

International Conference on Public Policy, July 1-4 2015, Milan, Italy
Panel T15P05 'Balancing 'public' and 'private' in public policy practice'
Co-chairs: Petr Witz and Robert Agren

Paper:

Ethics as a Driver for the successful PPP implementation – base for PPP
“Conceptualization”?

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The main purpose of this paper is to explain the foundation and features of ethics which present not only the environment and the determining factor for understanding the PPP concept, but could be considered as the philosophical foundations of a conceptual framework for Public Private Partnerships. Such a framework should provide clear structures and principles for theoretically informed and practically implementable PPP projects. The authors use synergistically a tripartite methodology: Dworkin's approach regarding the interpretation of a norm and the Popperian falsifiability method. The main limitation of the present thinking is the treatment of PPP as a stochastic category as well as fortresses of thinking in which public and private actors are locked. The paper demonstrates the need for an “out of box” and multidisciplinary (but by no means eclectic) approach to PPP. A suitable PPP ethic should be built using Popperian “what ethic is not” and Dworkinian “what ethic is” approaches with the ultimate aim to achieve practically implementable ethical standards. The paper considers ethics as the tool for resolving tensions between PPP actors' opposite interests.

Key words: Public Private Partnerships, Popper, true interpretation, Dworkin, Ethics, holistic approach

1. Introductory Remarks

1.1. Public-Private Partnership as a concept

There is no precise universally agreed definition of a Public-Private Partnership (PPP) in infrastructure. PPP is a widely used concept entailing joint action between the private and public sectors whereby the private sector makes a service available to the general public. PPP needs a flexible legal and regulatory framework which, in turn, requires a strong institutional background, ideological and political support. The PPP acronym itself

became known and popular in early eighties, and gained a significant keyword status in the nineties with the rise of the importance of the UK program known as Public Finance Initiative for social and economic environment renewal under surveillance of the public expenditures (Bovaird, 2010). Productivity of PFI concept contributed significantly to further popularization of the private sector involvement in different PPP forms. However, challenges abound: many parts of infrastructure systems in OECD countries are inevitably becoming obsolete overtime, public finances are becoming increasingly tight and infrastructure financing is becoming more complex. In 2006, the OECD assessed that around 3.5% of global GDP (around 2trn USD) needs to be invested in electricity distribution, road and rail transportation, telecommunications, and water infrastructure annually (around 53trn USD) in the period 2010 – 2030 (OECD, 2007). Therefore, the need for infrastructure development is a mid-term and long-term perspective of both developed and developing countries.

Furthermore, the demand for infrastructure development will continue to expand progressively in the time ahead, determined by major triggers such as global economic growth, climate change, urbanization, technological progress. In 2014, the aggregate value of PPP transactions which reached financial close in the European market¹ totaled EUR 18.7 billion, a 15% increase over 2013 (EUR 16.3 billion). The UK remained the largest PPP market in Europe both in terms of value and number of projects, with 24 transactions closed (compared to 31 in 2013) for a value of about EUR 6.6 billion (EUR 6 billion in 2013)².

Many factors can be considered as a prerequisite for the successful PPP implementation, among which we can stress the importance of good governance (voice and accountability, political stability, government effectiveness, regulatory quality, rule of law, control of corruption), good legal framework, institutional settings, etc. Due to some concerns about the ethical behavior of both public and private players acting in a global economy, more and more governments and international organizations started to recognize particularly

¹ EU 28 Member countries, plus Western Balkans and Turkey.

² See more: Market Update Review of the European PPP Market in 2014, http://www.eib.org/epc/epc_market_update_2014_en.pdf, page 2.

the first above mentioned factor - the relevance of the good governance in economic development. However, “the practitioners of PPP Projects in infrastructure have not given their specific attention to the question of governance. This gap needs to be addressed not just for countries with established institutions and procedures, but also for the vast majority of countries where such arrangements are lacking (UNECE, 2004)”. According to the same source, and recommendations from lessons learned, PPP should be governed by transparency (competitive tenders, corruption treatment, bottom up approaches, involvement of all stakeholders), public accountability (clear rules on tenders, disqualifications if these rules are breached, setting up a “public watchdogs”), sustainable development (Social protection and improvements, meetings social standards through the contract, creative solutions and good projects), dispute resolution (litigation is not recommended, dispute resolution has to be efficient, consultation with private sector in place, mediation in place), and security and safety (procedures must be put in place, government should establish body which can scrutinize the safety aspect of PPPs, environmental audits need to be organized before projects begun).

