

Public-Private Partnership in European Union Law and Member States

By

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INTRODUCTION

Bearing in mind my personal multiple years of professional experience working in state administration and local self-government through meeting and cooperating with the private sector, I chose the topic of this book: "The concept of public-private partnership with special reference to the normative aspect in the law of the European Union and Member States". Certainly, public-private partnership as a concept, which occupies a wide space both scientific, theoretical and positive-legal in the current frameworks of the environment and in addition to subjective preferences, with its interesting manifestations justifies the expressed interest. What is most intriguing is the question of what public-private partnership is, how broad a notion it is, whether and in what way it is regulated, and certainly whether the concept can have a meaning beyond and above the regulatory framework. Regarding the regulatory framework and experiences, the research in this paper is limited to the area of the European Union. This is important to emphasise considering that the experiences related to the mentioned term and its understanding require at least this much more attention, and perhaps more in the study of the framework of the term in, for example, the United States of America, where the same term has such a flexible nature that it is very challenging to study and to a very large extent it is understood differently than in the European Union.

During the preparation of this book, a number of different methods of scientific research were used, namely: historical-legal, functional, analytical, structural, positive legal, comparative legal, multidisciplinary, case report and logical methods. The materials used in the study of the subject of the work are primarily normative enactments of the European Union, Member States and other legal acts, foreign and domestic scientific works, publications of relevant consulting firms and international organisations and institutions.

The research is founded on the following hypotheses:

- Public-Private Partnership (PPP) is not a legal term but a concept.

- PPP is a very similar concept in terms of the goal that is achieved with the concept of privatisation and public procurement.
- Concession and PPP are terms that are often used as synonyms.
- The dual nature of the PPP contract, an administrative-legal contract and an obligation-legal relationship.
- PPP is not fully regulated in EU law.
- PPP is a concept that is an inevitable way of developing the realisation of activities in the public interest.

In the study of the previously mentioned theses, the starting point is the consideration of whether public-private partnership is only a legal term or a policy to be pursued and which represents a kind of ideology. In this direction, the historical development of the term and the study of different understandings of the term public-private partnership are taken into account. Namely, since its emergence as a social phenomenon around 1990, and perhaps even earlier, public-private partnership has become a concept that is attracting more and more attention from both political stakeholders and professional circles, participants in the creation of positive law as well as legal theorists. From such a broad conception of indefinite meaning, a tendency to narrow down the meaning, that is, to specify the meaning of the term for the sake of clear use of the term in practice, can be observed. This tendency leads to legal certainty and uniform application of the law against the discretionary interpretation of the term by vested interests. Namely, in line with this kind of thinking, we come across Geddes'¹ considerations. It begins with the Oxford dictionary defining "partnership" as "joint business with joint risks and profits." He continues, along those lines, by asserting that PPPs are often formed to perform a specific business task, as provided by the dictionary definition, but they are also often formed to fulfil broader tasks. Furthermore, the borderline between the public and private sectors is quite blurry today, as today's partnerships include communities, educational and health groups, many of which are funded by public and commercial sources. The formal term "public private partnership" really came into common use in Great Britain in the late 1990s. Before that, as part of the national agenda for improving the provision of

¹ Geddes Michael. 2016. *Making Public Private Partnerships Work: Building Relationships and Understanding Cultures*, Routledge

further on, one comes to the conclusion that PPP is not a legal term but a concept.

I further study the concept of PPP in relation to the related concepts of concession, public procurement and privatisation, and then the legal nature of PPP contracts and relationships in PPP arrangements, i.e., to what extent it is an administrative-legal relationship or an obligation-legal relationship. After a detailed analysis, it is concluded that public-private partnership is a very similar concept in terms of the goal that is achieved with the concept of privatisation and public procurement. Also, that concession and PPP are terms that are often used as synonyms. The study of the nature of the concept continues in the direction of considering the dual nature of PPP contracts and relationships. The nature of the PPP contract as an administrative-legal contract or as an obligation-legal relationship is examined.

Focusing our further research on community law, we move on to study the regulation of PPPs in the law of the European Union and individual Member States. For this purpose, a synthetic comparative legal method of study was applied. After presenting the relevant legal sources that regulate PPPs and concessions, it is concluded that PPPs are not fully regulated at the EU level, with an expressed view on a certain need for regulation.

