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THE TROUBLED DEVELOPMENT OF THE PUBLIC-PRIVATE PARTNERSHIP IN THE ITALIAN ADMINISTRATIVE LAW. ITS PERSISTENT RELATION WITH THE NOTION OF ECONOMIC RISK AND CRITICAL REFLECTION ABOUT THE PROPER IMPLEMENTATION OF THE IDEA OF FLEXIBILITY

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PARTE SPECIALE

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THE TROUBLED DEVELOPMENT OF THE PUBLIC-PRIVATE PARTNERSHIP IN THE ITALIAN ADMINISTRATIVE LAW. ITS PERSISTENT RELATION WITH THE NOTION OF ECONOMIC RISK AND CRITICAL REFLECTION ABOUT THE PROPER IMPLEMENTATION OF THE IDEA OF FLEXIBILITY

The purpose of this work is to provide an analysis of the patterns of collaboration between the public and private sectors in relation to the stringent financial obligations imposed to administrations and the analysis takes into account both contractual and corporate-based *PPPs*.
In this perspective, the *PPP* is a solution that public administrations can take advantage of, in relation to the many benefits provided by the current rules, both in terms of respect for public finances and optimal allocation of risks between administration and firms.
Specifically, the investigation is focused on the notions of flexibility and economic risk, to provide a legislative and interpretative framework that takes into account the objectives that administrations must achieve, especially with regard to infrastructure development.

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1. An unstable model and a broader preamble. Collaborative templates between domestic resistance and hybrid choices.

This work aims to provide a contribution to the study of the *PPP* model, as a privileged tool for public-private collaboration in infrastructure development, in the light of the current Code of Public Contracts, but not limited to.

Specifically, the investigation aims to analyze this mode of cooperation in the light of the general principle of flexibility of administrative action and from the perspective of risk allocation, even in the event of insolvency of the so-called *PPP* in corporate form; the premises will be broader and intend to provide a more comprehensive framework in this regard.

The continuous and permanent instability of the Italian legal framework in order to award public services makes it difficult to adquire a detailed knowledge about the different ways in which the public service itself is handled (1).

The efforts aimed at gaining a detailed and clear view of this issue collide with the so-called legilsative stratification (2), long transitional regime for some provisions (that, sometimes, became permanent) and a general uncertainty, both for public administrations and firms.

However, the transversal importance of the public procurement market is undeniable, from multiple perspectives, including the possible use of this market for a revival of the national and European economy, also through negotiated procedures for the infrastructural and strategic recovery (3).

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(1) F. Merusi, *I servizi pubblici instabili*, Bologna, 1990, noted that the notion and the legal framework of the local public services were unsettled, this definition was quoted by M. Dugato, *L'imperturbabile stabilità dei servizi pubblici e l'irresistibile forza dell'ente pubblico*, in *Munus*, 2012, p. 505. About the instability in the field of public services, with particular regard to in house providing, that will not be analyzed here, see C. Ialone, *Gli equilibri instabili dell'in house providing fra principio di auto-organizzazione e tutela della concorrenza. Evoluzione o involuzione della giurisprudenza comunitaria*, in *Giust. civ.*, 2006, p. 13 ff. and G. Marchegiani, *Gli affidamenti in-house e la sindrome del cavallo a dondolo. Sentenze a confronto*, in *Giust. amm.*, 2005, p. 511 ff.; from an analytical point of view, please refer to L.R. Perfetti, *Modelli di affidamento del servizio nei trasporti pubblici locali*, in F.A. Roversi Monaco - G. Caia (eds), *Il trasporto pubblico locale. Principi generali e disciplina di settore*, Napoli, 2018, p. 91 ff., that highlights the negative management results and the poor quality of the service provided, apart from the kind of operation preferred.

(2) For a complete analysis, please refer to B.G. Mattarella - M. Clarich, *Leggi più amichevoli: sei proposte per rilanciare la crescita*, in *Diritto e processo amministrativo*, 2011, p. 399 ff.

(3) Please refer to A. Pajno, *La nuova disciplina dei contratti pubblici tra esigenze di*

The thematic can be studied from different perspectives and the chosen angle of research affects the way of perception of a multiform and heterogeneous legal phenomenon and, as such, subject to various interpretations.

It is appropriate to clarify right out of the gate that the investiagation carried out here does not analyse the articulated relations and the complex balance between public auhority and firms in general (4), but intends to carry out further assessments with regard to the issue of public-private partnership (5) (*PPP*), with a particular focus about the notions of economic risk and flexibility.

The present assessment can start with food for thought, that will be developed over the course of the analysis, on the basis of article no. 166 of the current Public Procurement Code, entitled *Principle of free administration for public authorities*, under which the procuring entities are free to choose the private concession holder and to decide the best way to handle the execution of public works and executing services of general interest in order to ensure a high level of quality, safety and the promotion of basic rights for private users (6). But then again, it is undeniable that the administrative decisions, especially in the early stages of the procedure, produce economic and treasury effects, also and above all in view of the role

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semplificazione, rilancio dell'economia e contrasto alla corruzione, in this *Journal*, 2015, p. 1134 ff.; L. Torchia, *La nuova direttiva europea in materia di appalti servizi e forniture nei settori ordinari*, in *Dir. amm.*, 2015, p. 291 ff.; L. Torchia, *Diritto ed economia fra Stati e mercati*, Napoli, 2016.

(4) Recently, F. Sciarretta, *Verso nuovi equilibri tra potere pubblico e consenso sociale nell'amministrazione in movimento*, in *Dir. econ.*, 2017, p. 421 ff., noted that the wide dissemination of hybrid legal figures with an equivocal legal status caused a weakening of the speciality of the classical administrative rules. The distortion of the traditional categories and the gradually growing of the fragmentation of the legal type used makes it difficult to deepen this issue; please refer also to F. Benvenuti, *Per un diritto amministrativo paritario*, in *Studi in memoria di Enrico Gucciardi*, Padova, 1975, p. 807 ff., now in *Scritti giuridici*, IV, Milano, 2006, p. 3223 ff.; F. De Leonardis, *Soggettività privata e azione amministrativa. Cura dell'interesse generale e autonomia privata nei nuovi modelli di amministrazione*, Padova, 2000; A. Maltoni, *Il conferimento di potestà pubbliche ai privati*, Torino, 2005.

(5) In these terms, precisely with the Anglo-Saxon wording, see the analysis of M. Cammelli, *Società pubbliche* (encyclopedic voice), in *Enc. del Dir.* (Annali, V), Milano, 2012, p. 1190 ff., that noted that the partnership model is used for the management of local public services and for the performance of activities instrumental to the local authority.

(6) E. Mauro, *La giurisprudenza di Lussemburgo sul richio gestionale quale criterio dicrestivo tra concessioni e appalti*, in this *Journal*, 2011, p. 1183 ff., there is a general obligation to put public tenders out to tender, in accordance with transparent and non-discriminatory principles, but the grantor (i.e. the public administration) is free to choose the most appropriate procedure, according to the characteristics of the sector concerned by the invitation to tender.

as guarantor of the public administration, that must lead to informed choices but it must not dissuade from using *PPP* models (7).

Although this article (article no. 166 mentioned) only refers to the concession contracts, this paper tries to provide some indications in order to float the theory of the substantial equivalence between the various ways in which the public administration can handle public services (procurement contracts, in house providing, public-private partnerships), even in the light of certain indications of the case-law developed by the Regional Administrative Courts (8).

Among other things, the provisions contained in the articles no. 3 and 181 et seq. would allow to bring new subjects of study to the investigations about the atypical nature of the public contracts (9).

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(7) Especially on this aspect, see M. Ricchi*, Le scelte della pubblica amministrazione: gli affidamenti, i contratti di ppp ed i poteri di revoca*, in G.F. Cartei - M. Ricchi (eds), *Finanza di progetto. Temi e prospettive*, Napoli, 2010, p. 28 ff., the multiplication of the procedural solutions is a necessary countermove in compliance with the complexity of market, marked by a constant inclination to financial and contractual innovation. Neverthless, there are some overall criteria that can lead administrative choices, including the nature and the complexity of the agreement, the ability to trade the essential aspects of the contract, the administrative interest in order to verify a possible market interest for the work; C. Giorgiantonio - V. Giovanniello, *Infrastrutture e project financing in Italia: il ruolo (possibile) della regolamentazione*, in *Banca d'Italia* (*Occasional paper no. 56*), 2006, p. 27 ff.; M. Cafagno, *Lo Stato banditore. Gare e servizi locali*, Milano, 2001, p. 45 ff., the European system did not use the same degree of detail and specificity to regulate all the tools of public trading. All the different tender procedures have one thing in common, that is the prior expression of the administration's desire followed by an impartial comparison of the tenders; M. Cafagno, *Vincoli di gara e affidamenti concessori nel diritto europeo*, in G.F. Cartei - M. Ricchi (eds), *Finanza di progetto. Temi e prospettive*, Napoli, 2010, p. 395 ff., the Italian interpretative practice showed a very significant propensity to a tightening-up of the administrative choices. In other words, the European legislator showed a clear favour for a sort of procedural ductility and it stands in clear contradiction to the strict comparative mechanism of the Italian administrative tradition. This heterogeneous set of rules is the culmination of two regulatory bodies with different roots and properties, namely accounting rules that are designed to ensure the proper management of public money and the European disposition aimed at manning freedom of competition; G. Della Cananea, *Economic crises and public law*, in *Italian Journal of Public Law*, 2011, p. 1 ff.; F. Merloni - A. Pioggia (eds), *European democratic institutions and administrations. Cohesion and innovation in times of economic crisis*, Berlin, 2018, p. 34 ff.; G. Napolitano (ed), *Uscire dalla crisi. Politiche pubbliche e trasformazioni istituzionali*, Bologna, 2012, p. 7 ff.

(8) *Ex multis*, T.A.R. Marche, Sec. I, 5 June 2017, judgment no. 434, in *Foro amm.*, 2017, p. 1373.

(9) About this issue, see M. Dugato, *Atipicità e funzionalizzazione nell'attività amministrativa per contratti*, Milano, 1996, p. 2 ff., the administrative action made in the form of atypical contracts could potentially be in contradiction with the typical features of the administrative action in general; see S. Romano, *Autonomia privata*, in *Scritti in onore di Francesco Messineo*, Milano, 1959, p. 327 ff., now in *Scritti minori*, vol. II, Milano, 1980, p. 541 ff.; for a general overview, see C. Beduschi, *A proposito di tipicità e atipicità dei contratti*, in *Riv. dir. civ.*, 1986, p. 351 ff., the lagality of the contractual template is not essential for its typical characteristics, but it is necessary to assess the interior consistency of the relationship. In other words, the contractual type leads back to the idea of recurrence and to the coexistence of differences and identities; R. Sacco, *Autonomia contrattuale e tipi,* in *Riv. trim. dir. proc. civ*.,

The theme is very broad and it cannot be examined here, but it should be noted that the rule of law and the principle of the typical features of administrative action are connected, but they are autonomous (10).

This potential friction can be crossed through a shared observation, according to which the typical features of administrative action as to be respected only with regard to the administrative action carried out by authoritative measures (11).

In order to enter into the core of the investigation, it should be noted that this essay aims to analyze the current conformation of the Italian public-private partership model having regard with the central role and the polysemy of the concept of economic risk and taking into account of the pursuit of the (presumed) value of flexibility, perpetually used as a slogan when we talk about public negotiations.

The development of this contractual model is extremely appropriate in the debate about the deconstruction of the legal categories known by the Italian administartive law (12).

First of all, it is necessary to point out that this multi-faceted collaborative model goes far beyond the construction of public works or the award of local public service.

For example, in a broad sense, the agreements concluded in order to govern the territory, that is, the implemeting instruments for the urban planning regime, can be considered as public-private partnerships deals (13).

1966, p. 787 ff.; on the subject studied here, see R. Di Pace, *Partenariato pubblico privato e contratti atipici*, Milano, 2006, p. 98 ff.; EPEC, *The guide to guidance - How to prepare, procure and deliver PPP projects*, 2011, available on *www.eib.org/epec.*

(10) On the subject, see L. Vandelli, *La potestà amministrativa regionale e i relativi controlli*, in L. Vandelli - S. Bartole - F. Mastragostino (eds), *Le autonomie territoriali*, Bologna, 1988, p. 252 ff.

(11) See D. Sorace, *Promemoria per una nuova 'voce' "atto amministrativo"*, in *Scritti in onore di Massimo Severo Giannini*, vol. III, Milano, 1988, p. 759 ff.; G. Pastori, *Discrezionalità amministrativa e sindacato di legittimità*, in *Foro amm.*, 1987, p. 3165 ff.

(12) About this evolutionary parable, see the analysis carried out by M. Clarich, *I modelli contrattuali*, in this *Journal*, 2017, p. 414 ff., that notes that on the basis of an analysis of the past and present of public contracts in Italy there is still a persistent mentality of the culture of strict rules and procedures that has always characterized the Italian legal system.