1.2. Underlying tension inherent to PPP concept

There are inherent tensions related to PPP concept, and they can be addressed to the lack of explicit ethical principles and behavior to be followed during the PPP contract implementation. The tension between the public and private sectors may be defined by opposite and conflicting interests. The former is, by its very nature, aimed at the protection, exercise and development of the public interest. On the other hand, the latter aims to create economically measurable outcomes for the benefits of its stakeholders. This difference is *prima facie* the fundamental obstacle to, and the primary question to be answered in, the legal construction of PPPs. It is very important to take into the consideration if the PPP legal construction (project contract) covers both the technical-material details (technical specifications, requirements of infrastructure, risk sharing, etc). and governance aspects that are related to behavior of partners at all stages of PPP, mediation principles and ethics. The latter ones are particularly relevant in the case of difficulties in the PPP project, disagreements of partners and eventually phase of dispute. Certain authors like Weihe (2006) stress the difference between the hard (legal) and the

soft (governance or social) requirements of PPP arrangements where the latter one is of more implicit nature and is not included in the contract, which eventually is not sufficient to ensure the ethicality and trust of the PPP process overtime. Analyzing the definition of governance factors and their presence (incidence of specified keywords related to PPP) in PPP within the reports of supranational organizations (EU 2004, UN 2004, WB 2005), Johnston and Gudergan (2007) concluded that primary focus is around PPP legal contract, risk, transparency (which could be seen to have an ethical/governance nature), and partially “accountability”. These authors therefore found that “a search of keywords which might relate to actual partnership arrangements and touch on the fundamental substance of these arrangements, such as “collaborations”, “cooperation” and “mutuality” were mostly missing from the reports”. By concluding that “outside of the technical-rational guidelines about good governance, ethical leadership within the context of the social contract or the so-called soft relational dynamics surrounding PPPs is of interest” (Johnston and Gudergan, 2007), they invite those supranational organizations to focus their interest more explicitly to the issue of ethics and ethical leadership in PPP as it is already the case with the issue of “good governance” in their strategic and analytical documents that are promoting the market-based model of public governance.

While the allocation and consideration of risk is largely promoted as a technical-rational exercise in most of the literature, Edwards and Bowen (2003) suggests the possibility that risk perception and identification of risk within PPPs is actually a social category. This may present one more reason why the ethics and other social categories relevant in the relation between public and private partner should be considered as a factor of fundamental importance: the more ethically based risk –sharing, the better ability of both partners to manage the difficult time of the PPP projects. Consequently, this would lead to a less number of failed PPP projects, since most of the failures relate to non-appropriate risk-sharing (Brenck, Andreas et al (2005)).

As the phenomenon of undisputable economic, social, political and legal importance at national, regional and universal level, PPPs demand the creation of a broader “intellectual framework” in order to provide clear structure and principles necessary for producing genuine and practically implementable results of relevant

research. That process for the purpose of this work is named “conceptualisation” of PPPs (creation of a “common conceptual platform” for PPPs).

Two main directions of PPPs “intellectualization” could be detected: a polycentric and a holistic approach.

In prominent academic circles, the attitude prevails that PPPs are not suitable to be embraced in the generally structured system based on universally applicable principles (independent from the point of PPPs observation: legal, social, economic, political etc). The main argument for the “polycentric approach” is that PPPs have different faces. Therefore, the practice has to be criteria in finding the peculiar characteristic of each of them. The magisterial example in this sense is substantiated by Guðrið Weihe, who explains why is not possible, even not needed to have one genuine and holistic definition of PPPs.³

With full respect to the advocates of “polycentricity” as the methodological premise on which the research of PPPs phenomenon rests, this paper accepts and promotes another, holistic approach. Namely, the dynamic and importance of PPPs question and, above all, the immense practical consequences (economical, political, social) of the (un)successful implementation of particular public-private partnership project, are the impetus for the efforts for incrementally building of the encircled (but at the same time flexible) holistic “intellectual” framework for PPP research and implementation of its results. Broadly formulated, thoroughly defined and theoretically informed holistic framework should prevail over the polycentricism of PPPs in terms of subjects, tasks and discourse. The described approach is the presumption for the coordination⁴ and galvanization⁵ of public and private interests. The abovementioned

³ “(...) there are multiple understandings and usages of the PPP term. The label covers, for example, short-term and long-term contracting arrangements, joint ventures, and network relations between public and private actors as well as general public-private policy set-ups. For the same reason, it is argued that it is neither feasible nor expedient to search for an overarching and authoritative definition of PPP – i.e. one which is capable of capturing all the different variations of public private arrangements that the PPP label covers today. This is not logically possible without rendering the definition so broad that it in reality becomes meaningless (...). See: Weihe, “Public-Private Partnerships -Meaning and Practice”, PhD Series 2. Copenhagen Business School open archive, 2009, pp. 15-16. Available at: <http://openarchive.cbs.dk>, accessed June 11, 2014.