Then the comprehensive application of the concept in practice is shown, that is to say, in which areas of social life this concept figures and develops, as well as what the results of its application are. However, the question arises of the areas in which public-private partnership might be of value as a concept without being covered by the regulatory framework, or where it would be desirable for it to play the role but where this is not the case. Furthermore, does PPP only include the field provided for by the regulatory framework or does it go beyond that framework as well. That is, whether the framework is such that it implies a wider meaning than the meaning given to it by the regulation. It is particularly interesting to study the potential cooperation between the public and private sectors in culture, and then perhaps the potential role of PPP in intercultural domain and even a dialogue between civilisations. Economic cooperation is certainly an excellent basis for establishing deeper relations between economic entities,

of which the most important entity is the state. However, PPP is increasingly becoming a platform through which fundamental, long-term economic cooperation is achieved between one state and private entities from other states, in which other states often have capital, given that they are mostly multinational systems, which are generally the only ones able to implement such complex projects as PPP. Consequently, after such established cooperation, which is much stronger than cooperation in public procurement, due to the fact that it is long-term, the question arises whether it is possible to leave the framework of purely economic cooperation and move to the field of culture, taken as an example. In this light, it seems that the PPP concept has a very bright future that can certainly only go in the direction of development and further deepening of cooperation.

In the aforementioned opinion of the European Economic and Social Committee from April 27, 2004, on the role of the European Investment Bank in public-private partnerships and their impact on growth⁶, it was emphasised that concessions have been used since the Roman Empire, and then they were a method in the 19th century for the European railway network which was built entirely through concession contracts, but also a way for other public services such as water, gas and electricity supply, garbage collection from households, telephones, etc. In the 20th century, the concession agreement allowed not only the construction of highways and parking lots, but also water systems, museums, airports, tram lines, underground railway systems, facilities for urban areas, renovation of schools and hospitals, etc. The main objective of the public sector for the public-private programme is to use the skills of the private sector to support the improvement of public sector services. PPP structures can be a means to achieve infrastructure development across Europe. Provided that the public and private sectors take full advantage of their strengths and the potential synergies to be gained through cooperation, PPPs can contribute to improving the quantity and quality of public services. The European Economic and Social Committee welcomes the significant contribution of the EIB to the development of PPPs and to supporting the growth and

⁶ Opinion of the European Economic and Social Committee on the role of the EIB in public-private partnerships (PPPs) and their impact on growth (2005/C 234/12)

improvement of public services in Member States by providing the funds needed to carry out work in the following areas:

- trans-European networks and modernisation of transport infrastructure;
- school and university education;
- primary and secondary health care; and
- improvement of the environment.

However, it recommends that the EIB also include funding for applied research and innovation, including patents, which give the EU an advantage in the world.⁷

According to all the above, the tendency to expand the use of the term PPP despite the attempt to narrow the meaning of the term seems inevitable in the near future. This leads to the conclusion that PPP is a concept that is an inevitable way of developing the realisation of activities in the public interest.

⁷ *Ibid.*

CHAPTER I

Historical Development of Public-Private Partnership

There are different perspectives and approaches regarding the emergence of public-private partnership. Many consider its date of origin to be in the 90s of the last century in Great Britain in the form of the Private Financial Initiative, but there are many other points of view.

Thus, Yescombe⁸ says that the term “public-private partnership” appears to have originated in the United States of America and referred to the joint funding of educational programmes from the public and private sectors, and also to similar funding of utilities in the 1950s, but it entered the wider use in the 1960s when it referred to public-private joint ventures for urban renewal. It has also been used in the United States for public funding of the provision of social services by the non-public sector, often from the voluntary (non-profit) sector, as well as for public funding of private sector research and development in areas such as technology. Furthermore, in his opinion, in the international development field it was used when it referred to joint initiatives of the private sector and the government to fight diseases such as AIDS and malaria, introducing improvements in farming methods or generally encouraging economic development. Most of these can be described as “policy-based” or “programme-based” PPPs. However, he concludes that the most common meaning of PPPs is “project-based” or “contract-based” PPPs, the key elements of which are:

- long-term contract (PPP contract) between the public and private sectors;
- for the design, construction, financing and provision of public infrastructure by the private sector;

⁸ Yescombe E. R. 2007. *Public-Private Partnerships: Principles of Policy and Finance*. Series: Elsevier Finance. Amsterdam: Butterworth-Heinemann, Edition: 1st, 2-3

- with payments during the duration of the PPP Agreement to the private sector, provided by either the public sector or the beneficiary; and
- with the public infrastructure remaining in the ownership of the public sector or returning to the ownership of the public sector at the end of the PPP Agreement.