(13) On this topic, see F. Pellizzer, *Gli accordi pubblico-privato nel governo del territorio*, in F. Mastragostino (ed), *La collaborazione pubblico-privato e l'ordinamento amministrativo. Dinamiche e modelli di partenariato in base alle recenti riforme*, Torino, 2011, p. 131 ff., the so-called urban development agreements raise question linked to general fungibility of the administrative authorities with agreements between a private subject and the public administration; moreover, the enforcment of zoning tools can be achieved by means of creation of a processing urban company, governed by the article no. 120 of the Legislative Decree no. 267 of 18 August 2000, on this issue, see M. Dugato, *Oggetto e regime delle società*

In the same way, in the paperwork drawn up by the United Nations, the public-private partnership is a stepping stone to achieve the objective of a balanced and sustainable development, from a social and economic point of view (14).

The entire investigation must start with a broader premise — which obviously cannot be exhaustive — about both adjectives, private and public, which characterise the subject-matter of the survey, that is the partnership, intended as a cooperation prolonged in time. This issue is exterminated and has been addressed in its all possible shades, but here the reference is made to an essential and unsurpassed encyclopedic item (15).

The distinction between public and private should not be read in terms of antithesis because otherwise there is a danger of undermining the unitary conception of the whole legal system. However, it cannot be denied that there is a distinction that allows to read the

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di trasformazione urbana, in *Dir. amm*., 1999, p. 511 ff.; C. Vitale, *Società di trasformazione urbana e riqualificazione urbana nell'urbanistica per progetti*, in *Dir. amm.*, 2004, p. 591 ff.; L. Zanetti, *Le società a partecipazione pubblica nel governo del territorio*, in M. Cammelli - M. Dugato, *Studi in tema di società a partecipazione pubblica*, Torino, 2008, p. 331 ff.

(14) See J. KS - A. Chowdhury - K. Sharma - D. Platz, *Public-Private Partnerships and the 2030 agenda for sustainable development: fit for purpose*, in 148 *DESA (Department of Economic and Social Affairs) Working Paper* (2016), p. 4 ff.

(15) S. Pugliatti, *Diritto pubblico e diritto privato* (encyclopedic item), in *Enc. Dir.*, Milano, 1964; with specific reference to public contracts, see F. Franchini, *Pubblico e privato nei contratti pubblici*, in *Riv. trim. dir. pubbl*., 1962, p. 221 ff.; F. Galgano, *Pubblico e privato nella qualificazione della persona giuridica*, in *Riv. trim. dir. pubbl.*, 1966, p. 279 ff.; A. Barettoni Arleri, *Dalla procedimentalizzazione del contratto alla contrattualizzazione del procedimento*, in *Studi in memoria di Franco Piga*, Milano, 1992, p. 135 ff.; about the contradiction of this dichotomy, see M.S. Giannini, *Le imprese pubbliche in Italia*, in *Riv. soc.*, 1958, p. 232 ff.; on the elements and the reasons of crisis of the traditional model of public administration, see G. Pericu, *Verso nuovi modelli giuridici nel rapporto pubblico-privato*, in E. Samek Lodovici - G.M. Bernareggi (eds), *Pubblico e privato: cooperazione ed organizzazione tra privati ed enti locali nelle aree urbane*, Milano, 1990, now in *Scritti scelti*, Milano, 2009, p. 614 ff.; with specific reference to the management of local public services, please refer to F. Liguori, *Notazioni sulla presunta fine del dualismo tra pubblico e privato*, in *www.giustamm.it*, 2014; C. Franchini, *Pubblico e privato nei contratti della pubblica amministrazione*, in C. Franchini - G. Tedeschi (eds), *Una nuova pubblica amministrazione: aspetti problematici e prospettive di riforma dell'attività contrattuale*, Torino, 2009, p. 4 ff., contracts entered into by the public administration are characterized by strong ambiguity, with a dual soul, one private and one public; on the subject of the relationship between public and private, the following reflections are current, A. Orsi Battaglini, *Fonti normative e regime giuridico del rapporto d'impiego con enti pubblici*, in *Giorn. dir. lav. Relaz. Ind.*, 1993, p. 461 ff.; G. Rossi, *Pubblico e privato nell'economia di fine secolo*, in *Le trasformazioni del diritto amministrativo. Studi degli allievi per gli ottanta anni di M.S. Giannini*, Milano, 1995, p. 226 ff.; for an analysis in the health sector, see C.E. Gallo, *Pubblico e privato nel Servizio sanitario nazionale: i presidi sanitari privati*, in *Sanità pubblica*, 1997, p. 357 ff., the coexistence of public and private interventions in the health sector is a trait that goes back to the Italian health system, which has often been a laboratory for public administration reforms; F. Trimarchi Banfi, *Pubblico e privato nella sanità*, Milano, 1990.

relations between public and private in terms of dynamic and necessary synthesis (16).

This brief, but authoritative inputs will be included again in the course of the investigation, but they clarify the standpoint of the research, that highlights the tension between public and private, even if referring to specific hypothesis.

That pattern of administrative action enables to make a brief mention to two issues of crucial importance, namely the administration for results and the consensus-based administration.

In the first sense, at the planning stage, the nature of the risks related to the action that must be carried out is used in order to draw up the document on the economic and financial feasibility and, above all, in order to verify the convenience of the recourse to *PPP* instead of the public procurment. Programming, especially if it is pursued for projects, is the cornerstone of the administration for results (17).

With regard to the second approach, into the so-called consesus-based administration, in which the issue investigated falls within, administrative capacity must be replaced by a new form of responsibility, because administrative coordination must be supplemented by comparisons between the parties in order to detect any eventual responsability, over and above the legislative framework (18).

The issue under investigation represents one of the most studied topic in the so-called « *nouvelle vague* » (19) of the European public

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(16) S. Pugliatti, *Istituti del diritto civile*, I, Milano, 1943, p. 1 ff., this distinction must have only internal status, because it is necessary to underline the elements of difference and to reveal the set of elements of identity; W. Cesarini Sforza, *Il diritto dei privati*, Milano, 1963, 103 ff., according to which, one of the distinctive criteria can be identified in the interest protected by the law; on this subject, reference is made to the unsurpassed considerations developed by M. Santilli, *Il diritto civile dello Stato. Momenti di un itinerario tra pubblico e privato*, Milano, 1985, 31 ff.; M. Giorgianni, *Gli attuali confini del diritto privato*, in *Riv. trim. dir. proc. civ.*, 1961, p. 361 ff.

(17) Please refer to G. Pastori, *Pluralità e unità dell'amministrazione*, in G. Marongiu - G.D. De Martin (eds), *Democrazia e amministrazione. In ricordo di Vittorio Bachelet*, Milano, 1992, p. 99 ff., administrative planning is no more generic, but it is carried out through the definition of specific and precise goals.

(18) See F. Pugliese, *Nuove regole e nuova responsabilità. (Anche) per gli appalti e la gestione di lavori, servizi, forniture*, in Id, *Sull'amministrazione consensuale. Nuove regole, nuova responsabilità*, Napoli, 2013, p. 6 ff.; G. Berti, *La responsabilità pubblica. Democrazia e amministrazione*, Padova, 1994, p. 277 ff.

(19) From a comparative point of view, see G. Cerrina Feroni, *Il partenariato pubblico-privato nelle esperienze del Regno Unito e della Germania: alcune indicazioni per le prospettive di sviluppo dell'istituto nel'ordinamento italiano*, in *Munus*, 2011, p. 317 ff.; J. Broadbent - R. Laughlin, *Public-private partnerships: an introduction*, in 16 *Accounting, Auditing & Accountability Journal* (2003), p. 332 ff., this terminology was first introduced in the United Kingdom in 1997, prior to this, other arrangements of a similar collaborative form of engaging the private sector fell within the private finance initiative, whis was introduced by the

law, because it is an issue that gives scholars an opportunity to investigate tradional legal arragements of domestic administrative law and the strenght of the principles of European law.

This entire investigation is conditioned by a shareable reflection, according to which the realization of public infrastructure — in particular, for road and hydraulic paths — is a typical task that needs to be carried out by public authority, but not exclusively, due to high costs (20).

The cooperation between private and public entities is an element for the convergence of different disciplines and it provides an overview of legal reforms and interpretations (21).

Over the last thirty years, the hypotheses of cooperation bewtween the public and private sectors have been on the increase, in the idea that a proactive dialogue with private subjects can help to improve the protection of the public interest. In other words, the topic under investigation is a well-known phenomenon, but the legal pahts across which it is possible to involve private subjects for the performance of public duties took a fundamental extent (22).

UK government in 1992; A.C.L. Davies, *Public-private partnerships in the English law*, in A. Fioritto (ed), *Nuove forme e nuove discipline del partenariato pubblico privato*, Torino, 2017, p. 389 ff.

(20) G. Della Cananea, *Stato e mercato: le infrastrutture per i servizi pubblici*, in *Munus*, 2013, p. 2 ff., the critical infrastrucuture shall be identified according to a key criterion, namely are the ones that shall ensure the maintenance of vital societal functions, in accordance with the article no. 2, letter a), of the European Directive no. 118 of 8 December 2008; A. Police, *Infrastrutture, crisi economica e ruolo del 'project financing' e del 'project bonds'*, in *Munus*, 2013, p. 222 ff.; G. Corso, *Riflessioni su amministrazione e mercato*, in *Dir. amm.*, 2016, p. 4 ff. More generally, on the complex relationship between public authorities and market, pleaas refer to C. Marzuoli, *Le privatizzazioni fra pubblico come soggetto e pubblico come regola*, in *Dir. pubbl.*, 1995, p. 393 ff., the public-private relationship depends on whether the public sector is understood as an authority or as a function. Administrative law is not only the law of authority but it is the law that regulates the public function; the public version of autonomy is not freedom, but it is discretion; F. Salvia, *Il mercato e l'attività amministrativa*, in *Dir. amm*., 1994, p. 524 ff.; L. Carbone, *Momento di un itinerario tra pubblico e privato*, in *Giorn. dir. amm.*, 1995, p. 55 ff.; G. Amato, *Il mercato nella Costituzione*, in *Quad. cost.*, 1991, p. 7 ff.

(21) F. Cortese, *Tipologie e regime delle forme di collaborazione tra pubblico e privato*, in F. Mastragostino (ed), *La collaborazione pubblico-privato e l'ordinamento amministrativo: dinamiche e modelli di partenariato in base alle recenti riforme*, Torino, 2011, p. 35 ff.

(22) About this recognition, see G. Capano - E. Guelmini, *Introduzione* (specifically, the section no. 2, about new trends), in G. Capano - E. Guelmini (eds), *La pubblica amministrazione in Italia*, Bologna, 2006, p. 13 ff., according to which, the course of action for the public administrations have become marked by structured forms of cooperation with private parties, that became indispensable; in accordance with this careful examination, see L. Bobbio, *Produzione di politiche a mezzo di contratti nella pubblica amministrazione*, in *Stato e Mercato*, 2000, p. 136 ff., the deployment of the use of the contracts for the prosecution of public policy represents a middle ground between authority and market, because it is a concerted adjustment of the various interests in the search of common objectives.

The collaborative dynamic is no longer restricted to individual sectors of the administrative action, but it represents a widespread way of acting into the hands of the public administrations. The legal tools that the legislator has devised over the years transcend the old paradigm of the private activity carried out by the public administration (23).

In a broad sense, it was observed that into Italian law there is no widely accepted standard about the involment of the private citizens into the administrative decisions process. However, in certain sectors the need to involve the citizens is more felt, like in cases of administrative action where there is a risk, because the administrative decision must be adopted through complicated pathways, from a technical and scientific point of view, in which it is necessary to adquire knowledge of the private (24).

The environment sector is characterized by an high degree of cooperation between all stakeholders involved, consistently with the peculiar role of the public administration due to the tangible uncertainty of the subject. The Italian domestic law makes provision for the involvement of citizens for proceedings in order to draw up or develop environmental plans (25).

The plan or the programme as adopted shall contain a statement in which it is certified the involvement of citizens because this participation must take place at an early stage, when every option can be explored by the administration.

Another asset in which there is a prior cosultation of citizens is expected for the regulation acts adopted by the Independent Administrative Authorities (*IAA*), by an exchange of relevant informa-

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(23) This issue was examined by a very wide legal literature and the reference are limited to three studies that have investigated the limits of this asset, that are A. Amorth, *Osservazioni sui limiti dell'attività amministrativa di diritto privato*, in *Arch. Dir. pubbl.*, 1938, p. 464 ff.; V. Cerulli Irelli, *Note critiche in tema di attività amministativa secondo modelli negoziali*, in *Dir. amm.*, 2003, p. 229 ff., that underlined the need to demarcate the so called techinal ground in which a problem of equivalence between tha administrative act and the contract in the administration's lead may arise; C. Marzuoli, *Principio di legalità e attività di diritto privato della pubblica amministrazione*, Milano, 1982.