⁴ The coordination as the first phase in terms of PPPs implies the presence of clear and specific common interests (in addition to particular interests of each sector), which lays the common grounds for coordination as the first phase of public-private partnership establishment. The main presumption for the existence of mutual coordination between involved PPPs actors is the interdependence of the actors and the

framework has to be achieved using the general principles and standards able to provide flexible but at the same time coherent framework for PPP construction. The main driver for creating such framework is the developed ethical background for relationship between public and private sectors.

2. PPP as an Ethical Framework

2.1. Ethics and Economic Interests

PPP as a concept raises a serious question: the nature of, and relationship between, ethics and economic interests. Any legal framework for PPP must, in order to contribute to public welfare and eliminate (or at least decrease) moral hazard, enhance the synergies (and reduce the dichotomies) between these apparently competing interests.

As far as a public actor is concerned, moral hazard rests on the confidence and trust vested in the private actor and in its readiness, capability and commitment to fulfill not only his own (private) interest but also those of the public (the latter being the primary goal of any PPP). On the other hand, for a private actor, moral hazard stems from the uncertainty of being subject to fair and equitable treatment, and the exposure to the

convergence of their objectives. The abovementioned interdependence of actors (as the starting condition) arises when the actors perceive the pressure. This pressure differs in nature: political pressure for public actor (negative pressure, derived from economic need and public interests not adequately satisfied); economic pressure for private actor (positive pressure) which wants to use the public space as the field for generating the profit; and “metaphysical” pressure of “third” sector (having in mind the protection and development of broader public goals outside of available public actors arsenal of tools). See more in: Sack, Detlef, „Zwischen Usurpation und Synergie – Motive, Formen und Entwicklungsprozesse von Public Private Partnership“, ZSR 55 (2009), Heft 3, pp. 211-230, on p. 214.

⁵ The second level of PPPs establishment (after the coordination) is the galvanization of involved actors` interests. As the examples for such galvanization Competitive Dialogue Procedure and Unsolicited Project Proposal Procedure are used. The former procedure allows the public partner to behave in (PPPs discourse) almost like a private actor wanting to meet a specific need using the market and inquiring among various providers for potential solutions. Public actor relies on the knowledge of the private participants, to determine sufficiently and concretely the content of PPP project performance. Unsolicited Project Proposal procedure is option for innovative private proponent confident of the success of the project idea at the level which justifies his readiness to participate in the project preparation and to cover the (usually high) costs of project`s realization. About Competitive dialogue procedure see more in: D. Savvides, “The Effectiveness of the Competitive Dialogue Procedure under the EU Consolidated Public Procurement Directive (2004/18/EC) as an Award Procedure for Public Private Partnerships, EPPPL 1/2011, pp. 23-37. About Unsolicited Project Proposal Procedure see more in: A. Degenkamp, “Unsolicited Proposals in the Netherlands”, Master Thesis, Technology & Policy, School of Innovation Sciences, Eindhoven University of Technology, August 2010, <http://alexandria.tue.nl/extra2/afstversl/tm/Degenkamp%202010.pdf> (accessed: 19 February 2014)

discretionary and potentially capricious activities of the State and its emanations. The goal of a PPP is to increase benefits for both categories of participants. Thus, the public sector improves public welfare by enhancing the quality and accessibility of public goods and services while private participants derive a pure economic interest from the venture. *Nota bene*: The benefit of public actors is not as easily measurable as the economic result. On the political “market” (on which the performance of public actors is assessed and measured by stakeholders), there is no defined and workable law of “supply and demand”. Instead, the political market seeks to regulate public activities by scrutinizing their ability to secure actual and genuine improvements in the volume and quality of public services, and to protect public goods.

Having in mind that, in each particular case, PPP involves a unique “blend” of *in concreto* political, social, geographical, economic, legal, historical and even cultural elements, the following proposition should be posited: there is a lack of norms generally applicable to PPP projects (even in one single country, it is barely possible to find two projects the core of which is based on the same or similar circumstances).⁶ The relevant national laws are useful as a starting point, but PPPs is not only a legal question. In any event, those norms which do exist must be interpreted in accordance with the overarching policy goal of the PPP. Other than laconic statements about “furthering the public interest”, the prevailing political aims of each project are unique in every particular case, even in the same State.⁷ From this perspective, an inclusion of ethics in consideration of PPP has two purposes: *de lege lata*, the ethical considerations are necessary in order to contribute to the attempts to create cohesion within PPP as the *sui generis* concept of mediation between public and private interests. *De lege ferenda*, PPP has a broader function of developing the convergent (if not common) ethical principles of public and

⁶ See elaboration of connection between PPP and cultural features is given in: *Chan/Levitt*, “Strategic and Cultural Drivers of Renegotiation Approaches Infrastructure Concession Agreement”, in Proceedings of the Engineering Project Organization Society Conference LED 2009, p.3. Available from: EPOS portal: www.epossociety.org, (10. April 2013); See also the comparison between Asian and Western values in business discourse in: *Küng*, “Chapter 10: Ethic, Business and Managers”, in *Catholic Social Justice-Theological and Practical Explorations*, (eds.) P. Cullen, B. Hoose & G. Mannion, T&T Clark A Continuum imprint, 2007, p. 173.

