirement for pre-feasibility studies to be prepared for projects costing over ROM 30 million as the basis for approval of a project to go forward to appraisal and preparation (Figure

⁸ The MOPF's Budget Department is defined here as comprises the General Directorates under the responsibility of the State Secretary for Budget.

⁹ See World Bank. 2010. *Romania, Functional Review – Public Finance Sector, Final Report*. Europe and Central Asia Region, The World Bank. (para 26 para 45).

1.2). However, this requirement is not rigorously enforced. Furthermore, in the preparation, review and approval of pre-feasibility studies, insufficient attention has been given to either the priority of a project or its likely affordability. The lack of rigour at the pre-feasibility stage has contributed to project selection becoming heavily politicised, rather than being driven by policy, technical and economic justifications. This has resulted in too many projects proceeding to feasibility/appraisal and subsequent approval which, in turn, has led to a huge number of approved projects for which financing has yet to be found. For example, for the Ministry of Transport it was reported that in addition to the 100 projects under implementation there were close to a further 100 approved projects waiting to be financed.

Recommendation

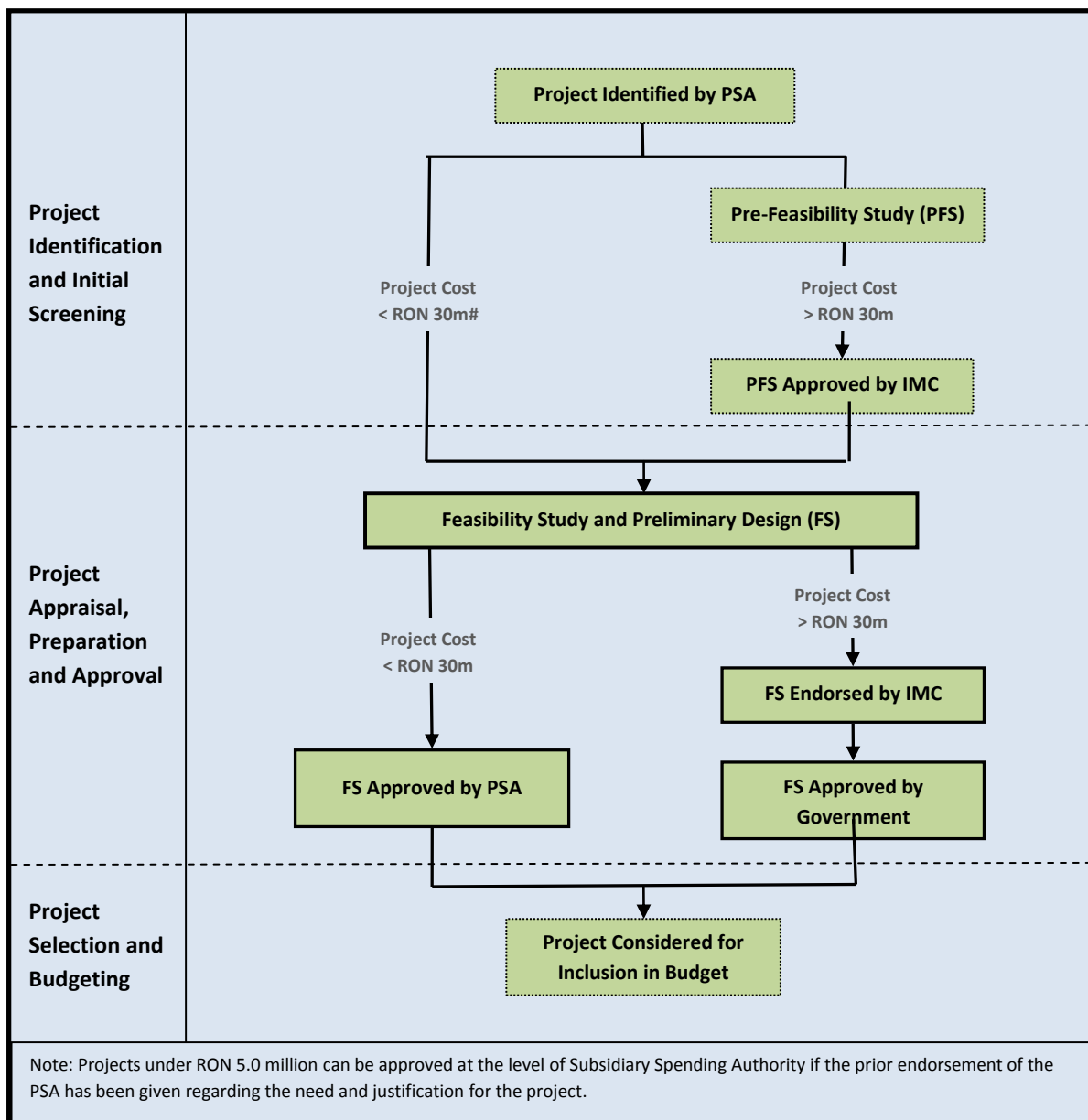
32. The introduction of improved procedures for project identification and screening will require:

- Development of an updated specification for the preparation of pre-feasibility studies that places greater emphasis on assessing the priority and affordability of the proposed investment;
- Pre-feasibility study (PFS) review guidelines that focus on screening out investment that are not consistent with sectoral investment priorities, and/or that are unlikely to be economically or technically viable, and/or stand little chance of being financed.

F. Project Appraisal, Preparation and Approval

33. The process of project appraisal, preparation and approval in Romania involves: (i) the preparation of a FS, which typically includes securing necessary permits and carrying out cost benefit analysis; (ii) endorsement of the FS by the relevant ministerial and inter-ministerial bodies; and (iii) approval of the project to be considered for financing and inclusion in the Budget. A FS is required for all projects and its subsequent approval by the PSA or by Government (Figure 1.2). Approved projects are then considered for selection and inclusion in the Budget (see Section D below).

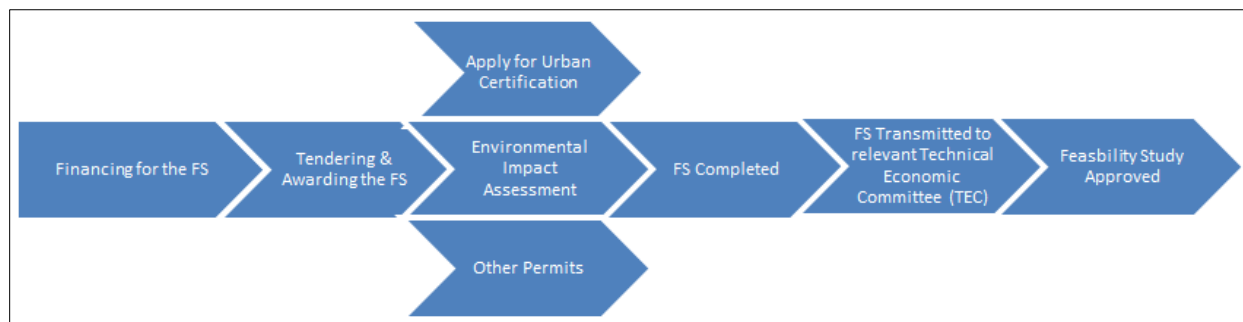
Figure 1.2: Project Identification, Appraisal and Screening



Feasibility Studies

34. **The FS includes a number of stages** (see figure 1.3). While the duration of the FS phase can vary widely, the FS for a large project is likely to require a minimum of 12 months and can take as long as two or three years to complete for more complex projects. There is often pressure from the project promoter to shorten the FS period as much as possible. In theory, a FS should determine where a project is technically and economically feasible and should be considered for approval and financing. In practice, feasibility studies may also be treated as involving preliminary design and providing the basis for tendering for project implementation.

Figure 1.3: Feasibility Study



35. While securing some financing for a FS does not seem to be a major problem, they are often not adequately financed with many being severely underfunded leading to sub-optimal quality of the study. Project promoters generally want the FS to be done as quickly as possible. If the project promoter will not finance the actual construction of the project, or will finance only a part of it, there is an incentive to move costs from the FS phase to later in the project cycle. For example, a FS is unlikely to assign funding to completing detailed archaeological research on a site, even if it is known to be at or near an area of archaeological interest. Instead, the FS consultant will be encouraged to obtain a “principle agreement” from the relevant Ministry and then to proceed without doing the research. The research will not be carried out until after the contract has been tendered and awarded, at the detailed design phase or even later. The cost, and potential uncertainty, is deferred to the project implementation phase. Inadequate funding for FSs has resulted in a trade-off of quality for quantity. Contractors who subsequently work with the feasibility studies during the project implementation phase have confirmed concerns about their quality.

36. The consultant selection process for feasibility studies presents a number of problems. One recurring problem is the wording of the TORs. These are always prepared by the project promoter using standardized requirements. The writers may have little relevant experience and no clear idea of what the FS of a large project will entail. There is not a sector specific set of standard formats or criteria for writing TORs. As a result, the TOR often gives an inadequate or inaccurate description of the study requirements, and/or an unclear definition of the project itself. The selection process for the FS consultant is an issue. The criteria for qualification of consultants and the criteria for evaluation of proposals are often poorly defined and sometime show a weak understanding of the selection process and related legislation. There is a recurring problem with poorly qualified firms using “front” companies to qualify. Romanian authorities are aware of this issue and are addressing it, including a proposed amendment to the relevant law. The award decision for feasibility studies are often challenged, resulting in further delays.

37. Securing urbanism certification, environmental and other permits are an important part of the feasibility process and can often take over a year to obtain. Requirement in carrying out environmental impact assessments can be particularly rigorous and time consuming and involve significant costs. Other permits may involve multiple applications such as where a road or pipeline project crosses several jurisdictions. Issues around the permitting process are discussed in detail in Chapter II.

38. The sector case studies have highlighted problems with the quality of feasibility studies due to poor specification of the TORs and an emphasis on selection of consultants on the basis of lowest cost, rather than technical competence. The framework content for feasibility studies is set out in Annex 2 of GD 28/2002 and provides a fairly comprehensive outline for PSAs to follow. However it is specified in

relatively general terms and is not backed up by more detailed guidance, for specific sectors and for different types and sizes of projects. One consequence is that TORs tend to be standardised rather than reflecting the specific circumstances and requirements of the proposed investment. A further problem is that TORs often prejudge key project design issues and suggest the desired results and conclusions to be achieved. Not surprisingly therefore feasibility studies almost always confirm that the project is viable. The award of FS contracts is almost always based on lowest cost mainly using a lump sum contract. This has resulted in the cost of undertaking a full FS being typically less than 1% of construction cost, whereas the norm elsewhere is 3-4%.

39. Other factors affecting the quality of feasibility studies include the absence of basic data such as cadastral information and the location of public utility infrastructure, inadequate information provided by local partners involved in the project, and the absence or poor quality of field information. In many cases these issues could be addressed in the FS if appropriate TORs were issued that specified the tasks involved and allowed for the required resources and time. Proper management of feasibility studies by the commissioning authority was also identified as an important factor affecting the quality of the studies produced. Independent quality assurance or appraisal is not carried out for FS except for EU financed project above EUR50m

40. The recent trend towards the use of design and build contracts for EU funded projects requires a more detailed preliminary design at the feasibility stage. This is needed to give contractors sufficiently detailed and robust design parameters within which to prepare their bids. It can involve carrying out at feasibility stage necessary studies of geotechnical and other site issues that could have a major impact on project costs. Evidence from the sector case studies indicates that these requirements have so far not been reflected in either the TORs or funding provision for feasibility studies. In the transport sector inadequate preliminary design has resulted in major costs increases and implementation delays. While this has been a particular issue for projects fully financed by the Government, it has also affected some EU funded projects.

Cost Benefit Analysis

41. A Cost-Benefit Analysis (CBA) is performed as part of the FS. GD 28/2008 requires that CBAs are carried out for all projects costing in excess of €25 million in the case of environment projects and €50 million for projects in other sectors. These limits are consistent with those applicable for projects to be funded from EU Structural Funds. However, in practice CBA has been required for virtually all publicly funded infrastructure projects regardless of size and the appropriateness of CBA as an appraisal tool.¹⁰

42. In other countries the formal requirement to undertake cost-benefit analysis usually depends both on the size and type of investment to be undertaken. It is rarely required for small projects that fall under a threshold limit or for projects (e.g. schools and hospitals) where the policy requirement and justification for undertaking the investment has been established and/or where there are significant economic costs and benefits of the project that cannot be readily quantified (Box 1.1). In these cases the investment can be justified more appropriately by using cost-effectiveness analysis which compares the costs of different ways of achieving a particular objective. Feasibility studies almost always confirm that the project is economically viable.

¹⁰ This would appear to reflect a more general requirement for CBA contained in the PFL, prior to its January 2013 revision, and in GO 980/2005 on the appraisal and selection of public investment projects.

43. **In sectors such as roads infrastructure cost-benefit analysis should be an important planning and decision-making tool in helping to select the most appropriate design alternative and in prioritising between similar projects.** In Romania it has been looked upon more as a formal requirement rather than as an aid to management decision-making. General and sectoral guidelines that would help to ensure consistency in approach and cost-benefit analysis outcomes do not exist. Such guidelines exist for EU funded projects, but these tend not to be applied more widely to other projects in the same sectors. Furthermore, the sector specific assumptions used are not standardisation, and the capacity in PSAs or in the MOPF to review and verify the quality of cost-benefit analyses carried out for feasibility studies is limited.

Box 1.1: Ireland – Projects For Which Cost Benefit Analysis Is Required

Ireland's guidelines for appraisal of expenditure proposals in the public sector emphasise that the resources spent on appraisal should be commensurate with costs and complexity of projects. The guidelines recommend:

- A simple assessment for minor projects < €0.5 million.
- An enhanced pre-feasibility study (PFS) for projects between €0.5 and €5 million.
- A multi-criteria analysis for projects between €5 million and €50 million that establishes preferences between project options by reference to a set of criteria such as: (i) policy/program and project objectives; (ii) project cost; (iii) value for money; (iv) social impacts; (v) environmental impacts etc.
- A full cost-benefit analysis for projects over € 50 million, and also on a case-by-case basis for innovative, pilot or complex projects costing over €5 million.

Source: Department of Finance. 2005. Guidelines for the Appraisal and Management of Capital Expenditure Proposals in the Public Sector. Government of Ireland. p11 and Appendix 1

Feasibility Study Review and Approval

44. **The process in Romania for FS review and approval follows a number of steps.**

- First completed feasibility studies are submitted to the relevant sectoral Technical and Economic Committee (TEC) for review. The TEC is supposed to review and, if necessary, amend the FS. Most TECs either rubber-stamp the FS or make only minor amendments to it. TECs almost never amend the FS.
- Second, where required the FS is then submitted for approval by the relevant local authority such as the local council or county council. This is almost always a purely formal step, except in those instances where political control of the local authority has changed since the FS was first undertaken.
- Third, projects costing less than RON 30 million are then approved by the PSA, while larger projects costing over RON 30 million are submitted for endorsement to the IMC.
- Finally following endorsement by the IMC a Government Decision may then prepared for projects over RON 30 million approving the technical and economic indicators.

45. **The procedures for review of feasibility studies focus on compliance with procedural requirements rather than on the relevance and priority of the proposed investment.** The IMC meets monthly under the chair of the Minister of Regional Development and Tourism and is responsible for

reviewing the feasibility studies for all projects exceeding RON 30 million. The Secretariat for the IMC is located in the Ministry of Regional Development and Tourism and is responsible for analysing the feasibility studies submitted by PSAs and for preparing a report for each project assesses whether it is “eligible” for approval by the Government. Endorsement of a project by the IMC is decided by a simple majority vote. The MOPF has a limited role in the IMC since availability of financing is not a specific issue considered in the endorsement decision.

46. The role played by the MOPF in the investment appraisal and approval of projects appears inconsistent with its responsibility of under the Article 41(2) of the PFL in setting the methodological norms, evaluation and selection criteria for public investment projects. In other countries it is commonly the finance ministry that plays the lead role in overseeing the project appraisal and approval process. In Romania, the MOPF role is primarily restricted to managing and programming the entry of approved projects into the Budget.

Appraisal Challenge Function

47. A feature of strong public investment management systems is an appraisal challenge function for major investment projects that is independent of the sponsoring sector ministry. The authority of the UK Treasury to “call in” larger projects for review prior to funding is one example. Aside from verifying the quality of the FS, the appraisal challenge also allows the project to be assessed from a broader outlook than that of the sponsoring sector ministry. The knowledge that the appraisal might be challenged also helps to prevent the rigour of a FS becoming subordinated to the interests of the ministry in getting the investment project approved. This appraisal challenge function is typically located within the public investment management department in the finance ministry. While it requires a professional capacity within the ministry to manage the appraisal challenge process, consultants are commonly engaged to carry out the appraisal reviews particularly for the largest projects for which multi-disciplinary appraisal teams may be required.

48. The role of the MOPF in Romania to carry out an effective appraisal challenge for public investment needs to be defined and the capacity for this function needs to be strengthened. The absence of this function results in projects that are inadequately prepared and of questionable economic value being approved and put forward for funding from the Budget. The importance of establishing an effective appraisal challenge capacity in the MOPF has been recently been recognised in the decision taken in January 2013 to establish a new directorate responsible for economic and financial appraisal/evaluation of major public investment projects.

49. It will be important that the role of the MOPF is interpreted more widely in setting standards for project appraisal, providing supporting guidance and capacity building to PSAs, and verifying compliance with the agreed procedures. An interim step could be for the IMC to be co-chaired by the MOPF and to have a joint secretariat with the MOPF responsible for reviewing and verifying the economic and financial aspects of project feasibility studies and the Ministry of Regional Development and Tourism responsible for the technical and permitting aspects.

50. Currently the Government is involved in the approval of projects down to a relatively low threshold of RON 30 million (Box 1.2), which poses some risks and may result in delays. In countries with advanced public investment management systems only the very largest and controversial projects are submitted for approval by the Government. In the more centralised public investment management systems, such as Chile, the finance ministry may be directly responsible for approving all projects. Elsewhere approval responsibility is either devolved to the sector ministries or undertaken centrally by the finance ministry with only a few of the largest projects referred for approval by the Government. There are significant risks in the Government having a wide approval responsibility, that project selection becomes overly politicised rather than being driven by politically agreed strategic priorities and by the technical and economic appraisal of the specific investment.

Box 1.2: Investment Project Approval Authority

In other EU countries approval for all but the largest projects typically takes place at the level of the sector ministry. For example, in the United Kingdom the Treasury (finance ministry) sets a limit for sector ministries above which a project requires its approval. In the case of roads projects this limit is set at GBP 500 million. The Treasury also reserves the right to “call-in” other projects for review prior to approval. In Ireland, the very largest projects are referred for Government approval.

In Chile, which has a highly developed public investment management system, appraisal and approval is centralised in the economic planning ministry, which undertakes an initial assessment of the project and subsequently a detailed cost-benefit analysis. Based on the results of the cost-benefit analysis and taking into consideration the sectoral medium-term budget envelope the investment project is either approved or rejected. Sector ministries then request a draft budget appropriation. Sector ministries typically maintain a bank of approved projects against which subsequent funding decisions are prioritised.

51. The endorsement of projects by the IMC and their approval by Government carries limited meaning since many projects approved stand little chance of being financed. As noted earlier, the failure to consider the likely availability of financing in the initial screening of projects results in considerable waste of time and resources both in preparing feasibility studies and in their subsequent endorsement by the IMC and approval by the Government.

52. The existing procedures for approval of projects should be reformed to address current weaknesses and bring procedures more into line with good practice elsewhere. Key issues that will need to be addressed in elaborating the new procedures include: (i) refocusing the role of the Government away from approving individual projects, except for a small number of the largest projects, towards the approval and monitoring of sector policies and strategies and related public investment priorities; and (ii) adopting a more decentralised approval system by raising PSA project approval limits in those sectors/PSAs in which project preparation and appraisal procedures and capacities have been validated as meeting an agreed benchmark standard.

Recommendations

53. Recommendations for reform and strengthening of procedures for appraisal, preparation and approval of projects cover:

- Revising the specification for feasibility studies to include: (i) sector specific requirements and guidance; (ii) proposed project management arrangements; and (iii) an stronger preliminary design element for projects that are to be implemented using design and build contracts.
- Adjusting estimates/norms for FS costs to reflect more rigorous technical requirements and emphasise technical quality and capabilities in selection criteria for consultants undertaking feasibility studies.
- Revising/updating TORs for IMC to: (i) give greater emphasis to quality of project and technical and economic appraisal; (ii) provide for the IMC to be chaired or co-chaired by the MOPF.
- Establishing capacity in new Public Investment Evaluation Directorate in MOPF to manage an effective appraisal challenge function and oversee the independent review/appraisal of proposals for selected major investment projects. Provide a budget line for engaging consultants to carry out these reviews.
- Undertaking a review of investment project approval authorities and limits so that the Government only approves the largest and most complex projects. The review should also include the future requirement for and role of the IMC, or equivalent body. There is little benefit to retaining IMC in its current role.

G. Investment Project Selection and Budgeting

Project Selection

54. **Selection of investment projects for financing is done by the PSAs as part of the preparation of the Budget, but in many sectors is not based on clear prioritisation criteria.** Approval of a project by the relevant sanctioning authority (the Government for all projects above RON 30 million) is a pre-condition for its inclusion in the Budget. Because the number of projects approved greatly exceeds the available financing, the approval process itself has limited impact on the final choice investments to be financed. Projects that are to be financed from the EU and other external financing agencies are prioritised. In the case of EU funded projects, the selection is based on the SOPs and therefore reflects some strategic analysis and prioritisation. The underlying basis of prioritisation and funding decisions for nationally financed projects is unclear and in some cases politically rather than strategically driven.

55. **A consequence of unclear prioritization criteria has been that the public investment program is overloaded resulting in delayed and extended project implementation.** This has caused project benefits to be significantly deferred with consequent economic loss. The overloaded investment program also has a wider impact by diffusing often limited program and project management capacities. An analysis of the 2012 investment programs in the transport and environment sectors highlights these issues. At 2012 levels of financing it would take 9 years to complete the portfolio of projects already included in the budget of the Ministry of Transport Infrastructure, and 11.5 years for those in the budget of the Ministry of Environment. This issue is further illustrated by the number of projects on which implementation commenced prior to 2000. In the case of the Ministry of Transport Infrastructure this amounted to 10 projects (10% of the total

number of projects in its 2012 budget), while for the Ministry of Environment and Forests the number was 23 (36% of the total). Additionally, the Ministry of Transport Infrastructure had at the end of 2013 around 100 projects that had been approved by the Government that had yet to receive financing and inclusion in the Budget.

56. The MOPF has in recent years taken steps to eliminate non-performing projects and to limit the pipeline of new projects going forward for approval, but these measures have yet to take full effect.

While there is little evidence that the number of projects in the investment program has decreased significantly in recent years, the recently introduced requirement that existing projects be adequately financed in the budget before new projects are introduced (except where external financing is available) has been effective. In the 2012 budget for the Ministry of Transport Infrastructure only one out of eight new projects was to be fully financed from national sources. However, the measures taken, which have been regularised in the 2013 PFL revision, are focused on addressing the symptoms of an overloaded investment program rather than the underlying causes which are the lack of a realistic and resource constrained sector strategy and an effective initial screening process at project concept stage. There are risks that the approach taken is too short-term in its outlook and could have unintended consequences including a negative impact on the quality of project preparation and appraisal (Box 1.3).

Box 1.3: Measures to Limit the Approval of Projects and Inclusion of New Projects in the Budget

The January 2013 PFL revision included two provisions[#] aimed at: (i) limiting the number of projects being submitted for approval; and (ii) ensuring that projects included in the budget are adequately financed.

- Article 43(6b) forbids PSAs from incurring expenditure on feasibility and other studies related to an investment project if the project cannot be included in the public investment program for the next budgetary year. There is a danger that this could result in shorter timelines for feasibility studies with consequent negative impacts on the quality of project preparation. It is quite normal that feasibility studies are carried out well in advance of the inclusion of the project in the Budget since they often take 12-18 months to complete, with subsequent review and other pre-projects actions requiring further time.
- Article 43 (9) requires that the public investment program only includes those projects whose financing requirements can be entirely covered within the financial limits set in the medium-term expenditure framework contained in the FBS. This requirement is inappropriate since the implementation schedules for many projects can be expected to extend beyond the three-year time horizon of the medium-term expenditure framework, particularly when the time taken for tendering and contractor mobilisation is taken into account. This emphasises the need for a public investment decisions to be framed within a longer term planning and financing perspective.

[#] These provisions had previously been issued under GEO 26/2012

Integration with the Budget Process

57. The present procedures for the selection and budgeting of public investment projects highlight the lack of integration between strategic planning, investment programming and budgeting. The key elements of such an integrated framework are: (i) sector level strategic plans are developed within realistic medium-term expenditure ceilings that include planned spending on public investment; (ii) investment project identification is driven from the strategic plans with projects undergoing initial screening for

consistency with sector strategies and investment envelopes; (iii) project preparation and appraisal lead to a well prioritised pipeline of projects to be financed that reflect a realistic assessment of the available investment funding over the medium-term; and (iv) investment projects, once entered into the Budget, are assured of funding sufficient for their timely completion.

58. Romania's medium-term budgeting calendar (Annex 2) could provide an appropriate framework within which these elements can be linked. As noted previously in Section D, the initial strategic phase leading to the preparation of the FBS has a critical role in strengthening linkages between sector strategies and investment allocations. This part of the budget preparation cycle, which should involve updating of sectoral expenditure strategies and consultations between the MOPF and PSAs, is still not sufficiently specified in either the FBRL or in the 2013 PFL revision which makes no reference to the FBS. For example, this initial stage could provide the point at which decisions were made on which major new investment projects should be financed in the Budget for the coming year. This would enable the Government to confirm the selection in its approval of the FBS, and allow the PSAs to proceed with preparing for implementation to commence in the following year.

59. There are inconsistencies between the timetables for preparation of the FBS and the Budget which suggest that the preparation of the FBS has still to be fully integrated as a key stage in the medium-term budgeting calendar. For example, the FBRL requires the FBS to be submitted to Government by 30th May, yet the 2013 PFL revision requires the medium-term macroeconomic and social indicators (which are part of the PFL) to be published on June 1st. Similarly, the PFL sets a deadline of 31st July for the MOPF to submit PSA medium-term expenditure limits to the Government whereas planned spending limits for the 10 largest PSAs were included in the FBS. Resolving these inconsistencies and developing and issuing a single integrated budget calendar that includes the preparation of the FBS is an urgent requirement.

60. The presentation of the public investment program in the Budget is comprehensive but could benefit from including a brief narrative description of the investments being undertaken. The investment program is detailed in a separate annex to each PSA's budget which contains a datasheet for each project comprising:

- Basic data on the project including location, date of FS, total estimated cost and date of the cost estimation, project duration, start date, and scheduled completion date.
- An expenditure table showing (i) total estimated cost; (ii) actual expenditure in preceding years; (iii) an updated estimate of expenditure for the year just ended; (iv) estimated expenditure for the current financial year and the following three years; and (v) any balance of expenditure required to complete the project in subsequent years. The table additionally separates out financing from nation budgetary and non-budgetary sources, and from external grants and loans. Counterpart financing for EU financed projects is also separately identified.

Recommendations

61. Measures aimed at ensuring that the on-going investment program is adequately financed and better integrated with Romania's budget planning process include:

- Undertake further rationalisation of the portfolio on-going projects included in the Budget to eliminate those that are no longer a priority or on which little progress can be made at current levels of funding.

- ◇ At sector level restrict inclusion of new nationally financed projects into the Budget until the existing portfolio can be completed within five years at current levels of financing.
- Clean up the “pipeline” of approved projects awaiting funding by:
 - ◇ making the “approval” of projects lapse after five years if no firm source of financing has been identified (lapsed projects may be resubmitted to the relevant authority for approval provided that the FS has been updated);
 - ◇ requiring that feasibility studies are only funded for major projects that have passed through pre-feasibility and project screening phase and for which the potential availability of financing has been confirmed; and
 - ◇ managing the “pipeline” of approved projects awaiting funding by providing PSAs with an overall financial limit for approved projects still to be included in the Budget – once this ceiling is exceeded no new projects should be considered for approval or for feasibility studies, unless offset by the withdrawal of an existing approved project.
- Develop and issue an integrated planning and budgeting calendar and supporting guidelines that sets out all steps involved in the preparation of the FBS and the Budget. Special attention should be given to elaborating the initial strategic planning phase of the budget process leading to the preparation of the FBS.
- Include major new investment projects to be financed in the Budget for the coming year in the FBS for government endorsement.

H. Investment Program Implementation and Monitoring

62. **This sub-section considers issues around project implementation and the regulatory framework for the management of investment program implementation.** It covers project implementation, budget releases, reallocation procedures, public internal financial control and audit, payments, and arrangements for monitoring investment program implementation. It does not consider procurement management since this is treated separately in the following chapter.

