

**PUBLIC-PRIVATE PARTNERSHIPS
IN CLUJ-NAPOCA
DEVELOPMENT TOOL FOR LOCAL COMMUNITIES**

**By
Bálint Balogh**

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Supervisor: Professor Károly Jókay, Ph.D.

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Executive Summary

The aim of this thesis is to present a realistic picture of how public-private partnership projects are being implemented in Romania, in more general terms, and in Cluj-Napoca, in more specific terms. The paper is structured into three main parts. The first one is presenting an overview picture of what public-private partnerships are, and what are their main characteristics. In the second part of the paper there is an analysis of the Romanian legislative framework in the field of public-private partnerships. The last part of the work is based on a case study in Cluj-Napoca and details specific contractual agreements between the Local Government and different private partners. The scope of the entire thesis is to show the fact that public-private partnerships represent a feasible solution for investments, and that public authorities should consider them seriously when they want to involve themselves in investment projects.

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Chapter 1 Theoretical framework of Public-Private Partnerships

1.1 Introduction into Public-Private Partnerships

What are Public-Private Partnerships? In the literature there are so many definitions of what Public-Private Partnerships (PPPs) are. Probably the most simplistic one which I found in a Guideline of The Romanian Chamber of Commerce, is the following:

PPP is a method of infrastructure development and serviced modernization, based on a partnership between the public sector and the private sector. As the title already tells, it is about a partnership between a public entity and a private entity. The interest of creating such a partnership lies in the ability of using more financial resources than the public party might be able to provide, and at the same time to use the private party's experience and know-how to administer the costs of the project in a more efficient way.

By involving public partners in such PPP type partnerships, the state authorities still remain responsible for maintaining the public interest and assure a specified level of service qualities. Shortly put PPPs allow authorities to provide modern and efficient services and to deliver an added value for the citizens.

According to Bennett and Krebs (1991) there is no unique form of partnership, there is “no specific form which is best in a given set of circumstances”, but rather there is a wide variety of forms, which varies from place to place and problem to problem. One main characteristic of PPPs is that there is no recipe for partnerships; due to their flexibility, different approaches can be used to handle different kind of problems. Kaul (2006) argues that it is very problematic to frame a definition “that would be wide enough to capture the broad gamut of partnerships yet precise enough for analytical as well as policy purposes”.

A very common misunderstanding of PPPs is that they are about private sector financing a public infrastructure (Grimsey and Lewis 2004). Financing is only one part of the whole. The quintessence of a PPP project is that the public entity does not buy an asset, but it is acquiring a “stream of services under specified terms and conditions”.

Rondinelli (2003) noted that the delivery of public goods or services by a private party is considered more effective and efficient than if public entities would have delivered the same goods or services. Despite this fact, if the PPP structure is not well designed and monitored there might appear a series of disadvantages which could lead to dissatisfactions. The same author emphasizes the fact that a government should enact adequate and transparent legislation, and should reshape its role from producing and providing goods or services, becoming a regulatory body over the private sector delivery.

In the same flow of idea, Batley (2001) argues that neoclassical economic theory claims that public intervention in service delivery is inefficient. He shows that there are many different arrangements between public and private sectors to deliver a service, depending on the service itself and on the organizational capacity of the public entity. The choices may be the followings:

- pure public sector provision
- contracting out service production and delivery
- lease, concession or license of monopolies
- licensed competition b/w producers
- partnership b/w public and private bodies
- joint ventures with beneficiaries
- public support for private consumption and provision

In practice there can be distinguished two main approaches towards PPPs. The first one is the UK Private Finance Initiative (PFI) approach; this is based on a contractual

framework which involves creating partnerships and joint-ventures (Bennett and Krebs 1991). They are a specific type of partnerships, characterized by “risk-sharing agreement directed at the attainment of specific policy objectives” (Vincent-Jones in Grimsey and Lewis 2004). According to the UK National Treasury these frameworks permit a high degree of central control, while avoiding the burden of the public sector borrowing requirements.

Another widely spread approach is the French concession model. It is a very different approach compared with the Anglo-Saxon countries. There is no specific legislation regarding it, however there is a coherent legal framework based on the long-lasting tradition of it. In particular it concerns the division of responsibilities between the operator and the public bodies (Ligniers in Grimsey and Lewis 2004). The main characteristic of this approach is the superiority of public entities over private partners: the concession contract remains subject to the principles governing public services activities. The infrastructure and buildings necessary for the provision of the public service are placed under the regime of public properties (under the property of the public entity, and are returned to them at the end of the contract).

1.2 Description of PPP projects

According to Pierson and MacBride (1996 cited in Grimsey and Lewis 2004) the arrangements in PPPs can take many forms and may incorporate some or all of the following features:

- the public entity transfers land, property or facilities to the private sector entity for specified number of years;
- the private sector entity builds, extends or renovates a facility;
- the public sector entity specifies the operating services of the facility;

- services are provided by the private sector entity using the facility for a defined period of time;
- the private sector entity agrees to transfer the facility to the public sector at the end of the arrangement.