⁷ The consequence of this approach is the application of the Popperian method to the PPP analysis. See more infra in point II.2.c.

private sector. Had this latter function been absent, it would make more sense to talk about Public Private “agency” instead of “Public Private Partnership”.⁸

The PPP legal framework has to be underpinned by a post-modern way of reasoning: the Cartesian dualism between the public and private sectors should be reconciled with a process of adjustment which should be open-minded by nature and characterized by a holistic approach. The concept of “post-modernity” is used in the sense that value judgments about the particularities and the concept as a whole depend on principles based on a fresh approach as well as on the *sui generis* concepts. The premise about PPP considered to be of a *sui generis* nature having as the basic presumptions the necessity to combine the elements from the “private reasoning” discourse with those from the “public reason” and “public goods” implementation and protection.

PPP is certainly a phenomenon constructed and developed by a practical discourse. As such, PPP is not the result of “intelligent design”, but the outcome of the practical needs of the public sector (and of the legitimate interest of private actors). Too fully develop it into a concept, the PPP regulatory framework needs an ethical (or even a philosophical) base underpinning developed *modus ponens*, i.e. striving to reach conclusions about what PPP principles are, instead of defining it negatively).

2.2. Predominance of the Public Interest?

The basic presumption of PPP is that, in the conflict between the primarily ethical drivers of public actor and the primarily financial motivations of the private partner, the former predominates. This is because competent public authorities are obliged to establish the standards governing the administration of public services and to protect the public interest, irrespective of whether this is carried out through the agency of the private or public sector. This specific feature of providing public services is defined as “the hierarchical constant” of the public sector, which is also relevant in Public Private Partnership. The linguistic term, specifically referring to the “Public-Private” rather than the “Private-Public” partnership, actually reflects this hierarchical relationship. But the

⁸ More than a decade ago, the transformative effect of PPP was noticed in the relevant literature in the German language, pointing to the change of the role of State (“Veränderung von Staatlichkeit”). See more in: *Bauer*, “Zum Wandel der öffentlichen Verwaltung in den liberalisierten Netzwerkindustrien”, Max Planck Institute for Research on Collective Goods, issue 2002/08, Bonn, p.3. Available from: Max Planck Institute portal: www.coll.mpg.de (10 January 2015).

hierarchical constant should not be used by public authorities to impose a crypto-monopoly over general public interest activities; the private sector is entitled to satisfy its own private interest in a manner which is complementary and convergent with the public interest.

The hierarchical constant ensures that the exercise of the public good through the “mediation” of the private sector does not result in excluding or imposing restrictions on legitimacy and its respective control. This legitimacy is absolutely necessary in the process of structuring and applying the PPP concept; such necessity is a result of the political sensitivity and significance of the interests involved. Namely, the participation of private actors in exercising the public interest may potentially jeopardize the legitimacy of the action aimed at exercising such an interest; as a rule, the political public is rather skeptical towards the disposal of public resources for the benefit of private entities. This skepticism is embodied in the view that the primary goal of including the private sector into the process of ensuring the public good is to generate private profit rather than satisfy the public interest. The public sector may be exposed to a critical political pressure where the private investor’s activity is predominantly aimed at financial gains, without demonstrating due consideration for a further development of the quality of public services (schools, hospitals, infrastructure). For this reason, it is necessary to establish the “public identity” of the interest which is achieved by means of enacting relevant PPP regulations, establishing “best practice” as the criteria for a successful exercise of the public good and providing clear criteria for establishing the public interest and its implementation. Thus, the private sector is, in some crucial respects, placed in the position of an accountable actor.

Protecting the public interest and ensuring the legitimacy of private action in the public sector are in accordance with the principles of transparency and public accountability. The hierarchical constant necessarily reflects prevailing legal and political opinions, and its concomitant system of values. Since the structure of PPPs is determined by elements laid down by the political leadership and, their goals are frequently no more than a reflection of political priorities of the governing elite. The elite can use PPP as “an ideological safety buoy” – an instrument for accomplishing prospective goals and

justifying the changes in the legislative and political paradigm underlying the legislation.⁹ The above mentioned constellation of interest and influences is the universally applicable formula for the determination of the hierarchical constant as an element of PPP, irrespective of the time, place, subject matter or ideological provenance. However, PPP should secure the morality and ethics to be effected through a framework of economic laws.¹⁰

