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The New Regulation of Public-Private Partnership Contract in Romanian Legislation. Critical Analysis

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The New Regulation of Public-Private Partnership Contract in Romanian Legislation. Critical Analysis.

Simona Petrina GAVRILĂ¹, Ștefania Cristina MIRICĂ²

Abstract

The concept of public - private partnership has generated interest worldwide due to the need for public services associated with the need to limit public spending that is seen as an alternative for the development of major projects or public service delivery typically developed or provided by the public sector. Legal regulation of this institution has experienced a tortuous in Romania since the adoption of Ordinance no. 16/2002 and Law no. pending. 233/2006, which seeks to respect the best practices recognized at EU level in the field, and to implement a legislative framework able to effectively enable public and private sectors cooperation for implementation of projects covering public works or services. This paper aims at checking how the adoption of the new law that is Law no. 233/2006 of the Romanian legislator has achieved goals.

Keywords: Contract, public - private partnership, public administration, cooperation.

1. Introduction

The juridical literature has stated the fact that the public-private partnership is a new concept which makes the cooperation among the authorities of the central and local public administration possible, as well as between other public partners, defined as such by the law, and the private

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sector; the reason of this cooperation is the realising of certain services of public use, and the harmonizing of their specific interests [9].

In spite of all these, even since the interwar period, in Romania there were “establishments of public use”, meaning the juridical persons that were created out of the private finance initiative, which were not oriented towards profit, with the purpose of accomplishing common goals [10], for which the involvement of the private law entities in organizing public services was completely recognized [4].

In Romania, the first public-private partnerships were formed at the national level, even in the absence of the juridical establishment, ad hoc, even since the mid-90s, because of the elaboration of certain national or local strategies, as well as of certain established structures, such as The Tri Public-Private Partnership as a form of public-private collaboration can be a viable way to fund infrastructure projects at regional or national level. The size of investments in PPP projects can have important consequences for the economic and social development of the countries in which such partnerships are taking place.

Public-Private Partnership as a form of public-private collaboration can be a viable way to fund infrastructure projects at regional or national level. The size of investments in PPP projects can have important consequences for the economic and social development of the countries in which such partnerships are taking place.

In fact, the first two main stages of this type of partnership are: identifying the need at the level of society and, respectively, proposing projects that are susceptible to solving the identified need.

According to Stephen P. Osborne, the benefits of using it include: combating social exclusion by including the private component of the local community; Reforming local public services, increasing the accessibility of the local community and bringing it to the real needs of society; The development of public-private link networks for the efficient use of resources to meet the needs of society and the creation and maintenance of a high quality of life by developing development projects in any field is needed [12].

From the way we use public private partnership, we also distinguish, along with the economic and social development component of the countries where such partnerships are used, and a strong international component.

Indeed, both the single European market and the international market may be willing to participate in the realization or, as the case may be, the rehabilitation and / or extension of a good or goods intended for the provision of a public service and / or the operation of a Public service,

within the public-private partnership, of course, in compliance with the legal conditions.

2. Problem Statement

In order to establish the legislative direction that led to the adopting of Law no.233/2016 regarding the public-private partnership, we shall review in the following paragraphs the evolution during time of the rules concerning the issue here discussed.

3. The evolution during time of the rules concerning the issue of the public-private partnership

The Romanian legislative structure brought the public-private partnership under regulation for the first time by OG no. 16/2002 regarding the public-private contracts, and it was adopted with amendments by Law no.470/2002 [5], although OG 26/2000 had already made reference to it for what concerned the associations and the foundations, as well as Law no.215/2000 regarding local public administration.

Without defining the public-private partnership, it suggested the fact that “it concerned the settlement of the devising, financing, building, exploiting, supporting, and transferring of any public asset on account of the public-private partnership” (article 1), and by HG 621 from the 20th of June 2002 concerning the approving of the methodological norms for the executing of OG no. 16/2002 regarding the public-private partnership contracts it stated the main types of public-private partnership, respectively: devising-building-operating (DBO), building-operating-renewing (BOR), building-operating-transfer (BOT), leasing-development-operating (LDO), and rehabilitation-operating-transfer (ROT).

