

OSCILLATING BETWEEN DIFFERENT TYPES OF PUBLIC CONTRACTS REGARDING THE CONSTRUCTION OF A HIGHWAY *

Cătălina Georgeta DINU **

Abstract: *The article underlines the difficulties that the public authorities have in choosing the most suitable public contract for the construction of a highway, starting from the identification of the applicable legislation in this matter, both at European and national level. The analysis of examples of good practice in such constructions is also necessary, by evaluating some public contracts already executed at the level of some foreign states. The impasse in which Romania has been for many years for the construction of a highway can be overcome by elaborating an appropriate legislation and applying it correctly. Therefore, the understanding of the specificity of the various contractual categories to which the Romanian state can appeal in order to materialize this old desire to build a highway is essential. The representatives of the central authorities often oscillated between public-private partnership, concession of works and public procurement, although the legislation has changed several times during this time. And the transposition of the European directives in the field seems not to have led to a clear conclusion on the long-term benefits and efficiency of these contracts. The article intends to respond to these concerns that currently grind the aspirations of materialization and completion of the Brasov-Comarnic highway from Romania.*

Key words: *Public Law, Administrative Law, Public Contracts, public private partnership, concession, public procurement.*

Introduction

The dynamics of investments and of the economy in general, but also the constant legislative changes have led both to the diversification of the categories of public contracts, as well as to a fluctuating interpretation of the specificity of each of these categories – too less the resultant of an in-depth analysis.

According to art. 5 paragraph (1) lit. a) of Directive 2014/23 / EC¹, the works concession is a "contract with the onerous title concluded in writing by which one

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** Senior Lecturer – Transilvania University of Braşov (catalina.matei@unitbv.ro).

or more contracting authorities or contracting entities entrust the execution of works to one or more economic operators, in which the consideration for works it is represented either exclusively by the right to exploit the works that are the subject of the contract, or by this right accompanied by a payment". The works concession is not confused with the works contract, the last one referring to the public works contract.

In the current Romanian legislative space, according to art. 5 paragraph (1) lit. g) of Law no. 100/2016², the works concession contract is a contract with an onerous title, assimilated according to the law of the administrative act, concluded in writing, by which one or more contracting entities entrust the execution of works to one or more economic operators, in which the consideration for works it is represented either exclusively by the right to exploit the result of the works that are the subject of the contract, or by this right accompanied by a payment. The definition unequivocally clarifies the membership of the concession contract to the category of administrative contracts, as well as the existence of the concession by itself, as it is not a form or a derivative of public procurement³.

According to art. 3 paragraph (1) lit. 1) of Law no. 98/2016⁴, the public procurement contract is the contract concluded in writing between one or more economic operators, on the one hand, and one or more public authorities, whose purpose is the execution of works, the supply of products or the provision of services. Similar O.U.G. no. 34/2006⁵, Law no. 98/2016 defines in the same article the sub-categories of public procurement contracts, including the public works contract, previously called - works contract.

Therefore, the public works procurement contract is that public procurement contract that has as its object: either exclusively the execution, or both the design and the execution of works in connection with one of the activities provided in annex no. 1; either exclusively the execution, or both the design and the execution of a construction; or the accomplishment, by any means, of a construction that corresponds to the requirements established by the contracting authority that exerts a decisive influence on the type or design of the construction.

¹ Directive 2014/23/EC of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts was published in OJ L 94 of 28 March 2014, and entered into force within

20 days from the date of its publication in the Official Journal of the European Union.

² Law no. 100/2016 regarding the work concession and the services concession, published in the Official Journal of Romania, Part I, no. 392 from 23rd of May 2016.

³ C.G. Dinu, *The Concession Contract*, 2nd Edition, C.H.Beck Publishing House, Bucharest, 2016, p. 229 and the following.

⁴ Law no. 98/2016 regarding the public procurement, published in the Official Journal of Romania, Part I, no. 390 from 23rd of May 2016.

