

# DOMESTIC LEGAL FRAMEWORK FOR PPPS AND IMPLICATION OF THE EU RULES

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## **Abstract**

*The paperwork aims at analyzing the domestic legal frame work and the implication of the Public Private Partnerships EU rules at national level, especially the Romanian case. Among the multiple positive goals of the Public Private Partnerships, the paper takes into consideration the fact that the PPPs are one of the the solutions to overcome the generalized sub financing situation of the public spending and investments. To value this particular quality of the the PPPs, they should be ruled in a unique manner at European level, in order to insure the proper results for the practice in the field. The influence of the legal frame work on the performance of the PPPs is pointed out and some legal improvements should be the main objectives of the research.*

**Keywords:** public-private partnership, public investment, the European Union, administrative law

**JEL Classification:** K23

## **1. Introduction**

Partnership is a form of that implies co-financing planning and building infrastructures, operating and maintenance of public service in order to offer an efficient alternative to the traditional framework. The relations of public-private partnership (PPP) are a legal understanding between different subjects whereas the partners establish together the purpose of the partnership with the impact on the community level<sup>2</sup>. Today, governments are keen to shift more welfare provision into private hands to keep public spending under control and to avoid having to raise taxes or cut benefits<sup>3</sup>.

This traditional view was recently abandoned in the favor of the complex cooperation between public sector and private initiative. The public-private partnership is present today on local level, as the cooperation between local authorities and private sector aimed to implement the project to restructure the industrial areas in collapse<sup>4</sup>. This situation stimulated the privatization process. The drive to privatization of public services has been apparent at every level of government. The private sector is present in partnerships with public sector, bringing an important contribution in resolving various problems. In order to choose a public-private partnership, the administration should consider the following arguments<sup>5</sup>:

- the lower cost, considering the fact that the private partner is able to borrow money easier and with a lowers interest level that public institutions;
- the lack of expertise for the technical personal in the administration;
- as the private companies are governed by others legal documents than public sector, the private companies are more flexible in conceiving and managing a project;
- private companies usually take action faster.

The concept of public-private partnership expresses a way to cooperate for a public authority and private sector, non-profit organization, businessmen associations or companies to make a project with positive effects on the labor market and local development.

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<sup>3</sup> Pauline Vaillancourt Rosenau, *Public-Private Policy Partnerships*, Massachusetts Institute of Technology, 2000, p. 2.

<sup>4</sup> *Local partnership for better governance*, OECD, Paris, 2001, page 15, and also *Partnerships, Participation, Investment, Innovation Meeting the Challenge of Distressed Urban Areas*, Dublin.

<sup>5</sup> Seader, David L., *The United States Experience with Outsourcing, Privatization and Public Private Partnership*, SUA, 2002.

## 2. Different forms of public-private partnerships

Some authors used the PPP for various activities that are based on cooperation and partnership<sup>6</sup>. The partnerships may have different forms and different purposes, considering different criteria:

- Starting from their legal personality, the partnership may be formal or informal;
- Considering the purpose of the partnership, the PPP may be a federation, union, council, alliance, and coalition, all of them built in order to plan policies.

In order to have a successful partnership, choosing a certain is very important. Building a PPP is generally based on two dimensions: political dimension (according to governmental program) and operational dimension (according to the methods to reach this purpose). Operational partnerships imply particular projects as a reason of association in order to develop the different forms of services<sup>7</sup>. The PPP has to link this dimensions to the benefits of the community.

## 3. Romanian regulation on PPP

In the last years, the local authorities from Romania started partnerships with civil society and private sector in order to do investments in infrastructure and to develop local public services. This new orientation, which is in accordance with the European trend, is imposed by the advantages shown by a public private partnership, such as splitting the investments costs and splitting the risks by common use.

The specific regulation was adopted starting 2002. Whereas the cooperation areas are diverse, the public private partnership is never confounded in Romanian practice with the legal procedure to start up a new a commercial activity; such are companies and business partnership. Still, this does not mean that a public-private partnership cannot have activities with the purpose of obtaining a profit, besides of the activities that does not suppose a certain profit. In this respect, an example is the activity of maintenance for parks and green areas. So, in Romania's case, the partnership is an instrument for cooperation that mainly aims to realize a project to improve the public services. The partnership is not analyzed or defined in accordance with the activity that is taking place, its profitable or non-profit purpose, but with the contract through which it is realized.