1.2.1 Participants

The main actors involved in a PPP are the followings:

- 1) *Public sector* (central/local government and agencies, state owned enterprises)

In a PPP the government has always a permanent interest in the delivery of a good or a service. It is responsible for determining the goals of the agreement, assuring that the outcomes are delivered to the required quality and quantity standards, and ensuring that the public interest is safeguarded.

- 2) *Special Project Vehicle Company (SPV)*

It is a corporate body created specially to fulfill the tasks of a PPP arrangement. Private actors and the public entity are the sponsors or equity holders in the SPV, and they are responsible for meeting their contractual obligations.

- 3) *Financiers*

In order to finance the project, financial resources have to be attracted. The role of the financiers is to provide these financial resources. A precondition for this to happen is a safe revenue stream that will provide security for the financing institutions and encourage equity participation. In short, a corporate entity (SPV) must be created that can represent itself as an acceptable credit risk.

- 4) *Subcontractors*

The project company's obligations and responsibilities to the public procurer are delivered through specialized subcontractors. Functions that are usually subcontracted:

construction, equipment supply, and operation and maintenance, with a separate agreement for each.

5) Others:

- *Advisers*: provide financial, legal, technical to both the private and public sector
- *Rating agencies*: in case the PPP agreement is financed through a public issuance of bonds, rating agencies are consulted to provide credit ratings for the underlying debt
- *Insurers*: provide risk enhancement. Usually they work closely with project sponsors and lenders in order to produce an insurance package that limits risk at an achievable price

1.2.2 Typology

The main types of PPPs are the followings:

➤ *BOT (Build-Operate-Transfer)*

The private sector takes primary responsibility for funding (financing), designing, building and operating the project. Control and formal ownership is then transferred back to the public sector.

➤ *BOO (Build-Own-Operate)*

The control and the ownership of the contract remain in private hands. The private sector entity finances, builds, owns and operates an infrastructure facility effectively in perpetuity.

➤ *Leasing*

Part of the risk is transferred to the private sector. In France, most PPPs are performed under *concession* contracts (basically BOT-type contracts) or lease contracts (which cover design and building, or operation, but do not embrace project financing).

➤ *Joint Ventures*

The public and private sector jointly finance, own and operate a facility.

➤ *Operations or management contracts*

The private sector is only partially involved; it only provides a service or only manages the operation. These contracts allow the private sector to provide infrastructure-related services for specific periods of time.

➤ *Cooperative arrangements*

They are more informal than many of the equity partnerships and concession-type franchise arrangements for social housing projects.

These examples comprise the most common types of partnership, but there are also other types of PPP arrangements, like: DBFO (Design-Build-Finance-Operate); BLT (Build-Lease-Transfer); BLTM (Build-Lease-Transfer-Maintain); BTO (Build-Transfer-Operate); BOOR (Build-Own-Operate-Remove); LROT (Lease-Renovate-Operate-Transfer); DCMF (Design-Construct-Manage-Finance); DBFOM (Design-Build-Finance-Operate-Manage); OM&M (Operate-Maintain & Manage); O&M (Operate & Maintain).

There are many different types of PPPs and the models differ from country to country. The concept of PPP is evolving in different ways in each country where the arrangements are being put into practice. Grimsey and Lewis (2004) describe that some countries have a central body dealing with PPPs (e.g. Netherlands), some do so for particular applications (e.g. the UK), while others leave it to individual states or municipalities (Australia, USA).

1.2.3 Organization of PPPs

In a PPP structure several parties join in order to achieve infrastructure investment. Usually they form a separate legal entity, a so called SPV, created specifically for the project. Normally the execution of the agreed activity involves a number of parties, and the SPV enters into sub-contractual relationships with these. SPVs are used in PPPs for the following reasons (grimsey and Lewis 2004):

- to allow lending to the project to be non-recourse to the sponsors;
- to enable the assets and liabilities of the project not to appear on the sponsors' balance sheets (no sponsor has more than 50% of the shares in the SPV);
- for the benefit of the project lenders, to protect the project from a potential bankruptcy of any of the sponsors.

The parts involved in a SPV have clearly defined division of tasks and risks. In terms of which parties take the lead in organizing the agreement there are two approaches:

a) Traditional construction and facilities management approach

It is very common in UK. The contractors and service providers take equity stakes in the SPV, as a sign of their loyalty to the project and its provision. Investors with stronger financial interest take a more prominent role in the project.

b) Financier-led approach

It has developed in Australia in recent years. Specialized investment banks have a more active role in managing the SPV. They take 100% of the equity and guarantee capital market issues and all the other contractual elements.

1.3 Characteristics of PPP projects

- *Participants*: involves two or more parties, and at least one of them is public entity.

- *Relationships*: continuing and for a long-term.
- *Resourcing*: each of the participants must bring something of value to the partnership. PPPs seek to draw on the best available skills, knowledge and resources, from both the public and the private sector.
- *Sharing*: PPPs involve sharing of responsibility and risk for achieving results (financial, economic, environmental or social). There has to be a reciprocal interest and joined dedication.
- *Continuity*: involves the existence of a contractual framework, which provides certainty to the partners. It is necessarily “incomplete” and does not identify all components.
- *Type*: there are important differences between partnerships that are predominantly economic in comparison to which are concerned with welfare, educational and other policies.
- *Focus on service*: the emphasis is on services received by the government, not on the government procurement of infrastructure.
- *Whole-of-life cycle¹ costing*: integration of design and construction costs with ongoing service delivery, operational, maintenance and refurbishment costs.
- *Innovation*: PPP focuses on outputs, and provides opportunities and incentives for bidders to model innovative solutions to meet the specified requirements.
- *Risk allocation*: transferring some of the risk to the private entity, which manages it at a lower cost, can substantially decrease the overall cost to the state authority.