⁵ Government Emergency Ordinance no. 34/2006 on the award of public procurement contracts, public works concession contracts and service concession contracts, published in the Official Journal of Romania, Part I, no. 418 from 15 of May 2006. It was repealed by Law nr. 98/2016.

1. Delimitation among concession/PPP and public procurement

The criterion of the risk assumed by the concessionaire delimits its situation to that of the works contractor. We also note that the operation of the works does not belong to the contracting economic operator of the public procurement, being a step that exceeds the contract and belongs to the contracting authority.

In the situation of the traditional way of constructing the highway, through public procurement, the following aspects were presented:

1.1. Design and construction stage:

- approximately three or four design and construction contracts would be awarded by auction for separate portions of the road infrastructure in question depending on the budget allocated for the project;
- nominal fixed price for the planned design and construction period, but only for the initially planned construction stage;
- the procedures for awarding the public procurement contracts are started according to the insurance of the financing source;
- the payments are made according to the progress of the works, so it implies the need of sufficient public funds for the design and construction stage, which could lead to the limitation of the availability of funds for the necessary works in other public projects;

Unlike the variant in PPP / concession regime, the risks related to the interface existing between the various parties involved in the project are borne by the contracting authority.

1.2. Maintenance and operation stage:

- the maintenance and operation works would be purchased separately from the works for the construction phase, depending on the budget allocated annually;
- the payments are made according to the progress of the works;
- although the decision regarding the realization of other investments and their conception (regarding the object, schedule, technical specifications) remains of the contracting authority, it is possible that the maintenance of the respective road sections will not be made on the basis of optimization considerations from the point of view technically, but on considerations related to the prioritization of the use of available funds, in case there would be road projects with immediate or higher investment needs.

1.3. Financing

The source of financing the costs would be the state budget and, therefore, in the last instance, any loan is contracted at the state level, the costs being immediately recorded in the public sector balance sheet, thus contributing to the increase of the budget deficit.

High financing needs for the contracting authority, especially during the realization of the investment itself.

2. Significant differences between concession / PPP and public procurement

The responsibility for the maintenance and operation works is borne by the same company (the concessionaire) that is responsible for the design and construction, which leads to the optimization of these two activities within the life cycle of the project.

The payments to the Concessionaire are made exclusively based on and depending on the availability of the road and the quality of the services provided during the contractual period, the quality of the construction being thus ensured on the basis of the commercial interest of the concessionaire. *The payment of availability* to be made by the contracting authority is known by at the time of the award procedure as part of a competitive selection process, including on the basis of price.

As a consequence, when the concession contract is signed the costs of operation and maintenance of the road are known, unlike the traditional public procurement procedure, where the decisions regarding the operation and maintenance activities are made at future times, when the infrastructure has already been achieved, thus resulting in a much higher cost predictability in the case of a PPP than of a project realized in the classical acquisition system.