However, to be precise, the purchase or management by the private sector of existing public infrastructure without major capital investment or upgrading is not considered a PPP as defined here. Similarly, ensuring “soft” infrastructure by the private sector, which does not include significant investments in fixed assets (and therefore does not require financing by the private sector), falls into the category of “outsourcing” instead of PPP, although obviously the boundary is not precise because oftentimes “soft” services associated with “hard” infrastructure.

Hodge and Greve⁹ argue that it is certain that governments of various countries have contracted with the private sector for centuries. Many articles and books (including theirs) have been devoted to the study of PPP for the reason that the concept promises a new way of managing organisations that provide services to citizens. Nevertheless, stories about the participation of the private sector in the public sphere throughout history are numerous: Matthew - the private tax collector from the Bible, the private cleaning of public street lighting in 18th century England, private railways in the 19th century or the fact that 82% of 197 vessels in Drake's fleet that conquered the Spanish Armada in 1588, was provided on the basis of contracts with private entities.

Wettenhall¹⁰ explains that there are nine “stages” of economic and social activity in which such interweaving of the public and private sectors can be identified during the last two millennia. There may be more, but even

⁹ Hodge G., Greve C. 2005. Introduction. *The Challenge of Public-Private Partnerships*, ed. Graeme Hodge, Carsten Greve. UK, Edward Elgar Publishing Limited, 1-2

¹⁰ Wettenhall R. 2005. The public-private interface: surveying the history. *The Challenge of Public-Private Partnerships*, ed. Graeme Hodge, Carsten Greve. UK, Edward Elgar Publishing Limited, 24-26

these nine are not completely separated from each other and there is overlapping among them. They are the following:

- Private ships;
- Paid army;
- Trade, commercial and colonial expansion;
- Treasury organisation;
- Public companies;
- Mixed enterprises;
- Intersectoral cooperation in agriculture, health and education;
- Private provision of public infrastructure;
- Important events.

Private ships. A mixture of public and private initiative was vital to England's growth as a major sea power, and the so-called Spanish War of 1585-1603 was of paramount importance in laying the foundations for this development. The navy was then still in its infancy, and vessels led by now-famous navigators such as Sir Francis Drake and Sir Walter Raleigh, financed by powerful merchants and aristocratic landowners, played a crucial role. The most famous example is that of the English fleet under Sir Drake that defeated the Spanish Armada in 1588, in which 163 out of 197 vessels were privately owned. It used to be difficult to even distinguish these private ships with public authorisations from real pirates. "Authorisation" most often took the form of issuing "letters of reprisal" that authorised the bearer to set sail in an armed vessel to seize Spanish goods at sea. In this early form of contracting, they were required to pledge themselves to observe certain rules of conduct and in dividing the prize, one-tenth of the value had to be surrendered to the Crown. It took several centuries for this system to disappear. It had both good and bad sides. The most important downside was corruption.¹¹

A paid army. Before the 18th century, mercenary armies were not seen as something negative; however, later on, a stance was taken that a mature modern state has a standing army, which is provided and regulated by the state itself. Nevertheless, not all of today's states are mature in this sense. It

¹¹ *Ibid.* 24-26

is estimated that around 90 militant groups were operational in Africa in the mid-90s. The largest at the time was called "Executive Outcomes" (EO). It was composed mainly of former members of the regular South African Defense Force made redundant at the end of the apartheid regime, and was closely linked to a diamond mining company and registered in the Isle of Man tax haven. Its primary task in Sierra Leone was to defend diamond and rutile mines in danger of being looted by bandits. The mines were mostly owned by foreign private owners, although it is likely that the government also had some investments in them. The government was largely dependent on these companies as a source of state revenue and, as a matter of fact, with a small and unreliable official army and weak legitimacy among the citizens, the advantage of using EO for its own preservation soon surfaced.¹²

Trade, commercial and colonial expansion. The first overseas settlements of English subjects in the 1600s were "the work of private companies", with the initial role of the Crown providing the authority to govern on its behalf in the form of a charter. Probably the best known of these companies is the British East India Company (with French and Dutch partners). Initially a private commercial organisation, although authorised by the Crown and with a major governmental interest in the trade it developed, soon acquired territorial and governmental responsibilities throughout India and the East. Still, its employees, underpaid and inadequately controlled, cheated the company, it got into financial difficulties and could no longer meet its financial obligations to the Crown. Finally, in 1858, it was placed under the independent control of the Crown.¹³¹⁴

¹² *Ibid.* 26-27

¹³ Keir, Sir David Lindsay. 1953. *The Constitutional History of Modern Britain 1485-1951*. London, Adam and Charles Black, 157

