Public-Private Partnership: Current Status and Prospects for Development

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Summary:

In this article the Public private partnership (PPP), due its special meaning to the national economy, is under investigation. A theoretical framework has been established, with all different types of PPP to be realized according to it. The study outlines the current state of PPP contracts, explaining the regulatory barriers hindering PPPs pursuant to the Public-Private Partnership Act (PPPA). The authors of this study hope that it will become grounds for the discussion of the issues raised in, whereby the result from the "part-time dispute" would be assessed along with the prospects for the formation of PPPs on a national level. And there are prospects for the development of PPPs- both in terms of their "natural substance" of activities, which are already realizes, as well as on terms of transforming the funding mechanisms of different projects of public importance.

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1. Introduction:

The public-private partnership (PPP), due to its' specific significance for the economic cycle, has been extensively studied: a theoretical framework has been created, according to which the different forms of PPP are being implemented. Otherwise said: the theory has been put into practice- on the one side and on the other- the theory and practice are coherent. There is a multitude of foreign and national studies, which are researching the problems surrounding PPP - specifically relating to the current state and prospects for PPP in Bulgaria. Due to the former, it seems hardly possible to add something new to the discussion of PPP.

However, as it often happens in a research practice "… even the greatest of minds…fail to note things, which are right under their nose". In relation to the former statement- all domestic researchers, concerned extensively with the problems surrounding PPP (after 2012), miss one essential requirement for a PPP to be present, namely only when it is in accordance with the prescribed legal form. In particular, for a PPP to be present (pursuant to the domestic law), there are the following necessary conditions[1]:

- initially, the PPP needs to be included in the strategic plan for PPPs (supported by the Ministry of Finance)
- on a following stage: special funds, part of the state's budget, need to be set aside (meaning they need to be voted for and approved in Parliament)

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[1] In 2012 the first PPP law has been passed.

- afterwards, there are prescribed legal procedures which need to be followed when choosing a partner, where it is important to note that at this stage it does not follow that the chosen partner initiates the PPP, irrespective of any and all preliminary investments committed by different parties
- it is a necessity to comply with the legally prescribed method for the registration of a project/ public-private company,
- one has to specify the finance of the project- on the side of the public partner, whereby it is a requirement that the legal procedure pursuant to the domestic law on state support is followed (with the necessary result: a statement affirming, that the required funding does not constitute a state aid)
- and only then can one proceed with the performance.

Following from the facts described above, it is not difficult to reach the reasonable assumption, that currently there are no such PPPs. The fact is that the absence of even one contract for a PPP (in accordance with the domestic Public-Private Partnership Act (PPPA) requires that the problem area of domestic PPPs should be evaluated anew.

The following study aims to study and assess the current state of affairs and prospects for PPPs that are compliant with the domestic law on PPS. The set aim presupposes the application of an interdisciplinary approach to this evaluation based on a legal and economic analysis (in accordance with their respective analytical techniques), in the study of the domestic law on PPPs (in the direction set out above). Structure-wise, the study comprises of two distinct parts, namely current state (part 1) and prospects (part 2), which are situated in two articles. In this article part 1 has been introduced.

2. PPP in Bulgaria: current state of affairs

Current state of the subject in question reveals two distinct developments:

- **Firstly**, if it is assumed as a starting point the conceptual definition of a PPP (which is outside the scope of the legal one pursuant to Article 3, para. 1 of PPA), it is established that the multitude of domestic practices are in the form of a PPP- in accordance with the established theoretical assumptions. The former practices are defined in this study as "**implied**". This definition is necessitated due to the requirement that for a PPP to be **"express"**, it needs to be published in the designated informational bulletin of the Ministry of Finance, whereby currently there are no such publications (and none will be published in 2016).
- **Secondly, the normative existence of the domestic PPPs,** examined through the prism of the domestic law on PPPs. The aforementioned legislation was adopted in 2012, subsequently repealed in 2013 on the grounds that during the time in which it was in force not a single PPP contract was signed. That same legislation was restored as law later on in 2013 (by the subsequent National Assembly) and it has been over two years since the reinstatement of the legal regulation concerning domestic PPP policy and PPPs (as a legal technique and establishment procedures) and there are no legally constituted PPPs yet.

To provide arguments in support of the first assumption, namely that there is a multitude of realized PPPS, albeit in an **implied form**, it is sufficient to consider the definition of a PPP, meaning that this issue is handled in a conceptual plan (not even necessitating

an in-depth analysis). From this point of view a PPP is "…every long-term contractually settled partnership between one or more public partners and one or more private partners, which is aimed at the realization of activities of public interest".[2] This definition for PPP encompasses an almost unlimited range of various activities and places the PPP "in a schematic way…in-between the traditional method of public-procurement… and the complete privatization of the assets themselves". [3] This point of view has to be broadened by the methods used for the leasing public assets (state or municipal) as private property in accordance with the State Property Act (SPA) and Municipal Property Act (MPA), including the concessions under the Concessions Act (CA), also including a variety of other practices - for instance implicit privatization, through increase of the capital of joint-ventures, through the addition of state/ municipal property in the companies' assets.[4]

