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The allocation of risk in the public-private partnership (PPP) between public contracts and concessions

Ph.D. Thesis in

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To Lidia,

a beautiful dream.

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Abbreviations and legend

In Italy we use the term "*appalti*" for the public contracts under EU law and we call "*concessioni*" the concessions, so that it makes easier to fix the distinction between the two, at least in the language (despite the several flaws occurring in the translation from english: hereinafter this should be taken into due account).

art. = article
AVCP = Authority of Vigilance on Public procurement Contracts (Autorità di Vigilanza sui Contratti Pubblici, now become ANAC, Autorità Nazionale Anti-Corruzione)
c.c./cod. civ. = Code Civil
cd. = so-called
cf. = *confer* (see)
cit. = cited
Code = d.lgs. n. 163/2006 – Code of Public Contracts (Codice dei Contratti Pubblici)
Consiglio di Stato (Adunanza Plenaria)/Cons. St. (Ad. Plen.) = Council of State (Plenary Conference)
Corte di Cassazione (Sezioni Unite)/Cass. Civ. (Sez. Un.) = Court of Cassation Civil (United Sections)
Cost./Corte Cost. = Constitution/ Constitutional Court
c.p.a. = d.lgs. 104/2010 – Code of Administrative Process (Codice del Processo Amministrativo)
d.lgs. = legislative decree
de qua/*quo*/*quibus* = in question
dir. = considerato in diritto (in sentences, the part in law after the one in fact)
Dir. = Directive
d.p.r. = presidential decree
ECJ = European Court of Justice
e.g. = *exempli gratia* (for example)
ESC = Economic and Social Committee
EU = European Union
ibid. = *ibidem* (in the same place)
id. = *idem* (the same)
i.e. = *id est* (that is)
ivi = therein
L. (all.) = law (annex)
lett. = letter
n./no. = number
op. cit. = *opere citato* (cited work)
p./pp. = page/pages
para. = paragraph
PPP(s) = Public-Private Partnership(s)
pt./ptt.= point/points
R.D. = royal decree
ss. = subsequent
Sez./Sect. = section
sent. = sentence (sentenza)
T.A.R. = Regional Administrative Court (Tribunale Amministrativo Regionale)
TENs = Trans-European Networks
TEU = Treaty on the European Union
TFEU = Treaty on the Functioning of the European Union
T.U. = Text Unique (Testo Unico)
TUEL = d.lgs. n. 267/2000 – Text Unic on Local Entities (Testo Unico degli Enti Locali)
v. *infra* = see below
v. *supra* = see above
vs. = versus (against)

A few preliminary thankful words must go to all the people which have contributed in a more or less factive manner, sometimes even unconsciously, to the realization of the present Ph.D. thesis.

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To them my esteem and my affection.

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Introduction

Before considering the merits of the particular matter, to which the title of this elaborate study refers, we must firstly make some brief remarks to the issue of risk, such as ineluctable component of any economic activity, particularly in the free market.

I do not have any claim to define herein the notion of risk; if anything, a worthwhile goal is that of bring out the polysemy of a concept often used incorrectly.

This is especially true in the legal field, where the purely positivistic and normative preparation inevitably does affect the attitude of the jurist in the face of phenomena unknown to him/her, or at least difficult to understand.

Economic science usuallly distinguishes between systematic and idiosyncratic risk to show how the first is never eliminated, while the latter is attenuated by the diversification of investments.

In business administration, additionally, the overall risk of the company can be decomposed into economic risk (related to the balance between costs and revenues), financial risk (related to the actual balance between cash flows in and out), capital risk (when directly affecting the activity and the estate) and reputational risk.

Within a company the risks can then cover the operating results, the company's liquidity and assets, or the reputation of the institution.

According to Frank Knight, in the admirable *Risk, Uncertainty and Profit*, the risk corresponds to that part of the uncertainty which is measurable and therefore manageable through certain objective methods.

Therefore Knight shows criticism for the widespread tendency to consider the risk unfavourably, as synonymous with loss (*downside risk*).[I]

In any case, despite the perception in a negative sense, the risk is to all intents and purposes a *vox media* resulting from the mathematical formula that expresses the product of the frequency of occurrence and the severity of consequences (cd. "magnitude").

This means that the risk may also have a positive meaning, that is as synonymous with opportunity (*upside risk*).

[I] Knight F.H., *Risk , Uncertainty, and Profit*, Hart, Schaffner & Marx; Houghton Mifflin Company, 1921, *passim*, in particular p. 233.

In addition to the lack of clarity regarding the protean *quid* risk, it is to be recorded a certain ambiguity about *quomodo* govern the risk as well.[II]

The patent consequence is the classification of the risk within the problem of *governance*.[III]

Entering *in medias res*, in public procurement transactions, it means that we must identify the most suitable tool, among those available under the law, to allocate the risk between the public and private parties.

At present there are essentially two macro-models: public procurement contracts and concessions.[IV]

As we will see later, the public-private partnerships (PPPs) appear difficult to read and however, though affecting the dichotomy public contracts-concessions, are not able to obliterate it.[V]

Just as there is no precise definition of what constitutes risk, there is not a unique and decisive methodology for dealing with it.

[II] The opinion focused on the usefulness (*expected utility*), which emerged in game theory with the study of Von Neumann J.; Morgenstern O., *Theory of Games and Economic Behavior*, Princeton, NJ. Princeton University Press, 1953, has been countered by the *prospect theory* of Kahneman D.; Tversky A., *Prospect Theory: An Analysis of Decision Under Risk* , Econometrica, 47(2): 263-291, 1979.

[III] According to the economic theory of organization, there are essentially two explanations for the presence of different organizational models: one focused on the transaction costs that vary depending on the specificity, frequency, and complexity of the transactions; the other focused on the asymmetry of information (adverse selection and moral hazard).

In summary, there is not a model valid for every eventuality.

On these topics, please refer to Moe T.M., "La nuova economia dell'organizzazione", in Brosio G., *La teoria economica dell'organizzazione*, Il Mulino, Bologna, 1989, p. 25 ss, and, more generally, to Nacamulli R.C.D.; Rugiadini A., *Organizzazione e mercato*, Il Mulino, Bologna, 1985.

[IV] There would also be a third one, *i.e.* the privatization, but as it goes beyond the present discussion it won't be analyzed.

[V] On this topic Mastragostino F., "I profili processuali comuni ai vari istituti", in Mastragostino F., *La collaborazione pubblico-privato e l'ordinamento amministrativo: dinamiche e modelli di partenariato in base alle recenti riforme*, Giappichelli Editore, Torino 2011, p. 73, points out that in Italy there are essentially two schools of thought on the PPPs. The one, headed by Chiti – *I Partenariati pubblico-privati e la fine del dualismo tra diritto pubblico e diritto comune*, in "Il Partenariato pubblico-privato", Edizioni Scientifiche, Napoli, 2009, p. 5 – concludes that "the PPP is not a legal category, including institutions that, despite their peculiarities, have common traits; but a descriptive notion with which we are referring, without any particular legal consequences, to any type of situations – contractual or institutionalized – which are marked by the coexistence of public and private entities". The other, sustained by Cortese – "Tipologie e regime delle forme di collaborazione tra pubblico e privato", in Mastragostino F., op. cit., p. 44 –, considers the PPPs as a reconstructive scheme which reproduces the rationale of the European Partnership *stricto sensu* in contexts where it appears more and more frequently the pursuit, by the public and private parties, of objectives materially coincident, especially from the point of view, so to speak, of good administration and economic efficiency. In this second sense PPPs end up covering also institutions for administration such as agreements *ex* art. 11 l. 241/90, accreditation or settlement to private entities, horizontal subsidiarity, and entities of various kinds (foundations and joint ventures) aimed at the collective interest (*e.g.* participation foundations, companies for urban development or enhancement of cultural heritage, or for experimental management).

The *golden rule* just wishes that the risk is placed in the hands of the parties who know how to handle it better by virtue of their expertise and experience, as well as of their own attitude toward the risk.

So these are the conditions under which one must try to understand the different interactions between risk and *public procurement*.[VI]

There are several schools of thought claiming about the greater or lesser capabilities of public versus private investment: according to the so-called "*Principle of Arrow-Lind*", for instance, the public apparatus would be neutral to the risk as it can put in place the diversification of investments on a very broad basis.[VII]

The drawback is the fact that, in the face of the limited resources and capacity of the public one, the private sector has proved to be endowed with more resources and a better know-how which do ensure a higher efficiency rate.

In the aftermath of the technological revolution that has occurred in the final part of the last millennium and of the phenomena of Europeanization (partially also globalization) of both market and law, the needs of the administrative plexus have therefore to confront – for not say to collide – with a problem not insignificant: the growing complexity of public procurement in spite of the ever decreasing availability of resources and means.

The goal thus becomes to engage the world of private enterprises from the technical and operating points of view, as from the economic and financial ones, in order to exploit the business know-how as goodwill and startup, reducing waste and maximizing efficiency-effectiveness of the administrative *agere*.

It follows, as a result, that the most interesting scope of analysis involves not only the study of what codified and implemented in Italy, in Europe and in the World (as proof

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[VI] From now on it is fundamental to use the original english expression, to be translated in the italian "approvvigionamento pubblico", so as to non equivocate by considering only public contracts instead of any contractual form of the public administration (concessions, above all, and others: associative...).

That is not for a mere style formula, but because of the relevant implications subtended to the wrong use of translations: see, for example, the "*green public procurement*", which in Italy is generally translated as "appalti verdi" and therefore it erroneusly gives the impression that the operative field refers solely to the public contracts and not to the concessions (v. *infra*).

[VII] The mentioned "Arrow-Lind Theorem" (in Arrow K.J.; Lind R.C., *Uncertainty and the evaluation of public investment decisions*, American Economic Review 60: 364-78, 1970) states that, under certain conditions, the social cost of risk tends to zero as the population tends to infinity, so that public projects would never be inferior to the market value of those conducted by private subjects.

The theorem has been criticized by Foldes L.P.; Rees R., *A Note on the Arrow-Lind Theorem*, American Economic Review, American Economic Association, vol. 67(2), 1977.

About this matters see Tirelli M., *The evaluation of public investments under uncertainty*, Research in Economics 60: 188-198, 2006.

of how the evolutionary trend *de quo*, within the system of public procurement, falls in a well marked and absolutely universal furrow, which goes far beyond the borders of individual States and Continents), but especially the conceptual elaboration, somewhat abstract and foretelling, of *quomodo* obtain the best allocation of the utilities between public and private parties in view of the *value for money*.[VIII]

Problem not at all easy to solve if we just reflect on the contrast of the two spheres: one serving the community and therefore guardian of the superindividual interests (*i.e.* common social objectives such as environmental protection, greater efficiency in terms of resources, combating climate change, promoting innovation and social inclusion and ensuring the best possible conditions for the provision of social services at high quality), the other animated primarily by the selfish capitalist ideology mostly aimed at maximum individual profit.

To be honest, however, this doctoral thesis has started not from theoretical issues (such as those that have seen main protagonists Knight, Neumann & Morgenstern, Kahneman & Tversky, Arrow & Lind, Foldes & Rees, and Nash), but as a practical matter with which I dealt when I was still a trainee at the legal office of the Province of Como.

That is the carrying out of the local service of inspection for heating systems: public service of municipal (for institutions with more than 40.000 inhabitants) and provincial jurisdiction, subject to the regional coordination, and usually outsourced through private operators paid by the public body. The oddity lies in the fact that those operators are paid by the institutions with funds from the private individuals subjected to the inspection (similar to tariffs, established at the regional level); furthermore, there is a whole regulation about the number of inspections, the related documentation and modes of communication to the public entity.[IX]

In a nutshell, there are some very aspects of the public contract, of the concession and of the public service.

[VIII] See Burger P.; Hawkesworth I., *How To Attain Value for Money: Comparing PPP and Traditional Infrastructure Public Procurement* , OECD Journal on Budgeting Volume 2011/1, OECD, 2011.

[IX] The national and regional legislation to which reference is made is the following: L. 9 january 1991 n. 10; D.P.R. 26 august 1993 n. 412 (as modified by the D.P.R. 21 december 1999 n. 551); D.Lgs. 31 march 1998 n. 112; D.Lgs. 19 august 2005, n. 192 (as modified by the D.Lgs. 29 december 2006, n. 311); L.R. Lombardia 26 december 2003, n. 26; L.R. 21 december 2004, n. 39; L.R. 11 december 2006, n. 24; Delib.G.R. 26-10-2006 n. 8/3393; Delib.G.R. 5 december 2007, n. 8/6033; Delib.G.R. 30 november 2011, n. 9/2601.

At a technical summit, organized by the Lombardy Region in order to clarify the nature of the inspection service, the representatives of local authorities split between public contract and concession award without a precise logic and with no valid arguments (if not the habit).[X]

Therefrom arose the very need to better understand the distinction between these instruments, especially in light of the phenomenon of the moment: the mantra of *public-private partnerships* (PPPs).

The anecdote narrated indeed means to shed light on the question of distinguishing between public contracts and concessions. The theme is not new nor elementary.[XI]

The importance of the distinction between public procurement contracts and concessions has found so far – that is, until the recent approval of the EU Directive on concessions 2014/23/EU of February 26, 2014 – its *raison d'être* in the pursuit of gimmicks and *escamotages* with the aim to evade the discipline on the former through the latter ones (emblematic was the Italian case of the concession *intuitu personae* for only construction).

It has not fully served its purpose the application of the TFEU principles (mainly for the services, being the concessions of works considered equivalent to public contracts).[XII]

Now that an obligation to tender is laid down for all the concessions, the focus must shift to another profile: the greater procedural flexibility destined to concessions.

How should we give it a justification? And, especially in the light of PPPs, is either an exclusive of concessions or could it be extended to public contracts?

Applying the institutionalist economic theories and the science of organization to the two main forms of public procurement known in the European Union law, we see that they are modeled quite slavishly, at least in the ends, on the market (simple public contract) and the organization (concession).

[X] For its part, though refusing the assignment of specialized services *ex* d.lgs. 165/2001, the case-law did not agree on the taxonomic classification of the inspection service.

A decision of the T.A.R. Lazio (Roma, Sect. II-*quater*, 27 october 2010, n. 33046) had excluded the character of local public service, but remained dubious the nature of public contract or concession.

[XI] A milestone has been Coase's "*The lighthouse in Economics*" in Journal of Law and Economics 17, 1974 ("Il faro nell'economia" in *Impresa, mercato e diritto*, Il Mulino, Bologna, 1995, pp. 291-317), where is destroyed the myth of the public management at all costs of the productive services potentially desirable for private operators, which then will assume the economic risk of the activity. Yet, once we choose the private management, we must recall that different possible organizational forms exist, the ends being represented by the public contracts and the concessions. In Italy the matter was addressed for the first time by Pototschnig U., *Concessione e appalto nell'esercizio dei pubblici servizi*, in Jus, 1953, 393 ss.

[XII] Rather, in the country of the manzonian Azzeccagarbugli, that has worsened the situation because, as we will see, it has generated a multiplication of different interpretations about which rules are general, therefore finding application also to the concessions, and which not.

Public contracts (simple) and concessions (complex) in fact constitute the poles apart into the system of public procurement, respectively taking the shapes of the market (the well-known "invisible hand" by Adam Smith) and of the organization (the known "visible hand" by Alfred J. Chandler).

Thence derives the structural, nearly ontological, diversity of the two concepts.[XIII]

The merit for having made an in-depth study is due mostly to Oliver E. Williamson who has examined the different internal mechanisms of the institutions that he has called *market* and *hierarchies*.[XIV]

In a few words, the differences are the better adaptation by the organizations to the human (bundled rationality and opportunism) and environmental (uncertainty/complexity of transactions and meagreness of operators) factors which cause the crisis of the market.

Moreover, Williamson contemplates the concept of "atmosphere" which holds some aspects relating to the ethical-moral involvement of the individuals in a given context.

It is then very easy noting a certain resemblance, first of all, between the public contracts (simple) and the market, at least for the same and intrinsic concorrential component which joins them, as well as between the concessions and the organization, where the main element becomes the *management*.

Consequently, the organizational forms of public contracts and concessions are traditionally seen as opposed: on one hand, the market of public contracts, with its solutions "*off-the-shelf*" and at competitive prices; on the other hand, the organization of concessions, with its economic-financial plan (cd. "PEF") and the cost/revenue estimate *pro futuro*.

Anyway, when you have to deal with non banal objects, as it happens in PPPs, public contracts seem to undergo a sort of metamorphosis assuming some traits proper of the concession.

Public contracts and concessions, antipodes of the system, end up coming so near that they almost overlap. The reverse happens whenever is the concession to take on certain aspects of the classic public contract according to the simplicity of the specific object.[XV]

[XIII] About the dichotomy enucleated in the doctrine between market, on one side, and organization, on the other side, see Arrow K.J., *The Organization of Economic Activity: Issues Pertinent to the Choice of Market versus Non-market Allocation*, in Analysis and Evaluation of Public Expenditures: The PPP System, 1: 47-64, Washington, D.C., Government Printing Office, Washington, 1969.

[XIV] Cfr. Williamson O.E., *The Economics of Internal Organization: Exit and Voice in Relation to Markets and Hierarchies*, The American Economic Review 66 (2): 369-377, Papers and Proceedings of the Eighty-eighth Annual Meeting of the American Economic Association, 1976; *id*., "Mercati e gerarchie", in Nacamulli R.C.D.; Rugiadini A., *Organizzazione e mercato*, Il Mulino, Bologna, 1985, pp. 161-186.

The application of the "Theory of organization" to public procurement leads to outline a set-up *prima facie* unsuspectable.

The PPP thus becomes a useful magnifying glass to examine the relations between public contracts and concessions.

In the first Part – "*The allocation of risk between public contracts and concessions*" – the main intent is to clear up the hoary question about the distinguishing of public contracts and concessions (by tradition considered to be poles apart of public procurement), a distinction which is based on the different allocation of risk.

Despite the decisions by the European Court of Justice have fixed some strongholds and mainpoints *in subiecta materia* – absorbed by the new EU Directives – noteworthy criticalities at the definitory level (especially in Italy, because of the heritages of the past and for the close connections that public contracts and concessions have with other items) are to be kept out for immediate consideration.[XVI]

Then the distinguishing criterion chosen at EU level does not appear resolutive.[XVII]

At the end of the section is finally hatched, in broad terms and with the help of some cases, the different rules generally applicable to public contracts and concessions to show that the hiatus, if any, seems to refer not just to the *genus* (public contracts or concessions) but to the *species* (public contracts/concessions simple or complex).

This is because of the risks in public purchasing and holds by reason of the risks present in the contract itself.

In essence, it is the objective and subjective allocation of the risks to make a difference.

[XV] See Council of State, Sect. V, 14 april 2008, n. 1600, for a case of concession of service in which has been ratified the legitimacy of the non-exclusion of a participant who had not attached the economic-financial plan (PEF) to his offer and, therefore, of the *lex specialis* that had not imposed the compulsory exhibition of the same plan.

The judge has stated that PEF is justified only when concessions entail huge investments subject to amortization, so that the verification of the basic economic-financial balance is required to allow eventual modification of the PEF during the execution of the concession for any change of the former conditions.

[XVI] Of course does not help the genesis of the concessions from the public contract, of which traces still remain.

[XVII] Already, the European Economic and Social Committee (EESC), in its Opinion of the Economic and Social Committee on the "Strengthening of the law governing concessions and public/private partnership (PPP) contracts" (2001/C 14/19), had branded as simplistic the Commission's decision to base on the operating risk the distinction between public contracts and concessions in the interpretative communication on concessions under Community law, 29 april 2000, (2000/C 121/02).

The operating risk in fact involves, in addition to the various forms of financing and/or remuneration, the duration of the contract and the overall economic and financial balance of the operation, as well as any contingency related to the heterogeneity of the interests protected.

Neither the operating risk seems to respond to the purpose of obviating the scarce public resources by boosting the private investments: on the one hand, for the structural weaknesses of the system and, on the other, for the ambiguities of the same system, too.[XVIII]

In the second and final part – "*The allocation of risk in the PPP*" – I will try to demonstrate that the PPP rises as "keystone" of the entire public procurement overall becoming the common ground for concessions and public contracts (complex).

The complexity depends on the service included in the contract and on the interests, even superindividual, protected, as well as on the private contribution – labour (*PPP soft*) and/or capital (*PPP hard*) –, so that these elements enrich the content of the operating risk.

The aim pursued is to demonstrate that there are different types of risk and that the expression "operating risk" appears to be extremely limited in comparison to the reality that in theory it would and should represent.

After an introductory part centred on the genesis of the public-private partnerships (PPPs) and on the strategic use of public procurement, briefly sketching out the steps which brought to the emersion of PPPs as a political tool to manage complexity at European level and, as a result, into national law (despite some very perplexities), attention is then given to the allocation of risk as the reading key of this whole written and, to this end, a quick *excursus* is made about the interests – at first only economic, afterwards also social and environmental (the famous 3 pillars of the TFEU and of the "Europe 2020 strategy": environment, economy, society) – underlying public procurement (with regard to which some problems of translation, at least in Italy, are pointed out).

Besides, mention is made of the important functions acknowledged to innovation and to the "*Total life cycle cost*" (TLCC) as brand-new ways of conceiving the public procurement and, therefore, of facing the risks implied. Particularly, it will be highlitghted the risk and benefit sharing in the partnership between public and private subjects, without forgetting the general public interest of the communities.

The question of the Eurostat decision of 11 February 2004 will be briefly considered only in order to clarify its scope, that is, whether a PPP be *on-balance* or *off-balance*, without affecting the substantial – but only the statistical and accounting – qualification of PPPs.

[XVIII] Light and shade concern in particular the case of privately funded projects with "zero risk" payment, subject to the normal alea of enterprise: think of the network services, the British PFI, or the various forms of government guarantees in the contemporary scene.

From all the foregoing it descends, indeed, the adoption of a quite peculiar statute when you are faced with a particularly complex procurement object, be it a public contract or a concession.

As regards the PPPs, must be recognized the gradual transition from the allocation of risk to the management and mitigation of risks (not only for concessions, but also for complex and risky public contracts).

In the first place, are relevant the risk management tools provided by the new EU Directives on public contracts and concessions: so there are common traits in the discipline of those institutions which, as mentioned above, are usually considered the antipodes of public procurement.[XIX]

The common features are derived by the turning away from the typical pattern of the public contract with regards to both the preliminary stage as to the contractor selection and contract design, in which are experienced moments of dialogue and (re)negotiation with maximum collaboration and flexibility.

In a comparative perspective are then offered some insights obtainable from the foreign law, examined in relation to their compatibility with the Italian national context (that presents some critical issues: influence costs and high rate of corruption, mistrust in public administration, lack of large and specialized enterprises).

At the end of the elaborate will be made some concluding remarks on the central core of this doctoral thesis, namely the allocation of risk in public procurement, to check what results the discussion exposed has brought about.

[XIX] Although in Italy are sometimes encountered examples of "creative" , so to speak, case law.

On the inclusion of a public contract into a concession see Council of State, Ad. Plen., 6 august 2013, n. 19: "Support services to the public and ticket integrate, the one, a public service concession, and the other, a public service contract. This is not an obstacle to consider a given relationship, for certain purposes, in a unitary manner, if the law itself indicates the legal form, and then the regime, to which the relationship is to be subject".

If it is certainly true that there are some contracts with mixed object (works, services, supplies plus all the combinations and/or variations of the three categories), it seems unlikely to accept the coexistence of a public contract and a concession in an *unicum*, unless this is the PPP understood in the terms explained above.

Not to mention the obvious logical artificiality of such a legal "*monstrum*", the mere introduction of a public contract into a concession would replicate thoroughly the epic story of the Homeric "Trojan horse" with the same disastrous consequences (whose effects can already be seen in the definition *per differentiam* and in the discipline of the concessions).

In order to proliferate, in line with the new EU Directive, the concessions have to maintain their characteristics, having regard to the procurement procedures, the ways by which the service is rendered, and the remuneration system, especially the allocation of risks.

If anything, we must witness the inverse process when, in the face of a not standardized contract, public contracts abandon their rigid shape of mechanical and aseptic procedures to give way to moments of flexibility, collaboration, dialogue and (re)negotiation.

The public procurement, in general, and the PPPs, in particular, should pursue the "3Es" (economy, efficiency, effectiveness) always bearing in mind the public interest, especially in the case of public service infrastructures.

Hence it results, in some ways, the metamorphosis of the classical public contract through the drift towards the modes considered exceptional (pre-commercial contracts and partnerships for innovation, technical and competitive dialogue, negotiated procedure with and without prior notice) giving rise to a trade-off between competition and collaboration.

Feature that does not appear to be denied, but rather strengthened, by the evolution marked by the new European Directives on the subject of public contracts and concessions.

If you really want to attract the private sector, the only solution is to prepare the best conditions to do this: *id est* a shift from "*risk transfer*" to "*risk and benefit sharing*".

It follows the valence of the PPPs as a political (and to some extent economic) instrument to manage complexity not only on the part of the European Union aiming, through it, at the full realization of the single market – rather than the mere internal one[XX] – in order to compete with the world Great Powers, but also on the part of the national plexus that has always been adopting the PPPs in different situations, so that it is necessary to distinguish between the PPPs *stricto sensu* (public contracts, concessions, joint ventures) and *lato sensu* (participation, subsidiarity, *munera*).

As well demonstrated by the economic and legal science, behind the various organizational and/or market forms lies the problem of *governance*, that is the teleological functionality of the institution with a view to the most efficient allocation of the resources – *i.e.* Pareto optimality – in the light of the possible transaction costs.

Since these latter increase along with uncertainty and complexity, are to be studied the hints retrievable from the current and existing law to reach an adequate solution.

Certainly it won't be the only solution, but at present the PPP – if understood in the terms of *fair risk sharing* between public and private parties – seems to be a clever remedy against the "*clouds of vagueness*" so dear to Arrow.[XXI]

[XX] In this regard, it is important to emphasize the transformation occurred within the Community from the original European Coal and Steel Community (ECSC), limited to trade coal and steel between 6 countries, to today's European Union of 28 States, in view of the realization of the coveted "People's Europe" (cf. Communication from the Commission to the European Parliament, june 24 1988, COM (88) 331 final, Bulletin of the European Communities, Supplement 2/88).

[XXI] Arrow K.J., "I know a Hawk from a Handsaw", in *Eminent Economists: Their Life Philosophies*, edited by Michael Szenberg. Cambridge University Press, New York, p. 46, 1992.

"*It is a world of change in which we live, and a world of uncertainty. We live only by knowing something about the future; while the problems of life, or of conduct at least, arise from the fact that we know so little*".

(Knight F.H., *Risk, Uncertainty, and Profit*,
Hart, Schaffner & Marx; Houghton Mifflin Company, 1921, p. 199)

Part I: The allocation of risk between public contracts and concessions

Chapter I (premise). Public Contracts vs. Concessions

The reasons that *funditus* lie behind the need to distinguish between public contracts and concessions are many and wide-ranging; of them I will try to give an account, with no claim of exhaustiveness, in the following pages.

Historically the main foundation of the distinction coincided with the exclusion of concessions from the outward evidence relating to public procurement – at first established by the internal rules and afterward by the European Directives on public procurement –, resulting in an award *intuitu personae*, highly personal or, however, less constrained.[1]

And this, at least in Italy, has brought to an exploitation of the dichotomy in relation to the captious elusion of the rules of disclosure provided for public procurement.[2]

Leaving to the administrative discretion the choice *ad libitum* between the two instruments, without taking into account the functionalization of the public administration to the pursuit of the public interest, has indeed proved to be a harbinger of abuses and inefficiencies.

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[1] In reality the unique text for the local finance (R.D. September 14, 1931, n. 1175), in Articles. 265-267, provided in the sense of the necessity of a public award procedure for the selection of the concessionaire: concessions were, as a rule, to be preceded by public auction, unless special circumstances in relation to the nature of the services suggested the auction for restricted invitations or the private negotiation.

In the same sense was art. 42 of the Royal Decree of may 9, 1912, n. 1447 on railway concessions (cf. also artt. 14 and 24 of the Royal Decree of 2 august 1929, n. 2150).

[2] A detailed survey of the chronological progression of the concession in Italy is carried out by Martinelli F.; Santini M., *La scelta del concessionario di pubblico servizio tra affidamento "intuitu personae" and procedura ad evidenza pubblica*, Urbanistica e appalti 9: 1016, 2001, which show how the concession in Italy was firstly considered an administrative act to to be entrusted *intuitu personae* in pursuit of the best public interest, then gradually losing the public law characteristics (v. *infra*).

About the age-old problem of the distinction between public contracts and concessions, because of their common matrix, see also Picozza E., "Appalti pubblici di servizi e concessioni di servizi pubblici", in *Gli appalti pubblici di servizi: con il commento articolo per articolo del D.lg.vo 17 march 1995, n. 157*, edited by Picozza E., Maggioli, Rimini, 1995, p. 47 ss.; Tucci M., *Appalto e concessione di pubblici servizi. Profili di costituzionalità e di diritto comunitario*, Cedam, Padova, 1997; Picozza E., "I contratti della pubblica amministrazione tra diritto comunitario e diritto nazionale", in *I contratti con la pubblica amministrazione*, trattato dei contratti diretto da P. Rescigno e E. Gabrielli, edited by C. Franchini, vol. I, Utet, Torino, 2007, p. 6 ss. Particularly, in the last contribution, a unedifying picture emerges where Italy comes portrayed as a reactionary and misoneist country, ruled by corporations and conservative classes, which fails to capture the essence of public procurement as a tool to achieve efficient and effective results, rather than merely as a set of rules to (not) follow as such. The author, in the face of a well-established elusive trend by Italy (*e.g.* the concession of only construction or the subthreshold contracts, even the real estate lease qualified as a service), concludes at p. 34 that "any attempt to circumvent or application and "restrictive" interpretation of Community obligations is destined sooner or later to fail".

As proof of this, it should be recalled that the concession of construction alone has been equated to the public contract, the subthreshold contracts are regulated similarly to those suprathreshold, and real estate leasing is considered a works contract; with regard, finally, to the concessions will be seen shortly.

As will be shown further, the instances – to which correspond just as many risks – underlying an intervention of public nature are very numerous and somewhat conflicting, so that it is necessary a careful evaluation of the costs/benefits in the preliminary choice of the most appropriate instrument.[3]

It was, and still is, a problem of substantial and procedural harmonization in order to the various tools available for the administration.

If the public contracts of works, services, supplies and the works concessions have long been made subject to special regulation at European level, the concessions of services (public or not) have only recently received the same treatment, in spite of the various attempts to make them part of positive law in the past.[4]

Moreover, in Italy, the public contracts (and works concessions) are regulated in a detailed and compelling manner so as to avoid possible malpractice and malfeasance, thereby giving preference to the need of controllling public officials rather than to what it should be the economic-allocative function of the contract.[5]

If, on the one hand, such an over-regulation seems to frustrate the potential of public procurement as a vehicle of information and innovation, on the other hand, appears quite incompatible with the instrument of concession, clashing with its commercial vocation.

No one can help but see that the concessions just for the presence of the business plan (PEF) are difficult to reconcile with a disciplinary regime of control over the public administration, instead they must be supported by a proactive inspiration of mutual learning by doing.[6]

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[3] Also thanks to the development of the "Public Sector Comparator" (PSC) under the PPP, there are prognosis tools on the present and future convenience of public interventions: on the issue, please refer to Coltellacci M.; Smeriglio M., "Il «Value For Money Assessment»: un metodo per paragonare la convenienza della concessione di costruzione e gestione rispetto all'appalto tradizionale", in Cafagno M.; Botto A.; Fidone G.; Bottino G., *Negoziazioni pubbliche. Scritti su concessioni e partenariati pubblico-privati*, Giuffrè, Milano, 2013, where it is emphasized that the determining factor for assessment is the allocation of the risks associated with the operation.

[4] For a retrospective on the subject, please refer to the conclusions by Adv. Gen. Fennelly, pt. 21 ss., in Case C-324/98, *Telaustria and Telefonadress*.

[5] Please refer to Ledda F., "Per una nuova normativa sulla contabilità pubblica", in *Studi in onore di Antonio Amorth. Scritti di diritto amministrativo*, Vol. 1, Giuffrè, Milano, 1982.

[6] On this subject see Cafagno M., *Lo Stato banditore. Gare e servizi locali*. Giuffrè, Milano, 2001; *id*., "Vincoli di gara e affidamenti concessori nel diritto europeo", in *Finanza di progetto. Temi e prospettive*, a cura di G.F. Cartei e M. Ricchi, Napoli, Editoriale scientifica, 2010; *id*., *Flessibilità e negoziazione. Riflessioni sull'affidamento dei contratti complessi*, relation at the conference "Il diritto degli appalti pubblici all'alba delle nuove direttive comunitarie" at the Chamber of Deputies, Rome, 15 november 2013, Rivista Italiana di Diritto Pubblico Comunitario 2: 991-1019, 2013.

The internal restrictions on the use of administrative discretionary power in theory hinder the implementation of the concessions, in which the core is given by the economic risk of the transaction, that, falling it also on the private entity, requires maximum flexibility in the analysis and management; otherwise, it is unlikely that the private will bear that risk, if not with prior appropriate guarantees and at excessive costs. Even more so when you consider that the risks inherent in a complex and long-term contract are only foreseeable *ex ante* and, therefore, error-prone *ex post*.

The reasons for the debate should now be reinterpreted in the light of the new provisions laid down in the Directive 2014/23/EU since it has finally managed to produce a special coding on concessions, that can be compared with the one on public contracts (Directives 2014/24/EU - 2014/25/EU and national frame) in order to understand if indeed the distinction between the two instruments is actually worthy and what constitutes really.[7]

The question is interesting under several profiles:

- firstly, for the final landing reached by the European discipline wih the Directive that transposes the judicial decisions of the Court of Justice in the concessions matter;
- secondly, for the repercussions that will necessarily reverberate on the Italian framework, which has proved to be too submissive to the *opinio juris* handed-down and therefore imbued with elements that clash with the *acquis communautaire* and the EU development;
- in the third and last place, for the rules applicable to the various situations which will serve to clarify the systematics of public procurement, in consideration of the global phenomenon of PPPs that is closely connected with the distinction between public contracts and concessions.

[7] Berionni L., *I contratti pubblici di rilevanza europea: il discrimen tra appalto e concessione, tra incertezze normative e oscillazioni giurisprudenziali*, Diritto del Commercio Internazionale 3: 731, 2013, rightly points out that in recent years, through the emergence of the concepts of European origin, in Italy has been established a new rationale for the institution of the concession: no longer the method of choice for preventing activities of particular public interest from free competition and attributing, *intuitu personae*, special or exclusive rights to subjects who have the task of replacing the administration in overseeing certain activities deemed strategic for the welfare of the community, but "irreplaceable means of cooperation between public and private, aimed, more than at the replacement of public administration in carrying out activities intimately public, at the involvement of private capital and entrepreneurial skills in the provision of new or improved services to the community. In this changed context, if on the one hand there is a need to ensure open competition between economic operators, there is also the need to draw a clear distinction between the figure of the concession and the other typical instrument of outsourcing: the public contract" (cf. Pavesi A., *Concessioni: aspetti problematici*, Laboratorio dei contratti pubblici, www.contratti-appalti.it, 2009).

Obviously, lots of papers having already been written about the public contracts as well-established institutions over time, the perspective used in the present study will be primarily focused on the concessions, not just for the novelty of the EU Directive dedicated to them, but in order to determine their effects on the public procurement, thus reversing the traditional view of the concessions as "generated by a rib" of the public contracts.

§1.1. Once were public contracts, then concessions and finally PPPs

It is now necessary to give an account of how the instances just outlined about the need for a different model and update of the public procurement have emerged in practice.

Before arriving at the Communication, at first, and at the EU Directive, after that, on concessions, it is necessary to briefly review the evolution in public procurement at European level to record a not always linear and somewhat conservative trend which, starting from the public contracts, has gradually proceeded to shape concessions and PPPs.

Circumstance, this, to keep in mind as a harbinger of many aftermaths.

If it is true that the Directive on concessions, along with the other two Directives, represent the arrival point of an evolutionary path of the public procurement contracts which lasted more than forty years, it is certainly true that the foundations on which rests the entire system are to be identified in the public contracts, with a whole series of effects.

To resume the title of the section: in the beginning were public contracts.[8]

[8] For ordinary sectors: Council Directive 71/305/EEC on the coordination of procedures for the award of public works contracts, amended by Directive 89/440/EEC and replaced by Council Directive 93/37/EEC, as amended by Directive 97/52/EC of the European Parliament and of the Council; Council Directive 77/62/EEC on the coordination of procedures for the award of public supply contracts, amended by Directive 88/295/EEC and replaced by Council Directive 93/36/EEC, as amended by Directive 97/52/EC of the European Parliament and of the Council; Directive 92/50/EEC coordinating procedures for the award of public service contracts, as amended by Directive 97/52/EC of the European Parliament and of the Council; all transferred into the Directive 2004/18/EC of the European Parliament and of the Council of 31 march 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and services, and finally in the new Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement, repealing Directive 2004/18/EC.

For special (ex excluded) sectors: Directive 90/531/EEC concerning the procurement procedures of entities operating in the water, the entities providing transport and by entities operating in the telecommunications sector, replaced by Council Directive 93/38/EEC of 14 june 1993 coordinating the procurement procedures of entities operating in the water and energy, entities providing transport services as well as energy, operating in the telecommunications sector, as amended by Directive 98/04/CE of the European Parliament and the Council, and Directive 2004/17/EC of the European Parliament and of the Council of 31 march 2004 coordinating the procurement procedures of entities operating in water and energy, entities providing transport services and postal services, and finally by the new Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on the procurement procedures of entities operating in the water, energy, transport and postal services, repealing Directive 2004/17/EC.

The Directive 71/305/EEC of 26 july 1971 concerning procedures for the award of public works contracts included concessions, but only in order to exclude them from its scope of application.[9]

There was not even a discipline *in nuce* of works concessions, which appears only in the Directive 93/37/EEC of 14 june 1993, on the coordination of procedures for the award of public works contracts, preceded by this recital: "*in view of the increasing importance of concession contracts in the public works area and of their specific nature, rules concerning advertising should be included in this Directive*".

For the services you have to wait the Directive 2004/18/EC of the European Parliament and of the Council of 31 march 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and service.[10]

Both in the definition and in the regulation of concessions within the Directives, thus, always remains the cumbersome presence of the public contract.

Even when it has finally come to the long-awaited Directive on concessions, with the principal aim to shed light on the EU rules governing concessions, it has been necessary to come to terms with the same bias.

If you give read access to the Commission working papers on the proposal for a Directive of the European Parliament and of the Council on the award of concession contracts – SEC(2011) 1588 and SEC(2011) 1589, Brussels, 20.12.2011 – [11], you will notice that, leaving out the non-legislative options (no change of policy, policy focused on infringements, non-binding instruments), the alternatives were three: two "extreme" legislative options (respectively, either the adoption of the corresponding base provisions in

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Only recently with the Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 has been adopted a corpus *ad hoc* on the award of concession contracts.

[9] See art. 3, para. 1, of Directive 71/305/EEC, which already included the definition *per differentiam* of concessions with respect to public contracts, indicating as *discrimen* the fact that the consideration for the works consisted "either solely in the right to exploit the construction or in this right togheter with payment".

[10] In particular art. 1, para. 4, for the definition; art. 3 for the application of the principle of non-discrimination in assignments "downstream" by the dealers holders of special or exclusive rights; and art. 17 for the exclusion from application of the other provisions of the Directive.

[11] Cf. Commission working documents accompanying the proposal for a Directive of the European Parliament and of the Council on the award of concession contracts COM (2011) 897 final – SEC (2011) 1588 final and SEC (2011) 1589 final, Brussels, 20.12.2011 – in which are considered the potential impacts of the various options not only in legal terms, but also from the political (economic, social and environmental) ones. In recommending the option of mixed rules, the Commission sought to better achieve a number of objectives, in particular to improve market access, increase investment opportunities and, therefore, increase the number and quality of services. According to the Commission the mixed rules would also have a positive impact on public-private partnerships (PPPs).

force concerning public works concessions as set out in Directive 2004/18/EC, or the adoption of detailed rules based on the public contracts law); the third, the mixed rules, represented a compromise between the other two.

As it is known, the solution chosen within the new EU Directive has been the latter, that is a soft version of the rules on selection and award criteria and procedures for the conduct of procurement in the public contracts (the obligation to publish in advance criteria for the selection and award, consistent with the object of the concession, and to comply with the time limits for submission of tenders, as with the rules on technical specifications, the obligation to provide the same information to all the tenderers during the negotiations, the discipline of the modifications to the concessions in the course of execution and, finally, the mandatory publication of the notice of award).[12]

This annotation is relevant because it highlights so self-evidently as the concessions were initially generated from the public contracts, firstly as case excluded – almost a kind of nemesis – and then as a sort of grafting, but they subsequently have distanced themselves and developed their own *status*.

In fact, wanting to see a new interpretative address, it is possible to affirm the reversal of the roles: as we will see later, it is now the concession that produces influences on the public contracts.

The advent of the change of perspective has occurred, due to the impulse given by the EU Court of Justice, in the beginning of the new millennium, more precisely with the interpretative Communication on concessions under Community law of 29 april 2000 (2000/C 121/02) as well as with the own-initiative opinion of the European Economic and Social Committee on the strengthening of the law governing concessions and public/private partnerships (PPPs) as a means of stimulating growth in Europe at the service of citizens and integration of markets (2001/C 14/19).

[12] In doctrine see Sanchez Graells A., *The continuing relevance of the general principles of EU public procurement law after the adoption of the 2014 Concessions Directive*, University of Leicester School of Law Research Paper No. 15-12, who observes: "most of the general provisions of the Concessions Directive are a copy (or a 'Frankenstein copy') of provisions already available in other procurement Directives and, mainly, in Directive 2014/24 on public sector procurement. Such duplication makes me think that the EU legislator would indeed have been better off by just including a limited set of specific provisions dealing with concession contracts within Directive 2014/24. By not doing so, it has created unnecessary duplication and complication".

§1.2. The Communication on concessions and the ESC's opinion

With regard to the acts of *soft law*, keeping in mind the commitment made in 1998, the Commission issued on 29 april 2000 the Interpretative Communication on concessions under Community law (2000/C 121/02).[13]

The main purpose of the Interpretative Communication *de qua* has been to remedy the uncertainty of law and especially the "escape from law"[14] – to borrow a recurring expression – in the field of concession arrangements.

There are essentially two aspects reviewed in the Communication[15]:

- the definition of works and services concessions;
- the rules applicable to them.

Having reminded that the Community legislature defined the notion of concession on that of public contract, the Commission has identified the right of exploitation as the crucial distinctive element in order to distinguish them.[16]

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[13] With a note by Leggiadro F., Urbanistica e appalti 10: 1061-1075, 2000, where we read at p. 1074: "The communication sets itself the goal of demarcating the concept of concession. In reality, even this time, the hermeneutic operation that is carried out leads, de facto, not to a restriction of the concept of concession, but to an extension of that of public contract".

[14] Cf. Commission's interpretative communication on concessions under Community law (2000/C 121/02), Brussels, 29 april 2000: "Certain Member States have sometimes thought that concessions were not governed by the rules of the Treaty in that they involved delegation of a service to the public which would be possible only on the basis of mutual trust (*intuitu personae*). According to the Treaty and the Court's established case law, the only reasons which would enable State acts which violate Articles 43 and 49 (ex Articles 52 and 59) of the Treaty to escape prohibition under these Articles are those referred to in Articles 45 and 55 (ex Articles 55 and 66). The very restrictive conditions specified by the Court for the application of these Articles are described below. There is nothing in the Treaty or in the Court's case law which implies that concessions would be treated differently".

[15] The subject of the Communication are "acts attributable to the State whereby a public authority entrusts to a third party by means of a contractual act or a unilateral act with the prior consent of the third party the total or partial management of services for which that authority would normally be responsible and for which the third party assumes the risk. Such services are convered by this communication only if they constitute economic activities within the meaning of Articles 43 to 55 (ex Articles 52 to 66) of the Treaty. These acts of State will henceforth be referred to as concessions, regardless of their legal name under national law".

This record is important because it accounts for the discrepancy existent about the concessions, sometimes considered contracts and other times administrative measures.

The condition will be analyzed later to show how the different configuration of the concession into national law has significant effects on the discipline applicable to the institute (see below).

[16] See the same communication cited above, pt. 2.1.2: "In conclusion, the risks arising from the operation of the concession are transferred to the concessionaire with the right of exploitation; specific risks are divided between the grantor and the concessionaire on a case by case basis, according to their respective ability to manage the risk in question. If the public authorities undertake to bear the risk arising from managing the construction by, for example, guaranteeing that the financing will be reimbursed, there is no element of risk. The Commission considers such cases to be public works contracts, not concessions".

This element represents the peculiarity of a concession contract in general, regardless of the object (works or services).

In fact, as for works concessions, the criterion of management is an essential feature to determine if you are in the presence of a service concession as well.

By applying this criterion, according to the Communication, there is a concession when the operator assumes the risks linked to the economical operation put in place, since the right of management also entail the transfer of responsibility involving at the same time the technical, financial and managerial issues.[17]

In order to distinguish the concession from the public contract, at this early stage, great importance is acknowledged not only to the risk, in particular economic, but also, as symptomatic figure of the first, to the source of remuneration of the concessionaire.[18]

The predominant task, in a phase in which only works concessions were crystallized into positive law, so seems to be the distinction between public contracts and concessions in order to mark a boundary line between the two different cases.[19]

And this is because of the very different disciplines applicable, especially in relation to service concessions.

With the exception of works covered by the EU Directives, the concessions were subject as a general "*de minimis*" ruling to the rules and principles of the Treaty (that is, particularly, those of non-discrimination, equal treatment, transparency, mutual recognition and proportionality), to the extent that they were attributable to acts of the State and had as their object the provision of economic activities of cross-border interest.

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[17] The Commission is aware that also in public contracts part of the risk is borne by the contractor (for example, the risk of changes in the environmental rules during the execution of the contract, or changes in tax law, likely to upset the financial balance of the contract itself, or the risk of technical obsolescence). This type of risks, however exists to a greater extent within the framework of a concession, bearing in mind that it covers a relatively long period of time and that the alea due to the financial aspect of the transaction – "operating risk" – is proper only of concessions.

[18] According to the Communication, under Community law, it is in the presence of public contracts when the cost of the transaction is essentially borne by the contracting authority and when the contractor does not receive remuneration through the proceeds received by users. The situation does not change for the fact that the right of exploitation can be accompanied by a payment, as long as it does not eliminate the risk inherent in the management.

However, the Commission does not fail to annotate that although, in general, the origin of the compensation – directly paid by the users – is an important factor, the crucial one is the existence of exploitation risk, linked to the investment made or to the capital invested, particularly in the case where the conceding authority pays a price.

[19] See the same communication cited above, pt. 2.1.2: "The Commisison notes that more and more public works contracts are the subject of complex legal arrangements. As a result, the boundary between these arrangements and public works concessions can sometimes be difficult to define".

Consequently, the choice of the concessionaire had to be made on the basis of objective criteria and the procedure was to take place in accordance with the procedural rules and the basic requirements originally established; were these rules not been preset, the choice of candidates still was to be done in an objective manner.

At the end of the day, the Commission's action mostly materialized in clarifying the concept of concession and its discipline, *sub specie* of the very limits to the extension of the Treaty's general principles as of the rules governing public contracts.

In order to arrive at a more substantial intervention we have had to wait the following year, when the Economic and Social Committee decided to draw up an own-initiative opinion on strengthening the law of concessions and public-private partnerships (2001/C 14/19).[20]

The motive of the European Committee – it can be read in the title of the opinion – is given by the awareness that the legal framework of the public contracts has been largely consolidated by the progressive development over time, whilst concessions and PPPs are yet to be implemented.[21]

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[20] As we will see, the issue that the dress of the public contract went strait to the figure of the PPPs had already been raised in 1996 at the time of the Green Paper on "Public Procurement in the European Union - Exploring the Way Forward", COM (96) 583 (v. *infra*).

[21] See Opinion of the Economic and Social Committee on the "Strengthening of the law governing concessions and public/private partnership (PPP) contracts" (2001/C 14/19), Brussels, 19.10.2000, where it is observed that the Commission Interpretative Communication on Concessions under Community law, after the Green Paper on public contracts of january 1997, and the note for guidance of march 1998, makes a number of points which raise several fundamental questions. The Commission has in fact recognised the variety of contractual relations falling within the PPPs but has focused its analysis exclusively on the concessions.

In particular, at ptt. 2.1.3.2-2.1.3.3, the ESC underlines that "the communication does not regulate all the problems, either with regard to the content of concession contracts or in relation to the law applicable. *The Commission uses "the right to exploit the construction or this right together with payment" as the sole criterion for distinguishing between public purchasing and concessions; the Commission states that the right to exploit the construction confers the right to charge fees to users, it considers that payment in the form of user fees distinguishes concessions from public purchasing, and it equates exploitation with risk of use, which is not in fact the case in some concession contracts, or in relation to the works directive, still less the services directive.*

Risks vary greatly, depending on the nature of the service to be provided, and are not restricted solely to risks related to traffic (hospitals, car parks, water networks etc.). Before the operating phase the concessionaire is responsible for planning, financing, the execution of works and maintenance services over many years. The concession cannot therefore be reduced to a single criterion, the payment risk; it is a much broader concept and all its components need to be identified and ranked in order of importance if the concept is to be effectively clarified. Moreover, the contractual transfer of risk is negotiated on a case-by-case basis" (emphasis added).

For the ESC, in essence, the PPP consists of a *quid pluris* compared to concessions and represents a set of contracts, originated from the need to build the Trans-European Networks (TENs), which possess strategic interest for their specific aspect connected with the performance of services of general interest (social, environmental) and to the formation, consolidation and growth of a true market of private capitals in infrastructure, but at the moment are hampered by the uncertainty that reigns on the current European law.

The Committee deals with two main areas of interest: the legal, economic, social and strategic issues, on the one hand, and the matter of harmonization and clarification of European law, on the other.

The first category includes substantially the legal, economic, political and social obstacles that will be exposed further in the text[22], while belong to the second all the considerations that, by force of circumstances, largely fall outside of the existing Community rules.

The reference is definitely to the incomplete law of concessions as to the absent law of PPPs, from which descends a situation of uncertainty and incoherence in the practices adopted by the operators.

The European Committee can not but recognize the extremely problematic nature of the foundation of the concept of concession on the substrate of public contract.[23]

And, to this end, examines a number of issues that conflict with its basic inspiration: it is not sufficient a harmonized and transparent procurement procedure for PPPs and concession contracts, because for such contracts come into play very special profiles that deserve careful attention.

This is the case, for instance, of the previous consultation with the social parties, of the final selection of the concessionaire (the public authority must define in advance the goals and objectives of the project, while leaving to the private party the responsibility of

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Emblematic is the case of PFI in the UK: "British Private Finance Initiative (PFI) contracts are of very long duration, they are fully negotiated and they entail payment in full by the public sector following the transfer of risks of varying degree to the private sector. These contracts can be considered either as public purchasing arrangements, or as concessions in the light of the interpretative communication".

By the Committee's opinion the procedures should be used to take into account the three pillars (economic, environmental and social aspects) and therefore shows the way forward *pro futuro* (pt. 2.2.8.3): "*The Commission needs to adopt the strategic view: either Europe adopts the right methods of public-sector management for the new millennium, which would be in keeping with its tradition, or else it remains trapped in a regulatory straitjacket which involves additional costs both for consumers and for private-sector investors who have a higher financing cost*" (emphasis added).

[22] See Part II, Chapter I, para. §1.4.2 (v. *infra*).

[23] See ESC's opinion, ptt. 2.1.2-2.1.2.1: "*The definition of public works concessions in European law is open to criticism. The criticism is that the definition equates concessions with works contracts, which makes no sense*, and the fact that in most Member States the law makes no provision for private-sector proposals for concessions.

A public works concession is a complex contract by which a public authority delegates to a private organisation the responsibility for financing, executing and maintaining a project in return for the right to operate the facility for an extended period, thus enabling its investment to be amortised. This entails the transfer of responsibility from the awarding authority to the concessionaire and a global contract which includes numerous functions (construction, financing, operation), whatever the means of payment of the concessionaire. The remuneration of capital and of the investor's risk must strike a fair balance with the service provided to the consumer or user" (italics added).

the technical and economic solutions proposed), of the selection criteria (a selection of tenderers based solely on quantitative criteria is not suitable for such large and complex projects), of the repayment of a significant portion of the costs for tenders preparation, of the intellectual property protection and encouragement of relevant and essential innovations (on all the technical, financial or commercial aspects), and of the sustainable development (given the importance of these projects, it is necessary that the public authorities take into account social and environmental profiles), of dialogue and negotiation (after the submission of proposals by one or more candidates a dialogue may start with potential dealers in the course of which the public party must show elasticity and flexibility in developing the final concession contract in accordance with its needs), of elasticity and flexibility (the dealer must enjoy all the freedom in the way of achieving the goal of service defined by the public party: conception of the project, scheduling of the work, assumption of technical risks, etc...).

The auspice is then to reach, if not the introduction of a statute *ad hoc* for concessions and PPPs, at least the clarification of the existing rules applicable to them and adapt those rules in a functional-teleological perspective.[24]

Expectation that has been translated into the promotion of a specific Directive on concessions, the current point of arrival of the troubled evolution of public procurement within the EU.[25]

[24] See pt. 4.3 of the same opinion: "The directive must define concessions and other forms of PPP contract in terms of their long-term character and fundamental constituent parts (planning, execution, financing, maintenance and management of works). [...]

4.3.2. A legal framework appropriate to concessions is essential for the execution of concession or PPP contracts. Partnership contracts will be possible only if contractual balance can be established and observed; without this no operator would be willing to undertake a concession contract. Principles must therefore be established enabling risks to be fairly shared between the awarding authority and concessionaire, both for works and services concessions. The following principles should be incorporated into European law:

4.3.2.1. The risks of an infrastructure concession must be identified, quantified and clearly assigned to the party better able to assume them.

4.3.2.2. The concessionaire and its financiers must receive guarantees that the contract will continue for its whole term without change. Any change to the financial conditions of the initial contract would require renegotiation. There must be contingency arrangements for government action risk and force majeure (principle of contractual stability).

4.3.2.3. Rules must be drawn up by the awarding body to cover exceptional risks: sudden, unforeseeable events which increase the cost of the contract, *e.g.* changes to administrative requirements.

4.3.2.4. The concessionaire must enjoy sufficient flexibility in carrying out the task delegated to it by the awarding authority. The awarding authority must not unduly interfere in the execution of the contract. Its role must be restricted to questions of prerogative, security or public policy, maintaining and taking into account its policy-making function and social responsibility".

§1.3. The final landing (for now): the Directive 2014/23/EU

As openly acknowledged in the recital 18 of the EU Directive n. 23 of 2014, "*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*".[26]

It follows plainly the need to clarify the definition of concession, particularly with regard to the concept of "operating risk".[27]

Art. 5, para. 1, lett. a) and b) defines:

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

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[25] See pt. 4.3.4. of the same opinion: "The Commission must propose a clear legislative text, to be adopted at European level as soon as possible, establishing a basis for partnership between the public and private sectors in order to develop the infrastructures and services which Europe needs".

See now the Directive 2014/23/EU of february 26, 2014 on concession contracts award.

As explicitly confirmed by recitals 1 and 2 of the same Directive, the absence of clear rules that should govern the award of concessions at EU level, as well as having given rise to legal uncertainty, has hampered the movement of services and caused distortions in the single market.

Consequently, if the economic operators, particularly small and medium-sized enterprises (SMEs), have missed significant business opportunities, the authorities have not been able to use public money at best, in order to provide quality services at the best price to the citizens of the Union.

The solution is identified in the definition of an appropriate legal framework, balanced and flexible for the award of concessions to allow effective and non-discriminatory market access to all traders of the Union, also ensuring legal certainty and thus favouring public and private investment on infrastructure and strategic services for citizens. That framework could provide a basis and a tool to further open international markets for public procurement and strengthening world and global trade.

The rules of the legal framework applicable to the award of concessions should be clear and simple, taking in due account the specificity of concessions with respect to public contracts.

[26] In fact, the multiplication of the judgments on concessions by the European Court of Justice (26 since 2000), where, by clarifying certain aspects of the award of concessions, the Court has sought to address the legal vacuum in this area, shows that the current situation is far from satisfactory and that the problems can not be adequately dealt with case by case (cf. European Commission - MEMO/14/19 15.01.2014).

[27] With the disappearance of the term "substantial" contemplated in the proposal for the Directive.

Ergo it is an unitary legislative framework[28], applicable to concessions both for works and services, but the most interesting newness is undoubtedly represented by the express inclusion and connotation of the right to management as operational risk.[29]

Pursuant to art. 5, in fact, the award of a works or services concession connotes the transfer to the concessionaire of an operating risk in exploiting those works or services, encompassing demand or supply risk or both.

§1.3.1. The notion of "operating risk"

The Directive 2014/23/EU considers that the concessionaire assumes the operating risk in the event that, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred for the management of the work or services covered by the concession.

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[28] Contrarily to what happened in the past, namely the definition *per differentiam* of the concessions with respect to public contracts, the new Directive 2014/23/EU of the European Parliament and of the Council of 26 february 2014 on the award of concession contracts (OJEU L 94 of 28 march 2014) has for the first time introduced the autonomous definition of the concessions by deleting any reference to the public contracts.

[29] This is an absolute new entry with regard to the European Union binding law, since the only precedent that was actively engaged in risk was the above-mentioned Commission's interpretative communication on concessions under Community law (2000/C 121/02), Brussels, 29 april 2000, a *soft law* act, which not only stated that the criterion of the right of exploitation, implicant the transfer of responsibility relating to the technical, financial and managerial issues of the work or service, could enable to identify several characteristics in order to distinguish the concessions from the public contract, but also concluded that the concessionaire had to assume the economic risks inherent in the operation, having been transferred to him the risks inherent in management.

Once noted that more and more public works contracts were the subject of complex legal arrangements, according to the Commission it was in the presence of public contracts when the cost of the work or service was essentially borne by the awarding authority and the contractor did not receive remuneration from the fees paid directly by users. Conversely, fell within the concept of concession those circumstances in which the right to exploit the work or service was accompanied by a public payment, provided that the latter did not eliminate the risk inherent in the management, with the clarification that, although in general the origin of the compensation from the user could be a significant factor, the determining one was the presence of the operating risk related to the investment or the capital invested.

"However, even within public works contracts, part of the risk may be borne by the contractor. However, the duration of concessions makes these risks more likely to occur, and makes them relatively greater. On the other hand, risks arising from the operation's financial arrangements, which could be considered 'economic risks', are part and parcel of concessions. This type of risk is highly dependent on the income the concessionaire will be able to obtain from the amount of use of the construction and is is significant factor distinguishing concessions from public works contracts. In conclusion, the risks arising from the operation of the concession are transferred to the concessionaire with the right of exploitation; specific risks are divided between the grantor and the concessionaire on a case by case basis, according to their respective ability to manage the risk in question. If the public authorities undertake to bear the risk arising from managing the construction by, for example, guaranteeing that the financing will be reimbursed, there is no element of risk. The Commission considers such cases to be public works contracts, not concessions" (cf. COM 2000/C 121/02 cit., pt. 2.1.2 - *Distinction between the concepts of 'public works contract' and 'works concession'*).

Consequently, the part of the risks transferred to the concessionaire must entail a real exposure to the market fluctuations, such that any potential estimated loss suffered by the concessionaire shall not be purely nominal or negligible.

According to recital 18, the main feature of a concession, namely the right to operate a work or a service, always implies the transfer to the concessionaire of an operational risk of economic nature which involves the possibility of not being able to recover *in toto* the investments made and expenses incurred, even if part of the risk remains with the contracting authority or contracting entity.

The application of the specific rules governing the award of concessions (see below) would therefore not be justified if the contracting authority or contracting entity would take the economic operator safe from any potential loss by guaranteeing a minimum income equal to or greater than the investments and costs that this latter has to bear in relation to the execution of the contract.

Likewise, the Directive specifies that certain agreements, remunerated exclusively by the contracting authority or entity, should be seen as concessions if the recovery of the investments made and expenses incurred by the operator to perform the work or provide the service depends on the effective application of the service or the goods or on their delivery and availability.

This is the case where it becomes more difficult the distintion from the public contracts, not only because it constitutes a change of views from the recent past, but also for the persistence of entrenched contrasting orientations (as it happens, for example, in Italy).

In short, what characterizes the concession is the transfer to the concessionaire of the responsibility concerning the technical, financial and managerial aspects of the work or service.

Having the recital 18 identified *expressis verbis* the allocation of risk as *discrimen* between public contracts and concessions, the subsequent recital 19 has to address the problematic question of the scope and extent of the risk, *i.e*. the *quantum* of operating risk needed to move from one case to the other.

As we will see shortly, it has been decided to follow the path outlined by the European Court of Justice, which has admitted the sufficiency of a reduced risk – provided

that it is significant and corresponding to the one which would be placed in the hands of the public administration – to qualify a contract as a concession.[30]

Finally, recital 20 deals with the origin of the risk affirming its exogenous nature with respect to the contractual parties and its close connection with the performance of the market, particularly with the matching between demand and supply.[31]

Therefore the concessionaire remuneration, as well as derived from user charges, can also result from payments by the administration, as long as they are related to the service rendered by the concessionaire (availability canon, shadow tolls…).

All the provisions just enucleated, which will be recouped and deepened hereinafter, present some critical issues.

In primis, there is the problem of the extreme volatility of the concept of operating risk insofar it just looks like, rather than building a well-defined type, wanting to exclude the possibility for the public plexus to relieve the private from losses and default.

In secundis, compared with a similar purpose, it seems possible to point out a contradiction in the possibility of mitigating the risk through a *pretium* paid by the public administration, with specific contractual clauses, or by the particular discipline of the sector (just think of the network services, in which is difficult to imagine the risk of failure[32]).

[30] Cf. recital 19 of the Directive n. 23 of 2014: "Where sector-specific regulation eliminates the risk by providing for a guarantee to the concessionaire on breaking even on investments and costs incurred for operating the contract, such contract should not qualify as a concession within the meaning of this Directive. The fact that the risk is limited from the outset should not preclude the qualification of the contract as a concession. 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".

[31] Cf. recital 20 of the Directive n. 23 of 2014: "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".

[32] Take the example of the networks: it is almost unreal that the concession of these services includes a significant risk absolutely comparable to the case of a collective decision-making to break away from the networks and autoproduce the services (gas cylinders, garden well, domestic electrical plant *off-grid*). Indeed, these are natural monopolies which usually ensure a certain profit because the administration gives, it should be remembered, a "package" of customers and assets from the sure yield (speech partially different for public transport, particularly by road, which would require a real reform, including consumption and habits).

In tertiis, if it is true that the risk, unable to be the mere entrepreneurial alea, must depend on factors external to the parties, especially on the unpredictable encounter between supply and demand, with the possibility of real and substantial loss for the concessionaire, the concession would then turn into an aleatory, and not commutative, contract in spite of the synallagmatic bilateral relationship between the performances.[33]

In addition to all this, it must be said that the possible causes of non-recovery of investments and costs incurred, due to the market, are far more numerous and variable compared with the sole exception of the total public guarantee of budget balance or of a minimum gain.[34]

Consequently, if we must not forget that the allocation of risks between the contracting authority or entity and the contractor is made on a case by case basis according to their ability to prevent, manage and repair the risks at best, should also be recollected that those subjects tend to be characterized by a strong aversion to risk.

This could mean either the onerousness of concessions (for the presence of a high risk premium or insurance policies) or their devaluation in favour of the public contracts.

Both effects, these, that unequivocally clash with the present reality plagued by economic depression and poor circulation of capitals, as well as limited availability of public resources to carry out the interventions.

Personal considerations aside, there remains the problematic distinction between public procurement contracts and concessions, especially in terms of procedure because

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Still, they are concessions traditionally and, no one would dare to deny it, all the more so in light of the jurisprudence by the European Court of Justice (and although the new EU Directive on concessions n. 23 of 2014 creates some doubt: see recital 17 thereof).

[33] On this point Iaione C., *La nozione codicistica di contratto pubblico*, in giustamm.it (published on 24.5.2007) states that we must "determine whether, under the jus-civilistic profile, the risk enters into the legal cause of the concession deal or remains confined within the underlying economic transaction. The characterization of the causal profile of the concession in terms of uncertainty would entail no small matter on the legal system. In fact, the concessionaire would be deprived of a number of instruments of protection – such as mechanisms for the balance for the commutative contracts (art. 1467 and 1664 cod. civ.) – that give a frame of legal certainty to the underlying economic transaction. And this could undermine the purpose of the concession, provided that the institution is intended to encourage the involvement of private capital (economic and cognitive) in the realization of infrastructure or the supply of services to citizens".

For an opinion stating the functional (and not merely economic) alea of the concession see Tullio A., *La finanza di progetto: profili civilistici*, Giuffrè, Milano, 2003, p. 186 ss.; to the contrary advice is Ricchi M., *La regolazione di una operazione di partenariato pubblico-privato*, Rivista amministrativa, 169, 2007 (www.osservatorioappalti.unitn.it).

[34] As an example can be reported the cases of incorrect prediction of future demand, the duration of the contract, and the object of the concession to which should be made changes *in fieri*.

These issues are, however, treated in the new EU Directive on concessions but are not properly reconnected to the issue of the risk of non-economic equilibrium of contract (v. *infra*).

different regulatory statutes apply to the two cases (except for what will be discussed in Part II on PPPs).

Moreover, are recognizable different interactions with other institutions both in national and supernational frame (services of general interest and public services above all).

Let us start by examining the judgments of the Court of Justice that have dealt with the subject, in order to obtain useful information to address the concerns set forth above and understand more about the distinction between public contracts and concessions.[35]

We must not forget, however, that the definition of concession is a matter reserved to the Union law[36] and, because of the principle of the *primauté*, therefore provokes a direct effect of integration into the national law with a requirement to conformation for the operators.

In this regard it is useful to investigate the *status quo* of the domestic law to check whether it is actually aligned to the orientations of the European Union; should the result be negative, we will need to understand the reasons for the failure to adapt and point the way to address them.

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[35] As it is opportunely highlighted by Levstik S., "Proposta di direttiva sulle concessioni: una prima analisi ricognitiva", in Cafagno M.; Botto A.; Fidone G.; Bottino G., *Negoziazioni pubbliche. Scritti su concessioni e partenariati pubblico-privati*, Giuffrè, Milano, 2013, the discipline of concessions conforms to the jurisprudence by the Court of Justice according to which the element that characterizes the concession (as distinct from the public contract) is the presence of "substantial operating risk" (cf. recital 7 and art. 2, para. 2, Proposal for a Directive on the award of concession contracts COM (2011) 897 final, Brussels, 20.12.2011). However, in the proposal there was art. 2, para. 2, stating that the economic risk could take one of two forms: a) the risk related to the use of work or to demand of the service provided; or b) the risk related to the availability of the infrastructure provided by the concessionaire or used for the provision of services to users.

These specifications on the concession risk were then eliminated upon approval of the Directive n. 23 of 2014 as deemed not fully in line with the case law of the Court of Justice.

To a careful observer will indeed not be escaped that these types of risk, withdrawn by the Directive, correspond to those that are listed in the Eurostat decision of 11 February 2004 – "*Treatment of public-private partnerships*", that is to say the risk of demand and of availability (with the obvious exception of the construction as it is normally not present in service concessions). Therefore, it would be inappropriate to limit the types of risks to those just mentioned not only because they are not the result of the Court of Luxembourg, but also because, as will be seen later, they are only some of the risks that may arise in the management of a concession.

[36] The Court of Justice has repeatedly stated that the question of whether a transaction should or should not be regarded as a concession or public contract is to be assessed solely in the light of EU law, with no recognition of the qualification made into the national orders (cf. ECJ Sect. II, July 18, 2007, C-382/05, *Commission/Italy*, ptt. 30-31; Sect. III, 15 october 2009, C-196/08, *Acoset*, pt. 38; Sect. III, 10 march 2011, C-274/09, *Stadler*, pt. 23; Sect. II, 10 November 2011, C-348/10, *Norma-A*, pt. 40).

This premise is particularly appropriate in relation to the Italian legal framework, where the hermeneutical activity of the interpreters is strongly influenced by the domestic legal tradition.

As we shall see, neither the legislature was free from the same preconceptions.

We must not forget indeed that the administrative concessions are a centuries-old institution that has its roots even in Roman law[37] and has experienced an evolution which is wholly independent from the recent developments led by the European plexus, so that it is now having to adapt to the new era and to the dictates of the Union.[38]

In particular, being Italy a country very attached to tradition and by then hinged on the administrative bureaucracy ("*red tape*"), the difficulties of adaptation to the new course of the concessions are quite pronounced and even more felt in comparison to the rest of the Continent (the most striking emblems are the arguments propounded by our representatives in the proceedings before the Court of Justice, which will be examined shortly).

[37] On the topic refer to Lepore P., "A proposito del fenomeno delle "concessioni amministrative" nell'esperienza romana", in Cafagno M.; Botto A.; Fidone G.; Bottino G., *Negoziazioni pubbliche. Scritti su concessioni e partenariati pubblico-privati*, Giuffrè, Milano, 2013.

[38] Although in the post-unification Italy has known a setting for the concession similar to the present, as a private contract for the realization and management of public utility infrastructures.

For an example of this state of affairs see Articles 242 to 300 of the law of 20 March 1865 n. 2248 (All. F), repealing the administrative litigation, on concessions of railways.

With reference to the railway concessions see also the Royal Decree 17 June 1900, n. 306, the law July 7, 1907, n. 429, and later the Royal Decrees May 9, 1912, n. 1447, and August 2, 1929, n. 2150.

In addition to the construction of railways, the instrument was used for the realization of reclamation works in the Royal Decrees December 30, 1923, n. 3256, and February 13, 1933, n. 215, while the deputy-legislative decree February 6, 1919, n. 107, provided for the possibility of granting the execution and management of works on behalf of the State in concession to private subjects (similar provisions are in the Royal Decrees February 8, 1923, n. 422, as amended by Royal Decrees December 2, 1923, n. 2847, and August 28, 1924, n. 1396, and in Royal Decree-Law 6 August 1926, n. 1657).

The first general codification of the instrument is due to the Article 1, Law of 24 June 1929, n. 1137, which provided for the possibility of granting in concession to provinces, municipalities, consortia and private subjects, the execution of public works of any nature, even independently from their management.

To carry out the work in concession it was determined that the cost charged to the State was divided "in no more than 30 equal annual installments, including capital and interest" (or that it was "paid in a lump sum at the time of liquidation work", after the law of 15 January 1951, n. 34), with the specification that "Should it be necessary, for the supplementary and unexpected works, to set new prices, will be added an additional act, to approve with the forms used for the concession. However the total amount of the contributions shall not exceed by more than one-fifth what expected at first, remaining the sole responsibility of the concessionaire any more spending needed for the work".

Despite some nominalistic ambiguity, mostly due to the "concession" of public land and to the convention ancillary to the decree, it can be seen what will be the peculiarities of the European concession, *i.e.* the risk taken by the concessionaire, who becomes responsible for the conception and realization of the economic operation.

Chapter II. The judgements by the European Court of Justice

As already mentioned above, ever since the Commission's interpretative Communication on concessions under Community law of 29 april 2000 (2000/C 121/02), the *proprium* that distinguishes the concessions as a *genus*[39] has been identified in the transfer to the concessionaire of the economic risk of management.[40]

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[39] It remains firm the methodological premise, already endorsed by the Communication 2000/C 121/02, under which the criterion for distinguishing concessions applies irrespective of the individual *species* (works and services).