¹⁴ Wettenhall R. 2005. The public-private interface: surveying the history. *The Challenge of Public-Private Partnerships*, ed. Graeme Hodge, Carsten Greve. UK, Edward Elgar Publishing Limited, 27-28

Treasury organisation. Naomi Cayden¹⁵ presented a model of the "pre-budget financial administration" system that was applied in Western countries before the main administrative reform in the 19th century. Essentially, the backbone of the system was an entrepreneurs' authority which managed the budget for their own account based on contracts with state governments. They had the right to collect taxes and if they could collect more than the amount contracted for the state they could also collect their own profits. But a large part of their profits arose simply from the use of state funds for their own banking activities. However, the system was dynamic, flexible, incoherent and "dependent on corruption to survive". It had to be replaced. The answer was the nationalisation of public finances, as another indicator of the maturation of the state administration system. The intermingling of the public and private sectors becomes even more apparent if we consider the church's involvement in the international military/commercial enterprise that arose during and after the Crusades in the form of the medieval orders of the Knights Templar and the Knights Hospitaller. Formally established by the order of the then Christian states of the Levant and the Catholic Church and sponsored by various European kings, these knightly orders performed military duty in support of the established crusading enterprise, thus consolidating their position in agriculture and finance in Europe, and developing expertise in accounting and banking. They came to provide a number of services for European monarchs such as collecting debts and taxes, granting loans, paying royal pensions, transferring funds and providing warehouses for governments. One of them, the Knights Hospitallers (otherwise known as the Order of St. John), underwent a final public transformation by ruling Malta as a sovereign state from 1530 to 1798. They left a legacy that would later appear in fields as diverse as legal education in London and the provision of St John's Ambulance Service, which is now considered a charity organisation.¹⁶

¹⁵ Caiden N. 1989. A new perspective on budgetary reform. *Australian Journal of Public Administration* 48(1), 53

¹⁶ Wettenhall R. 2005. The public-private interface: surveying the history. *The Challenge of Public-Private Partnerships*, ed. Graeme Hodge, Carsten Greve. UK, Edward Elgar Publishing Limited, 28-29

Public companies. Except in the 20th century, which was the century of centrally planned economies, public enterprises were mostly a field where elements of the state (public) and the market (mostly private in the conventional sense) met. Several historical examples show the dimensions of such interference. In Pharaonic Egypt, the government's warehousing department purchased (from temples and peasants), stored, and distributed the staple food upon which early civilizations depended.¹⁷ In Europe in 1628, the state of Geneva provided "chambers" for the purchase, storage and distribution of corn, and this continued for almost two centuries through complex relationships with individual suppliers, investors and traders.¹⁸¹⁹

Mixed enterprises. Governments stepped in to promote or protect enterprises they considered to be of strategic value to the state, especially where private capital was inadequate as in many developing countries or in decline as in various industrialised countries. At the urging of Winston Churchill as First Lord of the Admiralty, in 1914 the British government signed a "convention"²⁰ with a private Anglo-Persian oil company in its infancy in order to ensure a regular supply of oil for the Royal Navy: the government subscribed capital, acquiring shares of about 50 % ownership and the right to appoint two directors. Of course, the deal ensured continuous further contributions to Treasury revenues through dividends. Likewise, perhaps the best practical application of mixed enterprises is when large industries were brought into public ownership in early post-World War II France, which was seen as a kind of "nationalisation outside the state". Namely, the steering boards of the affected industry were made up of state representatives, workers and consumers in almost equal numbers, who were theoretically expected to act collaboratively and

¹⁷ Erman Adolf. 1969. *Life in Ancient Egypt*. New York, Benjamin Blom

¹⁸ Blanc Hermann. 1940. A great state enterprise of olden times: The Geneva Corn Chamber, 1628-1798. 136-191. *Annals of Collective Economy* 16(1)

¹⁹ Wettenhall R. 2005. The public-private interface: surveying the history. *The Challenge of Public-Private Partnerships*, ed. Graeme Hodge, Carsten Greve. UK, Edward Elgar Publishing Limited, 29-30

²⁰ Davies Ernest. 1938. Government directors of public companies. *Political Quarterly*, 9 (3), 423

autonomously from direct state institutions. Unfortunately, internal cooperation did not take off.²¹²²