By detailing the concept of a PPP, it can be assumed that its' substance "… consists of the joint undertaking of a public and private subject of activity relating to financing, building, maintaining, exploiting or operating assets, which are part of the public infrastructure, of the joint realization of major projects with a considerable investment and technological complexity, as well as in activities for the provision of services in the public sector or the performance of other activities of public importance, whereby the private legal subject assumes proprietary liabilities and bears the economic risk in at least three phases of the life cycle of the project". [5] In addition to this extended definition of a PPP, it has to be noted that from an economic perspective a PPP is "…a cooperation between the public authorities and the private business, which aims at securing the finance, building, renovation, operation and maintenance of the infrastructure and the provision of services".[6] In summary, **in any of the described practices, where (at least) one of the partners is a public entity, even if it does not fall within the strict definition of a PPP, the practice contains elements of a PPP.** The presence of an **implied form** of a PPP - from the viewpoint of its substance (meaning from a theoretical or a conceptual viewpoint), does not necessitate its' analysis in greater detail. It is sufficient to refer to the broad variety of typical practices, considered on a theoretical level (but not on the normative plane) as PPPs; they range from the contracts of carriers (for public transport) to highway construction contracts, and are even found in the public defence area[7]. Furthermore- an ample set of examples are present where the public partner is the municipality or the state, or where the public partner is a company with a state/ municipal participation in the capital of the company.[8] The examples make it apparent that each one of the realized PPPs is based on a specific law- whether it is the CA, the Public Procurement Act (PPA) or Subsurface Resources Act (SRA) etc. In this respect, prior to the introduction of the normative framework for PPPs (with PPPA from 2012), the academics studying the issue were of the unanimous opinion that the lack of a common normative framework for the implementation of a PPP presupposes the

[2] As can be seen in Marcheva (2011).
[3] See Kanev (2011).
[4] For example: supplying the service of mass public transport, usually, is achieved in the form of a PPP under the Public Procurement Act (PPA), however utilities services usually are subject to different administration.
[5] See Mateeva (2008), p.10.
[6] Green Paper on PPP and Community law on public contracts and cohesions, EC, Brussel, COM (2004) 327 final.
[7] See avt. Kol. (2008).
[8] See Mateeva (2008)

need for the cooperation between the public and private sectors to be based mainly on the public procurements and concessions.[9]

This is the state of a PPP before its codification in the Law on PPPs. Naturally, one can assume that when PPPs are present before the adoption of a statutory instrument that regulates this realm of legislation, thereafter the already existing practices should be made compliant with and formalized under the new framework.[10] However, contrary to these 'natural' expectations, the transformation did not occur. Currently, there is a paradoxical situation in which one needs to answer the question as to whether there are any legal obstacles that hinder the creation of PPPs (it has been over two years since the adoption of the special legal framework for PPPs and there is yet to be an implemented or even an initiated PPP in compliance with the law). This circumstance necessitates the analysis on the PPPA, as well as the laws related to its' application, taking into an account its' specificity and the need for application of financial instruments. In this regard and within this meaning the following laws have been analysed: The Public Finance Act (PFA), the State Aid Act (SAA), the CA and the Bulgarian Development Bank Act (BDA). Naturally, this overview of the legislative framework does not exhaust the one applicable to the creation of a PPP, but rather the scope is determined by the specificity of the study related to the application of financial engineering and in particular, to financial instruments. Based on this analysis, PPPA has been discussed - in the light of the arrangement of specified public transactions through another legal construction (meaning the creation of an implied PPP), which is in fact one of the essential contributions of this study.

In an answer to the above-posed question, namely: regulatory barriers to PPPs (in relation to the domestic law on PPP)- firstly, it has to be noted that there is the need for codification, if there are specific public dealings and the legal framework is unquestionably regulating them, due to the lack of other applicable framework. In practice, the public dealings governed by PPPA are regulated by other laws. In other words, PPPA re-regulates public dealings already settled by other laws. This in part explains the lack of even one materialized PPP on the basis of PPPA. It also explains the identification of a multitude of PPPs in an implied form, realized on the grounds of other laws - mainly PPA and CA, which are assumed to be PPP on a conceptual rather than legal (normative) basis.

Herein arguments following this line of reasoning are presented. In accordance with the Law on Normative Acts (LNA), and in particular the provisions of Article 3, para.1, "the law is a normative act, which regulates in a primary way or based on the Constitution public dealings, which are the subject of a permanent regulation, in accordance with the subject or subjects of one or several institutes of law or their subdivisions". In this definition, there are several essential elements, but bearing in mind the specifics of the current analysis, the first "primary way" of regulation is of interest. One of the most popular classifications of the models of (types) PPP, subdivides them into the following categories[11]:

1. Models of PPPs with declining participation of the public sector:
   a. Design-Build (DB)

[9] See In this respect see:Materials relating to the project "Municipal administration of the city of Varna- transparent, competent, dynamic and interactive business partner", co-financed by the EU Social Fund through OPAK with contract № A08-14-30-C/10.02.2009 signed between MDAAR and the municipality of Varna, Area-3, p.6

[10] Improvement of the legal environment for PPPs is also crucial for better supply of public and private services and eventually for lowering income and wealth inequality (Peshev, 2015).