Project Implementation by PSAs

63. **The project implementation stage of the project cycle has several steps and starts with the contract for the project being tendered and awarded.** Tender documents are often based on the FS. The contract is awarded primarily using an open selection process. The current system of tenders and awards is consistent with EU standards in theory. The winning contractor then carries out the detailed project design. The detailed design stage is a very critical part of the project cycle. During this stage the permits are reviewed and re-approved. As noted above, during the feasibility phase, most permitting agencies issue principle agreements instead of true permits. The then requires the actual work of permitting to be done later, typically during the detailed design phase. At this point, the contractor must go to the various agencies and find out exactly what is really needed in order to carry out construction. Finally, a construction authorization is issued and the contract is implemented. Before the final takeover of the project, the PSA will undertake post inspection and submission of as-built drawings. The inspection, submission of as-built drawings, and final taking over are important and complex parts of the project cycle which usually proceed smoothly.

64. **A number of delays can be attributed to problems encountered during the detailed design stage and one of the most common problems encountered at this stage is with permits.** During the detailed design phase many of the permits have to be reviewed and reapproved, in some cases because the technical solutions approved at the FS stage are being modified. More frequently, however, it is because the permit issued earlier was a principle agreement rather than a formal permit. This is a major weakness in the existing project cycle and results in critical delays and uncertainty. Effectively, as explained above, Romania has a double permitting system. A provisional permit is issued at the FS stage in the form of a principal agreement, and then a “real” permit is issued during detailed design. The second permit review often uncovers new issues that were not anticipated during the FS stage, since the contractor must go to the various agencies and find out exactly what is needed in order to carry out construction. This often leads to delays as the contractor may either discover previously unknown underground assets (gas pipelines, cables, water pipes, etc.) that must be relocated or designed around, or the Ministry of Culture may classify items as relics or other issues of archaeological significance. These types of issues occur regularly and are a frequent source of delay.

Budget Releases

65. **Budget releases to PSAs are based on the annual budget appropriation, but may be subject to revision and expenditure capping in the event of revenue shortfalls.** Article 48(2) of the PFL specifies that the Budget is released to PSAs in quarterly allocations sub-divided by chapter and title based on proposals submitted by the PSAs. The PSAs then distribute the allocation between their subordinated spending authorities. The Government may further impose monthly spending limits in circumstances where it considers this necessary to maintain macro-fiscal stability [Article 49j(4)].

66. **The 2013 PFL revision introduces a new article setting out measures aimed at giving investment project implementers and suppliers greater certainty over the limits of funding available in the annual budget.** Specifically, it requires PSAs: (i) to notify project implementers and suppliers of project appropriations included in the public investment program within 30 days of the approval of the Budget by Parliament; (ii) together with project implementers and contractors/suppliers to update execution/delivery and associated payment schedules consistent with the project appropriations included in the Budget; and (iii) to receive and pay for works, services and products provided in compliance with a contract up to the value of annual budgetary appropriation and quarterly funding release. These provisions increase the transparency of the relationship between the PSA, project implementer and contractors/suppliers. They should also make it more difficult for PSAs to reallocate available funding between projects without taking into account existing contractual commitments.

Reallocation ('virement') Procedures

67. **Reallocation procedures for capital investment projects are less flexible than for other expenditure and recognize the need to maintain the integrity of project budgets while maintaining flexibility to respond to variations in project performance.**

- Article 47 sets out the general procedures regarding reallocations. These prohibit increases in or reallocation of appropriations from employee expenses and, in the 2013 PFL revision, reallocations from capital to current spending. Within these restrictions the transfer framework provided by the recent revisions to the PFL is overly permissive with PSAs able to make reallocations between sub-divisions totalling up to 20% of the total appropriation for the Chapter. Provisions for allocations

between Chapters are more restrictive, requiring approval of the MOPF and may not be carried out during the first half of the year.

- Article 44 sets out the special rules regarding reallocations between capital investment projects. These allow PSAs to request the MOPF to sanction reallocations between projects in situations where an investment project cannot be implemented as planned. The recent revision of the PFL prevents allocations from investment project budgets to “other investment expenditures” such as pre-feasibility and feasibility studies, and land purchase costs except in the case of externally financed projects¹¹.

68. The provision for reallocations between capital projects could be strengthened further to avoid potential abuse. Where projects cannot be implemented as planned it makes sense to allow reallocations to other projects on which progress can be accelerated provided that this involves no increase in the total estimated cost of the project. However, there are dangers of reallocations being used as a form of cash rationing in managing payments on an investment program that is already overloaded, potentially reallocating resources away from high priority projects. A further risk is that overuse of reallocation procedures reduces the incentives for realistic budgeting and adversely affects the quality of project management. MOPF officials indicated that to some extent these risks were reduced by their review of reallocation requests which aimed to ensure that there would be no adverse effects on the projects from which funding were being reallocated.

Public Internal Financial Control (PIFC) and Internal Audit

69. The internal financial control and internal audit framework in Romania is characterized by retention of ex ante financial controls and gradual progress towards putting in place an effective internal audit system. This is despite a commitment undertaken prior to Romania’s EU Accession to reform the existing public internal financial control environment towards one that emphasizes managerial responsibility and accountability, backed up by an effective internal audit system. The timing for this changeover has been progressively pushed back and currently there is no clear deadline.

Preventive Financial Control

70. Preventive financial control in Romania is exercised by the granting of visas required for transactions to be processed and is carried out at two levels – own preventive financial control (OPFC) and delegated preventive financial control (DPFC). OPFC is organised in all public structures, usually in the finance and accounting departments and operates under general rules set by the MOPF. In the event of a visa being refused management may still perform the respective operation under its own risk with the financial controller required to inform internal audit, the MOPF and the Court of Accounts. MOPF consent is required for the appointment of financial controllers. DPFC is carried out by the MOPF through Delegated Financial Controllers appointed in around half of the PSAs where audit missions identified continued risks in managing public funds. DPFC is focused on operations that are considered high risk due to their size or type of transaction. Ceilings above which DPFC applies are set by ministerial order for each PSA and each Delegated Financial Controller. However, on average the control ceiling for national funds is around RON 25,000 and for EU funds, where public institutions are direct beneficiaries, around EUR 200,000 (Box

¹¹ Presumably because in such cases the external financing agency has agreed the funding of these costs.

1.4). As with OPFC, in the event of a visa being refused management may still perform the operation with the MOPF and Court of Accounts being informed.

Box 1.4: Public Internal Control for EU Funds

The systems for managing both European funds and national budget resources observe the overall internal control and management principles described by the European Acquis Communautaire. Protecting EU financial interests and anti-fraud inspection are responsibilities of the MOPF, the Audit Authority, the Department for Fight Against Fraud and specialized internal structures.

Financial control of EU funds is exercised by MOPF and by each implementing entity or public institution, coordinating or hierarchically superior under the following forms:

- own preventive financial control exercised over all financial project operations on budgetary commitments and authorization;
- when public institutions are direct beneficiaries of EU funds, delegated preventive financial control exercised on all financial project operation on budgetary commitments and authorization over a certain threshold value, based on risk analysis (currently, the average threshold is set at EUR 200,000);
- basic internal control;
- internal audit.

71. The Government's public internal financial control strategy is focused on strengthening OPFC and integrating it within managerial responsibility. Following completion of this process and verification that the overall systems in the PSA are compliant the DPFC should be withdrawn. Although most PSAs are now at least partially compliant, it seems that some PSAs, particularly those which are newly created, have asked MOPF to reintroduce DPFC. This reflects a reluctance among these PSAs to take on full managerial responsibility that may be related to a lack of confidence in the capacities of their own civil servants. Overall, the MOPF considers that Delegated Financial Controllers now play more of a guidance and advisory role in PSAs.

Internal Audit

72. Internal audit departments have been established in all PSAs and operate within a decentralized system. Their focus is gradually shifting from financial compliance towards systemic issues and risks. The legal framework for internal audit in Romania is governed by Law 672/2002 on public internal audit which was republished in December 2011. This law sets out the framework for organizing internal audit within the public entities and the responsible structures for coordinating and supervising public internal audit activities. These comprise the Committee for Public Internal Audit, the Central Unit for Harmonizing Public Internal Audit, and the Internal Audit Committees and Public Internal Audit Departments. The Public Internal Audit Departments are required to undertake system audits to assess management and internal controls, performance audits of PSA programs and activities, and regularity audits. Consistent with the draft General Methodological Norms on Internal Audit, which describes the three levels of performing the internal audit (regularity, system, and performance audits), there has been a marked shift in focus from regularity audits, based on risk analysis, to system audits. The Court of Accounts is responsible for external evaluation of the internal audit functions. At the level of PSAs, the role of internal audit is not fully clear to the management.

As a result, internal audit has yet to have a significant impact on strengthening management systems and procedures.

Payments

73. Delays in payment were identified as a significant issue by contractors and had resulted in a number of international construction firms closing their operations in Romania. This appeared a more significant issue for nationally funded projects which are more subject to cut-backs and cash rationing in the event of Treasury liquidity problems. A further factor is the adequacy of the original budget allocation and the extent to which PSAs have to ration available funding across an overextended and overcommitted investment program. Bureaucracy was also a cause of delay, although the internal control system was not in itself a significant factor with most payments being processed within 1-2 days.

74. On EU financed projects payment delays were more related to the speed with which EU reimbursement claims could be processed. The MOPF has ring-fenced allocation of national funding shares for EU financed projects and prioritized the release of these funds when required. However, difficulties in securing timely reimbursement have arisen due to document processing delays, problems with securing timely recovery of advances to contractors, interruptions resulting from audit queries and reductions in levels of funding eligible for reimbursement from the EU due to adverse audits (Box 1.5). These have resulted in increased short-term cash demands on limited national budgetary resources with the MOPF unwilling to make additional financing available until reimbursement had been received. In the case of reductions in eligible funding more significant revision to the Budget has been required.

Box 1.5: Possible Causes of Delays in Reimbursements on EU Financed Projects

Document Processing Delays. Delays occurring at the beneficiaries' level due to the relatively large volume of documents to be prepared for submitting a reimbursement request; delays in processing beneficiaries' reimbursement requests due to poor management, bureaucratic procedures (including layers of control procedures) and insufficient (qualified) staff compared to the volume of documents to be processed for a payment to be approved; delays in processing payment requests by the managing authorities in sending them to the Certifying and Paying Agency in order to reimbursement from the EU.

Recovery of Advance Payments. Arrangements for advances granted to public or private beneficiaries stipulate that the pre-financing is to be recovered over the life of the contract. This is done by applying a percentage recovery rate to the amount included in intermediate reimbursement requests (arrangements vary for different SOPs) until the advance has been fully recovered. Advances have been granted from both EU funds resources and national budget resources in order to speed up the EU funds absorption. Significant problems in the recovery of advances have been experienced. These have been due to delays in project implementation which have resulted in relatively large amounts of money remaining to be recovered from the beneficiaries (in the absence of works done or goods supplied). This has led to additional pressures on the national budget.

Adverse Audits. Payment suspensions on operational programs following adverse EU or national audits have resulted in the national budget having to make up the shortfall in project financing to supplement delayed or reduced disbursements of EU resources. The time taken to resolve audit queries has resulted in significant delay in the submission and processing of reimbursement claims to the EU. Additionally, where adverse audits have resulted in financial corrections being applied to the level of EU funding, additional national financing has had to be obtained in order to cover the increase the share of funding that is not eligible for reimbursement by the EU.

Implementation Monitoring

75. Arrangements for monitoring the implementation of the public investment program reflect the primary role of the MOPF in the programming and monitoring of public investment spending. Article 44 of the PFL requires PSAs to submit to the MOPF quarterly monitoring reports on the implementation of public investment projects. The reports are required to explain any issues that have arisen in the implementation of the investment program and the remedial actions to be taken. Reporting follows a format specified by the MOPF in GO 1202/2008 which also increased the frequency of reporting to monthly¹². The focus is on financial performance information although information for percentage physical completion is also included. The reports form the basis for periodic reports presented to the Government on the implementation of the public investment program. They are also used in evaluating requests submitted by PSAs for reallocations between projects.

76. The monthly monitoring reports contain little qualitative information on investment project and program performance and of any remedial actions being taken. The frequency of the reporting is also excessive and can be contrasted with practice elsewhere of requiring quarterly or half-yearly monitoring reports. The follow-up on the monthly monitoring reports is quite limited, reflecting both their content and the MOPF's limited public investment oversight role.

77. The establishment of the new Public Investment Evaluation Directorate could provide an opportunity for strengthening procedures for monitoring investment program implementation. New procedures and guidelines should be built around the use of monitoring information by management, rather than on information reporting. For example, the MOPF could provide guidance to PSAs on organising quarterly investment program review meetings at which the performance of major investment projects is discussed and necessary actions identified to improve performance. The MOPF could be represented at these meetings. An initial step in developing guidelines would be to undertake a review of existing arrangements for investment program monitoring in the major sector PSAs that identifies existing good practice that could be replicated more widely.

Recommendations

78. As a part of the wider measures being taken to improve Romania's budget execution systems the following actions to strengthen investment implementation and monitoring were identified:

- Update the action plan for implementing already agreed reforms to the public internal financial control environment and include necessary capacity building requirements in PSAs.
- Analyze if PSA control ceilings for nationally funded expenditures could be harmonized with those for EU funds.
- Establish a framework for reporting and monitoring payment delays in key PSAs and their causes. Identify and implement interventions to tackle the underlying issues.
- As part of the broader regulatory framework and guidance for public investment management, develop model procedures and guidelines for monitoring by PSAs of the implementation of their investment programs including identifying and reporting on actions to be taken. The procedures should also

¹² The 2013 PFL revision regularises this change by increasing the reporting frequency to monthly.

address requirements in the MOPF for monitoring implementation of the public investment program as a whole.

I. Completion Review and Ex-Post Evaluation

79. There is currently no requirement for PSAs to undertake project completion reviews or program in place for carrying out ex-post evaluations of major investment projects and programs (Box 1.6). Learning from and feeding back the lessons of experience from the implementation of completed projects into the planning of new public investment initiatives is an important element of an effective public investment management system. In Romania, without any general guidance, practice varies across PSAs. Even in major sectors such as transport there is little systematic review of project implementation experiences or evaluation of project outcomes. In the MOPF there is no information available on the performance of the investment program in terms of the extent to which expected benefits have been realised.

80. While the immediate public investment management priorities should be to strengthen the planning, appraisal and implementation of Romania's public investment program, a start should be made to put in place procedures for project completion reviews and ex-post evaluations. This will take some time and in PSAs will need to be linked to wider initiatives to strengthen their central capacities to for policy analysis and program development and oversight. A first step would be for the MOPF to set out clearly the framework and requirements for undertaking completion reviews and ex-post evaluations and to develop supporting guidelines for use by PSAs.

Box 1.6: Completion Reviews and Ex-Post Evaluations

- Investment Project Completion Reviews assess the efficiency with which the projects outputs have been achieved. They typically focus on issues relating to the technical design, implementation experiences, and management arrangements. They look at actual project costs compared with the original estimates and compare these with costs of other similar projects. An effective programme of completions reviews identifies key lessons for the design and management of new projects. It also helps to identify requirements for strengthening program level management and financial procedures in the PSA and its implementing authorities. Project completion reviews are typically carried out or commissioned by the implementing agency or the project or by the overseeing ministry, often within general guidelines set by the finance ministry.
- Ex-Post Evaluations are usually undertaken for a sample of major projects or at programme level. They are more focused on the extent to which envisaged outcomes, incomes and economic benefits are likely to be realised. An ex-post evaluation is usually carried out 3-5 years after project completion in order to capture information on the extent to which outcomes are being realised. . TORs for evaluations should emphasise the independence of the evaluation. For this reason they should not be carried out by the managing authority responsible for the project or program. While they may undertake by the sector ministry, it is common for major evaluations to be commissioned by the finance ministry particularly if the finding are considered likely to have wider relevance for other sectors or ministries.

Recommendations

81. Proposed actions to feedback implementation experience into the planning and design of new investment projects cover:

- Developing guidelines for undertaking project completion reviews and commissioning ex-post investment evaluations. The guidelines should identify: (i) the respective roles of the MOPF, PSAs and project managing authorities; and (ii) how review and evaluation findings should be fed back into strengthening the planning and management of investment programs and projects.
- Introducing a regulation requiring project PSAs to undertake completion reviews for all projects above a specified threshold size.
- Initiating a program of ex-post reviews of major projects to be funded from the MOPF budget and commissioned by the new Public Investment Evaluation Directorate. Initially 3-5 evaluation might be carried out annually. Guidance and oversight should also be provided to PSAs wanting to undertake these.

J. Reform Strategy and Change Management

82. **Going forward, in addition to the planned revision of the PFL, the MOPF could undertake a two-pronged strategy for reforming public investment management in Romania.** This would include: (i) consolidate the role, responsibility and capacity of the MOPF for public investment management; and (ii) strengthen public investment management focusing particularly on rationalization of the current investment portfolio, prioritization of the new projects with adequate supporting documentation such as FS and CBA, and streamlining the critical process of permits.

83. **A core requirement will be a stronger and more proactive role for the MOPF in public investment management.** The role, mandate and the capacity of the Public Investment Evaluation Directorate responsible for increasing the efficiency and effectiveness of public investment planning should be clearly defined. This includes: (i) introducing a longer-term public investment strategy framework, consistent with the government's medium-term fiscal and budgetary strategy, and within which PSAs can develop their investment plans and identify and prioritise investment projects; (ii) ensuring that quality standards for project preparation are being met and that major investment projects are subject to independent review and appraisal; (iii) in providing guidance and support to PSAs in strengthening public investment management in their sectors; and (iv) in acting as the primary adviser to the Government on whether proposed investments represent an effective and efficient use of limited public resources.

84. **Key priorities for strengthening the public investment management process in Romania include rationalization of the existing portfolio and strengthened framework for screening and prioritizing of new project.** A review of the existing project portfolio could potentially free up fiscal space for new priority projects. Specifically, the reform agenda could focus on three key areas, namely (i) strengthening the strategic framework for public investments, and (ii) managing the pipeline of project and strengthening the existing procedures for project selection, approval and budgeting, and (iii) streamline the permitting rules and processes.

85. **Reforming the public investment management process will require high level commitment and leadership and active change management.** The MOPF will have to take a leadership role for

strengthening public investment management in Romania. These reforms will pose significant change management challenges for the MOPF. Resistance to the reform will need to be managed by preparing staff, managers and stakeholders (including parliament, audit and the general public), for change by disseminating an overview of the planned reforms, including their goals, means, and timing. This should be undertaken by conducting regular conferences and events, and using the MOPF webpage to communicate the objective and progress.

Annex 1 A: FBRL Article 20 - Provisions Relating to Public Investment

Chapter VI, Article 20 of the FBRL sets out the requirements for treating public investment within the Government's fiscal and budgetary framework. Effectively this involves outlining the Government's strategy, priorities and planned medium-term spending allocations for public investment. Specifically, the Law requires that:

- The medium-term fiscal framework contains updated forecasts for the current year and the next three years for capital expenditures to be financed from the consolidated general budget along with actual expenditure in the previous two years [Article 20 (2.a.iii)]
- The medium-term expenditure framework sets out at an aggregated level the spending plans of the Government for the next three years covering:
 - expenditure priorities and their justification in terms of improvements in policies, in the effectiveness and efficiency of public services, and in the quality of regulatory activities and initiatives to promote private sector growth [Article 20 (3.a)];
 - the resulting consolidated budgetary expenditure allocations broken down between: (i) state government expenditures with allocations for the 10 largest PSAs separately detailed; (ii) expenditures of the other components of the consolidated general budget; and (iii) the expenditures of the centralised administrative territorial units [Article 20 (3.b)].
 - the public investment program, including a statement of the Government's investment priorities with a detailed breakdown provided for the ten largest PSAs in the State Budget [Article 20 (3.c)]

Annex 1B: Public Finance Law - Chapter 3 Section 3 – Public Investment

- Public investment in the draft Budget [Articles 38] requires that all expenditure investments financed from public funds are detailed in an annex to the Budget of each PSA.
- Information on public investment programs [Article 39] explains how public investment allocations are to be shown in the Budget Annex, specifying the financial and non-financial information to be provided for each project. This has in the past included a requirement for cost-benefit analysis to support all investment projects, although under the 2013 PFL revision this and other information requirements should in future be specified in forms issued by the MOPF.
- Information determined at Government level [Article 40] requires that Government through the MOPF designs the public investment strategy based on the investment programs proposed by PSAs. This article is deleted in the 2013 PFL revision, since it has been superseded by the provisions of FBRL covering the preparation of the FBS.
- Role and competences of the MOPF [Article 41] defines four specific authorities for the MOPF: (i) defining investment program content, format and information required to support budget formulation [Article 41 (1)]; (ii) setting preparation requirements (methodological norms) and evaluation and selection criteria for public investment projects; [Article 41 (2)]; (iii) reviewing the investment program for compliance with agreed expenditure limits [Article 41 (3)]; and (iv) coordinating investment program monitoring and eliciting the required monitoring information from PSAs [Article 41 (4)].
- Approval of public investment projects [Article 42] sets out the levels of authority for approving new investment projects and other investment projects are specified. The 2013 PFL revision requires that all investments over RON 30 million are approved by the Government. Below this amount approval is at the level of the PSA.
- Conditions for inclusion of investment projects in the draft Budget [Article 43] specifies that only investment projects that have been approved may be included in the PSA budget. The PSA is also responsible for updating costs and approving cost increases resulting from price index provisions. In the 2013 PFL revision this article includes a provision designed to ensure that projects can be adequately funded.
- Procedures for the investment project monitoring by PSAs [Article 44] establishes a requirement for PSAs to report monthly on the implementation of their investment program and to identify any issues affecting project implementation and the measures being taken to address these issues. It also sets out the conditions under which PSAs may request reallocations between projects in circumstances where it is unlikely that the funds can be utilised as originally planned.
- Provisions relating to international agreements and external financing of public investment projects (Articles 45) requires that all expenditure commitments on externally financed projects are consistent with the relevant investment financing agreement. In the 2013 PFL revision this section is further expanded to require that the provisions of the PFL should apply to the use of EU Post Accession Funds, donor funding and external loans with any exceptions to be detailed in the annual budget law.
- Structure of public investment programs [Article 46]. This distinguishes three categories of investment: (i) on-going investment projects; (ii) new projects; and (iii) other capital investment expenditures. The latter category includes real estate purchase, project appraisal and design expenses, and technical site investigations. In the 2013 PFL revision this sub-section is moved to follow Article 38.

Annex 1C: Public Investment Management Related Government Ordinances and Decision

- Decisions Regulating Project Appraisal, Preparation and Approval
 - GD 28/2008 - technical and economic documentation required to support the approval of public investment projects. This provides outline lists of contents for pre-feasibility studies and feasibility studies. It also includes more detailed instructions for costing of the proposed investments.
 - GD 435/2009 and GD 150/2010 – establishment, organisation and operation of the Inter-Ministerial Council for Endorsing National Interest Public Works and Housing (IMC). The Council is responsible for examining and endorsing the technical and economic documentation (feasibility studies) for public investment projects that fall under the approval responsibility of the Government. This endorsement is required before a project may be submitted for approval by the Government.
 - GD 980/2005 - approval of methodological norms for the criteria for appraisal and selection of investment projects. This sets out the appraisal criteria and methodology to be used in selecting project for inclusion in the PSA public investment annex to the Budget. It applies both to the inclusion of new projects, already approved by Government, and to the review of on-going projects to determine whether they should continue to be funded.
- Decisions and Ordinances Addressing Specific public investment management Issues
 - GD264/2003 on categories and criteria, procedures and limits for advances from public funds;
 - GO 1202/2008 on requirements for monitoring performance of the public investment program and clarification of certain financial procedures;
 - GEO 66/2011 on punishing of irregularities in obtaining and using European Funds;
 - GEO26/2012 on measures for reducing public expenditure and consolidating fiscal discipline.

Annex 2: Medium-Term Budgeting Calendar	
Deadline (2013 Revised PFL)	Task
June 1	The medium-term macroeconomic and social indicators are published on the website of the National Commission of Prognosis.
July 31	MOPF submits to Government medium-term expenditure limits as well as the medium-term expenditure plans provided by the PSAs.
August 1	MOPF issues to PSAs the Framework Letter setting out the macroeconomic context within which the budget will be prepared, guidelines for preparation of budget proposals and the expenditure ceilings approved by the Government.
September 1	PSAs submit to the MOPF their budget proposals and annexes prepared within the expenditure ceilings provided.
September 15	PSAs submit revised budget proposal and annexes to MOPF in cases where their draft budget proposals were rejected by the MOPF for non-compliance with the budget guidelines and expenditure ceilings.
September 30	MOPF submits draft Budget and draft Budget Law to the Government
November 1	MOPF submits revised Draft Budget to Government that takes account of comments received from the Government and the updated fiscal forecast provided by the National Prognosis Commission.
November 15	Draft Budget and Budget Law submitted to Parliament
December 15	Budget approved by Parliament (or Government applies for emergency procedures.
<p>Note: The above calendar does not include requirements relating to the preparation and presentation of the Fiscal and Budgetary Strategy (FBS). The FBRL requires that the FBS is submitted to the Government by 30 May, but this requirement is not referred to in the PFL.</p> <p>Source: PFL – January 2013 revision</p>	

II. PERMITTING PROCESSES

A. Introduction

1. **The project cycle is governed by a great many permitting rules and regulations. (See Annex 2.1 for a summary of major approvals). This is common for large projects all across the EU. Most of these rules derive from Romanian law, but some (especially in the environmental area) are driven by EU law and directives.**
2. **In theory, most permitting takes place during the Feasibility Study phase, in accord with the terms of the Urbanization Certificate. In practice, permitting is really a two-step process, with much of the work of compliance coming later in the project cycle.** This is because of the widespread use of principle agreements, which allow a project to proceed past the Feasibility Study phase without actually carrying out the work of regulatory compliance. The net effect of principle agreements is to shift effort, costs and uncertainty downstream to a later phase in the project cycle.
3. **The two largest and most complex permits are the Environmental Impact Assessment (EIA) and the Archeological Permit.** Both of these take months to complete (though they are normally carried out in parallel), and both are governed by complex and detailed legislation. For both, compliance can carry significant costs to the project promoter. However, the Environmental Impact Assessment does not use principle agreements, while the Archeological Permit does. As a result, the EIA, once completed, is not likely to generate unexpected costs or delays later. Unless the project undergoes significant modification later in the project cycle, an EIA, once done, represents a set of clear guidelines that allow straightforward calculation of likely costs and time issues. Archeological permitting, on the other hand, often generates additional unexpected costs and uncertainties far into the project cycle.
4. **The legal framework for most permits is well developed and reasonably clear and consistent, although there is room for improvement.** Permitting issues usually derive from the use and abuse of principle agreements, not from lack of clarity or contradictions in the law. (The archeological permit is a partial exception.) An occasional problem is that local authorities, or local offices of a central Ministry, may not be perfectly consistent in applying the law.
5. **Land acquisition is a significant problem for some projects, although not for roads.** Land acquisition was once a problem with roads, but is no longer so, because the legal framework was dramatically changed in 2010. Most land acquisition problems now lie with energy projects, especially those needing extensive transmission lines. This is because the relevant legal framework for land acquisition for energy projects is incomplete.
6. **Problems with the cadastre are common, and can have a serious impact on project implementation.** Two sets of problems consistently arise. One is that the cadastre does not accurately identify land ownership and/or land boundaries. This gives rise to problems with land acquisition, and sometimes also with the EIA (i.e., when an environmentally sensitive area has not been depicted accurately). The other common problem is that the cadastre often fails to record underground assets (pipes, cables, etc.). These errors are almost never caught during the Feasibility Study phase, and so give rise to unexpected risks and costs later in the project cycle.

B. The works authorization procedure

7. **The works authorization procedure is described by Law no. 50/1991 and the associated implementing norms. It comprises the following six steps:**

- a) Issuance by the competent local authority¹³ of the Urbanism Certificate;
- b) Issuance of the competent environment authority's official statement on investments falling outside the environmental impact evaluation procedures;
- c) Notification by the project promoter of the competent local authority in respect of its intention to further apply for a construction authorization in case of investments subject to the EIA procedure;
- d) Obtaining of all relevant permits and approvals listed within the Urbanism Certificate, including the environmental permit;
- e) Drafting of the necessary technical documentation and applying for the construction authorization;
- f) Issuance of the Construction Authorization by the competent local authority, subject to all conditions listed above being complied with.

8. **There are several other aspects to the process not formally considered by the law.** A complete picture of the legal/procedural framework for authorization of construction works should also take into account the following issues.

9. **In current practice, the permitting process implies more than one single stage.** Permits are issued at the Feasibility Study stage as a "principle agreement", then renewed or re-confirmed at the Detailed Design phase. This is formally in accord with the relevant laws, since it is not explicitly forbidden, but the result is to force each project to effectively apply for the same permits at two different points in the project cycle. As noted above, this is a major weak spot in the process and is often a source of uncertainty and delay.

