



Department of Impresa & Management
Chair of “International Finance”

**The Public Private Partnership tradition and
innovation:
“The importance of a PPP Standard Contract for social
infrastructure”**

SUPERVISOR
Prof. Federico Merola

CO-SUPERVISOR
Prof. Arturo Capasso

CANDIDATE
Gaia di Francesco

SUDENT ID
687071

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SUMMARY

INTRODUCTION

Public-private partnership projects (PPP) have recourse both the public and private sectors to supply goods and services that are traditionally offered by the public sector, while at the same time loosening the strict restrictions of budget on public expenditure. Recently the European Court of Auditors has noted that PPPs are potentially capable of ensure

faster implementation of policies and vouchers maintenance levels. The same projects submitted to a careful analysis have shown that the projects do not they have always been managed effectively, and they do not have guaranteed an adequate ratio between benefits and costs. The potential benefits of PPPs are often not materialized, as PPPs have been delayed, increases in costs and underuse, which has resulted € 1.5 billion in inefficient and ineffective expenses, of which € 0.4 billion of EU funds. This was due also to the inadequacy of the analyzes, of the strategies for the use of PPPs as well as institutional frameworks and regulatory. Because only a few Member States possess experience and consolidated skills in implementation success of PPP projects, there is a high risk that PPPs do not contribute to the goal of use a higher percentage of EU funds for mixed-finance projects including PPPs.

However, the use of these tools is increasingly necessary in countries that no longer have the possibility to finance any public works. Within the European Union then the budget constraints are constantly accused of stifling the initiatives of governments. Partnership projects are therefore crucial especially for financing not only large works, but above all socially relevant projects such as hospitals, schools and schools.

The first chapter of this paper analyzed the defining problems concerning the partnership. Definitive problems that arise not on the definition as such but above all because the partnerships are subject to specific

discipline within the different countries. In Italy, for example, the discipline must deal with the “Codice degli Appalti” and with all the problems that this entails. The second chapter then reflects on the issues raised by the European Court of Auditors. Member States that do not fully exploit resources and can not balance the risk associated with each project that is practically the essential element within this type of contract. Contracts that must have a high value for money and can remunerate the investment and therefore reduce the risk that is not only the private person, but also the public sector. The third chapter then analyzed, using recent studies consulted in the most updated economic databases, the economic and financial mechanisms that underpin each project. We then moved from the economic evaluation of the project, to the estimate of future cash flows and also to the duration of the investment both in terms of realization and in the temporal assessment of the concession on a given asset. The fourth chapter is then structured in such a way as to create a closure to the analysis by referring to the most recent Italian regulatory efforts for the creation of a standard contract for the PPP. To this was added the description of a simple concept that is the application of partnership schemes to works of "smaller" dimensions but of great social relevance. The decision to start a PPP operation requires a careful assessment of the risks for the Public Administration. It is, in fact, the allocation of risk to the specialized operator that allows obtaining benefits

that can not be achieved with one or more traditional contracts. These benefits can be summarized in the possibility of making an investment, with the majority contribution of private resources, aimed at providing a service of public interest on-time, on-budget, on-quality, thanks to contractual mechanisms that allocate in a manner correct and balanced risks create the incentive to manage risks in such a way that they do not occur. It is the contract to translate into adequate terms the convenience to use the PPP rather than the contract, on the basis of the results of the preliminary investigation carried out by the Administration with reference to the analysis of the demand and supply of the service, the economic and financial sustainability and economic-social nature of the transaction, as well as the nature and intensity of the various risks.

The theme of the correct allocation of risks, as specified in the second and third chapters, concerns all public works carried out through the use of forms of PPP and, in particular, through the Concession of construction and management which is the main institution used for the structuring of PPP operations. As specified in the third chapter, pursuant to article 180, paragraph 3, of the Code, the PPP Contract must allocate: a) construction risk (linked to the delay in delivery times, non-compliance with project standards, 'increase in costs, technical problems in the work, and failure to complete the work), b) the risk of demand (related to the different volumes of demand that the dealer must realize or the lack of users and

therefore flows cash flow), c) and / or the risk of availability (attributable to the concessionaire's ability to provide the agreed contractual services, both in terms of volume and quality standards). The correct allocation of these risks, also in compliance with the indications provided by Eurostat for any off-balance sheet accounting, operationalizes the operational risk of the Contract.

CHAPTER FIRST

The private public partnership: regulatory evolution in Italy and its application

1.1. The public private partnership for the realization of public works: general considerations

Over the last decade, the phenomenon of collaborations between public and private subjects developed in large sectors of the public sphere. In the European context, the broader policy on partnership matters has been implemented by Great Britain¹. At the beginning of the nineties of the last century, Great Britain launched the Private Finance Initiative (PFI) system which, in general, envisages the assignment to a private company of a "global" contract comprising the planning, financing, construction, management and maintenance of the work². However, in order to be able to talk about PFI, the operation must be characterized by the effective assumption by the private sector of the economic risk related to the implementation and management of the intervention³. In PFI, the public purchaser selects a private contractor in charge of carrying out the work and taking care of its maintenance, which is remunerated through periodic payments made, for the entire duration of the contract, by the

¹ NICOLAI M., TORTORELLA W., Partenariato pubblico privato e project finance, Maggioli editore, 2017, p. 370 e ss

²CARTEI G., RICCHI M (a cura di) Finanza di progetto: temi e problemi, Editoriale Scientifica, 2010, p. 36 e ss

³AA.VV., Pratique des partenariats public-privé. Choisir, évaluer, monter et suivre son PPP, Paris, Litec, 2006, p. 36

administration itself, by other persons using the infrastructure , or from a combination of both solutions⁴. PFI is therefore not a contract, it is not an award procedure, but a way of carrying out public works. To encourage the use of PFI and the culture of public-private collaboration, the British Government has regulated the institution with non-binding legal acts, such as guides, practical notes, recommendations. Among the most important PFI guides are those developed by the Treasury Ministry (HM Treasury), concerning, among other things, the standardization of PFI contracts and the identification and evaluation of the various options available to the PFI. administration for the realization of the work. The European Commission has dealt with the theme of Public Private Partnership in various documents since 2000 with the "Interpretative Communication on Concessions in Community Law"⁵. In these acts the Commission addressed several issues. The Commission focused on analyzing the characteristics of public works and service concession contracts compared to traditional public procurement contracts to develop guidelines for the success of PPPs. With the Green Paper on "PPPs", the Commission launched a public consultation on partnerships

⁴ RUTIGLIANO M., FACCINCANI L., Project finance nel partenariato pubblico e privato e valutazione del piano economico-finanziario, Riv. dottori comm., fasc.1, 2012, pag. 127

⁵CARTEI G., RICCHI M (a cura di) Finanza di progetto: temi e problemi, Editoriale Scientifica, 2010, p. 36 e ss

and subsequently reported the results of the consultation in a report⁶. The Green Paper therefore focuses on cases that we can define as very complex in relation to the partnership linked mainly to the construction of an infrastructure and its subsequent management⁷. In particular, the PPP operation is characterized by: 1) the relatively long duration of the collaboration; 2) financing of the guaranteed project, even if not necessarily exclusively, by the private sector; 3) the economic operator participates in various phases of the project (not only its implementation, but precisely the design, financing) and the public partner focuses mainly on the definition of objectives and control; 4) there is a precise distribution of risks between the public partner and private partner, in relation to the management discipline of the implemented infrastructure (in relation to the management capacity deployed by the same economic operator, but also in relation to the private partner's indulgence of some at least the risks of a more purely financial type, that is to say, not merely of a commercial nature).

⁶RAGANELLI B., FIDONE G., Public private partnerships and public works: reducing moral hazard in a competitive market, Riv. dir. fin. 2008, 1, p. 23

⁷ RUTIGLIANO M., FACCINCANI L., Project finance nel partenariato pubblico e privato e valutazione del piano economico-finanziario, Riv. dottori comm., fasc.1, 2012, pag. 127

1.1.1. Elements characterizing PPP

A precise series of elements normally characterize the PPP operations: the relatively long duration of the collaboration, which implies a cooperation between the public partner and the private partner in relation to various aspects of a project to be implemented; the method of financing the project, guaranteed by the private sector sometimes through complex relationships between different subjects; the important role of the economic operator, who participates in various phases of the project (design, implementation, implementation, financing). The public partner focuses on defining the objectives to be achieved in terms of public interest, quality of services offered, and pricing policy⁸. The government usually guarantees control of compliance with objectives including the distribution of risks between the public partner and the private partner. On the private sector risks are transferred that would instead be borne by the public sector. However, these forms of partnership do not necessarily imply that the private partner assumes all the risks, or the most important part of the risks associated with the operation. In 2005, with the Communication on PPPs and Community law on public procurement and concessions, the Commission received the conclusions of the

⁸RAGANELLI B., FIDONE G., Public private partnerships and public works: reducing moral hazard in a competitive market, Riv. dir. fin. 2008, 1, p. 23

consultation on the Green Paper, taking into consideration the possibility of any legislative initiatives aimed at clarifying, supplementing or improving Community law public procurement and concessions⁹. Finally, in 2008 it adopted the Interpretative Communication on the application of Community law of public procurement and of concessions to institutionalized PPPs.¹⁰ In all these documents the Commission was oriented to identify the characteristics of the PPP phenomenon, to classify it - contractual PPP and institutionalized PPP - and to regulate it, also in order to verify, the use of the instrument in the various Member States and to understand the extent of the phenomenon in Europe¹¹. The economic and social benefits of PPP were compared with the traditional methods of building infrastructure and managing related services, in an effort to maximize value for money for the public sector. The November 2009 Communication presents a new purpose: the use of PPP as a tool to mobilize public and private investments to promote economic recovery and long-term structural changes. Indeed, in the introduction of the Communication, the Commission stresses that in order to tackle the

⁹COSSALTER P., in *L'esternalizzazione delle gestioni amministrative*, resoconto del Convegno *L'esternalizzazione delle gestioni amministrative* organizzato dall'IRPA (www.irpa.eu) tenutosi presso la facoltà di giurisprudenza dell'Università degli Studi di Siena il 24 novembre 2006, www.esternalizzazioni.it

¹⁰TRAVI A, *Il partenariato pubblico-privato: i confini incerti di una categoria*, in M. Cafagno - A. Botto - G. Fidone - G. Bottino (a cura di), Giuffrè, 2012, p. 32 e ss

¹¹CARTEI G., RICCHI M (a cura di) *Finanza di progetto: temi e problemi*, Editoriale Scientifica, 2010, p. 36 e ss.

economic and financial crisis, the European Union and individual Member States have considered investments in counter-cyclical infrastructure projects to support the economy and the growth of markets. However, the restriction of infrastructure credit and public finance constraints have reduced the possibility for Member States to make investments in infrastructure. The PPP appears to be an appropriate tool to be used in this context as expected benefits for both the public sector and the private sector¹². The combination of public and private capacities and capital can contribute to the recovery process and the development of markets. The PPP mitigates the burden of public finances (at least in the short term); allows medium-long term structural development linked to the implementation of infrastructure programs (economic impacts on employment, GDP, public services); favors the modernization and innovation of infrastructures and services, thanks to the experiences of the private sector; obtains greater efficiency through the division of risks between the public sector and the private sector¹³. Precisely at a time when they could benefit greatly from a more systematic use of PPPs, the crisis has made the situation less favorable to

¹²COSSALTER P., in L'esternalizzazione delle gestioni amministrative, resoconto del Convegno L'esternalizzazione delle gestioni amministrative organizzato dall'IRPA (www.irpa.eu) tenutosi presso la facoltà di giurisprudenza dell'Università degli Studi di Siena il 24 novembre 2006, www.ernalizzazioni.it

¹³RAGANELLI B., FIDONE G., Public private partnerships and public works: reducing moral hazard in a competitive market, Riv. dir. fin. 2008, 1, p. 23

the use of these instruments. To this end, the Commission identifies in the Communication under consideration concrete actions to be implemented during 2010-2011, for the implementation of infrastructure projects, the management of public services and the launch of important research projects that promote economic recovery¹⁴. Among the main obstacles to the PPP market are the Commission's most important factors related to the complexity of PPP contract awarding procedures, in particular they require significant mobilization of resources in the tendering stages, for the management of the procedures there are also specific requirements skills, by the administrations reduces to the possibility of success of such operations. In Italy, for example, the latest changes made to the set of rules that characterize the PPP has introduced art. 3 co. 15-ter of the Code of Public Contracts the definition of "private public partnership contracts"¹⁵. In fact, within the Italian legal system, the partnership contracts have as their object one or more services such as the design, construction, management or maintenance of a public work or public utility, or the provision of a service, including in any case the total or

¹⁴MARIN, La valorizzazione del patrimonio immobiliare pubblico nelle manovre varate per la crescita, l'equità ed il consolidamento dei conti pubblici, in *Urb. e App.* 2012, 4, p. 377

¹⁵COSSALTER P., in *L'esternalizzazione delle gestioni amministrative*, resoconto del Convegno *L'esternalizzazione delle gestioni amministrative* organizzato dall'IRPA (www.irpa.eu) tenutosi presso la facoltà di giurisprudenza dell'Università degli Studi di Siena il 24 novembre 2006, www.esternalizzazioni.it

partial financing by private individuals, even in different forms, of these services, with allocation of risks in accordance with the provisions and the community guidelines in force¹⁶.

1.1.2. Types of projects implemented through the PPP

The "Public-Private Partnership" therefore relates to all forms of cooperation between public authorities and companies whose purpose is to guarantee the financing, construction, renovation, management or maintenance of an infrastructure or the provision of a service. In particular, they can be implemented via PPP a) projects with an intrinsic capacity to generate income through user revenues, or initiatives that can be carried out in the transport, energy and telecommunications sectors. Investments capable of producing certain prospective commercial revenues that make it possible to fully recover the investment costs (ie hot works); b) projects that require a public contribution, since the commercial revenues of users are not sufficient to generate adequate

¹⁶COSSALTER P., in L'esternalizzazione delle gestioni amministrative, resoconto del Convegno L'esternalizzazione delle gestioni amministrative organizzato dall'IRPA (www.irpa.eu) tenutosi presso la facoltà di giurisprudenza dell'Università degli Studi di Siena il 24 novembre 2006, www.esternalizzazioni.it

economic returns¹⁷. The disbursement of the contribution is justified by the fact that the implementation of the infrastructure produces significant positive externalities in terms of social benefits (ie tepid works); c) projects in which the private entity directly provides services to the public administration: these are public works, such as prisons, hospitals and schools, for which the private partner derives remuneration, exclusively or principally, from payments made by the Public Administration or by local authorities (so-called cold works). Therefore, in the case of important works to the public sector no financial commitment is required and its role consists in assigning tasks and responsibilities, guaranteeing the transparency of tender procedures, reducing information asymmetries and clearly defining the final outputs of the project. With regard to works defined as "cold", the public partner must instead intervene financially by providing support to income and / or a capital contribution. Over the last decade, the phenomenon of PPPs, as mentioned, has developed in many sectors falling within the public sphere, due to causes that can be attributed to various factors. In the framework of general initiatives for growth, the Council of the European Union has approved a series of measures to increase investment in the

¹⁷MARI N, La valorizzazione del patrimonio immobiliare pubblico nelle manovre varate per la crescita, l'equità ed il consolidamento dei conti pubblici, in Urb. e App. 2012, 4, p. 377

infrastructure of the trans-European network and in the research and development sector, in particular through PPP operations¹⁸.

1.2. The aims of the PPP and the general objectives of European and national legislation

The directives relating to the field of procurement and concessions set up activity regimes as the middle ground between efficient management of services and the value of competition. These impose themselves on the Member States with the force of law, encouraging States to comply with Community principles. The collaboration between the public and private sectors is not new. The public administration has always used, for the realization of public works or public utility, the activity of private subjects, entrusting the execution, or both the executive design and the execution of works and works through the classic contractual models . The traditional contractual models for the management of the works and services on which the community intervened are the tender (*marché public*) and the concession (*délégation*). Each internal legal system has its own definition of procurement and concession contracts. It can not therefore be denied that there are difficulties in harmonizing regulatory

¹⁸MARI N, La valorizzazione del patrimonio immobiliare pubblico nelle manovre varate per la crescita, l'equità ed il consolidamento dei conti pubblici, in *Urb. e App.* 2012, 4, p. 377

systems with different legal traditions, but these obstacles must be overcome by virtue of the need to leave the patterns within each country¹⁹.

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¹⁹AA.VV., *Il Partenariato pubblico-privato*, a cura di M.P. Chiti, Napoli, Editoriale Scientifica, 2009, p. 25 e ss

²⁰ NICOLAI M., TORTORELLA W., *Partenariato pubblico privato e project finance*, Maggioli editore, 2017, p. 370 e ss

refers to the Italian context. In fact, in Italy as elsewhere, within an institutional context favorable to privatization, it was considered that some important infrastructural works could be successfully achieved through the use of capital and private sector initiative. The public-private partnership (PPP) expresses a broader concept than project finance itself, covering a wide range of models of cooperation between the public and private sectors and can be evoked in all those cases where the public sector intends implement a project involving a public work, or public utility, relying on the private sector.

The private sector is therefore able to provide its managerial, commercial and creative skills in the construction and management of a public utility infrastructure, obtaining an economic return. The public sector can benefit, in economic and financial terms, from the presence of private individuals through a reduction in its overall financial commitment and an improvement in the quality of services in question through strict regulation of private activity²¹.

²¹ NICOLAI M., TORTORELLA W., *Partenariato pubblico privato e project finance*, Maggioli editore, 2017, p. 370 e ss

1.2.1. The characteristics of PPP in Italy

In Italy the PPP has some well-defined characteristics as the duration of the collaboration between public and private partners to reach the realization of the project is relatively long; the financing that is provided by the private sector; the public partner that focuses mainly on the definition of objectives in terms of public interest, quality of services offered and price policy, as well as ensuring control of the achievement of these objectives; the distribution of risks between public and private partners, a breakdown that varies from case to case according to the ability of the parties to evaluate, control and manage the risks themselves. In recent years, the PPP has attracted increasing interest from the public authorities due, on the one hand, to the advantages that they can derive from the exploitation of private sector knowledge in the construction and management of infrastructure works and, secondly, from the need to respect the stringent constraints of public budgets aimed at containing expenditure.

These aspects can make the PPP preferable compared to traditional forms of realization of the works. In fact, the PPP could allow, thanks to the efficiency that usually distinguishes the private sector, the reduction of time and expenses to be incurred for the construction of infrastructure, as well as the contraction of the outputs for the financing of the work by virtue of the resources that come from private entities willing to invest in

capital-intensive projects. Moreover, the availability of adequate infrastructures and the provision of efficient public services assume strategic importance in determining economic development and the degree of competitiveness, favoring the establishment of new production units and the strengthening of existing ones. The importance that an extended diffusion of forms of PPP can cover for the growth of a country is evident²².

This is due to the increasingly felt and generalized need to contain the amount of public spending, a requirement that may make it even more difficult, compared to the current situation, to finance strategic investment projects through the resources of public budgets. In this sense, it is believed that it is above all countries that have an infrastructural gap with respect to their competitors and an extremely high public debt, such as Italy, that must pay particular attention to the forms of partnership with the private sector, which may allow, if properly structured, to efficiently realize infrastructural works of public utility, with the consequent positive effects that this can generate²³.

The PPP mechanism has known, in recent years, even greater developments outside the world of common law. In Italy under the

²²ROSSI M. , I progetti di sviluppo. Metodologie ed esperienze di progettazione partecipativa per obiettivi, Milano, Franco Angeli, 2004, p. 89 e ss.

