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Course of EUROPEAN ADMINISTRATIVE LAW

**PUBLIC-PRIVATE PARTNERSHIP: AN ANALYSIS OF
EUROPEAN PRINCIPLES AND ITALIAN LEGAL
SYSTEM**

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*A mamma e papà,
perché il mio traguardo
è il loro successo.*

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INTRODUCTION

The aim of the present work is to analyse the topic of Public-Private Partnership, as an alternative form of co-operation to set the relationship between public authorities and private sector, which attempt is to ensuring funding, construction, renovation, management and maintenance of infrastructures, related with the provision of services.

It concerns an area of investigation that is currently under development and also affected by changing-in-law, in which the principles deriving from European Union procurement law have contributed to the adoption of effective managerial forms and enhance the role of private investment. In fact, in recent times, there has been the emergence of business models that are based on close cooperation between the public and private sectors.

This is a consequence of the progressive awareness of finding, in the skills and values contribution of the private sector capabilities, an important solution to the increasing limits that public bodies have in financing and in the pursuit of its institutional interests.

In recent years, therefore, economics and legal literature have taken into account a strong interest on the topic of PPPs, considered as a privileged instrument in order to correct market failures and those of Public Authorities, in financing and management of public services. In particular, it has been observed as, compared to traditional forms of public procurement of goods and

services, Public-Private Partnerships allow combined use of resources and infrastructure that is revealed to adhering to efficiency, economy and cost orientation principles, without neglecting the pursuit of quality objectives. Clearly not only the positive aspects and potential benefits are highlighting, but also the critical issues that this approach entails, in terms of costs and risks.

The whole work is divided into three chapter, that mainly concern three sub-topics.

The first Chapter, *Origins of Public-Private Partnership in Europe*, opens with a section dedicated to the UK experience of the Private Finance Initiative. In fact, the European diffusion and regulation of Public-Private Partnership phenomenon for the construction and management of public works and services of public interest, it is subsequent to the English practice of involving private capital in public management.

Later, I have taken into account the international spread of the phenomenon of Public-Private Partnership, with a general overview of pros and cons of that mentioned policy tool.

Then, in the third section, the analysis follows with the European approach to the issue of Partnership. First, I have examined the PPS guideline, which came out from the Green Paper adopted by the European Commission on 30 April 2004 (2004/327). In this document it is drawn the distinction between forms of Contractual PPP and institutionalized PPP. Then, for many reason, I choose to focus the analysis only on the contractual form of Partnership, in its different embodiments.

Therefore, in the second Chapter *Public-Private Partnership and current*

law in force, attention have been placed on the provision of public works and services, in the light of the changes introduced by Directive no. 23 of 2014 and subsequently by the Italian Public Contract Law reformed in 2016. In fact, in order to understand this complex issue of Public-Private Partnership, have been highlighted, at first, the most important aspects of European general principles and procurement law. And then, I have made an analysis of the legislation adopted in this regard by the Italian domestic law, with particular emphasis on the changes introduced in 2016 Public Contract and Concession Code (Legislative Decree no.50/2016) compared to the former Code of 2006. Thereafter, the scope of the analysis will cover the model of contractual PPPs that have been implemented in practice, and I observed especially how have changed the Concessions Contracts and the Project finances' discipline. In addition, I focused on the analysis of basic concepts that are relate to PPPs, such as operation risk, economic and financial balance, and procedural aspects linked to partnership method.

Regarding sources and law materials, I based this analysis on the current European rules, as they are settled on Directives n.23, 24 and 25 of 2014; and the comparison between the former and the current Italian domestic law related to Public Contracts and Concession Contracts.

Moreover, I used other different sources, such as judgments of the European Court of Justice and Italian Courts, opinions and communications of the European Commission, journal review on items of public and community law.

Lastly, the third Chapter, *Innovation Partnership*, is entirely dedicated to this new procurement procedure, which have been disciplined since 2014. The first section of this chapter mainly concerned the concept of Public Technology

Procurement, as an essential element for the enforcement of Innovation, Research and Development, in the context of European public and private investments. In this connection, the analysis will suggest the European ten-year strategy, “*Europe 2020: A European strategy for Smart, Sustainable and Inclusive Growth*”, which takes into account the key role that assume in the European markets, the public demand for innovative services and works. Then I have expose how European Union and Italian laws have transposed the concept of innovation and technology procurement into a new procedure to award Public Contracts.

I choose to deepen and discuss the topic of Innovation Partnership because during my last academic year I took part in the public policy school, “*Politiche pubbliche e strategie d’impresa per innovazione e start-up ad alto contenuto tecnologico*”, carried out by the Association for the evaluation of quality of public policy (*Italia Decide*), within I could find out about Innovation in Italian context. The meetings cycle was related to the role of public policies in supporting innovation. In fact, during seminars and conferences, the main reflection concerned the impact of measures adopted by the legislature and Government, to promote economic growth, employment, development of human capital, openness and competitiveness of enterprises, in a perspective of innovative and sustainable growth. The common thread that binds these interventions, as well as being represented by the concept of innovation, which is the thematic background, is also the role of public policies. Besides, the innovation process is a phenomenon that can not ignored the requirement of active intervention of public sector, which is called, especially at time of economic crisis, to encourage the assumptions on the basis of production, growth, employment could find a prosperous environment.

At the end of the abovementioned public policy schools' course, I have decided to delve into this topic on Innovation Partnership in the European strategy context, which is a particular institution promoted by the European Commission, both in Horizon 2020 funding Program, and analytically disciplined in Directive no. 24 of 2014. Moreover, the political premises contained in the objectives settled in the *Europe 2020 Strategy* on the synergy between innovation and social interests have therefore initiated a rethinking of relationship between public and private sphere. In fact, the European Union, alongside of those which are the direct financial support measures, also encourage a strategic use of contractual tools, and suggest an adjustment of the models provided in the administrative legal systems of Member States.

Then the European Directives of 2014 inspired prediction of discipline of some legal institutions, which refer to the more general framework of the Public-Private Partnerships in view of a greater synergy between public and private entities.

CHAPTER I

ORIGINS OF PUBLIC PRIVATE PARTNERSHIP IN EUROPE

This First Chapter aims to provide a general overview of the institute of Public-Private Partnership. In order to perceive how this instrument could affect and modifies traditional approaches in the field of Public Procurement matters, it is necessary to make a preliminary analysis of its history and its development in European Countries.

The first section is focused on the introduction of Private Finance Initiative, which was adopted in United Kingdom and represent a kind of antecedent of Public-Private Partnership.

Then, the second section is dedicated to the international relevance and spread of the mentioned tool as innovative method to regulate relationship between public and private bodies.

Finally, the third and last section, deeply analyses the European official proposal related to the topic of Public-Private Partnership, that emerge for the first time in 2004 Green Paper on PPP and the European Procurement Law.

1. *Private Finance Initiative (PFI) in United Kingdom: the antecedent of Public-Private Partnership*

At the early 1990s in United Kingdom, later on a first embryonic experiment in United States¹, it was introduced the usage of a partnership approach between public authorities and private bodies in the field of infrastructural projects and public utilities, toward general interest satisfaction. A typology of public-private cooperation was proposed, despite the absence of a general regulatory provision of a Public-Private Partnership, to address problems which were raised as a result of increased use of market's rules in the public sector services framework, under the Margaret Thatcher's government. In that period United Kingdom had to faced a background of increased use of deregulation and privatization: have implied a policy of disposal of entire State Corporations and Nationalised industries in favour of private enterprises in some relevant sectors such as energy, water, telecommunication and transport infrastructure.

Otherwise should be consider that the privatization policy would not have been effectively implemented in particular functional sectors, for which the nature and the quality of the services required, could not be provided regardless public assumption of risk and responsibility. For instance, services related to health, education, national defence, roads infrastructure, would have not

¹ The project financing was born at early 30's of the previous century, in the field of petrol oil and electric energy in USA, when private companies started to finance, by limited sources, operations of constructions, production and maintaining the necessary infrastructure required, object of public interests.

efficiently replaced without public expenditure and accountability. At the same times, the necessary modernization of infrastructures had to face the international financial crisis challenges through 1970-1980, which had led the UK Government to impose a tight control over the public expenditure².

As a consequence, under the Sir. John Major Government (1990-1997) and the New Right Ideology *era* of the Conservative Party, have been developed the first attempt to reform the public procurement approaches. Abandoning the former Ryrie Rules³ standpoint, which have represented the traditional and strict conditions on the basis of which private funds of investment were allowed into the nationalised industries, has been pursued the aim of involve private sources of investment, and private management tools, in order to achieved the modernization of the major public infrastructural projects, avoiding resorted privatization solutions.

In the Conservative prospect, the Ryrie Rules represented a restriction which would have not permitted the establishment of public and private cooperation scheme. Allowing private capital investment in the provision of

² At that time in UK was imposed a tight financial control, and the general government deficit should be no greater than 3% of Gross Domestic Product, as calculated in the annual Public Sector Borrowing Requirement (PSBR).

³ In the 1980s the Ryrie Rules governed the use of private or additional finance. These required that private finance applied at public service delivery could only be allowed if:

- there were no favourable risk terms, such as a government guarantee;
- projects yielded benefits in terms of improved efficiency and profit commensurate with the cost of raising risk capital; and
- that use of private finance could not be additional to public finance. In other words, public expenditure would be reduced, pound for pound, in consequence of the use of private finance.

In 1995 the Private Finance Panel, which have promoted the PFI as a successor scheme, have criticized the Ryrie Rules “*for being too restrictive and giving public bodies no incentive to seek privately funded solution*”. (Cfr., Private Finance Panel, 1995, par. 2.2.)

infrastructure-related services, it could have been developed also some profitable opportunities that “*Government funding restriction and public sector finance would not be able to cover*”⁴.

In the Autumn Statement of 1992⁵, Norman Lamont, the Chancellor of the Exchequer, has announced that the *Private Finance Initiative* (PFI) would have been launched, despite the fact that there was an absence of a general provision of public private partnership in United Kingdom. In the abovementioned Statement, the Chancellor explained the incoming policy in the development of the “*private financing of capital projects*”⁶, which would have replaced the traditional procurement patterns. The three principal developments concerned:

- Firstly, the allowance of any project in the public sector, which would be privately financed, whether they could be profitable and convenient rather than public projects;
- Secondly, the encouragement of any kind of joint ventures between private and public companies, that shared a common purpose, that would have permitted a sensible transfer of risk linked to the operation to the private sector;
- Finally, the possibility of use leasing, which would not have to face the public expenditure limits, it would have permitted good value for money for taxpayers and risks would have remain connected to the private

⁴ Cfr., Jane Broadbent and Richard Laughlin, *The Private Finance Initiative: Clarification of a future research agenda*, Financial and Accountability Management, 15/05/1999, Blackwell Publishers Ltd, Oxford, UK.

⁵ The PFI was launched by Norman Lamont, the Chancellor of the Exchequer, in the Autumn Statement of November 1992.

⁶ Cfr. Norman Lamont speech, House of Commons Hansard (HCH), 12/11/1992, column 998.

sector⁷.

Through the establishment of *Private Finance Initiative* (PFI), announced in 1992⁸, was implemented the possibility to realize efficient infrastructure, with the specific features that the financial risk related to the construction operation of assets, have been transferred over a private bodies.

The PFI have introduced a “*financial mechanism to obtain private finance which could satisfy the political need to increase investment in the infrastructure without affecting public borrowing, guarantee large contracts for construction companies and create new investment opportunities for finance capital*”⁹.

According to the prevailing doctrine, the Private Finance Initiative did not simply represent a type of contractual scheme, even so “*a method to realize a public infrastructure, with the participation of a private sector*”¹⁰, which

⁷ Cfr. Norman Lamon speech: “*In future, any privately financed project which can be operated profitably will be allowed to proceed. [...] Secondly, the Government have too often in the past treated proposed projects as either wholly private or wholly public. In future, the Government will actively encourage joint ventures with the private sector, where these involve a sensible transfer of risk to the private sector. [...] Thirdly, we will allow greater use of leasing where it offers good value for money. As long as it can be shown that the risk stays with the private sector, public organisations will be able to enter into operating lease agreements, with only the lease payments counting as expenditure and without their capital budgets being cut*”. House of Common Hansard (HCH), 12/11/1992.

⁸ It is essential to notice that there is no overall statutory frameworks which had introduced the Private Finance Initiative, its discipline is based on of a series of guidance lines addressed from the Treasury Ministry.

⁹ Cfr., *Private Finance Initiative and Public Private Partnership: What future for public services?*; Research published in 2001, by Centre for Public Services (now the European service Strategy Unit).

¹⁰ Cfr., Hodge Grame, Greve Carsten, *The Challenge of Public-Private Partnership. Learning from International Experience*. (Cheltenham, UK; Northampton, MA, USA: Edward Elgar, 2005).

included a several type of contractual arrangements.

In broad term, PFI scheme consist in a long term contract, usually a period between 20 and 30 years, within the parties has a different nature and tasks, sharing a common aim. Key institutional role and responsibilities should be maintained. This requires that authorities like Public authority party is responsible to define a specific output, in accordance to the assessment of the specific public interest; then the private awarded contractor is in charge of design and builds the assets which are required; to fund the construction costs, which would be recovered over the contracts' whole duration, charging the government a periodic payment. It means that, comparing PFI to a conventional public procurement, the Government should be qualified such a purchaser of *services*, rather than purchaser of *asset*. In fact, the private entity is required to provide the infrastructural asset, and could be receiving payment only since when it would enable public sector to benefit from the service flow.

As reported by Paul Grout on Oxford Review of Economic Policy (1997):

“The PFI concerns the transfer to the private sector of infrastructure projects which have traditionally been directly or indirectly delivered by the public sector [...]. The central feature of PFI projects it that the private sector funds and builds the asset and it is the flow of services from the asset that is sold to the public sector; that is, the obligation on the part of the government is to purchase, directly or indirectly, a flow of service over time rather than the capital asset that provides.”¹¹

In these statement emerge that the Conservative party had a based assumption,

¹¹ Cfr., Paul A. Grout, *The economics of the Private Finance Initiative*, Oxford Review of economic policy, vol.13 no.4; 1997 Oxford University Press and the Oxford review of economics policy limited.

relying on the fact that the private sector would have been able to undertake projects, which would not be better financed through conventional public expenditure. Moreover, while the asset remained as private ownership, they would not be counted as part of public spending budget, their cost is *off-sheet balanced*.

However, after a year from the establishment of PFI, it has been noticed that it was slowly implemented and the relative net effect was limited, comparing the result to the initial optimistic prediction.

To enhance this model, the Conservative party adopted in the following Autumn Statement (1994) the so called *universal testing* for PFI: it was a rule stating that private finance should be the preferred option for capital projects in public service delivery, and the Treasury Ministry would not have approved any kind of public funding unless it has been demonstrated that the private finance was not economically preferred to other alternative ways of funding.

For as the Private Finance Panel pointed out in 1995: “*self-financing projects undertaken by the private sector would no longer need to be compared with the theoretical public sector alternative*”¹².

The Treasury Ministry had also highlighted how the PFI scheme would have been the eligible criteria, comparing to traditional procurement methods, because it would be able to provide *value for money*. That concept expresses that the estimated whole-life-contract-cost would have to be lower, hence more convenient also for the taxpayer, than the total amount of the cost if it had adopted a traditional procurement pattern.

¹² Cfr., Private Finance Panel, 1995.

In order to enforce the new public management policy, the Treasury Ministry and Private Finance Panel Executive, in 1995 jointly have published an exhaustive guidance entitled *Private Opportunity, Public Benefit - Progressing the Private Finance Initiative*¹³. This document has outlined the purposes of the PFI, and furthermore which progress would have been achieved. It has also emphasised the two base line principles in the field of Private Finance Initiative: the risk transfer to private sector and the concept of value for money.

However, the principal merit of that guidelines it is to have classified three main types of projects, which includes:

1) *Financially free-standing projects:*

The first type implied that the private sector undertakes the entire project (from design, built, to operate and maintain operations), within the public party have defined a specific output. The total amount of costs would have recovered through charging public authorities for the service provided. Usually the private company which offer the preferred bidder, through a competitive selection process, award a concession over a fixed period of time, during which is entitled to receive the agreed fee. From the opposite position, the public sector involvement is limited to enabling the prosecution of project, for instance, by undertaking some of the initial planning, licensing and statutory procedures.

2) *Services sold to the public sector:*

In that contract type, the cost of the project is totally or partially charges from the private sector provider to the public sector body. Basically most of these projects are structured as leasing contract, in which the

¹³ The guidance was jointly published by Treasury Ministry and the Private Finance Panel in 1995.

periodic payments made by the public sector recover for using capital asset.

3) *Joint ventures:*

The third main category implied that the cost of the project is partly financed from public funds and partly from other private sources of income. With joint venture agreement, public and private members enter into an association and agree to jointly invest funds, sharing risks and benefit.

It may also be worth saying that the developing policy of PFI, although it had received heavy criticism from the politics opposition, which argued that PFI represented the successor of a policy of privatization of the public sector, was token forward also by the following New Labour Government, in 1997, under Toni Blair's leadership.

Labours have promoted the idea that partnership arrangements were central to ensure the success of public service delivery.¹⁴ Otherwise it should consider that the main Labour thinking have adopted a cooperative standpoint in the public service provision. It means that Labours did not assume PFI as a unique adequate model, whereas adopted an highly pragmatic view based on the reliance that *“should be encouraged the best use of what the public, private and civil society had to offer, through the establishment of a wide variety of partnership arrangements”*¹⁵.

The Labour Government indeed has committed a speedy review of the PFI

¹⁴ Cfr., Peter K. Falconer and Kathleen McLaughlin, *Public-private partnership and the “New Labour” Government in Britain*; Chapter Seven, in Osborne Stephen P., *Public Private Partnership, Theory and practice in international perspective*. (London, Uk; New York, USA: Rutledge, 2000).

¹⁵ See above.

process, culminated with 29 Recommendation gathered in the Bates Review of 1997, which have simplified the practical procedure and completely rejected the concept of *universal testing rule* of private finance, previously applied for all public sectors capital projects. Labour Reform has also emphasized the need to decentralize the use of PFI scheme, to better apply this method to the local level projects, directly involving Local Governments instead of Central Department.

1.1 Key features of Private Finance Initiative

Regardless of the political and academic debate over the new public management, and bearing in mind that PFI scheme has been subject to further amendments that have taken place over the years¹⁶, also due to government

¹⁶ For instance, in 1997 the Private Finance Panel Executive was disbanded and adopted a new Private Finance Taskforce; the Local Authority Association established the Public Private Partnership Programme (4Ps) with the aim to brought PFI and other partnership investment in local services; in 2000 was established a new UK Partnership. Furthermore, a significant role was assumed by National Audit Office (NAO), which have conduct several examinations of PFI projects, stressed its criticism, addressing the difficult issues of project, in order to better proceeded. In 2012 was set out the review of PFI Government's new approach, called PF2, to ensure more efficient delivery, flexible service provision, greater transparency and appropriate risk allocation.

changes and public policies developed, is essential is to analyse the core that characterizes the Private Finance Initiative.

In 2006, the HM Treasury, in its “*PFI: strengthening long term partnership*” guidance, has pointed out how the potential benefits of Private finance methods would consist in its attitudes to allocates the operation risks to the party best able to manage them¹⁷.

The main key features still consist of the genuine transfer of financial risk over private bodies. The PFI, generally provides to entrust a private company, which is properly constituted to participate at the project, which is called “*Special Purpose Vehicle (SPV)*, and it is charged to designed, realize, finance, govern and maintain the entire infrastructural project. On the other hands, public sector is responsible to remunerate the private finance initiative, through periodic payment, better defined as *unitary charge*, during the whole period contractually agreed.

It seems appropriate to quote the Seventeenth Report of Session 2010/2012 on the PFI, which has been drafted by House of Common, within the Treasury Committee have stated as follow:

“In a typical PFI project, the private sector party is constituted as a Special Purpose Vehicle (SPV), which manages and finances the design, build and operation of a new facility. The financing of the initial capital investment (i.e. the capital required to pay transaction costs, buy land and build the infrastructure) is provided by a combination of share capital and loan stock from the owners of the SPV, together with senior debt from banks or bondholders. The return on both equity and debt capital is sourced from the

¹⁷ Cfr., HM Treasury Guideline, *PFI: Strengthening long term partnership*, March 2006.

periodic “unitary charge”, which is paid by the Public Authority from the point at which the contracted facility is available for use. The unitary charge may be reduced (to a limited degree) in certain circumstances: e.g. if there is a delay in construction, if the contracted facility is not fully operational, or if services fail to meet contracted standards. Thus, the PFI structure is designed to transfer project risks from the public to the private sector”¹⁸.

The Report illustrated that there are three different parties actually involved in a PFI project:

- the Special Purpose Vehicle (SPV), which generally is a limited a company or a consortium of more companies, that are set-up for the merely purpose of delivering the PFI project.
- the Public Awarding Authority, which could be Central Government Department or Local Authority.
- the third party such as Bank, or another financial institution: it is the subject that ensure the project, providing warranties for funding the costs related to the program.

Whereas the Public Authority is bounded in a long term agreement with the Special Purpose Vehicle, generally it have no direct bound to the Bank or financial institution, which has an agreement with the private company. In that consist one of the potential advantages for public body, that is not expose to the business risks and capital risks, concerning the construction of the *assets*.

¹⁸ Cfr., House of Common, Treasury Committee, *Seventh Report of 2010/2012 on Private Finance Initiative*, Published August 2011 by authority of the House of Commons London: The Stationery Office Limited.

(<http://www.publications.parliament.uk/pa/cm201012/cmselect/cmtreasy/1146/1146.pdf>).

1.2 Main Differences between PFI and others forms of PPP

It is essential to clarify that the PFI approach, representing a *species* of more extended *genus* of Public-Private Partnership, and it differ from privatization policy, outsourcing and from contracting out schemes.

As a matter of fact, privatization concerns the policy of selling off State asset, purchased by private entities that would carry on the related activities. Meanwhile in the PFI scheme does not exit public asset: whom are designed, built and financed directly from private contractor, which are the asset provider and flow of service seller.

PFI differs from outsourcing, an option that allowed the public authority to assign some public services to a private entity, which become the only responsible of his activity and could conduct it in perfectly autonomy.

Neither is contracting out, concerning the latter the case that private sector operators use existing public asset and is responsible only to provide services which previously have been provided by a public agency. Contracting out implies that the public authorities, through public competition which ensures transparency, select the most efficient bidder, which entrusts the management of a service, having a payment in return. Differently, in PFI project, private company is required to be provider of the capital asset as well as provider of services. Finally, in case of public service has been contracted out, the public authority appointed to perform remains the sole responsible subject of the delivery of service, although the latter is carried out by a private entity.

In that sense the PFI represents a specific contract that “*is intended to provide a continuing commercial incentive for synergy, flexibility and efficiency right through from initial design, built and operation*”¹⁹; and permit us to distinguish between the State as purchaser, but not as well as provider.

The PFI, is just one method includes in the most extended Public-Private Partnership category, but it has represented the first concrete implementation that have subsequently been extended to other countries and European states. The United Kingdom has been the leading State behind this new approach, both in terms of number of approved PFI projects and in terms of budget invested. Therefor it seemed appropriate to refer to the mentioned experience English before proceeding with the analysis of Public-Private Partnership as well as proposed at European and International level.

It is worth observing one last clarification: the PFI approach, compared to the Partnership generally considered, is characterized by what concerns the requirement of transfer risk by the private entity. Instead Public-Private Partnership methods is qualified as a more broaden category, including also models that provide for an equal based cooperation between administrative authorities and public entity, in a perspective of sharing aims, risks and benefits.

¹⁹ Cfr., David Corner, *The United Kingdom Private Finance Initiative: the challenge of allocating risk*. (Chapter 3), in Hodge, Greve, *The challenge of Public Private Partnership*, Edgward Elgar, 2005.

2. International development of Public-Private Partnership as a strategic policy tool

The PFI in United Kingdom experience does not represent a unique case. Indeed, the large scale diffusion of the Public-Private Partnership models in recent decades, has involved most European countries, and the majority of the Western world. Among others, one of the main reason that has contributed to the development of the mentioned cooperation approach, was the fact that the demand for infrastructures and public utilities remained unchanged; rather the needs of the community have shown increased tendency. Furthermore, have been increased also the requirement to reduce or rigidly control the public expenditure, and address budgetary constraints imposed both on European or International level.

Concerning both that controversial needs, how could National Governments better achieve the construction of new infrastructural facilities or maintain of the existing ones, while avoiding an excessive government expenditure?

Traditionally, the exigency of infrastructural modernization has been delivered through public expenditure made by central or local authorities, and through a direct State intervention in the economics matter. But the orthodox approach to the public procurement in delivering services and public utilities in many cases has generated inefficiencies and caused loss and wasting of public sources.

For as Professor Chiti pointed out: *“il Partenariato evoca l’esistenza di una terza via rispetto all’economia socializzata ed al mercatismo, segnata da un*

tendenziale equilibrio tra interessi pubblici e interessi privati”²⁰.

It means that to cope with different social requirements has proved to be useful to explore a “third way” which aimed to reach a balance of public and private interests, rather than proceed with the State economy interventionism or, on the contrary, through service providing privatization. It also suggests that there clearly was an evolution and an afterthought in relations between public and private sphere.

Hence an increasing number of governments has respond to these needs attempting to fulfil the creation of partnerships that contemplate direct investment of private sectors in funding projects and operations that accomplish to the public interest satisfaction.

A relevant analysis, made by the contribution of Fiscal Affair Department of International Monetary Fund in 2004²¹, shows that the use of PPP model has

²⁰ Cfr., Chiti M.P., *I partenariati pubblico privati e la fine del dualismo tra diritto pubblico e diritto comune*. In “Il partenariato Pubblico Privato. Concessioni, Finanza di progetto, Società miste, Fondazioni”, a cura di Chiti M.P., 2009, Editoriale scientifica, Napoli, IT.

²¹ Cfr., International Monetary Fund, “*Public Private Partnership*”, March 12, 2004, mentioned by Fiscal Affair Department of International Monetary Fund. According to the Report, “*a number of advanced OECD countries now have well-established PPP programs [...] The best-developed program is the United Kingdom’s Private Finance Initiative (PFI), which began in 1992. Other countries with significant PPP programs include Australia and Ireland, while the United States has considerable experience with leasing. Many continental European Union (EU) countries, including Finland, Germany, Greece, Italy, the Netherlands, Portugal and Spain, now have PPP projects, although their share in total public investment remains modest. Reflecting a need for infrastructure investment on a large scale, and weak fiscal positions, a number of countries in Central and Eastern Europe, including the Czech Republic, Hungary, and Poland, have embarked on PPPs. There are also fledgling PPP programs in Canada and Japan. [...] Also Mexico and Chile have pioneered the use of PPPs to promote private sector participation in public investment projects in Latin America. [...] Some other countries, most notably Brazil, are planning significant use of PPPs. There is also a*

provide to be an effective strategy to contain government spending, ensuring for citizens demand of public works and use of public services at an appropriate level, without necessarily having to privatize companies that are responsible for implementing or managing them. Conversely, the emergence of PPPs has permitted the strengthening of cooperation between public and private: a reality which sees a systematic involvement of private know-how and expertise, of the central role of the public sector and thus control of government authorities.

The mentioned Report of 2004 explain how the PPP projects have been adopted also in developing countries, such as Latin American States or some African States. As the matter of fact, in emergent economy countries the infrastructure development is highly demanded, and it coupled with the pressure on national budget expenditure. As a result, government's strategies mostly moves towards encouraging an alternative forms of investment in infrastructure projects, provided by the private finance.

Looking at PPP model at international level, emerge quite clearly that they differ from country to country, depending basically to their national contractual system. Some countries count over a central body dealing with PPP arrangements, while others tend to let the local entities or municipalities acting in that sense.

proposal for a regional approach to infrastructure development in Latin America that would involve PPP-type arrangements, much as in the EU".

2.1 General classification of PPP models

Regardless of the enormous variety of existing partnership in the different continents, some authors have tried to set-up a general classification, that could summarize and explained the most distinguished types²². Could be mentioned, just in terms of example:

- DBFO (Design Built Funding and Operate) Contracts, includes projects within any phase of operation are entirely runs by a private entity, which ensure that public interest's service is provided, behind a public periodic retribution. In that first class complain the PFI model, as described earlier.
- BOT (Build Operate Transfer) Contracts, within the private contractor has the responsibility to fund, design, build and operate the contracted project. Then the monitoring activity and, above all, the ownership of the project in this type of contract has to be transferred back to the public authority.
- BOO (Build Own Operate) Contracts, in whom control and also ownership of the utilities provided remain a private firm competence.
- Leasing Contract: characterized by the fact that only part of the risk related to the operation are transferred to the private body.

²² Cfr., Darrin Grimsey, Mervyn K. Lewis, *The origins of partnership*, Chapter 3, in *Public Private Partnership, The Worldwide Revolution Infrastructure Provision and Project Finance*. (Edward Elgar; Cheltenham, UK; Northampton, MA, USA, 2004).

- Joint Venture: it is achieved whenever the public authority and private entity agree to cooperate to realize a common purpose, sharing risks and benefits related to the operation which is jointly takes into account.
- Operation or management contracts: these are limited to a specific operation within the private sector is partially involved in providing public service for a certain period of time.