Besides, it contained the defining of the public-private project as “a project that is entirely or mainly realized through its own financial resources or through finances coming from an investor as the result of a type of public-private partnership which will generate a public asset”; also, the contract for the public-private partnership or the contract of the project is “the act of law that state the rights and the obligations of the public authority and the investor for the entire period of time that the public-private partnership is available, covering one or several of the preliminary stages of preparing, financing, building, or exploiting a public asset for a determined period of time, but no longer than 50 years”.

The frequent amendments brought to this regulation because of bad legal technique, the using of terms similar to terms used in the law of public administration or in the law of public concession, but with different meanings, the limitation of the object of right, and respectively of the object of the contract of public-private partnership, as well as of the private persons who could enter such partnerships, led to formulating criticism of the doctrine and to the propositions to adopt a new normative act that would be complete, fluent, and suitable for the economic realities of that moment [1, 3, 14].

Given the circumstances and because of the Romanian legislator's urge to undertake the directives of The Green Book regarding the public-private partnerships and the community right of public acquisition and of the concessions of The European Commission (the 30th of April 2004), The Government gave OUG 34/2006 regarding the arrogation of the contracts for public acquisition, of the contracts for the concession of public works, and of the contracts for the concession of services [11], which by article 305 formally abolished by the Government Ordinance no. 16/2002 regarding the contracts for public-private partnership.

The Green Book regarding the public-private partnership and the community right of public acquisition and the concessions of the European Commission (the 30th of April 2004) defines the public-private partnership as consisting of „forms of cooperation between the public authorities and the world of companies that regard to ensure the financing, the building, the renovation, the administration, or the supporting of the infrastructure or of offering certain services”.

The doctrine has shown that whenever this normative act did not mention explicitly the public-private partnership the Romanian law did not bring under its regulation such a contract as a distinct juridical act, and because of this it created a real legal void [9].

On the other hand, when attentively reviewing OUG 34/2006 regarding the arrogation of the contracts for public acquisition, the contracts for the concession of public works, and the contracts for the concession of services, and HG no. 71/2007 regarding the adopting of the norms for executing the provisions regarding the arrogation of the contracts of the concession of public works and of the contracts of the concession of services as provided by the Government Emergency Ordinance no. 34/2006 regarding the arrogation of the contracts for public acquisition, of the contracts for the concession of public works, and the contracts for the concession of services, and HG no. 925 of 19/2006 regarding the approval of the norms of the execution for the provisions regarding the arrogation of the contracts of public acquisition of the Government Emergency

Ordinance no. 34/2006 regarding the arrogation of the contracts for public acquisition, the contracts for the concession of public works, and the contracts for the concession of services and HG no. 1660/2006 regarding the adopting of the norms for the execution of the provisions regarding the arrogation of the contracts of public acquisition by electronic means of the Government Emergency Ordinance no. 34/2006 regarding the arrogation of the contracts for public acquisition, the contracts for the concession of public works, and the contracts for the concession of services, they noticed that they had taken over some of the instruments advanced by the previous rules regarding the public-private partnership [13].

Moreover, even in the absence of a normative act that specifically stated the public-private partnership, HG no. 34/2009 regarding the organizing and functioning of the Ministry of Public Finance provided the existence of the Central Unit for the Coordination of the Public-Private Partnership, that had the following responsibilities: ensuring the elaboration and the strategy of the Romanian Government for advancing and implementing such projects as the public-private partnership; establishing and advancing the proceedings for the identification and structural of such projects as the public-private partnership; and of supporting the authorities of the central and local public administration when preparing and implementing such projects as the public-private partnership, the administration of the database regarding such projects.

Afterwards, Law no.178/2010 regarding the public-private partnership was adopted, but it did not consider the European legal context.

As a result of Inform no. 724 of the 26th of January 2011, by which the Permanent Representation of Romania to the European Union informed the Romanian authorities of the fact that the European Commission recommended the modification of the law regarding the public-private partnership (named PPP in what follows) in order to make it compatible to the *acquis* and the European rules within the public acquisition and concession domains, to which was added that the case had already been sent to be included within the EU Pilot system that proceeds the proceedings of community right infringement, OUG no. 86/2011 regarding the modification and completion of the Law of public-private partnership no. 178/2010 was adopted.

This modifying normative act contained rules regarding the basic principles, the definitions of the public-private partnership, the types of contracts of partnership, the domain of implementing, its public partners, the procedure of negotiation without previously publishing an announcement for participation, the alternative offers, the stages in assigning

a contract of partnership, and the litigations at the Central Unit for the Coordination of the Public-Private Partnership.