10. **Some permits might provide for specific conditions** to be observed by the applicant during the execution of works. It is not unusual for permits to go beyond the authority granted to the permitting agency by the relevant law.

11. **The local authorities might impose the need for obtaining additional permits during the works execution stage.** Such additional permits are typically imposed for specific operations (e.g.: digging permits). These additional permits are more likely to be a nuisance than a serious delay to a project, but they can add additional uncertainty and delay.

¹³ Municipalities and Communes issue authorizations for projects located within their territorial competence. County (*judet*) councils are responsible for projects located in more than one single commune/municipality or outside the buildable area of communes. In case of projects located on more than one single county, the relevant central authority issues a coordinating permit on which basis the authorization of construction works is carried out by each county council.

C. The Urbanism Certificate

12. The Urbanism Certificate is an administrative document issued by the competent local authority. Formally, an Urbanism Certificate should do the following:

- i) provide information to the applicant on the legal, economical and technical status of the land and/or construction concerned, as per the provisions of the existing zoning plans;
- ii) define the core requirements to be observed, based on the location specifics/zoning requirements; and,
- iii) Provide the list of permits, approvals and authorizations that the project promoter should further obtain in order to be in the position to apply for the Construction Authorization.

In practice, the Certificate is more likely to be a “checklist” for the various permits, approvals and authorizations. From the perspective of a project promoter, the issuance of the Urbanism Certificate represents the first step towards the authorization of construction works.

The provisions for the Urbanism Certificate are formally consistent across the country, but in practice there is often some local variation in the format and content, and local authorities may occasionally add other elements or requirements beyond those enumerated in the law.

13. An Urbanization Certificate is based on the provisions of the existing zoning plans. As per the provisions of Law no. 50/1991, the Urbanism Certificate is to be issued within 30 days time from the date of the application. Law no. 255/2010 provides for a 10 day deadline in the case of public utility projects. It appears that, in practice, the 30 day limit is more typically observed.

The duration of validity of Urbanism Certificates is occasionally an issue. Most are issued without any date limitation, and certificates issued for public utility projects as described by Law no. 255/2010 are deemed valid until the end of the related construction works. However, it is not unknown for a municipality to claim amendment of an Urbanism Certificate after it has been issued.

14. Within the project cycle, Urbanism Certificates are applied for and issued at the Feasibility Study stage. This should take place once the promoter has a clear picture of the nature and main characteristics of the project proposal and seeks information about the zoning constraints. As per the provisions of Government Decision no. 28/2008, the framework content of the Feasibility Study includes the Urbanism Certificate and the permits listed therein, including the Environmental Permit or EIA.

D. The Archeological Permit

15. Although the archaeological permit is just one of many required for a typical project, it is worth examining closely. There are three reasons for this. First, it is a frequent source of delays and problems. Difficulties in obtaining the archaeological permit generate a disproportionate number of complaints from project promoters. (Archaeological permits are a particular issue for transport projects.) Second, it is the second longest and most complex permit after the Environmental Impact Assessment (which is treated separately below). And third, many of the issues with this permit (such as the reliance on “principle agreements”) are found again and again with other permits.

16. Romanian law protects the country's archaeological patrimony. Romania ratified in 1997 the European Convention on the Protection of the Archaeological Heritage, whose declared scope is "to protect the archaeological heritage as a source of the European collective memory and as an instrument for historical and scientific study". Interventions that are likely to affect the archeological patrimony are strictly forbidden without the prior approval of the Ministry of Culture.

17. In theory, the issuance of the Environmental Permit is conditioned on the granting of the archaeological permit by the Ministry of Culture (MC).¹⁴ This follows the principle of "integrated conservation", set forth in the European Convention on the Protection of the Archaeological Heritage (ratified in Romania by Law no. 150/1997). In practice, both permits are almost always applied for, processed, and issued in parallel with each other.

18. The Ministry of Culture is obligated to review the possible impact of the proposed project upon the country's archaeological heritage. This is in accord with Romanian law. In order to obtain the Ministry of Culture's authorization (the 'archaeological permit' or 'MC permit'), project promoters have to comply with certain conditions that are provided by a number of legal acts. A flowchart of the procedure, as well as a detailed description of the procedural steps required, is provided in Annex

Common practices and problems with the Archeological Permit

19. The procedures described in Volume 2, Chapter 5 are not being followed by project promoters at the Feasibility Study stage. The relevant legislation is clear enough with regard to coordination and integration of the archaeological permitting process with the authorization of the construction works and with environmental related procedures. As noted above, the MC permit should be an integrated part of the EIA procedure. However, this coordination is rarely acknowledged and or put into practice by the relevant actors.

20. Instead of an actual permit, the Feasibility Study almost always receives a principle agreement from the Ministry of Culture. If an archeological permit is listed within the Urbanism Certificate, the project promoter usually gets a principle agreement from the Ministry of Culture (MC). Typically, this consists of a simple statement that the MC is not opposing the project, subject to all relevant archaeological research procedures being undertaken as per the legal provisions in force. This agreement is sometimes based on a preliminary archaeological desk study, but it may be issued with less study, or indeed with none at all. Nonetheless, the principle agreement can be used by the project promoter for the obtaining of the Environmental Permit and, consequently, the Construction Authorization.

¹⁴ These include Government Order no. 43/2000, art.2, par. 10 (in respect of the environmental permitting) and art. 19 (f) (in respect of zoning plans); Order no. 2392/2004 clearly stating that the Theoretical Evaluation Report, the Field Evaluation Report and the Archaeological Digging Report should be undertaken during the EIA stage; GD no. 445/2009 and MO no. 135/2010 regarding the EIA procedure explicitly mentioning the need for assessing the project's impact on archaeological heritage and the attendance of the Ministry of Culture representative within the Technical Analysis Committee; and GD no. 1076/2004 regarding the SEA procedure explicitly mentioning the need for assessing the plan's impact on archaeological heritage. GO no. 43/2000 explicitly forbids the local authorities to issue building/demolition permits in areas with identified archaeological patrimony without the Ministry of Culture's specific approval in this respect (art. 5 par. 15, art.19 letter g and art. 20 letter b).

21. **The actual permitting process is delayed until much later in the project cycle.** A complete permit requires a number of archaeological related procedures, including diagnosis, preventive research and discharge. These procedures are typically entrusted to the works contractor, to be carried out during the works execution period. The effective delay of the permitting process, and the consequent overlapping of archeological research with the works execution phase, has led to a wide range of problems.
22. **The archaeologically related costs and externalities are not quantified during the Feasibility Study phase.** Thus, they are not taken into account either in the Cost-Benefit Analysis nor in the final design of the project. In some cases, these costs and externalities can significantly affect the overall costs and timing of the project.
23. **Insufficient financial resources are available within the works contract budget** for the archaeological research. Tender procedures and bids consistently do not acknowledge the real or probable costs of archeological research and permitting. This can lead to cost overruns and other problems.
24. **The archaeological process** may not be properly managed by the Contractor, whose basic interests are not in archaeological heritage protection but rather with works execution and commercial profit.
25. **There may be delays in the execution of works**, because archaeological related procedures can often be quite time-consuming. (This is a well-known fact which nonetheless seems to be rarely acknowledged by either project promoters or works contractors.) These procedures could easily be undertaken during the 1-2 year Feasibility Study phase. But in the Detailed Design or the implementation phase, the loss of weeks or months to archaeological research, survey, and mitigation procedures can be seriously problematic.
26. **In general, movement of archeological permitting into the works execution phase can cause contractual and legal problems for the project promoter**, especially if the outcome of the archaeological procedures requires significant modifications of the project's physical characteristics.
27. **These problems have also led to additional knock-on effects**, which include a culture of rushing archeological procedures (which may potentially lead to harm of the protected patrimony) and a lack of mutual understanding and collaboration, or even an adversarial relationship, between the responsible governmental bodies (typically the Ministry of Culture and the Ministry of Transport).

Legal uncertainties and procedure-related problems

28. **There are issues with the relevant archaeological legislation.** While the archaeological and the environmental related procedures are equally complex, the associated legislation is not comparable in terms of coherency and comprehensibility. The environmental legislation defines a coherent institutional framework with associated obligations and responsibilities, and clearly sets forth the steps to be undertaken by a project promoter, from the filling-in of the initial application up to the issuing (or rejection) of the environmental permit. The archaeological protection legislation, however, often lacks clarity and concision.

29. Specific problems with the legislation include the following:

- There is no clear, integrated and detailed description of the procedure to be followed by a project promoter, from the issuance of the Urbanism Certificate up to the granting of the permit allowing execution of construction works.
- The legislation provides for no clear reference in respect of the number and type of permits to be issued by the MC for various stage of project preparation (Feasibility Study, Detailed Design, authorization of construction works). Only one permit is mentioned, and it seems to be the one requested for the granting of the Construction Authorization. However, the MC usually issues

“principle agreements” which are not defined by the law and which are commonly considered as covering the Feasibility Study phase only.

- Although the law clearly provides for the integration of the archaeological related procedures within the larger framework of environment permitting system, there are no clearly defined institutional responsibilities for doing so. As a result, archaeological permitting remains distinct and separate.
- There seems to be no consolidated internal procedures for issuing permits. As a result, similar permits that are being issued by different decentralized units of the Ministry of Culture can vary significantly in content.

Issues of management by the project promoter

30. Project promoters typically lack specific knowledge of the archaeological protection legislation and related procedures. Consequently, the services contracts for Feasibility Studies preparation usually include little or no reference to the designer’s specific obligations in this respect, and often do not include appropriate financial allowances. For example, the TOR for the revision of the Feasibility Study of the Satu Mare road bypass (currently under tendering) makes no specific reference to any archaeological legislation or other archaeology-related obligations, but only mentions the Ministry of Culture’s territorial unit as the last of a longer list of stakeholders that the designer should get a permit from.

31. There is a lack of dedicated financial resources for archaeology or permitting at the project preparation stage. Since the work does not take place until after the contract is awarded, the necessary resources must be mobilized from within the works contracts. Project promoters are inclined to view this as a cost savings, because the archaeological research is typically allowed to make use of the Contractor’s manpower and machinery instead of separately mobilizing the necessary logistics at an earlier stage. In fact, given the complications likely to arise from doing archaeological digging during the works phase, it is much more likely that there will be significant financial loss.

32. Legal uncertainties are likely to arise with respect to the availability of land for carrying out intrusive archaeological research. Both GD no. 53/2011 (methodological norms of Law no. 255/2010) and GO 43/2000 include specific provisions covering both a land owner’s obligation to allow archaeological researches and the subject of adequate financial compensations for such. However, there is no specific detailed procedure for the project promoter to follow in this respect.

Budgeting and financing

Preventive archaeological research is supposed to be financed by the project promoters, as per the so-called “developer pays” principle. However, there are a number of problems that arise with the budgeting of this research.

33. Archaeological research is not recognized as a category within the General Estimate of the investment framework content approved through GD no. 28/2008. (Only a general reference to costs associated with “*other permits and authorizations*” is found there.) **There are no general cost standards for archaeological research.** Thus, even if project promoters are trying to make estimates in good faith, it is difficult to adequately estimate the need for financing in various project stages.

34. The law artificially restrains the number of institutions allowed to perform archaeological research. GEO no. 34/2006, art. 15, par. 1 specifically excludes preventive archaeological researches from the list of economic activities that are subject to procurement legislation. Instead, the law says that all such activities shall be undertaken by “the National Museum for Romanian History and other legally-entitled museums”. This approach severely limits the number of entities legally allowed to perform such activities. Taken together with the provisions of MC Order no. 2562/2010 (providing for territorial competences of

local museums), and given the lack of standards in this respect, the result is to make cost control by project promoters almost impossible.

35. **There is a significant shortage of available archaeologists.** The archaeologists performing the field investigations are not being paid on a project basis. Their remuneration as employees of the museums entrusted with the preventive researches is far from attractive. Consequently, though the National Register of Archaeologists currently comprises 833 suitable qualified professionals, there is a significant shortage of archaeologists who are actually capable and willing to perform field work.

36. **Risk is not being apportioned rationally.** The project promoters' approach of entrusting all the archaeological related activities to the works contractors contradicts basic management principles. Risk should be allocated to the Party most capable of bearing it. Instead, the promoters are moving the risk "downstream" to the works contractor. Works contractors are being made responsible for archaeological research and mitigation, even though this is not appropriate.

37. **Tender Documents for works contracts do not provide a clear and comprehensive picture of the procedures to be complied with** and the associated activities the Contractor shall be responsible for. The contractor is expected to sign a very open-ended contractual commitment, which can lead to significant unexpected costs and delays.

38. **The associated financial risk is being allocated to the works contractor.** The bills of quantities/schedules of prices usually comprise a lump sum General Item against which the Contractor is required to include all the related costs for the activities depicted therein (most common under a lump sum approach. Often, contractors have little experience in adequately pricing archaeological related activities. There is a well observed predisposition towards underestimating the related costs. As a result, it is very common for Contractors to discover that the contractual allowance made for archaeological related activities is vastly inadequate to the real costs encountered.

Problems related to field investigations

39. **Preventive archaeological researches are hindered by a number of problems.** In theory, the issuance of a permit should be preceded by both desk and field research to locate and define potential issues of archaeological concern. In practice, a number of complications arise.

- As noted above, there is a lack of sufficient qualified professionals at the level of the legally-allowed institutions (the museums) being both capable and willing to perform field-work;
- As per the provisions of MC Order no. 2562/2010, a project promoter shall be requested to contract the local museum for everything related with archaeological activities. However, the museums that have "territorial competence" among a given area might not have qualified archaeologists for the specific sites that are being investigated therein. A particular regional museum may not have qualified professionals for each and every type of archaeological site under its competency area. This can result in the prolongation of the field investigations.
- There are no standard conditions of contract the preventive archaeological research. Other countries do have standard contracts, serving both the interests of the developer and the archaeologists and providing details on both Parties obligations. Romania does not, so each project must "re-invent the wheel" and develop contract terms from scratch.
- The records of archaeological protected sites are not always complete or accurate. This has occasionally resulted in a significant amount of preventive research being done in areas with no real archaeological potential.

40. **The Ministry of Culture does not always issue permits in a timely manner.** This is not generally an issue with transport projects, as these are separately regulated. But for other projects, significant time – weeks or even months – might pass between the finalization of the archaeological research in a particular site and the issuing of the related MC decision (i.e., the archaeological discharge certificate, the request for modification of the project, or the denial to allow execution of works).

Recommendations

These recommendations are divided into two groups: one group targeting the legislative and institutional framework, and the other dealing with some identified poor implementation practices.

Legal and institutional recommendations

- **Clear and detailed procedures for the archaeological related permitting process.** These procedures should be user-friendly (written for the use and benefit of applicants or project promoters) and should include clearly-defined compulsory stages, institutional responsibilities and approval timelines.
- **Modification of the law to make research easier.** In particular, modification of GEO no. 34/2006 in order to allow preventive archaeological research being also undertaken by other specialized bodies, such as research institutes and universities, and modification of Order no. 2562/2010 in order to eliminate the musea's territorial competence.
- **Define a general standard of costs for archaeological related activities** in order to allow project promoters to budget their resources accordingly. In Hungary, for example, a 1% amount from the project's value is typically allocated for the costs of archaeological activities.
- **Define a clear procedure in respect of land access and associated compensations.** The default should be that preventive archaeological research is allowed to take place before the expropriation or compensation process.
- **Define a clear timeline and deadlines for issuing archaeological discharge certificates.** The Romanian authorities might consider generalizing the use of the already existing procedure for large transport projects, which compels rapid granting of decisions, whether positive or not.
- **Update the National Archaeological Record.** As noted above, this is desirable in order to avoid situations in which unnecessary amounts of works are being done in areas with no real archaeological potential.
- **Improve inter-Ministry cooperation.** At short notice, the Romanian authorities should also consider effective enforcement of the already agreed institutional collaboration mechanisms that have been set-up between MC and the Ministry of Transport (Joint Order no. 653/2497/2010). However, such collaboration protocols are limited through their very character to the specific type of works/sectors that a specific stakeholder is covering.
- **In the long run, the Romanian authorities might consider also more significant modifications of the institutional framework by setting-up a dedicated unit under the coordination of MC** with specific responsibilities in respect of:
 - Providing specific standards and procedures for preventive archaeological research;
 - Setting-up and revising relevant cost standards;
 - Ensure adequate training sessions for the archaeologists;

- Contracting the preventive archaeological research activities for national importance public projects (specific thresholds in this respect to be established) and further sub-contracting to legally allowed institutions (musea, universities, institute), based on criteria such as territorial proximity, specific skills and amount of activities to be performed.

Recommendations regarding implementation practices

- **With regard to archeological permits, either eliminate or drastically amend the current system of principle agreements.** The current system is effectively a two-tiered permitting system. It allows risks and costs to be shifted “downstream” from the Feasibility Study phase to the Detailed Design or Implementation phases. This has the perverse effect of actually adding to uncertainties, costs and delays. The law should be amended to either eliminate Principle Agreements entirely, or only allow them after a necessary minimum of research has already been carried out – if not all the research necessary for a complete permit, at least enough to enable project implementers to make a reasonable estimate of costs going forward. This will add to the cost of Feasibility Studies, but is unlikely to add to the time required (since most of that is taken up with the EIA, which is conducted in parallel). The cost will be recovered in the implementation phase – it is simply being moved further back in the cycle – and the resulting reduction in uncertainty will make project implementation much easier.
- **Consider amending Law 2010/55 to allow more time for permitting.** Currently, the law only allows 15 days for the issuance of most permits. This encourages permitting authorities to issue principle agreements that are broad and vague. If the use of principle agreements is to be restricted, at least some permitting authorities will need more time in order to issue better, more complete permits.
- **Carry out the archaeological diagnosis during the Feasibility Study stage.** This diagnosis includes steps such as the theoretical evaluation, desk review, field evaluation and sample digging. It should be done during the FS phase, as this could lead to significant reduction of uncertainty down the line.
- **Define standard formats for the outcomes of the diagnosis stage,** so that the project promoter to be provided with an estimation of the financial and time resources needed for the next phases.
- **Provide for the Contractor’s obligations** to carry out the required archaeological research, based on the results of the diagnosis stage.
- **Finance archaeological related activities under a cost reimbursement approach.** This should be an “incidental expenditure” under the services contract or a “provisional sum” within the works contract. This approach would allow financial risk to be borne by the project developer, which is both recommended in terms of proper management and specifically provided by the law (the “developer pays” principle).

E. Environmental Permitting

41. **Romania has a complex but clearly defined environmental permitting process.** The procedures are aligned to EU legislation and basically involve five main separate permitting procedures. Consistent with the EU Directives, at the core of the system is the environmental impact assessment (EIA) requirement for projects in EIA Directive Annex 1 and Annex 2 of listed projects. This is accompanied, in certain cases, by additional procedures: (i) a strategic environmental assessment (SEA) when plans and programs are

involved, (ii) an Appropriate Assessment (AA) when Natura 2000 sites are present, (iii) an Integrated Pollution Prevention and Control (IPPC) for industrial and agricultural activities with high pollution potential affecting the atmosphere, water and soil, and (iv) an Environmental authorization (EA), which establishes operating conditions for all projects requiring an environmental assessment.

42. **The EU *Acquis* itself does not address the issue of the institutional set-up, as the separation of regulatory and enforcement functions into different institutions is a prerogative of each Member State.** Currently the EA permitting – screening, scoping, reviewing, and operating phases – are the responsibility of the MECC/NEPA/LEPAs, whereas inspection and enforcement rests with the Environment Guard.

43. **The Romanian environmental institutions are currently undergoing a major restructuring process.**¹⁵ As REPAs were eliminated and their permitting responsibilities were transferred according to the case to NEPA or EPAs, this process already has had, and will have, a significant impact on the permitting process.

44. **The duration of an EIA in Romania is estimated at a minimum of 6 months** (which is best practice at the EU level). In practice it can vary considerably, according to the particularities of each case. Durations in excess of a year are not unusual.

Common themes affecting the quality and duration of the permitting process

45. **In its 2011 *Functional Review of Environment and Forestry*, the World Bank identified three structural issues. These still need to be addressed in order to improve the efficiency of the whole system:**

1. Lack of risk-based approach in environmental permitting. Modifications of the Construction Law (no. 50/1991) introduced to ensure better participation by the public in the environmental permitting procedures have led to a de facto equal treatment of all economic and development activities in terms of EA process, irrespective of scope and severity of their environmental impacts. According to NEPA officials this has resulted in NEPA and its local structures having to undertake over 100,000 reviews in 2011. This has led to considerable delays of the entire permitting process, as well as impacting the quality of the review and decision process. At the end of 2011, about 90,000 environmental decisions were issued, of which more than 90% were environmental reviews not requiring an environmental assessment procedure.

2. Enforcement of EA permits requirements. The issue of consolidation of the permitting and inspection functions — which exists in many EU countries — was raised in 2011 by the World Bank during the functional review exercise as a possible way of streamlining and improving the efficiency of the EA process. This of course has to be weighed against the risks posed by potential conflict of interest in case of consolidation. But a key question is how important is the information received from the inspection and enforcement activities in determining permit requirements.

¹⁵ G.E.O. 58/2012 on modification of legislation in the field of environment protection and forestry; G.D. 1000/2012 on reorganization of NEPA and its subordinated institutions

If permitting and enforcement are undertaken by separate institutions, it is necessary that both work closely together so that information from inspections can be used in revision of permits. A separation of functions is useful to avoid conflict of interest and therefore is legally more appealing. However, it becomes much harder to operate where the conditions in permits are closely linked to local environmental conditions (i.e. not just following national/EU standards). In this case inspectors, environmental monitors and permit issuers must work closely to determine what is required and what is achievable. This argues for the two authorities to be part of the same institution, separate and yet ensuring full interface and resulting in better service delivery.

46. Quality of Environmental Assessment Reports. The quality of EIAs is considered uneven and in some cases inadequate. This directly impacts on investment projects seeking EU funding. This is in part because of a lack of quality assurance of environmental reports. This, in turn, stems from a shortage of qualified individuals to carry them out, and an accreditation system that does not clearly distinguish between qualified and under-qualified individuals.

Currently, in Romania there is practically no proper accreditation system for individuals and companies allowed to perform environmental documents related to the permitting process. The procedure begins with registration in the National Register, which is administrated by the Ministry of Environment and Forestry¹⁶. The rules of registration are stipulated in M.O. 1027/27 July 2009 for approving the conditions of elaboration of documents necessary in the environment permitting process and include the following key aspects (i) evaluation criteria; (ii) validity of registration certificate; (iii) tariffs for registration. In 2012, 496 Romanian companies and natural persons and just one legal entity from other EU countries were listed in the National Register. 35 further requests were registered in March 2012.

In order to assure proper expertise for elaboration of EIA reports, a modification of M.O. 1027/27 July 2009 is recommended. This would include revising selection criteria (Annex 5) and conditions for cancelling the registration certificate (Article 9).

47. Current legislation on EIA for projects is sometimes inconsistent and may also cause delays. The new EU Directive will provide a clearer, more coherent and simplified legal framework. It should also reduce administrative costs (both direct costs and costs due to delays), most notably by simplifying and further harmonizing the screening and EIA processes.

48. There is an imbalance between the number of staff and workload at the NEPA level, especially in the Permitting Unit. This has a significant influence on the duration and quality of the permitting process.

International Experience in Coordination of Environmental Permitting

A presentation of environmental permitting systems in 2 EU Member States (Greece and Italy), with focus on strong points demonstrated by each of them is provided in Volume 2, Chapter IV. While the national implementation of the environmental permits process mostly follow the example of the EU Directive on Environmental Impact Assessments in EU countries, important areas of difference can be remarked in these countries as follows:

¹⁶ http://www.mmediu.ro/protectia_mediului/legislatie_orizontala.htm

49. **Responsible institution for leading the process:** When the national government is responsible for the environmental permits process a more efficient processes and knowledge management is expected. However, it requires the involvement of more people in the process as knowledge of the local context and local expertise are still necessary to evaluate an application. On the other hand, a decentralized process might be more effective in encouraging public participation.

50. **Tightness of the rules:** Both countries distinguish between mandatory and optional environmental impact assessments. However, the lists vary in their strictness. They also differ in their requirements for professionals conducting environmental impact assessments. Some require formal accreditation and training, while others only refer to *relevant expertise*.

51. **Length of the process:** Some EU countries analyzed defined detailed, step by- step timelines, while others chose to set a total amount of time or refrain from committing themselves. A longer timeframe allows authorities to properly assess the application and thoroughly consult local stakeholders, while a tight schedule can be more effective and attractive for businesses.

While each country will define its own rules, it is clear that a more transparent and accessible approach to environmental impact assessment, using modern tools such as the internet, will make it more attractive for both concerned citizens and investors.

52. **Examples of EIA good practices in other EU Member States (Austria, Hungary, Estonia, Czech Republic) are given in Volume 2, Chapter IV.**

These demonstrate solutions identified by various EU member states for common problems identified in the implementation of the EIA Directive, e.g. related to EIA and development-consent procedures (Austria), opportunity to challenge screening decisions (Hungary and Estonia), assessment of alternatives (Czech Republic), public participation and informing the public on the outcomes of consultations (Hungary, Estonia) and accessibility of documents (Estonia).

Recommendations:

- *Reduce the high burden on NEPA and EPAs and high workload on reviews for projects with **no impact on environment***, by transferring to the local authorities the activities related to initial screening. As a consequence, only projects that require an EA procedure will be subject to analysis by environmental institutions.
- Measures must be taken to ensure adequate professional requirements for the companies/individuals who undertake work related to environmental permitting. We propose the modification of M.O. 1027/2009. In particular, we recommend revising the selection criteria (Annex 5) and the conditions for cancelling the registration certificate (Article 9) of consultants that undertake EIA documentation
- Joint SEA and EIA procedures, where applicable. The establishment of joint procedures between SEA and EIA is a solution that has rarely been favored by Member States. In addition to the differences in the nature and requirements of SEA and EIA procedures, the authorities involved are generally not the same. However, there are some instances where Member States have merged the two

procedures. This is mainly the case for local plans and programs which determine the use of small areas, e.g. land-use plans. Such joint procedures are seen as a way of saving resources in terms of time and money. (One example is Denmark where the EIA Directive is implemented in the Danish Planning Act at municipal level.) By conducting an EIA according to the Planning Act the municipal authority has to make an amendment to the municipal plan. This means that EIAs are also planning documents. For that reason, every EIA has to undergo a screening process according to the SEA Act at the very minimum. If the EIA planning document also has to undergo a SEA, it is possible to combine the procedures into one common procedure and the Impact Statements into one paper fulfilling both the EIA and the SEA Directives. This might be an alternative worth exploring in Romania. It would require the revision of GD 1076/2004, e.g. to include situations where combining EA and EIA is possible, resulting in issuing a single environmental permit instead of 2 permits.

- Include the appropriate assessment (AA) procedure (for Natura 2000 sites) in the EIA procedure. Correlate MO 135/2010 (*on approving methodology for implementing environmental impact assessment on public and private projects*) with MO 19/2010 (*on approval of the methodological guide on appropriate assessment of potential effects of the plans and projects on natural protected areas of public interest*).

F. Utility Permits

Utility permits (gas, water, telecommunications, etc.) share many of the same issues with archeological permits, discussed above. All of them are issued at first during the Feasibility Study phase. Most utility permits are required by law to issue within fifteen (15) days of application.

53. **Utility permits are issued by utility providers**, such as electric power, gas, water and waste water, or communication companies. During the authorization of the construction works, these utilities can issue two different types of permits:

1. *Connection permits* providing the conditions to be met by the project in order to ensure the supply of the service during the operation phase; and,
2. *Location permits* allowing the execution of construction works in areas where public utility infrastructure already exists, subject to protection or relocation works being carried out by the project promoter.

54. **There is a complex legal framework for the issuance of utility permits.** The legal framework for the issuing of such permits is constituted by sectoral regulations, such as Law 51/2006 on communitarian services for public utilities or Law no. 123/2012 on electric energy and gases. Very generally speaking, these laws are reasonably complete and are at least formally consistent with international norms and best practices.

55. **Utility permitting is a process by which the utility imposes certain conditions on the applicant.** The issuing utility grants its agreement to the project proposal, subject to various conditions being complied with by the applicant. These conditions may be negative (the project cannot dig in a particular area) or positive (the project must do something). Positive conditions often consist of an obligation to finance relocation or protection works, to the extent that the project proposal affects the existing infrastructure. When this is the case, permits may sometimes include specific provisions concerning the design and execution of such relocation works. These may include requirements for the use of authorized designers/contractors; the use or avoidance of certain working methods; or supervision of works by the utility owner's personnel. Once included in the permit, these become legal/regulatory obligations that the project promoter is obliged to observe during the works execution stage.

56. **Utility permits are typically first issued in preliminary form as a principle agreement.** As with the archeological permits in Section C, above, utility permits typically begin as principle agreements. Often this is simply a checklist indicating the various procedures that must eventually be undertaken by the promoter in order to get the final approval, i.e. the permit itself.