From that not exhaustive scheme, it is anyway possible to derive that the forms of cooperation between public and private sector in the management of public services, may involve private body investment and management, more or less intensively.

Darrin Grimsey and Mervyn Lewis, in their essay on Public Private Partnership published in 2004, have argued that, regardless the difference that affected the implemented model, should be identify those elements that steadily subsist in each type of partnership.

First of all, it is an evidence of the fact that more than one subject is required to participate to the project, within almost one of which should necessarily be a public authority. Then the fact that a stable and endurance relationship between the parties is required; furthermore the fact that each party must confer an added value to the partnership, by providing resources, or knowledge, or proper skills; finally the fact that an agreed and shared allocation of responsibility and risks associated with financial, economic, environmental or social ones, must be provided²³.

²³ Cfr., Darrin Grimsey, Mervyn K. Lewis, *The origins of partnership* (Chapter 3), in *Public Private Partnership, The Worldwide Revolution Infrastructure Provision and Project Finance*. (Edward Elgar; Cheltenham, UK; Northampton, MA, USA, 2004).

More recently, the International Institute for Sustainable Development (IISD), within its Policy Brief Recommend have shown that: “*Although initially restricted to public infrastructure in the form of roads, railways, prisons, government buildings, power generation, or water and waste treatment facilities, PPP has increasingly moved into the provision of so-called “social infrastructure” such as schools, hospitals, and health services*”²⁴.

However, by the mentioned above Reports of IISD it could be find out that, apart from the *Pros* that follow PPP approaches, also exist a potential disadvantage that should be taken into account.

Risks related to PPP projects concern the fact that in the long-term they could be more expensive than the standard procurement, because of the higher costs of private sector borrowing, and also due to the complexity of contractual arrangements could occur high transaction costs. Moreover, the principles of accountability and transparency principles could be distorted and the major risk concern the fact that if any exclusivity clause agreement are foreseen in PPPs contract, it could lead at award of monopoly market to private partner, decreasing the competitiveness as a consequence.

Concluding, “*it is necessary for both the public and private sectors to possess PPP-specific capacity for an agreement to be signed and administered successfully. Such capacity is absent from many jurisdictions, both at a*

²⁴ Cfr., IISD., *Sustainable Development: Is there a role for public–private partnerships? A summary of an IISD preliminary investigation*. October, 2011.

national and regional level, and it takes both time and experience to establish it, making it difficult to scale up PPP procurement quickly”²⁵.

The general overview on the implementation of Public-Private Partnerships tools on international prospective, its beneficial aspects and potential disadvantages, allows now to move in the section below focusing on the institute, as concretely disciplined in the European Union legal framework, since it has been introduced, till the most recently innovation which have concerned Public-Private Partnership approach.

²⁵ See above.

3. European legal frameworks in the field of Public Procurements

Introducing briefly the origin of PFI in the UK, as a starting point in the framework of partnership, and the increasingly international application of PPPs contractual arrangements, has been instrumental in differentiating the approach taken by the European Commission, which have introduced a general debate over a partnership phenomena, that appears for the first time in an official Communication of 2004²⁶.

This section explores the general provision of Public and Private Partnership, investigating the expectations, the role, the responsibility and obligations of the subjects which are involved.

The principle of partnership is closely related to the principle of subsidiarity, which implies that decisions should be taken at a more appropriate level, to perform them acting within the context of a broader cooperative network²⁷.

At supranational level, the European Union reconciles forms of cooperation and partnership, with the need to ensure that all the procedures relating to public contracts is in accordance with competition rules, taking into account also national divergent practices.

Before address the topic of partnership, it is clearly appropriate to referring that

²⁶ Cfr., European Commission, COM (2004)/327, Bruxelles, 30.4.2004.

²⁷ See art. 5 of the Treaty establishing the European Community and the art. 8 (3) of Regulation 1260/1999).

institute at the macro level of the European established principles in the general legal framework of competitive market, which have been a pillars since the origins of the European Community.

In fact, even in the public procurement sector, Member States, defining their national procedures, are binding to observe the basement rules that the European executive body have established, since the introduction of the first Treaty establishing the European Community, to ensure the fundamental economic freedoms and rights in the Single European Market.

Basically, also regarding Public-Private Partnership therefore must be applied the fundamental principles aimed to preserve the Right of Establishment and the Freedom to provide Services delivery within the Member States. That provisions are currently included in the Treaty of the Functioning of European Union (TFEU)²⁸, and reflect what was originally stated in the previous Treaty

²⁸ Cfr., Article 49 TFEU, (ex Article 43 TEC), regarding the Right of Establishment

“Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital”.

Cfr., also Article 56 TFEU (ex Article 49 TEC), regarding to the Freedom to provide Services

“Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union”.

establishing the European Community (TCE).

These principles leading to others fundamental ones, including transparency of selection procedures (including advertisement obligation), non-discrimination and equal treatment of competitors firms, proportionality, mutual recognition. Every Member States has to follow and respect them during the competitive procedure and selection phase of a private operator to whom entrust the management of a public service. The private nature of the selected contractor which would be the responsible entity for managing a public service, does not exclude the integral application of the public rules when awarding contract.

A recognized doctrine argued that Public-Private Partnership model postulates the need to demarcate duties and responsibilities of each parties of the relationship: the role played by the contracting authority is subject to the imperative rules of administrative activities, and therefore characterized by a public nature and bound by the rules competition; conversely, the activity carried out by the concessionaire, which is a private entity, despite providing a public interest's services, it remains with the business sphere organizations and discipline²⁹.

²⁹ Cfr., Gian Franco Cartei, *Le varie forme di partenariato pubblico-privato. Il quadro generale*. Opinioni, Rivista Urbanistica e appalti, no.8/2011 (p.893).

3.1 Green Paper on Public Private Partnership: COM 2004/327/CE

On 30 April 2004 the European Commission adopted the “*Green Paper on Public-Private Partnerships and Community Law on Public Procurement and Concessions*”, in order to launch a broad debate to ascertain whether the Community should act to give economic operators in the European Member States better access to forms Public-Private Partnership (hereinafter indicated with the acronym PPP), under a legal certainty and ensuring effective competition.

The European Commission, as first, has placed emphasis on the data that, over the years that preceded the Communication no.327/2004, have been an increased resort of partnership operations.

Among the causes that have pushed Member States to make that choice, the European executive body has included problems related to budgetary restrictions, which could be tackled by providing private funding in the utilities sector. It also has justified the use of the partnership approach to face the necessity to modernize infrastructural devices and local public utilities, hence public authorities need the private Companies know-how and their mode of operate regarding business organizations rules. Finally, the ultimate factor that have to be taken into account is the fact that State are no longer a direct player in the market’s economy, rather than they have a regulatory role and monitoring action over the economic activity. These preliminary

considerations are expressly provided for in the Green Paper of 2004³⁰.

In light of awareness of the spontaneous spread of the phenomenon, the Commission therefore have considered appropriate to provide a general definition of Partnership, with a prospective towards standardizing the elements that distinguish such forms of cooperation from other procurement formality in the field of public works and services.

Despite that primary intention, what it is clearly explained in the the Green Paper preamble, is that the will of the Commission is not to give a communitarian legal definition of the mentioned institute, which it was an extremely difficult goal to be achieved, due to the variety of types of contract previously adopted in each Member States.

Generally considered, the term Public-Private Partnership “*refers to forms of cooperation between public authorities and the world of business which aim to ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of a service*”³¹.

In short, European Commission has highlighted the central role of cooperation between the two parties involved in the project, and afterwards have defined four basic features that, relate to the Partnership operations, represent their

³⁰ Cfr., Green Paper on public-private partnerships and Community law on public contracts and concessions; COM (2004)/327.

In particular, point 3, stated: “*During the last decade, the PPP phenomenon developed in many fields falling within the scope of the public sector. Various factors explain the increased recourse to PPPs. In view of the budget constraints confronting Member States, it meets a need for private funding for the public sector. Another explanation is the desire to benefit more in public life from the know-how and working methods of the private sector. The development of the PPP is also part of the more general change in the role of the State in the economy, moving from a role of direct operator to one of organiser, regulator and controller*”.

³¹ Cfr., point 1 of Green Paper on public-private partnerships and Community law on public contracts and concessions; COM (2004)/327.

minimum common framework³².

- The first major characterizing element is the long term of the collaboration between the project's partners. It means that nature of these projects include more stages and different types of operations.
- Secondly, are expected complex methods of funding the project, which usually have to be guaranteed, wholly or at least mainly, by the private entity. However, it is not excluded the possibility to add public funds to private ones, as if to emphasize the element of co-operation between partners.
- The third aspect concerned the key role assumed by a private body. In the Commission provision are clearly diversified tasks and responsibility of each partner. The private subject is called to take part in various phases of the project: design, construction, implementation and financing of the operation. The public authority role is confined to defining the achievement goals and determine the quality of the service's standards required. It also defines the pricing policy and is in charge of monitoring the quality of the operation and the compliance of them to the predetermined objectives.
- The fourth and final connatural element of PPP operations concerns the delicate issue of the allocation of risks which inherit the project. The European Commission, on this specific issue, clarified that partnerships do not necessarily imply that the private partner is required to charge itself of all the risks arising from the entire operation. Above all it is necessary to evaluate each concrete case and take into account the

³² Cfr., point 2 of Green Paper on public-private partnerships and Community law on public contracts and concessions; COM (2004)/327.

proper ability of the parties involved, in order to better ensure a proper allocation of management risk, which could be equally or partially shared.

In the wake of the last consideration should be made clear that the Commission, despite has encouraged the use of partnerships in the most relevant economic sectors, it has, however, make an explicit reference to the potential limits in itself. In fact, at the fifth point of the Green Paper has specifically expressed that the “*PPP cannot be presented as a miracle solution*”, actually implemented for any type of project. Over the years some negative experiences, or not at all favourable ones, have shown that there are some relevant aspects in setting partnership that could not be neglected. In conclusion, for each project it is considered essential to compares and evaluate whether it is better to proceed concluding a partnership or to adopt a traditional contract³³.

The Green Paper continued stating that the development of the PPP would have to take place in fair market conditions and especially in a context of legal clarity in the field of public procurement. From this perspective, it is not a merely coincidence that almost simultaneously the Commission has introduced the package of European Directives on the coordination of procedures for the award of public works contracts, public supply contracts and public services contracts³⁴.

³³ Cfr., point 5 of Green Paper on public-private partnerships and Community law on public contracts and concessions; COM (2004)/327.

³⁴ Cfr., Alberto Massera, *Il partenariato pubblico-privato e il diritto europea degli appalti*, in *Rivista Italiana di Diritto Pubblico Comunitario*-2005.

In paragraph 2 the author stated as follows: “*Il Libro verde dell’aprile 2004, in modo programmatico, afferma di voler analizzare il fenomeno dei PPPs alla luce del diritto comunitario degli appalti*”

The Green Paper, according to the experiences observed in the Member States, have identifies two main broad legal categories of partnership, distinguishing those which are the methods implemented for operations.

- 1) The contractual partnership (PPPc) includes the generality of cases that are based on negotiating nature of public and private partner's cooperation relationship.
- 2) The institutionalized partnership (PPPi) instead provides the creation of a third entity, which is distinct from the partners, endowed of its own legal personality and owned jointly by public authorities and the private partner.

Within the contractual category, the Green Paper has also distinguished between the so called “*Concession model*” and the “*PFI model*”. The first one, which is based on the ancient institute of concession, implies a direct link between the private entity and the final user of the services. The private contractor provides a service to the citizens; the public authority is responsible in terms of monitoring the quality of the results obtained and service provided; then the final users are required to remunerate the service received; finally, whether is considered necessary, the public authority could provide an additional subsidies to remunerate the contractor. The PFI model, conversely, implied that the private partner has to realize and administrate an infrastructure, replacing the public authority's role; the contractor, in the last case, receives regular payment from public body that buying services

pubblici delle concessioni, che è appunto il diritto oggi contenuto nelle nuove direttive; e dunque è ritenuto dover condividere gli obiettivi di chiarificazione e semplificazione, di modernizzazione e di flessibilità delle procedure, che hanno presieduto alla elaborazione del pacchetto legislativo vero e proprio del marzo 2004 [...]”.

provided³⁵.

Following with the institutionalized PPP description, the Commission clarifies that this type of partnership could be achieved through two different mechanisms.

Firstly, it could be committed the creation of an entity that is jointly owned by public and private sector. In other terms could be formed a mixed entity, within the public body maintain a direct monitoring role over the operation development. Otherwise, an analogous result could be achieved through a mechanism that induce a change inwardly a former public company, that yield its votes or shares in favour of a private company.

At any rate, in the mentioned Green Paper the Commission have also reminded to Member States that the selection phase of the private contractor must comply with competition rules on which is based the entire European discipline in the field of the public procurement.

The priority of the Commission is to ensure that these forms of cooperation did not circumvents the competition and transparency principles that derives from European public contracts Law. The Green Paper major aim was to addresses both public and private stakeholders to contribute to the debate a set of questions about how these rules and principles work in practice, so that the Commission can determine whether the requirements and characteristics are sufficiently clear and suitable for PPP³⁶.

³⁵ Cfr. from point 21 to 23 of Green Paper on public-private partnerships and Community law on public contracts and concessions; COM (2004)/327.

³⁶ Cfr., Commission of the European Communities, *“Report on Public Consultation on the Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions”*,

As Professor Chiti has clearly described, the development of the PPP debate has simultaneously occurred in some of the most advanced legal systems, but that would not have its importance without the decisive contribution of the European Union, which has launched organic proposal in this pattern since the Green Paper of 2004³⁷. So it is formally recognized the importance assumed by the appreciable effort of the European Commission to lay down guidelines and a general characters of partnership, in order to achieved a common framework.

On the other hand, Professor Chiti, within his 2005 paper, which is part of the Conference acts of Italian Institute of Administrative science (IISA), have also analytically detected and explain “*lights and shadows*”³⁸ of PPP European guidelines, focusing on the controversial issues, doubts and gaps left by the Green Paper.

First it is emphasized that the Green Paper actually only provided a narrow view of the Partnership ongoing phenomena. As a matter of fact, the macro distinction between contractual and institutionalized PPP completely ignored the existence of horizontal subsidiarity models that gave rise to several forms of agreement, cooperation, conventions between public administration, both central or local ones, and private entities.

Furthermore, Professor Chiti, stressed that it contained also an imprecise definition of public contract (in Italian is defined *Appalto pubblico*). Arguably

Brussels, 3/5/2005, SEC (2005)/629.

³⁷ Cfr., Chiti M.P., *il Partenariato pubblico privato e la nuova direttiva concessioni*, in Finanza di Progetto e Partenariato Pubblico-privato; (a cura di Cartei G. e Ricchi M.), Editoriale scientifica, Napoli, 2015.

³⁸ Cfr., Chiti M.P.; *Luci, ombre e vaghezze nella disciplina del Partenariato Pubblico-Privato*; contenuto in *Il partenariato pubblico-privato. Profili di diritto amministrativo e di scienza dell'amministrazione*. (Bologna, IT: 2005).

it could be included public contracts within the framework of PPPs: it appears to be inadequate due to the lack of the four characteristics of partnerships as well as defined in the Green Paper by the Commission.

The public contracts indeed, which are concluded for pecuniary interest, does not imply a form cooperation, a corporate purpose and risks allocation over both parties: the parties remain separate, operating for an oppose interests, on the basis of enforced contractual agreement.

Others have noted that the concept of *public services* as defined by the Green Paper has widely extended its scope of application: that includes both services offered by the privates to the final consumers and users, since flow of services that are sold directly to the public administrations. As a consequence, several different juridical issues are roughly reduced into a unity: in a single category of contractual partnerships³⁹.

For what concerned institutionalized PPP, as well as denoted in the Green Paper, it has been found greater application of joint venture companies (in Italian, *Società Miste*) within public authority, as well as private body hold equity, specifically set up to operate with a common purpose. and it perfectly complies with the partnership concept, generally considered. Otherwise, some have correctly observed that in the mentioned case of mixed companies would probably lack the characteristic, which instead is required to configure it as a partnership, a direct risk for a private party, because the management risk are

³⁹ Cfr., Massera A., *Il partenariato Pubblico-Privato e il diritto europeo degli appalti*. In *Rivista Italiano di diritto pubblico Comunitario*, 2005.

proportionally allocated between parties, depends on their equity holding⁴⁰.

Getting aware of that issues, it is essential to remind that the definition included in the 2004 Green Paper on PPPs, could be sufficient to give an overview of the partnership phenomenon, whereas not entirely accurate regarding legal issue included.

3.2 Directives 2004/17/EC and 2004/18/EC: European award procedures for public contracts.

The latter considerations lead to investigate the states of implementation of the European award procedures for public contracts, as it was provided on 2004.

The first relevant step towards the establishment of a unified and coherent discipline of the matter of public procurement, was precisely advanced in 2004 with the adoption of European Directives pack that have simplified and made unitary the previous legislation⁴¹.

⁴⁰ Cfr., Chiti M.P., *Il Partenariato pubblico privato e la nuova Direttiva Concessioni*. In Finanza di Progetto e Partenariato Pubblico-Privato. Temi europei, istituti nazionali e operatività. Cartei G., Ricchi M. (a cura di). Editoriale Scientifica, Napoli, 2015.

⁴¹ Before the adoption of Directives 2004/17 and 18/CEE, there were a fragmented discipline of the award of public contracts, and it was part of four different Directives:

Concerning this discipline, the European Commission has attempted to promote the opening of public procurement market through the harmonization of national legislation, and in compliance with the Treaty fundamental principles, regarding transparency and competition among companies which take part in public contracts competition.

Directive 2004 /18/ EC⁴² on public Work, Service, and Supply Contracts has introduced several innovative aspects of Community law on public procurement. It has proceeded to the unification of all the previous Community rules on public procurement, apart from the so-called “special sector”, for which the Directive 2004/17/EC was simultaneously adopted.

The guiding principles of that legislative rules concerned: the simplification of procurement procedures, the modernization of the selection phase of tendering companies, introducing systematic use of new technologies tools, the ensure of greater flexibility of the legal instruments.

Among others, some of the main changes in the Directive 2004/18/ EC included: higher thresholds applied to contracts that are subjected to the competitive and transparency rules, the introduction of competitive dialogue procedure, electronic auctions, dynamic purchaser systems, framework agreements, and also the opportunity that companies could compete as holding.

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- Dir.92/50/EEC on Public Service Contracts Directive
 - Dir. 93/36/EEC on Public Supply Contracts Directive
 - Dir. 93/37/EEC on Public Work Contract Directive
 - Dir. 93/38/EEC on Public Contracts in the Water, Energy, Transport and Communication Sectors Directive.

⁴² Cfr., Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004, on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

Referring to Public-Private Partnership, it could be observed that the Directives did not make any mention to that institute, which therefore remains only subject of description on the Green Paper.

Instead, regarding legal instruments that the Commission includes in contractual partnership arrangements (public contracts and concessions), a complete legislative procedural rules applied only to public contracts. It was not provided an accomplished and autonomous legislative framework of concession contracts by the European regulatory framework of 2004. The applicable law to concessions, a part from some punctual articles regarded to work concession⁴³, remained in the provisions of each Member State, clearly in compliance with the Treaty principles. Actually Article 17 of Directive no. 24 has excluded the service concession from the application of the standards provided.

It took ten years for that the first European Directive related to concessions of work and service has found formal provision, introducing clear rules that have give legal certainty also in the award of concession procedures at Union level,⁴⁴.

Conversely the European public contract law since the legislative pack of 2004 was so detailed that national legislation had pretty edge left.

In the first article of the Directive no.24, the main definition, which are relevant for the scope of application of law, are listed⁴⁵.

⁴³ Art 56 e ss. Directive 2004/18/CE.

⁴⁴ Directive 2014/23/CE on the award of Concession contracts.

⁴⁵ Directives 2004/18/CE of the European Parliament and of the Council of 31 March 2004, on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts Article 1

Definitions

1. For the purposes of this Directive, the definitions set out in paragraphs 2 to 15 shall apply.

2. (a) “Public contracts” are contracts for pecuniary interest concluded in writing between one or

Comparing the given notion of a “*public contracts*” to the “*concession*” agreements, the Directive indirectly suggested that the main distinction between these two legal tools is represented by the allocation of management risk. In fact, while in the public contract arrangement the awarded contractor is remunerated by the contracting authority for the realization of the work, service or supply, on the contrary within the concession contract the contracting entity

more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

(b) “**Public works contracts**” are public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A "work" means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.

(c) “**Public supply contracts**” are public contracts other than those referred to in (b) having as their object the purchase, lease, rental or hire purchase, with or without option to buy, of products.

A public contract having as its object the supply of products and which also covers, as an incidental matter, siting and installation operations shall be considered to be a "public supply contract".

(d) “**Public service contracts**” are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.

A public contract having as its object both products and services within the meaning of Annex II shall be considered to be a "public service contract" if the value of the services in question exceeds that of the products covered by the contract.

A public contract having as its object services within the meaning of Annex II and including activities within the meaning of Annex I that are only incidental to the principal object of the contract shall be considered to be a public service contract.

3. “**Public works concession**” is a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment.

4. “**Service concession**” is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.

[...]

merely obtains the right to provide works or services which directly are charged to final users. The definition of concession actually stressed that “*the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment*”⁴⁶; whereas that payment does not change the nature of the concession contract in the event that in fact does not eliminate the risk management in the chief of private contractor.

Accordingly, the general rule in the concession contract consist on the fact that the consideration in favour of the concessionaire shall be provide only the right to manage and economically exploit the work or service provided.

It appears to be useful remind that the debate on the nature of the Concession, had officially commenced with the interpretative “*Communication of the Commission on concessions under Community law*” of 2000, therefore, enacted before the validity of the package of the 2004 Directives.

In the above mentioned Communication, the Commission acknowledges that the Concession is an ancient institution differently regulated in the legal systems of the Member States. However, it was expressed the need to identify the characteristic and distinctive features compared to public contract figure. The Commission have detected in the risk management (which is an objective matter) the distinctive point between the two issue under review.

As observed by a doctrine⁴⁷, was within the interpretative Communication of 2000 that for the first time was expressed the difference between public contract and concession, in the transfer to the private of management risk, as well as clarified by the Commission: “*The right of exploitation also implies the*

⁴⁶ See above.

⁴⁷ Cfr., Fidone G., *La concessione di lavori e servizi alla vigilia del recepimento della direttiva 2014/23/UE*, in *Rivista italiana di Diritto Pubblico Comunitario*, fasc.1, 2015.

transfer of the responsibilities of operation. These responsibilities cover the technical, financial and managerial matters relating to the construction. For example, it is the concessionaire who is responsible for making the investments required so that it may be both available and useful to users. He is also responsible for paying off the construction. Moreover, the concessionaire bears not only the usual risks inherent in any construction - he also bears much of the risk inherent in the management and use of the facilities”⁴⁸.

It will be analysed in the following chapter the distinction between public contracts and concession contract and the nature that assumed within the Italian legal system as a result of the transposition of European Directives into national law, referring at the current law in force (which have repealed the former public contract and concession code of 2006).

Investigating the contractor selection procedures, and bearing in mind that their have been regulated in detail only for public procurements, the 2004 Directive has innovated the previous legislative framework introducing, for complex contract, the procedure of *Competitive Dialogue*⁴⁹, in addition to the opened, restricted and negotiated procedures.

Competitive Dialogue, which found it legal basis on the Article 29 of Directive no. 18, appears to be a solution to proceed in the selection phase of contractor,

⁴⁸ Cfr., point 2.1.2. Distinction between the concepts of “public works contract” and “works concession”, within the *Commission interpretative communication on concessions under Community law*, 29/04/2000.

⁴⁹ Directive 2004/24/CE, Art. 1. Par.11, letter (c) “**Competitive dialogue**” is a procedure in which any economic operator may request to participate and whereby the contracting authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender. [...]

when the contract object is particularly complex and the contracting authority “are not objectively able to define the technical means for its execution [...]or do not know legally or financially set the project[...]”⁵⁰.

In the Green Paper of 2004, the Commission made an explicit reference to the Competitive Dialogue as a more suitable procedure for the award of a contract within a Public-Private Partnership, due to the complexity of project⁵¹. For that reasons it seem relevant investigate the fundamentals of that procedure.

As stated in Article 29, within selection process there is a clear separation between the dialogue stage, which could enable the contracting administration to have a comparison of different solution advanced by the private candidates; then the following phase in which the administration received and evaluate the offers, until discovered the most appropriate one.

⁵⁰ Cfr., art. 1, par. 11, letter c) Directive 2004/18/EC.

⁵¹ Cfr., Green Paper on Public-Private Partnerships and Community law on public contracts and concessions; COM (2004)/327; point 25: “Since the adoption of Directive 2004/18/EC, a new procedure known as “competitive dialogue” may apply when awarding particularly complex contracts. [Article 29 of Directive 2004/18/EC] The competitive dialogue procedure is launched in cases where the contracting body is objectively unable to define the technical means that would best satisfy its needs and objectives, or in cases where it is objectively unable to define the legal and/or financial form of a project. This new procedure will allow the contracting bodies to open a dialogue with the candidates for the purpose of identifying solutions capable of meeting these needs. At the end of this dialogue, the candidates will be invited to submit their final tender on the basis of the solution or solutions identified in the course of the dialogue. These tenders must contain all the elements required and necessary for the performance of the project. The contracting authorities must assess the tenders on the basis of the pre-stated award criteria. The tenderer who has submitted the most economically advantageous tender may be asked to clarify aspects of it or confirm commitments featuring therein, provided this will not have the effect of altering fundamental elements in the tender or invitation to tender, of falsifying competition or of leading to discrimination”.

During the first stage, the phase of dialogue, the administration has the faculty to compare and evaluate the proposals made by competitors.

The directive also allows to proceed to the later stages in the reduction of the proposals, in the case it was provided in the notice of invitation to tender. Hence the administration may choose to perform the procedure in several successive stages in order to identify the solution or solutions which it considers suitable and satisfactory.

Closed the dialogue phase, the authorities shall invite the selected candidates to submit their final tenders.

Then the stage of choosing the best offer is opened. In the dialogue competitive procedure, the Directive states that tenders have to be selected according to the criteria of the *most economically advantageous tenders*. In these types of complex contracts, therefore, can not only consider the price factor; must take into account the ratio between the price and the specific technical qualities related to the final purpose.

After choosing the most economically advantageous tender, it still provides the possibility for the contracting authority to ask the bidder to clarify certain aspects of the offer and confirm commitments derived from offering presented. It is important to stress that anyway it is no allowed to modify fundamental aspects of the previous tender, which would involve a breach of fair competition⁵².

⁵² Cfr., Article 29 of Directive 2004/18/EC

Competitive dialogue

1. In the case of particularly complex contracts, Member States may provide that where contracting authorities consider that the use of the open or restricted procedure will not

allow the award of the contract, the latter may make use of the competitive dialogue in accordance with this Article.

A public contract shall be awarded on the sole basis of the award criterion for the most economically advantageous tender.

2. Contracting authorities shall publish a contract notice setting out their needs and requirements, which they shall define in that notice and/or in a descriptive document.

3. Contracting authorities shall open, with the candidates selected in accordance with the relevant provisions of Articles 44 to 52, a dialogue the aim of which shall be to identify and define the means best suited to satisfying their needs. They may discuss all aspects of the contract with the chosen candidates during this dialogue.

During the dialogue, contracting authorities shall ensure equality of treatment among all tenderers. In particular, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others.

Contracting authorities may not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the dialogue without his/her agreement.

4. Contracting authorities may provide for the procedure to take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria in the contract notice or the descriptive document. The contract notice or the descriptive document shall indicate that recourse may be had to this option.

5. The contracting authority shall continue such dialogue until it can identify the solution or solutions, if necessary after comparing them, which are capable of meeting its needs.

6. Having declared that the dialogue is concluded and having so informed the participants, contracting authorities shall ask them to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue. These tenders shall contain all the elements required and necessary for the performance of the project.

These tenders may be clarified, specified and fine-tuned at the request of the contracting authority. However, such clarification, specification, fine-tuning or additional information may not involve changes to the basic features of the tender or the call for tender, variations in which are likely to distort competition or have a discriminatory effect.

Object of discussion in the following chapter will be the analysis of the new European legal framework Directives, as it has been implemented in 2014. Hence it will be take into account Italian administrative law, with all that entailed in terms of adaptation of existing institutions, transposition of European Directives principles and adoption of a new procedural rules collected in the current Public Contract Code of 2016.

The aspects that will be considered will concern the regulation of contractual Public-Private Partnership phenomena, referring also to the Italian and European Courts case law related to the most controversial aspects.

7. Contracting authorities shall assess the tenders received on the basis of the award criteria laid down in the contract notice or the descriptive document and shall choose the most economically advantageous tender in accordance with Article 53.

At the request of the contracting authority, the tenderer identified as having submitted the most economically advantageous tender may be asked to clarify aspects of the tender or confirm commitments contained in the tender provided this does not have the effect of modifying substantial aspects of the tender or of the call for tender and does not risk distorting competition or causing discrimination.