(24) Please refer to F. De Leonardis, *Il principio di precauzione nell'amministrazione di rischio*, Milano, 2005, p. 194 ff.; M. Renna, *Le misure amministrative di enforcment del principio di precauzione per la tutela dell'ambiente*, in *Jus*, 2016, p. 61 ff.; formerly S. Cassese, *Azionarato di Stato* (encyclopedic voice), in *Enc. dir.*, IV, Milano, 1959, when public authorities act in private companies together with private shareholders, they have the opportunity to benefit significantly from the technical and financial collaboration of private capital.

(25) See A. Licci Marini, *Vas e pianificazione urbanistica*, in *Urb. app.*, 2018, p. 128 ff.; F. Parente, *Urbanistica contrattata e pianificazione territoriale*, in *Rass. Dir. civ.*, 2016, p. 444 ff.

tions and feedbacks; in this case there is no the obligation of the evaluation of the participants contributions.

However, this consultation process focuses on increasing the level of understanding of the Authority's decision, because the final choice stays in the ownership of the administration. To put it painly, the strengthening of the participative guarantees has to replace the representative dialectic, but it does not introduce any requirement.

The constant data of these two examples is the potenatial lack of effect on administrative decision, because there is absolutely no obligation for public administration to follow up on the contributions of the private; the power of decisions only belongs to the public subject.

In the field of infrastructure, the type of intervention to be carried out and its location are defined after an extensive debate between the administrations territorially competent and the authorities delegated to caring for the so-called delicate interests, such as the right to health.

The issue of the public-private partnership concerns the organizations of the State structures and it is an important subject of attention for issues of European interest, as the protection of free competition (26).

The public-private partnership is a form of interactive governance, which emerged in many advanced and industrailized countries and its development is based on pragmatism as well as ideology, or a combination of both, because « the appreciation of governing in

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(26) On this topic, in a non-exhaustive manner, see F. Merusi, *The troubled life of competition in local public service*, in *Italian Journal of Public Law*, 2012, p. 38 ff.; B. Caravita Di Toritto, *Il fondamento costituzionale della concorrenza*, in *federalismi.it,* 2017; R. Wettenhall, *The rhetoric and the reality of puyblic-private partnership*, in 3 *Public Organization Review* (2003), p. 77 ff., « Partnership is the new fashionable concept: it is difficult today to open a public sector management journal, look at a prospectus for a public sector management conference or a publisher's list of new books on public sector management, or even scan a policy statement about public sector management from a politician, without seeing a reference to it. For many, following a British lead, it focuses on attracting private financing for public projects. However there are several other forms of public-private mix that are also often described as partnerships, and some of them are not nearly so new. The term partnership is now a dominant slogan in the rhetoric of public sector reform, arguably capturing that status from privatization which held similar dominance through the 1980s and 1990s. As privatization captured the minds of so many would-be reformers over those decades and produced its own huge literature, so, it would seem, partnership — especially in the form of public-private partnership (or *PPP*) — is about to do the same. The weight of relevant discourse is already immense and, as with the discourse of privatization, it is impossible for any observer to do justice to it all, either to support the notion and the practice, to make criticism, or simply to offer general comment ».

partnership cannot be separated from changing views on the way of public and private inteact » (27).

The public-private partnerships scheme is based on the framework of joint decision making rather than a principle-agent relationship, and the subject which defines what the problem is and what solutions should be selected is not the government alone, but both the public and the private sectors; different from tradional contracts or arragements, a partenership bewtween two parties concerned requires an appropriate mechanism to ensure that the public interest is protected for a long term and the risk can be equally shared by the two partners concerned (28).

There are revealing indicators of the cooperation between the public and the private sectors, from the beginning of the history of the Italian administrations (29).

In the Italian administrative law, the borderline of the legal regimes and of the sphere of activities between public and private entities is becoming increasingly blurred (30).

According to an authoritative and shared approach, the public-private partnership is not a classic legal arrengement and not even a legal category, but rather a way of acting marked by rapid and dynaminc development in the light of the variable relations between theprivate and the public subjects (31).

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(27) See J. Kooiman, *Governing as governance*, London, 2003, p. 102.

(28) R. Geert Teisman - E.H. Klijn, *Partnerships arrangements: governmental rhetoric or governance scheme?*, in 62 *Pubic Administration Review* (2002), p. 189 ff.; in the same direction, see P. Carroll - P. Steane, *Public-Private Partnerships: sectorial persepctive*, in P. Stephen Osbourne (ed), *Public-Private Partnerships: Theory and Practice in International Perspective*, London, 2000.

(29) For a complete overview, see L. Mannori - B. Sordi, *Storia del diritto amministrativo*, Bari, 2001, p. 225 ff.

(30) See G. Napolitano, *Pubblico e privato nel diritto amministrativo*, Milano, 2003; M. Tucci, *L'amministrazione tra pubblico e privato e il principio di legalità dall'antichità ai giorni nostri. Aspetti ricostruttivi e prospettive di sviluppo*, Milano, 2008, p. 243 ff.

(31) The comments made by M. Dugato, *Il partenariato pubblico-privato: origine dell'istituto e sua evoluzione*, in F. Mastragostino (ed), *La collaborazione pubblico-privato e l'ordinamento amministrativo. Dinamiche e modelli di partenariato in base alle recenti riforme*, Torino, 2011, p. 55 ff.; M.P. Chiti, *Il partenariato pubblico-privato e la nuova direttiva concessioni*, in G.F. Cartei - M. Ricchi (eds), *Finanza di progetto e partenariato pubblico-privato. Temi europei, ambiti nazionali e operatività*, Napoli, 2015, p. 3 ff., *PPP* does not represent an autonomous, distinct, and uniform legal arrangement, but it is a descriptive notion of a complex and structured phenomenon marked by various facets of different legal tools. One of the main issues is undoubtedly the research of the notion of operational risk, to be understood as the risk of exposure to market fluctuations, both from the point of view of supply and demand; *ANAC*, guidelines no. 9, adopted on 28 March 2018, full text available on *www.anticorruzione.it*, p. 3 ff., *PPP* represents a complex legal phenomenon that holds several contractual models, in which the economic and financial character is prevalent. For these

The issue cannot be dealt just with regard to the static component of administrative organization, because of the complexity of the tasks entrused to public administration, there is the use of the hybridasation of the permitted legal forms (32), to mitigate the borders between public and private sector.

The 1990s has seen the establishment of public-private partnership as a key tool of public policy across the world as a chance to reform public service, making them more accesible to the local community and as an opportunity to develop cost-efficient ways of meeting social needs (33).

It is possible to articulate three level of cooperation, on the basis of the intensity of the relationship (34). The first level is represented by the perspective of the separation, in which the activity is carried out just by private entities and there is an absence of tutelage by public authorities. The second level is represented by a relation based on a trade, such as in public contracts or, more broadly, in case of outsourcing of public service (35). The third level is the cooperation, in which public and private bodies shall work together in achieving a common result.

The strenght of the relationship and the template selected cannot be freely chosen by the parties, but often the legislator sets out the elements of the relationship.

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reasons, the purely legal approach must be complemented with technical and economic knowledges; G. Fidone, *Un'applicazione di analisi economica del diritto. La procedura per la scelta del concessionario nel c.d. project financing*, in *Riv. giur. edil.*, 2006, p. 59 ff.; C. Marcolungo, *Il partenariato pubblico privato istituzionalizzato: un tentativo di ricostruzione*, in M.P. Chiti (ed), *Il partenariato pubblico-privato*, Napoli, 2009, p. 193 ff., when it is trying to trace the main charachters of the *PPP*, a discouragement is perceived due to several factors, including the incostant position of the Courts and the different forms of manifestation of the phenomenon.

(32) R. Chieppa - R. Giovagnoli, *Manuale di diritto amministrativo*, Milano, 2017, p. 267.

(33) S.P. Osborne, *Understanding public-private partnerships in internatioal perspective: globally convergent or nationally divergent phenomenon?*, in S.P. Osborne (ed), *Public-Private Partnerships: Theory and Practice in International Perspective*, London, 2000, p. 2 ff.

(34) On this topic, G. Piperata, *La collaborazione pubblico-privato nell'ordinamento comunitario e nazionale*, in F. Mastragostino (ed), *La collaborazione pubblico-privato e l'ordinamento amministrativo. Dinamiche e modelli di partenariato in base alle recenti riforme*, Torino, 2011, p. 7 ff., collaboration between the public and private sectors is a multifaceted phenomenon, involving various dynamics with different intensities; Id., *La scienza del diritto amministrativo ed il diritto privato*, in L. Torchia - E. Chiti - R. Perez - A. Sandulli (eds), *La scienza del diritto amministrativo nella seconda metà del XX secolo*, Napoli, 2008, p. 167 ff.

(35) C. Franchini, *L'appalto di lavori, servizi e forniture stipulato con le pubbliche amministrazioni*, in Id. (ed), *I contratti di appalto pubblico*, Torino, 2010, p. 7, the procurement contract represents an indirect way to pursuit public interests.

The interest in this issue is also due to the behalf demonstrated by European Union in this phenomenon, but the word used is not collaboration or cooperation, but partnership, an expression with a wider meaning. In the European perspective, the public-private partnership is a principle that influences the organisational form (36).

This expression is definied in a comprehensive manner, by foreign academics, a grammar of multiple meanings (37).

In 2003, came the first attempt by the European Commission to settle the subject because published the « Guidelines for Successful Public-Private-Partnership », a document that was designed as a pratical tool.

This document focused on four aspects, that were: ensuring open market and competition, protecting the public interest, defining the optimal level of grant financing both to realize a viable and sustainable project but also to avoid any opportunity for windfall profits and assessing the most effective type of *PPP* for a given project with the appropriate parameters.

Beyond the European framework, Italian administrative law was moving the centre of gravity of administrative action from authority to the consent.

For example, the article no. 11 of the Law no. 241 of 7 August 1990 regulates the administrative arrangements to promote the contribution from the citizens in the administrative procedure, but it does not represent a form of public-private partnership.

The first real kind of partecipation for a publc task was represented by transfers of public tasks to private entities, that did not change their nature and legal regime governed by private law (38); but in this case there were not a collaboration or a partnership.

It is impossible to make a unitary recovery of this phenomenon due to the hetereogeneity of the various types of partnership.

There are some forms of cooperation in which there is a strict separation of tasks and responsibilities whose result seems to be the sum of two coordinated actions more than a partnership. These forms of cooperation are tested in the conduct of the health facilities,

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(36) See M.P. Chiti, *Diritto amministrativo europeo*, Milano, 2004, p. 290 ff.; G. Della Cananea, *I poteri pubblici nello spazio giuridico globale*, in *Riv. trim. dir. pubbl.*, 2003, p. 37 ff.

(37) S.H. Linder, *Coming to terms with public-private partnership. A grammar of multiple meanings*, in 43 *American Behavioral Scientist* (1999), p. 35 ff.

(38) G. Zanobini, *L'esercizio privato delle funzioni e dei servizi pubblici*, in V.E. Orlando (ed), *Primo trattato completo di diritto amministrativo*, Milano, 1935, p. 478 ff.

when the private and the public partner, holders of different skills, agree to take common action but the related contribution are separated.

There are other cases in which the collaboration is more comprhensive, the action is unique and the partners pool any necessary organisational and material resources.

Into italian law, the public-private partnership does not represent a legal arrangement in the classical sense, but it is a method of fulfilment of collective interests that finds expression in typical and atypical legal tools (39).

The original idiosyncrasy regarding this model of execution of public works was due to various reasons, including the events of corruption discovered at the beginning of the 90s, followed by a legislation for public works hostile to any forms of interaction between the public and the private sectors.

There are different reasons for this ever-increasing interest in consensual modules alternative to the tenedering procedure.

First of all, the economic and financial crisis and the resulting restrictions for public financies oblige the State to use legal tools that transfer the price of the public project to be paid by the private entity (40).

Furthermore, the involvment of the private sector in the development and execution phase of the public work is something able to increase the efficiency and to reduce aggregate costs of the work (41). Indeed, the contracting authorities may benefit from private know-how, knowledge and experience.

It is important to underline that the partnership is an expression of the so-called horizontal subsidiarity laid down by the article no.

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(39) G. Sciullo, *Le dinamiche collaborative tra pubblico e privato ed i principi generali di riferimento*, in F. Mastragostino (ed), *La collaborazione pubblico-privato e l'ordinamento amministrativo. Dinamiche e modelli di partenariato in base alle recenti riforme*, Torino, 2011, p. 23, the public-private partnership represents a descreptive notion rather than a legal institute.

(40) Please refer to M.P. Chiti, *La crisi del debito sovrano e le sue influenze per la "governance" europea, i rapporti tra Stati membri, le Pubbliche Amministrazioni*, in this *Journal*, 2013, p. 1 ff., the deep and broad economic crisis has caused numerous effects on governance models and on the public administration structure, which is responsible for implementing measures to deal with the crisis.

