DEFINING PUBLIC-PRIVATE PARTNERSHIP IN ROMANIA

IOANA TATIANA STĂNESE,
MIHAI ARISTOTEL UNGUREANU [*]

ABSTRACT: *Definition of the concept of public-private partnership (PPP) in Romania becomes essential in the conditions of a rigid legislation that is constantly changing, updating, republicating or repealing. In the current European and international context, where PPPs are gaining momentum and are considered to be real tools for financing major infrastructure projects urgently needed for the development of a state, understanding the concept of PPP brings important clarifications to the use of this new type of public-private cooperation. The scope of application, the eligibility of the private partner, the PPP contract and the financing mechanisms are fundamental elements of the concept of public-private partnership. The European Union, international organizations such as the Organization for Economic Co-operation and Development (OECD) and international bodies such as the World Bank or the European Investment Bank are constantly concerned about the implementation and improvement of public-private partnerships, considering them as concrete ways of solving the needs of developing countries, a cooperation that goes beyond the public sector's boundaries through financial contributions and influx of expertise in the matter brought by investors as private partners of public authorities. Legislative developments in the fieldof PPP in Romania have been troblesome and failed to provide a stable and secure framework for potential private investors. In 2016 a new law is approved in the desire to shed light on the matter and to bring the necessary provisions and clarifications for the successful implementation of such partnerships in Romania.*

KEY WORDS: *Financing, Private Investor, Private Public Partnership, Public Authority, Infrastructure Projects, Public Investment, Public Finance, Public Good, Public Services.*

JEL CLASSIFICATIONS: *G300 Corporate Finance and Governance: General; H41 Public Goods; H430 Project Evaluation; Social Discount Rate.*

[*] *Ph.D. Student, "Lucian Blaga" University of Sibiu, Romania, tatiana@stanese.ro*
Prof., Ph.D., Romanian-American University of Bucharest, Romania, m_a_ungureanu@yahoo.com

1. INTRODUCTION TO PUBLIC PRIVATE PARTNERSHIP

Public-Private Partnerships (PPP) can be considered an instrument that contributes to the economic recovery and sustainable development of the European Union (EU) by combining public and private capacities and capital. The Commission is concerned about the obstacles encountered in the implementation of public-private partnerships, generated basically generated basically by the economic crisis that has limited access to finance, in this sense, EU is seeking ways of encouraging them.[1](European Commission, 2009).

Since the early 1990's, but especially since the 2000, there has been a significant enhancement in the use of PPP by OECD countries. Countries like Australia, France, Germany, Korea and the United Kingdom are increasingly using PPPs to provide services they have previously provided through traditional public procurement. Thus public-private partnerships are expected to play an important role in boosting European investment in infrastructure.

The European Union has recorded low levels of investment since the occurrence of the phenomenon known as the global economic and financial crisis. In this respect, collective and coordinated efforts at European level are necessary to reverse this downward trend and to put Europe on the path of economic recovery. European Commission representatives consider that adequate levels of resources are available but need to be deployed throughout the Union to support investment.

There is no singular, simple answer, no push button that can be pushed, and no valid universal solution[2]. Economic recovery by stimulating investments in the real economy is the reason why the European Commission launched the Investment Plan for Europe[3] in November 2014, having as strategic partner the European Investment Bank. The objective of the Plan is to support economic recovery by stimulating investments in the real economy. The investment plan for Europe uses public investment and guarantees to mobilize private sector capital and expertise.

According to Eurostat, public-private partnerships are long-term contractual arrangements mainly used for infrastructure development, concluded between a government entity as a supplier and a private partner, usually private, as an operator. The partner is responsible for the construction, operation and maintenance of infrastructure assets designed to provide certain public services. In exchange for the

[1]COM(2009) 615 final - Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 19 November 2009 - Mobilising private and public investment for recovery and long term structural change: developing Public Private Partnerships. Not published in the Official Journal.
[2] European Commission**,** Factsheet - Why does the EU need an investment plan?, 08 December 2015, Part of collections: Factsheets on the Investment Plan. Available at: https://ec.europa.eu/commission/priorities/jobs-growth-and-investment/investment-plan_en
[3]European Commission, Investment Plan for Europe, 2014. Available at: https://ec.europa.eu/commission/priorities/jobs-growth-and-investment/investment-plan_en

services received, the government entity pays the regular commission to the non-government partner after the asset has been built[4].