[11] Kanev (2011, p 65-73) and Mateeva (2008, p. 10-11).

b. Design-Build-Operate (DBO) and others which are determined by the criterion of the "project's life cycle"

2. Models of PPS with declining public financing
   a. Additional payments for use
   b. Payments for fulfilment and for other purposes., which are according to the degree of risk transfer.

Based on the aforementioned, without the need to have expert legal knowledge, it can be concluded that there are no aspects of implementation of the activities of PPP that are not specifically regulated on a domestic level falling beyond the scope of the law on PPP. In fact, even before the codification of the law in PPPA, separate researchers identified the absence of a specific regulation with regards to "…the conditions and way of selection of the private partner when establishing the legal form of a PPP". [12] Currently, the legal gaps in the area of public dealings are filled by Chapter IV, Section III "Determining a private partner" under PPPA, but the problem persists in the same manner: this provision did not lead to an establishment of a PPP under PPPA. Following this line of argument, there is a lot of reason behind the question as to what the qualitatively different options available to PPPs under PPPA, are compared to the already effective legal framework regulating public dealings, being an implied form of PPPs.

Under the provisions of Article 12, para 2of PPPA, the possible life span of the PPP contract ranges between five to 35 years. This time limit is significantly longer than the one envisaged in Article 16, para 6 (public property) and Article 19, para. 4 (state ownership) SPA, as well as in Article 14, para 3 (municipal ownership) and para. 7 (public municipal property) MPA, where in the aforementioned articles the duration of such a contract cannot exceed 10 years. In that sense PPPA creates the legal opportunity to construct technical and social infrastructure instruments that could be exploited by the private partner for a considerably longer duration than what is envisaged in SPA and MPA. In other words, the advantage of PPPs in this case is the possibility for the private partner to be guaranteed the operation of the projects built by him for up to 35 years, which, if they were to be built by the state or the municipality and then leased for operation and/or management under the provisions of SPA or MPA, that period would be limited to up to 10 years. Apparently this provision changes qualitatively the economic evaluation of the projects in question. In fact, the provisions of Article 16, para 5 SPA introduces a time limit, and accordingly sole traders with state property and the state enterprises that pursuant to the law operate, maintain or manage the state-owned facilities, as well as persons who possess a concession contract pursuant to the CA or a contract for a PPP in accordance with the law on PPPs granting the right to the possession of the state-owned facilities can lease part of the facilities in question for a period of up to 10 years, in accordance with the act granting them the possession over the facilities and under the condition that the latter are being used for the intended purpose. It is evident that this provision regulates special cases of subleasing assets and in this sense it does not influence the above-mentioned conclusion.

The matter is further clarified by the comparison of time limits of PPPs and concessions - from the viewpoint of the advantages granted by the PPPA in terms of the duration of operation. Pursuant to the provisions of Article 10, para 1 CA, the concession can be granted for period of up to 35 years. The logical conclusion that

[12] See Mateeva, 2008, p.18-

is that PPPA does not create a privileged mode of operational use, referring to the duration. However, this is not the fact of the matter with regard to concessions in which there is no income from users of the public service or from third parties in relation to the use of the public service. Yet in case there is such income, it is not envisaged that the private partner should have any rights over it. In substance, this is reflected by the provisions of Article 3, para.2, point 2 of PPPA. This is one of the significant advantages created under PPPA, compared to the provisions of CA, because in practical terms there is a possibility to avoid the standard model of a concession, specifically for more "unattractive" (in terms of generated income) assets or public services, whereby the former could be operated under the legal form of a PPP. This is a notable advantage of the current law on PPPs: hence, there is the possibility for the private partner to protect his proprietary interest (his financial interest, in particular), when the mechanisms for financial support are applied to the private partner. Pursuant to Article 9, para 1 PPPA, the financial support could take the following forms:

1. Direct payments to the private partner;
2. Granting of rights over an asset or parts of the facilities, being different assets, with which the public service activities are being carried out, for the performance of an additional economic activity and / or for the provision of additional services, falling outside of the scope of the public services;
3. Granting of rights for the performance of an additional economic activity and/ or for the provision of additional services, falling outside of the scope of the public services related to the asset, with which the former is performed.

In relation to the direct payments, a special analysis of the assets created under PPPA as to concessions falls short of necessary- in comparison to the concession under CA. The provisions of pt. 2 and 3 (above) are of much greater interest because they create special arrangements for the granting of rights to assets or parts of assets; or rights permitting the performance of additional economic activities and/or for the provision of additional services. At this stage, one can pose the question as to whether the granting of rights over the assets or part of the assets limited by the provisions of SPA/MPA, meaning- for a period of up to 10 years.