57. **Despite the many problems that they can cause, principle agreements are a generally accepted part of the utility permitting system.** Other actors in the system are generally willing to accept a principle agreement in lieu of a completed permit, at least until the project's Detailed Design phase has begun. The task of actually obtaining the final permit -- undertaking the steps indicated by the utility owner and obtaining the final approval -- is being left either for the designer or for the design-build contractor to execute.

58. **The utility permitting process generates a number of problems.** These problems typically stem from either the quality and consistency of the information being provided by utility owners, or from defective management of the process by the promoter. These are discussed below.

a. Problems with the quality and consistency of the information provided by utility owners

59. **Project promoters may be provided with contradictory information** at various project preparation stages with respect to the public utility infrastructure affected by the project proposal. For instance, in response to the first application being made at Feasibility Study stage, the utility owner might grant its agreement based on the assumption that the project proposal does not affect its own assets. This may then be contradicted at the Detailed Design stage when the promoter may be informed that there is actually interference between the project proposal and the existing utility infrastructure.

60. **It is quite common for un-charted infrastructure (mainly underground) to be revealed during the execution of works.** In such cases, the impact upon project implementation, in terms of both time and cost, is likely to be significant.

61. **The main underlying reason for such inconsistencies lies with the lack of adequate geographical information** in respect of the existing public utilities infrastructure. This further results in:

- the project promoter not being able to access such data in early design stages and minimize the project proposal's impact upon the existing infrastructure;
- the competent local authority sometimes failing to indicate in the Urbanism Certificate all the relevant stakeholders the promoter should get permit from;
- the utility owners failing to indicate the exact impact of the project proposal upon their own underground assets.

b. Defective management

62. **Sometimes, delays in works execution may stem from the improper management of the project promoter itself.** This is most common in the case of design-build contracts which are being awarded on the basis of a Feasibility Study comprised largely of principle agreements. As noted above, principle agreements usually provide little information on the infrastructure likely to be affected by the project and the amount of the needed relocation/protection works.

63. **During the tendering stage, the bidders are therefore left with no real means of assessing the cost of such works.** Consequently, the tender prices may not reflect the real cost of the relocation/protection works. This can generate further delays in the execution of the works, claims and disputes. Awarding a works contract (either construction or design-build) without a prior identification of the type and amount of the utility relocation works to be executed often results in the need of acquiring supplementary land surfaces, which might also trigger supplementary delays.

Box 2.1: – The electric companies permitting system

The permitting procedures of the electric grid operators (the national company for transmission and system operator – *Transelectrica* and the local energy providers) are being regulated by Law no. 123/2012 and Order no. 48/2008 issued by the Government Regulatory Body for Energy (ANRE).

As per the above referred legal act (art. 12), the procedure implies the following stages:

- a. preparation of the relevant documentation and application for the location permit;
- b. issuance of the location permit;
- c. concluding of the contract for site clearance and/or implementation of the co-existence conditions for the electrical grid;
- d. Implementation of the site clearance/relocation works.

As with other utility permits, the bulk of the procedure and the associated risks of prolongation rather consist in the implementation of the co-existence conditions (i.e., protection or relocation of the existing utilities works) than in the issuance of the permit itself. In the worst-case scenario (the project proposal affects existing electric infrastructure which has to be re-located accordingly), the procedure might prove time and resources consuming, as comprising the following steps:

- drafting of the co-existence study;
- approving of the co-existence study by the Technical and Economic Committee (TEC) of the relevant electric power company (in the case of *Transelectrica*, the study is being approved by both local and central technical committees);
- drafting of a study assessing re-location/protection alternatives;
- approving of the study above by the TEC of the relevant electric power company (in case of *Transelectrica*, the study is being approved by both local and central technical committees);
- drafting of the detailed design for the re-location works;
- approving of the design by the TEC of the relevant electric power company (in case of *Transelectrica*, the study is being approved by both local and central technical committees);
- implementation of the re-location/protection works;
- Issuance of the location permit, in line with the new physical coordinates.

A graphical outline of the procedure is provided in Annex 2.2 at the end of this chapter.

As per the relevant provisions of Order no. 48/2008, all the preliminary studies mentioned above are realized by the relevant electric power company. The tariffs to be paid by the applicant in this respect are being established based on ANRE regulations.

For site clearance/relocation works, the applicant is bound to contract the relevant electric power company who further assigns authorized construction companies in this respect.

The improvement of the process could benefit from both adjustments to the existing legal/procedural framework and improved management practices by the project promoter. The main recommendations in this respect are :

- provide clear deadlines for internal approval of the studies that are being prepared during the permitting procedure;
- proper integration of the electrical permitting procedures during the Feasibility Study stage, so that the power grid re-location/protection solutions are established before the tender for works;
- in case the above recommendation is not complied with, financing by the project promoter of the power grid relocation/protection works should be ensured within the works contracts'

budget under a cost reimbursement approach (“provisional sums”), in order to adequately reflect the contractual risk allocation.

Other permits

64. **The list of permits that a project promoter must apply for in order to be granted the construction authorization can be quite long.** This is particularly true in the case of large infrastructure projects with a major impact upon land use, such as greenfield road projects. Apart from the environmental, archaeological and utility companies’ permits (described above), such a list might include the following authorizations/agreements:

- Approval from each and every local authority whose administrative territory is being crossed by the project;
- Approval from the administrator/administrators of relevant county/local roads;
- Romanian Waters National Administration permit;
- National Agency for Agricultural Land Amelioration permit;
- National Army Headquarters permit;
- Ministry of Transport permit (Road and/or Rail company); and,
- Permit lifting the agricultural occupancy condition.

65. **Most of the above listed permits are granted free of charge or for fees that are quite small, especially in the context of a large project.** The cost of compliance conditions, however, may be quite a different matter. Complying with conditions such as utility network re-locations can be a significant cost for a project.

+Box 2.2: – The water administration permit

The permitting procedures of the water administrator body (the National Administration “Romanian Waters” and its subordinated entities) are being regulated by Law no. 107/1996 and MO no. 662/2006.

The National Administration “Romanian Waters” grants two types of permits:

- the *water management permit* which is being issued at project preparation phase allowing the promoter to apply for the construction authorization;
- the *water management authorization* which is being issued after the Taking Over of works, allowing the promoter to operate the investment;

The obtaining of the water management permit is compulsory by law for all the developments that are susceptible to affect the underground or surface waters.

The habilitated institution for issuing the water management permit is the National Administration “Romanian Waters” (and its subordinated entities), as defined by art. 22 and annex no. 1 c ^2 of the MO 662/2006.

The water management permit has to be applied for by the project promoter at Feasibility Study stage, as provided by art. 15 of the MO 662/2006.

As per the above referred MO, the water management permitting procedures implies the following stages:

- a) Preparation of the relevant documentation, in line with the relevant provisions of annexes 1c^1 and 1 f. The technical documentation shall be drafted only by certified institutions and shall be in line

with the relevant technical normative.

- b) Application and obtaining of the relevant additional permits, as requested by art. 23 and annex I f of MO no. 662/2006. Depending on the project proposal specific characteristics, such permits might include:
 - the permit from the mineral waters resources administrator;
 - the permit from the river navigation competent body (Ministry of Transport);
 - the permit from the fishing stock management authority;
 - the permit from the National Agency for Mineral Resources;
 - etc.
- c) Application for the water management permit;
- d) Issuance of the water management permit;
- e) Implementation of the works with full observance of the conditions imposed by the permit issuer;
- f) Application for the water management authorization and obtaining of the same.

While the legislation is clear enough in requiring the water management permit to be applied for at Feasibility Study stage, in current practice the amount of data and information that the competent body needs in this respect requires the assessment to be sometimes performed at Detailed Design stage.

This happens for instance in case of Greenfield motorway projects which are usually being granted at Feasibility Study stage with a so-called “*water management permit for exceptional situations*”, which basically equals with a “principle agreement” (the promoter is required to apply for the complete procedure at a later stage).

Once issued, the water management permit provides for compulsory conditions to be complied with by the project promoter in respect of the physical characteristics of those parts of the project directly or indirectly affecting waters. Non-observance of such conditions might result in cancelling of the permit.

The Construction Authorization

66. The Construction Authorization represents the final authority act of the competent local authority.

It is the only permit that allows works execution to commence. The application for the Construction Authorization shall include the following:

- The Urbanism Certificate;
- Proof of ownership of the affected land/construction;
- The technical documentation for authorization of the construction works;
- The permits and authorizations required listed within the Urbanism Certificate, including the point of view/administrative act of the competent environmental authority;
- Proof of payment of the legal taxes for the issuing of the Urbanism Certificate and the Construction Authorization.

67. However, as per the provisions of Law no. 255/2010, in case of public utility projects the Construction Authorization is deemed issued “immediately”. This means that the issuing of the

Construction Authorization in case of public utility projects is no longer conditional upon the prior obtaining of the documents listed above. (As a practical matter, this applies only to road projects.)

68. **The project promoter is required to commence works execution within a given time limit (12 months), in which case the Construction Authorization remains valid until the taking over of such works.** Any modification of the authorized works during the execution period might affect the validity of the Construction Authorization, in which case the procedure has to be re-loaded.

69. **As per the legal provisions, the Construction Authorization represents the outcome of the development consent procedure, no other permits being further necessary for the execution of the related works.** However, additional permits/specific authorizations might be required, either by the local authorities for the execution of specific works (such as street/sidewalk pavement digging) or by other relevant stakeholders (conditions imposed through the permits granted at various design stages).

G. Land Acquisition

Land acquisition is a significant issue for most infrastructure projects. Romania is unusual, however, in that the ease of land acquisition varies dramatically across sectors.

70. **Land acquisition is not usually an issue for road projects.** Road projects in Romania can condemn and acquire land very rapidly. The relevant prevailing law, Law 2010/255, was drafted under the auspices of a former Minister of Transportation. Ministry lawyers drafted the text of the law so as to favor road projects, and it was passed rapidly by the legislature with little amendment. When road projects do occasionally encounter difficulties, it is usually because of poor management of the acquisition, not because of legal issues as such.

71. **Under Law 2010/255, land acquisition for road projects is fast and easy.** Under the law, both public and private land can be quickly condemned. There is no effective appeal of this decision. A court can review the description of the land or, later, the price paid for it. But the act of condemnation itself is almost unstoppable.

72. **Law 2010/255 is so favorable to the acquiring agency that it has been widely criticized.** Representatives of the road company have said that they are “entirely content” with Law 2010/255. However, this attitude is far from universal. There was significant public outcry when the law was passed. There have been a number of well-publicized incidents where landowners were forced out of their homes or businesses on very short notice and/or with what was perceived as inadequate compensation. Several court cases have been brought challenging the law’s constitutionality and the legality of the government decisions implementing it¹⁷. However, at this time the Law is still valid and is still regularly being used for land acquisition.

73. **Land acquisition is a relatively minor issue for environmental projects.** These projects have relatively small footprints compared to road projects, so it is usually fairly straightforward to assemble a plot of land for them. Solid waste and sewage treatment plants may attract a range of regulatory and legal

¹⁷ Decision 184, amended by Decision 198.

challenges (i.e., challenges from neighbors who don't want the project enacted nearby) but these are usually separate from, and subsequent to, the process of acquiring land.

74. **Land acquisition is a major issue for energy projects.** Unlike other infrastructure projects, energy projects can face serious expenses and delays from land acquisition issues. The problem that energy projects face is twofold.

75. **Energy projects often have a large footprint.** Wind farms, in particular, can require significant amounts of land. A large wind farm can spread across hundreds or thousands of hectares. This almost always requires multiple land acquisitions, often of both public and private parcels. In theory it is possible, under Romanian law, for a wind farm to acquire title only to the land on which the towers stand, along with right of access, leaving the land free for farming or herding. In practice, energy projects almost always find it simpler and easier to acquire title to the land.

Wind farms are generally implemented by private promoters. As private entities, these have both advantages and disadvantages in land acquisition. The major disadvantage is that they cannot call on the power of the state to condemn land. The major advantage is that they can show much more flexibility than public entities in negotiating for land ownership and rights. (For instance, a private company can pay different prices for similar pieces of land, while a government agency will be very reluctant to do so.)

76. **Energy projects require the construction of transmission lines.** The greater problem for energy projects is the acquisition of land for transmission lines. This can be, and usually is, a major source of additional expense and delay.

77. **Acquisition must be done by Transelectrica.** Transelectrica is Romania's national energy transmission company. Until the early 2000s, all of Romania's energy systems were state owned. Between 2001 and 2008, the system was "unbundled" into three parts: generation, transmission, and distribution. On the generation side, power plants were privatized and the market was opened up to construction of new plants by private investors. On the distribution side, eight regional distribution companies were created and then privatized. Electrical transmission, however, was kept intact, and remains the responsibility of Transelectrica. Transelectrica is thus the entity responsible for acquiring land or land rights for transmission lines.¹⁸

78. **The legal framework for acquiring land or land rights for transmission lines is inadequate.** The law governing acquisition of land rights for transmission lines is Law 2010/210. This law is similar in many respects to law 2010/255, the law for acquiring land for roads. Both laws were passed by Parliament and signed by the President in 2010. However, Law 2010/210 has never become effective, because the Ministry of Justice has refused to promulgate or approve regulations or secondary legislation for it. As a result, there is no effective legal framework which Transelectrica can use for rapid and efficient land acquisition.

¹⁸ Transelectrica's representative noted that cooperation with the distribution companies "is easy, because they are our former colleagues". So, for example, if Transelectrica needs to run a power line over a buried cable belonging to a distribution company, it is relatively easy for them to get information from the distributor and then reach a mutual agreement.

79. **The current system for acquiring land or land rights is slow and cumbersome.** Since Law 2010/210 is inactive, Transelectrica must act under an older law – Law 94/33. This law has a number of problems. For example, it requires an expert analysis to assess and establish the value of land *before* the land can be condemned and acquired. (This is in sharp contrast to Law 2010/255, which allows the road company to acquire the land immediately, leaving valuation issues to be resolved after the fact.)

80. **The lack of a clear legal framework is adding to time, costs, and uncertainty.** While Transelectrica can force a condemnation, without a strong legal framework this is a very lengthy and expensive process. This means that usually Transelectrica will try to negotiate with individual landowners instead. Since a transmission line may cross over dozens or hundreds of separate parcels of land, this is a tremendously time-consuming process. A small minority of recalcitrant landowners can force Transelectrica into an expensive administrative and court process or an even more expensive rerouting of the line. Either way, a great deal of time may be lost.

It should be emphasized that while the legal problem is Transelectrica's, the issue affects most energy projects. Almost all energy projects need transmission lines.

81. **In addition to problems with the legal framework, cadastral issues can also cause delays.** Much of Romania does not have an accurate, updated, and easily searchable cadastral system. Infrastructure projects regularly encounter issues that are not marked on the available maps. Land boundaries or ownership may vary from the official information, or buried assets from other infrastructure systems may not be properly recorded. This is an issue for all infrastructure problems, but a particularly problematic one for roads and transmission lines. Resolving these problems can cause a wide range of delays, particularly in the case of permitting. Furthermore, on the particular topic of land acquisition, it should be noted that there is not always a complete and accurate record of who owns land, who has easements or other rights on land, and where exactly the land boundaries are. This can make land acquisition significantly more difficult.

82. **Coexistence studies are a minor but significant additional problem for transmission lines.** Although not strictly an issue of land acquisition, the problem of coexistence studies is related, and so is considered here. Romanian law requires a coexistence study where a power transmission line crosses a road or passes through an inhabited area. Only a handful of specialists are legally permitted to conduct these studies. Because of this, coexistence studies tend to be expensive. This can also lead to delays when only one specialist is available in a particular area.¹⁹ Also, the problem of coexistence studies interacts with the problem of bad cadastral information mentioned above: it can be difficult for Transelectrica and/or the specialists to gain good and accurate information upon which to base the study.

Recommendations:

There are several changes that could improve land acquisition.

- **Improve the cadastre. This is a general recommendation with broad application beyond land acquisition. Romania desperately needs a modern, accurate, updated, and easily**

¹⁹ Representatives of the road company were particularly unhappy with this. They believe that they have perfectly competent engineers who could conduct the study much faster and more cheaply. Instead, they are forced to pay for a study from one of "their" approved specialists.

searchable cadastral system. The GOR should develop a strategic approach to the cadastre issue at national level. This should be a multi-year strategy with associated financial allocations, with the goal of solving this problem within a reasonable time horizon (i.e. not more than five years);

- **Adopt regulations to Law 2010/255 for Transelectrica.** Law 2010/210 was unpopular and was never implemented. It does not appear that anything very similar to it can pass. However, it should be possible to draft regulations to law 2010/255 that would cover land acquisition for Transelectrica. Although Law 2010/255 was drafted by the road company for purposes of road acquisition, its wording is sufficiently broad that it could support such regulations.
- **Make it easier to carry out coexistence studies.** It is not clear why only a very small pool of approved experts can carry out these studies. (Transelectrica's representatives were vague on this point.) This seems to be a minor but significant bottleneck in the process. It is probably worth investigating the relevant regulations and considering an amendment consistent with EU best practices.

E. Common Themes Affecting the Quality of Regulation and Implementation

83. **We have found little evidence that permits, licences or authorisations are a major factor in delaying or stopping the implementation of projects.** This is despite enquiring specifically about this issue. This is consistent with a critical path analysis (see Figure 2.1 below). Most permits and licenses are issued rapidly during the Feasibility study phase. Permit quality is an issue, as discussed above, but the current legal framework does not appear to be imposing severe or unreasonable requirements on project planners or implementers.

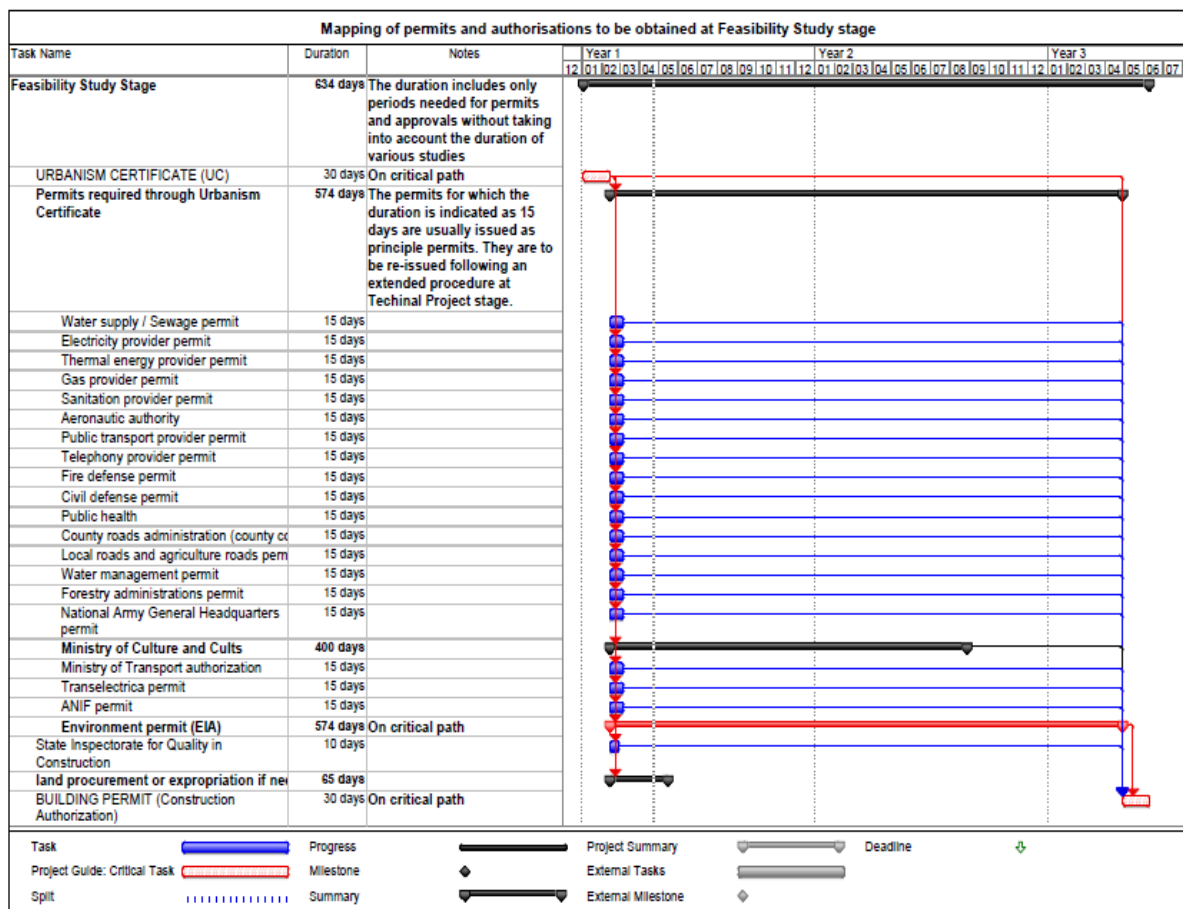
Romania has already seen several attempts to reduce the "burden" of regulation on projects, most notably law 255/2010. These have already reached or passed the point of diminishing returns. The issue is not the number of permits; research suggests that this is not higher in Romania than in other EU member states. Nor is it with the time required to obtain permits; in most cases, this has been cut to a very minimal 15 days, and almost all authorizations can be obtained in parallel. Nor do the informational requirements for permits appear to be unduly burdensome. Rather, the outstanding issue is with the quality of permits being issued, particularly in the case of permits issued as principle agreements.

84. **The details vary by sector.** Road projects require many more authorizations and so are more likely to encounter issues. On the other hand, the environment sector benefits from its de-centralized status in that most of the permitting and licences necessary for a project implementation are also issued locally. This means that project beneficiaries and licensors often have shared interests in the successful outcome of the project. Such 'problems' that are sometimes described appear to be along the lines of discussions about timing of road works to avoid town festivals and the like. One beneficiary that had said that environmental permits were a problem admitted that the problem arose due to mismanagement and human error on their part (incorrect information supplied) and the permitting authority (failure to be pro-active in pointing this out), rather than a systemic issue. Improved project management skills might have provided some necessary impetus to ensuring that issues like this are quickly resolved in future.

85. **No permitting issue seemed to have adversely affected the critical path on any of the case studies undertaken.** Discussions with utility companies and the railway company for access rights to perform works are often described as troublesome. However there has been no evidence of a material, or critical path, delay as a result. It should be pointed out that delays in liaising with utility companies in particular are hardly a problem unique to Romania. It is an often heard complaint even in countries whose PIM systems are considered amongst the best in the world. Again, stronger project management skills and leadership qualities are often the surest way to resolve such issues.

86. **Land ownership uncertainties, or cadastre issues, remain a systemic issue** in common with other countries of the wider region. However, experience elsewhere in the region suggests that this is far from being an intractable problem.

Figure 2.1: Critical Path Analysis



The critical path through the Feasibility Study phase (heavy red line) consists of the Urbanism Certificate, the EIA, and the Building Permit. All other permits can be conducted in parallel and so are off the critical path.

Current legal situation

87. **The general legal framework for permits is reasonably complete.** While there are some gaps and inconsistencies in the relevant laws (see the discussion of archeological permits, above), for the most

part the legal framework is complete and reasonably consistent. Law no. 50/1991 allows permits to be obtained at the Feasibility Study stage, based on the list included within the Urbanism Certificate. Government Ordinance no. 27/2003 on silent approval states that most permits are deemed granted if the issuer is not providing its answer within a given time limit (30 days). (Though this provision is rarely invoked – see below.)

Law no. 255/2010, as noted above, was passed with the support and approval of the Transportation Ministry and is focused on roads. However, it has application to many (though not all) other infrastructure projects. Law 255/2010 is noteworthy because it mandates a very tough approach with regard to permits. Among other things, it sets up reduced deadlines for many permits. The law was clearly written at the request of Road Company engineers who were inclined to see permits as, at best, a necessary evil. Where Law 255/2010 applies, it imposes an unusually fast permitting process (typically 15 days) with little discretion allowed to the relevant regulator. In theory, this could allow faster approval and construction of projects. In practice, since most of the relevant permits are off the critical path, it has little effect but to reduce the quality of the permits that are issued.

88. In addition to general legislation, most permitting related procedures are regulated by specific legislation (environmental, water management, archaeology, public utilities such as electricity and gas, etc.). In this context, it should be noted that Law no. 255/2010 explicitly contradicts specific provisions of other legislation regulating the public utility infrastructure (i.e., Law no. 51/2006 on public utilities services and Law no. 123/2012). Some specific permits and related procedures are also imposed at local level, through local/county council decisions.

Current practice

89. Permits are being issued at more than one single phase of the project cycle. Permits are being issued, or effectively issued, at the Feasibility Study phase, Detailed Design phase, and sometimes during the execution of works, after the granting of the construction authorization. Many (if not most) permit issuers are only granting principle agreements at the Feasibility Study phase, providing little information (sometimes no information at all) to the project promoter in respect of the existing easements/constraints.

Law no. 50/1991 provides no specific reference as to when the permitting process should take place. As a result, Construction Authorizations are sometimes applied for and granted on the basis of the principle agreements issued at the Feasibility Study phase, even though the physical characteristics of the projects are usually far from being fully defined at this point. As noted above, this practice is often responsible for contractual and legal problems during the execution of works.

90. Permits are often also granted under various conditions to be complied with by the project promoter. For example, a permit may require the issuer's affected assets to be protected or re-located. It may require that works that might affect existing infrastructure should be carried out under the issuer's surveillance. Or, it may require that part of the design and works should be undertaken by specialized sub-contractors.

91. Silent approval is rarely being invoked. This is because most permits are not approval/denial types (in which case silent approval might apply). More typically, a permit provides a list of specific constraints that the project promoter should take into account and comply with in order to obtain the Construction Authorization.

92. Apart from road projects, the permitting provisions of Law 255/2010 are generally not applied. There is no particular evidence of the harsh provisions of Law no. 255/2010 (especially with respect to utilities' obligations to pay for the relocation/protection of their own assets) being actually applied in practice.

Common problems

93. **A wide variety of problems can affect project implementation.** Some of the most common permitting related problems that have affected projects' implementation include the following:

- Construction Authorizations being applied for and issued on the basis of principle agreements granted during the Feasibility Study stage;
- Quality and completeness of the information provided through permits (i.e., the same permit issuer may provide contradictory information in various stages of the project approval, or uncharted underground assets could be discovered during works implementation);
- Some permits might include excessive information in respect of the project's physical characteristic and, consequently, any further modification at works implementation stage could affect the validity of the permit itself (it is mostly the case of the environmental permit);
- Abusive conditions are sometimes being imposed by permit issuers (such as the promoter's obligation to replace/renew assets which are not directly affected by the project);
- Abusive rejection or unreasonable bureaucratic delays in the permit issuing process (mostly the case of local authorities, but not necessarily).

94. **The problems listed above have a range of underlying causes.** These include:

- lack of clear legal provisions in respect of the permitting process stages;
- lack of cadastral information in respect of land ownership;
- lack of consolidated geographical data at the level of the local authorities;
- incomplete mapping of the underground utilities;
- lack of clear legal provisions in respect of type and limits of conditions that might be imposed by a permit issuer;
- lack of clear legal distinction between *administrative* and *opportunity* decisions to be taken by a public authority.

95. **Previous attempts to streamline the process have not been successful.** The past attempts made by the Romanian authorities to streamline the construction authorization process focused on reducing deadlines and introducing various procedural exceptions for priority projects and sectors (mainly road infrastructure, but not necessarily). Law no. 184/2008, Law no. 255/2010 and GEO no. 27/2003 on silent approval are typical examples of actions taken in this respect.

However, the effects of such approach in terms of speeding-up project implementation have so far proved rather limited. This comes from a basic misunderstanding of the nature of works authorization related problems, which focus rather on procedural aspects (such as deadlines for responding) than on the quality and effectiveness of the process itself.

The three-stage works authorization procedure (Urbanism Certificate, subsequent permits and approvals, Construction Authorization) is not excessively burdensome in itself. Therefore, apparent progress in project implementation is more likely to be achieved through dedicated actions targeting the underlying causes of the identified problems, than through tight deadlines or procedural exemptions.