1.3.1 Value for Money (VfM)

Value for Money is considered to be the optimum combination of whole of life cost and quality to meet the user’s requirements. Based on experience UK PFI projects, there is a

¹ *Whole-of-life cycle*: costs associated with the ongoing repair and maintenance of a facility for the term of a facility’s economic life (Grimsey and Lewis 2004)

largely acceptance that there are six main determinants of value for money (Arthur Andersen 2000):

1. risk transfer (15,36%)
2. output based specification (12,14%)
3. long term nature of contracts (11,64%)
4. performance measurement and incentives (11,36%)
5. competition (10,55%)
6. private sector management skills (10,00%)

Hence, what is required to achieve VfM is: competition, risk and Public Sector Comparator.

A) Competition

It creates a healthy environment that encourages competitors to be innovative in the design of their solutions and efficient in their service delivery. As Peter Drucker once said “innovation is not about grand architectural design but about the cumulative impact of a large number of small changes”. In a competitive environment the parties from the private sector usually provide its most efficient bids. The PPP project is encouraging the private actors to come up with ingenious design and construction solutions to decrease afterwards the operation costs.

B) Risk

VfM is increased by the transfer of the appropriate risks. The risks should be handled by the best suited parts from a partnership. In case of a suboptimal transfer to private sector, VfM declines because the premium awarded to the private sector outweighs the benefit to the public procurer. Hence the objective of a PPP agreement is to have an optimal risk transfer and not a maximum one.

C) Public Sector Comparator (PSC)

The possibility of accomplishing extra VfM by implementing a PPP can be estimated through:

- i. Calculating the benchmark cost of providing the service under a traditional procurement methods
- ii. Comparing the benchmark cost with the cost of providing the same service under a PPP model

In the case that the PSC is higher than the cost under the PPP scheme, it means that the PPP offers more VfM.

The components of the PSC are the following:

- *Base or raw cost*: the cost of providing the services required by the public sector.
- *Retained risks*: those risks which always remain with the public sector. It is equal for the PSC and the private supplier.
- *Risk adjustments*: transferable risks.
- *Competitive neutrality*: reflects the neutrality of the PSC compared to the private sector offer.

1.3.2 Public interest

In 2001 in the UK, the Commission for PPPs has come up with a set of principles that a system of public accountability should be judged on the followings:

- *Transparency*: organizations which deliver public goods or services are required to disclose key information, making these open to the public.
- *Responsibility*: the organization from the public sector has to be answerable for particular decisions and courses of action.

- *Responsiveness*: services must to adapt to reflect citizens' needs, priorities, and expectations.

A good communication between firms and state authorities is essential for improved business and regional development (Bennett and Krebs 1991). Interaction between public and private parties involved in a PPP project during the tender process is necessary if the project objectives and value for money are to be achieved (Grimsey and Lewis 2004). Government has certain responsibilities and democratic accountabilities towards the delivery of services to the community. In the case of PPPs the issue is whether public functions can be delegated to private sector parties without losing sight of the expectations of citizens that public services ought to be more than seller-buyer relationships, or customer-provider exchanges and serve a larger social purpose.

1.3.3 Risk management

The risks of PPPs can be viewed from two perspectives. For the public authority the risk is constituted by the needs to ensure that VfM will be achieved with public funds. For the private entity the risk is whether it will be able to rely on direct revenues to cover its costs, and its service debt finance. In order to realize a risk evaluation, it is not only necessary to analyze the risks from these two perspectives, but it also needs good knowledge of the project.

The risks of a project can be categorized as follows:

- Technical risk: due to engineering and design failures
- Construction risk: faulty construction techniques, cost escalation, delays
- Operating risk: higher operation/maintenance costs
- Revenue risk: volatility of prices, demand for products and services
- Financial risk: inadequate hedging of revenue streams and financing costs
- Force majeure risk: war, calamities

- Regulatory/political risk: planning changes, legal changes, unsupportive government policies
- Environmental risk: adverse environmental impacts and hazards
- Project default – as a result of failure of the project from a combination of any of eh above

Transferring some of the risk to the private party which can manage it better is reducing the overall costs to the public entity. As it has been mentioned before, it is not cost-effective to transfer all risks to the private party. A PPP seeks to achieve the “best” risk allocation, by finding the optimal risk transfer, rather than a maximum one. In order to transfer the risks in a best way possible, there exist different types of risk allocation tools:

- *Specified service obligations*

Public sector’s aim under PPP is not to procure assets, but to receive services. Therefore a clear output specification reflecting is a prerequisite to the successful realization of government aims for a partnership project (Grimsey and Lewis 2004). These output specifications must be able to be measured and compared with standard indicators, which the PPP agreement should contain. By neglecting the way how services will be delivered or the asset constructed, the public authority encourages the private firm to be innovative, consequently providing VfM to the government sector.

