

Legislative evolution of public-private partnership in Romania

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ABSTRACT

In 2018 it is extensive debate regarding the use of public-private partnership (PPP) contracts in most important public investments, so-called strategical investments. On one hand, governmental experts and the National Commission for Prognosis considered that these investments cannot be financed from public funds and the only possible way to realise any of these investments it is a PPP contract. On the other hand, European Commission, i.e. commissioner for regional policy, informed the public opinion that there are European funds to finance the strategical investments and that there is no need to use a PPP contract.

In the light of this debate, the scope of the current material is to present the PPP legislation in Romania over the last years, its evolution and the main characteristics of the Romanian PPP contract under the current law.

KEYWORDS: *public-private partnership, concession, public investment, public funds*

1. Introduction

A public-private partnership contract represents a specific type of agreement based on which the public entities and private sector collaborate in order to provide strategic and important public investments in different fields such infrastructure (roads), social (hospitals, utilities, prisons) or environment (water waste treatment, waste management). In some jurisdiction this type of agreement is governed by the general rules applicable to concession contracts and in other jurisdictions is governed by a special law (PPP law). There is no general international definition of a PPP but in the Recommendation of the Council on Principles for Public Governance of Public-Private Partnerships¹⁾, Organisation for Economic Co-operation and Development (OECD) is mentioned that a PPP contract is a “long term contractual arrangement between the government and a private partner whereby the latter delivers and funds public services using a capital asset, sharing the associated risks”.

¹⁾ <http://www.oecd.org/gov/budgeting/oecd-principles-for-public-governance-of-public-private-partnerships.htm>.

In the Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (“Concession Directive”)²⁾, it is included a general definition of the concession being “a contract for pecuniary interest by means of which one or more contracting authorities or contracting entities entrusts the execution of works, or the provision and the management of services, to one or more economic operators”, having as “consideration the right to exploit the works or services or in that right together with payment”.

Basically, a public authority can use a concession contract or a PPP contract either for the execution of public works or for provision and management of public services.

In accordance with the Romanian current legislative framework, a public entity can finance public works (i.e. public investment³⁾) or services from any of the following sources:

- a) public funds from the public budget or
- b) private funds.

In case the public funds are available in full for the realization of a public investment the public entity can enter into a public procurement contract in accordance with the current law in force, i.e. Law no. 98/2016⁴⁾ regarding public procurement.

If there are limited or no public resources, the public entity could choose to initiate a public procedure to use private funds from private investors to procure public assets or services and in such situation the public authority can sign one of the following contracts:

- a) public works or services concession contract under Law no. 100/2016 regarding works concession and services concession⁵⁾ (“Concession Law”), as supplemented and amended.

²⁾ Published in the Official Journal of the European Union, L 94/1 of 28.3.2014.

³⁾ Public investment is defined in the Emergency Government Ordinance no. 88/2013 on certain fiscal measures aimed to fulfil commitments agreed with international bodies, as well as amending and supplementing certain normative acts, published in the Official Gazette no. 593 of 20 September 2013, as “*the investment made by or on behalf of a central public authority, of a local public administration in the case the project being cofinanced from funds allocated from the state budget through national programs or by a undertaking controlled by the state and is classified in the public sector under Regulation (EC) no. 549/2013 of the European Parliament and of the Council of 21 May 2013 on the European system of national and regional accounts in the European Union. Investments financed from loans guaranteed by the state, contracted by a local authority or by an undertaking state-owned and classified in the public sector under Regulation (EC) no. 549/2013 of the European Parliament and of the Council of 21 May 2013 on the European system of national and regional accounts in the European Union and investments developed under a public-private partnership are also public investments*”.

⁴⁾ Law no. 98/2016 was published in the Official Gazette no. 390 of 23 May 2016 and transposed Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, p. 65-242.