3. The Threefold “Added Value” as the Result of PPP’s Ethical Framework

PPP as a concept cannot exist without an ethical substance and underpinning. The lack of an ethical backdrop could easily result in shortcomings for any partnership, both in terms of public interest protection and private utilitarian goals. Bearing that in mind, a PPP must support functionality in addition to well-known ethical concepts. The standpoint on ethics as the connecting factor between economy and the public good has its origin in the hypothesis that behavior in line with moral norms not only leads to exercising the general public interest, but also to the self-realization of the private actor. The intended result of this process is to deliver a defined and structured body of principles governing the relations between public and private ethics, and implementable via competitive dialogue and unsolicited proposal procedures. The application of such principles should provide that the public and the private actor perceive themselves as better off if they participate in PPPs, rather than if they refuse such participation.

Judging the position as “better” should be made by assessing the added-value attributable to the PPP project. There are three modalities of added value which can be derived through building an ethical PPP framework:

- economic added-value,
- social added-value,
- political added-value.

⁹ See: *Varady*, “The Emergence of Competition Law in (Former) Socialist Countries”, *The American Journal of Comparative Law*, Vol. 47, No. 2, Spring, 1999, pp. 272-273. Available from: www.jstor.org.

¹⁰ See more in: *Homman*, “Moral oder ökonomisches Gesetz“, *Diskussionpapier Nr. 2007-7. des Lehrstuhls für Wirtschaftsethik an der Martin-Luther-Universität Halle-Wittenberg*, hrsg. von Ingo Pies, 2007, *passim*. Available at: Menalib Digital Publications home page, <http://edoc.bibliothek.uni-halle.de> (9 March 2015).

3.1. Economic Added-Value

Economic added-value is assessed in accordance with “value-for-money” criteria. If the PPP is considered as an “upgraded” modality of public procurement, it is reasonable (in order to ensure an in-depth analytical framework for PPP through the prism of the “value for money” principle) that the academic and theoretical treatises about public procurement regulations should be taken into account. However, in public procurement systems, value for money is not universally acclaimed as the leading principle. Moreover, the integrity of public procurement¹¹ is (rather than economic efficiency) generally the overriding goal of competitive tendering.¹²

3.2. Social Added-Value

Social-added value emanates, for the most part, from the development of the integrity of the system. The term *Integrity of the system* refers to the idea that procurement should be carried out without any influence of corruption.¹³ Corruption can, for example, involve various forms of collusion between government and bidders, or between bidders themselves. In some States, corruption is an endemic problem in the public sector because of the low wages, the structure of the government and as a result of ingrained cultural and societal mores. Integrity contributes to the achievement of value for money because, otherwise, contracts may not be awarded to the firm with the best offer. Transparency and competitive bidding without discrimination are the most effective tools against corruption. But integrity in the form of probity is not always easy to apply to PPPs. The structure and importance of a PPP, in social and economic terms, lends probity within the PPP processes an even greater importance in comparison with ordinary P2P transactions. However, the demand for integrity must neither neutralize nor eliminate the speculative element of PPP (as such, speculation is the reason for private sector participation in the project). Probity cannot be such an overriding principle that it would

¹¹ See: *Arrowsmith*, „Public Procurement: Basic Concepts and the Coverage of Procurement Rules”, in *Public Procurement Regulation: An Introduction*, (eds.) S. Arrowsmith, 2011, p.5. Available at: University of Nottingham Public Procurement Research Group, pp. 1-33, 11. April 2009).

¹² See: *ibidem*, note 11. More analysis of the competition among different values involved in public procurement process see in: *Dekel*, “The Legal Theory of Competitive Bidding for Government Contracts”, *Public Contract Law Journal*, Vol. 37, No. 2/2008, passim. Available at: <http://papers.ssrn.com>, (18 April 2009)

¹³ See more in: *Arrowsmith* (fn. 6), pp. 8-11.

replace the general “caveat emptor” maxim which reflects the speculative character of economic activity. Probity is merely one relevant (although highly important) criterion and, as such, is included in the legal framework and norms (especially in the anti-corruptive legal norms) applicable to PPP. Why is it so? The answer lies in the following explanation: legal norms, even in the case of PPP, are tool for the protection of rights and interest. But they are not intended to protect the “expectation of virtue” on the part of PPP actors.