[40] To be fair, such a distinguishing criterion crystallized *in nuce* in the definition of concession, formerly appeared in the case law of European Court of Justice (Case C-272/91, *Lottomatica*, 26 april 1994, Case C-360/96 *BFI Holding*, 10 november 1998), yet it is considered appropriate to fix the starting point of the discussion in conjunction with the cited interpretative Communication on Concessions 2000/C 121/02 and the opening of the new millennium, for nothing but the greater relevance acquired by theme.

In the first case (*Lottomatica*) relating to the automation system of the game "Lotto" in Italy, the EU Court had to determine, first, whether it was a concession of the power to exercise the lottery, and then, whether occurred a transfer of jurisdiction to exercise public powers (see ptt. 21-33).

The Italian Government, on the assumption of derogation from competition for the activities connected with the exercise of official authority in the member States, contended that the contest at issue constituted a concession by which the administration transferred to a third party some activities pertaining to public authority in fiscal matters (and characterized by the absence of any transfer of goods and of any price corresponding to such a transfer), namely the powers of organization, inspection and certification relating to the lottery, the exercise of which, by virtue of the Italian legislation, belonged exclusively to the State.

As demonstrated by the Adv. Gen. Gulman (at ptt. 1-25 of the opinion delivered on 14 july 1993), the introduction of the automated system at issue – which included, according to the the invitation to tender, the premises, supply, installation, maintenance, operation, data transmission and whatever else was necessary for the conduct of the lottery – did not involve any transfer of powers to the contractor for what concerned the various operations related to the lottery.

The judgment in question, while not coming to decree that the concession does not necessarily entail a transfer of public powers, stated that the crucial element for a public service concession consisted in ascertaining whether it was transferred to the contractor the right to exploit the automation system in the management of the lottery and to obtain its remuneration thereby.

In the second case (*BFI Holding*), concerning the award of contracts for services related to the waste collection, the Court merely deny that the contracts stipulated could be considered a public service concession since the amount paid to the dealer consisted solely in a *pretium* and not in the right to operate the service (see ptt. 24-25).

The conclusions of the Adv. Gen. La Pergola, delivered on 19 february 1998, deepen the question (ptt. 25 ss.): "The view commonly taken in the absence of a specific Community definition embodied in legislation, is that the distinction in Community law between service contracts and service concessions, is based on a number of criteria. The first concerns the recipient or beneficiary of the service provided. In the case of a contract the recipient of the service is deemed to be the contracting authority, whereas in the case of a concession the beneficiary of the service is a third party unconnected with the contractual relationship, usually the community, which receives the service and pays an appropriate sum for the service rendered. Under Community law, the service that is the subject of a service concession must also be in the general interest, so that a public authority is institutionally responsible for providing it. The fact that a third party provides the service means that the concessionaire replaces the authority granting the concession in respect of its obligations to ensure the service is provided to the community. Another characteristic feature of concessions is the remuneration of the concessionaire, which derives wholly or in part from the provision of the service to the beneficiary. This is connected with another important feature of service concessions in the Community context, namely that the concessionaire assumes the economic risk associated with the provision and management of the services that are the subject of the concession" (pt. 26).

In that act of *soft law*, anyway, there was a statement on the mode of remuneration which presaged some awareness on the part of the Commission in relation to the extreme volatility of the concept of operating risk, which reveals why it is necessary to identify the symptomatic elements that would help to better distinguish the concessions from the public contracts.[41]

Definitely worth the intent, not the concrete effects.

The methods of remuneration of the concessionaire has long been understood in a quite restrictive manner just like a synonym for derivation of the payment by users "third" – not in a substantive way, but in a purely formal sense – with respect to the conceding public administration.

The case law of the European Court of Justice, albeit peacefully now focused on the management risk, was itself plagued by the prejudice lastly indicated.

Thus it is necessary to trace back the evolution in the thinking of the Court to highlight how it was not always straightforward and unambiguous, giving rise to doubts of interpretation in relation to a somewhat elusive concept such as the operating risk.[42]

After having done this dense list, in any case, the Advocate concluded at pt. 33 that in the case, lacking the cornerstone of the assumption of the risk connected with operating the service, it was not possible to bring the relationship to the scheme of concession.

It begins, indeed, to delineate a hierarchy between the various criteria identified by the legal science about the distinction between public contracts and concessions and the importance given to the operating risk is demonstrated by the careful analysis given to the method of remuneration of the concessionaire (in this case it was provided the payment of a fee, whose concrete determination did not depend on predetermined indexes nor had been established at a flat rate, so as to place the economic responsibility of management on the concessionaire, the compensation was instead a direct consequence of the total cost actually incurred by the concessionaire to ensure the service and did derive both from the municipal funds, aimed at allowing the dealer to break even, and from the fees paid by the community for the service, adapted as necessary in order to strike a substantial balance between costs and revenues).

[41] It is worthy reporting again this passes: "Even though the origin of the resources directly paid by the user of the construction — is, in most cases, a *significant* factor, it is the existence of exploitation risk, involved in the investment made or the capital invested, which is the *determining* factor, particularly when the awarding authority has paid a sum of money"; "It should be noted that *economic risk exists where income depends on the amount of use. This holds true even in the case of a nominal toll, i.e. one borne by the grantor*" (cf. COM 2000/C121/02, §2.1.2 and note 13 thereof, italics added).

[42] Cf. Mauro E., *La giurisprudenza di Lussemburgo sul rischio gestionale quale criterio discretivo tra concessioni e appalti*, Rivista italiana di diritto pubblico comunitario 5: 1183, 2011, who observes that "The criteria to assess the effectiveness of operational risk are countless, depending on the economic and financial aspect of the single operation". The author divides the evolution path of the jurisprudence of the Court of Justice in three stages: in the first, there is the total absence of any reference to the operational risk; in the second, the operating risk supports *a latere* the origin of the remuneration; in the third and last, we have the overcoming of the operational risk on the origin of remuneration, downgraded to a simple indicator of risk.

See in similar terms Berionni L., *I contratti pubblici di rilevanza europea: il discrimen tra appalto e concessione, tra incertezze normative e oscillazioni giurisprudenziali*, Diritto del Commercio Internazionale 3: 731, 2013.

The decisions of the Court that led to the rules contained in the Directive 23 of 2014 can be broadly grouped into two following lines:

- the first, chronologically precedent, takes the form of a rather naive reasoning affected by the novelty of the subject and by the absence of references in positive law (except for the defining rules in the Directives and the aforementioned Communication on concessions of 2000): in this phase the mode of remuneration of the concessionaire takes on paramount importance in a sour version, barely limited to the payment by users different from the public administration;
- the other one, more recent, building on the previous rulings, reaches a higher degree of maturity enclosed in the correction of the aporias and in focusing the contracts-concession distinction on the risk, especially on the quantitative aspects of this latter.

We should start by saying that in both strands are elements that make them spurious, ruling also profiles other than the main two indicated herein (*i.e.* the modes of remuneration of the concessionaire and the regulatory configuration of the market).

The most problematic profile remains related to the actual coexistence of elements essential, always necessary, and accessory, qualifying the institution only accidentally, as well as to the "grey areas" that the European Court of Justice does not specifically explore (first of all, the various types of risk covered by the broad concept of right of exploitation), aspects that would have helped to clarify the inner content of concessions, the *quid* of risk. The Court has preferred to focus on the *quomodo* and the *quantum* of operating risk, delineating the boundaries of such an item but at the same time leaving to the exegetes the difficult task of giving it a concrete texture.[43]

§2.1. The *quomodo* of risk: the modes of remuneration of the concessionaire

With reference to the mode of remuneration of the concessionaire shall be identified what the very definition of concession, in order to distinguish it from the public contract, describes as consideration consisting solely in the right to exploit the works and/or services covered by the contract or in this right together with a price.

[43] It should be pointed out, in order to avoid any misunderstandings, which it is not up the EU Court to specifically classify the transactions at issue in the subject of a preliminary ruling *ex* art. 267 TFEU.

In fact, this responsibility falls to the national courts alone: the Court's role is limited to providing to them an interpretation of Union law useful for the decision to be taken in the disputes submitted. In any case, for the record, should be also noted that almost all of the questions which are considered in the present study felt under the *nomen* of concession, albeit with different objects. As already explained, the reason lies, if not in the elusive aim toward the procurement law, behind the greater freedom allowed to the contracting entities.

It is evident that to such periphrasis can be attributed various meanings.

The big inconvenience lies in the complexity of the concept.

In this regard, the first pronouncement of the European Court of Justice that has addressed the issue, in truth only *incidenter tantum*, has been the case *Telaustria*[44], where was excluded from the scope of application of the EU Directives on public procurement (although it was still subject to the fundamental principles of the Treaty, in general, and, particularly, to the principle of non-discrimination based on nationality, implying an obligation of transparency in order to ensure, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the opening up to competition, let alone the control on the impartiality of award procedures) a contract in which the consideration consisted in a right of exploitation.

Hence, the Court's ruling was limited to exclude the extension of the EU Directives to the service concessions, as these latter did not fall within their scope.[45]

Then follows the ordinance *Buchhändler-Vereinigung*[46], about the reproduction and distribution of the German national bibliography on paper and on CD-ROM, which recalls

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[44] ECJ, Sect. VI, 7 december 2000, Case C-324/98, *Teleaustria*, ptt. 42-58.

[45] Much more it is clear from the conclusions of Adv. Gen. Fennelly delivered on 18 may 2000.

At pt. 37 he concludes that "a case-by-case approach should be adopted to the question of whether a contract amounts to a concession or a service contract which takes account of all indicative factors, the most important of which is whether the supposed concession amounts to a conferral of a right to exploit a particular service as well as the simultaneous transfer of a significant proportion of the risk associated with that transfer to the concessionaire".

In this case, relative to the production and publication of telephone directories printed and electronically accessible, the applicants argued, firstly, that the essence of a concession resided in the fact that the grantor did not give any compensation to the concessionaire, but only the right to economically exploit the concession, although associated with the obligation to pay a fee to the grantor; secondly, that the object of the concession concerned a service of public interest related to the exercise of public power.

According to the other intervening parties a concession had three essential characteristics: the service was to be provided for the benefit of third parties rather than for the benefit of the contracting entity; the service concession had to concern a matter of public interest; the concessionaire had to take on the risk related to the performance of the service.

On the basis of the premise that the European legislator has determined the essence of the concession in the lack of a full remuneration paid by the grantor to the concession holder, the Adv. Gen. has stated that the peculiarity of the concession manifests itself in the fact that the concessionaire has to bear the principal, or at least substantial, economic risk related to the performance, and so he has rejected the other arguments, namely that, in the case of the concession, the beneficiary of the service is a third party unconnected with the contractual relationship and that the service subject of the concession is always of general interest.

These considerations anticipate what will be the thought of the Court in the following judgments and will be useful when we will examine the Italian context (v. *infra*).

[46] ECJ, Sect. II, 30 may 2002, C-358/00, *Buchhändler-Vereinigung*, ptt. 13, 21, 23-29.

The Court merely reiterates the meaning of the right of exploitation by the concession holder on the basis of the absence of direct public expenditures.

Such a view will prove to be unsuitable in front of more complicated cases.

the precedent by confirming that the consideration of the concessionaire is the right to exploit, for purposes of compensation, his own performance.

In these early decisions gets emphasized the exemption from the application of the public procurement Directives, on the assumption that the distinction of concession is based on the fact that the grantor body does not pay the concessionaire.

Suggestion engendered by the performance of services to the general public.

Another judgement of great interest is the very famous *Parking Brixen*[47], concerning the award of the management of two car parkings within the municipality of Brixen.

The right of management begins to take shape and takes on the garments of the concessionnaire's remuneration from the third-party users of the service.

Onto the scene bursts a factor – *i.e.* the trilateral relationship – that did not appear in the previous decisions of the Court, despite being included in the debate on the matter.[48]

Almost coeval with the decision just examined is the one on the case *Contse*[49], relating to services of home respiratory treatments and other assisted breathing techniques,

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For the judge *a quo* the agreement constituted a public service concession because it involved the transfer of the right to exploit a particular performance to private enterprise, which borne the risk inherent in such exploitation. In addition, the performance was not remunerated by the public administration with the payment of a certain price, but on the contrary it was the undertaking that had to pay a fee to the latter.

The national court was not, however, exempt from the mentioned prejudice that wanted the service granted in the general interest, within the delegation to a private undertaking of a task in the accountability of the State, without losing the right of inspection and control by the contracting authority.

[47] ECJ, Sect. I, 13 october 2005, C-458/03, *Parking Brixen*, pt. 40 ss. ("the service provider's remuneration comes not from the public authority concerned, but from sums paid by third parties for the use of the car park in question. That method of remuneration means that the provider takes the risk of operating the services in question and is thus characteristic of a public service concession. Therefore, in a situation such as that in the main proceedings, it is not a case of a public service contract, but of a public service concession").

From the conclusions of the Adv. Gen. Kokott, delivered on 1 march 2005, ptt. 27-33, it is also apparent that if a contracting authority assigns the management of a public car parking to a contractor which may charge a fee for the use of the same car parking and, in return, undertakes to pay an annual compensation to the municipality, it is not a public service contract, but a service concession.

Unlike a public service contract, the service concession is characterised by the fact that the consideration for the service that the service provider obtains from the contracting authority is the right to exploit its own service for payment: according to the Adv. Gen. "in the case of a *service concession*, the contractor bears the risks associated with the service and receives his consideration – at least in part – from the user of the service, for example through the payment of a fee. There is therefore a triangular relationship between the contracting authority, the service provider and the service user. A public *service contract*, on the other hand, leads only to a bilateral legal relationship in which payment for the service provided is made by the contracting authority itself, which, moreover, also bears the risk connected with the procurement" (original emphasis).

As we shall see, that of the "triangularity" or "trilateralism" of concession activities is an acceptation which reappears frequently in practice, especially in Italy.

[48] Cf. footnote 40 *supra*.

where the lack of transfer of risks related to the provision of services, together with the remuneration of the same by the public administration, led the Court of Justice to recognize not a concession, but a public service contract instead.

So from the remuneration by the users there is a switch toward the management responsibilities of the concessionarie, on which must necessarily fall operational risks.

The operating risk, in the modal perspective, finds again the features of the remuneration from users in the decision *ANAV*[50], concerning the direct award of a local service of public transport to a company owned and controlled by the contracting entity.

It is important to note that the origin of the remuneration of the concessionaire from the users does not exhaust the framework of the remuneration arrangements, which may involve not only the very type of user (third party, public administration, both), but also the mechanism under which the return is expected (performance, demand, availability).

Although the Court has not directly addressed the issues just mentioned, from the *obiter dicta* it will be possible to extrapolate ideas and useful information.

With regard to the main characteristics of concession, as opposed to public contract, it becomes essential the reading of the decision *Auroux*[51], about an agreement for the construction of a leisure centre in France.

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[49] ECJ, Sect. III, 27 october 2005, C-234/03, *Contse*, in particular pt. 22: "As a preliminary point, it should be observed that the case in the main proceedings, contrary to the Spanish Government's submissions, appears to concern a public service contract and not a management contract for a service categorised as a concession. As Insalud stated at the hearing, the Spanish administration remains liable for all harm suffered on account of a failure of the service. That factor, which implies that there is no transfer of risks connected to the provision of the service concerned, and the fact that the service is paid for by the Spanish health administration, support that conclusion. It is, however, for the national court to determine whether in fact that is the case".

[50] ECJ, Sect. I, 6 april 2006, C-410/04, *ANAV*, particularly at the pt. 16 which recalls *Parking Brixen*: "It is apparent from the documents relating to the case in the main proceedings that the public transport service in the Municipality of Bari is remunerated, at least in part, through the purchase of tickets by those using it. That method of remuneration characterises a public service concession".

[51] ECJ, Sect. I, 18 january 2007, C-220/05, *Auroux*, where it is disputed whether an agreement under which a first contracting authority engages a second contracting authority to carry out, for the purposes of general interest, a development project, in which the second contracting authority is to deliver to the first one works which are intended to meet its needs, and at the expiration of which the first contracting authority automatically receives the land and the works that have not been disposed of to third parties, constitutes a public works contract.

The judge *a quo* also reflected about the remuneration of that agreement, asking whether it is necessary to take into account only the price paid as consideration for the supply of the works to the contracting authority, or the sum of that price and the contributions paid, even if the latter are only partly allocated to the execution of those works, or, finally, of the total amount of the works, whereby assets not disposed of at the end of the contract will automatically become the property of the first contracting authority, which continues, in this case, the execution of the contracts in course and assumes the debts incurred by the second contracting authority.

The European Court of Justice makes it just clear that, being the other elements (transfer of public law functions, objectives in the general interest, trilateral relationship) able to relate to both cases, the only factor actually discriminating between public contracts and concessions is represented by the operating risk of the concessionaire.

As you can see, the issue is very complicated because it involves various aspects underlying the distinction between public contracts and concessions.

Not only is considered the operating risk, *sub specie* of the method of remuneration, but also the destination of the performances and their character of general interest.

The agreement, by means of which the municipality of Roanne intended to regenerate a run-down urban area and promote the development of leisure and tourism, involved the construction of a leisure center in successive phases.

The first phase involved the construction of a multiplex cinema and commercial spaces to be transferred to third parties, and works intended to be returned to the contracting authority, namely a public car park as well as access roads and public areas.

The later phases contemplated the construction of additional commercial spaces and a hotel.

The remuneration of the contractor derived both from municipal financing for the all the works, from the consideration for the sale of the car park to the municipality, and from the proceeds of the sale of works intended for third parties.

At the expiry of the agreement, any surplus appearing on the closing balance sheet had to be paid to the municipality and this latter was to take over the debts and become the owner of all the land and the works to be transferred to third parties not yet sold.

In light of the foregoing, the Court answered the question by stating that, in order to determine the value of a contract, "account must be taken of the total value of the works contract from the point of view of a potential tenderer, *including not only the total amounts to be paid by the contracting authority but also all the revenue received from third parties*" (pt. 57; italics added).

As a result, if also in public contracts it is possible to include revenues from the third parties, seems to fade the distinction between public contracts and concessions based on the origin of the remuneration and on the morphology of the relationship (bilateral or trilateral).

This is confirmed in the conclusions of the Adv. Gen. Kokott, delivered on 15 june 2006, ptt. 46-47, where it is explicitly stated that the fact that the contractor had the faculty to dispose of large parts of the leisure centre directly to third parties does not mean that "what is involved is a *public works concession*".

Although the triangular relationship between the town of Roanne, the dealer and the third party purchasers, who with their payments contribute substantially to the remuneration of the concession, could remind a concession, the Adv. Gen. has pointed out – recalling *Parking Brixen* – that a public concession is also characterised by the fact that the party with which the public authority has entered into a contract bears the economic risk of the business.

What was missing in this case, having the town of Roanne made a contractual commitment to take over any parts of the leisure centre not disposed of at the end of the project and bear the risk of any other losses incurred in connection with the project.

Neither the transfer of public functions to the contractor (the development agreement engaged him, *inter alia*, to purchase land and procure funding, to submit certain accounts, to have studies conducted, to organise a competition, and to coordinate the project and report to the town; it was also responsible for marketing a large part of the facilities to be constructed), nor the purpose of general interest (the notion of a public works contract does not depend on the use which the work to be constructed is to be put; equally irrelevant is the intention of the contracting authority to use the work to be constructed by itself or to make it available either to the general public or to individual third parties) could make any difference.

Therefore, the only factor on which to focus the dichotomy public contracts-concessions remains the operational risk.

The other elements – *i.e.* transfer of public functions, aim of general interest, trilateral relationship – simply represent clues relating to concessions: conditions sometimes sufficient, never necessary, for having a concession instead of a service contract.

It is then in relief the landmark ruling *Commission/Italy*[52], about agreements on the use of that part of municipal waste remaining after the collection of selected material,

[52] ECJ, Sect. II, 18 july 2007, C-382/05, *Commission vs. Italy*, with comments by Di Martino M., *La Corte censura la qualificazione di una procedura di affidamento di servizi secondo l'ordinamento nazionale*, Rivista di Diritto pubblico comparato e europeo 4: 1907-1911, 2007; Coduti C.F., *Appalto pubblico o concessione di servizi? La Corte enfatizza il criterio del rischio*, Rassegna dell'Avvocatura dello Stato 2: 81, 2007; and Masera S.R., *Appalto pubblico di servizi e concessione di servizi nella giurisprudenza comunitaria*, Urbanistica e appalti, 5: 579-585, 2008.

Just as in the preceding case, the diatribe concerns the classification of a contract in the terms of concession or contract; the novelty lies in the set of arguments put forward by the Italian Government which the Court of Luxembourg has dismantled one after the other, at ptt. 32-44.

According to the Commission, the agreements at issue could not be classified as service concessions insofar the remuneration of the operators did not consist in the right to exploit their own performance earning revenues from the user and assuming all the risks associated with that activity.

From the one side, the operator's remuneration consisted of a tariff – in Euros per tonne of waste transferred to him by the municipalities – to be paid directly by the delegated commissioner; on the other side, the operator could not bear the risk inherent in such activities because the agreements at issue did guarantee the transfer of a minimum annual quantity of waste, providing for the annual adjustment of the tariff in order to take account of the costs incurred.

By contrast, the Italian Government sought to argue, leaning on the national jurisprudence, that the agreements at issue constituted service concessions. To this end, proposed the following arguments:

- first, the agreements were intended to delegate authority for the performance of a service of general interest, the continuity of which was to be guaranteed by the operator;
- secondly, the services were provided directly to those users, namely the body of residents of the municipalities producing the waste, who, having to pay a charge to the same municipalities covering both the removal and processing of the waste, would have ultimately borne the cost of the royalty paid to the operator and thus remunerated him for the services provided. The Commissioner was only an intermediary in that respect;
- thirdly, the obligation to dispose of the waste was accompanied by the production of energy and therefore the sale of the latter was part of the object of the agreements at issue by way of remuneration;
- fourthly, given the financial investment made by the operator (close to one billion euros), as well as the long duration of the agreements at issue (*i.e.* 20 years), the profits to be realized by the operator had aleatory character;
- fifthly, the responsibility for the organization and management of services thus delegated weighed solely on the operator, since the administration was confined to a mere surveillance role.

Needless to say, none of these arguments adduced by the Italian Government has been accepted by the Court (cf. ptt. 38-44). As regards the fact that the operators were able, in addition to the collection of the rate agreed upon, to take advantage of income deriving from the sale of electricity produced as a result of waste incineration, the Court noted that the consideration obtained by operator in respect of the provision of services consisted essentially in the payment, by the Commissioner, of the tariff, while the proceeds from the sale of electricity were only accessory. Furthermore, neither the long-term agreements nor the significant initial investment which the operator had to make in performing them were conclusive for the purpose of classifying those agreements, since such characteristics could be present both in public contracts and service concessions; the same was also true for the fact that the treatment of waste fell within the general interest. Finally, not even the fact that the services provided by the operator required a significant degree of executive autonomy appeared decisive for the qualification of the contract as a public contract or a concession.

The Court's opinion is focused on the remuneration arrangements provided for by the conventions and contains useful insights to unravel the question on the dogmatic classification of the same.

Building on the above-mentioned cases *Telaustria*, *Buchhändler-Vereinigung* and *Parking Brixen*, the Court recalls that you are in the presence of a service concession when the agreed method of remuneration consists in the right of the provider to exploit its performance and does imply that this last assumes the risk in the management of services and, therefore, it is found that the method of payment required by the agreements at issue did not fit the right of exploit the service, nor did it involve the assumption by the operator of the risk associated with the management.

produced by the municipalities of the Region of Sicily, in which the Court has occasion to delve deep into the substance of the distinction between public contracts and concessions.

In particular, it starts to come up the idea of the absence of public consideration (except for the possible price) as *proprium* of the concessions with respect to contracts.

The contradictory nature of the assertion can already be found in the possibility of providing a *pretium* to compensate the performance under concession. It makes equivocal, if not impractical, the discernment of the concession from the public contracts.

Even wishing to circumscribe the condition in question to the absence of a public consideration that ensures completely, not partially, the concessionaire, the remuneration should be analyzed to figure out if the security *ex ante* is such even *ex post*, that is to say whether the payments are related or not to the qualitative-quantitative level of performance.

The risk of the concessionaire must be real, being excluded its assusmption in case of economic rebalancing of the contract intervening a posteriori through clauses and renegotiations *ad hoc* (like the adjustment and revaluation of tariffs).

The judgment *Coditel Brabant*[53], on the award to an inter-municipal cooperative society of a concession for the management of the municipal cable television network, remains in line with the previous ones in the sense of the remuneration of the concessionaire through payments made by (third-party) users.

The core of the decision is given by ptt. 36-37, where it is established that the agreements at issue must be considered to be public service contracts and not as service concessions since "Not only is the operator essentially remunerated by the Commissioner by means of a fixed royalty per tonne of waste transferred to it, as pointed out at paragraph 32 of the present judgment, but it is not in dispute that, under the agreements at issue, the Commissioner undertakes, first, that all the municipalities concerned will transfer all of the remaining part of their waste to the operator and, secondly, that a minimum annual quantity of waste will be transferred to it. The agreements at issue provide, moreover, for the adjustment of the amount of the royalty if the annual quantity of waste actually transferred falls below 95% or exceeds 115% of the guaranteed minimum quantity, in order to ensure the economic and financial equilibrium of the operator. They also provide for the annual adjustment of the royalty in the light of trends in the costs of staff, raw materials and maintenance work, and of an economic index. The agreements provide moreover for a renegotiation of the royalty if, owing to a change to the legislative framework, the operator is faced with investment above a certain level in order to comply with the new legislation".

Ultimately, once rejected the various connotations suggested by the Italian Government as common to the public contracts as well, for the EU Court the concessions appear to be peculiarly characterized by the operational risk materialising, *a contrario*, in the absence of a full coverage by the public plexus for the contactor's investments.

This peculiarity of the concessions will become very significant in the subsequent decisions.

[53] ECJ, Sect. III, 13 november 2008, C-324/07, *Coditel Brabant*, in particular pt. 24.

For framing the issue, the conclusions of the Adv. Gen. Trstenjak delivered on 4 june 2008 refer to the settled case law of the Court (*Parking Brixen* and *Telaustria*) and back up the contract within the public service concessions, rather than in the sector of contracts for services, due to the fact that the local authority does not pay the value of the service provided, but the consideration consists in the right to exploit the performance, which implies the assumption of the operating risk (pt. 48).

Whereas the service provider is instead remunerated by the administration alone, without the aid of third-party users, the Court of Justice – at this early stage – tends to rule out the possibility of a concession for the lack of a proper management risk.

This interpretation may perhaps be explained with the prevailing judgement by the EU Court on contracts for the provision of services to the general public, historically utilized by users who pay the price of the service in lieu of the public administration.

This operating risk, however, is essentially equivalent only to that of demand, that is the response of the market to the services offered by the contractor.

The Beautiful Country[54] plays the role of the protagonist once again in the case *Commission/Italy*[55], concerning the design and construction of a rubber-tyred tramway for public transport in the municipality of L'Aquila, which we might call "*Commission/Italy-bis*" to distinguish it from the ruling on the waste emergency already examined in Sicily (even if the final result has been the same, namely the condemnation of Italy for breach of EU law). The national recidivism about the incorrect distinction between public contracts and concessions brings to mind a background reflection: is it difficult to understand such a distinction insofar not supported by positive law and fruit of claims of a judicial matrix, or behind the lack of understanding are hidden elusive surreptitious purposes?

For what it is worth, the doubt remains.

Nevertheless this examination may prove helpful to those who want greater clarity about the distinction between the types of public contract and concession.

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[54] Italy is known as "Bel Paese" ("the beautiful country") from the description contained in the works by Dante, Petrarca and Stoppani.

[55] ECJ, Sect. III, 13 november 2008, C-437/07, *Commission vs. Italy*, ptt. 27-35.

Following on its own precedents, the Court reiterates at the outset that you are in the presence of a services concession when the agreed methods of remuneration consist in the right of the provider to exploit his performance and imply that this last assumes the risk associated with the management of services (pt. 29), that the lack of transfer to the contractor of the risks associated with the provision of services indicates that the transaction is a public service and not a concession of public service (pt. 30), and that such considerations, affirmed in relation to service contracts and concessions, are valid for works contracts and concessions as well (pt. 31).

In this case, the remuneration of the contractor was divided into two *tranches*: a first share (60%) came from the contracting municipality; while the remainder (40%) was instead be paid by the future operator of the tramway, *id est* the concessionaire of the service.

We are witnessimg the proverbial Italian creativity which, in memory of the times of the concession of construction alone, has attempted to qualify as concession a case in which the contractor carries out the work having his consideration for repayment guaranteed *in toto*, though split between two different subjects: on the one hand, the municipality; on the other hand, the service provider (the real concessionaire).

In a situation like this, concludes the EU Court, the contractor does not assume the risks related to the management of the work. It follows that the transaction must be classified as a public works contract and not as a public works concession (ptt. 34-35).

Going back to the Court rulings, it is the turn of *Hans & Christophorus Oymanns*[56], relating to the provision by specialized technicians, under an agreement concluded with the statutory sickness insurance fund, of orthopaedic shoes, made and tailored individually in accordance with the patient's needs, together with detailed advice given to the patients before and after such supply.

[56] ECJ, Sect. IV, 11 june 2009, C-300/07, *Hans & Christophorus Oymanns*, where the national court asked whether a contract should be regarded as a service contract or a service concession for the fact that, despite a public administration having to pay the compensation to the supplier, at the same time was to be taken into due account the criterion of the attribution of risk: on the one hand, the risk associated with the collection of credits and the insolvency of the debtors did not affect the supplier, because the statutory sickness insurance fund, and not the patient, was responsible to remunerate the provider; on the other hand, however, the supplier borne the risk of his products and services not being required by patients.

To the judge *a quo*, by recalling the case *Telaustria*, the crucial point for the purpose of classifying the contract as a service concession or not was also the lack of costly initial investments by the contractor (such as the construction of premises, and the cost of personnel or equipment), to be amortised later by means of the right to exploit his own service for repayment.

As observed by the Adv. Gen. Mazák, upon rejecting the idea that it was a concession of services, the integrated provision scheme *de quo* could not be classified as a service concession since the latter involves *naturaliter* a transfer of the right to exploit a particular service and the concessionaire bears all or a major part of the economic risk related to the exploitation.

Making reference to the precedent cases *Parking Brixen* (since it was the sickness insurance fund – and not the patient, except for small contributions – which was responsible for remuneration) and *Telaustria* (where the EU Court defined the right to exploit a service as "right to exploit for payment its own service"), the Adv. Gen. pointed out that:

- the contractor did not have to set up and maintain any costly infrastructure (premises, personnel, equipment) which would have to be paid off by means of remuneration for specific contracts;
- the provider was required to render his service upon request of the insured, without, however, any possibility to negotiate price or his own compensation (which was agreed with the sickness insurance fund and paid by this latter).

Consequently, the contract signed between the sickness insurance fund and the provider had to be considered as an almost classic example of framework agreement, because the provider did not bear any economic risk in accordance with the Community case-law.

Thus the decision of the Court, by reminding the case *Commission/Italy* and not differing from the conclusions of the Adv. Gen. Mazák delivered on 16 december 2008, has stated that, since the principal burden of the risk connected with the carrying out of the activities did not fall on the contractor, was lacking the element which distinguishes the situation of a concessionaire in the context of a service concession.

The reasoning of the Court shows itself very interesting when it goes deep into the analysis of risk.

Having found at first that on the part of the operator was missing the economic freedom which *funditus* characterises the service concession, endowed with highly commercial vocation, the Court seems then to fall in contradiction by affirming that the economic operator was not exposed to a significant risk connected with the services provided, though later admitting that he was exposed to a certain risk inasmuch as insured persons may not avail themselves of his products and services.

"However, that risk is limited" – continues the Court – "The trader is spared the risk connected with recovery of payment and the insolvency of the other party to the individual contract since, in law, the statutory sickness insurance fund alone is responsible for paying the trader. In addition, although the trader must be sufficiently equipped to provide its services, it does not have to incur considerable advance expenditure before an individual contract with an insured person is concluded. Finally, the number of insured persons suffering from diabetic foot syndrome, who are likely to seek out the trader in question, is known in advance, with the result that a reasonable forecast can be made as to the number of customers" (pt. 74).

This is an aspect which will find further widening in the next pronouncements of the Court of Justice and which here is only sketched out in an embryonic form: in fact the *quantum* of the risk assists the modes of remuneration of the concessionaire in the hard mission of deciphering the *discrimen* of concessions.

This decision marks the border line between the two phases of the case law of the Court of Justice.

From the connotation of the operational risk inherent in the methods of the dealer's remuneration we move to the study of the quantitative dimension of the same.

It is not enough that in abstract the remuneration depends on the vagaries of users: we must determine whether in practice there is the danger of not recovering the investments and what is the acceptable level of risk in order to have a concession.

The legal classification of a contract is therefore subject to the specific elements that make up the single case in point.

Anyway, the aforesaid decisions of the European Court of Justice show a definition of concession which is characterized by a situation where the right of management of a given service (trait common both to service and works concessions) is transferred by a contracting authority to a concessionaire, who has, under the contract, a certain economic freedom to determine the operating conditions, so remaining exposed to the risks involved in the operation.

From this first part of the retrospective on the case law of the EU Court of Justice in the matter of operational risk we can derive the progressive refinement of the concept that, starting from the judgement *Parking Brixen* (where it was considered almost synonymous with remuneration by the user, implying, however, the alterity and otherness of the latter with respect to the contracting authority), has experienced an evolutionary path that has gradually clarified important aporias and dispelled some false myths.

Firstly, it is necessary to clarify, in spite of some fluctuations by the EU Court, that the service users which remunerate the concessionaire can change and may be composite (public administration, third parties with respect to the public administration, or combinations of both).

As a result, in addition to the general distinction between contracts and concessions, it follows a further one within these latter between public concessions of services and concessions of public services.

The first ones relating to services provided directly to the administration – *rectius*: performances in which the fee is paid directly by the public administration (v. recital 18, last period, of the Directive 2014/23/EU, equal to art. 143, para. IX, of the d.lgs. 163/2006)

– and the others relating to services provided to the public, that is a set of indeterminate subjects which are responsible for the remuneration of the concessionaire.[57]

Of course, the boundary between the two cases is not clear nor static, but rather stems from the case because sometimes there is a price paid by the public administrations, as a partial compensation for the concessionaire, or the public administration can pay him "indirectly" through the disbursements of users which the same appropriates and transfers to the concessionaire.

Such an assumption will return to be useful again, especially with reference to the Italian heritage (see below), in order to refute the theory under which the direct payment[58] of the contracting authority to the contractor would exclude the possibility to speak of "concession".

Secondly, if the right of economic exploitation of the service granted is opposed to the classical consideration of the contract, can not be ignored the commonality of other elements between the two cases in question: above all, the purposes of general interest and the delegation of public functions.

Finally, it is worth repeating that the operating risk depends on the modes of the contractor's remuneration but does not coincide with these (least of all with the origin of the remuneration).

The fact that the remuneration of the concessionaire is not guaranteed *in toto* by the public administration does not exhaust the essence of the right of management.

Hence, for this reason it is not sufficient that the profitability of the service granted is theoretically uncertain, being connected to the future remuneration from the users.

We should also conduct an investigation into the quantitative dimension of the concessionaire's management responsibility to determine whether the operational risk is actually placed in the hands of the private contractor in a significant way.

[57] In these terms see also Ricchi M., *La nuova Direttiva comunitaria sulle concessioni e l'impatto sul Codice dei contratti pubblici*, Urbanistica e appalti 7: 741-757, 2014, in particular pp. 749-750.

[58] We are not making reference to the hypothesis, expressly provided for, of partial public funding (which can be paid by way of compensation for service in the case of administered prices or to ensure the economic and financial balance of the concession in relation to the quality and/or duration of the transaction), but to the integral public payment parameterized to certain variables (not established in a fixed extent).

§2.2. The *quantum* of risk: the public regulation of the market

The second streak of the Court of Justice case law, which focuses on the *quantum* of risk in the concessions, starts with the cause *WazvGotha* (better known as *Eurawasser*)[59], concerning the award procedure of a public service for the distribution of drinking water and disposal of sewage in German territory.[60]

[59] ECJ, Sect. III, 10 september 2009, C-206/08, *WazvGotha*, with notes by Alesio M., *Anche se la controparte riscuote un corrispettivo da terzi quel contratto si configura come «concessione di servizi»*, Diritto & Giustizia, 147, 2009; and Bianchi T.; Ponzone L., *La Corte di giustizia torna sulla distinzione tra concessione di servizi e appalto di servizi*, Diritto comunitario e degli scambi intenazionali, 279, 2010 (www.osservatorioappalti.unitn.it).

The decision is essential to integrate, from the quantitative viewpoint of risk, the observations already exposed relating to the methods of remuneration of the concessionaire.

By comparing the definitions of concession and contract in accordance with the European Directives and the earlier decisions of the Court, it emerged that the difference between a contract and a concession was still residing in the consideration: the contract involves a consideration paid directly by the contracting authority to the provider, while in the case of a concession the consideration for the performance consists in the right of management, either alone or together with payments.

The Court stated, however, that "the fact that the service provider is remunerated by payments from third parties, in this case from users of the service in question, is one means of exercising the right, granted to the provider, to exploit the service" (pt. 53) and that, when the agreed method of remuneration consists in the right of the providers to take advantage of their own performance, it shall imply that the providers assume the risk associated with the management: "In that regard, it must be stated that risk is inherent in the economic operation of the service" (pt. 66).

In the event of a total absence of transfer of the risk relating to the services onto the relative provider, the transaction is a contract.

[60] The tender notice and the related draft contracts provided that the concession holder would have had to supply the services to the users resident in the territory covered, on the basis of private law contracts, concluded in his own name and account, and he would have received, in consideration, payments from users. It was provided that the concession holder was competent to calculate at his own discretion, *ex aequo et bono*, the payment due for the services supplied, and to set that amount on his own responsibility (even though he had to practice regulated tariffs).

Furthermore, the technical installations for water distribution and disposal of sewage were to remain in the public property and they were to be leased by the concession holder, who was entitled to include the corresponding rent in the payment sought from the users by way of consideration for the services supplied; the maintenance of those installations was the responsibility of the concession holder, to whom were destined, as far as legally possible, amount of public subsidies; lastly, both the connection to the public networks of water distribution and disposal of sewage and the use of those networks were compulsory by regulation, but the concession holder could not, however, require that obligation to be respected in each individual case.

In this context, the court *a quo* decided to suspend the proceedings and refer to the Court of Justice the following questions:

- whether a contract for the supply of services should be regarded as a service concession – and not, instead, a service contract – by the mere fact that the supplier was not directly remunerated by the contracting authority, but through a consideration of private law that the latter authorized it to collect from third parties;
- if that contract constituted a service concession as the risk connected with operating the service in question – though *ab origine*, that is to say even if the contracting authority were to provide the service itself, significantly limited because of the rules of public law governing it (compulsory connection and usage; prices calculated on a break-even basis) – was assumed by the contractual counterparty in full or at least to a predominant extent;
- if the degree of risk connected with operating the service, particularly the marketing risk, had to be comparable, in qualitative terms, to that which normally exists under conditions in a free market with more than one competing tenderer.

The Court has stated that the fact that the service provider is remunerated by payments from third parties, *i.e.* the users of the service, is just one means of exercising the right of the concessionaire to exploit the service.

This means admitting various forms of remuneration, being irrelevant, in that regard, whether the remuneration is governed by private law or public law, but most of all

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The Court was therefore asked to clarify whether the mode of remuneration of the concessionaire is a sufficient condition to qualify the concessions, or if it is necessary also the risk element and to what extent:

"The questions referred start from the premise that the supply of the service in question in the main proceedings involves very limited financial risks, even in the event that that service is provided by the contracting authority, on account of the application of the rules governing the sector of activity concerned.

According to some of the arguments submitted to the Court, for the transaction in question to constitute a concession in such circumstances, it is necessary that the risk transferred to the concession holder be a significant risk.

Those arguments cannot be accepted unreservedly.

It is not unusual that certain sectors of activity, in particular sectors involving public service utilities, such as the distribution of water and the disposal of sewage, are subject to rules which may have the effect of limiting the financial risks entailed.

First, the detailed rules of public law, to which the economic and financial operation of the service is subject, facilitate the supervision of how that service is operated, and scale down the factors which may threaten transparency and distort competition.

Second, it must remain open to the contracting authorities, acting in all good faith, to ensure the supply of services by way of a concession, if they consider that to be the best method of ensuring the public service in question, even if the risk linked to such an operation is limited.

Moreover, it would not be reasonable to expect a public authority granting a concession to create conditions which were more competitive and involved greater financial risk than those which, on account of the rules governing the sector in question, exist in that sector.

In such circumstances, as the contracting authority has no influence on the detailed rules of public law governing the service, it is impossible for it to introduce and, therefore, to transfer risk factors which are excluded by those rules.

In any event, even if the risk run by the contracting authority is very limited, it is necessary that the contracting authority transfer to the concession holder all, or at least a significant share, of the operating risk which it faces, in order for a service concession to be found to exist" (ptt. 69-77).

The Court also adds that it is for the national court to assess whether there has been a transfer of all, or a significant share, of the risk faced by the contracting authority and, to that end, cannot be taken into account the general risks resulting from amendments to the rules, made in the course of performance of the contract.

And finally concludes that, in relation to a contract for the supply of services, the fact that the supplier does not receive consideration directly from the contracting authority, but is entitled to collect payment under private law from third parties, is sufficient for that contract to be categorised as a service concession when "*the supplier assumes all, or at least a significant share, of the operating risk faced by the contracting authority, even if that risk is, from the outset, very limited on account of the detailed rules of public law governing that service*" (pt. 80; italics added).

In essence, the modes of remuneration of the concessionaire are not in themselves sufficient to characterize the concessions if they do not mingle with the operating risk, although sometimes reduced by the regulations of the sector.

Such a conclusion, to a closer look, was already present in the opinion of Adv. Gen. Fennelly, delivered on 18 may 2000 in the case *Telaustria*, the leading case on the subject (at least chronologically), where at pt. 40 could be read "the mere fact that there is a likelihood that the concessionaire will be able beneficially to exploit the concession would not suffice to permit a national court or tribunal to conclude that there is no economic risk. To my mind, a national court or tribunal would need to be satisfied to a high degree of probability that the possibility of loss was minimal or even non-existent".

After almost a decade, the concession rediscovers its origins in the operational risk.

denying the immanence of the assimilation between operating risk and trilateral relationship. Such a conclusion, however, requires to clarify the concept of the right of management as consideration for the performance of the concessionaire.

From the case law of the Court it is also apparent that the right of the concessionaire to take advantage of its own performance shall imply that the provider assumes the risk associated with the management; otherwise the operation represents a public contract.

The combination "right of management-remuneration by third party users" which gave birth to a vision of the exploitation of the benefit granted in terms of the normal exclusion of direct public payments (except for any eventual price, something that already proves the theory wrong) must deal with the fact that the risk in concessions is not equivalent to that of demand, related to cash flows, but it is something different and wider.

Although the risk incurred by the contracting authority is very limited, it should still be free to choose whether to award a concession, on condition to transfer, in full or at least significantly, to the concessionaire the risk of management that the former would encounter in case of carrying it out in first person.

The acceptance of a risk quantitatively reduced by the legislative and/or administrative configuration of the market leads us to reflect on the contents of the risk.

If, as repeatedly stated by the Court's rulings, the *discrimen* of concessions is to be found in the right of management and economic exploitation of the performance, then can be considered also the risk of availability, first, and all the other risks that may occur during the execution of a concession. Otherwise there would be a concession "maimed", which includes only the risks already listed by the Eurostat decision of 11 february 2004, but excludes a whole range of additional contingencies on which to reflect and which influence, even before that, the choice of the most appropriate tool, between contract and concession, in view to achieve the intended purpose and how to share the risks during contract design.

On this point we will return later on (see below).

The judgment *Acoset*[61], concerning the selection of the private minority participant in the semi-public company which was directly awarded the integrated water service

[61] ECJ, Sect. III, 15 october 2009, C- 196/08, *Acoset*, in particular ptt. 37-43.

At the outset, the Court notes that the attribution of a local public service consisting of the integrated management of water services may be covered, according to the nature of the consideration of such services, by the definition of public service contracts or by that of service concession within the European Directives: the difference between a service contract and a service concession lies in the consideration for the provision of services (in the contract is paid directly by the contracting authority to the service provider; in the services

("servizio idrico integrato") for the province of Ragusa, present no major changes in matter if not the new entry regarding a reflection on the public-private partnership (PPP).[62]

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concession the mode of remuneration consists in right of the service provider to take advantage of its performance and imply that the latter assumes the risk of operating the services).

The national court, since the duration of the operation was intended to last thirty years, referred to the public-private company to be formed as a "concessionaire" for the management of integrated water services.

Likewise, the Italian Government observed that it was clearly in issue is the award of a public service by means of a thirty-year concession, whose main consideration was the possibility of claiming from the users the water tariff referred to in the tendering procedure as the consideration for the service provided.

The Court therefore assumes that it is a concession without further investigation and confirms, according to the *stare decisis*, its precedent case law on the remuneration of the concessionaire by third party users. As it is self-evident, that is a step back compared to the case *Eurawasser* (of the previous month), where the trilateral relationship of concessions was belittled in favour of the risk.

Even the Adv. Gen. Ruiz-Jarabo Colomer, in his opinion delivered on 2 june 2009, agreed to classify the case as a concession but on the assumption that the risk was assumed by the private partner.

It was clearly important "to identify the criteria for establishing the vague dividing line between a contract and a concession, a task which, in the absence of the necessary information, it ultimately falls to the national court to carry out on the basis of the criteria of 'the operating risk' and 'the payment for the provision of the service', as interpreted by the Court of Justice. [...]In addition, the transfer of the operating risk is one of the most valuable clues for the purposes of examining that distinction, because it is an essential element of a concession but does not feature in a contract" (ptt. 74-77).

[62] The conclusions delivered on 2 june 2009 by the Adv. Gen. Ruiz-Jarabo Colomer face for the first time the problematic relationship of the distinction between contracts and concessions within the orbit of the PPP.

That discussion unfolds in three subsections respectively rubricated: "*Towards an autonomous concept of public private partnership*", "*A classification of PPPs*" and "*The distinction between contracts and concessions*".

The first examines the evolutive trends of the financial and managerial activities of the public authorities who have undergone a large transformation over the last century (from an initial *laissez-faire* liberalism, with the sole objective of maintaining public order through traditional control measures, such as orders and prohibitions, their activities evolved into the provision of assistance to individuals, finally leading to the welfare state model, based on the concept of solidarity).

In this perspective, the increased degree of permeability between public administration and citizens prevent to isolate and compartmentalize the reciprocal functions:

"Although the efforts of the authorities must be directed at the general interest, there are many methods of satisfying that requirement; particularly striking are methods which foster a clear measure of cooperation by enabling private parties to carry out activities of a public nature.

As exponents of that convergence, the models based on the so-called indirect management of public services or public contracts – models which have their roots in the history of the law – occupy a unique position.

In that connection, where a private undertaking assumes responsibility for providing a service and, motivated by profit, places its assets at risk in order to ensure that the service is provided properly and operates well, a close link is forged with the public finances. That also occurs where an administrative authority is aware of its technical or financial limitations and decides that a contractor is best suited to executing works or providing services.

Private capital acts as an intermediary between the body responsible for the work or service and its beneficiaries, and accordingly, subject always to variations based on type, the shared-work model is omnipresent in such structures and governs all their characteristics.

Moreover, aside from the contractual model and concessions, it is neither unusual nor original for an administrative authority to carry out public duties in cooperation with private parties which are not, however, part of its structure.

Accordingly, in order to identify the public-private partnership as an autonomous category, it was necessary to create the term on the basis of all the reciprocal influences with which certain legal concepts are imbued" (ptt. 44-49).

Perhaps it would be more correct to make it back in the first row of cases, relating to the modes of remuneration of the concessionaire, but the reasoning on the PPP seems to have a broader content, including both the *quomodo* and *quantum* of risk as well as the underlying philosophy of the institute that includes procurement contracts and concessions.

Even in the case *Helmut Müller*[63], relating to the sale of a public land on which the purchaser was subsequently to carry out works aimed at pursuing the objectives of urban development defined by a local government, the horizon is widened.

The EU Court shall, on the one hand, determine the minimum content of public contracts in view of the application of the European Directives[64], on the other hand,

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After an analysis of the "New Public Management", the origin of the PPP, which opens the doors to models of business management that require private financial contribution (the "Private Finance Initiative"), the Adv. Gen. then focuses on the fragmentation of the Community landscape, despite the aspiration to achieve the harmonisation of national laws in the field of public contracts, all the more of the PPPs.

We do witness the increasing presence of PPP in the public sector since, as well as serving as a remedy for the public budget constraints, these instruments facilitate the private financing and exploitation of the expertise of companies, faced with the transformation of the State from direct operator to regulator and ultimate guarantor of conduct which may affect the public interest.

According to the Adv. Gen., the absence of harmonisation at Community level precludes the emancipation of PPPs as true contracts, especially because the Community legislature has harmonised public contracts, but not concessions and public services.

In the second section, he introduces the Green Paper on PPPs and the different classification depending on whether the collaboration is based on constraints only conventional (contractual PPPs) or take the form of an organism (institutionalized PPPs), both being able to relate to a contract or a concession .

In the third and last section, as already mentioned in the previous note, the Adv. Gen. is concerned with the fundamental distinction between contracts and concessions in relation to the management risk and the consideration of the provision, as interpreted by the Court of Justice.

[63] ECJ, Sect. III, 25 march 2010, C-451/08, *Helmut Müller*.

The question arose from the need to classify the case as a contract (contract concluded in writing and for consideration, in which the public body is to provide the contractor with a counter-performance, not necessarily in cash, but economically assessable) or concession (alternative compared to the contract model, in which the price of the work consists solely in the right to exploit the construction or in this right together with payment).

According to the national court it would have been a public works concession, since the government was limited to allow the subject that intended to carry out the construction work to take full advantage, in adherence to the rules of property law, of the results of its constructive activities and that the notion of concession does not preclude the granting of indefinite duration nor the recognition, in favour of the dealer, of a right of ownership of the goods covered by the concession.

[64] In the conclusions presented by the Adv. Gen. Mengozzi on 17 november 2009 is openly stated that for the purposes of the applicability of the rules of the Directives on public procurement, is irrelevant the aim that the public authorities are pursuing through the services and/or the works to be realized.

What matters is only the existence of objective conditions laid down by the regulatory text as the main objective of the Community rules is to eliminate the restrictions on fundamental freedoms and to promote effective competition between companies and open up markets to people who may be interested to perform the services. And for these people is irrelevant the purpose which the government intends to pursue.

Consequently, as already shown above, appears to finally fade away the possibility to distinguish contracts and concessions on the basis of the objectives of general interest attributed to the latter.

The Court of Justice, however, disagrees with the Adv. Gen. on the fact that, for the existence of a public works contract or a public works concession under EU Directives, there is the need for a direct *link* between the contracting authority and the works, which may exist, in particular, where the property of the

interpret the concessions risk in a view inverted with respect to the case *Eurawasser* above (*i.e.* no more the reduction of the risk, but rather its unlimited extension on the grounds of the right of ownership granted to the contractor[65]).

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work is intended to be acquired by the government (under right of ownership), or provide a direct economic benefit to the same (enjoyment in various forms), or in the fact that the contracting authority has taken the initiative for implementation, or employs public resources, in cash or in kind, for the execution of the services, work and/or works financing at least part of the costs of the same.

For the Court, indeed, there should be a direct economic *benefit* on the part of the contracting authority that can be found where it is provided that the public authority is to become owner or have a legal right that guarantees the availability of the works or work which is the subject of the contract, in view of their public target. The economic interest may also lie in the economic advantages which the contracting authority may derive from the future use or transfer of the work, in the fact that it contributed financially to the realization of the work, or in the assumption of the risks were the work to be an economic failure, without being necessary, however, the form of the acquisition of a material or physical object.

[65] On this point, the Court of Justice concludes that a public works concession can never allow the concessionaire to have a right unlimited in time on the object of the concession (ptt. 70-80).

That conclusion, despite the firmness, raises some concerns.

To ensure that a contracting authority may transfer to its counterparty the right to manage a work, according to the Court, "that contracting authority must be in a position to exploit that work. That will normally not be the case where the only basis for the right of exploitation is the right of ownership of the economic operator concerned. The owner of land has the right to exploit that land in compliance with the applicable statutory rules. As long as an economic operator enjoys the right to exploit the land which he owns, it is in principle impossible for a public authority to grant a concession relating to that exploitation" (ptt. 72-74).

Seems to manifest some confusion between the content of the concession and that of the legal sphere of the concessionaire, perhaps resulting from the excessive importance placed on the concept of "transfer".

The concession has *naturaliter* a limited duration for not to cancel *ad aeternam* the beneficial effects of competition (pt. 79, now cf. recital 52 and art. 18 Dir. 2014/23/EU), this situation remaining unchanged even if the dealer is the owner of the infrastructure built.

Not surprisingly, the European law proclaims itself indifferent to public or private property in the field of public procurement: the main proof is the inclusion of private subjects – public companies and holders of special and exclusive rights – as contracting entities in the utilities sectors, but others can be the examples. One is certainly given by the possibility of resorting freely to autoproduction (direct management and in-house providing) or outsourcing; another is represented by contracts that focus on the risk of availability, which normally presupposes the private ownership of the property; similarly, the contracts related to the market demand do not exclude the private ownership of the asset.

This raises the doubt that the Court, as well as the Adv. Gen. Mengozzi (ptt. 86-98 of the opinion of 17 november 2009; in particular, see the pt. 88: "By its very definition, a concession is a way of allowing a person to exploit property to which that person could not otherwise claim any right"), actually did a little bit of confusion in this regard.

This means that the concession does not at all exclude the private ownership of the property entrusted to the concessionaire, including even some cases that provide this (leasing and availability in Italy, but globally, under symbol "O", the concession knows different versions based on the performance "Own").

The proof of what I have just said is given by the Court when – recalling *Eurawasser* – reminds us that "the essential characteristic of the concession is that it is the concessionaire himself who bears the main, or at least the substantial, operating risk" (pt. 75).

In response to the Commission, which argued that this risk may consist in entrepreneur's uncertainty about the approval of the projects by the territorial authority, the Court states that "In the type of scenario referred to by the Commission, the risk would be linked to the contracting authority's regulatory powers in respect of urban planning and not to the contractual relationship arising from the concession. Consequently, the risk is not linked to exploitation" (pt. 78).

The Court's reasoning is impeccable this time in the terms of method (trying to demarcate the border between the content of the right of management and what comes out of it), but suffers from lack of foresight: if it is true that the risk in concessions relates to the management of the performance by contract, it is also

On the first point, regardless of whether it be a public contract or a concession, in the opinion of the Court is necessary that the administration has a direct economic interest to become the owner or have a legal right of enjoyment on the object of the public contract or is likely to take any economic benefits from the future use or transfer, or has contributed financially to the implementation or has assumed risks in the event of economic failure.

The notion of public contract and the one of concession within the meaning of the EU Directives also require that the operator is contractually obligated, towards the public authority, to provide the performance agreed: in a word, the *synallagma*.

The performances and benefits derived from public contracts are legally binding and must be enforceable in judgement in accordance with the procedural rules laid down.

It follows, therefore, the synallagmatic nature of both public procurement contracts and concessions, that does not solve the fundamental issue of the commutative or aleatory character of concessions (v. *infra*).

With regard to the other aspect, that is the maximum extension of the concession, given the not illimited duration of the same, we should also admit the private ownership by the concessionaire on the assets which are the subject of the contract.

In fact, the right of management, to which is related the risk in concessions, do not concern the asset *ex se*, but its management, *i.e.* the specific use of the property that is agreed between the public administration and the concessionaire (maybe also the owner) for the duration necessary to recover the investment and allow a profit.

Once the concession, and indeed the management conditioned to the needs of the public target, is ended (for expiry, termination or default) the property can return to the full availability of the individual who played the role of concessionaire, unless it is established the exercise by the public body of the right to redeem the asset.

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undeniable that includes all the stages leading to the execution of the contract and, for this reason, becomes absolutely essential the allocation of risks in the hands of those who can best address them (prevention, management, repair).

In the case of "administrative risk" obviously would be appropriate to the assign it to public parties; if these last did not want to take it, that risk would ultimately be passed onto the dealer and would certainly be part of the operating risk (in this sense, in Italy, cf. art. 160-*ter*, para. II, of Legislative Decree n. 163/2006).

It is evidently an extreme case, which moreover relates to a situation in its turn border-line as well (neither contract nor concession), which only serves to draw inspiration and provide clarity on the same.

In the normality of the cases the procedures to select the contractor include the assessment and approval of the projects, besides a number of remedies against the administrative risk (*i.e.* delays, variations, etc…) so as to guarantee the entrepreneur, who would otherwise be completely at the mercy of the public administration.

The sentence *Stadler*[66], concerning the award of contracts for the provision of ambulance services, brings to the fore the issue of the problematic relationships that exist between the distinguishing criteria of public contracts and concessions.

[66] ECJ, Sect. III, 10 march 2011, C-274/09, *Stadler*.

In Germany, as regards the remuneration for providers of public emergency services, there are two different models: in the first one, the so-called "tender" model (*Submissionsmodell*), the remuneration is paid directly by the local municipality; in the "concession" model (*Konzessionsmodell*) the remuneration of the provider of the rescue services takes the form of the collection of payment from the patients or social security institutions.

In this context, the national court decided to refer the following questions:

- if a contract for the provision of ambulance services should be regarded as a service concession, and not as a service contract, for the facts that the provider is not paid directly by the contracting authority, that the usage fee for the services to be provided is determined through negotiations between the dealer and third parties who, in turn, are contracting authorities (social security institutions), that in case of no agreement provision is made for a decision by an arbitration board established to this end, whose decision is subject to review by State courts, and that the fee is not paid directly by users, but in regular payments on account by a central settlement office whose services the contractor is statutorily required to call upon;
- if you are in the presence of a concession when the contractor assumes entirely the risk of management inherent in the provision of public services, but this risk is reduced because it is guaranteed a certain exclusivity of exploitation in the contractually stipulated area and the usage fees of the service, under a statutory provision, shall be calculated on the basis of expected costs estimated in accordance with the economic principles of business administration, about proper performance of the service, rational and economical management as well as efficient organization, and are due from solvent social security institutions.

As noted by the Adv. Gen. Mazák in the conclusions presented on 9 september 2010, the questions of the present case are similar to those raised in the aforesaid cause *Eurawasser*.

In both cases we have the dual criterion of the absence of direct remuneration of the service provider, (namely the fact that the remuneration does not come by who has to award the service but from a third party), on the one hand, and the assumption of the risk attached to the service, although limited from the outset (*i.e.* even in the case of the provision of services by the public authority), on the other.

As always, the Court draws inspiration from its case-law and by the definitions contained in the EU Directives, arguing that, in the case of a contract for the provision of services, the fact that the contractor is not directly remunerated by the administration, but has the right to receive a remuneration from third parties, is sufficient for having a concession.

Then adds that if the mode of remuneration is one of the key factors for qualification as a service concession, this last implies that the dealer assumes the risk associated with the management of the services and the lack of the transfer of the risk of providing the services to the contractor indicates that the transaction is a public service contract and not a service concession.

In this case, the remuneration of the service provider being not guaranteed by the authority which awarded the contract, but by the usage fees which he is entitled to obtain *ex lege* from the social security institutions from which the insured persons received rescue services or even from the privately-insured or non-insured persons who received such services, it is a concession: according to the Court what matters is that "all the remuneration obtained by the provider of the services comes from persons other than the contracting authority which awarded it the contract" (pt. 28).

The direction traveled by the Luxembourg Court had been drawn in that direction by the Adv. Gen., according to which the lack of direct remuneration of the service provider by the public authority which assigned to it the service requires that the service contract has to be qualified as a service concession (although the existence of a direct remuneration of the service provider by the public authority concerned does not necessarily imply the existence of a contract for services), representing "a sufficient criterion for the purposes of classifying a contract as a service concession[…]. In that regard, it is not important to know, first, who pays the remuneration due in respect of the services provided, assuming that it is a body which is sufficiently distinct from and independent of the public authority which assigned the service in question, second, what the procedures for collection of the remuneration are or, third, whether the operating risk connected with the service at issue is limited from the outset" (pt. 39).

And here it seems legitimate to ask the question if indeed the lack of remuneration by the public administration customer (which awarded the contract) always makes it a concession or may even constitute a service contract besides.

The question concerns first of all the public services, for which, therefore, there would never be a contract.

As already mentioned several times, the classification of a public contract depends on the intersection of two criteria: the mode of remuneration and the operational risk, with the first one being a symptomatic figure of the second. It would therefore be more correct to say that the criterion is only one, *i.e.* the operating risk.

Reversing the perspective can create confusion and legal uncertainty.

To this topic the Adv. Gen. devotes only a few lines simply recalling the case *Eurawasser*.

More attention is spent by the Court, which reminds at ptt. 37-38 that the risk of economic operation of the service is to be understood as the risk of exposure to the vagaries of the market, which can result in the risk of competition from other operators, the risk of an imbalance between demand and supply of the services, the risk of insolvency of the persons who have to pay the price for the services provided, the risk of failure to fully cover the operating costs through revenue or even the risk of liability for harm or damage resulting from an inadequacy of the service; on the contrary, risks such as those related to bad management or errors of assessment by the economic operator are not decisive for the qualification of a contract as a public service contract or as a service concession, since such risks, actually, are inherent in every contract, whether it be a public service contract or a service concession.

Entering into the merits of the case, the EU Court observes, "first, that the usage fees are not determined unilaterally by the provider of the rescue services but by agreement with the social security institutions on the basis of negotiations which must take place annually. Those negotiations, the results of which cannot fully be foreseen, involve the risk that the provider of the services must face constraints imposed throughout the duration of the contract. Those constraints may result *inter alia* from the need to make compromises during the negotiations or from the arbitration proceedings regarding the level of the usage fees.

Considering that – as stated by the referring court itself – the social security institutions with which the service provider is obliged to hold negotiations attach importance, with regard to their legal obligations, to fixing the usage fees at the lowest possible level, that service provider also runs the risk that those fees will not suffice to cover all operating expenses.

The service provider cannot guard against such eventualities by ceasing its activity since, first, it would not recoup the investments made by it and, second, it may face legal consequences as a result of its decision to terminate the contract early. In any case, an undertaking specialising in rescue services has only limited flexibility on the transport market.

Second, it is apparent from the Bavarian law that it does not guarantee full coverage of the operator's costs.

If the operator's actual costs exceed, in a given period, the estimated costs which serve as a basis for calculation of the usage fees, that operator may face a deficit and would have to ensure pre-financing of those costs from its own resources. It is a fact that the demand for rescue services can fluctuate.

In addition, if a difference arises between the actual costs and the estimated costs recognised by the social security institutions, the result of the rendering of accounts will be dealt with only at the next negotiations, which does not oblige the social security institutions to make good a possible deficit in the course of the following year and thus does not offer a guarantee of full compensation.

It should be added that if the costs are provided for in a budget, it is not possible for the undertaking to carry forward a surplus or deficit to the next financial year.

Third, the service provider selected is exposed, to a certain degree, to the risk of default by those liable for the usage fees. While a large majority of users of the services are insured by social security institutions, a not insignificant number of users is not insured or is privately insured. While the central settlement office is responsible for the technical recovery of their debts, it is not liable for the debts of non-insured or privately-insured persons and does not guarantee actual payment by those persons of usage fees. According to information provided to the Court, that central office does not enjoy the powers of a public authority.

Finally, it must be noted that, according to the statements of the referring court, the Bavarian law does not exclude the possibility that several operators may provide their services in the same area" (ptt. 39-47).

If, regardless of the mode of remuneration, a contract provides for the right of management by the contractor, who bears the operational risks attached, then there is a concession instead of a contract.

It is important to emphasize that the Court, after having initially followed the road of the origin of the remuneration, has changed course and ended up identifying the peculiar *discrimen* of the concession in the operating risk, which can take – normally it happens so – the form of remuneration from third parties other than the public contracting entity, but may also have the features of a fee to be paid by the same public grantor subjected to predetermined parameters (*e.g.* availability canon, shadow tolls, etc…).

Similarly, it is not axiomatic that the absence of a direct remuneration of the service provider by the public administration grantor shall exclude *tout court* the service contract: for example, in the case of public services, it is possible that the contract between the public authority and the contractor provides the guarantee of total remuneration of the latter through third party payments (or with the successive compensation by the administration), thereby excluding operational risk.

To come to the point, the only necessary and sufficient criterion for distinguishing between public contracts and concessions is the operating risk, with respect to which all the other secondary criteria serve only as complementary accessories.

In the case *Norma-A*[67], relative to public transport services by bus, is further clarified the relationship between remuneration of the contractor and right of management, with the hierarchical consolidation of the risk as the only deciding factor.

The Court resolves the raised issues by stating that, when the remuneration of the economic operator selected is fully guaranteed by entities other than the contracting authority that has awarded the contract for the provision of rescue services and the trader bears a risk in management reduced as much as, in particular, the amount of fees for the use of these services depends on the outcome of the annual negotiations with third parties and it is not assured the full coverage of the costs incurred in managing his activities in compliance with the principles laid down into the national law, "that contract must be classified as a service concession" (pt. 48).

[67] ECJ, Sect. II, 10 november 2011, C-348/10, *Norma-A*, with a note of comment by Caranta R., *La Corte di giustizia ridimensiona la rilevanza del rischio di gestione*, Urbanistica e appalti 3: 287-298, 2012.

The referring judge asked the EU Court of Justice whether it should be considered as public service concession a contract by which the contractor assumes the right to provide public transport services by bus, in the event that a portion of the consideration consists in the right to exploit the public transport services but, at the same time, the contracting authority reimburses the service provider for any losses incurred as a result of the provision of such services and, additionally, the public law governing the service provision as well as the contractual clauses limit the management risk of the service.

The doubt of the national court arose from the observation that the risk associated with the operation of the service was not borne by the contractor, who did not even took a significant part.

Where on the basis of public law and contract clauses, the contractor does not take to a significant extent the very risk in which would incur the contracting authority or entity and it is also guaranteed the offsetting of any losses related to the service, you cannot speak of concession.

We witness the final reversal of roles between the origin of the remuneration and the operational risk.

In the event that part of the consideration for the service provider consists in the right of management, that is to say in the remuneration to be obtained from users, but at the same time the public administration ensures a compensation for the losses suffered because of the performance, it is the lack of risk which prevails on the trilateral relationship.

Therefore, on the assumption that the provisions of public law or contractual clauses may limit the management risk, reducing it compared to what would be borne by the public

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In fact, to the contractor was guaranteed the compensation for all the losses related to the services: essential costs associated with performance of the public transport service contract which were to exceed the income obtained, costs incurred through the application of the tariffs laid down by the mandating authority, lost revenue because the mandating authority applied a reduction of the transport price for certain categories of passengers, and costs incurred in fulfilling the minimum quality requirements laid down after the public transport services began to be provided, if compliance therewith was to involve additional costs compared to the quality requirements previously laid down. In addition, it was expected the compensation for earnings, determined by multiplying the income by a profit percentage (to be calculated by adding 2.5% to the average Euro Interbank Offered Rate (EURIBOR) for the 12 months of the reference year).

Nevertheless, the Latvian government opposed a number of reasons to exclude that the risks were assumed by the contracting authority and, therefore, such an operation should be regarded as service contract: the possible reduction of the public resources available to cover any losses, the costs of sunk investments, expansions or reductions of the routes, or, even, the uncertainty with respect to user demand, increased the risk in such a way that this latter was in fact taken by the contractor to a significant extent, all the more so as the contract was for a period of eight years.

Therefore, it would be a service concession.

The Adv. Gen. Cruz Villalón, in his opinion delivered on 7 july 2011, instead believed that the legal transaction at issue in the main proceedings did constitute a service contract.

Echoing what was said by the Adv. Gen. Mazák in the opinion about the case *Stadler* cited above, but avoiding to stumble into the same difficulties, the Adv. Gen. Cruz Villalón observed that the remuneration of the service by a third party is a decisive criterion for the classification of the transaction as a service concession only to the extent that it implies that the risk associated with the management of the service is assumed by the contractor: the truly decisive element consists in taking the risk.

The Adv. Gen. then went on stating that "For the contract to be regarded as a concession, it is not necessary that the risk assumed by the service provider be 'considerable in absolute terms', only that it be at least a 'significant share' of the risk which the contracting entity would anyway be assuming if it were to provide the service in question itself" (pt. 51).

In the present case, having been laid down the compensation for both losses of income and losses associated with the provision of the service, the risk of the dealer was practically null.

The Court of Justice, though it is not for it to classify specifically the transaction at issue in the main proceedings since only the national court may assess the amount of risk assumed by the contractor in practice, reaches the conclusion that the transaction has the characteristics of a service contract.

Therefore, the EU Court affirms that a service contract is a contract whereby "a contracting party, pursuant to the rules of public law and the terms of the contract which govern the provision of the services in question, does not bear a significant share of the risk run by the contracting authority" (pt. 59).

administration, but still keeping it at a level of effectiveness and significance, the contract must be classified as a concession.

What it does count is that the management is up to the concessionaire in first person so as to take its effects, without any guarantee of exemption by the public counterparty

Finally, the decision *Commission/Netherlands*[68], about the award of public works by the municipality of Eindhoven through a "cooperation contract", thus closes the *excursus*

[68] ECJ, Sect. II, 11 july 2013, C-576/10, *Commission/Netherlands*.

The dispute arose from the decision of the municipality of Eindhoven to realize in its territory a real estate project to redevelop a residential area, of which it was the owner, allowing people to access to certain social and cultural services (a medical center and a center for play, integration and learning, as well as a shopping center with apartments and housing).

It was necessary to determine whether the contract, concluded between the municipality and the counterparty under the *nomen* "cooperation contract," was a simple land sale or a public work concession.

The Court, in dismissing the proceedings brought by the Commission, does not enter into the merits of the issues relating to the contract qualification, in contrast to the conclusions presented on 11 april 2013 by the Adv. Gen. Wathelet, from which one can derive interesting thoughts on the subject.

According to the Adv. Gen., as demonstration of the genesis of the concessions from the contracts, the conditions necessary for having a public works concession are: a written contract between a contracting authority and an economic operator, concluded for pecuniary interest, where the consideration must consist either solely in the right to exploit the work or in this right together with payment, and whose object is either the execution, or both the design and execution, of works or of a work, or the realization, by whatever means, of a work corresponding to the requirements specified by the administration.

The object of the cooperation agreement made no reference to the sale of land, being intended to define the terms and conditions for exclusive cooperation between the parties in order to carry out the project for the redevelopment of the planning area. The contract also provided for the creation of a project team and various working groups, in order to devise the planning documents and prepare the decision of the parties, with the project group chaired by the municipality's project manager.

The price of land amounted to € 5.616.024, whilst the estimated value of the construction of the project was € 28.186.000. The object of the cooperation contract thus was not primarily the sale of land, but, more importantly, the execution of works related to assets and land to be owned by the private contractor.

At this point the Adv. Gen. poses two questions: first, a public works concession – and therefore the right to exploit the work – for an indefinite duration is compatible with EU law? Furthermore, does the consideration exist where the concessionaire is or becomes the owner of the land and/or finished works?

In relation to the first question, the Adv. Gen., by distinguishing the notion of "indefinite duration" from the "infinite duration" (which, alone, is limitless), admits a concession of indefinite duration.