- *Payment/pricing structure*

In order to establish a good risk allocation and to induce performance to the private part, the public entity has to develop a robust payment mechanism. These payment systems may include:

- Service-based mechanisms: payments based on a combination of availability of the service and service performance levels

➤ Transaction- or usage-based elements for which payments are made per transaction unit

➤ Benefits-based incentives where payment is linked to improvements in the business or organizational environment, such as safety or efficiency improvements

Normally payment mechanisms include at least the first two, and maybe all three features described above.

- *Risk take-back*

The scope of the risk allocation is to allocate the risks to the party best able to bear it. The public organization may take back some risks for which the private company would charge too much.

Usually a risk matrix is employed for the allocation of risks. The goal of it is to show the range of risks that may occur at all phases and to specify the possible public sector position on allocation.

Risk premiums for the private parties are a form of self-insurance. If the premium is high enough the private entity will accept the risks. Therefore we can note that nothing is free in the risk allocation procedure.

1.4 Obstacles and Solutions in implementing PPP projects

Some of the major obstacles are the following:

- Legal framework
 - The absence of a reliable commercial and legal framework
 - Restrictions on public procurement legislation may affect the implementation of PPPs
 - Often foreign companies are governments' partners and these may face additional restrictions

- Finance
 - Perception of high risk in certain regions or a high country credit risk
 - Limitation of government indebtedness may prevent public authorities to involve themselves in long-term agreements
 - Limited financial flexibility of the public sector arising from the long-term commitment of funds
 - Complex, more expensive and time-consuming transaction costs in the development stage
- Taxation
 - Taxation system might be not well prepared to deal with PPPs
- Accounting
 - In whose books should the PPP assets be covered
 - Ambiguities between international standards and national systems
- Public acceptance
 - Public consent for the participation of private entities in infrastructure projects (this is the case especially when user charges are to be introduced)
- Public administration
 - Capacity and skills of public administration have to be broadened to manage and negotiate successful projects

Some of the major causes why PPP projects should be implemented are:

- Lack of budgetary resources
- Deficiency in public experiences or skills
- Enormous infrastructure needs (having an ageing or poor infrastructure)
- Growing demands of citizens on public sector services

- Desire to introduce competition
- It can be designed to achieve commercial, social and environmental goals
- Recognition that PPPs are good vehicles for a “green” agenda (Office of Government Commerce 2002)

There are also several solutions regarding the implementation of PPP projects:

- Stable political framework and explicit political commitment
- Transparent legal framework, without a complicated documentation
- Public acceptance of the private sector involvement
- Quality of practitioners (experienced project sponsors and lenders)
- Available financial resources either from international organizations or from a mature banking sector and a developed capital market

Chapter 2 Romanian Approach towards Public-Private Partnerships

2.1 Government Ordinance No. 16/2002 – “PPP Ordinance”

Before July 2006 the Romanian legislation regarding PPPs has been governed by the Government Ordinance No. 16/2002 (**GO No. 16/2002**). According to this “PPP Ordinance”, a PPP is a project which is realized totally or partially with private financial resources – based on a PPP model – and whose result will be a public good. In the Annexes of the GO No. 16/2002 there have been described different models of PPPs, like: DBO (Design-Build-Operate), BOR (Build-Operate-Renovate), BOT (Build-Operate-Transfer), LDO (Lease-Develop-Operate), ROT (Renovate-Operate-Transfer).

However the public-private agreements have been regulated as an implementing type of public work concessions. The initiatives to start such projects have belonged to the public authorities. This has meant elaborating a pre-feasibility study and publishing the study in the Official Gazette. The works under such agreements have been awarded to a private entity or group of private entities through a specifically described tendering process. Normally the private entities have incorporated a project company into the scheme in order to accomplish the awarded works.

The GO No. 16/2002 introduces terms like “competitive dialogue” and “comparative reference cost”. The first one refers to the negotiation part, where the involved parts should focus more time for an open communication, while the second concept approximates the PSC notion from the UK. The Ordinance also makes a difference between PPP contracts in term of their price structure, and differentiates four types of PPP contracts:

with fixed price, with variable price calculated in function of unitary prices, based on cost and remuneration and on realization phases.

The Norms of the Ordinance have detailed the organization and evolution of the tender procedure, the elaboration method of the pre-feasibility and feasibility studies, the negotiation with the selected investors, the standard content of a PPP contract and the way how the project costs and the “comparative reference cost” have to be calculated.

2.2 Government Emergency Ordinance 34/2006 and Government Emergency Ordinance 54/2006

On June 30, 2006 the Government Emergency Ordinance No. 34/2006 on the award of the public procurement contracts, public works concession contracts and service concession contracts (**GEO No. 34/2006**) came into force and has replaced the former legal regime of public acquisition arrangements and of PPPs (GO No. 16/2002). This Ordinance compiles provisions of the European Directives 2004/18/CE, 2004/17/CE, 1989/665/CEE, and 1992/12/CEE regulating the regime of public procurement in EU member state countries (Pachiu and Associates 2008). For PPPs related to concession of public property assets, Government Emergency Ordinance No. 54/2006 (**GEO No. 54/2006**) applies.

