Theoretical and practical aspects of the public-private partnership in the European Union

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Abstract: The European Commission, that established this notion in a Green Paper on public-private partnerships (PPs) (2004), considers such a partnership “forms of cooperation between public authorities and the world of business which aim to ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of a service”. Such cooperation involves the setting up of an entity with joint capital aiming at implementing public acquisitions or concessions. According to some researchers, the renewal of a concession contract complies with a general trend with multiple underlying causes, two of them being budgetary restrictions and the occurrence of certain financial needs in the infrastructure.

Today, the public-private partnership is a notion that appears more and more often in the economic media, within international institutions, in the political rhetoric, and in political, financial and legal publications. The notion, in its various forms, is used in most marketing documents, in the offer of products and services of major auditing and consulting firms, in business banks and in international law firms.

The creation and consolidation of the European Community accelerates this phenomenon not only by enhancing the budget constraints of Member States but also by increasing their needs to build a common market, mainly where investments in the infrastructure of the transport is concerned. The liberalisation of public services, initiated at European level, encourages the development of public-private partnerships.

Keywords: public-private partnership; România; European Union.

1. THE THEORY OF THE PUBLIC-PRIVATE PARTNERSHIP

Though it is old, the public-private partnership notion was promoted in 1997 with the publication of the Report, by the group gathered around Neil Kinnok, on the question of the financing projects regarding the trans-European transport network through partnerships between the private and public sectors [1]. The public-private partnership concept represents a form of “cooperation between a public authority and the private sector and between non-governmental organizations, business people associations or companies respectively” [2].

Because of the various forms of cooperation between the public authorities and the private sector, it is difficult and at the same time inappropriate to give a standard definition of the public-private partnership. There are different perceptions regarding this type of partnership, insomuch as there are different systems of administrative and public services organization which can be found within a diversity of religious, social and political backgrounds. The model of organizing the public administration (centralized-decentralized) and the character of the program which is about to be implemented (sectoral
character with national or local application) are considerations which determine the “centralized”, decentralized/mixed [3] or “integrated” [4] approaches in defining this type of concept.

Nowadays, the public-private partnership (PPP) is a notion more and more present in the economic media, within the international institutions, within the political discourses and the economic, financial and juridical publications. Under different forms, the theme is used in the majority of the marketing documents and in the offer of the products and services of big audit and consulting firms, of business banks or of international juridical firms.

The partnership projects between the public and private sectors as well as the financing of the projects have a long history [5]. For example in the Roman Antiquity, the harbor equipment, the plazas and the thermal establishments were exploited through concession granting. Le Digeste highlights the fact that those who worked in the public sector and who performed public activities/work were protected. Beginning with the 17th and 18th centuries, in France concession was used for building bridges and canals and the 19th century was considered the Golden Age of the concessions as well, the railways and the urban utilities (water, drainage, transport, light) being built in this way. Similar forms of partnerships we find in the U.S.A in the second half of 19th century in the construction of railways [6]. The public-private partnership form fell into place at the beginning of ‘80s in the 20th century through the cooperation between the local authorities and the private bodies for the implementation of some programs regarding the rehabilitation of some industrial areas which fell into decline [7].

The public-private partnership concept designates any form of cooperation between the public and private sectors. Of course, juridically, the way of expressing these partnerships differs from a juridical system to another. In the case of the juridical systems which had the French law as a base, the concession or public work contracts are more often met as forms of expressing the public-private partnership.

However, the PPP contract is perceived differently in specialized literature depending on how it is viewed:
- in the American and Anglo-Saxon doctrines the PPP represents an agreement between the private and public sectors, according to which services of public interest are provided, services which were provided until then by the public administration. The main features of such a partnership depend on the following aspects: the division of the investment, the risks, the responsibilities and of the benefits between the two partners.
- within the French doctrine the stress is laid upon the contract itself which regulates a new form of association of the private bodies regarding the exploitation of the public services and the investment in them as well. Due to the attention paid to the administrative contract, in this case, to the public-private partnership, this form of cooperation between the public and private sectors is very rigid.