²³ NICOLAI M., TORTORELLA W., Partenariato pubblico privato e project finance, Maggioli editore, 2017, p. 370 e ss.

umbrella of the PPP there is a wide range of financial structures and possible sectors of intervention, including both projects able to independently produce sufficient income to repay the investment and the related financial charges and those for which activation the public sector must provide, according to different methods, a component of public contribution. Different forms of PPP come into play in project finance within a general distinction between a merely contractual and an institutionalized partnership. While in the contractual partnership the circumstances of the contract and the granting of works or services are considered, in the "institutionalized" partnership it is the mixed company that has importance as a preponderant procedural module. This occurs above all in the context of local public services, managed by local authorities to manage services in this way, referring to the private code of the Civil Code.

The partnership expresses a broad vision of cooperation between the public and private sectors. The use of the PPP, through its different implementation methods, can be evoked in all those cases in which the public sector intends to carry out a project involving a public work, or public utility, whose planning, realization, management and financing - in all or in part - are entrusted to the private sector. Projects that can be implemented through PPP interventions can be identified in three main types: projects endowed with an intrinsic capacity to generate income

through user revenues: the prospective commercial revenues of these projects allow the private sector to fully recover the investment costs in the of the life of the concession²⁴.

In this type of project, the involvement of the public sector is limited to identifying the conditions necessary to allow the realization of the project, taking charge of the initial phases of planning, authorization, call for tenders for the awarding of concessions and providing the relative assistance for authorization procedures. Projects in which the private concessionaire directly provides services to the public administration. This is the case of all those public works - prisons, hospitals, schools - for which the private entity that creates them and manages their own remuneration exclusively (or mainly) from payments made by the public administration on a commercial basis. To these are added the projects that require a component of public contribution. We are referring to the case of initiatives whose commercial revenues from users are insufficient to generate adequate economic returns, but whose realization generates significant positive externalities in terms of social benefits induced by the infrastructure.

These externalities justify the provision of a public contribution component. The appeal to the PPP is increasingly spreading, at European

²⁴ CAPOROSSO P. ., Come rendere trasparenti ed efficienti le amministrazioni pubbliche, Rubettino, 2017, P. 8 E SS.

and international level, fundamentally for a specific reason. This reason is that the private sector is able to provide its managerial, commercial and innovative skills in the design, financing, construction and management of public utility infrastructures, obtaining an economic return. The management phase of the work represents the necessary result of a correct design and construction, constitutes an element of primary importance, as only an efficient and quality management allows to generate the cash flows necessary to repay the debt contracted and remunerate the shareholders . In this scheme and with this method the public sector benefits, in economic and financial terms, from the presence of private individuals, through a reduction of its overall financial commitment and, more generally, by an improvement in the quality of services provided. The lack of an unambiguous Community legal definition necessarily affects the regulatory framework within which partnership contracts are inserted, highlighting specific problems, depending on the transposition of the institution into the different legal systems²⁵.

The analysis of the regulatory peculiarities of individual Member States, referring to the European case, can on the other hand constitute an important contribution to the national debate on the critical issues of a

²⁵ NICOLAI M., TORTORELLA W., *Partenariato pubblico privato e project finance*, Maggioli editore, 2017, p. 370 e ss

regulatory nature that do not favor the participation of private individuals in the construction of infrastructural public works. The European institutions have provided some guidelines, both with regard to the notion of public-private partnership, and to the Community legal framework in which to include such procedures.

In order to respond to the simplified and modernized requirements of the system of public-private partnerships, the Green Paper presents the state of practice in the European Union in the light of Community law²⁶.

In reality, the elements that the Green Paper has identified as characterizing, correspond to operational variables. A collaboration between a public administration and a private operator can be traced to different types ranging from traditional public intervention, in which the institution directly controls every single phase of service delivery, until the complete privatization of the property and management of the infrastructure and related public service. In general, in all the possible partnership models, the public body retains: a) the responsibility for the definition of service standards as minimum standards; b) the prerogative of controlling the achievement of certain levels of management efficiency and effectiveness in meeting the needs of users; c) control over the mechanisms for determining tariffs at socially acceptable levels. There are

²⁶ CAPOROSSO P. ., Come rendere trasparenti ed efficienti le amministrazioni pubbliche, Rubettino, 2017, P. 8 E SS.

several potential areas for PPP intervention. These include projects capable of producing sufficient income independently to repay the investment and the associated financial burdens. To these we must add that the role of the Administration is limited to the regulation and control of the procedures²⁷.

1.3. The national and community legislative provisions

The Community legal framework on PPPs is composed of a set of general rules and principles contained in different sources. These include, first of all, the general principles contained in the Treaties and resulting from the jurisprudence of the Court of Justice of the European Community, which recognizes the rank of primary Community law. To these is added the discipline of secondary Community law (regulations, directives, decisions), including lastly the directives nos. 17 and 18 of 2004, coeval with the Green Paper on partnerships. The European Commission itself has always questioned the adequacy of Community law to the specific characteristics of the PPP. The Commission is primarily concerned with ensuring that these forms of cooperation are not in some way

²⁷ CAPOROSSO P. ., Come rendere trasparenti ed efficienti le amministrazioni pubbliche, Rubettino, 2017, P. 8 E SS.

circumventing the competition rules. The search for greater flexibility in the awarding procedures finds the limit in respect of the community principles enshrined in the Treaties and in secondary Community law. More specifically, the Commission document aims to illustrate the scope of the Community rules applicable to the selection phase of the private partner and the next stage, in order to identify any uncertainties and to assess whether the Community framework is appropriate to the specific challenges and characteristics of PPP²⁸.

In Italy, private public partnership contracts have found their legislative position in art. 3 paragraph 15 ter, d.lg. 12 April 2006, n. 163, paragraph introduced by the legislative decree 11 September 2008, n. 152 (c.d. corrective third to the Code of Public Contracts). These contracts are subject to the informative obligations set forth in the Circular of the President of the Council of Ministers of 27 March 2009 (pursuant to Article 44, paragraph 1 bis, of December 31, 2007, No. 248 converted by Article 1, paragraph 1, Law 28th February 2008, No. 31. The most frequent forms of implementation of the PPP seem to coincide with some of the legal models of reference for project finance, among which the

²⁸ NICOLAI M., TORTORELLA W., *Partenariato pubblico privato e project finance*, Maggioli editore, 2017, p. 370 e ss

"mixed company", ie a company with both public and private participation²⁹.

The Public-Private Partnership is emerging from its embryonic stage and, although it can not yet be said that it has entered the stage of maturity, it has certainly entered a new phase, assuming in a few years importance and value to such an extent that today presents itself as the main way to go to fill the infrastructure gap with the main European countries and to boost economic growth. The progressive emergence of the various forms of public-private collaboration for the realization of works and services of public utility has certainly been favored by the difficulties related to public finance, in the wake of the recent international crisis of the credit system.

After an initial period of experimentation, the use of this procedure was successful first of all for the construction of car parks, sports facilities, tourist infrastructures, as well as health facilities. Necessary notation to do concerns the complex nature of the PPP market, which is divided into four main types, namely the granting of construction and management on the proposal of the promoter, the granting of construction and management on the proposal of the contracting authority, the granting of services and other forms of public-private collaboration; as can be seen

²⁹ CAPOROSSO P. ., Come rendere trasparenti ed efficienti le amministrazioni pubbliche, Rubettino, 2017, P. 8 E SS.

there is a close analogy or affinity with that fundamental legal model for the project finance represented precisely by the concession³⁰.

The concessions directive then changed the regulatory framework envisaged for the regulation of the PPP. The definition of works and services concession outlined by the proposal of Directive of the European Parliament and of the Council on the award of contracts for concession (COM (2011) 0897 - C7 - 0004/1012 - 2011/0437 (COD)) (Directive concessions), approved by the European Parliament, introduces some changes. The definitions of the concession of works and services of art. 5, paragraph 1, lett. a) and b) of the Concessions Directive do not differ substantially from the definitions reported in art. 3, paragraph 11 and 12 of Legislative Decree 163/2006, Code of public contracts (Code)³¹.

The Community "additions" concern the possibility of aggregation of a plurality of subjects, from the side of public demand (contracting authorities and contracting entities), to meet the demand for well perimeter and on the supply side, it is reiterated the possibility of entrusting the "concession" to groupings of companies, useful in these

³⁰ MARI N., Il regime dei contratti esclusi e il partenariato pubblica privato, Ipsoa Milano, 2016, p. 147 e ss.

³¹ CAPOROSI P. ., Come rendere trasparenti ed efficienti le amministrazioni pubbliche, Rubettino, 2017, P. 8 E SS.

cases of complex offers. The Community legislator had foreseen that for the purpose of a definition

Concessions are of little importance for the ownership of the constructed work. The exercise of the public service in the private sector is decisive. This service remains a prerogative of the public body which, at the end of the concession, can freely dispose of a new concession (this time only of services) or opt for the management direct. Further news compared to the Code, bearer of future needs of adjustment, inserted in the same paragraph 1 of the art. 5 of the Concession Directive, concerns the clarification of what involves the awarding of a concession, in other words what is the necessary content of a concession contract: i.e. transfer to the dealer of an operational risk linked to the management of the works or services³².

Article. 143, paragraph 9, indicates the need in concessions - in which the main payer is the PA to maintain the concessionaire "the economic and financial management of the work ", this implies that this allocation of risk is, instead, discounted in the concessions in which the market risk is borne by the Concessionaire where the management proceeds are paid by the users. In addition to the aforementioned European directives, the most recent regulatory changes (2013) that impacted on the public private

³² MARI N., Il regime dei contratti esclusi e il partenariato pubblica privato, Ipsoa Milano, 2016, p. 147 e ss.

partnership concern those introduced from the so-called "Decreto del Fare" published in the Official Gazette on June 21st 2013, n. 144, S.O. and entered into force the following day and the most recent decree law 12 September

2014, n. 133, published in the G.U. General Series n. 212 of the same day (c.d. "Decreto Sblocca Italia"), in force since September 13, 2014 being converted into law during the drafting period of this text. Legislative Decree 50/2016 has then made operational changes related to the operating practices that characterize the PPP. Given the economic and financial nature of private public partnership contracts, a multidisciplinary approach to controls is needed. For this reason it can be envisaged that the sole manager of the procedure (RUP) has a training in the field of project management or that a support structure is created³³.

With reference to the construction manager or the execution director, the "Stazione Appaltante" must identify the appropriate professional skills to carry out the activities required in the management of the specific contracts, also assessing whether it is advisable to set up the works management office. The New Code in art. 180, regulates in a systematic way the contract of Public Private Partnership, as a form of synergy between public and private powers for the purpose of financing, building

³³ NICOLAI M., TORTORELLA W., *Partenariato pubblico privato e project finance*, Maggioli editore, 2017, p. 370 e ss

or managing infrastructures or providing public services. The new legislation outlines the concepts of PPPs that were implemented today in practice and contained in various documents. The article specifies, first of all, that the operating revenues of the economic operator may come not only from the fee recognized by the granting body but also from any other form of economic compensation, such as, for example, direct revenue from the management of the service to external users, thus distinguishing the PPP for the realization of the CDs "cold works" and "hot works".

Risk allocation and financial and economic balance are regulated. In particular, it is recognized that the transfer of risk to the economic operator involves the actual and substantial allocation to the latter, as well as the risk of construction, including the risk of availability or the risk of demand for services rendered, for the period of management of the work. Correlatively, the regulation of the Public Private Partnership contract also includes risks, incidents on the fees, deriving from facts not attributable to the economic operator, recognizing the contracting authority the right to pay a fee to the economic operator that is proportionally reduced or canceled in periods of reduced or zero availability of the work or provision of the related services.

For Community law, the attribution of a PPP is attributable to the award of a public contract or a concession and is therefore governed by the rules applicable to such institutions³⁴.

Accordingly, the Green Paper shows that any contract or unilateral act by which a public undertaking entrusts the performance of an economic activity to a third party must be examined in the light of the rules and principles laid down by the Treaty, in particular on the matter freedom of establishment and freedom to provide services, rules and principles that apply to contracts and concessions.

Ultimately, the Community legislation does not bother to define the legal categories, but rather to specify the competition rules applicable to them. Nevertheless it represents a work of recognition of the different experiences of public-private collaboration present in Europe. Because of its documental nature, the text within it contains quite heterogeneous experiences, even if reported within the same category. For example, under the same wording of contractual partnership, reference is made both to the concession and to the c.d. Private Finance Initiative (PFI) of Anglo-Saxon derivation, while the latter is rather a public-private cooperation program based on different contractual solutions. The Green Paper thus draws a macro-distinction on the basis of the degree of

³⁴ NICOLAI M., TORTORELLA W., *Partenariato pubblico privato e project finance*, Maggioli editore, 2017, p. 370 e ss

involvement of the public sector by identifying two types of PPP: purely contractual PPPs and institutionalized PPPs³⁵.

This distinction is based on the finding that the diversity of PPP practices encountered in the Member States can be linked to two major models. Each of them raises specific questions concerning the application of Community law on public procurement and concessions, but both modalities are subject to the obligation of a competitive tendering procedure for the choice of the private partner, in accordance with the Community regulation on the market indoor.

The legal instruments through which a PPP plan can be implemented distinguish, in Italy, the two already mentioned forms of Public Private Partnership: a contractual partnership based exclusively on the contractual links between the parties involved in the operations and an institutionalized partnership that involves the creation of a corporate structure, endowed with legal personality and managed jointly by the public and private partners, whose function is to guarantee the supply of a work or service to the community. In the Italian legal system the contractual PPP is explicitly regulated by the d. lgs n. 163 of 12/4/2006 (Code of Public Contracts related to works, services and supplies), while the legislation concerning the institutionalized PPP is contained in

³⁵ MARI N., *Il regime dei contratti esclusi e il partenariato pubblica privato*, Ipsoa Milano, 2016, p. 147 e ss.

Legislative Decree n. 267 of 18/8/2000. It should be noted that in paragraph 15-ter of the art. 3 of the Code of Public Contracts relating to works, services and supplies, a definition of PPP contracts is provided, stating, in a manner consistent with the foregoing, that they have as their object one or more services such as design, construction, management or the maintenance of a public or public utility project or the provision of a service. By way of example, it is also specified that PPP contracts include the granting of works, the granting of services, the leasing, the assignment of works through project finance and mixed companies; moreover, the assignment to a general contractor may also be included in the PPP if the fee for carrying out the work is in whole or in part postponed and linked to the availability of the work for the client or for third party users. The assertion that the contents of the Eurostat decision "Treatment of public-private partnerships" of 11/2/2004, which provides that if in a PPP the administration assumes the construction risk the transaction must be recorded in its balance sheet, regardless of the allocation of the risks of demand and availability. If, on the other hand, the private sector assumes the construction risk, the transaction must be classified off the Administration, unless the latter supports both the risk of demand and the availability³⁶. The Eurostat decision also specifies that

³⁶ MARI N., *Il regime dei contratti esclusi e il partenariato pubblica privato*, Ipsoa Milano, 2016, p. 147 e ss.

forms of public intervention can influence the allocation of risks, such as the provision of funding, the provision of guarantees and the presence of clauses concerning the termination of the PPP contract which establish the payment of compensation from the Administration can affect the accounting treatment to be reserved for Public Private Partnership operations. From the content of the law it is clear the will of the legislator to avoid that investments for PPP operations, which do not effectively involve a transfer of construction and market risk to the private sector, are not correctly accounted for by the public administration. For example, private public partnership contracts include the granting of works, the granting of services, the leasing, the assignment of works through project finance, mixed companies, sponsorship contracts. The contract can also be entrusted to a general contractor where the fee for the construction of the work is in whole or in part postponed and linked to the availability of the work for the client or for third party users. Starting from the definition provided by the Code of public contracts, it is possible to define the scope of partnership contracts, first of all in negative, if the particular characteristic of these contracts is the involvement of the private entity in all phases of public intervention, it is to exclude that the traditional procurement contracts, be they of works, services or supplies. These, in fact, provide for the involvement of the private individual only in the construction phase or at most in the design phase. The public-private

partnership model of a purely contractual nature is based exclusively on the contractual links between the various parties, through which one or more tasks are entrusted to the private partner. The contractual term therefore refers to the links between the various subjects. In fact, the relationship between the administration and the owner of the management are governed by a service contract (which regulates the concession relationship) and the relations between the owner of the service and the user are governed by a contract that regulates the individual provision of the service, for which the user pays the related tariff. These contracts are directly attributable to contracts and concessions, depending on whether the public entity, once the project horizon has been defined, seeks in private the technical skills for the realization or management of the project (contract), or, beyond the technical skills, the commercial skills aimed at selling the service in order to find the financial resources necessary to support it, in whole or in part (concession). In the Green Paper the Commission emphasizes that the distinction between contractual or institutionalized PPPs is greater than that between contracts and concessions³⁷. This is because there are certain elements, such as the risk spreading criterion, the distinctive sign of contracts and concessions, which may remain for a long time in a

³⁷ MARI N., *Il regime dei contratti esclusi e il partenariato pubblica privato*, Ipsoa Milano, 2016, p. 147 e ss.

situation of legal uncertainty in the award phase. Analyzing the purely contractual model, it is emphasized that if it were confirmed that legal insecurity, linked to the difficulty of identifying a priori the distribution of management risks among the partners, and often present in the framework of the awarding of some purely contractual PPPs , the Commission could envisage subjecting all contracting PPPs, both those defined as public contracts and those defined as concessions, to a single awarding system. Also to delimit positive the scope of the category, European law is helpful, especially the Green Paper in which the elements that characterize a partnership operation have been indicated. The first is represented by the relatively long duration of the collaboration between the public entity and the private entity. The second relates to the financing methods of the project. The private sector can guarantee financial coverage through complex operations involving a variety of entities, including public ones, provided that private capital is not absent. The third is given by the role of the economic operator participating in the various phases of the project (conception, planning, implementation, implementation and financing), where the administration identifies the public interest to be achieved, establishes the quality standards of the services, defines the pricing and tariff policy and finally monitors the achievement of the set objectives. The fourth is that of the distribution of risks between the public entity and the private entity: the risks are usually

transferred to the private sector, which usually fall on the public entity to which, instead, the supervisory function is responsible. In this regard, it must be specified that it is not necessary that all risks be taken over by the private entity. The allocation, in fact, must be carried out on a case-by-case basis, depending on the actual capabilities of the parties, through the negotiation of the contractual clauses. There is therefore a sharing of decision-making power over the project, with a clear division of roles: the public entity defines the objectives and monitors, while the private sector identifies the most effective ways to achieve the objectives. This is an open category, which may include various cases and the constituent elements just mentioned can be used as "indices of recognition" of the partnership operation, if there is no specific qualification to that effect. The definition provided recalls the "current community requirements and guidelines", but in fact it favors a contractual approach focused more on the object of the same, than on the element of public-private cooperation. In the Green Paper, the Commission identifies two basic types of public and private partnerships. The first contract, based exclusively on contractual links between the various subjects, where the concession institutes are inserted, both public works and services. The new organizational formulas based on the establishment of mixed companies aimed at managing public services are highlighted. With regard to the operational procedures by which public entities can identify their private partners, the Commission

has made it clear that the principles of the Treaty on the prohibition of discrimination and full respect for competition between private operators must always be respected, making, therefore, recourse to competitive and competitive procedures³⁸. The third corrective introduces a definition of partnership contracts in the Code of Contracts which does not seem to consider the cds. institutionalized partnerships, even if you then include mixed companies, which for some profiles could more appropriately fall within the second type of PPP outlined in the green paper. It seems that the legislator wanted to define the relationships in question as an open type of contract that rests essentially on some assumptions: it is in fact a non-exhaustive list, formulated "by way of example". Following the approach followed in other jurisdictions, such as Spain and France, it was decided to settle the case in more substantial than formal terms. In this way, the contract becomes a flexible instrument with a variable structure. In fact, its content can be directly determined by the parties according to the concrete needs that they will want to satisfy. In fact, the Partnership, while representing an open contractual category, is characterized by its typical function, that is, for its being instrumental to the design, construction, management or maintenance of a public work or public utility, or to the provision of a service, through a total or partial

³⁸AA.VV., *Il Partenariato pubblico-privato*, a cura di M.P. Chiti, Napoli, Ediritoriale Scientifica, 2009, p. 25 e ss

participation of private individuals from a financial point of view. If the function is typical, as it is not possible to read in an illustrative way the services listed in paragraph 15-ter, to the most alternative, the possible contractual configurations of these activities may be different, provided that the allocation of risks is respectful of « requirements and current Community guidelines », which act as a result constraint³⁹. Furthermore, it is expressly prescribed that "the contents of the Eurostat decisions shall apply". Public administrations and private individuals will have a certain margin of autonomy in defining the legal and economic instruments necessary for the realization of the investment project. This explains the absence of any attempt to classify such profiles on the part of the legislator. Crucial is to identify a decidedly new attitude in our system, with the identification of greater negotiating autonomy and discretion in public choices. The community activity in the field of public-private partnership is, therefore, aimed above all at the regulation of the candidate's choice phase, in order to ensure that it takes place according to the principles of effective competition and transparency. Among the issues still to be tackled stands out the discipline of the phase following the selection of the private partner; although the execution of the contract has traditionally been the preserve of national law, there have been too

³⁹ MARI N., *Il regime dei contratti esclusi e il partenariato pubblica privato*, Ipsoa Milano, 2016, p. 147 e ss.

many discriminatory incidences, direct or indirect, and unjustified attacks on the economic freedoms enshrined in the Treaties⁴⁰. It can therefore be concluded by stating that the overall intervention of the Community law is, in fact, the result of progressive adjustments aimed at increasing the efficiency of the rules and governance system of a sector, that of public procurement, particularly relevant at an economic level. and always intimately connected to the state paradigm⁴¹.