⁵⁾ Law no. 100/2016 was published in the Official Gazette no. 392 of 23 May 2016 and transposed Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94, 28.3.2014, p. 1-64.

b) a public-private partnership contract as regulated by Emergency Government Ordinance no. 39/2018 on Public-Private Partnership⁶⁾.

As already stated in the Romanian doctrine⁷⁾, the delimitation between a PPP contract and a concession contract is an interesting and important subject because the public entity has to choose between one of these two types of contracts. In the Romanian academic literature⁸⁾, the public-private partnership contract was defined as a form of cooperation between public authorities and private investors. The public partner (public authority) has the obligation to perform an economic analysis in accordance with the international parameters⁹⁾ in order to determine if more than 50% of the income to be obtained during the implementation of the PPP contract derives from public partner or other public entities in the name of the public partner.

The PPP contracts represent a debated subject in 2018 and from legal perspective the subject is not exhausted. The current article includes a presentation of the Romanian legislation and its evolution over the last years but also the main characteristic of this contract in the specific Romania piece of law governing PPP contracts.

2. PPP legislation in Romania

The first law regulating PPP in Romania was **Government Ordinance no. 16 of 24 January 2002** regarding public-private partnership contracts¹⁰⁾. In the initial form of the law the PPP project was defined as a “project that is wholly or mostly realized with own financial resources or contracted by an investor, based on a public-private partnership model, resulting in a public good project”¹¹⁾ and the PPP contract was defined as a “the legal act stating the rights and obligations of the public authority and the investor for the entire period of operation of the public-private partnership, covering one or more of the stages of preparation, financing, construction or exploitation of a public good for a specified period of time, but no more than 50 years”¹²⁾. The Law no. 470/2002 while approving the G.O. no. 16/2002

⁶⁾ Emergency Government Ordinance no. 39/2018 on Public-Private Partnership was published in the Official Gazette no. 427 of 15 May 2018.

⁷⁾ Gherghina, Simona. *Public contracts crossroads: Concessions or Public-Private Partnerships?*, in the *Romanian Public-Private Partnership Law Review*, no. 5/2013, p. 12.

⁸⁾ Rațiu, Monica; Gherghina, Simona. 2011. *Comments and Annotations to the Public-Private Partnership Law*, Bucharest, Romania: R.A. Official Gazette, p. 30.

⁹⁾ Farquharson, Edward; Torres de Mästle, Clemencia; Yescombe, E.R. and Encinas, Javier. 2011. *How to engage with the Private sector in Public-Private Partnerships in Emerging Markets*, World Bank.

¹⁰⁾ The Government Ordinance no 16/2002 was published in the Official Gazette no. 94 of 2 February 2002 and approved with modifications by the Law no. 470 of 9 July, published in the Official Gazette no. 559 of 30 July 2002.

¹¹⁾ Article 2 letter (b), G.O. no. 16/2002.

¹²⁾ Article 2 letter (e), G.O. no. 16/2002.

modified the definition of the PPP contract in the sense the duration of the contract was reduced to 49 years.

In 2004, Law no. 528 of 25 November 2004¹³⁾ modified G.O no. 16/2002 and Law no. 219/1998 regarding concession regime. One of the most notable changes is related to the combination made between PPP contract and concession contract, which generated a total confusion in this field. The scope of law was limited to the “public-private partnership contract for the concession of works” which was defined as “a contract having as object the execution or, as the case may be, both the design and the execution of one or more construction works, as they are included in the official statistical classifications, or the execution through any means of any combination of such construction works which meets the requirements of the contracting authority and which results in a result intended to fulfil a technical-economic function by itself. In exchange of the works executed, the contractor, as a concessionaire, receives the right to exploit the result of the works, in whole or in part, to which may be added, as the case may be, the payment of an amount”¹⁴⁾.

Usually, the main difference between a PPP contract and a concession contract is the legal regime applicable to each contract, i.e. the applicable law. In general terms, a concession is a form of cooperation between the public and private sector which could lead to the interpretation that any concession is a PPP. Based on this interpretation, it is correct to mention that Romania used concession contracts¹⁵⁾ for infrastructure investments (railways) since early days.