Recommendations

Develop legal provisions with respect to the following issues:

- **Make a clear distinction between the administrative and opportunity decisions of public bodies, in order to limit the possibility of permitting authorities refusing to grant some specific permits for reasons outside the project promoter's responsibility and control, particularly after the Feasibility Study phase;**
- **Give clearer definitions of the type and limits of constraints that a permit issuer might impose on a project promoter;**
- **Give clearer definition of the stages and specific permitting requirements on which basis the Construction Authorization can be issued;**
- **Amend the current system of principle agreements.** The current system allows risks and costs to be shifted "downstream" from the Feasibility Study phase to the Detailed Design or Implementation phases. This has the perverse effect of actually adding to uncertainties, costs and delays. The law should be amended to either eliminate Principle Agreements entirely, or only allow them after a necessary minimum of research has already been carried out – if not all the research necessary for a complete permit, at least enough to enable project implementers to make a reasonable estimate of costs going forward.
- **Consider amending Law 2010/55 to allow more time for permitting.** Currently, the law only allows 15 days for the issuance of most permits. This encourages permitting authorities to issue principle agreements that are broad and vague. If the use of principle agreements is to be restricted, at least some permitting authorities will need more time in order to issue better, more complete permits.
- **Develop a strategic approach to the cadastre issue at a national level. This should be a multi-annual strategy with associated financial allocations, with the goal of solving this problem within a reasonable time horizon (i.e. not more than five years);**
- **Develop a strategic/consolidated approach at government level with respect to the availability of integrated geographical data (possibly in the broader framework of the INSPIRE Directive). This approach should tentatively address the following:**
 - the obligation of the utilities to provide updated and reliable maps of their underground assets, as well as a time limit in this respect;
 - the obligation of the local authorities to provide consolidated mapping of the underground utility systems, as well as a time limit in this respect;

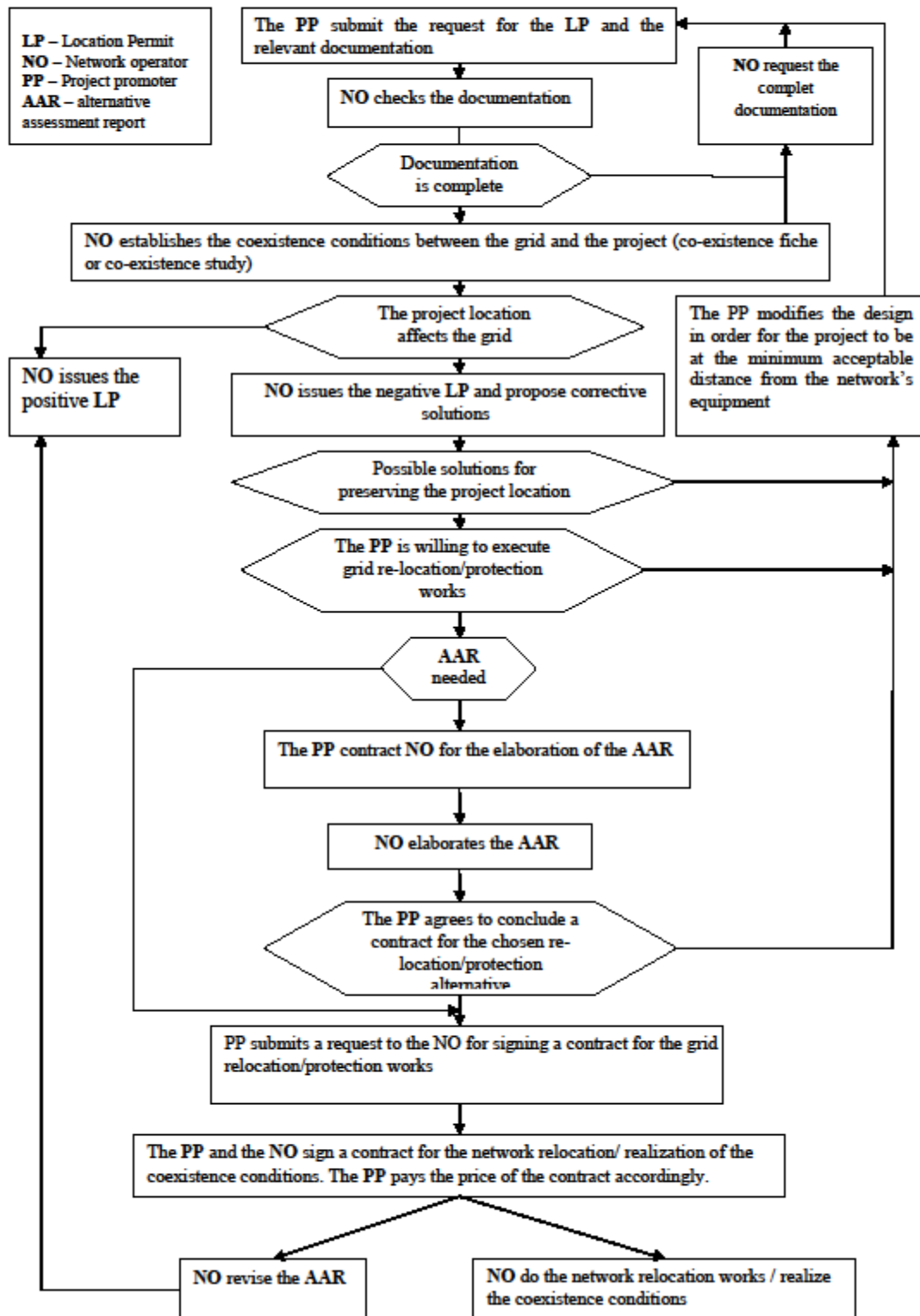
- potential financial liability for the utilities for incomplete or false information provided through a permit.. Such a provision would have to be drafted carefully, taking into account the legitimate capacity issues and resource limitations of the utilities. The goal would not be to inflict full liability for delays and losses upon the utilities, but rather to provide a clear incentive to provide accurate, timely and complete information

Annex 2.1: Major Approvals and Milestones for Public Investment Projects

	Utility Permits	Archeological Permit	Land Acquisition	Environmental Permit	Urbanization Certificate	Feasibility Study Approval
Responsible Institution	Utility owners (gas, electricity, water and waste water,	Ministry of Culture	Project Promoter	Environmental Protection Agency (national or local)	Local authority (municipality or county)	Multiple, depending on size and financing of project. Always TEC, usually line Ministry, sometimes EC.
Sectors Most Affected	Transport, Environment, Energy	Transport	Energy, Transport	All	All	All
Range of Time Required (best/worst cases)	15 days from the date the full documentation is being submitted (dedicated legal provision)	Very variable; depends on the amount of research to be performed on a case by case basis.	Legal deadline is about 60 days, but can take much longer for complex projects w/multiple acquisitions	5 to 27 months	10 to 30 days	If government approval is needed (common), can take from three to six months.
Stage of Project Cycle	Feasibility Study, Detailed Design (for renewal /confirmation)	Feasibility Study, Detailed Design, Works execution	Feasibility Study, sometimes Detailed Design	Feasibility Study	Feasibility Study	Feasibility Study (end)
Major challenges for project promoters	Lack of reliable information in respect of the real amount of the relocation/ protection works	Lack of qualified researchers. Overlapping of Permitting stage w/works execution.	Lack of regulations (energy). Cadastre issues (all).	Natura 2000 issues. Uneven quality of EIAs. Public opposition to some projects. Overlapping procedures.	Usually no major issues, unless list of permits is incomplete or geographical information is incorrect.	Usually no major issues except time required to pass through several reviewing bodies.
Potential Reforms to Consider	Mapping and charting of the existing underground networks. Direct liability of utility owners for wrong data provided through permits.	Revision of legislation.	Pass regulations for energy sector. Fix the cadastre.	Streamline procedures. Better qualification for environmental experts.	Resolve issue of uncharted underground assets.	Increase quality of feasibility studies through better guidance and use of independent reviews for major projects.

Project co-financed by the European Regional Development Fund through OPTA 2007 – 2013

Annex 2.2: The particular steps and actions of both the project promoter and the network operator in respect of issuing the Location Permit



III. OVERVIEW OF THE ENVIRONMENT SECTOR

1. **As a member state of the EU, Romania has the benefit of grant funding (Structural and Cohesion Funds) to enable it to invest in improvements to its infrastructure.** The Funds are designed to contribute to the significant costs of upgrading the country's infrastructure, standards of which often lag far behind those in many other EU countries.

2. **In the environment sector, the requirements for investment are driven by the legal requirement to comply with a number of EU Directives.** These include directives that set minimum service and quality standards across the EU in various sub-sectors. The environment sector (and the public investment projects that are initiated within it) in Romania contains three significant sub-sectors²⁰:

- Drinking Water Provision
- Waste Water Management
- Municipal Waste Management²¹

3. **In common with many other countries, investment in the environment sector in Romania is more delegated from central to local government than in other infrastructure sectors.** This has advantages; for example a stronger link to locally based permitting authorities facilitates easier co-operation. But there is also a significant disadvantage: a stronger prospect of missing skills and experience at a local level in both the preparation and implementation of projects.

In order to attempt to overcome the lack of capacity and to create 'critical mass' in projects that often follow natural catchment areas across municipal and provincial boundaries, The Ministry of Environment and Forests – the Managing Authority (MA) – encouraged and supported the local authorities around the country to form Inter-Communitarian Development Associations (IDA) at a County level, each of which might contain 15-20 communes and municipalities.

4. **Regionalization was also driven by the need to ensure coordinated and coherent investment programs aiming to gradually cover the whole of the country.** This is because the entire territory of Romania has been classified as a "sensitive area" (according to Directive 91/271/EEC), requiring tertiary treatment of waste water for all agglomerations exceeding 10.000 population equivalent. This required both significant compliance costs and also adequate territorial institutional set-up.

Drinking Water Provision and Waste Water Management are now organized into Regional Operating Companies (ROCs) which became responsible for delivering and operating investment projects in their designated areas on the basis of a delegation contract signed with the IDA, as the empowered representative

²⁰The full SOP Environment contains Five Priority Action Axes: 1) Water and Wastewater; 2) Solid Waste; 3) District Heating; 4) Nature Protection and 5) Floods and Coastal Erosion. Due to their relatively small size in the overall program, Priority Action areas 3, 4 and 5 are not considered in the scope of this report. Due to their relative large scale Water and Waste Water are frequently mentioned separately.

²¹Fully and correctly referred to as Priority Action Axis 4 - Waste Management and Contaminated Sites

of the relevant local authorities. Municipal Waste Management is organized at a County level, with all local the local authorities involved being also reunited within IDAs.

5. It is generally agreed that an average of two years was lost at the start of the current Operating Program (OP). This has been a significant factor in the low absorption rate in the sector.²² The Sector Operating Plan (SOP – often shortened to OP) was approved and became theoretically ‘live’ on 11 July 2007. However, the need to create new institutions and agreements to collaborate took significant time to achieve. The work done to establish these Regional Operating Companies (ROCs) as implementing bodies was certainly not without precedent in other countries and the time taken to create so many, with a multitude of often conflicting local priorities and demands, did not appear to be unreasonable either. Without these structures, strategic projects aiming to address compliance with the goals set-up by the Accession Treaty would have been unmanageable. A comparison of the environment sector in Slovenia²³ shows that, thanks largely to long standing institutional expertise found in that country, absorption rates are more than double that of Romania. The good work done in establishing these structures and the hard lessons learned in the first Operating Program will ensure a smoother planning and implementation process for the next EU funding round between 2014 and 2020.

6. In the solid waste management sub-sector barely half of the proposed / sanctioned projects are under implementation. This might be expected given the level of controversy attached to waste projects which in the case of Romania are largely landfill projects. Again, delays are the unsurprising result.

7. Solid waste management projects appear to be particularly prone to delays when compared to water projects. Water projects’ Project Implementation Units (PIUs) at least have the essential technical skills and experience through past local or national projects such as SAMTID and ISPA. PIU’s in solid waste however do not. Solid waste management is a relatively new ‘science’ and County Councils lack previous legal responsibilities in this respect. Some of the projects are multi-disciplined adding different levels of complexity to an area of public investment that is already notoriously difficult. For example some implementing bodies have to deal with the clear-up of contaminated sites, collection, landfill and treatment. See Box 1. The scope and scale of some of the waste management projects in Romania would be challenging for EU member states with more developed solid waste management systems and experienced industries; in Romania it is over-whelming. By way of a comparison, the case study in Volume 2 Chapter VI shows a major and complex capital project being run effectively by a well-resourced and experienced project team with clear governance arrangements and supported by international experts to fill in skills and capacity gaps.

8. This capacity deficit will need to be specifically addressed for future waste management projects and probably most of the current ones too. Substantial Technical Assistance that offers project management support will be required in the solid waste management sub-sector if the investment requirements are to be adequately implemented.

²² 12.88% absorption rate as of the 31st March 2013, based on data from the official website of ACIS.

²³ Volume 2 Chapter VI

Box 3.1: Municipal Waste Management, Vrancea County

The Inter-Communitarian Development Association in Vrancea County has its base in Focșani. The County Council is the ultimate beneficiary of the project.

It has a Project Implementation Team comprising only 5 members, not all of whom were full-time engaged on the project as they had other duties and responsibilities elsewhere.

The project requires:

1. The closing and rehabilitation of 5 urban and 200 rural dumping sites
2. The construction of a new, fully engineered landfill site
3. The construction of a new sorting and composting plant (MBT facility)
4. The construction of 3 new Transfer Stations and 6 Collection Points
5. Reform of the collection system to facilitate greater recycling rates and to create the conditions that would allow the MBT plant to achieve its objectives. This includes the procurement of new vehicles and bins

The overall project has an estimated capital value of €36.5mln

The treatment of contaminated formal and informal dumping sites adds significant uncertainty to delivery programs given the unknown and unquantifiable level of risk inherent in such projects.

Establishing thorough surveys of existing waste streams is an essential component of quantifying the risk in waste management projects. Experience in gathering and interpreting this type of data is a key component in identifying the most efficient implementation route. Mistakes are notoriously common and expensive even when the implementing team is experienced and skilled.

9. More generally, projects in the environment sector also appear to be affected by further cross-cutting issues that affect other projects in other sectors. In particular, poor project analysis and preparation and poor procurement practice are very common issues.

Overall, given the scale of the challenge and set against much longer time scales that have allowed mature environmental systems to evolve in older Member States, often over decades, it could even be considered that Romania's progress in the sector has been quite positive.

In order to conduct the research for this chapter, meetings were held with a range of stakeholders such as the MA, beneficiaries, consulting firms, contractors and special interest groups. Due to the devolved nature of the sector, a field trip was necessary in order to meet with beneficiaries in the regions. A sample of five projects was visited on the field trip to visit beneficiaries. References to findings are made throughout the text.

A. Programs and their interface with the Project Cycle in the Environment Sector

10. **Environment projects are usually funded either from the project promoter's own resources (local budgets, operator's own sources, bank loans contracted and reimbursed at local level) or by a combination of sources** including various national Programs financed from the state budget and non-reimbursable funds. By far the most significant programs and projects in the Environment sector are those in the SOP Environment which is majority funded by the EU²⁴. As a result the majority of the research for this chapter has focused on the SOP. However for completeness, the other programs are listed in Volume 2, Chapter I.

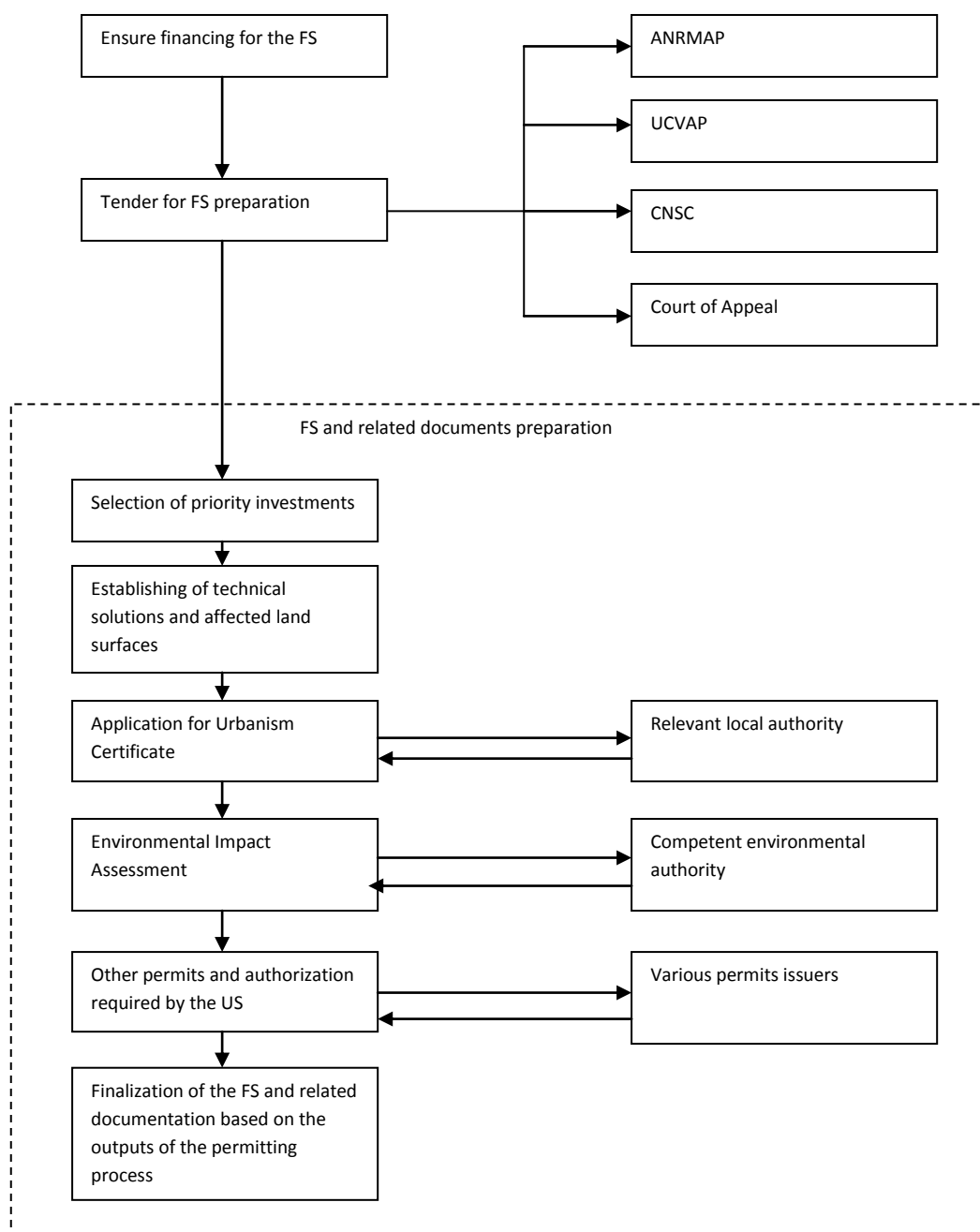
11. **With the sole exception of SOP Environment, none of the above Programs demonstrates full consistency with the sector policy framework and objectives.** These include coordination and convergence with other similar interventions, transparent selection criteria and clearly identified and available financing sources. However, a clear distinction will be made between constraints/administrative steps imposed by SOP Environment and those provided for in the relevant Romanian legislation specifically covered by this report

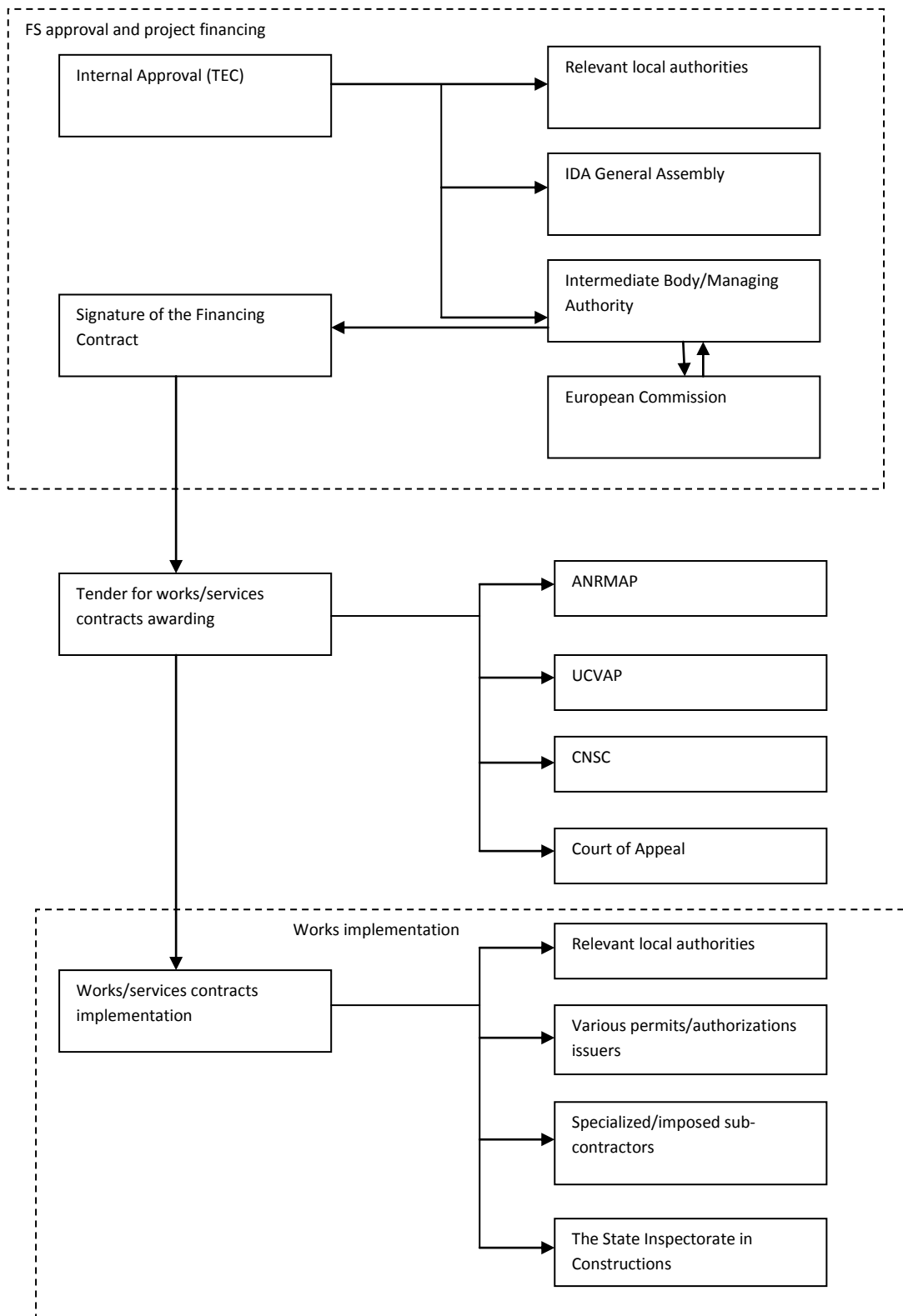
Most of the state budget financed Programs listed in the annex suffer from chronic under-financing and some (if not most) are likely to be cancelled.

²⁴ With matching funding from beneficiary authorities

B. Environment projects preparation and implementation flow diagram

The stages of project preparation and implementation are represented graphically below in order to highlight the interventions of various third parties during the entire process. The left column summarizes the actions and responsibilities of the Final Beneficiary and his agents (Contractors, Consultants) while the right column provides the interventions of various other actors during project preparation and implementation stages. It is to be also highlighted that, through their complexity, some of these interventions (e.g. EIA procedure, tender procedures) might become subject of separated individuals flow diagrams.





C. Project Preparation, Appraisal and Independent Review

12. **As the project pipeline was prepared in parallel with the work in establishing the ROCs, a top-down approach was followed with the Ministry of Environment.** The relevant Managing Authorities (MA) contracted TA services for project preparation in co-operation with JASPERS. At the time there was no real alternative to this approach. However, the importance of allowing the beneficiaries to have full engagement and responsibility in the preparation of the project has become clear.

13. **A disconnect between project preparation and implementation has caused innumerable problems and created a culture of blame for subsequent errors and failures.** Frequent complaints were heard from beneficiaries that they were not sufficiently involved in the process of preparing projects that they would ultimately be responsible for delivering or managing. (However, in the interests of balance, it should also be pointed out that the beneficiaries were responsible for 'signing-off' the projects before they were submitted for further scrutiny in Brussels.) The level of involvement and the quality of the assessment performed by the Final Beneficiaries at this stage seems to have substantially contributed to future implementation performances. The experience from Slovenia set forth in Chapter VI of Volume 2, and other countries, shows that the ultimate beneficiary – the long term operator - is best engaged to prepare the projects and best motivated to complete them efficiently and effectively.

14. **Project preparation was the subject of TA from a range of often highly qualified international consulting firms. These qualifications and experience however did not insulate them from criticism from the beneficiaries and indeed from contractors** who were often the first to identify errors during either the tendering phase or the implementation phase. Most Feasibility Studies contained mistakes or were incomplete enough to cause delays in the implementation. Fault for this might be as a result of a combination of various factors:

- The TA Contracts were tendered at a time when some basic requirements for project preparation (such as Master Plans or Feasibility Studies framework contents) had not been fully defined. Consequently, the financial allowances made by the Consultants at tender stage might have been inadequate.
- Basic input data was missing e.g. cadastre, insufficient knowledge of utility locations.
- The input data provided by the local beneficiaries was wrong.
- Field investigations were missing or incomplete.
- The consultants failed to interpret data correctly, or
- The quality of the FS was compromised by strictly fixed budgets and procurement constraints, meaning that even when mistakes had been identified, they could not be corrected.

15. **It was notable that the top-down approach in the preparation of projects did not encourage partnerships between the MA and their consultant and the beneficiary.** Conversely, it was more noticeable that there were stronger working partnerships between the beneficiaries, their agents and the contractors during the implementation phase. This might be because the beneficiaries have a much clearer (and almost self-evident) stake in the quality of the outcome.

16. **The likelihood of a repeat of these mistakes in the next EU funding phase from 2014 to 2020 is greatly diminished by the bringing together of the preparation and implementation phases under the management of the beneficiaries.** In short, they should only have themselves to blame in the event of future issues in the next phase of investment projects.

17. As a Quality Assurance matter, the role of the Independent Review of Feasibility Studies (or Project Proposals), with its scrutiny and challenge function should be specifically enhanced. It is widely accepted that mistakes were made in Feasibility Studies for reasons suggested above. It is common for mistakes to be made in such documents when they are prepared by outside experts and even by internal officials. Projects in the environment sector can often be remarkably complex and require the analysis of large amounts of technical, physical, bio-chemical, engineering, financial and economic data. Mistakes are almost inevitable. That is why the input assumptions, the methodology and means of calculation require significant checking and scrutiny. This is best done by people who have no interest in the outcome of the project and can assess the project passively and objectively. Whilst this is considered international best practice for public investment projects (and the private sector too) the complexity of environmental sector projects demands a greater level of attention in this area.

18. It appears clear from the meetings and discussions related to this chapter that the scrutiny and challenge function did not work properly. The Feasibility Study was presented to the beneficiary and approved within its Technical and Economic Committee, to the MA, to JASPERS and finally to the European Commission for financing approval. Of these opportunities to scrutinize and identify errors in the FS, the beneficiary would have had the strongest interest in ensuring that the assumptions used were correct, the MA also might have been considered to have a strong interest in the quality of the work that they had commissioned. Finally the Commission (supported by JASPERS), as the recipient of the application for funding and the supporting FS, might have been seen as the provider of the Independent Review role in projects supported by Structural Funds.

19. Perhaps above all, the Independent Review role failed to establish whether or not the implementing authority had the necessary capacity (or access to the necessary capacity), and to satisfy itself whether adequate arrangements had been put in place to acquire that capacity. Institutional links and stakeholder consultation appeared weak. Relationships between beneficiaries and central functions that should have supported them such as the MA and the procurement agency ANRMAP appeared to be strained and at times dysfunctional. This should have alerted reviewers of the proposed projects to the potential for problems in the implementation. Furthermore, as illustrated by the example in Box 1, fundamental weaknesses in implementation capacity were not identified or acted upon.

20. Consideration therefore should be given to making the project 'go-ahead' conditional on the implementing authority being able to demonstrate that it has, or will put in place, sufficient human capacity to implement the project.

21. The initial delays in setting up the environment program led to a climate of rushing procedures and cutting corners that ultimately cost time rather than saved it. The fact that the OP is limited by time contributes to the pressures faced by beneficiaries and the MA alike. Losing two years from that program timescale due to the institutional set-up requirements in the sector, created additional pressures the result of which led to sub-optimal practices. Many of the parties interviewed recognized that the desire to make up lost time resulted in overlooking or deferring problems which later manifested in the procurement process or during the implementation phase. This cause and effect is a common observation of experienced project professionals.

D. Permitting and Challenges in the Sector

22. We have found no evidence that permits, licences or authorisations have had any material impact on the implementation of projects in the environment sector. This is despite enquiring

specifically about this issue. It has been constantly and categorically denied as being material by both the public and private entities. The environment sector benefits from its de-centralized status in that most of the permitting and licences necessary for a project implementation are also issued locally. This means that project beneficiaries and licensors often have shared interests in the successful outcome of the project. Such 'problems' that are sometimes described appear to be along the lines of discussions about timing of road works to avoid town festivals and the like. One beneficiary that had said that environmental permits were a problem admitted that the problem arose due to mismanagement and human error on their part (incorrect information supplied) and the permitting authority (failure to be pro-active in pointing this out), rather than a systemic issue. Improved project management skills might have provided some necessary impetus to ensuring that issues like this are quickly resolved in future.