If one follows the legal principle of lex speciali derogat legi generali (refers to the doctrine whereby a law governing a specific subject matter overrides a law that only governs general matters), it can be concluded that with regard to the above-mentioned points, the contract's valid maximum time duration should be the one envisaged by the PPP contract under the rules of PPPA. Otherwise, the private partner would not have the necessary protection of his proprietary interest, if the rights are granted for a shorter duration than the one granted under the legal form of a PPP. In fact, Article 11, para 2 of PPPA, the law maker has unambiguously decided (again confirming the case for "rearrangement") on the matter. This provision envisages that the time limits pursuant to SPA/MPA will not apply to the aforementioned cases. This legally settled case (the duration) creates unequivocally an advantage of the legal form of PPP over the legal form of a concession and overall over all other implied forms of PPP (meaning the ones created under a different law), but nonetheless the question persists as to why there are no PPPs set up under the provisions of PPPA, considering that the law creates a mechanism for protection (falling just short of guaranteeing) of the private interest. Before this question is examined, it is worth discussing the cumulative requirement of material preconditions for the creation of a PPP, given by the provisions of Article 3, para. 2 PPPA- and in particular point 2 in relation

to point 1 letter b). This article suggests that in case the public service is "unfit" for a concession (because there is no income from its consumers), there is a cumulative requirement for material preconditions and the public partner cannot secure financing the activity.

If this assumption is correct, then the public partner is in practice incapable of providing financing for the activity, and therefore he cannot participate in the PPP with funds. As a result, the advantage of PPP is smaller than the legal forms created on the basis of CA/SRA. The following analysis is based on the assumption that the legislator has failed to express his true intention in the clearest of language.

Following the line of this assumption and in relation to the above-posed question, the analysis has to return to an earlier stage- namely to the commentary on financing, but this time reviewed through the prism of the technique, rather than the protection of the private interest. In this sense, the provision of Article 9, para.2 of PPPA creates a special scheme for funding of the private partner- through the provision of financial support (Article 9, para.1 PPPA) under the conditions and in the legally prescribed order of the State Aid Act (SAA). The latter is not only the formal financial mechanism, in parallel it also limits the scope of the scope of application of the PPP structure. In accordance with the rules laid down in Article 4 of the SAA, the granting of state aid is possible, when the latter:

1. Promotes the economic development of regions with low living standards or with high unemployment rate;
2. Aids the fulfilment of project from a significant economic importance to the European Community or for the tackling of current major economic challenges on the territory of the Republic of Bulgaria;
3. Aids the development of certain economic activities or economic areas, to the extent that it does not affect the trading conditions to a degree, which is contrary to the public interest;
4. Aids the preservation of cultural and historical heritage, if it does not affect the trading conditions and competition within the European Community to the extent that it is contrary to the common public interest;
5. That it is authorised by a Council decision adopted with a qualified majority based on a proposal from the European Commission.

The domestic law on Public-Private Partnerships in Article 4, para. 1, pint 1 and 2, defines the objects of a PPP as belonging to:

- The technical infrastructure and green system (including in urban areas: parking areas, garages, objects of the public transport, surveillance and security systems, street lighting systems, green areas, parks, gardens, as well as parking areas, garages, parks and gardens in separate plots of land which fall outside of the urban areas);
- Objects of the social infrastructure for healthcare, education, cultural activities, sport, recreational activities and tourism, social aid, public housing, imprisonment, for the fulfilment of the administrative activities of the public partners;

It should be noted that among professional economists, there is no consensus on the scope of the term „economic development" in the economic doctrine. To date in the national legislation, there is yet no statutory (legal) definition of „economic development" and a competent authority/official that can resolve the matter. In view of this, it is unclear how the development of any of the aforementioned properties of the technical infrastructure can „promote economic development" (not even economic „growth", if boosting economic growth had a simple

solution), as is required by the provisions of Article 4, point 1 SAA, so as to enable the establishment of a PPP! Or else, how could it possibly be proven that the funding pursuant to SAA of a PPP will facilitate the development of certain economic activities or areas, while not affecting the trading conditions to such an extent that it can be considered contrary to the public interest? One solution might be through the preliminary opinion of the Commission for Consumer Protection (CCP)?

The legal possibility (or rather failure) to obtain such an opinion is not is not even analysed because even it is obtained and is somehow taken into account, then who could possibly guarantee that the European Commission will be of the same opinion, considering that the Regulation (the regulatory framework for state aid) allows for a direct referral to the relevant European institution.

Nor is there any further clarification of the definition of "public interest". PPPA adopts the legal definition provided in para.1, item 22 of the Services Activities Act (SeAA) (per arg. In para.4 of the addition to PPPA), according to which, the grounds for a "public interest" are recognised as such by the Court of Justice of the European Union, including public policy, public security, public safety, public health, the preservation of the financial stability of the social security system, protection of consumers, protection of the recipients of services and workers, the fairness of commercial transactions, fraud prevention, environmental protection, animal health, intellectual property, protection of national historical and cultural heritage, the aims of social and cultural policy.