CHAPTER SECOND

The role of the European institutions and the systemic impact of the partnerships in the individual Member States

⁴⁰ MARI N., *Il regime dei contratti esclusi e il partenariato pubblica privato*, Ipsoa Milano, 2016, p. 147 e ss.

⁴¹ AA.VV., *Il Partenariato pubblico-privato*, a cura di M.P. Chiti, Napoli, Ediritoriale Scientifica, 2009, p. 25 e ss

2.1. The European PPP market: critical aspects detected by the European Court of Auditors, potential and effective use of PPP's

Since the PPP is considered as the alternative way of public procurement and delivery of public infrastructure and services, it can be justified to be implemented only if there are reasoned arguments that the private entities can optimize investments in public infrastructure. .i.e. can deliver a greater value and/or efficiency additional to those obtainable from purely public sector. Here optimization is considered as maximization of benefits the public sector can potentially get through alternative affordable ways of investments implementation⁴². Up to now, however, EU funds have been poorly used for PPPs. For many Commission policy has encouraged the use of PPPs (think about it) for example in the Europe 2020 strategy) as a potentially effective means to achieve projects, the Court's auditors found that in the period 2000-2014 only 84 PPPs (total project cost of € 29.2 billion) received EU funding for € 5.6 billion. The Structural and Cohesion Funds are the main source of EU funding, followed by financial instruments, often in cooperation with the European Investment Bank (EIB)⁴³. The reference to the "European Court of Auditors" report on the matter is not to be considered casual. Legal

⁴² JASIUKEVICIUS L., VASILIAUSKAITE A., The Assessment of Public-Private Partnership's Possibilities to Optimize Investments in Public Infrastructure, *nzinerine Ekonomika-Engineering Economics*, 2018, 29(1), 32-45

⁴³ Special Paper, Parteneriati pubblico – privato nell'Ue: carenze diffuse e benefici limitati, available su www.eca.europa.eu

nature of public-private partnership, provides that bodies of public authority and private business entity realize functional and targeted consolidation of their resources for common realization of certain projects or group of projects in case of provision of priority of public interests. According with several studies⁴⁴ in most of European states there are no special laws that regulate interrelations of participants of public-private partnership. There is no legal regulation on subordinate local level also. At the same time, projects of public-private character do not initiate in those fields, which do not have legal, organizational, technical, social, economic conditions. This happens because of the fact that fulfillment of a number of projects is conducted with the risk not only economic, but also ecologic character. It is important to bring the regulatory and legal framework in a proper manner in order to minimize such risks⁴⁵.

In a very recent study, the European Court of Auditors⁴⁶ reviewed 12 PPPs co-financed by the EU in France, Greece, Ireland and Spain in the fields of road transport and information and communication technologies

⁴⁴GREILING, D. , Public-Private Partnerships - A Driver for Efficient Public Services or just an Example of Wishful Thinking, Journal for Public and Nonprofit Services Supplement 37, 2009, 108-125

⁴⁵ DE VRIES, P. , Public-Private Partnerships, Public Sector Budget Norms, and Public Finance Sustainability, Paper presented at the Conference "Public-Private Partnership. An Appropriate Institutional Arrangement for Public Services?", 21/22 June 2010, in Leipzig, Germany.

⁴⁶ Special Paper, Partenariati pubblico – privato nell'UE: carenze diffuse e benefici limitati, available su www.eca.europa.eu

(ICT). Member States visited accounted for around 70% of the total cost of projects (€ 29.2 billion) related to PPPs supported by the EU. PPPs have allowed public authorities to contract large infrastructures through a single procedure, but have increased the risk of insufficient competition, thus weakening the negotiating position of contracting authorities⁴⁷. For PPPs in which tenders are called for, it is generally necessary to negotiate aspects that are not normally part of traditional procurement, so more time is needed than traditional projects and generates big delays. Similarly to traditional projects, even the greatest art of audited PPPs were affected by significant inefficiencies, which resulted in delays in construction and large increases in cost. The wide range, the high costs and the long life of the typical infrastructure PPP require special diligence. However, the Court's auditors found that the preliminary analyzes were based on overly optimistic scenarios on the future demand and use of planned infrastructures: project utilization rates were lower than expected, even 69% (ICT) and 35% (motorways). This data does not affect the risk associated with Greek highways, which are heavily underutilized after their completion. The results highlighted by the European Court demonstrate that the PPP instrument is not used optimally because the legislative instrument that regulates it in different

⁴⁷ Ibidem p. 9

countries is not efficient. Numerous studies emphasize that the necessary condition for the success of these investments lies in the optimization of legislation. Analysis of literature and special research projects allowed to make a conclusion that legal measures concerning the regulation of PPP can be embodied in a variety of forms. For example, some countries have special laws on public-private partnership (Germany, Poland, Romania, Czech Republic, Hungary, Greece, Brazil, South Korea, Japan, Argentina, Latvia, Moldova, Kyrgyzstan, Russian Federation, Ukraine). In most part of countries there are separate laws that regulate main principles and instruments of public-private partnership, and they work at preparation and adoption of by-laws in the field of public-private partnership (Italy, Great Britain, Belgium, the USA, China, Bulgaria, Croatia, Slovakia, India, Lithuania, Azerbaijan, Kazakhstan, Uzbekistan). The number of countries with federative division adopted regional bills (and prepare special laws)⁴⁸. This could be a road that we can define optimal but to realize a regulatory framework that optimizes the PPP is very difficult. A collaborative approach between different countries and the European Union could be a winner. This could also allow a different risk measurement based on a comparative approach in different states and for

⁴⁸GREILING, D. , Public-Private Partnerships - A Driver for Efficient Public Services or just an Example of Wishful Thinking, Journal for Public and Nonprofit Services Supplement 37, 2009, 108-125

different works. The European Court reports that the distribution of risks between public and private partners has often been inadequate, inconsistent and ineffective, while the high remuneration rates (up to 14%)⁴⁹ of the risk capital of the private partner have not always reflected the risks incurred. Furthermore, almost all the six ICT projects audited were hardly compatible with long-term contracts, as they were subject to rapid technological change. The assessment of PPP possibilities to optimize investments in public infrastructure is not without problems. Literature discloses many methodological issues in this field. Scientific discussions on this research topic are mostly concentrated on “value for money” assessment as its core element. However, neither the performance of this assessment, as such, nor the formation of rational comparative objects are sufficiently analyzed⁵⁰. As important factors for higher “value for money” achievement, it is also separately analyzed the problems related to the determination of a concession period and encouragement of adequate incentives from the private sector through determination of appropriate payment and compensation mechanism. However, most of these issues and aspects are analyzed only

⁴⁹ Special Paper, Parteneriati pubblico – privato nell’Ue: carenze diffuse e benefici limitati, available su www.eca.europa.eu, p. 11 e ss.

⁵⁰ GREILING, D. , Public-Private Partnerships - A Driver for Efficient Public Services or just an Example of Wishful Thinking, Journal for Public and Nonprofit Services Supplement 37, 2009, 108-125

fragmentally as well as the attempts to apply an integrated systematic approach, including all above-mentioned factors and aspects into consistent assessment, are very limited. There are no tools allowing to do complex assessment of PPP's possibilities to optimize investments in public infrastructure and make reasonable decisions for the most efficient ways of their implementation⁵¹. The need for different and targeted approaches for calculating the value of investment and risk are essential in PPP cases. While traditional projects can be divided into lots to attract more bidders, PPP projects require a minimum size to justify the cost of the contract and to facilitate the economies of scale needed to increase the efficiency of operation and maintenance. Sometimes, however, the enormous scope of a project can reduce the level of competition, since generally few companies have the necessary financial resources to submit offers. In the case of contracts of very high value, only a few operators (if not a single one) are able to offer all the requested products or services; this would risk placing the contracting authority in a position of dependency⁵².

⁵¹JASIUKVICIUS L., VASILIAUSKAITE A., The Assessment of Public-Private Partnership's Possibilities to Optimize Investments in Public Infrastructure, *Ekonomika-Engineering Economics*, 2018, 29(1), 32–45

⁵² Special Paper, Parteneriati pubblico – privato nell'Ue: carenze diffuse e benefici limitati, available su www.eca.europa.eu, p. 11 e ss.

2.2. Use of PPP in the main Member States

According to the European Advisory Center for PPPs (EPEC), between 1990 and 2016 1 749 PPP projects, worth a total of EUR 336 billion, achieved financial closure on the PPP market in the EU. Before the financial and economic crisis, the PPP market was in a phase of strong expansion in terms of volume; from 2008 onwards, however, the number of new PPP projects has significantly decreased. In 2016, the aggregate value of the 64 PPP transactions reached for financial closure on the EU market was 10.3 billion euro. The majority of projects concerned the transport sector, which in 2016 absorbed one third of all investments in PPPs, followed by the health care and education sectors. After all PPPs signify a departure from transactional contracting and even collaborative, complex contracting, by engaging the private sector in far more integrated roles in designing, financing, developing, and maintaining public infrastructure. In many ways, “transportation PPPs demonstrate the most extreme form of public-private collaboration⁵³. The characteristics of the relationships are joint-dependence or “mutual

⁵³RUDENKO-SUDARIEVA L., PASHYNSKA K. S. The Paradigmatic Basis Of The Institutional And Regulatory Nature Of The Public-Private Partnerships The practical science edition Independent AUDITOR No 19 (I) 2017, p. 26 e ss.

dependence”, where public and private parties both bear significant risks. PPPs also involve “incomplete” specifications of public and private roles, which can change over time and they are relational, since the terms and practices of enforcing the agreement extend beyond the written contract”⁵⁴.

The European Court itself points out that in many states the PPP is not used because of a low risk propensity but also because of a wrong assessment of the same. Wrong assessments have led many Member States not to use resources.

Risk allocation in PPP projects is suitable to be viewed from a transaction cost economics perspective because any issue that can be formulated as a contracting problem can be investigated to advantage in transaction cost economizing terms. The suitability also arises from many features of PPPs, which include incomplete contracting, long-term partnerships, heavy investment in assets, complex uncertainty, etc. Transaction costs are the costs of running the economic system. The literature on transaction costs, for example, argues that much of the literature on organizational capabilities fails to pay attention to the business environment and the resultant potential for opportunism. On the other hand, the literature on

⁵⁴ BOYER E., SLYKE D., ROGERS J., An empirical examination of Public Involvement in Public Private Partnerships: qualifying the benefits of public involvement in PPS, in Journal of Public Administration Research And Theory, 2016, 45–61

organizational capabilities argues that transaction costs under-emphasizes differences in firm capabilities⁵⁵. In fact, in a collaboration between the State and the private sector typical of PPP, the risks of speculative and opportunistic behavior are numerous and can certainly lead to making the works less appreciable. Statistically⁵⁶, the states that have a greater propensity to give life to these agreements are those that have long had the optimization of the same legislation that governs these contracts.

The EU PPP market is mainly concentrated in the United Kingdom, France, Spain, Portugal and Germany, which have implemented projects worth 90% of the total market over the period 1990-2016. While some Member States have implemented a large number of PPP projects (in the period under review, the United Kingdom has for example, more than 1 000 were realized, worth almost € 160 billion, followed by France with 175 PPPs worth almost € 40 billion), 13 of the 28 EU Member States have implemented less than five projects PPP.

The main problems are due to the fact that sometimes risks will inevitably be allocated to the party least able to refuse them rather than the party

⁵⁵ XIAO-HUA JIN, HEMANTA D., Interpreting risk allocation mechanism in public-private partnership projects: an empirical study in a transaction cost economics perspective, p. 2008, p. 709 e ss.

⁵⁶ Special Paper, Parteneriati pubblico – privato nell'Ue: carenze diffuse e benefici limitati, available su www.eca.europa.eu, p. 11 e ss.

best able to manage them, especially when the government maintains maximum competitive tension⁵⁷. In Australia, for example, PPP is now seen as an opportunity for government to avoid almost all the risks by purchasing outputs. It has been expressly made clear to the private party that the allocation is offered for acceptance and little divergence is expected⁵⁸. This structure implicitly creates an initial risk allocation in which all risks associated with delivering the outputs to the specified service standards are allocated to the private party⁵⁹. The traditional procurement method requires private companies engaged in large infrastructure projects to be paid during the construction period, which usually lasts a limited number of years. Public authorities must therefore allocate sufficient budgetary resources to finance the entire construction work in a relatively short period of time. If the funding is insufficient, it is possible to divide the projects into a series of different sections, to be contracted over several years depending on the financial allocation: in this way the construction of the complete infrastructure is spread over a

⁵⁷ XIAO-HUA JIN, HEMANTA D., *Interpreting risk allocation mechanism in public-private partnership projects: an empirical study in a transaction cost economics perspective*, p. 2008, p. 708 e ss.

⁵⁸ POLLOCK, A. M., PRICE, D. AND PLAYER, S., *An examination of the UK Treasury's evidence base for cost and time overrun data in UK value-for- money policy and appraisal*. *Public Money & Management*, 27, 8, 2007 pp. 127-133

⁵⁹ BOYER E., SLYKE D., ROGERS J., *An empirical examination of Public Involvement in Public Private Partnerships: qualifyng the benefits of public involvement in PPS*, in *ournal of Public Administration Research And Theory*, 2016, 45-61

greater number of years⁶⁰. PPPs, on the other hand, normally provide that the private partner finances the entire construction and is then reimbursed by the public partner or by the users during the period of the contract, which usually exceeds twenty years and can often reach thirty. In this way, the public partner can immediately begin the construction of the entire infrastructure, accelerating its completion and therefore the realization of all the benefits deriving from the infrastructure complex. Related to this last aspect is certainly also the problem of public perception of the projects in question.

It is then necessary to clarify that a further problematic profile is that linked to the perception of the public opinion of a project of PPPs. The approval of the community is a very important aspect that can undermine even the success of the initiative as the involvement of the community also depends on political support for projects. A competing perspective suggests that public involvement can inhibit the project delivery process by fostering, rather than appeasing, public resistance⁶¹. Irvin and Stansbury⁶² point out that, "if citizen participants are misled into thinking

⁶⁰GREILING, D. , Public-Private Partnerships - A Driver for Efficient Public Services or just an Example of Wishful Thinking, *Journal for Public and Nonprofit Services Supplement* 37, 2009, 108-125

⁶¹ MORSE, R S., The practice of collaborative governance. *Public Administration Review* 71, 2011, p. 953-7

⁶² IRVIN R. A., STANSBURY J.. Citizen participation in decision making: Is it worth the effort? *Public Administration Review* 64, 2004, p. 55-65

their decisions will be implemented, and then the decisions are ignored or merely taken under advisement, resentment will develop over time". Also, problems with the representation of communities in deliberative activities may not accurately inform government of the preferences of the entire community. Public involvement may be held too late in the project delivery process to incorporate changes citizens may not be well informed enough to ask for practical changes and the public may be biased against government⁶³. Also, problems with the representation of communities in deliberative activities may not accurately inform government of the preferences of the entire community. Public involvement may be held too late in the project delivery process to incorporate changes, citizens may not be well informed enough to ask for practical changes and the public may be biased against government⁶⁴.

⁶³RUDENKO-SUDARIEVA L., PASHYNSKA K. S. The Paradigmatic Basis Of The Institutional And Regulatory Nature Of The Public-Private Partnerships The practical science edition Independent AUDITOR No 19 (I) 2017, p. 26 e ss.

⁶⁴BOYER E., SLYKE D., ROGERS J., An empirical examination of Public Involvement in Public Private Partnerships: qualifying the benefits of public involvement in PPS, in Journal of Public Administration Research And Theory, 2016, 45–61

PPPs supported by EU for the period 2000-14 in millions of euros by country.

Country	Numer of projects	Total cost	EU contribution	% of EU contribution
Greece	8	6 806	3 301	58,53 %
Portugal	3	2 379	564	10,00 %
France	21	9 856	324	5,74 %
Spain	4	2 422	311	5,51 %
Poland	4	388	272	4,82 %
Germany	14	2 147	254	4,50 %
Italy	6	553	210	3,72 %
UK	3	2 212	110	1,95 %
Belgium	2	686	101	1,79 %
Ireland	3	1 286	81	1,44 %
Lithuania	3	99	40	0,71 %
Slovenia	10	52	36	0,64 %
Croatia	1	331	20	0,35 %
Malta	1	21	12	0,21 %
Estonia	1	4	4	0,07 %
Total	84	29 242	5 640	100,00 %

Source: table prepared by the European Court of Auditors on the basis of data provided by the Commission, EPEC and selected Member States. For the EU contribution, the sources are as follows: ERDF, Cohesion Fund, Marguerite Fund, LGTT, PBI and Jessica.

Funds earmarked for EU-supported PPPs for the period 2000-2014 (millions of euro), by sector.

Sectors	Number of projects	Total cost	%	EU contribution	%
Trasport	24	25 538	87	4 555	81
ICT	28	1 740	6	472	8
Other sectors	32	1 964	7	613	11
Total	84	29 242	100	5 640	100

Source: European Court of Auditors based on data provided by the Commission, EPEC and selected Member States.

2.3. The micro and macro economic impact of PPPs and the importance of national regulatory support

With the advent of private participation in public works, infrastructure projects are being developed globally as PPPs, which take many forms, depending on the allocation of risks, ownership of assets developed, and transfer of facilities. Typically financed through project finance structures, “infrastructure projects have economic characteristics such as inelastic demand, near monopoly market structures, relative pricing power; stable operating cash flows, low correlation with traditional asset classes and limited technological obsolescence”⁶⁵. Given the economic characteristic of infrastructure and the nature of contractual structures in PPPs, one would expect these infrastructure projects to be assessed at relatively lower credit risk than typical corporate finance. It has been argued that “infrastructure projects (and also firms) have stable, predictable, and sustainable income streams and hence low project (or firm) specific risks. Risk analyses of infrastructure assets (stocks) validate the view that infrastructure is a low-risk asset class, but with relatively higher systemic risks”⁶⁶. This reflection is of fundamental importance if we think that one reason for choosing the PPP option is the possibility of

⁶⁵ IYER K., PURKAYASTHA D., Credit Risk Assessment in Infrastructure Project Finance: Relevance of Credit Ratings, *The Journal of Structured Finance*, 2017, p. 17 e ss.