G.O no. 16/2002 was repealed by the Government Emergency Ordinance no. 34/2006 on the award of public procurement contracts, of public works concession contracts and of services concession contracts¹⁶⁾. One of the reasons for the abrogation of G.O no. 16/2002 is the fact that in the 2004 Regular Report on Romania’s progress towards accession¹⁷⁾ the European Commission mentioned that “Romanian Government has adopted ad hoc decisions derogating from the national public procurement rules” and “contracts, worth up to €2.023 billion in aggregate, are currently being negotiated on the basis of Romania’s public/private partnership law, which excludes certain types of contracts falling within the scope of the *acquis* from the scope of Romania’s public procurement legislation”. European Commission mentioned in the conclusion that “significant ad hoc derogations from Romania’s public procurement legislation and the award of large contracts without

¹³⁾ Law no. 528/2004 was published in the Official Gazette no. 1153 of 7 December 2004.

¹⁴⁾ Article 1.1.

¹⁵⁾ Negulescu, Paul. 1925. *Tratat de drept administrativ român*, Third Edition, Bucharest, Romania: Tipografile Române Unite, p. 241.

¹⁶⁾ G.E.O. no. 34/2006 was published in the Official Gazette no 418 of 15 May 2006 and was subsequently amended and supplemented and repealed in 2016.

¹⁷⁾ 2004 Regular Report on Romania’s progress towards accession, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/archives/pdf/key_documents/2004/rr_ro_2004_en.pdf accessed on 23 November 2018, p. 54.

open tenders have, however, raised serious concerns about the Government's commitment to open and transparent procurement rules. Romania should discontinue such practices and align those parts of the public/private partnership legislation falling within the scope of the public procurement acquis"¹⁸⁾. Romania was requested to abolish these provisions that were deviating from an open and transparent award procedure.

It seems that the idea to introduce in the Romanian legislation a specific law on PPP was not forgot and **Law no. 178/2010¹⁹⁾ on Public-Private Partnership ("Law no. 178/2010") was adopted.**

If under the previous law, several projects were initiated, even if those projects were not really PPP projects, under the Law no. 178/2010, as subsequently amended and supplemented no PPP project was initiated. Several comments can be made related to the provisions of this law. The PPP contract was defined by the law²⁰⁾, but the definition as not very useful: "the legal act providing for the rights and obligations of the public partner and private partner for the entire duration of the public-private partnership, covering one or more phases of the public-private partnership, for a specified duration". Probably this is one of the most general definitions of a PPP contract, having no particular element included in a law. It is important to reiterate that at EU level there is no legal definition of a PPP contract which is considered to be "form 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"²¹⁾.

One other peculiarity of the Romanian Law no. 178/2010 was that it provides for a classification of the PPP contract similar as the public procurement contract, in the sense that there are definitions of the PPP asset contract, PPP work contract and PPP service contract. The usefulness of this provision was analysed in doctrine²²⁾ and the conclusion was that this classification has no effect as concerns the legal nature of a PPP contract. This delimitation was included in the public procurement law related to the selection and award procedures as regulated by the E.G.O. no. 34/2006. Even if article 10 of Law no. 178/2010 mentioned that there is a clear delimitation between public-private partnership and concession contract still the inclusion of this classification had no real legal impact. In accordance with the provisions of Law no. 178/2010, the single criterion to identify a PPP contract

¹⁸⁾ 2004 Regular Report on Romania's progress towards accession, p. 55.

¹⁹⁾ Public-Private Partnership Law no. 178/2010, published in the Official Journal of Romania, Part I, no. 676/2010, amended by Emergency Government Ordinance no. 39/2011, published in the Official Journal of Romania, Part I, no. 284/2011 and by Emergency Government Ordinance no. 86/2011, published in the Official Journal of Romania, Part I, no. 729/2011.