The local public administration law (article 104 from law 215 from 2001) establishes that the local council is entitled to decide, according to the law in force, the cooperation and the association with civil actors from Romania or abroad, in order to finance and realize in common a work, a service or a project for regional purposes. This text is about the basis of a partnership that is the political decision, before any other procedure to initiate a PPP.

Romanian authorities use the following forms of partnership:

- a. The partnership according to Romanian Civil Code and Romanian law on non-profit organizations. This form of partnership may be used only in fields such as instruction sessions, various forms of social assistance, technical support for public administration. The legal force of the cooperation protocol is weak, compared with a contract; as such protocols do not include sanctions for contractual liabilities.

This type of partnership does not have to be approved with a direct vote in the local council, the decision of the president of the council is sufficient. The big investments do never take place through such a form of partnership.

- b. The partnership started for commercial purposes.

This type of partnership does not give birth to a new subject of law and does not suppose the forming of a new company. A public authority and a civil subject of law are partners in a contractual relation, sharing the risks and the profits according to the percent of participation into this partnership association.

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<sup>6</sup> Mihaela Lambriu, Ioan Margineanu, *Parteneriat public-privat in furnizarea serviciilor sociale*, Bucuresti, 2004, p13.

<sup>7</sup> Alina Profiroiu, Sorina Racoviceanu, Nicolae Taralunga, *Dezvoltarea economica locala*, Editura Economica, 1998, p. 46.

This joint ventures was used by Timis local council in 2003, approved by the council and signed by the president of the council. We note that this partnership form is lack in transparency.

c. The starting up of a new company

A public private partnership may also start by forming a company that is according to Romanian law a juridical entity that develops commercial activity with the express intention of getting profit. In this case, only the regional council is able to decide if the community participates with capital in a company.

The partnerships between public and private sector have many advantages for the public administration, as they gather public resources, but also private resources. In the Romanian regulation on PPP, the financial resources are mainly provided by a private investor, so the first advantage to be noticed is the share of the costs between the public authority and private actors.

It is also notable the fact that PPP procedures may conduct to externalization of many activities from the public administration responsibility, usually by concession but also by procurement.

The law in force ensures, at least on declarative level, the concentration of financial capital on public services and supplier operation, with the respect of transparency. Still, there are some aspects not so transparent if we consider the local budget of the community involved in a PPP.

The first regulation addressing expressly to PPP's in Romania is the law no. 219 from 1998, about the concession contracts, which was modified by law nr. 528 from 2004 and two years after it was cancelled (by Govern Emergency Ordinance no. 34 from 2006). The domestic legal framework for PPP's is a very flexible, the govern adopting many legal acts which are completing and canceling each other. The ordinance no 16/2002 was followed by the ordinance (G.E.O.) 34 from 2006 for selection the contracts of public procurement, contracts of concession of public work and contracts of concession of services. This legal act cancelled 2 laws, 3 other govern ordinances and 2 govern decisions, and modifies 2 govern ordinances and 2 govern decisions. Furthermore, it has been modified three times (once by law and twice by another ordinance) and it has been also criticized by Romanian Constitutional Court in July 2008.

Today, the domestic legal framework for PPP consists of the regulations on public procurement and the legislation on PPP, the law no. 178 /2010, which is considered a failed reform.

#### 4. EU PPP regulation influence on the Romanian domestic rules

The Romanian regulation applies into force the rules from:

- Directive no. 2004/18/CE about coordination of the procedure of awarding public procurement contracts
- Directive no. 2004/17/CE about coordination of the procurement procedure for the entities that operates in water, energy, transport, mail services sectors
- Directive 1989/665/CEE about coordination of laws, reglements and administrative normative about the procedure of contesting the award of contracts of delivery and works contracts
- Directive 1992/13/CEE about coordination of laws, reglements and administrative normative regarding the Community rules for public procurement procedures for the entities that operates water, energy, transport, mail services sectors

As a result, the Romanian regulation is in accordance with contractually theory, preponderant in all legislations. The Romanian case is strictly referring to the situations when an investment in a public or private state's good is done, or the use of this good is taking into consideration.