In relation to the second question, referring to the case *Helmut Müller* cited above, suggests that the Court should exclude the possibility of configuring a public works concession when is granted to the (alleged) concessionaire a right of ownership on the works.

In any case, the Commission having not sufficiently demonstrated the existence of a consideration – namely the right to manage or this right together with payment – in favour of the contractor, owner of the land and works to be carried out, the Adv. Gen. denies that it is a concession contract.

The conclusion does not convince, all the more the reasoning.

The Adv. Gen., and far more the Court, have missed a great opportunity to deepen the theme of PPPs in a practical case that had all the basics.

It would have been appropriate to devote greater attention to the issues raised in this case instead of recall the precedents and dwell on abstract notions.

In particular, it perplexes the reproposition of the right of management for an undetermined period, this time admitted but again confused with the ownership of the contractor. One thing does not exclude the other, insomuch that in PPPs under the label of "O" and "T" are respectively identified the performance "Own" and "Transfer" which point to the possibility that the contractual counterparty of the public body be the owner of the property and may have to transfer it to the latter at the end of the contract.

on the pronouncements of the European Court of Justice which preceded the adoption of the Directive n. 23 of 2014 on concessions.

This last one has finally codified the long production about the concessions in a text of positive law which is binding, although some deficiencies remain.

It is definitely helpful the provision of the determined duration of the concessions (cf. recital 52 and art. 18 Dir. n. 23), which nips some interpretative issues in the bud.

Before focusing on the quantitative dimension of risk, we need to return once again, at least for a few moments, on the modes of remuneration of the concessionaire to make a brief general summary of the risk in concessions.

Only in the early days, the EU Court had intended the concessions as characterized by the remuneration from "third" users – characterization then degenerated in the absence of direct remuneration from the public administration grantor (despite the possibility of a price to be paid by the same) –, later having always interpreted the remuneration of the concessionaire from the user *lato sensu* (including both the third parties and the public administration, and the various combinations of these), as a reflection of the definition of concession that wants the remuneration consisting in the provider's right to take advantage of his own performance.[69]

Applying this criterion, the Court has therefore reputed it configuring a concession when the agreed method of remuneration consists in the management right of the provider who takes the connected risk: the fact that he is remunerated by payments from third parties

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Moreover, as already explained, the substance of the concession contract does not conflict with the status of owner of the asset. Let us make an example in this regard: among several potential candidates – all owners of land and property (currently or at the end of work/works) – the public entity selects the one most appropriate to meet its needs and entrusts him with a series of performances by entering into a fixed duration (by hypothesis: 30 years) contract, in which the payment is linked to the performance levels and user access. It can also be provided the purchase option by the public administration when the contract will be expired.

Now, someone would dare to deny that what we are in front of is a concession?

Unfortunately, sometimes we forget the quintessence of the concession as well as developed by the case law of the European Court of Justice over the years, despite some fluctuations and uncertainty.

The true *discrimen* of the concessions consists in the risk of management on the part of the private contractor, and this can only be recognised case by case, on the basis of the contractual clauses agreed upon by the parties.

What does not seem useful is fossilizing on aspects of little importance, as has happened several times with reference to the alleged right of unlimited management that derives from the property of the dealer, or even the prognostication of virtual scenarios based on the perceived intention of the public admnistration to award a contract or a concession in the future (see the last question of the cause *Helmut Müller*).

In both situations, only an *ex post* evaluation of the national court may properly take into account all the facts of the case, without the need to disturb the Court of Justice.

[69] Paradigmatic is the case *Stadler*, where we see at first the specious connotation of the concession in accordance with the origin of the remuneration from a public administration other than the client one, but then having to admit that the *condicio sine qua non* is constituted by the operational risk.

is only one of the forms which can assume the exercise of the right of management granted to the provider, for we cannot exclude direct payments by the contracting authority.

As already stated, the jurisprudence by the European Court of Justice has refined over time.

This happened not only with regard to the modal perspective of risk, but also with reference to its quantitative dimension.

In that light it has been specified that, for purposes of qualification as a concession, is necessary that the contracting authority transfers in full, or at least to a significant extent, to the concessionaire the risk in which the same incurs.

As for the risk, indeed, the Court considers that it can be, *ab origine*, considerably reduced due to the sector regulation by the public law, but the public administration must transfer it fully, or at least to a significant extent, to the concessionaire.

The fundamental point is that the risk must be limited by the existing regulation, as by the contracting authorities, prior to the award of the concession so that all the subjects potentially interested shall have cognizance.

The consistency of the risk must be assessed diachronically: *ex ante* and *ex post*.

They are in fact the contingencies and changes in the market that allow to determine whether or not a contract is to be qualified as a concession.

Yet this does not mean that a concession necessarily has to include such a risk that the economic operation will turn into a total gamble, but rather the opposite: which is to say that a risk that does non exist practically excludes the concession.[70]

The boundary line is faint and blurred since it presupposes subjective claims.

Typical examples are the network services and, in general, the monopolies in which the actual risk is reduced both for the intrinsic characteristics and the sector disciplines.

The public – regulatory and/or administrative – configuration may therefore affect the objective extension of the concessions, extending it to all those situations where there is an inherent risk modest but still significant and relevant.

[70] Cf. recital 18 and art. 5 of the Directive 2014/23/EU. We shall exclude a concession in the case that the administration relieves the economic operator from any potential loss by guaranteeing a minimum income equal to or higher than the investments made and the costs to be incurred in connection with the performance. The part of the risk transferred to the concessionaire entails a real exposure to market fluctuations such that any potential estimated loss suffered by the dealer is not purely nominal or negligible.

That limit, ultimately, marks the boundary line with the figure of the contract.

Of course, the exception is the assumption of risk only "on paper", where the concessionaire is found to be warranted for any eventuality (emblematic the case *Norma-A*, where the contractor was a posteriori compensated for any losses and also obtained a secured margin of profit).

In the view of who's writing, in these cases, the indicator of the concession is given by considering the position that the public administration would assume when it decides to carry out the performance on its own.

Were it to coincide at least in part with the one taken by the private contractor, there will be a concession; but if the public administration contributes – beyond a normal level of reasonableness (as mentioned, the allocation of the risks subtends a weighted attribution) – in such a way as to benefit the private counterparty and impoverish itself, then you will have a contract.

The litmus test is that in concessions there must always be the private operating risk.

In essence, it is not required that the economic operation be destined to fail (otherwise it would be undermined in the root the purpose of concessions), but that any contingency allocated to the entity responsible for the management, *i.e.* the concessionaire, shall fall on him without excessive guarantees from the public plexus.

The equation "right of management equal to operational risk" should be ultimately read with a view to balance public and private interests, preventing abuses of the ones and/or the others but taking into account and bearing in mind that the concession is an option for the public administration in the pursuit of the collective welfare.

And this possibility depends ineluctably on the activities of interpretation made by national jurists, as it is up to them the burden to frame the concessions, distinguishing from the contracts and providing a certain definition and an adequate discipline into the internal regulatory framework.

Whereas the definition of concession (and thus of operating risk) is reserved to Union law, in fact, according to the Court of Justice it is the national jurist who must assess whether the operational risk of the contractor is configuring a concession in the case and what should be the consequences of a possible breach of the concessionaire in performing the contract.

For that reason it is quite necessary to bring back the legal certainty on concessions into the national context.

Chapter III. The italian heritage

The national legal system, just like the supranational one, has known a troubled development in order to the concessions, too.

Whereas at European level the priority has been and is the distinction of concessions from contracts, in the Italian context we have to face several problems of interpretation arising from the pre-existing legal substrate.

If, in fact, with regard to contracts the influence of the pre-existing national law seems limited to the application of the statute represented by some of the rules contained in the Civil Code[71] which adds to special public law (mainly contained in the d.lgs. 163/2006 – cd. "Codice dei contratti" – and in the D.P.R. 207/2010), in relation to concessions, perhaps because of the lack of regulations, it must be noted that there has been a greater incidence due to the cumbersome *opinio juris* put in place.

I am referring in particular to the one concerning the administrative concessions and that on public services.

After all, the expression "concession" into Italian law has traditionally been used with heterogeneous meanings and to refer to a broad category of cases for different object, content and effects – concessions of State property, works, services (public and non, local or otherwise), honors and citizenship, even the old building concessions (now become

[71] Particularly art. 1655 ss. cod. civ.. The procurement contract, by the codified definition, implies, on the part of the contractor, the assumption of the economic risk falling in the alea of this type of contract, focused on an obligation of result. The fact is today undisputed in doctrine and jurisprudence: please refer to Tucci M., op. cit., *passim*; to Santoro P., *Gli appalti pubblici: nozione comunitaria e tipologie negoziali*, Foro Amministrativo 4: 1282, 1998 and, especially to Iaione C., *La nozione codicistica di contratto pubblico*, in giustamm.it (published on 24.5.2007), for which the public contract does not escape from the typical pattern of the contract in art. 1655: "With regard to the definition and legal structure, there are no substantial differences between the public contract and that regulated by art. 1655. Under the Civil Code, the procurement contract is «a contract under which one party assumes with organization of the necessary means and management at its own risk, the completion of a work or service for a consideration in money». From this point of view, the contract is "public" simply because it is part the public administration in the role of principal. In fact, from the point of view of the structure of negotiations, they are in both cases contracts of exchange, interest-bearing, durable (with long-lasting execution) that have commutative and non-aleatory character. Now, the contract, although entailing special types of risk expressly regulated, it remains a contract not aleatory. In the contract the nature of obligation undertaken by the contractor is, in fact, of result. The customer, therefore, doesn't assume any risk. Similarly, the contractor does not assume a different risk than the normal consequence of the alea inherent in every contractual operation".

However, in the past, the nature of the contract was so controversial that it was created the category of "public subject contracts" to find a compromise between administrative measure and private law contract: refer to Musolino G., *L'appalto pubblico e privato*, vol. I, Utet, Torino, 2002. Today the same problem afflicts the concessions, on which weighs the legacy of the provisions relating to administrative concessions (v. *infra*).

permits to build) – "characterized unitarily only by the fact that the Administration enriches of any utility the legal sphere of the concessionaire, or, in accordance with a different and more accurate interpretation, constitutes or transfers to the juridical patrimony of the concessionaire new *status*, new legitimizations, new qualities or new rights".[72]

In particular, the administrative concession triggers an expansion of the legal sphere of the recipient and may be constitutive (when constituting *ex novo* a utility to the recipient) or translational (when the utility is only transferred to the recipient).

The position of the institution always oscillates between private and public law depending on the greater emphasis given to the first dimension or to the second one.[73]

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[72] Cf. Scoca F.G., "La concessione come strumento di gestione dei servizi pubblici", in Roversi-Monaco F., *Le concessioni di servizi*, Maggioli, Rimini, 1988, p. 25; *id.*, *Il provvedimento amministrativo*, Giappichelli, Torino, 2008, p. 274; Rizzo G., *La concessione di servizi*, Giappichelli, Torino, 2012, p. 1.

[73] The national doctrine has long questioned on the legal nature of the concession, dividing between the public law (concession as an administrative measure) and the privatistic setting (concession as a contract). It is not possible to give here an account of the various arguments put forward in this field; the topic deserves special treatment just for the dating back in time of the debate and the authority of jurists who have expressed, but as far as of interest it is sufficient to outline the latest developments in order to reconstruct briefly the contemporary scene. For a reconstruction of the controversy on the legal nature of the concession please refer, *ex multis*, to Rizzo G., "Il dibattito sulla natura giuridica dell'istituto: provvedimento o contratto?", op. cit.; Moliterni A., *Il regime giuridico delle concessioni di pubblico servizio tra specialità e diritto comune*, Diritto Amministrativo 4: 567, 2012; Monzani S., *Il trasferimento al privato del rischio economico di gestione quale tratto distintivo della concessione rispetto all'appalto di servizi e le conseguenze in tema di normativa applicabile*, Foro Amministrativo C.D.S. 1: 243, 2013; Botto A.; Iannotta L., "La concessione dei lavori pubblici nella sua oscillazione pendolare: dal privato al pubblico e ritorno", and Raganelli B., "Pubblico, Privato e Concessioni in Europa", in Cafagno M.; Botto A.; Fidone G.; Bottino G., *Negoziazioni pubbliche. Scritti su concessioni e partenariati pubblico-privati*, Giuffrè, Milano, 2013, and to the bibliographies indicated therein.

It should be noted that even the Interpretative Communication on the concessions (2000/C 121/02) was affected by the issue and it has reported some marks thereof by taking into account "Any act of State laying down the terms governing economic activities, be it *contractual* or *unilateral*" and "acts attributable to the State whereby a public authority entrusts to a third party by means of a *contractual* act or a *unilateral* act with the prior consent of the third party the total or partial management of services for which that authority would normally be responsible and for which the third party assumes the risk" (pt. 2.4; italics added).

Today part of the Italian doctrine (in the jurisprudence see, for example, Council of State, Sect. V, 27 january 2006, n. 236) states that the concession is an administrative arrangement under art. 11 L. 241/90: cf. Sandulli M.A.; De Nictolis R.; Garofoli R., *Trattato sui contratti pubblici,* vol. IV – Le tipologie contrattuali, Parte II – Le procedure di affidamento, l'aggiudicazione, le tipologie contrattuali, Capitolo 15 – Le concessioni di lavori pubblici*,* Giuffrè, Milano, 2008, *passim*; D'Ancona S., "La revoca e il recesso nelle concessioni amministrative", in Cafagno M.; Botto A.; Fidone G.; Bottino G., op. cit. and bibliographies therein indicated. Other authors, including Picozza, advocate instead the contractual nature of the concession on the basis of the European provisions slavishly transposed into the national law: "affirm that the concession is a contract, means demolish the theory of administrative concessions and even that of the public subject contracts" (cf. Picozza E., "Le concessioni nel diritto dell'Unione Europea. Profili e prospettive", in Cafagno M.; Botto A.; Fidone G.; Bottino G., op. cit., p. 37). In the same sense see Monteferrante L., *Il diritto dei contratti conquista gli accordi*, Urbanistica e appalti 8: 955, 2006; Luminoso A., *Codice dell'appalto privato*, Giuffrè, Milano, 2010; Caranta R., *I contratti pubblici*, Giappichelli, Torino, 2012; Botto A.; Iannotta L., op. cit., in particular p. 65 ("After a long and contorted evolutionary path, the concession is substantially back to basics and that essentially under the pressure of the Community discipline. Additionally, the concession, born as a contract between a public authority and a private trader, after a long bath in the river of German law

idealism, has resumed its own private law suits and looks for what it really is: a legal transaction for consideration between public administration and a private operator").

Methinks that trying to combine the conception of the concession-act as an administrative measure and the nature of the concession-contract as a contract is a blunder because of the anachronism of the vision of concession as an artificial set of acts (measure and contract) – surpassed in theory but in practice persistent – in the face of the current EU definition of the concessions as contracts (for once, in this case, it helps the assimilation of them to public contracts: if these latter are contracts to all intents and purposes, though preceded by a public administrative procedure, it is not clear why different considerations should be for concessions: cf. Corte Cost., 19 june 1998, n. 226, pt. 4 dir. and, especially, 23 november 2007, n. 401, ptt. 6.7-6.8 dir., where the Court notices as "it was just the need to standardize the internal regulations to Community legislation, in terms of discipline of the procedure of selection of the contractor, which resulted in the final overcoming of the so-called "accountabilistic" conception, which qualified such internal regulations as placed solely in the interests of administration, also for the proper formation of its willingness to negotiate. It should be moreover specified that the observance of Community provisions and internal public evidence ensures compliance with the rules of the effectiveness and efficiency of the public authorities: the selection of the best offer assures, in fact, the full implementation of the public interests in relation to the good or service covered by the award. […]It is known that the contractual activity of the public administration, being functionalized to the pursuit of the public interest, is characterized by the existence of a two-phase structure: at the typically procedural stage of public evidence follows a phase of negotiations. In the first stage of contractor selection the administration is acting, as was already pointed out, in accordance with pre-defined procedural modules guaranteeing for the protection of public interest, even if are present at the same time relevant moments of negotiations, having the public administration to keep in any case behaviours based on respect, among other things, of the rules of good faith. In the second phase – which starts with the signing of the contract (cf. art. 11, para. 7, d.lgs. 163/06) – the administration is placed in a position of tendential parity with the counterparty and does not act in the exercise of administrative powers, but in the exercise of its negotiating autonomy").

Furthermore, in addition to the exposed analogical reading of concessions with respect to contracts (which have also suffered from the same bias, having been originally deemed as administrative measures), just think about the characteristics of an administrative measure to understand that little or nothing befits the concessions under the new EU Directive n. 23 of 2014.

Ever since the foundation of the administrative measure, as a manifestation of power by an authority, it is blatant the antinomy with the concessions.

Rather the public administration is in a weak position insofar it has to turn to the market to satisfy a certain need.

The concession of works and/or services, as a way of outsourcing the realization/management risk, responds primarily to the need to identify a subject qualified to carry out in the public interest an operation which pays off the capital invested through the economic management of the same.

That the reconciliation of the various administrative concessions as parts of an unitary establishment is a very self-evident error of method is confirmed by their classification as administrative arrangements *ex* art. 11 L. 241/90: if the intent can be appreciable from the systematic point of view and for the simplification, since it would give a general garment to the concessions, the result is conversely questionable and fallacious.

In particular, it is unthinkable that the concession may be imposed on the recipient, even against his/her will, when there is no agreement with the public administration (please refer to Renna M., *Il regime delle obbligazioni nascenti dall'accordo amministrativo*, Diritto amministrativo, 2010). This is an *impasse* that characterizes, to tell the truth, all the concessions as they need an act of acceptance by the recipient. But even were it not so, the problem is strongly emphasized with reference to the concessions *de quibus*, risk-based and equipped with a strong commercial vocation.

Other weaknesses of such an approach also derive from the application of the Civil Code principles relating to obligations and contracts only to the extent they are compatible and unless otherwise provided for, and from the exclusive jurisdiction of the administrative courts for disputes relating to the formation, conclusion and execution of administrative arrangements (cf. art. 133, para. 1, lett. a), n. 2, C.p.a.).

As pointed out by a careful doctrine, if the rationale for publicizing the concessions is linked to the need for the public administration to maintain a position of supremacy over the private party, that is also achievable by negotiating clauses which reproduce the special faculties claimed by the administration (cf. Moliterni A., op. cit.; Botto A.; Iannotta L., op. cit.) or via the exercise of these in the cases provided *ex lege*.

In any case, the influence of the supra-national order onto the national one has led to frame the concession in question as a legal unit, of contractual nature, even if arising from a prior process of public evidence.

And certainly this has very significant implications in terms of risk as it excludes a whole range of public and administrative prerogatives *d'antan* which, if not under contract, can not be unilaterally imposed on the concessionaire.

Thing that could facilitate the implementation of the instrument, once relieved of the Damocles' sword of administrative self-help (although the practice is quite different).[74]

In conclusion, you can not but take note of the existence of the dichotomy between concession-acts and concession-contracts and of the fact that the ones we are dealing with are contracts – not administrative arrangements laid down in L. 241/90 – stemming from a previous administrative procedure (which closes with a measure of award), and that the complexity of the concession as a macro-category is reflected on the single concession as relationship of duration which is subject to numerous risks.

This requires a change of perspective: from the final act to the proceedings. As suggested by Sartorio L., "Le operazioni di partenariato contrattuale tra interesse pubblico e concorrenza: sviluppo economico e ruolo dei privati in Italia e in Francia", in Cafagno M.; Botto A.; Fidone G.; Bottino G., op. cit., p. 701, "the public-private partnership in function of the economic development needs bargaining, which is to mean substantially less disparity in the relationship between the parties involved. A bargaining that is needed to ensure even greater flexibility and adaptability to the operation of the partnership with an object almost never standardized, but that has to come to terms with the Community principles of competition and *par condicio*". The public prerogatives must then find input in the proceedings preliminary to the the formation of the final act, which may also contain some safeguards for the public administration (*e.g.* revocation, withdrawal) that yet do not distort the negotiating nature of the contract even if interpreted in light of the peculiar concept of "administrative operation"."

[74] The risk of administrative self-defense by the granting body should not be overlooked.

On this point D'Ancona S., "La revoca e il recesso nelle concessioni amministrative", in Cafagno M.; Botto A.; Fidone G.; Bottino G., op. cit., p. 601 ss., starting from art. 11, para. 4, L. 241/90, recognizes the existence, in favour of the public administration, of the power to terminate the contract under public law.

And to this also he associates the exercise of the power of revocation *ex* art. 21-*quinquies* L. 241/90.

In reality an enormous ontological gap exists between the two norms just mentioned.

Whereas art. 11, para. 4, L. 241/90 provides for the unilateral termination of public law agreements, with compensation for any injury caused, art. 21-*quinquies*, para. 1-*bis*, refers to the different case of the revocation of an administrative measure with lasting or instantaneous effectiveness when it affects mutual contractual relationships, providing that the compensation paid by the administration to the interested parties is benchmarked to the actual loss and takes into account both any knowledge or understanding by the contractors of the contrariness to the public interest of the administrative act subject to revocation, and the possible involvement of contractors or other parties to the erroneous assessment of the compatibility of the measure with the public interest.

Therefore, the revocation is only possible for administrative measures; rather it should be framed as withdrawal by the administration the right to *exit* in the agreements *ex* art. 11 L. 241/90 and in the contracts. The confirmation of the above can be found in art. 21-*sexies* L. 241/90, "Withdrawal from the contracts", where it is stated that the unilateral termination of Public Administration contracts is permitted only in cases provided by law or contract.

In Italy the *querelle* concerning the nature of the concession has produced various aporias.

The present study has accepted the vision of the concession as a contract, albeit arising from prior proceedings of public evidence culminating with the awarding measure.

It is only this last measure that can be the subject of self-defense by the administration for:

- supervening reasons of public interest or a change in the factual situation not foreseeable at the time of adoption of the measure (in the case of revocation, which excludes any new evaluation of the original public interest for the authorization procedures or the assignment of economic benefits);

The other big influence suffered by concessions is bound to public services.[75]

- or vices of illegittimacy (in the case of the annulment: see also art. 1, para. 136, L. 311/2004, which, in order to achieve savings and lower financial costs for public administrations, allows the annulment *ex officio* of unlawful administrative measures, within three years of effectiveness and even if their execution is ongoing, and provides the compensation of any financial damage for the measures affecting contractual or conventional relationships with private subjects).

For contracts, agreements or arrangements, as you may be calling them, the different assessments by the administration can not lead to procedural or provvedimental self-defense through an act of second degree, but must be invoked before the court or through negotiating tools.

In particular, the Code regulates the withdrawal at art. 134 giving to the administration the right to withdraw from the contract at any time, after formal notice, with the payment for the work performed and the value of useful materials in the construction site, in addition to the tenth of the amount for non-performed works. The rule addresses specifically the public works contracts but also extends to concessions, at least to the works concessions (since the ones of services are excluded from the scope of the Code).

The hermeneutical question arises because in the matter of project financing the art. 158 – entitled "Termination" – contains a discipline that creates some epistemological doubts.

Beside the hypothesis that the concession is terminated for default by the grantor authority, it shows the different case where "*this last revokes the concession for reasons of public interest*", then reaffirmed in the last paragraph ("*The effectiveness of the revocation of the concession is subject to the condition of payment by the grantor of all the sums provided for in the preceding paragraphs*").

Are reimbursed the value of the works realized plus the accessory charges, net of amortization, or, if the work has not yet passed the test phase, the costs actually incurred by the concessionaire; the penalties and other costs incurred or to be incurred as a result of the termination or revocation; an indemnity, as compensation for loss of profit, equal to 10% of the value of the works still to be performed or the part of the service yet to be managed evaluated on the basis of the economic and financial plan.

It is not so much important to point out that the concessionaire finds himself in the same situation in the cases of withdrawal and termination for breach of the grantor (what it is quite disturbing and scary: *ed*.), but the introduction of the administrative self-defense in a provision that regulates something else.

In this provision is thus synthesized the legal uncertainty of concessions in Italy.

Put toghether the revocation for reasons of public interest and the termination for breach it means equate an instrument of public law self-defense to a civil contract remedy.

In the first case the concession would be an administrative measure, in the second a contract.

The contradiction is due to the reproduction of the text of art. 37-*septies* L. 109/1994, inserted by art. 11 L. 415/1998 in an age where the impact of European law on the internal one was less substantial than nowadays. Currently, as mentioned, the works and services concessions covered by the Directive 2014/23/EU are to be considered contracts to all intents and purposes, while the measure is the act for their award.

We will see hereinafter how these national inaccuracies do cause significant repercussions for what concerns the execution of concessions (v. *infra*).

[75] Also in this case it is impossible to account for the whole production occurred by the hands of juridical scientists; be it enough to mention the most important currents to outline a synopsis of the matter.

With regard to public services as legal and economic category sinking its roots into the Constitution of the Italian Republic, especially in the foundation of solidarity and egalitarianism under artt. 2-3 Cost. and in the public and private economic activity carried out for social purposes referred to in art. 41 and 43 Cost., refer to Pototschnig U., *I pubblici servizi*, Cedam, Padova, 1964. In matters see also: Cassese S., *I servizi pubblici. Finanza pubblica e privata*, Trattato di diritto amministrativo, Diritto amministrativo speciale, Tomo III, Giuffrè, Milano, 2003; Mangiameli S., *I servizi pubblici locali*, Giappichelli, Torino, 2008; Villata R., *Pubblici servizi. Discussione e problemi*, Giuffrè, Milano, 2008.

And this double soul, public and private, of the public service has given rise to an internal conflict between the subjective theory (which gives importance to the person in charge of performing the service) and the objective one (which gives prominence to the service to be performed).

The dichotomy is not trivial since it directly involves the concession, its distinction from the contract and its characterization based on operating risk.

No coincidence that to the topic has been dedicated a collective volume that sought to illustrate the various dogmatic questions arisen *in subiecta materia*: that is Pericu G.; Romano A.; Spagnuolo Vigorita V.,

As for public services, it should be specified that the European Union law provokes important effects by virtue of the regulation of the services of general interest, economic and not.[76]

La concessione di pubblico servizio, Giuffrè, Milano, 1995, to which reference is made for having perception of the previous Italian context which was in force before the examined Court of Justice case law.

From the title it is easy to deduce that between the concession and the public service there is a close connection, so much that it is necessary to analyze the public service to complete the concept of concession.

The implications have already emerged in relation to those arguments put forward by the Italian government in the mentioned ECJ causes above: the purposes of general interest, the replacement of the public administration in the exercise of its functions, and – *last but not least* – the trilateral relationship.

The literature on the various issues related to public services, local and not, is enormous, so refer to: Cavallo Perin R., "Concessione di pubblici servizi e pluralità di produttori", 135-143, in Caia G., *I servizi pubblici locali, evoluzioni e prospettive*, Rimini, Maggioli, 1995; Napolitano G., *Servizi pubblici e rapporti di utenza*, Cedam, Padova, 2001; Passalacqua M., *Concessione di servizio pubblico e cooperazione: nuove prospettive per un istituto antico*, in www.ddp.unipi.it, 2002; Capantini M., "I servizi pubblici tra ordinamento nazionale, comunitario ed internazionale: evoluzione e prospettive" and Massera A.; Taccola C., "L'uso del contratto nel diritto dei servizi pubblici", in Massera A., (a cura di), *Il diritto amministrativo dei servizi pubblici tra ordinamento nazionale e ordinamento comunitario*, Pisa, 2004; Torricelli S., *Il mercato dei servizi di pubblica utilità. Un'analisi a partire dal settore dei servizi a rete*, Giuffrè, Milano, 2007; Montedoro G.; Giordano M., *I Servizi pubblici locali fra diritto interno e comunitario*, in Giustizia Amministrativa 5: 1107, 2007 and in giustamm.it, 2008; Soverino L., *I servizi pubblici nell'Euroregione: nuove prospettive di diritto comunitario per la cooperazione transfrontaliera, tra Consiglio d'Europa e potere estero delle Regioni* (a proposito del Regolamento CE 1082/2006), Rivista Italiana di Diritto Pubblico Comunitario 1: 17, 2009; De Chiara A., *Dai servizi pubblici ai servizi di pubblica utilità: evoluzione della morfologia giuridica dell'interesse pubblico e riflessi sulle situazioni soggettive*, , relation at the conference "La tutela giurisdizionale nei confronti del potere amministrativo e "le ragioni" dell'interesse pubblico", Siena, 12-13 june 2009; Cacciari A., *Concessione e affidamento dei servizi pubblici*, report at the annual meeting of Associazione Culturale Articolo 111 on the topic "*Società pubbliche e controllo giurisdizionale*", Milan, 5 may 2013 (www.osservatorioappalti.unitn.it).

Please refer also to the directive of the President of the Council of 27 january 1994, listing the "principles in delivery of public services", and to the L. n. 481/1995, which actually contains the "rules for the competition and the regulation of public utility services".

[76] As highlighted by Leggiadro F., *Concessione e appalto: il nocciolo duro della distinzione*, Urbanistica e appalti, 11: 1429, 2007, "At paragraph 1.1. the EU Commission's Green Paper on Services of General Interest, 21 may 2003 – COM (2003) 270 – is clarified the meaning of the expression «services of general economic interest», which refers to services of economic nature which, by virtue of a general interest criterion, the Member States or the Community make subject to specific public service obligations. The concept of services of general economic interest covers in particular certain services provided by the big network industries such as transport, postal services, energy and communications. However, the term can be extended to any other economic activity subject to public service obligations".

From the combined provisions of artt. 14 and 106 of the TFEU is the responsibility of Member States to provide, to commission and to fund such services, while the Commission acts as a supervisor overseeing compliance with the rules on public aid compatibility and maintenance of special and exclusive rights with reference to the applicable Community law. On this point, in the doctrine see the lucid analysis carried out by Picozza E., "Le concessioni nel diritto dell'Unione Europea. Profili e prospettive", in Cafagno M.; Botto A.; Fidone G.; Bottino G., *Negoziazioni pubbliche. Scritti su concessioni e partenariati pubblico-privati*, Giuffrè, Milano, 2013, p. 26: "Services of general interest represent the "essential policy" of the Member States in the XXI century, both at statal and local level. Faded out the authoritarianism of the liberal State (as regards the conception of the administrative activity), and also eclipsed the illusion of the welfare state by performance (Forsthoff), the political and programmatic challenge for European governments is played on their ability to provide services of general economic interest".

And in fact the new Directive on concessions, n. 23 of 2014, shall not affect the freedom of Member States to define, in conformity with Union law, the organization and financing of their services of general economic interest (cf. art. 4).

Although not in an unambiguous way, has been established the "objective" conception of the public service, who wants it to exist whenever there is a public and/or private activity aimed at satisfying the interests of a community of unspecified recipients.[77]

Here again it is not possible to prescind from the close link between services and concessions: both in the mercantile dimension, as in the strategic one of cohesion (not only economic but social and territorial).

The oscillations shown by the Court of Justice (v. *supra*) with reference to the operating risk must be interpreted in the sense that, since many are the interests to be balanced, governments need to ensure the best solution in order to meet the public interest underlying the public service.

For this purpose, as by definition of the concession, it is possible that the administration, along with the transfer of the right of management, pays to the concessionaire a sum of money by way of price, or better, of compensation for public service obligations (if the concessionaire is obliged to apply to users prices lower than those corresponding to the sum of the cost of the service and ordinary profits, or were it necessary to ensure to the concessionaire the attainment of the economic-financial balance of the investments and of the management in relation to the quality of service to be provided). However, beyond the issue of State aids in the field of public service, or services of general interest if you prefer (see Gallo D., *Finanziamento dei servizi di interesse economico generale e aiuti di stato nel diritto comunitario*, rivista italiana di Diritto Pubblico Comunitario 5: 893, 2007), that price can not eliminate the operating risk on the part of the concessionaire, otherwise there will be a public contract instead of a concession.

[77] Rizzo G., "Il servizio pubblico nel diritto italiano: concezione soggettiva e oggettiva", op. cit., examinates the various trends that emerged into the national law in relation to the concept of public service. The author observes at p. 16 that "From the unification of Italy various arguments countered and the notion of public service has been reconstructed in subjective and objective terms; today it is eroded by the Community framework which reconnects, intrinsically, the notion of service to that of economic activity".

It is an important observation because it helps to reaffirm the commercial vocation of the concession as an instrument, along with the contract, for the implementation of the single European market.

The diatribe *de qua* is reflected in the division of jurisdiction because, it is useful to recall, art. 133, para. I, lett. c), d.lgs. n. 104/2010 – cd. "Code of the administrative process" (c.p.a.) – provides the exclusive jurisdiction of the administrative courts for any "disputes in the field of public services related to public service concessions, except for those concerning indemnities, fees and other charges, or relating to measures adopted by the government or by the operator of a public service in an administrative procedure, or even related to the award of a public service, and to the supervision and control over the operator, as well as relating to the supervision of credit, insurance and securities markets, to pharmaceutical services, transport, telecommunications and services utilities".

Despite a case law in favour of the so-called "pubblicistic-extensive" theory which included within the administrative exclusive jurisdiction, therefore in the public service, also the activities merely instrumental in satisfying the users' needs, it has been established the position of those who believe that only the direct satisfaction of users constitutes a public service.

Finally has intervened the Court of Cassation (Cass. Civ., Sez. Un., 3 august 2006, n. 17573, with a note by Giovagnoli R., *È servizio pubblico solo l'attività rivolta direttamente a soddisfare le esigenze dell'utenza*, Urbanistica e appalti 12: 1393, 2006), pointing out that the cd. "privatistic-restrictive" argument about the notion of public service – elaborated by the Cass. Civ. Sez. Un. in the precedent decisions nn. 71 and 72 of 2000 – "as direct provision to meet the needs of the community, made by a subject, even private, which is plugged into the system of public authority or is connected to this, and is subjected to a legal regime of derogations from the common law, it has been shared also by the subsequent case law, both ordinary and administrative, and now represents *ius receptum*".

More generally, it is disputed whether is still up-to-date the permanence of an exclusive jurisdiction on public services in the light of the recent developments that led the concession, and the service contract itself, to separate from the administrative measures. In this sense see Moliterni A., op. cit., who notes that "The process of contractualisation of the concession of services by Community law has led, in fact, to an approach of the criteria for allocating the jurisdiction on the concession contract with the traditional ones in the field of public contracts". According to the author many of the traditional trends to publicize concessions (framed at first as measures, then as administrative agreements) and their sphere of application (through the inclusion of public powers by the administration) would find explanation in the "particular type of jurisdiction

The qualification of the concession depends, therefore, on that of the public service.

This does not mean that the service concessions must necessarily serve an audience like that.

This dynamics relates in fact to public service concessions.[78]

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in our current system, firmly anchored to the nature of the acts and legal situations", which has determined "some stretching in the interpretation of the same conceptual categories of substantive law".

In this perspective, the current wording of the art. 133 c.p.a. – along with the uncertainty in the substantial reconstruction of the public service concessions (and of the concept of public service as well) – raises some problems of interpretation that come directly to affect the effectiveness and consistency of the existing system of judicial protection in the field of concessions:

- firstly, the traditional distinction between the pecuniary profiles and the other aspects concerning the execution of the relationship is likely to result in a dangerous (and artificial) segmentation of the events that characterize, in an unified way, the execution phase of the concession and the phase of fulfillment of its obligations;
- secondly, the existence of a dual criterion for allocating the jurisdiction depending on the relationship to be qualified as a public service contract or service concession (regulated by art. 120 c.p.a.), or when it is recognized the presence of a public service concession (regulated by art. 133, para. I, lett. c), c.p.a.), accentuates the problematic nature of the absence (or instability), on the substantive level, of clear and unambiguous criteria for distinguishing between the various instruments of the concession of public services, of the services concession and of the service contract.

The author concludes that "would thus be desirable, in a perspective *de iure condito*, a more careful reconstruction in equal key of most of the powers that come to affect the execution phase of the relationship" and, in a perspective *de iure condendo*, that "the jurisdiction over such relationships should instead be set according to the distinction between «award procedure» and «execution phase», in a manner consistent with that provided for all public contracts governed by the d.lgs. n. 163/2006. The concept of execution in fact, best fits the bilateral and compulsory structure of the concession relationship. Compared to the execution phase may remain within the exclusive jurisdiction only those powers effectively reconstructed as authoritative powers: and then, mainly, the revocation of the «organizational choice» of proceeding to the award of the concession. All the other executive events of the conventional relationship, as substantially related to a judgment on the proper fulfillment of obligations, should be specifically attributed to the ordinary courts. The withdrawal, the decadence, the termination for breach, the application of a penalty, the notice of cancellation shall always concern — both in contracts and in concession agreements — subjective rights in the execution of a common-law relationship and never, instead, lesion of legitimate interests, related to the exercise of a power. Moreover, the centrality covered by the execution phase is confirmed by the fact that, in order to overcome the ambiguity inherent in the traditional formula of apportionment about concessions, the judge sometimes feel the need to invoke the rule concerning the jurisdiction over agreements which gives the entire phase of «execution» of the relationship to the administrative judge. Regardless, therefore, of the theoretical debate on the legal nature — authoritative, negotiating or public-contractual — of the instrument used, at the time when an obligation arises it comes to create a hiatus with the exercise of public powers that renders seriously problematic the same provision of the exclusive jurisdiction of the administrative courts. Compared to that stage, there is in fact primarily a problem of fulfillment of obligations, and it is right this element that would justify the natural embedding of the ordinary jurisdiction".

Another factor to be taken into account, but that the author leaves out, is definitely the risk.

As a criterion for distinguishing concessions from contracts, it seems to address the same concession to the civil jurisdiction which, at least in theory, appears more appropriate to judge the events of negotiating.

[78] It must be here made mention both of the circular from the Presidency of the Council of Ministers no. 3944 of 1 march 2002 (Procurement procedures for public concessions of services and works) as well as of the judgment of the Council of State, Sect. V, 30 april 2002, n. 2294 – commented by Tessarolo L., www.dirittodeiservizipubblici.it, 27 may 2002 – regarding the distinction between public services contracts and award of public services concessions. Almost contemporary, they have similar content.

The first one, after noting that under European law to the concessionaire is not acknowledged a price, but only the right to obtain the remuneration of the performed activity through the management, adds in paragraph 4 that, for the purposes of domestic law, "while in public contracts of services the contractor

Yet they are not the only species actually existing, in spite of some deep-seated convictions.[79]

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provides the service in favour of the public administration, which uses that performance just for the purposes of providing the public service for the benefit of the community, in the concession of public service the concessionaire replaces the public administration in the provision of the service, that is in the performance of the direct fulfillment of the collective interest.

In order to draw the distinction between the service contract and the concession of public services, the traditional doctrine has identified a variety of criteria to be used, such as:

a) the surrogate character of the activity performed by the concessionaire of a public service as opposed to the mere economic importance of the activity carried out by the contractor in the interest of the public client;

b) the unilateral nature of the award title for the public service concession, as opposed to the negotiating character of the contract;

c) the transfer of public authority to the concessionaire, as opposed to the prerogatives of any economic entity recognized to the contractor that does not operate as an indirect body of administration;

d) the accretive effect typical of the concession".

The second one, in its turn, deals with the sensitive issue of delimitating the figure of the service contract, in relation to the contiguous notion of concession (or award) of public services (ptt. 14-19 dir.) and offers very interesting hints to reach a greater clarity on the diversity of object for the opposing instruments, which is also reflected on the physiognomy of the considered relationships.

Just as in the circular cited above, the Council of State affirms that "the service contract concerns services provided in favour of the administration, while the concession of services is always about a complex trilateral relationship, which involves the administration, the concessionaire and the service users.

This entails, as a rule, further consequences on the identification of the subjects required to pay for the activity performed. Normally, in the concession of public services, the service charge weighs on users, while in the contract of services the burden of compensating the activities of the private sector lies with the administration. Such integrative criterion, however, assumes appreciable value only when the public service, for its objective characteristics, can be divided between the users that, in practice, benefit directly from it".

The last period suggests that the origin of the remuneration does not always affect the status of public service, in the same way as it does not affect the status of concession in accordance with the case law of the Court of Justice: the *proprium* of the concessions is the operating risk.

In conclusion, therefore, is confirmed the assumption that the origin of the remuneration only serves as a clue, never ever as the decisive criterion, for the distinction between public contracts and concessions.

[79] Rocchietti March A.; Papi C., "Le concessioni di servizi e l'attività di regolazione interpretativa dell'Autorità per la vigilanza sui contratti pubblici", in Cafagno M.; Botto A.; Fidone G.; Bottino G., op. cit., pp. 422-423, argue that "in the definition of service concession is certainly emphasized the distinction between the mere service to the public administration and the public service, to be found indeed in the direct beneficiary of the same. According to the jurisprudence, in fact "[…]occurs the hypothesis of the public service if the service provided by the contractor is provided to meet the immediate needs of a community or of the individual user; on the contrary, constitutes merely instrumental service that whose performance is carried out directly in favour of the contracting authority" (Tar Lombardia, Sez. Brescia, 27 december 2007, n. 137; more recently, also Tar Liguria, Sez. II, 9 january 2009, n. 39). So the pattern of the concession occurs when it must be provided a service to the public (while the instrumental service to the public administration falls within the scope of procurement rules) that can play the character of essentiality – in the case of services of general economic interest or local public services – or when the existence of reasons in the general interest justify a restriction on the freedom of access to a particular economic activity which concerns, however, the provision of services to customers. Therefore, in essence, talking about services, the existence of a concession system has to do with an activity of public interest taken upon in public hands as essential or characterized by a condition of natural monopoly and then assigned to a private party".

The one of the authors is a very narrow view towards the concessions that, regardless of the risk, would end up covering only public services but never services to the administration as they are contracts.

As we will try to show, instead, there are also concessions of mere services: in this sense is Goisis F., *Concessione di costruzione e gestione di lavori e concessione di servizi*, Ius Publicum, 2011.

Indeed, as was already reminded, it is possible that the service is provided directly to the public administration, as long as the concessionaire retains the operational risk related to management.[80]

[80] In the matter is reported a national pronunciation – T.A.R. Roma, Sect. II, 11 may 2007, n. 4315, with a note by Giannelli A., *La concessione di servizi: verso un'interpretazione estensiva del concetto di rischio di gestione*, Urbanistica e appalti 10: 1276, 2007 – which represents a "voice out of the chorus".

The dispute has concerned the public service concession for the management, maintenance and monitoring of the municipal road patrimony ("Grande viabilità") by the Municipality of Rome.

The duration of the concession was scheduled in eight years for a total value of more than € 700 million.

In this case, the concessionaire had to carry out the extraordinary and ordinary maintenance works, including the technical and constructive innovation of some roads that were entirely or largely to be rebuilt in the light of the technical requirements laid down in the *lex specialis*.

The T.A.R. has denied the possibility to configure a public service concession in this case by virtue of the lack of production *ex novo* of goods and activities, non existent before: the road network itself constitutes a legal utility for the benefit of the community, and not a service. Nevertheless, has agreed with the municipality on the fact that, as the Grande Viabilità is a network, could you treat the streets like a public service, there would be no preclusion to award its integrated management to a qualified enterprise after the experiment of a public competition, equitable and non-discriminatory.

The reasoning of the administrative judge, however, has followed a different path taking the start from the definition of works concession (contract for pecuniary interest, having as its object the execution of works, whose consideration consists in the right to exploit the work or in this right together with payment) and – recalling the case *Telaustria* (v. *supra*) – has considered that the concessionaire should be responsible for the economic risk of management, over the entire duration of the concession, of the works constructed or reconstructed, "in the sense, that is, of the reduced or missed remuneration of the management in relation to its progress. Then you have a concession not only when the concessionaire can get a direct profit, by means of the payment of a price on the part of users, from the management of the work done, but also in cases where that management does not lead to a divisible supply or product, or to an individual demand service and thus it is not possible asking each consumer for the price of single performance. So, however, as long as like in the present case and through a series of mechanisms of disincentive for the poor quality of the various services (*e.g.* surveys and inspections on their execution and performance, penalties, obligation to ensure continuity of services provided to the road user, etc…), the concessionaire, though getting the full price agreed, in reality will see reduced as many shares as many qualitative deficiencies in the performance of the contract he will cause to the same user. In short, instead of a mixture of price and tariff remuneration and/or compensation, the concession will be paid with the price reduced by non-compliance in the quality of the work management, although not arisen by the disfavour of the market, but rather by the stipulating Municipality for the failed appreciation by the community" (pt. 3.4 dir.).

This decision proves to be interesting for two series of reasons: in the first place, because it debunks the myth of remuneration of the concessionaire from users other than the purchasing administration; secondly, because it admits an operating risk atypical for the juriprudence (never encountered by the Court of Justice), unrelated to the demand of the performance and reconnected to the availability of the same.

Now, is true that you could sustain it resembling the shape of the public contract due to the totally public genesis of the operation, the absence of a business plan and of private investments, the remuneration derived exclusively by the local government, and at the same time argue that the penalty clauses occur also in contracts: critical is indeed Giannelli A., op. cit., according to which "the conclusions reached about the legal boundaries of the notion of concession do not seem equally to be shared, to the extent that they encourage a very elastic, if not arbitrary, interpretation of the diriment element of the risk in management. In other words, can not keep silent the risks related to a progressive approach between the institutions of the contract and of the concession".

It is also true, however, that the case in question, in addition to appearing as a classic example of work cd. "cold" (not directly remunerated by the payments from users of the service), on which is theoretically possible the performance of a service (in this sense see Bellagamba L., *Il Comune di Roma e l'affidamento in concessione, di servizio e non di lavori, della manutenzione stradale e di servizi annessi*,

www.appaltiecontratti.it, 20 january 2006), furthermore denotes quite peculiar characters in relation to the remuneration.

Art. 208 of d.lgs. n. 285/1992 – cd. "Nuovo codice della strada" (New Code of the road) – provides that the proceeds of the fines shall be intended, among other things, for enhancing the traffic on roads, the expansion and the improvement of road signs and road safety interventions, in particular to protect the vulnerable users (pedestrians, cyclists, children, elderly, disabled).

The same happens for the vehicle tax (cd. "bollo" auto/moto) pertaining to the regional bodies.

It seems, therefore, raising the question that the maintenance of the roads is actually funded by the users.

In the end, little matters that the remuneration is derived from fees or taxes, and not by rates or fares; what matters is that such a remuneration, although required to ensure *ex ante* the economic and financial equilibrium of the operation, may *ex post* be reduced as a result of the deficiencies in the performance of the concessionaire.

The only *discrimen* of the concessions is the operating risk in management.

The big drawback in the Roman case is that such management risk did not involve an initial private investment to be recovered through the subsequent exploitation of the performance (which is usual in the case of service concessions).

Thereby ensued a simple risk of mismanagement which alone, according to the above-mentioned Court of Justice case law, is not sufficient to qualify a concession (even if, in this regard, to tell the truth, it is difficult to imagine any different risks in a concession of service focused on the risk of availability, or better, on the supply side, according to the new Directive 2014/23/EU).

The story has had further development in appeal and continued in front of the Council of State.

The first instance judgment was in fact reformed by Council of State, Sect. V, 15 january 2008, n. 36 – with a note by Bellagamba L., *Il Consiglio di Stato ribalta la tesi del T.A.R. Lazio: possibile la concessione di servizio per la manutenzione stradale*, www.diritto.it, 6 march 2008 – in whose opinion the controversial award represents a public service concession because regards "a series of interventions concerning circulation and traffic in the streets of major viability of the road network in the Municipality of Rome, not just related to maintenance, but, coordinated and organized, including the activities of the overall management of road assets and innovative, in instruments and purposes, also through the transfer of public authority".

According to the judges of Palazzo Spada, passed over the hypothesis of the procurement contract and the global service as deemed unfit to ensure the compliance, on a continuous basis, to the needs of the local community, with particular reference to the services of security and prompt intervention on the roads, "the Municipality decided that – in order to ensure the promotion of the economic and civil development of the local community, with specific reference to the requirements relating to the busy roads, and to the corresponding traffic on the road network – the most appropriate tool was represented by the direct and total accountability of the "third" private operator called to provide, in favour of users, the services pertaining to the "road" asset to be achieved through the concession of the local public service" (pt. 2.1 dir.).

In particular, the activities related to the administration and management of public roads (including ordinary and extraordinary maintenance of the same) have been made to be part of local public services on the assumption that the realization of the "social purposes" and the promotion of the "economic and civil development of local communities" *ex* art. 112 d.lgs. n. 267 of 2000 – cd. "Text Unique on Local Entities" (TUEL) –, does not meet limits in the pre-existence of the "network", instrumental to provide the service.

The continuation of the decision (pt. 4.5 dir.) focuses on the remuneration of the contractor because the activities subject to contract were paid exclusively by the payment of a price, since it was not provided for any form of exploitation related to the management of the service: "The jurisprudence formed on the matter has already had occasion to clarify that does not affect the status of local public service that the service is, or not, subject to the payment of a fee (Council of State, Sect. V, 16 december 2004 n. 8090). In the cited precedent it was also pointed out how the fact that the Title V of the T.U. n. 267 of 2000 is also regulating the criteria for the determination and collection of the tariffs does not exclude from the scope of local public services those provided without consideration, when the performance is instrumental to the satisfaction of the social objectives of the Entity; whilst, under a different profile, it was also pointed out that the distinctive element of the concession (*i.e.* the assumption of the management risk) is not excluded by the fact that the cost of the service is not made burdening on users, as this element is relevant only when the public service, for its objective characteristics, can be divided between those who, in the concrete, benefit directly from it (Council of State, Sect. V, 30 april 2002 n. 2294)."

Nevertheless, in Italy importance continues to be attributed to a number of aspects that are rooted in the antecedent legal tradition and that in the practice come up alongside, though not replacing, the criteria developed within the supranational level.

As you see, they are all aspects (the surrogate character of the activity performed by the concessionaire, as opposed to the activity of the contractor in the interest of the public client; the unilateral nature of the concession title, as opposed to the negotiating character of the contract; the transfer of public authority powers to the concessionaire, as opposed to the prerogatives, proper to any economic entity, recognized to the contractor that does not operate as a body of indirect administration; the accretive effect of the concession) which have little or nothing to do with the risk and the judicial interpretation expressed by the European Court of Justice, having just been rejected by this latter, and therefore are irrelevant under the new Directive 2014/23/EU on concessions.

To tell the truth, in most cases, behind the link between concession and public service is often implicitly hidden, on the one hand, the persistence of *mores translaticii* (public prerogatives to which relates the administrative jurisdiction) and, on the other hand, the willingness of being able to apply the more flexible regime reserved for concessions.

This does not mean reducing the very value of the exploration of Italian experience in order not only to obtain useful elements to interpret the overall picture, but mainly to see if the discrepancy with respect to the European outcome poses problems of compatibility and, if so, what are the margins of correction in view of a new-found harmony.

In short, even the Council of State has agreed on the qualification as a concession (albeit of public services, and not of works as claimed by the T.A.R.) due to the presence of the management risk of the concessionaire (not coinciding with the origin of the remuneration, but resulting from the modes of the same).

It is not easy at all to settle the question that was submitted to the Roman judges: there are elements of ambiguity, some in favour of the contract and others in favour of the concession (without wishing to reveal the ending of the present study, we will see how the condition will return to be detected in the PPP: v. *infra*).

Regardless of the specific legal nature of the contract *de quo*, it is important to understand that the concessions may be targeted to the public administration or to third parties, that the remuneration may come from the first as from the others, and that, if the contractor has to bear the operational risk arising from the exploitation of his performance, this last must be parameterized at certain levels of quality.

We must avoid a spasmodic quest of the ultimate recipient or of the actual payer of the performance of the concessionaire, otherwise generating the danger of an infinite regress, useless and harmful.

In order to identify the concessions attention should be paid to the operational risk in management.

The counterproof is right in the case analyzed here: by attributing importance to the criterion of the provenance of the remuneration you might even find an "interposed" trilateral relationship in which the public administration pays the concessionaire via the so-called "bollo" or through the sanctions *ex* art. 208 of d.lgs. n. 285/1992, but this would apply as well to the general tax-payers contribution ending up with the creation of an insoluble interpretive loop.

§3.1. The implicit and explicit trilateral relationship

In the previous section we gave a brief account of the traditional and long-standing influences that have been affecting the concessions into the Italian order.

The purpose of that digression was certainly not to deviate from the discussion on the topic of risk in public procurement, yet to prepare the ground for the analysis of a very relevant question *in subiecta materia*, if anything.

That is the trilateral relationship associated with concessions (in Italy and not only).

The oddity of the situation lies in the fact that this element does not replace the *discrimen* emerged in the European Union, but accompanies it *a latere*.

And not only, as it comes natural to think, within the scope of the public service[81], but with reference to the concession in general.[82]

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[81] Cavallo Perin R., *La struttura della concessione di servizio pubblico locale*, Giappichelli, Torino, 1998, shows the progressive consolidation of the trilateral relationship as the key element of the concession.

The author has written that "the legitimacy of the concessionaire to a direct relationship with the recipients of public services is also considered an essential element of this distinction from the contract, so that normally the public administration adopts the latter where intends to act as a necessary intermediate in the relationship with the recipients of the public service, just because it lacks between the "users" and contractor any legal relationship concerning the provision of public service" (pp. 46-47; 32-36).

It derives that "The oft-repeated assertion according to which the public service establishes a trilateral legal relationship between public administration, concessionaire and service recipients, seems correctly understood where it is considered that the concession act creates in the third organization the quality of concessionaire, that is the subjective position of operator of that public service indicated by the rules and by the program, with a legal effect which is produced, first of all, toward the recipients of the public services. Recipients who see thus determined the organization holder of the obligation to provide the performances of public service designated by the program in subsequent administrative proceedings. With the definition of the quality of concessionaire the recipients of public services can recognize in the third party the subject of their right to obtain the performances of public service" (p. 82).

That is clearly a legal analysis, while in this study is adopted a perspective corresponding to the current informal use verifiable in practice (*e plurimis* see Council of State, Sect. V, 11 august 2010, n. 5620: "The hallmark of the public service concession is given: a) from the assumption of the risk borne by the concessionaire for the management of the service; b) from the fact that the consideration is not paid by the administration (like in the contracts for works, services and supplies), which, in fact, receives a fee from the concessionaire; c) from the diversity of the object of relationship, that in the concession of services is trilateral (involving the administration, the manager and the users), while in the contract is bilateral (contracting authority-contractor)" (confirms T.A.R. Milano, Sect. I, n. 4502/2009)).

[82] If you go to plumb the national case law – both administrative and civil – on concessions, it can be noted as the trilateral relationship is inevitably a constant presence. Just to mention the most important ones: Cass. Civ., Sez. trib., 12 november 2014, n. 24095; Council of State, Sect. V, 12 november 2013, n. 5421; Council of State, Sect. VI, 21 june 2013, n. 3378; T.A.R. Napoli, Sect. I, 15 january 2013, n. 313; Council of State, Sect. VI, 4 september 2012, n. 4682; Council of State, Sect. V, 3 may 2012, n. 2531; Tribunal Enna, 9 february 2010; Council of State, Sect. V, 15 november 2010, n. 8040; Council of State, Sect. V, 11 august 2010, n. 5620; Council of State, Sect. VI, 4 august 2009, n. 4890; Tribunal Milano, 27 may 2009; T.A.R. Catania, Sect. III, 18 february 2009, n. 369; Council of State, Sect. V, 5 december 2008, n. 6049; T.A.R. Bolzano, 8 april 2008, n. 129; Council of State, Sect. V, 1° august 2007, n. 4270; T.A.R. Milano, Sect. III, 8 may 2007, n. 2580; Council of State, Sect. VI, 5 june 2006, n. 3333; Council of State, Sect. IV, 14 june 2005, n. 3114; Council of State, Sect. IV, 30 may 2005, n. 2804; Council of State, Sect. V, 11 march 2005, n. 1035; Council of State, Sect. V, 22 july 2002, n. 4012; Council of State, Sect. V, 30 april 2002, n. 2294.

Consequently, the difficulties to give a legal framework to the cases, arising from the need to balance interests absolutely different (of the public administration principal and of the private contractor), join those arising from the inclusion of an additional component of the relationship, that is to say the users.

Shall be pointed out that users do not always differ with respect to the public administration principal, insofar the two could coincide even in the case of concession, but it happens as well that, in the face of the remuneration by the public administration, the user of the performance is an indeterminate collectivity (*e.g.* availability fee, shadow tolls).

As stated, for the purposes of the qualification of the case, it is irrelevant that the performance is indivisible and remunerated with, instead of a consideration to be paid by the users, the payment of a price by the administration, which rather usually receives a fee from the concessionaire.

This does not facilitate at all the task of the interpreter, who is surrounded by a *mare magnum* of shapes and shades.[83]

The distinctive feature of the concession would thus be given not only by taking the operational risk in management, both in terms of risk that the public administration incurs in the case of self-provision and as exposure to the vagaries of market (competition from other operators, imbalance between supply and demand, insolvency of the users, not full coverage of expenses by revenues, or even liability for damage related to a lack of service; while risks such as those related to mismanagement or errors of judgment on the part of the economic operator are not decisive for the classification as a contract or as a concession), but also by the object of the relationship, which in the concession would become trilateral,

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A separate mention deserves Council of State, Ad. Plen., 30 january 2014, n. 7 (v. *infra*).

[83] As evidenced by Martinelli F.; Santini M., op. cit., "it must be recognized that the category "services" acts in a way entirely different, in the first place for the multiplicity of services which fall into it, and which are not easy to reduce to unity. In fact there are services where the performance takes place under market conditions, and others for which there is an inevitable monopoly; there are those which need to be provided by the public administration and those that can be done even by private entities; there are services for which it is the beneficiary itself who chooses to enjoy it (services "upon individual demand"), and services from which everyone benefit regardless of a voluntary act in this sense (services "for collective use")".

In addition, in Italy, there are various concession forms (laid down in art. 152 ss. of d.lgs. 163/2006), starting from the project financing, which, presupposing by definition the recovery of private financing through the cash flows generated by the economic operation, may perhaps have contributed to strengthen the suggestion that the concession excludes the public payment.

Suggestion in any case disproved by the presence of the contracts of availability and leasing, as well as by art. 143, para. IX, of d.lgs. 163/2006 according to which can be be operated under concession the works intended for the direct use of the public administration, as functional to the management of public services, provided that it remains the responsibility of the concessionaire the economic and financial alea in the management of the work.

involving the administration, the manager and the users, whilst in the contract would remain bilateral.[84]

And this not only in the case of compensation for the services from third-party users (*explicit* trilateral relationship), but also where it is the same public administration who shoulders the burden of having to remunerate the concessionaire.

It would then be configured an *implicit* trilateral relationship.[85]

This is a position which clearly reflects the strong public-administrative internal tradition and that does not seem to align with the present state of European law.[86]

Additionally, there is the problem of the many-sidedness of the relationship that sometimes assumes further facets till becoming even quadrilateral and beyond.[87]

But the main problem is that from the tendency to use the triangular relationship – instead of the operating risk in management – as benchmark, for the purpose of dogmatic qualification, arise significant consequences into the national law:

- *in primis*, as regards the distinction between concessions and contracts;[88]

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[84] For all, please refer to Villata R., op.cit., in particular pp. 107-108 ss. and references ivi indicated.

[85] Linguiti A.; Linguiti A., "Cosa resta della natura pubblica della concessione?", in Cafagno M.; Botto A.; Fidone G.; Bottino G., op. cit., p. 118 argue that still today we should conceive "the concession as an instrument aimed at the satisfaction of the general public interest of the user, interest that, however, with the choice of the concession does not remain outside the concession relationship becoming a fundamental element of interpretation able to charge the concessionaire with the responsibility for its economic and functional satisfaction". It would follow the existence of an implicit trilateral relationship, which adds to the explicit one verifiable where the concession is remunerated directly by the users: in this sense Goisis F., *Rischio economico, trilateralità e traslatività nel concetto europeo di concessioni di servizi e di lavori*, Diritto Amministrativo 4, 2011, also evokes the translating-accretive effect of the concessions that would transfer to the concessionaire public functions in the collective interest.

On the basis of the national jurisprudence (in particular Cons. St., Sect. V, 1 august 2007, n. 4270; Trga Trentino-A. Adige Bolzano, 8 april 2008, n. 129), go even beyond – in the sense that the concession presupposes in each case an explicit trilateral relationship – Caringella F.; Protto M., *Codice dei contratti pubblici commentato con dottrina e giurisprudenza: commento articolo per articolo al D. lgs. 12 aprile 2006, n. 163 aggiornato ai decreti Monti sulle liberalizzazioni (conv. dalla L. 24 marzo 2012, n. 27)*, Dike giuridica, Roma, 2012, pp. 27-28, 31.

Opposite opinion has Berionni L., *I contratti pubblici di rilevanza europea: il discrimen tra appalto e concessione, tra incertezze normative e oscillazioni giurisprudenziali*, Diritto del Commercio Internazionale 3: 731, 2013, according to which it should be borne in mind that "The trilateral relationship administration-concessionaire-user is not the element that, unequivocally, indicates the presence of a concession; on the contrary, it may also configure a contract".

[86] In this regard it should be recalled that the Court of Justice has recognized the ends of a contract, despite the existence of a trilateral relationship, in causes *Commission/Italy*, *Hans & Christophorus Oymanns*, *Auroux* and *Norma-A* (v. *supra*) because of the absence of risk in the hands of the contractor.

[87] Cf. ECJ *Hans & Christophorus Oymanns*, *Auroux*, and T.A.R. Lombardia, Milano, Sect. III, 8 may 2007, n. 2580, with a note by Leggiadro F., *Concessione e appalto: il nocciolo duro della distinzione*, Urbanistica e appalti, 11: 1426-1432, 2007. Or just think of the sub-contracts by the dealer, or the so-called "*direct agreement*", namely the direct agreement with the lenders of the project (banks, investors...): on this point cf. Gentiloni Silveri S., "Il coinvolgimento dei finanziatori nei contratti di partenariato pubblico-privato e l'opzione per "l'accordo diretto", in Cafagno M.; Botto A.; Fidone G.; Bottino G., op. cit., p. 539 ss.

[88] Cf. Council of State, Sect. VI, 21 june 2013, n. 3378, where it is classified as a contract, and not as a concession, the award of the services of *focal point* – consisting of navigation on internet services for educational, cultural and informative purposes, photocopying services at subsidized prices and the use of PCs and printers for educational and study purposes – at the Faculty of Medicine, University of Rome Tor Vergata.

In the letter of invitation was provided, by the client, an annual contribution of € 15.000, to be divided in twelve deferred monthly installments, payable within 60 days from the receipt of the invoice and of the monthly report (in which must be stated that the service has been executed in accordance with what described in the letter of invitation, in the special conditions and to what offered in the tender).

Well, the Council of State has stated that "the amount established in the letter of invitation can not but be qualified as a consideration for the provision of the service object of the award in the context of a relationship of prevailing bilateral nature intervening between the client and the tenderer, so that the case appears more plausibly to be classified as a service contract, and not a concession (in which prevails the trilateral relationship with the user, providing the fee), regardless of the relief that the concession of services is subject to the rules of the public evidence".

Emerges clearly how the reasoning followed by the judges of Palazzo Spada is not focused on the allocation of risk, but rather on the morphology (bilateral or trilateral) of the relationship.

There are several situations in which the legal classification of specific cases is not clear.

- As for the treasury service of public sector entities T.A.R. Bologna, Sect. I, 10 april 2001, n. 303 (cf. Tar Bologna, n. 622/95, Tar Lazio, n. 2022/95, Tar Parma, n. 27/96, Tar Lombardia, Brescia, n. 837/99), had brought it to the translational concession of public service and, since no assimilable to the contract, subtracted from the EU Directives. In a consistent manner see Cass. Civ., Sez. Un., 3 april 2009, n. 8113 and T.A.R. Firenze, Sect. II, 28 february 2014, n. 409.

In the opposite sense is Council of State, Ad. Plen., 18 june 2002, n. 6 (commented by Bacosi G., *Amministrazioni locali e servizi di tesoreria: la Plenaria "sponsorizza" il collegamento contrattuale*, lexitalia.it); also Council of State, Sect. V, 18 october 2012, n. 5359 has identified a service contract.

Has then stepped in the pronunciation of Council of State, Sect. V, 6 june 2011, n. 3377, stating that "When the private operator assumes the risks of the management of the service, relying substantially on the user through any type of fee, charge or right, then there is a concession: is the mode of remuneration, hence, the distinctive trait of concessions from the contract of services. So, you will have a concession when the operator takes in practice the economic risks of management of the service, relying essentially on the user, and you will have a contract when the cost of the service is to weigh substantially on the administration.

And this assumption has been repeatedly confirmed from the case law by the European Court of Justice, which has stressed that you are in the presence of a service concession when the agreed method of remuneration consists in the right of the provider to exploit its performance and implies that the latter assumes the risk of operating the services in question (EC Court of Justice, Sect. III, 15 october 2009 C - 196/08), while in case of the absence of transfer on the provider of the risk related to the performance, the transaction represents a service contract (EC Court of Justice, Sect. III, 10 september 2009, C - 206/08). Given the above, there is no doubt that the competition at issue in this case falls within those in which "the consideration in favour of the concessionaire consists either solely in the right to manage functionally and to exploit economically the service", and for that reason alone, among service concessions, pursuant to art. 30, para. 2, of the D.Lgs. 163/2006. In fact, as rightly pointed out by the Court of first instance, the aforementioned legislation "does not mean that the concessionaire can not draw any economically appreciable utility from the performance of the service (were it so, highly scarcely you would find competitors for the award of treasury), but only that the award must not provide for a price that remunerates the service, charged to the Contracting Authority; in other words, the concession of services involves the transfer to the concessionaire of the responsibility for the management, to be understood as risk-taking, which depends directly on the proceeds that the concessionaire can draw from the economic use of the service".

In this sense, moreover, has also expressed the Court of Cassation, with its decision n. 8113/09, where it is precisely noticed that "as repeatedly stated by these United Sections (in the sentences n. 13453/91, n. 874/99, n. 9648/2001) the treasury contract ... must be classified in the terms of a concession, and not of a contract of services ... having for its object the management of the service involving municipal treasury, pursuant to the T.U. on Municipal and Provincial Law, approved by R.D. 3 march 1934, n. 383, art. 325, conferring public functions such as the handling of public money and the control over the regularity of the mandates and prospectuses of payment, as well as on respecting the limits of the budget appropriations".

Conclusively, the award of the public treasury takes the form of a service concession".

Afterwards have expressed T.A.R. Trieste, Sect. I, 26 january 2012, n. 33 (where it is assumed that the treasury service, as done for free, does not constitute a service contract but a service concession) and T.A.R. Napoli, Sect. I, 3 may 2012, n. 2014: a case where the treasury service, after an initial procedure concerning the award of a contract for financial services, saw a new tender for the award *ex* art. 30 of d.lgs. 163/2006 on concession of services: the particularity comes from the fact that the bidder – excluded from the first tender for not having produced the provisional security – appealed the second procedure for the same exclusion ground, appeal that the court has, however, accepted on the basis of the assumption that "the legal classification of the nature of the object of the tender procedure is not dependent on any qualification made by the contracting authority, but on the objective characteristics of the performance derived by the contract to be stipulated at the end of the public evidence, so that it is necessary to scrutinize the nature of that particular set of financial services which integrates the treasury service (municipal). According to the definition inferable from art. 209 of D.Lgs. n. 267 of 2000 (Text Unique on Local Entities), the treasury service consists in the "complex of operations related to the financial management of the local Entity and aimed, in particular, at the collection of revenues, at paying the expenses, at the custody of securities and values and at the connected implementations under the law, the statutes, regulations of the entity or pactional rules". On this point there is no reason to depart from the conclusions reached by the Council of State on an absolutely similar question (sent. n. 3377 of 2011)".

Clearly emerges how the interpretation is the result of the encounter between the traditional criteria in the national law (translational effect and trilaterality) and the innovations inspired by the supranational plexus (operating risk), so much that we witness a situation of hermeneutical syncretism for the concessions.

Situation that is generating, if not legal uncertainty, at least methodological confusion.

- Confusion evident in the case of the "additional services" for the public laid down in art. 117 of d.lgs. 42/2004 – cd. "Codice dei beni culturali" (Code of cultural assets) – consisting in the assistance to the users of cultural sites or museums, in the publishing services, in the sale of reproductions of cultural heritage, in the production of information materials, archival or library materials or even in the cafeteria services, catering and wardrobe, which may be subject to the indirect management of the public administration through a concession to third parties *ex* art. 115 d.lgs. 42/2004.

According to the jurisprudence, since in the additional services occurs the typical concession pattern (where the administration does not correspond any price to the contractor, but it is this latter who pays a fee to the administration for the right to exploit the service), it is necessary to distinguish this type of services from those denominated "instrumental services" (*e.g.* cleaning, surveillance or maintenance) which are instead to be qualified as public contracts, insofar being activities carried out directly in favour of the administration.

The *busillis* rises because among those instrumental services was also brought the ticketing service, in which the contractor is remunerated by retaining a portion of the ticket price paid from users.

On the basis of a precedent by the Court of Cassation (Cass. Civ., Sez. Un., 27 may 2009, n. 12252), Council of State, Ad. Plen., 6 august 2013, n. 19, has stated that "Assistance to the public and ticket service integrate, the one, a public service concession, and the other, a public service contract".

A special mention deserves the Cassation cited, which, having to express in matters of jurisdiction, however, has ended with trespassing beyond into the difficult field of the qualification for public transactions:

"The ticket service can not be considered strictly attributable to the "additional services".

It is true that such a service, as opposed to cleaning and surveillance services, in terms of remuneration of the operator seems burdening directly the visiting users who access the institute or place of culture. In fact the D.M. 11 december 1997, n. 507, establishes that the operator of ticketing service retains for himself a part, not exceeding 30% of collection. Yet although apparently funded directly by users, the cost of such service is charged to the resources of the public administration, since the price of the ticket, which would be payed directly and in full to the public administration, is partially retained by the service provider. Additionally, the operator provides the ticket service not in favour of the private user, but in favour of the public administration, on whose behalf he collects such money. It follows that the ticket service assigned to a private individual can not constitute, for the reasons stated above, a public service concession, but a public service contract".

Leaving aside the obvious observation that the same dynamics (the concessionaire retains a portion of the proceeds as his profit, paying the remainder by way of concession fee) is configured also for the "additional services" other than the ticket service, it is clear that the use of the criterion of the trilateral relationship instead of the operational risk has distorted the distinction between contracts and concessions, placing within the first a case more suitable for the second ones and thus causing ruinous effects (refer to the

Authority – "Autorità di vigilanza sui contratti pubblici" (AVCP) – deliberations n. 13 of 11 march 2010 and n. 10 of 6 march 2013 to highlight the impact of the aforesaid).

As repeated several times, it is not the origin of the remuneration nor the recipient of the supply to tip the scales in favour of the contract or the concession, but rather the risk.

And on this basis the case has been properly framed as a concession of service by T.A.R. Roma, Sect. II-*quater*, 11 january 2012, n. 239 and Council of State, Sect. VI, 26 june 2012, n. 3764.

- With regard to the service of assessment and collection of taxes cf., for all, T.A.R. Brescia, Sect. II, 18 april 2013, n. 363, which is leaning towards the concession nature of the same on the basis of the risk and of the trilateral relationship ("The competition for the award of services for the collection of the municipal tax on advertising and of the duties on public billboards relates to a concession, where the successful tenderer assumes the entire risk of the initiative undetaken and his remuneration is through the collection of a percentage premium calculated on the amount paid by users: the so-called "criterion of management" is the index relevant for the identification of the hallmarks between public service concessions and service contracts, and in this case the concessionaire directly bears the economic risks of the activity, whereas the recipients of the performance are the citizens users and not the administration").