Despite the fact that the new 2006 Ordinances have abrogated the old “PPP Ordinance”, their methodological norms keep some of the “PPP Ordinance’s” working instruments: the comparative reference cost’s methodology and the preliminary risk matrix. However they do not maintain the regulation on the establishment of project companies.

The scope of GEO No. 34/2006 and GEO No. 54/2006 are the followings:

- to promote competition among economic operators
- to guarantee an equal and non-discriminatory treatment towards economic operators

- to safeguard transparency and integrity of the public procurement process
- to ensure the effective and efficient use of public funds

Under the GO No. 16/2002 the concept of a PPP has been defined as a concession by public authorities to private entities. At present, GEO No. 34/2006 does not make any reference to PPP arrangements, nor defines its concept (Dumitrache and Petroiu 2007). Based on GEO No. 34/2006 there are two types of public-private agreements: concessions of public works and concessions of public services (see Chapter VII of GEO No. 34/2006).

The PPP procuring authorities in Romania are:

- a) Central or local state authorities
- b) Public organizations, established to serve the public interest, and which are financed, subordinated or administered by a state authority
- c) Any association between entities listed under items a) and b)
- d) Any public enterprise or company which is active in the public works field, when it has to assign agreements concerning such works
- e) Any other entity which is part in a PPP agreement and who assigns all or part of its special or exclusive rights to third parties

The award procedure of a public concession is initialized by a public authority by publishing a tender announcement with the Electronic System of Public Acquisition (“SEAP”) and with the Official Gazette of Romania. If the estimated value of the contract exceeds 5 million EUR, the tender announcement has to be published in the Official Journal of the European Union as well.

The concession contracts are awarded by completing one of the following procedures:

- a) *open tender*: any interested entity is allowed to submit its offer

b) *limited tender*: any interested entity is allowed to submit its offer, and the public authority selects for the awarding process only those entities which fit for the performance of the PPP project

c) *competitive dialogue*: when the project is very complex and the public authority cannot establish the project's technical or funding requirements or the first two variants are not applicable

d) *negotiations*: allows the public authority to establish final terms and conditions based on previous negotiation with selected entities

e) *offer requests*: such procedure may be used only when the total value of the project (exclusive of VAT) does not exceed 250.000 EUR

f) *solutions comparison*: such procedures are mainly employed for public domain development projects.

GEO No. 34/2006 provides that concession arrangements have to be awarded by either open tender or limited tender. The other public awarding procedures may be employed under certain legally prescribed circumstances. The Romanian government has the right to specify different awarding systems for PPP projects performed in sectors such as national defense or national security. In these last cases the PPP arrangements are classified as secret, or special safety measures are to be undertaken. However until now there have been no such awarding procedures performed (Dumitrache and Petroiu 2007).

The public project is awarded to the "best author" upon an award announcement (Pachiu and Associates 2006). The "best author" either has the most economically advantageous offer or asks the lowest price. The most economically advantageous offer is calculated on the basis of an evaluation grill, in which relative weights or a pre-defined algorithm is used. The evaluation factors can include price, quality characteristics,

environment features, operating costs, cost-efficiency reports or other elements which are considered significant by the public authority.

Under GEO No. 34/2006 and GEO No. 54/2006, PPP structures are to be employed as part of a concession agreement. In accordance with the provisions of GEO No. 54/2006, a number of standard conditions must be met in a concession contract. By awarding the contract, the public authority has the right to impose on the private contractor:

- a) to assign the contracts to third parties as much as 30% of the value of the awarded works or services
- b) to mention how much of the value of the contract will it assign to third parties

GEO No. 34/2006 and GEO No. 54/2006 make no reference to risks which have to be retained either by the public authority or by the private entity (Dumitrache and Petroiu 2007). Under GO No. 16/2002 the risks allocated to the private sector have had to be insured by insurance agencies and/or to be divided between the public and the private sector. However, GEO No. 34/2006 and GEO No. 54/2006 do not talk about such a risk insurance or division. The only thing they mention is that private investors have to secure their finances therefore security in movable and immovable assets is a form of securitization (Dumitrache and Petroiu 2007). Another issue which is mentioned on the Ministry of Finance's webpage is that the concession contract should contain specific clauses about the risk division between the private and public entity.

The public tenders and procurement actions are surveyed by the Romanian National Authority for Regulating and Surveillance of Public Acquisition ("ANRMAP"). It has the role to verify the execution of the legal provisions during every public works awarding process. Any individual or legal person may petition any public procurement related undertaking at the National Council for Contestations' Resolution ("CNSC"). The CNSC is competent to act as a PPP expert, whenever it is asked by a court of law (Dumitrache and Petroiu 2007).

2.3 Conclusions regarding legislative framework

In the Romanian legislation PPPs are represented by concessions. According to the webpage of the Romanian Ministry of Finance (www.mfp.ro) the concept of concession has to be understood as a long-term relationship between the public and the private sector, where the first one transfers to the latter one an activity from the public sector. Through a contractual agreement the involved parties share risks and benefits, use a common expertise, and finance together the achievement of a public good or service.