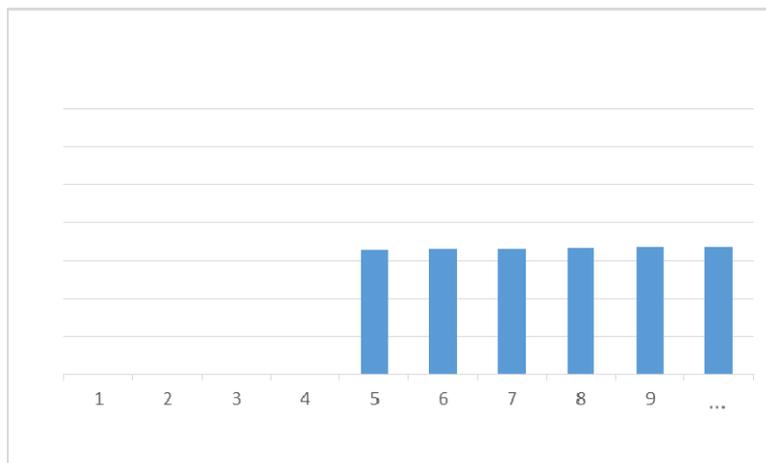
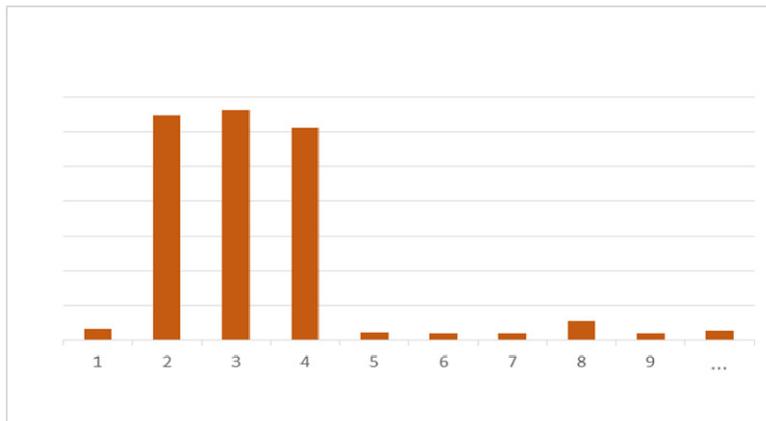
The payments made by the public authority are made during the operation period, after the completion of the construction, and take into account the level of performance in the provision of services by the concessionaire.

Most of the risks are allocated to the concessionaire, the rule being that the public authority bears exclusively the risks expressly assigned to it by the concession contract.

Compared to the traditional acquisition process, the financing costs of the private partner are *higher* in the case of a PPP / concession project; on the other hand, appropriately, the acquisition of services related to a road sector in PPP / concession system compared to the purchase of separate contracts of the same road sector (broken down into several lots) leads to a *high level of risk transfer* to the private partner and to *economies of scale* for this, which can translate into the bidding of competitive prices for the contracting authority as well as the existence of the appropriate incentives of the concessionaire to carry out the contract within the contractual terms and at the established costs (otherwise its capacity is affected, repayment of the loan as a result of the lack of income, the project does not reach the exploitation stage within the deadlines established with the contracting authority and the financiers), the economic-social benefits pursued can thus be achieved.

Given the emphasis on the performance of the concessionaire to provide services throughout the operational stage of the project, according to the nature of the PPP / concession contracts, the attention paid to the end user of the investment is essential.

The typical profile of the payment flows made by the contracting authority over time in the case of the traditional acquisition reflects consistent amounts of money paid by the Contracting Authority during the 4 first years, as reflected in the following graphic:



On the contrary, the typical profile of the payment flows made by the contracting authority over time in the case of PPP / concession acquisition shows a financial participation of the state over the last years, as it is reflected above.

Another notable difference in the distribution of payments made by the Contracting Authority over time in the case of the two acquisition options is the financing costs of the contracting authority, which are affected by the due dates for making these payments to various contractors. In the case of the PPP / concession

option, the private partner must obtain and secure the financing of the project for a much longer period of time, as opposed to the traditional acquisition where the payments made by the Contracting Authority are made earlier. From the perspective of the contracting authority, in the case of the PPP / concession option, the costs of financing public funds have a different distribution over time compared to the traditional acquisition.

3. Repeated Attempts of building a Highway. Short history.

In 2002, the first steps were taken to achieve the Bucharest - Brasov Highway in a public-private partnership regime by publishing in the Official Monitor of Romania the Announcements of Intent for the different sections of this highway. Following the completion of the awarding and negotiation procedures, in 2004, the public-private partnership contracts *were no longer concluded*, and the necessary Government decisions were not adopted and adopted according to the law for the approval of the contracts.

The first attempt took place in 2004, when the Government led by Adrian Nastase then selected three companies to build the Bucharest-Ploiesti (Strabag from Austria), Comarnic-Predeal (Vinci from France) and Predeal-Brasov (Ashtröm-Roichman, Israel) sections.