The economic branches which the public-private partnership projects refer to are very diverse and they are not limited to infrastructures, they may refer also to maritime transports projects (harbors), to air transports (airports), to water distribution, to sanitation, to waste processing, to electricity, to gas, to general reconstruction, to research and development etc. The partnerships also refer to the social and exclusive activities of the state: justice (prisons, reformatory etc.), defense (the conversion of the sites, the construction and maintenance of the logistic resources, the troops carrying, logistic assistance within the foreign missions etc.) to education and health. To give a few examples, projects regarding sport
facilities, sewage treatment plants, garbage processing plants, cultural and touristic programs, IT services or public electricity will be elaborated.

The private sector stands out from the partnership with the public sector, by bringing an important contribution to the process of solving different public problems. The public-private partnership has registered lately a surprising development in providing multiple types of public services. Some researchers consider that the great interest shown by the governmental sector in the public-private partnership development, is a consequence of three factors: 1) the governments are interested in an effective reallocation of the resources they have; 2) the private service providers (profit and nonprofit) show a great capacity in the public services offer; 3) the idea of an increasing intra-sectoral complementarity in organizing and providing services is gradually developing;

The partnership is a form of cooperation in which the risks, the costs and the profits are equally shared among the partners. The reason of forming such partnerships varies but generally speaking it involves the financing, planning, creating, operationalizing and maintaining the infrastructure and the public services to provide some cost-efficient alternative public services. In other words, each partner contributes to the planning and mobilizing of the necessary resources to achieve a common goal. Each participant comes voluntarily and brings his own resources (financial, material, symbolic, authority etc.)

The appearance, creation and development of the partnerships in between the public and private sectors have advantages for the local administration bodies: they mobilize both the public resources and the private ones, they create new abilities and they learn from experience, they give confidence contributing to the consolidation of the partnership and enhancing the wish of a mutual help. Although the starting point towards a public-private partnership varies from the public administration who is interested in providing some public goods or services, to the private partner profit-oriented, subsequently the final goal being a common one: providing some cost-efficient services in the community. The significance of the public-private partnership term, extended from the cooperation between a public body and an economic agent from the private sector, to the cooperation between a public body and the nongovernmental, associative sector formed of controlled organizations under private ownership, but whose goal is answering to some public and social necessities and not just profit-oriented.

2. THE PUBLIC-PRIVATE PARTNERSHIP IN THE EUROPEAN UNION

The term of public-private partnership is not officially defined in the European Union, in general this indicates cooperation in different ways between the public authorities and the business branch in order to ensure the financing, building, renovation, management, the maintenance of an infrastructure or providing a service. The PPP is considered to be extremely dynamic, and the particular characteristics of the most agreements point certain circumstances, many of the individual components used for forming and structuring the specific partnerships [8] being used for different approaches of these agreements.

By imposing its hard budgetary constraints to its member states, the Maastricht Treaty, signed on 7th February 1992, brought indirectly forward, yet indisputably, the emergence of the public-private partnerships. The enforceability of the abatement of national budget deficits led to the drop of public costs, which by now, were earmarked to build some big developments and to public facilities.
Seeing the latter, they were indispensable to the accomplishment of public services and any delay in the developing of these domains was appreciable, the member states setting their face towards the private sector that it would get all the congruent assets.

The public-private partnerships, in Community Law, do not have a precise definition, which is related to jurisprudence or to a certain text, to which corresponds a juridical regime perfectly identifiable [9].

But taking into consideration the development of PPP, the civil authorities should classify the term or formulate a developing phenomenon. Thus, the *Green Card of public-private partnerships and the community law of public procurement and concessions* (30th of April 2004) of the European Commission defines PPP as a partnership between public authorities and the totality of companies concerned with ensuring funding, building, renovation, managing or maintaining an infrastructure or offering some services.

In European Union, the European Commission and the European Court of Justice tend to include in the sphere of the term public-private partnership any collaboration between the public and private actors, and the juridical categories for which this partnership applies, are usually the public procurement contracts and the concessions. If the former benefit from a specific juridical regime, provided by secondary competition law, the concessions apply the provisions of the Treaty institutionalizing the European Community regarding the internal market and the jurisprudence of the European Court of Justice. The ways of institutionalizing PPP are either represented by a contract, case in which the relation between the public partner and the public one is purely contractual, or by creating a new economic entity controlled both by the public and the private partners.