Of the opposite opinion are Rocchietti March A.; Papi C., "Le concessioni di servizi e l'attività di regolazione interpretativa dell'Autorità per la vigilanza sui contratti pubblici", in Cafagno M.; Botto A.; Fidone G.; Bottino G., op. cit., p. 418, who argue that "analyzing the services provided, it is noted that there is no management risk charged to the contractor, the fee is a percentage of the sums collected from the citizens, namely resources of the contracting authority and, furthermore, that those activities are not directly aimed at meeting the needs of users, being, however, instrumental activities provided to the local authority; these characteristics according to the definition of Community derivation evidently would not allow to bring the case within the category of service concessions and exempting the application of the rules of public evidence in force for the service contracts".

Even here must then be registered a clear conflict of interpretations engendered by the diversity of the hermeneutic criteria used: in the first case, adhering to the European discipline, the risk-based criterion of management; in the second, showing the resistance of domestic preconceptions, the trilateral relationship.

- With reference to the service of installation and management of vending machines for food and beverages at the premises of a public administration (in particular hospitals or schools), the status of a service concession has been affirmed by Council of State, Sect. VI, 4 september 2012, n. 4682, with a note by Monzani S., *Il trasferimento al privato del rischio economico di gestione quale tratto distintivo della concessione rispetto all'appalto di servizi e le conseguenze in tema di normativa applicabile*, Foro Amministrativo C.D.S. 1: 243, 2013. Particularly, in the wake of the case law formed on the subject (Cons. St., Sect. III, 8 july 2011, n. 4128; Cons. St., Sect. VI, 20 may 2011, n. 3019; T.A.R. Bari, 12 april 2012, n. 716; T.A.R. Latina, Sect. I, 7 march 2012, n. 195; T.A.R. Firenze, Sect. II, 6 july 2010, n. 2313; T.A.R. Bari, Sect. I, 17 february 2009, n. 315), the administrative judges of appeal have confirmed that the activity in question is attributable not to the figure of service contract – as erroneously believed at first instance by T.A.R. Roma, Sect. III, n. 4736/2010 –, but to the institution of service concession, thereby considering as diriment in the indicated direction the circumstance that the risk of management is placed entirely in the hands of the contractor (which, moreover, has to pay a sum of money to the administration), as well as the fact that the service is delivered to the community of users rather than to the administration.

To the same conclusion has also come T.A.R. Perugia, Sect. I, 11 june 2010, n. 369 in order to the canteen and bar service at universities. Although, in the tender documents, the commissioning body had used the term "contract", the judge has instead found a "services concession" based on the observation that the same acts of the awarding procedure were unequivocal in the sense that the manager's remuneration consisted exclusively in the amounts paid by users, without any charge to the University; indeed, the manager had to go back to the grantor a percentage of the receipts by way of royalties.

- Opposite opinion is widespread in relation to the public lighting service instead: cf. T.A.R. Salerno, Sect. I, 28 november 2001, n. 1501 (cf. Cons. St., Sect. V, 4 may 2001, n. 2518), for which "In the event that, via an agreement having as its object the provision of services on public lighting systems, a town has conferred the task of putting to norm, upgrading, maintenance and operating the equipment associated with the service to a company, that is required to maintain in optimal state of efficiency the installations, against payment of an annual amount, by specifying, into the convention, that the administrative functions pertaining to acquisitions, occupations, expropriations and constitutions of easements are to be carried out by the administration and that for extraordinary maintenance the company is required to prepare special estimates to be submitted to the municipality for approval, falling on this latter the related costs, it is an activity assigned

- *in secundis*, for what concerns the public service local and not;[89]

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with a pecuniary contract for the local authority, which maintains the ownership of the service, without constituting a public service concession; therefore, the dispute concerning the termination of the relationship falls outside the hypothesis of the termination of a relationship related to the public service, with the result that it is not within the jurisdiction of the administrative courts".

In the same terms has also expressed the Authority AVCP in its opinion of 20 june 2012 (AG 5/12). The Authority has prior proceeded to the qualification of the contract and has come to the conclusion that the award described in the question (having, in particular, as its object the "(…) service maintenance and management of public lighting systems, installing Christmas lights, as well as the adaptation to the norms, technological and functional modernization, energy saving and extension, for a total base bid of € 1.581.000.00, to be paid in the form of monthly fees. The contract provides the obligation borne by the Company to carry out in the first year of the concession works for € 240.000.00, funded entirely by the company") can be qualified as a procurement contract, despite the original misclassification of the contract as a thirty-year concession. According to the AVCP "appears undisputed that on the company, given the nature of service in undifferentiated demand, does not and can not weigh the demand risk resulting from the exposure to the vagaries of the market. Similarly, according to the documentation in acts, it does not appear that the economic operator's remuneration is linked to the performances of service provision and to the degree of users satisfaction. The mere provision of contractual penalties, in fact, is not sufficient to establish the risk of availability, since the system of penalties is generalized to all public contracts and governed by art. 133 of d.lgs. 12 april 2006 n. 163 and by the art. 145, 257 and 298 of d.P.R. 5 october 2010, n. 207. The penalties, which are of very limited value, just fix the damage arising from failure to comply and do not introduce a complex system of assessment sufficient to jeopardize the financial viability of the operation. It should be noted, ultimately, the lack of a detection system of users satisfaction and the fact that the Company does not bear the risk arising from any damage caused to public lighting by third parties or force majeure events – excluding the works inherent in its own financing – remaining, therefore, that risk on the part of the municipal administration, which is required to repay to the Company the expenses related to the restoration works needed to ensure their operation (artt. 9 and 18 of Capitolato Speciale d'Appalto). Not relevant, then, for the purposes of the correct classification of the agreement as a concession or contract is the public service nature of the local public lighting, generally accepted by the administrative case law (most recently, Cons. Stato, Sect. V, 25 november 2010, n. 8231)".

- Finally, in the field of healthcare accreditation, the agreements between the National Health System ("Sistema sanitario nazionale" – Ssn) and the accredited private structures can be classified as public service concessions according to T.A.R. Genova, Sect. II, 2 february 2011, n. 184, and Cass. Civ., Sez. Un., 26 january 2011, n. 1773, whilst they escape from the scheme of public service concessions and must be qualified in contractual terms as public service contracts for Cass. Civ., Sez. Un., 5 april 2012, n. 5446 – with a note by Mazzamuto M., *Riparto di giurisdizione. Rapporti tra Ssn e strutture private accreditate. Procedure di evidenza pubblica e contratto*, Giurisprudenza Italiana, 10, 2012.

With consequent difference of view on the division of jurisdiction (v. *infra*).

As can be seen in a clear manner, this use of different criteria for judgment (in addition to the risk) by different judging bodies (*i.e.* civil, administrative, AVCP) entails a certain hermeneutical schizophrenia, for which everything and the opposite is stated through the most varied opinions.

[89] Cf. Council of State, Sect. V, 3 may 2012, n. 2537, summarized as follows: "*The local public service of economic importance is not configurable only when the administration makes an act of concession, but also in the event that puts in place a contract (bilateral relationship, payment of an amount by the administration), as long as the activity is addressed directly to the users – and not to the contracting authority in a function instrumental to the administration – and the users are required to pay a fee, or tariff, for the use of the service*".

The contradiction is already selfevident within the maxima but in the judgment is even more evident: "the element of the allocation of the enterprise risk in the hands of the operator of the service is functional to the distinction between a service contract and a service concession, in order to identify the rules applicable to the two instruments, but it is irrelevant with regard to the configuration of the service contract as opposed to the local public service. The resistant party seems to believe that the local public service is configurable only when the Administration adopts an act of concession (cd. trilateral relationship, consideration of the service fixed by the concessionaire, who bears the risk of the enterprise), but this thesis is belied by the rule whose application is discussed, which speaks of management "in fact or by provisions of law, of administrative act

or for local public services contract under direct award". Must be deduced that you are in the presence of a local public service of economic significance even when the Administration – instead of the concession – puts in place *a public contract, (bilateral relationship, payment of an amount by the Administration) provided that the activity is addressed directly to the users* – and not to the contracting authority in a function instrumental to the administration – *and the users are required to pay a fee, or tariff, for the use of the service*" (italics added).

The question is: can you imagine a public contract of local services? Or is it a paradox indeed?

If the local public service ontologically presupposes a consumer that benefits from it, can be argued for the use of such a contract characterized, according to the decision, by *bilateral relationship* (yet for this arises the question) and by *payment of an amount by the administration* (it would be the payment of amounts not directly connected to the service and procured by the general contribution, thing very different from an "endorsement" of the payments by users to which reference is made immediately after)?

The solution is not immediate, at least not so immediate as it is for the Council of State, which, though recognizing that the distinction between public contracts and concessions is based on risk, denies that the latter may be relevant in the classification of local public service and ends up falling into contradiction when configuring a bilateral contract funded by the public administration but at the same time characterized by a service to the public and fees paid by users.

This oxymoron, mainly due to the bulky past that characterizes the concession in Italy, is the clearest evidence that the trilateral relationship *ex se* does not function as distinguishing criterion of the concession, being it prerogative of the public service and therefrom been transmitted by osmosis also to the concessions.

In the opposite sense is instead Cass. Civ., Sez. Un., 1 july 2009, n. 15381, according to which the management of a public service, assigned by a government to the private sector, can find title only in a concession act, irrespectively of the *nomen iuris* – in the species "lease contract" – that the parties have attributed to the legal instrument through which the award has occurred: "It is established in the jurisprudence of legitimacy, the principle that in the event that the ASL has conferred to a private subject the management of a bar service in a public hospital, the relationship between the the public administration and the private party, having the object of an activity to be carried out in the premises within the hospital building structure (as such destined to the public service and therefore falling among the undisposable assets pursuant to art. 830 cod. proc. civ.), can find title only in a concession deed, as these assets could be transferred to the availability of private parties, for certain uses, only through administrative concessions, with the result that their disputes shall be referred to the exclusive jurisdiction of the administrative courts (Cass. Sez. un. 14 november 2003, n. 17295; 12 june 1999, n. 327; 21 july 1998, n. 7131; 29 march 1994, n. 3075)".

Aside from the typo about the art. 830 cod. civ., such a judgment seems to "prove far too much" by attributing the nature of concessions to all the cases that involve the transfer of rights over publicly owned assets or undisposable property. In fact, the predominant object of the award to the contractor consists in the service, not in the asset, so that it is necessary to implement the European rules on competition (see now recital 15 Dir. 2014/23/EU).

This does not exclude the contracts in theory, as also stated by the Council of State, but the *discrimen* must necessarily be identified in the allocation of the operating risk, irrespectively of the trilaterality:

"In conclusion, it can be said that not all the local public services are or may be provided through the concession, because it is possible that they are provided in the forms of contract (think of the tenders for the Transport service with the remuneration c.d. *net cost*), and not all service concessions are local public services (for example, the distribution of food and beverages in school institutes, Cons. Stato, Sect. VI, sent. 20 may 2011, n. 3019)": this is the annotated AVCP opinion of 20 june 2012 (v. *supra*).

In doctrine see Calvieri C., *Concessione e appalto di servizio pubblico come contratti pubblici nei c.d. settori speciali ex esclusi. Il caso del trasporto pubblico locale*, federalismi.it n. 17/2007.

The inclusion of the contracts in the public services leads us to reflect on the current positive law.

In particular, there is a doubt in regard to the recourse for the efficiency of administrations and concessionaires of public services, on which can be found in Cacciavillani C., *Sull'azione per l'efficienza delle amministrazioni e dei concessionari di servizi pubblici*, giustamm.it (published on 11.11.2011).

Pursuant to art. 1 of d.lgs. 20 december 2009, n. 198, "in order to restore the proper performance of the function or the proper provision of a service, the holders of interests legally relevant and homogeneous for a plurality of users and consumers can make judicial action, in the manner set out in this Decree, against *public administrations* and *concessionaires of public services*, if it derives a direct, concrete and current infringement of their own interests, from the violation of terms or the failed enactment of general administrative acts obligatory and not having normative content to be issued no later than a deadline set by a

- *in tertiis*, with reference to the sharing out of the judicial jurisdiction.[90]

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law or regulation, from the violation of the obligations contained in the cards of services, or from the violation of quality and economic standards established, for *concessionaires of public services*, by the authorities responsible for the regulation and control of the sector and, for *public administrations*, as defined by them in accordance with the provisions on performance contained in legislative Decree 27 october 2009, n. 150, consistent with the guidelines established by the Commission for the evaluation, transparency and integrity of public authorities referred to in Article 13 of the same decree and in accordance with the deadlines established by Legislative Decree 27 october 2009, n. 150" (emphasis added).

From the verbose text of the rule it seems that the capacity to be sued is reserved only to the public administrations and to the concessionaires of public service, with the exclusion of those who serve under a contract (choice quite criticizable if compared with what stated in art. 140-*bis*, para. 12, d.lgs. 206/2005 – cd. "Codice del consumo" (Code of consume) – where, in a similar case, more correctly reference is made to the "providers of public services or public utilites").

Even willing to consider it a simple oversight (which is not in the light of the constant combination of concession and public service, by virtue of the trilateral relationship, in our system), one wonders whether the blatant unconstitutionality for violation of artt. 3 and 24 Cost. can be remedied through the analogical and/or systematic interpretation.

In my very opinion, as the internal *communis opinio* is in the sense of the antithesis between public contracts and concessions, it seems very unlikely to go beyond the letter of law (long-winded, what's more) and allow to experience an action for efficiency against the contractors of public services.

[90] Cf. Council of State, Sect. V, 12 november 2013, n. 5421, where it is stated that in relation to the division of jurisdiction on the concessions "is not callable any parallelism with the contracts, much less it is worth remembering what was stated by the Constitutional Court in the several times mentioned decision n. 204/2004, since the exclusive jurisdiction on the administrative concessions is respectful of the need to concentrate in a single jurisdiction any dispute pertaining to the concession relationship, in consideration of the public interest that this instrument is typically designed to realize, even though beside the authoritative profile is flanked a strictly private law aspect relating to the financial relations between the administration and the private concessionaire. From the above mentioned judgements of the United Sections in fact is caught the essence of the institute concession, which is in any case an instrument to achieve the purposes of general character entrusted to the public administration. In particular, in the public services it is one of the forms of organization which the administration may use to carry out activities of general interest, as an alternative to the direct management, interposing the private concessionaire between itself and the community. In the past this profile was particularly valued by emphasizing the effect of translation of public power that it determined (in particular cf. Cass., Sez. Un., 8 august 1990, n. 8058; 3 december 1991, n. 12966; ord. 9 may 2002, n. 6687). Currently, instead, for the decisive boost by Community law, the profiles of public law are strongly attenuated, so much that art. 3, para. 12, D.lgs. 12 april 2006, n. 163 assimilates service concessions to service contracts, except for the remuneration of the price (not coming from the administration but through the economic management of the service itself and therefore from the private users). *But there is no doubt that the trilateral relationship that is set in concessions makes the public interest anyway predominant also during the execution of the relationship arising from the concession. Unlike the contracts, the awarding authority retains an undoubted interest on the manner in which the service is managed by the concessionaire in its replacement since that one, even when it is assigned to private parties, does not lose the fundamental characteristic of its finalization to the collective needs.* It is exactly in the light of this unavoidable connotation that is justified by the logical, as well as constitutional, point of view the amplitude of the exclusive jurisdiction, whilst, on the other hand, this latter is excluded when the dispute between the awarding authority and the private concessionaire regards purely civil issues, relating to the patrimonial aspects arising from the relationship. And it is for these reasons that the administrative jurisdiction must be established also in this case, since the act of decadence/termination from which it stems is concerning the alleged breaches in the performance of the integrated water service whose effects are not confined to the aforesaid relationship, but are reflected on the collectivity too" (pt. 2.7 dir.; italics added).

Then, the trilateral relationship would justify the exclusive jurisdiction of the administrative courts on the public service concessions (except for the merely patrimonial questions), but what happens whenever you have instead to deal with a public service contract, which has been also admitted by the Council of State (v. previous note)?

Conversely, there can be found some upstream decisions of the Italian courts that have given implementation to what elaborated at European level and which are more in line with the case law of the Court of Justice on the concession risk.[91]

Art. 133, para. I, lett. c), of d.lgs. n. 104/2010 – cd. "Code of the administrative process" (c.p.a.) –, as mentioned, expressly provides for the exclusive jurisdiction of the administrative courts for "the disputes in the matter of public services related to *public service concessions*, excluding those relating to indemnities, fees and other charges, or relating to *measures* adopted by the public administration or by the operator of a public service in any administrative proceedings, or even related to the *award of a public service*, and to the supervision and control over the operator, as well as relating to the surveillance on credit, insurance and securities market, to the pharmaceutical service, transports, telecommunications and public utilities services" (emphasis added).

The procurement contract certainly is not a concession nor an administrative measure; maybe you could argue whether the award of a public service can include the stipulation of the contract after the award, but you will never get to encompass also the execution of the contract.

As a result, there will be asymmetry between the public contracts (to which must be added works and/or services concessions when they do not concern the public service), on the one hand, and, on the other, the public service concessions, with the first ones subjected to the normal criterion of the *causa petendi* and the second ones to the exclusive administrative jurisdiction. This diversity of treatment focused on a false assumption, the trilaterality or not of the relationship, therefore requires a rethinking of the jurisdiction about public services in compliance with the supranational law.

Just think that as for the reserves, according to the jurisprudence, the disputes are to be devolved to the ordinary courts dealing with issues arising during the execution of contract (see *ex multis*, Cass. Civ., Sez. Un., 6 may 2005, n. 9391; cf. also Cons. Stato, Sect. V, 16 january 2013, n. 236; Cons. Stato, Sect. V, 21 june 2007, n. 3318; T.A.R. Venezia, Sect. I, 3 june 2003, n. 3130 and T.A.R. L'Aquila, 2 october 2001, n. 583). But what happens if you are within the public service? Are these issues purely patrimonial (ordinary courts) or is their rationale rooted somewhere else (exclusive jurisdiction)?

[91] They are, for example, Council of State, Sect. IV, 15 may 2002, n. 2634 and Tribunal of Enna, 9 february 2010, commented by Neri V., *Il «rischio economico» negli appalti e nelle concessioni di servizio pubblico*, Il Corriere del Merito 6: 681, 2010; lately v. T.A.R. Roma, Sect. III, 22 july 2014, n. 8001.

The first states that "The concessions within the framework of Community law, are distinguished from contracts not for the measure title of the activity, nor for the fact that you are facing a matter of transfer of official authority or extension of the legal sphere of the private party (that would be a typical phenomenon of the concession in a perspective cultivated by traditional doctrinal orientations), nor by their authoritative nature instead of the contractual nature of the contract, but for the phenomenon of translation of the alea inherent in a certain activity in the hands of the private subject" (pt. 5.7 dir.).

Though it goes on by emphasizing the genesis of the remuneration of the concessionaire (pt. 5.8 dir.): "When the private operator assumes the risks of the service management, recouping from the user through the collection of a fee or tariff of any kind, then there is a concession, it is the mode of the remuneration the hallmark of the concession compared to the services contract (point 2.3 of the interpretative Communication). And then a public service of line transport reveals itself as a service contract when, as sometimes happens for example in the case of "schoolbus" service, its burden is borne entirely by the administration, whilst if the service is not provided in favour of the administration but for an undifferentiated community of users, and is at least partially paid by these users to the operator of the service, then you are in the concession area".

There remains the trilaterality but in an ancillary function to the operating risk of the concessionaire. Besides the coincidence of the management risk with the modes (*rectius*: origin) of the remuneration that *illo tempore* afflicted also the EU Court of Justice, the decision is important because it starts to show a change of perspective in contrast to the anachronism of the previous (and current) situation.

Change of perspective that comes to completion in the second judgement, where it is qualified as a service concession the inspection of heating systems assigned by a Province to a private company on the basis of the actual allocation of risks, and not for the abstract mode of the remuneration: "art. 7 of the convention expressly provides that "the Regional Province of Enna is the holder of the collection of all the fees paid by users for the service of control and verification of thermal plants, both accrued and to mature". Such an article imposes on user the charges for the services provided, the price of this service is, however, first paid to the local territorial authority and subsequently to the supplier of the service. This mechanism of the remuneration,

prima facie, appears attributable to services contracts, as the service provider receives a fee directly by the administration and not by the users. But at a careful examination of the agreement of 22.12.2006 is clear that art. 7 transfers the risk of default to the service provider and not to the local entity. In fact, that article, while providing that the local territorial authority can collect coercively (by role) the claims against defaulting users, also provides that "the sums collected by the defaulting users will be paid periodically to the Società Multiservizi Energia S.r.l. Unipersonale after having been collected and hence available in the coffers of the province". This provision, unequivocally, transfers the final risk of insolvency, in the event that even the collection by registration with the role would be unsuccessful, in the hands of the provider for that service. Such method of remuneration is definitely the diriment element to qualify the convention of 22.12.2006 – object of the present controversy – as a public service concession because the alea inherent in the management of the service is moved, ultimately, from the local territorial authority to the service provider that assumes and bears the economic risk of the activity. The remuneration of the service provider is closely related to the income received by the individual users, and the economic risk of insolvency of these latter weighs on the operator".

At first glance it might seem paradoxical that it was a civil court having to light the way on a purely administrative theme, but it is not so: as mentioned in relation to the division of the jurisdiction, precisely because the matter has evolved over time assuming a more and more civil and negotiating drift, was to presume that the civil jurisdiction would have been better in adapting to the dictates of supranational law.

The allocation of risks in public transactions does not seem a profile suitable to be reviewed by the administrative courts, far more permeable to the suggestions of public law (trilateral relationship above all) and much inclined to syndicate the exercise of power by acts, as they are not used to dealing with the internal dynamics of the contracts (despite the exclusive jurisdiction on the agreements).

Finally, should be reported the determination of AVCP, 11 march 2010, n. 2, *Problematiche relative alla disciplina applicabile all'esecuzione del contratto di concessione di lavori pubblici*, where is provided a careful analysis of the concept of operating risk in management.

It is *expressis verbis* stated that "Peculiar characteristic of the concession institute is the assumption by the concessionaire of the risk associated with the management of the services to which is instrumental the intervention made, in relation to the tendential capacity of self-financing of the work, *i.e.* to generate a cash flow from the management making it possible to remunerate the investment. In the public works concession the entrepreneur, as a rule, designs and executes the work and through the management and the economic exploitation of the work itself gets in exchange the proceeds by way of consideration for the construction, possibly accompanied by a price. Should be noted that in accordance with the framework laid down in art. 143, paragraph 9, of the Code are fully included in the notion of concession both the hypotheses where the concessionaire assumes, in addition to the construction risk, the risk of demand (motorways model), and the concessions in which to the risk of construction adds the so-called availability risk (hospitals, prisons, etc… model), on which we will return in more detail further on. In the absence of the alea related to the management, it is not configured the concession but rather the contract, in which there is only the business risk arising from an incorrect assessment of the construction costs compared to the amount that will be received as a result of the execution of the work. In the concession, to the risk proper of the contract, adds the market risk of the services to which is instrumental the work carried out and/or the so-called availability risk. […]Practice shows that, in certain cases, the contrating entity partially intervenes in the economic risk assumed by the concessionaire. It happens, thus, that the public administration does support part of the cost of construction and/or management of the concession in order to limit the amount for performance chargeable to the final users. This intervention can take place in different ways in the construction phase with pre-established payments during execution and in the management phase with guaranteed payments in a lump sum, or as a function of the number of users and does not lead necessarily to a change in the nature of the contract. According to the Commission, if the price paid covers only part of the cost of the work, the concessionaire shall always have to take a significant portion of the risks associated with the management. The payment of amounts into management accounts is a consequence of the fact that the concessionaire must, for reasons relating to the public interest, practice "social prices" and thus receives at this title a compensation by the administration, as a lump sum or through some installments spread over time. This participation by the administration to the cost of operation does not relieve the concessionaire from a significant part of the operating risk. Essential element of the public works concession is, hence, the attitude of the work object of the same to create a cash flow that can allow to fully or partially repay the investment. Right in regard to this, we are used to classifying the works into three types: hot, cold and tepid works. Hot are the works with an inherent capacity to generate revenues through user charges, to such an extent to repay the investment costs

But the general and widespread tendency remains to assign a predominant specific weight to the trilateral relationship.[92]

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and adequately remunerate the capital involved over the life of the concession; cold are, instead, the works for which the private subject implementing and managing them provides directly services to the Public Administration and gains proceeds from the payments made by the same. To these works traditionally refers Article 143, paragraph 9 of the Code, cited above. Between these two types of works, place themselves in a middle position those where the revenues from user fees are not sufficient to fully repay the resources used to produce them, making it necessary, to allow the financial feasibility, a public contribution (cd. tepid works)".

The AVCP has the merit to adopt a methodological approach consistent with the two judgments aforementioned and, especially, to the *acquis communautaire*, giving emphasis to the operating risk in the concession management.

Particularly important is the finding that it is not always necessary a trilateral relationship in order to have a concession: a bilateral relationship could also exist in the case of cold works.

[92] More recently there have been other decisions in accordance with the precedents illustrated above, although more or less intensely affected by the trilateral relationship that still remains on the background: Council of State, Sect. V, 1 december 2014, n. 5915; T.A.R. Ancona, Sect. I, 8 november 2013, n. 808; T.A.R. Brescia, Sect. II, 18 april 2013, n. 363; T.A.R. Roma, Sect. II, 13 february 2013, n. 1555; T.A.R. Torino, Sect. I, 19 december 2012, n. 1365; T.A.R. Bari, Sect. I, 11 october 2012, n. 1756; Council of State, Sect. VI, 4 september 2012, n. 4682; T.A.R. Genova, Sect. II, 3 september 2012, n. 1157; Council of State, Sect. V, 5 july 2012, n. 3941; T.A.R. Catania, Sect. III, 30 may 2012, n. 1422; Council of State, Sect. V, 3 may 2012, n. 2537; T.A.R. Napoli, Sect. I, 3 may 2012, n. 2014; T.A.R. Perugia, Sect. I, 6 march 2012, n. 73; Court of auditors reg. Abruzzo, Sez. giurisd., 24 january 2012, n. 27; Council of State, Sect. VI, 27 december 2011, n. 6835; Council of State, Sect. V, 9 september 2011, n. 5068 (confirming T.A.R. Veneto, Sect. I, n. 1500 of 2010).

According to the national case-law, in short, you have a concession when the operator bears concretely the economic risk of the service management, relying essentially on the users through the collection of a fee or tariff of any kind, while you have a contract when the burden of the service is to weigh substantially on the administration.

Of such a bias is also affected the decision of the Council of State, Ad. Plen., 30 january 2014, n. 7 – with a note by Balocco G., *Il principio di corrispondenza delle quote per lavori nell'ambito dei PPP: il nuovo corso inaugurato dalla Plenaria*, Urbanistica e appalti 6: 665, 2014 –, where it is considered to be a public service concession the social housing program undertaken by Roma Capitale. It is one of the rare occasions where the administrative justice has effectively dealt with the phenomenon of PPPs, so that becomes interesting to see how it has been faced in the practice.

The *plenum* takes the view that has been put in place an initiative of public-private partnership for the management of a local public service of economic significance and upon individual demand, through the instrument of public service concession.

After tracing the genesis of both PPPs and social housing, the judgment enters into the merits reflecting firstly on the legal nature of the procurement award and subsequently on the rules applicable to it:

"6.2.1. In the particular case at issue are present all the indexes that have been considered, over time, as qualifying a concession of local public service of economic significance and upon individual demand.

In detail:

a) the presence of an authentic local public service aimed at the production of goods and utilities for the objective social needs - that is, in the language of the European Union (Articles 16 and 86 of the TFEU), a service of general economic interest that comes to play an essential part of the economic constitution of all the member Countries, being understood as such the one addressed to the users, able to satisfy the general interests and ensure profitability - from which citizens benefit *uti singuli* and as community members;

b) the provision charged to the users that is typically found in the services upon individual demand (in this case the users must participate in a selection process, managed by the concessionaire, for the assignment of houses, time by time paying the consideration for the lease or for the various types of sale based on the complex tariff system identified by the competition rules);

c) the assumption by the concessionaire of the economic risk relating to the management of the service; on this point, must be deemed irrelevant that the competition rules have provided for a partial consideration charged to Roma Capitale, given its character merely possible, as a result of the tenderer's

choice aimed at guaranteeing the financial equilibrium of the company, choice necessarily disadvantageous in the attribution of the relative score; additionally, the subordination to the payment of a fee - relevant in the national and European perspective for the distinction between the figure of the contract and that of concession - depends on the technical characteristics of the service and on the "political" willingness of the entity but does not affect, *ex se*, its status as a public service and can not be therefore overrated;

d) the foreordination of the activity to directly meet the needs proper of an audience of undifferentiated users, basically for an indefinite period of time or at least for a long-term period (in this case the concession has a duration of 25 years);

e) the subjection of the operator to a number of obligations, including those of exercise and tariffs, designed to conform the fulfillment of the activity to the rules of continuity, regularity, technical and professional capacity and quality, because what distinguishes significantly the nature of public service is the achievement of social purposes for the community through the activities carried out by the operator;

f) the translational delegation of organization powers by the entity to the private party (in this case, not only the tasks as contracting authority for the construction of a monumental work, but especially those of organization concerning the beneficiaries selection, the housing assignment, the management of the subsequent relationships); this element must express, beyond the *nomen iuris* used by the competition rules (concession, assignment, award, service contract, act of engagement), the substance of an act of organization and, as such, ontologically different from a contract; therefore there is an external projection of the *utilitas* pursued with the concession deed, unlike the internal dimension of the *utilitas* that is achieved by the procurement contract; only thanks to the concession module it is possible to outsource the service entrusting its management to private entities for which the benefit is the ability to require a price (tariff) towards the users, thence the importance of the relationship duration suitable to allow the concessionaire to make a profit (all these features present in the case at issue);

g) the content of the housing program, furthermore, is characterized by its trilateral structure as all the performances of the parties involved are headed by the administration, the operator and the users, while in the procurement contract, as known, the relation has a bilateral character (in this case it is undisputed that the main part of the performances of the concessionaire are aimed to meet the needs of the disadvantaged users, respecting the operational constraints imposed and monitored by the administration)".

It has been decided to report textually this pronunciation because it represents the *summa* of the foregoing, that is the permanence in Italy of a concept focused on the trilaterality of the concessions which, confusing these latter with the public services, seems to be out of tune compared to the European framework.

Clear evidence of such an assertion are the indexes used by the judges to affirm the concession nature of the social housing intervention. Only at one point (c) mention is made of the operational risk, whilst for the rest prevails the trilaterality of the relationship in various respects (ptt. a, b, d, f, g). In particular, it is important to emphasize how the trilaterality is not used to separate the public service from what it is not (*i.e.* instrumental services to the public administration), but to distinguish the concessions from the contracts.

The circumstance is self-evident where it is apodictically stated that "in the procurement contract, as known, the relation has a bilateral character" and that "there is an external projection of the *utilitas* pursued with the concession deed, unlike the internal dimension of the *utilitas* that is achieved by the procurement contract", while it has already been acknowledged that the trilaterality also occurs in the case of contracts (v. *supra*). So it seems that the traditional contiguity between concession and public service has pushed its roots so deep as to make the trilateral relationship a *condicio sine qua non* for the existence of the concessions, straying from the original area of competence.

The impression is confirmed by the remainder of the Adunanza Plenaria judgment.

In dealing with the complicated distinction between services and works in the cd. "mixed contracts", the decision reiterates the qualification of the procedure as a public service concession, despite the presence of substantive works:

"6.3.1. When an award contemplates the execution of works in conjunction with the management of a service, the line of demarcation between the different institutions should be identified by taking aim at the direction of the instrumentality link that binds the management of the service and the execution of the works, in the sense that only where the management of the service is serving with respect to the construction of the works is configurable the hypothesis of a public works concession; conversely, the inclusion of the work in a complex program aimed at the management of services in order to satisfy basic needs of social and economic great relevance (the housing difficulties of vulnerable groups of the population), suggests that the works are to set themselves objectively in terms of accessories or secondary to the management of the facilities serving the community".

As you might guess from the examination just exposed, the national legal science has long misunderstood – and sometimes still perseveres in doing so – the distinction between contracts and concessions putting in a single pot administrative concessions, public services and inheritance of the past.

By assimilating concessions and public service because of the trilateral relationship, as opposed to the alleged bilaterality of contracts, has been created some confusion.[93]

In the mixed contracts, it is difficult to establish exactly the main object of performance since you have to balance both the economic value of the same performance (quantitative criterion), and the function, prevalent or ancillary, performed by each component (qualitative criterion): cf. art. 14 d.lgs. 163/2006.

This approach is essentially disproved by the Adunanza Plenaria – according to which "it is necessary to have regard to the main object of the performance [...] regardless of the economic value" – on the basis of not univocal elements: the social destination of all the works (both the public ones and those of public utility, as well as the commercial ones); the value of the public works in the proper sense (houses of public residential building, public school and urbanization works) lower than the value of all the public utility works and of those merely private (only 15% of the total accommodation was intended to public housing, while the remainder, more than 75%, regarded the construction of private housing, as well as commercial properties); the duration of the service for the assignment and management of housing higher than the time strictly necessary for the execution of the works (minimum period of 25 years).

None of the criteria used seems to be diriment as they refer to heterogeneous elements: the public purpose of the works can be equally noted for works and services; the value of the works should be compared with that of the services and not with the one of the works overall; finally, it is but normal for the duration of the service to exceed that of works so as to allow the subsequent management (rule that applies to all services, otherwise it is difficult to imagine the return of the investments involved in the *opus*).

Therefore a doubt arises that the decision of giving significant weight at the function of performances "regardless of the economic value", conditioned by the trilateral relationship, is a stretch teleologically aimed at validating the award of a public service concession rather than a works concession.

The result is a distortion of the relationship between works and services within the mixed contracts.

As a rule, the difference between the hypothesis of services concession and works concession is found in the nexus of instrumentality: you have the first one – services concession – when the completion of the works is instrumental, in relation to their maintenance, restoration and implementation to the management of a public service whose operation is already ensured by an existing work, while you have the second one – works concession – when the management of the service is instrumental to the realization of the work, in order to enable recovering the funds necessary for the same realization (T.A.R. Roma, Sect. III, 27 june 2012, n. 5863; Cons. St., Sect. V, 11 august 2010, n. 5620; Cons. St., Sect. V, 14 april 2008, n. 1600; Cass. Civ., Sect. Un., 14 february 2008, n. 3518; Cons. St., Sect. IV, 30 may 2005, n. 2804).

Having so determined the nature of a concession of local public service in the procedure contested, the conclusion of the Adunanza Plenaria is the application of the more resilient system scheduled for the service concessions compared to the one of works contracts and concessions.

All things considered, it can be plainly inferred that the ubiquitous value of the trilateral relationship produces repercussions that go far beyond the distinction between public contracts and concessions, featuring the concession in its most intimate essence and, in particular, creating a strong syncretism between the service concessions and the public service, which in Italy go through a sort of symbiosis (as confirmed even by the Adunanza Plenaria, which is the national supreme administrative court).

[93] Resulting in a large part by the logical inversion between the concession and the public service, with the former that ends up absorbing the latter when the contrary should happen.

In Cavallo Perin R., *La struttura della concessione di servizio pubblico locale*, Giappichelli, Torino, 1998, p. 84, is in fact highlighted that "The concession is not the source of the obligation of public service, but it is above all the public service in its definition offered by the program of the administration which forms an obligation in favour of the recipients, better still a right of credit of the recipients to receive the performances by the operator of the public service".

The supposed duo concession-public service, always hovering and then crystallized into the positive law (see art. 133 c.p.a. and art. 1 of d.lgs. 20 december 2009, n. 198), provokes a wholly peculiar consideration of the concession in Italy.

The result is a hiatus with respect to what has been established by the European Union.

As already said, in fact, the concessions have undergone an updating revision focused on risk by the Court of Justice, which has resulted in the new EU Directive.

From the illustrated hermeneutical discrepancy between national and supra-national law derive some controversial issues that remain unsolved at present state.

The fact that the criteria for distinguishing between contracts and concessions do not fit on the point of trilaterality entails indeed difficulties of taxonomy, on the one hand, and issues of legal-dogmatic interpretation, on the other.

In relation to the first aspect, have been shown numerous examples of cases where the qualification within the category of contracts or concessions is critical and ambiguous, or is even the subject of jurisprudential and/or doctrinal disagreements (fostered and amplified by the dualistic model of division of the jurisdiction between civil and administrative courts, with non homogeneous subjects and overlapping competences).

With regard to the second point, it is first of all relevant the already anticipated question about the commutative or aleatory nature of the concessions (in front of the undisputed commutative nature of the contracts), on which we will return later.

It then becomes interesting to examine the effects on the discipline dedicated to the institution, moreover in the light of the new Directive 2014/23/EU, by the supranational and national levels, respectively, in order to verify the compatibility thereof (we will see how also in that case the internal legal order presents the same aporias and anomalies observed in relation to the dogmatic classification and to the division of jurisdiction).

Although the historical courses and recourses echoing the Vico's philosophy, it is perpetuated the underestimation of the operating risk: fifteen years ago Cavallo Perin R., *ibid*., pp. 85-86, observed that originally the concession to third parties was the legal form by which it was allowed a separation of the negative results of the service management from the assets of the local public entity, because it was up to the concessionaire alone to run the business risk.

This interpretation was confirmed by the discipline on the local finance, a few years after the reform in the early '900 of the law on the municipal services, where it was expressly indicated the possibility for the local authority to provide, in alternative to the concession fee, for the participation in the company profits (cf. R.D. 14 september 1931, n. 1175, T.U. for the local finance, art. 265, para. I).

So, as we will see, after almost a century, in the wake of the EU law, it is time to return to the past, obliterating everything that has happened in the meantime in Italy.

In addition to all this, there is the problem of how to assign the concessions, and PPPs in general, in order to allocate in the best way the risk and the other elements of the institution.

If in the recent past, as mentioned, the distinction between public contracts and concessions has been exploited in order to circumvent (in the latter ones) the competitive procedures of public evidence boosted (for the former ones) by the Community law[94], nowadays the situation has changed: even for the concessions is provided – from the jurisprudence of the European Court of Justice at first, and now from the new Directive 2014/23/EU – the procedure for the award by tender where it is not the case of direct management (self-provision or *in house*) of the public purchasing.

Then, today no longer makes sense trying to distinguish surreptitiously the two cases, instead it is necessary to determine their boundaries in order to prepare the best practices that are most suited to each one.

Thus it is left essentially open the question relating to the practical procedures for the award of the concessions, and for their consequent contractual execution as well, to see the real extent and scope of their distinction from the public contracts.

[94] Cf. Council of State, Sect. VI, 6 september 2000, n. 4688, with a note by Martinelli F.; Santini M., *La scelta del concessionario di pubblico servizio tra affidamento "intuitu personae" e procedura ad evidenza pubblica*, Urbanistica e appalti 9: 1016, 2001; Protto M., *Le concessioni di servizi pubblici sono escluse dall'ambito di applicazione delle direttive comunitarie sugli appalti pubblici*, Urbanistica e appalti 1: 47, 2001.

Chapter IV. Procedural cadences and features

The time has come to review the procedural rules prepared by the new European Directive n. 23 of 2014 on concessions in order to make a comparison with the homologous Directives on public contracts and see the differences, especially in light of the framework offered by the domestic legal order.

The objective of the EU Directive just mentioned, as expressly stated in recital 4[95], is not only that of remedy the legal uncertainty arising from the regulatory gap and from the different treatment of works and services, but above all to reach the opening to competition of the concessions by means of a harmonization that allows a certain level of flexibility.[96]

The rationale of the last-mentioned needs springs to mind should you just think to the *ubi consistam* of concessions, namely the operating risk of the contractor.

Who would ever risk its own resources in a rigid and hetero-determined context, without even being able to contribute to determine the conditions which affect the fortunes of the economic operation?

The importance of the risk allocation as the *discrimen* between public contracts and concessions, indeed, finds its own prominence in the peculiar procedural cadences for the public administration and and its private counterparty both in the initial stage of the award and in the phase of the contractual execution (at least in most of the cases: v. Part II *infra*).

It is here that we can see the greatest difference between the two instruments that *funditus* share a common origin as derived one from the other.

The normal characterization of the simple procurement contracts by means of rigid procedures, aimed at the standardization (centres of purchasing) and simplification (ICT)[97],

[95] Cf. recital 4 of the Directive 2014/23/EU: "The award of public works concessions is presently subject to the basic rules of Directive 2004/18/EC of the European Parliament and of the Council; while the award of services concessions with a cross-border interest is subject to the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the principles of free movement of goods, freedom of establishment and freedom to provide services, as well as to the principles deriving therefrom such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. There is a risk of legal uncertainty related to divergent interpretations of the principles of the Treaty by national legislators and of wide disparities among the legislations of various Member States. Such risk has been confirmed by the extensive case law of the Court of Justice of the European Union which has, nevertheless, only partially addressed certain aspects of the award of concession contracts".

[96] Cf. recital 8 of Dir. n. 23.

[97] Please refer to Baldassare F.; Labroca A.S., *Public procurement: gli acquisti pubblici fra vincoli giuridici e opportunità gestionali*, Franco Angeli, Milano, 2013.

In Italy are in that direction, in addition to Consip S.p.A, the possibility for the regions to establish central purchasing bodies in accordance with art. 1, para. 455, L. 27 december 2006, n. 296, and the

is in contrast with the rather elastic regime of the concessions through phases of dialogue and (re)negotiation, imbued with flexibility and collaboration.[98]

Far more uncertain remains the question of the contractual execution, given that the European Directives on public procurement contracts and concessions devise a common discipline for the modification of such contracts during their term, thereby leaving to the national law the onus of concretize the distinction.

As we are going to see, the major difficulties of interpretation take place in the activity of conciliation of the previous national law with the innovations introduced by the supranational plexus, that is in the very solution to the many aporias engendered by the legacies of the past met in the pages immediately preceding.

Otherwise it is impossible to identify the real extent of contracts and concessions.

Are essentially two the procedural profiles under which analyze these instruments: the choice of the contractor, on the one hand, the design and the execution of the contract, on the other hand.

The phase of competition

§4.1.1. Concessions: the Directive 2014/23/EU and the national context

The European procedural flexibility and the Italian rigidity

The Directive n. 23 of 2014 contains an entire Title II concerning the rules on the award of concessions, divided into a Chapter I on the General principles and a Chapter II about Procedural guarantees.

In truth, only one rule – namely the art. 37, entitled "Procedural guarantees" – specifically deals wih the methods of choice of the contractor.

There are no typed procedures nor is set a specific mode of competition award.

The rule requires a "fair process", respectful of the competitive trappings, that could balance the public and private interests competing, without any prevarication of sort.

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obligation under art. 9 (Acquisition of goods and services through aggregators subjects and reference prices) of D.L. 24 april 2014, n. 66, converted into L. 23 june 2014, n. 89, which amended art. 33 of the Code.

Cf. Title II, Chapter II – "Techniques and instruments for electronic and aggregated procurement" of the Directives nn. 24 and 25 of 2014 (v. *infra*).

As for complex contracts the situation is different: on the point we will return futher on.

[98] Regime inaugurated by the Interpretative Communication on concessions under Community law (2000/C 121/02), in particular pt. 3.2.1.2 for works, and by the case law of the Court of Justice, beginning from the previously examined case *Telaustria* about the services.

Please refer to Clarich M., "Concorrenza e modalità di affidamento delle concessioni", in Cafagno M.; Botto A.; Fidone G.; Bottino G., *Negoziazioni pubbliche. Scritti su concessioni e partenariati pubblico-privati*, Giuffrè, Milano, 2013, p. 42 ss.

The rationale lies in the peculiar allocation of risks within the concessions:

"Concessions are usually long-term, complex arrangements where the concessionaire assumes responsibilities and risks traditionally borne by the contracting authorities and contracting entities and normally falling within their remit. For that reason, subject to compliance with this Directive and with the principles of transparency and equal treatment, *contracting authorities and contracting entities should be allowed considerable flexibility to define and organise the procedure leading to the choice of concessionaire*. However, in order to ensure equal treatment and transparency throughout the awarding process, it is appropriate to provide for basic guarantees as to the awarding process, including information on the nature and scope of the concession, limitation of the number of candidates, the dissemination of information to candidates and tenderers and the availability of appropriate records. It is also necessary to provide that the initial terms of the concession notice should not be deviated from, in order to prevent unfair treatment of any potential candidates".[99]

Provisions that, confirming the choice of adopt a soft version of the rules dedicated to the public contracts, are then recalled by art. 30 on the general principles to be followed in the award of concessions.

The contracting authority or entity shall be free to organize the procedure for the selection of the concessionaire, in accordance with the principles of equal treatment, non-discrimination and transparency, on the condition that, during the procedure for the award of the concession, it is not provided any information which may give some candidates or tenderers an advantage over others.

When you consider that the Directive 2014/23/EU includes both the ordinary sectors and the special ones, unifying their disciplines (in contrast to what happens for contracts), this flexibility is not surprising at all.

Nevertheless, the flexibility allowed in the awarding of concessions is closely linked to the presence of the operational risk in the hands of the private contractor, which must inevitably be able to interact with the public administration.

As a result, it seems to open up a scenario totally different from that one accorded in Italy to works concessions and traditional contracts (except for some cases).

[99] Cf. recital 68 of Directive 2014/23/EU (italics added).

In the Beautiful Country, accomplice the notorious *sfavor* for discretionary powers (and the frequency – still now – of judicial scandals), it has been decided to limit the freedom of use in relation to the works concession, instead leaving the utmost liberty for the services.[100]

Here is the first datum of discrepancy between the supranational discipline and the national one.

The merit of the new European Directive on concessions is surely to have enclosed all the types of concessions in a single piece of legislation, devoting to them the same procedure which will avoid – it is hoped – asymmetries like the Italian one.

The procedure crystallized by the EU Directive only provides a scheme *de minimis*, similarly to that already in place for service concessions, requiring the contracting entity to publish a notice containing the characteristics of the concession, the conditions for participation and the award criteria (which can alternatively be included in the other tender documents).[101]

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[100] Regarding the first, art. 144, para. I, d.lgs. 163/2006 states that "the contracting authorities shall award the public works concessions with open or restricted procedure, using the selective criterion of the most economically advantageous tender"; relatively to the second ones (as well as for works in the special sectors), in contrast, art. 30 and art. 216 are limited to exclude *tout court* the concessions from the scope of the d.lgs. 163/2006 (hereinafter also indicated as "Code").

The domestic situation is even more complicated because of the proliferation of several variations on the theme of the concession: I am referring to all the instruments listed in art. 3, para. 15-*ter*, of d.lgs. 163/2006, namely the project finance, the leasing and availability contracts and so on.

In fact, it is worth remembering that all these forms can be traced to the European concession only if the risk allocation reflects what stated by the Court of Justice and, now, by the EU Directive.

The European Union order does not know all the variants included in the Italian one.

Which is why I will do not enter into the details of every single case but, if anything, will be proved the redundancy of specific statutes *ad hoc* for each which only end up weighing down the system.

[101] The concessions are indeed awarded on the basis of the technical and functional requirements drawn up by contracting authorities and contracting entities, but may be also included minimum requirements, which might refer to the specific process of production or provision of the requested works or services, insofar as they are linked to the subject-matter of the concession and proportionate to its value and objectives (cf. recital 67 and art. 36 of Directive 2014/23/EU).

The strategic use of public procurement leads us to reflect on the fact that the various and numerous instances that come into play actually cause substantial effects on the object of tender and contract (v. *infra*).

If it is necessary that the technical requirements and functional specifications defined by the contracting authorities and contracting entities shall allow the opening of the concessions to the competition, it is equally true that these requirements could include social and environmental aspects, such as those relating to the accessibility for people with disabilities or the levels of environmental performance.

Therefore, the allocation of risks must take them into account already during the procedure, enabling the candidates to participate actively in the definition of the object of the award.

The same way, in the contract stipulation, it will be necessary to determine who will be in charge of what risks and in which modes.

Therefore, the contracting authorities and contracting entities wishing to award a concession shall make known their intention by means of a concession notice.[102]

The derogation is allowed[103], so that contracting authorities or contracting entities are not required to publish a concession notice where the works or services can be supplied only by a particular economic operator for any of the following reasons:

a) the aim of the concession is the creation or acquisition of a unique work of art or artistic performance;

b) the absence of competition for technical reasons;

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[102] Pursuant to art. 31 of Directive 2014/23/EU the concession notices shall contain the information referred to in Annex V, that is:

1. Name, identification number (where provided for in national legislation), address, including NUTS code, telephone, fax number, e-mail and internet address of the contracting authority or entity and, where different, of the service from which additional information may be obtained.

2. Type of contracting authority or entity and main activity exercised.

3. If the applications are to contain tenders, e-mail or internet address at which the concession documents will be available for unrestricted and full direct access, free of charge. Where unrestricted and full direct access, free of charge, is not available in the cases referred to in art. 34, para. 2, Directive 2014/23/EU an indication of how the procurement documents can be accessed.

4. Description of the concession: nature and extent of works, nature and extent of services, order of magnitude or indicative value and, where possible, duration of the contract. Where the concession is divided into lots, this information shall be provided for each lot. Where appropriate, description of any options.

5. CPV codes. Where the concession is divided into lots, this information shall be provided for each lot.

6. NUTS code for the main location of works in case of works concessions or NUTS code for the main place of performance service concessions; where the concession is divided into lots, this information shall be provided for each lot.

7. Conditions for participation, including:

a) where appropriate, indication whether the concession is restricted to sheltered workshops, or whether its execution is restricted to the framework of protected job programmes,

b) where appropriate, indication whether the provision of the service is reserved by law, regulation or administrative provision to a particular profession; reference to the relevant law, regulation or administrative provision,

c) a list and brief description of selection criteria where applicable; minimum level(s) of standards possibly required; indication of required information (self-declarations, documentation).

8. Time limit for the submission of applications or receipt of tenders.

9. Criteria which will be applied in the award of the concession where they do not appear in other concession documents.

10. Date of dispatch of the notice.

11. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning the deadline for lodging appeals or, if need be, the name, address, telephone number, fax number and e-mail address of the service from which this information may be obtained.

12. Where appropriate, particular conditions to which performance of the concession is subject.

13. Address where applications or tenders shall be transmitted.

14. Where appropriate, indication of requirements and conditions related to the use of electronic means of communication.

15. Information as to whether the concession is related to a project and/or programme financed by Union funds.

16. For works concessions, indication as to whether the concession is covered by the GPA.

[103] Cf. recital 41 and art. 31 of Directive 2014/23/EU.

c) the existence of an exclusive right;

d) the protection of intellectual property rights and other exclusive rights.

Moreover, the contracting authority or contracting entity shall not be required to publish a new concession notice where no applications, no tenders, no suitable tenders or no suitable applications have been submitted in response to a prior concession procedure[104], provided that the initial conditions of the concession contract are not substantially altered and that a report is sent to the Commission, where required.

The time limits for the receipt of applications or tenders shall take account in particular of the complexity of the concession and of the time required for drawing up tenders or applications, without prejudice to the minimum time limits.[105]

When the applications or tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the concession award, the time limits for the receipt of applications for the concession or for the receipt of tenders shall be fixed so that all economic operators concerned be aware of all the information needed to produce applications or tenders (and have, in any event, to be longer than the minimum time limits set out in the EU Directive).

It is interesting to note how the normal complexity and riskiness of the concessions affects these aspects of the procedure, allowing the public administration to require the submission of the tenders together with the applications (as for the more simple objects), or to extend the deadlines for submitting the same applications by virtue of the preliminary need to proceed with access to documents, site inspections and verifications in order to be able to submit offers (for the more complicated subjects).

The same applies to the definition of the award criteria.[106]

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[104] A tender shall be considered not to be suitable where it is irrelevant to the concession, being manifestly incapable, without substantial changes, of meeting the contracting authority or contracting entity's needs and requirements as specified in the concession documents.

An application shall be considered not to be suitable:

a) where the applicant concerned shall or may be excluded pursuant to art. 38, para. 5 to 9, or does not meet the selection criteria set out by the contracting authority or the contracting entity pursuant to art. 38, para. 1, of Directive 2014/23/EU;

b) where applications include tenders which are not suitable.

[105] In accordance with art. 39 of Directive 2014/23/EU the minimum time limit for the receipt of applications whether or not including tenders for the concession shall be 30 days from the date on which the concession notice was sent.

Where the procedure takes place in successive stages the minimum time limit for the receipt of initial tenders shall be 22 days from the date on which the invitation to tender is sent.

The time limit for receipt of tenders may be reduced by five days where the contracting authority or contracting entity accepts that tenders may be submitted by electronic means.

Concessions shall be awarded on the basis of objective criteria which ensure that tenders are assessed in conditions of effective competition so as to identify an overall economic advantage for the contracting authority or contracting entity (may be included, *inter alia*, environmental, social or innovation-related criteria).

The award criteria, which shall be linked to the subject-matter of the concessions and can not confer an unrestricted freedom of choice on the contracting authority or entity, are to be listed in descending order of importance, but the ranking order may, exceptionally, be later modified to take account of any innovative solutions.

The modification of the ranking order shall not result in discriminations.

Whereas the contracting authority or contracting entity receive a tender which proposes an innovative solution with an exceptional level of functional performance that could not have been predicted using the ordinary diligence, they shall inform all tenderers about the modification of the order of importance and shall issue a new invitation to submit tenders, in respect of the minimal time limits.

Hence, for the purposes of a fair and equitable procedure assumes importance the *lex specialis* for the award (notice, letters of invitation, other documents) where can also be indicated the possibility of reducing the number of candidates and offers (cd. "forcella"), provided that the competition is ensured.

The last paragraph of the art. 37, namely the 6th, is certainly the most interesting: "*The contracting authority or contracting entity may hold negotiations with candidates and tenderers. The subject-matter of the concession, the award criteria and the minimum requirements shall not be changed during the course of the negotiations*".

The broad faculty of negotiation conferred on the parties confirms the need to adopt a teleological-functional approach in order to run the procedures aimed at the best award of a concession. Approach that can not be disavowed by the eventuality that the greater freedom of action allowed to the (public and private) parties can lead to dishonest practices.

If the ultimate goal is to reach an optimal allocation of risks in view of efficiency, you should not overload the procedure with excessive instances that should be protected by other disciplines.[107]

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[106] Cf. art. 41 of Directive 2014/23/EU.

[107] Refer to Søreide T., *Risks of Corruption and Collusion in the Awarding of Concession Contracts*, European Parliament's Committee on Internal Market and Consumer Protection, 2012.

Compared to public procurement contracts, where the consideration is guaranteed, in the concessions the contractor runs the risk of economic failure of the operation by having only the right to exploit the management and receive the income.

The lack of typed procedures, in concert with the malleability of the same, therefore suggest that the contractor must attend in first person to plan the rules of a game in which he/she is the protagonist (in negative or in positive as the case may be).

The question is not trivial.

Just think about the treatment of concessions in Italy to understand how the attitude of legal science is not always consistent with the aim outlined.

It has already been said of the antinomy inherent in the bipolar choice to assimilate the works concession and procurement contracts for the ordinary sectors, on the one hand, while, on the other, for service concessions (and all the concessions in the utilities sector) the regime is completely uncoupled from that of public contracts.

Another example is given by the partition between the concession and the project finance.[108]

Should you consider the project financing as a concession upon a private initiative, in front of the traditional concession under public initiative, appears reasonable the greater involvement of the promoter in the first, but this can not in any way justify the sterilization of his participation in the second one.[109]

According to art. 32 of Directive 2014/23/EU concession award notices shall contain the information set out in Annex VII, among which fall – in addition to the type, main activities and identification of the contracting authority or contracting entity and to the CPV e NUTS codes – both the description of the award procedure used (with an obligation of motivation in the case of an award without prior publication) and of the concession (nature and extent of works, nature and quantity of services, duration of the contract, including any options). When the concession is divided into lots, this information shall be provided for each lot.

This means that for all the concessions awarded must be externalized the object and the assignment procedure carried out by the granting body, thus ensuring transparency and maximum disclosure.

[108] The project finance represents in fact a particular financial technique, not a legal entity to which is reconnected a special discipline: cf. Tullio A., *La finanza di progetto: profili civilistici*, Giuffrè, Milano, 2003.

So it makes little sense discerning concession and project finance as separate cases, especially when you consider that one connotes the other. You can not provide the right of management of the concessionaire unless the same relies on the economic feasibility and profitability of the operation, just as it is unlikely that the investors will finance the concession if the management does not appear profitable.

They are in any case investments for specific assets, whose intrinsic guarantee is thence given by their capacity and capability to generate profits and economies.

[109] In the intentions of the legislator the project financing had to be a sort of "private initiative" concession to encourage the private sector contribution in terms of capital and know-how.

The intent has essentially remained on paper (except for the case laid down in art. 153, para. IX ss., of d.lgs. 163/2006), having to deal with a *monstrum* of positive law composed of as many as 23 paragraphs.

Then again, given that in the project finance the private contractor develops his own initiative, submitting it to public scrutiny, remains to understand who is actually charged with the related risks.[110]

As will be seen shortly, into the national legal system (especially by the case law) has been shown off a perspective little in line with the centrality of the operational risks and their allocation.

This issue is *de plano* related to the riddle about the commutative or aleatory nature of concession contracts (v. *infra*).

As a rule, in fact, is up to the public administration include the project in the program of public works and carry out the feasibility study, which comprises the risk analysis (cf. art. 14 of d.p.r. 5 october 2010 n. 207).

In any case, with respect to the classical concession, in the project financing can be noticed a greater involvement of the private party in the design of the work.

The traditional instrument of the concession presupposes, on the part the contracting administration, the preparation of the necessary documentation for the competititon award: preliminary project, draft contract, discipline on management, business plan.

Under art. 143 of the Code, on the characteristics of public works concessions, these have, as a rule, for their object the final design, the detailed design and execution of public works and public utilities, and works structurally and directly connected, as well as their functional and economic management possibly extended, even in advance, to works or parts of works in whole or in part already realized and directly related to those subject of the concession and to be included in the same.

When the contracting authority has the final and executive design, or the final project, the object of the concession, as for the design performance, may be limited to the completion of the project, or to the review of the same by the concessionaire.

So, usually the concessionaire formulates his offer on a project prepared by the public administration and also the draft of the economic and financial plan, to cover the investments, is of public origin.

On the contrary, in all the procedures of project financing, the preliminary project − with indication of the relative costs and resources to be used − and the economic and financial plan are prepared by private individuals in full autonomy. *Ergo* "the project financing, while not setting up an autonomous legal institution – because it belongs to the genus of the concessions – is characterized by an increased attractiveness to the private partner, who, elaborating the project in all its forms and phases, since from the preliminary design, has more incentive to choose this form of cooperation with the public administration, which allows him to invest and take the entrepreneurial risk on an "idea" of his own. Indeed, it has been observed that the essential core of the institution of project financing is represented by the idea that the chances of success of the investment will tend to be greater in cases where are transferred to the concessionaire a greater degree of freedom in the design phase of the works and greater levels of operational responsibility in their management" (see Taglianetti G., *I limiti del contributo pubblico e il rischio di gestione nelle procedure di project financing*, Rivista Giuridica dell'Edilizia 1: 168, 2013).

This asymmetry within concessions is at the origin of the problems relating to the discipline of the institution, in particular as regards the allocation of the risks assumed by the concessionaire (v. *infra*).

[110] Refer to the determination of the AVCP, 14 january, n. 1, *Linee guida sulla Finanza di progetto dopo l'entrata in vigore del c.d. "Terzo Correttivo" (D.Lgs. 11 settembre 2008, n. 152)*, Clarizia A., *Concessioni, concessioni di servizi e project financing*, Report to congress on the Code of contracts, LUISS, 19 june 2006, giustamm.it (published on 29.9.2006), Lugaresi N., "Concessione di lavori pubblici e finanza di progetto", in Mastragostino F., *La collaborazione pubblico-privato e l'ordinamento amministrativo: dinamiche e modelli di partenariato in base alle recenti riforme*, Giappichelli, Torino, 2011, p. 542 ss., Baldi M.; Fasano S., *Il "rischio d'impresa" nelle operazioni di project financing*, Urbanistica e appalti 7: 803, 2012, and Gaiani L., *Project financing: problemi aperti in materia contabile e di reddito di impresa*, Fisco 32: 3136, 2014.

Even worse than the legislator has proved to be the jurisprudence when it provided an interpretation anchored to the rule of law, often favouring the tutiorist attitude summed up in the Latin maxim "*ubi lex voluit dixit, ubi noluit tacuit*".

Especially in relation to the service concessions, for which the national positive legislation consists only of a provision, *i.e.* the art. 30 of d.lgs. 163/2006.[111]

[111] The third paragraph of art. 30 of the Code of public contracts, has not only provided that the service concessionaire should be selected "in accordance with the principles established by the Treaty and the general principles relating to public contracts and, in particular, the principles of transparency, proper advertising, non-discrimination, equal treatment, mutual recognition, proportionality", but also added the necessity of a prior "informal competition to which are invited at least five competitors, if there is such a number of qualified subjects in relation to the object of the concession, and with predetermination of the selection criteria" (please refer to Cori R., *La concessione di servizi*, giustamm.it, 6, 2007 and Calderoni G., "La nuova concessione di servizi" in Mastragostino F., *La collaborazione pubblico-privato e l'ordinamento amministrativo: dinamiche e modelli di partenariato in base alle recenti riforme*, Giappichelli, Torino, 2011, p. 214 ss.).

Without prejudice to art. 30, to the service concessions apply only the rules of the d.lgs. 163/2006 which are expressions of the above-mentioned general principles: the jurisprudence has therefore had to delimit the scope of the Code.

They have been deemed applicable the "*stand still*" (T.A.R. Brescia, Sect. II, 10 april 2012, n. 618), the principle of the causes of exclusion as *numerus clausus* (T.A.R. Bari, Sect. I, 9 november 2012, n. 1907), the principle of predetermination of the rules governing the process and the criteria for evaluation of bids (T.A.R. Lecce, Sect. III, 1º august 2012, n. 1444; T.A.R. Venezia, Sect. I, 30 november 2005, n. 4114), that of predetermination of the detailed evaluation criteria for the assignment of the numerical score (T.A.R. Bari, Sect. I, 12 april 2012, n. 716), the publicity of the award sessions at least with regard to the phase of the verification of the integrity of the envelopes containing the administrative documentation and the financial bid (Council of State, Sect. V, 20 april 2011, n. 2447; T.A.R. Firenze, Sect. II, 6 july 2010, n. 2313), the availment and participation in the competition as a group (T.A.R. Roma, Sect. II-*ter*, 8 june 2012, n. 5221), as well as the prohibition of the tacit renewal of contracts (T.A.R. Genova, Sect. II, 28 march 2012, n. 430).

Conversely, the jurisprudence has rejected the application by analogy of the art. 70 of the Code – deadline for submission of tenders in relation to negotiated procedures without prior publication of a contract notice for the award of public contracts – to the field of the service concessions "because in a blatant violation of the provision contained in art. 30, paragraph 1, of the Code of Public Contracts" (Council of State, Sect. V, 11 may 2009, n. 2864), and of the art. 75 of the Code insofar as it requires the filing of a provisional deposit (Cons. Stato, Sect. V, 13 july 2010, n. 4510, with a note by Contessa C., *Le regole applicabili alle concessioni di servizi fra peculiarità disciplinari e lacune normative*, Urbanistica e appalti 12: 1437, 2010), of the discipline on the anomaly of tenders (T.A.R. Latina, Sect. I, 7 march 2012, n. 195; Cons. Stato, Sect. V, 24 march 2011, n. 1784 (confirms T.A.R. Milano, Sect. I, n. 6073/2009); T.A.R. Perugia, Sect. I, 1 december 2011, n. 389), as well as of the rule about the appointment and the establishment of the Selection Committee after the expiry of the deadline for the submission of tenders pursuant to art. 84, paragraph 10, of the Code (T.A.R. Firenze, Sect. II, 20 december 2010, n. 6781, with a note by Taglianetti G., *La distinzione tra appalto e concessione e l'(in)applicabilità dell'art. 84, comma 10, d. lgs. n. 163 del 2006 alle concessioni di servizi*, Foro Amministrativo T.A.R. 7-8: 2308, 2011).

This last profile was then subject to *revirement* by Council of State: Sect. V, 23 may 2011, n. 3086 (confirms T.A.R. Campobasso, Sect. I, n. 651/2009) and Ad. Plen. 7 may 2013, n. 13 (commented by Berionni L., *L'applicabilità delle norme del Codice dei contratti pubblici alle concessioni di servizi*, Foro Amministrativo 7-8: 1913, 2014), which considered applicable to service concessions the art. 84, para. 4 (concerning the incompatibility of the members of the Selection Committee) and 10 (relative to the time of appointment of the Committee), of d.lgs. 163/2006 "for their nature of direct derivation from general principles, mandatory rules, expressive of general principles consolidated in the field and therefore as such, able to integrate and overlap the *lex specialis*".

In the national context occurs the tendency of overlook the essence of concessions and concentrate, in a quite self-referential way, on the positive law and the legal traditions, forgetting the concession risk and its repercussions on the procedures.[112]

Likewise, the Adunanza Plenaria – 6 august 2013, n. 19 – has had to rule on the provisional deposit *ex* art. 75 of d.lgs. 163/2006 and the so-called "social clause" in art. 69 of d.lgs. 163/2006 on the conditions for the execution of the contract.

A precedent on a similar case (Council of State, Sect. VI, 26 june 2012, n. 3764) had considered legitimate the conditions, attached to the letter of invitation addressed to the companies already pre-qualified for a concession, including the obligation to provide a security, in accordance with art. 75 and requiring, under penalty of exclusion, the obligation to mantain the jobs of the former employees of the previous concessionaire.

In relation to the first question, *i.e*. the *quantum* of the security, the Adunanza Plenaria has come to the conclusion of the legitimacy of the provisional deposit clarifying that it should be calculated on the full value of the concession, not only on the amount of the premium of the concessionaire.

Regarding the second question, namely the social clause, the Adunanza Plenaria ends up rejecting "the applicability of specific legislative provisions – such as the art. 69 of d.lgs. 163/2006 – *per se* unrelated to the service concession", since not representing general principles.

As you can see, by the latter decision, the jurisprudence has shown a wavering attitude, directly related to the subjective perception of the judges in the individual case and very often hinged on the text of the law rather than on the rationale of the same, which has not helped to solve the problem of the extension of the discipline of the Code to the concessions.

Justify the application of the only rules expressive of the general principles leaves too much room for the discretionary power of the public administrations (although they still have the shield of self-constraint), but above all for the interpretative function of the courts, creating legal uncertainty.

With the approval of the new EU Directive is presumable that the situation will not change much.

The Directive 2014/23/EU remains very abstract and delegates to the Member States the burden of preparing the specific disciplines for the award of concessions, with the consequent shift of the problem into the hands of the national legislator.

[112] For a practical reflection read, for example, Council of State, Sect. V, 30 april 2014, n. 2249.

The dispute in question has concerned the negotiated procedure arranged by the City of Verona for the concession of the bike sharing service, to be managed for a period of fifteen years.

The award documentation having not set a specific and accurate method of certification, a competitor had provided a rough indication, without chronological details, of the previous professional experiences, getting from the jury zero points as score for activated services in other cities.

According to the T.A.R. the Commission had not adequately justified this determination, resulting not sufficient for this purpose the failure to indicate the date of activation of the different services and the failure to produce the documents about the successful installation and operation of the service, considering that the technical discipline had left the competitors free to indicate, without formalities, that curricular item; therefore it approved the claim of the competitor for lack of preliminary activity and motivation.

In the face of the appeal by the City of Verona, focused on the facts that it could not be used the cd. "soccorso istruttorio" (preliminary activity rescue), since it was a service concession (art. 30 d.lgs. 163/2006 does not recall art. 46), and that, anyway, such an institution could not be used to complete the technical bid, the Council of State has reformed the judgement of first instance by merely reproducing the statements of Adunanza Plenaria, 25 february 2014, n. 9, and ruling that in this case the Selection Committee had only an option - not an obligation - to use the preliminary activity rescue, option, however, that could not be exercised because such a tool allows you to complete declarations or documents already submitted (but not to introduce new ones) and could never be used to make up for supply shortages, except for the correction of material mistakes or typos: "so that, the Committee could not speak with the bidder, in order to achieve the integration of unsuitable documents under penalty of violation of the principles of impartiality and *par condicio*" (emphasis added).

Whether you want to identify the legal basis of the "preliminary activity rescue" in the Constitution, in d.lgs. 163/2006 or in L. n. 241 del 1990, according to the administrative procedure in turn, little changes when you are dealing with a formal deficiency that could be easily remedied.

So you may experience a certain detachment from the European matrix that should characterize certain institutes.

This seems confirmed by the role that assumes the economic and financial balance of the concession in our legal system. In relation to the latter point, the new EU Directive on concessions appears to be in a direction not much collimating with the recent Italian experience, mostly focused on the national picture (v. *infra*).

Apart from the question relating to the nature mandatory or not of the "preliminary activity rescue" (on which see the aforementioned Ad. Plen. n. 9/2014), it should be remembered that the procedure in question was of the "negotiated" type and thence an interaction between the client and the candidate was definitely included in the legal type chosen, especially when you consider that there were beginnings of proof for what required by the *lex specialis*.

If it is true that the negotiation in such procedures must comply with the obligation of *par condicio*, including the prohibition to provide advantaging information, is also true that the adaptation of the tender to the needs of the client presupposes a certain margin of maneuver also for the rest (of course *cum grano salis*: you can not make up for the total lack of certain requirements, but you could overcome the formal shortages through an integration or specification not affecting the legality of competition insofar as it concerns the clarification of a situation already occurred and acquired, albeit incomplete or accompanied by misstatements, or the production of documents already indicated in the offer).

Had it not been allowed such a corrective at a preliminary stage of the investigations, one wonders what fate awaits the Code provisions relating to negotiated procedures – paragraphs 2, 3 and 4 of art. 56 – and competitive dialogue, such as art. 58, paragraphs 14 and 16, d.lgs. 163/2006, where, in essence, it is stated that tenders may be clarified, specified and refined, without, however, changing the basic features of the tender or of the contract in a way that is anti-competitive or discriminatory.

Anyway, the Council of State, in a precedent – Sect. V, n. 3750, 12 june 2009 – *expressis verbis* stated that "The integration of the offer, of course, is to be considered admissible only if, through it, you do not bring about an essential change to the original offer and not when via the surreptitious form of integration, clarification or specification of the constituting elements of the offer itself, missing or gravely incomplete, you arrive at a modification of the original offer through a new manifestation of the contractual will, fully autonomous and independent as to its actual content than the original one. In conclusion, according to this Section, the original bid submitted was lacking the essential elements in order to be considered serious, reliable and valid, and by specifying the same has been unlawfully permitted not merely the specification, but its replacement with a new offer, as a result of a new and different contractual will. So it was violated, as the judges have rightly observed, the fundamental principle in public procedures of *par condicio* of competitors".