The new legal framework on public acquisition and concessions introduced by GEO No. 34/2006 and GEO No. 54/2006 dismisses PPPs as a viable option for public authorities to spend public funds. According to Pachiou and Associates (2006) all existing PPP arrangements under GO No. 16/2002 have been “brought to a stand still and are going to be terminated by the contracting authorities”. GO No. 16/2002 provided that PPP structures were able to use private finance. At present, the two Ordinances from 2006 do not expressly provide details concerning this issue. However, as this option is not prohibited, it is likely that private finance undertakings are also eligible. In the absence of special regulations on PPPs, the only solution for private entities to contract public works remains the public concessions agreement.

The value for money notion is mentioned nowhere in neither the old or new legislation. This concept is defined only on the webpage of the Ministry of Finance, but very vaguely.

According to a guideline of the Romanian Chamber of Commerce (2006), in several Central and Eastern European (CEE) countries there have been adopted special regulations on PPPs recently (Poland-2005; Slovenia-2006) or there exist governmental “Policy Guidelines” for the promotion of PPPs (Czech Republic, Hungary). This is a very important feature

because in these CEE states it is used to believe that those regulations which are not provided by certain legislation may not be applied.

2.4 Central PPP Unit

The Chamber of Commerce has had an idea to establish an Excellence Center for PPPs. Unfortunately this attempt has had no result at the end due to lack of support from the political spectrum and because of the low experience of public and private structures in PPPs.

However there exists a Central Unity for the Coordination of PPP-type Activities (UCCPPP) at the level of the Ministry of Finance. This Central PPP Unit has the following responsibilities:

- a) ensures the elaboration of governmental policies and strategies for the promotion and implementation of PPP projects
- b) establishes and promotes identification and structural procedures of PPP projects and sustains the public authorities in the development and implementation of PPP type arrangements
- c) elaborates the proposals of normative acts for the modification and completion of the PPP and concession legislation
- d) administers the database of the PPP and concession projects at central and local level

According to the same webpage of the Ministry of Finance, starting from a December 2007 a PHARE program is implemented at the UCCPPP. After November 2008, when the program will finish, the UCCPPP will have the necessary expertise to make recommendations in the PPP field, like: PPP project scheduling, best practices, alternatives for the implication of the private sector, risk analysis etc.

In this context the Ministry of Finance by the UCCPPP will have the necessary capacity to ensure the technical assistance for the state authorities to elaborate the Value for Money and Price Sector Comparator methodologies. This means the understanding of the two concepts, the estimation of public sector's costs, risk and performance, the ability to understand the results of the PSC models, and the standardization of the VfM and PSC analysis models.

At the same time, the Ministry and the UCCPPP should give a lot of attention to the aspects concerning PPP projects which involve receiving funds from the EU Structural and Cohesion funds: the eligibility of projects, costs, and co-finance rates.

Another significant step is to create a database with all the PPP/concession projects successfully implemented in the last years in Romania. Based on this conclusions for the future can be drawn.

Chapter 3 Case study: Implementation of PPP projects in Cluj-Napoca

In order to find some empirical evidence on how PPP projects are implemented in Romania, I have chosen to study the case of Cluj-Napoca. The reason behind my choice is that Cluj-Napoca is my home city and I am more familiar with the situation there than in other cities. The study is based on data collected through unstructured interviews conducted with several local civil servants from the City Hall. The choice of this kind of interviews has been based to gather as much primary data as possible. Because of the informal type of the interview (see Barbie 2007) the respondents have been more open in discussions. Interviewees had different backgrounds regarding PPP projects, and the unstructured interviews have allowed more freedom in moderating the discussions.

The interviews have been conducted between August 19 and August 25, 2008. The allocated time for one interview was approximately one hour. The complete list of the interviewees and the questionnaire guide used can be consulted in Appendix 1.

I would like to address special thanks to Ms. Lucia Lupea, who has been of a great help in conducting the above described interviews.

Document analysis techniques have been also used to assess several local contracts, regulations, and other official documents. This assessment has allowed a verification of the data gathered from the interviews.

3.1 Current PPP/Concession contracts in Cluj-Napoca

In my analysis of the PPP type agreements in Cluj-Napoca, I have found four different approaches of the Local Council.

1. creation of a Special Purpose Vehicle (SPV), where the Local Council own 51% of equity
2. concession of public property assets, under GO No. 16/2002
3. concession of public works, under GEO No. 34/2006
4. participatory contract with a private entity

In the followings I will detail each one of them.

3.1.1 Special Purpose Vehicle (SPV)

The Local Council (LC) has decided on the basis of a Local Council Decision to create a company (SPV) in order to construct a new neighborhood in an unpopulated region of the city. The LC would participate with 51% of the equity, providing the land property, meanwhile the private entity would participate with 49% of equity in the newly created firm. The same LC Decision particularly describes the eligibility criterions the private part would have to fulfill (technical, financial, expertise etc.).

