ADVANTAGES AND RISKS OF USING THE PUBLIC-PRIVATE PARTNERSHIP IN ROMANIA

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This article presents the advantages and risks of the public-private partnership in realizing the public investments in Romania. Public-private partnerships refer to the forms of cooperation between public authorities and private entities and target the regulation of the design, financing, construction, operation, rehabilitation, development, rental and transfer of any public work, asset or public service. It is a formula agreed by the public authorities by which the solving of public problems of general interest is "commissioned" by attracting entrepreneurs from the private sector.
One of the main arguments for supporting the public-private partnerships in case of public investment projects is the transfer of the managerial competencies and of the know-how from the private partner to the public one.
One of the main risks of the public-private partnerships is related to the temptation of using the private-public partnerships as a means of eluding the budgetary pressure, which may lead to their inadequate use.
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Introduction

The involvement of the private sector in providing public assets is a longstanding practice in the Organisation for Economic Co-operation and Development countries. Public-private partnerships are effective means to deliver infrastructure projects (which may produce a rapid return to economic growth in the current context), to provide public services and to innovate. Public-private partnerships are attractive to the private sector because the investment is recovered either by governmental transfers and/or by charges applied to the users of the facility. As benefits are obtained by the participation of the private sector (practicing innovative solutions, better allocation of inputs), public-private partnerships can represent a better solution than the traditional public procurements.

In the EU, public-private partnerships have developed in the transport sector, in the area of public buildings and equipment (schools, hospitals, prisons) and the environment. Many EU Member states only have a limited experience of public-private partnerships or none at all (Mihai Petrescu, 2010: 54). In terms of overall management of public services or the construction and operation of public infrastructure in the EU, the spread of public-private partnerships is still rather limited.

Of the entire EU, Great Britain uses the most the public-private partnerships; the total value of the 935 agreements of this type is £66 billion. The sectors preferred in the public-private partnerships in Great Britain are the transport sector (road, rail), building prisons, hospitals and public housing.

In the paper *Public-Private Partnerships and Investment in Infrastructure,* Sónia Araújo and Douglas Sutherland underline that public-private partnerships are best suited when there is a positive externality between the construction and the operating phase, which gives incentives for the private sector to internalise the costs of service provision and asset maintenance in its decisions at the construction phase. To allow the private sector to explore innovative solutions, the contract should lean towards output specification rather than input requirements. In the absence of this positive externality, the government should grant the private sector the ownership of the asset. In this case, public-private partnerships are more suitable for leisure centres and public housing, as the number of buyers is potentially higher, allowing the private sector to enjoy a higher bargaining position relative to a situation where the public sector is the sole buyer.

The recent economic crisis has had a major negative impact on public-private partnerships projects due to the fact that there has been a marked reduction in the availability of bank lending and a significant deterioration of the financial conditions offered for public-private partnerships lending and also some national governments and regional authorities have reduced or put on hold their public-private partnerships programmes.

1. Legislative framework of the public-private partnerships in Romania

Public-private partnerships refer to the forms of cooperation between public authorities and private entities (NGOs, businessmen associations, companies) in order to realize a project with positive effects. These partnerships target the regulation of the design, financing, construction, operation, rehabilitation, development, rental and transfer of any public work, asset or public service. The role of the public partner is to finance and to implement the general interest objectives, to establish the prices. The role of the private investor is to finance, design, realize and operate on economic criteria the objective of the public-private partnership agreement.

Currently, these public-private partnership agreements for public works in various fields of activity are regulated by the much-disputed Law 178/01.10.2010 and by its Application norms, the Government Emergency Ordinance 39/21.04.2011 to amend and complete the Public-Private Partnership Law 178/2010 and the Government Emergency Ordinance 86/17.10.2011 to amend and complete the Public-Private Partnership Law 178/2010.

The public-private partnership agreements had been regulated before by the Government Ordinance 16/2002, which was abrogated once the Government Emergency Ordinance 34/2006 entered into force, concerning the public procurement contract awarding; the notion of "public-private partnership" was replaced with that of "work concession", which led to confusions in the business community. This legislative initiative proved to be an obstacle to the development of public-private partnerships because of several reasons, out of which the most important is, in my opinion, is the fact that not all the ways of realizing the public-private partnerships were regulated. A proof of this is the very small number of public works and public services concessions, where we cannot find the concept of "partnership", as it was replaced with that of "concession".

The Public-Private Partnership Law 178/2010 defines under Art. 4 the *public-private partnership agreement (project agreement) as* the legal document concluded for a definite term between a public authority and a private investor after the whole completion of the stages of preliminary analysis, selection of private investors, conclusion of the project agreement, negotiation. Before concluding this partnership agreement, another legal document must be concluded – *the project agreement*, for the purpose of preparing the public-private partnership agreement.