In 2004, on October 18, in Bucharest, in the presence of the former French Prime Minister, Jean-Pierre Raffarin and of the Prime Minister Adrian Nastase, the former Minister of Transport Miron Mitrea signed with Vinci the public-private partnership contract with the French company Vinci for the realization of 36 km of the highway between Comarnic and Predeal. Cost: 480 million euros.

Traian Basescu argued that there was no tender for the construction of the Brasov-Bucharest highway and that it was "at most a selection of bids, which is illegal for works over 100,000 euros", and the contract for the French company Vinci, which will build this highway, is a gift offered by Adrian Nastase to the French Prime Minister.

Subsequently, at the change of Government at the end of 2004 and after the European Commission expressed its disagreement on how the concessionaires were selected, the contract for the highway to Brasov was not signed anymore.

In 2007, the second attempt was made to realize the first public-private partnership/concession project in the road infrastructure in Romania by launching the public procurement procedure in order to award the concession contract for the Comarnic Highway - Brasov. The concession contract was awarded to the Consortium consisting of Vinci Concessions, Aktor Concessions, Vinci Construction Grands Projects and Aktor, the project did not reach financial closure.

The discussions regarding the realization of the highway between Comarnic and Brasov continued, and in 2009 the tender for the project in public-private partnership was designated. The highway from Comarnic to Brasov should have

been 58 kilometers long and the Minister of Transport since then, estimated at 1.5 billion euros.

In April 2010, however, the Vinci - Aktor consortium unilaterally denounced the contract, the official reason being the lack of funds. The representatives of the consortium showed that the Romanian state did not accept certain clauses, which led to the impossibility of obtaining financing for the project⁶.

On December 19, 2013 was announced the association Vinci-Strabag-Aktor that was to make the concession of the Comarnic - Brasov highway

The prime minister at that time, Victor Ponta announced that the Vinci-Strabag-Aktor association won the tender for the concession of the Comarnic - Brasov highway section. The 58-kilometer-long section of the highway would cost around 1.2 billion euros for construction, being practically the first Romanian highway made in concession and the builder will pay the tax. The concession was estimated for a period of 30 years, during which time the state grants availability payments to the manufacturer to offset the income from the tax. Comarnic - Brasov highway is in the third attempt of concession, after two failed attempts in the past: in 2004 (with Vinci company) and in 2009 (with Vinci-Aktor association).

In February 2013, Prime Minister Victor Ponta declared in a show at Realitatea TV that the realization of the Comarnic - Brasov highway is a priority for him and that if he does not manage to finish it by 2016 then he will not run for the next parliamentary elections.

3.1. Concession for 30 years - a test for the Government's highway strategy

According to the information published on the public procurement website, with the launch of the procedure, the section of the Comarnic-Brasov highway was 58 kilometers long, and the value estimated by CNADNR was 5.32 billion lei excluding VAT (total: 1, 2 billion euros, 21 million euros / km).

The duration of the contract was 360 months (30 years), starting from the date of the award of the contract or from issuing the orders to start the works, this period including the construction phase, the operation and maintenance stage, the success of this contract also depended on other projects to be developed in public-private partnership or concession, some already removed in the competitive dialogue procedure (Pitesti-Craiova, Highway A0 of the Southern Belt of the Capital). But nothing has materialized.

Regarding the availability payments, some calculations showed that the state could end up paying even *three times more money* than the estimated value of the motorway, but the amount will be "extended" over the 30 years concession. Basically, the state should cover the repayments and interest of the loans that the contractor will contract for the realization of the motorway.

⁶ <https://www.hotnews.ro/stiri-esential-16243041-ultima-ora-asocierea-vinci-strabag-aktor-castigat-licitatia-pentru-realizarea-autostrazii-comarnic-brasov.htm>

The payments that the state would have made were strictly related to the fulfilment of the performance criteria associated with the operation and maintenance, provided in the contract. In other words, if the highway was not profitable, the state would pay more and vice versa.