After a tender procedure a private firm has been selected to participate in the creation of the new company. In the contract the two parties have signed it is mentioned the objective of both parties:

- objectives of Local Council:
 - o the construction of a new neighborhood
 - o the desire to introduce public utilities in the area and to take over 33% of the land afterwards, to offer it to socially disfavored persons
 - o takeover of 75 social apartments
 - o in order to achieve all these, it is necessary to involve a private party with the necessary financial infusion and know-how
- objectives of the private entity

- desire to realize and develop a real estate project in Cluj-Napoca
- favorable financial consequences after selling the construction (apartments)

The LC's participation in the newly created firm is the property itself, which totalizes 51% of the equity capital, and the LC will have to regularize the judicial situation of the land property. The private party's participation in the capital of the new company is a financial one; it has to pay in the account of the new firm the sum which represents 49% of the equity.

All the legal risks involving the obtaining of necessary documents to start the construction have been transferred to the LC. On the other side, the private entity has the obligation to finish the 75 social apartments and the introduction of public utilities on the 33% of the land in 24 months after receiving the construction permit. The finalization of half of the project has to be done in three years after receiving the construction authorization, and in five years the entire project has to be completed by the private company.

Conclusion: the Local Council gives into concession a land property to a private entity with whom creates a SPV. The private part designs, finances and builds the constructions and introduces public utilities in the area. In the final stage the same private part takes care of the selling of the apartments and gives back to the LC 75 apartments and 33% of the land. All these aspects are taken care of by the newly created company. Both parties gain from this partnership: the public authority receives apartments and 33% of land with public utilities whereas the private part gains financially after selling the buildings.

3.1.2 Participatory contract

In order to realize a municipal network of telecommunication cables in Cluj-Napoca, the Local Council has signed a participatory association contract with a private company. This

form of association has been undertaken for the reason that a private company – Administrator Associate – has the necessary financial resources and technical and operational competence to develop and construct an underground telecommunication network.

Here we have again a case of a “hidden” concession. The LC associates with a private company, without creating a new organization, and gives exclusive operation rights to the latter one on the entire area of the municipality. The essential scope of the contract is the exclusive exploitation right by the private entity. This has to construct and maintain a telecommunication network of fiber optics, and has the right to establish new lease contracts. However the prices are not allowed to exceed a value which is specified in the contract.

The duration of the contract is 20 years, and after it ends, the LC will regain the property rights of the telecommunication network.

The LC comes into the association with the land property itself meanwhile the private entity has the obligation to finance, design, implement, exploit, and maintain the network. It is also its responsibility to cover all necessary costs for the proper development of the activity. The risks regarding the authorizations are transferred to the LC. The private part has the obligation to finish the network in 36 months.

The Associate Administrator has the obligation to pay a fee to the LC of 1% from the gross annual income, but not less than 100.000 EUR per year. The participatory contract also contains the ways how the payments should be made.

Conclusion: by entering into such an association, the LC transfers the main risks to the private party. This will have to finance, design, and maintain the whole network, but at the same right will have privileged rights to earn profits by signing contracts. Therefore both parts are gaining from this participation. The public sector will have a functional

telecommunication network and will receive a yearly fee from the private entity. For the private party the gains are expressed in financial terms.

3.1.3 Concession of public property assets (GEO No. 34/2006)

For the construction of a parking lot the Local Council signed a concession contract with a private firm. The scope of the contract has been the concession of land property in the city area for 49 years. The private entity has the obligation to pay the concession fee to the Local Council, which concession fee and its ways of paying it are expressly detailed in the contract. Besides this the private party has to realize the investment works on its expenses. The obligation of the Local Council resumes to supervise the investment works and to assure the quality standards. The duration of these types of contracts is usually the maximum number of years allowed by the law, which is 49 years.

Conclusion: it is a very basic contract model, which does not include the risk transfer nor the methods how the public authority should supervise the constructions. No quality standards are detailed in the contract. However the private party has the freedom to construct the parking in a way it wants. This approach secures innovation, which might result in decreasing operation costs.

Both parties gain: the private party has the possibility to earn nice profits whereas the Local Council has several benefits. First of all it gains financially from the revenue stream paid by the private firm. Secondly the investment helps to reduce traffic and pollution in the city. Thirdly after the concession contract ends, the parking lot will be transferred to the Local Council's property.

3.1.4 Concession of public works and services (GEO No. 54/2006)

To create a nice atmosphere in the Cluj-Napoca, the Local Council has conceded the operation of ornamental illumination to a private company. The object of the contract has been to improve the service quality of ornamental illumination, and to promote quality and efficiency of these services.

The duration of the contract is five years. The contract also contains a detailed description of the payment amounts and methods.

The concessionaire has the right to exploit directly, and on its own risks, the asset which is the object of the contract – the terrain of the municipality. The Local Council has maintained the rights of changing the policies about ornamental illumination policies, and to supervise and control the realization of the services.

The private entity has the contractual obligation to exploit in an efficient and effective manner the public property assets and to assure a qualitative management. As regards the obligation of the Local Council, the most interesting thing is that it has to pay to the private party the value of the performed services.

In the contract quality indicators are also mentioned; these have to be achieved by the private company.