23. No permitting issue seemed to have adversely affected the critical path on any of the case studies projects in the sector. Discussions with utility companies and the railway company for access rights to perform works are often described as troublesome, it is believed for bureaucratic reasons due to the size and complex structure of those institutions. However there has been no evidence of a material, or critical path, delay as a result. (This is in contrast to the experience of some other EU member states. For example, Slovenia has recently seen a number of projects delayed solely by permits that are overly complex or difficult to achieve.)

It should be pointed out that delays in liaising with utility companies in particular are hardly a problem unique to Romania. It is an often heard about complaint even in countries whose PIM systems are considered amongst the best in the world. Again, stronger project management skills and leadership qualities are often the surest way to resolve such issues.

24. Land ownership uncertainties, or Cadastre issues, remain a systemic issue in common with other countries of the wider region. Again due to the localised nature of the projects, the prospects for resolving these issues in the environment sector are rosier than for centralised national projects such as highways. This issue is more fully addressed in Chapter 2.

E. Implementation Phase

25. Poor procurement practices (in a range of aspects) have been, and still are at the present time, the single biggest contributor to delays in implementing major projects. Unless corrective action is taken, these problems will continue to obstruct future investment projects. This view was consistently and often vociferously expressed by *all* those interviewed from beneficiaries to contractors to consulting firms. It should be stressed that the complaints concerned procurement practice rather than law. Although some complained about it, attempts to change the law would be rather futile.

26. Challenges to procurement exercises have caused delays in the range of 6 months to 3 years in the sample of environmental sector case study projects. Some projects have had all of their contracts challenged; all have had more than half.

27.

Box 3. 2: Challenges in Implementation: the TurdaWaste-Water Treatment Plant

The Arieş ROC based in Turda near Cluj project is regarded as a relative success in Romania. At 79.9m€ the project is of a significant size. At the time of the meeting between them and the authors in late 2012,

the project was 99% implemented and plans for Phase II during the 2014-2020 period were already being prepared. However this relative success hides a series of problems encountered by the Arieş team.

1. In common with other public procurement exercises in Romania, any tender prices that exceed the budget have to be re-run. Out of 10 tenders on this project, 3 had to be re-run. The other 7 were under-budget. Instead of taking a holistic view of the overall budget, the 3 out of 10 over budget tenders, ran the risk of delaying the 7 out of 10 under budget tenders.

2. The FS omitted detail about the main sewer line connections which were only finally realized during implementation. This not only indicates weaknesses in the preparation stages but highlights the failure of several opportunities in the review and challenge function across several institutions to discover this problem.

3. Problems with the FS and rigidity in the procurement process meant that mistakes in the FS were slavishly reproduced in the implementation phase. Opportunities to innovate, offered by some bidders, that would have improved the outcome and reduced the overall cost of the project were, to the frustration of the beneficiary, not allowed. Tenders were prepared on an input rather than output basis and lowest price was the only award criteria.

4. Processes were challenged in half of the tender procedures, including a case in which a complaint was received from a company not even participating in the tender.

5. Cash-flow problems are hampering the latter stages of the implementation. Re-payments from the MA are being held up according to Arieş because the MA has its own cash-flow problems – an accusation that was hardly denied by the MA. A Government Decision in July 2011 allowed funds to be withheld if there even a suspicion of wrongdoing or mal-practice. It appears that the MA is able to control the reduced flow of funds to the beneficiaries through this mechanism.

28. The use of the two-stage Restricted Procedure (which includes a RFQ stage) is extremely limited in Romania. It was claimed by those at the beneficiary level that to do so would effectively double their chances of having to deal with legal challenges; as one stage gives rise to one set of challenges, they believe that two stages would simply give rise to two sets. Several stakeholders stated that despite the benefits of 2-stage tendering – better qualification of bidders and reduced numbers of tenders to evaluate – the potential for legal challenges to delay the overall process was considered too great a risk within a fixed timescale OP.

29. Another example of poor procurement practice in the sector was the use of minimum time limit for tender returns that are allowed for by law. Even though the law is clear that these deadlines are considered to be the minimum, pressure, often from politicians, means that these minima also become maxima. The experts concerned with this sector are not aware of any other EU country where this practice is used.

30. Contractors object vociferously because they don't have enough time to prepare tenders adequately. This is particularly problematic in the environment sector where the engineering challenges are often significant and require time to resolve. Faced with insufficient time to prepare their tender responses, bidders caveat their bids in the hope that issues can be resolved 'on the job'. Not only does this lead to poor tender quality but also to increased risk and uncertainty for the beneficiary authority during the implementation phase.

31. **Almost all tenders (and out-turn costs to the extent identifiable) were significantly (15-30%) below the estimates in the FS and Application Forms.** This, it is thought may be a factor of the economic crisis – more aggressive pricing of tenders - but it points to the possibility that even full physical implementation of the entire OP might only result in around 80% ‘absorption’ in the sector.

32. **The mis-interpretation of the difference between the words ‘unforeseen’ and ‘unforeseeable’ has caused great harm in implementing projects in Romania making it nearly impossible to make necessary adjustments to the project beyond the FS stage.** This problem stems from the strict interpretation of the procurement legislation and seems to betray a lack of understanding of the very nature of capital projects by policy makers. In the eyes of Beneficiaries, the single biggest remaining issue by far is poor procurement practise. ANRMAP in particular is being blamed by beneficiary authorities for not adequately supporting them and therefore is an institution considered by them to be unfit for purpose.

33. **ANRMAP should consider how it might transform itself from being perceived as a ‘control’ organisation to a ‘facilitating’ organization – in other words how it could help beneficiary authorities achieve their objectives rather than telling them what they cannot do.** Central institutions such as ANRMAP and the Managing Authority that are designed to advise and assist implementing beneficiaries are instead more concerned with avoiding trouble for themselves and blaming others when mistakes are made due to inadequate, insufficient or incomplete advice. From the perspective of the implementing authorities, advice that is given is often inconsistent depending on the officials contacted.

34. **Advice given by central authorities is not seen by audit and control bodies as sufficient justification or ‘cover’ for subsequent actions taken if genuine mistakes then result.** The result of this unwillingness to help, inconsistent advice and over-zealous control, paralyzes implementing bodies with the fear of making a decision leading to inevitable delays.

35. **A corrosive culture of mistrust and over-zealous control undermines the capacity of the beneficiaries to implement their projects:** financial corrections are also undermining the very institutions that are supposed to be implementing the projects. Financial corrections are being used as a management tool by central institutions rather than a sanction for misdeeds. It was said that one water company is at high risk of becoming insolvent due to these ‘corrections’.

Summary Comments

36. **It is possible to do well-implemented projects in the environment sector in Romania** (in this case using the narrow definition of ‘on time/on or under budget’). The key to success for those that are well implemented appears to be good preparation and good management. These are skills that not all beneficiaries will have, particularly at a local level. It remains to be seen whether the definition of ‘good projects’ can in the future be extended to a results or output based interpretation. Significant improvements in project management capacity appear to be the key to further progress in the sector. Strong consideration should be given to how these skills can be adopted for future projects. If they are not immediately available within the public sector, authorities should not be afraid of hiring in these skills on a contract basis.

37. **Lessons are being learned in the current funding round.** The ROCs in the water and waste water sector in particular seem to understand already how mistakes were made and how they would learn from those mistakes. Already master-plans for a new phase of investment projects are being prepared for the

2014-2020 period. Crucially for this phase it has already been decided that the beneficiary will retain responsibility for both preparation and implementation.

38. **Also absent in the second round will be the delaying institutional arrangements that caused trouble in the environment sector in the current funding round.** With the support of the recommendations contained in this report, most of which have a horizontal, cross-cutting component, both the percentage of absorption and the quality of the outcomes will be significantly improved.

F. Summary of Recommendations

- **As a Quality Assurance matter, the role of the Independent Review of Feasibility Studies (or Project Proposals), with its scrutiny and challenge function should be specifically enhanced.** Strong consideration should be given to a formal ‘traffic light’ system for assessing project proposals before they are allowed to proceed to the procurement stage. Although a quality assessment procedure can be formulized, it still needs the experienced eye of skilled project professionals to identify potential problems and advise on corrective action.
- **Consideration should be given to making the project ‘go-ahead’ conditional on the implementing authority being able to demonstrate that it has, or will put in place, sufficient skilled capacity to implement the project and that it has demonstrated how it will do so.**
- **On a more general basis, strong consideration should be given to how these skills can be adopted for future projects.** If they are not immediately available within the public sector, authorities should not be afraid of hiring in these skills on a contract basis.
- **The capacity deficit in the solid waste management sub-sector will need to be specifically addressed for future projects and probably most of the current ones too. Substantial Technical Assistance that offers project management support will be required if the investment requirements are to be adequately implemented.**
- **Advice given by central authorities is not seen by audit and control bodies as sufficient justification or ‘cover’ for subsequent actions taken if genuine mistakes then result. This needs to change.** Central authorities with ‘control’ responsibilities must not focus their duties only on telling public authorities what they cannot do. Instead the focus should be on providing advice on how particular issues can be resolved in order to ensure compliance with laws and norms. If these central authorities are not able to advise implementing authorities on what may or may not be acceptable, the culture of blame, fear and an unwillingness to make decisions is unlikely to be broken. Public bodies and authorities need to work together to achieve the common objective of well-implemented public investment projects.
- **ANRMAP should consider how it might transform itself from being perceived as a ‘control’ organisation to a ‘facilitating’ organization.** ANRMAP can help beneficiary authorities achieve their objectives instead of simply telling them what they cannot do. Given the overwhelming weight of concerns raised about poor procurement practices, significant efforts should also be given to improving the quality of advice given by ANRMAP.

IV. OVERVIEW OF THE ROAD SECTOR

1. The National Road Company²⁵ (RC) is under stress to prepared highway projects, have them appraised, approved and contracted out quickly in order to disburse available local and external financing. Many projects are suffering from implementation delays caused by multiple factors, where limited institutional capacity is at the core. Attempts to catch up quickly and to cut costs and reduce time for preparation, tendering and award have negatively affected quality of preparation, documentation and award processes leading to complications and delays during implementation and slow disbursements. Temporary lack of local budget funding in the highway sector and specific road sector issues may also be factors.
2. Without exceptional performance from RC over the coming 2-3 years, not only might large amounts of EU financing on grant terms be lost from the SOP-T for 2007-2013, but Romania's allocations from foreign funded programs in the future might also be affected.
3. Institutional constraints make it difficult to improve project implementation and increase absorption of EU funds in the short term. The sector is suffering from: (i) high turnover of technical staff; (ii) past political interference in key appointments; (iii) frequent changes to institutional arrangements; and (iv) slow decision making.
4. Given the above, the only short term option for increasing absorption of EU funds for the road sector is to build temporary capacity by contracting key project management services to the private sector. This is the best approach when there is no time to build indigenous capacity, and confidence has to be created that grant funds and loans as well as local budget funds will be timely and well spent.
5. **Specifically, it is recommended for RC to:**
 - (i) employ an international consulting firm to act as a Financial Management Agent to help processing of payments, carry out accounting services and provide training in financial management;
 - (ii) use a Procurement Agent (consultant) to assist in improving Tender Documents and Requests for Proposals (TOR) for consulting services, improve bid/proposal preparation by service providers, address bidders concern, and monitor and make recommendations on the evaluations/awards processes besides developing capacity;
 - (iii) allow the financial management and procurement agents to also help address requests for variation orders, claims and requests for extension of time in a timely fashion, while also helping to remove the large backlog of such requests on ongoing road contracts;
 - (iv) start the preparation of candidate projects for any follow-up program in the sector. There is an urgent need to identify good projects and start quality preparation activities in order for such projects to be appraised, tendered and implemented as soon as funding becomes available;
 - (v) There are good reasons to entrust preparation of critical projects for the next program period with a new dedicated organizational unit under the RC Board, whose only objective should be to manage preparation of large projects for appraisal, programming and funding by EU and other donors.

²⁵ National Company for Motorways and National Roads (RNCMNR)

6. In addition to the above recommendations, this chapter provides many suggestions and options for addressing wider sector sustainability and efficiency issues. The main ones are: (i) carry out a public expenditure review of the road sector; (ii) restructure the central highway budget; (iii) review the classification of road networks and address coordination issues; (iv) improve on-site construction supervision; (v) review the current road planning regulations; and (vi) introduce regular independent technical and financial audits and other quality assurance arrangements for projects under implementation.

Volume 2, Chapter II provides an overview of the road sector in Romania with information on the road networks, institutional arrangements, project cycle and information on the budget and key road corridors.

A. Institutional Challenges

7. **Ambitious sector reforms over the past years have negatively affected managerial capacity.** Institutional reforms for the road sector in Romania have not followed the typical gradual learning process that other road organizations and parent ministries have gone through. From 2004 the road administration was directly transformed from a public works type of administrator into a joint-stock company in one single step with dedicated funding from a road vignette system (annual national road access charge).

8. Such leapfrogging of administrative arrangements without necessary capacity building and/or institutional twinning arrangements with a mature road organization has proved a unique challenge to Romania and seriously affected its ability to manage state funded projects, not to mention IFI-supported projects and absorption of EU grants. The organizational adaptation has taken place over a period of time where annual expenditures for the national highways have increased from EUR 721 million in 2004²⁶ to EUR 1.7 b in 2012, seriously affecting financial management and procurement capacity. Frequent changes in government, political interference in management and a high turnover of technical staff have worsened the difficulty of developing institutional capacity and introducing reforms.

The reliance on private contractors and consultants in development and rehabilitation of the highway network is an institutional strength. However, the management of a large number of such contracts annually is also taking attention away from management of maintenance and operation of the existing network of roads and bridges. The workload balance between the head quarter and the regional offices could possibly be improved to address this.

9. **Government's control environment has also slowed down project implementation.** Another unique challenge to institutional capacity shared by several infrastructure agencies is the control environment that staff of the Road Company has been exposed to, making them financially liable for administrative mistakes. This has seriously affected fiduciary capacity and slowed down procurement processing and financial management. The above challenges have also in a negative way affected the absorption of EU grants for national roads under the SOP-T for the 2007-2013 program period. Unless short term actions are implemented to improve absorptive capacity and project implementation, future grant allocations for the sector operational program for transport may be adjusted down.

²⁶ In 2004, only EUR 51 million from the budget was spent on national road maintenance and repairs, and the State Budget contribution to national roads in 2004 was EUR 248 million out of total national roads expenditures of EUR 721 million compared with the about EUR 1.7 billion in 2012 (estimate).

Recommendations:

- **Restructure road budget to cancel or postpone slow progressing low priority projects and concentrate funding to finish high priority and foreign funded projects earlier.**
- **Develop arrangements for ex-post evaluation of national road programs and projects to guide future planning, programming and budgeting.**
- **Carry out a Public Expenditure Review for National Roads (with a focus on the 2014-2020 period) to assess the capacity of the Gov. of Romania to finance and execute its ongoing and proposed road investments and maintenance programs.**
- **Balance sources and uses of funds for the national roads, and review policies on borrowing to address past over-investments in highways.**

B. Project Cycle and Process Mapping in the Sector

10. **The lack of Master Planning results into an unclear definition of priorities and waste of resources.** There are currently no Master Plans elaborated at national and regional levels. The lack of clear definition of priorities becomes critical when it comes to the preparation of large projects, that requires significant time and resources, with the risk of preparing studies for projects that would not be funded and / or launching projects that would further be considered as non-priority.

11. **The Feasibility Study (FS) in Romania is the basis for decisions on budget entry as well as the basis for preparation of the tender documents, including for many motorway projects.** To serve this dual purpose, the FS has requirements to format and content that is very detailed, close to what is expected on the preliminary engineering design of a project with a selected road corridor. This is unusual compared to many other countries as road projects normally go through at least two planning stages before tender documents are prepared. Concept study (for complex projects), pre-feasibility study, feasibility and preliminary engineering are stages of the project cycle often used that gradually prepares a highway project for decision making, while reducing the costs and efforts later in preparing detailed design and tender documents. To address this weakness in road project preparation should be a high priority, especially since the Road Company now is gradually transferring detailed design responsibility to the contractor under a design-build type of contract.

12. **Funding of County Roads.** County roads are not funded through the State road budget, but through the road budget in each county using revenues from VAT, share of the income tax and also through block allocations from the state budget. There are 41 counties (plus Bucharest) and 2861 communes and 320 towns/municipalities administering the county, commune and municipal road networks of 184,000 km.

13. **Most counties do not have funding available for major investments in county roads.** Therefore, most funding for new construction or road rehabilitation is coming from the MRDT using among others the funding available under the EU funded Regional Operational Program (ROP). MRDT issues a call for application with deadlines. There have been three calls over the last seven years. There are few regional development projects with 100% financing by the state budget through MRDT, last year about EUR 80 m was allocated for county roads. The state budget is also used to provide required counterpart fund for EU and IFI financed county road projects.

14. The FS for county and communal road projects are normally prepared by a consultant as the basis for an application to MRDT Regional Development Agency (RDA) for funding under the regional operational program. The application forms are prepared by County/Mayor's Technical Office using information from the FS, but the FS is not normally submitted to the RDA (Intermediary Body) with the application forms. After an administrative conformity and eligibility verification is carried, an independent Financial and Technical Assessment is carried out. If positive, detailed technical design is carried. For projects where the DTD is not required, and after IB approval a financing agreement is signed between three parties, the beneficiary, the RDA and the MRDT. Contracting can take anywhere from 2-10 months and construction is followed-up by the Monitoring Department of RDA, while site supervision is normally carried out by the County Technical Committee. The ROP Axes 2 (Roads) is fully committed as all available funds allocated for roads (>EUR 750 m) have been committed and financing agreements are signed for EUR 1,065 m worth of road projects including counterpart funding for the 2007-2013 program.

15. **Weaknesses in project preparation are reflected in the official cost estimate.** What should be addressed in a FS study is covered by (GD) 28/2008. The coverage is reasonable but broadly defined and not specific to the road sector as was pointed out before. The required accuracy of the cost estimate is +/- 10% but this is normally not achieved at the feasibility stage, and the official FS cost estimate is typically 20-30 percent or even more above the lowest bid price offered by bidders. For road projects it appears that the official FS cost estimate plus 10% is the upper cost ceiling and the amount requested in the road budget, with plenty of room for additional work and variation orders during construction. Normal practice is for the FS cost estimate to be within +/-20% of lowest bid price or the average of the three lowest bidders, but it seems RC is allowing for uncertainty and large variation orders during construction.

16. **There is a strong focus on lowest cost and speed of study implementation:** The RC is awarding FS work to consulting firms in an open competitive process, awarding the contract to the firm offering the lowest lump sum, possibly in combination with the shortest completion time offered as well. The focus on lowest cost and short completion time offered affects the quality of the consulting work negatively, as there are few specific requirements to the extent of investigations to be carried out per km of road or for specific bridge foundations. The number of alignment alternatives to be investigated is only set at a minimum of two, etc. Details regarding pavement designs based on axle load surveys, preliminary design of structures such as bridges and large culverts, and specific requirements for field surveys, physical detection of utility networks and testing of alignment soils, borrow pits and material sites seem to be missing in the TORs for FS consultants. Furthermore, any feasibility study should not be considered as complete until and unless the related Environmental Permit is issued.

17. **Independent appraisal is only carried out for large EU funded projects.** The approval process for a FS of a state budget financed road project can take from 6-9 months, sometimes shorter depending on the political attractiveness of the project. Only at the level of the Beneficiary are the key FS issues addressed such as technical standards and cost-benefit analysis, but no independent appraisal is carried out as the basis for approval. The ministries and inter-ministerial technical committee are mostly just endorsing the findings of the Beneficiary agency. This is in contrast to larger EU funded projects where a full appraisal is carried out of each project above the EUR50 m cost limit.

Recommendations:

- **Consider to evaluate and award consultancy proposals for FS by using a combination of technical score and price (for example 80% weight on technical score and 20 % weight on price).**

18. For the generally smaller road projects in the counties financed through MRDT the preparation and appraisal of road rehabilitation projects seems appropriate and progress is good. After the FS is completed and applications are submitted to the Regional Development Agency (Intermediary Body) and approved by the MRDT they are all going through a final design stage where the detailed design, drawings and tender documents are prepared by consultants working for the local beneficiary²⁷ (county council's or mayor's technical office). This can take from 2-6 months while contracting up to 10 months. The same consultant is also providing design support during construction to create continuity, provide updates and correct any mistakes. During construction and for larger projects another consulting firm is providing on-site construction supervision services to address any technical issues and review interim payment requests. For all relatively small projects (less than EUR 10m) and technically easy with uncomplicated permitting and EIAs the site supervision is normally carried out by 2 technical supervisors from the county council's technical unit.

The EU funding available under the Regional Operational Program for Romania are now almost fully committed and it seems very likely that all road projects under MRDT will be implemented and fully disbursed by the deadline set (2015).

Recommendations:

- **Applying a standard contract, FIDIC type, for all road rehabilitation contracts.**
- **Applying the same selection procedure for financing of road projects, regardless of funding source: budget or EU financed projects.**

19. The national highway projects are all mostly large in size, often EUR 100-200 m or more each. They suffer from delays that are caused by multiple factors where limited institutional capacity is at the core. About 85 percent of the SOP-T allocations for roads have been committed and disbursements by EU for eligible expenditures are still very low at less than 20%. The early delays in preparing projects for EU funding had partly to do with the recent institutional changes just before the start of the 2007-2013 program period. Later attempts to catch up has reduced quality of project preparation affecting also quality of detailed design, tender documents, contract award processes and led to delays, cancelling of awards and construction problems during implementation with large number of claims, variation orders and requests for extension of time. According to RC allocations for national roads are limited to about EUR 4 billion, and RC senior staff are confident that by the end of 2013 all projects in the pipe line will be awarded and the total amount committed. See Annexes for details.

20. Design-build contracting as adapted from the FIDIC standard ("Yellow Book") reduces time for preparation but may not reduce overall time for project completion. Since 2009 and for SOP-T projects, the Road Company has gradually moved towards awarding larger contracts covering both detailed design and construction to the civil works contractor to save time allowing design to take place

²⁷ The tender documents and contract formats are not following the FIDIC standards and templates but instead are using more familiar Romanian standard documents.

during mobilization of the contractor and the initial stages of construction. This necessitates that the preparation of tender documents are based on FS site investigations and cost estimate, and that many of the permits will have to be updated by the contractor including EIA and utility relocations as alignment location (horizontal and vertical) or other features are adjusted during design. Basing the tender documents on the feasibility study also affects the tendering/award process, risks and uncertainties and might increase the number of claims and variation orders and requests for extension of time by contractor. An issue not well addressed relates to an apparent conflict of interest when the contractor is responsible for preparing the detailed design and update the EIA and has an incentive to introduce shortcuts and savings that may affect quality, the environment and other safeguards. Close on-site supervision could address some of these concerns.

Recommendations:

- **Review and strengthen the process for preparation and approval of road projects with the objective of simplifying and improving analyses directed at budget entry and project approval, while strengthening requirements for preliminary engineering and detailed design of complex projects.**

C. Project Identification, Planning, and Preparation Phases

21. **The planning, programming and budgeting process in the highway sector is not well developed with a reliance on feasibility studies only, awarded at lowest cost using a lump sum contract and “one-size-fits-all” terms of reference.** The project identification stage is deficient in the sense that there is no agreed Master Plan with a pipeline of prioritized projects that have undergone pre-feasibility stage planning, prioritization and approval. The process for selection and approval of projects has been described above and leads to a large number of approved projects in the road budget that are not affordable. The current portfolio of projects would require 8 years of regular road budgets to complete provided no new projects are entering the budget for a while! The system used for project selection appears to be uncoordinated and unfocused, and leads to a mere list of projects that are all wanted.

22. **There is a danger that the funding balance among key categories of road expenditures and between national highways and county roads is suboptimal, leading to losses due to inefficiencies in the allocation of funds.** In the state roads budget the national roads projects are grouped into: (a) ongoing, and (b) planned projects, and these two groups are again split into new investments (new roads or widening of existing roads), road rehabilitation (mostly pavement reconstruction or strengthening) and road repairs/ maintenance. No underlying strategy seems to be present, and there is no indication as to what extent upgrading and improvements (investments) are included in rehabilitation projects. The county, commune and urban road network is largely budgeted by local levels of government (and by another ministry) making balanced budgets for development and O&M of the total national and county network difficult. This is significant since the national roads are less than 8% of the total public road network.

Recommendations:

- **Review the classification system for roads in Romania and transforming some county roads in "regional roads" for a better administration of these.**
- **Review the role of the Road Company in coordinating investments for national and regional road networks and develop practical improvements to current practices in the short term.**

Relevance to Tender Method

23. **For larger highway projects it is not uncommon to have several planning stages** that each assists in identification and decision making of alternative options for a highway project. For example Pre-feasibility, Feasibility and Preliminary engineering are some time necessary before detailed design and tender documents are prepared. In Romania all the preparation work for any road project is carried out in the form of a Feasibility Study with common requirements to scope of work that apply to all sectors. For smaller low cost projects with minimal impacts, this seems well justified, but larger project may benefit from a splitting of the preparation into (Pre-) Feasibility Study and Preliminary Engineering Design with sector specific requirement as to the scope of work, accuracy of cost estimates and deliverables. This would make the (pre-) feasibility stage less costly and allow more options and alternatives to be considered and open for broader involvement of project affected people in definition of alternatives to be considered.

24. **A preliminary engineering design would focus on a better cost estimate, cost-benefit analysis (CBA), EIA and land acquisition and provide a good basis for tendering of design-build contracts.** The detailed design drawings with tender documents of a regular employer designed project would be prepared by the firm also undertaking construction supervision to have continuity of service and ownership of the designs.

25. This would leave to the (pre-)feasibility study to determine if a project and its location is economically justified, the degree to which such an alternative is considered preferable from an environmental or social perspective and if or how such an alternative could be financed. This stage should also considered approval and inclusion of the project in a national transport plan.

Recommendations:

- **Develop the Road Law to include better Planning Regulations to address regulatory gaps and enact improvements to road project preparation, approval and permitting processes and coordination between owners of road networks (RC, regional entities, counties and communes/municipalities). Reference is made to the Special Road Act of Poland as an example of a recent road act that achieved simplifications and speeded up project preparation.**
- **Revise Law 10 of 1995 on technical review of FS by the State Inspectorate and related legislation to establish guidelines for quality assurance and independent appraisal of feasibility studies for new projects prepared by consulting firms, as well as better and more independent review and appraisal of the readiness of projects before tendering/construction. Such guidelines should include sector specific requirements for cost-benefit and financial analysis, road safety audits and possibly value engineering assessments of designs carried out by consultants or contractors.**

Adequacy of the FS for Project Preparation and Design

26. **Poor project preparation is the major factor contributing to implementation delays, additional work and variation orders, claims and cost overruns.** The excessive “pipeline” of projects under preparation (50 or more has been indicated by RC), many of which stand little chance of being financed, results in available resources for project feasibility assessments and designs being spread too thinly. As with other sectors, inadequately prepared feasibility studies and preliminary engineering design in road projects gives rise to greater uncertainty over the final costs and contributes to difficulties during implementation. Lack of adequate preparation often triggers significant needs for contract modifications that might enter in direct conflict with the applicable public procurement rules and lead to contract cancellation and re-tendering.

27. **Many factors together contribute to the deficiencies in the project preparation stage.** These are discussed in more detail in Chapters 3 and 4, above, but some factors include and below are a few factors that were mentioned by stakeholders:

- Terms of Reference are general and common for several infrastructure sectors and costs are difficult to estimate;
- When there is an older study for the same project, the TOR is often a cut-and-paste from the older TORs with little adaptation;
- Award of consultancy assignments is based on lowest cost mainly using a lump sum contract. The cost of undertaking a full FS is now typically less than 1% of construction cost, while the norm elsewhere is 3-4%;
- Low budgets for FS services and award of the FS to lowest cost bidder is affecting quality of technical (site) investigations, the number of alignments and alternatives being investigated and limits attempts to optimize designs. The end result of this can be seen in disagreements on the technical solution and locational choices between communes and municipalities and cancellation of projects at a late stage;
- Due to low budgets and a pressure to tender the projects quickly, not enough time is allowed for assessment of environmental impacts, the relocation of utilities are underestimated and a complex permit process is left for the contractor to update.

28. **Cost-benefit and financial analysis requirements could be reviewed and simplified.** Romanian Law (GD 28 /2008) requires a full Cost Benefit Analysis (CBA) for any project that is major. For all projects regardless of their value, this law requires a Financial Analysis as well. A socio-economic analysis is requested only for major projects. To prepare a financial analysis for projects that do not generate revenues (such as public roads) is unusual and demonstrate that the requirements have been set for all types of projects. The EC requires a full CBA for all projects that are submitted to the EC for funding approval (i.e. projects of a value of more than EUR 25 million). However, the Managing Authorities (for Transport, Regional Development, Environment, etc.) require a full CBA for each and every capital investment project financed by EU, regardless of project costs. In the case of a county road projects, for example road rehabilitation, the requirement to have a full CBA is often excessive and a simpler form of analysis would be quite sufficient, especially for road rehabilitation projects.