The World Bank Group provides support to small and medium-income countries to develop PPPs through a range of different tools and mechanisms. The World Bank supports and promotes public-private partnerships. From their perspective, PPPs combine skills and resources from both the public and private sectors, sharing risks and responsibilities. This allows governments to benefit from private sector expertise and focus instead on policies, planning and regulation by delegating day-to-day operations.

The level of development of countries is different and governments are not homogeneous, often confronted with "aging" or lack of infrastructure. These are concrete cases when public authorities require more efficient services than previously provided, and a partnership with the private sector can help to know and promote new solutions and bring additional funding to traditional public ones. Therefore, public-private partnerships can represent new mechanisms through which the government can acquire and implement services and/or works in connection with the development of public infrastructure using the resources and know-how of the private sector. [5]

For a PPP to be successful, the following are fundamental:

- a rigorous analysis of long-term development objectives and risk allocation;
- a national legal and institutional framework that supports this new service delivery model by providing for effective governance and monitoring mechanisms for PPPs;
- a well-designed PPP agreement for the project that clearly assigns risks and responsibilities.

In practice, however, PPPs include a wide variety of arrangements and are not always standardized. Therefore, PPPs are defined according to a set of criteria related to the degree of cooperation in terms of common objective, financing, sharing of resources and activities and risk distribution.

The role of the public entity is to ensure the public interests within the operation. To this end, the contract stipulates precisely the tasks to be undertaken by private entities with regard to the services to be delivered, the capital to be invested, the safety standards to be followed, etc. Private entities are generally involved in bringing equity and/or operating services. There are many different forms of public-private partnerships (eg concessions, BOT, etc.). In the context of the neoliberal economic systems that have prevailed over the last decades, many public-private partnerships have been created across Europe, under various forms of association and operation.

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[4] European Commission - Fact Sheet, Launch of the EPEC-Eurostat Guide to the Statistical Treatment of Public-Private Partnerships, Brussels, 29 September 2016, Available at: http://europa.eu/rapid/press-release_MEMO-16-3224_en.htm

[5] http://ppp.worldbank.org/public-private-partnership/

2. CURRENT STATE OF RESEARCH

Literature addresses the concerns about what a public-private partnership means and illustrates the notion that there is no clear and universally valid definition of what constitutes a public-private partnership: "there is no single definition of PPP. It covers a wide range of transactions in which the private sector has a certain responsibility, including investment, ranging from management contracts without investment obligations to concession contracts with significant investment obligations, in addition to operational and management obligations" (Marin, 2009).

From another perspective, the public-private partnership is perceived as an agreement between the government and one or more private partners (which may include operators and financial donors) under which private partners provide the services in such a way that the delivery goals of service set by the Government to be aligned with the objectives of private partners and the effectiveness of the alignment depends on sufficient risk transfer to the private partners (OCDE, 2008, p. 17).

Public-private partnerships (PPP or 3P) are increasingly being considered as a rational proposal for involving the private sector in international development cooperation. (IOB, Ministry of Foreign Affairs, Netherlands, 2013)

Da Rosa et al. (2012) presents an extensive overview of 28 PPP definitions that they mark across 14 dimensions. They note that most of the definitions that describe PPPs: have different societal environments, share goals, objectives and problems, are for the provision of public goods, benefit from complementary resources, and have partners that collaborate in an interdependent and interactive way. (Da Rosa et al., 2012 after the IOB Ministry of Foreign Affairs, 2013).

The Public-Private-Partnership in Infrastructure Resource Center is conducting extensive research on PPP, starting from the premise that there is no internationally agreed definition of a PPP. The term is used to describe a wide range of types of agreements between public and private sector entities and different countries have adopted different definitions as PPPs have evolved. [6] However, in a broad definition a PPP is the long-term contract between a private entity and a government entity for the provision of a public asset or service in which the private party bears a significant risk and the responsibility of management and remuneration is performance-related[7] (PPP Reference Guide, 2017).

Starting from the above-mentioned recommendations we distinguish that the legally sound regulation of the public-private partnership is a crucial essential condition in the absence of which the public-private partnership may not achieve the purpose for which it was created, encountering major deficiencies in understanding and application.