²⁰⁾ Article 4 letter g).

²¹⁾ Green Paper on public-private partnerships and Community law on public contracts and concessions, COM/2004/0327 final.

²²⁾ Gherghina, Simona. *Considerations on the qualification and classification of public-private partnership contracts*, in *Romanian Public-Private Partnership Law Review*, no. 3/2012, p. 20.

was the fact that a PPP contract was an institutional type²³⁾. A PPP contract is a long-term, complex contractual structure in the sense that includes one or several concession contracts, depending on the subject of the contract (assets, works or services) or concession and public procurement contracts.

During its validity was modified by the Emergency Government Ordinance no. 39/2011²⁴⁾ and Emergency Government Ordinance no. 86/2011²⁵⁾, further to the observations of the European Commission regarding the PPP contract award procedures and the fact that the procedure to challenge the action taken during the award procedure did not comply with the relevant norms applicable in the EU at that time. The modifications to the Law no. 178/2010 were in the sense that the provisions of E.G.O. no. 34/2006 were included in the PPP law. In the end, the main difference between Law no. 178/2010 and E.G.O. no. 34/2006 was the existence of the project company which was jointly owned by the public partner and the private partner. One consequence of this interpretation was that, regardless of the legal nature of the contract concluded by the public partner, Law No. 178/2010 was applicable whenever a public partner was supposed to become a shareholder in a project company through which the envisaged public project should have been performed.

Another critic that was made to the Law no. 178/2010 referred to the fact that Law No. 178/2010 regulated the institutional PPP that was implemented through a project company the shareholders of which are the public partner and the private partner. In the doctrine²⁶⁾ was mentioned that the regulation only of the institutional PPP was an unjustified limitation of the freedom of public partners that could use a number of complex yet flexible contractual structures but probably the most important limitation was represented by the prohibition of PPP projects that were qualified as on-balance sheet, according to ESA 2010 Manual on Government Deficit and Debt²⁷⁾. In case of a PPP project qualified on-balance sheet, the PPP contract was absolute null and void, as per article 38 of Law no. 178/2010.

As mentioned above, even if Law no. 178/2010 was in force for six years until was repealed by the Law no. 100/2016 still no PPP project was realized under this regulation.

A new project was initiated and debated in 2013 passed in 2014 but returned to the Parliament due to the fact the Constitutional Court ruled that the provision allowing the unilateral modification of the PPP contract included in the law was

²³⁾ Ratiu, Monica. *Considerations on the institutionalised public-private partnership*, in *Romanian Public-Private Partnership Law Review*, no. 1/2012, p. 11.

²⁴⁾ Published in the Official Gazette no. 284 of 21 April 2011, approved by the Law no. 205/2015.

²⁵⁾ Published in the Official Gazette no. 729 of 17 October 2011, approved by the Law no. 206/2015.

²⁶⁾ Gherghina, Simona. 2015. *The financing of public investments between legal limitations and the public interest imperative. A Romanian perspective*, Bucharest, Romania: C.H. Beck Publishing House, p. 70.

²⁷⁾ <https://ec.europa.eu/eurostat/documents/3859598/7203647/KS-GQ-16-001-EN-N.pdf/5cfae6dd-29d8-4487-80ac-37f76cd1f012>.

unconstitutional²⁸⁾. The draft was again under the review of the Parliament and it was approved in 2016, as **Law no. 233/2016²⁹⁾ on PPP projects**. The law was modified and supplemented in 2017 by the Emergency Government Ordinance no. 104/2017³⁰⁾. This law was in force for less than two years. During its validity no PPP project was initiated or signed. This law was a step forward as the initial proposed version was drafted in cooperation with the group of professors from the Faculty of Law, University of Bucharest. There was no legal definition of the PPP contract in the proposed draft as the doctrine considered that there is no requirement to have such a definition in the law.