Intersectoral cooperation in agriculture, health and education. Throughout history, there has been a lot of interference between the public and private sectors in these areas. In agriculture, it can be seen that the use of public food enterprises was a key element in public administration even in the most autocratic governments.²³ A brief review shows that, once again, outside the centrally planned economy, such interference was also characteristic of the field of education and health for a long period. There were private schools alongside public schools, many of which were run by churches. It is similar with private hospitals, some were managed by churches and existed side by side with public ones. Support to healthcare institutions can also be provided by the non-profit sector, which is often very active in this area. The Red Cross blood transfusion service is active in many countries and is a significant example of this type of contribution.²⁴

Private provision of public infrastructure. The private finance initiative introduced by the Conservative government in Britain in 1992 is an example of such an arrangement. Wettenhall notes that what is surprising is that many people see this as a revolutionary development. The French counterpart is in the so-called French concession model.²⁵

²¹ Einaudi Maro, Maurice Bye and Ernesto Rossi. 1955. *Nationalisation in France and Italy*. Ithaca: Cornell University Press

²² Wettenhall R. 2005. The public-private interface: surveying the history. *The Challenge of Public-Private Partnerships*, ed. Graeme Hodge, Carsten Greve. UK, Edward Elgar Publishing Limited, 30-32

²³ Somasundram M. 1987. Successes are the pillars of failure? A case study of the Cereal Marketing Public Enterprise. *Public Enterprise: The Management Challenge*, ed. Colm O Nuallain and Roger Wettenhall. Brussels, International Institute of Administrative Sciences, 153-166

²⁴ Wettenhall R. 2005. The public-private interface: surveying the history. *The Challenge of Public-Private Partnerships*, ed. Graeme Hodge, Carsten Greve. UK, Edward Elgar Publishing Limited, 32

²⁵ *Ibid.* 34

Major events concern the involvement of the public and private sectors in the planning and management of events such as international exhibitions, fairs and the Olympic Games.²⁶

However, the modern history of PPPs begins in Great Britain, where governments, alarmed by rising levels of public debt in the 1970s and 1980s, engaged the private sector in one-off joint projects while retaining responsibility for and control of service delivery. In 1992, spurred by the success of several independent infrastructural projects and the ideological appeal of the PPP concept, the Conservative government led by John Major in Great Britain introduced the Private Finance Initiative (PFI) as the first systematic programme offering a framework designed to stimulate PPP practices in the public services sector.²⁷

The practice of PPP has also spread beyond Great Britain. Other countries with a developed history of PPPs are Canada, France, Germany, India, Ireland, Japan, the Netherlands, Switzerland and the USA. A special case of PPPs is represented by companies in continental Europe that are jointly owned by the public and private sectors, but with majority ownership by the public sector (e.g., water supply companies in France). On the other hand, Tycher²⁸, believes that international health care and aid projects, such as those organised by the United Nations, can also be considered examples of PPP. In France, PPPs have been developed as key elements of a new public policy framework designed to stimulate innovation and the distribution of responsibilities in the social sector.²⁹

Cvetković and Zdravković³⁰ conclude that the concept of public-private partnership in the last two decades in developed countries is gradually

²⁶ *Ibid.* 35

²⁷ Teicher Julian. 2013. *Sharing Concerns: Country Case Studies in Public-private Partnerships*. UK: Cambridge Scholars Publishing, 1

²⁸ *Ibid.* 2

²⁹ *Ibid.* 2

³⁰ Cvetković Predrag, Zdravković Uroš. 2012. Public-private partnership in the legal system of the Republic of Serbia - initial considerations. Collection of Papers of the Faculty of Law in Niš, LXIII, 149

becoming a paradigm for providing public infrastructure and performing activities and services of public importance.

From all of the above, it is clear that the historical understanding of the moment of creation of PPP depends on the understanding of the concept of PPP. If one is inclined to understand PPP as a way of providing public infrastructure through a public contract concluded between a public and a private partner, it is likely that the historical moment of the emergence of the term public-private partnership will be linked to Great Britain and the beginning of the last decade of the twentieth century, through the emergence of the Private Financial Initiative. However, I agree with the understanding of PPP as a concept of cooperation between the private and public sectors in the field of providing activities of general interest, in the broadest possible sense, and also of the opinion that public-private partnership is not a modern creation from the end of the twentieth century. Moreover, since the beginning of the emergence of the public, and opposite to it, the private sector, there have been various forms of public-private partnerships.