The “pool” of social added-values embraces respect for so-called “horizontal values”: the reduction of unemployment, balanced regional development, ecological protection etc. Those values have, in contrast to “integrity of the system”, at least equal position with the “economic” criteria. This equality is the main characteristic of PPP as a concept, in comparison with the ordinary business transaction. Fundamentally, horizontal values emanate through the “hierarchical constant” as the main feature of any PPP skeleton.¹⁴

3.3. Political added-value

The political added-value of PPP is reflected in the improvement of policy design and planning, the development of policy coordination, higher level of policy monitoring, resource mobilization and resource management. PPP is potentially the legal, economic and organizational institute which enables the exchange of information and better understanding among the public and private actors involved. Perhaps most importantly, PPP can contribute significantly to the legitimization of innovative practice in the solution of issues of public interest.¹⁵

4. Buliding the PPP Ethic as the “Sui Generis” Concept: The “Popper-Dworkin” Connection

Bearing in mind the practical nature of PPP’s functionality and observing that it lies at the *fulcrum* between postmodern necessity and the interplay between different and vivid elements of the public and private sectors, the Popperian *falsifiability/refutability*

¹⁴ See more about hierarchical constant supra II.1.b.

¹⁵ See: *Bovaird*, “Public–private partnerships: from contested concepts to prevalent practice“, *International Review of Administrative Sciences*, Vol 70(2), 2004, p.200. Available at: Graduate Institute Geneva Home page, <http://graduateinstitute.ch> (10. April 2012).

method should be applied. It means that the *novum* which brings the PPP in terms of public and private sector relations needs a fresh approach based on the observation of PPP as the practical phenomenon. The magisterial example in this sense is that substantiated by Guðrið Weihe. Weihe explains why it is not possible, even not needed to have one genuine and holistic definition of PPP. The starting point is that PPPs have different faces, so the practice has to be the decisive criteria in finding the peculiar characteristic of each of them. If it is possible, the common characteristics will arise. The Popperian method is found in the following sentences:

*there are multiple understandings and usages of the PPP term. The label covers, for example, short-term and long-term contracting arrangements, joint ventures, and network relations between public and private actors as well as general public-private policy set-ups. For the same reason, it is argued that it is neither feasible nor expedient to search for an overarching and authoritative definition of PPP – i.e. one which is capable of capturing all the different variations of public private arrangements that the PPP label covers today. This is not logically possible without rendering the definition so broad that it in reality becomes meaningless.*¹⁶

In legal discourse, research on the ethics of PPP should contribute to a genuine compromise between, and galvanization of, the public and private roles. Conducting such research is only possible through a normative approach to academic research. Such an approach defines the goal of the legal research on PPP as the need to determine what the law should be in light of relevant political, social and other circumstances (“horizontal values”). In order to conduct such research, it is necessary to establish relevant principles for the interpretation of the PPP legal framework. The paradigm, in this sense, is the approach of Ronald Dworkin toward the issue of finding the truth in interpretation: Dworkin’s approach regarding the interpretation of a norm as a collective endeavor is formulated in the following manner:

“First, interpretation is a collective endeavor; we can interpret because others have in the past. Second, interpreters suppose that their critical efforts have a

¹⁶ See: Weihe, “Public-Private Partnerships -Meaning and Practice”, PhD Series 2. Copenhagen Business School open archive, 2009, pp. 15-16. Available at: <http://openarchive.cbs.dk> (11 June 2012).

*point, embody some value. For example, lawyers interpreting documents might disagree greatly on specific laws but agree that the general purpose is to serve justice [...] The true interpretation is the reading that best serves the responsibility of the purpose of interpretation [...]. It is wrong to say that there is no right answer. Justice lies not in trying to make up the law, but in finding the law. [...] Although law is not literature, it is closer to poetry than to physics”.*¹⁷

The application of the rules defined in the passage quoted above on the PPP construction lead to the interpretation of relevant PPP framework based on:

- the responsibility of the interpreter (in case of PPP, responsibility of public and private actor); and
- a certain body of values (in case of PPP, values emanate in *ex ante* definable and *ex post* verifiable viable win-win structure of private-public relations).

If the postmodern approach is applicable to the process of finding the unique PPP ethic (value judgments based on interdisciplinary “out of a box” approach and on the *sui generis* concepts), then there is space for the connection between a philosopher of law (Dworkin) and a philosopher of science (Popper).

The connection lies in the following construction. Two preconditions which Dworkin defined as the condition *sine qua non* for the truthful interpretation are:

- a) The responsibility of the interpreter;
- b) A body of values to which the interpreter is attached (a body of values as generated from certain tradition of interpretation).

In the case of the interpretation of the PPP legal framework, in order to identify its ethics, one should take into consideration the responsibility of the potential interpreter (public and private actor involved), as well the traditions of society which public interest PPPs should fulfill.

¹⁷ See: Dworkin, “Is There Truth in Interpretation? Law, Literature, and History”, Library of Congress, 2009. Available from: www.youtube.com/watch?v=742JyiqLhuk (17 December 2009).