(41) L. Torchia, *Il controllo pubblico della finanza privata*, Padova, 1992, p. 450 ff., according to which it was appropriate to rethink critically the notions of public and private and adapt them to the idea of a State as a regulator and no longer as an entrepreneur. In other words, public managerial functions are reduced and regulatory and control functions are expanded.

118, subparagraph no. 4 of the Italian Constitution by means of which the State, the Regions, the Provinces, the Metropolitan cities and the Municipalities promote the private action by citizens for carrying out activities of general interests.

The recent story of the Italian administrative law is chopped up by the so-called « administrative activity governed by private law » (42) and it seems possibile to subsume in this category the public-private partnership. But there is the likelihood of misuse of the public-private partnership in order to circumvent the public finances measures and the principle of free competition.

The partnership instruments can be a tool for significant problems of the public administration, among which the shortage of public funding, constraints by European law concerning public finance and the difficulties to set sustainable projects (43); but, as will be explained in detail below, they are not and must not be a comprehensive solution to all the problems of the administration.

Public-private partnership is not a miracle solution because, according to the project, it is necessary to examine if the partnerships can bring an added benefit compared to other options.

For this reason, it is not possibile to estabilish in advance what form of funding is more cost-effective, but we need to carry out an assessment in concrete terms.

In the end, the analysis below will focus on the so called value for money — that is the benchmark used to assess the viability of these ventures — which is shared by all the partnerships models into the different national laws, and, after, it will be concentrated on the Italian framework.

However, it is necessary to examine the fundamental notions of economic risk and flexibiliy, which cannot be withdrawn, whether it

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(42) Please refer to G. Napolitano, *L'attività amministrativa e il diritto privato*, in *Giorn. dir. amm.*, 2005, p. 481.

(43) M.P. Chiti, *Il partenariato pubblico-privato e la nuova direttiva concessioni*, in *www.studiolegalechiti.it,* 2015, p. 3 ff.; F. Fracchia, *I contratti pubblici come strumento di accertamento*, in this *Journal*, 2015, p. 1530, public contracts must be placed within the framework of the study of public action and is traditionally linked to the issue of the use of public resources in the light of the provisions of article no. 81 of the Constitution. Among other things, there is a growing interest in the good use of public resources. The evolutionary events generated by the two main interests that emerge in public procurement (competition and financial sustainability) have not followed homogeneous trajectories; M. Di Lullo, *Soggetti privati "pubbliche amministrazioni" ai sensi delle norme di contabilità e finanza pubblica*, in *Foro amm. CdS*, 2013, p. 3579 ff.

is appropriate to reconsider them in a critical direction, in order to avoid an excessive e diproportionate use of these terms (44).

2. The marked (but necessary) polysemy of the notion of economic risk.

The rapid and lucky development of this template for administrative action is inextricably lined to a general shortage of public funds, to financial limitations imposed by the European Union and to the difficulties in order to set up an efficient shared management for long-term projects (45). These restrictions of financial nature makes the notion of economic risk central for the conduct of the theme.

However it is opportune to make an operational and conceptual premise about an issue that intercepts lines of research that are beyond the administrative law in the traditional sense.

In these lines of the work the notion of economic risk is analysed in its entirety, without making any kind of distinction between concessions agreeement and partnership contract, but with the appropriate premise that the economic risk is a requirement in order to classify an agreement as a concession and it is an accounting rule in order to classify a *PPP* operation as 'off balance' (46).

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(44) In this sense, see the doctrinal position of F. Liguori, *Flessibilità e modelli organizzativi del S.S.N.*, in F. Liguori - L. Zoppoli (eds), *La sanità flessibile*, Napoli, 2012, p. 3 ff., according to which, flexibility represents a ratty terms of which we should be doing less. Flexibility is not a legal arrangment, but it is a general rule or a characteristic of the administrative organization.

(45) Please refer to A. Di Giovanni, *Il contratto di partenariato pubblico-privato tra sussidiarietà e solidarietà*, Torino, 2012, p. 45 ff.; B. Giliberti, *La concessione di pubblico servizio tra sistematiche nazionali e diritto comunitario*, in *Dir. amm.*, 2011, p. 183 ff., the allocation of the risks has a relative range, because what is relevant is the contractual nature of the relationship; on the pendulum that fluctuates between the choice between the procurement contract and in house providing, see G. Piperata, *I servizi pubblici locali tra rimunicipalizzazione e de-municipalizzazione*, in *Munus*, 2016, p. V ff.; F. Fracchia, *Pubblico e privato nella gestione dei servizi pubblici: tra esternalizzazione e municipalizzazione*, in *www.federalismi.it*, 2016.

(46) G.F. Cartei, *Rischio e disciplina negoziale nei contratti di concessione e di partenariato pubblico-privato*, in *Riv. trim. dir. pubbl.*, 2018, p. 608 ff.; Regulation (EU) no. 549/2013 of the European Parliament and of the Council (*European system of national and regional accounts in the European Union*), 21 May 2013, full text available on *www.eur-lex.europe.eu*, « *PPP* contracts under this definition involve the grantor paying the operator 'availability' or 'demand' fees, and as such constitute a procurement arrangement. In contrast to other long-term service contracts, a dedicated asset is created. Thus, a *PPP* contract implies the government purchase of a service produced by a partner through the creation of an asset. There can be many variations in *PPP* contracts regarding the disposition of the assets at the end of the contract, the required operation and maintenance of the assets during the contract, the price, quality, and volume of services produced, and so forth », « In *PPP* contract, the corporation acquires the fixed assets and is the legal owner of the assets during the contract

The central role played by the notion of risk appears for the first time within an interpretative communication released by the European Commission in 2000, in which the transfer of the risk is an essential element in the distinction bewteen the concession contract and the procurement contract (47).

Furthermore, the Italian administrative jurisprudence reaffirirmed that the distinction between public procurement contracts and concession contracts must be carriedvout on the basis of the risk-sharing (48).

As set out in article no. 3, letter eee) of the Legislative Decree no. 50 of 18 April 2016, and confirmed by guidlines for transposition no. 9, issued by the National Anticorruption Authority on 28 March 2018, public-private partenerships contracts are a form of cooperation, in which the risks associated with the procedure shall be divided between the parties but, in accorance with the article no. 180, subparagraph no. 3 of the Legislative Decree mentioned, it is necessary that the economic operator (namely the private part) bear the construction risk and the availability risk or, in the cases of lucrative business, the demand and commercial risk, during its management period of the work.

This legislative approach is nothing new but it clarifies the central role of the allocation risks between the parties and it allows to examine every single kind of risks, even beyond the legislative data (49).

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period, in some cases with the backing of the government. The contract often requires that the assets meet the design, quality, and capacity specified by government, be used in the manner specified by government to produce the services required by the contract, and be maintained in accordance with standards defined by government », « The provisions of each *PPP* contract shall be evaluated in order to decide which unit is the economic owner. Due to the complexity and variety of *PPPs*, all of the facts and circumstances of each contract should be considered, and then the accounting treatment, that best reflects the underlying economic relationships, selected »; S. Van Garsse - K. Van Gestel - K. McKenzie, *PPP-Contracts: Or on off balance sheets*, in 18 *European Public Private Partenrship Law* (2017), p. 5 ff.

(47) Please refer to A. Barone - U. Bassi, *La comunicazione interpretativa sulle concessioni nel diritto comunitario: spunti ricostruttivi*, in *Foro it.*, 2000, IV, p. 389 ff.; C.H. Bovis, *Public-private partnerships in the 21st century*, in 11 *ERA Forum* (2010), p. 379 ff.

(48) See T.A.R. Lazio, Latina, Sec. I, 5 May 2006, no. 310, in *Foro amm. TAR*, 2006, p. 1770.

(49) Furthermore, the article no. 180 includes the concession contracts in the public-private partnership model, in whom the private party must bear the operative risk, that is the risk linked to the possibility not to recover the investments made and the costs incurred for the transaction, under normal operating conditions. About this issue, recently, see M. Ceruti, *Il Consiglio di Stato torna a pronunciarsi sul valore stimato delle concessioni: finalmente sulla questione può scriversi la parola "fine" (o forse no). Nota a Consiglio di Stato, sez. V, 21 agosto 2017, n. 4049*, in *Appalti e contratti*, 2018, p. 55 ff.; M. Ceruti, *Il valore delle concessioni ed il*

The Legislative Decree no. 163 of 2006, consistenlty with the European directive no. 18 of 2004, laid down that both work and service concession were included into the category of the public contracts and in which the payment for the private party consisted in the right to manage and to exploit economically the work or the service (50). This method of retribution underlines the fundamental role played by the economic threat with regard to the topic under analysis.

Early as 2010, the European Commission had made clear that the concept of risk is an essential element of the concept of *PPP* and the verification of its existence can only be done on a case-by-case an basis (51). Furthermore, the European Court of Justice (from here on out, ECJ) remarked that the essential element of the procedures alternative to the public procurement contracts is the relocation of risks (52).

Previously, in 2004, Eurostat — the statistical Office of European Communities — took a decision on the accounting treatment in national accounts of contracts undertaken by government units in the framework of partnerships with non-government units (53). The decision specified the impact on government deficit/surplus and debt.

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rischio di gestione del concessionario Riflessioni a margine della pronuncia di TAR Lazio, Roma, sez. II, 25.7.2016, n. 8439, in *Appalti e contratti*, 2017, p. 67 ff.; M. Ceruti, *Le concessioni riscoprono le proprie origini nel rischio operativo: riflessioni su presente, passato e futuro dell'istituto*, in *Appalti e contratti*, 2016, p. 22 ff.; with regard to project financing, see R. Sciuto, *Il rischio nelle operazioni di project financing*, in *Il project financing. Analisi giuridica, economico-finanziaria, tecnica, tributaria, bancaria, assicurativa*, Torino, 2012, p. 523 ff. (spec. subparagraph no. 3, 4 and 5).

(50) For a comprehensive and detailed analysis, see F. Goisis, *Rischio economico, trilateralità e traslatività nel concetto europeo di concessioni di servizi e di lavori*, in *Dir. amm.*, 2011, p. 706 ff.

(51) European Commission, *Guide to the application of the European Uninon rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest*, SEC (2010), p. 75 ff.

(52) ECJ, 25 March 2010, C-451/08, *Helmut Müller GmbH v Bundesanstalt für Immobilienaufgaben*; A. Brown, *Helmut Muller G,bH v Bundesanstalt für Immobilienaufgaben (C-451/08): clarification on the application of the EU procurement rules to land sales and development agreements*, in 1 *Public Procurement Law Review* (2010), p. 4 ff.

(53) Eurostat, *Treatment of public-private partnerships*, 11 February 2004, available on *www.epp.eurostat.ec.europa.eu*; O.H. Petersen, *Emerging Meta-Governance as a Regulation Framework for Public-Private Partnerships: An Examination of the European Union's Approach*, in 11 *International Public Management Review* (2010), p. 3 ff., « Within the institutional approach, *PPPs* can be divided yet again into social type partnerships, as found in various issue networks and policy communities, and economic type partnerships characterised by long-term commercial contracts between government and business for various combinations of planning, procurement, construction, finance and operation of a construction or infrastructure facility »; about the Italian condition, see A. Massera, *Il partenariato pubblico-privato e il diritto europeo degli appalti*, in this *Journal*, 2005, p. 1210 ff.; L. Martiniello, *Analisi dei rischi nelle partnership*

In particular, Eurostat identified three main forms of risk in the parterships arrangements, on the basis of which it was possible to establish if the work had an impact on the government balance or not (54) (the so-called '*off balance works*').

The construction risk is related to late delivery of the works, to additional costs arisen in the course of the works, to technical weaknesses; if the public administration pays the price indipendenlty from any inspection on the progress of the works, the same administration bears the construction risk.

The availability risk is related to the quality of the service that the private partner has to ensure during the time, this means that this risk concerns the fulfilment of quality standards provided for in the contract. If the public administration (namely the procuring entity) is entitled to block or to halt the payments through the failure to reach predetermined standards, the risk shall lie with the company. If, on the contrary, the contracts provides for permanent payments and constant royalties, the availability risk is borne by the administration (55).

The demand risk covers variability of demand met by the private, because demand for a service is irrespective of its quality. Whether public payments are related to the amount of the service wondered by the user community, the demand risk is borne by the private firm. If the administration cashes the profits directly by the users and ensures a fixed fee or a take-or-pay formula to the firm, the risk is suffered by the public administration.

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pubblico-private e riflessi contabili della decisione Eurostat 2004, in G.F. Cartei - M. Ricchi (eds), *Finanza di progetto. Temi e prospettive*, Napoli, 2010, p. 589 ff.

(54) Please refer to L. Martiniello, *Le regole di contabilizzazione delle operazioni di "concessione" e di "partenariato pubblico-privato"*, in G.F. Cartei - M. Ricchi (eds), *Finanza di progetto e partenariato pubblico-privato. Temi europei, ambiti nazionali e operatività*, Napoli, 2015, p. 444 ff.