Then continues the Council of State: "The observations above exclude any importance to the fact that in the letter of invitation was specifically provided that the contracting entity could invite the competing companies to complete or clarify the content of the documents submitted or to the interpretation of the offer: in fact this requirement, that well is framed indeed in the c.d. rescue duty which is required to the contracting authorities in a vision not purely formal of charges and obligations that are imposed on participants in the proceedings of public evidence, must be properly understood and interpreted consistently with the principles of impartiality and good performance, predicates by Article 97 of Constitution, and therefore presuppose a valid bid, serious, reliable, complete in its essential elements, characters that did not countersign, as has been shown, the one presented[*omissis*]. Neither it is helpful for the thesis of the appellant contracting entity invoke the negotiated nature of the tender procedure in question, given that this does not exempt the administration from regularly comply with the requirements laid down in the *lex specialis* of the award: these in fact do not bind only the competitors, but the same administration that does not mantain, therefore, any margin of discretionary power in their concrete implementation (*ex pluribus*, C.d.S., Sect. IV, 21 may 2004, n. 3297; Sect. V, 10 january 2005, n. 32; 13 november 2002, n. 6300), nor can disapply them (even if some of the rules appear to be formulated inappropriately or incongruously, without prejudice to the possibility to put in place, in the exercise of the power of self-defense, the annulment of the tender notice, C.d.S., sez. V, 30 december 2004, n. 8292; sez. VI, 1 october 2003, n. 5712; 14 january 2002, n. 166)".

It is clear that a flexible procedure can not remedy an absolute deficiency of the offer submitted, but it is not unreasonable to expect a greater degree of collaboration between the the public and private parties.

§4.1.2. Contracts: the Directives 2014/24/EU, 2014/25/EU and the internal frame

The simplification and standardization of the simple procurement contracts

As said, at European level, the procedural model of the concessions is flexible and capable of adaptation to the specific subject (what it implies a procedure calibrated over individual objects and guided by the general principles governing the administrative action: proportionality, reasonableness, good performance, ban on aggravations,...), because of the existence of an unique procedure for different sectors and contents (works and services, simple or complex, depending on the actual operating risk).

The Directives on public procurement contracts, in line with a tradition over many decades, have made a choice quite different, even if they are divergent one from the other.

In general, in awarding public procurement contracts, the contracting authorities have to apply the national procedures adjusted to be in conformity with the European Directives, *id est* on the condition that it is published a notice of call for competition (except for the use of the negotiated procedure without notice in exceptional cases).[113]

As for the public contracts in the ordinary sectors, it is of particular significance the art. 26 of Directive 2014/24/EU, concerning the selection of procedures.

The norm provides the possibility for the contracting authorities to apply open or restricted procedures as a general rule, but also allows to use the innovation partnerships and apply a competitive procedure with negotiation or a competitive dialogue in particular circumstances.[114]

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[113] The content of the notices does not differ from that already seen for concession: cf. Annex V to the Directive 2014/24/EU and Annex XI to the Directive 2014/25/EU.

[114] In the ordinary sectors the use of the flexible procedures for works, supplies or services must fulfill one or more of the following criteria:

i) the needs of the contracting authority cannot be met without adaptation of readily available solutions;

ii) works, supplies or services include design or innovative solutions;

iii) the contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial make-up or because of the risks attaching to them;

iv) the technical specifications cannot be established with sufficient precision by the contracting authority with reference to a standard, European Technical Assessment, common technical specification or technical reference within the meaning of points 2 to 5 of Annex VII to the Directive.

With regard to works, supplies or services where, in response to an open or a restricted procedure, only irregular or unacceptable tenders are submitted. In such situations contracting authorities shall not be required to publish a contract notice where they include in the procedure all of, and only, the tenderers which satisfy the criteria set out in Articles 57 to 64 and which, during the prior open or restricted procedure, submitted tenders in accordance with the formal requirements of the procurement procedure.

As a residual *extrema ratio* remains the negotiated procedure without prior publication.

In turn the Italian system, except for the newly introduced innovation partnerships, has always aligned itself to what is now an European tradition.

For the identification of the economic operators that may tender for the award of a public contract, the contracting authorities utilize open, restricted, negotiated procedures, or a competitive dialogue. They shall award public contracts by open or restricted procedure; nevertheless, in specific circumstances expressly provided for, they may award contracts through a competitive dialogue and a negotiated procedure with or without publication of the contract notice.[115]

Therefore finds confirmation the starting premise under which to the flexibility characterizing the concessions is opposed the normal award of ordinary public contracts through procedures rather rigid and standardized.

The perspective radically changes within the special sectors regulated by the Directive 2014/25/EU.

Although art. 44 establishes that only the procurement of goods, works or services must be preceded by the publication of a notice of call for competition, seems to be of great value the aside "*salvo il disposto dell'articolo 47*" on the use of the negotiated procedure with prior call for competition.[116]

In particular, tenders which do not comply with the procurement documents, which were received late, where there is evidence of collusion or corruption, or which have been found by the contracting authority to be abnormally low, shall be considered as being irregular, whilst shall be considered as unacceptable tenders submitted by tenderers that do not have the required qualifications, and tenders whose price exceeds the contracting authority's budget as determined and documented prior to the launching of the procurement procedure.

[115] Cf. art. 54 ss. d.lgs. 163/2006.

The discourse becomes a bit more complicated for the contracts which fall below the EU thresholds, where you have acquisitions in economy (as the cd. "cottimo fiduciario"), the simplified restricted procedure for contracts involving only the execution of works of less than one million and five hundred thousand Euros and a negotiated informal procedure for works up to one million Euros (with invitation to at least ten subjects for works of an amount equal or more than five hundred thousand Euros and at least five subjects for work amounting to less than five hundred thousand Euros): cf. art. 121 ss. of the Code.

[116] The Union legislator has bothered to specify *expressis verbis* that the procedure at last mentioned must in all respects be considered equivalent to every other.

In the English version appears the expression "*without prejudice to Article 47*", which emphasizes more the safeguard towards the competitive negotiated procedure with publication.

Previously, within the norm for the contracts award procedures, the Directive 2004/17/EC contained a different passage that kept safe the extraordinary recourse to the negotiated procedure without publication (just as it happens now in the new Directive 2014/24/EU on public procurement contracts: cf. art. 26 thereof).

One of the two things indeed: either it is a typo or else it would like to promote the competitive procedure with negotiation.

Ever since the beginning the EU Directives emanated over time have consented for the utilities in special sectors an operational freedom unfamiliar to the ordinary sectors.[117]

In the last one, the Directive 2014/25/EU, such an address has been confirmed.

This seems partly contradicted by paragraphs 2 and 3 of the same art. 44, where a distinction is made between the procedures open, restricted or negotiated with prior call for competition, on one hand, and the competitive dialogue and innovation partnerships, on the other. As if wanting to keep separate the procedures of "Serie A" from those of "Serie B".

Actually there is no real gap between the two categories.

Unlike the ordinary sectors, where are identified the conditions in order to use the more flexible procedures (v. *supra*), in fact, the article provides only that the competition may be made with one of the following ways:

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[117] As it is known, in the field of public procurement, the first European Directives in the 70s of last century had excluded from their scope some sectors particularly strategic.

These sectors (water, energy, gas, transport services, telecommunications), characterized by great political and economic significance, at first took the epithet of "excluded", awaiting to be regulated in a fairly differentiated manner than the ordinary sectors.

Only in the 90s the European plexus has come to a discipline *ad hoc* of these sectors, which have thus taken the name of "special".

But how do we justify it and what is actually such speciality?

The answer to the first part of the question made is quite straightforward and is enucleated in the Community sources, which – in front of the extreme heterogeneity of objects and entities in these sectors – have decided to introduce a "tempered" competition regime, inspired by fairness and flexibility at the same time (cf. now recital 2 Dir. 2014/25/EU; refer also to the opinions of the Economic and Social Committee on the proposals for Council Directives relating to the procurement procedures of entities operating in the water, energy, and transport services (89/C 139/08) and on the procurement procedures of entities operating in the telecommunications sector (89/C 139/09), where it is stressed that the liberalization of public procurement must not jeopardize the attainment of these important functions in terms of regional policy).

The most obvious reason – crystallized in the initial recital of the new EU Directive – consists in elements both objective (construction, extension, operation and maintenance of strategic infrastructure, unduplicable, public utilities in closed and potentially monopolistic markets) and subjective (national authorities are able to influence the behavior of operating entities, sometimes public other times private, through the regulation of the sector, the participation in their capital or the inclusion of their representatives in the management, administrative or supervisory bodies).

A further argument for continuing to regulate by law the public procurement in these areas consists in the persistence of special or exclusive rights held by subjects – that are neither contracting authorities nor public undertakings – not selected with a procedure based upon objective criteria and after proper advertising, in accordance with Union legislation (cf. now recital 20 Dir. 2014/25/EU).

The result is a composite picture, made of public and/or private providers of economic and industrial services often under monopoly and monopsony.

The mass of entities operating in the utilities sectors must fulfill their tasks beyond the special sectors *de quibus*: whereas for the contracting authorities it is imposed the compliance with the Directive 2014/24/EU on the procurement in ordinary sectors, for public companies and private subjects that means being again exposed to the free market.

Then it should be avoided that the competitive situations of public enterprises and of private subjects are aggravated by overly bureaucratic tendering procedures in the utilities sectors.

In order to reconcile these two opposite needs has been allowed and is still allowed a higher degree of liberty in choosing and using tender procedures.

- by means of a contract notice;
- a periodic indicative notice where the contract is awarded by restricted or negotiated procedure;
- a notice on the existence of a qualification system where the contract is awarded by restricted or negotiated procedure or by a competitive dialogue or an innovation partnership.

Consequently, all procedures with prior publication are placed on the same plane.

At the conclusion of the norm, the last paragraph of art. 44 – really making a caesura on the qualitative standards of the procedures – includes the negotiated procedure without prior call for competition, recalling its exceptionality and ratifying its prohibition outside the cases and circumstances expressly laid down in art. 50.

So the real dichotomy occurs between the negotiated procedures.

Only the negotiated procedure with prior call for competition is always allowed.[118]

And here we find the more evident dystonia compared to the ordinary sectors, where the negotiation is in principle recessive in response to the predominance of open and restricted procedures.

Anyway, the biggest novelty brought about by the new Directive 2014/25/EU consists in having a separate article for each procedural type (the rules of the previous one made reference to the various aspects and steps of procedures).[119]

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[118] Structure that also characterizes the national legal system: cf. art. 220 and 221 d.lgs. 163/2006.

[119] In relation to restricted and negotiated procedure with prior call for competition, competitive dialogue and innovation partnerships, the Directive 2014/25/EU (an identical text is in Directive 2014/24/EU) raises a hermeneutical question of no small importance when, after stating that "any economic operator may submit a request to participate in response to a call for competition by providing the information for qualitative selection that is requested by the contracting entity", provides that "*Only those economic operators invited to do so by the contracting entity following its assessment of the information provided*" may submit a tender and participate in the procedure, in the negotiations, or in the dialogue (cf. artt. 46-49 Dir. 2014/25/EU, equivalent to artt. 28-31 Dir. 2014/24/EU).

Note the difference in wording contained in art. 47 of the Directive 2004/17/EC of 31 march 2004: "In restricted procedures and negotiated procedures, contracting entities shall simultaneously and in writing invite the selected candidates to submit their tenders or to negotiate".

Thence it seems possible to discern the chance to make highly discretionary choices on the part of the contracting authorities.

In addition to the usual option to prepare objective criteria by which to reduce the candidates within a numerical range appropriate to the contract, the Directive appears to accept a sort of evaluation *ad libitum* about whom to be invited to participate in the procedure.

Of course, it is useful remembering this, must be applied all the chrisms relating to the administrative *agere* (which in Italy find their source in the L. 7 august 1990, n. 241 either for public and private parties: cf. art. 1, paragraphs 1 and 1-*ter*), but the fact remains that it is permissible to imagine a discretionary margin hardly verifiable and controllable.

Apart from some differences about the call for competition (prior information and notices for the ordinary sectors, the modes just examined for the special ones), you can still find a common plot across the different sectors.[120]

To the stage of publication of notices and competition rules it follows the one of participants selection and award of contracts, based on the criteria for qualitative selection and contract award as well as on the grounds for exclusion.[121]

In this procedural series, especially in the open and restricted procedures (but also in the competitive negotiated), it is very difficult for the candidates to contribute actively to the proceedings but for the inclusion of variants by the purchaser.[122]

What it would indicate a certain simplicity of the object of tendering.

If anything, the goal is to reduce the number of candidates (via the cd. "forcella")[123] or facilitate the outcome of the competition in order to the commonly used or off-the-shelf purchases, whose characteristics, as far as generally available on the market, are able to meet the needs of the contracting entities.

So much that the trend is in the opposite direction, that is towards techniques and tools for electronic and aggregated procurement, which are used to simplify and streamline the procedures, while maintaining a certain distance between contractors and contracting authorities through the unification of demand and the interposition of subjects more or less third or screens (framework agreements, dynamic purchasing systems, electronic auctions, electronic catalogues, centralization of clients and purchasing, occasional joint procurement and/or between contracting entities from different Member States).[124]

If in fact such a discretion can be deemed reasonable when reconnected to the preparation of any preliminary range and objective criteria, its exercise *in itinere* clashes with the principles of *par condicio* and *favor partecipationis*.

In theory, except for the cd. "forcella", all participants who meet the quality requirements requested should be invited to the tender, in the negotiations or in the dialogue. The selection should be so to say "automatic": either you are eligible to be invited or not, without any room for subjective assessments.

Differently, the new EU Directives seem to go further and accentuate the operational flexibility.

[120] Also with regard to design contests (artt. 78-82 Dir. 2014/24/EU and artt. 95-98 Dir. 2014/25/EU) and to the award of contracts for specific services (such as the social ones: cf. artt. 74-77 Dir. 2014/24/EU and artt. 91-94 Dir. 2014/25/EU).

[121] Refer to Lacava C., *Le nuove procedure, la partecipazione e l'aggiudicazione*, relation at the conference "Il recepimento delle nuove direttive sui contratti pubblici", at the Chamber of Deputies, Rome, 19 january 2015, Giornale di diritto amministrativo 12: 1141-1150, 2014.

[122] Cf. art. 45 Dir. 2014/24/EU and art. 64 Dir. 2014/25/EU, respectively.

[123] Cf. artt. 65-66 Dir. 2014/24/EU and artt. 76-78 (para. II) Dir. 2014/25/EU.

[124] Cf. artt. 33-39 Dir. 2014/24/EU, equivalent to artt. 51-57 Dir. 2014/25/EU, namely the articles of Title II, Chapter II - "Techniques and instruments for electronic and aggregated procurement" of the Directives 24 and 25 of 2014 on procurement contracts.

The phase of contract

Has gained ground the idea that the contract is basically a *risk allocation device*.[125]

The contracting parties assume or not certain risks and define the respective spheres of relevance committing themselves to exploit the economies and bear the possible losses.

What it leads to distinguish not just the content of the single contract in terms of obligations but also among different contractual types.[126]

These assumptions turn out to be only right for the question that concerns us here.

The distinction between public contracts and concessions, based on the risk, must be assessed by taking into due account that, while from the standpoint of the awarding procedure the concessionaire should be able to actively participate in the allocation of risk, during the contractual execution the operating risk of concessions creates a model entirely different from that of the public contract.

On the topic can be found in Cristina F., *Le nuove direttive sugli appalti pubblici e le concessioni*, Giornale di diritto amministrativo 12: 1135, 2014, who, however, questions whether purchasing centers are a good way to prevent illegality and corruption, as well as of optimizing the public expenditure by reducing waste, because of the constant risk of phenomena of *capture*.

[125] Cf. Flume W., *Rechtsgeschäft und Privatautonomie*, Hundert Jahre deutsches Rechtsleben, 1960; Atiyah P. S., *An introduction to the law of contract*, Clarendon Press, 1961.

Gabrielli E., *Dottrine e rimedi nella sopravvenienza contrattuale*, conference of 29 march 2012, Faculdade de Direito da Universidade de São Paulo, intended for the *Volumem en homenaje al profesor Fernando Hinestrosa*, Jus Civile (http://www.juscivile.it/contributi/01%20-%20Enrico%20Gabrielli.pdf) observes on this point that "each type of contract is at the same time «a plan for the distribution of the risks». The choice of the contractual type represents therefore a technique to distribute the risks within the contract and allows to evaluate, with respect to its overall economy, the compatibility between the original structure of interests and the one present at the moment of fulfillment. Each contract has in fact the economic equilibrium that the parties give to it, so that in its «economy», intended as the allocation of the risk of an occurrence that results time by time in compliance with the regulation of interests contractually agreed, each performance has always and only the value of the consideration given by the interested contractor in order to obtain it and not an abstract and objective market value. The adoption of a certain type of contract is then index of the choice that the contracting parties have wanted to make on the allocation of the risks arising from the contract, so that depending on the model of negotiation, to which the parties have referred, can be inferred what party has to bear the consequences that are inevitably reconnected to the formal legal scheme into which the entire economic operation falls. The allocation of the contractual risk marks the limit up to which you can bear oscillations able to affect the measure of the exchange without, at the same time, operating changes that prevent the realization of such a function. The measure established by the parties for the sharing of the contractual risk – since the event occurred can affect the measure of the exchange meter, and thus the function of the exchange in practice – may thence represent an index of enucleation and evaluation of the defects of this function, because it allows to ascertain the possible alterations of the same.[…]We must, therefore, necessarily examine whether the type (or sub-type) of the contract put in place, for its content or for its function, does not in itself imply that at the time of its perfecting there is or should be the awareness for the parties to face necessarily a certain margin of risk, connected to the possible occurrence of incidents and events that normally affect the performance «of that single type of relationship and influence the economic result that the parties want to achieve»."

[126] Cf. Bessone M., *Adempimento e rischio contrattuale*, Giuffrè, Milano, 1975, pp. 2-3 ss. and 291, who reiterates that every contractual type is already in itself a model for the distribution of risks and therefore the choice of its kind suggests the criteria by which allocate among the contractors the damage caused by circumstances even neglected by the contractual clauses.

This means that it is not possible to look at this last case as useful to fill in the gaps, through the analogical or extensive interpretation, in spite of what has been done by the EU Directives on public procurement (which have opted for the homologation of the discipline about the modification of contracts during their term).

That temptation has characterized and characterizes the national scenario too.

As will be shown, it is an error of method and, before that, of concept, because ends up annulling the distinction between public procurement contracts and concessions.

It would make no sense to set such a distinction on the allocation of risk and then cancelling it through the application of uniform rules that ignore the differences.

§4.2.1. The risk of management in the concessions: the Directive 2014/23/EU

The duration and value of concessions

Duration and value of concessions represent a counterbalance for the operating risk: the concessionaire assumes certain operational risks in lieu of the public administration and, for this activity of substitution, expects to have the just reward as long as necessary.[127]

Depending on the type of concession and on the object – works and/or services that are simple or complex – there can be short or long concessions.[128]

According to the Directive 2014/23/EU, the duration of a concession should be limited in order to avoid market foreclosure, restrictions of competition and obstacles to the free movement of services and freedom of establishment caused by the concessions of very long duration (permitted only if indispensable to allow the concessionaire to obtain a return on the invested capital and recoup the investments planned to perform the concession).

Consequently, for concessions lasting more than five years, the duration should be limited to the period in which the concessionaire could reasonably be expected to recoup the investment made for operating the works and services together with a return on invested capital under normal operating conditions, taking into account the specific contractual objectives undertaken by the concessionaire relating to quality or price for users.[129]

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[127] The Interpretative Communication on concessions under Community law (2000/C 121/02) already ruled that the principle of proportionality wants competition to be reconciled with financial stability: "the duration of the concession must be set so that it does not limit open competition beyond what is required to ensure that the investment is paid off and there is a reasonable return on invested capital, whilst maintaining a risk inherent in exploitation by the concessionaire" (pt. 3.1.3).

[128] Sometimes very long: in *Eurotunnel* (v. *infra*), for example, the base term is fixed at 99 years, reducible to 65.

[129] Cf. recital 52 and art. 18 Dir. 2014/23/EU.

As identified by the Court of Justice, must be excluded the possibility of assign concessions for unlimited periods, by recognizing to the concessionaire a right of limitless duration on the assets under the concession.[130]

The EU Directive has thence finally resolved the issues of interpretation that arose in relation to the possibility of concessions for an indefinite period or infinite duration, making clear that the concession must not only be temporary, but it must also have a term determined with certainty.

Although concessions must have a time limit in order to reopen the market to free competition, the duration shall ensure to the concessionaire the amortization of the initial investment, an appropriate return on the invested capital and the refinancing of future investments. These estimates must be valid at the time of the award of the concession and the investment taken into account for the calculation shall include both the initial ones and those in the course of concession.[131]

But there are some quite problematic profiles.

One is certainly the fact that the maximum duration of the concession should be decided unilaterally by the public administration and indicated in the tender documents as a binding requirement non-negotiable (save the variants permitted), unless the term is used as a criterion for the award of contracts: hypothesis even more critical given that, in this case, the competition would play exactly on one of the items of greater risk in the concession, which could affect the accomplishment of the same.

It should then be possible to negotiate with each candidate the duration that best fits the individual proposal, assuming even different durations for the different offers of the applicants for the concession and excluding the renegotiation a posteriori, retrospectively, whenever the estimates, provided by the concessionaire in the awarding, would prove to be erroneous in practice (at least for the risks allocated into his sphere, leaving aside the ones *ex lege* or for *factum principis* and those absolutely extraordinary: v. *infra*).

Another question, yet again, is the possibility for the contracting authorities and contracting entities to award a concession for a period shorter than the time necessary to

[130] See above the notes n. 63 and 65: ECJ, Sect. III, 25 march 2010, C-451/08, *Helmut Müller*; and footnote n. 67: ECJ, Sect. II, 11 july 2013, C-576/10, *Commission/Netherlands*.

[131] It should be possible to include initial and further investments deemed necessary for the operating of the concession in particular expenditure on infrastructure, copyrights, patents, equipment, logistics, hiring, training of personnel and initial expenses.

recoup the investments, provided that the corresponding compensation does not eliminate the operating risk.

Here you definitely have two alternatives: either the residual value of the concession is crystallized in the original contract or is evaluated at the time of expiry of the concession, with the effect – in any case – to be paid by the public administration or by the incoming successor and without any consideration of the potential risks linked to it.

In such circumstances it is likely to expect a certain difficulty in the classification of the case because the operating risk of concessions could be curbed.

To the duration of concessions inevitably relates the value of the same.

The method for calculating the estimated value of concessions, unique for works and services, refers to the total turnover, net of VAT, of the concessionaire for the duration of the contract.

The EU Directive applies to concession contracts for the provision of works and/or services whose value is equal to or greater than a predetermined threshold (5.186.000 €), which should reflect the clear cross-border interest of concessions for economic operators established in Member States other than the one of the contracting authority or entity.

The value of a concession is to consist in the total revenues of the concessionaire generated over the duration of the contract, excluding VAT, as estimated by the contracting authority or entity in consideration for the works and services subject of the concession, as well as for the supplies which are incidental to such work and services.

Wish to highlight that the estimated value of the concession is calculated using an objective method specified in the concession documents, taking into account in particular:

- the value of any form of option and extension of the duration of the concession;
- the proceeds from the payment by the users of fees and fines other than those collected on behalf of the contracting authority or contracting entity;
- the payments or any financial advantage in any form whatsoever conferred to the concessionaire by the contracting authority or entity or by other public administrations (including any compensation for the compliance with a public service obligation and public investment subsidies);
- the value of grants or any other financial advantages, in any form, from third parties for the performance of the concession;
- the revenue from sales of any assets which are part of the concession;

- the value of all the supplies and services that are made available to the concessionaire by the contracting authorities or contracting entities, provided that they are necessary for executing the works or providing the services;
- any prizes or payments to candidates or tenderers.[132]

Like for the duration, the EU Directive has finally put an end to the uncertainty on how to calculate the value of concessions, by including any economic advantage – regardless of its origin (contracting authority or entity, other public administrations, third parties) – deriving from the management until the expiry date.

It should not be underestimated the fundamental aspect of the changes in value of the concession over time (v. *infra*).

This value is estimated at the moment of the concession notice or, where it is not provided that notice, at the time when the contracting authority or entity shall initiate the procedure for the award of the concession (for example, by contacting economic operators and inviting them to express their interest).

The Directive takes in consideration only the variation in the tendering procedure[133], whilst it fails to specifically address the problem relating to the changed value of the concession during the contract execution, preferring to entrust it to the generic discipline of the modifications in the course of work.

The modification of concessions

On the assumption that the concession contracts generally involve complex technical and financial arrangements and long lasting, subject to changing circumstances, the Directive makes it clear, having regard to the case law of the European Court of Justice on the matter, the conditions under which the changes of a concession during its execution require a new award procedure.

A new concession procedure is necessary whenever there are material changes to the initial concession, in particular to the scope and content of the rights and reciprocal obligations of the parties, demonstrating the parties' intention to renegotiate essential terms or conditions of the concession.

[132] Cf. recital 23 and art. 8 Dir. 2014/23/EU.

[133] Should the value of the concession at the time of the award be more than 20% higher than its estimated value, then the valid estimate shall be the value of the concession at the time of the award.

Nonetheless, the contracting authorities and contracting entities can be faced with external circumstances impossible to predict at the moment of the awarding[134], in particular when the performance of the concession covers a long period.

In these cases a certain degree of flexibility is unquestionably needed in order to adapt the concession to the circumstances without a new award procedure, except that the modifications involve a variation in the overall nature of the concession (for instance, by replacing the work to be performed or the services to be provided with something different, or through a substantial change in the type of concession).

One might add also the transformation of the concession in a public contract.

Rather, in light of all the foregoing, that one should be without a doubt the principal purpose of the European rules about the concessions, but at present state can not be said that the objective has been achieved.

The European Union discipline on the modification of contracts during their term[135] in fact raises some concerns, mainly stemming from the extension of the rules provided for procurement contracts.

Since the peculiar characteristic of the concessions consists in the risk-taking by the concessionaire, the problem regards both the changes permitted and their consequences, that is to say which contingencies can cause a modification of the concession and whether they can affect the operating risk of the concession.

Considering that concession contracts typically involve long-term and complex technical and financial arrangements, subject to changes in the circumstances, it is therefore necessary to understand to what extent the risk can be, so to say, "absorbed" from the original contract (minor amendments) and when it leads to a new procedure for the award of the concession (substantial changes).[136]

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[134] The concept of "unforeseeable circumstances" refers to the circumstances that could not have been predicted despite a reasonably diligent preparation of the initial award by the contracting authority or contracting entity, taking into account its available means, the nature and characteristics of the specific project, good practices in the field in question and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value.

[135] Cf. recital 75, 76, 77, 78, 79 and art. 43 Dir. 2014/23/EU.

[136] Art. 43, para. 2, of the European Directive allows the modification of contracts under execution, without the need for a new award procedure, where both of the following conditions are met:

(a) the value of the modification is below the European threshold;

(b) the modification does not exceed 10% of the value of the initial concession.

However, the modification may not alter the overall nature of the concession.

What's more, the contracting authorities and contracting entities may provide for amendments to the concession by means of review clauses or options (price indexing, adaptation to technological changes, adjustments as a result of technical difficulties appeared during operation or maintenance), but without that such clauses could give them an unlimited discretionary power nor they can alter the scope of the concession agreement, and as far as they are expressly indicated in the tendering procedure.

Contracting authorities and contracting entities might also be faced with situations where additional works or services become necessary.[137]

Regardless of the threshold for the cases typified (additional works or services on the part of the original concessionaire which have become necessary and were not included in the initial concession; circumstances that a diligent contracting authority or entity could not have foreseen; changing of the concessionaire) – where, except for the special sectors, any increase in value shall not exceed 50% of the value of the initial concession – it is important to highlight that the modification of a concession during the period of its validity is always considered to be substantial:

- when it introduces conditions which, had they been part of the initial concession award procedure, would have allowed for the admission of applicants other than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the concession award procedure;
- whether it does change the economic balance of the concession in favour of the concessionaire in a manner which was not provided for in the initial concession;
- if it extends the scope of the concession considerably;
- where a new concessionaire replaces the one to which the contracting authority or contracting entity had initially awarded the concession in cases other than those provided for under the EU Directive.[138]

[137] In such cases the modification of the concession is permitted only when a new award cannot be made due to economic or technical reasons (such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial concession) as it would cause significant inconvenience or substantial duplication of costs for the contracting authority or contracting entity.

[138] Cf. recital 77 Dir. 2014/23/EU: "In line with the principles of equal treatment and transparency, the successful tenderer should not, for instance where a concession is terminated because of deficiencies in the performance, be replaced by another economic operator without reopening the concession to competition. However, the successful tenderer performing the concession should be able, in particular where the concession has been awarded to a group of economic operators, to undergo certain structural changes during the performance of the concession, such as purely internal reorganisations, takeovers, mergers and

The circumstances that arouse major concerns (and issues of compatibility with the current Italian legal system) are definitely the second and the third ones.

Considering a "substantial modification" every restoration of the economic balance of the concession in favour of the concessionaire by ways not been laid down in the initial concession, thus maintaining the allocation of risks established in the tendering procedure and in the contract, is surely dutiful but it does not clarify the distinction between public contracts and concessions, just like the variations for additional works/services and unforeseeable contingencies do not state who should take on such modifications.

As we will see later, while the rule should be deemed appropriate for the contracts, it seems conversely to dull the distinction with respect to concessions, where the contractor who assumes the operational risks should be basically free to handle unexpected events and contingencies to the extent that they fall within his/her sphere of interest.

In its turn, the prohibition of significant extensions of the scope of the concession actually seems to restrict the operating space that should characterize the entire concession proceedings, from the choice of the object and contractor up to the contractual execution (especially if the burden of the modification falls on the concessionaire).

After all, since the concession contracts are complex arrangements (for nothing but their duration), the risks of which end up pouring even on private subjects, it seems reasonable to allow a certain margin of flexibility and adaptation of the same unless you want to determine the discouragement about the concessions or, at worst, their distorted use (the competition upstream, in the tendering procedure, would be frustrated as it should take into account the limited modifiability *in fieri* of the concession).

So it is probable that the candidates will opt for some caution in formulate their own proposals when there are little predictable or no discernible future scenarios.

They seem to attenuate such a danger, on the one hand, the possibility of providing clauses to restore the economic balance within the concession contract and, on the other, the limitation of the forbidden extensions to those "considerable": concept that assumes a qualitative and quantitative amount of a certain thickness, certainly beyond 50% of the value of the initial concession.

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acquisitions or insolvency. Such structural changes should not automatically require new award procedures for the concession performed by that tenderer".

Even in this case, however, it is imperative to point out that the operating risk can not but take account of the circumstance that, during its implementation, the concession can be put back into competition in the face of unforeseen events, the more so if you just think to the wide variety of interests and purposes attributed to public procurement (v. *infra*).

In this regard, having to note once again the pernicious effect of the genesis of the concession from the contract, must be stressed the conservative choice and lack of foresight from the EU legislator in coding the same discipline for public contracts and concessions[139] in relation to the changes during the execution of the performances, despite the expressed possibility of bypassing the problem by negotiating clauses.

In reality, at a closer examination, it turns out the pondering that is concealed behind the provisions just mentioned.

The choice of ensuring a large degree of flexibility in the stage of selection of the concessionaire is offset against a greater rigour in the implementation, where the elasticity is not eliminated but limited.

Relating to the duration and the object of the concession lies the same rationale: they both must be finalized, from the time of the awarding of the concession, to ensure the amortization of all the investments (initial and in-course), an appropriate return on the invested capital and the refinancing of the future investments needed to achieve the specific requirements and objectives of the contract.

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[139] On the point D'Aleo E., "La revisione delle direttive sui contratti pubblici: criticità e prospettive", in Cafagno M.; Botto A.; Fidone G.; Bottino G., *Negoziazioni pubbliche. Scritti su concessioni e partenariati pubblico-privati*, Giuffrè, Milano, 2013, observes that the EU discipline, in relation to the possibility of adaptation over time of the concession contracts, which by definition present high risks associated with incompleteness and long lasting, appears quite lacking, effectively too flattened on the logic of contracts: "Reserve a common legislation for contractual phenomena so different, in relation to the risk and duration, appears strongly incongruous: all that despite the same proposal cares to define the concession clearly as contract characterized by the "substantial operating risk", from the complexity and the long duration".

In effect, should you consider that the rules in question follows from the case law elaborated by the European Court of Justice in the field of public procurement contracts (Case C-337/98, *Commission/France*; Case C-496/99 P, *Commission/CAS Fruit Juices*; Case C-454/06, *pressetext Nachrichtenagentur GmbH*), where the consideration is not subject to the risks inherent in the market and does not imply, for the contractor as opposed to the concessionaire, the special responsibility in the management which exceeds the normal business risk, it is clear that the assimilation between contracts and concessions causes an aporia of the system as regards the latter ones.

Would then seem to glimpse *ab ovo* the European Union fear that the concessions could be still used in a treacherous manner in order to circumvent the provisions laid down for the public procurement contracts in the initial phase of awarding and after that be converted into public contracts for the rest of the operation (without operating risk).

Returns again the logic of control that is hard to reconcile, it is worth repeating, with the commercial vocation of the concession in which the economic risk pertains also to the private sector.

And to this primary end the EU law allows for a greater "upstream" involvement of the concessionaire in defining the contents of the forthcoming concession "downstream".

This large and deep interaction *ex ante* of the concessionaire with the contracting entity justifies, in the European view, the reduced modifiability *ex post* of the concession.

Besides the contradictory appearance due to the common discipline of instruments that are differentiated from the allocation of risk between the public and the private parties, remains appreciable the usual pragmatism shown off by the Union legislator in regulating the concession while striking a balance between the constraints of the public administration and the needs of the market.

If anything there can be seen a dissonance between the emphasis placed on the operating risks of the concessionaire, who should be affected in the economic operation, and the reduced possibility of modifying concessions (which nevertheless does not exclude the insertion of automatic adjustment clauses and renegotiation).

Either way, the upper limit by which changes can be made to the concession awarded, pursuant to art. 43, para. 1-2, of the Directive 2014/23/EU, is identified in the *condicio sine qua non* of the non-alterability of the general nature of the concession.

It follows the impossibility of transforming the concession into a public contract through the elimination of the operating risk in the hands of the concessionaire.

(continues): the national context

Arises, then, the problem of analyzing how the legal system has addressed the concessions, with particular reference to the contingencies that may possibly influence the performance by altering the economic and financial equilibrium, in order to see whether or not there is a discrepancy of positive law or are discernible some conflicts of interpretation.

Here they assume a particular significance the provisions concerning the value and duration of the concessions, which constitute the main content of the economic and financial plan of the contractual operation.

As mentioned, however, these parameters may vary over time and this is the greatest risk for the concessionaire, especially when he comes to find himself having to cope with unexpected and/or unforeseeable events that upset the original plan.

In conclusion, it is about understanding if the concessionaire actually bears this risk in the national law, or if the economic and financial equilibrium cancels the operating risk, just like in procurement contracts.

Duration, value and public contribution

For what concerns the duration of the concession, *nulla quaestio*.

Art. 143 of d.lgs. 163/2006 provides, in paragraph VI, that the works concessions as a rule last no more than thirty years and, in paragraph VIII, that exceptionally the period may be higher "in order to ensure the pursuit of the financial and economic equilibrium of the investments of the concessionaire".

The granting body can thus establish that the concession shall have a duration of more than thirty years, taking into account the productivity of the concession, the percentage of the price charged to itself compared to the total amount of work, and the risks associated with changes in market conditions.

In order to ensure the return on investment and the economic and financial balance, for new concessions whose value is more than one billion euros, the duration can be established up to fifty years.

The same principle, according to an interpretation by analogy, applies for services.

Since the duration is limited and calibrated a priori on the economic operation, must be stated the full compliance with the rules set out in the new EU Directive on concessions.

Art. 29 of the Code provides that the estimated value of the works and/or services concessions is based on the total amount payable, net of VAT, as evaluated by the administrations taking account of the estimated total amount (including prizes or payments to candidates or tenderers and any form of option or contract renewal).

For the public works concessions the calculation of the estimated value shall take account of the works themselves and of the overall estimated value of the supplies and services necessary for the execution of the works, made available to the contractor by the contracting entities.

Even with reference to the value of the concession there are no problems, although the new EU Directive has clarified the inclusive character of the value of the concessions regardless of the subject who pays the concessionaire.

In fact the Italian legislation still follows the rule laid down for public contracts (cf. art. 5 of the Directive 2014/24/EU and art. 16 of the Directive 2014/25/EU) and will have to be updated in the upcoming reform.

The consideration in favour of the concessionaire consists, as a rule, only in the right to functionally operate and economically exploit all his performance.

Nevertheless, the grantor may establish in the tender a price and, where appropriate, the functional and economic management, even in advance, for works or parts of works already developed, whereas the concessionaire is obliged to charge the users with prices lower than those corresponding to the return on investments as to the sum of the service cost and ordinary profits, or when it is necessary to ensure to the concessionaire the attainment of the economic-financial balance of the investments and of the connected management in relation to the quality of the service to be provided.[140]

In determining the price is taken into account the possible provision of goods and services by the concessionaire to the contracting authority, in relation to the work awarded, according to the provisions of the tender notice.[141]

[140] The criteria for determining the public service tariffs are fixed by art. 117 d.lgs. n. 267 of 2000 – corresponding to art. 12, L. 23 december 1992, n. 498, now repealed –, where it is ruled that the entities determine the tariffs of public services to an extent that ensures the economic and financial equilibrium of the investment and related management.

The criteria for calculating the services fee are:

a) the correspondence between costs and revenues so as to ensure the full coverage of the costs, including charges for technical and financial depreciation;

b) a balanced debt-to-equity ratio;

c) the amount of the costs for operating the infrastructure, taking into account investments and service quality;

d) the adequacy of the return on invested capital, consistent with the prevailing market conditions.

The tariff is the consideration for public services; it is determined and adjusted annually by the subjects owners, through multi-year program contracts, in compliance with the specifications and statute consequent to the organizational models chosen.

If the services are managed by subjects other than the public entity as a result of special agreements and concessions or as a result of the organizational model of joint venture, the fee is levied by the entity that manages the public services.

In matters see also art. 10 L. n. 537 of 1993, providing rules for the determination of the prices of public utility services on the grounds of the criterion of the tendential coverage of operating costs.

As it is well observed by Ricchi M., *Finanza di Progetto, Contributo Pubblico, Controllo ed Equità (Le Concessioni sono Patrimonio Pubblico)*, Documento UFP – CIPE - May 2006, in the Italian legal system "the allowability of the price-contribution has been unhooked from the imposition to the concessionaire of practicing any tariffs or administered prices, controlled or predetermined. This price or public contribution […] is provided to the subjects awarded of the concession contract for the construction and operation for the "*pursuit of the economic and financial equilibrium of the investments and related management in relation to the quality of the service to be provided*". […] The concession contract is a contract in reciprocal performance where the parties shall exchange corresponding values; the concessionaire builds and operates the public asset exploiting it economically and the grantor is deprived of the right to do so. The public contribution allows to rebalance the exchange values if they are, in fact, non-aligned. The task of the negotiation is to balance the values exchanged in the concession contract, *ex ante* its subscription, through an appropriate public contribution".

[141] On this point it is interesting the decision of the Council of State, Sect. V, 10 january 2012, n. 39 – with a note by Baldi M.; Fasano S., *Il "rischio d'impresa" nelle operazioni di project financing*, Urbanistica e appalti 7: 803, 2012 – in which a Municipality had annulled *ex officio* a procedure of project finance by claiming the lack of business risk, that is an essential element of the case, as the operation did charge to the Municipality the resources necessary to cover the full amount of the works.

In the event of a price paid by the public administration, the paragraphs IV-V of art. 143 of the Code establish that it may consist of money (financing either on capital account or on current expenditure) or be in kind (the functional and economic management, even in advance, of works or parts of works already completed, or the transfer of ownership or possession over immovable properties already available or at purpose dispossessed, whose use or development is necessary to the economic and financial balance of the concession).

Then the contracting authorities, after an analysis of cost-effectiveness, may provide into the economic-financial plan and in the concession agreement, by way of price, a public contribution necessary to the economic and financial equilibrium of the concession.

This is because the aspirant concessionaire in the offer has to indicate, besides the duration of the concession and other various obligations (any variants to the project placed at the basis of tendering, the time of execution of the works, the share of works that intends to outsource to third parties), the price asked and possibly the one that he is willing to pay to the contracting authority, the concession fee, the initial level of the tariff to be charged to the users based on the level of quality of the service management and its implementation, and especially the economic-financial plan.[142]

The offer and the contract have in fact to contain the business plan to cover the investments and the related operations for the entire time period chosen and must include the specification of the residual value, net of annual amortization expense, as well as any residual value of the investment not amortized at the end of the concession, even providing for a payment (art. 143, para VII, of the Code).[143]

In the case at issue some burdens were charged to the public administration, which committed itself to pay rental fees for thirty years in the face of the renovation works and the realization of primary urbanization assigned to the private undertaking.

The Council of State rejected the application on the basis of the assumption that the project finance is a procedure characterized by a high degree of flexibility, allowing to adapt to the specific needs of the parties: to the necessary financial contribution of the promoter can be added the possible public contribution.

[142] Cf. art. 116 D.P.R. 5 october 2010, n. 207.

[143] Art. 115 D.P.R. 5 october 2010, n. 207, bears the scheme of the concession contract:

a) the conditions relating to the preparation by the concessionaire of the project of the work to be done and the procedures for approval by the contracting authority;

b) an indication of the functional characteristics, plant, engineering, technical and architectural features of the work and the standard of the services required;

c) the powers reserved to the contracting authority, including the criteria for the surveillance of the works by the head of the procedure;

d) the specification of the annual depreciation of investments;

e) any minimum threshold of the work to be compulsorily contracted out to third parties as provided in the notice or indicated in the offer;

f) the testing procedures;

The same applies to the services pursuant to art. 30, paragraphs II and VII, of the Code.

Therefore the economic and financial plan represents the value of the concessions and, to this end, entails fixing the time and price intended to achieve the overall equilibrium of the transaction.

As we have seen, in order to ensure the pursuit of the economic-financial balance of the investments of the concessionaire, it is even possible to derogate from the maximum duration laid down *ex lege* as well as it can be provided a *pretium*.

And here it is right questioning on whether or not the national principle of economic and financial equilibrium of the concession is compatible with the European concept of the operating risk in concessions.

If the economic and financial equilibrium serves only in a static perspective, as an initial assumption of the concession, then should not be found defects incompatible with the new Directive 2014/23/EU because the ultimate goal is that of involve private subjects in the implementation of viable operations of public interest.

In this perspective must be analyzed the national provisions aimed at guaranteeing the economic and financial viability of the concessions.

First of all, the art. 144, para. 3-*bis*, of the Code states that all the tender documents (the tender notice and its annexes, including, depending on the case, the draft contract and

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g) the procedures and terms for the maintenance and management of the completed work and the powers of the grantor's control over the management itself;

h) the penalties for breaches of the concessionaire, as well as the terms of forfeiture of the concession and the procedure of its declaration;

i) the procedures for payment of the possible price, also in accordance with article 143, paragraph 5, of the Code;

l) the criteria for the determination and the adaptation of the tariff that the concessionaire may levy by the users for the services provided;

m) the obligation for the concessionaire to acquire all the necessary approvals besides those already obtained during the approval of the project;

n) the methods and terms of fulfillment by the concessionaire of any burden to the concession, including the payment of fees or benefits of different kinds;

o) the insurance guarantees required for the design, construction and management;

p) the manner, the terms and any charge relating to the delivery of work to the contracting authority at the end of the concession;

q) in the case of article 143, paragraph 5, of the Code, the modes of the eventual immission into the possession of the asset prior to the work testing;

r) the economic and financial plan to cover the investments and the related temporal management for the entire time period chosen;

s) the fee for the residual value of the investment not amortized at the end of the concession.

It is especially this last point that creates some doubt in interpreting, but the same question also relates to the new Directive 2014/23/EU (v. *supra*).

the economic and financial plan) are defined by the administration in order to ensure adequate levels of bankability for the operation.[144]

For the concessions to be awarded with the restricted procedure, in the notice may be specified that the contracting authority can hold, before the deadline for submission of tenders, an early consultation with the economic operators invited to tender, in order to verify the absence of critical aspects in the financing of the project placed at the basis of tendering, and may provide, following to the consultation, to adjust the tender documents updating the deadline for tenders submission.

What it can not be the subject of consultation is the amount of tax relief measures referred to in artt. 18 L. 12 november 2011, n. 183[145], and 33 d.l. 18 october 2012, n. 179,

[144] Cf. art. 143, para. VII, and art. 144, para. 3-*ter* and 3-*quater*, of the Code.

The notice may provide that the offer is accompanied by the declaration, signed by one or more financial institutions, of expression of interest to finance the operation, in consideration of the contents of the scheme of agreement and of the economic and financial plan.

Tenders must then give an account of the prior involvement of one or more financial institutions in the project, but do not need their formal commitment to invest in the concession.

The faculty becomes obligation – under penalty of termination – later in the tendering.

In the tender notice, in fact, the contracting authority provides that the concession contract is terminated in case of failure to sign the loan agreement or in the absence of subscription or placement of project bonds, within a reasonable time determined by the notice itself, not exceeding twenty-four months from the date of approval of the final project.

Also remains the right of the concessionaire to raise the cash required to carry out the investment through other forms of financing, provided that these are underwritten within the same period.

In the event of termination, the concessionaire shall not be entitled to any reimbursement of the costs incurred, including those relating to the final design.

The notice may also provide that in the case of partial financing of the project, and anyway for an excerpt technically and economically functional, the concession contract remains valid only for the part regulating the construction and operation of the same functional excerpt.

[145] In order to encourage the creation of new infrastructures to be implemented with the public private partnership contracts referred to in art. 3, para. 15-*ter*, d.lgs. 12 april 2006, n. 163, reducing or eliminating the non repayable public contribution, so as to ensure the economic sustainability of the operation of public-private partnership taking account of market conditions, may be provided to the interested subject, including the concessionaires, the following measures:

a) income taxes and IRAP generated during the concession period may be offset in whole or in part with the above non repayable grant;

b) payment of VAT can be accomplished by offsetting the above non repayable public contribution, in accordance with Directive 2006/112/EC of 28 november 2006;

c) the amount of the highway concessions fee laid down in art. 1, para. 1020, L. 27 december 2006, n. 296, as amended, and, the integration provided for by art. 19, para. 9-*bis*, d.l. 1° july 2009, n. 78, ratified with amendments by L. 3 august 2009, n. 102, as amended, may be recognized as a contribution to the concessionaire for operating expenses.

The amount of the non repayable public contribution and the methods and terms of the measures just seen, which may also be used cumulatively, are placed in the tender for identifying the concessionaire, and later reported in the concession contract to be approved by the Minister of infrastructure and Transport, in consultation with the Minister of Economy and Finance.

The public contribution, including the tax relief measures, can not exceed 50% of the investment cost and must comply with the national and EU legislation.

ratified with amendments by L. 17 december 2012, n. 221[146], and the amount of the public funds, where provided, besides.

The question of interpretation does not arise so much in relation to the initial public contribution, insofar as essential in balancing the economic operation *ab origine*[147], but to its subsequent changes.

If you provide *in itinere* to redress the original balance, you should not encounter objections because the contractor would ultimately maintain the same position obtained in the award, without gaining undue advantages.

Such measures can also be used for the infrastructure of strategic interest already assigned or under current award with public-private partnership contracts referred to in art. 3, para. 15-*ter*, d. lgs. 12 april 2006, n. 163, insomuch as necessary to restore the balance of the economic and financial plan.

The CIPE with its own resolution, after the opinion of NARS that for the purpose is integrated with two additional members appointed respectively by the Minister of Economy and Finance and the Minister for Infrastructure and Transport, following a proposal by the Minister for Infrastructure and Transport together with the Minister of Economy and Finance, determines the amount of the non repayable public contribution, the one necessary to re-balance the economic and financial plan, the amount of resources available under current legislation that can be used, the amount of the measures to be recognized as a compensation of the share of contribution missing, as well as the criteria and procedures for the re-determination of the extent of the benefits in case of improvement of the parameters forming the basis of the economic and financial plan.

In the periodic updates of the economic and financial plan there is a check of the calculation of the weighted average cost of the capital invested and possibly of the risk premium specified in the concession contract in force, and the recalculation of the tax relief measures based on the values posted in the previous regulatory period, also in the light of the traffic estimations recorded in the same period.

[146] In order to facilitate experimentally the realization of new infrastructure projects envisaged in plans or programs approved by the public authorities for amounts exceeding 50 million Euros through the use of contracts for public-private partnerships referred to in art. 3, para. 15-*ter*, d.lgs. 12 april 2006, n. 163, whose final design is to be approved by 31 december 2016, for which are not provided non-repayable public contributions and is ascertained the non-sustainability of the economic and financial plan, is recognized to the subject holder of a public-private partnership contract a tax credit worth on IRES and IRAP generated in relation to the construction and management of the work and the exemption from the payment of the concession fee to the extent necessary to achieve the equilibrium of the economic and financial plan.

The CIPE, after consulting the NARS that for the purpose is integrated with two additional members appointed respectively by the Minister of Economy and Finance and the Minister for Infrastructure and Transport, on the proposal of Minister of Infrastructure and Transport, following a proposal by the Minister of Economy and Finance, with its own deliberations identifies a list of works that, as a result of the application of the tax relief measures, achieve the conditions of economic and financial equilibrium necessary to allow the financing, and the overall value of the works that can gain access to those facilitations; for each infrastructure are also determined the tax relief measures necessary for the sustainability of the economic and financial plan, by establishing the procedures for the assessment, for its monitoring and for their restatement in case of improvement of the parameters forming the basis of the economic and financial plan and applying, as far as compatible, the principles and criteria established by the CIPE with the specific guidelines for the application of article 18 of L .12 november 2011, n. 183.

The measures adopted to ensure the economic sustainability of the operation of public-private partnership can not in aggregate exceed 50% of the investment costs, taking into account the non-repayable public contribution, in accordance with the European rules on State aids and are alternative to those provided for in article 18 of L .12 november 2011, n. 183 (see the preceding note).

[147] In this sense can be read the judgment of the Court of Justice, Sect. I, 25 october 2012, C-557/10, *Commission/Portuguese Republic*, which states the principle that Member States have an obligation to lay down appropriate conditions to ensure the economic and financial equilibrium of the accounts of the infrastructure manager.

On the contrary, were the administration to intervene *in medias res* with a view to ensure the economic balance of the concession *tout court*, by compensating the deficiencies and the limits of the contractual operation put in place, the result would indeed become the substantial elimination of the private operating risk.

Consequently, not only you do not have a concessions any longer [148], but moreover you should note the presence of State aid not permitted.[149]

Furthermore, the new EU Directive severely limits the possibility of modifying the concession awarded, although allows to include clauses for adjustment and economic rebalancing (which constitute the very exception, not the rule).

We must, above all, pay heed and be aware that when it is the law that imposes to restore the economic and financial equilibrium of the contractual operation, remains doubtful its qualification as a concession.

Thereby would be inverted the ratio of rule and exception prescribed under the European law.

It is therefore necessary to examine both the national rules and the case law on the revision of prices and on the modifications in the course of implementation to check whether the treatment of concessions in Italy complies with the Union law and, in the end, if the operating risk really distinguishes the concessionaire as opposed to the contractor.

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[148] Cf. *supra* note n. 52: ECJ, Sect. II, 18 july 2007, C-382/05, *Commission vs. Italy*; and note n. 55: ECJ, Sect. III, 13 november 2008, C-437/07, *Commission vs. Italy*.

[149] In accordance with the European Court of Justice – see in particular cause C-280/00, *Altmark* – for such compensation to escape the classification as State aid in a particular case, a number of conditions must be satisfied:

- first, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined;
- second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings;
- third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. Compliance with such a condition is essential to ensure that the recipient undertaking is not given any advantage which distorts or threatens to distort competition by strengthening that undertaking's competitive position;
- fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

The revision of prices and tariffs

As for the positive law, at present state, by virtue of article 142 of the Code to the works concessions apply the same rules that are governing public procurement contracts, namely artt. 132 (variations during construction) and 133 (revision of prices), on which we will return later (v. *infra*).

While for services, pursuant to art. 30, it is doubtful whether should be applied – and are therefore to be considered representative of the general principles relating to public contracts – artt. 114 and 115 of the Code regulating once again variants and adjustment of prices.

Already in this fact is there an unexpected diversity of treatment within an unique institution, arising from the wretched legislative option to evaluate the actual applicability norm by norm.

This prompted the interpreters, on the one hand (especially for service concessions), to recall the traditional vision of the concession as an administrative measure or public law contract[150] and, on the other (especially for works concessions), to seek in the common law for the correction of the gaps in the Code.[151]

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[150] In this sense see T.A.R. Napoli, Sect. I, 5 april 2002, n. 1888 ("The mechanism of prices revision is laid down by law solely for the procurement contracts and not for the ones accessory to a public service concession, for which there is an opposite principle of normal invariance of the concession fee, except for the presence of an explicit and clear derogation clause. Accordingly, the concession of a public service escapes the legal provision of art. 1664 c.c. on the revision of prices, operating it only for the procurement contracts"), as well as Council of State, Sect. VI, 9 february 2006, n. 521, and 6 april 2006, n. 1864 ("The principle of compulsoriness of the price revision clause is provided for the contracts with ongoing and periodic performance and not for the concessions").

One exception, besides the presence of an express clause of revision, was planned where the reasons for the delay in the implementation of the work were due to design deficiencies not attributable to the concessionaire: according to Council of State, Sect. V, 27 december 2001, n. 6400, when the administration, in order to obtain the projects in a very short time has taken upon himself the burden of providing the documents necessary for the design, there is no impediment to the allowability of the price revision.

But here, more than a revision of prices, it must be noticed a compensation for damages to the concessionaire.

More recently have intervened Council of State, Sect. V, 27 marrch 2013, n. 1755 and T.A.R. Sicilia, Sect. III, 17 april 2014, n. 1053: "in accordance with the consistent teaching of administrative jurisprudence, the provision in the invoked Article 115 of Legislative Decree n. 163 of 2006 relates only to the procurement contract and not to the contract accessory to a public service concession, which is subject to the opposite principle of normal invariance of the concession fee (cf. among many: Cons. Stato, Sect. VI, june 5, 2006, n. 3335; 3 february 2006, n. 388). In fact, the service concessions are subject to the provisions of Legislative Decree n. 163 of 2006 only in the narrow limits therein specified (see in particular art. 30), with the exclusion, therefore, of the revisional institute invoked".

In effect, these decisions only affirm that to the concessions awarded in a direct way is not applicable the institution of prices revision, logically connected to the competitive dynamics proper of public contracts, being in force the opposite principle of invariance of the concession fee.

A different conclusion is received by Council of State, Sect. V, 26 august 2010, n. 5954, which has recognized the very obligation of inserting the clause of periodic revision of prices provided for all contracts with periodic or ongoing execution on the assumption that the contract stipulated with the administration has not the purpose of regulating a concession relationship, but the contents of a true contractual relationship that, regardless of the preexisting concession, constitutes the sole source of legal regulation of the relations with the administration, according to the regulations of general character governing the contractual relationship.

[151] In regard to the revision of prices, observed the splitting of the earlier jurisprudence prior to the Code, the doctrine has held that "the problems associated with the substantial inapplicability to the service concession of the remedy provided by the art. 115 of D.Lgs. n. 163/2006 (reconnected to the explicit subtraction of the concession contracts of services from the general regulations on contracts for services and/or supplies of goods, by the cited art. 30, para. 1, of D.Lgs. n. 163/2006), can find (partial) solution with the application - as a subsidiary - of the legal discipline outlined in the said artt. 1664 and/or 1467 c.c., at least starting from the variations in the cost of labour and in the prices of materials higher than the margin of alea of the entrepreneur, identified in a lump sum of 10%" (cf. Balestreri A.M., *L'applicabilità di meccanismi revisionali ai contratti di concessioni di servizi*, Urbanistica e appalti 4: 393, 2009).

The conclusion of the author totally ignores the fundamental question of the commutative or aleatory nature of the concession contract, by virtue of the peculiar allocation of the operating risk.

Question on which instead explicitly has expressed, for example, the judgment of T.A.R. Milano, Sect. III, 16 december 2011, n. 3200 – commented by Cartei G.F., *Il rischio di costruzione del concessionario segue la disciplina generale del contratto di appalto*, 2012, giustamm.it (published on 11.1.2012) – in the sense of the commutativity of the concession just like the public contracts.

The administrative judge, in the face of the action of a project company against the refusal of the public customer to assent the price revision, has rejected the defensive argument denying that the right to request compensation was precluded by the specific nature of the concession of public works in which the concessionaire is paid from the proceeds of the work and assumes the risk of the construction and management, being able to activate, only on the conditions provided for in the concession agreement, the mechanisms for the review of the economic and financial plan (which, in this case, did not provide for any need to rebalance in the event of changes in the prices of construction materials). Rather, for this purpose is used the analogy with the contracts: "*The contract of concession for construction and management, as the works contract, has commutative and non-aleatory nature. The performances that characterize the object (realization of the work and right to manage it for a period of time) are, in fact, determined ever since the birth of contract. As it happens for all contracts whose execution is prolonged in time, the economic value of such benefits in constancy of relationship can undergo variations, even remarkable, in response to changing contingencies of the market. In the absence of a different agreement, the distribution of risks arising from market fluctuations or other contingencies that alter the economic balance of the initial contract is governed by the general discipline of the Civil Code and by the special one relating to the specific type of contract*" (italics added).

By referring to art. 133 d.lgs. 163/2006 and to art. 1664 cod. civ., as said, the judge has come to reject the defensive allegations based on the concession nature of the contract, thus overreaching until mystify the construction risk and ignore that such risk in this case expressly fell on the concessionaire.

According to the T.A.R. Milano, the fact that the remuneration of the concessionaire consists, instead of a cash benefit, in the attribution of the right to exploit the work carried out does not affect the allocation of the risks related to the construction: "*The greater alea that the concessionaire bears with respect to the contractor concerns, in fact, the management of the work: the moment when he accepts that his own investment is remunerated through the concession of the right to economically exploit the manufactured product he is assuming an undertaking risk that normally is borne by the contracting entity. Apart from that the concession contract, according to its definition in legislation (both internal and of the Community), is no different than an ordinary procurement contract, with the result that the construction risk assumed by the concessionaire remains within the limits of the normal alea typical of the works contract*" (emphasis added).

The reasoning, which brings to its support the positive law (art. 152 establishes the applicability to the project finance of the entire discipline of works design and programming dictated for the public contracts, including also the revisional compensation for the increased cost of building materials, whilst art. 143 only deals with the effects on the economic balance of the contract from the contingencies likely to affect the pay-back for the management of the work, such as changes in tariff rates, but not from those that affect the construction costs), does not convince at all.

Since the principle of the mandatory clause for price revision is provided, textually, "for contracts with ongoing and periodic execution"[152], we need to understand whether it also applies to concessions.

The revisional clause finds its justificatory reason in the danger of impaired balance of the contractual performances due to their devaluation or revaluation over time.

The payment of the revisional compensation by the administration ensures that the bilateral relationship between the performances at the time of contract signing is valid until the end of its execution.

This is certainly true for commutative contracts, but what about concessions?

How do you reconcile the operating risk of the concessionaire with the obligation of the public administration to compensate for the changes in prices?

The answer provided by the national law, as seen, varies depending on the public or private nature acknowledged to the concession, but does not concentrate on the allocation of risks.

Considering the concession as an administrative measure or a contract accessory to such deed, the revision of prices is generally excluded for the prevalence of the public law that gives full discretion to the public administration; in the contractual vision, conversely, the concession not only has to include the revisional clause, but attributes to the contractor a subjective right to be recognized with the related remuneration.

It is therefore not at all easy framing and assigning the correct legal position to be protected in case of disputes.

In othwer words, the construction risk would occur identicallly for both contracts and concessions, characterized by a "normal" alea charged to the provider and by the responsibility of the contracting authority for the rest. The above conclusions would not change, according to the T.A.R., not even as a result of the recent classification of the concessions of construction and management within the cd. "partnership contracts" often connoted by the private, instead of public, financing of the work and of the related risks.

In conclusion, the Court believes to be adopting "a hermeneutic option in compliance with the object and the nature of the concession contract for construction and management (as it keeps the construction risk under the normal alea assumed by the concessionaire) and which also strikes a fair balance between the interests of the parties".

By bringing back the increased costs of the construction materials to the "force majeure" inscribed in the contract among the causes for the revision of the economic-financial plan ("PEF"), it is not automatically determined an obligation of the administration to pay the revisional fee *ex* art. 133 of the Code, but the need to proceed to the joint review of the plan to redress the economic and financial equilibrium.

The decision does not seem satisfactory, to the extent that it completely obliterates the allocation of risks impressed by the parties in the concession contract and draws up a construction risk *sui generis*, equivalent both for public contracts and concessions and detached from the European perspective.

[152] Cf. art. 133 of the Code, which reproduces art. 6 L. n. 537/1993 as replaced by art. 44 L. n. 724/1994.

The Code of the administrative process provides for the exclusive jurisdiction over the disputes concerning the price revision clause and related application measure for the contracts with ongoing and periodic execution, in the circumstances referred to in art. 115 d.lgs. 12 april 2006, n. 163, as well as on those concerning the implementation measures of the price adjustment pursuant to art. 133, paragraphs 3 and 4, of the same decree.

Consequently, in the field of price revision, there is the exclusive jurisdiction of the administrative courts by virtue of art. 133, para. 1, lett. e), n. 2 c.p.a., regardless of whether the claims submitted relate to the *an* or *quantum* requested or hold concurrently both profiles.[153]

But that rule applies only to the contracts subjected to the Code of public contracts, such as works concessions in ordinary sectors, or to those expressly recalling the articles of the same in matters of price revision.

And then are normally excluded the service concessions and those in special sectors, both from price revision and from the exclusive jurisdiction.

This implies a certain asymmetry in the regulation of concessions.

Such a question cannot be overcome through the application by analogy of the rules codified for the public and private contracts, without first clarifying the distinction between procurement contracts and concessions and the nature of these last.

The same way, as well as prices, the problem concerns tariffs.[154]

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[153] In doctrine see Pagani I., *Riparto di giurisdizione in materia di revisione dei prezzi e condizioni per ritenere sussistente il presupposto riconoscimento revisionale*, Urbanistica e appalti 8-9: 904, 2014.

[154] On this point see Council of State, Sect. V, 26 october 2011, n. 5713, on the appeal of a company against a Municipality to demand the establishment of the entitlement to the annual adjustment of tariffs.

The request had its foundation in a thirty-year concession, in relation to which the concessionaire had obtained from the Municipality an early review of the charges and then, in the face of the silence maintained by the administration on the further requests for tariff adjustment, he provided, autonomously, to increase annually the rates charged to users.

Having the TAR rejected at first instance that application, the company filed an appeal arguing that the unilateral increase of the rates, would not alter the bilateral relationship but, on the contrary, would keep the balance in the management of the service.

Yet, at the outset, the Council of State has refused the configurability of a subjective right of the concessionaire to obtain the annual review of the rates applicable to service users: "The applicant company wants to infer the merits of that claim from the terms of the agreement, at the time stipulated by the Municipality, and in particular, from the fact that a clause in such convention indicates three specific benchmarks - the change in the general costs imposed to the undertaking, the change in the cost of labour and the change of the electricity costs - under which the tariff modification would result mandatory, without any residual discretionary assessment of the public body. In this regard, we must, however, agree upon the claim of the Municipality who stressed that "the same clause specifically referred to the interest of users, which would imply the persistence, even when there are the conditions for the aforesaid adjustment of tariffs, of a discretionary power of the public body, called to reconcile the interest of users with that of the service concessionaire; power in the presence of which the subjective position of the concessionaire can not be

The modifications during the execution

As seen, the new EU Directive provides for the possibility to modify the concession by restoring the economic balance in favour of the concessionaire as set out in concession or through the (not considerable) extension of the concession or via objective/subjective amendments that do not denature the concession involved.

The European legislation indeed would seem to provide a sort of Solomonic midway solution that allows to lay a hand on the concession, within well-defined limits, even *in medias res*.

On the domestic front, art. 143, para. VIII, of the Code states that the changes to the assumptions and basic conditions which determine the economic and financial equilibrium of the investments and of the related management, made by the public client and/or by laws or regulations that do establish new tariff mechanisms or that do affect the balance of the economic and financial plan – after verification of the CIPE, heard the consultative nucleus for implementation of the guidelines in the public utility services regulation ("NARS") – provide the "necessary" revision of the concession, to be implemented through new equilibrium conditions, including the extension of the expiry date.

In the absence of the review, the concessionaire may terminate the contract.

In the event that the changes made or the new conditions are more favourable than the previous for the concessionaire, the revision of the business plan must be made in favour of the grantor body.

In its turn, art. 143, para. VIII-*bis*, integrates the above, stating that the concession defines the conditions and the basic conditions of the economic and financial plan whose variations not imputable to the concessionaire, should they determine a change in the balance of the plan, require its revision.

The concession also includes a definition of economic and financial equilibrium referring to indicators of profitability and capacity to repay debt, as well as the verification procedure and the timetable for linked activities.

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configured otherwise than in terms of legitimate interest" (cf. judgment of SS.UU. n. 25508/06, between the same parties, in which it was excluded the applicability to this case, of the arbitration award). That entails[…] the illegitimacy of the modifications made unilaterally by the applicant to the conventional stipulations for providing the service".

After excluding the competence of the subjects concessionaire to set their own tariffs, as pertaining to the public administration *ex* art. 117 TUEL (v. *supra*), we need to understand whether and to what extent their revision may impact on the economic balance of the operation being executed.

Compared to the European counterpart our national legislator has emphasized not the risk allocation, but the economic and financial equilibrium[155], identifying the grounds for the revision of the concession in the variations not imputable to the concessionaire and in those arising *ex lege* or due to the *factum principis*.

It should be specified that the restoration of the economic balance operates in the two directions: both in favour of the concessionaire and in favour of the contracting authority or entity.

However, still remains the concern that the internal discipline is a bit too favourable to the private contractor, especially in the event that the alteration of the contract depends on factors external to the parties (the national rule cited speaks of "*variations not imputable to the concessionaire*"), thus departing from the risky essence of the concession (where the "*operating risk should stem from factors which are outside the control of the parties*").

If indeed the hypotheses contained into the Directive 2014/23/EU foreshadow exceptional scenarios that can sometimes occur in the contractual practice, the Italian rules seem to overly protect the private contractor against the operational risks.

Let us now see what has been the position expressed by the Italian jurisprudence in this regard.[156]

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[155] Refer to Cartei G.F., *Il principio di equilibrio economico finanziario e la disciplina del contratto di concessione*, Urbanistica e appalti 2: 129-138, 2012, and to Cori R.; Paradisi I., "La fase di esecuzione del contratto di concessione di lavori pubblici", in Cafagno M.; Botto A.; Fidone G.; Bottino G., *Negoziazioni pubbliche. Scritti su concessioni e partenariati pubblico-privati*, Giuffrè, Milano, 2013, p. 568.

As well Santoro S., *Le oscillazioni dei prezzi negli appalti e nelle concessioni: rimedi e prospettive,* Relation to IGI Convention - Rome, 28 april 2004, giustamm.it, under the previously in force Merloni Law 109/94, highlights the presence of a tendential principle – the pursuit and maintenance over time of the original economic and financial equilibrium between investment and management in relation to the quality of the service to be provided, even through a pre-established price in the tender – which "ensures a paramount protection for the concessionaire, but dramatically suffers the absence of any institutional attention for the interests of users and consumers, the protection of which is inevitably shifted to the judicial level".

[156] Asserts the commutative nature of the concession, in addition to the already seen judgment of T.A.R. Milano, Sect. III, 16 december 2011, n. 3200, Council of State, Sect. V, 11 october 2013, n. 4979: "*Pursuant to art. 3 para. 12, d.lgs. 12 april 2006 n. 163 the service concession is the contract which presents the same characters of a public contract of services, except for the fact that the consideration for the provision of services consists either solely in the right to manage and economically exploit the service or in this right accompanied by a price; therefore they are both traceable to the general scheme of art. 1321 c.c., differing in the fact that in the one case the Administration receives directly from the private contractor instrumental services for its own purposes, while in the other that contractor provides the services to the community in substitution of the public entity; both, therefore, have a cause given from the economic and social function of the exchange that with them takes place between the contracting parties, being excluded that such an exchange could not occur in the practice, as it happens, lawfully, for the aleatory contracts*" (italics added).

As it appears really evident, there is a misunderstanding about the notion of aleatory contract (together with the usual epiphany of the trilateral relationship in concessions: v. *supra*).

The aleatoriety, just like the commutativity, is an internal subset of the synallagmatic contracts.

So, one thing does not exclude the other: the *discrimen* lies in the economic and/or legal uncertainty of at least one of the performances stipulated in the contract.

Uncertainty that may thus be inherent to the *an* and/or *quantum*.

This means that the exchange function is also present in the aleatory contracts.

The peculiarity of these latter, at least in the civil orbit, is the impossibility of applying the provisions on the excessive supervening onerousness (adaptation and termination) and on the rescission for lesion when the reason for the *ex post* imbalance is determined precisely by the risks agreed and stipulated *ex ante*; conversely, in the other cases it should be possible to use such remedies (on which we will return quite soon: v. *infra*).

Returning to the annotated decision of the Council of State, must be said that the dispute concerned a concession for the construction and management of a swimming facility on which had been carried out some supplementary works provided in the tendering but not expressly included in the project.

The concessionaire appealed to the administrative Court for the expenditure refund by the grantor.

Although the Court of first instance, in relation to the typical function of the concession instrument, had rejected the claim emphasizing the transfer, from the public entity grantor to the private concessionaire, of the economic risk arising from the management of an asset having productive capacity, the Council of State has replied that this last subject can not be exposed to an indeterminate alea, so as to alter the natural commutative function of the contract (whether it be a public contract or a concession): "It is in other words not sustainable that all the contractual risks fall indiscriminately on the private operator, in particular those attributable to the contracting administration, responsible of the design shortcomings, which the private participant in the competitive procedure for the award of the contract may in full good faith ignore. To opine in this sense, in fact, would fade away the same reason of a competitive process to which are to participate the private companies aspiring to be concessionaires, selected - as in the present case - through the provision of a fee to be paid to the administration. In particular, it would be impossible or unnecessary any estimate of the economic convenience of the contract, which is the fundamental reason under which the entrepreneurial subjects compete for the award of public contracts".

There seems to be a misunderstanding even on this point: it is not true that all the risks are borne by the concessionaire and that, therefore, the competition for the award of the concession loses any meaning.

When the object of the competition is a concession, the predominant phase is undoubtedly the risk allocation aimed at the attribution of the same to those who are able to better manage them at the lower cost.

Only in the case in which the aspirant concessionaire takes the burden to bear risks of public matrix, nonetheless perceiving a specific additional remuneration (the so-called "*risk premium*"), would be justified the statement contained in the judgment under review.

In the case at issue, having to fulfil by contract all the renovation works needed to conform to standards the swimming complex, the concessionaire had to perform some improvements not expressly included in the preliminary project drawn by the contracting administration.

As mentioned, the public works concessions have for object, as a rule, the final design, the executive design and the realization of public works or public utilities, and of works with them structurally and directly connected, as well as their functional and economic management and the consideration for the concessionaire is, besides a *pretium*, only the right to operate functionally and economically exploit all the work done.

It follows that the burden of assessing the economic viability of the operation lies primarily with the concessionaire, who is responsible for determining whether the costs are to be adequately covered from the revenues reasonably foreseeable.

Of course, a big problem is the fact that in all the concessions the feasibility study and the drafts of contract and economic-financial plan shall always be outlined by the public administration grantor.

Moreover, only in project finance and strategic works the concessionaire addresses the entire design (preliminary, final, executive), whereas in the other concessions it is normally the responsibility of the public administration prepare the preliminary project.

