

The Interference of Private Law in Public Debt Management - Normative Analysis, Systemic Risks and Regulatory Strategies

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Abstract

The legal relationship between private investors and states is an essential area of analysis in the context of contemporary economies, marked by financial interdependencies and the permanent need for financing the public sector. Although, at first glance, government bonds belong to the sphere of public law, in reality, the relationships generated by these financial instruments are predominantly governed by the rules of Private Law, based on standardized contractual mechanisms. This legal ambiguity generates a series of theoretical and practical challenges regarding the delimitation of normative and jurisdictional powers, as well as the rights and obligations of the parties involved. The article aims to explore the foundations and legal implications of the relationship between private investors and states, with a focus on the contractual nature of government bonds, investment mechanisms and the legal protection of creditors. The principles of Civil Law applicable to this type of relationship are analyzed, in parallel with the limitations brought by state sovereignty, especially in contexts of crisis or public debt restructuring. The interactions and overlaps between Private Law and Public Law in the management of government bonds are also discussed, including through the lens of international jurisprudence and investment protection treaties. The paper provides a comparative perspective, highlighting good practices from several European jurisdictions and analyzing the Romanian legislative framework in this regard. Finally, proposals are formulated for improving the legal and institutional architecture regulating the state-investor relationship, considering objectives such as legal certainty, contractual transparency and sustainable attraction of private capital.

Keywords: government bonds, private law, investors, public debt, contract, regulation, sovereignty, legal protection.

JEL Classification: K15

1. Introduction

In the era of globalization and interconnected financial markets, governments increasingly rely on external and domestic financing, through sophisticated mechanisms for attracting capital, of which the issuance of government bonds occupies a central place. These instruments not only allow states to quickly mobilize resources to support public budgets and finance strategic investments, but also reflect the degree of confidence that the investor community places in a state regarding its economic and political stability. For this reason, the relationship between the state and investors transcends the strictly economic dimension, acquiring a legal character of particular complexity.

Traditionally, contracts concluded by the state with third parties were viewed from the perspective of public law², taking into account the authority and sovereignty of

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² See in this regards Cătălin-Silviu Săraru, *Cartea de contracte administrative. Modele. Comentarii.*

the state. However, in the current context of capital markets, bonds issued by governments are structured and traded on the basis of mechanisms specific to private law, in particular with regard to the rights and obligations of investors, the remedies available in the event of breach of contract and the modalities of dispute resolution. This legal reality generates an area of intersection between public and private regimes, which raises questions regarding the applicability of general principles of contract in relations with the state, the legal nature of government securities and the limits of legal protection enjoyed by private investors.

Moreover, the sovereign nature of states and their discretionary prerogatives in managing budgetary policy may conflict with the interests of investors, especially in situations of public debt restructuring or suspension of payments. Thus, the issue of treating investors as mere contractual creditors or as holders of special, internationally guaranteed rights becomes particularly topical.

2. Legal foundations of the relationship between investors and states

2.1. Definition of public bonds and debts

Government bonds are contractual financial instruments through which a state borrows from the domestic or international market, committing to repay the amount received (the principal), together with an associated interest, at a set term. They are usually issued in the form of standardized securities, tradable on capital markets, which gives them relatively high liquidity and makes them attractive to institutional and private investors alike.

From a legal point of view, government bonds can be understood as manifestations of the contractual will of the state, as issuer, which unilaterally and voluntarily undertakes to comply with the financial conditions stipulated in the issuance documents. These include the offering prospectus, the terms and conditions, as well as any other ancillary documents.

Although the state acts as a public entity, the contractual relationship that arises between the issuer and bondholders is governed predominantly by rules of Private Law, especially in the case of issuances made on international markets, where the legislation of neutral jurisdictions often applies.