⁶⁶ GREILING, D., Public-Private Partnerships - A Driver for Efficient Public Services or just an Example of Wishful Thinking, *Journal for Public and Nonprofit Services Supplement* 37, 2009, 108-125

spreading risks (those concerning, for example, construction, demand, availability) according to the principle that they should be supported by the most suitable partner to manage them. The ability to correctly identify and allocate project risks in order to achieve the optimal balance between risk transfer and compensation for the part that supports it is an essential factor for the success of a PPP. Failure to do so could lead to financial implications for the public partner and the achievement of project objectives could be hindered. Non-optimal risk-sharing agreements may reduce incentives for the private partner or increase project costs and decrease benefits for the public partner⁶⁷. All this explains, for example, why the types of, and motivations for, public– private partnerships (PPPs) have varied over time, across sectors and agencies and between countries. As we have seen in this work significant motivations have been to increase efficiency and spread risk more appropriately compared to traditional financing methods and to reduce budget and borrowing constraints. The term ‘PPP’ is restricted here to those projects involving private provision, but continued public funding, of services formally provided by the public sector, whereby the private sector partner assumes substantial financial, technological and operation risks in the finance, design, build and/or operation of the project, although it is

⁶⁷ Special Paper, Parteneriati pubblico – privato nell’Ue: carenze diffuse e benefici limitati, available su www.eca.europa.eu, p. 40 e ss

recognized that PPPs may include other forms of partnership⁶⁸. Normally, PPPs are expected to seek to maximize their benefits by combining and exploiting the respective strengths of public and private competences. In this way, they should ensure a better quality of infrastructure and services and stimulate the search for innovative solutions in the provision of public services. For example Broadband projects audited were implemented as PPPs mainly because public partners felt that they did not have the technical capacity to implement them in traditional ways without risking serious technical interface problems. However, they clashed with a common difficulty of PPPs in the field of new technologies, in which the choice of the most appropriate technological solutions is essential for a successful implementation of long-term contracts. Committing to use a certain technology and providing certain services in the usually long arc of a PPP contract exposed projects to a high risk of technological obsolescence, which would inevitably result in lower revenues as soon as new technology became available. The micro-economic drivers of PPPs emphasize the importance of choice for the provider of a public service; and the implementation schemes to exploit possible efficiency gains in the provision of public services⁶⁹. However,

⁶⁸ MCQUAID R.W., SCHERRER W., Changing reason for public-private partnerships (PPPs), Public Money & Management January 2010, II, 27 e ss.

⁶⁹ POLLOCK, A. M., PRICE, D. AND PLAYER, S., An examination of the UK Treasury's evidence base for cost and time overrun data in UK value-for-money policy and

there may be no increase in choice of service or product for the ultimate user of the service⁷⁰. This partly reflects the outcomes of the debates since the 1980s concerning whether the public sector should have an enabling role, determining the form and level of public services but not primarily delivering them, or a role as sole provider of services⁷¹. There are a variety of related factors that have affected the development and implementation of PPPs, such as varying value and ethical systems between the public and private sector actors, poor contractual design and arrangements and inappropriate risk-sharing (based partly on limited expertise, experience and capacity, especially at a local level), as well as accountability⁷². The applicable EU strategies and regulations allow the use of PPPs as a potentially effective means of creating infrastructure projects that enable the pursuit of public policy objectives by combining various forms of public and private resources. However, the Court found that the implementation of projects on a larger scale than usual and the merging into a single infrastructure design, financing, construction, management and maintenance contract exacerbated the risk of a low level of competition (thus placing the public authority in a position of

appraisal. Public Money & Management, 27, 8, 2007 pp. 127–133

⁷⁰Stirling Council (2005), Stirling High School PPP consultation. Available at: www.stirling.gov.uk/stirlinghspppminutes020505.pdf

⁷¹ MCQUAID R.W., SCHERRER W., Changing reason for public-private partnerships (PPPs), Public Money & Management January 2010, II, 27 e ss.

⁷² Ibidem, p. 28 e ss.

dependency) and has increased the overall complexity of the projects. In addition to the perceived benefits of an enabling approach, PPPs have potential problems concerning the ability to learn the lessons from providing the service in order to develop a policy; the availability of actors who can carry out the service, be they in the private, public or third sectors; and the danger of the organization failing to 'learn' from past experience and so repeating mistakes of the past or 'reinventing the wheel' due to a lack of corporate 'memory'⁷³. The preceding thoughts show how an important reflection on the PPP is current and important given the period of economic stagnation that is felt in Europe. Deregulation and economic structural change has made some sectors, which had been dominated by public firms, attractive for PPPs⁷⁴. Formerly sheltered sectors such as parts of the transport or health services have been pressured to, or are expected to, become more competitive markets with the entry of private competitors, the transfer of organizations from public to private, or the creation of 'internal markets' (internal to the public providers)⁷⁵. In the context of discussing the development of legal support for public-private partnerships, the study

⁷³ MCQUAID R.W., SCHERRER W., Changing reason for public-private partnerships (PPPs), Public Money & Management January 2010, II, 27 e ss.

⁷⁴ Stirling Council (2005), Stirling High School PPP consultation. Available at: www.stirling.gov.uk/stirlinghspppminutes020505.pdf

⁷⁵ MCQUAID R.W., SCHERRER W., Changing reason for public-private partnerships (PPPs), Public Money & Management January 2010, II, 27 e ss.

of the successful experience of foreign countries is becoming increasingly important in this area. Today, the institution of PPP is most actively developing in Australia, Germany, Great Britain, the United States, India, Spain, Italy, Canada, France, South Africa, Japan, and other states. It must be mentioned "that the tremendous importance and effectiveness of the PPP instrument has led to the creation of a range of international institutional structures that assist governments in successful implementation of the best practices, ensuring the exchange of PPP experiences for comprehensive support and development of PPPs"⁷⁶The Court⁷⁷ itself found that the PPP option was often chosen without a sufficiently strong analytical basis. For most of the projects audited, no comparative analysis, such as the Public Sector Comparator, was carried out to show that the PPP guaranteed the best cost / benefit ratio or to protect the public interest by ensuring a level playing field with other methods of contract.

⁷⁶RUDENKO-SUDARIEVA L., PASHYNSKA K. S. The Paradigmatic Basis Of The Institutional And Regulatory Nature Of The Public-Private Partnerships The practical science edition Independent AUDITOR No 19 (I) 2017, p. 26 e ss.

⁷⁷ Special Paper, Parteneriati pubblico – privato nell'Ue: carenze diffuse e benefici limitati, available su www.eqa.europa.eu, p. 40 e ss

Tabella 1. International institutional structures of support of ppps. Source Sudarieva et al. 2017

Insitution	Purpose of creation and functions
UNECE international PPP CENTRE	Created for the following purposes: identification of the best global PPP practices, assisting governments in successful implementation of best practices, ensuring the exchange of PPP experience between experienced countries
Eropean PPP expertise centre	Created according to the joint initiative of the European Investment Bank, the European Commission and the member states and candidate states
The National Council of For Public – Private Partnerships	Federal platform, created in 1985 for comprehensive support and development of PPP
PPP in Infrastructure Resoruce Center	Created at the initiative of the World Bank with the involvement of funding of the Public-Private Infrastructure Advisory Facility (PPIAF) and the Norwegian Trust Fund for Private Sector and Infrastructure (NTF-PSI).
International Project Finance Association	Created in 1998 with the aim of facilitating dialogue between government partners from different countries and business representatives – potential private partners, providing advisory support, training and organizing international events to promote PPP projects
Europea forum PPP	Created at the basis of the European Institute of Public Administration, EIPA in order to increase qualification of workers of public bodies and establishments
Programme devolPPP	Is simultaneously implemented by several organizations German cooperation for the sake of development DEG (German Investment Agency), GIZ (German Agency on International Development) and sequa gGmbH (Private Implementation Partner).
Programme of the development of public – private partnership of USAD	The task is to accomplish the following tasks: mobilizing funding, technical assistance, advisory support, dialogue between government partners, international organizations and the private sector for the purpose of organizing successful PPP projects The purpose of the Program is the development of public-private partnership in Ukraine by means of assisting the government of Ukraine at the national and local levels. The Ministry on Economic

	Development and Trade of Ukraine has been cooperating with the Program of the development of public-private partnership of USAID since 2010
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In this context, it is important to clearly outline the specialization of such centers in the countries, basing on the identification of the needs of the countries themselves. At the same time, it may be expedient to involve in the organization of the work of such centers of civil society institutions that, despite the lack of proper funding, have a powerful intellectual potential, aspirations for innovation and readiness to work⁷⁸. The weaknesses identified by the Court in the course of the audit indicate that considerable administrative capacity is needed for a successful implementation of the PPP projects, and that the latter can only be guaranteed through appropriate institutional and regulatory frameworks and extensive experience. The Court found that, at present, these conditions exist only in very few Member States: this contrasts with the increased EU insistence on the wider and wider use of the leverage effect between public and private funds, as well as on the role that PPP can play in this regard.

⁷⁸RUDENKO-SUDARIEVA L., PASHYNSKA K. S. The Paradigmatic Basis Of The Institutional And Regulatory Nature Of The Public-Private Partnerships The practical science edition Independent AUDITOR No 19 (I) 2017, p. 26 e ss.

CHAPTER THIRD

Practical uses and economic value of partnership projects

3.1. Economic crisis, public debt and infrastructural growth: the use of PPP for the construction of public works

Arguments in favour of PPPs usually relate to the terms of the contracts. Their relatively tight character, with clear provisions for monitoring and sanction is seen as a strength. "A long contract period allows private parties to spread their risk and innovate. Both of these assumptions are inspired by (neo)economic institutional theory and by new public management ideas (which are strongly influenced by economic theories). Other disciplines emphasize PPPs' relational character and thus the possibilities for renegotiation and building trust"⁷⁹. In economic and legal literature contracts of the type PPP mentioned as important because private partners need time to recover their initial investment. Long contracts may also contribute to the overall quality of the product or service. Because "these projects integrate a number of phases, contractors are able and incentivized to invest in better materials in the construction phase in order to have fewer maintenance costs later on So, long contract periods can be associated with a good overall performance: lower costs

⁷⁹ KLIJN E.H., KOPPENJAN J., The impact of contract characteristics on the performance of public-private partnerships (PPs), Public Money & Management September 2016, p. 455 e ss.

(cost-efficiency), better quality services and products, and more innovative solutions and products”⁸⁰.

The length of the contract period also creates conditions for innovation by providing private partners with incentives to come up with new, innovative solutions regarding the way they organize processes and the products and services they provide. The extra investment needed by these innovations will be more affordable with long contract periods during which there is a guaranteed cash flow. A complexity of a financial nature certainly also binds to a complexity of an administrative nature, since in the realization of a PPP project different actors come into play. Actors often moved not only by economic, financial or administrative logic. Political principles and political decisions are added to these principles. Central to interpret this complexity is a viewpoint from which the public sector does not appear as some sort of fictive unit solely dedicated to pursuing the public interest. Rather, this public sector is disintegrating into a system with various actors, each pursuing self-interests. This is the public-choice perspective. Taken from this point of view, actors in the public sphere are also individuals who are constantly guided by their own interests - as “political entrepreneurs”, as

⁸⁰Ibidem, p, 460 e ss.

bureaucrats, as voters or as representatives of interest groups. The political output depends on the one hand on these particularist interests and on the other hand on the institutional circumstances in which they are co-ordinated and implemented, e. g. via voting markets, the influence of interest groups, budget regulations or publicity through transparency in decision-making procedures. Decisions on framework conditions and thus the chances of success of PPP arrangements are also made within the scope of a complex political process. This process cannot be simply expected to generate exactly the proper scope of government. The political system is involved in the formation, design, implementation and performance of PPP solutions in a variety of ways. From a political point of view, first a decision is made on the *institutional framework* within which public but also private sector provision of goods must be organised. At the same time, this framework determines the extent to which PPPs make it possible to serve individual interests. The political framework for alternative allocation procedures and the appeal of related decisions is defined through rules on the public budget, the possibilities of public financing via taxes or debt, as well as the institutional possibilities for democratic control of, e. g., approval processes for infrastructure projects. The political system also turns out to be a potential *driver* of PPP solutions: As long as PPP arrangements serve the specific interests of political decision-makers better than conventional

public services a political suction effect will arise. At the same time, under certain circumstances political involvement can also turn out to be a *barrier*, namely when - despite economic advantages - the political net costs are estimated to be higher than the economic net gain. Finally, the relevance of the political system leads to very specific *arrangements* and *results* from the realisation of permitted PPP solutions. Arrangements with a special political problem-solving competence and which do not maximise societal welfare but policy-makers' individual interests might shape the design of PPPs. These realms of influence are connected to central economic and political challenges of PPP scholars are interested in when assessing PPPs: In the public sector, on the other hand, the interests of *political entrepreneurs* play a central role. Politicians' interest in satisfying the demand for public services in a vote-winning way outside the constraints of the public budget is deemed in the literature to be *the* ultimate political driver⁸¹. The financial crisis of the modern tax state overcharging public expenditures in relation to tax revenues brings forth the innovation of the PPP, not because it could succeed in efficiently redefining the proper scope of government, but because it can minimise the political costs of government spending. In the funding crisis of the

⁸¹ GRIMSEY D., LEWIS M.K. , "Are Public Private Partnership value for money? Evaluating alternative approaches and comparing academic and practitioner views", Accounting Forum, 29(4), 2005, pp. 345-378

modern tax state (continuously growing demands on the state with increasingly noticeable limits on the income side) PPP appears to point to comfortable ways out. PPP is seen as a tool for tapping into private capital for the realisation of public tasks without formally increasing debt.

3.1.1. From the "traditional" PPP to the "institutional" PPP

The analysis of the previous paragraphs reiterates that it is central, in the current context, a form of collaboration between the public sector and the economic world to make long lasting and very demanding investments. This need modifies the traditional paradigms of collaboration between State and Individuals. All procurement and licensing legislation was developed on the basis of the "counterpart available" in the 1990s for the PPP: the local manufacturer and the "elite" entrepreneur at the national level. The current economic dynamics impose a change and an openness in terms of collaboration that goes beyond national borders and involves subjects able to provide capital in a more consistent way. In this sense, partnership projects should be characterized by the presence of institutional investors, ie subjects that can move large sums of money that

do not come from a single company or from a family of entrepreneurs, as often happens in Italy.

Lack of economic resources and technical skills suitable to provide to the realization and management of public works and services of public utility is one of the prerequisites for research by the public administration of forms of collaboration with the private sector. This is reflected, among others things, in the strong growth of the public procurement market and concessions recorded in recent times in relation to the reduction of public spending. In this sense, the private public collaboration solves the problem of lack of resources and plays a very important role in the eventual problem that is created in the management of a public work. Only in Italy pension funds, pension funds, banking foundations and insurance companies that have about 1,000 billion euros of assets⁸². These are now, internationally, investors in infrastructure funds, managed by regulated and supervised operators as savings managers. We have thus moved from public-private partnerships to public-institutional or social-public partnerships. According to the OECD, globally, only 1% of pension fund assets are invested, with various instruments, in infrastructure, compared to about 10-15% of Canada and Australia, which are the "best" countries under this profile. pension like the Canada Pension Plan

⁸² FRANSEN L, DEL BUFALO G., REVIGLIO E., Boosting investment in social infrastructure in Europe, 2018, Discussion paper, 074, p. 50 e ss

("CPP"), the Omers; Ontario Teachers; Aimco or the Australian IFM have for years been fully involved in international news on infrastructure investments. In Europe, on the other hand, only 3% of private investments in "alternative" instruments to stocks, bonds and liquid assets concern infrastructures, a value which, however, is reduced to 1.4% excluding the United Kingdom⁸³. In our country, this type of reflection plays a particular role.

In Italy, as well as in the major industrialized countries, during the last century there was assistance in the privatization of public goods and services. Privatizations, especially in those economies characterized by a strong presence of the State in the management of essential public services, have solved the problems linked to the maintenance of goods and services. Maintenance too expensive within a state budget burdened by very important costs, difficult to eliminate and gradually growing compared to revenue. In this sense, private public partnerships would not only allow us to solve the problem of maintaining infrastructures works efficiently and, in any case, very important public works, but also to allocate risks and charges of the same realization more efficiently. The need to raise funds for these projects it has always clashed with recurrent

⁸³ Ocse, Working Paper n.32, "Pension Fund Investment in Infrastructure: A Comparison between Australia and Canada" Luglio 2013, p. 12 e ss.

financial crises and consequent reductions in public spending, thus paving the way for investment private. In our country, and also in several European countries, the public works that will be carried out in Ppp are those referred to in article 14, paragraph 1, letter a) of the law decree 189/2016 on public reconstruction. We are therefore talking about the possibility of building schools, universities, municipal buildings, state-owned buildings or properties owned by ecclesiastical bodies subject to protection. The other condition is that the single reconstruction intervention is included in one of the plans to be approved by the commissioner's orders. The normative references are the articles of the code of contracts number 180 and number 183, paragraphs 15 and 16. The initiative starts from the private presenting the proposed intervention accompanied by a feasibility project, a draft convention, the economic-financial plan verficato. In the case of post-earthquake reconstruction, the proposal must be presented directly to the building owners, who will assess the feasibility within one month of submitting the proposal. In the economic-financial plan - specifies the order - it is in any case contained the separate indication of the amounts to be covered by the contribution made by the Extraordinary Commissioner pursuant to art. 14 of the decree-law. This indication respects in any case the quantitative limits referred to in art. 180, paragraph 6, fifth sentence, of the Code of public contracts ". In other words, the total public contribution can not exceed

49 percent. It must however be said that there are different types of partnership depending on the works to be carried out. The first, most common, form of PPP concerns the provision of and/or operation of infrastructure. Building infrastructures is a very complex task that must progressively involve, as already mentioned, the collaboration between the public and private sectors, where private investors are institutional investors. Infrastructures are medium to long-term investments for which above all credibility, institutional and political, and modern discipline are needed. It is not just a matter of pure technicalities, but of a new policy approach, which opens up to public-institutional partnerships and public-social partnerships. Thus we move on to an enlarged PPP model, extended to private but social or institutional operators, transparent and responsible, and therefore suitable for convergence solutions of public and private interests. A not easy transition that requires coordinated interventions at different levels: from the legislation on the uses of institutional investors to that of asset management; from the discipline of tenders and concessions to that of the credit sector; from the fiscal one to the regulation of the single sectors of possible intervention.

An opening to an institutionalized PPP must generate a process of regulatory change that can support such a change. Until now the partners that we can define traditional coincided at most with the big

entrepreneurial ropes or with groups of companies interested in carrying out a specific project. In the Italian case, the large business groups in the country have guaranteed the financing of strategic public works that are not capable of affecting the country's economic dynamics in the long term. In most cases resorting to this instrument has been the local authorities that have historically suffered more than the cuts of resources from the central government. McKinsey⁸⁴ estimates the global need for new infrastructure investments of 20 trillion dollars by 2030. The economic effort to fill the gap is certainly not to be considered feasible without a modification and an opening to institutional subjects able to provide resources that the individual entrepreneur or group of companies can not support. It is also necessary to change the types of contracts and works that can be funded through partnership projects. Currently, the Italian legislation provides for very rigid categories that could be expanded once the categories of lenders have grown and especially the amount of financing by private individuals.