8. The contracting authorities may specify prices or payments to the participants in the dialogue.

CHAPTER 2

PUBLIC-PRIVATE PARTNERSHIP AND CURRENT LAW IN FORCE

European Union, through the Green Paper of 2004 (Communication no. 327 on PPPs), and the following Commission interpretative Communications⁵³ and Eurostat decisions on the accounting treatment of PPP⁵⁴, did not give a legal basis to Public-Private Partnership, whereas identified it as a complex phenomenon, regarding to several cases in issue at European level through both legislation and European Court of Justice case law's.

As a result, PPP have been defined as a complex case in issue, and given its concrete diffusion in every Member States, the priority aim was to avoid that it could become a source of *circumventium* of Community rules on competition,

⁵³ Cfr., Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions (COM/2005/569).

⁵⁴ Cfr., Eurostat Decision no.18 of 11 February 2004, (STAT/04/18), Treatment of Public-Private partnership.

free movement of services and non-discrimination principles, which must govern the common market.

However, since 2011, the European Commission have published proposal to revise the public contracts sector and awarding procedures law⁵⁵, to grant tendering procedures more flexible, opening the public procurement market in order to support economic growth policies, ensure free movement of supplies, services and works within European Union.

European Commission has highlighted not only the need to simplify procedures, while also reducing costs and administrative burdens associated with the private contractor selection procedures. Moreover, it has been emphasized the strategic implementation of public contracts to promote economic policy objectives. In fact, public procurement market would be a strategic sector in order to achieve the priorities of the Europe 2020 strategy⁵⁶: among others, the strengthen of economic governance system, competitiveness, innovation, environmental protection, then also in solving issue arise by climate change challenges and social exclusion.

Furthermore, due to the economic and financial crisis that erupted since 2008, it was believed that that public investment in infrastructure and services were deemed to be a Member States key tool, such as possible revival of employment and economic “smart” growth.

According to professors Nicolai and Tortorella, as well as they have

⁵⁵ Cfr., European Commission, *Proposal for a Directive of the European Parliament and of the Council on public procurement*, Brussels, 20.12.2011 (COM 2011/0438).

⁵⁶ Cfr., European Commission, 3 March 2010, “*Communication from the Commission – Europe 2020 – A strategy for smart, sustainable and inclusive growth*”.

highlighted in their recent work on PPP and Project Finance⁵⁷, Italy suffers from a serious gaps accumulated over the years, especially in infrastructure and technological modernization.

Comparing Italy to other European Countries, this gaps could be considered, in its positive side, as a fertile ground and as a starting point to boost the quality and efficiency of the economic system. However, that requires deeply reconsideration of traditional financing systems and lead to introduces, not only at normative level, but also ensuring it concrete implementation, of Public Private Partnership and Project Finance contracts. The latter should be considered as a viable alternative comparing it with traditional system of public works funding. The Project Financing, as will be discuss afterword, can successfully combine both public and private aims and financial resources, when it operating in a transparent environment and is oriented to boost investment potential.

The involvement of private sector in constructing infrastructural works and public services, not only detects in terms of private funding resources, but also results in an improvement of the quality of projects and the management and maintenance of works and services.

According to Italian doctrine, in order to allow the definitive implementation of PPP, this should not be considered as an exceptional case that occurred in emergencies or economic crises, but should be considered as a viable alternative to traditional methods of public intervention execution⁵⁸.

⁵⁷ Cfr., Nicolai M., Tortorella W.,(a cura di):*Partenariato Pubblico-Privato e Project Finance: Come uscire dalla crisi*; Santarcangelo di Romagna, Maggioli editore, 2015.

⁵⁸ Cfr., Dipace R., *Il partenariato pubblico privato e contratti atipici*; Milano, Dott. A. Giuffrè editore, 2006: “[...]per una affermazione definitiva del partenariato, è necessario che esso sia considerato una normale alternative ai tradizionali strumenti di esecuzione degli interventi pubblici. Ciò significa che il ricorso ad esso non dovrebbe essere motivato solo da esigenze eccezionali, legate a carenze di

Despite the fact the private involvement in public intervention it is not new, these case in issue must be reconsidered in the light of the innovative and significant amendments, introduced through simplifying procurement procedures since the 2014 new European Directives, and also by the transposition in Italian legal system through the promulgation of the new Public Contracts Code of 18 April 2016, which hereafter will be extensively discussed.

bilancio delle amministrazioni, ma deve rispondere alla logica di una accurata valutazione dei costi e benefici derivanti dalla collaborazione con il settore private. Questa logica deve ispirare le pubbliche amministrazioni nella individuazione degli interventi da realizzare e delle modalità attraverso le quali agire, sin dalla fase della programmazione, allorché vengono compiute le valutazioni strategiche poste a fondamento delle future iniziative pubbliche”.

1. Directives 2014, no.23-24-25/EU. Simplifying European Public Procurement Law: Necessity and Opportunity

Since the publication of the new European *legislative package* for the award of public contracts and concessions, in the Official Journal of the European Union (OJEU) on 28 March 2014, the former Directives no. 17 and 18 of 2004 have been repealed. The current legal framework of public procurement consists of three distinct Directives:

- 1) Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of Concession contracts (OJEU L 94, 28/03/2014, p. 1).
- 2) Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on Public Procurement (OJEU L 94, 28/03/2014, p. 65), and repealing Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts;
- 3) Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors (OJEU, L 94, 28/03/2014, p. 243), which repealing Directive 2004/17/EC.

The introduced changes provide a more modern, flexible and commercial approach of procurement rules. The main pursued *ratio* is to open up the European public procurement market, ensuring free movement of supplies,

service and works within the Member States, requiring the effectiveness of competition. Moreover, as the European Parliament had stressed out in 2011, *“if used effectively, public procurement could be a real driver for sustainable growth [...]”*⁵⁹.

According to the working paper realized in 2016 from the global law firm Dentons, *“The public procurement market in the EU is huge. Every year more than a quarter of a million public institutions and authorities in the EU spend around 14% of GNP on acquiring services, construction works and goods of all kinds”*⁶⁰.

These data clearly explain the consideration that lead the European legislator to regulate a common framework of standards for public procurement.

Therefore, the adoption of new European Directives on public procurement represents both a necessity and an opportunity.

It is considered an opportunity, because it is assumed that increasing competition could produce best quality at convenient prices, and thereby enhancing efficiency of public administration and effective gains for public sector.

Actually, the most relevant changes to the Public Sector and Utilities Directives have been made for various reasons linked to the European Union’s Europe 2020 strategy, including facilitating small and medium enterprises

⁵⁹ Cfr. Resolution of European Parliament of 25 October 2011, on modernization of public procurement, 2011/2048.

⁶⁰ Cfr., DENTONS: *“A few questions about implementation of the EU public procurement Directives.”* (dentons.com) /CSCS29452-Implementation of the EU Directives_v5 — 14/06/2016).

(SME) access to the public procurement, promoting innovation, environmental and social protection policies via public procurement. Pursuant to second Recital of 2014 Directive no.24, “*Public procurement plays a key role in the Europe 2020 strategy, [...] as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds*”⁶¹.

Furthermore, due to fiscal constraints applied in various Member States, the efficient and effective performance of public administration in delivering public services to civil society is becoming increasingly important. Concerning this issue, the use of procurement procedures could be seen as a guarantee in relation to financial control, and using transparent procedures is often considered a means for preventing fraud, corruption and malpractice.

Conversely, public procurement procedures are considered also a necessity. The public sector cannot be presumed to behave as a common customer in the market, which usually tend to opt for the best quality products at lowest price. The public authorities or entities, often could be motivated and encouraged to act for purpose that differs from price and quality. For instance, due to political reason, a local authority may prefer to award a contract to a local enterprise rather than a competitor from other Regions or Countries. This behaviour, concerning the public procurement market, hindering competition, and clearly produces distortion and inefficiency.

Hence, Public procurement rules are therefore necessary to rectify this type of public sector demeanour, introducing the principle that “*Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment, with a*

⁶¹ Cfr., Directive 2014, no.24, Recital 2.

view to ensuring an objective comparison of the relative value of the tenders in order to determine, in conditions of effective competition, which tender is the most economically advantageous tender [...]"⁶².

For this purpose, the Directives include rules regard advertisement and publication requirements, various competitive procedures suitable for different types of contracts, and requirements concerning types of criteria and specifications to be used during the public procurement procedures. Furthermore, the Directives require institutions and procedures to ensure that award of contracts can be effectively reviewed.

The detailed rules of the Directives generally apply at and above specific and high thresholds⁶³. In fact, the contracts that exceed a certain economic threshold are significant at European level and it is important to make access to public contracts easier, especially in terms of cross-border participation by small and medium-sized enterprises. Below these thresholds national rules apply typically to smaller contracts and each European Member State has a public procurement system combining its domestic rules with the requirements of the Directives. The European thresholds are intended to reflect if public procurements are subject of interest to cross-border or Internal market trade and the application of the free movement Treaty principles. It is important to remark that, at the same time, European law has established that, even below the thresholds of the Directives, the award of public contract has to comply

⁶² Cfr., Directive 2014, no.24, Recital 90.

⁶³ As far as concerned issue related to threshold see Directive 2014, no.24, Article 4, 5 and 6; Directive 2014, n.23, Article 8 and 9.

with the legal principles of non-discrimination, equal treatment, transparency and proportionality⁶⁴.

With reference to the Public-Private Partnership, the most innovative aspect is represented by the *ex novo* creation of the European Concession Directive, No. 23, which will be the subject of specific discussion in the following section.

1.1 The new Concessions Directive n.23 of 2014, and Public-Private Partnerships

For the purpose of the present work, and having regard to the specific topic of Public-Private Partnership, the following analysis will consider mainly the innovative aspects introduced by the Directive no. 23 of 2014. In fact, the reforming legislative package includes an entirely new Directive governing the award of Concessions. The Concession contract, as a cornerstone of the

⁶⁴ Cfr., Directive 2014, no.24, Recital 1: “*The award of public contracts by or on behalf of Member States’ authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition*”.

contractual Public-Private Partnership, have received an accomplished discipline in European legal framework.

As it was detected before, until 2014, the regulation of concessions was rather confused and uncompleted. The former public sector directives of 2004 contained limited rules on the award of works concessions, but explicitly excluded services concession from the scope of application of awarding procedural rules.

The first innovative aspect, that have to be detected considering the Directive 2014/23 (hereinafter Concessions Directive), consist on the fact itself that the legal instrument of Concession, which represent an ancient institute in national administrative legal system, has finally been part of a complete legislative regulation of European system.

It is worth emphasizing that concession contracts are seen as important instruments in the long-term structural development of infrastructure and strategic services, contributing to the progress of competition in the internal market, making it possible to benefit from private sector expertise, and helping to achieve efficiency and innovation.

As doctrine have pointed out, the Concessions Directive requires a new uniform contract model which is comparable in the Member States, should avoid opportunistic practices of participation in public tenders for the sole purpose of having an advantage against the public authority, or otherwise, to conclude contracts that deplete the profit margins of private contractor who

take the risks of operation⁶⁵.

According to the first Recital of Concession Directives: *“The absence of clear rules at Union level governing the award of concession contracts gives rise to legal uncertainty and to obstacles to the free provision of services and causes distortions in the functioning of the internal market. [...] An adequate, balanced and flexible legal framework for the award of concessions would ensure effective and non-discriminatory access to the market to all Union economic operators and legal certainty, favouring public investments in infrastructures and strategic services to the citizen”*⁶⁶.

This mentioned Recital demonstrates the awareness of the European Union to adopt a common legal system for all Member States to enable the harmonization of the awarding procedures, and the rules governing concession agreements.

As a result, the introduction of complete legislative rules in the field of concession have risen several compatibility matters, coordination and adaptation issues of national former rules, which have to transplant the changes introduced in the European legal system. Otherwise it allows to uniform the legislative provision of concession contract, enabling the accomplish harmonization of European administrative procedures.

As well as detected by the doctrine, appears to be singular the fact that the new European Directives do not deals with PPPs: do not make any reference or

⁶⁵ To a depth discussion in that sense, see Ricchi M., *I contratti di concessione* 2. €; in Finanza di Progetto e Partenariato Pubblico-Privato, Cartei G., Ricchi M.,(a cura di); Editoriale scientifica, Napoli, 2015.

⁶⁶ See Directive 2014/23/EU of European Parliament and the Council, first Recital.

recourse to the concept of Public-Private Partnership, (with the only exception of Innovation Partnership, that finds legal basis in Article 31 of Directive 24/2014). It was argued that the absence of such a reference could be justified by the fact that comprehensive regulation of the Concession, as a main legal tool in the phenomenon of the contractual partnership, would be sufficient for the purpose of regulation. Furthermore, according to the doctrine, there are no conditions for punctual and uniform regulation of the legal system of PPP⁶⁷.

For these above mentioned reasons, the analysis of the main changes introduced by Concessions Directive will enable to understand what is the impact they have had in the reformulation of the Member States' legislation, with particular reference to the Italian administrative discipline.

1.1.1 The coverage of Works and Services Concession Contracts

Firstly, it should be noted that whereby the Concession Directive (2014/23) the question of the distinction between works and services concessions have been superseded. The new Directive in fact refers to a unitary category of concessions which covered works and services ones, as well as defined in Article 5, first section: *“For the purpose of this Directive, [...] concessions*

⁶⁷ Cfr., Chiti M.P., *Il Partenariato Pubblico-Privato e la nuova Direttiva Concessioni*, gennaio 2015. *“[...] La ragione è che nel breve volgere di un decennio (2004-2014) il dibattito critico sul PPP è stato così intenso da aver, a mio avviso, indotto l'Unione europea ad una virata delle proprie politiche. Tanto da porre il problema della perdurante validità di una nozione unitaria di PPP, visto che l'Unione europea sta sviluppando una politica del diritto incentrata sulla definizione di alcuni dei maggiori istituti del partenariato; abbandonando la prospettiva di una disciplina generale del tema”*.

*means work or service concessions [...]”*⁶⁸.

It has been found⁶⁹ that the two typology of concessions, although differ in the nature and object carried out by the contractor, deal with common characteristic elements that determine the possibility to subject them to the same discipline with regard to procurement awarding procedures, the duration of contracts, the contingencies in progress and the possibility to extinguish events of such contracts⁷⁰. Works and Services Concession solely differs for

⁶⁸ See Article 5, paragraph 1, Directive 2014/23:

Definitions

For the purposes of this Directive the following definitions apply:

1) ‘**concessions**’ means works or services concessions, as defined in points (a) and (b):

(a) ‘**works concession**’ means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the execution of works to one or more economic operators the consideration for which consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment;

(b) ‘**services concession**’ means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works referred to in point (a) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment.

⁶⁹ The consideration that works and services concessions have common characteristics come from the European Commission, which already in its interpretative Communication on Concessions under Community law (2000/C-121/02), had planned to unify the discipline.

⁷⁰ It seems to be appropriate to remind that within the former Directive of 2004, in order to apply the awarding procedural rules, only works concession are assimilate to the public procurement. Conversely, services concessions were merely subject to respect the Treaty fundamental principles

the fact that the main object in the first one category consist on the realization (construction) of an asset, that would be the vehicle with whom providing service to citizens, or directly to public authority. While the object of the second typology of concession contract concern the management activities. However, the object of the private partner performance agreed, no longer justifies the differential treatment of the two types of concession contracts.

Thus as noted by the doctrine, the new definition of works and services concession will have an innovative impact in the rewriting the Concession discipline in national legal transposition⁷¹.

(TFEU). Moreover, this position was expressed by the European Court of Justice and confirmed by Italian case law.

⁷¹ Referring to the Italian administrative system, see Ricchi M., *La nuova Direttiva comunitaria sulle concessioni e l'impatto sul Codice dei contratti pubblici*; in *Urbanistica e Appalti* n.7/2014, pag.741. See also Fidone G., *Le concessioni di lavori e servizi alla vigilia del recepimento della direttiva 2014/23/UE*, in *Rivista italiana di diritto pubblico comunitario*, n.1 2015: “*La concessione di servizi costituisce attualmente un contratto “escluso” dal Codice dei contratti pubblici ai sensi dell’art. 30, al quale si applicano le poche disposizioni dettate da tale articolo, in corrispondenza della già segnalata esclusione dall’applicazione della direttiva 2004/18/CE, in virtù dell’art. 17 della medesima direttiva. Peraltro, la recente inclusione di tale contratto nella nuova direttiva Concessioni 2014/23/UE dovrà necessariamente comportare una sua più puntuale regolazione anche nel diritto interno*”. According to this consideration, during the regency of Legislative decree no.163/2006 (Codice dei contratti pubblici relativi a lavori, servizi e forniture), service concession agreement was excluded from the application of procedural rules that governed public contracts and works concession. Currently, that discipline have been repealed by the Legislative decree no. 50/2016, which have transpose the Concession Directive rules and made works and services concession equally treated.

1.1.2 Unifying treatment of hot and cold works and services concession (Issue related to the accountant treatment of PPP contracts).

Another aspect to be considered is the fact that with the Concessions Directive the issue that opposed the so-called hot and cold works Concessions (in Italian system they are called *opere “calde”* and *opere “fredde”*)⁷² have been overcome.

The first typology, *hot works*, concerns concession contracts that have an inherent capability to generate a cash flow which would be sufficient to cover and remunerate private investment. The private income derives from charging directly the final users for the service provided.

⁷² For a complete clarification of what concern hot and cold works, it is suggested to see also the AVCP (today ANAC) Determination (Determinazione n. 2 dell'11 Marzo 2010: *Problematiche relative alla disciplina applicabile all'esecuzione del contratto di concessione di lavori pubblici*) within is clarified what does they mean: “*Elemento imprescindibile della concessione di lavori pubblici è, quindi, l'attitudine dell'opera oggetto della stessa a realizzare un flusso di cassa che può consentire di ripagare totalmente o parzialmente l'investimento. Proprio in relazione a questa attitudine, si usa classificare le opere in tre tipologie: opere calde, fredde e tiepide.*

Calde sono quelle opere dotate di un'intrinseca capacità di generare reddito attraverso ricavi da utenza, in misura tale da ripagare i costi di investimento e remunerare adeguatamente il capitale coinvolto nell'arco della vita della concessione; fredde sono, invece, le opere per le quali il privato che le realizza e gestisce fornisce direttamente servizi alla Pubblica Amministrazione e trae la propria remunerazione da pagamenti effettuati dalla stessa [...]. Tra queste due tipologie di opere, si pongono in posizione mediana quelle i cui ricavi da utenza non sono sufficienti a ripagare interamente le risorse impiegate per la loro realizzazione, rendendo necessario, per consentirne la fattibilità finanziaria, un contributo pubblico (c.d. opere tiepide).

La concessione di lavori pubblici, come è stato definitivamente chiarito all'articolo 3, comma 15 ter, introdotto nel Codice dal terzo decreto correttivo, ricade tra i contratti di partenariato pubblico privato (nel seguito “PPP”), nei quali è previsto in ogni caso il finanziamento totale o parziale a carico dei privati.

Those type of concession are qualified as trilateral contracts: it implies a direct link between private contractor and final-users who benefits from the work or service provided. Whereas the contracting authority assumes a regulatory position, monitoring the ongoing performance.

Conversely, the latter category, so called *cold works*, generally is less profitable, due to the fact that it refers to a sensible sector (for instance health services, education, prison, etc.), that would be provided services to citizens, as a final user, gratuity or based on political price. In this case, the private partners' investment capital is remunerated charging contracting authority of periodic payment. Those contract implied a bilateral relationship: only are implied contracting authorities and private party, while citizens remain outside of the contractual agreement.

The difference between hot and cold works was also outlined in the Eurostat Decision no.18 of 11 February 2004⁷³, as an element that distinguished the works accounting treatment. Under the Decision, only the cold works could be classified as PPP contracts and therefore accounted *off* the State balance sheet. While hot works, directly remunerated charging final users, were configured as concessions, but not as PPP operations, and therefore subject to accounting *on-balance*. In line with Eurostat Decision, in PPP contracts must be met the condition that a substantial risk is transferred from the public to the private party. As it claimed in Eurostat Decision, the risk transfer occurs when the private partner assumed both the construction risk and at least one of the availability risk and/or risk on demand⁷⁴.

⁷³ Cfr., Eurostat Decision no.28 of 11 February 2004, *Treatment of Public-Private Partnerships*.

⁷⁴ For an accurate definition it is suggested to see Eurostat clarification notes which has selected three

For the purpose of accountant treatment, in that 2004 Decision of Eurostat, only cold works, whereby public authority, mostly or wholly, remunerate private party for the service provided, were considered as a PPP contracts, and its investment could be recorder off-balance of sheet. Conversely, hot or warm works, totally or partially covered charging final users, were qualified as a concession whereas not treated as a PPP contract, and government investment could not have recorded off-balance sheet.

main categories of risks.

“A first category is “construction risk” covering notably events like late delivery, non-respect of specified standards, additional costs, technical deficiency, and external negative effects. Government’s obligation to start making regular payments to a partner without taking into account the effective state of the assets would be evidence that government bears the majority of the construction risks.

A second category is “availability risk” where the responsibility of the partner is quite obvious. It may not be in a position to deliver the volume that was contractually agreed or to meet safety or public certification standards relating to the provision of services to final users, as specified in the contract. It also applies where the partner does not meet the required quality standards relating to the delivery of the service, as stated in the contract, and resulting from an evident lack of “performance” of the partner. Government will be assumed not to bear such risk if it is entitled to reduce significantly (as a kind of penalty) its periodic payments, like any “normal customer” could require in a commercial contract. Government payments must depend on the effective degree of availability supplied by the partner during a given period of time. Application of the penalties where the partner is defaulting on its service obligations should be automatic and should also have a significant effect on the partner’s revenue/profit, and must not be purely “cosmetic” or symbolic.

A third category is “risk on demand” covering variability of demand (higher or lower than expected when the contract was signed) irrespective of the behaviour (management) of the private partner. This risk should only cover a shift of demand not resulting from inadequate or low quality of the services provided by the partner or any action that changes the quantity/quality of services provided. Instead, it should result from other factors, such as the business cycle, new market trends, direct competition or technological obsolescence. Government will be assumed to bear the risk where it is obliged to ensure a given level of payment to the partner independently of the effective level of demand expressed by the final user, rendering irrelevant the fluctuations in level of demand on the partner’s profitability”.

This issue have been resolved by the changing introduced in the ESA 2010⁷⁵, and Eurostat 2014 MGDD, Manual on Government Deficit and Debt, within it is specified that for the purpose of public accounting, both cold and hot works are treated as a PPP operations. It means that could be considered *off-balance* operations where private partner bears most of the risks and at the same time, has the right benefit from a large part of the income derived from the operation⁷⁶.

Moreover, Concessions Directive, subjecting the concessions contracts to a unified discipline, repealed the matter, and includes in the same category also concession in which the final user is responsible to remunerate services provided, considering also the latter as a PPP contracts. Referring to concession, the Directive includes contracts that in Eurostat Decision are

⁷⁵ Cfr., European system of accounts, ESA 2010, which is in force since 2014.

⁷⁶ According to Eurostat 2014 MGDD, part VI.4 on Public-Private Partnerships (PPPs), at point 29 it is expressed: “*In national accounts, the assets involved in a long-term contract between a government unit and a non-government unit can be considered non-government assets only if the non-government partner is bearing most of the risks attached to the asset all over the contract and is also entitled to receive almost all the current benefits from the assets*”. Then the following point 30 stated: “*ESA 2010 20.283 states that a majority of the risks and rewards must be transferred. It is not required to transfer “all” of them. In reality, it is usually observed in partnerships a share of risks between government and the partner. As mentioned further, it may be seen as normal that some risks might be taken by government (for instance in the case of very exceptional events or for government action that changes the conditions of activity that were agreed previously) but the risks incurred by the private partner must have a significant impact on its profitability, and possibly in some cases on its solvency, under normal circumstances where there is a clear link between the realisation of these risks and the actions (or absence of actions) taken by the partner. Therefore, this analysis of risks borne by the contractual parties is the core element as regards classification of the assets involved in the contract, to ensure the correct accounting of the impact on the government net lending/borrowing and debt of this type of partnerships.*

treated as PPP contracts, within public authority is the subject required to remunerate the contractor.

According to the latter part of 18th Recital: “[...] *it should be made clear that certain arrangements which are exclusively remunerated by a contracting authority or a contracting entity should qualify as concessions where the recoupment of the investments and costs incurred by the operator for executing the work or providing the service depends on the actual demand for or the supply of the service or asset*”⁷⁷.

In this way it affirms the equality between concessions of hot and cold works, could both be the subject of a Public-Private Partnership.

1.1.3 Reaffirming distinction between Concession and Public Contracts: concept of operation risk.

The previous consideration leads to detect a further point: Concession Directive reaffirms and clarifies the distinction between concessions and public contracts (which in Italian administrative law are called *Appalti pubblici*), modifying the approach that had been given in the Green Paper of 2004 when both were classified as PPP contracts.

According to the new Directive, as well as defines and qualifies the concession contract, it is clear that only the latter could be considered as a PPP contract, excluding instead of this area public contracts, which due to their nature lack

⁷⁷ See Concessions Directive (2014/23/EU), 18th Recital.

the essential element of cooperation between the public and private partners.

The clearly distinguishes element between concession and public contract essentially concern the issue of risk-taking.

Analysing the object of the concession and the nature of the risk, could be perceived the substantial difference from public contracts. In line with the view expressed by doctrine⁷⁸, the consolidate judgment of European Court of Justice⁷⁹ and also national case law, the Directive has confirmed that the

⁷⁸ Distinguish concession from public contract, Fidone G. stated as follow: “*Si può fare un esempio, immaginando che una pubblica amministrazione voglia costruire un parcheggio pubblico. Nel caso di appalto tradizionale, la stazione appaltante potrà procedere alla progettazione dell’opera e ad affidarne la costruzione all’appaltatore, a fronte di un corrispettivo pagato in danaro. Nel caso della concessione di lavori, a fronte del finanziamento privato da parte del concessionario, questi otterrà in concessione il diritto di gestire l’opera per un certo periodo nel quale, attraverso l’incasso del prezzo dei biglietti venduti agli utenti, otterrà ricavi tali da coprire i costi sostenuti e da garantirgli un margine di profitto. Qualora tali ricavi siano insufficienti, l’amministrazione potrà corrispondere un prezzo aggiuntivo*”. To deepen the issue, see Fidone G., *Le concessioni di lavori e servizi alla vigilia del recepimento della direttiva 2014/23/UE*, in *Rivista italiana di diritto pubblico comunitario*, fasc.1, 2015.

⁷⁹ The community concept of concession (public works or services), was drawn up by the Commission since the communication of 12 April 2000, and supported by the Court of Justice on several occasion: for instance, see Judgment of the CJEU (III Chamber), of 13 November 2008, in case law C-437/07, *Commission vs. Italian Republic*. See also judgment of the CJEU (II Chamber), of 18 July 2007, in case law C-382/05, *Commission vs. Italian Republic*. See also Judgment of the CJEU (II Chamber) of 10 November 2011. *Norma-A SIA and Dekom SIA vs. Latgales plānošanas reģions*, C-348/10, point 41: “*It is clear from the definitions of service contract and service concession, contained in Article 1(2)(a) and (d) and Article 1(3) of Directive 2004/17 respectively, that the difference between a service contract and a service concession lies in the consideration for the provision of services. A service contract involves consideration which is paid directly by the contracting authority to the service provider while, for a service concession, the consideration for the provision of services consists in the*

consideration of works or services by means of concession “*consist in the the right to exploit the work or service*”⁸⁰, which represent the contractual advantages in favour of the concessionaire.

Analysing the 18th Recital, emerge the awareness of European Parliament and Council to give a clear answer and legal certainty to the issue of the distinction between concession and public contract: “*Difficulties related to the interpretation of the concepts of concession and public contract have generated continued legal uncertainty among stakeholders and have given rise to numerous judgments of the Court of Justice of the European Union. Therefore, the definition of concession should be clarified, in particular by referring to the concept of operating risk. The main feature of a concession, the right to exploit the works or services, always implies the transfer to the concessionaire of an operating risk of economic nature involving the possibility that it will not recoup the investments made and the costs incurred in operating the works or services awarded under normal operating conditions even if a part of the risk remains with the contracting authority or contracting entity. The application of specific rules governing the award of concessions would not be justified if the contracting authority or contracting entity relieved*

right to exploit the service, either alone, or together with payment”.

⁸⁰ Cfr., Concessions Directive (2014/23/EU), 11th Consideration: “*Concessions are contracts for pecuniary interest by means of which one or more contracting authorities or contracting entities entrusts the execution of works, or the provision and the management of services, to one or more economic operators. The object of such contracts is the procurement of works or services by means of a concession, the consideration of which consists in the right to exploit the works or services or in that right together with payment. Such contracts may, but do not necessarily, involve a transfer of ownership to contracting authorities or contracting entities, but contracting authorities or contracting entities always obtain the benefits of the works or services in question”*.

the economic operator of any potential loss, by guaranteeing a minimal revenue, equal or higher to the investments made and the costs that the economic operator has to incur in relation with the performance of the contract [...]”⁸¹.

The main feature of concession always implies that economic operator assumes an operating risk and, according to the following 19th Recital, it should stem from factors which are outside the control of the parties. Furthermore, the new Directive, abandoning the Eurostat definition of demand or availability risk, adopting instead the definition of operating risk: it consist of either a demand risk or a supply risk, or both a demand and supply risk⁸².