As a result, the conclusion should be made that one of the significant problems in the national regulation of PPP is that the phenomenon of "rearrangement" of the public dealings (which has already been discussed above and forms a reason for the absence of PPPs under PPPA) have not been addressed. These dealings can be summarised under the common denominator (conceptually) of a PPP, but rather stems directly from the requirement that the financing scheme proposed by the public partner should comply with the SSA provisions (in the cases that require such a financing scheme), that is to say by narrowing the scope through the accumulation of the material preconditions provided for in Article 3, para.2 of PPPA as well as the ones laid down in the provisions of Article 4 of SSA.

In fact, the PPPA is overly restrictive in terms of its scope of application, even if no additional constriction to the scope results from the requirement that the mode of the financial aid has to be compliant with the prescriptions of SSA. The latter requires a separate analysis. Hence, the provisions of Article 3, para 2 of the PPPA, state that the latter is created when the following conditions are met, especially, in a cumulative way:

1. The procurement of activities of public interest cannot be executed under the Public Procurement Act because:
   a. The public partner cannot provide the required finance for the provision of public services and the financing has to be fully or partly borne by the private partner; and
   b. Through distribution of the related risks, between the public and private partner, a better value needs to be achieved for the invested public finances; and
2. The procurement of public services cannot be effected through a concession, because there is no income coming from the consumers of the public service or from third parties in relation to the public service, and when there are such available revenues- it is not foreseen by the law for the private partner to receive any rights thereon.

These provisions outline the scope of

the PPPs. They can also be considered as a quasi-definition of the concept of a PPP (in the form of an absolute material prerequisite), i.e. such a definition which falls outside of the legal one in Article 3, para1 PPPA. Therefore, if the public service cannot be procured under the provisions of PPA or CA/SRA for the reason, particularly defined in PPPA, then it is a PPP! However, if the procurement of the public service is possible under PPA or CA/SRA, then it is certainly not a PPP (as per arg. Article 3, para.3 of PPPA).

In addition to the aforementioned flaws, the accumulation of the requirements specified in item 1a and 1b seem to be contradictory: item 1a envisages that the public partner cannot provide the required funding for the public service and item 1b makes reference to the realisation of a better value of public financing. Obviously, there are number of reasons to account for this discrepancy. It can be permitted by the legal definition of "achieving a better value for the invested public finances" pursuant to Article 6 of the Addition to the PPPA, according to which "better value for the invested public finances" is the attainment of a higher quality of public service at a consistent or a lower price or the procurement of the same quality of service at a lower price when compared to other available ways for the delivery of the public service. In fact, the matter here is not concerned with an "investment" of funds in the doctrinal economic sense of the term.

Returning to the discussion of Article 3, para 2, items 1 and 2 of the PPPA, there arises the necessity to interpret the requirement for a PPP to be set up when there is no option for procurement under PPA - because the public partner does not have the necessary funds or when the award for a concession is not available under CA/SRA- due to the lack of income from the consumers of the public service. These issues should to be discussed in the light of Article 8, para.1 and 3 PPPA. The latter prescribe that the private partner should carry out the public service and secure its financing, and his participation in a PPP includes a guarantee for the return of equity (i.e. no difference is made between „equity" (own capital) and „value for money"), which is provided through the financial support of the public partner. In other words, the public partner does not have a full funding capability and therefore, a PPP is established and secures financial aid. This conclusion follows logically. Indeed, pursuant to Article 9, para. 1, point 2 and 3 PPPA, the financial aid does not necessitate the form of monies (respectively the form of payments), it could be in the form of property rights (which could be evaluated in monies) (as per arg. Article 9, para. 3 PPPA). But here the problem appears to be precisely in the adopted legal formulation, whereby even if the aid is treated as a „financial aid", the latter should be provided in compliance with ZDP, which introduces the quasi-restrictions pertaining to the scope of PPPA.

In fact, the obligation to provide financial aid on the part of the public partner is imposed in all cases where the establishment of the so-called „public-private company" is envisaged - per arg. Article 51, para.2 PPPA, which reads as follows: „The participation of a public partner in the capital of the public-private company may be made through a monetary contribution and or with a contribution-in-kind and does constitute financial aid pursuant to Article 9". As already explained in the preceding analysis- financial support is provided in accordance with the requirements under SAA (per arg. Article 9, para.3 PPPA). However, the lawmakers‘ logic behind such demanding requirements remains unclear. However, the consequences become evident: there has not been a single PPP established in accordance with PPPA for the three years since its implementation. The only ostensible reason for such a

demanding approach could be identified by the principle of „market investor", as set out in a communication of the European Commission (OJ 1993 C307/16), according to which the public authority shall pay the price for the service to his private partner, when the price is not higher than the market price, and this principle serves as a criterion for the assessment of all types of public funding, including the provision of guarantees, loans and state subsidies as elements of the state aid.

In fact, among the lawmakers' „contributions" are the supplements to the legal doctrine of two new types of companies (with Chapter V, Section III PPPA): a „project" (per arg. Article 49 PPPA) and a „public-private" (per arg. Article 50 and the following PPPA) company. As a matter of fact, the legal definition if these two types of companies provides for them to be commercial companies with a capital, in compliance with the Commercial Act (CoA). In other words, these dealings (of association) are already regulated and in this sense again reaffirm the view held in this study that PPPA rearranges already regulated public dealings. In brief, it is redundant and unnecessary.