29. **A proposal to be considered could possibly be to limit CBA to new construction and widening projects** (investments in more capacity), while road rehabilitation projects involving only restoration of assets without major improvements could be exempted as such projects generally have a high rate of return. For capital investments one could also request full CBA for projects of more than EUR10 million only, and for projects of lesser cost, alternative methods could be acceptable as well, such as cost-effectiveness or even just benchmarking. Streamlined procedures for CBA (such as the World

Bank RED model) and alternative methods for simple projects could be introduced. Finally, the law should request a financial analysis only for revenue-generating projects such as toll roads.

30. **Land acquisition delays have been addressed effectively** and Law no. 255/2010 has significantly shortened the overall process of getting the building permit and access land before expropriation is completed. Some problems do continue because of a lack of ownership records (title registry) and limited cadastral maps. The FS consultant often does not prepare detailed and accurate land acquisition data and drawings. As a result, more responsibilities (and risks) are left with the contractor, including dealing with unhappy land owners.

Recommendations:

- **Prepare more specific Terms of Reference for the feasibility/preliminary engineering design stage of highway investments to be used as basis for any project including those where older studies are used as basis. Ensure adequate time and budgets for preparatory work.**
- **Prepare a detailed operational manual for RC staff covering road project preparation for small, medium and large projects including (minimum) requirements regarding field surveys and analytical work to improve review of work of consultants carrying out project preparation work.**

Capacity Building of Institutions under Stress.

31. **Challenges to RC impact its performance to deliver.** The Road Company is under stress to deliver approved projects, contract them out and disburse state budget funds as well as external financing for the road sector. Without exceptional performance over the coming 2-3 years, not only might large amounts of EU financing on grant terms from the SOP-T for 2007-2013 be lost, but also Romania's allocation from future programs might be affected (2014-2020).

32. **The current institutional arrangements may make it difficult to increase absorption considerably in the short term.** These include (i) high turnover of technical staff, as many leave to work in the private sector after just 2-3 years (much of which would be training); (ii) political interference in appointments of key managerial staff such as technical directors and deputy directors and frequent institutional changes; (iii) decision making is negatively affected by the personal liability of managers for judgmental mistakes made in the execution of their duties; (iv) high workload in term of ongoing projects with implementation problems as well as pressure to deliver more projects to absorb funding available, and (v) the apparent reluctance in RC to use technical assistance to help in addressing performance issues.

33. **The first steps are being made to address key constraints in the leadership of the Road Company and institutional challenges.** Generally, building institutional capacity depends critically upon leadership in the key parent ministry and the road agency. A strong and capable General Director supported by a professional Board of Directors would be able to attract high quality staff and advisors, as well as to be able to mobilize and manage funding needed for maintenance operations as well as development. But even with this in place it is also almost impossible to attract and retain motivated staff unless there is decent pay scale, merit is recognized in selection and promotion of staff, and political influence is kept to a minimum. Getting basic incentives right ensures that trained staff remains in the

road organization and makes fighting corruption easier. This may take more time in the case of Romania than what is available.

34. **Building temporary capacity by contracting key project management services to the private sector is a good option** when there is no time to build indigenous capacity and confidence has to be created that grant funds and loans as well as local budget funds will be timely and well spent. Under such circumstances hiring international firms to provide key fiduciary services such as *procurement support, financial management support and audit services* has been used successfully. The lessons are that this can work when there is clearly no other option. It is also better to employ a few medium sized firms, each strong in a particular field of need, rather than to employ one large firm to do all the above support services. Coordinated efforts and support from EC, IFIs and bilateral donors may also be helpful in addressing temporary capacity constraints.

35. **Firms providing temporary capacity may also build local capacity**, but this dual role has rarely been very successful as there is an inherent conflict of interest in such arrangements. However, firms providing temporary capacity should still be held accountable for transferring knowledge. But building the government's own capacity must go on in parallel building on what already exists. A parallel program to build capacity is easier to implement and monitor and allow more trained staff to take over once the firms providing extra capacity are no longer needed.

36. **Preparation of candidate projects for the next SOP-T program period (2014-2020) must start now.** There is an urgent need to identify good projects and start preparation in order that they can be tendered and implemented as soon as funding becomes available. There is already a pipeline of good projects identified in the budget for which funding is not available in the next 2-3 years. These projects are hastily prepared and suffer from many of the challenges described above including lack of agreement on the corridor, weak EIA, Nature2000 issues, questionable cost-benefit ratio, with poor site investigations and cost estimates. It is recommended that preparation to be improved for these projects to improve the cost estimate and analytical work and prepare better tender documents over the coming 2 years to make them ready for appraisal and approval for funding under the new program.

37. **There are good reasons to entrust preparation of critical projects for the next program period with a new dedicated organizational unit**, whose main objective should be to manage preparation of large projects for appraisal, programming and funding by EU and other donors. Addressing urgent implementation problems and delays on ongoing projects would then not be an excuse for preparation delays and poor quality of preparation of new projects. The proposed new unit under a/the Board of Directors would be staffed with qualified technical staff (highway engineers, safeguards specialists, and transport economists) recruited on fixed term contracts from the private sector allowing current qualified staff from RC and other public institutions to apply on an equal basis. The unit director should be selected with care from candidates that have demonstrated leadership skills from the highway sector. Once the term contracts expire, staff of the unit would either go back to the private sector or take over permanent positions in a restructured RC.

38. There is also a need to improve the regulations covering project preparation in the road sector in Romania and to prepare guidance for staff on planning, programming and budgeting as well as on feasibility studies and on preliminary engineering designs for highways. An Operational Manual would be a good first step covering all critical preparation subject as well as appraisal techniques and review of consultants' reports.

39. **Technical assistance needs.** Support to RC should also be provided by an international financial management consulting firm (agent) to help addressing all implementation difficulties on ongoing

projects and projects to be tendered shortly to speed up disbursements and improve financial management capacity. To facilitate tendering and award of projects would be another challenge to a consulting firm providing also support for tender document preparation, guidance in pre-selection of contractors and evaluation of bids from qualified bidders. This procurement agent would also help address contract law related issues and requests for variation orders, extensions of time and claims from contractors. Based on conditions in Romania, the procurement agent would also prepare a Procurement Manual covering best international practice in preparing tender documents for various projects depending on readiness and quality of project preparation. The manual could also cover pre-qualification and bid evaluation criteria and evaluation practices, how to avoid challenges to award and shortening the tendering process and mobilization of contractors.

Recommendations:

- **Jumpstart the preparation of national road projects for EU funding under SOP-T 2014-2020 program for timely appraisal and approval by the Gov. of Romania and EC. Consider establishing a dedicated organizational unit for this purpose.**
- **Prepare a Procurement Manual covering guidance to RC staff on tender document preparation, tendering, evaluation of bids and award.**
- **Improve short term capacity by employing an international consulting firm to act as a Financial Management Agent (FMA) to help processing of payments, accounting and provide training.**
- **Use a Procurement Agent (PA) to assist in improving Tender Documents and Requests for Proposals for consulting services, improving bid/proposal preparation by service providers, addressing bidders concern, and monitor and make recommendations on the evaluations/awards processes besides developing capacity.**
- **FMA and PA to help address variation orders, claims and requests for extension of time in a timely fashion, while also help in reducing the large backlog of such requests on ongoing contracts.**

D. Specific Challenges to the Sector

40. New construction of motorways is dominating the national road budget. The type of projects implemented by the an average European highway agency would broadly be a blend of (i) routine and periodic maintenance projects; (ii) road rehabilitation projects; and, (iii) new highway construction, where most of the annual highway budget would be for used for operation, maintenance and rehabilitation works. The situation in Romania for national roads is different as the new construction and investments in improving existing national roads are dominating the budget. Maintenance works are mostly contracted out to the private sector but not under the form of long-term performance-based contracts, and the budgeted amount is typically far less than the needs to maintain the network according to the Road Company (RC). A large share of the road network of Romania is also under the administration of the counties.

41. Coordination of management between national and county road networks could be improved. For county roads under the administration of the county council, management is mostly by the equivalent

of a technical department. It appears that there are few new construction projects and road rehabilitation or periodic maintenance of existing county main roads dominate in the budgets reflecting the weak condition of many county roads. The role of the national Road Company and its seven regional offices in prioritization of maintenance and rehabilitation of the large county road network is unclear and coordination with national highway development is an area of concern. **Financing of routine and periodic maintenance**

42. **Funding for highway maintenance including routine, periodic and winter maintenance is negatively affected by the current strong focus on investments and absorption of EU funding for new highway corridors.** Only about 30% of the budget request from RC for O&M funding was included in the road budget last year. The Rovignetta system (annual access charge to use the national highway system) that was supposed to provide the RC with a dedicated funding arrangement for maintenance and operation has been compromised. The secured annual funding stream from road users have been used to secure supplier credits to finance off budget highway investments, and all income from the Rovignetta has been committed for the next six years to service this debt²⁸. Additional funding from road users for maintenance of highways and country roads have been discussed for some time including electronic tolling arrangements but no decision is expected on this in the short term due to the political sensitivities.

Urbanization Certificates/Others

43. **Utility networks are rarely mapped, and utility companies some time do not know exact location of their pipelines, pipes, ducting and cables.** The RC shares in this problem, as it also has no detailed as-built drawings with exact locations of the national road network in places. These are the main problems affecting relocation design and costing of utility relocation. In rare cases, some NGOs are interfering in road construction even after all permits have been given, delaying motorway projects.

44. **The current practice in Romania requires both the Environmental Permit and the Urbanism Certificate (UC) to be available before one can obtain the final Building Permit (BP).** To comply with the requirements for the EIA generally takes more time for a consultant than to carry out all FS investigations requested in the current scope of work and secure all other permits. The UC includes in one section the usual parameters related to the area to be developed, such as utilization degree and minimum distance to structures/buildings. The other section includes a list of all the clearances needed before you can request the Building Permit (BP). Normally the preliminary UC will be provided within 30 days but have to be requested from each commune and town/municipality affected by the project. After the detailed design has been completed, the process has to be repeated to get the final UC and then the BP. The Urbanism Certificate is only valid for 12 or in some cases 24 months, and has to be renewed in case of project delays. With all UCs approved a request for approval of the FS can be directed to MOTI and the Inter-ministerial TEC. Depending on the size and type of road project, approval from the County Councils affected may also be needed. The office for Clearances, Permits and Certificates (Permit Unit) in the RC is helping consultants and other departments in the RC in speeding up all types of clearances. It also organizes meetings with concerned authorities in cases of reported obstructive behaviour or when unreasonable requests are made by officials in connection with permits.

45. **Currently, contractors are made responsible for detection of utility networks.** Most road contracts include a requirement for the works contractors to perform a physical identification of any

²⁸ As part of a program of Reimbursable Advisory Services for the Romanian Government the World Bank is in the process of preparing a cost recovery and road user charges study, to prepare a basis for policy decisions on financing of the sector. Draft study to be available in Spring 2013.

utility network affected by the works, within a limited period of time from the commencement of the works (typically 70 days). Such requirement should actually be transposed to consultants performing feasibility studies and design, that should, instead of simply relying on indications provided by utility owners, perform detailed field investigations. Actual compliance with such requirement should then be closely monitored.

46. **The same laws related to permitting apply to all road projects irrespective of financing source.** The Environmental Permit (EP) is the one that has the most requirements and takes up to 12 months for the permit to be issued. This is considerable longer than the current duration of a FS, and entails that more detailed and better prepared FS would not delay project preparation. Moreover, unless the requirements for the Environmental Permit are simplified to save time, the time for getting the Building Permit would stay the same, regardless of what is being done to shorten the time to obtain other permits. In case of disagreements locally on the location of the road project, the EP is not issued until this is resolved. The FS consultant is responsible for obtaining all permits related to his project. Some permits are withheld in cases where there are weaknesses in the performance of the consultant undertaking the study.

Recommendations:

- **Carry out a Road Sector Environmental Assessment to guide RC and highway study consultants.**
- **For design-build contracting of highways, review role of contractors and their design consultant in the update of environmental impact assessments and permitting during construction to facilitate the process, monitoring by RC and avoid conflicts of interest.**
- **Ensure utility companies can be made legally responsible for providing exact location of their utilities and facilitate relocation necessitated by a road project. This could include supervising relocation works by contractor and to provide quality controls and certifications of utility works.**
- **Ensure physical detection of utilities at feasibility and design stages, through adequate ToR requirements and supervision.**

E. Contract Award and Construction Phases

Review of tenders and contract award practices

47. **The Road Company is using an “Open procedure” in tendering highway projects** allowing all firms that meet relatively simple established selection criteria to submit qualified tenders (post-qualification). The tender documents are mostly prepared by the RC and have several weaknesses according to service providers and other stakeholders:

- The qualification criteria are too relaxed allowing many marginally qualified contractors to bid, increasing overall time for evaluation and award. Firms with no experience in the highway sector are allowed to bid, provided annual turnover is high enough and a letter of support of another qualified firm is available. There are also no limits on the share of the contract that can be sub-contracted by a contractor in addition to the sub-contractors or partners defined in the contract, and such additional subcontracting does not require prior approval by the Employer;

- The tender documents include for all bidders to prepare certificates, declarations, financial statements and forms and all bidders are required to certify all submitted information in multiple copies, and each page to be signed, certified and stamped. One tender document can reach thousands of pages, and the process has to be repeated for each new tender submitted;
- The special conditions of contract are extensive, up to 50 pages and unbalanced according to many contractors, leaving all risks on the contractors, even those he cannot easily manage;
- The evaluation of the bids therefore takes a lot of time just to verify the compliance with the post-qualification criteria and the completeness of the certified forms, a process that is heavily influenced by the fact that the bid prices are known at the time;
- The scoring method used is mostly the m.e.a.t. (most economically advantageous tender) using both technical points and costs. But the criteria used for the combined technical and financial score have serious weaknesses and award decisions are often challenged in court.

48. **There are good reasons to consider introducing pre-qualification²⁹** of contractors in tendering of road works, thereby separating the review of technical qualifications of bidders from the evaluation of bids when the bid prices are known. This in combination with more stringent qualification requirements would hopefully simplify evaluation, improve competition and limit claims from contractors in the evaluation and award stages under “open procedure”. The excessive certifications of all bid forms and submittal in multiple copies should only be required for the firm awarded the contract. With pre-qualification of contractors, the award of many contracts could be based on lowest price offered. At the same time, training in evaluation and scoring of bids should be provided to the RC in order to introduce better technical evaluation and criteria that are a fair and consistent, easy to apply and provide a better combination of scores.

49. **The competition among contractors is fierce, and challenges or complaints to award decisions are very common causing delays.** Any appeal suspends the award decision until final settlement is reached through the National Council for solving Complaints (CNSC). This process with appeals could take up to four months or more, and consequently, the top ranked bidder may have to wait for up to five months for signing of the contract. In the worst case, when a serious mistake is done, the annulment of the award and rebidding is the only option with even longer delays to the mobilization of a contractor.

50. **Statistics for 2011** (at the level of the country)

- 4065 Complaints rejected (67,65% of the total number of complaints)
- 1935 Complaints admitted (32,35% of the total number of complaints). Of these
 - 25,8 % - NCSC disposed remedy measures
 - 6,55 % - NCSC disposed procedure annulment

Preliminary data for 2012 indicates an overall reduction of about 20 percent in complaints and challenges.

51. **Time allowed for preparation of bids should be reconsidered.** The design-build contract type preferred by the RC requires the contractor to also spend time in verifying the accuracy of the FS site investigations and other information in the tender document, such as relocation of utilities, foundation of structures and geotechnical lab data, etc. This can take a long time and be very costly; several hundred

²⁹ "Pre-qualification" is to be understood as selection of a list of qualified contractors on the basis of pre-established selection criteria. This corresponds to the "Restricted Procedure" under EU procurement law.

thousand EUR was mentioned by contractors as the cost of preparing a serious tender for a large highway project. However, only a maximum of 40 days is allowed by RC for preparing a tender for a design-build contract and 30 days for a project with detailed design available as basis for tendering. There are good reasons to increase the time for preparing bids as this would improve the basis for the offered contract price and reduce request for variation orders later due to unforeseen conditions.

52. **Works contracts are signed while the related project significantly lacks maturity.** In most cases, works contracts are signed while only a part of the necessary land acquisition has been performed. Other difficulties are related to insufficient preparation, permits not being available or updated, etc. There is a need to ensure that no works contracts are signed if a number of pre-conditions are not met. Such conditions would include land acquisition, validity of approval and permits (including Environmental Permit and building permit), adequate independent check of designs, etc.

Recommendations:

- **Review tender documents and experiences with tendering of road projects in order to simplify and standardize the general and particular conditions of contract and simplify certification and qualification requirements. Could be undertaken by a procurement agent using available studies.**
- **Allow increased time for preparation of technical and financial proposals for design-build contracts to improve quality of bids.**
- **Consider introducing "Restricted Procedure" with pre-qualification of contractors, and move away from the current practices in using "quantitative" factors in technical scoring of bids.**
- **Develop a check list for certifying project maturity to be signed by the head of the RC prior to works contract signature.**

Regulation and practices for managing project variations

53. **The EC in May 2012 in a letter to the Romanian Government defined the conditions under which contracting authorities may authorize variation orders in public works contracts financed by EU.** The letter defines conditions where contracting authorities may contract additional works not included in the initial contract by negotiated procedure without publication, only if such additional works, *through unforeseen circumstances*, become necessary for the performance of the works. The aggregate value of contracts awarded for additional works may not exceed 50 % of the amount of the original contract without the contracting authority having to retender the contract³⁰. Modifications caused by insufficient preparation of the tender/project and additional works cannot be considered "unforeseen circumstances" and would normally require retendering if substantial. Natural disasters and changes to law and regulations are mentioned as examples of unforeseen circumstances.

54. **How design-build contracts in Romania are affected by these regulations is not clear.** These contracts are considered having a fixed price without variation clauses or bill of quantities and are also designed by the contractor. Variations or change orders are not as common on design-build contracts but

³⁰ In Romanian national legislation - EGO 34/2006, the relevant article has been changed since 2011 and only a maximum of **20%** is allowed by the law.

in combination with weak preparation of the FS and unclear tender document, the contractor may have a case when there is justification (for example under unforeseen circumstances or when there is a case of gross negligence).

55. **Weak contract management by the contracting authority adds to the problem.** For many contracts, claims and relatively straight forward variation orders and requests for extension of time are not addressed timely and routinely left for decision until the works are completed. There are sharing arrangements between contracting authority and contractor for savings (related to overhead and profit of contractor) due to agreed optimizations of the design during constructions. How this is implemented in practice and accounting of such savings is unclear. In any case, it does provide an incentive also to lower technical standards below what may be recommended for long term durability of the road to be constructed.

56. **However, the use of large projects awarded using 'design-build' tender documents may make it possible to commit all available EU funds for highways under SOP-T.** The RC claims that when the last few contracts are awarded this year, and allowing for 30 months of implementation, all funds set aside for national highways under SOP-T will be committed and disbursed within the two years grace period. The lowering of financing percentages by EC in the road sector and the potential of large but necessary variation orders and additional works not fundable under EC regulation make the volume of contracts much larger in order to commit all structural funds. This increases the burden of contract management on RC. And in addition, much needed budget funding for critical highway maintenance works may not be available for several years.

57. **Current legislation is oriented towards traditional "red FIDIC" approach.** The requirement for defining technical solutions at feasibility study stages (rather than performance standards) is an example of legal requirement not fully adapted to a design-build approach under which contractors actually compete on developing the most adequate technical solution for a particular project.

Recommendations:

- **Revise construction and feasibility studies legislation to better integrate design-build contracting.**

Regulation and practices for supervision of works and payment of contractor

58. **Contractors and consulting firms give the impression that the RC has gradually reduced the role and authorities of the Resident Engineer** and the supervision consulting firm as defined in the FIDIC contract documents. The RE's powers to certify interim payment certificates and recommend actions to the employer on variation orders, requests for extension of time and claims of the contractor have been reduced considerably by the RC. This slows down reviews and approval by the RC and now such reviews can take up to 6 months or more according to one contractor. According to one firm, the supervision consultants sometimes have to get prior approval by the RC before coming back officially and recommending RC what actions should be taken! Example mentioned is approvals of material sites that require several offers and can take 2-3 weeks for a decision by the RC. All letters from RC has to be signed by the Director General and has multiple other signatures slowing down response time. The contractor's detailed design drawings are normally reviewed by the RE, but also has to be checked and stamped by authorized design checkers. There are also individually certified site inspectors, duplicating the role of the Resident Engineer and his staff who review all construction drawings prepared by the contractor, supervise site investigations and approve works and materials.

59. Payments to consultants for services are late and linked to approval of monthly and quarterly reports. Sometimes 4-5 revisions are requested on a report before the consultant's remuneration payment is approved.

60. **Detailed design on design-build contracts is mostly sub-contracted by the contractor to smaller local consulting firms.** The design support during construction is carried out by the same firm and not the supervision consultant or contractor. All consultancy contracts are awarded on lowest price using open competition procedures and lump sum contracts. This also applies to construction supervision, based on a proposed staffing schedule and agreed time for implementation. When there are delays or other unforeseen circumstances, the supervision contract is extended. Consultants find the processing of their payments slow, and mostly blame the personal liability and control environment in RC.

60.a **Most design checkers are hired by the designers, which is a clear conflict of interest.** The law defines the obligation of ensuring that designs are checked as an obligation of the beneficiary, but in practice they are hired by the designers, i.e. those who are supposed to be checked, which is a clear conflict of interest. In addition, the design checker is responsible on an individual basis

60.b **The role of the State Inspectorate for Quality in Construction (ISC) should be revised.** The ISC is supposed to check feasibility studies. Such requirement should be cancelled since it brings no added value. The ISC also inspects works. Having in view the risks related to Romania (seismic risk, etc.) and the lack of discipline in the construction sector, an independent check is welcome. This check should not be conflicting with the daily activity of the supervisor (FIDIC Engineer). In Romania, the check is performed by the ISC as State Authority. Similar checks are performed by State Authorities in many EU countries including France.

60.c. **Delays occur because the contract does not have enough room to allow for price increases due to inflation.** When a contract has a price adjustment formula, the total amount of payments to be made might exceed the initial contract value, due to the impact of inflation. Under Romanian law there is therefore a requirement to have a contract addendum so as to increase the value of the contract accordingly. The delays which result of this, could be avoided if the initial contract includes a limited contingent amount for price escalation, e.g. in the order of 5%, and a clause allowing an increase of the contract value once per year, based on inflation forecasts, in an addendum.

Recommendations:

- **Restore the role of the Resident Engineer in technical supervision of works contracts and in facilitating timely processing of contractual payments, variation orders and extensions of time.**
- **In this respect, clarify the role of the State Inspectorate for Construction in the quality control phase and also the role of the Engineer in the actual legislation (Law 10/1995 - related of quality in construction) where the Engineer is not mentioned.**
- **The requirement that the State Inspectorate for Quality in Construction (ISC) checks feasibility studies should be deleted.**
- **Design checkers should be hired by the project promoter.**

- **The individual responsibility of the design checker should be replaced by a professional liability insurance (Law 10/1995 should be modified accordingly).**
- **Include clauses in the initial contract, allowing for a limited contingency for price escalation, e.g. in the order of 5%, and an increase of the contract value once per year, based on inflation forecasts, in an addendum.**

Regulation and processing of payments to contractors

61. **The RC and MOTI are also slow in processing payments to contractors, allowing in all about 120 days for review and approval** and only after 120 days can the contractor claim interest on the outstanding amount. Contractors' right to suspend work if not paid is also addressed in revised contract condition where 182 days after notice to terminate is required before demobilizing staff, plant and equipment. Other contract provisions call for extensive penalties in case of staff changes, equipment changes, delays in implementation, etc. Unpredictable conditions are reported as cause for discouraging some foreign road contractors from entering the contracting market in Romania.

62. The design-build special conditions of contract are imposing arrangements for payments to contractors not on well-defined and approved mile stones but on approved interim payment certificates that are based on a pro-forma bill of quantities and fictitious unit rates prepared by the contractor after the detailed design is finished and approximate quantities of work have been estimated. The problem is that such design quantities are never accurate and in regular contracts the contract price will change based on the actual quantities of work measured and offered unit rates of contractor. A complicating factor is also that the contractor may deliberately adjust the quantities and unit rates to fit his design and a preferred flow of payments (front-loading) of the lump sum contract price.

63. **For design-build contracts, it is unclear how the monthly interim payment-certificates may provide adequate cash flow if some quantities are over or underestimated by the contractor.** The contracting authority may reject payments for work after the total quantity of a work item in the bill of quantities is reached. If the contractor has overestimated the some quantities, he may not even be paid the full price for that work item in the bill of quantities. If the quantity is underestimated, he may not be paid for the extra quantities necessary to finish. It is unclear how this is sorted out in the end; as a variation order or as additional work. In any case, the contractor may have to wait until the end of the contract for his final (and full) lump sum payment. The above complications with payments under a design-build contract provide the background of a recommendation to strengthen the role of the supervision consultant and have an independent (of contractor and the consultant) technical audit of the project during the defects liability period.

Recommendations:

- **Review the practice of using Bill of Quantities and unit rates to make contractual payments to contractors on fixed price design-build contracts, and adjust payments to contractors to better reflect progress.**
- **Consider to introduce annual independent technical and financial audits for ongoing and just completed road projects covering studies, tender docs, and the construction stage. Objective would be to improve planning, project preparation, tender documents, supervision, employer actions and implementation/construction.**

- **At project completion, finalize review and decisions on any outstanding claims, variation orders and other outstanding implementation issues, and shorten the handing over process, release of performance bond and other actions to finalize projects sooner.**

V. OVERVIEW OF THE RENEWABLE ENERGY SECTOR

Background³¹

The renewable energy sector, given the specific nature of electricity, cannot be taken out of the context of the overall operation of the electricity sector and the grid of the country.

Electricity Supply

Romania has a balanced portfolio of power station generation capacity, with renewable energy (RES)³² representing a small but rapidly growing subsector of the generation market. The portfolio capacity comprises hydro³³ (32.3%), nuclear (19.2%), coal, oil and gas-fired power plants (47.6%) and RES (other than hydropower). According to Transelectrica, the net generation capacity has been increasing steadily over the past three years and it will go beyond 20GW by 2015. The increase in installed and net generation capacity is mainly driven by the development of wind generation (in 2012 almost 10% was from RES), and it is expected to still record positive growth rates, but likely contained by coming capacity decommissioning following refurbishments and modernization. The National Institute of Statistics has reported an average electricity production of about 60 tWh for the past three years. In 2011, renewable energy represented 16.14 tWh, out of which 1.51 tWh benefited from the national support scheme. In 2012, renewable energy represented 26.40 tWh, an increase by about 65% compared to the previous year due to the new wind capacities installed.

Electricity Demand

Romania is more than twice as fast as EU-27 in the pace of decoupling energy consumption from economic growth³⁴. The consumption of electricity decreased significantly between 1990 and 2000 in Romania, largely owing to the collapse of industrial demand after 1990 and structural changes in the economy. The situation stabilized after 2000 and reached its lowest point in 2008. Still, in 2010 Romania recorded the lowest gross inland consumption³⁵ of electricity per capita in the EU-27 (1.66 toe per capita compared to the EU average of 3.51 toe per capita), mainly due to the underdeveloped domestic economic structure. In 2012 the final energy consumption in Romania reached 52.9 tWh. A gradual increase in electricity consumption is expected after 2012, due to the economic recovery.

In Romania, the energy intensity³⁶ decreased by 4.1% from 1990 to 2010 compared to 1.5% in the EU-27, despite that, in terms of energy amount required to produce one unit of economic output, in 2010

³¹ Data used from ANRE (Autoritatea Nationala de Reglementare in Domeniul Energiei/National Authority for Energy Sector Regulation), National Institute of Statistics Romania, KPMG: "Overview of the electricity sector in Romania, March 2012", Eurostat 2012, European Environment Agency

³² Renewable Energy Resources: wind power, solar power, geo-thermal power, biomass power, waves power, hydrogen (produced out of RES) power, hydro-power produced in units with an installed capacity of up to or equal to 10MW set up or modernized starting 2004.

³³ Including hydro-power produced in units with an installed capacity of up to or equal to 10MW.

³⁴ Achieving simultaneously economic and environmental goals requires decoupling energy-consumption from economic growth. (European Environment Agency)

³⁵ The gross inland consumption is calculated as the sum of the gross inland consumption of the following sources of energy: solid fuels, oil, gas, nuclear and renewable sources (including hydro).

³⁶ Total energy intensity is the ratio between the gross inland consumption of electricity and Gross Domestic Product.