⁸¹ Cfr., Concession Directive (2014/23), 18th Recital.

⁸²Cfr., Concession Directive (2014/23), 19th and 20th Recitals: (19) “*An operating risk should stem from factors which are outside the control of the parties. Risks such as those linked to bad management, contractual defaults by the economic operator or to instances of force majeure are not decisive for the purpose of classification as a concession, since those risks are inherent in every contract, whether it be a public procurement contract or a concession. An operating risk should be understood as the risk of exposure to the vagaries of the market, which may consist of either a demand risk or a supply risk, or both a demand and supply risk. Demand risk is to be understood as the risk on actual demand for the works or services which are the object of the contract. Supply risk is to be understood as the risk on the provision of the works or services which are the object of the contract, in particular the risk that the provision of the services will not match demand. For the purpose of assessment of the operating risk the net present value of all the investment, costs and revenues of the concessionaire should be taken into account in a consistent and uniform manner*”.

(20) “*The award of a works or services concession shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both. The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession. The part of the risk transferred to*

Typically, the risk on demand concerns the fact that certain services may have a decline, due to presence of others market competitors, or to a generic consumption contraction because of economic crisis conjuncture. Rather the risk on supply side concerns concession contracts in which private contractors are remunerated by contracting authority (*cold work*), which pays a periodic fee for the structure construction or service management. Therefore, the risk on the supply side, leads to the possibility that, where the capacity or quality of service are not in compliance with the agreement clauses, will automatically apply penalties that reduce fee charged to public body⁸³.

The latter feature of risk transfer is that mostly characterizes the concession agreements, and therefore PPP contracts. Whether there is no risk transfer, at least partially, over the private partner, the contract cannot be considered a PPP, but is classified as traditional public contract.

The European Court of Justice (CJEU) has also contributed to define management risk: it is construed as the risk of exposure to the vagaries of the market , which may result of the risk of competition from other operators, the risk of imbalance between supply and demand for services, the risk of insolvency of the subjects that have to pay the price of the services provided, the risk of failure to cover operating costs, and ultimately the risk of liability for damage related to a deficiency in service⁸⁴.

the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible.

⁸³ For a depth discussion on this topic, see Ricchi M., *I contratti di concessione 2. €*; in Finanza di Progetto e Partenariato Pubblico-Privato, Cartei G., Ricchi M., (a cura di); Editoriale scientifica, Napoli, 2015.

⁸⁴ See, to that effect, Judgment of the CJEU (Third Chamber) of 10 September 2009, *Wasser- und*

In line with what is clearly expressed in the Directive concerning the risk issue, there is an extensive case law of Italian administrative and civil courts⁸⁵, which

Abwasserzweckverband Gotha und Landkreisgemeinden (WAZV Gotha) v Eurawasser Aufbereitungs- und Entsorgungsgesellschaft mbH, C-206/08: “In relation to a contract for the supply of services, the fact that the supplier does not receive consideration directly from the contracting authority, but is entitled to collect payment under private law from third parties, is sufficient for the contract in question to be categorised as a ‘service concession’ within the meaning of Article 1(3)(b) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, where the supplier assumes all, or at least a significant share, of the operating risk faced by the contracting authority, even if that risk is, from the outset, very limited on account of the detailed rules of public law governing that service”.

See also: Judgment of the CJEU (Third Chamber) of 15 October 2009, *Acoset SpA v Conferenza Sindaci e Presidenza Prov. Reg. ATO Idrico Ragusa and Others*, C-206-08; Judgment of the CJEU (First Chamber) of 13 October 2005. *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG*, C-458/03.

⁸⁵ Cfr., Consiglio di Stato sez. V, 18 giugno 2015 n. 3120, Massima: “*Si ha una concessione quando in base al titolo l'operatore assume in concreto i rischi economici della gestione del servizio, rifacendosi essenzialmente sull'utenza per mezzo della riscossione di un qualsiasi tipo di canone o tariffa, mentre si ha appalto quando l'onere del servizio stesso viene a gravare sostanzialmente sull'Amministrazione*”. (Annulla TAR Lombardia, Milano, sez. III, n. 631 del 2014). See also Cassazione civile sez. VI, 06 maggio 2015 n. 9139: “*Si configura una concessione di servizi quando il rischio di gestione nel quale incorre l'amministrazione aggiudicatrice sia assunto integralmente o in misura significativa dalla controparte contrattuale, mentre si è in presenza di un appalto pubblico di servizi qualora la prestazione sia resa nei confronti della sola pubblica amministrazione e non comporti il trasferimento del diritto di gestione quale controprestazione*”. Concerning that issue see T.A.R. Genova (Liguria) sez. II, 19 novembre 2014 n. 1673: “*Il discrimine tra le figure dell'appalto e della concessione viene individuato nel rischio operativo (ad esempio, considerando 18 della direttiva 2014/23) che deve sempre gravare sul concessionario, e che non sussiste allorché l'amministrazione pubblica si obbliga a coprire le eventuali perdite occorse nell'esercizio dell'attività esercitata comunque nell'interesse pubblico; l'appalto di servizi ricorre invece (considerando 4 della direttiva 24/2014) allorché l'ente aggiudicatore acquisisce in senso ampio un vantaggio dall'attività dell'appaltatore, senza con ciò ottenere necessariamente il trasferimento della proprietà di un bene*”.

have confirmed the distinctive element between concessions and public contracts.

Although it represents an isolated case, it seems to be appropriate to recall the 2013 Tribunale Amministrativo Regionale (Tar Sardinia) judgment, within the Court has declared the invalidity, with the nullity sanction, of the invitation to tender and the consequently concession contract, due to its failure to comply with the provisions of Community law on the proper distribution of risks⁸⁶.

See also T.A.R. Brescia (Lombardia) sez. II 07 ottobre 2013 n. 824: “*Nelle concessioni di servizi almeno una parte del rischio deve necessariamente ricadere sul concessionario. Se quest'ultimo chiede di essere sollevato interamente da tale rischio, si esce dallo schema del partenariato pubblico-privato e si entra nel campo degli appalti*”. T.A.R. Perugia (Umbria) sez. I, 21 gennaio 2010 n. 26: “*La differenza tra un appalto di servizi ed una concessione di servizi risiede nel corrispettivo della fornitura, nel senso che la seconda è configurabile allorché il concessionario si assuma il rischio legato alla gestione dei servizi*”.

⁸⁶ Cfr., Tar Sardegna, 10.3.2011, n 213, punto 7: “*Il contratto di concessione in esame si deve qualificare, infatti, come contratto nullo per la illiceità della causa ai sensi dell’art. 1344 (Contratto in frode alla legge) del codice civile. L’operazione negoziale ed economica conclusa all’esito della procedura di affidamento in esame, si caratterizza per costituire uno strumento con il quale si elude l’applicazione delle norme e dei principi che disciplinano la concessione di lavori pubblici e il project financing, facendo conseguire alle parti un risultato precluso dall’ordinamento. E ciò – si ribadisce – attraverso la previsione (in netto contrasto con lo schema normativo tipico) di una remunerazione degli investimenti dei privati concessionari posta interamente a carico dell’amministrazione aggiudicatrice, senza che si verifichi quella traslazione in capo ai privati del rischio economico e gestionale (elemento essenziale dello schema contrattuale del project financing) collegato alla svolgimento dei servizi erogati attraverso le opere pubbliche realizzate, in modo tale che il rientro e l’adeguata remunerazione dei capitali investiti siano assicurati dalla redditività dell’iniziativa economica intrapresa*”.

1.1.4 Rules governing the award of Concession Contracts

As previously mentioned, with regard to the award of concession contracts rules, Directive 2004/18/EU only provided few provisions of advertising and transparency (dictated by Articles 56 et seq.), applicable to works concessions. Service concessions instead, in accordance with Article 17, were excluded from the scope of application⁸⁷. As a consequence, the award system of concessions was subjected to the merely application of Treaty principles.

The currently Concessions Directive, within II Title (*Rules on the award of concessions: general principles ad procedural guarantees*), while providing for a uniform concession regulation, confirms that contracting authorities should be free to award the concessions negotiated with flexible and competitive procedures. The new directive attempts to reconcile the provision of certain *minimum* of fixed rules, with the exercise of administrative discretion, above all in such a complex area of concessions. For this reason, the Community guidelines in choosing works or service concessionaire is less regulated and certainly more flexible than the award of public contracts discipline, as it regulated on Directive 2014/24/EU.

According to Giani, *“uno sguardo di insieme sulle norme [...] consente di porre in evidenza, già in sede di premessa, che la disciplina sulla aggiudicazione delle concessioni si connota per accentuati profili di flessibilità della regolamentazione dettata in sede europea, certamente aliena da rigidità*

⁸⁷ Cfr., Directive 2004/24/EC, Article 17, Service Concessions: *“Without prejudice to the application of Article 3, this Directive shall not apply to service concessions as defined in Article 1”*.

procedurali che hanno sovente caratterizzato il mondo degli appalti. [...]. Quel che deve essere subito evidenziato è che le norme in commento costituiscono comunque una significativa ed importante novità, laddove rappresentano l'imposizione, a livello europeo, di una disciplina di gara per l'affidamento delle concessioni, delle concessioni tutte, di lavori e di servizi, in ciò innovando su un pregresso quadro normativo in cui la concorsualità era venuta lentamente affermandosi in abito di concessione di lavori e stentava invece ad imporsi in termini rigorosi in ambito di concessioni di servizi”⁸⁸.

The Title II of Directive 23, in fact, collected all the main rules that govern the concessionaire selection procedure, starting from the publication of the competitions notice, the submission procedures of applications and tenders, until the final award of contract. The European legislature therefore provides the the public tender regulation, through the method of invitation to tenders for the selection of the other contracting party of the public administration.

The rules on the award of concession contract marks the overcoming of the different discipline of award of works and services concessions, but it is important to stress that the rules in question do not provide an analytical and detailed regulation, it appears instead to be soft regulation.

Under Article 30 it is pointed out that: *“The contracting authority or contracting entity shall have the freedom to organise the procedure leading to*

⁸⁸ Cfr., Giani R., *Norme sulle aggiudicazioni e sulle garanzie procedurali e impatto sul codice*; in Finanza di Progetto e Partenariato Pubblico-Privato, Cartei G., Ricchi M., (a cura di); Editoriale scientifica, Napoli, 2015.

the choice of concessionaire subject to compliance with this Directive [...]”⁸⁹, recovering what was previously claimed in 68th Recital: “[...] subject to compliance with this Directive and with the principles of transparency and equal treatment, contracting authorities and contracting entities should be allowed considerable flexibility to define and organise the procedure leading to the choice of concessionaire⁹⁰”.

⁸⁹ Cfr., Concessions Directive (2014/23/EU), Article 30: “1. The contracting authority or contracting entity shall have the freedom to organise the procedure leading to the choice of concessionaire subject to compliance with this Directive. 2. The design of the concession award procedure shall respect the principles laid down in Article 3. In particular, during the concession award procedure, the contracting authority or contracting entity shall not provide information in a discriminatory manner which may give some candidates or tenderers an advantage over others. 3. Member States shall take appropriate measures to ensure that in the performance of concession contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X. 4. The Commission shall be empowered to adopt delegated acts in accordance with Article 48 to amend the list in Annex X, where necessary, to add new international agreements that have been ratified by all Member States or where the existing international agreements referred to are no longer ratified by all Member States or they are otherwise changed, for instance in respect of their scope, content or denomination”.

⁹⁰ Cfr., Concessions Directive (2014/23/EU), 68th Recital: “Concessions are usually long-term, complex arrangements where the concessionaire assumes responsibilities and risks traditionally borne by the contracting authorities and contracting entities and normally falling within their remit. For that reason, subject to compliance with this Directive and with the principles of transparency and equal treatment, contracting authorities and contracting entities should be allowed considerable flexibility to define and organise the procedure leading to the choice of concessionaire. However, in order to ensure equal treatment and transparency throughout the awarding process, it is appropriate to provide for basic guarantees as to the awarding process, including information on the nature and scope of the concession, limitation of the number of candidates, the dissemination of information to candidates and tenderers and the availability of appropriate records. It is also necessary to provide

The abovementioned Article 30 developed the fundamental pillars of the procedure for the award of concessions: first, it expresses the freedom of the contracting authorities and contracting entities to “*organize the procedure*”⁹¹. Then it refers to the dual limits to that freedom, which is given by the specific provision that the Directive sets in Title II, in addition to the principles mentioned in Article 3 of Directive, of which paragraph 2 of Article 30 reiterates the non-discrimination principle. Finally, compliance with the obligations in the field of environmental social and labour law, according to the Member State implemented measures.

Referring to the principle of freedom of choice of the procedure, the doctrine has emphasized that it responds adequately to the principle of partnership⁹², considered it as a dialogue between equals. This means that the administrations could therefore freely configure, in each case, the most appropriate procedures, also “*conducting negotiations with candidates and tenderers*”⁹³.

It must be observed that the freedom to organize the selection procedure for concessionaire is subject to compliance with the Directive 23 provisions. This means that the profiles regulated in Title II of the Directive represent a *minimum* limit, on the basis of which the freedom to organize the procedure could be adopted.

that the initial terms of the concession notice should not be deviated from, in order to prevent unfair treatment of any potential candidates”.

⁹¹ See above.

⁹² Cfr., Chiti M.P., *Il Partenariato Pubblico Privato e la nuova Direttiva Concessioni*, in Finanza di Progetto e Partenariato Pubblico-Privato; Cartei G., Ricchi M., (a cura di); Editoriale scientifica, Napoli, 2015.

⁹³ Cfr., Concessions Directive (2014/23/EU), Article 37, paragraph 6.

- First it is recognized in Article 31, which refers to the Concession notice and the transparency principle in public tender⁹⁴. In paragraph 1, it claimed that “*contracting authorities and contracting entities wishing to award a concession shall make known their intention by means of a concession notice*”. Then, as specified in paragraph 2, the concession notice has a prerequisite content, which is stated in the Annex V, with reference to the awarding authority, the accessibility to the tender documents, the object of the concession, the participation conditions, the deadline for submission of offers and requests, the award criteria, the organ to which it is possible to appeal and have remedies.

Furthermore, it deserves attention to Article 33 which, to ensure transparency, establishes the rule of prior European publication, compared to the national publication of the concession notice. Under paragraph 4 of article 33 it is stated that Concession notices and Concession award notices shall not be published at national level before publication by the Publications Office of the European Union. Moreover, it is provided that Concession notices and concession award notices published at national level shall not contain more or different information than that contained in the notices dispatched to the Publications Office of the European Union.

⁹⁴ Cfr., Concessions Directive (2014/23/EU), *Article 31: Concession notices*

1. Contracting authorities and contracting entities wishing to award a concession shall make known their intention by means of a concession notice.

2. Concession notices shall contain the information referred to in Annex V and, where appropriate, any other information deemed useful by the contracting authority or entity, in accordance with the format of standard forms.

- Secondly, some limits to freedom of organize procedures, concern the Concession object, participation requirement and selection exclusion causes. Under Article 36, 37 and 38, the Directive regulates technical and functional requirement, procedural guarantees, selection and qualitative assessment of candidates.

In accordance with Article 36, which deals with technical and functional requirement, the main topic concerns the concession subject-matter, by means of works or services that will be provided. The first basic rule is that functional and technical requirement should be set out in the concession document, and have to be complained by tenders. Otherwise, paragraph 3 claimed that contracting authority could not reject offers in case they do not perfectly meet all technical and functional requirement, if the tenderer proves that the proposed solution “*satisfied in an equivalent manner the mentioned requirement*”⁹⁵.

According to Article 37, the contracting authority shall set out the award criteria and the concession shall be awarded if the tender complies with the minimum requirement referred to technical, physical, functional and legal conditions⁹⁶.

⁹⁵ Cfr., Concessions Directive (2014/23/EU), Article 36, paragraph 3.

⁹⁶ Cfr., Concessions Directive (2014/23/EU), Article 37: **Procedural guarantees**

1. Concessions shall be awarded on the basis of the award criteria set out by the contracting authority or contracting entity in accordance with Article 41, provided that all of the following conditions are fulfilled:

(a) the tender complies with the minimum requirements set, where applicable, by the contracting authority or contracting entity;

The subjective requirement and condition of participation to tender are stated under Article 38. In particular, candidates are required to

(b) the tenderer complies with the conditions for participation as referred to in Article 38(1); and

(c) the tenderer is not excluded from participating in the award procedure in accordance with Article 38(4) to (7), and subject to Article 38(9).

The minimum requirements referred to in point (a) shall contain conditions and characteristics (particularly technical, physical, functional and legal) that any tender should meet or possess.

2. The contracting authority or contracting entity shall provide:

(a) in the concession notice, a description of the concession and of the conditions of participation;

(b) in the concession notice, in the invitation to submit a tender or in other concession documents, a description of the award criteria and, where applicable, the minimum requirements to be met.

3. The contracting authority or contracting entity may limit the number of candidates or tenderers to an appropriate level, on condition that this is done in a transparent manner and on the basis of objective criteria. The number of candidates or tenderers invited shall be sufficient to ensure genuine competition.

4. The contracting authority or contracting entity shall communicate the description of the envisaged organisation of the procedure and an indicative completion deadline to all participants. Any modification shall be communicated to all participants and, to the extent that they concern elements disclosed in the concession notice, advertised to all economic operators.

5. The contracting authority or contracting entity shall provide for appropriate recording of the stages of the procedure using the means it judges appropriate, subject to compliance with Article 28(1).

6. The contracting authority or contracting entity may hold negotiations with candidates and tenderers. The subject-matter of the concession, the award criteria and the minimum requirements shall not be changed during the course of the negotiations.

demonstrate “*professional and technical ability and financial and economic standing*”⁹⁷, in accordance with the predetermined outlines specified in the concession notice. In order to fulfil each requirement, candidates are allowed to “*rely on the capacities of other entities, regardless of the legal nature of its links with them*”⁹⁸. In fact, as it claimed in paragraph 2 of article 38, and also in accordance with Italian reiterated jurisprudence of the *Consiglio di Stato*, it is admitted the ability to use the capacities of other economic operators to satisfy the conditions of participation required by the concession notice⁹⁹. Otherwise, article 38 deals with condition that excludes candidate from the award of concession contract. In the first place, provides the exclusion of economic operator which has been the subject of a conviction by final judgment for certain type of crimes (participation in criminal organization, corruption, fraud, terrorist offence or offence linked to the terrorist activities, money laundering or terrorist financing, child labour and other forms of trafficking in human). Furthermore, the exclusion of the public tender is extended in case of subject of conviction is member of administrative, management or supervisory body, or person who is entitled of representative power of economic operator¹⁰⁰. In second place, the article in issue set out some hypothesis of mandatory or facultative case of exclusion from the tender, in case of

⁹⁷ Cfr., Concessions Directive (2014/23/EU), Article 38, paragraph 1.

⁹⁸ Cfr., Concessions Directive (2014/23/EU), Article 38, paragraph 2.

⁹⁹ Several times the *Consiglio di Stato* expressed that the “*Avvalimento*” institute, which is the rely on the capacity of other entities, is the expression of general principles concerning the protection of competition, allowing the participation of persons who without the help of another company would not qualify for participation. (See State Council, VI Section, 22.07.2014, n.3905. See also, State Council, VI Section, 8.5.2014, n.2365).

¹⁰⁰ Cfr., Concessions Directive (2014/23/EU), Article 38, paragraph 4.

the economic operator did not comply with obligation related to the payment of taxes or social security as it disposed in domestic law¹⁰¹.

- Finally, the Directive no. 23 provides certain rules regard selection and award stage. As it was previously hinted, the main innovative aspect is claimed in article 37, paragraph 6: it deals with the freedom of negotiate between contracting authority and tenderers. The concept of negotiation between public and private body, that was already foreseen in the previous rules, but only in cases of negotiated procedures (open or restricted ones), and in case of the competitive dialogue. Currently instead, for effect of this provision it will be possible to introduce the negotiation elements in each type of competitive procedure. This also allows the effective exercise of contracting authorities' discretion.

1.1.5 Rules governing the performance of Concession contracts.

Possibly of greater relevance is the fact that the new Concession Directives, innovating the previous legislative system, containing, for the first time, the provisions governing the implementation phase of contract and the performance stage of concession. In fact, in Directive 2004/17/ EC, the rules on the execution of the concession contract had no independent recognition.

¹⁰¹ Cfr., Concessions Directive (2014/23/EU), Article 38, paragraph 5.

The whole III Title of the Concessions Directive concerns rules on performance of concessions, including subcontracting, modification of contracts during their terms, termination of concessions and monitoring by authority.

In particular, European legislator, through the rules of the renegotiation clauses and of contract terms has placed clear limits to Administrative autonomy, in order to prevent excessive freedom in the modification of the contractual agreements, otherwise it would violate the competition principle.

Regarding to the modification of contracts during their terms, pursuant to article 43, exist some cases in which Concessions may be modified without a new awarding procedure. Clearly the law specifies that modification must does not alter the overall nature of the concession.

The provisions contained in Article 43 provide specific guarantees for the protection of competition and transparency, otherwise its prescribe the need to proceed with a new procedure for the award of the contract.

In particular, Article 43 paragraph 1, states that modification could be allowed without the need for a new tender procedure, in the certain specific cases¹⁰².

In order to highlight and summarize the main event that are permitted changes to the initial concession they are listed below:

a) if the changes, regardless of their monetary value, have been provided in the tender documents through clear and precise terms that identify the re-pricing assumptions.

¹⁰² Cfr., Concessions Directive (2014/23/EU), *Article 43: Modification of contracts during their term.*

b) if modification following the additional works or services which were not initially granted but which have become necessary.

c) if the following conditions are met: - the need to modify the contract is determined by circumstances that administration could not be predictable in advance; - the change does not alter the overall nature of the concession

Article 43, in second paragraph, also provides for a general and residual clause: changes are allowed if they do not determine the concession contract amount variations above the threshold of 5.186 million and 10% of the initial concession. In order to modify the previous contract, these two conditions must be observed simultaneously. If not occur any of the circumstances envisaged in Article 143, it will be necessary to proceed with a new award procedure.

Another point that should be noted concern the fact that the Concession Directive clearly expressed the duration of a concession, which must be limited. Although Article 18 does not provide a maximum duration, it does clarify that for concession contracts lasting more than five years, the maximum duration must not exceed the estimated time that a concessionaire could reasonably be expected to take in order to recoup the investments made in operating the works or services together with a return on invested capital, taking into account total investment, the asset's capacity to generate revenue, user tariffs, and the asset's operation and maintenance costs¹⁰³.

¹⁰³ Cfr., Concessions Directive (2014/23/EU), *Article 18: Duration of the concession*

1. The duration of concessions shall be limited. The contracting authority or contracting entity shall estimate the duration on the basis of the works or services requested.

2. Implementation of Contractual Public-Private Partnership in the Italian legal system

In view of all the above, the 2014 European Directives transposition into Italian domestic law, represent both a necessity and an opportunity¹⁰⁴, as it supported in a recently published reviews' article from Pajno: *“la necessità di procedure entro il 18 aprile 2016 al recepimento delle tre nuove direttive comunitarie in tema di contratti pubblici [...] implica una profonda rivisitazione della disciplina contenuta nel d.lgs. n.136 del 2006, a sua volta a più riprese modificato, insieme al regolamento emanate con il D.P.R. 5 ottobre 2010 n. 207, e costituisce una occasione decisiva non solo per il rilancio dello sviluppo economico del Paese, ma anche per la modernizzazione del Sistema amministrativo italiano”*¹⁰⁵.

From this perspective, Pajno clearly stressed that transposing new public

2. For concessions lasting more than five years, the maximum duration of the concession shall not exceed the time that a concessionaire could reasonably be expected to take to recoup the investments made in operating the works or services together with a return on invested capital taking into account the investments required to achieve the specific contractual objectives.

The investments taken into account for the purposes of the calculation shall include both initial investments and investments during the life of the concession.

¹⁰⁴ Cfr., Pajno A., *La nuova disciplina dei contratti pubblici tra esigenze di semplificazione, rilancio dell'economia e contrasto alla corruzione*. In *Rivista italiana di Diritto Pubblico Comunitario*; (fasc.5, 2015, pag.1127).

¹⁰⁵ *Ibidem*.

procurement rules implies a depth revision of 2006 Legislative Decree on Public Contracts and Concessions, that means boosting of economic growth and reducing administrative red tape.

As regards to the Italian administrative law on public procurement, the former Code was in force since 2006, transposing the European public procurement legal framework of 2004. It is worth to emphasizing that the mentioned code has the merit to collect in a unique legislative text the whole discipline related to public procurement, which previously was part of distinctive normative acts.

Nevertheless, the entry into force of Legislative Decree 2006 n.163 has been amended several times, introducing Corrective Decree Laws¹⁰⁶, and was also completed by an implementing regulation, the D.P.R 2010 n. 207¹⁰⁷. Only in 2012 the Code was modified with eight normative acts, within seven decree laws; in 2014 it was amended by nine normative acts, within eight decree laws.

According to the *Consiglio di Stato* counsel of March 2016¹⁰⁸, adopted when held a special commission, the Italian regulatory framework is therefore, on the eve of the transposition of the new European Directives, extremely complex. It counts, only adding Public Contract Code and implementing regulation, 630 articles and 37 annexes. This means that the Italian matter of public

¹⁰⁶ Cfr., the first corrective decree (Legislative Decree 26 January 2007, no. 6); the second corrective decree (Legislative Decree 31 July 2007, no. 113); the third corrective decree (Legislative Decree 11 September 2008, no. 152).

¹⁰⁷ Cfr., d.P.R. 5 ottobre 2010, n. 207, Regolamento di esecuzione ed attuazione del decreto legislativo 12 aprile 2006, n. 163, recante «*Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE*».

¹⁰⁸ Cfr., Consiglio di Stato, Special Commission Gathering, 2016 march 21, no.00464.

procurement was over regulated, and therefore it was necessary to revert to a streamlining of procedures.

Regarding the specific issue of Public-Private Partnership, it was the Article 2 , par. 1, letter a.2) of the third corrective decree in 2008 that introduced for the first time into public contracts Code a definition of “*Public-Private Partnership Contracts*”¹⁰⁹ in Italian legal system. Under that definition, they are contracts having as their object: design, construction, operation or maintenance of public works, or service provision; total or almost partial funding from the private partner; proper allocation of risks according to European guidelines in Eurostat Decision.

Furthermore, the Article 3, paragraph 15-ter of legislative decree 2006 no.163,

¹⁰⁹ Cfr., Art. 3 paragraph 15-ter, Legislative Decree no. 163/2006: “*Ai fini del presente codice, i «contratti di partenariato pubblico privato» sono contratti aventi per oggetto una o più prestazioni quali la progettazione, la costruzione, la gestione o la manutenzione di un’opera pubblica o di pubblica utilità, oppure la fornitura di un servizio, compreso in ogni caso il finanziamento totale o parziale a carico di privati, anche in forme diverse, di tali prestazioni, con allocazione dei rischi ai sensi delle prescrizioni e degli indirizzi comunitari vigenti. Rientrano, a titolo esemplificativo, tra i contratti di partenariato pubblico privato la concessione di lavori, la concessione di servizi, la locazione finanziaria, il contratto di disponibilità, l’affidamento di lavori mediante finanza di progetto, le società miste. Possono rientrare altresì tra le operazioni di partenariato pubblico privato l’affidamento a contraente generale ove il corrispettivo per la realizzazione dell’opera sia in tutto o in parte posticipato e collegato alla disponibilità dell’opera per il committente o per utenti terzi. Fatti salvi gli obblighi di comunicazione previsti dall’articolo 44, comma 1-bis del decreto-legge 31 dicembre 2007, n. 248, convertito, con modificazioni, dalla legge 28 febbraio 2008, n. 31, alle operazioni di partenariato pubblico privato si applicano i contenuti delle decisioni Eurostat. (comma introdotto dall’art. 2, comma 1, lettera a), d.lgs. n. 152 del 11/09/2008 in vigore dal 17/10/2008 e successivamente così modificato dall’art. 44, comma 1, lettera b) D.L. n. 1 del 24/01/2012 in vigore dal 24/01/2012, convertito senza modificazioni dalla Legge di conversione 24 marzo 2012, n. 27, in vigore dal 25/03/2012) – (si veda anche quanto disposto dall’art.18 della L. 183/2011 in vigore dal 01/01/2012”.*

stated that by means of example, PPP contracts concerns:

- works concessions;
- service concessions;
- leasing;
- commitment of works by means of project finance;
- joint venture;
- commitment of works on a general contractor, in cases in which the consideration for the project execution was postponed in whole or in part and connected to the work available to the customer or third party users.

Hence, the legislator has inserted several contracts and legal cases that no really deals with the PPP contracts.

Following these cues, emerge that the 2006 Code has incorporated both partnership notions dictated by the Green Paper of 2004, including the list also the joint venture (which are qualified such institutionalized partnership). But the focus leans more to a contractual approach.

It deserves to be considered a doctrine, which in 2006 described the PPP as a contractual based operation: *“il partenariato pubblico privato assurge a nuova categoria giuridica che va ad arricchire il bagaglio di strumenti a disposizione delle pubbliche amministrazioni per raggiungere scopi istituzionali. [...] Non si può fondare su provvedimenti autoritativi, bensì solo su contratti. [...] Affermazione di modelli consensuali, si passa da una concezione fondata sulla centralità del provvedimento ad una basata sulla alternative provvedimento e*

contratto per l'espletamento della attività amministrativa."¹¹⁰

Therefore, as well as regulated in 2006, the Private-Public Partnership was a wide and opened category, and it contained a not exhaustive list of contractual examples which could be included in it.