[6] https://pppknowledgelab.org/guide/sections/1-introduction

[7] Public Private Partnership Reference Guide, 2017, version 3, International Bank for Reconstruction and Development / The World Bank. Available at: https://pppknowledgelab.org

3. PUBLIC-PRIVATE PARTNERSHIP IN ROMANIA

The post-communist history of the first public-private partnership (PPP) structures started at the national level in the 1990s when developing sectoral or national strategies (National Strategy for Sustainable Development - 1999, Medium-Term Economic Development Strategy 2000), as well as institutionalized structures such as the Tripartite Commission and the Economic and Social Council. During this time, concessions were the most common form of private participation in the Romanian infrastructure. [8]

Romanian legislation has undergone changes over time in order to establish a legal framework to distinguish classical concessions from non-concessional public-private partnerships.

Romania registered one of the highest growth rates in the EU in 2015, but the state of energy, transport and health infrastructure remains behind other EU Member States. Therefore, in 2015 Romania approved the Masterplan of transport, which amounts to 45.451 billion euros of investments in projects, including PPPs[9].

Financing economic and social development projects in Romania by public-private partnerships can be a viable alternative in the following cases:

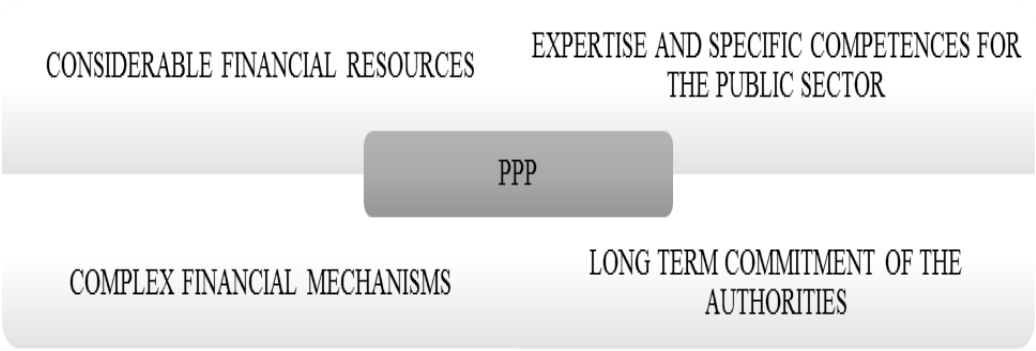
- when a particular project cannot benefit from a grant under European funds granted by the European Commission;
- the estimated budget of the project that a public authority wants to develop is considered too high as a sustainable financial effort;
- the local public authority cannot contract loans from the domestic and international financial organism and banking institutions in order to carry out the project.

A public-private partnership should be a formal collaboration agreement (generally materialized by a contract) through which a public body (governmental, regional or local authority) and one or more private entities decide to cooperate for the construction of goods and / or the provision of services. The choice of private entities is generally based on the principle of competition.

Despite recent efforts in Romania, limited progress has been made in involving the private sector in major national road infrastructure projects through concessions or through public-private partnership (EBRD, 2015, p. 7).

[8] Public-Private Partnership - a solution for better management of local communities in Romania - practical guide for County Councils, Institute for Public Policies (IPP), Bucharest, April 2004, available at www.ipp.ro

[9] https://pppknowledgelab.org/countries/romania



Source: own processing from COM(2009) 615 final http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=LEGISSUM:em0026

Figure 1. Implementation of PPPs

3.1. Overall PPP regulations

In order to analyze this new concept of financing we will turn to the study of national legislation in this field, which establishes the legal framework for action of the public-private partnership in Romania.

Public-Private Partnership is defined and regulated distinctly for the first time by Government Ordinance no. 16/2002[10], which stipulates that PPP only applies in the field of works. From the legislator's perspective, the public-private partnership is equivalent to the contract resulting from the cooperation between the two entities - public and private. It was defined as a partnership having its object in designing, financing, construction, operation, maintenance and transfer of any public good, based on the public-private partnership for the concession of works.

This partnership was supposed to meet the requirements of the contracting authority as a transferee/grantor, to have a technical-economic function and to be carried out in consideration of the works executed by the contractor, as the concessionaire, who receives the right to exploit the result of the works in full or in part, as to which you can add, if necessary, payment of a lump sum. PPP is therefore not seen as a form of collaboration for the implementation of programs or projects, but is regulated by the legal instrument under which it is carried out, the scope of PPP being rather limited[11].

[10] Government Ordinance no. 16 of 24 January 2002 on public-private partnership contracts, published in the Romanian Official Journal no. 94 of 2 February 2002.

[11] Public-Private Partnership - a solution for better management of local communities in Romania - practical guide for County Councils, Institute for Public Policies (IPP), Bucharest, April 2004, available at www.ipp.ro, p.31-32.