The profit of the builder came from the concession rates that is from the freeway fee, the renting of the service spaces and advertising spaces. These amounts would have covered some of the costs of operating the highway.

The Romanian state transferred the risks of construction, operation and availability of financing to the builders.

The next step that the Vinci-Strabag-Aktor association had to do after signing the concession contract was to make the financial closure of the project within six months, is to sign the financing credits with the banks. Only after the financing was obtained, construction work could begin.

According to the national company of highways (CNADNR) calculations, "in the variant with the usage tariff, the traffic on the new section of the highway will be 66.67% of the traffic in the situation in which the drivers should not pay the usage tax".

Moreover, in the descriptive documentation of the project, CNADNR estimates that the *annual average traffic* of traffic will increase from 10,000-20,000 vehicles in 2015 to 22,000-36,000 in 2030 and to 36,000-59,000 in 2045. Highway made through mountains: 53 bridges, passages and viaducts, 18 tunnels.

However, on the CNADNR site it was specified that for design and construction 4 years are allocated, and for operation and maintenance - 25 years.

The route of the highway is on a mountainous terrain which implies the accomplishment of some very expensive works of art (bridges, passages, viaducts). During the 58 km of the highway 53 bridges and viaducts will be built and no less than 18 tunnels with a total length of 2.89 kilometers. New tunnels near Busteni-Sinaia-Predeal resorts

In addition to the tunnels estimated in the descriptive documentation, the director of CNADNR announced that, following consultations with the interested manufacturers, the variant of the construction of other 3 tunnels in 10 kilometers length will be considered near the three big resorts: Busteni, Sinaia and Predeal.

The highway was divided into two sections: Comarnic-Predeal and Predeal-Brasov (Cristian).

4. The highway project in the period 2012-2013⁷

On 08.12.2012, the Contracting Authority (the association between the Ministry of Transport and the National Company of Highways and National Roads of Romania) published in SEAP the Concession Announcement no. 2253 regarding

⁷ www.mt.gov.ro › web14 › documente › interes-public.

the start of the competitive dialogue procedure for the award of the Public Works Concession Contract for the design, construction, financing, operation and maintenance of the Bucharest-Brasov Highway, the Comarnic-Brasov Section.

At the end of the first stage of the procedure, the following candidates were pre-selected in March 2013 4 competitors, and after the completion of the dialogue phase, the following candidates submitted final offers within the deadline (09.12.2013):

- ASOCIEREA VINCI SA, VINCI CONSTRUCTION GRANDS PROJETS SAS, VINCI CONSTRUCTION TERRASSEMENT SAS, STRABAG AG, STRABAG SE, AKTOR SA, AKTOR CONCESSIONS SA,
- ASSOCIATION OF IMPREGILO & SALINI.

Following the analysis and evaluation of the final offers, on 19.12.2013, the first offer was declared a winner.

Regarding *the concession rate and tax system*, on the Comarnic-Brasov Highway, a “semi-closed” toll system was planned, which provided for full-road barriers at the two ends of the highway, located in the Comarnic and Rasnov area, as well as toll booths in Sinaia-Busteni and Predeal. The concession tariff was charged once the entire highway is completed and becomes operational.

The concession contract is structured in three main stages as follows: 1. Preliminary period 12 months from the date of signature of the Contract; 2. Construction period 36 months from the end of the preliminary period; 3. Operating period 26 years from the end of the construction period. The operating period begins on the date of completion of the highway construction and lasts 26 years, when the concessionaire has the obligation to operate and maintain the highway according to the performance standards provided in the concession contract.