A public authority had the possibility to apply the provisions of the Law no. 233/2016 if “the feasibility study demonstrates that the revenue to be obtained by the project company from the use of the good or the operation of the public service which is the subject of the project is generated in majority by payments made by the public partner or by other public entities”³¹⁾.

The complexity of a PPP project was reiterated in the “Special Report of the Public Private Partnerships in the EU: Widespread shortcomings and limited benefits” published by the European Court of Auditors (ECA)³²⁾. The report was realized by a team of auditors who examined 12 EU co-financed PPP projects in France, Greece, Ireland and Spain in the fields of road transport and Information and Communication Technology (ICT). The founding’s of the ECA team should be analysed very carefully by all public authorities interested in PPP, including Romanian government. One positive aspect mentioned refers to the fact that “PPPs allowed public authorities to procure large-scale infrastructures through a single procedure”, but at the same time it was identified an increased “risk of insufficient competition” which putted the “contracting authorities in a weaker negotiating position”. One negative aspect that should be taken into consideration when initiated a PPP project is that “procuring PPPs typically requires negotiating on aspects that are usually not part of traditional procurement and therefore takes up more time than traditional projects. One third of the 12 audited projects were, with their procurement duration of 5-6.5 years, affected by considerable delays”. One other interesting aspect identified by the European Court of Auditors related to the audited projects was that “the PPP option was chosen without any prior comparative analysis of alternative options, such as Public Sector Comparator, thus failing to demonstrate that it was the one maximising value-for-money and protecting the public interest by ensuring a level playing field between PPPs and a traditional procurement”.

²⁸⁾ Gherghina, Simona; Ratiu, Monica. *In search of clarity of the law: commentary on the Constitutional Court's decision on the public-private partnership law*, in *Romanian Public-Private Partnership Law Review*, no. 10/2014, p. 26.

²⁹⁾ Published in the Official Gazette no. 954 of 25 November 2016.

³⁰⁾ Published in the Official Gazette no. 1037 of 28 December 2017.

³¹⁾ Article 2 of the Law 233/2016, as amended by the EGO no. 104/2017.

³²⁾ https://www.eca.europa.eu/Lists/ECADocuments/SR18_09/SR_PPP_EN.pdf.

As already mentioned in the Romanian doctrine, the decision to choose a PPP mechanism in order to implement a public project has “to rely on a rigorous analysis”³³⁾ made by the public authority. No project was launched as the Law no. 233/2016 requested to have norms adopted by the Government to explain different provisions of the law.

Even if Romania had PPP legislation but no implemented projects, the odyssey of the adopted laws continues. Law no. 233/2016 was repealed in 2018 by the **Emergency Government Ordinance no. 39/2018**³⁴⁾, being less than two years in force and no project was initiated.

In accordance with article 17 paragraph (4), the Government may decide to approve a list of strategical investments projects and to these projects will be prepared and awarded by the National Commission for Prognosis and implemented by the competent public authorities. Under this current regulation, the Government adopted two decisions, Governmental Decision no. 357/2018 approving the List of public-private strategical investments projects³⁵⁾, which included five projects and Governmental Decision no. 643/2018 supplementing the List public-private strategical investments projects³⁶⁾ with additional 16 projects.

The National Commission for Prognosis published until now the substantiation study for Ploiesti – Brasov motorway³⁷⁾ and the Public-Private Partnership Framework-Contract “Ploiești-Brașov Motorway”³⁸⁾ that should be signed between the National Commission for Prognosis and the private partner. The public partner empowered to implement this project is the Ministry of Transports through National Company for Road Infrastructure Administration (CNAIR) and the National Commission for Strategy and Prognosis is empowered to monitor the performance of the PPP project.

³³⁾ Ratiu, Monica. *The decision made by a public partner to implement a project as a PPP*, in *Romanian Public-Private Partnership Law Review*, no. 3/2012, p. 6.

³⁴⁾ Published in the Official Gazette no. 427 of 18 May 2018.