It is obvious that truthful interpretation will largely depend on the parochial and particular characteristic of the social venue in which the PPP project is to be implemented. To explain these particularities, it is not possible to start from one general idea of universally justified and hence universally applicable ethic (and, being universally valid, necessary simplified), capable of being imposed and controlled in implementation. Now, here starts the role of the Popperian falsifiability method (i.e. a fresh approach to the relations of public and private needs based on the observation of PPP as a practical *in concreto* phenomenon, underpinned with the particularities of each concrete case) which should lead to the step-by step building of a balance between utilitarian ethics (pertinent to the private actor and judged by the result, e.g. consequential ethic) and ethics of virtue (public sector ethic) in the every particular set of circumstances. In this sense, the body of values present in every society plays an important role. Those values are embedded in their tradition (for example, the privatization concept is not equally welcomed in the countries of the former communist block and the countries of “Old Europe”).

4.1. The Main Features of PPP Ethical Framework

PPP is a form of ethical revitalization. Namely, as the private sector gradually transforms and makes qualitative improvements, private actors start observing their own narrow private interest through the prism of general public interest and welfare. Thus, the relationship between the public and the private sector is fundamentally changed; once based on the hierarchical structure and administrative regulation (where the private sector was treated as a second-rate participant, which frequently triggered the private actors’ reaction clearly reflecting their “misconception” of the public interest). It should be replaced by relations based on mutual trust and cooperation

The major impact of PPP on the “ethical discourse” of public actors stems from the fact that PPPs promote a new form of self-governance as an alternative to the traditional forms of policy-making via politically-oriented bureaucracies (thus, the managers of public companies had to “step into the entrepreneurs’ shoes” and resolve the issues generated in the relations with new stock holders - private entrepreneurs who demanded that the public companies be managed by applying the business management

strategies which *they* would be using as participants on the market (Starr, 1988). In that context, there is always an emphasis on the fact that the PPP concept is necessarily determined *in concreto*, considering that it does not exist as a universally applicable concept, but largely depends on the social, economic, historical, societal, legal and other contexts.¹⁸ Yet, the need to synchronize the interests of the public and the private sector remains the common denominator of PPP understood in generic terms. The synchronization must be based on certain ethical principles which are sublimated in a “third”, mixed dimension of PPP which emerged as a result of intertwining the public and the private interests (and accordingly, interconnecting private and public actors). The authentic ethics of PPP is also supported by the standpoint that the contracts it rests on are classified as co-called “relational” agreements. These agreements are based on the presumption that there are common values which the contracting parties are likely to pursue. Such values are perceived as an ethical category, being “the key” for interpreting the provisions of the PPP contract as the relational and long-term agreement. The explicit inclusion of ethical principles in the process of interpretation of a PPP-based contract lays down a consistent legal framework. Such framework should be vibrant enough to preserve the survival of the PPP structure in the circumstances of tension emerging between the public and private sectors during the implementation of the PPP concept (this tension is of a *sui generis* nature because it does not and may not appear in that form either in public law agreements or in private law contracts).¹⁹

The ethical issue raised in PPP seems to be much more controversial when it comes to private partnership. Indeed, the ethics of economic relations is *prima facie* utilitarianism, which is by nature an ethics of results (consequential ethics). Contextualized in light of the PPP concept, the desirable development of business ethics have to be directed towards the accomplishment of solidarity, justice and mutual respect

¹⁸ See: *Baker/Justice*, “The Institutional Design of Self-governance: Insight from Public-private Partnerships”, Paper for XII Annual Conference of the International Research Society for Public Management, Queensland University of Technology, Brisbane, Australia, 2008, *passim*. Available at: International Research Society for Public Management portal www.irspm2008.bus.qut.edu.au (19 April 2011).

¹⁹ For more information about relational contracts see: *Diathesopoulos*, “Relational contract theory and management contracts: A paradigm for the application of the Theory of the Norms”, 2010. Available at: Munich Personal RePEc Archive Portal: <http://mpira.ub.uni-muenchen.de/24028/> (16 June 2010); *Macneil*, “Relational Contract: What We Do and Do Not Know”, *Wis. L. Rev.*, 1985, pp. 483-525.

to maximize the benefits of PPP as the whole. The opposite development (even stagnation only), would lead to the deficient realization of public interests and ultimately to serious damage to the basic values on which every society is based. The private actor's ethics in PPP must promote competitive social justice rather than an abstract institutional justice. It must determine and, where necessary, transform every commercial transaction. Thus, justice (including social justice) becomes the global characteristic of business activities, where the PPP concept has a significant role. Contemporary PPP ethics should grasp "public interest" as the "trusted goods" managed by the contemporary generation with the aim of preservation and development of such goods for the descendants. Using this premises as cornerstones, the utilitarian ethics (immanent to the economic sphere) should be made compatible (or at least not opposed) to the ethics of public sector.