As discussed in further detail in next section, it will be analysed the institutions that the current Italian legislation considers as a contractual PPP operations, having also expressed in the first chapter that the European choosing of including joint ventures and public contracts in the type of institutionalized PPP, is unconvincing¹¹¹.

Arguably could be considered that public contracts fall within the definition of PPP. They lack the requirements given by European guidelines set out in 2004 Green Paper on Public Private Partnership. Public contracts do not include the design phase of the activities to be implemented, do not deal with the guarantee of financing from the private activities. Furthermore, in public contracts the public and private parties remain connected to active and passive bonds, often in opposing positions, preventing the realization of a shared interest and pursuit of a common interest. Finally, unlike partnership contract, in the public contract the involvement by the private party is limited to the execution stage of intervention, by means of works or services provided.

¹¹⁰ Cfr., Dipace R., *Il partenariato pubblico privato e contratti atipici*; Milano, Dott. A. Giuffrè editore, 2006.

¹¹¹ Arguably it could be included public contracts within the framework of PPPs: it appears to be inadequate due to the lack of the four characteristics of partnerships as well as defined in the Green Paper by the Commission. For a depth discussion on this issue see Chiti M. P.; *Luci, ombre e vaghezze nella disciplina del Partenariato Pubblico-Privato*; contenuto in *Il partenariato pubblico-privato. Profili di diritto amministrativo e di scienza dell'amministrazione*. (Bologna, IT: 2005).

This reconstruction was recognised by Italian administrative law: in fact, in the contractual Public-Private Partnership concept referred to in Article 3 paragraph 15-*ter* of 2006 Legislative Decree no. 163, does not include public contract.

Regardless the discipline of 2006, the focus will be on contractual PPP institutions as well as currently regulated in the new Code, introduced in April 2016.

Actually, in the next paragraph it will be examined the principles introduced with the Enabling Act no.11 of 2016, by which the Italian Parliament authorized the Government to proceed with adoption of the new Public Contracts and Concessions Code.

2.1 Enact law 2016 no.11, enabling the transposition of the 2014 European Directives

The European legislator has imposed on Member States the transposition of the 2014 Directive on public procurement within two years of their entry into force. As far as concerned Italy, it took about 18 months just for the approval of the law enabling government delegation to the transposition of European legislation. Having spent a considerable amount of time, the legislature of the enabling law had suggested the possibility of implementation in two stages: imagining that it was firstly only enacted the decree transposing the European Directives, and then following the adoption of the final text of the code. Actually, the government proceeded directly adopting the new public contracts code, which became immediately executive, after its entry into force April 18, 2016.

The Enabling Act of January 2016¹¹², has recommended that the Government proceed to overall reorganization of public procurement matters, codifying the innovative principles introduced by European Directives.

Comparing the recent enabling act with the former one for the adoption of the

¹¹² Cfr., Legge 28 gennaio 2016, n. 11: Deleghe al Governo per l'attuazione delle direttive 2014/23/UE, 2014/24/UE e 2014/25/UE del Parlamento europeo e del Consiglio, del 26 febbraio 2014, sull'aggiudicazione dei contratti di concessione, sugli appalti pubblici e sulle procedure d'appalto degli enti erogatori nei settori dell'acqua, dell'energia, dei trasporti e dei servizi postali, nonché per il riordino della disciplina vigente in materia di contratti pubblici relativi a lavori, servizi e forniture.

old public contracts code (2006), it seems to be a long and complex guidelines act: the first one only includes 4 principles; conversely the 2016 act, is divided into 59 letters and contains a total amount of 71 principles of delegation.

Among main purpose of Italian legislator, could be countered: simplifying of procedures, reaffirming the fundamental principles such as transparency, efficiency, fighting against corruption, embodying aspects of environmental protection and social inclusion. Furthermore, the law requires the implementation of flexibility instruments as provided by the European directives 2014.

Pursuant to Article 1, first paragraph, of Enabling Act, formally it is required the adoption of a unitary legal framework, consisting in a Code, that includes provision for the entire issue related to public procurement matters¹¹³. Substantially, it is required to respect European directives guiding principles, without introduction regulatory provisions and higher standard than the *minimum* stated at European level.

The first director criterion, in fact, provides the prohibition of introduction or maintenance of adjustment layers above the minimum required by the directives, the so-called *gold plating* ban. Basically, in accordance with this criterion, the gold plating ban, in the transposition of the new Directives it is

¹¹³ Cfr., Enabling Act, 2016 no. 11, Art 1, paragraph 1, letter b): “[...]adozione di un unico testo normativo con contenuti di disciplina adeguata anche per gli appalti di lavori, servizi e forniture denominato «codice degli appalti pubblici e dei contratti di concessione», recante le disposizioni legislative in materia di procedure di affidamento di gestione e di esecuzione degli appalti pubblici e dei contratti di concessione disciplinate dalle tre direttive, che sostituisce il codice dei contratti pubblici relativi a lavori, servizi e forniture, di cui al decreto legislativo 12 aprile 2006, n. 163, garantendo in ogni caso l'effettivo coordinamento e l'ordinata transizione tra la previgente e la nuova disciplina [...]”.

necessary to conduct a review and a simplification of the national legislation in order to eliminate even the most restrictive rules than the European ones, which are not justified by the protection of public interests.

The debate that have preceded approval of the enabling law, identified in the implementing regulation D.P.R n.207 of 2010, which developed the legislative decree 2006, no.163 one of the main reasons for the over-regulation of the procurement and concessions. A body of rules made up of over six hundred articles was considered as the main cause of the public procurement national system crisis. Hence, the need to definitively overcome a regulation model based on a double level, which includes primary law and secondary source. The 2016 enabling act expressly requires the immediate repealing of the implementing regulation of 2010 (D.P.R. no. 207/2010)¹¹⁴, and the possibility of introducing a soft law regulation, by means of sub-primary regulation entrusted exclusively to the guidelines expressed by ANAC, whit the Ministry of Infrastructure and Transport approval¹¹⁵.

¹¹⁴ Cfr., Enablig Act, 2016 no. 11, Art 1, paragraph 4: *“Il decreto di recepimento delle direttive dispone l’abrogazione delle parti incompatibili del codice di cui al decreto legislativo 12 aprile 2006, n. 163, e di altre disposizioni, espressamente indicate, anche prevedendo opportune disposizioni di coordinamento, transitorie e finali. Il decreto di riordino dispone, altresì, l’abrogazione delle ulteriori disposizioni del medesimo codice di cui al decreto legislativo n. 163 del 2006, del regolamento di cui al decreto del Presidente della Repubblica 5 ottobre 2010, n. 207, e di altre disposizioni, espressamente indicate, nonché prevede opportune disposizioni di coordinamento, transitorie e finali. Tale decreto legislativo comprende al suo interno il contenuto del decreto di recepimento delle direttive con le eventuali e opportune disposizioni correttive e integrative”*.

¹¹⁵ Cfr., Enablig Act, 2016 no. 11, Art 1, paragraph 5: *“Sulla base del decreto di riordino sono, altresì, emanate linee guida di carattere generale proposte dall’ANAC e approvate con decreto del Ministro delle infrastrutture e dei trasporti, che sono trasmesse prima dell’adozione alle competenti Commissioni parlamentari per il parere”*.

Some of principles, which have been dictated in the Enabling Act no.11, represent an absolute innovation in the administrative Italian system. Among others, should be take into account the principle of transparency, digitization and right of access to the public administration acts, which are in coherence with the implementation of freedom of information act and digital administration code. Then, the intention of centralized purchasing with reduction of contracting authority number, it is expressly stated, due to the specific Italian context that count with more than 32 thousand of contracting authorities. Furthermore, the enabling act suggested the establishment of public tenders Commissioners register held at ANAC. Another point that should be considered concern the introduction of monitoring and control tool, separating design and execution of public works phases, by introducing monitoring and control instruments to ensure the program quality.

With regard to the Public-Private Partnership, as it claimed in Article 1, paragraph 1, letter ss), the Enabling Act requires the implementation of flexible and innovative procedures, not merely imposing the rationalization of the existing forms (for instance, project finance and leasing) but also by providing new forms of PPP¹¹⁶.

Furthermore, with the awareness to simplifying and streamlining of procedures, the Enabling Act have prescribed the principle that in PPP contracts, must be pre-determined timing and modality of specific feasibility

¹¹⁶ Cfr., Enabling Act, 2016 no. 11, Art 1, paragraph 1, letter ss) *“razionalizzazione ed estensione delle forme di partenariato pubblico privato, con particolare riguardo alla finanza di progetto e alla locazione finanziaria di opere pubbliche o di pubblica utilità, incentivandone l'utilizzo anche attraverso il ricorso a strumenti di carattere finanziario innovativi e specifici ed il supporto tecnico alle stazioni appaltanti, garantendo la trasparenza e la pubblicità degli atti”*.

studies of projects, in order to ensure that projects in public tenders has a determined financial coverage¹¹⁷.

It can be concluded that the enabling law has laid the foundation scheme which, enabling government to adopt the Public contracts code, attempt to ensure the implementation of a new philosophy approach that combines rigor and flexibility.

However, a realistic measurement of the entity of changes could be detected with the concrete implementation of Public Contract Code. In fact, those which in the enabling act are merely guiding criteria, have been declined into effective legislative precepts.

¹¹⁷ Cfr., Enabling Act, 2016 no. 11, Art 1, paragraph 1, tt) *“al fine di agevolare e ridurre i tempi delle procedure di partenariato pubblico privato, previsione espressa, previa indicazione dell'amministrazione competente, delle modalità e delle tempistiche per addvenire alla predisposizione di specifici studi di fattibilità che consentano di porre a gara progetti con accertata copertura finanziaria derivante dalla verifica dei livelli di bancabilità, garantendo altresì l'acquisizione di tutte le necessarie autorizzazioni, pareri e atti di assenso comunque denominati entro la fase di aggiudicazione”*.

2.2 Public-Private Partnership provision in the New Public Contracts Code, Legislative Decree 2016 no.50

On 18 April 2016, consequently to the guidelines dictated by the Enabling Act 2016 no.11, has come into force the Legislative Decree n.50¹¹⁸ .

The Legislative Decree, containing the provisions of the new “*Public Contracts Code*”¹¹⁹, have replaced the former Legislative Decree 162/2006. It has been published in the Official Journal of the Italian Republic (*Gazzetta Ufficiale della Repubblica Italiana*) and, as it claimed in its Article 220, it is immediately executive as a general rule¹²⁰. The new Public Contracts Code governs public tender procedures, which are called subsequently its entering in force.

The new public contracts Code, that have been enacted after 10 years of the old

¹¹⁸ Cfr., Decreto legislativo 18 aprile 2016, n. 50. “*Attuazione delle direttive 2014/23/UE, 2014/24/UE e 2014/25/UE sull'aggiudicazione dei contratti di concessione, sugli appalti pubblici e sulle procedure d'appalto degli enti erogatori nei settori dell'acqua, dell'energia, dei trasporti e dei servizi postali, nonché per il riordino della disciplina vigente in materia di contratti pubblici relativi a lavori, servizi e forniture*”. The latter, is the actual name of the Decree Law 2016, no.50. The enabling law 2016 no.11, has foreseen a different title: “*Codice degli appalti pubblici e dei contratti di concessione*”. Otherwise, the State Council criticised legal vagueness of that title and suggest “*Codice dei Contratti pubblici*”. Currently, the Decree Law in force, has not assumed a proper name, recalling the transposition of the 2014 European legislative pack of public procurement.

¹¹⁹ The Legislative Decree 2016, no.50, could generally and shortly called Public Contracts Code.

¹²⁰ Cfr., Legislative Decree 2016, n. 50, Article 220, paragraph 1: Entrata in vigore: “*Il presente codice, entra in vigore il giorno stesso della sua pubblicazione nella Gazzetta Ufficiale [...]*”.

Code validity, attempt to balance two massive and fundamental interests: on the one hand the management of public affairs and public intervention; on the other hand, the exercise freedom of enterprise in a competitive regime. For these reasons, the Legislative Decree no. 50 requires the reform of public contracts matters, in order to simplify procedures, provide regulatory clarity and fight against corruption.

The new Code, has been adopted after a long debated process. Nevertheless, it appears to be efficiently compact: it only contains 220 articles, which represent a great result in comparison with the more than six hundred precedent regulations. Clearly, there will be implemented several soft law guidance, to support the Code articles and facilitate the interpretation and its concrete implementation. In this context, the Anti-Corruption National Authority (ANAC) overlays a strategic role in the guidelines formulation.

During a conference that was held at Luiss University in Rome, attended by experts and academics that discussed on the new Public Contracts Codes impact on the market, evaluating the effects produced by the current innovation few months after its entry into force, has been expressed the almost unanimous vision: it has been registered a contraction in the market for public contracts, and a block in the publication of new notices of competition. This sudden effect could be justified in part by the exigency to adapt the system to the new provision¹²¹.

¹²¹ These opinions have emerged during the Conference: *“Il Nuovo Codice dei Contratti Pubblici: effetti sul mercato”*, promoted by Integra Consortium, which was held on July 10, 2016, in Luiss University of Rome. They took part into debate: Antonio Nuzzo, Director Department of Law LUISS; Vincenzo Onorato, Consortium Integra President; Mauro Lusetti, Legacoop National President; Marcello Clarich, Administrative Law professor at LUISS; Raffaele Cantone, ANAC President; Gianpiero Paolo Cirillo; President of Section of the State Council; Filippo Arena, Lawyer of State and

According to Raffaele Cantone, ANAC President, there is no doubt on the fact that the first practical application of public contracts code has highlighted critical issues and administrations cautions, which often are reluctant to changes. However it must be acknowledged that the code introduces a new vision and is characterized as a system efficiency factor¹²².

The Code in force presents a more systematic and articulated discipline, as a consequence of the innovative rules introduced after the transposition Concession Directive (2014/23/EU) regarding Concession contracts, but also concerning Public-Private Partnership.

The Public Contracts Code structure is divided into six parts:

- The First one is devoted to the scope, general definitions, common disposal, discipline of excluded contracts, planning and design steps (Article 1 to 34).
- The Second part is related to public contracts (*Appalti*) for works, services and supplies (Article 35 to 163).
- The Third part regulates concessions, introducing significant changes in the wake of the aspects leaded by Directive 2014 no.23, (Article 164 to 178).
- The Fourth part of the Code is entirely dedicated to the Public-Private Partnership and general contractor (Article 179 to 199).
- The Fifth part disciplines infrastructure and priority settlements (Article

Head of Cabinet AGCM; Carlo Deodato State Councillor; Michele Corradino, State Councillor and Member of ANAC; Saverio Damiani Sticchi, Member of ANAC Guidelines of the Public Contracts Code Commission; Mario Pilade Chiti, Professor of Administrative Law University of Florence.

¹²² Cfr., Press Review of Integra Consortium Conference, July 10, 2016, Luiss University of Rome. (<http://www.consorziointegra.it/wp-content/uploads/2016/07/2016-07-13-II-Sole-24-Ore-Italia-Oggi.pdf>)

200 to 203).

- Finally, the Sixth part of the Code includes the final and transitional provisions (Article 204 to 220).

The new Public Contract Code includes specific provisions concerning PPP, both in the General Definitions Articles, and then in the following specific Section V of the Code, which is entirely dedicated to Public-Private Partnership and general contractor discipline.

For the first time, the institution of Public-Private Partnership is governed by the Code through accomplished discipline. It is presented as a form of synergy between public and private competence, to finance the construction or management of infrastructure building or public utilities, in order to enable the administration to have more resources and acquiring innovative solutions. It is also provided that the economic operator's remuneration consists on charging the contracting authority with a periodic payment, but also from other forms of economic compensation, as direct revenue to external users of the service management. The most innovative aspects, introduced in new Code provisions, concern the issue of commitment of contracts, the financial term, and have also introduced new typology of PPP, including horizontal subsidiarity interventions, administrative barter and cession of properties in exchange for work.

As part of the PPP, the Code includes other types of contractual arrangement, between civil society and public administration, that reflects an explicit reference to the subsidiarity principles regulated at Article 118 of Italian Constitutional Law.

The “*horizontal subsidiarity intervention*”¹²³, calls for the active participation of civil society in the care of public areas or exploitation of areas and unused real property through cultural initiatives, urban quality interventions, recovery and reuse for purposes of general interest. It is also regulated the “*administrative barter*”¹²⁴ for the realization of works of interest of citizens, with social and cultural purposes, by groups of organized citizens at no cost to the administrative authority. The latter two category of Public Private Partnership, that found a legal basis in Articles 189 and 190, are qualified as a contractual social partnership

Moving to the more detail examination of Partnership contracts, Under Article 180, paragraph 8 of Decree Law 2016 n.50, in PPP contracts typology are included: project finance, works and management concession, service concession, leasing (the so called *locazione finanziaria di opere pubbliche*), availability contract, and any other type of partnership procedure which mainly shared the same features.

Hence, the new Code provision confirms that Public-Private Partnership is still a broad and complex legal category. It is a “*Uncertain boundaries category*”, as it was supported previously by Travi¹²⁵, which have argued that public private partnership are not a *numerus clausus* case in issue. Conversely, being open to the possibility of concluding other agreements which differs from those listed in the law, PPP includes typical and atypical contracts.

¹²³ Cfr., Legislative Decree no.50, 2016, Article 189: “*Interventi di sussidiarietà orizzontale*”.

¹²⁴ Cfr., Legislative Decree no.50, 2016, Article 190: “*Baratto Amministrativo*”.

¹²⁵ Cfr., Travi A., “[...] *Il partenariato pubblico privato rappresenta una categoria dai confini incerti [...]*”, *Il Partenariato Pubblico Privato: i confini incerti di una categoria*; in M. Cafagna, A. Botto, G. Fidone, G. Bottino (a cura di); *Negoziazioni pubbliche. Scritti su concessioni e Partenariato pubblico privato*, Milano, 2013.

Therefore, the domestic law enables contracting authority to exploit partnership features in realization of works or services, even in cases that are not necessarily completely governed.

According to an article, recently published in Italian administrative law Review, Public private partnership, as it regulated in Article 3, paragraph 1, letter eee) and Article 180, represent a general archetype¹²⁶. It has been argued that even the new rules, in line with that contained in the 2006 Code, represent a general legal framework, which also applies to the atypical contractual figures.

Some concern arises from the fact that Article 180, paragraph 8, listing the types of partnership, includes also works and services concessions, describing precisely the latter as a species of the PPP genus. Otherwise, it is the same code that dictates the disciplines, separating those institutes, and by providing for the rules on concessions in the previous section. In fact, it regulates the concession objects and procedure *per se*, devoting the entire Part III of the sole concession contracts. Whereas it dedicates the IV Part of Code in governing Public Private Partnership. In short terms, the concessions are classified as a *species* of the *genus* of Public-Private Partnership.

According to what is stated in the Article 165 of the Decree, in the concession operations, most of the economic operator revenue comes from the sale of services provided to the market. Instead, under Article 180, in PPP contracts, the economic operator's revenues come from fees recognized by the contracting authority and or any other form of economic consideration, including in the form of direct income from the management of the service to

¹²⁶ Cfr., Di Cristina F., *Il Partenariato Pubblico Privato quale "archetipo generale"*; In *Giornale di Diritto Amministrativo*, n.4/2016 (Analisi della normativa Contatti Pubblici).

an external user.

As far as concerned works and services Concession, the Legislative Decree operates a disciplines' rationalization, faithfully with the principles provided in the European Directive. The current Code contains the definitions already established in Article 5 of 2014 Directive no.23, and subjecting these contracts to a common basic rules with regard to procurement procedures, the duration, the contingencies in progress and events extinguishing of such contracts, as it has been deeply discussed in the precedent section. Driven by the European guidelines, the Italian domestic law transpose a discipline dedicated to concessions, which is innovative in content and detail, and it aims to regulate principles, procedural guarantees, as well as the performance and eventual modification of the contracts during their term. The conceptual paradigm that inspires European and then Italian administrative law, is that Concessions should abandon their public connotation, and be considered as an effective contracts, fully to meet the demands of the business environment, and whose defining element is the transfer of operational risk. In this perspective, the concessionaire is a private partner which compares with the market, and is subject to competition rules, aiming to reduce costs and to make a business or manage a service efficiently.

Having regard to Public Private Partnership, in accordance with Article 3 of new Code, which among others provide also the PPP contract definition¹²⁷, it is

¹²⁷ Cfr. Legislative Decree no.50, 2016, Article 3, paragraph 1, letter eee) «**contratto di partenariato pubblico privato**», “*il contratto a titolo oneroso stipulato per iscritto con il quale una o più stazioni appaltanti conferiscono a uno o più operatori economici per un periodo determinato in funzione della durata dell'ammortamento dell'investimento o delle modalità di finanziamento fissate, un complesso di attività consistenti nella realizzazione, trasformazione, manutenzione e gestione operativa di un'opera in cambio della sua disponibilità, o del suo sfruttamento economico, o della fornitura di un servizio*”

possibly to analyse the main differences that occurred comparing the new provisions with the former ones.

Firstly, could be observed how, just in terms of definition, the old framework referred to a plurality of PPP contracts, whereas the current law declines it at its singular “*PPP contract*” model, as if to unify the subject in a single category (article 3 paragraph 1, letter eee).

Then, someone have detected that comparing both definition, former and current notion of PPP, it seems that the new legislation does not include the design/programming phase, among the performance covered by the PPP contract¹²⁸. In fact, the definition contained in the new Article 3 refers only to the phase of “*construction, transformation, maintenance and operational management of work [...]*” without mentioning the programming, the design stage. However, it appears to be a merely oversight, because of the inclusion of the works or service programming and designing phase in the Article 180, which is entirely dedicated to the detailed regulation of PPP contract¹²⁹. The mentioned article clearly express that exist two alternative: subject of a PPP contract could be a definitive program of works or services, which is directly

connessa all'utilizzo dell'opera stessa, con assunzione di rischio secondo modalità individuate nel contratto, da parte dell'operatore. Fatti salvi gli obblighi di comunicazione previsti dall'articolo 44, comma 1-bis, del decreto-legge 31 dicembre 2007, n. 248, convertito, con modificazioni, dalla legge 28 febbraio 2008, n. 31 si applicano i contenuti delle decisioni Eurostat”.

¹²⁸ Cfr., Di Cristina F., Il partenariato pubblico privato quale “archetipo generale”; In *Giornale di Diritto Amministrativo*, n.4/2016 (Analisi della normativa Contatti Pubblici).

¹²⁹ Cfr., Legislative Decree no.50, 2016, Article 180, paragraph 1: “Il contratto di partenariato è il contratto a titolo oneroso di cui all'articolo 3, comma 1, lettera eee). Il contratto può avere ad oggetto anche la progettazione di fattibilità tecnico ed economica e la progettazione definitiva delle opere o dei servizi connessi”.

provided by the public contracting authority¹³⁰. Otherwise, subject of a PPP contract could also be the technical and economic feasibility planning of works and services, prepared in this case by the economic operator.

In broad terms, the PPP contract is qualified as based on some general principles. Firstly, the principle of return of private investment, through the unitary payment, and the repayment of the initial loan (funding). Secondly, must be complain the economic-financial balance principle: it is a required prerequisite, the contract has to create value over the term of the contract and generate sufficient cash flows to remunerate the investment. Furthermore, it must be respect the principle of allocation of construction risk and entrusting private entity availability amounting to at least 50 %, with repercussions in the work to debt registration in the budget (on balance) and concession fees as current expenditure. Finally, it must respect the principle of carrier selection based solely on public competitive procedures, including competitive dialogue. In PPP contracts, the management income should come from unitary fee charged to public authority and or from any type of economic income that private operator could receive, even it is directly provider from the external users that benefit from works or services. Hence, the PPP definition includes both cold and hot works and services¹³¹.

¹³⁰ Cfr. Ibidem.

¹³¹ Cfr., Dlgs 50/2016, Article 3, paragraph1, letter *eee*) «**contratto di partenariato pubblico privato**», *il contratto a titolo oneroso stipulato per iscritto con il quale una o più stazioni appaltanti conferiscono a uno o più operatori economici per un periodo determinato in funzione della durata dell'ammortamento dell'investimento o delle modalità di finanziamento fissate, un complesso di attività consistenti nella realizzazione, trasformazione, manutenzione e gestione operativa di un'opera in cambio della sua disponibilità, o del suo sfruttamento economico, o della fornitura di un servizio connessa all'utilizzo dell'opera stessa, con assunzione di rischio secondo modalità individuate nel contratto, da parte dell'operatore. Fatti salvi gli obblighi di comunicazione previsti dall'articolo 44,*

2.2.1 Risk analysis and Financial-Economic Balance

The new Public Contracts Code, Legislative Decree 2016, no.50, is concerned to specify, either in the article relating to the general definitions, and both in the specific discipline of Concessions and PPP contracts, the Economic-Financial Balance concept and analysis of Risks involved with the operation, having awareness of what is provided in European Directives.

- To commence with the analysis of Risks involved in Concession and PPP contracts, it could be observed how the new Code recalls and reaffirms the 2014 European Directives provisions concerning the operation risk.

Under Article 3, paragraph 1 letter zz) it is provided an explicit definition of operation risk, which a clear transposition of the same concept placed at European level¹³².

comma 1-bis, del decreto-legge 31 dicembre 2007, n. 248, convertito, con modificazioni, dalla legge 28 febbraio 2008, n. 31, si applicano i contenuti delle decisioni Eurostat.

¹³² Cfr., Legislative Decree 2016, no.50, Article 3, letter zz), «**rischio operativo**»: “*il rischio legato alla gestione dei lavori o dei servizi sul lato della domanda o sul lato dell’offerta o di entrambi, trasferito al concessionario. Si considera che il concessionario assuma il rischio operativo nel caso in cui, in condizioni operative normali, non sia garantito il recupero degli investimenti effettuati o dei costi sostenuti per la gestione dei lavori o dei servizi oggetto della concessione. La parte del rischio trasferita al concessionario deve comportare una reale esposizione alle fluttuazioni del mercato tale per cui ogni potenziale perdita stimata subita dal concessionario non sia puramente nominale o trascurabile*”

The definition used in the text adopted by Italian domestic law, correctly identifies a close connection between the transfer of operation risk and balance on economic financial plan, which, even with regard to services, assumes a fundamental role of prerequisite for a proper evaluation and allocation of risk between the parties. In order that there is an effective risk transfer, the concessionaire must be concretely exposed to the possibility of not recovering the investment and operating costs.

The specifications contained in the text confirms then, as consistently stated by the jurisprudence according to which, and as it mentioned before, what distinguishes the concession of services from the public contract (in Italian domestic law, *Appalto*) is the fact that, in the first case, the consideration in favour of the concessionaire consist on the right to exploit the service, taking on the operating risk, and obtaining necessarily (at least for the major) remuneration of investment from the external user.

The Concession contract must therefore be characterized by a clear entrepreneurial matrix of risks and have to be directed to an open market made of a plurality of users. The risk, which is assumed by the concessionaire, must be assessed its rules with the uncertainty of demand for services, because the error about the analysis of demand and expected revenues influences the profitability of the investment and identifying the entrepreneurial success of this initiative.

According to the definition of risk¹³³, the concessionaire assumes the operating risk in the event that, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred for the management of the

¹³³ See above.

work or the subject of the concession services .

The part of the risk transferred to the concessionaire must involve a real exposure to market fluctuations such that each estimated potential loss suffered by the concessionaire is not purely nominal or negligible.

After defining in Article 3 the construction, demand and availability risk, transposing the same provisions contained in the European Concession Directive¹³⁴, Article 180, paragraph 3, applies the mentioned risks to the PPP contracts. Furthermore the law specifies that the PPP contract must also be disciplined further risks that may affect the income, arising out of acts which are not attributable to the economic operator¹³⁵. It could be concluded that the

¹³⁴ Cfr., Legislative Decree 2016, no.50, Article 3, letter aaa), «**rischio di costruzione**»: “*il rischio legato al ritardo nei tempi di consegna, al non rispetto degli standard di progetto, all’aumento dei costi, a inconvenienti di tipo tecnico nell’opera e al mancato completamento dell’opera*”; letter bbb), «**rischio di disponibilità**»: “*il rischio legato alla capacità, da parte del concessionario, di erogare le prestazioni contrattuali pattuite, sia per volume che per standard di qualità previsti*; letter ccc) «**rischio di domanda**»: “*il rischio legato ai diversi volumi di domanda del servizio che il concessionario deve soddisfare, ovvero il rischio legato alla mancanza di utenza e quindi di flussi di cassa*”.