After several successive modifications, brought by OUG no. 39/2011, OUG no. 86/2011, Law no. 76/2012, OUG no. 44/2012, OUG no. 96/2012, and OUG no. 4/2013 this normative act was adopted as well as the Law no.100/2016 regarding the concessions for works and services. [6].

4. European guiding marks for the public-private issue

The expression public-private partnership was not formally defined within the legislation of the European Union, but it generally refers to the cooperation under various forms between the public authorities and the business world with the purpose of ensuring the financing, the building, the renovation, the administration, and the supporting of the infrastructure or of offering certain services.

The Green Book of April, 30 2004 defines them as forms of cooperation between the public authorities and the business world with the purpose of ensuring the financing, the building, the renovation, the administration, and the supporting of the infrastructure or of offering certain services.

The European Commission and the European Court of Law of the European Union tend to consider any cooperation between the public and the private actors as belonging to the public-private partnership, and the juridical terms that this form of cooperation addresses are usually the contracts of public acquisition and the concessions. If the former have a specific juridical regime, provided by the secondary competitive rules, the provisions of the Treatise that appoints the internal market of the European Community, as well as the rules of the European Court of Law regard the concessions. The ways of institutionalizing the PPP consist either of a contract, in this case the relationship between the public and the private partners is of a purely contractual nature, or for the purpose of creating a new economic entity which is controlled by both the public and the private partners [8].

On the 28th of March 2014 three significant directives for the contracts of public right were published; on the one hand, they developed the community law of the kind, and on the other hand they represented a real proof that the perspective of the European Union on those was continuously evolving, and they were Directive 2014/23CE regarding concessions, Directive 2014/24/CE regarding public acquisition, and Directive 2014/25/CE regarding utilities.

When the legal context specific for the public-private partnership is missing, the principles and the legal instructions of these directives are to be implemented on the projects of public-private partnership, according to the type of chosen partnership.

5. Law 233/2016 regarding the public-private partnership

In an apparently short interval of time, the Romanian legislator adopted a new normative act, respectively Law no. 233/2016 regarding the public-private partnership [7].

Although this new normative act comes to fill the void left by the adopting of Law no.178/2010 regarding the public-private partnership, its adopting was realised as a result of a difficult process, which started in September 2013 when the project of law entered the Senate as the first chamber concerned.

On the 17th December 2013, the project of law had already been adopted by the Senate, as well as by the Chamber of Deputies, but on the 13th of January 2014 The Romanian President asked that it should be re-examined.

Again, the project was adopted by the two chambers of the Parliament, but on the 19th of June 2014, its directives were criticized as not being constitutional.

By Decision 390 of the 2nd of July 2014 regarding the objection to directives of the article 38, line (1) and article 42 of the Law regarding the public-private partnership as not being constitutional, the Romanian Constitutional Court partly admitted the exception of there being no constitutional and it reckoned that directives of the article 38, line of the law affect the positive obligation of the public authorities to inform correctly the public partner, as this obligation was stated by article 31, line (2) of the Constitution.

After pronouncing this sentence, the project of law was amended and adopted by the Parliament and it was issued in the form published by the Official Monitor.

Because the former Law no.178/2010 regarding the public-private partnership represents the most recent normative act of the kind within the Romanian system of law and the successive modifications fulfilled the requests of the European law of the kind, we shall analyse it by comparing it to the new Law no. 233/2016 in the following paragraphs.

Only the general directives of this law will be analysed because although article 45 had established a due date of 90 days since the effect of

the law for the elaboration of methodological norms of implementation by the Ministry of Finance, which would be approved by HG, a due date that expired on the 25th of March 2017; until that date the project of those norms was not published yet.

In the first chapter of the law that contains general directives, we notice firstly the absence of the main principles of the public-private partnership; the former Law no. 178/2010 regarding the public-private partnership specifically enumerated those principles in article 2, line 1 (non-discrimination, equal treatment, transparency, proportionability, efficiency in using funds and taking responsibility).