Conclusion: the local authority transfers the operational risks to the private party. Again both of the involved parts have gain possibilities: the private party has the chance to increase its profits, as the Local Council has just to supervise the implementation of the contract. My only concern is the fact that both parts have to pay to each other a sum of money. The private party pays a concession fee to the Local Council, whereas the local authority has to pay for the service to the private firm. One of the reasons might be the fact that the private entity has contracted out the service to another private firm, fact which would

be not legal under the terms of the contract (the sub-concession of the agreement is strictly forbidden).

3.2 Conclusions and Recommendations

The Romanian legislation regarding PPPs is based on concessions (GEO No. 34/2006 and GEO No. 54/2006). Despite this fact state authorities have other possibilities to implement such projects, by using SPVs or by associating themselves with a private organization in a participatory contract. However the legislative framework would need some improvements in order to help PPPs to increase in number.

From the Cluj-Napoca case study the conclusions are several. As positive aspects I can tell that the tendering procedure of the contracts' is transparent and easy to follow. This maybe is also due to the two supervisory organizations who watch over these procedures. Another positive feature is the fact that the members of the state authorities who are related to the elaboration of the contract are specialists from the respective departments or services.

One more appreciation would be received by the fact that the revenues from the parking lot concessions are specifically intended to be invested in the public transportation sector, according to Mrs. Moigrădean, chief officer of the Economic Office from Cluj-Napoca City Hall. However the revenues from the other concession fees have no specific destination and are going into the general local budget.

Unfortunately the number of issues which have to be improved is much higher. First of all there is no concept of Value for Money. On the webpage of the Ministry of Finance this term is just mentioned and defined as a cost/efficiency report, but the civil servants from public authorities do not know what it really means. Another deficiency is with the Public Sector Comparator (PSC). In the Cluj-Napoca City Hall nobody I interviewed knew what PSC means, which automatically denotes that nobody is using it – despite the fact that it

exists in the legislation. Therefore the idea to involve the private sector has to come only from the specialists from the departments, whose documentation has to be advised by the juridical and economical department. A functional Central PPP Unit would help on this situation. Even though there is such a Unit at the level of the Ministry of Finance, nobody I interviewed had heard before about such an institution. In consequence the UCCPPP should get involved more in the promotion of PPPs, especially at local levels.

Other problematic issues are related to the evaluation and control measurements effectuated by the local authorities. From the interviews I have taken I have seen that there are no control, evaluation or monitoring bodies. Usually there is a contact person at the public authority and who is doing some controls from time to time. This deficiency may be a consequence of the insufficient personnel and/or the lack of financial resources to maintain such monitoring bodies.

There are also no risk matrixes elaborated by state authorities, however some sorts of risk evaluations are being made, as Mr. Dranca noticed, from the Cluj-Napoca Technical Service Office.

Other recommendations I have heard during the interviews are more concerned about the inner organizational issues. It has been mentioned the fact to improve the organizational level in public entities. Because the salaries are quite low, many specialists choose the private sector. Another proposal was to give into concession all the public utility services, thus remaining more time for innovation. Actually it would be a good solution, since a good administration should be based on more managerial skills.

One last observation would be the “absence” of the UCCPPP. This PPP Central Unit should get more involved in the spreading of information regarding the possibilities of PPPs. In the media, by organizing lectures, seminars on the subject of PPPs, and even by opening

local or regional organizational units, so that even private investors would have the incentive to get involve themselves into public-private agreements.

This entire paper is embracing the idea that Public-Private Partnerships represent a viable solution for local authorities to use them as an investment tool. They should not be used all the time, of course, but only in situations when it does represent the best answer for a specific need. Local authorities should have always in mind the fact that they have the opportunity to use this method of project investment as well.

Appendix 1 - Interview List and Questionnaire Guide

For the analysis of the Cluj-Napoca case study, a primary data collection was employed, using individual unstructured interviews. The respondents involved in the PPP/concession projects of Cluj-Napoca and their positions, are listed below:

- Ms. Lucia Lupea, chief officer of the Public Procurement Office, City Hall, Cluj-Napoca, interviewed on August 19, 2008.
- Mrs. Daciana Pahon□a, inspector at the Public Procurement Office, City Hall, Cluj-Napoca, interviewed on August 19, 2008.
- Mrs. Virginia Muntiu, chief officer of the Land Administration Office, City Hall, Cluj-Napoca, interviewed on August 20, 2008.
- Mrs. Olimpia Moigrādan, chief officer of the Economic Office, City Hall, Cluj-Napoca , interviewed on August 21, 2008.
- Mr. Doru Popescu, chief officer of the Investments Office, City Hall, Cluj-Napoca, interviewed on August 22, 2008.
- Mr. Daniel Dranca, inspector at the Technical Service Office, City Hall, Cluj-Napoca, interviewed on August 25, 2008.

The questions for discussion were constructed around the following themes, based on the respondent background and knowledge regarding the PPP/concession subject:

1. The public-private partnership contractual points
2. Contract management: monitoring, reporting and evaluation framework
3. Notions of Value for Money and Price Sector Comparator
4. The decision-making process: rationale, arguments, objectives, and implementation

5. The actors involved in the PPPs and their perception of the risk and benefit sharing

6. Financial aspects: costs and benefits

7. Obstacles and possible solutions

8. Future public-private partnership projects

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