¹³⁵ Cfr., Legislative Decree 2016, no.50, Article 180, paragraph 3: “*Nel contratto di partenariato pubblico privato il trasferimento del rischio in capo all’operatore economico comporta l’allocazione a quest’ultimo, oltre che del rischio di costruzione, anche del rischio di disponibilità o, nei casi di attività redditizia verso l’esterno, del rischio di domanda dei servizi resi, per il periodo di gestione dell’opera come definiti, rispettivamente, dall’articolo 3 comma 1 lettere aaa), bbb) e ccc). Il contenuto del contratto è definito tra le parti in modo che il recupero degli investimenti effettuati e dei costi sostenuti dall’operatore economico, per eseguire il lavoro o fornire il servizio, dipenda dall’effettiva fornitura del servizio o utilizzabilità dell’opera o dal volume dei servizi erogati in corrispondenza della domanda e, in ogni caso, dal rispetto dei livelli di qualità contrattualizzati, purché la valutazione avvenga ex ante. Con il contratto di partenariato pubblico privato sono altresì disciplinati anche i rischi, incidenti sui corrispettivi, derivanti da fatti non imputabili all’operatore economico*”.

PPP agreement should provide also a provision of risks actually incurred by the parties.

Although the Code does not provide practical examples of risks that may occur in a PPP operation, these are identified and explored in the Consultation Paper drawn up by ANAC, regarding the monitoring of contracting authorities on the activity carried out by the economic operator in PPP contracts¹³⁶. ANAC, in its document, not only have detected and defined the three main types of risks related to the operations of PPP, but for each category have also identified concrete cases which may give rise to such risks¹³⁷. For instance, within

¹³⁶ Cfr., Autorità Nazionale Anticorruzione (ANAC) Documento di consultazione: “*Monitoraggio delle amministrazioni aggiudicatrici sull’attività dell’operatore economico nei contratti di partenariato pubblico privato*”.
(http://www.anticorruzione.it/portal/rest/jcr/repository/collaboration/Digital%20Assets/anacdocs/Attivita/ConsultazioniOnline/20160610/Documento%20di%20consultazione%20Monitoraggio_PPP.pdf)

¹³⁷ To a depth awareness in that matter, see Autorità Nazionale Anticorruzione (ANAC) Documento di consultazione: “*Monitoraggio delle amministrazioni aggiudicatrici sull’attività dell’operatore economico nei contratti di partenariato pubblico privato*”, paragraph 3 (Il trasferimento dei rischi all’operatore economico): “[...] Ai fini di una corretta identificazione dei rischi si forniscono le seguenti indicazioni.

3.1 Il Rischio di costruzione: Il Rischio di costruzione è quello legato al ritardo nei tempi di consegna, al non rispetto degli standard di progetto, all’aumento dei costi, a inconvenienti di tipo tecnico nell’opera e al mancato completamento dell’opera (art. 3, comma 1, lett. aaa), del Codice). In tale categoria generale di rischio è possibile distinguere i seguenti rischi specifici:

1. rischio di commissionamento, ossia che l’opera non riceva l’approvazione, da parte di altri soggetti pubblici o della collettività (portatori d’interessi nei confronti dell’opera da realizzare), necessaria per procedere alla realizzazione, con conseguenti ritardi nella realizzazione e insorgere di contenziosi;

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2. rischio amministrativo, connesso al notevole ritardo o al diniego nel rilascio di autorizzazioni (pareri, permessi, licenze, nulla osta, etc.) da parte di soggetti pubblici e privati competenti, con conseguenti ritardi nella realizzazione;
 3. rischio espropri, connesso a ritardi da espropri o a maggiori costi di esproprio per errata progettazione e/o stima;
 4. rischio ambientale e/o archeologico, ossia rischio di bonifica dovuta alla contaminazione del suolo e rischio di ritrovamenti archeologici, con conseguenti ritardi nella realizzazione dell'opera e incremento di costi per il risanamento ambientale o la tutela archeologica;
 5. rischio di progettazione, connesso alla sopravvenienza di necessari interventi di modifica del progetto, derivanti da errori o omissioni di progettazione, tali da incidere significativamente su tempi e costi di realizzazione dell'opera;
 6. rischio di esecuzione dell'opera difforme dal progetto, collegato al mancato rispetto degli standard di progetto;
 7. rischio di aumento del costo dei fattori produttivi o di inadeguatezza o indisponibilità di quelli previsti nel progetto;
 8. rischio di errata valutazione dei costi e tempi di costruzione, anche conseguenti alle varianti richieste dal concedente;
 9. rischio di inadempimenti contrattuali di fornitori e subappaltatori.

3.2 Il Rischio di domanda: Il Rischio di domanda è quello legato ai diversi volumi di domanda del servizio che il concessionario deve soddisfare, ovvero, il rischio legato alla mancanza di utenza e, quindi, di flussi di cassa (art. 3, comma 1, lett. ccc), del Codice). In tale categoria generale di rischio è possibile distinguere i seguenti rischi specifici:

10. rischio di contrazione della domanda di mercato, ossia di riduzione della domanda complessiva del mercato relativa al servizio, che si riflette anche su quella del concessionario;
11. rischio di contrazione della domanda specifica, collegato all'insorgere nel mercato di riferimento di un'offerta competitiva di altri operatori che eroda parte della domanda.

3.3 Il Rischio di disponibilità: Il Rischio di disponibilità è quello legato alla capacità, da parte del concessionario, di erogare le prestazioni contrattuali pattuite, sia per volume che per standard di qualità previsti (art. 3, comma 1, lett. bbb), del Codice). In tale categoria generale di rischio è possibile distinguere i seguenti rischi specifici:

construction risks category, ANAC explained that specific risks could be related to permits, authorizations, clearance, change in law (*ius superveniens*), and any typology of dangers that are related to the outcome of administrative procedures. Among others, are mentioned also the environmental and archaeological risk.

It deserves to be deepened the ANACs' analysis concerning further types of risks: in addition to the construction, availability and management risks, the ANAC Consultation Paper takes into account other risks that still involved in the implementation and operation phase of a public works.

The document specifically lists four types of additional risks¹³⁸:

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12. rischio di manutenzione straordinaria, non preventivata, derivante da una progettazione o costruzione non adeguata, con conseguente aumento dei costi;
 13. rischio di performance, ossia il rischio che la struttura messa a disposizione o i servizi erogati non siano conformi agli standard tecnici e funzionali prestabiliti, con conseguente riduzione dei ricavi;
 14. rischio di obsolescenza tecnica, legato ad una più rapida obsolescenza tecnica degli impianti, incidente sui costi di manutenzione.

¹³⁸Cfr., Autorità Nazionale Anticorruzione (ANAC) Documento di consultazione: “*Monitoraggio delle amministrazioni aggiudicatrici sull’attività dell’operatore economico nei contratti di partenariato pubblico privato*”, paragraph 3: 3.4 **Altri rischi:** Accanto ai rischi di costruzione, di domanda e di disponibilità, vi sono una serie di rischi che possono presentarsi nella fase antecedente l’aggiudicazione e/o la stipula del contratto in quella successiva al termine di scadenza contrattuale ovvero durante l’intero ciclo di vita del contratto di PPP.

1. Tra questi, si segnalano: rischio normativo-politico-regolamentare, ossia che modifiche normative non prevedibili contrattualmente, anche rinvenienti da atti di soft law, determinino un aumento dei costi per il conseguente adeguamento o, nei casi estremi, il venir meno della procedura o dell’affidamento, nonché costi legati alle azioni contro la nuova normativa;
2. rischio finanziario, che si concretizza nel mancato reperimento delle risorse di finanziamento a copertura dei costi e nei tempi prestabiliti dall’articolo 180, comma 7 o in un aumento dei

As first, it is considered political and regulatory risk, which consist on regulatory changes that are not contractually predictable, also deriving from soft law acts, which entail an increase in costs for the subsequent adaptation or, in extreme cases, the cessation of the procedure or the assignment.

Secondly, has been taken into account the financial risk: it concerns missed retrieval of funding resources to cover the costs, or consist in an increase of interest rates and/or non-repayment of one or more funding rates, resulting in increased costs or inability to proceed with the transaction.

Then it is mentioned the industrial relations risk, that is linked to relations with other subjects which could adversely affect the cost and time of delivery.

Finally, ANAC makes reference to residual value risk, which is the risk of returning of an asset, at the end of the contractual relationship, that is lower than expected value.

In order to allows the best risk-sharing activities, which as mentioned has to necessarily follows the principles already set out in the

ESA 2010 Eurostat MGDD¹³⁹, in ANAC document also is involved the use of some operating instruments. Especially in paragraph 4, it is suggested to draw up a “*risk matrix*”, which allows to define whether the optimal allocation of specific risk providing for its assignation to the public or private entity, or

tassi di interesse e/o di mancato rimborso di una o più rate di finanziamento, con conseguente aumento dei costi o impossibilità di proseguire nell’operazione;

3. rischio delle relazioni industriali, legato alle relazioni con altri soggetti che influenzino negativamente costi e tempi della consegna;
4. rischio di valore residuale, ossia il rischio di restituzione alla fine del rapporto contrattuale di un bene di valore inferiore alle attese.

¹³⁹ Manual on Government Deficit and Debt – Implementation of ESA 2010, Eurostat (2016).

whether it could be quite appropriate to consider other forms of management shared. Assuming that the risk factors should be allocated to the party that can best handle, manage and contain them, the specific risks will be included in the matrix in a variable way, they depend on the object and the nature of the PPP contract signed.

To better comprehend the usefulness of the risk matrix tool, it is inserted below the table sample prepared in the same ANAC Advisory document. This turns out to be a concrete operative method for assessing whether the allocation of risks allows to qualify the contract as an operation of PPP or Concession, pursuant to the Code requirements and criteria laid down by Eurostat, even in order to assess whether the public intervention may be registered off-balance.

Esempio di possibile matrice dei rischi

Tipo di rischio	Probabilità del verificarsi del rischio	Maggiori costi e/o ritardi associati al verificarsi del rischio	Possibilità di mitigazione del rischio se trasferito al privato	Strumenti per la mitigazione del rischio	Rischio a carico del pubblico	Rischio a carico del privato	Art. contratto che identifica il rischio
Rischio di costruzione							
Rischio di commissionamento							
rischio amministrativo							
rischio espropri							
rischio ambientale/o archeologico							
Rischio di progettazione							
Rischio di esecuzione dell'opera difforme dal progetto							
rischio di aumento dei prezzi o di indisponibilità dei fattori produttivi							
rischio di errata valutazione di tempi e costi							
Rischio di inadempimenti contrattuali da parte di fornitori e subappaltatori							
Rischio di domanda							
Rischio di contrazione della domanda di mercato							
Rischio di Contrazione della domanda specifica							
Rischio di disponibilità							
Rischio di manutenzione straordinaria							
Rischio di performance							
Rischio di obsolescenza tecnica							
Altri rischi							
rischio normativo-politico- regolamentare							
rischio finanziario							
Rischio delle relazioni industriali							
rischio di valore residuale							

EXHIBIT 1: Sample of possible risks matrix. Source ANAC: Documento di consultazione: “Monitoraggio delle amministrazioni aggiudicatrici sull’attività dell’operatore economico nei contratti di partenariato pubblico privato”.

- Regarding the *Economic-Financial Balance*, and pursuant to Article 3 (Definition), first paragraph, letter fff), it is clarified that economics and financial balance required simultaneous presence of economic convenience and financial sustainability of the whole operation¹⁴⁰. The first criterion concerns the projects' attitude to create value and sufficient income that ensure a profitability level. The financial sustainability regards the projects' capability to generate cash flow sufficient enough to grant the private investment refunding.

It seems to be appropriate to remind that the concept of economic and financial balance was covering its importance already in the Public Contracts Code of 2006, with reference to the concessions and also to project finance. Pursuant to Article 143 of the old Code of 2006, several times were recalled the concept of economic and financial balance and led to the conclusion that the it represents the viability of the operation, conditioning the management overall outcome. Regarding Concessions, the old code in its Article 143, required that the offer and the contract must contain the economic-financial plan to cover the investments and related operations for the period of time agreed¹⁴¹.

¹⁴⁰ Cfr., Legislative Decree 2016, no.50 Article 3, paragraph 1, letter fff) «**equilibrio economico e finanziario**»: “*la contemporanea presenza delle condizioni di convenienza economica e sostenibilità finanziaria. Per convenienza economica si intende la capacità del progetto di creare valore nell’arco dell’efficacia del contratto e di generare un livello di redditività adeguato per il capitale investito; per sostenibilità finanziaria si intende la capacità del progetto di generare flussi di cassa sufficienti a garantire il rimborso del finanziamento*”.

¹⁴¹ Cfr., Legislative Decree 2006 no.163, Article 143, paragraph 7: “*L’offerta e il contratto devono contenere il piano economico-finanziario di copertura degli investimenti e della connessa gestione per tutto l’arco temporale prescelto e devono prevedere la specificazione del valore residuo al netto degli ammortamenti annuali, nonché l’eventuale valore residuo dell’investimento non ammortizzato al*

Furthermore, and as was also noted by the supervisory authorities on public contracts (AVCP)¹⁴², pursuant to Article 153 of the old Code, the project financing was an institution that consisted on the funding of major investments on the basis of a project, taking into account its validity, its proper management and its ability to produce income for a certain period of time¹⁴³. The necessity that the management of the work ensures to generate profit for private partner, explains the importance of the discipline has the financial plan to cover the investments and the matters related operations. The economic-financial plan is a tool that proves the sustainability of the entire operation.

Regardless the former Code which is now repealed, the concept of economic and financial balance is taken into account in the current Code.

The balance in this case is associated with the risk inherent in the Concession contracts and PPP operations, and it is configured as a necessary prerequisite to ensure the proper allocation of risks.

termine della concessione, anche prevedendo un corrispettivo per tale valore residuo. Le offerte devono dare conto del preliminare coinvolgimento di uno o più istituti finanziatori nel progetto”.

¹⁴² Cfr., AVCP, Regulation Act 2000, 18 July, no.34: “*L’iniziativa viene valutata esclusivamente o prevalentemente sulla base dei profitti che può generare*”.

¹⁴³ Cfr., Legislative decree 2006 no.163, Article 153, paragraph 9: “*Le offerte devono contenere un progetto preliminare, una bozza di convenzione, un piano economico-finanziario [...], nonché la specificazione delle caratteristiche del servizio e della gestione, e dare conto del preliminare coinvolgimento di uno o più istituti finanziatori nel progetto; il regolamento detta indicazioni per chiarire e agevolare le attività di asseverazione ai fini della valutazione degli elementi economici e finanziari. Il piano economico-finanziario comprende l’importo delle spese sostenute per la predisposizione delle offerte, comprensivo anche dei diritti sulle opere dell’ingegno di cui all’articolo 2578 del codice civile. Tale importo non può superare il 2,5 per cento del valore dell’investimento, come desumibile dallo studio di fattibilità posto a base di gara [...]*”.

Also the new Code provides for both concessions and PPP procedures, that the economic operator can be found, in addition to the right to exploit works and services, a remuneration by the public authority. This is reflected in Article 165, paragraph 2, relating to Concessions and in Article 180, paragraph 6 with regard to the PPP contracts.

The public contribution, as already noted, was also recognized in the prior regulations, therefore, the ability to support the private operator is through the provision of financial resources, or through the assignment of ownership or use of immovable property owned by the public body, it is in continuity with the previous legislation. However, some significant changes have occurred, in particular by placing restriction. In fact, while Article 143, paragraph 5 of the old Code indicated the economic-financial balance pursuit as a fundamental parameter, without set out limits or constraints on the public authorities¹⁴⁴, the new code, conversely, set out some restrictions. If a an additional price is granted, in order to achieve the economic-financial balance, both for concessions and for the PPP, the recognition of that price can not exceed 30 percent of the total investment cost, including any financial costs¹⁴⁵.

¹⁴⁴ Cfr., Legislative Decree 2006 no.163, Article 143, paragraph 5: *“Le amministrazioni aggiudicatrici, previa analisi di convenienza economica, possono prevedere nel piano economico finanziario e nella convenzione, a titolo di prezzo, la cessione in proprietà o in diritto di godimento di beni immobili nella loro disponibilità o allo scopo espropriati la cui utilizzazione ovvero valorizzazione sia necessaria all’equilibrio economico-finanziario della concessione”*.

¹⁴⁵ The eventual price charged to public authority, in Legislative Decree 2016, no.50, is limited to a maximum of 30 percent of the total investment, and it is expressly provided in two different adopt provisions: See Article 165 (Rischio ed equilibrio economico finanziario nelle concessioni), paragraph 2: *“L’equilibrio economico finanziario definito all’articolo 3, comma 1, lettera fff), rappresenta il presupposto per la corretta allocazione dei rischi di cui al precedente comma 1. Ai soli fini del raggiungimento del predetto equilibrio, in sede di gara l’amministrazione aggiudicatrice può stabilire*

In addition, a further restriction is provided in the case of the transfer of ownership or possession of immovable property that belongs to the public body: it is only allowed when using the properties would be instrumental and technically connected to the work entrusted in concession. According to Article 165, paragraph 2, solely for the purpose of the abovementioned balance achievement, during the tender, the contracting authority may also set a price which consist on a government grant or in the assignment of real estate which is in the availability of the administration, and whose use is instrumental and technically connected to the work entrusted concession¹⁴⁶. Conversely, in previous legislation of concession contracts, there was also the possibility that, in order to transfer to private economic operator the immovable property, the

anche un prezzo consistente in un contributo pubblico ovvero nella cessione di beni immobili. Il contributo, se funzionale al mantenimento dell'equilibrio economico-finanziario, può essere riconosciuto mediante diritti di godimento su beni immobili nella disponibilità dell'amministrazione aggiudicatrice la cui utilizzazione sia strumentale e tecnicamente connessa all'opera affidata in concessione. In ogni caso, l'eventuale riconoscimento del prezzo, sommato al valore di eventuali garanzie pubbliche o di ulteriori meccanismi di finanziamento a carico della pubblica amministrazione, non può essere superiore al trenta per cento del costo dell'investimento complessivo, comprensivo di eventuali oneri finanziari. See also Article 180 (Partnership Pubblico-Privato) paragraph 6: "L'equilibrio economico finanziario, come definito all'articolo 3, comma 1, lettera fff), rappresenta il presupposto per la corretta allocazione dei rischi di cui al comma 3. Ai soli fini del raggiungimento del predetto equilibrio, in sede di gara l'amministrazione aggiudicatrice può stabilire anche un prezzo consistente in un contributo pubblico ovvero nella cessione di beni immobili che non assolvono più a funzioni di interesse pubblico. A titolo di contributo può essere riconosciuto un diritto di godimento, la cui utilizzazione sia strumentale e tecnicamente connessa all'opera da affidare in concessione. Le modalità di utilizzazione dei beni immobili sono definite dall'amministrazione aggiudicatrice e costituiscono uno dei presupposti che determinano l'equilibrio economico-finanziario della concessione. In ogni caso, l'eventuale riconoscimento del prezzo, sommato al valore di eventuali garanzie pubbliche o di ulteriori meccanismi di finanziamento a carico della pubblica amministrazione, non può essere superiore al trenta per cento del costo dell'investimento complessivo, comprensivo di eventuali oneri finanziari".

¹⁴⁶ Cfr., Legislative Decree no. 50, 2016, Article 165, paragraph 2.

latter could be expropriated for this purpose¹⁴⁷.

To summarize and easily understand the main changes introduced by the new Code, as regards to the public contribution or transfer of immovable property in favour of private party, in order to ensure the achievement of economic-financial balance, it follows a summary table of the repealed regulations and those currently applicable.

Repealed Code (Legislative Decree no.163/2006)		Public Contracts Code in force (Legislative Decree no.50/2016)	
Article 143, par.4	Pursuit of economic and financial balance of investment and linked management is the benchmark, in relation to the quality of services to be provided	Article 165, par.2 Article 180, par.6	It has been placed a limit of 30% of the total investment cost, including others financial charges, for the grant of additional price and any government guarantees or funding mechanisms from public authorities
Article 143, par.5	Public authority could assign asset or real property in its availability, or in order expropriated	Article 165, par.2	Public authority are allowed to assign asset and real property that are in its availability
Article 143, par.5	Yield of real property or right of using that property whose use is necessary to pursuit economic financial balance of concession contract	Article 165, par.2 Article 180, par.6	It is possible to assign or allocate asset or real property only if instrumental and technically connected to the concession subject

EXIBIT 2: Comparing former and current provisions, regarding the economic-financial balance

¹⁴⁷ Cfr., Legislative Decree 2006, n.163, Article 143, paragraph 5: “*Le amministrazioni aggiudicatrici, previa analisi di convenienza economica, possono prevedere nel piano economico finanziario e nella convenzione, a titolo di prezzo, la cessione in proprietà o in diritto di godimento di beni immobili nella loro disponibilità o allo scopo espropriati la cui utilizzazione ovvero valorizzazione sia necessaria all’equilibrio economico-finanziario della concessione*”.

- A last topic that deserves to be analysed, connected with the issues of risks and economic-financial balance, regard the question of funding.

The Concession contract or PPP contract signing can take place only after presenting documents eligible for financing of the work. Furthermore, the law also provides that the contract is terminated automatically in the event that funding is not completed within 12 months. It has thus been defined a shorter period than the previous of 24 months to resolve contract¹⁴⁸. In this sense it can be concluded that the new code pays more attention to the bankability of the investment.

On the same vein should be interpret Article 165, paragraph 4, of the present Code, which prescribes that, already in the tender phase, the economic operator's offer may be submitted together with a declaration of interest proposed by a bank or financial institution¹⁴⁹.

A further confirmation of the importance of the financial sector support is also considered in Article 180, paragraph 7. This provides that the existence of a documented availability of funding is considered as a necessary condition for evaluating admission to a PPP contract. Moreover, only attaching appropriate documentation relating to the financing the contract between contracting authority and economic operator could be conclude.¹⁵⁰

¹⁴⁸ Cfr., Legislative Decree no.163, 2006, Article 143.

¹⁴⁹ Cfr., Legislative Decree no.50, 2016, Article 165, paragraph 4: *“Il bando può prevedere che l'offerta sia corredata dalla dichiarazione sottoscritta da uno o più istituti finanziatori di manifestazione di interesse a finanziare l'operazione, anche in considerazione dei contenuti dello schema di contratto e del piano economico-finanziario”*.

¹⁵⁰ Cfr., Legislative Decree no.50, 2016, Article 180, paragraph 7: *“La documentata disponibilità di un finanziamento è condizione di valutazione di ammissione ad un contratto di partenariato pubblico privato. La sottoscrizione del contratto ha luogo previa la presentazione di idonea documentazione inerente il finanziamento dell'opera. Il contratto è risolto di diritto ove il contratto di finanziamento non sia perfezionato entro dodici mesi dalla sottoscrizione del contratto”*.

Therefore, in view of all the above, it is undeniable that the new Code attempt to give more security on the goodness and validity of performance operations. PPP is primarily valued as financial operation, and precisely the question of financing must be considered at the stage of preparation of the tender documents.

2.2.2 Public-Private Partnership procedure

The present paragraph purpose is to analyse the essential characteristics and awarding procedure of PPP contracts.

As mentioned in the previous paragraphs, Article 180, paragraph 8, embraces a wide range of contract types that fall within the general “*archetype*” of contractual PPP.

The New Public Contracts Code includes: project finance, works and management concession, service concession, leasing for the construction of public works (the so called *locazione finanziaria di opere pubbliche*), availability contract, and any other types of partnership procedure which mainly shared the same features.

All these contracts pattern, differ in their content and in the implementing rules, but have common characteristics that are regulated in Articles 180, 181 and 182 of the new public contracts code. Comparing it to the old discipline, that only provide the definition of partnership contracts, this represent absolutely an innovation.

Article 181 specifically regulates procedures for the award of PPP contracts¹⁵¹. In the first paragraph, the law is clear in establishing that the economic operator is selected with a public procedure or competitive dialogue procedure. Thus there is no possibility to select a private partner without having carried out the selection procedures that guarantee transparency and competition. Within PPP contracts are therefore not cover procedures awarded without public notice.

It has been noted that in this case there is a kind of coordination difficulties between the application of procedures prescribed for PPP operation in Article 181, and instead the principle of freedom in the organization of procedures, laid down in European Directive 23, that is transpose in Article 166 with reference to the award of concessions. In fact, if the concession, as it is included in the types of contracts falling within PPP operation, is considered a species of the general category, it should also be subject to the same rules laid down for the award. Conversely, the new code, even those that have been following the directive criterion of Enabling Act of 2016 no.11, has accepted all of the flexibility allowed for concessions contracts from European law.

In the second paragraph could be implicitly derived that on the basis of a PPP operation there may exist two different alternatives: in the first case, the contracting authorities shall award the contract basing it on a definitive project, jointly with a draft contract and economic plan financial. This represent a further innovative point: the previous regulations, with reference to concessions, provided that it was put out to tender a preliminary draft. Instead presently the administration is required to have greater rigor and precision in establishing from the beginning a complete and definitive project.

¹⁵¹ Cfr., Legislative Decree no.50, 2016, Article 181, *Procedura di Affidamento*.

Alternatively, in the case the contract includes also the program phase, it will be up to the economic operator to present the technical and economic feasibility of the design and the final project of works and services, as it claimed in Article 180 paragraph 1.

The third paragraph of Article 182 deserves to be taken into account because it requires the contracting authority, not merely to assess and analyses the supply and demand, the economic-financial and social sustainability of the whole operation, the nature of the risks associated with the performance, but also takes suitable comparison tools to find out whether it is convenient using the form of partnership or rather opt for a direct realization through traditional procurement procedures (*Appalto*). In fact, must be remembered that the activity carried out by public administrations should still strive for the better realization of public interest. And recurring to the Partnership model may not always guarantee the best satisfaction of certain requirements.

The fourth paragraph of Article 182 opens up the light on the issue of monitoring and control by the contracting authority, over the activities done by the awarding candidate. According to part of doctrine, it has been found that in this case, it seems that the Italian legislation is approaching like the common law jurisdictions does, in which it is particularly developed the business case study approach¹⁵².

For this purpose, appears to be useful to recall the Guidelines dictate by ANAC on monitor and control activities settled out by public authorities.

¹⁵² Di Cristina F., *Il partenariato pubblico privato quale "archetipo generale"*; in *Giornale di Diritto Amministrativo* 2016, no.4 (Analisi della normativa, Contratti pubblici) pag.485.

According to ANAC soft law provision, the efficiently risks allocation detected not only in the award phase, but has crucial relevance also for the operation success, or in the proper execution of performance agreed. In fact, considering that these are long term contracts, to ensure the correctness of execution phase and that the public interest is satisfied, it must ensure that the operational risk remains with an economic operator.

Pursuant to ANAC, the public authority control activity, to ensure that contractual terms are complied, with regard to deadlines, delivery methods, quality and quantity of works, products and services, is common to any types of public contract. While the monitoring of correct allocation of risk is typical control activity of PPP contract: *“Appare chiaro che, mentre l’attività di controllo sulla corretta esecuzione delle prestazioni contrattuali è comune a tutti i tipi di contratto, il monitoraggio sulla permanenza in capo all’operatore economico dei rischi allo stesso trasferiti è tipico dei contratti di PPP”*¹⁵³. Therefore, the risks matrix drafted by means of example, turns out to be a useful tool especially in the monitoring phase subsequent to the contract awarding.

Continuing with the analysis of Article 182, concerning the mode of funding project, in the first paragraph it is established that the financing of PPP contracts should be achieved by “using appropriate tools”¹⁵⁴, including the project financing. The latter method of financing, that is regulate in Article 183, will be deepened below. The law provides that the return on invested

¹⁵³ Cfr., ANAC: Documento di consultazione: *“Monitoraggio delle amministrazioni aggiudicatrici sull’attività dell’operatore economico nei contratti di partenariato pubblico privato”*.

(<http://www.anticorruzione.it/portal/rest/jcr/repository/collaboration/Digital%20Assets/anacdocs/Attivita/ConsultazioniOnline/20160610/Monitoraggio%20PPP.pdf>)

¹⁵⁴ Cfr., Legislative Decree no.50, 2016, Article 183, paragraph 1: *“il finanziamento dei contratti può avvenire utilizzando idonei strumenti [...]”*.

capitals is defined in the contract. Furthermore, the contract should defined the risk transferred, the monitoring of their permanence on private party during the entire life cycle of contract and the consequences arises from the eventually early termination of the contract¹⁵⁵.

The Code in force in fact addresses the issue of early termination of contract and the possibility to revise financial economic balance and financial plan (PEF)¹⁵⁶.

In the first case, it is provided that within the contract should be foreseen the consequences that occur if the contract itself is extinguished in advance. These consequences, however, must complies with requirement that the risks permanently are transferred to the economic operator¹⁵⁷.

As regard the second case, if occurs facts that are not attributable to the economic operator, it may lead to revise the contract, in order to restore the balance conditions established from the beginning. In case of the parties do not reach an agreement on the PEF rebalancing, they may withdraw from the contract, and the economic operator has the right to receive value of works and related charges, net of amortization and government grants¹⁵⁸.

As Di Cristina has highlighted, concerning the application of general principle in matters of withdraw, are there relevant differences between former and current provision.

¹⁵⁵ Cfr., Legislative Decree no.50, 2016, Article 182, paragraph 1 and 2.

¹⁵⁶ The acronym PEF means: Piano economico finanziario.

¹⁵⁷ Cfr., Legislative Decree no.50, 2016, Article 182, paragraph 2: *“il contratto definisce [...] le conseguenze derivanti dalla anticipata estinzione del contratto, tali da comportare la permanenza dei rischi trasferiti in capo all’operatore economico”*.