Article 1 of the law mentions that the public-private partnership is oriented towards the **purpose** of realizing or, depending on the situation, of rehabilitating and/or of developing of some asset or of certain assets meant for public service and/or for the administration of some public service within the conditions of the present law. Compared to the appropriate directives of the law 178/2010, which indicated the fact that the project of public-private partnership that has the public purpose of projecting, financing, building, rehabilitating, modernizing, operating, supporting, developing, and transferring an asset or, accordingly, a public service, we reckon that the new rule is righter.

The new rule keeps the main conception on the mechanism of the partnership, but it brings an essential modification when it comes to the **issue of the financing of the project**. So, if article 3, line 3, letter b of the Law 178/2010 provided the fact that the financing of the PPP project is private, article 3, letter c of the new normative act provides, along with the general rule that the financing of the project “mainly out of private funds”, the possibility that the financing is made by adding the private funds to the public ones, with the mention that the public partner can contribute to the financing of the realization of the investments with public financial resources coming exclusively from external irredeemable post-admission funds and from the national contribution associated with them, within the conditions provided by the European Union legislation.

So we notice that this solution is completely opposite to that provided by Law 178/2010. Also, the new normative act brings under regulation in further detail the issue of the financing of the PPP project, by dedicating a whole section to it (Chapter I, section 4).

On this issue, the Report of the European Commission regarding the concept of the state aid as it is mentioned in article 107, line (1) of the Treatise regarding the functioning of the European Union.

The financial commitments of the public partner can consist in the constitution of certain rights in favour of the society of the project society or

of the private partner within the law; contributions in cash to the social capital of the project society; taking certain financial obligations towards the private partner or the project society; offering guarantees within the law in favour of the sponsors of the project of public-private partnership which are credit or financial institutions.

A quality of the new regulation is the fact that it imposes the rule according to which the contribution of the public partner to the project of public-private partnership will be done within the regulations regarding the state aid.

On this issue, the Report of the European Commission regarding the concept of the state aid as it is mentioned in article 107, line (1) of the Treatise regarding the functioning of the European Union [15] uses the European jurisprudence [2] underlining the fact that “when a transaction is made under the same terms and on the same conditions (and consequently with the same level of risk and compensation) by the public institutions and the private operators which are in the same situation (a transaction *paripassu*), as in the case of the public-private partnerships, normally it can be deduced that such a transaction is according to the conditions of the market. Instead, in the case when a public institution and the private operators take part in the same transaction at the same time, but under different terms or conditions, normally this indicates the fact that the interfering of the public institution is not according to the conditions of the market.

5.1. In terms of the parts of this partnership, another novelty is the enlargement of the spheres of the concepts of private partner and private investor. So, article 6, letter f of the law 233/2016 defines the private partner as being the private investor or the association of private investors that signed the contract of public-private partnership with the public partner, the old normative act referring to the private partner solely as a private investor. As for the private investors, the old normative act provides that they should have the quality of asset provider, of service provider, or executor of work – activating in the field that legally provide assets, services and/or work execution on the market, and the new normative act does not provide such a condition anymore.

Unfortunately, the defining of the public partners is short as a legal technique, in the way that instead of enumerating the terms as such, the legislator preferred to make reference to the contractual authorities or the contractual entities as in article 4 of Law no.98/2016 regarding public acquisition with later modifications, in article 4 of the Law no.99/2016, as well as in articles 9 and 10 of the Law no.100/2016 regarding work concessions and services concessions.

We reckon that the sphere of the public partners as indicated by the normative acts to which the law refers is correct, and their directives respect Directive 2014/23/CE regarding the concessions as well as Directive 2014/24/CE regarding the public acquisitions, and respectively Directive 2014/25/CE regarding the utilities as well as the community jurisprudence [16]. But although the sphere of these public partners is essentially established in correct manner it would have been preferable from the technical point of view that the law should have enumerated these terms within the content of the normative act, instead of referring to other normative acts.

5.2. In terms of the forms of public-private partnership, Law no.178/2010 regularized only the institutional public-private partnership, run by means of a project company whose investors were the public partner and the private partner. It was reckoned that this limitation had no ground and that it affected the liberty of the public partners to choose the type of contractual structure most suitable for a certain project under the circumstances that many projects that did not follow that formula had been successful.