CHAPTER II

The Concept of Public-Private Partnership

Hodge and Greve³¹ conclude that few authors agree on what PPP really is. This is precisely the reason for the main challenge in the study of PPPs. In this chapter, I deal in detail with the following questions: what actually PPP is, i.e., is it a legal term or concept with a definite or indefinite meaning. It further explores the relationship of PPP with privatisation and public procurement. Namely, there are almost no doubts about what public procurement is and what privatisation is. This is exactly the opposite of the concept of PPP, where a great deal of attention and debate has been devoted to this issue. Accordingly, for the study of the concept of PPP, as a concept of indefinite meaning, it is very useful to determine it in relation to related concepts, where the inductive method is used to conclude about the concept itself, which is the starting point. Specifying the term inevitably implies demarcation, or the opposite of that, from the term concession. Concession is a term that figures significantly longer than the term public-private partnership throughout history. However, it has not always had the same meaning, nor is there agreement on what a concession is, or perhaps less precisely, what a concession is not. That is precisely why it is interesting to explore the relationship between these two terms. Furthermore, one comes to the very interesting field of studying the nature of the relationship regulated by the contract between the parties in the public-private partnership relationship. Without entering into a deep analysis from the aspect of contractual or administrative law, I study the basic features of the relationship in question that lead to a better understanding of the concept in question. Namely, in her doctoral dissertation, Gazivoda³² already enters into an excellent analysis of the contractual relationship in question and puts forward the thesis that the

³¹ Hodge G., Greve C. 2005. Introduction. *The Challenge of Public-Private Partnerships*, ed. Graeme Hodge, Carsten Greve. UK, Edward Elgar Publishing Limited, 1

³² Gazivoda J. 2015. *Doctoral dissertation "Agreements on long-term cooperation between the state, public companies, i.e., local self-government units and private investors in the field of performing activities of general interest"*. University of Belgrade, Faculty of Law, Belgrade, 6-7

basic postulates of the law of obligations receive a different understanding and interpretation in the context of complex, externally and internally dynamic, relations between contracting parties and third parties. She is very concerned with the involvement of the third party in that relationship, to whom she especially gives a significant role in the given relationship. However, I stand by the opinion that the obligation-legal nature is not significantly limited by the administrative-legal nature of the relationship in question, and that special emphasis is placed on its dual nature.

1. Definition of the concept of Public-Private Partnership

As already stated, there are very different opinions on what PPP is. From completely liberal views that would be on one end to very rigid ones that are on the entirely opposite end. In the following lines, there is a presentation of precisely this palette of different approaches.

Klijn and Theisman³³ point out that the biggest division seems to be between those researchers who understand PPP as a management tool and those who think it is “a language game”. Hodge and Greve³⁴ further deepen this analysis and deal with definitions of PPPs as organisational and financial arrangements, and then with understanding PPPs as “a language game”. In terms of the initial topic, i.e., the understanding of PPP as a financial arrangement, Van Ham and Koppenjan³⁵ are particularly cited, who define PPP as cooperation of a certain duration between public and private stakeholders, in which they jointly develop products and services, share the risks, costs and resources associated with these products. On the other hand, they clarify the understanding of PPP as “a language game”. The language game of “public-private partnership” by authors who perceive it as such serves to obscure other strategies and purposes. In their opinion, one of such purposes is privatisation. One of the proponents of

³³ Klijn E.H., Teisman G.R. 2002. Partnership Arrangements. Governmental Rhetoric or Governance Scheme. *Public Administration Review* 62(2), 197-205

³⁴ Hodge G., Greve C. 2005. Introduction. *The Challenge of Public-Private Partnerships*, ed. Graeme Hodge, Carsten Greve. UK, Edward Elgar Publishing Limited, 4-7

³⁵ Van Ham H., Koppenjan J. 2001. Building public-private partnerships: assessing and managing risks in port development. *Public Management Review* 3(4), 598

this position, Savas³⁶, openly talks about the terms “contracting-out” and “privatisation” being the terms which cause opposition, and a term such as PPP primarily invites people and organisations to join the debate and is the reason for the inclusion of the private sector into the market of public services. For this reason, Theisman and Klijn, Linder and Savas³⁷, although looking from a different point of view, but all agree that the use of the term PPP must be seen in relation to the previous more pejorative terms such as “contracting-out” and “privatisation”³⁸. It is precisely for this reason that the authors in question believe that PPP is nothing more than a more appealing term than a term such as privatisation, which essentially means that as well.

Wettenhal³⁹ further explains that for some authors almost every modern organisational innovation where there are public and private elements, can be described as PPP, while for others there seems to be only one acceptable application - private financing of public infrastructure. He concludes that this second understanding of PPP is certainly too narrow, but also that the first is too broad. This is precisely why it raises the question: at what point is this mixing (of private and public) semantically correct to be described as a partnership?