The obligation of the concessionaire to operate and maintain the highway has as its object all the activities necessary for the permanent assurance of a fully functional, safe and high quality highway for users. These activities include snow clearing and removal of ice from the road, cleaning, maintenance of the vegetation on the side of the highway, carrying out repair work on the tread surface and service and parking spaces, as well as monitoring the occurrence of damage (grinding, wear and tear).) and prompt repairs, such as periodic rehabilitation works in order to maintain the highway and related works in good conditions.

The concessionaire also has the obligation to collect the concession tariffs and to operate and maintain the tariff collection system. The penalty system provided in the contract places a special emphasis on minimizing any breaches of these obligations that may disrupt the flow of traffic flows in good conditions. The concessionaire must make available to the users a wide range of options regarding the modalities of payment of the tariffs, electronic and manual (with cash), as well as to assure the assistance to the users on any aspects related to them, among which the making available of a call center with 24/24 operation.

The concessionaire must frequently demonstrate, during the contract, that the operating and maintenance requirements are met. For this purpose, objective methods are used to determine the state of the road and the structures, according to international and national standards, the functionality of the charging stations is controlled by sensors, video monitoring system (CCTV) as well as other detection equipment are used to monitor the quality of the service placed at the disposition of the users, both on the route of the motorway and in the spaces of services and parking, all these besides the frequent inspections on which the monitoring staff will carry out.

In case the concessionaire does not meet the requirements for the operation and maintenance of the motorway, it is penalized by the Authority.

4.1. Payment mechanism. The Revenue of the Dealer

The concessionaire benefits from three categories of income:

- a) Availability payments from the public authority;
- b) Revenue from the concession fee paid by the users of the motorway (these will be deducted from the availability payment);
- c) Income from the use of secondary infrastructure (for example, rents or royalties paid by entities operating gas stations or other service spaces) - a percentage of 60% of these to be returned to the contracting authority and deducted from the availability payment.

So far only a few such projects have reached financial closure in South-East Europe, and as a result have been built and are currently in operation.

This is mainly due to some essential characteristics that countries in this region have in common:

- old road infrastructure and in many cases much degraded, requiring urgent restoration / reconstruction work
- the relatively low degree of ownership over the vehicles, low volumes of traffic and reduced availability of payment of the fees for road use
- small national economies, as well as limited fiscal space, resulting in limited budgetary resources for the realization of road infrastructure
- low country rating and absence of mature financial markets, considerably affecting the possibility of using the financial options available for this type of projects

In the face of such objective constraints, representatives of the public and private sectors require considerable efforts to create the conditions for the development of PPP / concession projects in this part of Europe.

5. The project "Bucharest - Brasov highway, Comarnic section - Brasov, Lot 2: Predeal-Christian sector"

The highway was to be promoted by the former Dancila government as a pilot project in PPP, through competitive dialogue, according to a 11 July 2018 press

release. The decision will be taken only if it obtains the support of the European Commission and if the IFI (International Financial Institutions), the World Bank, the EIB and the EBRD will agree to participate in the financing of the project.

On October 25, 2019, *the first asphalt layer is laid* on the Râșnov - Cristian / Brasov lot, part of the Comarnic - Brasov Highway. The general objective of the project was to make a fast and safe connection between DN73 (Rasnov) and DN73 (Brasov), thus bypassing the City of Rasnov and the Commune of Cristian, through the section of the Rasnov - Cristian Highway, part of the Predeal - Cristian section.

The project aims to reduce the travel time between Rasnov and Cristian from 11 minutes to 4 minutes; reducing the operating costs of the vehicles by approximately 15%; reducing the number of accidents as a result of avoiding the crossing of urban areas and, last but not least, improving the environmental conditions, as a result of reducing the amounts of pollutant emissions, noise and local air pollution.

The total value of the project is 204,219,379 lei (including VAT) and will be financed through the Large Infrastructure Operational Program 2014-2020 as follows: 75% European Union contribution from the European Regional Development Fund - 123,429,400.05 lei, 25% contribution own- 41,143,133.32 lei, the rest of 39,646,846.22 lei representing VAT⁸.