Art. 4 of the Law 178/2010 also regulates the functioning of the *project company* – the company residing in Romania, having as associates or shareholders both the public and the private partner, which are represented on a pro rata basis according to the quota of participation in the public-private partnership project, the public partner participating with a contribution in kind; The assets of the projects company, classified as non-assets, will be registered in the quarterly and yearly financial statement of the involved public partner, for the only purpose of the public-private partnership development. It will function throughout the period during which the public-private partnership agreement is developed and it will be closed at the date of its end.

Throughout the development of a public- private partnership agreement, the partners' related rights and obligations cannot be assigned. The project company cannot change its subject of activity and cannot develop economical operations which are beyond the precise purpose of the public-private partnership for which it was created or of its development for the community's benefit.

Upon the completion of the public-private partnership agreement, the project company transfers free of charge, the public asset achieved under the public-private partnership agreement, in a

good state, exploitable and free of any charges or obligations. The properties resulted from the implementation of the public-private project and the lands occupied by the project, except for the assets under public property, and that cannot be disposed of or encumbered can be mortgaged, pledged and they can be guarantees for the party financing the public-private project, during the validity period of the agreement.
Since the negotiation procedure initially included in the Law 178/2010 ignored the community norms referring to the obligation to ensure the transparency of the procurement procedure and real remedies for those whose candidateships had been rejected, the Government Emergency Ordinance 39/2011 stipulates only two procedures of awarding the public-private partnership agreement: the open procedure and the competitive dialogue procedure.
The value thresholds for the public-private partnerships agreements, which are actualized by Government Decision are the following (Law 178/2010, art.5 (1)):

- The equivalent in lei of 125.000 Euros without VAT, for assets and services;
- The equivalent in lei of 4.845.000 Euros without VAT for works.

The public-private partnership can be realized by the conclusion of agreements having as object assets, services or works. Art. 4(1) of the Government Emergency Ordinance 86/2011 specifies that these public-private partnerships agreements having as object works, assets and services include the agreements awarded for the execution of a relevant activity in the fields of public utility: natural gas, thermal and electrical energy, sewage, transport, postal services, exploration and extraction of oil, gas, coal or other solid fuels, ports and airports.
Art. 11 of the Law 178/2010 stipulates that the law does not apply to the conclusion of public-private partnership agreements that:

- have as object the purchase or lease, by any financial means, of lands, existing buildings, other immovable assets and rights to the same;
- refer to the purchase, development, production or co-production of programs for broadcasting purposes, by radio and television institutions;
- refer to the provision of arbitration and conciliation services;
- refer to the provision of financial services with respect to the issuance, purchase, sale or transfer of movable assets or other financial instruments;
- refer to the employment of labor force, namely the conclusion of employment contracts;
- refer to the provision of research – development services fully remunerated by the public partner and whose results are not exclusively dedicated to it, for its own benefit.

The Government Decision 1000/20.10.2011 abrogated the whole chapter III which specified the types of public-private partnership agreements. Thus, Romanian legislation does not limit the types of public-private partnership agreements which may be concluded. The partners may establish various types of public-private partnership agreements, provided that the Law 178/2010 is respected, together with its application norms, as subsequently amended and supplemented.

2.Public-private partnership versus concession

The *public-private partnership* is a formula agreed by the public authorities by which the solving of public problems of general interest is "commissioned" by attracting investors from the private sector. Usually in this type of association, the public authority has a contribution in kind (material resources, lands, buildings) and the private investor contributes with the knowledge, logistics, managerial experience and the financial support of the business. The public-private partnership, developed due to the existence of the project company, is characterized by the fact that the public sector and the private sector co-operate according to reciprocity principles, each of them having its own objectives: satisfying the general interest for the local government of municipalities and obtaining profit for the private partner (Marian Stoian, 2010:172).

The main form of public-private partnership used in the EU member states is *concession,* also used in Romania until the Law 178/2010 was passed, stipulating under art.10 that the conclusion of public-private partnerships is not possible if one of the following conditions is met:

- *the public works concession agreements and the services concession agreements* regulated by Government Emergency Ordinance no. 34/2006 on the award of public procurement contracts, of public works concession agreements and of services concession agreements, as approved, as subsequently amended and supplemented by Law 337/2006, as subsequently amended and supplemented, and the related legislation;
- *the agreements on the concession of assets under the public property*, regulated by Government Emergency Ordinance no. 54/2006 on the regime of the concession agreements of assets under public property, as approved, as amended by Law 22/2007, and by the related legislation;
- the joint venture agreements regulated under the law.

I have to mention *the main differences between a public-private partnership agreement and the concession agreement:*

- for the public-private partnership there are only two types of procedures (the open procedure and the competitive dialogue procedure), according to the updated Law 178/2010, compared to the four types of procedures stipulated in the Government Emergency Ordinance 34/2006 for the concession (open tender, restricted tender, competitive dialogue, negotiation with the prior publication of a participation announcement*).*
- For the public-private partnership, according to the updated Law 178/2010, there is no restriction/conditioning to subcontract with third parties some works, while according to art. 225 of the Government Emergency Ordinance 34/2006, the concessionaire must subcontract with third parties at least 30% of the overall value of the works subject to the concession.
- Unlike the concession agreement, the public-private partnership agreement does not entitle the public partner/contracting authority to receive from the public investor payment of a preset amount for the right to exploit for a definite term the services or the achieved asset.
- In case of public-private partnership, the risk of work interruption on a certain project is much smaller than in case of concession, where, as seen before, in some situations, this led to significant delays. Moreover, regardless of the situation of ending the cooperation before the settled term, the works already done remain in the project company patrimony.