In the same manner as the Irish law from 2002 does, the Romanian regulation on PPP does not give a definition on PPP, although art. 3 from the Govern Emergency Ordinance no 34 from 2006, consolidated, gives 28 definition from various concepts. The Romanian legal framework on

PPP establishes from the title of the ordinance the area of its applicability that is the award of the contracts of public procurement, contracts of public works and contracts of services concessions.

The Romanian regulation protects and respects the general principles of public private partnership, surely and shortly expressed in article 3 paragraph 1 of the law on PPP no. 178/2013. These principles are:

- nondiscrimination
- equal treatment
- mutual respect
- transparency
- proportionality
- efficiency in using public funds

The types of PPP ruled in Romanian regulation are in accordance with the administrative system, the level of development of public administration and the level of social income. The article 3 (2) says that the public-private partnership contract takes into consideration the following:

- a) the cooperation between the public partner and the private partner;
- b) the public-private partnership project has private financing;
- c) in the case of a public-private project, the partners' role is to finance and to enforce the objectives of public interest, as well as to comply with the stipulations of the public-private partnership contract;
- d) sharing of risks within a public-private partnership project is made in a proportional and equitable way between the public partner and the private partner.

According to the Romanian law on PPP (art. 5), public-private partnership can be achieved through the following types of contracts:

- a) contracts of works;
- b) contracts of goods;
- c) contracts of services.

The concession is the classic type of PPP. The Romanian regulation regards both the contract for concession of public work but also for public services. The contract for concession of public work (Article 3 g from the Govern Emergency Ordinance no 34 from 2006) has the same characteristics as the contract of work (according to article 4 from the Govern Emergency Ordinance no 34 from 2006, the contract of work is the contract of public procurement that aims to realize one of the following purposes: to built a work or a construction, to design and to built a work or a construction, to do by any means a construction that is needed by a contracting authorities) only that, in consideration of work done with the occasion of executing the contract, the public authority admits the right of the other party to use the work for a certain period or this right and a certain amount of money. The contract of public services concession (Article 3 h from the Govern Emergency Ordinance no 34 from 2006) has the same characteristics as the contract of services (According to article 6 from the Govern Emergency Ordinance no 34 from 2006, the contract of services is the public procurement contract that aims to realize one or more services) only that the another contracting party receives from the contracting authority the right to use the services for certain period of time, or this right together with a certain amount of money.

## 5. Final remarks and conclusions

The analyses on the domestic regulation concerning the PPP and the EU influences lead us tot the conclusions that there are some specific regulation in this respect but their positive effects into practice are lacking. We consider that this is due to the missing of specialized institutions or organisms in the public administration system with particular role in the PPP.

The Romanian regulation on PPP does not give strong guarantees to cover the financial risks for the capital invested (at least part of it) for example in the case when a partnership is abandoned even in an advanced phase, by one of the partners. Also, it is notable that there is a large priority

awarded to short-term projects and not for middle and long terms project. The PPP usually focuses on an investment for supply public services, so many problems may appear because of the citizens' perception on the way that a private partner is managing a public interest. The intention of getting a large profit in a very short period of time is common for the private partners, so the transfer of a public service to private sector equals with prices increase. This is why, in the citizens' opinion, the quality of the services is not so important as the prices stability.

### **Bibliography**

1. Camera de Comerț și Industrie a României, *Ghid pentru parteneriat public-privat*, București, 2005, [www.ccir.ro](http://www.ccir.ro).
2. Pauline Vaillancourt Rosenau, *Public-Private Policy Partnerships*, Massachusetts Institute of Technology, 2000.
3. *Local partnership for better governance*, OECD, Paris, 2001, page 15, and also *Partnerships, Participation, Investment, Innovation Meeting the Challenge of Distressed Urban Areas*, Dublin.
4. Seader, David L., *The United States Experience with Outsourcing, Privatization and Public Private Partnership*, SUA, 2002.
5. Mihaela Lambu, Ioan Margineanu, *Parteneriat public-privat in furnizarea serviciilor sociale*, Bucuresti, 2004.
6. Alina Profiroiu, Sorina Racoviceanu, Nicolae Taralunga, *Dezvoltarea economica locala*, Editura Economica, 1998.