Public debts, in a broad sense, include not only government bonds, but also other forms of loans contracted by the state, either from international financial institutions (such as the IMF or the World Bank), or through commercial credits or private issues. In all these cases, the state becomes a party to an obligational relationship regulated, in most situations, by the contractual norms of civil or commercial law.³

The apparent paradox of government bonds derives from the fact that, although they are issued by a sovereign authority, they involve the voluntary renunciation, within certain limits, of sovereign prerogatives, in favor of respecting contractual commitments.

Explicații [Administrative Contracts Book. Models. Comments. Explanations], C.H. Beck, Bucharest, 2013, p. 425-440; Cătălin-Silviu Săraru, *Contenciosul administrativ român [Romanian administrative litigation]*, C.H. Beck, Bucharest, 2019, p. 404-410.

³ Ion Sturzu. „State debt: A conceptual treatment”. *Economy and Sociology*, 2/2014: 53–59, <https://old.economy-sociology.ince.md/?edmc=829>.

This renunciation is accepted in exchange for the advantage of accessing private capital, without resorting to unpopular domestic fiscal policy measures.

Therefore, government bonds constitute an essential instrument of modern financing, located on the border between public and private law, and require a dual understanding: as a contractual commitment, but with profound macroeconomic and political implications.

2.2. Principles of private law applicable in relations with the state

Despite the fact that the State is, by its nature, a public law entity, when it acts as an issuer of bonds or a party to a loan contract, it voluntarily submits itself to the rules of private law. The relationship between the State and investors who purchase government securities is not one of authority, but one of contractual partnership, in which the State cannot unilaterally impose conditions, but must respect the clauses freely assumed. Thus, the contract becomes the legal foundation of the relationship, governed by general principles of civil or commercial law, applicable to all obligatory relationships between the parties.

A first essential principle is that of autonomy of will, according to which the parties are free to determine the content of the contract, while respecting public order and good morals. In the case of government bonds, this autonomy is expressed by the development of the issue prospectuses, the contractual clauses regarding repayment and interest, as well as the dispute resolution mechanisms. Once the state has issued these securities and they have been accepted by investors, a contractual relationship is created that cannot be arbitrarily modified by one of the parties, not even by the state⁴.

Another fundamental principle is the obligation of good faith in the execution of the contract, which requires the parties to refrain from abusive behavior, to cooperate and to respect the economic purpose of the agreement. If the state invokes financial difficulties or decides to restructure the debt, good faith requires transparent communication, consultation with creditors and respect for the initial contractual balance.⁵

Contractual liability is a central mechanism in guaranteeing the rights of creditors. The State, as a debtor, can be held liable for non-performance or improper performance of its obligations, including before international arbitration courts, if the contracts provide for such clauses. Private law also provides for the possibility of offsetting claims, foreclosure on the State's commercial assets (under certain conditions), or renegotiation of the contract based on unforeseen circumstances, in exceptional cases.

2.3. Mutual rights and obligations

The contractual relationship between private investors and the state, in the context of government bonds, is governed by a well-determined set of reciprocal rights

⁴ Wouter Bossu, Elsie Addo Awadzi, „Private law underpinnings of public debt securities markets”, *Uniform Law Review*, Volume 18, Issue 3-4, December 2013: 564–588, <https://doi.org/10.1093/ulr/unt025>.

⁵ Jose M Garrido, Ms. Chanda M DeLong, Amira Rasekh, and Anjum Rosha. „Restructuring and Insolvency in Europe: Policy Options in the Implementation of the EU Directive”. *IMF Working Papers*, 2021(152). <https://doi.org/10.5089/9781513573595.001>.

and obligations, which ensure the balance and proper functioning of the public financing mechanism through the capital market. Although the relationship involves a sovereign debtor and private creditors, the relationship is based on legal instruments specific to Private Law, and the rights of both parties are protected by contractual and legal norms.