The Council of State has then availed itself of the criteria for objective interpretation of the contract – the one of good faith and that, residual, of the least burden for the obligated, respectively provided by artt. 1366 and 1371 cod. civ. – and of the discipline of the private contract, where the necessary variations of the project shall be borne by the contractor to the extent of one-sixth of the value of contract (art. 1660, para. II, cod. civ.), whilst in case of exceeding this threshold, the same can disengage from the contract.

A choice full of prejudices and based *de plano* on the alleged commutative character of the concession contract.

Unfortunately, in relation to the reinstatement of the economic and financial equilibrium of the concessions appears insufficient the national consideration for the risk, relegated to be almost indifferent for the distinction between contracts and concessions, while are rather emphasized equitable evaluations through the analogy with the contract (public and not).

What it gives rise to a glaring dyscrasia compared to European law.

The national jurisprudence has instead proved to be more reliable in relation to the other modifications which may intervene on the concessions, namely the extension and the objective/subjective alteration of the same.[157]

Thence ensued the successful appeal and at the same time the reform of the judgment of the T.A.R. (Milano, Sect. III, n. 2177/2001), though this last had framed the issue well.

All the arguments put forward by the Council of State (pt. 4 dir.) – for which "also the concession must be economically attractive, otherwise being frustrated the purpose of attracting the private intervention", "argue that the concessionaire also bears the alea of the design errors from the administration not predictable at the time of participation in the award procedure means precisely frustrate any evaluation of the economic convenience with regard to the offer of the concession fee to be paid to the administration, and ultimately on the economic balance between the payment in question and the net result obtainable from the management of the service concession", "the solution here opposed determines an unjustified economic sacrifice for a party of the contractual relationship, which is charged with bearing the risks inherent in the organizational sphere of the other party" – appear apodictic and without a tangible feedback.

No reference is made to the allocation of risks crystallized in the concession contract.

Additionally, an excessive weight is attributed to the fee paid by the concessionaire (a sum of 50 million lire for a seven-year contract duration, for a total of 350 million) used even as the basis for equitative comparison with the amount of the supplementary works (297 million lire) in order to evaluate the contractual sharing of risk, in analogy to what happens for the variations in the private procurement contracts.

Yet another inaccuracy of judgment because the concession fee does not represent the full value of the concession as well as the percentage of one-sixth – *rectius*: one-fifth for public procurement contracts, ed. (cf. art. 161 D.P.R. 5 october 2010, n. 207) – does not stand out as an equitable parameter for the contractual risks allocation between the parties, as a sort of threshold beyond which either the public administration takes on the difference or the contractor may withdraw (for a correct interpretation of the concession fee refer to Council of State, Sect. IV, 13 march 2014, n. 1243).

Aside from any consideration of the concession risk and the related allocation, it must be noted the presence of the usual criterion of the economic and financial equilibrium inside the concession, this time inherent in the comparison of the improvements made and the fee paid.

In the end, the interpretation of the administrative Court results to be quite arbitrary and does not depart from the traditional inner vision of the concessions such as thorny figures uncomfortable to handle.

Taking a shelter in the private law is not wrong, rather it seems to be reckless using unsuitable tools that cause inconsistencies so much blatant as pernicious (all the more when you consider that it has been reformed the ruling of the judge of first instance which had correctly interpreted this concession case).

[157] I am referring especially to T.A.R. Milano, Sect. III, 12 october 2011, n. 2419 (considerable extension of a concession already stipulated), as to Council of State, Sect. VI, 10 december 2012, n. 6297, and T.A.R. Torino, Sect. I, 9 january 2013, n. 2 (renegotiation with the awarded contractor prior to the signing of the concession).

These cases has been concerned with public concessions in project finance related to car parkings, with respect to which the counterparty advanced request for modification as compensation for additional costs arising from contingencies.

In all the decisive criterion adopted by the judges has coincided with the "new" economic balance of the performances implied by the concessions, invalid precisely because "new" and not only as economically correct or incorrect.

Guaranteeing the contractual balance of the concession *ex ante* is definitely necessary to give birth to operations feasible in every respect, ensuring it *ex post* instead means essentially deleting the allocation of operational risk to the private counterparty, transforming the concession in a public contract.

It requires to frame the issue with a view of allocative efficiency.

In particular, the concept of imputability does traditionally refer to the fault or willful misconduct of the subject agent, who then responds only of the events related to him (since they fall within his sphere of availability) and so for these he is liable to reprimand (in contrast to what happens in the objective responsibility).

The observation is relevant to the extent that it presupposes a number of events in the empirical world that are not attributable to determined subjects: natural phenomena, acts of unknown, global and sector crises, market trends, and so on.

The proposal for amendments to the project submitted, far from being limited at rebalancing the investment, were intended to create a work other than the one awarded, in blatant violation of the rules of competition and *par condicio* among the participants in public tenders: principles which require that the object of the contract placed at the basis of tender can not be modified, nor overturned after the award, being the contracting authority able – if applicable – only to act in self-defense and start a new tendering.

Moreover also the type of contract it resulted distorted, since, due to the new equilibrium, the alea of management typical of the project finance would have been replaced by a profitability certain in the *an* and much higher in the *quantum*.

The confirmation of the assumption just done is offered also from the discipline of the concession that allows modifications to the business plan (PEF) only in terms of regulation of the financial management (such as just setting a price or either lengthening the duration of the management *ex* art. 143 Code *supra*) without affecting the essential characteristics of the *opus* (besides the variants permitted *ex lege*).

Ultimately, as pointed out by the administrative case law (T.A.R. Milano, Sect. III, 12 october 2011, n. 2419; conf. T.A.R. Roma, Sect. II-*bis*, 15 april 2013, n. 3801 for the service concessions), "*it is necessary to distinguish the variants (allowed) in the course of the implementation from the renegotiation (not allowed). By this standard, the changes of the work shall be prohibited to the extent that they have the capability to alter significantly the contractual settlement leading to the realization of works different from those placed at the basis of competition*" (emphasis added).

Otherwise it is necessary to reopen the "new" concession to competition, as stated by the EU Court of Justice, according to which every time the amendments made to the provisions of a concession contract "are materially different in character from those on the basis of which the original concession contract was awarded, and are therefore such as to demonstrate the intention of the parties to renegotiate the essential terms of the contract, all the necessary measures must be taken, in accordance with the national legal system of the Member State concerned, to restore the transparency of the procedure, which may extend to a new award procedure. If need be, a new award procedure should be organised in a manner appropriate to the specific features of the service concession involved, and should ensure that an undertaking located in another Member State has access to sufficient information on that concession before it is awarded" (cf. ECJ, Grand Chamber, 13 april 2010, in Case C-91/08, *Wall AG*, pt. 43; see also Sect. II, 27 october 2005, in Joined Cases C-187/04 and C-188/04, *Commission v Italian Republic*).

Orientation later transposed in the European Directive on concessions, as seen: in doctrine refer to Maresca D., *La modificazione sostanziale dei contratti di concessione di lunga durata durante l'esecuzione: commento alla direttiva europea 2014/23/UE*, Diritto del Commercio Internazionale 3: 749, 2014.

In the European Directive can be seen some limits of compatibility for the measures in favour of the contractor awarded with a concession.

The economic rebalancing in favour of the concessionaire in accordance with the concession – while it can justify the cases of contingencies *ex lege* or for *factum principis*, those made by the client and/or by the laws and regulations, or the exceptional ones – certainly does not allow rules that completely cancel the operating risk.

The extension of the concession is designed to address situations in which are required supplementary works or services.[158]

The objective/subjective modifications, ultimately, are only permitted insofar as they do not alter the concession involved, and represent the residual category to which belong all the various vicissitudes and problems that can configure without leading to the necessity of reopening the competitive tender (*e.g.* subcontracting, technical and/or technological adaptation, corporate restructurings, or insolvency).

This means that the renegotiation is prohibited not only when it is pretentious, but even if is intended to give an undue advantage to the contractor selected by tender, so that this last gains a position unfairly privileged compared to the market comparison had with the other competitors and aimed at the award.[159]

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[158] In Italy see art. 147 of the Code - "Award to the concessionaire of additional works":

1. May be entrusted to the concessionaire directly, without observing the procedures prescribed by this Code, the additional works not included in the concession project initially considered nor in the initial contract which have become necessary, as a result of unforeseen circumstances, for carrying out the work as described therein, provided that such award is made in favour of the economic operator performing the work, in the following cases: a) when such additional works can not be technically or economically separated from the initial contract without major inconvenience to the contracting authority, or b) when such works, although separable from the original contract, are strictly necessary for its completion.

2. In any case, the aggregate value of the contracts awarded for additional works may not exceed fifty percent of the amount of the original works object of the concession.

[159] Cf. ECJ, Grand Chamber, 13 april 2010, in Case C-91/08, *Wall AG*, opinion of the Adv. Gen. Bot, delivered on 27 october 2009, ptt. 47-48: "Then, at the stage of performing the contract, it is necessary to reconcile the duty of transparency with the public service interest, which means, in certain circumstances, that the contract must be adapted and amended. As I have pointed out, the holder of the concession takes on the responsibility of organising the service as well as the consequent operating risks. Given the complex and long-term nature of a service concession, a concession-holder must have sufficient leeway to adapt to market conditions and to any changes in the economic, technical or legal context of the concession. The parties must therefore be particularly flexible and act in a spirit of cooperation, in view of the unforeseeable constraints and performance setbacks which are inevitable in the case of long-term investments. Accordingly, there are many reasons to renegotiate contracts. Nevertheless, some of them may constitute abuse if they substantially alter the structure of the contract, making the transparency of the procedure and the prior call for competition illusory. It is therefore necessary to determine whether the planned amendment is merely an additional clause of the contract, justified by legitimate reasons, or whether it ultimately results in the conclusion of a new contract which, in accordance with the fundamental principles of Community law, must be subject to a sufficient level of publicity and a new tender procedure".

The principle of equal treatment thus has priority over all the other interests.

To counterbalance the rigidity of such a claim succor the tendering and contract clauses that have passed the scrutiny of the competition experienced. It follows the confirmation of what has been said earlier, namely that the flexibility desired by EU law is placed in the preparation of concession design and award, next being significantly reduced.

So we should picture that the award of a concession ends up conveying all the items of complexity and riskiness of the case, leaving to the contractual stage the reception of the competitive outcome in adherence to which having to perform the execution.

It seems to be noticed a false note in order to the limited changeability of the concession at supranational level (subject to the same discipline of procurement contracts), whilst the national law – always on the presupposition of the discipline of procurement (this time the one in civil law) – admits a review of the concession in terms of economic stability that is actually cancelling the allocation of risk in relation to the concessionaire.

Be added that the European Directives only set the boundaries of the possible changes to the concessions awarded without declaring which are the effective consequences (apart from the clauses for rebalancing in favour of the concessionaire, it is not clear who should take on the unpredictable contingencies and additional works or services, especially because the same rules apply for public contracts and concessions: for these latter, thence, there will be an extension of the expiry in the name of the economic-financial equilibrium or is the whole included in the operational and operating risk of the concessionaire?).

European law does not deal with these issues, so leaving to the national interpreter the honor and the onus of identifying which is the contractual regime of fulfillment and breach of the obligations in public contracts and concessions.

Yet the situation for the interpreter is complicated and worsened in Italy due to the resistance of the legacies from the past and a tendency to reaffirm the *stare decisis*.

What makes it very difficult to interpret in conformity with European law, although even this last shows deep gaps accompanied by the propensity to address them through the extension of positive and positivised law (in the field of procurement contracts, first of all).

Ultimately, under European law, the distinction between contracts and concessions, based on risk, regards mainly the procedures before the concession (competitive stage) rather than the subsequent segment (contractual phase), as demonstrated by their identical discipline in the matters of the modifications *in itinere*.

§4.2.2. The risk of management in the public contracts

Since the contractor is traditionally seen as *nudus minister* of public administration, in the common opinion he is considered to be free from risks other than that of enterprise.

Having little managerial autonomy, within the limits permitted by the contracting authority which is responsible to remunerate him, the contractor would thus bear few risks.

The emphasis on the operating risk of concessions has legitimised an interpretation *a contrario* with regard to the contracts, on the other hand.

This is not however the reality of facts, in spite of the positivistic vision that seeks to simplify and outline all the knowledge.

We will see in this respect that, although the EU Directives are silent on the point, the contractor puts in place a "management at its own risk" (cf. art. 1655 cod. civ.).

This aspect becomes important particularly in relation to the adjustment of prices and to the variations in the course of work.

The modifications during the execution: the Directives 2014/24/EU and 2014/25/EU

The new EU Directives 2014/24 and 2014/25 provide, at the articles 72 and 89, respectively, a nearly identical discipline for the modification of contracts during the period of their validity.

And, considering what has just been explained above in relation to the concessions, this implies a commonality even with these latter.

Contracts and framework agreements may be modified without a new procurement procedure in any of the following cases:

a) where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses, or options, without altering the overall nature of the contract or the framework agreement;

b) for additional works, services or supplies by the original contractor that have become necessary and that were not included in the initial procurement where a change of contractor cannot be made for economic or technical reasons (such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement) and would cause significant inconvenience or substantial duplication of costs;

c) the need for modification has been brought about by circumstances which a diligent contracting authority or entity could not foresee and the modification does not alter the overall nature of the contract;

d) where a new contractor replaces the one to which the contracting authority or entity had initially awarded the contract as a consequence of either:

i) an unequivocal review clause or option;

ii) universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established, provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of the Directives 2014/24/EU and 2014/25/EU; or

iii) in the event that the contracting authority/entity itself assumes the main contractor's obligations towards its subcontractors where this possibility is provided for under national legislation;

e) where the modifications, irrespective of their value, are not substantial.

The contracting authorities which have modified a contract in the cases set out under the points b) and c) aforementioned shall publish a notice to that effect in the Official Journal of the European Union.

The only difference of discipline, as already shown in dealing with the concessions (as single institution including both ordinary and special sectors), consists in the limitation of value set solely for the amendments relating to ordinary sectors, where any increase in price referred to in points b) and c) shall not exceed 50% of the value of the initial contract and, in case of multiple successive changes, such a limitation applies to the value of each modification.

On the contrary, this does not happen for the changes below the EU thresholds that do not exceed 15% (for works contracts) or 10% (for services and supplies) of the initial value of the contract: when several successive modifications are made, both for ordinary and special sectors, the value shall be assessed on the basis of the net cumulative value of the successive modifications to prevent maneuvers designed to circumvent the Directives.

However, the modification may not alter the overall nature of the contract or framework agreement.

A modification of any contract or framework agreement during its term shall be considered to be "substantial" where it renders the contract or the framework agreement materially different in character from the one initially concluded.

Besides the above-mentioned cases (specific clauses, supplementary obligations, objective and/or subjective modifications that do not alter the procurement), a modification shall be considered substantial where one or more of the following conditions is met:

a) the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure;

b) the modification changes the economic balance of the contract or framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;

c) the modification extends the contract or framework agreement considerably;

d) where a new contractor replaces the one to which the contracting authority had initially awarded the contract in other cases than those provided for.

In all these cases is required the call for awarding a new procurement procedure, with the termination of the contracts in force and the publication of a new tender notice.[160]

The limit is then given by the substantial, as well as unforeseen into acts, nature of the amendments.

When the *ius variandi* is not substantial and agreed-upon in negotiation or *ex lege*, conversely the contract will undergo some changes during the execution.

Although the Directives contain the same provisions for contracts and concessions and are indeed silent on who will bear the amendments, it is necessary to understand how the distinction between public procurement contracts and concessions actually works.

If it descends from the presence in the hands of the concessionaire of an operating risk that the contractor does not bear, we have therefore to suppose that the rules destined to the two contractual categories are to be different.

The question is pertinent primarily at the level of national law, as a matter for the Member States, since they must fix the rules about the fulfilment of the obligations and on the consequences of any breach or default.

[160] Cf. lett. a) of art. 73 Dir. 2014/24/EU and of art. 90 Dir. 2014/25/EU as well.

(continues): the internal frame

The Italian legal system, as anticipated, has mainly framed the public contract as a commutative contract, because of the massive assimilation of those characters that the institution has in civil law.[161]

For the public contracts the sum agreed in the award remunerates the performance that the contractor undertakes to carry out in favour of the administration without taking operational risks other than the normal entrepreneurial risk.[162]

Any change of such consideration that exceeds the normal alea of the contract is compensated by the legal system through regaining profitability to the operation in original (*i.e.* in those terms crystallized within the contract), to the extent necessary to indemnify the contractor for every supervenience.[163]

Thus it is shown a significant difference compared to the concessions, connoted by the operational risk of the concessionaire.

Such a characteristic emerges especially under two respects: revision of prices and variations in the course of work.[164]

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[161] In doctrine see Cianflone A.; Giovannini G., *L'appalto di opere pubbliche*, Giuffrè, Milano, XII ed., 2012, pp. 42-45; Rubino D., *L'appalto*, in Trattato di diritto civile italiano diretto da F. Vassalli, VII, 3, Utet, Torino, IV ed., 1980, p. 213 ss. and 780 ss.; Musolino G., *L'appalto pubblico e privato*, vol. II, Utet, Torino, 2002, pp. 17 ss. and 299-301; Luminoso A., *Codice dell'appalto privato*, Giuffrè, Milano, 2010, p. 13 ss., as well as Cervale M.C., "La struttura dell'appalto" (pp. 105-107), Pennalisico M., "Il corrispettivo" (pp. 158-159), and Gambini M., "L'esecuzione del contratto" (p. 176), in Cuffaro V., *I contratti di appalto privato*, in Trattato dei contratti diretto da P. Rescigno ed E. Gabrielli, Utet, 2011.

An orientation prior to the Civil Code of 1942 instead framed such contract as an aleatory contract: cf. Luminoso A., op. cit., p. 13 and Musolino G., *Dei Singoli Contratti - Artt. 1655-1802 c.c*, a cura di D. Valentino, Commentario del Codice civile diretto da E. Gabrielli: Vol. II, Utet, 2011, p. 107. See also Cass. Civ., 25 june 1960, n. 1676: to the procurement contracts conventionally aleatory "is not applicable the principle of excessive onerousness, provided and ruled by art. 1467 c.c. for the contracts in general, not only in the case referred to in the first paragraph of art. 1664 of the same code (price revision) but also in the one referred to in paragraph two of the said article (fair compensation for the difficulties of execution)".

[162] The Code of public contracts – d.lgs. 163/2006 – in its Part II relating to the public contracts for works, services and supplies in ordinary sectors, includes a Title I (Contracts with Community relevance), in which the Chapter V establishes the "Principles related to the execution of the contract" (artt. 113-120: performance bond, variations in the course of execution of the contract, price adjustments, subjective events of the performer of the contract, assignment of receivables arising from the contract, subcontract, activities that do not constitute subcontracting and protection of labour, direction of execution of the contract, testing), and a Title III (Additional provisions for public works contracts), whose Chapter I includes the rules on Programming, direction and execution of the works (artt. 126-141).

Despite all the provisions mentioned are not expressly recalled for utilities sectors, art. 206 allows their application in accordance with the general principles of administrative law.

[163] Refer to Cagnasso O., *Appalto e sopravvenienza contrattuale: contributo a una revisione della dottrina dell'eccessiva onerosità*, Giuffrè, Milano, 1979; and De Regibus G.A., *Riflessioni in tema di onerosità o difficoltà nell'esecuzione dell'appalto*, Giurisprudenza Italiana 3: 131, 1993.

[164] See Giannelli A., *Esecuzione e rinegoziazione degli appalti pubblici*, Editoriale Scientifica, Napoli, 2012, for a more complete reconstruction of the framework in matters.

The adjustment of prices and the penalties

For public procurement contracts is planned the rule known as "closed price".[165]

This one consists in the cost of the works, minus the reduction of the auction, plus a percentage to apply – whenever the difference between the real inflation rate and the inflation rate programmed in the previous year is higher than 2% – to the amount of the works remaining to be done for each entire year planned for the completion of works.[166]

The mechanism of the "closed price" is primarily aimed at ensuring the certainty of government expenditure, with the exception of any increase conventionally referring to general inflation indexes (that never occurred in reality so far).

In regard to price adjustment, art. 133 of the Code provides that for public works shall not be revised prices nor is to be applied art. 1664 of the Civil Code.

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[165] Refer to Centofanti N., "La revisione dei prezzi" in Musolino G., *L'appalto pubblico e privato*, vol. II, Utet, Torino, 2002, p. 297 ss., and Moscarini L.V., *Profili civilistici del contratto di diritto pubblico*, Giuffrè, Milano, 1988, p. 91 ss., on the historical evolution of the institution of price revision in public procurement.

[166] According to art. 32 of D.P.R. 5 october 2010 n. 207 they are the responsibility of the contractor:

a) expenses of contract and accessories and the registration tax;

b) general and specific financial charges, including the performance bond or the global execution guarantee, where provided, and the insurance policies;

c) the share of the expenses for the site organization and technical-administrative management of the performer;

d) the administrative management of site personnel and the technical direction of the construction site;

e) the expenses for the installation, maintenance, lighting and the final folding of construction sites, including the costs for the use of areas other than those made available by the purchaser, with the exclusion of the costs relating to the safety in the same construction sites not subject to reduction;

f) expenses for transport of any material or means of work;

g) expenses for equipment and temporary works and anything whatsoever necessary to the full and perfect execution of the works;

h) expenses for reliefs, tracks, audits, explorations, pillars and the like that may occur, even on a reasoned request from the director of works or the responsible for the proceedings or of the testing, ever since the day when begins the delivery until the issuance of the certificate of provisional acceptance or the issuance of the certificate of regular execution;

i) expenses for the access roads to the construction site, the installation and operation of equipment and means of work on site;

l) expenses for suitable premises and the necessary equipment to be made available for the office of direction of work;

m) expenditure on passing, for temporary occupations and for damages of plants felling, for deposits or extraction of materials;

n) expenses for the custody and proper preservation of the works until the issuance of the certificate of provisional acceptance or the issuance of the certificate of regular execution;

o) the cost of adapting the construction site in compliance with the Legislative Decree 9 april 2008, n. 81, which indicates the percentage share of the total overheads, for obligations provided by Article 86, paragraph 3-*bis*, of the Code;

p) general and special charges provided in the special conditions for procurement.

All these cost items are recorded in the accounts of the public contract and, without prejudice to any reserves, paid via the consideration.

Should the price of building materials, as a result of exceptional circumstances, suffer increases or decreases, higher than 10% compared to the price recorded by the Ministry of Infrastructure in the year of submission of the bid, it does result in a compensation, in addition or reduction, for half of the percentage exceeding 10% and within the limits of the sums specifically set aside for unexpected events in the economic framework of each intervention, for no less than 1 percent of the total amount of the works, with no new or increased burdens on public finances.[167]

Which means, the contractor being periodically compensated for the price changes of single materials arising from exceptional market fluctuations, that there is not his assumption of operational risk in this respect.[168]

The perspective adopted by the Code mainly concerns works contracts, but the reasoning is also extended to services and supplies by virtue of art. 115, which regulates the adjustment of prices in contracts with ongoing and periodic execution.[169]

The revisional mechanism of the prices under art. 115 of the Code is in fact binding and has imperative nature. Thereby ensues:

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[167] On the modalities for the calculation and payment of compensation, see also artt. 171-172 D.P.R. 5 october 2010, n. 207 and the Circular of the Ministry of Infrastructure and Transport on 4th august 2005.

The contracting authority shall verify, through the director of works, any actual higher cost incurred by the performer, proved with appropriate documentation, declaration of suppliers or subcontractors or other suitable means of proof relating to the variations, for the building materials, of the basic price paid by the performer, compared to that recorded by the same with reference to the offer time.

Should the higher costs proved by the performer be equal to a percentage variation lower than that reported in the annual ministerial decree, the compensation is recognized only for the aforementioned lower variation to the portion exceeding ten percent.

Whereas it is proved by the performer a higher cost relative to a percentage change greater than that shown in the said decree, the compensation is recognized within the maximum limit equal to the change reported in the annual ministerial decree for the part exceeding ten percent.

[168] Reference must be yet made to the ANAC report of 31 july 2008 to Government and Parliament, in which the Authority, also following a hearing of the operators and the main contracting authorities, considered it appropriate to report to the Government and Parliament the need to review some aspects of the current legislative mechanisms for adjusting prices in the public works contracts since it "does not result appropriate to maintain the bilateral equilibrium of the contractual performances. In this regard, must be assessed suitable methods for allocating the consequent over-costs in the logic of proper allocation of risk between contracting authority and contractor".

[169] On this point see Council of State, Sect. III, 19 july 2011, n. 4362 (annulls T.A.R. Veneto, Sect. I, 26 march 2010, n. 1009): "The provision of a mechanism for the revision of the price of a durable public contract on a periodic basis shows that the law (art. 115 d.lgs. n. 163 of 2006) has intended to provide contracts for supplies and services with a mechanism that, in certain cadences, entails the establishment of a "new" consideration for the performances subject of contract referred to the dynamics in price observed in a given period of reference, with the benefit of both parties, since the contractor sees reduced, though not eliminated, the alea proper of the lasting contracts, and the contracting authority sees decreased the danger of deterioration in a performance become onerous. Such discipline has mandatory nature and a possible contract clause differing from the discipline set by regulations must be considered null".

a) the illegitimacy of the silence kept by the public authorities against an application for price revision advanced by the contractor;

b) the application of the mechanism of "automatic integration" *ex* art. 1339 cod. civ. in the event that the obligation had not been included in the contractual settlement;

c) the nullity for contrast with a peremptory norm of any differing clauses contained in the contracts.[170]

The price revision in the procurement contracts plays a dual role: on the one hand, protecting the needs of the administration to prevent that the consideration of the lasting contract undergoes such uncontrolled increases over time, capable of upsetting the financial framework on the basis of which had occurred the conclusion of the contract; on the other, protecting the interest of the undertaking to be free from the alteration of the contractual equilibrium following the changes in costs that may occur during the whole relationship and might prompt a surreptitious reduction of the quality standards of the performances.[171]

Therefore, the revision of prices – that in the concessions we have seen to be of uncertain application – for public contracts constitutes a subjective right of the contractor, without any discretionary power on the part of the contracting entity.[172]

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[170] See, recently, *ex multis*: T.A.R. Napoli, Sect. II, 13 april 2015, n. 2086; 5 february 2015, n. 887; 22 october 2014, n. 5409.

The Supreme Administrative Court has even denied the possibility of providing by negotiation a revision more limited as to the effect and of introducing a relevance threshold on the assumption that "primary purpose of the rule, confirmed by art. 115 d.lgs. 12 april 2006 n. 163, is clearly to protect the public interest in having the performance of goods and services from the contractors of the public administrations not to suffer a decline in quality over time due to increases in the prices of factors of production, affecting the percentage of profit considered within the formulation of the offer, with a consequent inability of the supplier to fully address the same performances. Moreover, as the Section has already observed in that case too, the normative reference to the revisional clause does not attribute to the parties large margins of freedom to negotiate, but imposes to translate on the contractual plan the legal obligation, defining also the criteria and the essential procedural moments for the correct adjustment of the consideration" (Council of State, Sect. V, 2 november 2009, n. 6709; 20 august 2008, n. 3994).

In this perspective have been deemed inconsistent with such a legislative provision the contractual clauses that prescribed a biennial revision, those for which the contractor was to bear the price changes for the second year of the contract and those falling within the stipulated alea of 10%.

[171] Cf. Cervale M.C., "La struttura dell'appalto", in Cuffaro V., op. cit., p. 117: "also in public procurement contracts the revision of prices was born from the need to maintain in precise and defined terms the relationship between purchaser and contractor, with benefits for the one (accuracy in the calculation of the costs and security from any change in the market) and for the other (certainty of the good end of the work and of its correct execution)".

[172] The unavailability of the standardized costs determined by the Observatory of public contracts pursuant to art. 7, para. 4, lett. c), and 5 of the Code do not prevent from recognizing the price revision, remaining unchanged the right of the contractor to get the revision of prices, whose exact amount will have to be determined by an investigation carried out in accordance with the general inner limit of reasonableness (calculation must be in application of the F.O.I. index: Cons. St., V, 14 febraury 2006, n. 7461; 23 april 2014, n. 2052; 14 july 2014, n. 3669. Provided that, were the company during the investigation to prove the

And, mind it well, not a legal right whatsoever, but an individual subjective right non-disposable by the parties (despite the exclusive jurisdiction of administrative courts), so that must be considered null any contractual clause that differs from the discipline set by regulations and law.[173]

This is the umpteenth example of replacement of private autonomy via legislation[174] which, besides appearing to clash with the contractual dimension at the basis of the new EU Directives on the public procurement (not by chance the clause for revision of prices is included within the exceptional ways whereby it is allowed to modify the contracts signed), in Italy poses as blatant demonstration of the peremptoriness of the principle of economic equilibrium in the field of procurement.

Principle that is even set down at legislative level.

It is then found the peculiarity of the commutative contracts, entailing the exchange between certain values that must remain correlated for the duration of the obligation, except for the deficiencies of the parties.

In relation to the prices you have no risk with the contractor (but for a franchise basically equal to the margin of profit, which excludes potential losses), the revision being caused by circumstances beyond his control, in contrast to what happens if the performer is responsible for the irregularities in the implementation.

The executors of public works are subject to penalties for late fulfillment of their contractual obligations under the combined provisions of art. 133 of d.lgs. 163/2006 and art. 145 of D.P.R. 207/2010.

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existence of exceptional circumstances justifying the derogation of the FOI index, the quantification of the revisional compensation can take place with the use of different statistical parameters).

[173] In this sense see Council of State, Sect. III, 1° february 2012, n. 504, according to which the rules laid down regarding the revision of prices in the procurement contracts of services or supplies to run with periodical or ongoing execution, set out in art. 115 have an imperative character: although the law has failed to establish expressly a maximum period beyond which it is not possible to request for the price revision, given the nature of non-disposable right, and the absence of an express legislative term within which it can be invoked, the request can be made within the five-year prescription period dictated by art. 2948, n. 4, c.c. (confirms T.A.R. Lecce, Sect. II, n. 1658/2010).

For works, instead, art. 133 of the Code fixes a deadline for the request under penalty of forfeiture (sixty days after publication of the ministerial decrees in the Official Gazette of the Italian Republic).

[174] Permitted solely to the extent that the agreement between the parties is not the result of a regular and justified market exchange: what to protect is not the "just" contract but that concluded on fair conditions (just think that are not prohibited unfair clauses for the consumer and the economic dependence between companies, but their abuse). Cf. Barcellona M., *I nuovi controlli sul contenuto del contratto e le forme della sua eterointegrazione: Stato e mercato nell'orizzonte europeo*, Europa e diritto privato 1: 33-58, 2008, and Spangaro A., *L'equilibrio del contratto tra parità negoziale e nuove funzionalizzazioni*, Giappichelli, Torino, 2014.

Must be emphasized that is also permitted, upon reasoned request of the contractor, the total or partial non-application of penalties, when it is recognized that the delay is not imputable to the performer or when the penalties are manifestly disproportionate with respect to the interest of the contracting authority or entity.

The non-application does not imply the recognition of a compensation or indemnity to the contractor.

In special cases which make appreciable the interest that the completion of the work is done in advance of the deadline contractually agreed, the contract may provide that the performer is awarded a prize for each day in advance, determined on the basis of the same criteria for the calculation of the penalty established in the specifications or in the contract, through the use of the amounts for contingencies in the economic frame of the intervention, provided that the performance of the contract complies with the obligations assumed.

In essence, on the one hand, the contractor is subject to adjustments and safeguards with regards to the agreed remuneration and the related changes for non-imputable reasons, on the other, he may be rewarded for the excellent performance but responds of its own delays and defaults.

The variations in the course of work

In public procurement contracts, to the interest of the client to make changes to the original project, varying upwards or downwards the contract stipulated, other interests add: namely those enclosed, on the one hand, in the needs to reduce public spending (which are important in the event of any increasing variations) and, on the other hand, in the needs for protection of competition (which require that the contract executed in practice must not be substantially different from the one configured into the acts of calling for competition of the procedure experienced for the identification of the contractor).[175]

These supplementary needs have brought the legislator to adopt a special discipline – for public procurement contracts nowadays contained in the art. 114 and 132 of the Code, as well as in the art. 161 ss. of the D.P.R. 207/2010 – under which the possibility of making variations suffers limits narrower than those established by the Civil Code in matters of private procurement contracts (as already seen for the revision of prices).

[175] Cf. T.A.R. Milano, Sect. III, 13 september 2012, n. 2310, that has ruled as illegal the excerpt of works from an awarded lot, subject to judicial dispute, which were then assigned directly to the successful tenderer of another lot in order to avoid the alteration of the economic and financial equilibrium of the work.
The amendment had been implemented through a diminishing variant of the controversial lot.

It should however be noted that the fundamental interest underlying the regulation of variants remains unchanged even in the case of public procurement, namely the need to prevent that the client be obliged to receive the performance as configured in the contract if, as a result of new events, it is no more responsive to his own interests.

Art. 132 of the Code, to which refers art. 114, admits variants in course of work[176] exclusively on one of the following grounds:

a) for needs arising from supervening laws and regulations;

b) for unforeseen and unforeseeable causes or for the intervened possibility of using materials, components and technologies not existent at the time of design that can determine, without increasing cost, significant improvements in the quality of the work or of its parts and insofar as they do not alter the current project design;

c) for the presence of events that occurred in course of work, relating to the nature and specificity of the assets on which it intervenes, or unexpected or unpredictable findings;

d) in the cases *ex* art. 1664, para. 2, cod. civ. (cd. "hydrogeological surprise");

e) for the occurrence of mistakes or omissions in the executive project which affect, in whole or in part, the realization of the work or its utilization.

Except that in the latter case you have the responsibility of the designers for the damage suffered by the contracting authorities as a result of the errors or omissions in the project, for public procurement contracts concerning the executive design and execution of works he is the contractor who responds of any delays and burdens arising from the need to introduce variants in course of work due to the deficiencies in the executive project.[177]

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[176] No variations or additions to the approved project can be introduced by the performer if they are not prepared by the director of works and approved beforehand by the contracting authority.

Otherwise there will be the reinstatement, charged to the contractor, of the work and works in the original situation according to the provisions of the director of works, provided that in no case he can claim compensation, reimbursement or indemnity for the same works.

Are not considered variants the interventions prepared by the director of works to resolve questions of detail, which are contained in an amount not exceeding 10% (for the works of recovery, refurbishment, maintenance and restoration) and 5% (for all the other works) without any increase in the amount of the contract stipulated for the realization of the work.

Are also allowed, in the exclusive interest of the administration, variants, upward or downward, for the improvement of the work and its functionality, as far as they do not comprise substantial modifications and are motivated by objective needs arising from circumstances supervened and unforeseeable at the time of the contract signing. The increased amount relating to such variants can not exceed 5% of the original amount of the contract and must be covered in the amount budgeted for the execution of the work net of 50% of the auction rebates achieved.

[177] Were the variants to exceed the one fifth of the original amount of the contract, the contracting authority shall terminate the contract and launch a new competition in which the former contractor is invited.

In all other cases it is the contracting authority that indemnifies the contractor.

This occurs punctually in the case where the contracting authority decides to increase or decrease the works to be performed, followed by the obligation of the contractor to perform the variations that do not exceed the one fifth of the total amount of the contract (cd. "quinto d'obbligo").

The contractor is therefore required to carry out the increasing or decreasing works in the same terms, prices and conditions of the original contract, without any compensation further than the consideration for the new works.[178]

When, instead, the variant – provided that it falls into one of the types described – exceeds the amount of the fifth (cd. "sesto quinto"), the contractor has to declare whether he will accept the continuation of the works and under what conditions.

The limit of the one fifth, in essence, does not constitute a threshold beyond which the contracting authority cannot introduce any variations to the project: it is, rather, a threshold beyond which the contractor has the possibility to not fulfil the provisions of the public administration and to terminate the contract.

Being understood the impossibility of introducing essential modifications to the nature of the works covered by the contract, to the contractor is always guaranteed a fair compensation for the occurred changes not imputable to him that render his performance significantly more onerous.[179]

Are an exception to this statement the downward variants.[180]

The termination of the contract entails the payment of the works carried out, of the useful materials and 10% of the works not performed, up to four-fifths of the contract amount.

[178] Cf. art. 161 D.P.R. 5 october 2010, n. 207, reproducing art. 10 of the cd. "Capitolato Generale" (D.M. 19/04/2000 n. 145), now repealed. The same rule was already contained in the artt. 342-344 of the Law on public works 20 march 1865, n. 2248 (Annex F).

[179] In calculating the compensation in favour of the contractor are taken into account the increases, compared with the agreed terms, of the works relating to foundations (for which the performer may ask fair compensation for the amount exceeding the one fifth of the total amount of the contract) and also the changes in the various groups of homogeneous categories able to produce a significant economic prejudice (*i.e.* any change in the single group that exceeds one fifth of the original amount: only for the part exceeding this limit the performer is paid a fair compensation, anyway not higher than one fifth of the amount of the contract).

In case of disagreement on the extent of the fee it is credited to the accounts the amount recognized by the contracting authority, subject to the right of the performer to make his reserves for the further request.

The variations are usually valued at the prices of the contract, but if they involve works or materials for which it is not fixed the contractual price then occurs the joint formation of new prices.

Being the variants one of the modes which are best suited to surreptitiously modify the object submitted to the competition for tenders and often giving they rise to phenomena of corruption and malfeasance, has been introduced the obligation to communicate the same to ANAC and to the Observatory: v. art. 37 D.L. 24 june 2014, n. 90, as replaced by the conversion law 11 august 2014, n. 114.

[180] Cf. art. 162 D.P.R. 5 october 2010, n. 207.

Irrespective of the circumstances envisaged into art. 132 of the Code, in fact, the contracting authority can always order the execution of the works to a lesser extent than what provided in the contract signed, within the limit of one fifth of the relevant amount and with no compensation to the performer.

Even the contractor, during the course of the work, may propose possible changes for improvements to the functional or technological aspects of the project, resulting in a decrease of the original amount (but not of the qualitative and quantitative performance), without altering the safety conditions of workers and the timing of works.

If approved, the economies resulting from the ameliorative proposal can be shared equally between the contracting authority and the performer.

While doubting the effective practical relevance of the latter case, it seems possible to note an element of risk in these situations, where the contractor is not compensated for the economic loss (of income) relating to the works.

The same goes for the accidents to people and damage to property that may occur in the execution of contract, whose prevention, restoration and compensation shall be borne by the performer regardless of the existence of adequate insurance coverage.[181]

Conversely the contractor can claim compensation for any damage to the works or supplies that can be caused by force majeure, but only within the limits allowed by the contract.[182]

Here, to be honest, a part of risk may be construed in the time-limit within which the performer has to make his complaint unless he wants to lose the right to compensation, as in the fact that no compensation is due whenever to the damage causing have contributed the fault of the performer or of the parties for whom he is answerable.

This is the normal business risk assumed by any entrepreneur, resulting in his responsibility for own facts and imputable events (the well-known risks of bad management or errors of assessment by the economic operator which, according to the Court of Justice, are not decisive for the classification of a transaction as a public contract or concession).

What instead arouses interest is the identification of the "normal" alea of the public contract, in order to make a comparison with the definition of operating risk in concessions and thus establish the dividing line with respect to the concession.

[181] Cf. art. 165 D.P.R. 5 october 2010, n. 207.
[182] Cf. art. 166 D.P.R. 5 october 2010, n. 207.

From all the rules just discussed comes out quite clearly the underlying principle that the private contractor does not bear a real operational risk, such as what occurs in the concessions field, because of the various forms of compensation that the law has prepared against the possible contingencies.

Any liability of the contractor is bound to the attributable deficiencies.

Therefore the normal alea of the public contract, in light of all the foregoing above, ends up coinciding with the portion of prices and works variation that is not compensated (even though the jurisprudence is very rigorous on this point) and which, for that reason, remains the responsibility of the contractor.

This seems to be the upper limit of the economic risk of the contracting party for non-imputable contingencies.

In the other cases it is provided to regain profitability to the contract.

Hence, the "normal" alea of the public contract is to be summarized in the economic balance of performances, save the profiles of responsibility, for the entire duration of the contract. Extend to the concessions such a discipline regulating the public contracts would thus mean eliminate the operating risk of contractor, in flagrant violation of European law.

Some empirical findings: a comparison between Eurotunnel and the Lombardy case (BreBeMi, Pedemontana, TEEM)

In support of what has been shown so far it may be useful to provide a quick comparison between what is considered the European concession par excellence, *i.e.* Eurotunnel (*The Channel Fixed Link*, 1986), and the recent interventions regarding the Lombardy region (BreBeMi, Pedemontana, TEEM).

As it is well known, the first has been directed toward the construction of the tunnel under the English Channel (in english: *Channel Tunnel*; in french: *Tunnel sous la Manche*; in Italian is currently called *Eurotunnel*, but in reality this is the name of the concessionary company for the management until 2086), a more than 50 km long railway tunnel, passing under the bottom of the English Channel.

The seconds are the most glaring examples of homegrown motorway infrastructure, passed off under the label of "concessions" as apparently realized through a project finance but in reality they constitute something different.

The intent is indeed to show that in Italy the European concession does not exist.

The concession contract between Eurotunnel and British and French governments, dated 14 march 1986, is a project finance where the concessionaire agrees to conceive the operation at all stages, from the preliminary analysis of feasibility to the design, financing, unto construction and management.[183]

The remuneration of the concessionaire consists therefore in the collection of fees from users and in the commercial exploitation of the infrastructure.[184]

The United Kingdom and France have for their part assured to the concessionaire, at expense of this last, the availability of the areas necessary to the construction of the tunnel; whilst the concessionaire has had to ensure the financial soundness of the operation.[185]

They were also provided securities for fulfilment (*performance bond*).

The concessionaire has been able to independently choose the *Project Managers* (*Maitre d'Oeuvre*)[186], also because dependent on him, except for the veto power of States.

The same was true for the design of the *opus*, for which the concessionaire has had some freedom to change from the project initially approved and attached to the concession contract, though having to take into account the objections of the two States grantors ("*which may only be on grounds of safety, defence, security or the environment*").

Likewise the conformity of projects, the States have monitored the compliance with the schedule of works and their costs and financing.[187]

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[183] See Clause 2.1 thereof: "*Subject to and in accordance with the provisions of this Agreement, the Concessionaires shall jointly and severally have the right and the obligation to carry out the development, financing, construction and operation during the Concession Period of a Fixed Link under the English Channel between the Department of the Pas-de-Calais in France and the County of Kent in England. Subject as aforesaid, they shall do this at their own risk, without recourse to government funds or to government guarantees of a financial or commercial nature and regardless of whatever hazards may be encountered. The Principals shall, in a manner which they will endeavour to co-ordinate between them, adopt such legislative and regulatory measures, and take such steps, including approaches to international organisations, as are necessary for the development, financing, construction and operation of the Fixed Link in accordance with this Agreement and ensure that the Concessionaires are free, within the framework of national and Community laws, to determine and carry out their commercial policy*".

[184] Clause 2.3: "*The Concessionaires shall be entitled to levy charges for the use of the Fixed Link and its ancillary facilities during the Concession Period. The Concessionaires undertake duly to discharge all liabilities and obligations incurred by them under this Agreement*".

[185] It is important to highlight how the States grantors ("Principals") have delegated the operation to the concessionaire and did not assume any responsibility: cf. Clause 5.6: "*The Concessionaires shall ensure that any invitation of whatever kind made by or on behalf of either or both of them or of any of their respective Associated Companies with a view to raising finance of any kind for the purposes of the Fixed Link (whether by way of debt financing or equity participation) shall contain a prominent and clear statement that neither Principal makes or has made any representation, whether express or implied, as to the viability of the arrangements contemplated by this Agreement or as to the accuracy of any estimates, predictions or projections of whatever kind by the relevant company*".

[186] Corresponding to our "Direttore dei lavori" (Director of works).

[187] Cf. Clauses 7 and 9-10-11.

As regards the sheer operational phase, to the concessionaire was allowed maximum autonomy to set the tariffs and commercial policy (being subject solely to the four freedoms of movement and to the tax legislation, as well as to the requirements on public order established by the grantors).[188]

The concessionaire must guarantee the continuity and safety of the public service.

There are also imposed obligations of disclosure, such as those on increasing rates or on the interruption of service due to repairs or accidents.

With reference to the profiles of responsibility towards users and third parties, the rule is the responsibility of the concessionaire, with exclusion of that of concession grantors (except for any damage caused by "*serious default or recklessness of the Principals or either of them*").[189]

But the section of the contract which most interests this discussion is certainly the one dedicated to the risk of "*Exceptional Circumstances and Force Majeure*".[190]

In addition to establishing an *inter partes* procedure for the resolution of disputes (which provides the expertise of arbitrators in case of no amicable settlement), the clause lays down two fundamental precepts: that neither party is in principle responsible for the exceptional contingencies, but either can become such when it has aggravated the effects;

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[188] Cf. Clauses 12-13 and 23.

[189] Cf. Clause 21.

[190] Clause 24.1: "*None of the parties to this Agreement shall be liable for any failure or delay in complying with any obligation under this Agreement to the extent that such failure or delay has been caused directly by Exceptional Circumstances or by any other event or circumstance presenting the characteristics of force majeure such as:*

-war (whether declared or undeclared);

-invasion, armed conflict or act of foreign enemy;

-riot, insurrection, act of terrorism, sabotage, criminal damage or the threat of such acts;

-nuclear explosion, radioactive or chemical contamination or ionising radiation;

-any effect of the natural elements including geological conditions which it was not possible to foresee and to resist;

-strike of an exceptional importance;

-behaviour of one party causing serious and certain damage to another party;

to the intent that in particular, but without limitation, the time allowed for the performance of the obligations referred to in Clause 10 shall be extended accordingly.

[omissis]

24.6 A party shall not be entitled to rely upon Clause 24.1 where that party by act or omission has seriously aggravated the relevant Exceptional Circumstances or other event or circumstances referred to in Clause 24.1.

24.7 The giving of notice invoking Clause 24.1 shall not release the party giving the notice from the requirement to take all reasonable steps to mitigate the consequences of the relevant Exceptional Circumstances or other event or circumstance referred to in Clause 24.1.

24.8 Except as specifically provided to the contrary, no party shall be relieved of its obligations under this Agreement by reason of impossibility of performance or any circumstances whatsoever outside its control".

and that the parties have a duty to mitigate the consequences of extraordinary events, remaining the concession contract absolutely valid (as appropriately extended).

This is the neatest expression of the dogma of the conservation of contract.

And not only: it emphasizes the very part of risks unable to be allocated reasonably, being totally outside the control of the parties.

It would be unreasonable loading on one of the parties similar events; had it better to make the contract impermeable to them, by means of an appropriate adjustment, in order to avoid situations of abuse of rights.

The only remedy is the mitigation of risk by parties under good faith.

This does not mean that to all the contractual risks, including those specifically allocated to one of the parties, should apply the same.

We shall see how this observation will be very useful further in this study.

The concessionaire is instead responsible for any default, so that it may result in the interruption of the concession (construction and/or management) or in the imposition of penalties from the concession grantors.[191]

To this end were prepared monitoring bodies (*Intergovernmental Commission* and *Safety Authority*), at the expense of the concessionaire but referring to the governments of States grantors (which, it is worth pointing out for a second time, do not participate in any way to the losses and are not economic partners of the concessionaire).

The surveillance of the public bodies is aimed at the regular and proper execution of the concession.

Different is the role of the lenders, who are allowed to replace the concessionaire through the designation of new equivalent subjects (cd. "*step-in*").

If there are no substitutes willing to the takeover, is in the faculty of States grantors the award of a new concession, provided that the new concessionaire does assign a portion of profits to the original lenders by way of indemnity.

In case of new concession it was established the free use, exempt from any royalty, of whatever intellectual property of the previous concessionaire or third parties.

[191] Cf. Clauses 25-26, where it is expressly provided that the interruption of the concession for breach of the concessionaire or for the exceptional circumstances referred to in clause 24.1 (v. *supra*) does not entitle to any compensation, unlike the measures originated from the grantor for the protection of national security or other relevant interests.

The Principals have pledged not to finance other connections with public funds and not to prematurely terminate the concession (under penalty of damages), except in cases of impossibility due to force majeure, for reasons of national security or for non-performance of the concessionaire.

In the latter case it is not provided any compensation for the concessionaire, while in the first two cases shall be paid an amount within the limits of the grantor's enrichment.

These are the terms of the Eurotunnel agreement, an European concession to all intents and purposes.

Although it has largely preceded the jurisprudence of the Court of Justice and the Directive 2014/23/EU, history has shown that effectively the operating risk has been placed into the hands of the concessionaire, who has repeatedly had to renegotiate with his private sector creditors on debt restructuring in order to avoid bankruptcy.[192]

The concessionaire, together with the private lenders of the project, has indeed assumed the risks both on the supply side and on the demand side.

Not even an euro of public investment has been spent.[193]

No one can fail to see the sidereal distance of the above with respect to the situation of Italy, where it is impossible to detect similar episodes and moreover the interventions under project financing often hide the presence of lenders only formally private, but public in essence.

It is the very case of the Lombardy motorways (BreBeMi, Pedemontana, TEEM).[194]

These are the strategic motorway infrastructures of priority[195]: "direttissima Milano-Brescia", "sistema viabilistico Pedemontano" and "Tangenziale Est Esterna di Milano".

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[192] On the vicissitudes of Eurotunnel reference is made to: https://it.wikipedia.org/wiki/Eurotunnel and https://it.wikipedia.org/wiki/Tunnel_della_Manica.

The management of the tunnel has faced numerous losses of both profits (for insufficient traffic) and value of the shares, traded with the creditors who had financed the work in order to renegotiate the debt.

The commercial failure of the operation seems to be caused by the excessive transit fees and a heavy burden of debt interest.

In recent years, it is however to be registered an improvement in the operating results: cf. http://www.eurotunnelgroup.com/uploadedFiles/assets-uk/Media/Press-Releases/2015-Press-Release/150422-Traffic-Revenue-Q1-2015.pdf; and http://www.eurotunnelgroup.com/uploadedFiles/assets-uk/Media/Press-Releases/2015-Press-Release/150318-2014annualresults.pdf.

[193] The cost of the completed work has been estimated at about 10 billion pounds (€ 11.436.693.301). Information at the webpage: http://news.leonardo.it/tunnel-della-manica-anniversario-20-anni-fa-lapertura-del-tunnel-sottomarino-piu-lungo-al-mondo/.

[194] With a total value approaching 10 billion euro, thence comparable to Eurotunnel.

Article "*Brebemi, Teem e Pedemontana: fra costi, ritardi e pedaggi è la Caporetto delle autostrade*", 19 july 2014, highlights delays, soared costs and demands for tax relief which subtract money to the State (http://www.ilgiorno.it/milano/brebemi-teem-pedemontana-inaugurazione-1.60314).

The Lombardy Region has played the role of grantor – through the Company "Concessioni Autostradali Lombarde s.p.a." (CAL, partecipated by A.N.A.S. s.p.a. and Infrastrutture Lombarde s.p.a.).[196]

Both projects and conventions have been approved in accordance with the special procedures relating to infrastructure and production plants contained in Part II, Title III, of the Code of public contracts (rather than according to the Regional discipline).[197]

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[195] Considered a priority on the basis of the general criteria laid down in art. 161, para. 1-*bis*, Code: a) consistency and integration with European and territorial networks; b) state of progress of procedural *iter*; c) possibility of prevalent financing with private capital.

In the regional document on economic and financial planning 2006/2008 the project envisaged an action for the regional territory government, open to listening for social, economic and institutional questions, considering the environmental repercussions, also in connection with private initiatives of public interest (Deliberation of the Giunta - Lombardy - 20/07/2005, n. 8/328 B.U.R. 07/11/2005, n. 45).

[196] As you can read on the website (http://www.calspa.it/), the goal is to significantly reduce the time of construction of infrastructure, speed up the authorization procedures, attract private capital in the financing of works and involve the territory in the delicate phase of building consensus.

Notably in order to speed up the implementation of the three major strategic works for the road conditions in Lombardy, with the Deliberation of the Giunta - Lombardy - 26/06/2007, n. 8/4953 (B.U.R. 03/08/2007, n. 31) has been authorized, for 2007, the expenditure of € 2.000.000 for the capital increase of the company Infrastrutture Lombarde s.p.a.

[197] Art. 161 ss. of Chapter IV - Works related to strategic infrastructure and production plants.

In particular, as an alternative to the concession for construction and operation, art. 173 provides for the award to the general contractor, contract with which it is entrusted the design and realization by whatever means of an infrastructure corresponding to the requirements specified by the contracting authority.

The general contractor differs from the concessionaire of public works for the exclusion from the management of the work done and is qualified for the specific connotations of organizational capacity and technical realization, for the intake of the charge relating to the temporal anticipation of the financing needed to the realization of the work in whole or in part with private financial resources, for the freedom of forms in the realization of the work, for the prevailing nature of obligation to the overall result of the relationship between this subject and the awarding authority and for assuming the related risk (v. art. 176 of the Code).

The general contractor is liable toward the contracting authority for the proper and timely execution of the work: are the responsibility of the general contractor any variants necessary to amend the vices or supplement the omissions in the project drawn up by him and approved by the awarding authority, and remain charged to the awarding authority any variants induced by force majeure, geological surprise or supervening prescriptions of the law or of third-party entities or however required by the awarding authority.

General contractors therefore bear the risk on the supply side but not on the demand side.

The tender notice determines the share of the work value that must be done by the general contractor with anticipation of his own resources and the time and manner of payment of the price. For the financing of this share, the general contractor may issue bonds, guaranteed by the awarding authority.

It is therefore questionable whether the anticipation of private funds is actually a risk to the general contractor. So returns to mind the figure of the concessionaire for only construction that, also in consideration of the freedom of realization of the *opus*, seems to confirm the Italian reluctance to implement the discipline of competition and, above all, the absence in our system of the European concession.

Art. 174, for concessions relating to infrastructures, provides that the concessionaire shall bear the risk of management of the work. The possible price to be granted to the concessionaire and the concession period shall be determined in the tender notice, on the basis of the economic-financial plan and constitute parameters for the award of the concession. In determining the price, must be taken account of the provision of goods and services by the concessionaire to the same awarding administration.

Despite the emphasis placed on bankability and private financing, we will see that in reality the relationships between administration and contractor are structured in such a way that one cannot speak of "concession" as there is no assumption – except on paper – of operational risks by the private counterparty.

Just as in the case previously examined, the public authorities are given a task of supervision and surveillance on the implementation of the operation.[198]

As far as concerning the contract award procedure, namely the competitive phase, instead can be noted some substantial differences between the Eurotunnel concession and the Lombardy motorways.[199]

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[198] See, in particular, art. 163 of the Code on the activities of the Ministry of Infrastructure.

In general, the concerned public entities are attributed an advisory and proposing role, while all the decision-making powers belong to the Interministerial Committee for Economic Planning (CIPE), followed by the registration of the Court of Auditors and the publishing in the Official Gazette.

The Ministry prepares the investigation of the feasibility study and submit it to the CIPE, which expresses with the participation of the presidents of the regions and autonomous provinces possibly interested and, in the case of positive evaluation, indicates, among other things, any public resources destined to the project. It is also reproduced the faculty laid down in art. 153, paragraph 20, of the Code that allows specific parties to submit to the authorities the feasibility studies about the construction of infrastructure inserted in the Programme, but not present on the list.

The preliminary design can be drawn up by the awarding authority or delegated to the promoter, which provides the final project, for the purpose of the declaration of public utility of the work, and the executive design besides.

When the competition is made on the basis of the feasibility study, the notice must specify that the tenders should contain a preliminary project that should emphasize, with special adequate cartographic papers, the areas occupied, the related eventual respect zones and the necessary safeguards, and, moreover, must also indicate and highlight also the characteristics performance, the functional features and the costs of the infrastructure to be realized, including the cost of any works and compensatory measures of the territorial and social impact; a draft convention; an economic and financial plan asseverated, as well as give an account of the prior involvement of one or more financial institutions in the project.

The contracting authority shall evaluate the bids with the criterion of the most economically advantageous tender, draw up a list and appoint as promoter the subject who has submitted the best offer (even in the presence of only one tender); the evaluation of tenders shall be extended to cover the quality of the preliminary draft, the economic and financial value of the plan and the contents of the draft convention.

The contracting authority may require the promoter to make as many changes to the preliminary project, to the draft convention and to the economic and financial plan submitted, as many modications has intervened during the approval of the preliminary project by the CIPE.

In case of non acceptance, the contracting authority may ask to the competitors successive in the ranking the acceptance of the amendments to the preliminary project of the promoter under the same conditions proposed to the latter and not accepted by him.

In case of negative outcome or of a single bid, the contracting authority has the power to place at the basis of tender the preliminary project prepared by the promoter, updated with the prescriptions of the CIPE.

The promoter, or possibly another competitor, for the purposes of the final award, must give adequate consideration of the full financial coverage of the investment, even acquiring the willingness of one or more lenders to grant the financing envisaged in the economic and financial plan relating to the preliminary project presented by the promoter and, if necessary, adjusted to the deliberation of the CIPE.

[199] In relation to the connecting tunnel between the two sides of the Channel, the French and British governments, having invited tenders from private companies, received four different proposals (two rail tunnels, a car tunnel and a bridge) and they chose, on 20 january 1986, the proposal of the *Fixed Link*.

The Lombardy motorways, since they were not subject to the regional regulations in matters (Regional Law (Lombardy) - 04/05/2001, n. 9 - Off. Gazette 08/05/2001, n. 19, in particular Titles III-IV (artt. 7-14), and also Regional Regulation - 08/07/2002, n. 4 - Off. Gazette 12/07/2002, n. 28), as mentioned, have seen the application of the special rules of the Code of public contracts for strategic infrastructure.

Pursuant to art. 177 the award of the concessions and of the entrustment to general contractor is done through restricted procedure, placing at the basis of tender the preliminary project or final design. Awarding authorities may indicate in the tender notice, depending on the importance and complexity of the works to be executed, the minimum and maximum number of competitors which will be invited to submit offers (cd.

In the first case there was a number of proposals and an effective competition, whilst in the case of Lombardy there was the usual reluctance to cope with competition.

To the defects in the system settings (*i.e.* project public or by the private promoter), which inhibits the presentation of differing proposals and discourages the assumption of operating risks by the potential aspirants, must be added the market closure.[200]

"forcella"). In any case, the minimum number can not be less than five, when there are sufficient numbers of qualified subjects, and must be sufficient to ensure effective competition.

The contracts are awarded to the the lowest price or economically most advantageous tender, identified on the basis of a number of criteria, including: a) the price; b) the technical and aesthetic value of the variants; c) the time for execution; d) the cost of utilization and maintenance; e) for the concessions, the yield, the duration, the modes of management, the level and criteria for updating the rates charged to the users and the possible supply of goods and services to the contracting authority; f) the greater amount, compared to the one provided by the tender notice, of the prefinancing that the candidate is able to offer; g) additional elements identified in relation to the specific nature of the works to be executed.

By reading the provisions just reported, it quite seems to be delineated a competitive framework inspired from the *favor partecipationis*. Nevertheless, the truth is another.

Put into tendering a preliminary or definitive project drawn up by public bodies in fact discourages the candidates to take charge of the operational risks during the execution, in the same way a project drawn up by the promoter basically stifles the competition in the bud.

It follows that not only the potential candidates do not have the chance to present different proposals (though variants and ameliorative offers are permitted), but do not even have interest to appear in the presence of the promoter who conceived the operation from the beginning (as in the Lombardy case).

This is truly a limitation inherent in the procedures that admit the figure of the promoter, especially in Countries with a high rate of statism and bureaucracy, like Italy.

[200] As clearly demonstrated by the Survey regarding motorway concessions - Testimony of the Head of Service of Economic Structure of the Bank of Italy Paolo Sestito, Chamber of Deputies, Rome, Commission VIII of the House of Deputies (Environment, Territory and Public Works), 11 june 2015 (https://www.bancaditalia.it/pubblicazioni/interventi-vari/int-var-2015/sestito-audizione-110615.pdf), today almost all highway concessions are continuing under direct assignment and are the subject of an oligopoly of few dominating incumbents which share out the market.

In support of this, it is suggested to read the art. 5 of Decree-Law 12 september 2014, n. 133, converted into law with amendments by Law 11 november 2014, n. 164, on urgent measures for the opening of the sites, the construction of public works, the digitization of the Country, the bureaucratic simplification, the emergence of hydrological instability and the resumption of production activities.

On the basis of the provision, "the concessionaires of national motorway sections, by 30 june 2015, submit to the Minister for Infrastructure and Transport the modifications of existing concession arrangement aimed at updating or revision procedures also through the unification of interconnected sections, contiguous or complementary, for their unified management. Before the same date, the concessionaire shall submit to the Minister for Infrastructure and Transport a new economic and financial plan, equipped with appropriate guarantees and asseveration by authorized parties, for the signing of an addendum or of a special unitary convention, which have to intervene by 30 june 2015. The Minister for Infrastructure and Transport, heard as far as of its competence the Authority for regulation of transport, transmits the schemes of addendum or convention and the related economic and financial plans, accompanied by the opinions prescribed by law, including that of CIPE, to the Houses for the opinion of the competent parliamentary commissions, which express themselves within thirty days from transmission. After that date, the proceedings may still take place. The requests for amendments referred to in this article provide for new investments by the concessionaires, who are however required to carry out the investments already provided for in the current acts of concession" (paragraph so amended by art. 8, para. 10, L. n. 11/2015).

This is, quite obviously, a gift to the motorway (alleged) concessionaires who, despite failing to implement the actions already envisaged in their current contracts, ask for an extension of the expiry dates by prospecting further improvements to the network in favour of users.

Just browse through the national and local newspapers to realize what anticipated, that is the enormous conceptual gap existing between the Eurotunnel concession and the (alleged) concessions in Lombardy, which, despite being propagandised as interventions in project financing borne solely by the private sector, conceal operations where the public contribution ensures not only the initial feasibility but also the ultimate salvation.

What it is not a problem *per se*, rather is perplexing the role that the Italian Republic continues to play in the economy, in lieu and instead of private investors.

And here it is clearly a finding in the matters of economic policy, not strictly legal, that would divert us from the issue under discussion.

Regarding the highways it must thence be registered an improper reference to the "concession".[201]

Arise many doubts about the compatibility of the rule with the procompetitive European legislation: it is no coincidence that the EU Commission has opened an investigation on the case and is not to exclude an infringement procedure.

[201] See the report "Il sistema autostradale in concessione e regolamentazione del sistema tariffario", hearing of the Minister of Infrastructure and Transport to the Commission VIII of the Senate of the Republic, 22 january 2014: "The institute of the concession, being characterized prevalently from the use of resources generated by self-financing in place of public transfers, has ensured the implementation of a significant spending of investments in the past few years. On the contrary, other works financed exclusively by public contributions, have recorded major funding difficulties. In this sense, the field of motorway concessionaires is a key factor in the national economy due to the high investment capacity".

It denotes a certain conceptual confusion between project financing and concession, with the second which gets absorbed from the first one, when in truth the project financing is a prerequisite for the concession: it is not enough that any private subjects finance the operation, having them also to take some operational risk in order to give birth to a concession. Otherwise you will have a public contract, albeit in project finance.

For the purposes of the distinction it is important to consider the cd. "corrispettivo di retrocessione" in the event of takeover, which reminds us of the mythical bridge over the Strait of Messina: cf. Milotti A.; Patumi N., *Il finanziamento nelle infrastrutture di trasporto: enti locali e innovazioni*, Egea, 2008, *passim*, particularly pp. 40-45.

The Italian vision about the institution of concession is unfortunately anachronistic: still making reference to L. 21 may 1955 n. 463, which sets out the general rules on the concessions for construction and management of motorways, for instance, is utilised the expression "convenzione unica" (unique convention) in order to concession contracts (v. now Decree-Law 3 october 2006, n. 262, converted with amendments by L. 24 november 2006, n. 286, and subsequent amendments, governing aspects such as the allocation of risks, the return on capital invested and modalities of tariff adjustment).

Such a law, nevertheless, explicitly provides in artt. 3-4 for a limitation to the public contribution ("the State contribution can not exceed 40 percent of the construction cost recognized admissible") as well as to the duration of the concession ("can not exceed thirty years from the opening year of the motorway"), which is accompanied by an *ante litteram* regulation of the operational risks. Starting from the fifth year of opening to traffic of the highway, on the gross revenue of the right to toll exceeding 10 percent of the one held as the basis of the financial plan inserted in the Convention governing the concession, is devolved to the State an aliquot - subject to revision every three years - not lower than the percentage of the contribution granted by the State. In addition, the concessionaire is authorized to issue bonds to be amortized over a period not exceeding the duration of the concession, for an amount not exceeding the difference between the cost of the construction and the State contribution, and can contract loans with institutions, organizations and sections of credit authorized to engage in the credit in the medium and long term, or by institutes, entities and companies to pension and insurance.

As a result, not only the public contribution is the least part of the financing of the operation (which is in any case to be found from the concessionaire via own resources, loans and debts), but may also lead to the repayment in the form of participation in profits.

Though reproposes the formal legacy about the *nomen*, our legal system has neglected the substantial characters of the concession (except for the obligation of the concessionaire to pay an annual fee on the net revenues from tolls pursuant to the L. 24 december 1993, n. 537, which has begun the privatization process).

The concession relationship is in fact marked by such an economic and financial equilibrium that obliterates the operating risk of the concessionaire.

As evidence of this assertion, can be cited the Deliberation of CIPE n. 319 on 20 december 1996, that has rendered the financial plan as verification element of the service and has updated the arrangements for adapting tariffs, and the Deliberation of CIPE n. 39 on 15 june 2007 - Directive on the economic regulation of the motorway sector (integrated by the CIPE Deliberation n. 27 on 21 march 2013 and n. 30 on 19 july 2013), containing the criteria for eligibility of costs incurred and return on invested capital.

In such acts it is planned that both the new concessions and the current concessions, were the concessionaire to ask the economic and financial rebalancing, are subject to update of the plan at the end of each regulatory period (five years), with the verification of the permanence and/or of the variations occurred in the same period of the elements identified in the economic and financial plan, and/or to its revision (whenever the change is made necessary by a new investment program or by extraordinary events that can lead to an alteration of the same economic and financial plan).

Clearly it shows that the contractor does not bear a real operating risk in effect.

The construction risk is borne by the concessionaire after the approval of the final design by the grantor entity, except in cases where any increase in the cost of construction is determined by force majeure or acts of third parties not due to the fault of the concession holder. Construction costs include costs relating to the engineering services required for the design and realization of the work. The planning costs are borne by the concessionaire in the event that the final project is not approved in the Conference of services.

The operating costs eligible for the determination of tariffs according to the method of the price cap, include the costs directly and indirectly attributable to the activities of highway management; with regard to the costs of repayment and return on capital, the assets under construction are eligible for compensation according to the level of realization of the investment and the costs of remuneration of capital are determined using the methodology of the weighted average cost of capital (WACC).

The penalty system consists of administrative fines not lower than the minimum of euro 25.000,00 and not exceeding the maximum of 150.000,00 euro, depending on the severity of the failure, in the face of the infringement of conventional clauses imputable to the concessionaire, even by fault.

The main amendments recently introduced concern the criteria for calculating the parameters of tariffs updating related to the investments, and the determination of the regulatory invested capital at the end of each regulatory period as well as the update every five-year of the economic and financial plan.

For all the concessionaires subject to quinquennial adjustment of the plan (PEF), who have opted for the rebalancing, the grantor will proceed to determine the amount of the regulatory net capital employed existing at the end of each regulatory period admissible for tariff purposes in the successive regulatory period; the regulatory net capital invested at the beginning of period is given by the amount of investments made, including those established and recognized at 30 september of the last period of the previous regulatory year (net of financial amortization and of any public contributions of government).

The premium for the market risk (ERP), for the purpose of calculation of the WACC of the new regulatory period, is set at 4%.

It is true that the public interest that the grantor is protecting via the concession is the management of the motorway in order to guarantee the quality of the service, with adequate investments, for a period commensurate with the return on the investment made and with rates parameterized to the amount of the investment actually realized. But that cannot mean the elimination of the operational risk of the contractor, otherwise under the European law we are no longer in the field of concessions.

Finally, the aforementioned Survey regarding motorway concessions of 11 june 2015 highlights how "The sector is characterized by high and stable profitability, with operating margins (EBITDA) that in 2012 were more than 20 percent for all the concessionaires, moreover surpassing values of 50 percent in many cases, especially for the concessionaires of greater dimensions. Also the operating profit (EBIT) was in most cases elevated, on average equal to 20 per cent, with peaks close to or above 40 percent for the largest concessionaires".

As far as of interest it is sufficient to note that is not the public or private funding that characterizes the concessions as opposed to public contracts, but its very kind, which must allocate some operational risks also to the counterparty of the public administration for purposes of remuneration.

At present none of the three motorways in Lombardy includes an operating risk of the contractor, capable of cause him loss, neither on the supply side nor on the demand side (or rather, this risk exists but is compensated by the administration).

All the difficulties encountered during the implementation and management, in fact, have been offset by the public purse in lieu of the financiers of the operations.

While in Eurotunnel the choice has fallen on the substantial self-management of the concessionaire, protected merely for exceptional events and for reasons of force majeure, into the Lombardy case, on the contrary, the contractor is relieved from any operating risk.

With reference to the variants in the course of work compared to the initial plans, the relevant value has been subjected to the revision of the business and financial plans of works by the CIPE, irrespective of the actual motivation (necessary or ameliorative variant, environmental compensation and/or mitigation, other supervenience) without burdens on the concessionaire.

In relation to the demand side it is even more evident the absence of operating risk for the contractor, to whom public resources have been destined to compensate losses and to ensure the continuation of management.

Two observations must be preliminary exposed in this regard:

- if it is true that the agreements signed fall beneath the *nomen* of "concession", there should be a private operating risk which entails the assumption of both technical and capital responsibility (no matter that they are all predated to the Directive 2014/23/EU because, as shown, with the advent of the new millennium the European plexus had already begun to clarify the definition of the European concession: v. *supra*);

The updating of the tariffs has in fact more than offset the downward trend in the levels of traffic: this confirms that the (alleged) motorway concessionaire actually does not bear neither the risk of demand (should also be noted that, having mostly occurred assignments without tendering, traffic forecasts were made in a prudent way) nor that of offer (insofar as he is a monopolist little controlled by the competent authorities which, for structural limitations, can not adequately monitor the entire network and so they have not managed to impose the penalties due for failure to achieve the investment planned in the PEF: rather, as mentioned, they have opted for the art. 5 of the law 11 november 2014, n. 164, cd. "Sblocca Italia").

In doctrine refer to Casalini D., *Concessionario, organismo di diritto pubblico o gestore in house: chi sopporta il rischio economico della gestione delle autostrade?*, note of comment to T.A.R. Lazio, Roma, Sect. III, 9 march 2009, n. 2369, Urbanistica e appalti 7: 882-889, 2009.

- moreover, if these transactions were *ab initio* designed under "project financing", of private matrix, then the requests of renegotiation for the private risks should have been addressed to the financing partners, and not to the public administration (to which were to be destined only the renegotiations regarding its sphere of competence, namely the risks allocated to itself).

The fact that things have gone in a completely different way, with a strong public presence, strengthen the doubts about the existence of the European concession in Italy and authorizes us to reflect more deeply on the distinction between public procurement contracts and concessions.

To this end it is useful to investigate further the examination of the three motorways in Lombardy.

BreBeMi (A35)

On the dedicated website you read "*The new connection Brescia-Bergamo-Milano (Brebemi) is the first Italian highway infrastructure to be realized in project financing, which is in complete self-financing at no cost to taxpayers and for the State, at a cost of 1,611 billion euro. The investment is financed by approximately 79% with bank loans and about 21% with equity provided by the shareholders. The investment will be repaid exclusively through the revenues from motorway tolls and through the collection of a final compensation by the new concessionaire who will take over the management, through a public tender, at the end of the concession*".[202]

The total cost of the work is estimated at € 2.420.000.000, against a duration of the management of 19,5 years from the date of completion of the works (so until 2034).