Romania occupied the third rank in the EU, after Bulgaria and Estonia (with an energy intensity rate of 3.5 times higher than the EU average). This dynamics indicates that Romania is continuing structural changes in its economy, struggling to improve energy efficiency and shifting to renewable energy in the power mix. In 2010 Romania went up to the 5th place in the EU in terms of share of electricity from RES in total electricity consumption, increasing from 28.8% in 2000 to 34.2% in 2010. This dynamics and related qualitative improvements will be beneficial for Romania in the convergence process.

Currently, electricity demand is fully met by domestic electricity production in Romania. The country is the 7th largest net exporter of electricity in the EU-27, with a net export total of 2.27 tWh in 2010. In the same year, Romania had the 3rd lowest dependency rate on all energy imports in the EU, after Denmark and Estonia (21.7% compared to an EU average of 52.7%). Government energy policy envisages Romania maintaining its current position as a net exporter in the long term.

Despite increases in prices to end users triggered by the national support scheme for RES, electricity prices in Romania are still among the lowest ones in the EU. Electricity prices for households are the third cheapest in the EU after Bulgaria and Estonia with an average rate for households of € 10.9 /kWh in real prices, all taxes included (compared to the EU average of € 18.4) and the second cheapest for the industry sector, after Bulgaria, with € 8/kWh (compared to the EU average of € 12.9). According to ANRE, the financial impact on prices to end users increased from 0.026 Lei/mWh in 2005 to 9.03 Lei/mWh in 2011 because of the national support scheme for RES. Besides inflationary pressures that could have a negative impact on economic development and important financial pressures that could burden large industrial companies, this issue could become socially problematic as well, given that the increase in electricity prices for households by 20% was mainly determined by application of the national support scheme for RES.

Renewable Energy Sector (RES)

The renewable energy sector, given the specific nature of electricity, cannot be taken out of the context of the overall operation of the electricity sector and the grid of the country. The renewable sources which are the second and third most abundant in the country – wind and solar - are characterised by their intermittency, which requires that they have to be complemented by equal conventional sources of electricity and the accompanying transmission grid in order to balance the system.³⁷

The renewable energy market expanded in Romania due to the favourable legal framework. The national support scheme for RES was set up in 2005, at the same time when the first three producers of renewable energy were officially registered as such (one hydropower plant and two wind farms). This action was a direct result of EU Directive 2001/77/EC, which was transposed into national legislation through Government Decision no. 443/2003 and subsequently through Government Decision no. 1892/2004, amended by Government Decision no. 958/2005, which introduced the national scheme for promoting renewable energy. In order to make the energy sector even more attractive for potential investors, the national support scheme for renewable energy was amended in 2008 so that the period of time for which it was in force to be extended and the GC price to be increased. This amendment was done by Law no. 220/2008.

The current legal framework for Romania's renewable energy sector is driven by EU Directive 2009/28/EC, setting mandatory quotas of renewable energy in the final consumption of each member state. The Directive has been transposed into Romanian legislation through Law no. 139/2010,

³⁷ Hydro is the most abundant source of renewable energy in Romania.

bringing thus amendments to Law no. 220/2008, subsequently improved by Government Ordinance no. 29/2010, Government Emergency Ordinance no. 88/2011 and Law no. 134/2012. While the EU Directive target for 2020 is 24% RES in gross final energy consumption, the nationally assumed target for 2020 is 38%. The energy regulator ANRE designs, establishes and monitors the methodologies regarding the functioning of the “green” energy market.

Compared to other EU countries where the feed-in tariff system is used, Romania has in place an annual quota mechanism for energy consumption supported and subsidies taking the form of green certificates³⁸.

As a consequence of the favourable legal system, Romania registered the second highest rate of increase in the share of electricity from renewable energy in gross final energy consumption in the EU (after Estonia) during 2006-2010. The percentage increased from 17.1% in 2006 to 23.4% in 2010, compared to an EU-27 average of 12.5% in 2010 (and against the EU Directive target of 24% by 2020). The installed capacity for electricity generation from RES (including hydropower) increased from 6.37 GW in 2000 to 6.88 GW in 2010 (with hydro counting for about 94% and wind for about 5.5% of total installed capacity), due to increases in wind farms and small hydropower plants.

According to ANRE, there were 90 licensed RES producers in Romania, out of which 42 in wind farms, 32 in hydropower plants, 4 in biomass projects and 4 in solar projects, in 2011. The cumulated installed capacity as of the end of 2011 for all 90 producers represented 1,236.65 MW, out of which 830.23 MW in wind farms, 380.33 MW in hydropower plants, 25.08 MW in biomass projects and 1.01 MW in solar projects.

Given that Romania has declared development of renewable energy a priority in the National Strategy for the Energy Sector and in order to meet its EU obligations, the renewable energy sector in Romania has been included in the framework of support by the European Structural Funds. These subsidies are compatible with the specific support regime for renewable incentives in Romania. The legal framework provides for a mechanism of dealing with cumulating state aids for public sector beneficiaries and allows a reduction in green certificates granted to state aid beneficiaries so that a constant internal rate of return according to EC rules is preserved. In case of overcompensation (an increase of internal rate of return by 10% compared to calculations authorized by the EC), the number of green certificates is meant to be reduced.

The generous national system of incentives has brought about an unsustainable boom in renewable energy projects. The initial EU Structural Fund amount allocated for renewable energy projects under the Operational Program “Increase of Competitiveness” was increased by 50%, since for the second financing call the value of applications had been almost three times more than the available initial funds.

The arguments behind Romania’s strategic choice with respect to the mechanism chosen to support RES have been price competition, production efficiency and technology innovation. However, overgenerous tariffs, or allocation of green certificates per MWh of renewable energy generated, lead to an over-exuberant market and applications to construct an unsustainably large renewable energy sector. In

³⁸ In the EU, there are 6 countries having this mechanism in place: Romania, Italy, Poland, Sweden, Belgium and the UK (ROC for large and FIT for small renewable projects) according to COM(2011) 31 final “Renewable Energy: Progressing towards the 2020 target”.

Romania, with (per MWh) 2 GCs for wind and 6 GCs for solar PV, the applications reached 40,000 MW (with a maximum electricity demand of 9,000 MW).

A. Institutional, Regulatory and Legal Framework

Legislation- Green Certificates and State Aid

1. **Since the first legal initiative for supporting renewable energy production (Government Decision no. 443/2003) was issued, the development and implementation of frequent subsequent primary and secondary legislative changes have created confusion and uncertainty.** For example, during 2008-2012, Law no. 220/2008 has been amended four times, through two Government Decisions (GD no. 29/2010 and EGD no. 88/2011) and two Laws (Law no. 139/2010 and Law no. 134/2012), the latter being still subject to scrutiny in Brussels. These amendments adjusted relevant elements in the supporting mechanism frequently: the number of green certificates per mWh, minimum and maximum caps for green certificate value and their indexation methodology, the number of years to benefit from green certificates, the level of mandatory quotas, the rules for producers when participating in the energy and green certificate markets etc. Frequent amendments made the respective legislation more complicated, and raised questions on this legislative technique.
2. **ANRE is late and non-transparent in detailing notifications from the EC with regard to State Aid issues to potential investors, thereby increasing uncertainty in the market.** The issue of cumulating State Aid, which arose from the possibility of a project receiving aid simultaneously from the incentives regime of Green Certificates and EU Structural Funds was referred to DG Competition. In July 2011 a notification from Brussels was received, advising that the number of GCs awarded should be reduced to avoid windfall profits (C (2011) 4938). The EC suggestions have been transposed into the national legislation, but in a delayed and non-transparent fashion. A simple example relates to art. 11(d) from Order no. 6/2012 issued by ANRE's President that defines the forecasting data to be used for cost-benefit analysis (CBA). This CBA is needed to determine the internal rate of return (IRR) for an investment in order to establish if the respective investment benefits of overcompensation or not. The forecasting data should cover electricity prices, GC prices and various investment-related costs over a period of time longer than 15 years. This time span introduces a high degree of uncertainty and controversy. It is worth mentioning that an error of 10% in assessing the investment value might induce changes in IRR of up to 15-20% and in NPV³⁹ by 20-30%. As long as the IRR is not accurately calculated, the number of GCs to be withdrawn in this case is not correct, so the respective investor could be deprived of the amount corresponding to the reduced number of GCs. Despite public remarks from private investors to art. 11(d), ANRE has not yet presented an alternative.
3. **The uncertainty about the legal framework continues.** In defiance of the EC decision, the Romanian Parliament instead increased the number of GCs awarded, which resulted in a new notification to DG Competition being sent to Brussels. However, the latest public statements made by the Minister of Economy announced new amendments to the law in the light of revising downwardly the current incentives, discouraging thus any attempts to preserve the current national support scheme for renewable energy. The Ministry of Economy has recently published on its website a draft Emergency

³⁹ Net Present Value

Ordinance for modifying the national support scheme for green energy. This draft was for public debate in April. Practically, this draft proposes that the number of green certificates will be temporarily diminished between July 2013 and December 2016. The reduced number of green certificates (compared to the actual level in force) will be recovered starting January 2017 for hydro and solar energy and starting January 2018 for the other RES. The proposed reduction in GCs is more in line with market pressures and EC recommendations.

Recommendations:

- **Ensure a greater stability and predictability of the legal framework relating to the national support scheme for renewable energy, supported by a clearer Government strategy in the RES field. It is important to create the right expectations of potential investors in line with the energy targets assumed by the Government.**
- **Ensure better transparency and quicker adjustments of the legal framework for the RES sector, in view of the fast changes due to technological developments in this sector.**
- **Translate in English all relevant documents (legislation and reports) on the websites of Transelectrica, ANRE and OPCOM.**

The National Energy System (NES) and connection of renewable energy installations to the grid

4. **Romania has a single National Transmission and System Operator (TSO): Transelectrica.** Transelectrica is responsible for securing consumption according to the international quality and safety standards, insuring balancing and power evacuation from the newly installed capacities in the system, and increasing inter-connection capacity with other systems.
5. **The biggest problem for an appropriate NES development and maintenance is uncertainty with respect to the development of new production capacities, mainly in the renewable energy area, which is a direct consequence of the segregation of functions in the NES (production, supply, transmission and distribution).** Developing and/or maintaining transmission lines is time consuming and based on a long-term planning process which is influenced by multiple factors, some of which can change within a relatively short period (e.g. trend in consumption, new production capacities installed, trend in demand for cross-border energy transactions, age of transmission equipment, capacity of production facilities uninstalled, changes in dominant power flows). Identified solutions need to be both solid and flexible so that they are still valid under different scenarios and uncertainties. On the other hand, a delay in reaction by the TSO to market evolutions poses a significant risk for the NES.
6. **The number of applications for new renewable installations is very large.** According to the latest available figures from Transelectrica, a significant number of requests for endorsing Solution Studies were sent to Transelectrica and the distribution companies (40,000 MW as of the end of December 2012 only for wind farms).
7. **The applications greatly exceed what was projected, what is needed, and what can actually be used.** The analysis for developing the NES in the next ten years has taken into consideration an installed power in wind farms of just 2,500 MW. In the National Plan for Renewable Energy, the target for the installed power in wind farms is 4,000 MW by 2020. Due to technical factors, the more wind power is installed, the greater the need to develop additional transmission lines. An additional critical factor is the

geographical location of the respective projects, which often is at considerable distance from where the demand for energy is. The lack of a reliable database for wind forecast for all geographical locations as well as different speeds in installing new capacities across different locations adds a significant burden on the TSO, which needs to invest additionally in instruments for forecasting electricity production, integrating power supply in the operational functioning of the NES and controlling/balancing production/consumption rapidly when needed. The latest proposal of Government Emergency Ordinance amending Law no. 220/2008, to be publicly debated in April, tries to find a solution to this problem. It practically grants the right to grid operators to ask for financial guarantees before issuing the technical avis for connection to the grid (ATR⁴⁰), targeting thus to discourage proliferation of non-viable RES projects. The amount of financial guarantees and their potential usage will be set by ANRE through a regulation. Moreover, it imposes to ANRE the obligation to validate those RES producers benefiting from the national support scheme strictly within the annual ceilings for RES installed capacities according to the timetable set in the National Plan for Renewable Energy (NREP).

8. **Taking into consideration the consumption demand in NES and the related investment efforts, it is likely that only a relatively small percentage of these projects will actually be installed.** However, even if “only” a few thousand MW are installed, the economic effects could be significant. There is an overall concern that if all applications are connected to the grid, the cost of electricity will rise due to the cost of the green certificates. Such increase may cause political and economic problems.
9. **The technical and technological developments put serious financial and technical constraints on developing and maintaining the NES.** Of particular concern is the capacity of the Romanian grid and balancing issues of the electricity system to absorb and manage the planned installation of 5000 MW wind and 1000 mWp solar PV renewable power plants by 2030 (see NREP 2010). Furthermore, ANRE has at present authorized setting-up of more than 40,000 MW renewable wind power plants. Such capacity would exceed many times the existing minimum demand of 3000 MW and maximum demand of 8-9000 MW.
10. **The connection of such large capacity of renewable energy sources poses problems not only to the national grid, but as well to the distribution companies.** The distribution companies receive a high number of applications for renewable energy, particularly for wind in Dobrogea. If all applications are constructed and connected to the local grids, they will collapse, as they would not be able to carry the power. Significant investments are required to upgrade the local grids and these have to be added to the overall costs of renewable energy in Romania. Another problem is the costs of balancing the electricity system. For example, the solar PV installations generate their maximum output at 12.00-14.00 hours, when there is a minimum demand for electricity. This makes the balancing of the system costly and ineffective.
11. **There is a concern about affordability.** If all applications (for more than 40,000 MW, which would anyway cost in excess of €40 bn) are connected, the cost of electricity will rise (it has risen by 8% in 2012, the contribution to the rise by renewables being 6.5 €/MWh) by 14 €/MWh in 2015 and 30€/MWh in 2017. Such increases may cause social problems in addition to harming economic growth.

Recommendations:

- **Develop a methodology to make the NES users more responsible in their relation with the TSO. NES users should be made responsible for delivering reliable, complete and timely data with respect to their installed capacities, effective production and power supply forecast.**

⁴⁰ Aviz tehnic de racordare.

- **Develop/improve the database for wind forecast at national level in order to cover all potential geographical locations for RES projects; set up a Wind Forecast Agency.**
- **Develop financial solutions to meet investment needs by the TSO through a better dialogue between TSO, Ministry of Economy and Ministry of Public Finance.**
- **Introduce stricter monitoring of the eight distribution companies which are assumed to observe their commitments (included in their privatization contracts) with respect to upgrading the local grid.**
- **Design a plan for sustainable deployment of renewable energy in Romania, consistent with its economic development goals (to be done by the Ministry of Economy).**

B. Project cycle, permitting and procedures

Application procedures

12. **Lengthy and complicated application and approval procedures, along with a lack of technical and financial expertise in the evaluation, have resulted in a low rate of EU funds absorption for renewable energy projects.** The application form is quite complex and requires a very detailed description/analysis and specification of the equipment. This triggers complications for the procurement procedures. Given the length of the approval process, very often the producers meanwhile change their specifications and the procurement result or reimbursement file is rejected on formalistic reasons – i.e. the purchased equipment does not match exactly the specification details provided in the original application.
13. **The Managing Authority in the Ministry of Economy ('the MA') agrees that the complexity of the application forms and the guide for applicants are major problems.** The MA agrees in principle that for the next programming period the application form should be simplified and target results, not administrative procedures.
14. **The MA concedes that there is no training/assistance to public and private sector beneficiaries, which hinders the preparation of and application for funding.** One example specifically mentioned was Romania's large geothermal potential, which is underused, as public authorities (in their role of potential beneficiary) lack expertise in project preparation.
15. **The staff in the MA, the Intermediate Body for Energy and the Certifying and Paying Authority is relatively young, inexperienced and in flux.** The applications are often rejected for formalistic reasons, due to lack of specific technical know-how. To overcome the problem with the expertise of internal staff the Intermediate Body for Energy issued tenders for outsourcing the evaluation of project applications. For bureaucratic and administrative reasons, the whole procedure took one and a half year. This delay had a negative impact on EU funds absorption. Certain projects lost their bank financing, others found that technology became obsolete, others lost market opportunities. As a consequence, currently the MA finances lower quality projects, because the previous selected ones were withdrawn for the above mentioned reasons.

16. **The whole external (project evaluation) and internal (project implementation) process is further delayed by the propensity of the unsuccessful applicants to appeal and lodge complaints.**

Recommendations:

- **Simplify the application forms to have a target-oriented approach both in project appraisal and project implementation.**
- **Provide training and assistance to public beneficiaries, on how to identify projects and prepare applications**
- **Provide training to involved Government staff (IB, MA and CA), as required.**

Procurement

17. **The specific issue with procurement in the energy sector is that the project sponsor and owner is most often a private entity, while the applied procurement rules are designed for public projects.** While some portion of the project will be financed by public funds, the ultimate owner and operator is a private company. Initially, at the early 2008 and 2010 Calls for Proposals (CfP) issued by the Intermediate Body for Energy at the Ministry of Economy, public procurement procedures, in accordance with the Emergency Government Ordinance no. 34/2006, were applied for project implementation for the private beneficiaries as well. This imposed a high burden on the applicants, so in 2011 the internal regulations were amended and a simplified procedure, requiring three admissible offers, was introduced. However, there is confusion about the ranking and treatment of the applications under a call for proposal, the system of which underwent different internal procedures – an issue which creates further uncertainty and frustration amongst the applicants.
18. **Procurement rules are not well designed and allow misuse, which can lead to unfair competition.** Even the three offers procedure could lead to delays and does not always allow the beneficiary to select the best and most suitable project equipment. Such rules hardly justify the investment of significant amounts of private money for undesirable purchases. The renewable energy sector is characterized by 1) the need to use the latest technologies (practically every two years there are relevant changes) and 2) the need to keep up with the developments/changes in the fluid market of energy. Any changes with respect to qualification or selection criteria when judging best value for money or any delays in the bureaucratic procedures run by the public administration could disrupt the efficiency of a renewable project seriously. Another example is that companies without any experience can bid, including formally an experienced company in a consortium.
19. **Complicated procurement procedures block private investments.** The MA quoted Ordinance 34/2006, which in accordance with EU rules prevents the purchasers from asking the bidders for their qualifications. Most often the selection criterion is ‘the lowest price’ (versus ‘most economic’) and this makes the private companies reluctant to spend money on cheap, but low quality equipment for which they contribute at least 50%.

Recommendation:

- **Develop further simplification of the procedures, at least for private projects (similar to the 2011 amendment requiring three offers).**

Permitting

20. **The main issue for EU-financed projects relates to the need of having expired permits to be re-issued because of frequent delays in processing the project files.** The main permits required for a project in the renewable sector are the Construction Permit, the Connection Contract, the Environmental Permit as well as the 'Licence to operate a power installation', issued by the regulatory authority (ANRE). In order to prove the maturity of a potentially EU financed-project and to get a higher score during project evaluation, at the moment of project application, the potential investor needs to present certain permits required when implementing a RES project (e.g. construction permit, ATR⁴¹). Given the limited validity of these permits as well as the delays and the extended procedures in the public administration for EU-financed projects, in most cases these permits needed to be re-issued several times, incurring additional non-eligible expenditures for the potential beneficiaries of EU funds.
21. **Some of the required permits, when submitting an application in order to prove the project maturity -had limited time validity** (e.g. the urbanism certificate, the construction and environment permit or ATR) Given the time needed to prepare and process an application, very often they had to be renewed at the time of approval of an application. This issue was partially addressed with amendments of the respective legislation and the validity of those permits was prolonged. However, in some cases, there is no clear indication of a final deadline assumed by the public authorities. Of particular concern is the slow process of obtaining all permits – it takes 12 – 18 months altogether and meanwhile the economics position of the renewable project may well change.
22. **Obtaining permits can be prone to political and other interference**, which makes the process, its length and costs unpredictable. For example, if the permit needs to be re-issued, the authorities, particularly when changed in the meantime, may attach new conditions.
23. **The fee for connecting to the grid is non-reimbursable in case the permit cannot be used, which is a disincentive for investments.** The connection to the grid permit has a validity of 6 months and the applicant has to pay a fee when signing a connection contract, in most cases prior to being awarded finance. There are cases when a connection permit was awarded, but a connection contract cannot be signed, as meanwhile the capacity of the grid in that particular location was exhausted.
24. **These issues are exacerbated if a renewable energy project crosses protected sites (like Natura 2000) or if the transmission line crosses several communes and counties, and urbanisation certificates and construction permits need to be obtained from each authority and town hall.**
25. **There is no legal framework to deal with expropriation for setting up new energy transmission lines.** As already mentioned on pages 71-72,, Law no. 255/2010 (which is designed for roads land acquisition and for public utilities), cannot be applied to investments in energy transmission lines despite that Law no. 255/2010 covers officially the energy sector as well. The law does not make any reference to the energy sector, thus rendering it useless for public projects in this field. Currently, Transelectrica is dealing strictly with expropriation files opened before Law no. 210/2010 was approved. However, in this legal framework all approvals needed for crossing private property have to be dealt case by case, which is very slow and expensive. An example was given for a 16 km transmission line, which crosses the land of 249 private owners. The allocated budget for compensation of the owners was exhausted with the first 3 owners. Transelectrica finds it impossible to start any new transmission line project, as there is no appropriate legal framework in place at this moment to deal with expropriation matters specific to the energy sector.

⁴¹ Technical Connection Avis

26. **The legislation, regulations, permits and procedures for RES projects are complex and non-transparent.** Very often investors and beneficiaries do not know all laws and regulations well. Primary and secondary legislation governing a RES project is issued by various institutions (Ministry of Economy, Ministry of Justice, Transelectrica, ANRE, OPCOM etc.) and it covers various stages of a project separately (avis, connection to the grid, authorisation, energy production, certification of RES energy, supporting scheme, energy trading, GC trading etc). Most potential investors claim it is difficult to have access a priori to all information needed for a RES project, blaming that legislation is too vast and not transparent enough.

Recommendations:

- **Bureaucratic or procedural deadlines imposed by the administration during project application/evaluation/contracting period should be aligned with the expiration dates for the permits required during the respective phases in order to avoid appearance of unjustified increase of non-eligible expenditures for the beneficiaries.**
- **Under Law 255/2010, specific secondary legislation should be drafted for the energy sector.**
- **Draft a comprehensive Code for RES projects to map primary and secondary legislation, permits and procedures applicable to RES projects, in order to make all changes in legislation more transparent for potential beneficiaries in a timely manner.**

Financing Phase

Lack of private co-financing

27. **A major obstacle to utilising the EU Structural Funds programmes is the lack of own funds to provide initial funding to the projects.** The EU rules require the applicant to have funds for the implementation of the project and to be reimbursed after successful completion, having met the procurement and administrative requirements specified in the guide for the call for proposals. The procedures allow pre-financing (35% for private companies and 30% for local authorities), but a bank guarantee is required. The appetite for cofinancing is reduced by important delays in reimbursement procedures and/or other bureaucratic procedures undertaken by the public administration in the project implementation decision-making process.

28. **The uncertain economic and legal situation has further reduced the interest for investing in renewable energy projects.** The economic downturn in 2008-2012 further worsened the financial situation of Romanian companies and made potential applicants more reluctant to make an application and face further financial risks. Also, financial projections needed to be changed following modifications in external assumptions – for example, the increase of VAT rate from 19% to 24% triggered a re-evaluation of the financial projections. The uncertainty with regard to the financial incentives – Green Certificates and the level of State Aid- which may result in financial corrections in the future, aggravated the situation.

29. **High up-front costs are a barrier to entering the renewable energy market. The preparation of renewable energy projects development requires significant upfront costs (feasibility studies, including CBA, land purchase, permits, financing costs etc) which are not reimbursable for private companies, and**

there are no financing mechanisms to finance such costs. The extended period of time for RES projects triggered by the administrative delays might double or triple these costs for project promoters. All projects, for example, require a Cost Benefit Analysis (CBA) – a too stringent requirement for small private projects⁴².

Lack of bank financing

30. **Banks are prepared to finance renewable projects and co-finance renewable projects benefiting from EU Structural Funds' support, but are wary of the speculative and unsustainable trends in the current market.** There are no specialized banks or divisions of local banks in Romania dedicated to understanding the procedures and the sector. Foreign owned banks draw on the expertise of their parent's expert groups for assessing renewable projects. The major banks in Romania provide both project finance (for projects above €0.5m) and corporate finance to renewable projects (very often requiring a corporate guarantee during the construction period). Arranging financing takes a lot of time and financial resources.
31. **While loan pricing is not identified as an issue hindering investments in the renewable sector, the availability of loans is restricted by the limited available equity and the political and price uncertainties.** As a result, banks assume a conservative value of €27/mWh for 1 GC (the average spot price in 2012 was €49/mWh and the expected price for 2013 is €51/mWh). This leads to demands for higher equity contributions to projects – up to 40%, which is much higher than the 20-30% usually seen elsewhere in Europe and a high level of guarantees required.
32. **Project Sponsors often lack expertise in maintaining and operating renewable energy projects.** Many projects do not have bankable project sponsors, most of the projects are developed for speculative purposes – obtaining permits and selling them to investors. Banks, therefore, require binding maintenance and operation contracts.
33. **Within EU Structural Funds, specific instruments (e.g. JEREMIE) have been set up for the energy sector.** To date, however, their use has been limited, in particular due to administrative and legal problems.

Recommendations:

- **TA to assist in resolving the administrative and legal problems to use EU funds for energy projects.**
- **Training for financial intermediaries in the areas of appraisal and due diligence of renewable energy projects**
- **Assistance in establishing of equity, quasi-equity and guarantee facilities for renewable projects.**

Lack of Purchasing Power Agreements (PPA)

34. **Currently, there are no long term PPA contracts.** The lack of long term PPA is a very serious issue, as forecasting the future price of energy is highly uncertain and speculative process. As no PPAs are possible

⁴² See Chapter I, pages 34-35 of this Volume.

at present, banks require higher equity contributions to projects to increase their bankability. The impossibility to sign a long term Power Purchase Agreement (PPA) is a serious impediment, in particular to small generators of renewable energy. It is very difficult for a renewable project, generating intermittent electricity, to sign a long term contract with a financially sound buyer. Selling on a short term contract provides a scant comfort to financial institutions, which have to provide long term finance (wind and solar PV projects usually require finance of at least 10 years tenor).

35. **Another issue is that producers cannot offer contracts before the completion of their generating installation.** The market is centralised and based on competitive dialog. There has been a proposal to ANRE to prepare and issue an order which will allow large consumers to propose long term buy contracts. The contracts lengths at present are maximally 1 to 1.5 years, but they can involve a formula for indexing the price. In late December 2012, ANRE solved this issue partially when it issued Order No. 55/2012 which allows contracts of up to 5 years.

Recommendations:

- **Prepare and implement a standard PPA for renewable projects, which would allow long term purchase contracts on standardised terms and format, at least for smaller generators. To ensure stable returns, without excessive electricity price increases, a system similar to the UK Contract for Difference may be considered.**
- **Establish a long-term certificates market.**

Proof of Funds

36. **Proof of finance is an issue for many projects.** One issue identified by ANRE is that the MA requires that ANRE issues its Setting-up Authorization before the proof of funds is provided, but ANRE requires also proof of finance before issuing this permit. However, the banks are reluctant to issue letters of credit or guarantees, before there is a certainty that the project will be approved by ANRE. ANRE proposes that this rule is changed and they provide their permit after the proof of finance, at least after signing the financing contract with the MA for non-reimbursable funded projects. This issue leads to a lot of delays and going back and forth between the institutions – the practice shows that 75% of the applicants asked for postponement in order to sort out the proof of finance.

Recommendation:

- **Change this rule in such a way that the permit will be provided after the proof of finance.**

Financial evaluation

37. **For public sector beneficiaries to be able to qualify for a RES project, they have to demonstrate a Recovery Investment Rate between 7 to 15 years, but a positive cumulated cash-flow on a yearly basis.** The procedures for these applicants, who fall under the State Aid Rules, favour projects with a lower Financial Internal Rate of Return – for example, projects with $FIRR < 10\%$ get 6 points, but projects with $FIRR > 20\%$ get 1 point. However, a co-financing bank would obviously prefer to finance projects with a higher IRR, as they provide better security of cash-flow. Furthermore, projects in the renewable energy sector with low FIRR are poor value for money.

Such scoring system favours applications, which in comparison with similar projects are: (a) or are relatively more expensive; (b) or have lower yield (indicating less efficient technology or unsuitable location);, (c) or are more expensive to maintain.

38. **This could mean that applications, which are less efficient and should not be built, will be supported by public money and that public funds are used to generate electricity in an expensive and inefficient way.** While such scoring system makes sense in case of public infrastructure, it can hardly be justified given the specifics of renewable energy projects, owned by private investors.

Recommendation:

- Undertake independent economic and financial review of the use of financial evaluation in the scoring of renewable energy projects. The review would need to provide a revised scoring system, which results in more efficient use of public funds.