The public sector contracts to purchase services on a long-term basis, so as to take advantage of private sector management skills and also to provide an incentive for the private sector by incorporating a risk element

⁸⁴McKinsey, New Climate Economy's 2014 report available on <http://static.newclimateeconomy.report/>

in the private finance. This type of PPP includes concessions and franchises, where a private sector partner takes on the responsibility for providing a public service, including maintaining, enhancing or constructing the necessary infrastructure. The most common arrangements are PFI contracts, often involving the design, build, finance and operation (DBFO) of a particular asset, such as a hospital, school or road. We are therefore referring to what is called PPP intended to give substance to works defined as “calde”. The difference between the "hot" and "cold" typologies of the PPP lies in the source of revenues: in the PPP as a concession model, projects have an intrinsic capacity to generate income, for which the remuneration of private individuals derives mainly from user revenues. This is the case, for example, of motorways, bridges, sports centers and cemeteries. One way or another complex projects addressed by PPPs require specific transactions. Consequently, more complex contracts are needed to govern these projects or, alternatively, different forms of governance (for example more relational contracting)⁸⁵. A complex contract “has the advantage of arranging many different things, but its disadvantages include that it is costly to draft (because a lot of information and negotiation is needed), it is less flexible and it will

⁸⁵ KLIJN E.H., KOPPENJAN J., The impact of contract characteristics on the performance of public-private partnerships (PPs), Public Money & Management September 2016, p. 455 e ss.

lead to high transaction costs for monitoring and implementation. Therefore, it can be assumed that the more complex the contract, the less its overall effectiveness. The relationship between complexity and innovation is less easy to understand, with few clear ideas in the literature"⁸⁶. The second category of PPP is concerned with the introduction of private sector ownership into state-owned businesses. This involves a range of possible structures including a stock market flotation, or the introduction of a strategic partner, or with the sale of either a majority or a minority ownership stake to the private sector⁸⁷. The third type of UK PPP is generating commercial value from public assets, such as selling government services into wider markets, and other partnership arrangements where private sector expertise and finance are used to exploit the commercial potential of government assets. For example innovations from government research laboratories including defence research may be exploited through a PPP. Both these types that fall into the cataloging of "cold" works constitute the type more innovative than PPP, they include projects in which the private partner directly provides services to the public administration (PA). The private person derives his remuneration exclusively(or mainly) from payments

⁸⁶WEIHE, G., Public-Private Partnerships: Meaning and Practice (Copenhagen Business School), 2009, p. 147 e ss.

⁸⁷ MC QUAID R., SCHERRER W., Changin reason for public-private partnership (PPs), PUBLIC MONEY & MANAGEMENT JANUARY 2010 , p. 27 e ss.

made by the PA on a commercial basis. Projects for construction are included in this type of PPP and management of schools, prisons and hospitals. From this classification immediately emerges that a first characteristic of the PPP is the bundling of the phases of the project, or the unification of the distinct design phases into a contract covering the design, construction, financing, management and maintenance.

3.2. The accounting rules for the public institutions of the partnerships

The PPP is a descriptive notion that refers to a plurality of legal institutions characterized by some elements in common. This element of relationship between the public and private sectors has over time become an important tool for our country: there are about 29,000 proceedings in progress, for a total amount of almost 90 billion euro from 2002 to 2016 and represent⁸⁸, only in the last 53% of the total public works market, a percentage never achieved before. The upsurge of PPPs is arguable part of a broader trend in which traditional models of privatisation and contracting out are gradually being supplanted by alternative ways of organising economic activities in the public–private domain. Within the context of delivering infrastructure services, a PPP can be defined as ‘an agreement between the government and one or more private partners (which may include the operators and financiers) according to which the private partners deliver the service in such a manner that the service delivery objectives of the government are aligned with the profit objectives of the private partners’. A key feature of PPP is the transfer of

⁸⁸ GRIMSEY D., LEWIS M.K. , “Are Public Private Partnership value for money? Evaluating alternative approaches and comparing academic and practitioner views”, Accounting Forum, 29(4), 2005, pp. 345-378

construction, demand and operation risks, which incentivises the private PPP partner to execute the project within budget and on-time and operate it efficiently over the full duration – which is often 25–35 years – of the contract period. Other fundamental principle of PPP is the investment of private capital, which reinforces the risk transfer mechanism by putting private money at stake in case of non-compliance or outright project failure. Authoritative studies⁸⁹ claim that the need for accountability in the case of public-private partnership operations, such as construction and management concessions, is even stronger compared to other sectors. Despite this, some authors⁹⁰ believe that, in the absence of legal obligations, public administrations they may be unwilling to apply principles spontaneously public accountants due to factors of resistance to change and of the failure to perceive the benefits deriving from the adoption of well-founded systems on the economic-patrimonial accounting. Conventional provision of infrastructure funded by governments has led to inefficiencies and subjected infrastructure development to the availability of governmental funds. As a mechanism to balance such anomalies, a range of public-private partnership (PPP)

⁸⁹ FARNETI G., POZZOLI S. *I principi contabili per gli enti locali in Italia*, Milano: Franco Angeli, 2005, p. 196 e ss.

⁹⁰ MEGALI C., POZZOLI S. “Le proposte del Public Sector Committee (PSC) dell’IFAC di principi contabili internazionali per il settore pubblico con particolare riferimento agli enti locali italiani”, *Azienda Pubblica*, 16(3), 2003, pp. 245-256.

arrangements are rapidly becoming the preferred way to provide public services in many countries⁹¹. A major part of the PPP agenda is to improve the efficiency and effectiveness of the provision of public services. This is done mainly through innovations from other, usually private sector, approaches, and the development of appropriate incentives to each party and the spreading of risk more appropriately compared to traditional financing. Also important are greater assets utilization, economies of scale and 'cradle-to- grave' or whole life asset management, the introduction of private sector management techniques, and suitable creation and enforcement of performance measures and incentives⁹². The national accounting standards issued by the Observatory for Finance and the Accounting of Local Authorities, offer general considerations able to orient and influence the PA in its accounting choices. These principles have not yet addressed the issue of accounting for concessions. International accounting standards for the public sector (International Public Sector Accounting Standards - IPSAS), issued by the Public Sector Committee (PSC) of the IFAC (International Federation of Accountants) and subsequently from the IPSAS Board appear a natural

⁹¹ JIN X.H., DOLOI H., Interpreting risk allocation mechanism in public- private partnership projects: an empirical study in a transaction cost economics perspective, Faculty of Architecture Building and Planning, University of Melbourne, Melbourne, Australia, Construction Management and Economics (July 2008) 26, 707-721

⁹² MC QUAID R., SCHERRER W., Changin reason for public-private partnership (PPs), PUBLIC MONEY & MANAGEMENT JANUARY 2010 , p. 27 e ss.

derivation of IAS /IFRS. These principles constitute, unlike the Italian accounting principles, real behavioral rules that present, in many cases, operational solutions to practical problems.

3.2.1. Reporting and accounting method developed by Eurostat

Other indications on accounting representation of concessions, more generally PPPs are provided by Eurostat which sought to clarify the methods of accounting on-off balance in public budgets, in relation to the allocation of risks between the parties. The Eurostat indications concern the accounting treatment in the national accounts of contracts signed by public bodies in the context of operations in PPP, and yes applies to long-term contracts between the Public Administration and a private partner in which the public entity is the main acquirer and payer of the assets and of the services provided. A particularly delicate situation is one in which the financial risk, which in the opinion of many is a component of the construction risk, weighs indirectly on the administration due to the activation of one financial guarantee or when, at the end of the concession, the payment to the private person of a considerable value of the relegation

of the work public, paid directly or simply "guaranteed" by the PA. The guarantee partial or total funding, issued by the PA to make more easy access to the credit market and reduce the cost of money, not they alone would be sufficient to result in the on balance classification. There remains the need to verify the presence of other elements that affect on the extent of the risk transferred. Another cause of classification on balance of the operation would be attributable to the presence of guarantees on a certain level of return of the capital independent of the dealer's performance or level of the question. With reference to the level of public funding, finally, if the cost of capital is mainly covered by the PA this it could indicate that the project does not have market confidence and is feasible only if the administration assumes most of the risks⁹³. For the administration the on balance classification would result. In the past, public funding has always been understood by public financing in recognized capital account for construction or building costs renovation of the work. Recently the trend of administrations, found at international level, to finance also with credit capital projects that suffer from difficulties in finding resources on the market, have led to expanding the concept of public contribution. It must then be stressed that the reference literature is not to be considered critical in the contractual forms and in

⁹³ PISANI M. , *Un principio contabile per i beni in concessione*, Milano: Franco Angeli, 2002, p. 158 e ss.

the discipline imposed on PPPs. Many studies emphasize that regulatory obligations and the form of contracts do not have a direct influence on performance, they simply provide the possibility of renegotiation etc. Several earlier papers stress that it is managerial effort in partnerships that make the difference in performance⁹⁴. A complex network of actors is involved in a PPP and their relationships are not all regulated by the contract. The network of actors involved in a private consortium, for example, is very complicated and diverse (builders, banks, consultants and operators) and it may well be that, despite having an integrated contract the reality behind the scenes of this consortium is highly fragmented, with relationships being arranged and governed in traditional ways⁹⁵.

Governments are said to mainly develop their support for PPPs along three dimensions: by designing policies and expressing political commitment, by articulating the legal and regulative framework and by creating supporting arrangements. As academic sources remain at a quite general level on how to further detail and operationalise these main

⁹⁴ KLIJN E.H., KOPPENJAN J., The impact of contract characteristics on the performance of public-private partnerships (PPs), *Public Money & Management* September 2016, p. 455 e ss.

⁹⁵ DE BETTIGNIES, J. E. AND ROSS, T. W., Public-private partnerships and the privatization of financing. *International Journal of Industrial Organization*, 27, 3, 2009, pp. 358–368

dimensions, we will use practitioner-oriented literature produced by international organisations and consultancy firms which provide guidelines for governments. Explicit PPP policies and long-term political commitment — which refer to the first dimension of governmental support for PPPs — are crucial to create legitimacy for it as a public investment instrument which will in turn stimulate the growth and the development of a pipeline of projects. Long-term policy and political commitment are seen in PPP literature as key variables with which to manoeuvre successful PPPs projects. Moreover, PPP policies serve to define PPP in comparison to other infrastructure service procurement options, as well as to describe the reasons and goals for adopting the schemes. Finally, PPP policies can encourage good relationships by directing and coordinating cooperation between interested sectors and government institutions. Of crucial importance, according to the more detailed practitioner literature, are the existence and regular update of an explicitly adopted policy document on PPPs, as well as a clear programme for specific PPP projects. The legal and regulatory framework on PPP represents the second dimension of government support for PPP. Research has illustrated that both 'hard' and 'soft' regulations apply to PPPs which can either be enabling or prohibitive for the uptake of PPPs in various national contexts. Moreover, a high diversity in national approaches to the regulation of PPPs is found in the literature, with some

countries having launched specialised PPP laws and formal procedures for financing and green-lighting of projects, whereas others have adopted a less formalised and essentially more decentralised approach. The third dimension in which governments may support PPPs explicitly is that of PPP-supporting arrangements, of which the existence of a dedicated PPP unit is one crucial element. The role and functioning of PPP-supporting arrangements have recently become major themes in research; such units are considered to be major players vis-a`-vis shaping the national and local institutional conditions for PPP development

3.3. Risk allocation on the private sector

Infrastructure projects are usually financed through project finance structures, and infrastructure accounts for the major share of global project finance transactions. Most commercial infrastructure projects are developed under some form of concession from public authorities and developed through dedicated special purpose vehicles (SPVs). Started as private finance initiatives (PFIs) in the United Kingdom in the mid- 1990s,

such projects are now more commonly known as public-private partnerships (PPPs) in infrastructure. Infrastructure constitutes a major share of global project finance loans, accounting for more than 60% of such loans⁹⁶. A number of reasons have been advanced for the mismatch between global long-term finance and private infrastructure investments, which include, among others, lack of investable projects, improper risk allocation between the private and public sectors, the complex nature of infrastructure projects, unclear credit risk assessment, and lack of appropriate financing instruments⁹⁷. At the same time, the elements that are both essential and indispensable to include a specific contractual relationship between public administrations and private operators within the PPP are the transfer of economic risks to the successful tenderer and the maintenance of the economic balance for the entire duration of the negotiation relationship -financial. The regulation of the allocation of the various types of risk that can be configured in the context of such transactions is outlined by the articles 3 and 180 co. 3 of the Code, according to which in the PPP contract the transfer of risk to the economic operator involves the allocation to the latter: - in general terms, the

⁹⁶ IYER K.C., Credit Risk Assessment in Infrastructure Project Finance: Relevance of Credit Ratings, *The Journal of Structured Finance*, 2017, p. 17 e ss.

⁹⁷ POLLOCK, A. M., PRICE, D. AND PLAYER, S., An examination of the UK Treasury's evidence base for cost and time overrun data in UK value-for- money policy and appraisal. *Public Money & Management*, 27, 8, 2007, pp. 127-133

operational risk of the Code, the risk associated with the management of jobs or services on the demand side or on the supply side or both. In particular, it is considered that the economic operator assumes the c.d. "Operational risk"; - the risk of constructing the Code, the risk linked to the delay in delivery times, the non-compliance with project standards, the increase in costs, technical problems in the work and the failure to complete the work) ; - the risk linked to the concessionaire's ability to provide the agreed contractual services, both in terms of volume and expected quality standards; - in the case of profitable external activity, the risk associated with the different volumes of demand for the service that the concessionaire must satisfy, or the risk associated with the absence of users and therefore of cash flows.

Construction projects manifest more risks than do other industries. The success of a project management exercise depends very much on the extent to which the risks involved can be identified, measured, understood, reported, communicated and allocated to the appropriate parties. However, evidence from projects worldwide shows that this is not a straightforward event and risks are not managed properly⁹⁸. And, in fact, at the risk of the contract itself (deriving, for example, from the

⁹⁸BALL, R., HEAFEY, M. AND KING, D., The private finance initiative and public sector finance. Environment and Planning C: Government and Policy, 20, 2002, pp. 57-74.

bad management of construction costs, from supplier or subcontractor defaults, force majeure events, etc.), we can add that consisting in the possibility of failing to recover the investments made and the costs incurred for the operation and, therefore, to incur losses deriving from imbalances (which can be generated on the demand or supply side) such as to result in a contraction of revenues deriving from the fees paid by users finals or the availability fee recognized by the administration. Necessary is precisely to avoid a "front" allocation of risks to the private, that the risks associated with the construction and management of the work or service object of the contract are clearly identified, assessed and charged to the person who presents the greatest ability to control and manage the same, on the understanding that the private economic operator will have to bear the majority.

And in fact, the failure to allocate ex ante risks and an ineffective monitoring of the post-award phase, especially as regards the permanence of the risks transferred to the private partner, can undermine the added value expected from the involvement of capital. and private competence in the realization and management of public affairs. Transfer of risks to the private sector comes at a price and improper allocation of risks among stakeholders may lead to higher than necessary prices. If risks rest inappropriately with the public sector, government would raise

taxes or reduce services to pay for its obligations when the risks materialize. In contrast, if risks rest inappropriately with the private sector, excess premiums would be charged to the government or even directly to the end users. Many governments now recognize that privatization is a partnership in which they must retain some risk. However, a perception that privatization involves transfer of all risks to the private sector was still prevalent in many countries until recently⁹⁹.

From a strictly financial point of view project finance has been defined as raising of funds on no recourse or limited recourse or as structured financing of a specific economic activity through an SPV to finance economically separable capital investment projects in which the providers of funds look primarily at the cash flows from the project to service loans and provide return on equity. In addition to cash flows, project assets may be used as collateral, and some sponsor support may also be available in certain cases¹⁰⁰.

A few commonly accepted characteristics (Finnerty defining an SPV (also known as a project company) are 1) the borrower is the project company

⁹⁹ XIAO – HUA JIN and HEMANTA DOLOI, Interpreting risk allocation mechanism in public– private partnership projects: an empirical study in a transaction cost economics perspective. Faculty of Architecture Building and Planning, University of Melbourne, Melbourne, Australia

¹⁰⁰ IYER K.C., Credit Risk Assessment in Infrastructure Project Finance: Relevance of Credit Ratings, *The Journal of Structured Finance*, 2017, p. 17 e ss.

(and not the sponsor of the project), which is legally and financially independent; 2) lenders have no or limited recourse to sponsors after construction of the project is completed; 3) cash flows generated by the project company should be sufficient to cover operating costs and debt service; and 4) collateral is usually limited to project assets¹⁰¹. The introduction of significant competition into PPPs, and the transfer of endogenous risks to the developer or operator, are important for efficiency and the consequent delivery of value of money . PPPs can be seen as part way between privatization and full government delivery in terms of risk allocation between them. The more functions in a PPP, the greater the potential risk to be transferred to those best able to take them (i.e. those who can deal with the risk at least cost), with demand risk particularly important where operations are involved. The level of competition for, and the contestability of, the PPP is crucial to ensure that there is suitable transfer of risk to the private partner, although experience suggest that sometimes in the country like UK competition has been limited. The UK government “has argued that PPPs enable them to tap into the disciplines, incentives, skills and expertise that private sector firms have developed in the course of their normal everyday

¹⁰¹ JIN X.H., DOLOI H., Interpreting risk allocation mechanism in public– private partnership projects: an empirical study in a transaction cost economics perspective, Faculty of Architecture Building and Planning, University of Melbourne, Melbourne, Australia, Construction Management and Economics (July 2008) 26, 707–721

business, while releasing the full potential of the people, knowledge and assets in the public sector. Here PPPs might be supportive for changing the organizational structure of the units which provide the service; adjusting the organizational culture in order to better enable these institutions to meet the needs of customers, including those in the private business sector; and closing specific knowledge gaps”¹⁰².

¹⁰² MCQUAID R., SCHERRER W., Changing reason for public-private partnership (PPs), PUBLIC MONEY & MANAGEMENT JANUARY 2010 , p. 27 e ss.

CHAPTER FOURTH

The PPP contract: hypothesis of standard PPP contract for social infrastructure

▪ 4.1. The major objectives of the standard PPP contract

The purpose of the standard PPP contract is to regulate the PPP operations, regarding social infrastructure based on an availability fee. That is important as a guideline for both the private and the PA. This contract has the aim to reduce the difficulties in the use of PPP for the construction of the social infrastructure. Considering the excessive gap between existing infrastructures and actual needs (many of them cold works), the PPP has been re-evaluated as a valid tool for the realization of the latter. Especially if you want to encourage the intervention of institutional investors. Considering the enormous growth of their investment opportunities, more than doubled in the last ten years. Given the nature of these investors, it is necessary to regulate the PPP and also to issue a standard contract. The decision to draft a contract for the concession of cold works, to be implemented in PPP, derives from the need to correctly allocate the risks inherent in such operations. The objective is to incentivize and sustain investments in infrastructures, protecting public finance at the same time. This contract scheme, although it can be assessed in a positive way for the re-launch of investments in infrastructures, at the same time if it was judged negatively by investors it would end up slowing down investments with further negative

consequences. In order to involve institutional investors, it is necessary to make the risks and characteristics of the transactions compatible with the institutional investment functions.

It is important to move to an institutional and social PPP and a new policy is required.

The main concerns in drafting the contract outline include:

- Avoiding that the use of the PPP is motivated essentially by the need to draw the budgetary constraints imposed by the internal stability pact.

In fact, as explained below, there is the possibility to report the works on-balance sheet only under certain conditions, illustrated by Eurostat. Only if there is the actual attribution of certain risks to the PA and not in the other circumstances. So as not to account for the operation as generative of new debt, with positive effects for public finance.

- Increase control in order to prevent private parties from rejecting excessive risks to the public with the aim of increasing their profits.