(55) Eurostat, *Treatment of public-private partnerships*, 11 February 2004, accesible on *www.epp.eurostat.ec.europa.eu,* p. 2, « it may not be in aposition to deliver the volume that was contractually agreed or to meet safety or public certification standards relating to the provision of services to final users, as specified in the contract. It also applies where the partner does not meet the required quality standards relating to the delivery of the service, as stated in the contract, andresulting from an evident lack of performance of the partner. Government will be assumed not to bear such risk if it is entitled to reduce significantly (as a kind of penalty) its periodic payments, like any normal customer could require in a commercial contract. Government payments must depend on the effective degree of availability supplied by the partner during a given period of time. Application of the penalties where the partner is defaulting on its service obligations should be automatic and should also have a significant effect on the partner's revenue/profit, and must not be purely cosmetic or symbolic ».

This important decision made by Eurostat, even though it was not mandatory, provided a fundamental key to interpretation, above all in drowing up and in the allocation of the risks abovementioned.

In particular, according to this decision, the works have no impact on public budget if the private entity bears the construction risk and one among the demand risk and the availability one. Furthermore, it is necessary that there is a concrete relocation of the risks, or, in other words, « to demonstrate a clear risk transfer, the costs that accomapany a risk occurrence should generate financial consequences for the non-goverment partner. Such financial consequence should be sufficient to put at risk not only the non government partner's operating margin but also expose its equity to significant losses ». The transfer of risks must call into question the economic-financial balance of the entire contractual operation.

A different approach was given by the European Court of Justice, according to which the real risk that qualifies the *PPP* projects is the the demand risk. The economic management risk shall be understood as potential exposure to the unknown factors of the market, which means risk of competition or risk of insolvency of the users (56).

Nevertheless, as indicated by a document released by the suppressed Italian public procurement watchdog (*AVCP*) in 2010 (57), in accordance with the decision made by Eurostat, the project can be regarded as off-balance even if the private party bears the availability and construction risk. And besides, the subparagraph no. 9 of the article no. 143 of the Legilsative Decree no. 163 of 2006 (the Public Procurement Code previously in force) dictated this approach with regard to the risks allocation (58).

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(56) For a synthesis of this approach, please refer to ECJ, 13 November 2008, C-247/09, *Privater Rettungsdienst und Krankentransport Stadler*, the position of the European Court of Justice is complex, because according to this approach it should not be evaluate the potential risk in itself but the rate at which the risk is trasferred. However, this approach has to be declined depending on the nature of the activity to be put in place. With reference to a litigiation proceedings for the award of water-related services (ECJ, 10 September 2009, C-206/08, Eurawasser; A. Gunawansa - L. Bhullar, *Water Governance: An Evaluation of Alternative Architecture*s, Cheltenham, 2013, p. 44 ff. it is difficult to hypothesize that there may be a demand risk. In accordance with these judgments, see ECJ, 10 March 2011, C-274/09 and 10 September 2009, C-206/08.

(57) AVCP, 11 March 2010, act no. 2, *Problematiche relative alla disciplina applicabile all'esecuzione del contratto di concessione di lavori pubblici*, available on *www.anticorruzione.it*, p. 4 ff.

(58) Please refer to S. Gentiloni Silveri, *Direct agreements in public-private partnerships*, in *Italian Journal of Public Law*, 2014, p. 371 ff.

However, in relation to the Public Procurement Code previously in force — especially on the basis of the third corrective action which introduced the subparagraph no. 15-*ter* to the article no. 3, that laid down the definition of *PPP* contracts (59) — altough it was present an explicit reference to the decision released by Eurostat, it is appropriate to distinguish a formal perspective and a substantial one (60).

Formally, the concession contract may be included in the pattern of *PPP* template, if there is an effective risk transfer, but not all the concessions represent a form of *PPP*. On the contrary, as regards the substantial data, it is necessary to evaluate the relevance of the risk trasfer, more than the quality of the risk for assessing whether the project fall within the *PPP* model.

By these two approaches, what is perceived is the central role of the trilateral nature of the relationship, because in relation to the concession contract the management risk is borne by the private entity that draws a proper return benchmark by the users and not by the payments of the administration. However, as evidenced by the incostant positions of the scholars and the administrative court rulings on some aspects (61) — e.g. on the risk management in relation to the so called cold works, in which cash flows are guaranteed by the lending institution — the European directives issued in 2014 have clarified better the notion of economic risk, in an attempt to overcome the previous interpretative difficulties encountered.

In this respect, the recital no. 18 of the European directive no. 23 of 2014 has highlighted the need to determine clearly the definition of operative risk (62), with the necessary premise that it is always

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(59) R. De Nictolis, *Le novità del terzo (e ultimo) decreto correttivo del codice dei contratti pubblici*, in *Urb app*., 2008, p. 1225 ff.; A. Travi, *Il partenariato pubblico-privato: i confini incerti di una categoria*, in M. Cafagno - A. Botto - G. Fidone - G. Bottino (eds), *Negoziazioni pubbliche: scritti su concessioni e partenariati pubblico-privati*, Milano, 2013, p. 10 ff.; T.A.R. Lombardia, Brescia, Sec. II, 15 January 2008, no. 7, in *Foro amm TAR*, 2008, p. 34; T.A.R. Lombardia, Brescia, Sec. II, 7 October 2013, no. 824, in *Foro amm. TAR*, 2013, p. 2991.

(60) Please refer to F. Goisis, *Rischio economico*, *quoted*, p. 721 ff.

(61) See European Commission, *Commission staff working document impact assessment of an initiative on concessions*, Brussels, 20 December 2011, SEC (2011), p. 1588 ff.

(62) Directive 2014/23/EU of the European Parliament, 26 February 2014, recital no. 18, full text available on *www.eur-lex.europa.eu*, « Difficulties related to the interpretation of the concepts of concession and public contract have generated continued legal uncertainty among stakeholders and have given rise to numerous judgments of the Court of Justice of the European Union. Therefore, the definition of concession should be clarified, in particular by referring to the concept of operating risk. The main feature of a concession, the right to exploit the works or services, always implies the transfer to the concessionaire of an operating risk of economic nature involving the possibility that it will not recoup the investments made

required a case-by-case analysis, also on the basis of the project draft to be carried out.

The article no. 5 of the European directive abovementioned, within the definition of concession, states that there must be a transfer to the concessionaire of a risk, connected with supply and demand, or both of them (63). The risk transfer implies an effective exposure to the market fluctuations as meaning that there is no guarantee to recoup the investment.

In any case, it must be clear that there has to be risks beyond of the control of the parties, because, for example, the risks associated with the contractual default are inherent in each contract (the so-called ordinary factor of contractual uncertainty).

Furthermore, in relation to some kind of contracts — and « this can be the case for instance in sectors with regulated tariffs or where the operating risk is limited by means of contractual arrangements providing for partial compensation including compensation in the event of early termination of the concession for reasons attributable to the contracting authority or contracting entity or for reasons of force majeure » — the economic risk may be restricted since the beginning of the relationship.

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and the costs incurred in operating the works or services awarded under normal operating conditions even if a part of the risk remains with the contracting authority or contracting entity. The application of specific rules governing the award of concessions would not be justified if the contracting authority or contracting entity relieved the economic operator of any potential loss, by guaranteeing a minimal revenue, equal or higher to the investments made and the costs that the economic operator has to incur in relation with the performance of the contract. At the same time it should be made clear that certain arrangements which are exclusively remunerated by a contracting authority or a contracting entity should qualify as concessions where the recoupment of the investments and costs incurred by the operator for executing the work or providing the service depends on the actual demand for or the supply of the service or asset »; see also K. Almarri - P. Blackwell, *Improving risk sharing and investment appraisal for PPP procurement success in large green projects*, in 119 *Social and Behavioral Sciences* (2014), p. 119 ff.

(63) Directive 2014/23 EU of the European Parliament, 26 February 2014, recital no. 20, « An operating risk should stem from factors which are outside the control of the parties. Risks such as those linked to bad management, contractual defaults by the economic operator or to instances of force majeure are not decisive for the purpose of classification as a concession, since those risks are inherent in every contract, whether it be a public procurement contract or a concession. An operating risk should be understood as the risk of exposure to the vagaries of the market, which may consist of either a demand risk or a supply risk, or both a demand and supply risk. Demand risk is to be understood as the risk on actual demand for the works or services which are the object of the contract. Supply risk is to be understood as the risk on the provision of the works or services which are the object of the contract, in particular the risk that the provision of the services will not match demand. For the purpose of assessment of the operating risk the net present value of all the investment, costs and revenues of the concessionaire should be taken into account in a consistent and uniform manner ».

As recently clarified (64), it is necessary that the overall economic position held by the administration is to be trasferred to the private entity (individual subject or company), altough in some cases the risk is tempered, the economic position trasferred shall be independent from the will of the parties, because it just depends on market dynamics.

The interpretative problem persists, as evidenced in the various interpretation of the issue of the European directive, provided by the Italian scholars.

According to a particular interpretation (65), the supply risk can be considered as a construction or availability risk, as well as identified by the decision released by Eurostat in 2004.

The dominant opinion of the Italian scholars considered that the supply risk was referring just to the availabity risk (66), in accordance with the drafts of the proposals of the European Commission.

Neverthless, the legislative data that emerges from the European directive does not give any textual reference to the availability risk, with a position coeherent with the European Court of Justice guidelines (67).

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(64) Please refer to F. Goisis, *Il rischio economico quale proprium del concetto di concessione nella direttiva 2014/23/UE: approccio economico versus visioni tradizionali*, in *Dir. amm.*, 2015, p. 743 ff.

(65) G. Fidone, *Le concessioni di lavori e servizi alla vigilia del recepimento della direttiva 2014/23/UE*, in this *Journal*, 2015, p. 126; M. Ricchi, *I contratti di concessione*, in G.F. Cartei - M. Ricchi (eds), *Finanza di progetto e partenariato pubblico-privato. Temi europei, ambiti nazionali e operatività*, Napoli, 2015, p. 57 ff.

(66) M. Ricchi, *La nuova direttiva comunitaria sulle concessioni e l'impatto sul Codice dei contratti pubblici*, in *Urb app*., 2014, p. 747, the lack of an express requirement of the 'availability risk' in the recitals of the European directive implies the desire to overcome the content of the decision released by Eurostat; in a different direction, see G. Greco, *La direttiva in materia di "concessioni",* in this *Journal*, 2015, p. 1095 ff., the risk linked with the supply shall relate with the market components beyond the control of the private operator.

(67) ECJ, 10 March 2011, C-274/09, *Privater Rettungsdienst und Krankentransport Stadler*, point no. 37, « it must be stated that the risk of the economic operation of the service must be understood as the risk of exposure to the vagaries of the market (see, to that effect, *Eurawasser*, paragraphs 66 and 67), which may consist in the risk of competition from other operators, the risk that supply of the services will not match demand, the risk that those liable will be unable to pay for the services provided, the risk that the costs of operating the services will not fully be met by revenue or for example also the risk of liability for harm or damage resulting from an inadequacy of the service (see, to that effect, Case C-234/03 *Contse and Others* (2005) ECR I-9315, paragraph 22, and *Hans & Christophorus Oymanns*, paragraph 74) »; ECJ, 10 November 2011, C-348/10, *Norma-A and Deko*m, point no. 48, « The risk linked to such an operation must be understood as the risk of exposure to the vagaries of the market (see, to that effect, *Eurawasser*, paragraphs 66 and 67), which may, in particular, consist in the risk of competition from other operators, the risk that supply of the services will not match demand, the risk that those liable will be unable to pay for the services provided, the risk that the costs of operating the services will not be met by revenue or also the risk of liability for harm or damage resulting from an inadequacy of the service »; G. Greco, *La direttiva in*

In other words, the risk management shall be understood as an exposure to the market uncertainties, including the risk of competition from other operators. Of course, these considerations are not valid in cases of legal or natural monopoly (68), in which the demand is not unforeseeable, but on the contrary it is stable because of a lack of alternative.

Another point which the European directive has failed to address is about the precise quantitative expression of the risk to transfer and the recital no. 19 provides that the « the fact that the risk is limited from the outset should not preclude the qualification of the contract as a concession », which would mean that is not relevant that the risk is significant, but it is necessary that the same is trasferred (69). This quantitative uncertainty seems not consistent with the key role of the economic risk for the legal classification of the agreement, that characterizes the purely economic vision of the European law (70).

The choises of the Italian legislative, the interpretations provided by the Administrative Courts and by the indipendent authorities are taking into account for this polysemy of the economic risk, that remains a central issue in examing this subject.

As mentioned above, the transfer of the risks must not be restricted to the starting phase of the contractual relation, but it must last through the whole implementation stage of the project (71).

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materia, *quoted*, p. 1103 ff., connects the notion of supply risk to the changing of the costs of the production facilities. This interpretation does not take into account that the European directive provides that the revision of price is permitted.