For investors, the main rights arise from the bond issuance documentation and the general rules applicable to bond relationships. These include, first of all, the right to repayment of principal and payment of interest on the established deadlines, as provided for in the issue prospectus or other contractual documents. Failure to comply with these deadlines constitutes a breach of contractual obligation and may give rise to damages.⁶

Second, investors have the right to freely transfer bonds, meaning they can sell, transfer or trade these securities on secondary markets without undue restrictions from the issuer. This right is essential to ensure market liquidity and the attractiveness of bonds as an investment instrument.

Another important right is access to information, which requires the State, as issuer, to provide clear, up-to-date and transparent data on the economic situation, the level of indebtedness and the debt repayment policy. This principle derives from the general obligation to provide correct and complete information to investors, enshrined in both national law and European directives applicable to capital markets.

On the other hand, the state, as the issuer, has a legal obligation to strictly comply with the terms and conditions of the bonds issued, regardless of the nature of domestic political or economic fluctuations. This includes not only paying the amounts due, but also complying with clauses regarding the modification of contractual conditions, notifying investors in the event of restructuring or default, and maintaining a conduct consistent with the principle of good faith.⁷

The legal framework of the state-investor relationship requires a clear distribution of rights and obligations, designed to ensure contractual balance, investor protection and the proper functioning of the bond market. This balance becomes all the more important in times of economic instability, when compliance with contractual commitments becomes an essential test of credibility for the issuing state.

3. Dynamics of investments in public debts

3.1. Investment mechanisms from the perspective of private law

In the contemporary financial economy, investments in public debt represent an essential channel through which states attract capital to finance the budget and public interest projects. The process of issuing and trading government bonds is based on a complex legal architecture, which reflects a symbiosis between public law regulations and contractual mechanisms specific to private law. Although the state is a sovereign public actor, when it accesses financial markets, it enters into a contractual relationship

⁶ Roxana Maria Chiriac. "Considerations on penalty clauses: regulation and enforceability" *Proceedings of the International Conference on Business Excellence*, vol. 15, no. 1, The Bucharest University of Economic Studies, 2021, pp. 893-902. <https://doi.org/10.2478/picbe-2021-0082>.

⁷ Nigel Rawding, „Protecting Investments Under State Contracts: Some Legal and Ethical Issues”, *Arbitration International*, Volume 11, Issue 4, 1 December 1995: 341–372, <https://doi.org/10.1093/arbitration/11.4.341>.

with investors, assuming precise, quantifiable and enforceable obligations, within a predominantly civil regulatory framework.

The issuance of government bonds begins with the drafting and publication of a prospectus, a document with legal value similar to a contract, through which the state transparently declares the conditions under which it accepts to receive financing from investors. This documentation includes detailed information about maturity, interest rate, repayment procedures and, in some cases, clauses regarding international arbitration. Following publication, the securities are registered and listed for trading, which involves the involvement of authorized financial institutions and capital market infrastructure⁸The act of subscribing to bonds is considered full consent on the part of the investor, which gives this mechanism a strong anchoring in the sphere of private law, especially in relation to the general regime of obligations.

After issuance, bonds can be transferred between investors, without affecting in any way the rights and obligations of the issuing state. This process is regulated by the rules on the assignment of debt, so that the assignee investor takes over all the rights of the original creditor, under the conditions stipulated in the security. Thus, there is a contractual continuity between the parties, the state not having the possibility to raise exceptions against the new holder of the bond, which underlines the objective and transferable nature of the public debt.

3.2. Risks associated with investments in public debt

Despite the apparent legal robustness, investments in public debt involve major risks, which cannot be ignored in the analysis of the relationship between the state and investors. Among the most significant is the risk that the state will be unable or unwilling to honor its obligations. In the absence of a unified international framework for the management of sovereign insolvency, each state theoretically benefits from a wide autonomy in terms of the reorganization of its debts⁹. This reality generates a structural vulnerability for investors, who do not have the same protection mechanisms as creditors of a bankrupt private entity. Thus, debt restructuring by the state, even in the absence of creditors' consent, can become a legal reality with direct consequences for financial markets and confidence in the issuing state.