Beyond this „new type" of companies, the legal doctrine has been enriched with a new type of contract, a „PPP contract". The conclusion drawn in the previous paragraph fully applies to the PPP contract as well. However, its' legal (minimal) content stimulates one's interest and, in particular, the burden of the obligation placed on the private partner to provide the public-private entity with the resources, with which he has proven the compliance with the legally prescribed requirements for his economic and financial standing and for the technical capabilities and qualifications, to the extent necessary for the performance of the PPP contract (per agr. Article 53, para.1 PPPA). Such a regulatory approach is justified insofar as the new legislation provides for a ban on the performance of a similar activity and in this sense the redirection of those resources within the scope of performance of a PPP at first glance appears to be logical. But what if with those resources the private partner secures the performance of other activities not those involving the PPP's project (such as administrative capacity, and in particular the accounting department, legal department, design department, R&D directorate/laboratory, and other departments)? Evidently, this law does not have an exceptional foresight.

Nevertheless the aforementioned regulatory" achievements" can be put to academic debate or academic criticism. Yet this is not the case with the regulatory decision taken by the legislator in Article 63, para. 2, point 1 PPPA. According to its provisions, upon the early termination of the PPP contract for which the private partner bears the responsibility, the public partner owes the private partner a compensation in the amount of the unrecoverable investment costs, from which a deduction is made, which corresponds to the specified rate of return of the private partner for the entire duration of the contract, but cannot exceed the market value of the private partner's underlying investments as of the date of termination of the PPP contract, when the subject of the PPP contract under which the public service is being rendered is owned by the state, municipality or a public entity. All attempts to discover ratio legis in this provision remain futile. Even if one disregards this apparent legal absurdity, this regulatory solution nevertheless runs counter to the common (primordial) legal principles and to any economic reasoning.

Thus far, the regulatory barriers hampering the establishment of a PPP are to be found in the law concerning PPPs and could be identified and grouped as follows:

1. The phenomenon of "rearrangement" of already legally settled (pursuant to other laws) public dealings[13]. PPPA, in practice, is not needed, so far as it re-codifies already settled public dealings, which in substance (from a conceptual point of view) are PPPs (at the same time noting the trivial attempt for regulating the way of selecting the private partner, which is in fact, unnecessary).
2. Extraneous regulatory decisions, most notably:
   a. The definition of the scope of PPPA;
   b. The narrowing of the scope of PPPA, for cases where financial aid is provided by the public partner- respectively the application of SAA and the restrictions (in relation to the field of application), which arise from the latter law;
   c. A whole string of other extraneous regulatory decisions: the ones mentioned in the brief analysis above, as well as others, which have not been discussed in this study, due to their inconsistency with the aim of the current research project.

Plainly, the list could be further extended but the aim is not to provide an exhaustive list of the regulatory "misconceptions", but rather to defend the hypothesis, that PPPA- as it stands, hinders the development of PPPs (as unthinkable this might seem)[14].

The current analysis would be incomplete if one does not consider the reasons behind its adoption[15] and those for its repeal[16]. A pivotal point for the adoption of PPPA, were regulatory gaps (according to the logic of the legal drafters, which are in substance legislative obstacles) in the law governing the public procurement (provided for by PPA) as well as those relating to concessions (provided for by CA/SRA):

- Firstly, with regard to public procurement. It has been pointed out that PPA does not contain rules for the assignment of complex public procurement contracts, which incorporate the building of assets of the infrastructure with their subsequent operation and management. The adopted restriction of 4 (maximum 5) years of the length of contracts for the provision of a public service, which also includes the operation and management of the site, creates an absolute barrier for the effective use of the capabilities of the private sector in relation to the construction, operation and management of the objects of infrastructure. PPA does not contain rules pertaining to the application of institutionalized PPPs, which are being constituted through the creation mixed public-private entities for the construction of the project and /or for its' operation and maintenance in the public interest.
- Secondly, with regard to concessions. The domestic law on concessions (CA) strictly adheres to the definition of a concession for construction and a services concession, set out in the two directives in question. The concession is limited to the cases, where the remuneration of the private partner comprises of the collection of the income stemming from the usage of the facility or of the public service. The possibility for "further remuneration" provided by the public partner, which is widely accepted by European law, is very constrained by the domestic legislator with Article 6 of CA, where he only allows this in the following two cases- restoration of the object of the concession in case of force majeure and to achieve a socially acceptable price for

[13] See also Mateeva (2008) and Ivanova (2010, p. 20-32).
[14] See Beev (2015)
[15] The reasons for the second adoption of PPPA can be found at: http://parliament.bg/bills/41/102-01-60.pdf. The reasons for the initial adoption of PPPA can be found at: http://www.parliament.bg/bg/ 954-01-36
[16] The reasons for the abrogation of PPPA can be found at: http://parliament.bg/bills/42/402-01-14.pdf

the public service, but only in the cases where the same has been determined by legislation. In practice, this means that the form of a concession is only applicable to projects which are "self-financed", where the revenue from their operation (for their intended use) is enough to cover the expenses for their construction, management and maintenance. Outside the scope of a concession are all other objects of the technical and social infrastructure and public services, for which there is no direct revenue stemming from the provision of the public service in itself.