¹⁵⁸ Cfr., Legislative Decree no.50, 2016, Article 182, paragraph 3.

In the old Code, at Article 143, 8 paragraph, with reference to Concession contract (due to the fact that did not exist in 2006 Code a proper discipline of PPP contracts), it was established that requirements and condition which determined economic financial balance of investment, are an integral part of the contract. Hence, any change of the abovementioned conditions, made by contracting authority, as well as change in law that were likely to affect economic financial plan, involved the necessary contract revision. Then, if contract were not reviewed, the concessionaire was entitled to withdraw from the contract¹⁵⁹.

Conversely, under the law in force, there is more broad category of requirements relating to the possible termination of contracts (because the facts not attributable to economic operator are more extensive rather than variation made by contracting authority or change-in-law).

Otherwise, Article 182 provides only the right to proceed with the financial economic rebalancing. And in case of no rebalancing it is possible to exercise the withdrawal from the contract, which is not a necessity. In this way, as expressed in his recent article by Di Cristina, public finance is better protected

¹⁵⁹ Cfr., Cfr., Legislative Decree 2006 no.163, Article 143, paragraph 8: [...] *I presupposti e le condizioni di base che determinano l'equilibrio economico-finanziario degli investimenti e della connessa gestione, da richiamare nelle premesse del contratto, ne costituiscono parte integrante. Le variazioni apportate dalla stazione appaltante a detti presupposti o condizioni di base, nonché le norme legislative e regolamentari che stabiliscano nuovi meccanismi tariffari o che comunque incidono sull'equilibrio del piano economico finanziario, previa verifica del CIPE sentito il Nucleo di consulenza per l'attuazione delle linee guida per la regolazione dei servizi di pubblica utilità (NARS), comportano la sua necessaria revisione, da attuare mediante rideterminazione delle nuove condizioni di equilibrio, anche tramite la proroga del termine di scadenza delle concessioni. In mancanza della predetta revisione il concessionario può recedere dal contratto [...]*".

and the private party has less bargaining power¹⁶⁰.

After examining the general discipline of Public-Private Partnership, it seems to be appropriate to follow handling Project Financing, a specific type of PPP contract, also specifically detailed by the Italian domestic law.

2.2.2.1 *Project Financing*

Project Financing, which Italian Administrative Law includes in PPP contracts, is a long-term financing operation in which the consideration for mutually binding of financing itself, wholly or partly borne by the private, is guaranteed by the cash flows arising from the work management activities foreseen in the project.

Project financing has its roots in common law and economic legal systems. Among cases that have spread in the European Member States, the most important is certainly the Private Finance Initiative system, created in United Kingdom in the early '70s.

As well as detailed in the first chapter, the PFI consists in entrusting a private company of a global contract, whose subject is the design, financing, building, operation and maintenance of the work (DFBO contract).

¹⁶⁰ Di Cristina F., *Il partenariato pubblico privato quale "archetipo generale"*; in *Giornale di Diritto Amministrativo* 2016, no.4 (Analisi della normativa, Contratti pubblici) pag.486.

Over the past decades it has been widely used in civil law systems for the realization of works which provide an integration between the public and private sectors. In Italy, the Project Finance institution (so called *Finanza Progetto*) was born as innovative financial tool for public authorities, and this process has become central in a time of financial crisis and global economic activity.

The doctrine has raised some difficulty in identifying a definition which is able to highlight aspects of Project Financing, given the variety of interests and patterns related to it. With references to the definitional aspects should be noted that the doctrine has been divided in two different positions: the majority believes that the vision Project Financing is primarily a financing technique and not a means of undertaking public works. In the opposite direction, other commentators have argued that the Project Financing is much more than a financing technique. It is a method of implementation of large projects infrastructures¹⁶¹.

Definitely the economic data can not be neglected, in fact all of Project Finance definitions move from a base of financial economic mould.

From an economic point of view, and also pursuant to ANAC Determination of 2015,¹⁶² key features in operation of project financing are as follows:

¹⁶¹ For a further discussion see: the majoritarian doctrine that follow concepts of Peter K. Nevitt, *Project financing*, Cariplo-Laterza, 1987.

¹⁶² Cfr., Autorità Nazionale Anticorruzione (ANAC), Determinazione n. 10 del 23 settembre 2015: “*In sostanza, sono tre le caratteristiche immanenti del PF:*

a) the financial viability of the project. It means that the project should be able to produce in its life cycle a cash flow to cover operational costs, compensate the financial institution and provide a reasonable profit margin to the operation promoter. The project should be self-liquidating, and the capability of the projects to generate cash flows is the major attraction for individuals who are thus encouraged to make investments.

b) The second key feature is the off-balance sheet, that is, the project outsourcing of from the budget of the individual promoter. This is accomplished through the establishment of company *ad hoc*, the so called Special Purpose Vehicle (SPV) or Project Company, which will be responsible of the project, as established in Article 184. The concentration of funding in an autonomous legal and financial centre of reference, SPV, where the funds are entrusted, creating a ring fence. The ring fence lets to isolate the project from the risks and responsibilities related to the individual promoters, avoiding the asset confusion in terms of legal and financial separation between project and sponsors as project financing with respect to other activities of the promoters or shareholders of any project company.

c) The establishment of “security package” in favour of external funders. The guarantees are based on a wide range of agreements between the parties involved in the project. These agreements are based on the feasibility studies of

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1. *la finanziabilità del progetto, intesa come verifica della produzione dei flussi di cassa sufficienti a coprire i costi operativi, a remunerare il capitale di debito e a garantire un utile agli sponsor quale remunerazione del capitale di rischio;*
 2. *il “ring fencing”, ossia la definizione di un nuovo soggetto, lo SPV, al quale vengono affidati i mezzi finanziari per la realizzazione del progetto con contestuale separazione del progetto dal bilancio degli sponsor (operazione off balance);*
 3. *la costituzione di idonee garanzie, non solo a favore delle banche finanziatrici (“security package”).*

the project, the business plan, with related cash flows and risk analysis, with the result that the possibility of recourse of financial institutions and other creditors (of works contractors, supplies, etc.) in respect of the sponsors is limited to the value of the funded activities.

The complexity of Project Financing operations depends not only on the number of parties involved, but also on the variety of procedural cases and contracts that exist between main actors of the project. Framing Project Financing in a legal definition, the doctrine argued that it is in a “*sommatoria di singoli contratti che ne costituiscono la struttura*”¹⁶³. In fact, each transaction requires a plurality of contracts: from commercial, to insurance, and financial, that have to be coordinated to have a positive impact on the overall project.

Deepening the Project Financing examination in the Italian legal context, it should be noted how it was introduced for the first time in 1998, within the *Merloni-ter* Law no. 415, that has entered Articles 37-bis / 37-nonies in the framework Law of Public Works (the 1994 *Merloni law* no.109).

Hence, Project Financing has undergone several changes over the years¹⁶⁴.

¹⁶³ Cfr., Miscali M., Il project financing, in I contratti del commercio, dell'industria e del mercato finanziario, in Trattato diretto da Galgano F., Torino 1995.

¹⁶⁴ *Merloni-ter* Law no. 415/1998 was followed by the Law of 1 August 2002 n. 166 (*Merloni-quater* Law), which expanded the number of potential promoters (incorporating chambers of commerce and the banking foundations and has abolished the time limit of the concession. Also inserts the right of first refusal in favour of the promoter

It was established in 1999, within the Italian Ministry of Economy, a Task Force for Project Financing: Project Finance Technical Unit (UTFP).

Then some innovations have been introduced by the subsequent Law of 18 April 2005 (Community Law 2004).

The Legislative Decree no.163 of 2006, provides a comprehensive regulation of the Project Financing.

Subsequently, the 2006 Public Procurement Code (Legislative Decree no.163), brought together in a single body with the provisions on public contracts and, in Articles 153 to 160 has rewritten national Project Finance discipline, repealing all previous laws. Currently, a completely new discipline is designed in Articles 183 et seq. of the 2016 Public Contracts Code.

With reference to the new rules, the Project Financing system (hereinafter *PF*), has been affected by very significant changes.

First, the *PF* procedures are reduced to two main typologies: the new norm dedicated to the project financing (Article 183) provides for two distinct award procedures, which basically coincide with those covered by the 2006 Legislative Decree 163 in Article 153 paragraphs 1-14 concerning single tendering procedure, and paragraph 19 related to private initiative for unplanned works. The first one comes from the public authority impulse, and the second from a private initiative. Instead the procedures provided under the previous code, in Article 153, paragraphs 15, and 16 to 18 have been repealed¹⁶⁵.

The second corrective decree of Public Contracts Code, legislative decree 113/2007, abolish the right of first refusal of the promoter, and insert the leasing contract of public works or public utility.

Significant, then, is the Project Financing reform brought by the Legislative Decree n. 152 of 2008, the so-called third corrective decree of Public Contracts Code, which has completely rewritten the Article 153 of the 2006 Code. It rewrites the proceedings of the promoter, with three different procedures for award of the concession. Moreover, adding a definition of PPP contracts with paragraph 15-ter of Article 3.

The Law Decree 2011 no. 70 (Decreto Sviluppo) provides for the possibility that individuals have proposed to build in works concession public works not envisaged in the plans of the government program.

¹⁶⁵ Cfr., 2006 Legislative Decree no.163, Article 153, paragraph 15 (procedura a doppia gara) and paragraphs 16-18 (iniziativa dei privati in caso di inerzia delle amministrazioni).

Currently the Project Financing awarding procedures differs depending on whether or not the works are provided in the government three-year program.

- 1) Pursuant to Article 183, first paragraph, if the work is included in the program formally approved by Transport Infrastructure Ministry (MIT), the feasibility study is prepared by the public authority¹⁶⁶.

As it claimed in the first paragraph of Article 183, public authorities may, as an alternative to Concession Contracts, award a concession by placing a tender based on project feasibility. And according to Article 183 paragraph 3, the feasibility study should be prepared by the authorities staff having the necessary requirements, depending on the different professionals involved in the feasibility project¹⁶⁷.

Then public authority, publishing a notice, aimed at the presentation of offers that include the use of resources totally or partially borne by the proponents.

So the project financing, while culminating in the award of a concession

¹⁶⁶ Cfr. 2016 Legislative Decree no.50, Article 183, paragraph 1: *Per la realizzazione di lavori pubblici o di lavori di pubblica utilità, ivi inclusi quelli relativi alle strutture dedicate alla nautica da diporto, inseriti negli strumenti di programmazione formalmente approvati dall'amministrazione aggiudicatrice sulla base della normativa vigente, ivi inclusi i Piani dei porti, finanziabili in tutto o in parte con capitali privati, le amministrazioni aggiudicatrici possono, in alternativa all'affidamento mediante concessione ai sensi della parte III, affidare una concessione ponendo a base di gara il progetto di fattibilità, mediante pubblicazione di un bando finalizzato alla presentazione di offerte che contemplino l'utilizzo di risorse totalmente o parzialmente a carico dei soggetti proponenti. In ogni caso per le infrastrutture afferenti le opere in linea, è necessario che le relative proposte siano ricomprese negli strumenti di programmazione approvati dal Ministero delle infrastrutture e dei trasporti.*

¹⁶⁷ Cfr. 2016 Legislative Decree no.50, Article 183, paragraph 2: “[...] Il progetto di fattibilità da porre a base di gara è redatto dal personale delle amministrazioni aggiudicatrici in possesso dei requisiti soggettivi necessari per la sua predisposizione in funzione delle diverse professionalità coinvolte nell'approccio multidisciplinare proprio del progetto di fattibilità [...]”.

contract, differs from it.

In Project Financing, the new rules on the procedure starting point is the feasibility study that the contracting authority places at the base of the public tender, being the contractor entrusted only the final design and the executive¹⁶⁸. The feasibility study is an essential document, that implementing the three-year programs, and is processed by placing it at the base of the public tender. This means that the submitted bids by promoters are based on the feasibility study prepared by the administration.

According to paragraph 9, the economics operator bids shall include:

- the definitive project,
- the draft convention,
- the economic and financial plan declared by a credit institution,
- the specification of the characteristics of service and management,
- the prior involvement of one or more financial institutions in the project,
- the amount of expenses,
- guarantees.

Receiving the bids, administration have to select the best deal, naming the promoter. Pursuant to Article 183, paragraph 4, it is stated that tenders should be valued on the basis of the most economically advantageous tender. Then in the following 5th paragraph it is specified that the proposals are also evaluated on the basis of the definitive project quality, the economic and financial value of the plan and the content of the draft convention.

¹⁶⁸ Cfr., Giurdanella C., *Diritto degli appalti pubblici. Aggiornato alle novità introdotte dal nuovo codice appalti 2016*. Edizione CeSDA srl, giugno 2016. “*Nel project financing, nella nuova disciplina il punto di partenza della procedura è il progetto di fattibilità che la stazione appaltante pone a base della gara, essendo demandate all’aggiudicatario solo la progettazione definitiva e quella esecutiva*”.

Article 183, paragraph 10, is dedicated to the examination of the bids received by the public authority. The provision in issue is relevant because the administration might require the promoter to predispose some changes to the project. Therefore, it is the responsibility of the promoter to provide for modifications that are required for the project approval.

Finally, it should be noted that the concession contract conclusion could only take place following the approval of the definite project with any changes introduced. If the modifications are not required, could be proceed directly to the signing the concession¹⁶⁹.

- 2) Conversely, in accordance with paragraph 15 of Article 183, economic operators may submit to the contracting authority proposals relating to the construction in public works concession or public utility works, which are not provided in the programming tools approved by the administration¹⁷⁰.

In this case, therefore, there is a private initiative. Pursuant to paragraph 15, are allowed to present proposal qualified economics operator, that complies with requirement provided in paragraph 17 of Article 183.

¹⁶⁹ Cfr. 2016 Legislative Decree no.50, Article 183, paragraph 11.

¹⁷⁰ Cfr. 2016 Legislative Decree no.50, Article 183, paragraph 15: *“Gli operatori economici possono presentare alle amministrazioni aggiudicatrici proposte relative alla realizzazione in concessione di lavori pubblici o di lavori di pubblica utilità, incluse le strutture dedicate alla nautica da diporto, non presenti negli strumenti di programmazione approvati dall'amministrazione aggiudicatrice sulla base della normativa vigente. La proposta contiene un progetto di fattibilità, una bozza di convenzione, il piano economico-finanziario asseverato da uno dei soggetti di cui al comma 9, primo periodo, e la specificazione delle caratteristiche del servizio e della gestione [...]”*.

When the proposal comes from economic operators, it must contain:

- The feasibility project: it defines qualitative and functional features of works, and contain detailed project description, in order to evaluate effects and impact on the environment.
- The Convention draft
- The economic and financial plan declared by a financial institution: this includes costs incurred for the preparation of proposal.
- The specification of the characteristics of the service and management.

Hence, the administration has to evaluate, within a deadline of three months, the feasibility of the proposal received. Subsequently, the feasibility project, that could be amended and then approved, it is placed on the basis of tender, which is also called the proposer. Before the award of concession, it is opening a selection phase in which the promoter competes with other economic operators. The law provides that the notice specifies that promoter has the pre-emptive right. This allows the promoter does not result the concessionaire, to become the awarding tendered if exercise the right of first option within 15 days from the awarding communication. Moreover the promoter that exercise it first option right has to declare to fulfil the contractual obligations under the same conditions proposed by the competitive bid¹⁷¹.

¹⁷¹ Cfr. 2016 Legislative Decree no.50, Article 183, paragraph 15.

CHAPTER III

INNOVATION PARTNERSHIP

1. The emerging concept of Innovation and Public Technology Procurement.

Concluding the study conducted on the topic of Public-Private Partnership, it seemed appropriate to investigate a particular issue that concerns the concept of Public Technology Procurement, as an essential element for the enforcement of Innovation, Research and Development, in the context of European public and private investments.

According to Edsquit¹⁷² essay, “*Public Technology Procurement (PTP) occurs when a public agencies places an order for a product or a system which does*

¹⁷² Cfr., Edsquit C., “*Public Technology Procurement and Innovation Theory*”, in Edsquit C., Hommen L., Tshipouri L., “*Public Technology Procurement and Innovation*”; New York, 2000, Kluwer Academic Publishers.

not exist at time, but which could be (probably) be developed within a reasonable period”¹⁷³.

Following the analysis made by Edsquit, Public Technology Procurement have been considered as an instrument of innovation policy, which in the past few decades were treated as a neglected topic in the theoretical and research literature. Generally, the most common preoccupation related to the supply side measures, has lead policy maker to avoid implementing the demand-side instruments, such as Public Technology Procurement. However, in the mentioned essay, it is pointed out how, more recently, have been emerged a gradual awareness of concrete implementation of such measures among policy makers in the European Union long-term policy context.

A first relevant step in this direction has been offered by the 2009 Communication of European Commission¹⁷⁴, which addressed European Parliament, Regional Committee, European Economic and Social Committee, on the necessity to develop Public Private Partnership, as instruments that allows the overcoming the financial crisis. In the Commission’s view in fact, the PPP can contribute to economic recovery and the European Union sustainable development. The Commission not only have detected the main obstacles that have not allowed to reach the full potential of Public Private Partnership, but also have pointed out challenges in the economic crisis and opportunities to tackle with it¹⁷⁵, placing five indispensable key actions¹⁷⁶.

¹⁷³ See Above.

¹⁷⁴ Cfr., COM (2009) 615: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Mobilising private and public investment for recovery and long term structural change: developing Public Private Partnership.

¹⁷⁵ Cfr., COM (2009) 615, point 4. “Challenges: why are PPPs not reaching their full potential?”; point

As part of this Communication, emphasis was placed on the role of partnerships for technological innovation: it has been considered essential for European competitiveness and economic growth. The Commission's intentions included the implementation of a specific framework for ensure the sharing of risks and responsibilities between the public and private actors; guarantee access to finance through grants, public procurement or investment.

Subsequent to the 2009 Commission Communication, it is the European ten-year strategy, which is considered the key role in the European Economic public demand for innovative services and works, which will be discussed in the following section.

5. "The way forward: what needs to be done?"; point 6. "Conclusion".

¹⁷⁶ Cfr., COM (2009) 615, point 6: "*In order to ensure that PPPs continue to play a role in the longer term, in particular five key actions are indispensable in 2010:*

- The Commission will set up a PPP group inviting relevant stakeholders to discuss their concerns and further ideas with regard to PPPs. Where appropriate, it will issue guidance assisting Member States in reducing the administrative burden and delays in the implementation of PPPs: in this context, it will explore ways to facilitate and to speed up the attribution of planning permits for PPP projects.

- The Commission will work with the EIB with a view to increasing the funding available for PPPs, by re-focussing existing Community instruments and by developing financial instruments for PPPs in the key policy areas.

- The Commission will review the relevant rules and practices in order to ensure that there is no discrimination in the allocation of public funds, where Community funding is involved, depending on the management of the project, be it private or public. It will make proposals for amendments, where appropriate.

- The Commission will propose a more effective framework for innovation, including the possibility for the EU to participate in private law bodies and directly invest in specific projects.

- The Commission will consider a proposal for a legislative instrument on concessions, based on the ongoing Impact Assessment.

2. Europe 2020: “Strategy for Smart, Sustainable and Inclusive growth” and public contracts role

In order to understand the importance of Innovation in the field of European economic growth policy and, above all, the concept of Public Technology Procurement, it seems to be adequate to detect a deepen consideration of the European ten-year strategy, the so called “*Europe 2020: A European strategy for smart, sustainable and inclusive growth*”¹⁷⁷.

The strategy identifies three growth guidelines: firstly, the *Smart* growth, which covers aspects related to knowledge, education, innovation and digital society issues. Secondly, the *Sustainable* growth, pointing to convert the entire economy into a green economy, in line with the exigency to stimulate the production in a compatible way with environmental requirements. Finally, the *Inclusive* growth, with particular aim to dedicate attention to issues of social inclusion, employment and fight against poverty.

Actually, the theme of Innovation has taken on a key role in European policies of the above mentioned strategy *Europe 2020*, and has inspired some legal institutions, which refer to the general scheme of Public-Private Partnership (PPPs), designed for greater synergy between public and private entities.

¹⁷⁷ Cfr., Communication from the European Commission, “*Europe 2020: A strategy for smart, sustainable and inclusive growth*”, Brussels, 3.3.2010 COM (2010) 2020.

Within the framework of Europe 2020 Strategy, that have been launched in 2010, the European Commission has focused on the definition of five objectives for the next ten years, which include targets and objectives that should be met within ten years.

The European Union economic and legal system, in fact, is committed to overcoming the economic crisis, which has seriously affected Member States, adopting strategies to create the necessary conditions to be given a new impetus to public and private investment, and encouraging processes that lead to a more competitive economy with higher employment rate.

The major goals set out by the European Commission mainly concern the necessity to enforce employment growth, accomplish with climate, energy and environmental requirements, education, fight for poverty reduction, as well as increased public investment in research and development.

These political premises contained in the Europe 2020 objectives on the synergy between innovation and social interests have implied a re-thinking of the relationship between public and private spheres, adding to those that are the direct financial support, strategic use of contractual instruments and require an adjustment of the models provided in the administrative systems of the countries.

3. *Horizon 2020*: European Framework Program for Research and Innovation

Following this perspective, also *Horizon 2020* deserves a brief mention. It concern the funding program for Research and Innovation, which have been defined within the 7th Framework Programme for Research and Technology¹⁷⁸.

Under the third Consideration of *Horizon 2020* Regulation it is stated that: *“The Union is committed to achieving the Europe 2020 strategy which set the objectives of smart, sustainable and inclusive growth, highlighting the role of research and innovation as key drivers of social and economic prosperity and of environmental sustainability and setting itself the goal of increasing spending on research and development in order to attract private investment of up to two thirds of total investments, thereby reaching an accumulative total of 3% of gross domestic product (GDP) by 2020 while developing an innovation intensity indicator”*¹⁷⁹.

The *Horizon 2020* Regulation no.1291 of 2013¹⁸⁰, foreseen the settlement of Public-Private Partnerships for Innovation as a vehicle through which allocate

¹⁷⁸ The Framework Programme for Research and Technology, Development from European Commission, 2014-2020.

¹⁷⁹ Cfr., Third Recital of Regulation (EU) No. 1291/2013 Of the European Parliament and of the Council; 11 December 2013, establishing Horizon 2020 - the Framework Programme for Research and Innovation (2014-2020).

¹⁸⁰ Regulation (EU) No. 1291/2013 Of the European Parliament and of the Council; 11 December 2013, establishing Horizon 2020 - the Framework Programme for Research and Innovation (2014-2020).

directly European management funds in support of R&D strengthening.

Public-Private Partnerships, as provided for in Article 25 of the Regulation, are divided into two typology¹⁸¹: contractual PPPs, which are co-financed by the European Commission and the private sector; and institutional PPPs, in which in addition to the Commission and the private sector financial participation, also Member States contribute to the financing of programs.

The aim of *Horizon 2020* is to use funds allocated to enhance research, to get her out of the lab and bring it to market and trade. Actually, the second pillar of *Horizon 2020*, which is called *Industrial Leadership*, intends to invest in research, promoting activities and initiatives structured directly by the

¹⁸¹ Cfr Art. 25, II paragraph, Regulation EU n.1291/2013: “*The involvement of the Union in public-private partnerships shall make use of the pre-existing and lean governance structures and may take one of the following forms:*

(a) *financial contributions from the Union to joint undertakings established pursuant to Article 187 TFEU under the Seventh Framework Programme, subject to the amendment of their basic acts; to new public-private partnerships established pursuant to Article 187 TFEU; and to other funding bodies referred to in points (iv) and (vii) of point (c) of Article 58(1) of Regulation (EU, Euratom) No 966/2012. This form of partnerships shall only be implemented where the scope of the objectives pursued and the scale of the resources required justify it taking full account of the relevant impact assessments, and where other forms of partnerships would not fulfil the objectives or would not generate the necessary leverage;*

(b) *contractual arrangements between the partners referred to in paragraph 1, which specify the objectives of the partnership, respective commitments of the partners, key performance indicators, and outputs to be delivered, including the identification of research and innovation activities that require support from Horizon 2020”.*

companies in a bottom-up approach, providing them with adequate levels of funding, and allowing innovative SMEs to turn into businesses global level.

A further important step in the recognition of the importance of Public-Private Partnership in the context of *Horizon 2020* program, has been made by the Communication of the European Commission, “*Public-private partnerships in Horizon 2020: a powerful tool to deliver on innovation and growth in Europe*”¹⁸².

In the Second Paragraph of that Communication, the Commission has figure out the necessity to support the realization of structured Public-Private Partnership in research and innovation. According to the Commission, the high risk activities connected to research and innovation, combined with the economic potentially and societal returns, “*provide a strong rationale for public support to private research and innovation activities. [...] It is for these cases that structured partnerships are needed between the public and the private sector to jointly develop, fund and implement ambitious research and innovation agendas. For this reason, public-private partnerships in research are increasingly being used by policy makers across the world as a tool to deliver on their growth agendas*”¹⁸³.

¹⁸² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Brussels, 10.7.2013, COM(2013) 494.

¹⁸³ See Above.

4. Innovation Partnership in European framework

As already analysed in the previous Chapter, on March 28 of 2014 the legislative pack of European Directives, reforming the public procurement and concessions sectors, have been published. In particular, Directive no.24 of 2014 has introduced the principles of economy and efficiency in Public Procurement of the ordinary sectors.

Recital 47th of the Directive claimed that “*Research and innovation, including eco-innovation and social innovation, are among the main drivers of future growth and have been put at the centre of the Europe 2020 strategy for smart, sustainable and inclusive growth [...]*”¹⁸⁴.

The Member States’ Public Authorities are therefore called upon to encourage the best strategic use of the public procurement instrument, in the most possible efficient way to stimulate innovation. It could address the major societal challenges because of the importance of achieving best value for public money. Moreover, buying innovative product, works and services improve the quality of public services, generating a win-win result in terms of sustainable economic growth.

The debate developed in the European political agenda, starting with the 2010 Communication of the European Commission, on the assumption that public procurement plays a key role within the *Europe 2020* Strategy, as they are one of the market -based instruments necessary to achieving the objectives of the strategy.

¹⁸⁴ Cfr., Directive 24/2014/EU, 47th Recital.

Moreover, the Green Paper on the modernization of the European policy on Public Procurement¹⁸⁵ highlights how in Europe exist a pretty small percentage of public procurement that aims to promote innovation. Therefore, the introduction of additional measures, could help Public Authorities to improve performance and to promote and achieve the true objective of innovation.

The purchase of innovation products or services is also seen as a tool to achieve a smart budgetary consolidation for long-term growth.

It is clearly evident the evolution of thought on the topic of innovation and Public Technology Procurement in European legislation.

Actually, the European legislator, assuming that the existing institutions in the earlier Directives of 2004 did not allow to entrust innovative procurement, it provides for a specific procurement procedure which would allow the governments to establish a long term innovation partnership. The specific purpose is developing new products, services or works characterized by innovative content, and subsequent purchase of them.

While the term innovation did not appear in Directive no.18 of 2004, the current Directive no. 24 of 2014 refers not only to the innovation concept in the preamble, but it gives a definition in the body text and introduces a new *ad hoc* awarding procedure for public contracts, the Innovation Partnership.

Firstly it could be observed that the concept of Innovation specifically provided in the first Article of the Directive (Definition 22): “*Innovation, means the implementation of a new or significantly improved product, service or process, including but not limited to production, building or construction*

¹⁸⁵ Cfr., COM(2011) 15 def., Bruxelles, 27.1.2011.

process, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations inter alia with the purpose of helping to solve societal challenges or to support the Europe 2020 strategy for smart, sustainable and inclusive growth”¹⁸⁶.

Following that cues, the concrete meaning of innovation is extended also to a significant improvement that concern previous existing product, service or process.

Secondly, the concept of Innovation Partnership emerges in the 49th Recital of the current Directive no. 24 of 2014. Under that Recital, European legislator have stated that whether innovative product, service or works are required and are not already available on the market, “[...] *Contracting authorities should have access to a specific procurement procedure [...]. This specific procedure should allow contracting authorities to establish a long-term innovation partnership for the development and subsequent purchase of a new, innovative product, service or works provided that such innovative product or service or innovative works can be delivered to agreed performance levels and costs, without the need for a separate procurement procedure for the purchase*”¹⁸⁷.

The fact that the European legislator provides that public administrations should have access to a specific procedure, also implies the need of transposition of that mentioned awarding procedure in the national legal systems of the Member States

¹⁸⁶ Cfr., Directive 24/2014/EU, Article 1 (Definition), point 22.

¹⁸⁷ Cfr., Directive no.24/2014/EU, 49th Recital.

4.1 Article 31, Directive 2014/24/EU.

In third place, it deserved to be detected particularly the Article 31 of the current Directive 2014/24/EU, which has introduced and regulated the institute of Innovation Partnerships, as a new model of contract awarding procedure.

Regardless the procedural aspect, it could be noted that the main important concept of Innovation Partnership is fully covered in the first two paragraphs of that Article:

“I. In Innovation Partnerships, any economic operator may submit a request to participate in response to a contract notice by providing the information for qualitative selection that is requested by the contracting authority.

In the procurement documents, the contracting authority shall identify the need for an innovative product, service or works that cannot be met by purchasing products, services or works already available on the market [...].