(68) On the subject, see the unsurpassed analysis carried out by C. De Rose, *Il regime comunitario della concorrenza e le sue implicazioni di diritto interno*, in *Il Consiglio di Stato*, 1993, vol. II, p. 1059 ff.; F. Fracchia - L. Gili, *Ordinamento dell'Unione Europea, mercato, risorse pubbliche e contratti della pubblica amministrazione. Profili sostanziali e processuali*, Napoli, 2013, p. 43 ff.; F. Cintioli, *L'art. 41 della Costituzione tra il paradosso della libertà di concorrenza e il diritto della crisi*, in *Dir. soc.*, 2009, p. 373 ff.; R. Dickmann, *Le regole della governance economica europea e il pareggio di bilancio in Costituzione*, in *www.federalismi.it*, 2012.

(69) Please refer to T.A.R. Lombardia, Milano, Sec. IV, 9 February 2018, no. 386, in *Foro amm.*, 2018, p. 253; T.A.R. Liguria, Sec. II, 3 July 2018, no. 593; G.F. Cartei, *Rischio e disciplina negoziale*, *quoted*, p. 603-604; A. Massera, *Il quadro della trasposizione delle direttive europee tra obblighi di armonizzazione e opportunità di riordino della normativa nazionale, con particolare riferimento alle concessioni di lavori e servizi*, in A. Fioritto (ed), *Nuove forme e nuove discipline del partenariato pubblico-privato*, Torino, 2017, p. 43 ff.,

(70) See F. Goisis, *Il rischio economico quale proprium*, *quoted*, p. 765 ff. (in particular the paragraph no. 4), the European Law seems to be geared towards economic perspectives and then to get back to a traditional view, even in accordance with the the indications given by the European Court of Justice.

(71) The private firm can lose its interest to carry out the activity according to certain quality standars if the administration is the principal purchaser of the service (for a wide-

In order to achieve this goal, it is provided that the procuring entity shall exercise special vigilance on the private party with the rules set out by the National Anticorruption Authority guidelines (72), in order to verify the permanence of the risks transferred on the part of the private.

In particular, according to the mentioned guidelines, monitoring and evalution of the risks permanence have to be carried out by reference to the correct drafting of the contract clauses. So, that means, that the contract should include one or more clauses which incorporate the so-called 'risks matrix', namely the different kind of risks, their nature and allocation and tools in order to reduce thier impact on the project (73).

This attachment should not be just a summary document or a reconnaissance paper issued at the end of the procedure, but it plays a mush greater role, because this report can be used in order to evaluate the advantages of the recourse to a *PPP* agreement, in accordance with the article no. 181, subparagraph no. 3 of the Legislative Decree 50 of 2016.

Furthermore, this report can be a tool to control if the agreement is compatible with the current legal framework and it can be the parameter in order to ensure that any eventual changes of the contract terms does not alter the financial-economic balance of the whole operation (74).

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ranging analysis, see C. Burlando - E. Ivaldi - A. Camporeale, *Un indicatore di qualità percepita per il trasporto pubblico urbano: analisi delle macro-aree italiane*, in *Economia e diritto del terziario*, 2016, p. 267 ff.

(72) ANAC, guidelines no. 9, adopted on 28 March 2018, full text available on *www.anticorruzione.it;* in addition, the article no. 182 provides that the contract contains how the risks should be monitored and checked for their permanency during the entire period of the contractual relationship.

(73) Before the Code of public contracts of 2016 the expressed indication of the matrix risks was a discretionary choice for the procuring entities and it was mandatory for the firms only if specified in the tender notice. About that, it is possible to consult the document released by the Ministero dell'economia e delle finanze, *Partenariato pubblico-privato: una proposta per il rilancio. Guida alle pubbliche amministrazionu per la redazione di un contratto di concessione per la progettazione, costruzione e gestione di opere pubbliche in partenariato pubblico privato*, 2018, avaiable on *www.mef.gov.it*, (in particular the attachment no. 3, p. 53 ff.); ANAC, guidelines no. 9, adopted on 28 March 2018, full text available on *www.anticorruzione.it*, p. 13 ff.

(74) Please refer to G.F. Cartei, *Rischio e disciplina negoziale*, *quoted*, (spec. paragraph no. 5, 6 and 7), p. 617 ff.; R. Cori - I. Paradisi, *I contratti di concessione e il Partenariato pubblico privato dopo il correttivo del Codice dei contratti pubblici*, in *Appalti e contratti*, 2017, p. 36 ff.; R. Gallia, *La revisione della spesa per infrastrutture*, in *Rivista giuridica del Mezzogiorno*, 2013, p. 77 ff.; A. Troisi, *Partenariato pubblico-privato ed investimenti infrastrutturali*, in *Concorrenza e mercato*, 2012, p. 891 ff.; S. Calvetti, *Proroghe, affidamenti diretti ed immodificabilità del contratto*, in *Urb app.*, 2018, p. 562 ff.

In conclusion of this party of the analysis, it is opportune to refer that the Italian current Code of Public Contracts (Legislative Decree no. 50 of 2016), as modified by the Legislative Decree no. 56 of 2017, in subparagraph no. 2 of the article no. 180, states that the public-private parternship agreement may be used for the implementation of every public work, rule that opens the way to an application to the *PPP* beyond the necessary restrictions imposed by European and domestic public finance.

3. *PPPs* models, implementation or betrayal of the notion of flexibility. Critical notes about the use and abuse of a term.

In order to appreciate the importance of the notion of flexibility in the current Code of Public Contracts, a deferral should be made to the opinion made by of the *Consiglio di Stato* (75), during the implementation of the delegated law, according to which the Euopean directives represented a challange for an overall rethinking of the Italian public contracts system, inspired by a philosophy that combined flexibility and rigour, simplification and efficiency, by seeking a balance between all legal arragments (76).

As mentioned in the note *infra* 44, flexibility represents a ratty terms of which we should be doing less; it is not a legal arrangment, but it is a general rule or a characteristic of the administrative organization (77).

In general terms, the former rules were marked by a rigid system, based on a Code and on a strict implementing regulation, issued only after four years, which grealty increased the number of the provisions in force.

The Italian regulation of public contracts has always the need to combine the old accounting rules — aimed at ensuring the greates

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(75) Consiglio di Stato, Special Commission, 1 April 2016, opinion no. 855.

(76) On different aspects, please refer to R. De Nictolis, *Il Codice dei contratti pubblici: la semplificazione che verrà*, in *www.federalismi.it*, 2016; M. Calabrò, *Appalti pubblici e semplificazione della procedura di presentazione delle offerte. Alla ricerca di un bilanciamento tra fiducia e controllo*, in *Dir. econ.*, 2017, p. 219 ff.

(77) The contributions that most influenced this analysis, in addition to the one already mentioned by F. Liguori, note *infra* 44, are made by M. Cafagno, *Flessibilità e negoziazione. Riflessioni sull'affidmento dei contratti complessi*, in this *Journal*, 2013, p. 91 ff.; G.D. Comporti, *La flessibilità nelle negoziazioni pubbliche: questa sconosciuta*, in *Dir. soc.*, 2017, p. 177 ff.; on the subject of the temptation to use mathematical formulae for administrative choices, please refer to H. Hosni - S. Marmi, *La matematica, il ragionamento incerto e la discrezionalità*, in G.D. Comporti (ed), *Le gare pubbliche. Il futuro di un modello*, Napoli, 2011, p. 27 ff.

possible saving of public money — and the European rules, that have been issued to ensure the proper functioning of the market.

It should be made clear that the notion of flexibility can substantially have two different meanings, that are the call for so-called flexible of soft law regulation (78) and, from a different perspective, the use of flexible tendering procedures, in order to enable the contracting authorities to fill the cognitive gaps they suffer in relation to private companies.

From the first point of view, as noted in the previous paragraph, the guidelines issued by *ANAC* have provided a decisive key to interpretation, with a document divided into two autonomous parts, the first part dedicated to the analysis and allocation of the risks and the second one dedicated to monitoring the joint action conducted by the administration and the private firm.

From the second, and more decisive, point of view the tender procedure is the ideal place in which the contracting authority can take advantage from the positions of the individual firms in order to achieve a more informed administrative choice.

The issue concerns the need to compress or to extend the discretion of the administration, to make it flexible and to combine these aspects with the *PPP*, in order to assess if the *PPPs* procedures implment or not the concept of flexibility.

The automatism of the comparison between the offers of the firms and the related maximum restrictions of the administrative action cause phenomena that in the economic field are defined as 'adverse selection' (79). Especially in relation to the complex contracts, flexibility must be understood as a possibility for the administration to choose a method of execution of public works that allows a constant comparison between the parties, and to orient in a considered and conscious way the choice of the administration.

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(78) Please refer to M. Ramajoli, *"Soft law" e ordinamento amministrativo*, in *Dir. amm.*, 2017, p. 147 ff.; M. Lipari, *La regolazione flessibile dei contratti pubblici e le linee guida dell'ANAC nei settori speciali*, in *www.giustamm.it*, 2018; V. Marchianò, *ANAC e potere di regolazione*, in *Appalti e contratti*, 2016, p. 52 ff.; S. Valaguzza, *Nudging pubblico vs. pubblico: nuovi strumenti per una regolazione flessbile di ANAC*, in *Rivista della regolazione dei mercati*, 2017, p. 91 ff; P. Pantalone, *Le linee guida dell'Autorità nazionale anticorruzione nella regolazione flessibile del "mercato" dei contratti pubblici*, in *Rivista trimestrale degli appalti*, 2018, p. 889 ff.

(79) G. Fidone, *Le concessioni come contratti complessi: tra esigenze di flessbilità e moltiplicazione dei modelli*, in M. Cafagno - A. Botto - G. Fidone - G. Bottino (eds), *Negoziazioni pubbliche: scritti su concessioni e partenariati pubblico-privati*, Milano, 2013, p. 34 ff.; R. Michaely - W.A. Shaw, *The pricing of initial public offering: tests od adverse-selection and signaling theories*, in 7 *The Review of Financial Studies* (1994), p. 279 ff.

From this point of view the so-called contractualized *PPPs* (that must be distinguished from *PPPs* in corporate form, that will be analysed in the next paragraph) perfectly seem to implement the notion of flexibility, because the public entity sets the objectives and monitors their achievement, while the private partner identifies the most effective ways to achieve the objectives set.

However, this distinction of tasks is not clear-cut, and this consideration seems to be fully covered by the concept of flexibility; in fact, private individuals can contribute to the setting of objectives just as much as the public administration may influence the management of the work (80).

In some respect, the Italian legislator, in the drafting of the current Code of Public Contracts, opted for a more collaborative and flexible approach, withh several legal arrangement aimed at involvong the private sector, also in the planning and design phase of the work, even if many application doubts still exist (81).

This central role of flexibility already emerged from the European directives of 2014, in which the public procurement market is no longer a sector that needs to be controlled or stiffened, through formal rules that make the public action inflexible, but conversely, it is necessary to guarantee a wide margin of choice to the contracting authority (82).

PPP represents one of the most sophisticated manifestations of the collaborative models between the administration and the private sector, in which flexibility it is implemented through the use of knowledge and resources of the private sector from the earliest stages of the procedure (83).

In other words, the lenghty duration of the cooperation, the private method of financing the project, the contribution of the

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(80) Please refer to M.P. Chiti, *Luci. Ombre e vaghezze nella disciplina del Partenariato pubblico-privato*, in M.P. Chiti (ed), *Il partenariato pubblico-privato. Profili di diritto amministrativo e di scienza dell'amministrazione*, Bologna, 2005, p. 7 ff., one of the fortunes of the *PPPs* is the hybridization between different legal disciplines.

(81) G.D. Comporti, *La flessibilità*, *quoted*, p. 186 ff.

(82) F. Gambardella, *Le regole del dialogo e la nuova disciplina dell'evidenza pubblica*, Torino, 2016, p. 29 ff., all the measures to be taken in order to revitalise the public contract sector must include a role for the private entity, from a general perspective, in which authoritative legal instruments are replaced by flexible instruments, more consistent with market and competition values; M. Urbani, *L'efficienza della committenza pubblica e il mercato unico*, in *Giorn. dir. amm.*, 2014, p. 1159 ff.

(83) F. Gambardella, *Le regole del dialogo*, *quoted*, p. 167 ff.; S. Amorosino, *Profili sistemici del partenariato pubblico-privato per le infrastrutture e le trasformazioni urbanistiche*, in *Rivista trimestrale degli appalti*, 2011, p. 383 ff.

private entity to all the stages of the procedure and the optimal risks allocation bring to light a flexible model, in which the tasks and the roles held by administration and private entities are variable depending of the type of the collaboration chosen.

Especially with reference to the contractualized *PPP*, the numerous legal instruments (84)provided for by the Italian legislator show a variety of collaborative templates that implements the notion of flexibility.

The public-private partnerships testify that the active involvement of the firms, already during the design stage of the work, meets the need to minimise imbalances between the private and the public sectors.

The use of *PPPs* template often concerns the execution of large strategic infrastructures which require the conclusion of very complex contracts, with the involvement of large amounts of capital by companies. For these reasons, the inclusion of clauses which allow companies to modify and re-parameterize their bids encourages the participation in public tender procedures (85).