It is reasonable to raise the question about the extent to which these legal gaps (if they can be defined as such[17]) in public procurement, respectively in the law on concessions, necessitate the adoption of a specific law that should jointly regulate the divergent relationships within the dimensions of PPPs. The result speaks for itself: there are no PPP established in compliance with the PPPA. Perhaps the better and more practical approach would be to address those regulatory barriers (rather than legal gaps) existing in the current regulatory framework, namely Last am PPA, respectively CA/ SRA. Indeed, among the grounds for the acceptance of the initial proposal for adoption of the PPPA it is stated that: "the purpose of the bill is to liberalize the business environment and encourage entrepreneurship in the country. This will drive up the employment rate, speed up the construction of infrastructure and the completion of the projects. It will improve the quality of public services and reduce costs throughout the life cycle of projects. At the same time it will provide additional capital, additional added value to consumers and society as a whole. Furthermore, it will better identify the needs and optimal use of resources ... And most importantly, it will accelerate economic growth in the country, which will lead to an increased quality of life for Bulgarians" [18]. Furthermore, the expected results from the application of law are related to the creation of real conditions and prerequisites which would attract the expertise of the private sector in areas, which has traditionally been the responsibility of public authorities. This will ensure the use of private resources, knowledge, skills and experience in the public interest, whereby the ultimate goal is to provide better services to the public interest in competition, equality, non-discrimination and transparency".[19]

It is evident that none of the aforementioned objectives has been met and realized so far. There has not been a single PPP established under the PPPA, which renders the law unnecessary. The only effect is the meaningless aggravation of the complexity of the process.

Indeed, such a conclusion could be drawn from the careful examination of the grounds for the abolition of PPPA, where it is stated that "the current regulatory framework defines a complicated procedure for the planning and realization of PPP projects". In addition, it was reported that the current legal framework (PPPA) has adopted a restrictive approach (a finding which this study also reached), as it specifically referred to the activities of public interest where PPP projects can be implemented, such as properties of the technical infrastructure (parking areas, garages, objects of the public transport, surveillance and security systems, street lighting systems); of the social infrastructure (healthcare, education, culture, sport, recreational activities and tourism, social aid); of the green system (green areas, parks, gardens). The theory and practice of the application of PPPs

[17] See Mateeva (2008).

[18] See The reasons for the initial adoption of PPPA at: http://www.parliament.bg/bg/ 954-01-36

[19] Report of the Bulgarian parliamentary Commission of Economic Policy and Tourism of the 41st Parliament of Bulgaria: http://www.parliament.bg/bg/parliamentarycommittees/members/225/reports/ID/3161

[20] See Kanev (2011, p.17).

proved that "PPPs in comparison to the public procurement are an effective model for the provision of public services and the construction of public assets only when they are certain preconditions". It becomes evident that such conditions have not been met under the current legal framework.[20]

Moreover, in the motives for the abolition of PPPA, it has been laid down that the PPPA has another deficiency, namely that when defining the scope, one needs to take into an account the financial commitments undertaken by the public entities in PPP projects represent a state, respectively municipal debt. Taking this element into an account in parallel to the need to take into an account the financial aid provided by the public partner, necessitates the cohesion of a variety of complex legal regimes: the one pursuant to the State Debt Act (SDA), respectively the Municipal Debt Act (MDA)- on the one side and on the other- the law on State Aid (SAA). To put it in simple terms: the legislator regulates the PPPs pursuant to PPPA by taking it through a "regulatory morass". Under those circumstances, it is only natural that the law was enforced and subsequently abolished. One of the grounds for the repeal of the law goes straight to the heart of the matter, namely that "the repeal of PPPA would not create any obstacles to the realization of PPPs". The major infrastructure projects- national roads, ports and airports, according to the Constitution of the Republic of Bulgaria and the specific laws can only be assigned through the legal form of a concession. Inherently, the concession is a type of PPP. For the realization of these major infrastructure projects there are also applicable provisions from effective specific laws - the Roads Act, the law on Maritime Spaces, Inland Waterways and Ports of the Republic of Bulgaria, the Civil Aviation Act, the Water Act. Those laws stipulate detailed procedures for the selection of a partner, ensuring the compliance with the principles of publicity, transparency, free and fair competition, level playing field for all tenderers in the competition and non-discrimination. With regard to the smaller infrastructure projects one can apply the abovementioned specific laws but also the Law on Public Procurement and the Concessions Act.[21]