The works for the Râșnov - Cristian lot officially started on May 20, 2019. The deadline for completing the works on this motorway sector is April 2020. The contract for the design and execution of lot 5 of the Comarnic-Brasov highway, Râșnov - Cristian sector and the Link Road, length 6.3 km (highway) + 3.7 km (4-lane national road with median separator) was signed in the autumn of 2017 with the Association Alpenside - Specialist Consulting, for the amount of 118 million lei. As for the construction of most of the high-speed road in Prahova Valley, the future is uncertain. And that's because PNL, the party that could come to the government, has a different perspective than the PSD for this project⁹.

On the 25 of October 2019, The Orban government wants to make the Comarnic-Brasov highway also in public-private partnership (PPP) as the former prime-minister Viorica Dancila wanted. The differences are that the route of the road will change and that the liberals do not even think about going without European funding¹⁰.

⁸ <http://www.ziare.com/economie/infrastructura/ca-si-dancila-liberalii-vor-autostrada-comarnic-brasov-in-ppp-doar-ca-propun-alt-traseu-si-cer-bani-European-1582828>.

⁹ https://www.economica.net/premiera-pe-autostrada-comarnic-brasov-se-asterne-primul-strat-de-asfalt-pe-lotul-rasnov-cristian-video_175525.html; https://www.economica.net/autostrada-comarnic-brasov-primul-strat-de-asfalt-pe-lotul-rasnov-cristian-ar-putea-fi-asternut-pana-vine-iarna_175099.html.

¹⁰ <http://www.cnadnr.ro/ro/comunicare/comunicate-de-presa/interes-general/autostrada-bucuresti-brasov-tronson-comarnic-brasov>; <http://www.ziare.com/economie/infrastructura/ca-si->

The PNL governance program shows that the Minister of Transport, Infrastructure and Communications wants to continue to build the Comarnic-Brasov Highway in PPP.

In the recent past, the former Dancila Cabinet delegated the National Strategy and Forecast Commission to negotiate to select a private partner to build the high-speed road based on a feasibility study (SF) conducted in the early 2000s. That document provided a route of the highway that was to pass through the middle of the Busteni resort.

The forecast commission has launched a tender. Several large contractors have shown interest in the project. They asked for clarifications from the Forecast Commission, but did not submit any offers. Finally, the Forecast Commission announced that it is negotiating a contract with a Chinese-Turkish association called China Communications Construction Company - Makyol Insaat Sanayi Turizm.

Meanwhile, Viorica Dancila has decided that the high-speed road will be built with money from the budget. It wasn't long, however, until the late Minister of Transport, Razvan Cuc, announced that in the meantime the Forecast Commission was conducting new negotiations with the Chinese-Turkish association. The new version of the contract was not publicized.

Conclusions

The Liberals want to make a fifth attempt to build this road through the mountain in the PPP. It is sustained that PNL wants a route given by a feasibility study from 2015, more environmentally friendly and which provides for the construction of tunnels through the mountains.

In the PNL governance plan it is mentioned that: "The Comarnic-Brasov highway with a length of 58.0 km and costs 997.75 million euros (2014 MPGT prices) will be promoted as a pilot project in PPP, through competitive dialogue. The decision will be taken only if we get the support of the European Commission and if IFI (International Financial Institutions), World Bank, EIB and EBRD will agree to participate in the financing of the project, the Feasibility Study (SF) of 2015 will be used, on a route and modern and environmentally friendly technical solutions (tunnels)"¹¹.

dancila-liberalii-vor-autostrada-comarnic-brasov-in-ppp-doar-ca-propun-alt-traseu-si-cer-bani-europeni-1582828.

¹¹ <http://www.ziare.com/economie/infrastructura/ca-si-dancila-liberalii-vor-autostrada-comarnic-brasov-in-ppp-doar-ca-propun-alt-traseu-si-cer-bani-europeni-1582828>.