[202] Cf. the link: http://www.brebemi.it/site/wp-content/uploads/2014/09/Brebemi_Giugno2014.pdf, where it is stressed that this is a concession and that public funding is zero, and is also stated that the total cost of the work amounted to 1,611 billion euro, that the investment - including financial charges - amounted to 2,338 billions euro, divided between project financing: 1,918 million euro and own means: 520 million euro (and yet here must be pointed out a flaw in the calculation since it is found inconsistency of 100 million euro: for a much more detailed reconstruction can be seen the analysis of the Observatory Oti Northwest, edited by associations Assolombarda, Confindustria Genoa and Industrial Association, available on line at: http://www.otinordovest.it/progetti/autostrada_direttissima_brescia_milano__brebemi_).

What the website of Brebemi does forget to quantify, however, is the value of the take-over (cd. "corrispettivo di retrocessione"): 1,205 billions of euro.

As it has been well remarked by Percoco M., *Brebemi: l'autostrada in perdita che pagano i cittadini. Per tenere in piedi la Brebemi servirà molto più del previsto e pagherà solo il pubblico*, 06/01/2015 (http://www.linkiesta.it/brebemi-altri-costi-cittadini-imprenditori): "This latter is the very amount that a new concessionaire, successor to the company that carried out the work, should put on the plate at the time of handover. This point is very dear to the banks financing the project, starting from EIB and CDP, as well as Intesa, Unicredit, MPS, Ubi and Banco Popolare, which have lien on Brebemi shares".

On 25 march 2013 was structured the financial closing of the project financing that has enabled lines of credit for approximately 1,9 billions of euro (distincted between long-term lines, VAT lines, standby lines and other technical lines required for this type of transaction), in addition to equity for euro 520 million made available by the members of Brebemi Spa, to cover about 2,4 billion euro needed for the completion of the work.

It is worth remember that the private initial funding is not enough to set up a concession (especially in this case, since we can find the massive public intervention[203]).

Just in relation to this consideration arise many doubts on the possibility of considering the operation Brebemi as a concession in conformity with the requirements of European law.

[203] First of all, it must be stated that the work is actually financed with 820 million euro from the Cassa Depositi e Prestiti (public bank) and by 700 million euro from the EIB (European Investment Bank, public as well) with guarantor Sace Spa (which is itself owned by the Cassa Depositi e Prestiti).

According to Martinelli L., *BreBeMi: la favola dell'autostrada 'senza soldi pubblici'*, 24 july 2014 (http://www.altreconomia.it/site/fr_contenuto_detaiL.php?intId=4769) "it is false to affirm - as several newspapers did - that BreBeMi is the first highway built by having recourse only to private capital. Insomuch as it is financed by CDP (80% of the Treasury) and Bei (property of EU countries, including Italy), and then because it will be probably "defiscalized" for nearly half a billion euro".

Similarly Bacca D., *Una «direttissima» di 62 chilometri (senza soldi pubblici)* (http://www.corriere.it/cronache/14_luglio_24/direttissima-62-chilometri-senza-soldi-pubblici-cce86ada-12f8-11e4-a7ff-409dc1c2ba25.shtml) reveals that "Brebemi seeks for the rebalancing of the economic plan: compared to when the work was designed the traffic forecasts have decreased and the costs have increased. The company requested an extension of the concession of 10 years, from the current 20, and a tax exemption for a total 497 million: now awaits the green light by the CIPE".

Likewise Carbonaro M., *Brebemi, doppia partita per aggiustare il piano economico-finanziario* (http://www.ediliziaeterritorio.ilsole24ore.com/art/infrastrutture24/2014-07-30/brebemi-doppia-partita-aggiustare-164106.php?uuid=AbfJ8U8J&refresh_ce=1) deals with the company requests (agreed with Cal: first tax relief (429 million) and contribution of the State (69) to cover the new costs and declining traffic, then the extension to eliminate the takeover) highlighting the profiles of dubious legality.

Finally Casillo L., *Brebemi, l'autostrada privata con "l'aiutino" pubblico*, 25 april 2015 (http://tg24.sky.it/tg24/economia/2015/04/24/brebemi_autostradaa35_costi_pedaggi_fondi.html) observes that the A35 motorway, called Brebemi by the name of the provinces which crosses, namely Brescia, Bergamo and Milan, has been "the first born in Italy with the so-called project financing. But construction costs are higher than expected and the few tolls have prompted the intervention of the State and Lombardy Region. Which now put therein 360 million euro".

The Government will pay 20 million euro a year for 15 years set aside by the Stability Law 2015 (v. Art. 1, paragraph 299, of the Law of 23 december 2014, n. 190, upon which was presented a parliamentary question to the Minister of Infrastructure and Transport on tuesday 13 january 2015, session n. 361), while Lombardy Region will provide a further € 20 million a year for three years under an amendment to the last budget law (the report to the forward estimate 2015-2017 explicitly states that "the change is intended to finance road works" and subtracts these resources to the previous destination, *i.e.* the regional health).

With this background it is not surprising that Intesa Sanpaolo, the main shareholder of the motorway (with a stake of over 42% in Autostrade Lombarde, which is holding almost 79% of the company Brebemi), has decided to abandon the project before 2017 (confirming the dubious private nature of the operation): cf. http://brescia.corriere.it/notizie/cronaca/15_aprile_30/intesa-san-paolo-lascera-brebemi-entro-2017-a-35-milano-brescia-c8fef4a4-ef41-11e4-a9d3-3d4587947417.shtml.

As anticipated, on the supply side, the tariff mechanism ensures that there are no significant risks for the contractor and, even if they should occur, he is helped by the public treasury.[204]

Focusing on the demand risk, namely that of traffic levels lower than the estimates recorded in PEF, may be noted the same trends.[205]

At this point the question is whether the transaction in question, called concession and conceived as project financing, totally from private sources moreover, planned to be remunerated through its management, is really to be deemed as such.

Because of the economic rebalancing and financial support from public institutions and the provision of a high amount of money at the time of the takeover, would it seem to derive the lack of operational risks taking by Brebemi Spa, in line with the case law of the Court of Justice and with the new Directive 2014/23/EU.

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[204] Cf. Deliberation CIPE 4 october 2007, n. 109 (in Off. Gazz., 3 november, n. 256). - Scheme of unique convention between Concessioni Autostradali Lombarde S.p.a and project company BRE.BE.MI. S.p.a., where the principle of the economic and financial equilibrium is established through updating and revision of the PEF.

See Franco L., *Brebemi, pochi veicoli e tanti debiti in bilancio: nel 2014 buco di 35,4 milioni* (http://www.ilfattoquotidiano.it/2015/04/03/brebemi-pochi-veicoli-in-transito-tanti-debiti-in-bilancio-nel-2014-buco-354-milioni/1564001/): "The direct route Milan-Brescia has registered in 2014 the red of 35,4 million euro. While the average number of traveling vehicles has slightly exceeded 14 thousand per day, many less than the 60 thousand scheduled to occur in the design phase. The difficulties of the motorway running parallel to A4 were known, but the budget approved by the board at the beginning of march turns out that the operating costs, more than 14,2 million euro, passed the toll revenues (11,7 million). A "dramatic" figure, according to the head of Legambiente Lombardy Transportation Dario Balotta: "It means that Brebemi not only does not pay the monstrous debt with the banks, but neither the cost of the management. It means that keep it open costs more than keep it closed". […]To rebalance the financial plan Lombardy Region has already provided a budget of 60 million euro, while another 300 are expected to arrive by the government, provided that the CIPE gives the OK. Such measures, for which Balotta speaks of "therapeutic obstinacy", are motivated by the need to cover the holes of a work passed by the company president Francesco Bettoni as "realized without a public euro", although from the beginning much of the funding had arrived from Cassa Depositi e Prestiti and European Investment Bank, both public".

[205] Pucciarelli M., *Il disastro Brebemi, soltanto 11mila auto al giorno contro le 80mila previste* (http://milano.repubblica.it/cronaca/2015/03/08/news/brebemi-109011329/) does not fail to highlight that "The builders pointed to figures much higher than the budget of the first seven months: useless even the discount on the toll to attract customers. But other public money will come despite the flop", while Franco L., op. cit., clarifies the figures: "A disappointing impact on revenues was the passage of cars and trucks below expectations. Since the opening on july 23 until the end of the year have entered the highway 2,3 million vehicles, 78% of which were light means. The average is just above 14 thousand vehicles per day, while are 8 thousand the 'theoric vehicles', ie the number of vehicles that theoretically run through the entire route, paying the full toll. The peak of mileage has been touched in october (17,6 million), a figure which has gone even to fall in november (16,9 million kilometers) and december (16,6). According to the company's top things will improve when will be completed the "Tangenziale Est Esterna di Milano" and the "corda molle", which will allow a greater flow of cars on Brebemi. Nothing that according to Balotta will be however able to revive the fortunes of a highway that is "in an irreversible coma. In a normal situation, the auditors should not certify the financial statements and should accompany the company to the default. But the banks do not want it to die because there would be no heirs to pay the debt. So they keep it alive at public expense hoping for a miracle, always at public expense"."

Pedemontana Lombarda (A36)

Pedemontana Lombarda (*rectius*: "Sistema Viabilistico Pedemontano Lombardo") is a highway infrastructure divided into four sections, whose realization is planned in stages and subject to available funds for functional lots.[206]

What it does complicate the reconstruction of the intervention as a whole, especially in terms of costs and financing *pro futuro*.[207]

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[206] Cf. Deliberation CIPE 4 october 2007, n. 108 (in Off. Gazz., 2 november, n. 255). - Scheme of unique convention between Concessioni Autostradali Lombarde S.p.a and Autostrada Pedemontana Lombarda S.p.a.

[207] The cost of the work is estimated at € 4.118.000.000, against a duration of the management for 30 years after completion of the work, with public contribution for 1,245 billion euro, 536 million euro equity and bank loans for 1,810 billions of euro to be found in the markets in order to perform the work (with the exception of route D, that the company plans to achieve as self-financed thanks to the cash flow generated from the entry into service of the other sections). To this should have been added an amount equal to 1,290 billions of euro, originally planned and afterwards eliminated in conjunction with the tax exemption of the Pedemontana, consented by CIPE on 1 august 2014 (v. *infra*).

On this point see the analysis of the Observatory Oti Northwest, edited by associations Assolombarda, Confindustria Genoa and Industrial Association (available on line at the webpage: http://www.otinordovest.it/progetti/pedemontana_lombarda__cassano_magnago_osio_di_sotto_), where it is pointed out that the available funds amounted to only € 1.745.000.000 (essentially the public contribution and the contributions of members, plus a bridge loan) and many critical issues remain both from a technical view (the final project has received comments from 850 municipalities and 2.700 citizens and involves 22.000 parties interested to the expropriation) and a financial point of view (especially for the second phase of work).

Legambiente includes highway Pedemontana Lombarda among "the works more harmful to the environment and the territory of Lombardy", arguing that "Amongst the highest criticalities of this new infrastructure there is undoubtedly the disproportionate consumption of soil that this new highway will take, to which is to be added the crossing and the inevitable result of putting many protected areas in jeopardy" (http://www.legambiente.it/sites/default/files/docs/allegato_1_-_le_opere_inutili_e_dannose.pdf).

As regards financial terms, read Carbonaro M., *Pedemontana Lombarda, la situazione dopo l'uscita in Gazzetta della delibera sulla defiscalizzazione* (http://www.ediliziaeterritorio.ilsole24ore.com/art/lavori-pubblici/2015-06-24/pedemontana-lombarda-situazione-l-uscita-gazzetta-delibera-defiscalizzazione-200240.php?uuid=ACFZSJG), who thus observes "That therefore the Pedemontana Lombarda would be entirely made, and that it be really a project financing, is not yet certain. We remember in fact that lot 1 is nearly completed (route A and ring roads of Como and Varese) and route B1 under construction, have been and are paid by the State public contribution of 1.244 million euro, and the 300 million of capital already paid (also in large part derived from public parties). When these 1.544.000 will end, unless in the meantime will be arrived new private shareholders and the first closing with banks, the work will stop".

Finally we must note the parliamentary question submitted to the Chamber of Deputies - 4-09134 – on 11 may 2015 about the additional costs of Lot 2 of route B1 of Pedemontana, for whose realization was scheduled a cost of 1.713.547.749,35 euro, but the ever-escalating costs brought the amount of reserves – according to the latest report provided in relation to the work performed until september 2014 – up to the sum of 1.959.995.657,16 euro, so that the total cost of the work would be more than doubled.

In light of the opacities on the composition and activities of the committee that will have to find an agreement on extra costs, the suspicion of the investigators which have begun an official investigation is that behind the award for the construction of Pedemontana there is the payment of some bribes.

In the question, so, the Minister is asked whether he is aware of the above and if he does not believe, as a result of the disproportionately soared costs of Pedemontana whose total expenditure has, as known, always been unsustainable, thence to remove Pedemontana Lombarda from the list of infrastructure projects indicated as priority, and decide for immediate termination of the works of the same at the almost completed route B1.

The company Autostrada Pedemontana Lombarda Spa, is the "concessionaire" for the design, construction and operation of the motorway link in question.

Similarly to Brebemi, even in this case there are serious doubts about the real nature of the relationship established.

Besides the usual classification under the guise of the project financing (which however conceals public resources), it must in fact be remarked the absence of operational risks to the alleged concessionaire.

The main reason for this state of affairs is identified in the adoption of facilitation and tax relief measures aimed at the economic and financial rebalancing of the operation.

Consequently, as mentioned, not only the funding in order to build the infrastructure was generated from essentially public subjects, but these last suitably put their investment under cover through further support as well.[208]

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[208] Cf. Deliberation CIPE 1° august 2014, registered by the Court of Auditors on 13 january 2015, concerning: Strategic Infrastructure Programme (Law n. 443/2001) - Pedemontana lombarda: Attribution of tax relief measures, in accordance with Article 18 of the Law n. 183/2011and s.m.i. and opinion on the second addendum to the unique convention (Deliberation n. 24/2014 - OG Series General n. 24 of 30-1-2015).

Financially, the investment cost of the work to be deduced from the economic framework, amounting to 4.118.354.680,58 euro, has reached a new economic and financial balance using the cd. tax relief measures provided by the aforementioned art. 18 of the L. n. 183/2011.

In exchange for zeroing the value of takeover – equal to 1.290 billions of euro into the PEF 2009 –, the rebalanced PEF provides government grants for investments of 1.245 million euro (whose deadline for delivery is expected by 31 december 2015), besides the additional non-repayable theoretical contribution to restore the economic and financial balance of approximately 393 million of euro.

In the defiscalized PEF the measures to offset the theoretical non-repayable contribution do amount to about 800 million euro in absolute value and approximately to € 349.5 million in present value in relation to the period of application from 2016 to 2027 and, in particular, they are expected: in the period 2016-2027, the tax exemption from IRES-IRAP for a nominal value of about 376 million euro; and, for the period from 2019 to 2027, the compensation of the VAT debt, due pursuant to art. 27 of Presidential Decree n. 633/1972 and subsequent amendments, for a nominal value of about 424 million euro. These amounts are representing the maximum limit recognizable that can not be exceeded during the entire duration of the concession.

The ratio between measures and investment, taking account of the public contribution, is equal to approximately 40%.

The revision of the economic and financial plan designed to redress the same, also thanks to the tax relief measures, had led the EU Commission to initiate an infringement procedure on 17 october 2007, ended with the archiving dated 26 november 2008.

Even ANAC – AG 39/2012 – on 6 march 2013 gave an opinion on the possibility of reshaping PEF, *i.e.* whether it be "legitimate to modulate, in contrast to what contractually agreed, the arrangements for payment of the public contribution … also through anticipation and/or increase of the percentage of disbursement of the same or increase in the public contribution for the intervention (where available additional financial resources), taking into account that these changes do not result in higher yields and/or economic advantages to the interested economic operators than originally scheduled by the conventions", focusing on the distinction between contracts and concessions. "The complex question submitted to the Authority essentially requires to examine whether it be possible, in terms of legitimacy, to make a variation to the economic-financial plan of works concessions, in the event of significant changes in the economic conditions of the market, in order to restore the economic and financial balance of the investment of the concessionaire and, therefore, the sustainability of the economic enterprise.

Considered that at present the only resources for intervention are derived from the public sector, either in the form of direct investment and financing or *sub specie* of rebalancing and tax relief, we have to wait and see whether the private actors will be interested to participate in the operation.[209]

If on the one hand, therefore, seems to fade the labeling of private project financing, on the other, it does not even seem to be judged a risk allocation adhering to the concession scheme.

Both on the supply side (emblematic the case of the extracosts of lot 2 of route B1: v. note 207 *supra*) as on the demand side (we have already spoken of the tariff mechanism particularly favourable in the motorway sector: v. note 201 *supra*) the contractor does not give the impression of being significantly burdened with any operating risk – or rather, any risk is indemnified by the government that not only finances the construction of the work, but also exempts the management from tax.

Therefore any incentive of efficiency on the alleged concessionaire ceases.

As known, the differential and essential element of a works concession compared to the public contract is the absence of consideration, since it is planned that the concessionaire attains his earnings from the economic exploitation and management of the work. The consideration in favour of the concessionaire is, in fact, the right to manage functionally and economically exploit the work subject of the concession. Therefore, although we can not completely exclude the impact of the economic crisis factor, at the same time it must be considered for those who are its objective effects on the existing legal cases, subject to the requirement of verification by the contracting authorities that the imbalance of the plan does not depend in any way on the counterparty defaults instead".

After having observed how art. 143, para. 8, of D.Lgs. 163/2006 admits the opportunity to make changes to the economic and financial plan of the concession (v. *supra*), it is then found that, in addition to the provisions of the Code (cf. art. 2, para. 4), must be also be considered the provisions of the civil law: "with particular reference to the case of extraordinary events supervened to the conclusion of the contract the statutory category that best suits the matter, as proposed from the instant, it appears that of the "excessive onerousness supervened" (refer to art. 1467 cod. civ.)" and thence are reached the following conclusions that "should therefore be assessed, in such cases, the extent to which the cause of the difficulties in implementing the plan depend only on objective events unrelated to the concessionaire (eg. national economic crisis), containing any changes in these limits. In this evaluation, it appears also necessary to respect the nature of the legal system involved, particularly with regard to the element characterizing the concession and entrustment to the general contractor, that is expressed in the assumption of the economic risk, subject to the cultivation of the overriding public interest to the global realization of the work which can not be compromised by changes to the original contractual terms. It should, in particular, be avoided that a greater flow of public resources at this stage, at total public funding unchanged, although having as definite advantage to allow the continuation of a work of general interest, entails serious difficulties in the completion of the work in a much later stage, phase for which, at public funding unchanged, it would then be necessary for the concessionaire to guarantee the necessary resources".

[209] The financial regulatory plan (PFR aka PEF) explicitly provides for two tranches of financing and in particular: the total amount of the first tranche of senior debt is to be equal to about 1,7 billions of euros (the financial closing is expected by the second half of 2015); whilst the total amount of the second tranche of senior debt will be approximately 800 million euro (the financial closing is expected by the second half of 2018).

TEEM (A58)

To close the ring, finally, the highway TEEM ("Tangenziale Est Esterna Milano").

The total cost of this major infrastructure built in Lombardy is approximately estimated at € 2.200.000.000, compared with a duration of operation of 50 years starting from the date of completion of the works (expiry in 2065).

The investment was planned with a public contribution of 330 million euro (non-repayable) by Cassa Depositi e Prestiti in implementation of the cd. «Decreto del fare», while there is no consideration for the takeover.[210]

Tangenziale Esterna Spa, the "concessionaire" commissioned to design, build and operate the Tangenziale Est Esterna of Milan, has been certainly more skilled at mobilizing private investors than the companies encountered in the two previous cases.[211]

The economic and financial plan of TEEM has collected a pool of banks (Unicredit, Banca IMI-Gruppo Intesa San Paolo, Banca Popolare di Milano and Centrobanca-UBI) in the closing of the project financing, thanks to a twofold increase in capital (the first one, of € 120 million, was approved in late 2012 and fully subscribed by the shareholders bringing the share capital from 100 million to 220 million of euro, while in 2013 a second capital increase of 245 million euro has raised the share capital up to 465 million euro).

Amidst the three Lombardy motorways this is the one that comes closest to represent a private project financing.

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[210] On the website of TEEM (http://www.tangenziale.esterna.it/finanziamento-opera/) you read that "Just 18 months after the opening of the sites (11 june 2011) on 21 december 2013, the concessionaire has achieved full coverage of investments, mainly charged to private parties, to realize the Tangenziale Est Esterna of Milan. The closing of the financial plan by 2.2 billion euro (including VAT and expenses) has been, in fact, achieved almost under the Christmas tree thanks to the 1.2 billion euro made available by Cassa Depositi e Prestiti, European Bank for Investment and nine commercial lenders. The bank funding has, moreover, added to the 580 million euro (465 of share capital and 115 of subordinated loan) secured by shareholders and € 330 million secured by the State".

From the financial statements for 2012 and 2013, with delivery of the latest project documents and bill of quantities of the variants, it results that the Tangenziale Esterna Spa has approved the Economic Framework that summarizes and defines the commitment of expenditure in total € 1.659.901.084,00 of which € 1.071.682.922.00 for works and € 585.218.162.00 of available funds, compared with a total investment of over 2 billion euro (330 million of the State public contribution, 580 million of equity from the shareholders and 1.422 million in project financing).

Refer as well to the analysis report from the Observatory Oti Northwest, edited by associations Assolombarda, Confindustria Genoa and Industrial Association (available on line at the webpage: http://www.otinordovest.it/progetti/tangenziale_est_esterna_di_milano).

[211] Cf. "Unicredit nel pool di banche finanziatrici, contributo pubblico di 330 milioni di euro e nuovo aumento di capitale. Maullu: «Luglio di decisivi passi in avanti verso la realizzazione di TEEM».", Milano, 23 july 2013 (http://www.tangenziale.esterna.it/media/comunicati_stampa/unicredit-nel-pool-di-banche-finanziatrici-contributo-pubblico-di-330-milioni-di-euro-e-nuovo-aumento-di-capitale-maullu-luglio-di-decisivi-passi-in-avanti-verso-la-realizzazione-di-teem/).

Not much because the public contribution non-repayable is far lower than those found in the other two cases (although they must be taken into account the loans by EIB and CDP), but rather because of the fact that up to date are not to be reported any measures of facilitation and tax exemption.

The fact remains that even in relation to TEEM it is applied the tariff regime of motorways that, via updating and revision, mitigates the operating risks of the managers, and the PEF provides mechanisms to restore the economic and financial equilibrium.[212]

In a situation like this it becomes difficult to distinguish between public contracts and concessions.

Discourse that applies equally to all the three Lombardy infrastructures examined, and, more generally, for the highway sector.

In the first place, because the "unique conventions", despite the *nomen*, have experienced many addenda and changes through legislative and/or administrative acts, rendering the stipulated "concessions" something different.

Though *ex ante* the contractors had assumed operational risks (and in fact the losses have occurred), *ex post* the public administration has taken steps to eliminate them.

In the second place, by virtue of the mystification of the project financing, which, to be such, should employ resources mainly private and have recourse to public contribution only to the extent necessary to the feasibility of the operation.

The reason is obvious: if the subject which carries out the project does not risk resources of his own or derived from the financial markets, to be recovered through the

[212] Cf. Deliberation CIPE 3 august 2011, registered by the Court of Auditors on 24 february 2012, concerning: Strategic Infrastructure Programme (Law n. 443/2001). "Tangenziale est esterna di Milano". Approval of the final project (12A02503) (OG Series General n. 53 of 3-3-2012).

During the updating and revision of the PEF is calculated the cumulative deviation between the final traffic at the end of the five years and the related forecasts; whenever are to be registered extra revenues due to a change in traffic, the economic and financial benefit, net of taxes and concession fee, must be destined to redress the balance of the Plan.

It follows the confirmation of the ambivalence of the principle of the economic-financial equilibrium which operates both in favour of the contractor and to his detriment, by using any extra profits to compensate other deficiencies of the operation (for example, extra costs for maintenance or unforeseen events compared to the PEF).

Generally such a surplus is used to reduce the fees paid by users as proof of the collective purpose of the infrastructures, but in this case was decided to use it just to neutralize, through the demand, the risks on the side of supply.

It is not difficult to infer that the economic and financial equilibrium clashes with the allocation of risks, eliminating the negative effects and at the same time extracting the positive rents.

Ultimately, following this line, the subjective and objective allocation of the risks between the parties becomes nothing but a programmatic declaration without practical usefulness.

management of what he is to accomplish, then the project financing is useless since it results in the ordinary public funding that exempts the contractor from risks.

And this is especially true when, besides the initial public contribution, are added additional forms of facilitation, such as rebalancing and tax relief of the operation.[213]

Some might see in such guarantees a sort of public bail out in advance, to safeguard public interests, but even by wanting to set the issue in such terms would not be overcome the interpretive hurdle underlying.

The public organization does not run to the rescue of a private operation in trouble, but rather protects itself from the risk of non-return of its own investments.

In this aspect must be identified the largest gap compared to the Eurotunnel case, where the concessionaire in crisis asked for help to the financing parties of the intervention, not to the public plexus (responsible only for the administrative supervision).

This is a typical Italian problem, given that the administration takes the place of the financial system, at the same time taking care of both the funding and regulation, and of the supervision and control as well.

Consequently, as seen for example in the highway sector, the legal order is filled with provisions that tend to restrict the private autonomy by providing legislative and/or administrative mechanisms instead of negotiating agreements.

It is indeed the revival, in a contractual key, of the hyper-regulation concerning the procedures for the award.

Two practices that clash with the a contractual significance of European law.

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[213] On this point see the press release of Legambiente "*TEEM, Brebemi e le altre: dal trionfo del finanziamento privato al tonfo nella finanza pubblica*", published on 12 august 2013 (http://lombardia.legambiente.it/contenuti/comunicati/teem-brebemi-e-le-altre-dal-trionfo-del-finanziamento-privato-al-tonfo-nella-fi), in which the new highways of Lombardy are criticized because "Too large for the flows of traffic expected, too expensive in relation to the real problems of mobility, too redundant with respect to existing works, too unsustainable in a limited and polluted territory like that of Lombardy, which now more than ever has needed massive investment on collective mobility and sustainable transport of goods. And see the regional administrators singing victory for the CIPE funding to the highways makes tenderness, if you think that the promise on which were based these works was the 'no cost' to the accounts of the State: only project finance, secured by private lenders. Instead the post-Formigoni Lombardy buries his pride and begs the Government to earmark hundreds of millions of euro in order to cover the hole of the dear departed, the *project financing*."

Regardless of personal beliefs, a consideration is obligatory.

If the private investors are not attracted from financing certain works, it probably means that these are badly conceived and do not ensure the return of capital: what it should make us reflect.

Especially in the light of the results of the examined Lombardy motorways, from the beginning unattractive for private entities and later proved to be a commercial failure (so much as to make even the gas stations run away).

Unfortunately it is not the only limit of the national legislation, which is still marked by the legacies of the past and from public law suggestions that end up hiding the critical issues underlying.

In the case of the Lombardy motorways, given that in two out of three cases the idea of realizing them dates back to the period when was in force the block to the creation of new routes[214], the persistence of the public interest to the works has been justified by highlighting the need to decongest traffic through a road network connected and connecting with the main European corridors.

To this end they have been identified, on the one hand, the ramp of interconnection between TEEM and Brebemi (cd. "arco TEEM"), completed and opened to traffic with the entry into service of the motorway link between Brescia and Milan; and, on the other hand, the parallel Interconnessione Pedemontana-Brebemi (ex IPB), now known as Bergamo-Treviglio.[215]

The strategic importance of the works in question has been confirmed by their inclusion in the program of the strategic infrastructures related to Expo 2015, although only a portion has been completed on time.

In order to maintain unchanged their validity and their interest to the community, they provide, in addition to widespread works of environmental mitigation, for some special projects of compensation, designed with the objective to enhance and characterize natural and landscape areas of particular value (*e.g.* water works, bike paths, tree planting, noise barriers).

Nevertheless, remain several problems related to the excessive consumption of land, compensations for expropriations and local issues (such as traffic jams in correspondence with the works and possible risks from excavations in areas where there are remnants of the Seveso disaster).[216]

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[214] Such a suspension, with the Law 28 april 1971, n. 287, and later with the Law 16 october 1975, n. 492 (converting into law, with amendments, the Decree-Law 13 august 1975, n. 376), never formally repealed, has been overtaken by the use of special legislation: cf. Tonetti A., *Il Decreto "Salva Italia"*, Giornale di Diritto Amministrativo 3: 229, 2012.

[215] The promoter of the preliminary project is the company Autostrade Bergamasche Spa: http://www.trasporti.regione.lombardia.it/cs/Satellite?c=Redazionale_P&childpagename=DG_Infrastrutture%2FDetail&cid=1213470385065&pagename=DG_INFWrapper.

[216] As it clearly emerges from the study carried out by Silvia Salata and Stefano Ronchi for the Centre for Research on Consumption of Soil (CRCS Milan, 3 december 2013: available on line at webpage http://www.infonodo.org/node/38838), the new Lombardy motorways (BreBeMi, Pedemontana, TEEM) "steal to the region, which is already the first in Italy in terms of soil consumption by urbanization, 1.600

To properly assess the ambitious Lombard project we should therefore await its final outcome.

At the moment we can only see that the partial realization of the same project has disadvantaged the involved companies which, as shown, have registered levels of demand below the expectations, partly due also to the ongoing economic stagnation and decline in consumer spending.[217]

This brings us back to the subject of the analysis: the distinction between public contracts and concessions.

The allocation of risk in the Lombardy case differs noticeably from the one in the Eurotunnel concession.

If in this latter case the concessionaire has been in charge of the whole operation – from conception, to financing, to construction, up to the management – suffering the fate of the transaction both on the supply and on the demand side (apart from exceptional circumstances and force majeure), the case of Lombardy has highlighted a project finance *sui generis*, where the promoter (with a strongly public component) processes the project in the absence of competition and so fails to attract private capital, sufficiently distant from the public finance, eventually creating a loop.

Is not surprising, therefore, the presence of public measures in support of the works through rebalancing and review of the PEF, tax relief or other contributions.

This, however, contrasts with the European magisterium concerning concession activities, according to which the concessionaire has to bear a risk likely to lead to actual operating losses and default.[218]

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hectares of land, an area equal to fifteen times the area used for the Expo 2015 or 2285 football pitches" (Corvi L., Corriere della Sera, 5 december 2013, Pag. 13, available on line at the following weblink: http://archiviostorico.corriere.it/2013/dicembre/05/record_delle_nuove_autostrade_co_0_20131205_6c2dfc28-5d77-11e3-8960-10bd3fa100c5.shtml?refresh_ce-cp).

This led to dissent and protests: in particular, with regard to the Pedemontana, the protests against the project and the Lombardy Region have been expressed in a popular demonstration in Olona Valley on 28 november 2009, while Lombard farmers have mobilized against Brebemi and TEEM with their tractors giving themself an appointment in Milan, under the venue of Infrastrutture Lombarde, on 18 july 2014.

[217] And in fact Brebemi has benefited from the completion of the TEEM: on the point cf. Monaci S., *Inaugurata la tangenziale bis di Milano, boccata d'aria per la Brebemi*, 16 may 2015 (http://www.ilsole24ore.com/art/impresa-e-territori/2015-05-16/al-via-teem-boccata-d-aria-brebemi-104038.shtml?uuid=ABczfUhD).

[218] Not only refer to the previous discussions on the jurisprudence of the European Court of Justice (v. particularly the causes against the Italian State), but also to what has been said and will be said shortly on the Directive 2014/23/EU.

It is true that the concession contracts may contain clauses that reduce the operational risks of the concessionaire, but, in order to have a concession, a reduced risk must still exist and it can not be eliminated.

The Lombard case manifests the problematic relationship between risk allocation and economic and financial equilibrium.

In other words, between aleatory contracts and commutative contracts.

Chapter V. Interpretative questions

In the past pages we have seen, in short, the discipline of contracts and concessions, and some very examples of how, according to the national and/or supranational law, these institutions are understood quite differently and give rise to interpretive difficulties.

A question, however, remains in the mind of the jurist: the aleatory or commutative nature of the concession (in front of the undisputed commutative nature of contracts).[219]

This latter, as it is well known and we have tried to show, is such a particular legal relationship, which presupposes a certain risk in the task (capital and cash of the contractor) carried out on behalf of the customer (interested in the final result).

From the subjective viewpoint thence it derives an obligation "hybrid", so to speak: of means for the first party (contractor), of results for the second one (customer).[220]

The gap between the two positions clearly emerges in the event of a short circuit, that is to say in the specific case of serious contingencies not imputable to the parties (otherwise there is the *perpetuatio obligationis*, except for damages) which can lead either to the termination of relationship or to the adoption of appropriate maintenance remedies.

The national legal system anyway establishes the maximum limit of obligation in conjunction with the effort of the obligor that, according to diligence and good faith, appears out of all proportion compared to the expectation of the other party: once again it is a matter of allocative efficiency.

This is true for the private contract (and for the public, as a consequence), but what happens in the concessions? What is the importance of the concessionaire's operating risk?

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[219] First of all, we should start saying that, by definition, a contract is aleatory – and not commutative – when at least one of the performances is dependent on uncertain events, assuming some risk.

As well taught in civil law, "the relevance of the aleatory character is essentially this: that the parties, having agreed respectively to undergo the alea, or to speculate about it, they cannot later consider the contract as detrimental or as too onerous" (Sacco R., Sez. XV - "La qualificazione", cap. II - "Le altre classificazioni", in *Trattato di diritto privato*, diretto da Rescigno P., vol. X, tomo II - Obbligazioni e contratti, Utet, Torino, 2002, p. 591).

On the implications of the distinction between commutative and aleatory contracts, see Delfini F., *Autonomia privata e rischio contrattuale*, Giuffrè, Milano, 1999, *passim*, in particular pp. 16-39 and 200-205.

[220] For the traditional opinion that the procurement contract is an obligation of result refer to Luminoso A., *Codice dell'appalto privato*, Giuffrè, Milano, 2010, p. 17, and to Gambini M., "L'esecuzione del contratto", in Cuffaro V., *I contratti di appalto privato*, in Trattato dei contratti diretto da P. Rescigno ed E. Gabrielli, Utet, 2011, p. 178. In jurisprudence see Cass. Civ., Sect. I, 23 november 1999, n. 12989.

Should also be registerd the gradual overcoming into case law of the distinction between obligations of result and of means: cf. Nicolussi A., *Sezioni sempre più unite contro la distinzione fra obbligazioni di risultato e obbligazioni di mezzi. La responsabilità del medico.* (nota a Cass. civ. Sez. Unite, 11 gennaio 2008, n. 577), Danno e Responsabilità 8-9: 871, 2008.

In this regard, it is useful to preliminarly mention a judgement on the subject of conditioned tenders – T.A.R. Perugia, Sect. I, 11 june 2010, n. 369 – in order to ascertain the quintessence of concessions: the operational risk, indeed.[221]

The burden of the conditions unilaterally dictated by the aspirant concessionaire resolved itself in the total exclusion of any risk for the same concessionaire.

Not only the "guaranteed minimum" claimed by him practically coincided with the performance of the operator but the penalty was so high that, paradoxically, the manager would have had greater convenience to keep customers away rather than attracting them.

Everything thence transformed the concession in a public contract.

The decision is interesting because, on the one hand, indicates the distinction between contracts and concessions, on the other hand, reveals under which meaning should be properly understood the operating risk in management.

As a result we get a first axiom: the risk cannot be equivalent in public procurement contracts and concessions.

On the subject the Directive 2014/23/EU offers only some insights, in the sense of severely limiting the cd. "renegotiation" of the concession, leaving to national law the onus of preparing a more comprehensive response.

That task is made very awkward because of the difficulty to operate into the context of a general theory of the contract which in Italy has seen the emergence of the most diverse opinions.

In particular, with reference to the dichotomy aleatory-commutative contracts, dating back to the French experience of the Napoleonic codification and especially to Pothier[222], the doctrine has produced a series of specious speculation and meta-legal categories that are shaken from the foundations when they come to meet the peculiar cases of public procurement.

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[221] The dispute concerned the concession of a university canteen service, from whose competition a participant was excluded for having made a conditional offer that distorted the tender.

The defect was not much in the condition p*er se*, as in the consequences that arose from this.

The *lex specialis* scheduled that the concessionaire was required to operate the canteen for at least 250 days a year and that the structure had to serve a demand of 1.000 meals per day.

The conditional offer instead claimed a "guaranteed minimum" (240.000 meals per year) and fixed also the size of the penalty for failure to achieve (two-thirds of the standard price for each meal less).

[222] For the historical reconstruction please see Balestra L., *Il contratto aleatorio e l'alea normale*, Cedam, Padova, 2000, in particular pp. 14-29.

Such a crisis is due not only to the sterility of the debates on the concepts of risk and (normal) alea, contractual and extra-contractual, legal and economic, but also to the persistence of many anachronistic elements more useful to fill the pages of the books than to solve legal problems.

Everything revolves around the problematic qualification of aleatory contract.

A commutative contract assumes the correlativity among appreciable sacrifices of the parties, both *ex ante* and *ex post*, so that it is compensated every fluctuation in value that goes beyond the threshold of normal alea inherent to the specific contractual type.

In contrast, for the doctrine, an aleatory contract has two characteristic profiles: uncertain profit (functional element) and indeterminacy of performances (structural element); this means admitting a priori a hypothetical condition, subject to many variables, that a posteriori can be completely different from the initial expectations.[223]

The alea is merely "economic" when derives from elements external to the contract (*e.g.* changes in prices) or "legal" where the uncertain factors are expressly foreseen in the contract (just as for the condition but, unlike the agreement *sub condicione*, the changes relate only to the performances, not to the effectiveness of the contract).

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[223] On the model of the contracts considered as typically aleatory (insurance, annuity, game and bet) it has spread the idea that the alea consists in a future event – just like the condition defined by Civil Code – such as to cause effects on the contract: see, for example, Nicolò R., *Alea* (voce), *Enciclopedia del diritto* I: 1024-1031, Giuffrè, Milano, 1958 (now in *Scritti giuridici* II: 1421, Milano, 1980).

Not really to the conditional clause must we look in order to identify the origin of aleatory contracts, but rather at art. 1102 of the Civil Code of 1865, under which "is contract of chance and aleatory, when for both parties or for one of them the advantage depends on an uncertain event. These are the insurance contract, the loan at all risk, the game, the bet and the life annuity contract".

Even to date is still used the approach just mentioned for classifying the aleatory contracts.

It is an error of perspective: the alea should be discerned not so much in the cause of the uncertainty, as in the very effects that this last produces on the contractual synallagma (*id est* the uncertain final result, with possible alteration of the balance between performances).

Claiming the positivization of a volatile concept like the alea has led to futile ruminations on the causal moment of the contract (such as the invalidity for lack of alea in virtue of a posthumous prognosis: would then be null all those aleatory contracts in which the parties succeed in envisaging the future correctly? The nullity must be excluded once the agreement is concluded in any uncertain conditions that later prove to be according to the estimates and expectations).

The same should be said for the bizarre and specious distinction between risk, alea and normal alea since they are unified by the same discipline: cf. Boselli A., *Rischio, alea ed alea normale del contratto*, Rivista trimestrale di diritto e procedura civile, 769-795, 1948; and Gabrielli E., *Alea e rischio nel contratto. Studi*, Edizioni scientifiche italiane, Napoli, 1997.

If a legal significance may be attributed to the category of aleatory contracts, it corresponds in fact to the rules about the normal alea laid down in art. 1467 cod. civ., in addition to the exclusion of the remedies of rescission and termination *ex* artt. 1448-1469: in this sense can be seen the critique by Balestra L., *Il contratto aleatorio e l'alea normale*, Cedam, Padova, 2000, in particular p. 113 ss.

Ultimately – just as it has been correctly observed by Ferrari V., *Il problema dell'alea contrattuale*, Edizioni scientifiche italiane, Napoli, 2001, *passim* – the aleatory nature of contract consists in anything but the elision of contractual equilibrium, in a relation of inverse proportionality.

Only the second one would be alea in the technical sense, as contractual risk, while the first would constitute an extra-contractual economic risk incapable of affecting the classification of the contract as aleatory.[224]

Usually in the aleatory contracts we have reciprocal expectation-subjection since the *an* and/or *quantum* of the final result depends on events external to the parties, on which these latter have only limited control.

Notwithstanding, the function of the aleatory contracts remains that of exchange, not of uncertain lucre (which represents a character of the exchange, rather than its *ratio*), or either the associative one, at most being us able to identify a purpose of management and neutralization of risk.[225]

Would not otherwise make sense its membership in the *genus* of bilateral contracts.

It can be said that, while for the commutative contracts the proportionality, inherent in the genetic synallagma between benefits, exists for the entire duration of the relationship under the guise of functional synallagma, this linearity is missing in the aleatory contracts.

As a result of the objective and subjective allocation of the risk between the parties, the synallagma that gave rise to the exchange is not conserved all along the course of the relationship and does not take into account the changes that may alter the balance of the original contract.[226]

In order to correctly identify the aleatory nature of a contract, we need to investigate the abstract and concrete cause of the transaction: economic-social function of the type and intent of the parties in any given case.

Whenever the risk transfer desired by the parties is limited to the normal alea of the contract, as typified by the law, then you will have a rebalance of the benefits as far as the threshold of normal alea is exceeded (just like in the commutative contracts).

If it was instead decided to put in place an allocation of risks effectively aleatory, the performance marked by qualitative and/or quantitative indeterminacy, with consequent

[224] The idea dates back to the last century, following the entry into force of the Civil Code of 1942: cf. Rubino D., *L'appalto*, in Trattato di diritto civile italiano diretto da F. Vassalli, VII, 3, Utet, Torino, I ed., 1946, pp. 115 and 331; as well as Ascarelli T., *Aleatorietà e contratti di borsa*, Banca borsa e titoli di credito, I, 1958, p. 438 ss. and bibliography indicated therein.

[225] In this sense see Capaldo G., *Contratto aleatorio e alea*, Giuffrè, Milano, 2004, in particular pp. 141-148; *id*., *Dai contratti aleatori all'alea: attualità di una categoria,* Obbligazioni e Contratti 4: 296-301, 2006.

[226] On the elasticity of functional synallagma cf. Delfini F., *Autonomia privata e rischio contrattuale*, Giuffrè, Milano, 1999, p. 357 ss.

uncertainty of gain, can not be the subject of rebalance a posteriori nor of remedies designed to dissolve the commitment (but on the contrary they may be reviewed the non-aleatory contractual aspects).

In between the two ends there is a third way, which is the possibility that the parties provide for the use of maintenance tools at the conditions expressly agreed (which, though mitigating the risk, especially for abnormal operating conditions, should not delete it).

There are contracts aleatory *tout court*, but they are very rare and mostly confined to specific sectors (finance, stock market, games and betting).

The error of legal science is the tendency to identify the aleatory contract through the synthesis of the special disciplines dedicated to each contract considered aleatory and subjected to positive regulation.

Remains, therefore, the original idea of the alea as a future event able to determine the fate of the relationship.

Moreover, the majority doctrine, followed by the case law, considers the normal alea as a characteristic nuance of commutative contracts, on the assumption that otherwise all the durable contracts would be aleatory, but in that making a mistake since the *nomen*[227] of normal alea already connotes the aleatory nature affecting the relationship.

When the parties suffer the consequences of the alea agreed, the contract is aleatory; where are provided rebalance tools you will have commutativity: *tertium non datur*.

Referring to the commutative contracts, which include the procurement contract, the legal cause in abstract and concrete sense is the exchange of *utilitas* basically certain, whose price fluctuations can lead to change (hardship clause, renegotiation, *reductio ad equitatem*) or to extinguish (presupposition, termination for excessive onerousness, withdrawal, nullity for lack of cause in concrete, rescission for lesion) the relationship that must be performed in accordance with good faith and fairness.[228]

[227] "Alea" in Latin, besides indicating the dice game, it has the meaning of risk, chance, uncertainty. On the etymology of the term refer to Di Giandomenico G.; Riccio D., *I contratti speciali: I contratti aleatori* - Trattato di diritto privato diretto da M. Bessone, vol. XIV, Giappichelli, Torino, 2005, pp. 3 ss. and Balestra L., op. cit., pp. 2-3.

[228] See Macario F., *Adeguamento e rinegoziazione nei contratti a lungo termine*, Jovene, Napoli, 1996; Cesàro V. M., *Clausole di rinegoziazione e conservazione dell'equilibrio contrattuale*, Edizioni scientifiche italiane, Napoli, 2000; Mauceri T., *Sopravvenienze perturbative e rinegoziazione del contratto*, Europa e diritto privato 4: 1095, 2007; Bruno C., *La questione delle sopravvenienze: presupposizione e rinegoziazione*, Giustizia civile 5: 235, 2010; Abas P., *Errore di previsione e sopravvenienza contrattuale: un'indagine comparatistica*, Rivista trimestrale di diritto processuale civile 3: 787, 2011; Scarpa D.,

In the aleatory contracts does not count the imbalance of the performance exchange and of the original value ratio between the performances of the parties.

As mentioned, the line between the two dogmatic categories is defined from the alea cd. "normal" of the single contractual type, as fixed by the law and wanted by the parties, and from the inability to later changes, unless giving birth to a novation of the relation.

It is in reference to the contingencies that becomes relevant the distinction between commutative and aleatory contracts, otherwise mere exercise in rhetoric.

After all, constitutes a principle acknowledged in jurisprudence that for which in the contracts to correspondent performances, with ongoing or periodic or deferred execution, "*each party takes upon himself the risk of the events that may alter the economic value of the respective performances, within the limits of the normal alea of the contract, therefore, to be held present by each party at the time of stipulation for the non unpredictable events in accordance to the due diligence*".[229]

Consequently, the problem arises for the extraordinary and unforeseeable events that exceed the "normal" alea of the specific contractual relationship.

The extraordinary character has an objective nature, qualifying an event on the basis of the appreciation of elements – such as the frequency, the size, the intensity, *et cetera* – susceptible of measurement, so as to permit, through a quantitative analysis, classifications of statistical order at the least, whilst the character of unpredictability has a subjective root, referring to the phenomenology of knowledge, and it must be evaluated according to objective criteria, related to a normal capacity and an average diligence, with regard to the specific circumstances existing at the time of conclusion of the contract, being not enough the abstract possibility of the event.[230]

Ricostruzione ermeneutica della hardship clause nel diritto positivo italiano, Contratto e impresa 4-5: 951, 2013.

In the sense of the partiality of the review, namely that the renegotiation cannot cover every single clause of the relationship since are not renegotiable the essential elements of the type of contract entered into, nor can be suppressed essential terms of type, or be inserted incompatible ones are Bruno C. and Scarpa D., op. cit. and the bibliography indicated therein, as well as Gentili A., *La replica della stipula: riproduzione, rinnovazione, rinegoziazione del contratto*, Contratto e Impresa 2, 2003, p. 703.

[229] Thus Cass. Civ., Sect. I, 23 november 1999, n. 12989, and Sect. III, 25 may 2007, n. 12235.

In addition the case law (cf. Cass. Civ., Sect. III, 19 october 2006, n. 22396) excludes the termination for excessive onerousness if the parties have contractually inserted a clause involving a margin of risk on the possible occurrence of a specified event, undertaking to perform the contract anyway. In order to accept a request for termination due to excessive onerousness it is not sufficient the proof of disequilibrium between performances but must also be proved that the same was caused by a totally anomalous market trend.

[230] Thus Cass. Civ., Sect. II, 23 february 2001, n. 2661 (conf.: Sect. I, 9 april 1994, n. 3342; Sect. II, 13 february 1995, n. 1559; Sect. III, 19 october 2006, n. 22396).

From all the foregoing it follows the shattering effect brought about by the European Directives on public procurement – especially from the one on concessions – toward the contract theory:

- first of all, for the apparent emergence of a category of contracts aleatory by nature or by intent of the parties – *i.e.* the concessions – that make the uncertainty their *discrimen* compared to the commutative public contract;
- for overcoming the incompleteness through the introduction of two risk sides (supply and/or demand), not linked to single future and uncertain events but rather to entire families of events, so that we need to understand if are to be included also the contingencies (by virtue of the narrow margins of successive renegotiation descending from the presence of a preliminary competition in the award);
- eventually, for the tendential repudiation of both the contractual equilibrium as equitable principle derived from the general clause of good faith ("contractual justice")[231], and then of the collaborative dynamics between the parties in the long-term relationships[232] (that would not be free, but limited to the configuration given to it by the parties at the time when the contract is concluded).

The problem is therefore represented by the particular shape of public contracts that, while, on one hand, find their source in the private autonomy of the parties, on the other, cannot forget the traditional shackles and tethers of administrative action.

The public evidence does not allow indeed to operate like private parties.

It is true that outside the authoritative activity the public administration should act according to the trappings of the common law, but public procurement makes up a market *sui generis*, where the competition – in the market and for the market – necessarily affects the autonomy of the private contractors as well.

The competitive phase remains inspired by the general principles of administrative proceedings and, as a result, the contractual phase cannot erase nor obliterate what has occurred before.

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[231] On this point see Bessone M., *Adempimento e rischio contrattuale*, Giuffrè, Milano, 1975, p. 285 ss., in particular pp. 338-342.

[232] V. note 228 *supra*: in particular Macario F., *Adeguamento e rinegoziazione nei contratti a lungo termine*, Jovene, Napoli, 1996; Cesàro V. M., *Clausole di rinegoziazione e conservazione dell'equilibrio contrattuale*, Edizioni scientifiche italiane, Napoli, 2000; as well as Trubiani F., *La rinegoziazione contrattuale nel diritto privato europeo*, Obbligazioni e Contratti 2: 134, 2012 and *id*., *La rinegoziazione contrattuale tra onere ed obbligo per le parti*, Obbl. e Contr. 6: 447, 2012; Patti F. P., *Collegamento negoziale e obbligo di rinegoziazione*, Nuova Giurisprudenza Civile 2: 117, 2013.

What it demands a certain rigor in the public transactions in order to avoid any unfair advantage to the detriment of the collective interest.

Consideration which applies equally to public contracts and concessions, it is true, but for these latter assumes greater significance because of the fact that the concessionaire bears some risks that in the procurement contract are charged to the public counterparty.

This different connotation of the instruments leads to rethink the concession, having to understand the impact of the risks on the same: so that it seems to be configured *ex lege* an aleatory contract indeed, or at least a contract characterized by a "normal" alea more pronounced than the typical public contract, albeit with the possibility of reducing its scope through specific clauses of the *lex contractus*.

European law undermines the certainties of the jurist, used to bringing the whole back to the conceptual scheme of public contract, and thus a shift in register is imposed.

§5.1. Aleatoriety or commutativity for the concessions?

As in those brain teasers where you need to connect the dots to find out which figure will appear, now we must reorganize everything we know to come to a conclusion on the nature of the concession as opposed to the public contract.

Let us not be mistaken by the fact that the EU Directives on public procurement are devoting a specular discipline to public contracts and concessions as complex contracts (both expressive of PPP: v. *infra*), since they have a specific macro-purpose of market protection (*scope of competition*), while here comes into play the single contractual type (*scope of contract*).

Already we have seen that the Court of Justice and likewise the EU Directives have identified the *discrimen* between the two cases in the operational risk, which includes the possibility that the concessionaire – as opposed to the contractor – can get no return from the investments made in the economic operation.

We must try to fathom whether such a peculiarity is to affect the legal classification of the concession as aleatory contract into the national law: profile, this one, that could facilitate the distinction from the public contracts, traditionally commutative.

In the investigation, therefore, they do come at stake the controversial notions of "supervenience" and "normal alea" of the contract.[233]

[233] Please refer to Ambrosoli M., *La sopravvenienza contrattuale*, Giuffrè, Milano, 2002.

The principle of the cd. "*sanctity of contract*" has always been a matter of dispute between the rule "*pacta sunt servanda*" and the "*clausula rebus sic stantibus*".[234]

It is difficult to establish a clear boundary between the two cases, just as it happens for the categories of commutative and aleatory contracts.

After all, upon closer inspection, it is the repetition, in a different guise, of the same interpretative question.

The solution adopted by the legal science to overcome the *impasse* at issue is essentially to give precedence to the textual will of the parties, expressed in the agreement, privileging the objective interpretation over the subjective one.

Only in the case where the parties have not provided anything in relation to certain contingencies, so to be considered unpredictable and unforeseen, is then possible to resort to forms of "integration" of the agreement by eliminating the gaps.

Herein it does not matter to go into the detail of the different supplementary modes allowed by the various legal systems, but rather to point out that a similar reasoning has been extended to the "correction" of the agreement between the parties, that is to the hypothesis of supervening perturbative contingencies.

But it is not the very same thing to discipline a remedy for the shortcomings resulting from the incompleteness of contract (or other source of law) and, on the contrary, to correct an earlier negotiating expression.

If in the first case there is a problem of legal certainty, since there is no source that can provide the solution, in the second one a window is open to the weakening of the law-effectiveness of contract, in this respect equated to the laws, resulting in legal uncertainty.

The hermeneutic canon of good faith can certainly help to integrate the possible gaps, but it does not seem appropriate to overturn the terms of an agreement via equity, all the more in a manner inconsistent with the allocation of risks to the parties.

That is why the European legislator has aimed at addressing a discipline as much comprehensive as possible, leaving no room for regulatory gaps.

Yet, for public procurement contracts and concessions – in particular to the latter, since for the public contracts it is provided a really specific national regulation (v. *supra*) – we need to understand what importance has in practice the allocation of risk and whether this does render the concession an aleatory contract.

[234] For a historical and comparative reconstruction see Ambrosoli M., op.cit., *passim*.

As said, in contrast to the previous definition *per differentiam* of the concessions with respect to public contracts, the new Directive 2014/23/EU on the award of concession contracts has opted for the first time, in a single regulatory text *ad hoc*, for the autonomous definition of works and services concessions no longer referring to public contracts.

Art. 5, para. 1, lett. a) and b), in fact, defines the "*works/services concessions*" a *contract for pecuniary interest concluded in writing* by means of which one or more contracting authorities or contracting entities entrust *the execution of works/the provision and the management of services* to one or more economic operators, *the consideration for which consists either solely in the right to exploit the works/services that are the subject of the contract or in that right together with payment*.

Again, pursuant to art. 5: *The award of a works or services concession shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both. The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession. The part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible* (emphasis added).

So far the regulation of supranational origin.

Thereto we must add that, in Italy, legislation and case law has developed a concept of risk absolutely ephemeral, ousted by the role assumed by the economic and financial equilibrium inside the concession, on the basis of procurement contracts.

The latter, though has undoubtedly its *raison d'etre* for exceptional contingencies, *ex lege* or for *factum principis*, seems indeed to become overly invasive when it comes even to override the private autonomy of the parties.

One then wonders what it consists – if it does exist (the doubt seems reasonable) – the distinction between public procurement contracts and concessions.

For legal science the former are certainly commutative: the economic equilibrium corresponds to the "normal" alea of the traditional contract in private procurement, namely the risk of workmanlike performance ("*a regola d'arte*"): or rather, that this last is to meet the expectations of the counterparty in accordance with legal and conventional provisions.

Were it not so, the contractor is responsible for defects, flaws and any other default or forecasting error, with the result that the consideration agreed may be insufficient to cover the costs.

Which means that a quota of risk – in the sense embedded in the definitory rule contained in the Civil Code[235] – is present in the contract, too.

Yet, into legal taxonomy, this one is classified as a commutative contract since the genetic and functional synallagma between the performances of the parties tends to amortize that share of risk, in particular as regards the extraordinary and unforeseeable contingencies, via rebalancing remedies both conventional (*e.g.* revision of prices above a certain threshold, limit to variants beyond which is permitted the unilateral termination)[236] and judicial (execution of the specific or equivalent performance in the case of any breach, save resorting to termination in the more serious cases).

Additionally, the payment of the contractor by way of successive states of progress, with the correlated release of any deposits placed to guarantee the proper performance, tends to defer the risk of the contractor before the courts.

Such precautions appear to be sensible and reasonable on the very assumption that, as mentioned, the contractor engages in a specific obligation to the interest of counterparty, at whose will he is subject throughout the course of the execution.

Regarding the concessions the question becomes more complicated.

Realistically the concession risk can not be the same as just outlined above, otherwise it would make little sense not only the present study, but also the definitory and regulatory dichotomy between public contracts and concessions.[237]

Consequently, it is appropriate to analyze and identify the hermeneutic criteria in order to establish a demarcation line between the institutions at issue.

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[235] Art. 1655 cod. civ. speaks of "*gestione a proprio rischio*" by the contractor, in the meaning of organization of the company so as to fulfill the contract within the time and estimated costs, and according to the initial project. On this point, please see Lipari M., *Il rischio nell'appalto e l'alea normale del contratto*, Giustizia Civile II: 223-240, 1986, Luminoso A., *Codice dell'appalto privato*, Giuffrè, Milano, 2010 and Cuffaro V., *I contratti di appalto privato*, in Trattato dei contratti diretto da P. Rescigno ed E. Gabrielli, Utet, 2011.

In confirmation of that, art. 1673 regulates the risk of accidental perishing or deterioration of the thing by establishing that the risk lies with the contractor until the time of acceptance or of the formal notice of the customer. On the risk of perishing see Delfini F., *Autonomia privata e rischio contrattuale*, Giuffrè, Milano, 1999, pp. 123-192.

[236] For the private contracts cf. artt. 1660-1661 (variants *in executivis*) and 1664 (revision of prices) cod. civ.; for the public ones see above (v. *supra*).

[237] Truthfully, sometimes there can be a substantial specularity between them (v. Part II *infra*).

The interpretive problem arises from the different conformation of the concession, which – compared with the public contract – provides, as normal alea of performance, inherent in the specific contractual type, an operational risk that conditions the receipt of the consideration to the market response.

The result is an alea which goes far beyond the threshold of "normality" observed in procurement contracts, namely the one under which to the exact performance corresponds the payment of the agreed consideration (save the normal fluctuations in value), to fall indeed into the peculiarities of the situation where the accurate service is paid by the right of economic exploitation of the same toward the users. What it commonly makes people think of a trilateral relationship (customer, provider, user), although there is no reason to exclude that the customer be also user: in fact is not the subject *ex se* what changes, but the way it interacts with the service provider.

In the first case there is a kind of biunivocal relation in which the promised result must match with the promised consideration for the assignment, subject to shortcomings and errors of estimates by the parties.

In the other, instead, a variable appears: the promised result is going to match with the amount budgeted only on condition that the market will actually take charge of it.

And it is precisely this peculiarity that embodies the concession risk.

From the alea cd. "normal" takes place a switch to that commercial, mercantile and "marketable": from pure risk you come to the speculative one.

Is important to stress this step because it changes the perspective from which to watch the field of investigation.

In particular it results clearer the concept of supervenience.

As for the procurement contracts, even those public, in the past has been affirmed the compensation in favour of the contractor for the aforementioned non-imputable perturbative contingencies, unless the express contractual provision in the opposite sense (where permitted: v. *supra*).[238]

[238] For example, the repealed D.P.R. 16 july 1962, n. 1063, laying down the general conditions of contract for works under the Ministry of Public Works, at art. 24 provided for the possibility of excluding any compensation to the contractor for damage caused by force majeure.

Cf. Cass. Civ., Sect. I, 26 november 1984, n. 6106: "Pursuant to art. 1664, paragraph 2, c.c., also applicable to the contract of public works, the right of the contractor to a fair compensation for the difficulties of execution, resulting from geological causes, water and the like, postulates that these events were not the

This not only contradicts what has been previously seen for the public contracts, but it does mean that even for contracts traditionally commutative exists the possibility for the parties to include a further risk margin on the provider, modeling the normal alea typified by law.[239]

That option, however, must be no cause for concern because it is the exception that proves the rule: only by way of exception the procurement contract can become aleatory, generally finding application the revision of prices and the fair compensation for variants (v. *supra*).[240]

It has already been stressed, in fact, how the national law, in the silence of the supranational, has codified the procurement contracts as commutative within the Civil Code and into the Code of Public Contracts.

The contractor receives adequate protection both in terms of revision of the prices (beyond a certain threshold of alea against him), and as regards the variants that may occur at the request of the client or due to unforeseeable circumstances and force majeure.

Though the administrative case-law on procurement is much stricter than the civil (note again the effects of the dual model of jurisdiction), the first not admitting exceptions to the protection of the contractor, unlike the second one, it can consequently be deduced the general principle of commutativity of the procurement contracts.

As anticipated, in Italy, from the procurement such a principle has been extended to the concessions on the basis of the interpretation by analogy, on the assumption that both contracts have commutative character.

Thus is explained the applicabilty to the concessions of the maintenance remedies against the superveniences (revision of prices and rebalancing in the course of execution), which are sometimes even made the subject of positive law.

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subject of contractual provision, and therefore shall be excluded when the provisions of the special conditions negate any compensation to the contractor for the occurrence of the same events".

The jurisprudence had warned the derogability of the provision for the revision of prices too: cf. Cass. Civ., Sect. I, 13 february 2003, n. 2146 for public contracts.

[239] Cf. Luminoso A., *Codice dell'appalto privato*, Giuffrè, Milano, 2010, p. 14 ss., and Musolino G., *Dei Singoli Contratti - Artt. 1655-1802 c.c*, a cura di D. Valentino, Commentario del Codice civile diretto da E. Gabrielli: Vol. II, Utet, 2011, p. 112 ss.

[240] They firmly believe that a procurement contract does never become aleatory both Cervale M.C., "La struttura dell'appalto" (pp. 105-106) and Pennalisico M., "Il corrispettivo" (pp. 158-159) in Cuffaro V., *I contratti di appalto privato*, in Trattato dei contratti diretto da P. Rescigno ed E. Gabrielli, Utet, 2011 and bibliography indicated therein.

In jurisprudence see Cass. Civ., Sect. I, 20 september 1984, n. 4806, and Sect. II, 12 march 1992, n. 3013.

In our legal system, therefore, the concession ends up being substantially an *alter ego* of the public contract: particularly a mixed contract of works and/or services, extended to the management phase, covered by the same relevant provisions and in respect of which the rule is the economic and financial equilibrium.

The circumstance is self-evident if one just thinks that the revision of the concession for all the cases that anyway affect the balance of the economic-financial plan ("comunque incidono sull'equilibrio del piano economico finanziario") is rendered *ex lege* "necessary", to be implemented through new equilibrium conditions, even via extension of the expiry ("da attuare mediante nuove condizioni di equilibrio, anche tramite la proroga del termine di scadenza").[241]

And not only for any variations in the economic and financial equilibrium of the investments and of the related operations, made by the client and/or by laws or regulations establishing new tariff mechanisms, but also for those variations not attributable to the concessionaire which entail a modification of the equilibrium.

In the absence of the review, the concessionaire may terminate the contract.

Already these lines manage to recall the commutative law of contracts, where the supervening disequilibrium between the performances places the parties at a crossroads: either the interests of both are balanced in an equitable manner, or the overly burdened one frees himself.

But the evidence of the commutativity of the concession in the Italian context appears even much sharper in relation to the mechanism under which the review of the plan shall be carried out in favour of the grantor when the changes made or the new conditions are more favourable of the previous for the concessionaire.

What I have just described is clearly showing that the synallagmatic relationship between the performances of the grantor and of the concessionaire is extremely invasive and marked by the permanent reciprocity of the economic balance of the concession.

Is then to wonder what is the operating risk assumed by the concessionaire.

If in the worst case there is the rebalancing of the concession and in the best one there will be an extraction of rent, we do not see any operating risk other than the punctual implementation of the contents of the concession contract – *rectius*: PEF (plan).

[241] In these terms it is formulated art. 143, paragraphs VII-VIII, of the Code.

Since in the concession are defined the prerequisites and the equilibrium conditions of the economic and financial plan (PEF), referring to indicators of profitability and capacity to repay debt, as well as the verification process and the timetable for the inherent activities, it seems highly improbable that the final result can be different from that engraved *per tabulas*.

All the more so considering the fact that the draft of economic and financial plan and the feasibility studies of the concession are set by the public administration, and not by the concessionaire, who can only submit bids on the basis of the documents produced by the administration grantor and, if applicable, propose changes and adjustments.

It follows some kind of a spirit of solidarity between the parties, who have mutually contributed to the conception of the concession and have a share in it for the entire duration of entrustment.

It therefore opens a window to the collaborative method in the concessions.

The problem is that in the Italian case it is to note more a caution from the public administration towards the concessionaire, who embarks on a venture conceived by others, than a real dynamic of cooperation between the parties.

It thence results in the mitigation of the risks, but not in their assumption, just like in the procurement contracts.

Which seems to clash with the discipline addressed by the European legal system in the field of concessions.

The dilemma is the following: logically arguing, since the concessions are contracts to correspondent performances with ongoing or periodic or deferred execution, should then be applied the same rules of procurement contracts, as indeed it happens in Italy?

Or either the operational risk of the concessionaire affects the cause and legal nature of the concession contract and accordingly requires a different statute?

In other words, is it possibile to consider the concessions as commutative contracts and to treat them the same way as procurement contracts?

Or else are they aleatory contracts instead?

In order to answer these questions and delineate the distinction between public contracts and concessions, we should start as usual from the new Directive 2014/23/EU and investigate the real effect of the operating risk on the concessions.

§5.2. Operating risk and normal alea

In the preceding pages we have seen that the European context knows a concept of "*operating risk*", very different from the interpretative schemes used by domestic jurists, that needs to be framed into national law.

Under the new Directive 2014/23/EU on concessions:

- "*The main feature of a concession, the right to exploit the works or services, always implies the transfer to the concessionaire of an operating risk of economic nature involving the possibility that it will not recoup the investments made and the costs incurred in operating the works or services awarded under normal operating conditions*";
- "*The part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible*";
- "*The fact that the risk is limited from the outset should not preclude the qualification of the contract as a concession*";
- "*operating risk should stem from factors which are outside the control of the parties*" and "*should be understood as the risk of exposure to the vagaries of the market*";
- "*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*".[242]

On the topic they are certainly helpful, as well as the recitals n. 18-19-20 of the Directive and the definitional rule laid down in art. 5, the rulings of the Court of Justice, which has set two incontrovertible cornerstones with regard to operating risk:

- the remuneration of the concessionaire must not ensure *ex post* the total recovery of the investments (the *quomodo* of risk);

[242] Cf. recitals 18-19-20 Directive 2014/23/EU, where – in adherence to the case law from the EU Court of Justice – are estimated to be negligible those risks linked to bad management, contractual defaults by the economic operator or to instances of force majeure, since those risks are inherent in every contract, whether it be a public procurement contract or a concession.

This suggests indeed that European law has wanted to oust the risks which compose the normal, albeit pathological, alea of public procurement; better still, that in addition to them in the concession are present other types of risk which do render such an instrument more risky than the normal public contracts, or even aleatory.

- the risk undergone by the concessionaire can not be merely nominal, but must be significant, even though smaller than the one which would bear the public administration in the case of self-management (the *quantum* of risk).[243]

In relation to this last point, the Directive 2014/23/EU allows the modifications that:

- regardless of their monetary value, have been provided in the tender documents into clear, precise and unequivocal clauses (*e.g.* price revision or options), without affecting the general nature of the contract;

- are determined by circumstances unforeseeable with the ordinary diligence and do not alter the overall nature of the contract;

- change the economic balance of the contract in favour of the concessionaire in such a way provided for by the initial concession without substantially changing the scope of the agreement compared to the one initially concluded.

Let us then try to figure out what the "normal" alea of the European concessions is and whether they should rise to aleatory contracts within the national law.

For ease of exposition, as risks matrix, we use the three met in the Eurostat decision of 11 February 2004 on PPPs: construction, demand and availability.[244]

§5.2.1. Supply

As mentioned, the award of a works or services concession involves the transfer to the concessionaire of an *operating risk in exploiting those works or services encompassing demand or supply risk or both.*

Let us leave aside for a moment the last hypothesis, namely the simultaneous presence into the hands of the concessionaire of supply and demand risks, as we shall start from the risk on the supply side, the most problematic.

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[243] V. *supra* in particular footnote 52: ECJ, Sect. II, 18 july 2007, C-382/05, *Commission vs. Italy*; note 55: ECJ, Sect. III, 13 november 2008, C-437/07, *Commission vs. Italy*; note 66: ECJ, Sect. III, 10 march 2011, C-274/09, *Stadler*; as well as note 67: ECJ, Sect. II, 10 november 2011, C-348/10, *Norma-A.*

Especially by the latter decision of the EU Court can be seen the actual extent of the risk associated with a concession: where the contracting authority compensates the successful tenderer for the losses incurred because of the performance and ensures a percentage of profits as well, there is no assumption of risk by the service provider.

According to the Court of Justice, in order to set up a concession, it is necessary that, under the rules of public law and the contract clauses, the contractor assumes significantly the risk incurred by the contracting authority.

[244] Cf. *ESA95 manual on government deficit and debt - Long term contracts between government units and non-government partners* (Part IV): "construction risk" (covering events like late delivery, respect of specifications and additional costs); "availability risk" (covering volume and quality of output); "demand risk" (covering variability of demand).

The EU Directive defines it 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*".

Never was a definition more concise and controversial.

It is not clear, first of all, whether in the supply of works and/or services should be included not only the construction phase and that of availability, but also the ones of funding and design.

Art. 5 of the Directive 2014/23/EU merely tells us that for "execution of works" is meant the execution, or both the design and execution, of works or of a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority or contracting entity exercising a decisive influence on the type or design of the work.

Even this tautological definition does not help the interpreter.

We can then say that the EU Directive does not establish a predetermined module for works and services concessions, allowing versatility and ductility.

It is therefore remitted to the public administration the decision to configure the concession depending on the case, being able to choose the design of the operation by itself and to pay a public contribution in order to assess its feasibility (economic and financial equilibrium at the outset).

So it does not seem to be essential the total private financing of the concession.

Just as it seems but essential the absence of public funding, irrespective of any price to compensate for the universal service obligations, it must also be admitted the design by the granting body as well.

Both these profiles, although justifiable with the wide range of the concessions, create some difficulties in the reconstruction of the institution as they end up reducing or distorting the operating risk of the concessionaire.

In fact it becomes little sensible attributing to the concessionaire the operational risk on a project conceived and funded in large part by others.

If anything, given the link between the operating risk and the authorship of the operation, it appears reasonable to make the concessionaire intervene right from the early stages in order to involve him as much as possible in the design and financing of the concession.

Nevertheless the concessionaire shall be free to take the operating risk even on projects of mainly public initiative.

This consideration arises from the permissibility of concessions with limited risk.

In general, however, there should be a propensity for the substantial participation of the concessionaire to the success of the operation in the public interest, with consequent ideation and implementation of the same.

What it would suggest to set the competition on functional and performance-related requirements aimed at stimulating different proposals from the participants in the tender for the award of the concession.

In this way each participant would have the incentive to take the risks of his tender, without being able to object about the intrinsic defects of the initial public actions.

This is true also and especially for the preparatory phase of construction – provision for the services – that comes before the actual management.

The construction risk regards events that may occur during the execution of the concession, such as delays, defaults, increases in costs and prices, technical difficulties, damage and in general any external contingency that may give rise to a perturbative supervenience whatsoever.

Insofar as the European Directive does not expressly take into account these risks, it is not undisputed that they, forming part of the supply risk, fall on the concessionaire.