3.Advantages of using public-private partnership in Romania

Public-private partnerships refer to the forms of cooperation between public authorities and private entities and target the regulation of the design, financing, construction, operation, rehabilitation, development, rental and transfer of any public work, asset or public service. The role of the public partner is to finance, establish and implement the general interest objectives, to establish the prices and the quality of the assets/works/services. The role of the private investor is to finance, design, realize and operate on economic criteria the objective of the public-private partnership agreement. The sharing of responsibilities and of the financing necessary in order to realize the investment, but also the risk-sharing are stipulated in the agreement.

A first argument for supporting the public-private partnerships in case of investment projects is *the transfer of the managerial competencies and of the know-how from the private partner to the public one.* The contribution of the private sector consists in capital or other assets and in the transfer of managerial competencies to the public sector, ensuring thus a modern management and performant economic models to the public sector, compensating the lack of expertise of the

technical personnel of the public administration. On the other hand, the public sector ensures rules, financial stability and sometimes a redistribution of resources for the private sector.
A second argument for using public-private partnerships is that *they diminish the immediate pressure upon the public financial resources by providing an extra source of capital*. In turn, the participation of the public sector within a project offers serious guarantees to the private investors, regarding the long-term flows of capital, as well as regarding the integration of some social and environmental benefits in the projects (Mihai Petrescu, 2010:53).
A third argument for the development of public-private partnerships in Romania is the fact that *they can reasonably transfer a part of the risks to the private partner*. If the tasks are well distributed, an efficient risk sharing and management decreases the project costs.
A fourth argument is the possibility *to obtain lower long-run costs for the Romanian state* and also the fact that it will not have to make any payment until the service is provisioned according to the agreement. The lower project costs can be explained by the fact that the private partner can borrow funds easier and with lower interest rates than the public authorities. The financing costs of public investments projects are distributed during the whole life of the asset, which determines a diminishment of the immediate pressures upon public budgets,
Moreover, these public-private partnerships realize the mobilization of private financial resources and their association to the public financial resources, which, in the current economic context, when we must maintain the discipline of public finances, is a very important advantage, taking into account that Romania, just like the rest of the EU member states wants to increase the rhythm of the investments.
But, in order to have a positive activity in the PPP field some conditions have to be fulfilled such as: the stability of the cash flows, the punctual and complete provision of services, according to the agreement, the existence of a stable commercial law and of a stable profit rate.

4.Risks associated to the public-private partnership in Romania

The option to deliver infrastructure services by public-private partnerships is not free of risk, as Douglas Sutherland observes in his paper *Public-Private Partnerships and Investment in Infrastructure*.
First of all, *the advantages of the participation of the private sector are not guaranteed in a public-private partnership*. The result depends on several elements, from the correct identification of the most effective offer, to the adequate risk sharing and to the contract relationship established between the public and private partners.
Secondly and probably most importantly, *the temptation of using the public-private partnerships as a means of eluding the budgetary pressure may lead to their inadequate use.* The political decision makers must carefully analyze the option of provisioning infrastructure services by public-private partnerships, taking into account the specificity of the asset as opposed to the traditional public procurements. Because of the corruption existing in our country, the public-private partnerships are the most exposed to become “black holes” for public money if a permanent monitoring from the qualified authorities doesn’t take place.
In the third place, in Romania, not all the levels of the public administration have the specific structures for the evaluation of partnership opportunities and projects, and thus the regional development programmes cannot be correlated to the local ones.
In the fourth place, private investors are reticent about concluding public-private partnerships with the Romanian public authorities, given the lack of guarantees for financial risk coverage and investment recovery. The Romanian state can offer financial guarantees for a certain public investment of maximum 49% of its overall value.
Besides these inconvenients, the effective conclusion or implementation of a public-private partnership is affected by the difficulty to harmonize the interests of all the involved partners, by the lack of trust from the initial implementation period of the partnership and by the fear that the

partnership might be transformed into an immediate source of profit (Institute for Public Policy, 2004, 26).

Conclusions

The recent economic crisis has had a major negative impact on public-private partnerships projects, which have been reduced or even put on hold.

The development of public-private partnerships is, therefore, currently being restricted by two factors: the significant increases in the cost of debt for public-private partnership projects and the substantially reduced maturities being offered by banks on their debt.

Romanian public administrations use on a limited scale the public-private partnership as a tool for local development. A strategic approach of local development on a department level and the establishment of a relationship between the local development of the department and the region are necessary for the public administration to be able to promote the partnership system.

Therefore we need a modern and flexible public administration, which can manage the priority public investments for local development, which includes as an implementation tool the public-private partnership.

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