This can be remedied by identifying a central advisory unit, similar to that provided for by the Juncker Plan and then by InvestEU, which is able to assist local authorities in the management of PPP operations.

To evaluate the possibility of constituting a real independent authority of the PPP.

Simultaneously with these initiatives, each PA must however reach satisfactory levels of efficiency and transparency. And to prevent the

excessive transfer of risks to private individuals, thus obtaining an opposite extreme and thus discouraging investments.

It is necessary to obtain not only positive results in terms of bankability, but also results in terms of eligibility, reducing the obstacles that prevent the use of forms of financing other than banks.

And to do this, it is crucial to reduce the risks of operations that are the real barrier for institutional investors. Additionality must be considered. Since now in all the works we must also consider the secondary impacts and not only the direct impacts, or the externalities that are reflected in the social-environmental system.

4.2. The standard PPP contract: purposes, functions and characteristics

The public-private partnerships, can consist of forms of structured and lasting cooperation between P.A. and private, non-profit and for-profit entities. They can be "paid" both in long-term contractual forms and in specific forms new legal entities constituted by public bodies and private subjects. In the case of "contractual PPPs", P.A. and the private entity sign a contract for the execution of a work or the provision of a service (project financing) and, therefore, not constitute any legal structure. The contractual logic is the same that is found in the contract, except that in a hypothesis of PPP the parties are called to agree additional elements with respect to those which define a "traditional" contract. These are the basic principles that are also found in the Juncker¹⁰³ plan and that have found accommodation in Italian law. The architecture of the system of concession contracts and public - private partnership (PPP) contracts outlined in the new Code of Contracts, Legislative Decree 50/2016 (Code), is based on the substantial concept of a European concession specified in art. 5 of Directive 2014/23 / EU2 (Directive): "the awarding of a works or

¹⁰³ The European Fund for Strategic Investments (EFSI) represents the instrument operation through which the European Investment Plan (so-called Juncker Plan) presented to the European Parliament on 26 November 2014, approved later on December 18, pursues the goal of mobilizing funding for investment without create further public debt. The Fund, created jointly by the Commission and the European Bank for Investments (EIB), will have an initial endowment of 21 billion euros (of which 16 billion from the EU budget and 5 billion from the EIB) and will count on an estimated leverage of 1 to 15 that will allow, starting from 21 billion, to raise funds on the market for 63 billion, for collect a total of private and public co-financing for an amount of 315 billion from 2015 to 2017

service concession provides for the transfer to the concessionaire of an operational risk related to the management of the works or services, including a risk on the demand side or on the supply side, or both. ". The European concept of concession, fundamental part of the PPP, is characterized by the aforementioned substantial risk concept, articulated, in the national sphere, in the case of concession contracts and PPP contracts depending on the type of risk taken by the private sector, on the question or offer with two extremely circumscribed variants but always justified by the fact that, as will be argued, the main payer remains the PA.

The operational risk to which the private concessionaire must be exposed, is of economic nature for the potential repercussions on the sustainability of the financial economic plan (PEF) associated with the concession contract (European genus) and may concern both the demand side and the supply side¹⁰⁴. Operational risk is also considered to be borne by the State and the Government. Investment projects financed under PPP contracts can generate liabilities or debt for a government. The financing may be on or off the government's balance sheet, with or without a direct

¹⁰⁴ RICCHI M., L'architettura dei contratti di concessione e di PPP nel nuovo Codice dei Contratti Pubblici D.Lgs 50/2016, 15 march 2016, SVIMEZ on "La nuova legge sugli Appalti. Aperture al diritto della concorrenza e opportunità per il Mezzogiorno". L'articolo è in corso di pubblicazione sulla Rivista giuridica del Mezzogiorno, Il Mulino, n. 3 - 2016.

impact on government deficit and debt¹⁰⁵.

Tab 2. Forms of public sector participation. OECD 2017

<i>Forms of public sector participation</i>						
Characteristics						
What PPPs encompass						
Scope (discrete piece or network)	Discrete existing assets and network	Discrete existing assets	Discrete existing assets	Discrete new assets or refurbishment	Existing networks and existing point infrastructure	Existing network and point infrastructure (e.g. sea/airports)
Contract duration	1 – 3 years	2 – 5 year	10 –20 years	25 – 30 years	25 – 30 years	Perpetual/subject to license
Commercial risk for the private party	None	None	Yes	Both options	Both options	Both options
Money at risk ex ante	No	No	No	Yes	Yes	Yes

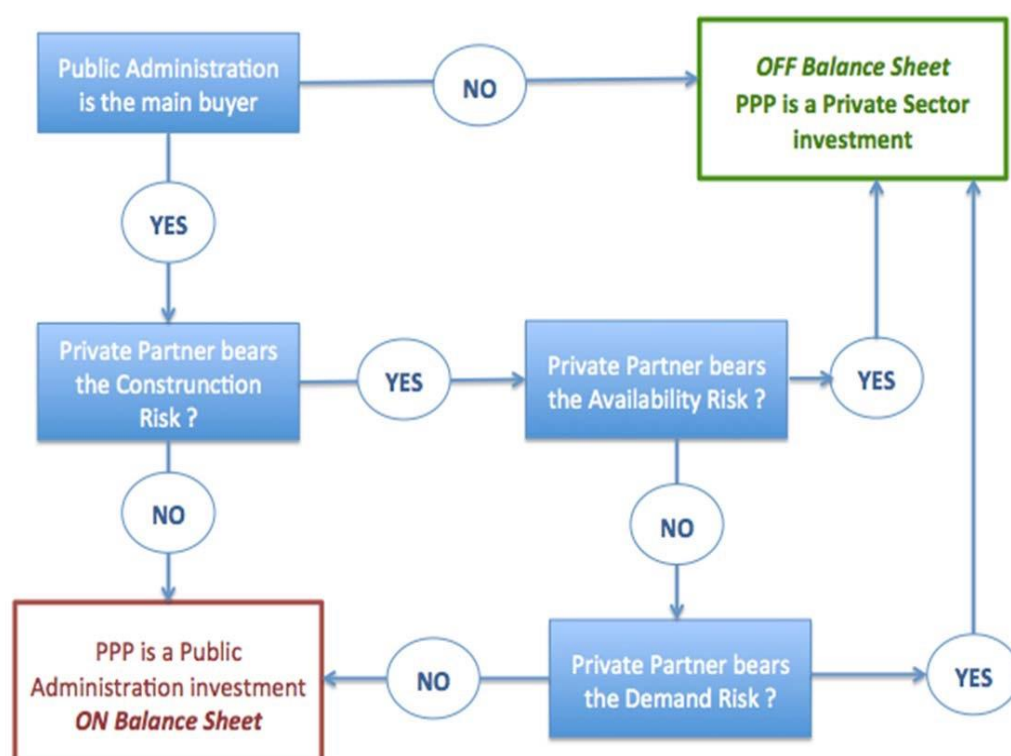
¹⁰⁵ FRANSEN L, DEL BUFALO G., REVIGLIO E., Boosting investment in social infrastructure in Europe, 2018, Discussion paper, 074, p. 50 e ss.

In Italy, as the art. 180, paragraph 8 of the Code belong to the PPP contracts those with the characteristics of the private public partnership contract. The legislation, as anticipated also in the first chapter, specifies that the type of contracts referred to in paragraph 1 (private public partnership contract) include project finance, construction and management concession, service concession, financial leasing of public Works. The contracts listed, to be classified in the case of PPP contracts, must possess the typical characteristics of the public private partnership contract referred to in art. 180 of the Code. In particular, the concessionaire must be remunerated by the Public Administration, assuming, in addition to the construction risk (Article 3, letter aaa of the Code) also the availability risk (Article 3, letter bbb of the Code) and / or the application risk (art. 3, letter c of the Code). The type of risks assumed by the PPP contractor can certainly vary, as we have seen, but the constant remains the direct responsibility of the PA to pay in various ways the income to the private and the very high complexity of the partnership operation. The reason for the differentiation between concessions and private public partnership contracts lies precisely in the need to regulate PPP transactions, where the PA is the main paying agent (main payer),

with specific requirements to ensure that it has undertaken the most convenient procedure in terms of costs, times and levels of performance. In fact, it must be emphasized that the work of typing a Standard Contract to promote the creation of public works through the PPP was initiated within the Ministry of Economy and Finance. The decision to create a contract for the concession of cold works to be implemented in PPP derives from the need to correctly allocate, through clear and unequivocal clauses, the risks inherent in PPP Operations, in compliance with the principles of the 2014/23 / EU Directive European Parliament and Council of 26 February 2014, the provisions of the Code of Public Contracts and the indications provided by Eurostat. The standard contract stems from the fact that risk management in PPP transactions and concession contracts has always been one of the most serious problems in the infrastructure sector. Important are therefore criteria that can manage this risk. Among these instruments, in particular, the Contract outline is decisive. Article 181, paragraph 2, of the Code provides, moreover, that the contracting authorities provide for the awarding of contracts by laying down a tender contract, together with the final draft, a model contract and financial plan that regulate the contract. risk allocation. On a general level, statistical and accounting criteria determine whether the financing of a specific project is on the government's balance sheet. In broad terms, these criteria state that if the

government bears the construction risk, then the PPP should be on the government's balance sheet regardless of the allocation of the demand and availability risks. On the other hand, if the private partner is the institution bearing the construction risk, then the financing should be classified as being off the government's balance sheet unless the government bears both the demand and the availability risks¹⁰⁶.

Tab. 3. Statistical treatment of PPP contracts. Source Fransen et al, 2018



Risk governance in the Contract from a legal point of view since the

¹⁰⁶ FRANSEN L, DEL BUFALO G., REVIGLIO E., Boosting investment in social infrastructure in Europe, 2018, Discussion paper, 074, p. 50 e ss.

correct allocation of risks is the Concession with respect to the contract in the Italian system. For the public administration, partnership contracts are defined as long-term contracts in which the PA is the principal purchaser of the service. The revenue stream in the phase of management is predominantly insured by the PA through the payment of a fee (cold works - ie without charging - which on schools, hospitals, local public transport). The contract is off balance if there is no transfer of substantial risk from the private to the public, or when two conditions occur: the private partner assumes the risk of construction; the private partner assumes at least one of the risk of availability and of application. Not all contracts, however, can be considered partnerships. The Eurostat¹⁰⁷ note concludes that almost all EPCs (Energy Performance Contracting) can not be considered as PPPs and therefore off balance sheets can not be accounted for. For contracts with particularly large investments compliance with all the conditions necessary to be considered PPPs and therefore evaluate whether they can be accounted for budget by National Statistical Institutes in cooperation with Eurostat. The note has caused quite a few criticisms from various EU countries as it creates further barriers to the development of investments in energy efficiency in the public sector and is in contrast with the objectives of energy policy and containment of

¹⁰⁷ Eurostat Decision Of 11 February 2004

climate-changing emissions pursued at Community level. In recent years this type of contract has increased significantly, considering the considerable savings margins underlying the energy redevelopment measures, especially with regard to public lighting. The peculiarities of these contracts, their highly technical character and the presence of a specific discipline makes it difficult to perfectly catalog the rules foreseen for PPPs and requires the elaboration of specific criteria to determine whether they should be classified in the budget or not. It is therefore clear that the risk management in the Standard Contract is, in fact, under the juridical profile, given that the correct allocation of risks is a qualification of the concept of Concession with respect to the contract. From an economic point of view it qualifies through the achievement of a positive value for money (contract expediency). From an accounting and statistical point of view, this operation makes it possible to classify the work off balance sheet and to account for the transaction as non-generative of new debt, with positive effects for public finance.

In the contract outline, the main source of remuneration is given by the availability fee. Therefore, the risk of availability, construction risk and, in the event of profitable external activities by the OE, the risk of demand for services rendered for the period of management of the asset are allocated. The contract scheme is applicable, with the necessary

adjustments, to all PPP Transactions and other types of Concessions - even at the rate of the users -, as the common denominator of the same is the correct allocation of risks between the Parties. This tool should contribute to improving the negotiating capacity of the Administrations and avoiding that the use of the PPP is essentially motivated by the need to "circumvent" the financial constraints placed on local self-government by the Internal Stability Pact. In PPP contracts not only the award procedures are limited, thus excluding the applicability of both the principle of free structuring of custody and the negotiation but are characterized by the individual contractual provisions by high and specific levels of guarantee to oversee the correct action administrative and best procedural quality. This translates into a particular attention of the Code in the field of assignments where the public commitment is aimed at planning, tendering and execution management, but is also firmly committed to the direct or mediated provision of public resources to be paid to the private sector.

4.3. Financing social infrastructure investment and PPPs

The infrastructures, express some idiosyncratic characteristics typical of newly established markets. The offer of finance has returned to be abundant, but the pipeline of bankable projects is still scarce, even in the most advanced markets such as the European one. We have mentioned in the course of this work how, in fact, many Member States do not even

use the incentives to finance infrastructure projects even by making use of the PPPs.

Economic infrastructure can largely repay its costs with the cash flow it produces. In the utility sector, independent regulatory authorities guarantee stable returns and moderate risks. Social infrastructure, which needs almost full payment by the public sector, is characterised by predictable and steady real returns which are usually attractive for investors. Therefore, economic infrastructure and social infrastructure have similar features, although they differ in some relevant characteristics, offering investors opportunities to diversify¹⁰⁸.

In Greece, for example, the first wave of PPPs, awarded in the 1990s, included projects such as the Rion Antirion bridge, the Athens ring road and the new Athens International Airport. The second wave of PPP, awarded in 2007-2008, essentially included the construction of motorways. These projects have been financed to a considerable extent by the toll collection levied on pre-defined motorway sections managed by the private partner. However, the serious economic and financial crisis that struck Greece has caused a collapse in traffic volumes, which fell by about 50% below the most pessimistic scenarios, with a consequent sharp

¹⁰⁸ Special Paper, Parteneriati pubblico – privato nell'Ue: carenze diffuse e benefici limitati, available su www.eca.europa.eu

reduction in the actual and estimated revenues for the concessions¹⁰⁹. The financial crisis has created big problems but in fact the project has paid off. Another advantage of PPPs, in this specific case, is the possibility of guaranteeing higher levels of maintenance and service compared to traditional projects, thanks to the whole life cycle approach. The private partner in charge of the construction, in fact, is also responsible for the operation and maintenance of the infrastructure for the entire duration of the project, ie for a much longer time than the usual guarantee period provided for by the traditional procurement rules. This requires the private partner to plan taking into account the long-term operating and maintenance costs it will have to pay.

Despite this, there is currently no pipeline "investment grade" projects, therefore not only bankable, but also suitable for the categories of more prudent investors on the capital market, such as pension funds and life insurance. The complexity of construction and financing of a major work, especially in the high sectors technological content or high regulatory risk or macro-economic, requires a concert complex among different subjects; and not for a short period of time, but in many cases for 30 or 50 years. The public sector does not always seem to be up to its tasks, both technically and politically, regulate and administrative. The

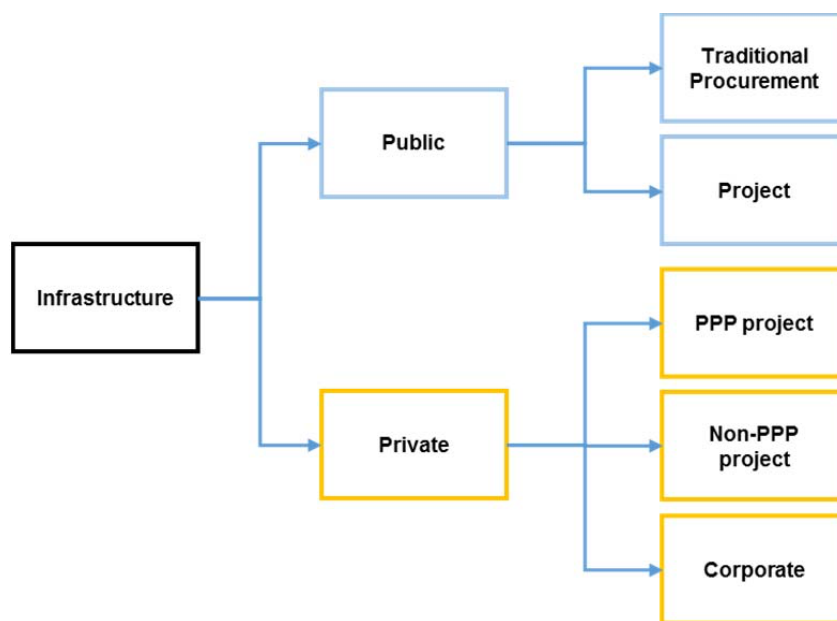
¹⁰⁹ FRANSEN L, DEL BUFALO G., REVIGLIO E., Boosting investment in social infrastructure in Europe, 2018, Discussion paper, 074, p. 50 e ss

EU can and must do a great deal on this front. Even the individual member countries they have to work on the regulatory environment and on the technical quality of public facilities involved, with different roles, in the PPP initiatives. The new generation model in infrastructure financing that is emerging at the level global represents a real new frontier in the realization of investments. Processes and models are more complex than in the past, and pose continuous challenges to all actors involved (public sector, private sector and financial community). After a decade of discussion at the global and the European level on the need for infrastructure to emerge as a new asset class and for long-term institutional investors to invest more in infrastructure, the new scenario has not materialised as planned¹¹⁰. The possibility of combining public and private competences in the design of a PPP is generally considered positive for a realistic assessment of the future use of the planned infrastructure. However, the fact that payments can be spread over a period of 20-30 years reduces the incentive to optimize the scope of the project according to real needs and therefore exacerbates the risk that public bodies undertake infrastructure projects that are larger than necessary, or than they would otherwise be able to sustain. Infrastructures with a stronger impact from a social point of view

¹¹⁰ Special Paper, Parteneriati pubblico – privato nell’Ue: carenze diffuse e benefici limitati, available su www.eca.europa.eu

entailing a major public component, mainly relies on public financing. Traditional public procurement, namely the process by which public authorities purchase the concrete infrastructure or the provision of services from companies, is the most widely used contractual arrangement. Examples in the social infrastructure sector include the building of a state school or of a public university.

Graph 2. Financing social infrastructure. Source Elti 2017



In the case of public procurement, the public authority is the one dealing with the large majority of risks by paying an agreed price to the private company. It is critical to improve and promote the use of strategic public procurement schemes to achieve societal, environmental and economic

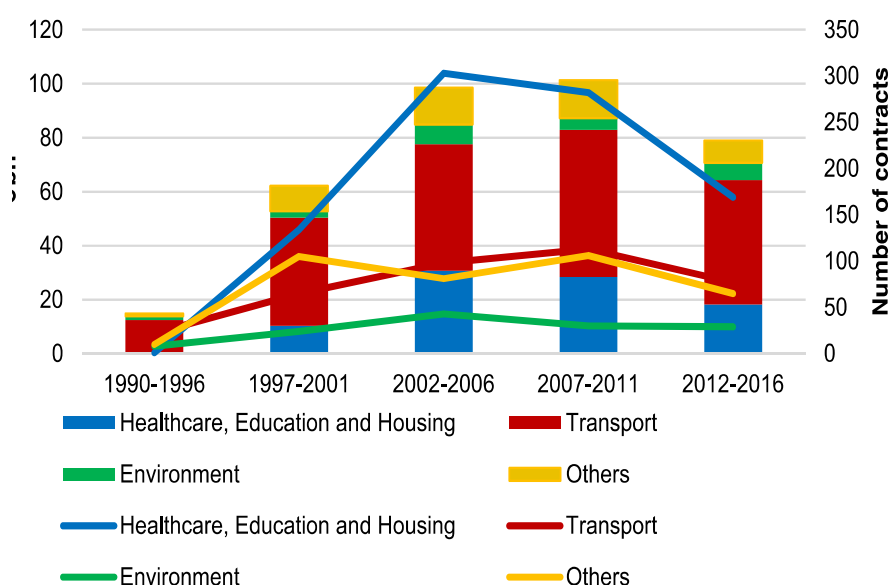
objectives¹¹¹. This type of works could also be considered as works in PPP of smaller size but with a strong impact on the community. A possible idea to get these works into a financing circuit that can make them possible authoritative studies have suggested to include them in a portfolio of small works. This poses some challenges that should be at the heart of EU policy actions in the next term. Although the PPP is strongly recommended by the EU it (apart from in transport and energy) has never really taken off, except for some countries like the United Kingdom, Holland and Belgium. In the United Kingdom, for example, social infrastructure built in PPPs were in the period 1990-2012 (based on the volume - given EPEC-BEI 2013) were equal to 35% of total PPP in education and 34% in health. In the rest of Europe equal to 11% respectively in education and health¹¹². The usefulness of this type of limited projects in terms of capital but of strong social impact is of great importance. If the projects are well studied, if the regulatory risk is contained or even protected by one public guarantee and / or special tax incentives, project finance with participation, alongside the private operators, "patient" and long-term investors can work, in

¹¹¹ Special Paper, Parteneriati pubblico – privato nell'Ue: carenze diffuse e benefici limitati, available su www.eca.europa.eu

¹¹² B20, Context on infrastructure sector globally Infrastructure and Investment Task Force March 2015, p. 12 e ss.

partcompensating for cuts in public funds due to the fiscal crisis that many countries are going through.¹¹³ However, in the Member States this type of investment appears to be very limited, even though the Union pushes for certain resources to be "socially" exploited through the PPP.