The legislative history of PPP in the domestic legislation is rightly interesting: for the first time a legislation is repealed and some few months later it is re-adopted, without any significant changes in the socio-economic conditions. Moreover in restoring the status of PPPA to the legal framework governing PPPs, the proposers of the law did not discard the bad practice of Transitional and Final provisions (TFP) in which to re-arrange the way in which significant public relations are regulated, without any clear stating the importance of the TFP of the Act. How else could one perceive , that with the TFP of the PPPA, "… along with significant changes to the Law on State Property, the Municipal Property Act, and the Concessions Act, the amendments to which are directly related to the new opportunities provided by the Act on PPPs, there are other amendments in the TFP of other significant laws"? By way of example, together with the aforementioned amendments to the TFP of PPPA, the Law on Physical Education and Sports has been amended. As a result, the ban has been removed, which prevented specifically-listed sports facilities of national importance to be to be granted at a concession (among those are a variety of properties on the territory of the city of Sofia: the Vasil Levski National Stadium, the Diana National Sports Complex Diana, the Serdika metropolitan racecourse, Festivalna hall, as well as other properties located across Bulgaria: the Palace of culture and sport city in Varna, the National sports base for canoeing in Kurdzhali, the Belmeken Alpine sports complex, the Pioneering Hut, the Seven Lakes

[20] See Kanev (2011, p.17).

[21] See http://parliament.bg/bills/42/402-01-14.pdf

hut in the Rila mountain, among many other properties).[23] Apparently, the only benefit of the repeal of PPPA was that at its' second submission, there were certain prohibition in other special laws which needed to be revised.

Conclusion

In conclusion and without any claim for exhaustiveness, the study outlines the current state of PPP contracts, explaining the regulatory barriers hindering the PPPs operations pursuant to PPPA. The authors hope that this study will provide the grounds for a further debate on the issues raised and as a result, the "minor discussion" would be assessed in the context of the prospects for the formation of PPPs on a national level. It is our assumption that there are prospects for the development of PPPs, both in terms of their "natural substance" of activities, which are already implemented, as well as with regard to the transformation of the funding mechanisms for different projects of public importance.

Bibliography:

1. Beev, I., Po nyakoi metodologichni problem pri konstruirane na modeli za otsenka na wazdeystvieto na zakonodatelstvoto, Natsionalna konferentsiya Ikonomicheski predizvikatelstva: Rastezh, disbalansi, ustoychivo razvitie, UNWE, Sofia, 2015.
2. Boeva, B., Vasileva, A., Publichno-chastno partnyorstvo: ikonomika, upravlenie, predizvikatelstva, Stopanstvo, 2009.
3. Ivanova R. Analiz na riska i efektivnostta pri realiziraneto na proekti chrez Publichno-chastno partnyorstvo, Stopanstvo, 2010.
4. Avtorski kolektiv, Politika za Publichno-chastno partnyorstvo v sektora za sigurnost i otbrana, Stopanstvo, 2008.
5. Kanev, E., Publichno-chastno partnyorstvo: printsipi, modeli i politiki za chastno predlagane na publichni uslugi, Stopanstvo, 2011
6. Materiali po proekt „Obshtinska administratsia gr. Varna – prozravhen, kompetenten, dinamichen i interaktiven partnyor na biznesa", safinansiran ot Evropeiskia sotsialen fond chrez OPAK po dogovor № A08-14-30-C/10.02.2009 g. podpisan mezhdu MDAAR i Obshtina Varna. V izpalnenie na Deynost 3 ot proekta e izvarshen indirekten pregled I sistematizirane po tipov beleg na nalichnata informatsia za realiziranite ot obshtina Genua I Hamburg formi, kontsesii I modeli na publichno-chastno partnyorstvo.
7. Ivanova, O. Predlozhenia za vavezhdane na dobri praktiki za publichno-chastno partnyorstvo, http://www.aksyst.com:8081/AgoraOpac/Uploads/Dobri%20praktiki_OI.pdf.
8. Marcheva D., disertatsionen trud „Publichno-chastno partnyorstvoo/administrativni aspekti/, SU „sv. Kliment Ohridski" 2011
9. Mateeva E., Pravni formi za osashtestviavane na PChP, *Savremenno pravo*, kn.3, 2008
10. Peshev, P., Analysis of the Wealth Inequality Dynamics in Bulgaria: Different Approach (November 30, 2015). *Economic Alternatives Journal*, issue 4, p. 29-33, 2015.
11. Normativni aktove: PPPA, ZDP, ZNA, ZDS, ZOS, ZPF, ZBBR – www.lex.bg
12. Operativen plan, MTITS ot 2012 g., https://www.mtitc.government.bg/upload/docs/NacionalenOperativePlan.pdf
13. Motivi za povtorno priemane na PPPA,: http://parliament.bg/bills/41/102-01-60.pdf.
14. Motivi za parvonachalno priemane na PPPA, http://www.parliament.bg/bg/954-01-36.
15. Doklad na PKIPT 41-vo NS na RB: http://www.parliament.bg/bg/parliamentarycommittees/members/225/reports/ID/3161
16. Motivite za otmiana na PPPA, http://parliament.bg/bills/42/402-01-14.pdf
17. Stanovishte na advokatsko druzhestvo Tsekova, Bebov, Komarevski po PPPA, http://tbk.bg/bg/publication/id/34

[23] See the opinion of the law firm "Tsenkov, Bebov, Komarevski" on PPP: http://tbk.bg/bg/publication/id/34 in fine.