The concept of public-private partnership proved its utility in the economy of the states which used it and allowed the response to the essential necessities of the community, without charging the public finances, and at the same time to release the public power of the duties of simple administration. In the last years the public-private partnership has gained an increasing importance in point of social policies, because starting from the process of governance reform, it identified the idea of collaboration between different sectors (public, private, social) in order to properly and efficiently solve many of the challenges of the communities through the participation of all social actors. Based on the principle of voluntary cooperation, the public-private partnership represents the belief of public and private agents that their gain would be bigger than if they acted alone.

In order to succeed in such cooperation and to avoid failure one needs to do coordination of activities and decisions, a qualitative management of common action, which presupposes the acceptance by both partners of common rules and norms of operation; the partnership contracts must be well negotiated and legally structured; monitoring the private partner during all the phases of investment and operation, which requires from the public sector to have management knowledge, because the public institutions lack of competence could cause difficulties in managing the partnership.

The increasing usage of PPP may be explained by different factors. For instance, depending on the budgetary constraints which the European Union states confront the PPP projects answer to a more
obvious need of private funding of the public sector. This also shows the need for knowledge and operating methods of the private sector, as part of the social life.

Public authorities of the member states of the European Union frequently use PPP for making infrastructure projects, especially in the transport sector, public health, education and public safety.

In Europe it is known that using PPP can contribute to make European transport networks, which was delayed a lot, partially because there were not enough investments. According to the initiative of economic growth, the Europe Council approved a series of measures to increase the investments for infrastructure of Trans-European network and in pint of innovation research and development, also the establishing PPP contracts. All in all the member states of the European Union are very interested in the public-private partnership as a possibility of economic development, but applying it differently and in different domains.

3. THE PUBLIC-PRIVATE PARTNERSHIP IN ROMANIA

In Romania, the first public-private forms of partnerships took place especially at a national level from the middle of the 90s thanks to the emergence of sectoral and national strategies but also to some institutionalized structures such as the Tripartite Commission and the Economic and Social Council.

These partnerships contributed step by step to the creation of a cooperation background between the social and political actors.

The growth of the readiness of the private sector of taking the a series of responsibilities and risks, and also of the public sector of privatizing the public services resulted in multiplication of the efforts of introducing the concept of public-private partnership in accomplishing the objectives and the social-economic projects in Romania.

The challenges of the process of adaptation to the world’s economy - for instance, the law of offer and demand and the competition law - and of the process of Romania’s integration in the European Union - the rehabilitation of infrastructure, the water alimentation, recycling waste, protecting the environment, monitoring social security, providing a loyal and predictable business environment, - represent factors of using the public-private partnership as a way of cooperation between the public sector - the initiator of public utility projects and the private sector who owns funds and performant management.

At a national level the public local administration in Romanian need to find solutions for financing. Romania adhered to the EU assuming to keep to some standards for the public services which the local development level and the local resources cannot cover alone. The public local administration is asked to identify and use, legally, the resource that it has and the ones that it can have, without waiting a solution form the Government. This involves initiative for capitalizing the resources already had on a local level and in attracting private investors, but also the responsibility in managing resources and promoting public concern.

Today, the Law no. 178. 2010 of the public-private partnership, published in the Romania’s Official Monitor, part 1, no. 676 from 8th October 2010, with its posterior changes and additions, brings under regulations the method of making a public-private partnership having as public objective designing, building, rehabilitation, modernization, operating maintaining developing and transferring of a good or a
public service, depending on the case. The objective of the law is to bring under regulation the initiative and creation of public-private partnership projects for public operations in different sectors having private funding. The public-private partnership law applies for the course of a public – private partnership project between a public partner and a private investor after applying one of the procedures of designation of the private partner for the project agreement closure and also for the foundation and regulation of the activity of the project company.

All in all, according to the legal terms mentioned before, the contract of the public-private partnership, contains a public partner, always a juridical person, of civil law, whereas the private investor may be a physical/legal person but also a judicial person or associations of judicial persons of civil law or private law. The goal of closing the contract is always a public objective: the designing, the financing, the building rehabilitation, the modernization, the operation, the maintaining, the developing and transferring a good or a public service. Also the public-private partnership contract is a named contract which needs to be segregated from joint venture adjunctions and other adjunctions created by the authority which has another objective different from the one specified in the public-private partnership contract. The public-private partnership contract is reciprocal, burdensome and rights constituent.