Evans and Bowman⁴⁰ state that despite the apparent difficulties in achieving a universal definition of PPP, a number of key features of today's PPP arrangements can be identified. Among the most important of these

³⁶ Savas E.S. 2000. *Privatisation and Public-private Partnerships*. New York: Chatham House Publishers, Seven Bridges Press

³⁷ Klijn E.H., Teisman G.R. 2002. Partnership Arrangements. Governmental Rhetoric or Governance Scheme. *Public Administration Review* 62(2), 197-205; Linder S.H. 1999. Coming to terms with the public-private partnership: a grammar of multiple meanings. *The American Behavioral Scientist* 43(1), 35-51; Savas E.S. 2000. *Privatisation and Public-private Partnerships*. New York: Chatham House Publishers, Seven Bridges Press

³⁸ Hodge G., Greve C. 2005. Introduction. *The Challenge of Public-Private Partnerships*, ed. Graeme Hodge, Carsten Greve. UK, Edward Elgar Publishing Limited, 7

³⁹ Wettenhall R. 2005. The public-private interface: surveying the history. *The Challenge of Public-Private Partnerships*, ed. Graeme Hodge, Carsten Greve. UK, Edward Elgar Publishing Limited, 22-43

⁴⁰ Evans J., Bowman D. 2005. Getting the contract right. *The Challenge of Public-Private Partnerships*, ed. Graeme Hodge, Carsten Greve. UK, Edward Elgar Publishing Limited, 62-80

key features are the contractual nature of the relationship between the public and private sectors, long-term obligations of the parties, a significant capital financial undertaking with contractual models based on the application of the theory of risk distribution.

Grimsey and Lewis⁴¹ emphasise that a common misconception about PPP projects is that they mainly refer to private sector financing of public infrastructure. They believe that this is not strictly true, but that financing is only one of the elements of the PPP relationship. The essence of PPP is that the public sector does not buy assets but buys services under certain conditions. This feature is the key to the viability (or not) of the transaction as it provides a real economic incentive. They also explain that others emphasise that this emphasis on the acquisition of asset-based infrastructure is a narrow definition of PPP. That broader framework of understanding PPP includes even partnerships at the policy level, in addition to partnerships at the project level. Partnerships at the policy level are concerned with coordinating public and private sector investment on design decisions and on the formulation of policy initiatives. For example, in the case of transport, policy-level partnerships assess different transport models, general rules for operation, investment and dispute resolution. Project-level partnerships, in contrast, focus on specific locations or situations, such as the development of a new urban transit terminal, with the goal of attracting private capital and project management. The reconciliation between these two views of PPP is partly approached depending on how we define "infrastructure". Many apparent differences disappear once we allow for the different forms that infrastructure can take, especially bearing in mind the distinction between "economic" and "social", "hard" and "soft" infrastructure. "Economic infrastructure" is considered to provide key intermediary services for business and industry and its main function is to increase productivity and innovative initiatives. "Heavy economic" facilities include roads, highways, bridges, ports, railways, airports, public transport, telecommunications, electricity and gas production, transmission and distribution. "Soft economic" infrastructure includes professional training, financial facilities for business (payments,

⁴¹ Grimsey Darrin, Lewis K. Mervyn. 2004. *Public Private Partnerships: The Worldwide Revolution in Infrastructure Provision and Project Finance*. UK, Edward Elgar Publishing Limited, 6-21

credit, capital, derivatives, risk capital, etc.), facilitation of research and development and technology transfer, organisations that encourage export orientation and productive cooperation of individuals and entities. "Social infrastructure" is seen as the provision of basic services to households. Its main role is to improve the quality of life and well-being in the community, especially where resources are limited. "Hard social" infrastructure includes hospitals, education and training buildings, water facilities, housing, sewage and drainage systems, childcare and elderly care facilities, and prisons. "Soft social" infrastructure includes a social security system, a range of community services and environmental protection. Therefore, in accordance with the aforementioned, PPP could also be defined as the provision of infrastructure if we understand infrastructure in a sufficiently broad way.