Complex and long-term contracts may be incomplete, because they are characterized by a generalized uncertainty and a informative vulnerability and, in this sense, the use of rigid and mechanical procedures is a deterrent factor (86).

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(84) Merely by way of observation, please refer to G. Crepaldi, *Il baratto amministrativo: sussidiarietà, collaborazione ed esigenze di risparmio*, in *Responsabilità civile e previdenza*, 2018, p. 37 ff.; V. Sessa, *La gestione dei beni pubblici in tempo di crisi: l'apertura del Codice al "partenariato sociale"*, in *www.giustamm.it*, 2018; M. Baldi, *Locazione finanziaria, contratto di disponibilità e baratto amministrativo nel D.Lgs. n. 50/2016*, in *Urb app*, 2016, p. 959 ff.; F. Gambardella, *Partenariato pubblico-privato e profili di liberalizzazione: il contratto di disponibilità*, in F. Liguori - C. Acocella (eds), *Liberalizzazion*i, Notebooks of the Journal *Diritti lavori mercati*, 2015, p. 129 ff.; S. Tarullo, *Il baratto amministrativo nel nuovo codice dei contratti pubblici: le pubbliche amministrazioni alla prova del partenariato civico*, in *Rivista trimestrale degli appalti*, 2016, p. 347 ff.; F. Di Nola, *Le attività lavorative prestate nell'ambito del c.d. baratto amministrativo: natura giuridica, disciplina e concorrenza con APU e LSU*, in *Rivista del diritto della sicurezza sociale*, 2017, p. 843 ff.; S. Zebri, *Il contratto di partenariato sociale e il nuovo baratto amministrativo*, in *Finanza e Tributi*, 2016, p. 538 ff.; for a reconstruction of the legal tool mentioned in the previous Code of Public Contracts, see G. Fidone, *Dalla locazione finanziaria al contratto di disponibilità: l'evoluzione del contratto di leasing immobiliare pubblico*, in *Foro amm. TAR*, 2012, III, p. 1039 ff. and G.F. Cartei, *Le varie forme di partenariato pubblico-privato. Il quadro generale*, in *Urb app.*, 2011, p. 888 ff.

(85) M. Cafagno, *Flessibilità e negoziazione, quoted*, p. 994 ff., long-term contracts, such as PPPs, may be incomplete due to the duration and complexity of the operation so that the rigid and mechanical procedures become unusable; M. Ceruti, *L'insostenibile leggerezza delle concessioni*, in this *Journal*, 2016, p. 809 ff.

(86) F. Saitta, *Contratti pubblici e potere di riesame della stazione appaltante*, in *Giur. it.*, 2015, p. 2756 ff.; F. Saitta, *Flessibilità e rigidità dei contratti pubblici; l'autotutela della stazione appaltante tra norme (poche) e prassi*, in *Dir. econ*., 2014, p. 275 ff.

A rigid formalism leads to longer tendering procedures, because the contracting authority is not in a position to predict in advance all the techincal uncertainties, reason why the possibility of using new data, acquired during the tendering procedure, can lead to the development of efficient contractual relationships and the contractualized *PPPs* seems to respond to these irrepressible needs for operational flexibility (87).

4. Economic risk and flexibility to the test of the corporate structure: consistency and findings with regard to the *PPPs* in company form.

As mentioned in the first part of the research, *PPPs* can also be developed through the establishment of an autonomous legal entity, in corporate form (88). This part of the survey does not aim to carry out a complete study of the state-owned companies (89), but intends

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(87) One example is represented by the evolution of the legal arrangement of the competitive dialogue, that allows an involvement of the companies from the first phases of the procedure (P. Carbone, *Il dialogo competitivo*, in *Rivista trimestrale degli appalti*, 2017, p. 479 ff.; M.B. Chito, *Procedure di scelta del contraente. La riforma della disciplina: prime considerazioni*, in *Rivista trimestrale degli appalti*, 2016, p. 723 ff.; B.M. Raganelli, *Il dialogo competitivo dalla direttiva 2004/18/CE al Codice dei contratti: verso una maggiore flessibilità dei rapporti tra pubblico e privato*, in this *Journal*, 2009, p. 127 ff.).

(88) G. Piperata, *La trasformazione delle società a partecipazione pubblica. Dalla società in house alla società a partecipazione mista*, in M. Dugato - F. Mastragostino (eds), *Partecipazioni, beni e servizi pubblici tra dismissione e gestione*, Bologna, 2012, p. 151 ff.

(89) About this issue, the legal literature is very varied, N. Irti, *Proprietà e impresa*, Napoli, 1965, p. 41 ff.; F. Merusi, *Le direttive governative nei confonti degli enti di gestione*, Milano, 1977, p. 1 ff.; F. Galgano, *Le società per azioni in mano pubblica*, in *Politica del diritto*, 1972, p. 681 ff; G. Cottino, *Partecipazione pubblica all'impresa privata ed interesse sociale*, in *Archivio Serafini*, 1965, p. 47 ff.; Vv. Aa., in M. Cammelli - M. Dugato (eds), *Studi in tema di società a partecipazione pubblica*, Torino, 2008; M.A. Sandulli, *Il partenariato pubblico privato istituzionalizzato nell'evoluzione normativa*, in *www.federalismi.it*, 2012, p. 5 ff; C. Ibba, *Le società a partecipazione pubblica: tipologia e discipline*, in C. Ibba - M.C. Malaguti - A. Mazzoni (eds), *Le società "pubbliche"*, Torino, 2011, p. 1 ff.; F. Liguori - C. Acocella, *Questioni (vere e false) in tema di società miste e in house dopo la pronuncia della Plenaria*, in *Foro amm. CdS*, 2008, p. 756 ff.; R. Caranta, *Ancora in salita la strada per le società miste*, in *Giorn. dir. amm.*, 2008, p. 1120 ff.; C. Marcolungo, *Il partenariato pubblico privato isitutizionalizzato: un tentativo di ricostruzione*, in M.P. Chiti (ed), *Il partenariato pubblico privato*, Napoli, 2009, p. 193 ff.; C. Acocella, *Alcune buone ragioni per la sopravvivenza delle società miste*, in *www.federalismi.it*, 2007; G. Grüner, *Enti pubblici a struttura di s.p.a. Contributo allo studio delle società legali in mano pubblica di rilievo nazionale*, Torino, 2009; F. Goisis, *Contributo allo studio delle società in mano pubblica come persone giuridiche*, Milano, 2004, p. 102 ff.; G. Napolitano, *Le società pubbliche tra vecchie e nuove tipologie*, in *Riv. soc.*, 2006, p. 999 ff.; A. Cardasco - P. Tonnara, *Le società miste: verso il partenariato pubblico-privato istituzionalizzato?*, in *www.federalismi.it*, 2018; M. Ceruti, *È ammessa la procedura negoziata per la scelta del socio privato nelle società miste? L'attualità della comunicazione interpretativa della Commissione sui PPPI del 2008*, in this *Journal*, 2017, p. 246 ff.; E. Brivio di Carpegna, *Società miste per i servizi locali e principio di sussidiarietà. Di alcune difficoltà nell'integrazione*

to applicate the interpretative coordinates and the observations carried out about the notions of economic risk and flexibility to the *PPPs* in corporate form.

It is appropriate to premise that in the Italian law there are some differences between the state-owned companies (*società a partecipazione pubblica*) and the *PPP* in corporate form (*società miste*), even if in this section of the work the choice of treating the two types of company jointly is functional in order to understand the scope of the corporate screen for the management of the economic risk, also in the pathological phase of the insolvence.

The Green Book on *PPPs* in the field of joint enterprises established two principles, namely the neutrality or fungibility of *PPPs* legal instruments and the protection of the chosen model in the light of the European values of free competition as a general public interest and equal treatment of economic operators, to be pursued in different ways (90).

The development of mixed societies is based on this paradigm; the corporate instrument is an opportunity for a shareholder to make a profit and the public interest represents an element of exception for certain profiles.

Obviously, this vision can lead to an alteration of the system, since the private partner can act alone, even if it is formally part of a joint society.

In order to try to recover any possible breach of the competition principle downstream, the competitive process must cover all aspects and stages of the award of the contract. In this sense, no activity, even if not ancillary, can be entrusted until after a competitive bidding process.

The difficulties in interpreting this kind of companies still persist, even after the entry into force of the *T.U.* of the public companies

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tra pubblico e privato, in *Dir. econ.*, 2013, p. 91 ff.; M. Lungarella, *Il socio pubblico e il controllo sulle società a partecipazione* pubblica, in *www.federalismi.it*, 2018; A. Amodio, *Le società pubbliche: genesi di una riforma*, in *www.federalismi.it*, 2018; S. Vanoni, *Le società miste quotate in mercati regolamentati (dalla "golden share" ai fondi sovrani)*, in C. Ibba - M.C. Malaguti - A. Mazzoni (ed), *Le società "pubbliche"*, Torino, 2011, p. 187 ff.; F. Luciani, *Pubblico e privato nella gestione dei servizi economici locali in forma societaria*, in *Riv. dir. comm. Dir. gen. Obbl.*, 2012, p. 719 ff.

(90) In this sense, see M. Dugato, *Le società a partecipazione mista per la gestione di servizi pubblici locali. Il procedimento di costituzione, l'affidamento dei lavori e la relazione tra ente socio e società*, in M. Dugato - F. Mastragostino (eds), *Partecipazioni, beni e servizi pubblici tra dismissioni e gestione*, Bologna, 2014, p. 214 ff., in a critical sense, noted that the current joint enterprises correspond more to an outsourcing model than to a partnership in the strict sense, because in real partnerships the relationship changes according to the changing context.

(Legislative Decree 19 August 2016, no. 175), who has undoubtedly had the merit to dispel some serious doubts, as evidenced by the provisions governing the conditions and limits of the public shareholdings (91).

Specifically, article no. 17 of the *T.U.* provides that the participation of the private individual in the *PPP* in corporate form (i.e. in the joint enterprise) cannot be less than thirty percent and the selection of the same is carried out with competitive procedures. In accordance with the provisions of paragraph 3 of article no. 17, the period of private participation in the company may not be longer than the duration of the contract or concession (92). This provision raises doubts about the application of the state of insolvency of the company and its relative protection of creditors.

In this section, the discussion will be divided into two autonomous parts: the first one has the objective of analysing the management of economic risk by the company, with profiles also linked to an eventual state of insolvency, while the second one try to combine the concept of flexibility with the corporate structure, in a *prima facie* unsurpassed antinomy.

4.1. *The management of the economic risk by the state-owned companies: the applicable discipline and brief information about an eventual state of crisis.*

The above remarks about the risk allocation during the *PPP* relationships are fully valid also with regard to the partership developed in corporate form, with some appropriate clarifications.

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(91) The issue has been authoritatively addressed previously by M. Clarich, *Le società partecipate dallo Stato e dagli enti locali fra diritto pubblico e diritto privato*, in F. Guerrera (ed), *Le società a partecipazione pubblica*, Torino, 2010, p. 1 ff.; P. Pizza, *Le società per azioni di diritto singolare tra partecipazioni pubbliche e nuovi modelli organizzativi*, Milano, 2007, p. 41 ff.; C. Ibba, *Società pubbliche e riforma del diritto societario*, in *Riv. soc.*, 2005, p. 1 ff.; F. Ghezzi - M. Ventoruzzo, *La nuova disciplina delle partecipazioni dello Stato e degli enti pubblici nel capitale delle società per azioni: fine di un privilegio?*, in *Riv. soc.*, 2008, p. 668 ff.; F. Guerrera, *Le società di capitali come formula organizzativa dei servizi pubblici locali dopo la riforma del diritto societario*, in *Società*, 2005, p. 682 ff.; G. Racugno, *Crisi di impresa di società a partecipazione pubblica*, in *Riv. soc*., 2016, p. 1144 ff.; I. Demuro, *La crisi delle società a partecipazione pubblica*, in *Anal. Giur. econ.*, 2015, p. 557 ff.; C. Pecoraro, *Pubblico e privato nella 'governance' delle sociretà partecipate: feremenți e incertezze nel quadro di riferimento*, in *Dir. fall. Soc. comm*., 2014, p. 701 ff.

(92) The reason of this provision is to avoid automatic renewals of entrustments or assignments to private entities with unlimited duration (on this aspect, please refer to G.A. Fois - A. Riccardi, *La società mista con contratto di partenariato pubblico-privato*, in F. Fimmanò - A. Catricalà (eds), *Le società pubbliche*, vol. II, Roma, 2016, p. 753 ff.).

The question is about the possibility for the corporate screen to absorb in a different way the economic risk compared to what happens in relation to thre *PPP* in contract form, a matter that directly affects the state of insolvency and the legal fallibilty of these kind of companies (93).

The subject is extremely slippery and there is no intention of giving a definitive answer here, but only to provide some key to further reconstruction, which will be followed by a conclusion.