What are the potential benefits and risks of the public-private partnership? Such a partnership acknowledges the fact that both sectors – public and private – have an equal importance, and that both of the advantages of the offer, come out from the development of their own abilities that must be used in the benefit of the public interest, in an efficient manner from an economical point of view. Thus, practically both of the sectors bring a specific contribution within the partnership, each of them assuming a part from the risks, but also from the benefits resulted from the PPP.

The public-private partnership is not the solution for providing all the services, as there are certain risks in the process of applying the partnership, especially if their adjustments to certain specific circumstances are not critically examined. Nevertheless, the administration gains significant benefits when the public-private partnership is used in an appropriate context, as it gets money related to projects elaboration, as well as the administration and maintenance of public services. The public-private partnership represents a way of introducing innovations regarding the manner in which the services are provided or organized, ensuring the improvement of quality and efficiency.

The public-private partnership is associated both with the potential benefits, and the potential risks that refer to the loss of control by the public authority. The control issue must be approached at the moment when the project is defined and kept raised in the process of negotiation of the contract, and in the final decision, the local authority has the duty to establish standards for services and to ensure the public interest. The combination between the local administration lack of experience and the unacquainted factors of decision with the public-private partnership can lead to political risks sometimes. The incapacity of the local authority to benefit from competition is another risk that would limit the capacity of local authority to produce innovations, efficiency and low prices. Thus, the competition between private partners in order to ensure their right to be part of a public-private partnership represents an important benefit for the local authority. The local authorities could not be able to benefit from this type of partnership if there is only a limited number of potential partners who have the experience or the ability to answer the requests. On the other hand, if the public-private partnership contracts are not well
structured, they can generate the decrease of the quality in services, providing services inefficiently or the lack of proper measures to maintain the utility.

In order to have benefits and minimize the risks, the local authority must establish a proper institutional framework, including politics, regulations, standards and proceedings, as well as human and organization resources towards achieving a successful public-private partnership.

Due to the multiple types of public-private partnership available for the administration, there are certain confusions related to the elements of the public-private partnership. Many times it happens that the public-private partnership is not taken into account as a possibility, just due to not having the correct information or due to some erroneous information based on bad conceptions, such as the fact by accepting PPP, the administration could lose the control over the provided services.

4. CONCLUSIONS

The public-private partnership represents a manner of introducing the private management in the public services through a long term contractual bound between an operator and a public authority. The public-private partnership ensures the public service partially or totally, based on the attracted private funds and appealing to the “know-how” of the private sector [10].

Among the advantages of the cooperation between the public and private sectors, we mention: accelerating the achievement of the objectives and projects related to infrastructure; combining the takeover of the responsibilities and the risks of the private sector with reducing the services of the public sector and the prompt payments; reducing the costs of the projects as a whole; stimulating the accomplishment of the contractual obligations assumed; the improvement of the quality of the public services; creating certain additional incomes that are interesting for the private sector and the improvement of the management of the public sector by exposing the services to the rigors and the requirements of the competition.

In conclusion, the public-private partnership (PPP) represents a viable manner of introducing the private management in the public services through a long term contractual bound between an operator and a public authority, appealing to the “know-how” and the resources of the private sector. First of all, this type of public-private partnership involves the existence of a good relationship between the public and the private sectors and it becomes possible only when the private one has an important value in the economy. Secondly, the agents of the public-private partnership (the public administration and the private entrepreneurs) keep their identity, their juridical personality, their direct responsibilities, and they own a “specific input”. In the case of a successful relationship, the cooperation of these is beneficial for all the parts, bringing new opportunities on a developing market.

In the present context of global economic-financial crisis, in which all the member countries of the European Union are in a real competition in order to attract available funding on the market and when it must be given special attention to the investments that do not bring consequences to the budget deficit and to the public debt of the state, it is very important an acceleration of the process of attracting private investments in projects of public interest significant at national level and very important at local level.
The public-private partnership must not be seen as a miracle of this period, but as a viable option, useful, among other existent traditional models. In time the practice has developed a great diversity of public-private partnerships, created by the quick progress, the multiple peculiarities of the contractual agreements and the contextual circumstances.

References

[8] Such as, for instance, the contractual clauses, the contributions in nature, the facilities for funding or the offered grants.