Generally speaking, the business community (in case of PPP, emanating through the private actor) has both the right and the duty to act as a subsidiary facilitator of social ethics in the circumstances when there is "an absence of public management". This standpoint is fully reflected in the PPP concept where the private partner must observe his own activities in light of the need to protect not only his own particular interest but also the general public interest. In that context, the following argument seems justified: the larger the economical power of a private actor, the larger his duty to contribute to the common good. Certainly, there are limits to this obligation: in this vein a clear distinction must be made between what is considered to be an individual virtue (on the one hand) and what is considered to be a social duty (on the other hand) which is perceived as a socially responsible business activity of private actors.

Thomas Aquinas illustrated the difference between the virtue and the duty by analysing the moral dilemma of a grain merchant. The basic question is whether the grain merchant, having been fully aware of the impending rise in demand and a subsequent decline in prices, should fully disclose the information to his customers, or whether he could legitimately profit from their ignorance and capitalize on the asymmetry of information. While it is unlawful to incur any damage or loss to another, this prohibition does not encompass the duty to give another the help or advice which would be of some competitive advantage. A single person is highly unlikely to take into account the interests of all participants in business; such a requirement would be unethical. *Mutatis*

mutandis, the described moral dilemma is present even today in the defining of the contents of the PPP legal framework. The basic question is how the private partner should be convinced (even in spite of his *habitus*) to take into account not only his own private interest but also the public interest (Kohls/Christensen, 2002).

4.2. The Principles of Establishing the PPP ethical Framework

To build the PPP ethics via mutual understanding and interface between public and private actor (and ethical rules inherent to them both), it is necessary to use following patterns:

- (1) *In concreto* considerations of particular political goals on the side of public actor; such considerations conditions the correspondent behavior of the private actor. The private actor is directed towards the use of abductive reasoning in order to predict the needs and goals of public actor. As a consequence, the public and political values embedded in the framework of public actor reasoning are transferred into the scope of private actor referential system of values.²⁰
- (2) The application of the Popperian method based on the verification of the features and needed characteristic of a particular PPP. This approach is encapsulated in the inapplicability of “one size fits all” principle to the PPP concept.²¹
- (3) The establishment of relevant ethical framework with reliance on the responsibilities of public and private actors (with the emphasis to the responsibilities of the former), in accordance with the Dworkin definition of the truthful interpretation.²² As Hans Küng clearly stated, “*both in the sphere of politics and in that of economics we need a new sense of responsibility; a responsible politics which seeks to achieve the precarious balance between ideals and realities which has to be rediscovered over and over again; and a*

²⁰ See more supra point II.4. This kind of reasoning does not include the private actor’s giving and support to the public purpose based on altruistic motives (“warm glove-joy of giving” syndrome).

²¹ See more supra point II.3.

²² Ibidem.

*responsible economics which can combine economic strategies with ethical convictions”.*²³

If the basis of such ethics is well founded and clearly structured in terms of the rights and duties of the actors involved, the PPP contract could become “self-enforced” agreement, in the sense that *“a self-enforcing agreement between two parties remains in force as long as each party believes himself to be better off by continuing the agreement than he would be by ending it”* (Tesler, 1980). The consequence of such dialectic is that the PPP is constructed as the self-adaptive system.

III. Conclusion

The main intention for the paper is to initiate the considerations for creation the general intellectual framework for Public Private Partnership as the phenomenon of undisputable economic, social, political and legal importance. Such framework should provide clear structure and principles for theoretically informed and practically implementable PPP projects. The “intellectualization” of PPP concept is based on holistic approach. The justification for holistically viewed intellectual framework of PPP is generated from the need to handle with immense practical consequences (economical, political, social) of PPP implementation. The abovementioned framework has to be achieved using the general principles and standards able to provide flexible but at the same time coherent framework for PPP construction. The main driver for creating such framework is developed ethical background for relationship between public and private sectors. The authors use synergistically the dual methodology: Dworkin’s approach regarding interpretation of a norm, Popperian falsifiability method and the **game theory analysis**. The ethic is eligible corrective element for creating the balance in PPP structure. The suitable PPP ethic should be built using Popperian “what ethic is not” and Dworkinian “what ethic is” approaches complemented by game theory for achieving practically implementable ethical standards. The paper signals the need for “out of box” and multidisciplinary (by no means eclectic) approach toward PPP. Ethic connects economy and public good. Properly balanced, it implements the idea that behavior in line with the ethical norms leads simultaneously to protection of public goods and self-realization of private actor. To quote the document “Towards a Global Ethic: An Initial Declaration”: “We must strive for a just social and economic order, in which everyone has an equal chance to reach full potential as a human being. We must speak and act truthfully and with compassion, dealing fairly with all, and avoiding prejudice and hatred.

²³ Küng (fn. 1), p. 169.

We must not steal. We must move beyond the dominance of greed for power, prestige, money, and consumption to make a just and peaceful world”²⁴

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