Graph 1. Projects by sector. Source. ELTI 2017



In the period 1990-2016, 1765 PPP contracts have been closed in the EU-28, Turkey and the Western Balkans. The largest number of PPP deals took place in the UK (58 %), followed by France (10 %), Spain (9 %) and Germany (7 %). The 1765 PPP contracts had a total value of EUR 356 bn,

¹¹³ FRANSEN L, DEL BUFALO G., REVIGLIO E., Boosting investment in social infrastructure in Europe, 2018, Discussion paper, 074, p. 50 e ss

of which 44 % of this total is concentrated in the UK, 10 % in France and in Spain, 6 % in Portugal, and between 2 and 5 % each in Belgium, Germany, Greece, Hungary, Ireland, Italy and the Netherlands¹¹⁴. Building a work in PPP is efficient if this work represents more "value for money" (proposition still controversial in the economic literature as underlined in the second chapter), but it is above all if we consider i economic multipliers on GDP, positive effects on employment, social cohesion. With such high public debts the future of infrastructure financing in Europe will have to necessarily change. In summary, the new model could be a sort of "capitalism institutional or institutional investors", technically very experienced, able to earn in efficiency through the economies of scale of standardization, through the creation of Dedicated national, regional and / or sectoral platforms. In fact, we talked about this in the third chapter of this work when the PPP was inserted in an institutional perspective.

¹¹⁴ FRANSEN L, DEL BUFALO G., REVIGLIO E., Boosting investment in social infrastructure in Europe, 2018, Discussion paper, 074, p. 50 e ss.

CONCLUSION

If we consider the public investments in Italy the reduction in the 2008-2016, amounted to around 8 billion euro, from 37 billion in 2008 to 28 billion in 2016, valued at current prices. In the period in question the decrease in public investment was almost solely due to the reduction in investments by local authorities, from 28 to 23 billion (- 22%), a large part of the reduction therefore concerned the expenditure of Local authorities that, in 2014, account for about 72% of total public expenditure per investments. It is difficult for the situation described to change radically in the coming years, if not decades, unless you return to grow at a sustained pace and / or do not take initiatives extraordinary in terms of public debt. This means that partnership projects must be able to shake the economy of our country as they could be a good opportunity to boost employment, the economy in general and above all provide the country with a sufficient amount of infrastructure to guarantee citizens goods and services. It must also be said that the analysis of the European Court of Auditors within several States has shown that the Court found that the PPP option was often chosen without an analytical basis sufficiently robust. For most of the projects audited it was not carried out any

comparative analysis, such as the Public Sector Comparator, to prove that the PPP guarantees the best cost / benefit ratio or to protect the public interest ensuring a level playing field with other procurement methods. Most of the PPP projects audited by the Court of Auditors reported problems in using the PPP option. The provisions on risk sharing were inadequately structured, resulting in an inefficient risk allocation inconsistent, or an excessive risk exposure for the private partner. In one case audited, the high remuneration (14%) of the risk capital of the private partner it was not consistent with the reduced risks it had to bear. The combination of new technologies (as in the ICT sector) with long-term contracts has not been managed always in a careful manner, since the public partners have had to keep a valid one contract even if the rapid evolution has caused technological obsolescence. This last point is definitely the weak point especially for investments that require a very substantial outlay of resources. For this reason it was stressed above all in the fourth chapter of this paper how partnership is above all indicated for works of small dimensions but which can change the fate of entire communities. In this regard, it is emphasized that the European Investment Plan (known as the Juncker Plan) can be summarized in few words: it is the attempt to use private savings to finance investments with a high risk, thus avoiding to produce new one public debt. The Plan represents a significant change in the paradigm in terms of

financing public investment. The transition from public grants to loans funds to the use of various financial instruments in the context of a loan predominantly private area focuses on the project, its quality, its effects, its profitability. The presence of private investors is likely to result in preselecting and discarding inefficient projects in terms of allocation, as private investors are generally very large attentive to their own convenience assessments. Because the competition between projects is based exclusively on merit, those will have to be evaluated and selected by the individual countries projects with an effective high rate of financial and economic profitability. The participation of private individuals, on the other, should act as a deterrent to any manipulation made during the evaluation exercise. However, this Plan may have beneficial effects on the methods of programming and assessment at national level. It can support public financing of infrastructural projects and evaluation techniques can emerge that are aimed at improving the development process selection and selection of interventions. There is a positive dynamic that provides that the private invest not only if it earns, but even if the key data of the project (demand, costs, etc.) are considered reliable and verifiable with sufficiently solid forecasting models. Furthermore, there are aspects which can be developed and integrated into the economic analysis of projects, like risk analysis. Secondly, much of the instrumentation used in the Plan could be usefully repeated in the

Italian case. A single national evaluation center, like this how the Plan has provided for an Investment Committee at European level.

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SUMMARY

INTRODUCTION

The objective of this work is to demonstrate the possibility to regolize an instrument for the constration of the social infrastructures, like PPP. Social infrastructure are now at the center of the priorities for the EU, (before with Juncker Plan and now with InvestEU). The method used is the direct analysis of the documents and reports and the analysis of the prototype of Standard contract itself.

Public-private partnership projects (PPP) have recourse both the public and private sectors to supply goods and services that are traditionally offered by the public sector, while at the same time loosening the strict restrictions of budget on public expenditure. Recently the European Court of Auditors has noted that PPPs are potentially capable of ensure faster implementation of policies and vouchers maintenance levels. The same projects submitted to a careful analysis have shown that the projects do not they have always been managed effectively, and they do not have guaranteed an adequate ratio between benefits and costs. The potential benefits of PPPs are often not materialized, as PPPs have been delayed, increases in costs and underuse, which has resulted € 1.5 billion in inefficient and ineffective expenses, of which € 0.4 billion of EU funds. This was due also to the inadequacy of the analyzes, of the strategies for the use of PPPs as well as institutional frameworks and regulatory. Because only a few Member States possess experience and consolidated skills in implementation success of PPP projects, there is a high risk that PPPs do not contribute to the goal of use a higher percentage of EU funds for mixed-finance projects including PPPs.

However, the use of these tools is increasingly necessary in countries that no longer have the possibility to finance any public works. Within the European Union then the budget constraints are constantly accused of stifling the initiatives of governments. Partnership projects are therefore crucial especially for financing not only large works, but above all socially relevant projects such as hospitals, schools and schools. The decision to start a PPP operation requires a careful assessment of the risks for the Public Administration. It is, in fact, the allocation of risk to the specialized operator that allows obtaining benefits that can not be achieved with one or more traditional contracts. These benefits can be summarized in the possibility of making an investment, with the majority contribution of private resources, aimed at providing a service of public interest on-time, on-budget, on-quality, thanks to contractual mechanisms that allocate in a manner correct and balanced risks create the incentive to manage risks in such a way that they do not occur. It is the contract to translate into adequate terms the convenience to use the PPP rather than the contract, on the basis of the results of the preliminary investigation carried out by the Administration with reference to the analysis of the demand and supply of the service, the economic and financial sustainability and economic-social nature of the transaction, as well as the nature and intensity of the various risks. The correct allocation of these risks, also in compliance with the indications provided by Eurostat for any off-balance sheet accounting, operationalizes the operational risk of the Contract. Also is important to understand the capabilities to create a PPP standard contract, it is possible? Are there really possibilities to regularize

and simplify this tool for the creation of social infrastructure? And to heal the gap between existing infrastructure and real needs? And at the same time push institutional investors to invest in such projects?

CHAPTER 1

The private public partnership: regulatory evolution in Italy and its application

Over the last decade, the phenomenon of collaborations between public and private developed in large sectors of the public sphere. In the European context, the broader policy on partnership matters has been implemented by Great Britain¹¹⁵. At the beginning of the nineties of the last century, Great Britain launched the Private Finance Initiative (PFI) system which, in general, envisages the assignment to a private company of a "global" contract comprising the planning, financing, construction, management and maintenance of the work¹¹⁶. However, in order to be able to talk about PFI, the operation must be characterized by the effective assumption by the private sector of the economic risk.

To encourage the use of PFI and the culture of public-private collaboration, the British Government has regulated the institution with non-binding legal acts, such as guides, practical notes, recommendations.

¹¹⁵ NICOLAI M., TORTORELLA W., *Partenariato pubblico privato e project finance*, Maggioli editore, 2017, p. 370 e ss

¹¹⁶ CARTEI G., RICCHI M (a cura di) *Finanza di progetto: temi e problemi*, Editoriale Scientifica, 2010, p. 36 e ss

Among the most important PFI guides are those developed by the Treasury Ministry (HM Treasury), concerning, among other things, the standardization of PFI contracts. The European Commission has dealt with the theme of PPP in various documents. With the Green Paper on "PPPs", the Commission launched a public consultation on partnerships and subsequently reported the results of the consultation in a report¹¹⁷. In particular, the PPP operation is characterized by: 1) the relatively long duration of the collaboration; 2) financing of the guaranteed project, even if not necessarily exclusively, by the private sector; 3) the economic operator participates in various phases of the project (not only its implementation, but precisely the design, financing) and the public partner focuses mainly on the definition of objectives and control; 4) there is a precise distribution of risks between the public partner and private partner. Finally, in 2008 it adopted the Interpretative Communication on the application of Community law of public procurement and of concessions to institutionalized PPPs.¹¹⁸ In all these documents the Commission was oriented to identify the characteristics of the PPP phenomenon, to classify it - contractual PPP and institutionalized PPP - and to regulate it. The economic and social benefits of PPP were compared with the traditional methods of building infrastructure and managing related services, in an effort to maximize value for money for

¹¹⁷ RAGANELLI B., FIDONE G., Public private partnerships and public works: reducing moral hazard in a competitive market, *Riv. dir. fin.* 2008, 1, p. 23

¹¹⁸ TRAVI A, Il partenariato pubblico-privato: i confini incerti di una categoria, in M. Cafagno - A. Botto - G. Fidone - G. Bottino (a cura di), *Giuffrè*, 2012, p. 32 e ss

the public sector. However, the restriction of infrastructure credit and public finance constraints have reduced the possibility for Member States to make investments in infrastructure. The PPP appears to be an appropriate tool to be used in this context as expected benefits for both the public sector and the private sector¹¹⁹. In Italy, for example, the latest changes made to the set of rules that characterize the PPP has introduced art. 3 co. 15-ter of the Code of Public Contracts the definition of "private public partnership contracts"¹²⁰. The collaboration between the public and private sectors is not new. The traditional contractual models for the management of the works and services on which the community intervened are the tender (*marché public*) and the concession (*délégation*). Each internal legal system has its own definition of procurement and concession contracts.

It can not therefore be denied that there are difficulties in harmonizing regulatory systems with different legal traditions, but these obstacles must be overcome by virtue of the need to abandon the domestic schemes of each country which tend towards internal protectionism¹²¹. As mentioned in the course of this work, the institute in question is born in the common law countries. The public-private partnership (PPP)

¹¹⁹ COSSALTER P., in *L'esternalizzazione delle gestioni amministrative*, resoconto del Convegno *L'esternalizzazione delle gestioni amministrative* organizzato dall'IRPA (www.irpa.eu) tenutosi presso la facoltà di giurisprudenza dell'Università degli Studi di Siena il 24 novembre 2006, www.ernalizzazioni.it

¹²⁰ COSSALTER P., in *L'esternalizzazione delle gestioni amministrative*, resoconto del Convegno *L'esternalizzazione delle gestioni amministrative* organizzato dall'IRPA (www.irpa.eu) tenutosi presso la facoltà di giurisprudenza dell'Università degli Studi di Siena il 24 novembre 2006, www.ernalizzazioni.it

¹²¹ NICOLAI M., TORTORELLA W., *Partenariato pubblico privato e project finance*, Maggioli editore, 2017, p. 370 e ss

expresses a broader concept than project finance itself, covering a wide range of models of cooperation between the public and private sectors and can be evoked in all those cases where the public sector intends implement a project involving a public work, or public utility, relying on the private sector.

In Italy, private public partnership contracts have found their legislative position in art. 3 paragraph 15 ter, d.lg. 12 April 2006, n. 163, paragraph introduced by the legislative decree 11 September 2008, n. 152 (c.d. corrective third to the Code of Public Contracts). The PPP it has certainly entered a new phase, assuming in a few years importance and value to such an extent that today presents itself as the main way to go to fill the infrastructure gap with the main European countries and to boost economic growth. The progressive emergence of the various forms of public-private collaboration for the realization of works and services of public utility has certainly been favored by the difficulties related to public finance, in the wake of the recent international crisis of the credit system.

The new legislation outlines the concepts of PPPs that were implemented today in practice and contained in various documents. They specified, first of all, that the operating revenues of the economic operator may come not only from the fee recognized by the granting body but also from any other form of economic compensation, such as, for example, direct revenue from the management of the service to external users, thus distinguishing the PPP for the realization of the "cold works" and "hot works". Risk allocation and financial and economic balance are regulated.

In particular, it is recognized that the transfer of risk to the economic operator involves the actual and substantial allocation to the latter, as well as the risk of construction, including the risk of availability or the risk of demand for services rendered, for the period of management of the work. The Green Paper thus draws a macro-distinction on the basis of the degree of involvement of the public sector by identifying two types of PPP: purely contractual PPPs and institutionalized PPPs¹²².

The legal instruments through which a PPP plan can be implemented distinguish, in Italy, the two already mentioned forms of Public Private Partnership: a contractual partnership based exclusively on the contractual links between the parties involved in the operations and an institutionalized partnership that involves the creation of a corporate structure, endowed with legal personality. In the Italian legal system the contractual PPP is explicitly regulated by the d. lgs n. 163 of 12/4/2006 (Code of Public Contracts related to works, services and supplies), while the legislation concerning the institutionalized PPP is contained in Legislative Decree n. 267 of 18/8/2000.

¹²² MARI N., *Il regime dei contratti esclusi e il partenariato pubblica privato*, Ipsoa Milano, 2016, p. 147 e ss.

CHAPTER 2

The role of the European institutions and the systemic impact of the partnerships in the individual Member States.

Since the PPP is considered as the alternative way of public procurement and delivery of public infrastructure and services, it can be justified to be implemented only if there are reasoned arguments that the private entities can optimize investments in public infrastructure. The results highlighted by the European Court demonstrate that the PPP instrument is not used optimally because the legislative instrument that regulates it in different countries is not efficient. Numerous studies emphasize that the necessary condition for the success of these investments lies in the optimization of legislation. A collaborative approach between different countries and the EU could be a winner. The European Court reports that the distribution of risks between public and private partners has often been inadequate. While traditional projects can be divided into lots to attract more bidders, PPP projects require a minimum size to justify the cost of the contract and to facilitate the economies of scale needed to increase the efficiency. Sometimes, however, the enormous scope of a project can reduce the level of competition, since generally few companies have the necessary financial resources to submit offers. In the

case of contracts of very high value, only a few operators (if not a single one) are able to offer all the requested products or services; this would risk placing the contracting authority in a position of dependency.

PPPs supported by EU for the period 2000-14 in millions of euros by country.

	Numer of projects	Total cost	EU contribution	% of EU contribution
Greece	8	6 806	3 301	58,53 %
Portugal	3	2 379	564	10,00 %
France	21	9 856	324	5,74 %
Spain	4	2 422	311	5,51 %
Poland	4	388	272	4,82 %
Germany	14	2 147	254	4,50 %
Italy	6	553	210	3,72 %
UK	3	2 212	110	1,95 %
Belgium	2	686	101	1,79 %
Ireland	3	1 286	81	1,44 %
Lithuania	3	99	40	0,71 %
Slovenia	10	52	36	0,64 %
Croatia	1	331	20	0,35 %
Malta	1	21	12	0,21 %
Estonia	1	4	4	0,07 %
Total	84	29 242	5 640	100,00 %

Source: table prepared by the European Court of Auditors on the basis of data provided by the Commission, EPEC and selected Member States. For the EU contribution, the sources are as follows: ERDF, Cohesion Fund, Marguerite Fund, LGTT, PBI and Jessica.

Funds earmarked for EU-supported PPPs for the period 2000-2014 (millions of euro), by sector.

Sectors	Number of projects	Total cost	%	EU contribution	%
Trasport	24	25 538	87	4 555	81
ICT	28	1 740	6	472	8
Other sectors	32	1 964	7	613	11
Total	84	29 242	100	5 640	100

Source: European Court of Auditors based on data provided by the Commission, EPEC and selected Member States.

With the advent of private participation in public works, infrastructure projects are being developed globally as PPPs, which take many forms, depending on the allocation of risks, ownership of assets developed, and transfer of facilities. Typically financed through project finance structures, “infrastructure projects have economic characteristics such as inelastic demand, near monopoly market structures, relative pricing power; stable operating cash flows, low correlation with traditional asset classes and limited technological obsolescence”¹²³. Given the economic characteristic of infrastructure and the nature of contractual structures in PPPs, one would expect these infrastructure projects to be assessed at relatively lower credit risk than typical corporate finance. It has been argued that “infrastructure projects (and also firms) have stable, predictable, and sustainable income streams and hence low project (or firm) specific risks. Risk analyses of infrastructure assets (stocks) validate the view that infrastructure is a low-risk asset class, but with relatively higher systemic risks”¹²⁴. This reflection is of fundamental importance if we think that one reason for choosing the PPP option is the possibility of spreading risks, according to the principle that they should be supported by the most suitable partner to manage them. The ability to correctly identify and allocate project risks in order to achieve the optimal balance between risk transfer and compensation for the part that supports it is an

¹²³ IYER K., PURKAYASTHA D., Credit Risk Assessment in Infrastructure Project Finance: Relevance of Credit Ratings, *The Journal of Structured Finance*, 2017, p. 17 et ss.