Faced with this imbalance, private law offers limited but significant protective instruments. Pre-negotiated contractual clauses – for example, those guaranteeing equal treatment of creditors or activating chain default conditions – attempt to create a predictable framework. However, the effectiveness of these clauses depends crucially on the state's willingness to respect the contractual regime and the capacity of arbitration jurisdictions to enforce them.

Also, the lack of transparency, local currency volatility, political risk and unpredictable legislative changes add to the range of risks that can affect the profitability and safety of these investments. Investors in government bonds must therefore evaluate not only the financial terms of the issue, but also the legal and political risks associated

⁸ Dan W. French, Thibaut G. Morillon, Adam S. Yore, Andrew E. Kern. „The impact of exchange listing on corporate governance: Evidence from direct listings”. *Financial Review*, Volume 58, Issue 2, May 2023, pp. 197-234, <https://doi.org/10.1111/fire.12327>.

⁹ Jose M Garrido, Ms. Chanda M DeLong, Amira Rasekh, and Anjum Rosha. *op. cit.*, 2021.

with each issuing country.

3.3. Interaction between public and private legislation

A critical aspect in the analysis of the relationship between private investors and states is the constant tension between public and private law regulations. While private law provides a rigorous contractual framework, designed to guarantee compliance with the commitments undertaken, public law provides the state with normative and political instruments that can affect the contractual balance. These two legal regimes coexist in an ambiguous space, marked by numerous gray areas, where the distinction between commercial actions and sovereign prerogatives becomes difficult to draw.

This ambivalence is acutely manifested in situations of financial crisis, when states, invoking overriding public interests, may decide to suspend payments, forcibly convert bonds or unilaterally modify repayment terms. Although such measures are often politically justified, from a legal point of view they raise serious issues of compliance with the principles of good faith and the obligations assumed.

In these situations, international investors frequently resort to international arbitration forums, such as the International Centre for Settlement of Investment Disputes (ICSID) or the United Nations Commission on International Trade Law (UNCITRAL).¹⁰ These courts are called upon to decide whether the state's measures constitute a breach of contract or whether they fall within the sovereign's legitimate right to regulate. The case law on the matter reflects a tendency to balance the two fundamental interests: protecting investments and maintaining the state's ability to act in the general interest.

Therefore, the dynamics of public debt investments cannot be understood outside this dialectic between contractualism and sovereignty. In the absence of a clear and harmonized regulatory framework, the relationship between investors and states remains vulnerable to major legal risks, which imposes the need for systemic reform at the international level, but also the alignment of national legislations with modern standards of protection of private capital.

4. Regulation of the state-investor relationship in Romania

4.1. Legislative framework applicable in Romania

In Romania, the regulatory framework governing the issuance and management of government bonds is outlined by several legislative acts and institutional regulations. Law no. 500/2002 on public finances is the main legal instrument regulating loans contracted by the state, including those obtained through the issuance of government bonds.¹¹ This law establishes both the debt limits and the mechanisms for guaranteeing and repaying public debts. In addition, the Ministry of Public Finance periodically issues methodological norms and instructions regarding the technical and legal conditions of

¹⁰ Pedro Rencoret, „ICSID Jurisdiction on Disputes Arising Out of Construction Contracts” (May 20, 2013). Available at SSRN: <https://ssrn.com/abstract=2372879> or <http://dx.doi.org/10.2139/ssrn.2372879>.

¹¹ Romanian Law No. 500 of 11 July 2002 on public finances. Published in the Official Gazette No. 597 of 13 August 2002.

bond issuances, depending on market conditions and the government's fiscal-budgetary strategy.

The government bond market is supervised and managed by two key institutions: the National Bank of Romania, in its capacity as the central monetary authority, and the Financial Supervisory Authority, which has responsibilities regarding the transparency and proper functioning of the capital markets. Operationally, government securities are issued through transparent mechanisms, such as auctions or direct placements, addressed to both institutional and retail investors.