An author who deals with PPP in a large number of works, Bovis⁴² especially emphasises that what is crucial in determining the relationship as a PPP instead of another public contract is the condition that there must be a transfer of risk from the public to the private sector in the execution of the contract. Accordingly, Bovis emphasises risk as a key feature of PPP. He concludes that if the public authorities effectively guarantee the indemnification of the private partner against future losses or if there is no effective exploitation of the service by the private partner, the arrangement cannot be considered a PPP, and therefore, the public procurement regulation has to be applied. A number of different risks are characteristic of PPPs: conceptual design problems, overcoming construction costs and eventual project delays; financial risk related to the variability of interest rates, exchange rates and other factors affecting financing costs; performance risk relating to the availability of assets and the continuity and quality of provision of appropriate services; demand risk, which refers to the current need for relevant public services; and residual value risk, which refers to the future market price of assets. Also, political risks imply a general term used to describe risks arising from external or internal factors. External political risks are, for example, currency convertibility, war, sanctions, political instability. On the other hand, internal political risks are

⁴² Bovis C.H. 2014. Highlight of the EU Procurement, Reforms: The New Directive on Concessions. 9 *Eur. Procurement & Pub. Private Partnership L. Rev.* 1

taxation, terrorism, inflation and industrial unrest.. Another essential feature of PPP, in addition to risk transfer, according to Bovis, is that the private sector provides financing. PPP financing is specialised financing that differs from public finance and corporate finance. PPP debt financing is considered off-balance sheet borrowing, which means that the borrowing does not affect the state's borrowing requirements in the public sector and any measures or calculations of measures of indebtedness⁴³. PPPs enable the public sector to access alternative sources of capital.

Bovis further explains that the impact of risk transfer on financing costs and the pricing of risk to ensure effective risk transfer is key to understanding how risk is treated within public-private partnerships. The cost of capital required to finance a public-private partnership depends only on the risk characteristics associated with the project and not on the source of financing. However, the source of financing may affect the risk of the project depending on the maturity and sophistication of the markets of risky countries. On one hand, within risky markets, it is irrelevant whether the project risk is borne by the public sector or the private sector. On the other hand, when the markets are less risky, the risk of the project depends on how well the risk is dispersed. Since the public sector can disperse risk to taxpayers in general, a common argument is that this gives the public sector an advantage over the private sector in terms of risk management. Nonetheless, the private sector can disperse risk in the financial market. The result is likely that project risk is lower in the private sector. The ability of the public sector to forcibly disperse risk to taxpayers, while financial markets must be provided with an incentive to accept risk, can put the private sector at a disadvantage in terms of large and risky projects. This outcome may contradict the assumption that private sector borrowing generally costs more than government borrowing. However, the key question is whether PPP results in efficiency increase that offset the increase in private sector indebtedness costs.⁴⁴

⁴³ However, it should be noted that the fiscal position of each PPP project is still monitored because it can affect the budget of that public body

⁴⁴ Bovis C.H. 2012. Risk and Public-Private Partnerships.7 *Eur. Procurement & Pub. Private Partnership L. Rev.* 44, 44-45

Link⁴⁵ says that in general terms, a public-private partnership is described as a project to provide public services or goods, which are financed and implemented through a contractual partnership between the government and one or more private or non-profit enterprises. He states that the normative definition of PPP was also given by the Canadian Council for Public-Private Partnerships. According to this definition, PPP is "a joint venture between the public and private sectors, built on the expertise of each partner that best meets clearly defined public needs through the appropriate distribution of resources, risks and rewards". The term "public" implies the use of government resources, whether from the federal or local level. "Private" refers to the use of private sector resources. And resources are broadly defined to include all resources, financial resources, infrastructure resources, research resources and the like. Finally, the term "partnership" refers to all relationships related to innovation, including but not limited to formal and informal collaboration in research and development.

Kellerman⁴⁶ states that according to the US Department of Transportation, the term "public-private partnership" is used for any scenario in which the private sector assumes a greater role in the planning, financing, design, construction, management and maintenance of a transportation facility compared to traditional procurement.⁴⁷

Bovis believes that future trends in the regulation of public-private partnerships will be based on the current regulatory deficit, and especially on the conceptual limitations of anti-monopoly regulation to intervene and regulate such complex relations between the public and private sectors. It emphasises the importance of standardised PPP regulation⁴⁸. Furthermore, it suggests that the bearers of standardisation can potentially be three regulatory stakeholders. First, the United Nations, through the specific task of achieving the Millennium Development Goals through public-private

⁴⁵ Link Albert N. 2006. *Public/Private Partnerships Innovation Strategies and Policy Alternatives*. Springer Science Business Media, 1

⁴⁶ Kellerman Leslie R. 2009. *Public-private Partnerships*. New York: Nova Science Publishers, Inc, 1

⁴⁷ *Ibid.* 1

⁴⁸ See International Monetary Fund, Department of Fiscal Affairs. 2004. *Public-Private Partnerships*, Washington