It is noteworthy that, O.G. 16/2002 is complemented by the provisions of Law no. 215/2001 concerning local public administration[12] - article 15 art. 38 letter x) and article 104 letter s), by Law no. 219/1998 regarding the concession regime[13] and Law no. 213/1998 regarding public property and its regime[14].

Law no. 219/1998 regarding the concessions' regime[15] regulates the existence and organization of the concession of activities, services and public goods, of national or local interest for public or private property, in exchange for a fee or remuneration. Nevertheless these regulations are distinct from the concession of works, as regulated by Government Ordinance no. 16/2002 regarding the public-private partnership contracts, approved with the subsequent amendments and completions.

By Law no. 528/2004[16] the concession of activities and public services of national and local interest and of goods is made on the basis of a contract by which a person, called the conceder, transmits for a definite period, not more than 49 years, to another person, a concessionaire which is acting on its own risk and liability, the right and the obligation to operate or to carry out a national or local public interest service, an activity or a good in return for a fee. However, the provisions of the concession law do not apply to design, financing, construction, operation, maintenance and transfer contracts regarding any public good, that is concluded according to the procedures provided for PPP in Government Ordinance no. 16/2002.

Thus, in the field of public utilities, the law of public administration valid at that time[17], outlines the concept of commercial PPP, given that the partnership is based on the decision of the local and county councils. These entities decided upon the participation with capital or goods on behalf of and in the interest of the local community they represent, when establishing commercial companies or services of local or county public interest, as the case may be.

In 2007, in the context of republishing the local administration law[18], the notion of public-private partnership was changed, so that the PPP would regard the functioning and development of bodies providing public services and public utility of local or county interest, under the law. Thus, the direct stipulation of a commercial company and the implicit commercial nature of the PPP contract have been removed.

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[12] Law no. 215 of 23 April 2001 regarding local public administration, published in the Official Journal no. 204 of 23 April 2001.

[13] Law no. 219 of 25 November 1998 regarding the regime of concessions, published in the Official Journal no. 459 of 30 November 1998.

[14] Law no. 213 of 17 November 1998 regarding public property and its legal regime, published in the Official Journal no. 448 of 24 November 1998.

[15] Law no. 219 of 25 November 1998 regarding the regime of concessions, published in the Official Journal no. 459 of 30 November 1998.

[16] Points 2 and 3 of article IV of Law no. 528 of 25 November 2004, for amending and supplementing the Government Ordinance no. 16/2002 regarding the public-private partnership contracts, as well as of the Law no. 219/1998 on the regime of concessions, published in the Official Journal no. 1153 of 7 December 2004.

[17] Article 15 from Law no. 215 of 23 April 2001 regarding the local public administration, published in the Official Journal no. 204 of 23 April 2001.

[18] Article 17 from Law no. 215 of 23 April 2001 (republished) regarding the local public administration, published in the Official Journal no. 123 of 20 February 2007.

Conclusion of a PPP with non-governmental organizations (NGOs) in the field of public utilities concerning non-commercial activities was separately addressed by other legal provisions specific to the Government Ordinance no. 26/2000 regarding associations and foundations. Thus, another type of public-private partnership is defined as the collaboration between the public authorities and private legal entities without patrimonial purpose and which shall be subject to the provisions of the Civil Code[19].

The old law no. 178/2010 of the public-private partnership[20] has until recently brought under regulation the implementation of a public-private partnership, regarding the initiation and development of PPP projects for public works in various sectors of activity and with private financing. According to it, PPPs were translated into a public-private project aimed at designing, financing, building, rehabilitating, upgrading, operating, maintaining, developing and transferring, as appropriate, resulting in a practical public good or service. The project was entirely or partly funded by the private investor's own financial resources or brought into play by him, on the basis of a public-private partnership model.

Considering that Law no. 100/2016 concerning works and services concessions[21] repealed the public-private partnership law in 2010, new regulation was needed.