4.2. Analysis of legislative gaps

Although Romania has made significant progress in regulating bond issuances, the current legal framework does not provide sufficient and coherent protection for private investors. In particular, the lack of clear procedural mechanisms in the event of public debt restructuring raises major issues of legal certainty. The Romanian state currently does not have specialized legislation that would provide for the conditions and stages of a possible suspension or postponement of payment obligations, which leaves investors in an area of heightened uncertainty.

At the same time, standard issuance contracts do not include, in most cases, detailed clauses on the rights of creditors in exceptional situations, such as sovereign insolvency, fiscal crisis or unilateral legislative interventions. The lack of clear provisions on clauses or international arbitration reduces the ability of investors to defend their rights effectively. In the absence of such clauses, access to justice is limited and the effective protection of private capital becomes relative.

Also, the level of transparency of information provided by authorities on the state of public debt is often low or outdated, which hinders informed investment decisions. This directly affects market predictability and stability, and, in the long term, discourages the participation of private investors in financing the public deficit.

4.3. Comparison with other European countries

In comparison, other European countries have developed more robust systems for regulating and protecting contractual relations between the state and investors. In Germany, the legislative framework offers a high degree of predictability, due to the German legal tradition of treating government bonds as rigorous contractual relations governed by private law. The detailed regulations, the standard protection clauses included in the issuance documentation, as well as the easy access to justice, make Germany a model of good practice.

In France, the state-investor relationship is regulated by a combination of administrative law and commercial law, but with a constant concern for protecting the interests of creditors. Mediation mechanisms, transparency in risk communication and the availability of commercial courts contribute to strengthening trust in the French legal system.

A notable example is the United Kingdom, where the common law system provides a rigorous and pragmatic interpretation of contracts, emphasizing the exact execution of the obligations assumed. Investors benefit from stable case law, a flexible

but predictable legal framework, and extensive protection against unilateral changes to contract terms by the state.

In this context, Romania could benefit from a review and harmonization of its own regulatory framework, by taking over the functional elements of the aforementioned European models. The reforms should aim to clarify the status of government bonds, introduce standard protection clauses, guarantee access to independent courts and strengthen fiscal transparency. Only in this way can a real balance be re-established between the public interest and the legal protection of private investors.

5. Perspectives and solutions for improving the state-investor relationship

5.1. The role of legislative harmonisation

In order to strengthen investors' confidence in the state's ability to meet contractual commitments and to provide a predictable environment for investments in government securities, legislative harmonization between public and private law norms is essential. This harmonization must not be just a formal adaptation, but a systematic effort to create coherent legislation, which recognizes public debt not only as a fiscal obligation, but as a contractual relationship subject to general rules of creditor protection.

In this regard, Romania could adopt institutional and legislative models from European jurisdictions that have developed effective practices in the field of investor protection. Jurisdictions such as the Netherlands or Luxembourg offer successful examples of combining the administrative flexibility of the state with the contractual rigor of civil norms, managing to attract and retain private capital in a sustainable manner. A modernized legislative framework should allow both to respect the decision-making sovereignty of the state in budgetary matters and to guarantee the fundamental rights of investors, including in conditions of financial crisis or budgetary reorganization.¹²

5.2. Strategies for protecting private investors

Improving the relationship between the state and investors requires the implementation of legal and institutional strategies that reduce information asymmetries and contractual power imbalances. A first step in this direction is the standard inclusion of protective contractual clauses, such as international arbitration clauses, which allow investors to avoid domestic jurisdictions in the event of disputes and access independent and neutral courts.

Transparency in public debt management also plays a key role. Constant publication of financial data on the level of indebtedness, repayment terms and possible restructuring intentions would significantly reduce the risks of distrust and capital withdrawal. Clear communication from the authorities must become an integrated element of fiscal policy, not a reaction to specific crises.