¹²⁴ GREILING, D., Public-Private Partnerships - A Driver for Efficient Public Services or just an Example of Wishful Thinking, *Journal for Public and Nonprofit Services Supplement* 37, 2009, 108-125

essential factor for the success of a PPP. Non-optimal risk-sharing agreements may reduce incentives for the private partner or increase project costs and decrease benefits for the public partner¹²⁵. Normally, PPPs are expected to seek to maximize their benefits by combining and exploiting the respective strengths of public and private competences. In this way, they should ensure a better quality of infrastructure and services and stimulate the search for innovative solutions in the provision of public services. The applicable EU strategies and regulations allow the use of PPPs as a potentially effective means of creating infrastructure projects. In addition to perceived benefits PPPs have potential problems. The danger of the organization failing to 'learn' from past experience and so repeating mistakes of the past or 'reinventing the wheel' due to a lack of corporate 'memory'¹²⁶. The preceding thoughts show how an important reflection on the PPP is current and important given the period of economic stagnation that is felt in Europe. The Court¹²⁷ itself found that the PPP option was often chosen without a sufficiently strong analytical basis. For most of the projects audited, no comparative analysis, such as the Public Sector Comparator, was carried out to show that the PPP guaranteed the best cost / benefit ratio or to protect the public interest by ensuring a level playing field with other methods of contract. The

¹²⁵ Special Paper, Parteneriati pubblico – privato nell'Ue: carenze diffuse e benefici limitati, available su www.eca.europa.eu, p. 40 e ss

¹²⁶ MCQUAID R.W., SCHERRER W., Changing reason for public-private partnerships (PPPs), Public Money & Management January 2010, II, 27 e ss.

¹²⁷ Special Paper, Parteneriati pubblico – privato nell'Ue: carenze diffuse e benefici limitati, available su www.eca.europa.eu, p. 40 e ss

importance of PPP has led to the creation of a range of international institutional instruments that assist government in successful implementation.

Tabella 4. International institutional structures of support of ppps. Source Sudarieva et al. 2017

Insitution	Purpose of creation and functions
UNECE international PPP CENTRE	Created for the following purposes: identification of the best global PPP practices, assisting governments in successful implementation of best practices, ensuring the exchange of PPP experience between experienced countries
Eropean PPP expertise centre	Created according to the joint initiative of the European Investment Bank, the European Commission and the member states and candidate states
The National Council of For Public – Private Partnerships	Federal platform, created in 1985 for comprehensive support and development of PPP
PPP in Infrastructure Resoruce Center	Created at the initiative of the World Bank with the involvement of funding of the Public-Private Infrastructure Advisory Facility (PPIAF) and the Norwegian Trust Fund for Private Sector and Infrastructure (NTF-PSI).
International Project Finance Association	Created in 1998 with the aim of facilitating dialogue between government partners from different countries and business representatives – potential private partners, providing advisory support, training and organizing international events to promote PPP projects
Europea forum PPP	Created at the basis of the European Institute of Public Administration, EIPA in order to increase qualification of workers of public bodies and establishments
Programme devolPPP	Is simultaneously implemented by several organizations German cooperation for the sake of development DEG (German Investment Agency), GIZ (German Agency on International

	Development) and sequa gGmbH (Private Implementation Partner).
Programme of the development of public – private partnership of USAD	<p>The task is to accomplish the following tasks: mobilizing funding, technical assistance, advisory support, dialogue between government partners, international organizations and the private sector for the purpose of organizing successful PPP projects</p> <p>The purpose of the Program is the development of public-private partnership in Ukraine by means of assisting the government of Ukraine at the national and local levels. The Ministry on Economic Development and Trade of Ukraine has been cooperating with the Program of the development of public-private partnership of USAD since 2010</p>

CHAPTER 3

Practical uses and economic value of partnership projects.

From the “traditional” PPP to the “institutional” PPP.

In the 1990s the “counterpart available” were the local manufacturer and the “elite” entrepreneur at the national level. The current economic dynamics impose a change and an openness in terms of collaboration that goes beyond national borders and involves subjects able to provide capital in a more consistent way. In this sense, partnership projects should be characterized by the presence of institutional investors, ie subjects that can move large sums of money. Only in Italy pension funds, pension funds, banking foundations and insurance companies that have

about 1,000 billion euros of assets¹²⁸. These are now, internationally, investors in infrastructure funds, managed by regulated and supervised operators as savings managers. We have thus moved from public-private partnerships to public-institutional or social-public partnerships. Privatizations, especially in those economies characterized by a strong presence of the State in the management of essential public services, have solved the problems linked to the maintenance of goods and services.

The need to raise funds for the projects it has always clashed with current financial crises and consequent reductions in public spending, thus paving the way for investment private. Code of public contracts said that there are different types of partnership depending on the works to be carried out. The first, most common, form of PPP concerns the provision of and/or operation of infrastructure. Building infrastructures is a very complex task that must progressively involve, as already mentioned, the collaboration between the public and private sectors, where private investors are institutional investors. Thus we move on to an enlarged PPP model, extended to private but social or institutional operators, transparent and responsible, and therefore suitable for convergence solutions of public and private interests. A not easy transition that requires coordinated interventions at different levels: from the legislation on the uses of institutional investors to that of asset management; from the discipline of tenders and concessions to that of the credit sector; from the fiscal one to the regulation of the single sectors of possible

¹²⁸ FRANSEN L, DEL BUFALO G., REVIGLIO E., Boosting investment in social infrastructure in Europe, 2018, Discussion paper, 074, p. 50 e ss

intervention. An opening to an institutionalized PPP must generate a process. McKinsey¹²⁹ estimates the global need for new infrastructure investments of 20 trillion dollars by 2030. The economic effort to fill the gap is certainly not to be considered feasible without a modification and an opening to institutional subjects able to provide resources that the individual entrepreneur or group of companies can not support. It is also necessary to change the types of contracts and works that can be funded through partnership projects. The public sector contracts to purchase services on a long-term basis, so as to take advantage of private sector management skills and also to provide an incentive for the private sector by incorporating a risk element in the private finance. This type of PPP includes concessions and franchises, where a private sector partner takes on the responsibility for providing a public service, including maintaining, enhancing or constructing the necessary infrastructure. The most common arrangements are PFI contracts, often involving the design, build, finance and operation (DBFO) of a particular asset, such as a hospital, school or road. We are therefore referring to what is called PPP intended to give substance to works defined as "calde". The difference between the "hot" and "cold" typologies of the PPP lies in the source of revenues: in the PPP as a concession model, projects have an intrinsic capacity to generate income, for which the remuneration of private individuals derives mainly from user revenues. This is the case, for example, of motorways, bridges, sports centers and cemeteries.

¹²⁹McKinsey, New Climate Economy's 2014 report available on <http://static.newclimateeconomy.report/>

Consequently, more complex contracts are needed to govern these projects. A complex contract "has the advantage of arranging many different things, but its disadvantages include that it is costly to draft (because a lot of information and negotiation is needed), it is less flexible and it will lead to high transaction costs for monitoring and implementation. The second category of PPP is concerned with the introduction of private sector ownership into state-owned businesses. This involves a range of possible structures including a stock market flotation, or the introduction of a strategic partner, or with the sale of either a majority or a minority ownership stake to the private sector¹³⁰. The third type of UK PPP is generating commercial value from public assets, such as selling government services into wider markets, and other partnership arrangements where private sector expertise and finance are used to exploit the commercial potential of government assets. Both these types that fall into the cataloging of "cold" works constitute the type more innovative than PPP, they include projects in which the private partner directly provides services to the public administration (PA).

Is important the accounting method for PPP operations, indications are provided by Eurostat which sought to clarify the methods of accounting on-off balance in public budgets, in relation to the allocation of risks between the parties. The Eurostat indications concern the accounting treatment in the national accounts of contracts signed by public bodies in the context of operations in PPP. A particularly delicate situation is one

¹³⁰ MCQUAID R., SCHERRER W., Changing reason for public-private partnership (PPs), PUBLIC MONEY & MANAGEMENT JANUARY 2010, p. 27 e ss.

in which the financial risk is a component of the construction risk, weighs indirectly on the administration due to the activation of one financial guarantee or when, at the end of the concession, the payment to the private person of a considerable value of the reversion of the work public, paid directly or simply "guaranteed" by the PA. The guarantee partial or total funding, issued by the PA to make more easy access to the credit market and reduce the cost of money, not they alone would be sufficient to result in the on balance classification. Another cause of classification on balance of the operation would be attributable to the presence of guarantees on a certain level of return of the capital independent of the dealer's performance or level of the question. With reference to the level of public funding, finally, if the cost of capital is mainly covered by the PA this could indicate that the project does not have market confidence and is feasible only if the administration assumes most of the risks¹³¹. For the administration the on balance classification would result. The allocation of various types of risk is important argument in a PPP contract, in accordance with articles 3 and 180 co. 3 of the Code, the transfer of risk to the economic operator involves the allocation to the latter the operational risk, the risk of constructing the Code, the risk linked to the delay in delivery times, the non-compliance with project standards, the increase in costs, technical problems in the work and the failure to complete the work ; - the risk linked to the concessionaire's ability to provide the agreed contractual services, both in terms of volume and expected quality

¹³¹ PISANI M. , Un principio contabile per i beni in concessione, Milano: Franco Angeli, 2002, p. 158 e ss.

standards; - in the case of profitable external activity, the risk associated with the different volumes of demand for the service that the concessionaire must satisfy, or the risk associated with the absence of users and therefore of cash flows. Construction projects manifest more risks than do other industries. The success of a project management exercise depends very much on the extent to which the risks involved can be identified, measured, understood, reported, communicated and allocated to the appropriate parties. And in fact, the failure to allocate ex ante risks and an ineffective monitoring of the post-award phase, especially as regards the permanence of the risks transferred to the private partner, can undermine the added value expected from the involvement of capital. and private competence in the realization and management of public affairs. Transfer of risks to the private sector comes at a price and improper allocation of risks among stakeholders may lead to higher than necessary prices. If risks rest inappropriately with the public sector, government would raise taxes or reduce services to pay for its obligations when the risks materialize. In contrast, if risks rest inappropriately with the private sector, excess premiums would be charged to the government or even directly to the end users. From a strictly financial point of view project finance has been defined as raising of funds on no recourse or limited recourse or as structured financing of a specific economic activity through an SPV to finance economically separable capital investment projects in which the providers of funds look primarily at the cash flows from the project to service loans and provide return on equity. In addition to cash flows, project assets may be

used as collateral.

CHAPTER 4

The PPP contract : the importance of a standard contract and its possible applications.

The purpose of the standard PPP contract is to regulate the PPP operations, regarding social infrastructure based on an availability fee. Considering the excessive gap between existing infrastructures and actual needs (many of them cold works), the PPP has been re-evaluated as a valid tool for the realization of the latter. Especially if you want to encourage the intervention of institutional investors. Given the nature of these investors, it is necessary to regulate the PPP and also to issue a standard contract. The objective is to incentivize and sustain investments in infrastructures, protecting public finance at the same time. This contract scheme, although it can be assessed in a positive way for the re-launch of investments in infrastructures, at the same time if it was judged negatively by investors it would end up slowing down investments with further negative consequences. In order to involve institutional investors, it is necessary to make the risks and characteristics of the transactions compatible with the institutional investment functions.

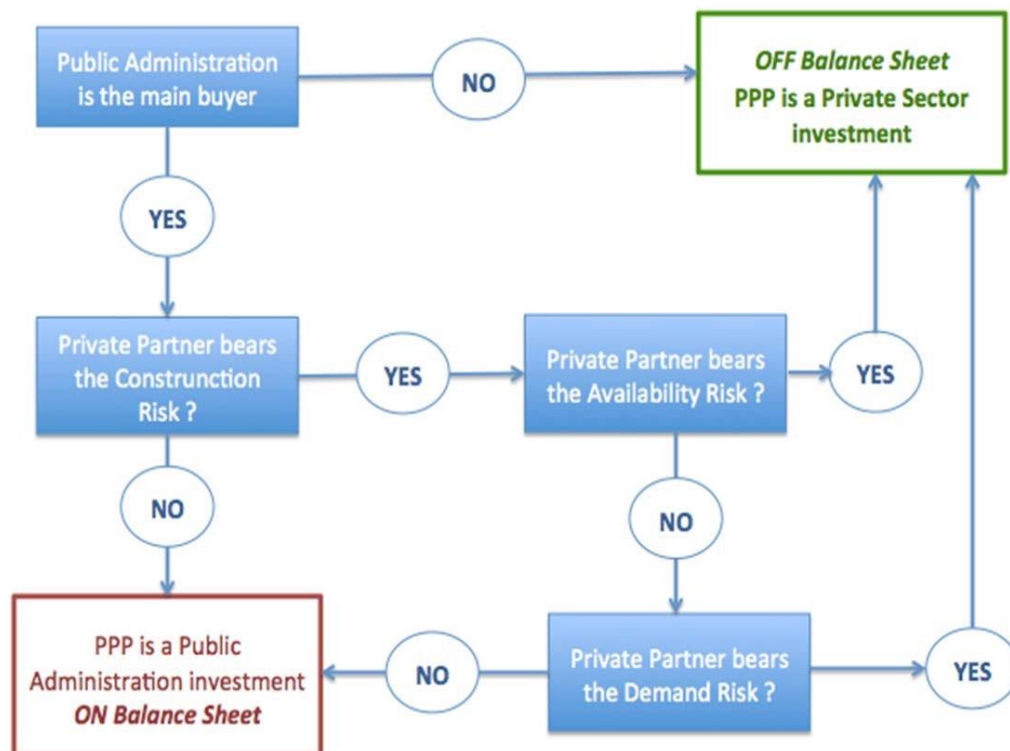
The main concerns in drafting the contract outline include:

- Avoiding that the use of the PPP is motivated essentially by the need to draw the budgetary constraints imposed by the internal stability pact.

Investment projects financed under PPP contracts can generate liabilities or debt for government. The financing may be on or off government's balance sheet, with or without direct impact on government deficit and debt. On a general level, statistical and accounting criteria determine whether the financing of a specific project is on the government's balance sheet. In broad terms, these criteria state that if the government bears the construction risk, then the PPP should be on the government's balance sheet regardless of the allocation of the demand and availability risks. On the other hand, if the private partner is the institution bearing the construction risk, then the financing should be classified as being off the government's balance sheet unless the government bears both the demand and the availability risks¹³². There is the possibility to report the works on-balance sheet only under the conditions , illustrated by Eurostat.

¹³² FRANSEN L, DEL BUFALO G., REVIGLIO E., Boosting investment in social infrastructure in Europe, 2018, Discussion paper, 074, p. 50 e ss.

Tab. 5. Statistical treatment of PPP contracts. Source Fransen et al, 2018



- The decision to create a contract for the concession of cold works to be implemented in PPP derives from the need to correctly

allocate the risks inherent in PPP operations. Increase control in order to prevent private parties from rejecting excessive risks to the public with the aim of increasing their profits.

This can be remedied by identifying a central advisory unit, similar to that provided for by the Juncker Plan and then by InvestEU, which is able to assist local authorities in the management of PPP operations.

To evaluate the possibility of constituting a real independent authority of the PPP.

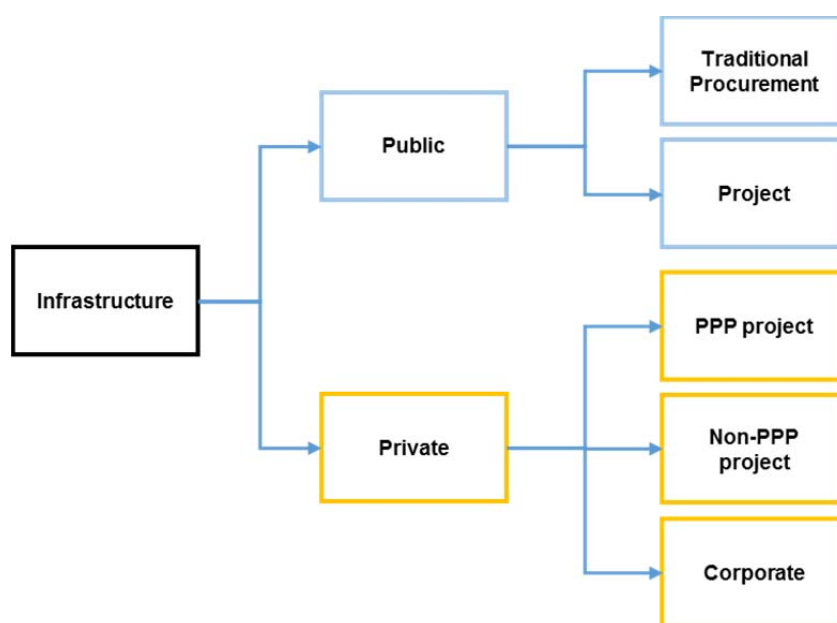
It is necessary to obtain not only positive results in terms of bankability, but also results in terms of eligibility, reducing the obstacles that prevent the use of forms of financing other than banks.

And to do this, it is crucial to reduce the risks of operations that are the real barrier for institutional investors. Additionality must be considered. Since now in all the works we must also consider the secondary impacts and not only the direct impacts, or the externalities that are reflected in the social-environmental system.

Finally invest in infrastructure could be a good idea for institutional investors. Economic infrastructure can largely repay its costs with the cash flow it produces. In the utility sector, independent regulatory authorities guarantee stable returns and moderate risks. Social infrastructure, which needs almost full payment by the public sector, is characterised by predictable and steady real returns which are usually attractive for investors. Therefore, economic infrastructure and social

infrastructure have similar features, although they differ in some relevant characteristics, offering investors opportunities to diversify¹³³.

Graph 2. Financing social infrastructure. Source Elti 2017



CONCLUSION

If we consider the public investments in Italy the reduction in the 2008-2016, amounted to around 8 billion euro, from 37 billion in 2008 to 28 billion in 2016, valued at current prices. It is difficult for the situation described to change radically in the coming years. This means that partnership projects must be able to shake the economy of our country as they could be a good opportunity to boost employment, the economy in

¹³³ Special Paper, Parteneriati pubblico – privato nell’Ue: carenze diffuse e benefici limitati, available su www.eca.europa.eu

general and above all provide the country with a sufficient amount of infrastructure to guarantee citizens goods and services. It must also be said that the analysis of the European Court of Auditors within several States has shown that the Court found that the PPP option was often chosen without an analytical basis sufficiently robust. For most of the projects audited it was not carried out any comparative analysis, such as the Public Sector Comparator, to prove that the PPP guarantees the best cost / benefit ratio or to protect the public interest ensuring a level playing field with other procurement methods. The combination of new technologies (as in the ICT sector) with long-term contracts has not been managed always in a careful manner, since the public partners have had to keep a valid onecontract even if the rapid evolution has caused technological obsolescence. This last point is definitely the weak point especially for investments that require a very substantial outlay of resources. For this reason, it was stressed above all in the fourth chapter of this paper how partnership is above all indicated for works of small dimensions but which can change the fate of entire communities. In this regard, it is emphasized that the European Investment Plan (known as the Juncker Plan) can be summarized in few words: it is the attempt to use private savings to finance investments with a high risk, thus avoiding to produce new ones public debt. The Plan represents a significant change in the paradigm in terms of financing public investment. The presence of private investors is likely to result in preselecting and discarding inefficient projects in terms of allocation, as private investors are generally very large attentive to their own convenience assessments. Because the

competition between projects is based exclusively on merit, those will have to be evaluated and selected by the individual countries projects with an effective high rate of financial and economic profitability. The participation of private individuals, on the other, should act as a deterrent to any one manipulation made during the evaluation exercise. It can support public financing of infrastructural projects and evaluation techniques can emerge that are aimed at improving the development processselection and selection of interventions. There is a positive dynamic that providesthat the private invest not only if it earns, but even if the key data of the project (demand, costs, etc.) are considered reliableand verifiable with sufficiently solid forecasting models. Furthermore, there are aspects which can be developed and integrated into the economic analysis of projects, like risk analysis. Secondly, much of the instrumentation used in the Plan could beusefully repeated in the Italian case. A single national evaluation center, like this how the Plan has provided for an Investment Committee at European level.