³⁵⁾ Governmental Decision no. 357 of 24 May 2018 approving the List of public-private strategical investments projects to be prepared and awarded as PPP by the National Commission for Prognosis, published in the Official Gazette no. 466 of 6 June 2018.

³⁶⁾ Governmental Decision no. 643 of 23 August 2018 supplementing the List of public-private strategical investments projects to be prepared and awarded as PPP by the National Commission for Prognosis, approved by the Governmental Decision no. 357/2018, published in the Official Gazette no. 739 of 27 August 2018.

³⁷⁾ Substantiation study Ploiesti – Brasov Motorway approved by the Governmental Decision no. 667 of 29 August 2018 and published in the Official Gazette no. 758 of 3 September 2018. http://www.cnp.ro/user/repository/Investitii_strategice_in_parteneriat_public_privat/Studiu%20fundamentare%20autostrada%20Ploiesti%20Brasov_en.pdf.

³⁸⁾ Public-Private Partnership Framework-Contract “PLOIEȘTI-BRAȘOV MOTORWAY”. http://www.cnp.ro/user/repository/Investitii_strategice_in_parteneriat_public_privat/Public_private_partnership_framework_contract_PLOIESTI-BRASOV_Motorway.pdf.

The new law is not very different from the Law no. 233/2016, except the main fact that it can be applied without additional norms approved by the Government.

One critic made to the previous Law no. 178/2010 referred to the fact that in the law were no clear distinction between a PPP contract and a concession contract. In the Law no. 233/2016 and in the E.G.O no. 39/2018 were included a clear provision, i.e. article 2 of E.G.O no. 39/2018, providing for a clear delimitation between a PPP and a concession contract. The basis of this provision is the principle established by EUROSTAT in the ESA 2010 Manual on Government Deficit and Debt³⁹⁾, in the sense that concessions are defined as those projects where most of the revenue comes from the final users of the service and not from the public entity, while in a PPP contract the majority of the partner's revenue under the contractual arrangement comes from government payments (e.g. shadow tolls). Currently, in order to initiate a PPP project, the public partner or the National Commission for Strategy and Prognosis have to have a substantiation study revealing that the estimated revenue of the project will be provided mostly by payments made by the public partner. In this case the public partner will apply the provisions of E.G.O no. 39/2018. If not, the project shall be a concession and the provisions of Law no. 100/2016 are applicable.

3. Features of a PPP contract under current legal regime

According to the EPEC PPP Guide⁴⁰⁾, a PPP contract (arrangement) is defined based on several elements:

- a) a long-term contract between a public authority and a private investor;
- b) transfer of certain project risks to the private investor, notably regarding designing, building, operating and/or financing the project;
- c) focus on the specification of project outputs rather than project inputs, taking account of the whole life cycle implications for the project;
- d) the application of private financing to underpin the risks transferred to the private sector;
- e) payments to the private sector which reflect the services delivered. The PPP Company may be paid either by users through user charges (e.g. motorway tolls), by the public partner (e.g. availability payments, shadow tolls) or by a combination of both (e.g. low user charges together with public operating subsidies).

Article 3 of the E.G.O no. 39/2018 describes the PPP mechanism as being defined by the following elements:

³⁹⁾ <https://ec.europa.eu/eurostat/documents/3859598/7203647/KS-GQ-16-001-EN-N.pdf/5cfae6dd-29d8-4487-80ac-37f76cd1f012>, p. 324.

⁴⁰⁾ European PPP Expertise Centre (EPEC). *The Guide to Guidance, How to Prepare, Procure and Deliver PPP Projects*, <http://www.eib.org/epec/resources/guide-to-guidance-en.pdf>, EIB, 07/2011, p. 5.