As a response to this criticism, the new law of the public-private partnership dedicates within article 4, line 1 two forms, namely the contractual public-private partnership (the partnership is based on a contract settled among the public partner, the private partner, and the project society whose social capital is totally detained by the private partner) and the institutional public-private partnership (the public-private partnership is based on a contract settled between the public partner and the private partner by which the public partner and the private partner build a new society that will act as the project society and which, after being registered in the societies register, will become a part of the respective contract of public-private partnership).

5.3. Preparing the project and the assignment of the contract of public-private partnership. In order to make a contract of public-private partnership the following stages have to be overcome:

1. Preparing the substantiation study by the public partner on his expense and by means of a feasibility report. In the case of the medium and significant investment projects, the following of the specific stages is regularized by the Government Emergency Ordinance no. 88/2013 regarding the adopting of fiscal-budgetary measures in order to fulfil certain engagements agreed with the international institutions.

The Romanian legislator underlined the necessity of introducing the aspects linked to the obligations that are to be assumed by the public partner within the substantiation study because of its concerns to respect the European legislation and on the grounds given by the contract of public-private partnership, namely in what way the limits of public duty and financial shortage are affected when calculated according to the methodology applied according to the European legislation.

2. Going through the procedure of assigning the contract of public-private partnership which has to be done through transparent and competitive procedures, respectively open auction, private auction, and competitive dialogue, no matter the value of the contract (the procedure of assigning is similar to that used for public acquisition and concessions).

In the case of this issue, the Romanian legislator chose to make reference to the directives of the Law no. 98/2016 with later modifications, of the Law no.99/2016, or of the Law no. 100/2016, from case to case, according to the purpose of the contract and the way in which the substantiation study provides the transfer of one significant part of the operating risk of an economical nature linked to work exploiting and/or related services.

The corroboration of these legal directives show that the assignment of the contract will be exclusively done through transparent and competitive procedures, respectively open auction, private auction, and competitive dialogue, no matter the value of the contract. The documentation for the assignment will be published in SEAP, and in case of projects with a value higher than 5 million euros, the publishing will also be done in JOUE.

5.4. Directives regarding the contract of public-private partnership.

The new normative act consists of a more detailed enumeration of the contents of the contract of public-private partnership, as article 32 enumerates the content of the contractual conditions in 32 paragraphs (from letter a to v), but we need to mention that some of them will appear in contracts according to the nature of the partnership and the agreement of the parts.

Although the formulation is apparently imperative – “the contract of public-private partnership brings under regulation at least the following aspects (...)”, we reckon that no conditions referring to the project societies will be provided if the type of partnership is a contractual one and that neither the procedure or the limits of the outsourcing, when it is forbidden. On the other hand, information such as the purpose of the project which is realized through the public-private partnership, the duration of the contract,

the financial means, and the stages of the project of public-private partnership, the remuneration of the private partner, indicating in detail the way of calculating the remuneration and the paying, inclusively the possibility of compensations, deductions among the sums owed to the private partner and any possible prejudice payment or any other sums of money owed to the private partner, the way of allocating the risks within the project of public-private partnership, contractual responsibility, including sanctions and penalties given to the private partner in case it did not respect its obligations, especially in the case of not reaching or not pursuing its goals or the performance indicators, as well as, from case to case, the possibility of compensating the sums so owed by the private partner with payments owed by the public partner in accordance of the contract of public-private partnership or the mechanisms of sharing the profit are an essential part of this contract, in such a way that their absence will be sanctioned with the abolishment of the contract.

Another novelty that determines the versatile, adaptable character of the contract of public-private partnership is conferred by letting its **duration** to be decided by both parts, and they are kept to respect only the general limits such as the period of amortization of investments that are to be realized by the project society and according to the way of financing these investments and those determined by the necessity of avoiding the artificial restraining of the competition, of ensuring a reasonable profit for the respective field, as a result of exploiting the asset/assets that make the purpose of the project and of the ensuring of a reasonable and tolerable price height for the services that form the purpose of the project, which are to be paid by the beneficiary of the services.

6. Conclusions

By analysing the directives of the new law of the public-private partnership, we notice both the desire of the Romanian legislator to make the rules of these institutions in accordance with the European norms of the kind, and its option to turn it into a versatile instrument that suits the needs of the present society.

Unfortunately, the absence of norms for the putting it into practice makes its implementation impossible at the moment, and we are aware of the reaction of the Romanian public authorities imposing not to start such a partnership while these norms are missing.

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