3.2. New PPP regulation

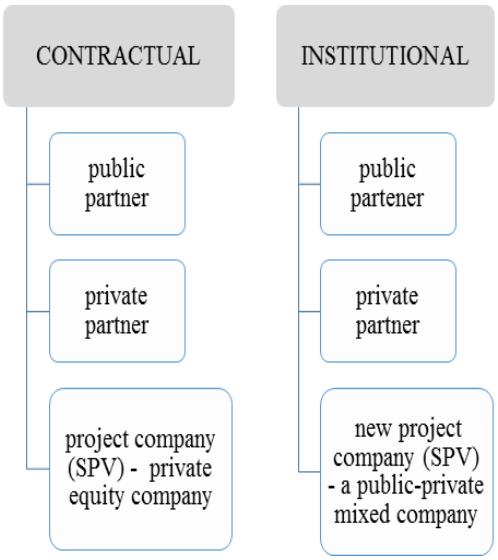
Law no. 233/2016[22] entered into force on the 25th of December 2016, is auspicious in the legislative vacuum created by the repeal of the Public-Private Partnership Law no. 178/2010, which received many criticisms during its time. The normative act now regulates the conclusion and the development of the public-private partnership, providing the premises for an efficient collaboration between the public and the private sector, in order to achieve projects of public interest with private financing.

In other words, the law considers investments in national, regional or local infrastructure serving a service or public utility.

PPP partners are the public authority, the private investor and the project company. The public partner consist of contracting authorities, namely the central or local public authorities and institutions or their structures which are acting as authorizing officers, public bodies which are within the sphere of influence of the

[19] Articles 2 letter e) and 3 from Government Ordinance no. 26 of 30 January 2000 regarding associations and foundations, published in the Official Journal no. 39 of 31 January 2000.
[20] Law no. 178 of 1 October 2010 regarding public-private partnership, published in the Official Journal no. 676 of 5 October 2010.
[21] Law no. 100 of 19 May 2016 regarding the concessions of works and concessions of services, published in the Official Journal no. 392 of 23 May 2016.
[22] Law no. 233 of 24 November 2016 regarding the public-private partnership, published in the Official Journal no. 954 of 24 November 2016.

previously mentioned public authorities[23] or the contracting entities within the meaning of article 9 and 10 of Law no. 100/2016[24]. Private partner becomes any legal entity or association of legal persons that wins the PPP award procedure and signs the contract. The project company is set up exclusively to carry out all the necessary activities, directly and indirectly, to fulfill the object of the public-private partnership project[25].



Source: author's perspective on Law no. 233/2016.

Figure 2. Forms of public-private partnership

This law states as a sine qua non condition that PPPs apply only to projects where the Substantiation Study demonstrates that the revenue to be obtained by the project company from the use of the goods or services that are the object of the project is generated by payments made by the public partner or other public entities for the benefit of the public partner.

Therefore, analyzing the main elements of the law we can deduct and define the public-private partnership as a form of contractual or institutional cooperation between the public partner and the private partners and the project company (mixed public-private or just private equity) for the purpose of carrying out a project, which involves the execution, rehabilitation or extension of goods, intended for the provision and/or operation of a public service, where the project is financed entirely from private funds or mixed public-private financial resources and the project revenues consist of

[23] Article 4 from Law no. 98 of 19 May 2016 regarding public procurement, published in the Official Journal no. 390 of 23 May 2016.
[24] Law no. 100 of 19 May 2016 regarding the concessions of works and concessions of services, published in the Official Gazette no. 392 of 23 May 23 2016.
[25] Article 31 from Law no. 233 of 24 November 2016 regarding the public-private partnership, published in the Official Journal no. 954 of 24 November 2016.

the charges collected by the project company, completed by the payments of the public partner.

As regards the methodological rules for application, they should have been drawn up by the Ministry of Public Finance and approved by government decision until the 25th of March 2017. In the absence of detailed provisions, we can conclude that through a partnership can be achieved the design, financing, construction, operation, maintenance and transfer of any public good.

4. CONCLUSIONS

Thorough regulation in terms of the legal concept of public-private partnership is an essential condition in clarifying basic operational concepts. In the absence of a clearly defined legal framework, public-private partnerships are at risk of not achieving the purpose for which they were created, with major deficiencies in understanding and law enforcement.

The new regulation does not take into account other types of possible partnerships, such as those in the field of social services where partners would be non-governmental organizations. Types of public-private partnerships between local public authorities and NGOs are still governed by legislation on associations and foundations and local public administration law, and maintain the title of cooperation or association with non-governmental organizations and other social partners in order to jointly finance and carry out joint actions, works, services or projects of local public interest.

A more detailed definition regarding concrete PPP activities and mechanism cannot be achieved in the absence of standard specifications regulation. In the absence of detailed provisions but starting from the spirit of the law on public-private cooperation and the literature in the field, we can conclude that through a PPP can be achieved the design, financing, construction, operation, maintenance and transfer of any public good as long as all the conditions provided by the law are met. The question remains open regarding how to properly apply all the necessary conditions imposed by law so that PPP becomes usable.

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