Also in this direction, it is necessary to develop a coherent commercial

¹² Mariana Man, Maria Macris, Ileana Sorina (Rakos) Boca. „Dynamics of public debt service in the context of Romania's current financial crisis”. *Procedia - Social and Behavioral Sciences*, vol. 62, October 2012: 462–467. <https://doi.org/10.1016/j.sbspro.2012.09.076>.

jurisprudence, specialized in disputes involving the State as a contractual debtor. National courts should be composed of judges with experience in financial and contract law, able to apply the principles of Private Law and ensure fair protection for all parties involved.

5.3. Proposals for Romania

In the context of the need to adapt to international standards and strengthen the state's capacity to attract private capital, Romania could consider a series of legislative and institutional reforms. A first step could be the creation of a domestic financial arbitration court, dedicated exclusively to disputes arising from the state's relations with its investors and creditors, thus offering an effective alternative to the classic judicial system, which is often slow and unfriendly to investors.

At the same time, the introduction of a national public registry of government bonds, updated in real time, would allow for better tracking of the state's contractual obligations and contribute to strengthening fiscal transparency. This tool would become an essential resource for investors, regulators and economic policy researchers.

In addition, encouraging the issuance of innovative government bonds, such as green or digital ones, could attract new segments of investors, interested not only in financial returns, but also in the social and ecological impact of their investment. Such instruments, already tested in developed economies, have the potential to modernize the financial profile of the Romanian state and diversify the investor base.

6. Conclusions and recommendations

The legal relationship between private investors and states, in the context of the issuance and management of public debts, constitutes one of the most important intersections between Private Law and Public Law in the contemporary economy. This relationship reflects a dual legal reality: on the one hand, the state is a sovereign entity, with prerogatives specific to the public authority; on the other hand, as a bond issuer, it engages in a contractual relationship governed by rules specific to Private Law, assuming obligations that must be respected with the same rigor as any debtor in the private sphere.

This paper has demonstrated that, although the legal framework applicable to government bonds is largely well-defined at a theoretical level, its practical application is marked by significant challenges. These challenges derive in particular from the tension between state sovereignty and contractual obligations assumed, the absence of unified international mechanisms for managing sovereign insolvency, and the diversity of national regulations on investor protection.

The application of the principles of Private Law in this area proves essential for maintaining a framework of trust between the state and the capital market. The contract, understood as a basic legal instrument, offers a series of guarantees for investors: transparency, stability, the possibility of forced execution and access to legal remedies in case of non-payment. At the same time, Private Law creates the premises for a fair dialogue between the parties, even when one of them is a public authority. However, the efficiency of these mechanisms is conditioned by the existence of a coherent legislative framework, which ensures a real bridge between contractual norms and the public

prerogatives of the state.

Romania is at an inflection point in how it manages its relationship with investors in public debt. While current regulations provide a functional basis for bond issuance, they remain limited in terms of effective protection of private creditors. The lack of standardized contractual clauses, insufficient institutional transparency, and the absence of specialized courts for financial disputes contribute to maintaining a high degree of legal uncertainty.

To overcome these obstacles, a profound legislative reform is necessary, aiming at harmonizing the norms of Public Law with those of Private Law. Such an approach involves not only amending the laws in force, but also a paradigm shift in the approach to the relationship between the state and the investor: from a vertical relationship, based on authority, to a horizontal one, based on mutual respect, contractual responsibility and transparency.

It is also necessary to develop modern institutional mechanisms capable of promptly and fairly responding to disputes that may arise in this area. Access to arbitration, real-time publication of information on public debt, promotion of new financial instruments (such as green or digital bonds), as well as education of actors involved in public financing mechanisms are just some of the strategic directions that can transform the state-investor relationship into a sustainable partnership.

In conclusion, the financial stability of a state does not depend only on its economic performance, or the fiscal policies adopted, but also on the quality of the legal relationship it maintains with investors. Only through a balanced legislative framework, by assuming contractual responsibility and by cultivating mutual trust can a healthy capital market be built, in which the public interest and the protection of private capital are not mutually exclusive, but mutually reinforcing.

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