II. The innovation partnership shall aim at the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works, provided that they correspond to the performance levels and maximum costs agreed between the contracting authorities and the participants.

The innovation partnership shall be structured in successive phases following the sequence of steps in the research and innovation process, which may include the manufacturing of the products, the provision of the services or the completion of the works [...].”¹⁸⁸.

According to that provisions, the European public intervention in this way seeks to stimulate innovative solutions by private companies, intervening directly in order to generate the demand for services and goods that

¹⁸⁸ Cfr. Directive no.24/2014/EU, Article 31, paragraphs I and II.

administrations need, expecting to meet the public demand through the conclusion of a public procurement contract or concession.

This means that the purchase of innovative products, works and services by public administrations, as well as play a key role in improving the efficiency and quality of public services at the same time turns out to be an effective tool to address key economic and social challenges.

On the one hand, thanks to the skills, the knowledge, the means of production and especially thanks to the stimulus of the private business sector investments, the result is an advantage in terms of cost and efficiency of which can benefit civil society and the economy of the countries that implement the system.

On the other, the public tender offer of innovative services and products that creates opportunities for public funding and especially finding outlets that often companies and innovative start-ups, which produce high-tech goods, struggling to find.

In this sense, the PPP in the field of technological innovation are essential tools for accelerating economic recovery, and boost the European Union's competitiveness.

Regarding procedural aspects, the European legislator has taken into account the possibility that the innovation partnership should be structured in subsequent phases.

The tendering process is similar to a restricted procedure with negotiation, in which Could be identify two main phases.

- 1) The first one concerns the publication of tender documents, for the qualitative selection of economic operators who will present the research and innovation projects.

2) The second phase concerns the effective negotiation between parties involved.

- Publication of tender documentation:

In Innovation Partnerships any economic operator can submit an application to participate in response to the notice, presenting the information which are required by the Authority for qualitative selection.

In the procurement document the contracting authority:

- Identifies the necessity of products, services or innovative work that can not be met by purchasing products, services or works which are already available on the market.
- Indicates which elements define the minimum requirements that all bidders must meet. The information provided should be sufficiently detailed to enable economic operators to identify the nature and scope of the required solution and decide whether to ask to participate in the procedure.

The Public Authority may also decide to establish the Innovation Partnership with one partner or with multiple partners, who are responsible to leading R&D activities separately.

The minimum time limit for receipt of requests to participate shall be thirty days from the date of transmission of the notice. Only those economic operators invited by A.A. following the evaluation of the information provided may participate in the procedure.

In selecting candidates, the Public Authority should apply particularly the criteria concerning the candidate's capability R&D activities and in the development and implementation of innovative solutions.

Following the assessment of the requested information, only those economic operators, who are invited by the contracting authority, may submit research and innovation projects in order to satisfy the needs identified in the tender documents, that can not be met by existing solutions.

Furthermore, in the procurement documents the contracting authority should define also the arrangements applicable to intellectual property rights.

It is important to observe that in case of an Innovation Partnership procedure with more than one private partners, specific attention is dedicated to equal treatment of participants and the confidentiality of information.

Actually the contracting authority has to no disclose to the other partners proposed solutions or other confidential information communicated by a partner in the partnership, without different agreement.

In accordance with paragraph 4 of Article 31 *“During the negotiations, contracting authorities shall ensure the equal treatment of all tenderers. To that end, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others. They shall inform all tenderers whose tenders have not been eliminated, pursuant to paragraph 5, in writing of any changes to the technical specifications or other procurement documents other than those setting out the minimum requirements. Following those changes, contracting authorities shall provide sufficient time for tenderers to modify and re-submit amended tenders, as appropriate. [...] Contracting authorities shall not reveal to the others participant confidential information communicated by a candidate or tenderer participating in the negotiations without its agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended*

communication of specific information”¹⁸⁹.

- Negotiation phase

A particular aspect of the Innovation Partnership procedure is that it is structured as a model of negotiated procedure.

The main feature of Innovation Partnership is that it aims to develop innovative products, services or works and the subsequent purchase of supplies, services or works, as a result of complex contract. It is provided that such products, works or services has to correspond to the highest levels of performance and costs agreed between the public authority and the private participants.

This constitutes an element of risk for the participants. In fact, according to paragraph 2 of Article 31, the contracting authority should provide intermediate aims that parties of partnership should reach.

Hence, the Innovation Partnership is structured in successive stages, following the sequence of steps of the research process and innovation, which may include the manufacture of products or the provision of services or carrying out the work.

The negotiations over the partnership procedures innovation can take place in successive stages to reduce the number of tenders to be negotiated by applying the award criteria specified in the tender notice.

The Innovation Partnership should include fixed intermediate objectives that the parties must reach and provides for the payment of the remuneration

¹⁸⁹ Cfr., Directive no.24/2014/EU, Article 31, paragraphs IV.

appropriate instalments.

Based on these objectives, the contracting authority may decide, after each stage, to terminate the Innovation Partnership or, in case of a partnership with more partners, to reduce the number of partners by solving individual contracts.

But the conditions to solve single contract required that the authority has indicated such possibility in tender documents and conditions for rely on. In fact, the contracting authorities shall indicate whether it will make use of this option, in the contract notice, the invitation to confirm interest or in the procurement documents.

As we have observed earlier, the contracting authority has to not reveal to the other participants, confidential information communicated by a candidate or a bidder who participates in the negotiations, without its agreement.

In respect for the principles of equal treatment and transparency, the European legislator, in that way, have stressed the necessity to protect the information and innovative solutions, although they are not part of the intellectual property rights.

Moreover, public Authority must firstly specify the minimum requirements that characterize the contract, and they have not to change during the course of negotiations. Actually, *“During the negotiations, contracting authorities [...] shall inform all tenderers whose tenders have not been eliminated, in writing, of any changes to the technical specifications or other procurement documents other than those setting out the minimum requirements. Following those changes, contracting authorities shall provide sufficient time for tenderers to*

modify and re-submit amended tenders, as appropriate”¹⁹⁰.

In conclusion, negotiations should aim at improving the offers so as to allow the contracting authority may purchase works, supplies and services tailored to their specific needs.

The negotiations may include all the characteristics of the works, supplies and services, including for example, quality, quantity, commercial terms and social, environmental and innovative, in so far as they do not constitute minimum requirements.

- *The award criteria*

Innovation Partnerships Contracts are awarded solely on the basis of the award of the best price-quality ratio criteria, in accordance with Article 67 of the Directive¹⁹¹.

The award criteria and their weighting, which the Contracting Authority precise in the tender documents, should remain stable throughout the procedure and are not be subject to negotiation. The weighting is given to each of the criteria chosen to determine the most economically advantageous tender, except in cases where this is identified solely based on price. Those weightings can be expressed by providing for a range with the range between the minimum and the maximum should be adequate.

¹⁹⁰ Cfr., Directive no.24/2014/EU, Article 31, paragraphs IV.

¹⁹¹Cfr., Directive no.24/2014/EU, Article 31, paragraphs I, latter part: “The contracts shall be awarded on the sole basis of the award criterion of the best price-quality ratio in accordance with Article 67.

If the weighting is not possible for objective reasons, the contracting authority shall indicate the criteria in descending order of importance¹⁹².

The best price-quality ratio, assessed on the basis of criteria such as quality, environmental and/or social ones, connected with the subject of the public contract in question.

These criteria may include, just in terms of example:

- a) the quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental, innovative, and marketing and related conditions;
- b) the organization, qualification and experience of the staff assigned to performing the contract, if the quality of the personnel in charge can have a significant influence on the level of performance of the contract; or
- c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery, and delivery or execution process.

¹⁹² Cfr., Directive no.24/2014/EU, Article 67, paragraph 5.

5. Innovation Partnership in Italian legal system

The Italian Administrative legal system has implemented, through legislative Decree no.50 of 2016, the institution of Innovation Partnership. Indeed, the Innovation Public Private Partnership, as well as specifically outlined in Article 65 of the Code in force, represent a new procedure for the award of a public contracts.

5.1 Article 65, Legislative Decree 2016 no.50.

This new procedure for awarding public contracts, which should assist the Public sector in smart, sustainable and inclusive growth, including at European level, as called for in the Communication of 3.3.2010 from the European Commission, for the *Europe 2020* strategy.

The name of the procedure “*Innovation Partnership*” let to glimpse the intention of the legislator to involve flexibility and the advantages of public-private partnership - even or especially in economic terms - in order to achieve innovation and usefully exploit it in the public service.

Innovation is precisely defined in the current Public Contract and Concession Code as *”[...]attuazione di un prodotto, servizio o processo nuovo o che ha subito significativi miglioramenti tra cui quelli relativi ai processi di produzione, di edificazione o di costruzione o quelli che riguardano un nuovo metodo di commercializzazione o organizzativo nelle prassi commerciali,*

nell'organizzazione del posto di lavoro o nelle relazioni esterne"¹⁹³;

According to that definition, Innovation may concern the implementation of a product, service or new process or that has undergone significant enhancements including those relating to production processes, building or construction, or those dealing with a new method of marketing, organization of the workplace or external relations.

However, subsequent to the introduction of the Innovation concept, in the part relating to the definitions of the Code, the Innovation Partnership procedure for public contracts award is thoroughly regulated in Article 65 of Legislative Decree.

It represents a new and innovative instrument of acquisition of products, services or works that are not reflected in the solutions already available on the market, and therefore must be made expressly, downstream of specific research and development activities.

This concept clearly emerged in the first paragraph of Article 65, under which it is claimed: *"I. Le amministrazioni aggiudicatrici e gli enti aggiudicatori possono ricorrere ai partenariati per l'innovazione nelle ipotesi in cui l'esigenza di sviluppare prodotti, servizi o lavori innovativi e di acquistare successivamente le forniture, i servizi o i lavori che ne risultano non può, in base a una motivata determinazione, essere soddisfatta ricorrendo a soluzioni già disponibili sul mercato [...]"*¹⁹⁴.

Passing through analysing the tender process, could be observed that it includes a preliminary stage, which is it actually complex. In fact, it requires a

¹⁹³ Cfr., Legislative Decree no.50 of 2016, Article 3 (Definition), letter nnnn) "Innovazione".

¹⁹⁴ Cfr., Legislative Decree no.50 of 2016, Article 65, paragraph 1.

clear definition of the requirements of the administration, which, in the notice, must indicate the minimum requirements in a sufficiently precise to allow operators to identify the nature and scope the proposed solution.

The second paragraph of Article 65 stated that *“Nei documenti di gara le amministrazioni aggiudicatrici e gli enti aggiudicatori fissano i requisiti minimi che tutti gli offerenti devono soddisfare, in modo sufficientemente preciso da permettere agli operatori economici di individuare la natura e l’ambito della soluzione richiesta e decidere se partecipare alla procedura”*¹⁹⁵.

Following the publication of the requirements set by the contracting authority, in Innovation Partnership procedure any economic operator may submit a request to participate in response to a contract notice or a notice of a call for competition, submitting the information required by the for the qualitative selection¹⁹⁶.

Hence, economic operators can offer their candidacy, but will be the contracting authority to decide, on the basis of criteria relating to the candidate’s ability in R&D and in the development and implementation of innovative solutions, such as subjects invite to the qualitative selection.

The innovation partnership procedure is presented as a process of progressive formation, with subsequent phases, in which all those involved are called upon to negotiate. It should be based on the procedural rules applicable to the competitive procedure with negotiation, characterized by being a flexible procedure.

Through a first selection of candidates and a series of parallel negotiations with parties who have expressed an interest in participating in the procedure,

¹⁹⁵ Cfr., Legislative Decree no.50 of 2016, Article 65, paragraph 2.

¹⁹⁶ Cfr., Legislative Decree no.50 of 2016, Article 65, paragraph 3.

contracting authorities may either express their needs by setting minimum requirements and the maximum cost of the required solutions.

Without committing *a priori* accomplished description of the required solution, Innovation Partnership is structured as a progressive phase stages, according to the traditional sequence of research projects, and setting intermediate targets that the participants will have to reach to obtain payment of the corresponding remuneration.

The negotiation phase, in fact, can be modulated in various ways and also repeatedly stages to gradually reduce the number of competitors provided that the option has been exercised and still manifested in the contract notice.

Under paragraph 5 is provided that the Innovation Partnership should sets interim targets, that the parties must reach, and also provides for the payment of the remuneration appropriate instalments. Based on these objectives, the contracting authority or contracting entity can decide, after each stage, to terminate the innovation partnership or, in the case of a partnership with more operators, to reduce the number of operators solving individual contracts, provided that it has indicated in the tender documents such possibilities and conditions for its exercise¹⁹⁷.

With a final clause the Legislature provides a clear obligation to guarantee, by the contracting authorities, in relation to the timing of the various phases (which must reflect the degree of innovation of the proposed solution and the sequence of research and innovation activities necessary for the development of an innovative solution not yet available on the market) and the value of the supplies, services or works, in terms of proportionality and reasonableness. Under paragraph 10 of Article 65 it is stated that: “*L’amministrazione*

¹⁹⁷ Cfr., Legislative Decree no.50 of 2016, Article 65, paragraph 5, 8, and 9.

aggiudicatrice o l'ente aggiudicatore assicura che la struttura del partenariato e, in particolare, la durata e il valore delle varie fasi, riflettano il grado di innovazione della soluzione proposta e la sequenza di attività di ricerca e di innovazione necessarie per lo sviluppo di una soluzione innovativa non ancora disponibile sul mercato. Il valore stimato delle forniture, dei servizi o dei lavori non deve essere sproporzionato rispetto all'investimento richiesto per il loro sviluppo”¹⁹⁸.

Finally, worthy of particular importance it is the attention of the legislator in order to related to the treatment of intellectual property profiles which, in accordance with the European provision in terms of equal treatment of tendered and confidential information, should be clearly regulated in the contract notice.

¹⁹⁸ Cfr., Legislative Decree no.50 of 2016, Article 65, paragraph 10.

CONCLUSION

As I have mentioned in the Introduction of this present work, I have split the discussion related to Public-Private Partnership into Three Chapters.

The First one is dedicated to the origins and the development of different form of partnership between public authorities and private body in the provisions of works and services related to public interest satisfaction.

After a general overview on British experience of PFI, I have considered the International adoption and development of PPPs models, and the cornerstone adopted by the European Commission since 2004.

The spread of PPP at both European and International level, has been supported by some of the phenomena that characterized markets and economies in recent decades, such as the establishment of privatization policies, the need to reduce government spending, imposed by budgetary constraints, even in the face of a consistently high demand for infrastructure.

The clearly advantage resulting from the adoption of such forms of cooperation between public and private sector include the possibility to minimize costs, which would be higher in case of direct public investment. In fact, the private partner is particularly interested in reducing the cost and time necessary to complete the work, in order to increase profits and reduce the risks involved.

Essentially, it has been found that public investment which are open to the participation of private capital could facilitate investment in innovation and growth and lead to a better allocation of resources.

Moreover, a general advantage concerned also the possibility for public authority to benefit from the private contribution, which is a fundamental component of public policies. Actually, the role of private partner is appreciable not only in terms of costs reduction, but also at the design and programming stage, which could be characterized by higher quality.

However, it could be find out that, apart from the *Pros* that follow PPP approaches, also exist a potential disadvantage that should be taken into account. Risks related to PPP projects concern the fact that in the long-term them could be more expensive than the standard procurement, because of the higher costs of private sector borrowing, and also due to the complexity of contractual arrangements could occur high transaction costs. Moreover, the principles of accountability and transparency principles could be distorted and the major risk concern the fact that if any exclusivity clause agreement are foreseen in PPPs contract, it could lead at award of monopoly market to private partner, decreasing the competitiveness as a consequence. Concluding, to avoid high expenditure in terms of time and financial resources, it is opportune to carefully evaluate the concrete consequences that follows the adoption of contractual Public-Private Partnership instead of a traditional form of procurement.

The Second Chapter, which represent the core of the thesis, is entirely based on the analysis of the current normative provisions in both European and Italian law, concerning the issue of contractual Public-Private Partnership.

The attitude of trust on Public-Private Partnership method is particularly evident in European law, with the support of the guidelines previously defined by the Commission, it drew up the institute of contractual PPP and have encouraged Member States to transplant that institute in their domestic law,

and to intensify its practical and concrete use.

Particularly, in the Second Chapter I focused in outlining the new features that, since the 2014 Directives, concerns Concessions contracts. It was, in fact, from the Directive no.23 of 2014 that the Concession contract, which is a priority instrument for the realization of contractual partnerships, has been the subject of a separate discipline that will definitely differentiated it from Public Contracts.

Regarding Italian domestic law, it has been observed that the use of PPP models covered various sectors of National economy and also initiatives in the local area. However, it must be considered that in past years, under the Legislative Decree no.163 of 2006, the use of Public-Private Partnerships and Project Finance as a contractual mode of realization of it, did not always generate the desired results.

In that regards I would comment the 2012 ANCE¹⁹⁹ Report on the implementation of works related to Project Financing in Italy²⁰⁰.

That Report pointed out how, in the last twenty years, many Government has invoked Public-Private Partnership, and in general the involvement of private capital for infrastructural and services needs satisfaction, as a viable solution to the public resources' scarcity for the Countries modernization.

Otherwise, ANCE Report firstly clarified that PPP can not be considered a mere substitute of public resources defection, for each infrastructural needs. At

¹⁹⁹ ANCE means "Associazione Nazionale Costruttori Edili". It is the Italian National Association of Construction Companies.

²⁰⁰ Cfr., *Il Project Financing in Italia - L'indagine Ance sulla realizzazione delle opere*. A cura della Direzione Affari Economici e Centro Studi. EDILSTAMPA S.r.l.; Roma, Ottobre 2012.

the basis of PPP contract in fact remain the need, for the private companies involved, to have the initial investment paid off, including also management revenue. Only for works that offer similar income guarantees should be used this kind of collaboration scheme between public and private sector. Ascertained the existence of such condition, the issue moves to the real capacity of PPP to turn ideas into effective works and, therefore, in community services. The Public-Private Partnership, in fact, was often proposed as a list of good intentions that, however, have been result slowly to take off. More frequently, the steps taken have had great difficulty in becoming concrete actions.

In this regards, the ANCE Report of 2012 have exhibit a concrete picture of Italian situation, and measured the distance between the good intentions and the reality of the Project Financing market, which is the most widely used procedure within the PPPs framework.

The analysis has take into account tenders that have been awarded between 2003 and 2009, and it has demonstrated a reduced effectiveness and efficiency of Project Financing procedures in Italy. Apparently exist an undeniable consistent number of published notices in the above mentioned term, but the Project Financing delays in Italy emerges, above all, by the low percentage actually made with these procedures works. Considering phases that follow the tender award, in fact, the information that ANCE made available indicates that only the 38% of public tender invitations have began construction sites and commenced works; while only 25% of published tenders activated the management phase. These percentages represent a relevant indicator that points out a clear weakness of the Project Financing efficiency.

According to 2012 ANCE Reports' conclusions, are listed and explained the

main critical issue related to the PPP contracts, that commonly emerged during the management phase. Could be mentioned, in terms of exemplification, litigation issues, divergent decision adopted by contracting authorities, environmental constraints, economic difficulties, archaeological constraints, changing in law.

In particular, it was found that the most common complications are inherent at the Project Financing approval phase. In this step, actually, used to emerged a large number of disputes, a slowly release of environmental permits by competent authorities and several request of project variants that cause difficulties to proceed with the development of operations. The most crucial consequence concerned the potential risk to affect the economic and financial balance of the operation.

Probably, also the vagueness of the rules that governed the institute of partnership, as well as was expected in the previous Public Contract Code of 2006, did not allow an adequate spread of this model of public-private relationships. Often, the information asymmetry between the partners, unbalanced in favour of the private partner, resulted in high costs for the public sector.

Therefore, quoting Professor Chiti, *“per quanto essenziale per le politiche pubbliche, si conferma che il PPP non è una panacea ai problemi che i tradizionali contratti pubblici hanno nel tempo registrato”*²⁰¹.

It means that, looking at some concrete experience from the past few years, the PPP implementation was far from unimpeachable.

²⁰¹ Cfr., Chiti M.P.; *Il Partenariato Pubblico Privato e la nuova Direttiva Concessioni*, in Finanza di Progetto e Partenariato Pubblico-Privato; Cartei G., Ricchi M., (a cura di); Editoriale scientifica, Napoli, 2015.

It seems to be appropriate to take into account some comments that have emerged during a workshop, held at ANCE Toscana headquarter in April 2014, in which have been discussed the results of PPPs operations' bankability in Italy²⁰².

The Engineer Vincenzo Di Nardo, National Vice President of ANCE, has deeply discussed the situation of the construction sector, and how the use of PPPs may be considered an alternative to finding new economic resources. In this context it showed that credit access for construction companies was still burdensome, underlining how the situation of the construction sector was dramatic. Actually, according with exposed data, 2013 represent the sixth consecutive year of economic crisis, closing with a -6.9% of construction investment, and reaching -30% of investment in the period between 2008 and 2013. Even taking into account the public expenditure, from 2009 to 2012 it registered a decreased around 19 billion, which represent a decrease of almost 29%. This abrupt contraction in public expenditure has made the PPP and the involvement of private capital in the satisfaction of public interests a great topic object of debates. In fact, from 2003 to 2012, Project Financing have registered an increasing from 13.9% to 35.6%, although most of the undertaken initiatives have had great difficulty in becoming concrete actions, as the ANCE Report shown in 2012.

In the lights of what ANCE have exposed, it can not be considered that the use of contractual PPP could be a viable solution a priori. But it is appropriate and necessary that the Government, and in general public authorities, have consciousness in order to evaluate and distinguish the cases they face and the objective that have to be realized for the public interest's satisfaction.

²⁰² Cfr., "*La bancabilità delle operazioni di Partenariato Pubblico-Privato*". Workshop held on 17 April 2014 at ANCE Toscana headquarter.

The last part of Second Chapter proceeds with the analysis of the current Italian legislation, the Legislative Decree no. 50 of 2016. In this regard have emerged that it has been given greater importance and a detailed regulation to the Private-Public Partnerships in its different form of implementation. In fact, that institute in the present discipline, has a complete prediction of its procedural aspects and has acquired significant legal certainty.

On the basis of the new legislative provision, it is reasonable to believe that in the future tenders could be made a more awareness and effective use of contractual PPPs.

Following that cues, I would like to add some considerations that have emerged in a conference held at Villa Monastero in Varenna, the last September 2016²⁰³. In particular, it is interesting to delve into consideration the intervention the Professor Veronica Vecchi “*Public Private Partnership: un equilibrio possibile?*”²⁰⁴. It commences with the analysis of PPPs’ usage that has been implement in recent years in Italy. According with that research, contractual Partnership method was used for both small local projects, as well as large scale national infrastructure projects for which available funds were not sufficient. Otherwise there is an undeniable evidence of PPP gaps that affected several key points:

- the programming phase was often characterized by an unclear and unstable politics;

²⁰³ Cfr., 62° Convegno Studi Amministrativi: *L’ Italia che cambia: dalla riforma dei contratti pubblici alla riforma della Pubblica Amministrazione*; (Settembre 2016 Villa Monastero, Varenna, Italia).

²⁰⁴ Cfr., Vecchi V., “*Public Private Partnership: un equilibrio possibile?*”, Intervention in 62° Convegno Studi Amministrativi: *L’ Italia che cambia: dalla riforma dei contratti pubblici alla riforma della Pubblica Amministrazione*; (Settembre 2016 Villa Monastero, Varenna, Italia).

- some problems were related to governance mechanisms, and therefore a complex, stratified, and uncoordinated normative rules system;
- additional weakness was relative at the selection process: the marginal role of private finance and the scarcity of developers and managers' involvement, did not allow to use PPP as a tool to allocate risks in a balanced manner, stimulating the market innovation and skimming process in favour of the most competitive enterprises.
- Finally, there were also the shortcomings in communication and often there was insufficient transparency and accountability on PPPs, with prevalence of bureaucratic and formal approach in the Public Authorities.

Once established that in Italy it has been registered an infrastructural gap and, above all, a constant decline in public investment spending, it is clear that PPP may be considered as a viable solution to close and solve that gaps, and mobilize private capital.

The potential benefits of Public-Private Partnership implementation include both microeconomic and macroeconomic aspects. The first one concerns a more efficient projects' selection phase; a more convenient projects' execution in terms of time and costs; management costs' optimization and management model innovation. The macroeconomic benefits, which represent the most expected results, includes private capital attraction, off-balance sheet accounting of investment, GDP and employment increasing, and public spending efficiency.

Hence the way forward for using the PPP would be not only to reduce public debt and infrastructural gap. According to Professor Vecchi analysis, public procurement should not be considered only as a set of rules and laws, or as a possible source of corruption; rather it should be strictly connected at industrial

policy. Actually, between 15% and 20% of GDP of an economy like Italy depends on purchase contracts made by the Public Authorities.

Without a clear industrial policy and a strong political commitment, the PPP will always be relegated to a few local experiment conducted by public manager or singular private economic operator, with the risk, therefore, that the model does not become scalable.

The Professor Vecchi therefore suggests to include the value for money test in the cost-benefit analysis of a PPP contract, comparing partnership with the traditional model. It is also indicated, as a viable solution to the existing gaps, to develop a managerial flow, a political definition of the PPP definition and its implementation. The managerial asset includes awareness, confidence, legitimation, widespread knowledge, and creation of PPPs market and culture.

At the end of the intervention, Professor Vecchi concludes with an observation related to the new rules of PPP and Project Financing as well as provided the Code of 2016. She has argued that it would be appreciate a better coordination between Article 180 and Article 183 discipline.

Then she has detected that the provision of the limit of 30% of the total amount of the investment that public administration could grant, could represent a significant obstacle for the PPP contracts that are based on a user charging mechanism, because heavily affect the private partner. With this limit of 30% of public funds, Private Partner may don't afford to complete the operation.

Concluding with the discussion related to the current Italian domestic law, appears to be adequate point out the opinion expressed by Raffaele Cantone, the ANAC President, during a conference that was held in Rome²⁰⁵. He argued

²⁰⁵ These opinions have emerged during the Conference: "*Il Nuovo Codice dei Contratti Pubblici: effetti sul mercato*", promoted by Integra Consortium, which was held on July 10, 2016, in Luiss

that, in order to effectively implemented the new system outlined in the 2016 Public Contract and Concession Code, it is required a strong and consciousness Public Administration, which should be able to contract with private companies, keeping a strict control on the activity and constant monitoring it.

In broad terms, in PPP and in public procurement it is necessary to reduce the information asymmetry between private and public parties in the contractors' selection phase; stipulate enforced and complete contracts; and, even more when contracts are ensured and covered by guarantee, it is necessary to reduce the information asymmetry during the tender phase.

This proactive and aware attitude will also advocate greater use, not distorted, of cooperation between public and private sector, as part of the implementation and management of infrastructure or services of public interest.

Finally, the Third Chapter explores the nature of peculiar institute of Innovation Partnership. I really appreciate to discuss the topic concerning Technology Public Procurement concept, and the consequent notion of Innovation Partnership.

According to Piga and Tatrai essay: *“The innovation should allow a contracting authority to deliver better public contracts in terms of quality, life-*

University of Rome. They took part into debate: Antonio Nuzzo, Director Department of Law LUISS; Vincenzo Onorato, Consortium Integra President; Mauro Lusetti, Legacoop National President; Marcello Clarich, Administrative Law professor at LUISS; Raffaele Cantone, ANAC President; Gianpiero Paolo Cirillo; President of Section of the State Council; Filippo Arena, Lawyer of State and Head of Cabinet AGCM; Carlo Deodato State Councillor; Michele Corradino, State Councillor and Member of ANAC; Saverio Damiani Sticchi, Member of ANAC Guidelines of the Public Contracts Code Commission; Mario Pilade Chiti, Professor of Administrative Law University of Florence.

cost cycle, and enable the contracting authority to incorporate better environmental and societal consideration and standards”²⁰⁶.

Focusing on that notions, I delve into consideration, first of all, the ten-year European Strategy “*Europe 2020*”, because it clearly takes the assumption that public procurement plays a significant role in the economic growth of Member States and European Markets. In that lights, the European Commission encouraged Member States to implement a strategic use of contractual tools, and even more the public procurement should generate public demand of innovative works and services.

This approach has found its legal basis in the Directive no. 24 of 2014, which have introduced a peculiar procedure called Innovation Partnership. As I have explained in the chapter dedicated to it, this new procedure, that it is also transposed into Italian Public Contracts and Concession Code, enables private partner to developed product or services that are not yet available on the market, and that meet public authorities’ needs. If used, Innovation Partnership contributes at the development of co-operative and less rigid procurement process for tenderers.

Following the European approach, Innovation Partnerships should enable the procurement process open up to new companies with innovative ideas and produce, not merely a better result for public authorities, but also tenders should become less burdensome. Moreover, the procurement procedure of Innovation Partnership should allow an opening to a smaller and innovative companies, generating a growth and competitiveness effect. Therefore, from a first assessment, the provision of a specific legislative discipline of Innovative Procurement procedure are largely to be welcomed, particularly if we take into

²⁰⁶ Cfr., Piga G., Tàtrai T., *Public Procurement Policy. The Economics of Legal Relationships*; (first published in 2016, by Routledge, NY).

account the situation of a Member State as Italy, which count a lot of small and medium innovative enterprises.

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