- a) cooperation between public partner and private partner in order to implement a public project;
- b) a fairly long-term contract, more than 5 years, allowing to the private partner to recover the initial investment and to make a reasonable profit;
- c) the financing of the project mainly from private funds and, depending on the case, from private and public funds;
- d) fulfilment of the pursued scope by the public and private partner;
- e) risk allocation between public partner and private partner, depending on the capacity of each party to evaluate, manage and assess a certain risk.

Also, Article 4 defines both the institutional PPP and the contractual one but will also impose it that the project should be implemented by a project company. The project company shall be incorporated for the sole purpose of carrying out the activities required directly and indirectly for the fulfilment of the object of the public-private partnership contract.

The first step that the public partner or the National Commission for Strategy and Prognosis has to take is to assess and justify the option to use the PPP mechanism by analysing the following main elements as part of the substantiation study: affordability of the project, risk allocation, debt and deficit treatment, bankability and value for money.

According to the international best practices the duration of the PPP contract is established primarily depending on the return period of the investment that the project company plans to make and/or depending on how this investment is to be made so as to ensure a reasonable profit for the respective business but also a reasonable and affordable level of the prices chargeable on the services supplied to the public. The duration of the PPP contract should be mentioned also in the substantiation study.

The possibility to use public funds in PPP projects is regulated and limited to 25% of the total value of the investment. Also, the public partner can finance the implementation of a project with EU funds and the national contributions equivalent to those EU funds, in accordance with EU legislation.

The private partner or, as applicable, the project company may create guarantees upon the rights acquired as per the contract as well as upon the shares held in the project company exclusively to the benefit of the project lenders that are credit institutions, financial institutions and/or international financial institutions and only for the duration of the PPP contract.

Throughout the development of the project, public funds may be used to make payments to the benefit of the project company in compliance with the provisions that regulate state aid and with the applicable public deficit limitations.

One other aspect included in Article 15 is that the public partner may be the direct beneficiary of the services supplied by the project company as part of the

project, but also another public entity or the public in general. This provision is similar with the one included in Law no. 233/2016.

The award of a PPP contract will be made in accordance with the provisions of Law no. 98/2016, Law no. 99/2016⁴¹⁾ or Law no. 100/2016, depending on the object of the contract and the manner in which the transfer of a significant part of the economic risk to the operation is carried out in connection with the operation of the works and / or services concerned.

Taking into consideration the current legislative framework governing PPP contract it is correct to say that the PPP contract is not a new type of contract, but it is just a combination of existing types of contracts including rights and obligations of the parties, most of them classifiable as concession of assets, works or services. As mentioned in the doctrine, there is no clear demarcation line between the legal regime of concessions and public-private partnerships. The main criterion used to differentiate between concession and PPP is the accounting principle included in the ESA Manual, as mentioned above depending on the source for the project revenues and the risks assumed by the public sector. There is no criterion used to differentiate from legal perspective, except the applicable law.

4. Conclusions

The objectives of the PPP law in any of the forms developed over last years in Romania are mainly related to the need to create a legal framework appropriate to attracting private financial resources into public projects. The use of private funds in public projects has also the scope to reduce the pressure on the public budget as there is not enough fiscal space to finance all public investments.

Nevertheless, for the time being no PPP project was developed in Romania and the public experience in concession contracts is also limited. In the next years the number of PPP and concession contracts should increase as the Government already approved 21 strategical public projects to be developed as PPP projects. Taking into consideration the economic demarcation between a concession and a PPP contract, several of the 21 projects are not PPP projects. It is necessary to mention that the European Court of Auditors in their 2018 Special Report considered that implementing successful PPP projects is possible only if there is "considerable administrative capability that can be ensured only through suitable institutional and legal frameworks and long-lasting experience in the implementation of PPP projects". This type of expertise is clearly not available in Romania and the local authorities should analyse the recommendations of the European Court of Auditors before promoting the use of PPP.

⁴¹⁾ Law no. 99/2016 on sectorial procurement, published in the Official Gazette no. 391 of 23 May 2016 transposed Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ L 94, 28.3.2014, p. 243.

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