The starting point must be unambiguous and concerns the need to protect any creditor who, for various reasons, comes into contact with the company, even if it is set up specifically for a project or an infrastructure.

As clarified by the notable ruling of the Supreme Court in 1995 (*Corte di Cassazione*, 6 May 1995, no. 4899, in *Giust civ. mass.*, 1995, p. 291), when the administration makes use of private law it must accept its rules.

In order to try to delimit the matter under investigation, the whole affair concerns the need to protect public and private entities that, for various reasons, enter into relations with the corporate entity (94).

The administration of the economic risk through a corporate form is obviously different from what happens in a contractualized *PPP*, in which any insolvency is resolved by private law instruments.

The model of the *PPP* in corporate form involves the establishment of an autonomous entity, which has the task of finding the resources for the provision of a public service or the construction of an infrastructure. The continuous collaboration between the public and private sides ensures that the public administration retains a high degree of control over the project but, at the same time, the public partner can improve its management skills.

In this section of the work, the hermeneutical coordinates traced in terms of insolvency of public shareholding companies will be applied to the *PPP* in corporate form to assess its compatibility with the current framework, especially after the 2016 reform.

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(93) M.A. Sandulli, *Il partenariato, quoted*, p. 6, the *PPP* in corporate form may result either from the formation of a new company or from the participation of the private individual in a pre-existing public company.

(94) The case relating to the protection of the creditors of public companies, even in the event of corporate insolvency, has been extensively addressed by courts and scholars, for all, please refer to C. Ibba, *L'impresa pubblica in forma societaria tra diritto pubblico e diritto privato*, in *AGE*, 2015, p. 409 ff.; G. Racugno, *Crisi d'impresa*, *quoted*, p. 1150 ff.

The article no. 14 of the Legislative Decree no. 175 of 2016 requires the company's directors have to monitor the financial situation and have to manage and prevent corporate crises, in an effective and timely manner, also through the support of indicators of « risk management ».

In addition, the article no. 6 requires the establishment of risk assessment programmes, which, in turn, requires the preparation of an adequate organisational model.

The abovementioned article no. 14 provides that all companies with public participation are subject to bankruptcy proceedings; the will of the legislator is clear and is directed towards the subjection of all companies overcoming the debate on the nature of these companies (95). However, the entire application of this provision to *PPPs* in corporate form raises some doubts.

The statutes of joint enterprises may provide that control over management is only exercised by the public partner and in this sense the position of the public partner seems similar to what happens in house providing.

The solution contemplated here must be split into two separate scenarios, since both the application of article no. 14 and the rules on in house providing do not seem satisfactory (96).

In the event that the state of insolvency affects the whole society, the provisional exercise of the receiver would be applicable, where possible, but always carried out using the resources, skills and industrial organization of the private partner. This solution is compatible with the risk sharing that underpins the *PPP*, but in any case, after the provisional procedure, the service must be reassigned.

In this first case, the insolvency could also be due to the public partner (i.e. the public administration as a partner) and from the point of view of administrative law, the service must be entrusted again, even if no provision requires another public tender to be carried out, this seems to be the most compatible solution.

If, on the other hand, only the private partner is in a state of insolvency, if the crisis is not managed with solutions that allow continuity of the public service, the state of insolvency affects the

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(95) In a broad sense, see G. D'Attorre, *La crisi d'impresa nelle società a partecipazione pubblica*, in F. Fimmanò - A. Catricalà (eds), *Le società pubbliche*, vol. II, Roma, 2016, p. 673 ff., and the cited bibliography on the quoted debate.

(96) For a complete analysis, see F. Guerrera, *Crisi e insolvenza delle società a partecipazione pubblica*, in *Rivista ODC*, 2018, p. 8 ff.

joint-venture company, and the contractual and corporate remedies provided for the premature termination of the *PPP* are activated. The tools for crisis management are the resolution of the tender or service contract and the dissolution of the joint enterprise, the redemption of the shares or quotas of the private partner, the transfer of the participation to a new partner; in other words, the aim is to interrupt the partnership (97).

In general, a common conclusion may be that the state of insolvency reveals the failure of the choice of a corporate *PPP* chosen for the organisation and management of those activities and obliges the administration to outsource the contract, over which it retains control during the execution phase.

In any event, it would be preferable for any possible future and additional legal adjustment to take into account the need to protect creditors in all the options that the administration may prefer under article no 166 of Legislative Decree no. 50 of 2016.

4.2. PPPs *in corporate form and flexibility: critical notes on benefit sharing clauses*.

If the notion of economic risk can be analysed in relation to the state of insolvency of the company, the connection between corporate structure and flexibility (which is already a vague concept in itself) could give rise to a contradictory situation in terms.

Flexibility is a concept that tends to be alien to companies and it can only be conferred through specific clauses inserted in the articles of association.

As noted more extensively during the analysis, the financing of infrastructure must be linked to virtuous paths in which public funds must be used in the best possible way.

One of the key themes of *PPP* is to maintain the economic and financial equilibrium of the project during the entire duration of the contractual relationship (98), in this case linked to the legal life of the joint venture.

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(97) Consiglio di Stato, Sec. V, 28 September 2016, judgment no. 4140, which declared that the priority clauses in favour of the private partner in companies with joint ventures were void; C. Ibba *Il nuovo diritto societario tra crisi e ripresa (Diritto societario Quo vadis?)*, in *Riv. soc.*, 2016, p. 1026 ff.

(98) G.F. Cartei, *Interesse pubblico e rischio: il principio di equilibrio economico-finanziario nella finanza di progetto*, in G.F. Cartei - M. Ricchi (eds), *Finanza di progetto. Temi*

During the *PPP* project there may be additional economic gains for the private partner, so-called benefits, which may alter the economic balance defined in the public tender.

For these reasons, the administration must provide for clauses, which must be included in the contract of establishment of the public-private company, for the sharing of these economic benefits by the community.

When a *PPP* project has a degree of uncertainty, it can be difficult for the administration to determine in advance a reasonable level of public contribution.

The inclusion of benefit-sharing clauses in the articles of association of the company makes it possible to give the company the minimum margin of flexibility, especially if it is provided for in non-exhaustive terms but with margins of action for the administration.

Potential increases in the value of the project's internal profitability may find in the benefit-sharing clauses a proportional and partial recovery of public finances to allow other funds to be released for other projects.

The legislative logic of these clauses, especially if they are included in a social clause, which tends to have a longer legal life, is to define an approach agreed between the public and private sectors in sharing economic benefits beyond a set threshold.

Specifically, the clauses studied, if drawn up in terms of cash flow or shareholder cash flow may allow the joint venture a breakdown on the basis of complex variables, which would give that sense of flexibility, referred to as additional value for these projects.

In addition, according to a shareable consideration, the benefit-sharing clauses also cover the political risk of the project, since the sharing of economic results allows to release the administration from the constraints of public finance, one of the reasons behind the use of *PPP* (99).

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e prospettive, Napoli, 2010; on the corporate side, see A. Di Carlo - M. Bisogno, *La ristrutturazione aziendale delle società pubbliche partecipate: un'analisi delle condizioni di equilibrio*, in *www.giustiziacivile.com*, 2018; S. Sorrentino, *La procedimentalizzazione della decisione di gestire i servizi pubblici locali mediante la società mista*, in *Munus*, 2018, p. 715 ff., it should be noted that the new framework seems to be aimed at limiting the use of the corporate instrument by administrations, because there are procedural burdens for this choice, both for the partner and for the manner in which it is made.

(99) R. Togni - G. Ferrante, *Clausole di benefit sharing: equità ed efficienza nell'affidamento dei contratti di PPP*, in G.F. Cartei - M. Ricchi, *Finanza di progetto e partenariato pubblico-privato. Temi europei, ambiti nazionali e operatività*, Napoli, 2015, p. 483 ff.

With these clauses in the statute of the joint venture, especially if provided for with variable returns for the parties, the same company assumes a certain degree of flexibility, to be understood as the possibility of distributing profits downstream on the basis of the profitability of the work.

5. Concluding remarks and observations on the criteria of the value for money.

It seems appropriate to address some conclusions, with the notice that these reflections may become no longer relevant in view of the aforementioned instability of the Italian legislator on the subject.

Public-private partnerships, regardless of the contractual or corporate form, cannot and must not be a miraculous solution, the panacea for all the evils of public finance in relation to infrastructure development.

There is no doubt that the possibility of including such projects outside the public budget is an incentive for the development of such collaboration between the public and private sectors.

However, it is not necessary to lose the final point of arrival, which is not (or not only) the saving of public expenditure, but the optimal execution of the contract, i.e. the primary public interest in public works.

In this sense, a totally favourable opinion is expressed with regard to the provisions contained in Legislative Decree 50 of 2016, which have organically regulated one of the most functional models of collaboration between the public and private sectors, even if it is extraneous to the Italian legal tradition, although it is undoubtedly a horizontal subsidiarity tool.

The optimal allocation of risks, long-term cooperation, joint management, the weight of economic resources shifted entirely to the private sector and the role of coordination and management of the administration are elements that encourage the use of this type of cooperation, since it is not a real legal institution.

This last consideration reflects precisely the introduction of the principle of flexibility in the field of public contracts, which has been mentioned in many respects but which always has uncertain boundaries.

But if the legal instruments provided by the current Code of Public Contracts allow to overcome the classic rigidity that characterizes the relationship between administration and business, the flexibility understood as a continuous exchange to fill the cognitive gaps that a person suffers against the other, can only be a value to aspire.

PPPs continue to be an instrument with vague legal boundaries but it is essential in the current context of public finance constraints and budgetary pressures. However, different foreign experiences also show that *PPP* is not a flawless instrument, especially in sectors with a strong social impact, such as health.

With regard to the two key concepts of the whole research, flexibility and economic risk, two brief considerations should be made.

Flexibility is a term to be used with care, but it should not be abused with the risk of emptying it of meaning; if flexibility is to be understood as a possibility for administrations and private individuals to fill their gaps through continuous dialogue, flexibility can only be an additional value.

As regards the optimal allocation of risks between the public and private entities, the options of Legislative Decree 50 of 2016 are fully appreciated. Moreover, this type of risk allocation is one of the most significant virtues of the *PPP*.

Before concluding, it is worth recalling some brief and non-exhaustive notations on value for money, one of the keys to guide the discretion of administrations on the basis of article no. 166 above-mentioned.

The drive to use public-private partnership is increasingly premised on the pursuit of value for money; as it includes both qualitative and quantitative aspects and typically involves an element of judgment on the part of government, a precise measure for value for money does not exist.

Value for money can be defined as what a government judges to be an optimal combination of quantity, quality, features and price expected over the whole of the project lifetime (100). This parameter

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(100) P. Burger - I. Hawkesworth, *How to attain value for money: comparing PPP and traditional infrastructure public procurement*, in 1 *OECD Journal on Budgeting* (2011), 1; K. Almarri - H. Boussabaine, *The influence of critical success factors on value for money viability analysis in public-private partnership projects*, in 48 *Project Management Journal* (2017), p. 93 ff., « realizing value for money in *PPP* depends on the ability to identify and allocate risks to

means delivering the required public services with the optimal cost and benefits. It is a key indicator used by the public sector to assess whether a public-private partnership project will offer better value over other conventional procurement options (101). Value for money can be an indicator, a guide, but it does not affect the autonomy of the administration, that is not freedom but discretion.

In any case, it should be noted that the *PPP* is a collaborative solution that is not included in the Italian legal tradition and does not represent a miraculous solution for all the infrastructural problems faced by the administration.

In this sense, it is allowed to recall a warning that the rules may have different outcomes depending on the subject that applies them, the remedy is to be found in an improvement of the culture of the rules, beyond the subject to which they are addressed.

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those parties that have the ability to manage them in a better manner. The underlying principle of risk allocation is that each risk should be allocated to the party that is able to control its occurrence and imapct on the project, as well as absorb its consequences with the smallest financial impact »; from this point of view, it is very interesting the Chinese experience, Y. Ke - S.Q. Wang - A.P.C. Chan - P.T.I. Lam, *Preferred risk allocation in China's public-private partnership (PPP) project*, in 28 *International Journal of Project Management* (2010), p. 482 ff.; *PPP* Reference Guide, *Assessing Value For Money of the PPP*, avaiable on *www.pppknowledgelab.org* (2015), « Some *PPP* programs also require quantitative assessment of value for money. This typically involves comparing the chosen *PPP* option against a Public Sector Comparator (or *PSC*) that is, what the project costs would look like if delivered through traditional procurement. This comparison can be made in different ways. The most common is to compare the fiscal cost under the two options comparing the risk-adjusted cost to government of procuring the same project through traditional procurement, to the expected cost to government of the *PPP* (pre-procurement) or the actual *PPP* bids (post-procurement) ».

(101) Please refer to L. Giani, *Project financing e sanità. Criticità di un modello in continua evoluzione*, in *Scritti in onore di Roberto Marrama*, I, Napoli, 2012, p. 414 ff.