As seen, the national jurisprudence has solved the unknown through the extension by analogy of the rules applicable to public and private procurement contracts on the assumption that the concessions are commutative contracts.

The same has done up to now (while awaiting reform) the legislature of the Code, through art. 143, by providing the necessary revision of the economic and financial plan for any variation not imputable to the concessionaire that alters the equilibrium of the relation.

It would descend the substantial homologation between contracts and concessions for all that precedes (and follows) the right of management exercised by the concessionaire.

Hence, the risk of construction, that for services becomes of provision, is either profiled almost identical to contracts and concessions, as it forms the core of the contract and represents the cause in law of the same within the boundaries of the cd. “normal” alea (thus finds explanation, beyond a certain threshold, the use of variants and prices revision), or else is it possible to conduct a different reconstruction?

The Directive 2014/23/EU specifies that the concessionaire actually assumes the operational risk in the event that, *under normal operating conditions,* it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of concession. In the concessions, moreover, *the consideration for the execution of works/the provision and the management of services* consists either solely in the *right to exploit the works/services that are the subject of the contract* or in that right together with payment (as compensation for any universal service obligations).

It should next be recalled that the definition of concession is no longer mentioning the public contract as a reference model.

From all the regulations listed above seems to follow the separation not only formal, but also substantive of the concessions from public contracts.

What it leaves to presume that the *right to exploit the works/services that are the subject of the contract*, as consideration for the concession, is affected by the *operating risk* also in the phase that foregoes the sheer management, implying possible losses or, anyway, the absence of a public guarantee.

Therefore it seems to be thoroughly disproved the national science of law that wants a construction/provision risk identical for procurement contracts and concessions, with the related application of the remedies of price revision and economic rebalance of contract.

After all, if the price to be paid by the public administration shall be justified by the universal service obligations, surely it can not include that part of extra-costs relating to the provision in general; as well as in the other cases it is possible for the contract to provide the revision of prices (*cost-plus*) or either a lump sum (*fixed price*).

It depends on the actual allocation of risk between the parties within the contract.

Must, nevertheless, be excluded the analogical extension of the rules provided for contracts, *i.e.* the automatic and generalized application of the mechanism of prices revision (that the EU Directive identifies as an extraordinary way to modify the concessions).

The same should apply for perturbative contingencies not attributable to any of the parties[245] (including even those *ex lege*; different matter for those deriving from potestative choices of an administrative or political character by the public administration: v. *infra*).

[245] In matters should be read the judgment of T.A.R. Roma, Sect. III, 2 september 2014, n. 9292.
The dispute concerned an action brought by a motorway concessionaire against the act of expertise for the supplementary variant, made necessary in advanced course of work, by which the grantor approved, with numerous excerpts and spending cuts, the project relating to the adjustment works.

During the execution of the works had emerged a number of circumstances, defined unforeseen and unpredictable, which prevented the proper execution of works according to the original project design, so that the concessionaire was forced to propose to the grantor a variant appraisal.

The proposal for design modifications made by the applicant had been approved by the grantor body with significant changes, consisting in the removal of certain operations, the reduction of several cost items, as well as in reducing contractual times for the implementation of the new works.

At first, disregarded the objection of lack of administrative jurisdiction advanced by the resistant part – according to which the variant appraisal is placed in the execution phase of the contract, so that the related disputes are ordinarily of the ordinary courts (cf. T.A.R. Basilicata, 9 march 2012, n. 113) –, the dispute has been ascribed to the exclusive administrative jurisdiction under the twofold provisions of art. 133, para. 1, c.p.a., lett. b (as it pertains to the relationship between the service concessionaire and the grantor and does not concern the concession fee or other payments) and c (provided that the concession regards the construction and management of a motorway, that is of a service of general economic interest, that is of public service).

And here reference can be made to what has been previously written about the idiosyncrasy of national law for concessions, still considered manifestations of public powers in the public interest.

Yet the judgment reveals itself interesting insofar as it deals with the relationship between concession and contingencies (pt. 4.1.2 dir.): “As to the item "Archaeological findings", the Board can not agree with the statement made by the verifier, who has deemed recognizable the expenditure item because of the unpredictability of the discovery of Etruscan finds and for the exceptional size and importance of the site, attested by the competent Superintendence.

4.1.2.1 - Is above all clear that the great archaeological importance of the findings can not constitute, *per se*, justification for a variant appraisal.

What makes it necessary such a design variation is, instead, the circumstance that the archaeological discovery was not foreseeable in the ordinary planning stage: circumstance that, in the case at issue, does not emerge neither from the court proceedings documents, nor from the report of verification, rather laconic on the point.

Does not result, in other words, that the presence of important Etruscan remains has constituted unforeseeable event, and not, instead, design shortage due to negligence or incompetence, or failure to deepen the archaeological situation of the site.

It should be observed that just the magnitude and importance of the archaeological site in question (comprising several wall structures, and referable to different anthropic levels), which can be appreciated, into the documents before the Court, especially from the report of the technical consultants to the applicant, lead to consider that a prior determination of possible archaeological findings was not at all unexpected, and that the relating hypothesis was, on the contrary, to be taken into account at the planning time of the highway route; on which, however, the site in question seems to insist almost entirely, judging by the same report of the expert witnesses to the applicant.

Therefore, it is not decisive the question (valorized in the same expertise) if under art. 22 of the public contract the sheer campaign of excavations conducted as a result of the first discoveries fell within or did not fall (because of the exceptionality of the site) into the obligations of the contractor.

Arises, rather, that the commission itself to the contractor to carry out archaeological surveys after the delivery of the works (which took place in 2007), compared to the considerable extent of the findings, states unequivocally the gross negligence that has characterized the planning phases pertaining to the concessionaire.

4.1.2.2 - In any case, a specific point in art. 22 of the public contract laid on the executor of the works the conduct of surveys and archaeological excavations just like required by the authorities in charge, without specifications or limitations of any kind”.

Thereby followed the rejection of the complaint.

Regardless of the inaccuracy with which the judge repeatedly refers to the contract indifferently as a concession or public contract, strikes the reasoning behind the decision.

The variant is charged to the contractor not by virtue of the operating risk which does connote the concession, but because of the imputability to the contractor for planning and executive negligence.

It means emphasizing the imputability of the event (except for the extraordinary unpredictability), rather than the allocation of risks in adherence to the contractual type.

The error of approach appears to be patently serious if only we consider that the solution asserted by the judge applies equally to public procurement contracts and concessions.

What it could have made the difference is the consideration of operating risk instead.

It would seem to be quite the opposite, namely that these remedies do not apply unless the express provision of the negotiating parties in the concession contract.[246]

Especially since the EU Directive seems to use the term "*exploit the works/services*" in an all-encompassing sense, without distinguishing between preparatory, executive and commercial stages, and the concession award has always been about both the construction and the management.

At the end of the day, it would be paradoxical to base the concession on the notion of operating risk and then deny everything via a supply risk which does completely ignore the previous stages that have led the concessionaire to offer his services.[247]

Besides the manifest illogicality, another valid argument can be adduced in support of the theory just exposed.

The new Directive 2014/23/EU, which originally mentioned the risk of availability, in its final version indeed utilizes the denomination of "Supply risk" followed by the aside "*in particular the risk that the provision of the services will not match demand*".

No one can but see the inclusion of the availability risk right in that aside.

In the case of public contract is indeed necessary the imputability of supervenience to the contractor, while in the concessions the event lies with the concessionaire as falling within his sphere of contractual risk: if in the first case you need the subjective element, in the second there is a sort of objective responsibility.

By adopting such a logical path you can then understand the distinction between these institutions as centered on risk.

In the present case, labeled under the *nomen* of concession, it would have been sufficient to note that the operational risk taken by the provider in accordance with the contract also included the archaeological finds.

Once established this requirement, the responsibility of the concessionaire is automatic, unless it is proved that the event is so extraordinary and unpredictable as to exceed the concession alea and even conflict with the contractual allocation of risk and the legal system overall.

Such a reconciliation is reasonable in relation to the concessions not so much in compliance with the Latin maxim *ad impossibilia nemo tenetur*, as for the natural and obvious need to not intimidate and scare away the candidates to the transaction, who must however invest at risk their own capitals.

Should the concession eventually rise to a total gamble, nearly to be labeled with the inscription "*Lasciate ogni speranza, voi ch'intrate*" (*Abandon all hope, ye who enter here*) evoking Dante's Inferno, would be frustrated at the root the private involvement in the realization of objectives in the public interest.

[246] The heterointegration of the contract is, moreover, expressly provided for by art. 1374 Civil Code, under which the contract obliges the parties not only to what is expressly agreed, but also for what is required by law (in this case European: *i.e.* the Directive 2014/23/EU).

Consequently, if the parties have not provided otherwise, recalling where appropriate the discipline for procurement contracts, you can not refer to the same *ex officio*.

To govern the matter it will be the European approach with regard to concessions, in which the emphasis is placed on the operational risk of the concessionaire.

[247] For the sole purpose of public accounting, in ESA95 it is provided that to consider an asset off balance the private partner has to bear the construction risk, and at least one between those of availability or demand. Therefore, whether the construction risk is borne by the public administration, or if the private partner of the administration assumes only the construction risk, the asset will be classified as of public relevance.

As it's known, the availability refers to the contractor's liability for mismanagement (the cd. "*bad performance*"), with repercussions on the quantity (lower volume) and quality (failure to comply with standards) of the services provided, in violation of the contractual agreements.

Making the risk of supply coincide with that of availability is not appropriate.

Interpret the Directive in these terms, besides going against the text of the same, would cause a distorted reading of the concession and a meaning of operating risk of supply that would exclude most of the occurrences that make it up.

If the operating risk of the concessionaire derives from the actual exposure to market fluctuations, with correlated possibility of significant losses and real diseconomies, the direct consequence can only be a supply risk that covers the whole rigmarole of the concession. All the more so since not only it is provided its alternative nature compared to the demand risk, but also the faculty for the parties to affix to the concession any upgrade and renegotiation clauses, namely the cd. "*hardship clauses*", for the events absolutely extraordinary and unpredictable that, as well as being uninsurable, do perturb the contractual balance.

It would make no sense consent to further forms of mitigation of an operating risk *per se* already mitigated *ab origine*.

There is, finally, another factor which lays in favor of the interpretation in question.

They are the penalty clauses for non-compliance by the performer subject.

These clauses accompany the execution of contract from the beginning to the end, both for the construction and for the provision, as for the operation and availability.

Circumstance that endorses a supply risk winding over the entire concession.

In order to be effective and not merely symbolic, such clauses have to heavily affect the capital profile of the operation and automatically (according to the requirements and imposition methods enshrined within the contract).

In truth the application of penalties, by nature lump-sum payments and surrogates to compensation, always includes the possibility of subjective assessments, by the parties or the courts, which may influence their effects.

It is also possible that they are fixed maximum sum ceilings, beyond which it is no longer possible to charge the other party by way of penalty for infringement.

What it generates a series of hermeneutic criticalities.

Entrust exclusively to these instruments the protection of the public administration *de facto* seems to recreate the situation already examined about the procurement contracts, reproducing that template for the operational phase following the construction/provision by the concessionaire.

Especially if it is invoked a private risk of supply limited to the availability.

The performer subject would end up responding exclusively of his own deficiencies, just like in procurement contracts, while he would be guaranteed for the perturbative contingencies not imputable. With good peace for the concession operating risk.

Instead, we must agree on the indisputable fact that if the public administration remunerates the contractor on the basis of operating costs (net of breaches encountered), and not for market outcomes, there is identity between public contracts and concessions.

What operational risk does the contractor assume if, despite the initial allocation, it is provided the compensation of the non-imputable superveniences (as in Italy)?

But, above all, does it make sense that, through outsourcing, the administration delegates a third party as its substitute and then has to compensate him as if it were itself the manager of the service affected in first person from market trends?

It is not very easy to provide an answer to these questions, because the European Directives on public procurement do not take an outright position.

On the one hand, there are rules that define the concession operating risk and emphasize it as the *discrimen* compared to public contracts.

On the other, are the rules that govern in a similar manner the contract modifications and allow to introduce contractual clauses that mitigate such operating risk.

With regard to the risk on the supply side, ultimately, for now we can only say that generally it has to include all the services which characterize the supply side, and not only the final segment (availability risk), resulting in the responsibility of the concessionaire for contingencies and defaults.

Thereby can thus derive the occurrence of losses and shortages of cash for the concessionaire, the same that happens in aleatory contracts.

We will see that this general rule is not exhaustive nor peremptory, being us able to have different situations from the one shown when the parties have by mutual agreement decided to allocate the risks differently, in observance of what contained in the *lex specialis* of tender (*condicio sine qua non*), especially where risks of supply and demand coexist.

§5.2.2. Demand

The demand risk constitutes the flip side of the operating risk.

It is defined as "*Demand risk*" the "*risk on actual demand for the works or services which are the object of the contract*".

The new Directive 2014/23/EU provides, definitely, for such a risk to be either an alternative in the event that there is no assumption by the concessionaire of the supply risk, or as complementary to the latter.

Demand risk pertains to the variability of market demand, which may mean levels higher or lower than the estimates expected, regardless of the very conduct adopted by the concessionaire (falling it, as seen, into the supply risk).

There are various external factors that can influence the development of demand: the emergence of new trends, the particular economic situation, the technical obsolescence, and so on.

The concessionaire who assumes the risk of demand must have in mind that the provisions contained in the economic and financial plan to cover the investments are only estimates, and then not strictly legal obligations enabling to actuate negotiating or judicial remedies in case of error.

This is a fundamental point, moreover already well-present in the Court of Justice case law, which in fact has dealt mainly with concessions of services focused on the demand risk.

It is hither, more than in the risk of supply (linked to events of the empirical world), that the operating risk really depends on the fluctuations of the market.

One hermeneutical doubt arises in relation to the "*actual demand for the works*", as an alternative to that of "*services*" (emblematic the use of the conjunction "*or*" by the Directive 2014/23/EU).

Via this expression may the European Directive be willing to mean that, once the works are completed, the concessionaire runs the risk of being left with an *opus* no longer needed, and so the public grantor could prevent him from earning revenues through the management of services?

Obviously the sensible reply cannot but be negative.

Although this is an imaginative hyperbole, such an aleatory contract would be, nonetheless, admissible should the concessionaire realize any works reusable in the market

(for instance, offices and facilities to be easily reconverted to uses other than those agreed with the public administration and no more necessitated).

In general, however, must be remarked the normal presence of the demand risk for works "*and*" services, because they are these last that essentially enable the concessionaire to recover the investments undertaken in the works.

The demand risk relates in fact to the purely operational phase that comes after the implementation of the propaedeutic and preparatory interventions by the concessionaire.

If it is the public administration the main buyer/payer for the performance of the concessionaire, the demand risk consists in the carrying out of the counterperformance – *i.e.* remuneration – only for the actual level of demand, own or of third parties, registered ("*take and pay*").

They must accordingly be excluded the clauses such as integral "*take or pay*"[248], through which is guaranteed a cash flow to the provider corresponding to the entire demand estimated but not occurred (while might be planned a partial compensation, a part of risk remaining on the concessionaire).

But if the beneficiaries and paying users are third parties with respect to the grantor, arises the question of tariffs, firstly, and, secondly, of the third parties obligation.

Usually the levels of tariffs are determined by the administration or by independent authorities as a function of standard cost plus a share of profits (v. *supra*).

The concessionaire is not allowed to establish the market price of his performance and this represents a big inconvenience.

It is true that is scheduled the compensation for the universal service obligations which lie outside the logic of market and enterprise, but the administrative competence of programming the services is up to the responsible authority.

This limitation to the right of management has meant that only the service contracts that retain some risk, albeit reduced, are deemed as concessions under the new Directive 2014/23/EU.

[248] See De Gaudio L., *L'obbligo di take or pay: qualificazione e gestione delle sopravvenienze*, Contratti 6: 605, 2013, on the substantial sterilization of the risk in the natural gas market; and Macario F., *Clausola di rinegoziazione del prezzo* (nota a Cass. civ., Sez. III, 26 febbraio 2014, n. 4557), Contratti 4: 381, 2014, for the invariability of the price without the agreement of the parties.

The first contribution highlights the need to mitigate the risks in the lasting contracts that involve significant and specific investments, the second one disavows the rule of automatic revision of prices.

Yet it is not said that regulated tariffs can ensure to the concessionaire the return of capitals employed when the level of demand is scarce, being him not able to coerce the will of third parties to require the services (just think of the Lombardy highways examined).

The demand risk in this case coincides with that of every commercial enterprise that is on the market and awaits the related response to know its fate, with the sole difference that it can not decide autonomously the conditions of service.

The concessions market suffers therefore an intrinsic genetic defect rendering the concessionaire particularly vulnerable, mostly because his limited freedom of management is furthermore associated with a considerable operating risk.

§5.2.3. Supply and/or demand

In the two preceding paragraphs have been shown the risks of supply and demand as separate entities, in the case that the concession provides for only one of the two.

On this premise it does not seem reasonable to further limit the operational risk by negotiating clauses, except for the abnormal operating circumstances.

Must be ruled out the existence in nature of concessions based on just one of the two risks, supply or demand, described above.

The alternation between them in fact descends exclusively from a human artificial selection.

Operational risk is composed of two complementary elements: supply and demand complement each other.

The concessionaire bears the risk of supply in order to realize the conditions aimed at the fulfillment of the demand, risky as well, on which the remuneration depends.

Well then, in such a situation no one would ever come to invest their capitals, considering the operational constraints and the administrative peculiarities that characterize the concessions.

By the same token the cited EU Directive allows for the mitigation of concessions operating risk.

As stated, even if requirement of the concession is the transfer to the concessionaire of an operational risk of an economic nature that involves the possibility of not being able to recover the investments made and the costs incurred under normal operating conditions, in the Directive 2014/23/EU it is envisaged that a part of the risk can be borne by the administration.

The important thing is that the granting body does not relieve the economic operator from any potential loss by guaranteeing him a minimum income equal to or higher than the investments made and the costs to be incurred in relation to the execution of the contract.

Therefore the contracts that do not involve payments to the contractor and under which the contractor is paid on the basis of regulated rates, calculated to cover the total costs and investments undertaken by the contractor for the provision of the service, are excluded from the EU Directive on concessions just like those for which the sectoral regulation eliminates the risk by providing a guarantee in favour of the concessionaire to recover the investments and costs incurred.[249]

Pursuant to the European Directive on concession contracts these contracts should not configure a concession.

Since in Italy art. 117 TUEL provides that the public service tariffs are calculated so as to ensure the economic and financial equilibrium of the investment and of the related management (in the light of various criteria, such as: the correspondence between costs and revenues, the balance between funding collected and invested capital, the amount of costs for operating the infrastructure and service; the adequacy of the return on invested capital, consistent with the prevailing market conditions), they would not be concessions.

Actually, despite some inaccuracies in formulating, the Directive seeks to exclude only those agreements for which it is ensured the economic and financial balance not at the beginning, but at the end of the transaction.

Which it is reasonable when you think to the fatuity of a concessions operating risk in the presence of regulations or guarantees that obliterate it.

Conversely the Directive, in accordance with the European Court of Justice caselaw, admits the operational risk of the concessionaire to be limited from the outset, for example, into sectors with regulated tariffs or through contractual agreements that provide a partial compensation, including a compensation in the event of early termination of the concession for reasons attributable to the contracting authority or entity or to force majeure.

Besides confirming what has been said in relation to tariffs, the European Directive stresses the openness toward the concessions with reduced risk.

Is this the major hermeneutic criticality about the nature of the concessions.

[249] Cf. recitals 17 and 19 of the Directive 2014/23/EU.

Surely, after the emphasis placed on the concept of operating risk, to the European plexus has seemed dutiful mitigating its scope in order to not discourage private investors, but this weakens the already controversial distinction of concessions with respect to public contracts.

Considering that the concession involves operational risks of demand and supply, the regulation and the parties shall manage to produce an allocation that tends to maximize the final outcome for both.

Dumping indiscriminately all the risks on the concessionaire would mean not only undertake an operation impossible to achieve and doomed to failure, but above all do it under conditions costly and inefficient in every respect.

As a result, it is presumable that a portion of each risk (supply and demand), or even one of the two is to be maintained on the part of the administration grantor.

For such reasons, via the Directive 2014/23/EU are authorized both the clauses and the modifications *in fieri* of the concession which do not alter the overall nature of the contract.[250]

In particular, they are provided two types of risk mitigation:

- the clear, precise and unambiguous clauses (*e.g.* revision of prices or options) that, irrespective of their monetary value, have been laid down into the tender documents and those that change the economic equilibrium of the contract in favour of the concessionaire in such a way provided for by the initial concession;
- the amendments caused by circumstances unforeseen with the ordinary diligence.

In either case it is forbidden to mutate substantially the nature of the concession compared to the one initially concluded.

[250] In line with what already emerged in the EU, thanks to the Court of Justice and ESC (v. *supra*).

Cf. pt. 4.3 of the ESC opinion about the «Strengthening of the law governing concessions and public/private partnership (PPP)» (2001/C 14/19) where it was expected that the future EU Directive would define the concessions in accordance with their long-term character and their fundamental elements (conception, construction, financing, maintenance and management of the works), but at the same time was stressed the need to attain and to respect the contractual equilibrium without which no operator would undertake a concession contract. Therefore into European law should be created some principles that would allow a balanced distribution of the risks between the awarding authority and concessionaire both in works and in service concession: the risks of a concession must be identified, quantified and clearly assigned to the party who is more able to assume them.

Particular emphasis was given to the principle of stability of the contract, for which the concessionaire and his financiers need to be assured that the contract is concluded without modification, except that the modification is justified by fortuitous cases and force majeure or by the change in the financial framework stipulated in the contract. In addition, the grantor shall take measures in case of exceptional risk: unforeseeable and sudden event insofar as it increases the cost of the contract.

This surely means that it is not possible to completely eliminate the operating risk insomuch as spilled out of the original allocation in the awarding, even though it is right to imagine renegotiation clauses that leave some flexibility to the parties.

This last annotation refers especially to the second type of modifications above, those provoked by unpredictable contingencies, for which the EU Directive on concessions enables the change without specifying who should bear the related risk.

Whereas, for the expressed clauses, it is in fact established that they can redress the original balance or even introduce a new contractual equilibrium in the terms spelled out, for unexpected changes the question arises of how to remedy the same.

The Directive does not deal with it and leaves open a problem not insignificant.

From the interpretative solution to this unknown descends indeed the legal nature, aleatory or commutative, of the concessions.

§5.3. The juridical nature of concessions

The concessions presuppose performance risks of both demand and supply, or only one of the two, and this gives rise to a certain difficulty in the dogmatic framing.[251]

Precisely in this sphere takes meaningful value the commutative or aleatory nature of the concession.[252]

Particularly with regard to the supply risk because, as explained above, it should also cover the phase prodromal to the actual management, namely the one of construction and preparation to the provision.

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[251] It is important to have clear idea of the separation between the two risks under examination, although it is presumable the simultaneous presence of both: for example you can see T.A.R. Trento, Sect. I, 31 january 2014, n. 30.

[252] Aleatory contracts are those with a risk function, in which the negotiation alea manifests as "function of uncertain lucre", implying that the final economic result depends on external circumstances.

The national doctrine asserts, in fact, that "to recognize an aleatory contract is necessary as much the «structural» datum as the «functional» one. Aleatory contracts, therefore, will be those that: a) have on the concrete cause the negotiation alea, as essential function of necessary risk, referred to an external element expressly wanted and expected by the parties; b) and in which, for this reason, the performances of the parties, meant as legal effects affecting the parties themselves, are indeterminate – without reciprocal correlativity – in the *an* or in the *quantum* at the moment of contractual perfectioning.

For the contract to be defined as aleatory it is necessary, furthermore, that the alea is essential, in the sense that the parties have determined themselves to the contract in the prospect of an uncertain lucre identified therein so that the reference to this interest, which may be non prevalent over all others, must be determinant and characterize the transaction since its inception" (Di Giandomenico G.; Riccio D., *I contratti speciali: I contratti aleatori* - Trattato di diritto privato diretto da M. Bessone, vol. XIV, Giappichelli, Torino, 2005, pp. 73-74).

At the same time it is necessary to specify that certain agreements remunerated exclusively by the contracting authority or contracting entity should be seen as concessions whenever the recovery of the investments made and the costs incurred by the operator to perform the work or provide the service depends on the effective demand or on their supply.

And that definitively denies the alleged trilaterality of the concession, which in Italy had great success and, from time to time, continues to draw the crowds in the legal science.

Let us make a practical example to give the clearest ideas.

Following a public tender procedure, the public administration enters into a contract of duration under which the counterparty has to make a certain performance in adherence to the specifications, receiving as consideration the right of exploitation of the same.

Premise that I have deliberately chosen not to label the case in question: we shall proceed step by step.

To someone the answer might seem obvious considering that the right of economic exploitation characterizes the concession, not the public contract, but in reality it is not so simple.[253]

When the contractual terms or the provisions of law put an obligation to regain profitability a posteriori to compensate for the poor results, or even they fix conditions "off-market" so as to obliterate any operational risk for the contractor, you can not speak of concession.

The problem of contingencies is ascribable to the allocative function of the contract, especially with reference to the spheres of objective and subjective risk.

The allocation of risk must ensure that the subject, who has taken charge of certain facts, responds of them irrespective of the related imputability (in this respect differing significantly from the compensation in specific form or by equivalent).[254]

[253] Perhaps it can be helpful illustrate the case with some numerical formulas.

We shall hypothesize that the contract at issue has an overall value of 100 over a period of 10 years, and provides for an annual fee of 1 in favour of the public administration (for a total of 10), a share of investments/costs equal to 75, and an estimated return of 25.

If everything goes according to expectations, the contractor earns 15; but if adverse events occur (beyond public administration and charged to the other party under the contract) you will have losses that may be minimal (lower than 10) or even exceed the fee paid to the public administration, with the risk of default of the operation.

The alternatives are: the economic rebalancing a posteriori of the operation; or else the public bail out or the private takeover with a new tender.

Where the public administration decides to rebalance the economy of the operation there will be the elimination of the private operating risk.

In relation with these matters it is not possible the economic rebalancing, except under the conditions provided for in the original concession and in no way as to eliminate the risk; would otherwise be frustrated the competition propaedeutic to the assignment of the concession since the offer resulted successful would be surreptitiously altered.

The claim to be held unscathed from any negative supervenience clashes with the very concept of risk, just like the possibility of withdrawal or termination of the contract (whilst it seems highly improbable the hypothesis of rescission).

Such remedies, as it is well known, are based on the notion of "efficient breach", finding justification in the logic of the efficiency of negotiating incentives in proportion to the fair balance between the interests of the parties.[255]

Without forgetting that the interests of the parties in the context of public contracts – involving the general public interest and also superindividual instances – are never fully disposable, emerges the difficulty of reconcile the concession operating risk with legal tools that, within certain limits, allow you to disengage from the agreements already concluded that had become overly burdensome or prejudicial to one of the parties.

Not by chance, as already mentioned, those instruments do not apply in principle to aleatory contracts, colliding with the entrenched presence of the risk in the legal cause underlying those contracts (*e.g.* annuities, *emptio spei*, gambling and betting).

Were it not so, the contractor burdened by the risk would certainly find more convenient to limit the damage to the first complications and exercise his own right of *exit*,

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[254] On the distinction between assuming contractual risks and responsibility for breach see Delfini F., *Autonomia privata e rischio contrattuale*, Giuffrè, Milano, 1999, *passim*, in particular pp. 1-8.

[255] On these issues reference is made to Trimarchi P., *Il contratto. Inadempimento e rimedi*, Giuffrè, Milano, 2010.

In general, the efficiency of the breach consists in the greater benefit for the debtor with respect to the disadvantage of the creditor, but what happens if this latter is the bearer of any instances in the collective interest?

In the case of public transactions, regardless of whether it is a concession or a contract, the difficulty of identifying in a well-defined manner all the possible components of the damage, in relation to both qualitative and quantitative aspects, suggests to insert into the agreements some penalty clauses that establish the flat rate extent of the compensation in favour of the public entity.

Nevertheless the penalties can be disapplied and involve subjective assessments of interests.

D'Alpaos C.; Vergalli S., *Time Overruns in Public Procurement and Concession Contracts: Penalty Fee and Option Value to Delay*, Review of Environment, Energy and Economics (Re3), march 2014, underline how the penalties relate to uncertainty about the costs and to inefficiency of the judicial systems: "In both procurement and concession settings, committed penalties for delays may consequently not represent significant losses to the defaulting party because the enforcement of the penalty results weak, or because the penalty to be paid is small by comparison with the supplier's option value to delay the works".

For the problems that may concern the penalties see also footnote 269 *infra*.

rather than carry out the commitment made, perchance hoping to be able to find more profitable opportunities elsewhere.

The same goes for the maintenance remedies other than those already provided into the contract (otherwise the contractor at every opportunity would advance the request to renegotiate).

To all this, in the opinion of who is writing, withstands the European conception of concession as revealed by the Court of Justice and by the new Directive 2014/23/EU.

This is why I knowledgeably believe that we cannot extend *de plano* the rules valid for private and public procurement contracts.

The concession with the demand risk does not involve great efforts of interpretation, constituting undoubtedly an aleatory contract: the concessionaire by negotiating accepts the uncertainty of the final profit as his performance depends on factors external to the contract (even if the parties do implement their own commitments it may happen that the market response is poor due to periods of crisis or change in the consumption).

Are anyway allowed correctives for the occurrence of quite exceptional events which exceed the normality of the alea desired by the parties (*i.e.* clear and precise clauses of hardship or economic rebalancing in favour of the concessionaire, established *ex ante*, that bring the concession near to commutative contracts).

And then the aleatoriety of the concession operating risk is sometimes limited, but not to the point of disappearing altogether, by the *lex specialis* to tender and by the will of the parties, from the very early stages, in order to facilitate the realization of the concession.

When the concession only covers the risk of supply it seems to manifest instead a commutative contract characterized by economic and legal risks within the normal alea.[256]

[256] At most it could perhaps be framed, for the lovers of sophisms, as a commutative contract with high economic and legal risk, characterized by a normal alea unlimited, but in this case it would clash with the provision of the EU Directive on concessions that limits the risk to the normal conditions.

About the concept of "normal alea unlimited" see Di Giandomenico G.; Riccio D., *I contratti speciali: I contratti aleatori* - Trattato di diritto privato diretto da M. Bessone, vol. XIV, Giappichelli, Torino, 2005, p. 117 ss.: "If in order to have an aleatory contract are required both the functional element (that is the purpose of uncertain profit), and the structural one (namely the indeterminacy of performances), it appears evident that in cases where it can be realized the first but not the second – having only fluctuations in value – you can not speak of aleatory agreement, but of agreement with economic risk, and then subjected to normal alea, maybe unlimited".

As regards the (alleged) difference between alea and risk see *ibidem*, *passim*, in particular p. 76.

In the substance very little changes between the aleatory agreements and the contracts with normal alea unlimited: to contracts unlimitedly risky within the normal alea would apply the provisions on rescission, whilst both are not subject to termination for excessive supervening onerousness.

Performances do depend on factors external to contract and linked to the empirical world, but they are not completely out of the control of the parties – which can always take precautions (see the annotated case of archaeological findings: v. footnote 245 *supra*) –, and thus the uncertainty of the final outcome is contained (since there is no relevance of third users, *nulla quaestio* if the parties fulfill their commitments properly).

These considerations are also corroborated by the circumscription of the concession normal alea, with the exclusion of exceptional occurrences and of force majeure.

Remains firm even here, in fact, the opportunity to remedy the extraordinary events exorbitating the "*normal operating conditions*" under the European Directive (v. *infra*).

On this second hypothesis, in relation to the risk of supply it becomes more feeble the distinction between public contracts and concessions, since in either the risk on the supply side will coincide with the normal business risk to be borne by any entrepreneur (responsible for his own deficiencies: just think, for example, to the penalty clauses).

The variables which condition the contractual execution (*i.e.* qualitative standards) are effectively included in the agreement signed by the parties and do not escape from their subjective spheres of control (what you can not conversely say of the market response, inevitably influenced by the individual preferences of the moment).

The distinction regains value if compared to the aforesaid, were the superveniences to be brought within the operational risk of the concessionaire.

It may be the case – similarly as what described in the Eurostat decision on PPPs – that the concessionaire bears the risk of provision/construction for a fixed fee and is not indemnified for delays, variants necessary (not ordered by the client) or for changes in the costs of labour and raw materials, rendering the contract aleatory also on the supply side and so facilitating the distinction from traditional procurement contracts.[257]

[257] Besides the issues related to the revision of prices for procurement contracts – admitted beyond the one tenth in those private (cf. art. 1664, paragraph I, Cod. Civ.), while in the public ones (see *supra*), being excluded the application of the civil law regulation just cited, art. 132 of the Code fix an ordinary regime indexed to inflation and another extraordinary that takes again the threshold of the one tenth and compensates for half of the excess –, the problems mainly concern the variants under the second paragraph of art. 1664 Cod. Civ., recalled by art. 133 of the Code too.

Should in the course of the work arise difficulties of execution deriving from geological causes, water and the like, not envisaged by the parties, which make considerably more onerous the performance of the contractor, he is entitled to fair compensation.

Well then, in the concessions should be applied the inverse rule, namely that, save the different provision by laws or parties, the concessionaire has no right to any compensation whatsoever for the variants due to such supervening contingencies.

In general, however, remains the problematic nature of the simultaneous presence of both kinds of risk, on the sides of supply and demand, within a concession.

Although the EU Directive does not require the necessary presence of both risks, such a situation involves the need to operate a unified judgment for the particular nature of the concession as a *genus*: that is to say an aleatory contract (in which from the exposure of the concessionaire to unexpected events and to fluctuations in the market it follows the risk of not being able to recover the investments made and the costs borne) or else commutative (in which the clauses of revision and rebalance do mitigate the operating risk).

Ultimately, there is no immediate solution to the *busillis* that gives the title to this paragraph.

Nonetheless, for the purpose of addressing, they must be identified some criteria to enable an adequate interpretation of the concession contracts and of the related risks.

First of all, given the substantial equivalence between alea and risk, must be leaning towards the exclusion of any remedy whatsoever for the protection of the posthumous economic-contractual balance that is not laid down in the concession, so as to leave intact the operating risk allocated.

With reference to the existence of risks of construction/provision, availability and demand, it should normally be excluded the use *ex post* of the instruments able to protect against the contingencies (in addition to the already seen restoration of contractual balance, the termination for excessive supervened onerousness pursuant to art. 1467 cod. civ.).

The statement that the concession is commutative just like the public contract, not only stands in sharp contrast with the dictates of supranational law, but appears moreover a juridical *nonsense* inconsistent with the recognition of risk as the *proprium* of concessions. All the more if you take heed of the fact that the application to the same of the common law procurement discipline ends up obliterating any distinction.

Cannot be understood what is the point of being provided with two juridical *species* when they, save the theoretical differences, in practice result all the same.

The dichotomy makes sense if the concession is interpreted as a reciprocal contract *sui generis* not only commutative, but also aleatory.

This state of affairs not only has its foundation in the operating risk in the hands of concessionaire (they are obviously allowed agreements that move the equilibria), but is confirmed by the direct and active participation of the same in the design and development of the operation overall.

The operating risk presupposes that the concessionaire, winning the competition with the bid submitted to the public administration and taking advantage of the procedural flexibility consented by the EU Directive (in addition to some good practices: accesses, sites inspections and surveys of places), has evaluated the possible future scenarios and determined his estimates with good faith and due diligence in the belief of being only right, but at the same time in the awareness that the future is uncertain and unpredictable.

Must be ensured the initial economic balance for the feasibility of the concession and it is possible to indemnify the contractor for the events which fall under the potestative sphere of others (*i.e. factum principis* and risk so-called "administrative"); else is guarantee the equilibrium in any case – also for the risks contractually assumed – with distortion of the concession.

The endurance test is the fact that even if the concessionaire performs well all his performance, but does not reach the prefixed objectives of market (demand and/or supply) – for reasons that do not depend on the counterparty and of which he has assumed the risks (*e.g.* damage, obsolescence, competition from other operators, insolvency, crisis) –, is not able to achieve the full coverage of costs and investments.

Obviously, as it was repeated several times, this is just the general rule on the risk, in respect of which derogation is possible through special clauses into the concession, provided that the concession risk is not utterly removed.

Otherwise you will have the metamorphosis from concession to public contract.

Taking as a model the various contractual types examined in the European Directives on public procurement and so wanting to represent the default situation – relating to normal operating conditions and except for different provisions from the parties – by way of a simple summary table, we have the following synoptic picture:

Operating Risk / Transaction	Risk of performance provision/construction (services/works)	Risk of management on supply and/or demand side (availability and/or demand)
Public contract	Yes (compensated)	No
Concession	Yes (not compensated)	Yes (at least one of the two)

If, on the one hand, the risk of management characterizes uniquely the concessions, on the other, neither the risk of performance is in principle homologous to that of contracts.

To better explain the distinction it is useful to refer to illustrative examples.

Let us think to the realization of a work of public utility.

Considering the risk of construction, except for the borderline case of deterioration, such a work is found as an asset of a certain value, albeit subject to the usual fluctuations – compensated over a certain threshold (price revision) or fully (variants) in public contracts, while normally in the concessions this does not happen (except as otherwise required by the parties) – between the time of conclusion of the contract and the completion of execution.

Considering the risk of management for the concessions, instead that work is worth a market position subject to the fluctuations of supply/demand, resulting in qualitative and quantitative uncertainty: it could then be not used or, on the contrary, be used too much (with consequent lack of income or need of continuous maintenance, respectively).

Let us think now to the performance of a general interest service.

The discourse is analogous to the one just displayed, differing for the presence both in public contracts and concessions of a risk of varying performance, with the constant, uniquely for the concessionaire, of the economic risk relating to market conditions.

From all of the above it follows that, whereas in the commutative public contracts the contract provides for the integral remuneration of the contractor (being us able to even picture a subordinated consideration of the contractor to be obtained via the management, on the very condition of the public guarantee to cover any losses and to generate a profit), in concessions this gives way to a commercial operation delegated to the concessionaire.

The exchange function typical of the commutative contract, where the remuneration consists of a fee that pays for the operating costs of the contractor, is replaced by the role assumed by the operating risk of the concessionaire, who takes the place of the public administration (which though remains to supervise) in the realisation of the enterprise under market conditions. In subrogating himself to the administration the concessionaire has to bear the risk of managing his performances and operate in the market for the purpose of his own remuneration, generated by the encounter between supply and demand.

For its part the granting body has to program and control the operation for the profiles of administrative competence, holding unharmed the counterparty for the events belonging to that public law sphere and, if applicable, for the perturbative contingencies absolutely extraordinary and unforeseeable – basically uninsurable – that could endanger the successful accomplishment of the concession.

It is due to the "regulated" market position of the concessionaire.

This reasoning presupposes that, in the early phase of conception and award of the contract, the parties have collaborated in the planning of the concession by allocating risks in a weighted manner and providing suitable maintenance remedies.

A final observation takes its cue from the explicit circumscription of the risk to the "normal operating conditions".[258]

Which implies the exemption of the concessionaire for the events quite exceptional (the school case is the fall of a meteorite, but the reasoning may be extended as well to wars, acts of unknown people, cataclysms, global crises like the current one).[259]

It is a dutiful counterbalance with respect to the presence of the operating risk.

And this not only for the events that go beyond every predictability, but also for those events "idiosyncratic", so to speak, to the public complex (just think of the protest movements "No-Tav" in Italy and France[260]).

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[258] Cf. art. 5 of the Directive 2014/23/EU, to which it reconnects the disappearance, in the final draft, of the paragraph 7 of art. 42 – now become 43 – on the modification of concessions during their validity.

In the proposal for an EU Directive on the award of concession contracts COM(2011) 897 final, Brussels, 20.12.2011, it was expected that the contracting authorities and contracting entities could not have recourse to modifications of the concession in the following cases:

(a) where the modification would aim at remedying deficiencies in the performance of the concessionaire or the consequences thereof, which can be remedied through the enforcement of contractual obligations;

(b) where the modification would aim at compensating risks of price increases that are the result of price fluctuations that could substantially impact the performance of a contract and that have been hedged by the concessionaire.

[259] On this point it must be observed that according to Trimarchi P., *Causalità e danno*, Giuffrè, Milano, 1967; *id*., *Il contratto. Inadempimento e rimedi*, Giuffrè, Milano, 2010, into the juridical system applies the general principle of non-liability for contingencies absolutely extraordinary and unpredictable.

The legal, as well as ethical, basis of such a restriction would lie in the basic need of a certain fairness in order to maintain the right proportion – in no case excessively unbalanced, but not always balanced – between the values assumed by the parties.

This preamble, valid for both non-contractual (to protect public order) and contractual (inspired by allocative efficiency) liability, states what it be the actual content of the spheres of risk, understood in terms of non attributable events for which the agent must nevertheless take the responsibility.

[260] In Italy it was even proceeded legislatively to keep under control these phenomena.

See art. 19 L. 12 november 2011, n. 183 ("Interventi per la realizzazione del corridoio Torino-Lione e del Tunnel di Tenda"), whereby to ensure the realization of the railway line between Turin and Lyon, and guarantee, to this end, the regular conduct of the exploratory tunnel of La Maddalena, have been declared areas of strategic national interest the sites of the City of Chiomonte, identified for the installation of the construction site of the geognostic tunnel and for the realization of the base tunnel of the railway line between Turin and Lyon.

It has been also ordered that anyone who illegally enters in the aforesaid areas of strategic national interest and impedes or hinders the authorized access to the same areas shall be punished pursuant to art. 682 of the Penal Code (which prohibits the access to sites in the military interest of the State), save the case of a more serious crime.

If it is true that the concessionaire is driven by a speculative logic, it is equally true that the context in which he has to operate is inevitably characterized by elements of a public nature which do condition his fortunes.

The consistency and immanence of the superindividual interests of the grantor body (economic, social and environmental), and the criticalities as well, are transferred together with the performances covered by the concession.

Hence, it would be unreasonable to expect the concessionaire taking risks about which has no influence (resulting from discretionary choices of the public administration), nor any primary interest in.

As amply demonstrated by empirical experience (emblematic the case *Eurotunnel*), the concessionaire can not free himself from the stipulations, being if anything able to renegotiate the original terms (especially with his financiers) or benefit from the bail-out by the public plexus.

In circumstances like these it seems thoughtless to make the concessionaire's risk coincide with what the public administration would undertake in the case of self-handling.

As taught by the European Court of Justice, and from what is now contained in the EU Directive, should be adopted appropriate restrictions to the sphere of operating risk to be put into the hands of the concessionaire, pain the devaluation of the concession from possible means of pursuing the collective interest to an impracticable method of unloading the risks on unfortunate private subjects (supposing to succeed in identify any).

Compared to public contracts, in the concessions yet you have to note a normal alea quite different, that is only exceptionally inspired by the economic equilibrium of contract (for the commutative aspects and for those which, though aleatory, benefit from partial compensation), while as a rule prevails the allocation of risk devised by the parties and law, starting from the inescapable operating risk of the concessionaire.

As well as this last can never be lacking in a concession, having moreover to be real and significant, the Directive 2014/23/EU is determined to firmly prohibit that the possible maintenance remedies provided by the parties (*i.e.* revision of prices, options, rebalancing, hardship clauses, renegotiation, extension of expiry date) can make any changes that would alter the general nature of the concession.[261]

[261] Cf. art. 43, para. 1-2, of the Directive 2014/23/EU and footnote 228 *supra*.

Are then excluded all those negotiating clauses not subject to prior disclosure and that do completely cancel the operating risks of the concessionaire (integral take-or-pay, government guarantees of profits, and so on), besides those so elastic as to leave *de facto* the parties free to renegotiate.

Conclusively, affects the contactual nature of a concession the fact that the final outcome depends on aleatory factors – and this not only with regard to the *an* and *quantum* of performances, but mostly because the contractor is obliged to make its own performance (which has not become impossible) to the risk of losses and default.[262]

On the point Capurro T., *La clausola di ius variandi tra giudizio di validità e sindacato sull'esercizio del diritto*, Contratto e Impresa 6: 1341, 2013, points out that, despite the fact that the principle of good faith is increasingly taking character integrative of the contractual relationship, the *jus variandi* can not in any case allow the modification of the cause of the contract and of the nature of the performances in the contract.

In terms and, *a fortiori*, they rule out that such a power may lie with the judicial authorities: Ambrosoli M., *La sopravvenienza contrattuale*, Giuffrè, Milano, 2002, *passim*, in particular p. 183: "The risk that must be avoided is that of legitimizing, through an uncontrolled recourse to the clause of good faith, a judicial intervention substantially corrective of the conventional regulation, which would ultimately realize a rewrite of the contract by the interpreter"; Gentili A., *La replica della stipula: riproduzione, rinnovazione, rinegoziazione del contratto*, Contratto e Impresa 2, 2003, pp. 709-719; Marasco P.G., *La rinegoziazione e l'intervento del giudice nella gestione del contratto*, Contratto e Impresa 3: 539, 2005: "you can not think that reasons of economic efficiency may lead to a solution that will allow the judge to substitute to the party in the management of his own interests and in the assumption of the consequent decisions and, above all, of the consequent risks: the decision of the judge can be expression of the autonomy of the parties but not subrogate to it.[…] A substitutive intervention of the judge, instead, might be admitted whenever from the negotiating regulation emerges in what terms the parties intended to share the risk under the contract, providing the judge (even in hermeneutical key) the criteria aimed at restoring the contractual balance. In this case, the judge rather than intervene from the outside, operates within the contract and under the contract, using all the instruments of interpretation provided by the legislature (artt. 1362-1371 c.c.) and, first among them, the one governed by art. 1366 (on the good faith in the interpretation of the contract)"; Sicchiero G., *Buona fede e rischio contrattuale*, Contratto e Impresa 4-5, 2006, pp. 939-942: "I believe in conclusion that there are some values, including that of autonomy in the resource allocation decisions made by the contractors, which can not be questioned because the actual individual case may seem a harbinger of negative consequences. This in particular right about the contractual distribution of the risk, which blatantly involves the alea of the concrete occurrence of the events as structural reason of the decision of the contracting parties, which the judge can not change if you do not recognize that in doing so he confiscates them the governance of their own assessments also on this side of the boundary constituted by the discipline of protection (art. 1467 c.c.). […]The judge, in the end, can not alter its content by altering the risk that the contracting parties have established in dictating the balance of the reciprocal performances and thereby reaching the control on the substance of the exchange: the private autonomy, here, is a supreme good because expresses a founding value of the system. In this sense and to this extent it can be said that the contract, then, can not be touched, namely it can not be changed in its economic balance by the hand of the judge and outside the cases in which are the parties or the law to allow it. […]Beyond this limit it would no longer be to perform the contract in good faith, that is according to what reasonably is expected in the exchange economy desired by the parties, but create a new and diverse contract. Contract in which the allocation of risks and earnings is not that nascent from the agreement, but a different one, deriving from the personal evaluation of the judge of what should be right in that situation and which for one of the contractors will instead be subversive of the choices that have determined him to give consent".

[262] The successful tenderer bears the risk of the non profitability of the service, that is to say the alea underlying the calculation of convenience for the offer, accepting consciously that the expected revenue from the execution of contract, deduced the percentage to be paid as fee to the contracting authority, may be insufficient to enable the formation of a return in favour of the concessionaire: in such terms Council of State, Sect. V, 1° december 2014, n. 5915.

The concession risk seems thus to exclude the mere commutative character of the concessions having not only incidence on the ground of the economic and financial equilibrium of the operation overall (economic alea) to be restored in case of events wholly extraordinary and unpredictable, but does penetrate into the very cause of the contract (juridical alea), which presupposes the related assumption by the concessionaire.

This conclusion is corroborated, first, by the fact that the allocation of risks aims to distribute the same in such a manner as to facilitate their management and mitigation, through the attribution to who is better equipped, and, secondly, by the European scaffold that provides a number of instruments for mitigation and guarantee.[263]

Emerges in short that the distinction between public contracts and concessions is not so much focused on an element – the operating risk of the partners of public administration – that in one case is present and in the other is not, as on the implications and repercussions of such an element.

At European level the concession was born not as a mode of recourse to the market, but rather as a form of outsourcing the performance in order to create the market.

In the case at issue the *lex specialis* spelled out that the economic offer was to be considered accepted at all risk and peril of the applicant, because with the fact alone of the presentation of the proposal, he did admit to having made the necessary calculations, inspections and investigations, and taken account of all the circumstances relating to the ordinary provision of the service.

[263] On the point you can see the Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts (2012/C 191/16), Brussels, 26 april 2012, pt. 5.10: "In the proposal for a directive, aspects such as the definition of concessions, the transfer of risk to private operators, the modification of concessions during their term, or their termination must be defined in such a way that they do not become obstacles to the funding and development of this type of contract. In the light of current plans for adjustment and curtailment of public investment in the Member States, they are set to play a major role as ways of relaunching activity and creating jobs".

In this regard, it matters to highlight that in Italy there are instruments to the guarantee of the contractor.

The local authorities (municipalities, provinces and metropolitan cities) can issue, by means of council deliberations, a suretyship for the assumption of loans for investment and for other operations of debt. Art. 207, para. III, D.lgs. 267/2000 provides, in general, that "the surety may also be issued to third parties for taking loans destined to the realization or renovation of works for cultural, social or sports purposes, on land owned by the local authority, provided that there are the following conditions: a) the project has been approved by the local authority and an agreement is signed with the borrower to regulate the possibility of using the facilities in view of the local community needs; b) the facility realized is acquired to the property of the authority at the end of the concession; c) the agreement regulates the relationships between the local authority and the borrower in case of withdrawal of this latter to the realization or renovation of the work".

In the recent judgment of the T.A.R. Milano, Sect. I, 20 november 2014, n. 2778, you can see the apparent contradiction of a system that introduces the project financing to attract private capitals, only to have afterwards to guarantee those investments with public funds.

The truth lies somewhere in between: it takes both components, the public and the private, to achieve good results in the area of public procurement, given the broad range of interests and objectives to be pursued which are reconnected with as many important risks.

While in the public contract the administration makes a direct exchange with the contractor (performance against consideration), in the concession you have the assignment of a market position to the concessionaire, who acts as an auxiliary to the public plexus and is remunerated through the economic exploitation of the right to manage his own performance.

Thereby ensues a different "normal alea" between the two instruments in question, with correlated application of different rules in relation to this aspect: unlike the contract, where the economic equilibrium is to be guaranteed *ex ante* and *ex post*, in the concessions the operational risk of the contractor can only be mitigated *ex ante* and *in itinere*, but never annulled *ex post* (also for there is no economic equilibrium to be restored, as the conditions of the economic and financial plan are mere forecasts and estimates, especially regarding the demand).

In this consists the hybrid nature of the concession, aleatory and commutative.

Aleatory by nature, since the law configures it as contract characterized by a strong operating risk of the concessionaire.

Commutative by will of the parties because at the same time the law agrees to various forms of reduction of such a risk to protect the contracting parties.

For the rest, similar or identical rules may apply relating to the award when there are many risks in the transaction (v. Part II *infra*).

The difference between public contracts and concessions is in the allocation of risks, which in the concession also fall on the private contractor and thence can not be removed, but only mitigated in the ways that we have seen and that we will see shortly.[264]

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[264] As said, not even the Courts can get to change the allocation of risk devised by the parties and crystallized into the concession contract.

Observes Marasco P.G., op. cit.: "It is stated in the doctrine that contracting is "predict" future events (by regulating the consequences) and the risks related to a certain business. If from the whole of the contract, even by way of hermeneutics, results that the parties have provided for a certain risk and have disciplined it, the judge can only stick to that apportionment without any possibility of substituting his own judgment for that originally expressed by the contractors".

The assessment *de quo* is particularly relevant in a context such as the Italian one in which the courts, as highlighted, treat the concessions in the same way as the public contracts, neither more nor less.

What it shall be considered inadmissible because, if on the one hand leaves completely out the negotiating content desired by the parties, giving rise to an unreasonable judicial subrogation, on the other, neglects the aftermath of the supranational law and is in sharp contrast with it, generating serious doubts of legitimacy.

In support of the above mention can be made of the Unidroit Principles (2010) relating to international commercial contracts, where in the Chapter 6 (Performance), Section 2 (Hardship), art. 6.2.1 – entitled "Contract to be observed" – lays down the rule that in the event the performance of a contract

In the public contract, instead, the contractor does not bear a real operating risk, because equitably compensated, but it is still the interests of both parties to identify and ease the risks so as to facilitate the realization.

Here too, then, it is important that the allocation of risks is done properly and that the parties have a cooperative attitude in the public interest.

All things considered, if it is true that in the public contracts the administration has to compensate the counterparty for the non-imputable superveniences, leading to the disbursement of public money, it is equally true that in the concessions, where some of the risks fall on the private sector, the investment must necessarily be attractive for this latter (exactly because some of the risks are borne by the grantor body).

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becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the provisions on hardship.

And what is the content of such provisions of *soft law* regarding the superveniences? Easy to say.

Art. 6.2.2 defines *hardship* – with consequent entitlement to request renegotiations of the contract – the occurrence of events that fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and:

(a) the events occur or become known to the disadvantaged party after the conclusion of the contract;

(b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;

(c) the events are beyond the control of the disadvantaged party;

(d) the risk of the events was not assumed by the disadvantaged party.

This last precondition just disavows the Italian attitude towards the concession.

Although even the other conditions would suggest that when the contractor is to be deemed aware of the risks which is assuming then he can not later complain precisely for the risks assumed, the expressed investiture of the allocation of risk to bulwark of the *sanctity of contract* requires a few thoughts.

The science of law has joined the *communis opinio* according to which the allocation of risk excludes the supervenience legally relevant, that is to say the assumption of a certain risk by a contractor also includes the possible hardship.

This indeed means binding the parties to what they have agreed upon, making it impractical the renegotiation.

By applying these hermeneutical criteria to the dichotomy public contracts-concessions is therefore confirmed the juxtaposition between the economic equilibrium of contract, on the one hand, and the allocation of risk, on the other.

The hardship and the renegotiations have *raison d'etre* only where the contract results incomplete or, on the contrary, provides them *expressis verbis* or *ipso iure*. Otherwise, as is to be considered for concessions, they can not operate on a general and extensive way.

Must accordingly be reconsidered the national practice not only jurisprudential, but also legislative, which sees the recourse to the discipline on procurement contracts in order to give a legal framework to the concessions.

Public contracts and concessions are acquainted with a different "normal alea": the operating risk of the concessionaire entails a deviation from the typical figure of the public contract.

It is not in either case an unlimited concession risk: to tell the truth, a corrective does exist and is represented by the irresponsibility for force majeure (cf. art. 7.1.7 of Unidroit Principles 2010), in addition to other forms of risk mitigation.

Concluding remarks

It is now worth trying to draw together the threads of the long discourse that has filled the preceding pages, by indicating to the reader what contents to be fixed.

First thing to say is that the distinction between public contracts and concessions – or better, the element which distinguishes these two intruments – has undergone a *restyling* in the course of time.

From the original definition of the concession based on the right of economic exploitation, dating back to the Directive 89/440/EEC[265], also by way of the European Court of Justice, it has been received the current notion of operating risk.[266]

Concept, this, extremely abstract and problematic, involving the possible absence of total public compensation *ex post* (a posteriori) of the concessionaire, on whose shoulders weigh risks of demand and/or supply.

At first, however, the outlook was another: what to be avoided was the total public remuneration *ex ante* (a priori) of the concessionaire, who had somewhat to recover it from parties other than the government body.

The primordial shape of the *discrimen* between public contracts and concessions thus consisted in the demand risk, essentially.

The scenario is very different today.

To the risks on the demand side have now added those on the supply side, for which it is difficult to exclude the direct public remuneration of the concessionaire.

It follows a series of hermeneutic repercussions worthy of note, which nonetheless the Directive 2014/23/EU does not address at all.

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[265] Art. 1, lett. d), of the Council Directive 89/440/EEC of 18 july 1989 originally defined the concession as a contract of the same type as the public contracts with the exception of the consideration for the performance consisting either solely in the right to exploit the work or in this right together with payment.

The Community legislator therefore considered that the essence of the concession was constituted by the lack of a total remuneration paid by the granting body to the concession holder, who had to actually attain at least a significant portion of his remuneration not by the administration but from the exploitation of the service. The trend was even to bring within the scope of the public procurement Directives all the contracts in which the consideration was *ab initio* fixed or determinable (to that effect see note 56 *supra*: ECJ, Sect. IV, 11 june 2009, C-300/07, *Hans & Christophorus Oymanns*).

[266] Actually, a very first draft of this notion had appeared in the Proposal for a Council Directive on the procurement procedures of the entities providing water, energy and transport services COM (88) 377 final, 11 october 1988 (88/C 319/02), insofar as art. 1, para. 1, n. 6 – suppressed by the Parliament with an amendment to the Commission text – did define the 'concession' as a contract concluded in writing between one of the contracting entities defined as public authorities and a counterparty which is not a public contracting entity, whereby the latter accepts the responsibility for constructing, supplying or managing a network at his own expense and risk, in return for a remuneration.

In relation to the demand risk, about which – though being helpful – is not enough the Court of Justice case law, remains open the question of how to reconcile the economic interests of the concessionaire with the socio-environmental superindividual instances.

To this end, it does not seem to be sufficient the provision of a price in return that may accompany the right to exploit the works or services.

It is not in fact to ensure the universality of the service, but to integrate social and environmental considerations in the award and execution of concessions in order to satisfy the particular demand for services of general interest.

These factors will inevitably affect the capability of the same to finance themselves, namely to generate such a cash flow that allows the return on investment.

Should it also be accompanied along with the risk of supply, the problem arises of transferring to private parties not only the economic-general risks (*i.e.* market fluctuations) but also idiosyncratic public-collective risks (*e.g.* innovation and sustainable development).

How to get rid of them and get private parties lumbered with them, at their own risk, without public guarantees?

Especially if one considers the inhomogeneity of a market, the public one, in which not all the transactions are equivalent and you can not promote the evolution of supply unless the demand is made more homogeneous and stable.[267]

With specific reference to these issues could be retrieved the concept of trilaterality, such as developed into national law, that is in the sense of involvement of third parties – especially when future users to be – in the concession.

Rather, the ideal would be indeed to find appropriate procedural spaces for those communities affected by the interventions planned within public contracts (as it happens, by the way, in the environmental assessment procedures: "*interest representation model*").

Leaving exclusively to the discretionary power of public administration what will need to be not only accepted, but also used by people, entails a considerable risk of demand (just think of the estimates of demand and usage, for instance, to understand that may be useful to make surveys, conduct public consultation or call for popular referendums).[268]

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[267] You can read the foonote 328 *infra* with regard to the voluntariness and fragmentation of the cd. "*green public procurement*".

[268] On the pattern of the french *enquête publique* and of the british *inquiries* as well: please see Cassese S., *Il diritto amministrativo: storia e prospettive*, Giuffrè, Milano, 2010, *passim*, in particular pp. 75 and 94.

The case of the new motorways in Lombardy (BreBeMi, Pedemontana, TEEM) *docet*: besides creating a widespread discontent on the territory there is a huge gap between the real needs and the expectations of the promoters.

All the set out above would prove appropriate too for the prevention of possible demonstrations of protest and contestation against the performances under the concession, which represent risks to be reckoned with and that should not be underestimated.

In relation to the supply risk of concessions, furthermore, we can not get to know the difference from the risk inherent in the procurement contracts, in particular as regards the penalty clauses.[269]

We have seen that the first hermeneutic question concerns the phase of performance that temporally precedes the sheer management: either it remains subject to the common discipline on procurement, so of the commutative contracts, or else can be considered aleatory by virtue of the concession operating risk?

A second order of doubts arises from the observation that if the risk differentiates the concessions from the public contracts it must also have some effect on the regulation.

In the present study has been suggested to facilitate the interpretation through the exclusion of concessions from the application of the specific rules dedicated to contracts (for example, regarding the revision of prices and variations during execution).

The need to conceptually separate the two cases – public contract and concession – derives from the observation that the risks of supply, especially in the services, are not fully independent and autonomous compared to those that we have herein chosen to define of "provision/construction". Indeed, they often end up overlapping.

Not by chance in the Directive 2014/23/EU, as stated, mention is made solely of the risks on the supply side and on the demand side.

In general, the various stages in which are identifiable the risks are the following: *pre-construction*, *construction*, *operation*, *post-operation*.

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[269] Refer to Aiello G., *Assunzione del rischio operativo e sostenibilità economico-finanziaria nel nuovo sistema concessorio*, relation to the seminar "Il recepimento della direttiva concessioni (2014/23/UE): L'*in house providing* e il rinnovo dei rapporti esistenti", 9 march 2015, at the Chamber of Deputies, Rome.

According to the author, although the application of penalties should be automatic and have a significant – and not purely symbolic – impact on the income or profit of the concessionaire, must be kept in mind that in Italian law there is a limit that the use of such clauses may meet: the one underlying the power accorded to the judge to bring back, also *ex officio*, their amount to equity even when the parties have agreed the irreducibility of penalties, with possible repercussions on the economic financial equilibrium.

This can be an obstacle to the protection of those public interests of a difficult qualification and quantification (the externalities above all).

If the demand risk relates mostly to the operational phase (save the due precautions in the design and realization phase), that of supply does extend along the whole rigmarole: it means that this latter further comprises the phase of design and realization.

The observation is not trivial because it allows to set a structural difference between public contracts and concessions in those procedural stages in which both the institutions present operational risks into the hands of the private contractor.

Deny in principle the applicability to the concessions of the remedies provided in procurement contracts, hence, means setting a first criterion of interpretation aimed at distinguishing the cases.

When it is instead allowed the analogical extension of the rebalancing instruments, either by will of the parties or as a result of the provisions set into the positive law, with suppression of the risk on the supply side, the contract may be classified as a concession only in the presence of a demand risk.[270]

The alternative nature of the two risks under the Directive 2014/23/EU, as well as the explicit possibility to include in the concession any clauses of rebalance that have passed the scrutiny of competition and negotiation, thus provokes uncertainty.

Ergo it is a very hard task that of trace net border lines between public procurement contracts and concessions.

The only conclusion to be drawn, taking into account the risks assumed by the contracting party, is in fact that uniquely for the concessionaire – and not for the contractor – is looming the real possibility of economic losses due to events not imputable to himself, but to the market, while in either – both public contracts and concessions – you have the responsibility of the contractor for his own breaches, inadequacies and mistakes.

All in all, the EU Directive on concessions does not seem to say much more.

Once identified and defined the operating risk as the distinctive feature of the concessions, it does not seem to worry too much about the aporias left to the interpretation of the jurist.

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[270] Relative to which, if there are no rules on procurement that can be made subject to interpretation by analogy, the Code of public contracts (not the civil one) does contain some provisions that could repropose the problem again (notably the art. 143 already examined: v. *supra*).

Therefrom you should reverse the reasoning and consider the contract as a concession whenever, compensated the risk of demand (for example, through a clause of integral take-or-pay), to the contractor remains that of supply.

The new EU Directive aims to ensure greater freedom in the selection procedure of the concessionaire, who is allowed to participate actively in the procedure for the contract design and award; conversely, during the execution of the contract, the possible changes are only the non-substantial ones and those already foreseen into specific clauses.

In the end, the discipline seems to reproduce that contained in the other procurement Directives (particularly for the utilities, but also in the ordinary sectors are in some cases admitted flexible procedures in the face of a fairly rigid execution: v. *infra*), inasmuch that it is to be found the same problem already encountered into the Italian context.

So what happens to the risk if to a concession and to a public contract shall apply the same rules?

The large emphasis on the concessions risk given by the European Union has not been matched by equal attention regarding the repercussions of the same risk.

The dilemma of interpretation arises from the fact that if it is true that the risk, unable to be the mere entrepreneurial alea, must depend on factors external to the parties, from the unpredictable encounter between supply and demand, in the domestic law system the concession would indeed become a contract aleatory too, and not just commutative, notwithstanding the synallagmatic relationship between the performances.

This would advise against the analogical extension of the rules dedicated to the procurement contracts, for no other reasons than that in so doing the distinction of the cases would be rendered illusory and would remain only at the level of definition.

But the issue is far more important: as was anticipated, while the definition of concession (and then of risk) is a matter reserved to Union law and, because of the principle of primacy, operates therefore a direct effect of integration into the national legislation with a consequent obligation to comply for the operators, according to the EU Court of Justice, provided that the benefits derived from public contracts are legally binding and have to be enforceable before the courts, it falls instead on the national law to determine the effects of a possible infringement by the contractor.

Consequently weighs on the legislative and judicial branches of the Member States the burden to give concrete implementation to the European discipline.

Hence, we must try to understand what is the true essence of the operating risk of concessions as opposed to public contracts.

The issue concerns mainly the cd. “normal alea” of the concessions.

We have said that within the boundaries of this concept, resulting both from the legal model and by the will of the parties, as a rule, it is not allowed any economic rebalancing of contract.

This requires a serious reflection on the execution phase of public contracts and concessions.

Such a premise is particularly appropriate in relation to the Italian national context (as demonstrated by the examined jurisprudence of the EU Court of Justice), where, being the hermeneutical activity of the interpreters heavily influenced by the domestic tradition (cd. "*path dependence*"), the legal science has not proved yet adequate in the definition of the concession, even less so on the contractual consequences.

The legislature has often put the emphasis on the economic-financial equilibrium, rather than on the operating risk, with evident antinomies compared to European law.

Even most of the judges, for their part, confined themselves to analogically extend the rules of civil and public law on procurement, making almost indifferent the distinction with concessions.

Instead, the national law must be investigated to see if it is possible and proper taking a different route on the grounds of the "concession risk" element.

Otherwise, it is not clear what actually is the nuance between the instruments.

The greater operational flexibility hoped for concessions – where the concessionaire "takes losses out of his own pocket", so to speak – would ultimately be not only ephemeral (reduced to a more flexible competition, really not different from the one in the utilities sectors, followed by a constrained implementation) but also useless (the management risk would be distorted and brought back to that of public contracts).

Insomuch you might as well keep only one model.

To me, on the contrary, there may be a concrete distinction between the institutions.

When we think of risky or complex public transactions, we can imagine a flexible competition for both public contracts and concessions to allow the private participation in the various stages (planning, project, design of contract), but with the basic difference that in the public contracts is missing the market risk borne by the contractor.

The contractor must carry out an asset (work, service and/or supply), in relation to which the subject responsible for the future management will be the public administration,

but he is not exempt from liability for the risks assumed (*e.g.* design or executive flaws): this is the risk of provision/construction.

The concessionaire has to create an asset (work and/or service) but has also to take responsibility for managing the market of the asset realized: here the contractor responds not only of failures, defects and vices, being additionally concerned with commercial risk (demand and/or availability).

I mean that the risks within the two different contractual typologies are the same: what it changes is the different objective and subjective allocation between the public party and the private counterparty.

Which then entails, in spite of some substantial assimilation at European level[271], the clear separation in terms of internal rules.

Otherwise the risk, as discriminant, is to be considered *tamquam non esset*.

Consequently, the normal alea of concessions must necessarily be different from that of procurement contracts.

If in the supranational law the concession risk features some characters of ambiguity (on the one hand, the limitation to the "*normal operating conditions*", on the other hand, the possibility to reduce and fix the risk, but not to delete it, through negotiated clauses), into the national legislation it encounters the rule of subjective irresponsibility for events absolutely unpredictable, exceptional and extraordinary (such as war, systemic crisis, terrorist attack, fall of the meteorite, diaspora, mass exodus, emigration and desolation…), in addition to the guarantee of the economic financial equilibrium in case of variations not attributable to the concessionaire or made by the client and/or by laws and regulations.

In this articulated context must be noted the partial misalignment between the levels which entails the necessity of an activity of rearrangement by the interpreter.

The operating risk implies in fact that the concessionaire, under normal operating conditions, is not guaranteed to recoup the investments made or the costs incurred in the management of works or services object of the concession.

The concession can nevertheless provide for modifications of economic equilibrium in favour of the concessionaire, on condition that they have been preliminarily disclosed during the tender and do not obliterate the risk assumed by the concessionaire.

[271] The reference is to be understood both to the new EU Directives on the public procurement (contracts and concessions) and to the various forms of risk mitigation established at European level as well: on the point we will return soon (v. *infra*).

This appears to be the European framework of the concession risk.

And, by reflex, the normal alea which characterizes the concessions as a contractual *genus*.

The national law not only confirms the need to hold undamaged the concessionaire for the abnormal operating circumstances, but goes further and imposes *ope legis* to redress the balance for all the events not imputable to the concessionaire.

As a consequence, some interpretative questions arise.

Market fluctuations are by definition not attributable to the concessionaire, precisely because they are produced by the mechanisms of encounter between supply and demand (for instance, competition from other operators, imbalance between supply and demand, insolvency of users, failure to cover all the costs of management by the revenues or even responsibility for damage related to a deficiency of service: see cause *Stadler* above).

But whereas the law provides that in such a case must be made a necessary revision of the economic equilibrium of the concession, so preventing the parties from derogating the peremptory norm, is still true that the concession connotes the operating risk of market?

In other words, is there really a distinction with respect to the public contract?

In order to regain sense to these questions and seek to provide an answer to them should be remembered what has been written on the aleatoriety of the concessions, as opposed to the commutativity of the public contracts.

The concession, in terms of legal classification, must be considered a hybrid contract both aleatory (for the part of risks taken by the concessionaire) and commutative (for the risks not assumed and for those which, even though assumed, provide for partial compensations).

In essence, the allocation of risk concerns single risks deriving from single factors and events. For the concessions, these risks relate to the management of the works/services on the side of demand, of supply, or both.

Anyway, such operating risk of management in no case can jeopardize the ultimate goal of the concession, which is the implementation of a public utility.[272]

[272] This does also stays in line with the provisions of art. 106, para. 2, TFEU, pursuant to which "Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them".

This is why the risks shall be objectively and subjectively allocated at best.

Precisely in this activity is the distinction between public contracts and concessions, with the former characterized by the economic and financial equilibrium of the contract, save any defaults; whilst the latter do involve some private operating risk which can upset the initial balance set by the parties (he who has assumed certain risks must ensure to bear the consequences or indemnify the counterparty, as the case may be).

The fact remains that even in procurement contracts there are risks on both parties, but in the concessions we witness a greater participation of the private contractor to the risk that normally falls on the public administration.

The economic and financial equilibrium – that in the commutative procurement contracts ensures, as a rule, the agreed payment to the contractor – in the concessions is subjected to an aleatory condition with regard to the operating risk assumed by the concessionaire. To the extent of such a risk the concession becomes an aleatory contract, remaining for the rest a commutative contract to the concessionaire (compensated for the *factum principis* of the public administration and for the utterly extraordinary events).

The economic and financial equilibrium, therefore, appears also in the concessions.

So it can be seen a dual dimension of inquiry for the concessions: one endogenous, in which the economic and financial equilibrium serves to balance – *ex ante* and *ex post* – the performances of the parties as resulting from the original allocation of the risks to them; and an exogenous one, where the economic and financial equilibrium shows the continuity or not of the concession object, from which follows a requirement to resume competition every time are agreed conditions different from those already externalized and known by the participants in the initial tendering, with the alteration of the nature of the transaction from public procurement concession to public procurement contract.

Except for these moments in which counts the overall economic balance, it is rather to be found the recessivity of this latter to the advantage of the operational risks such as allocated within the concession.

Undoubtedly the provision of an operational risk excessively onerous for the concessionaire would ultimately become counterproductive, inhibiting the private investments instead of attracting them.

And, even if there were the availability of these to participate, the costs would be too high.

The leading case on the subject is the judgment of the EU Court of first instance (Third Chamber, extended composition) of 27 february 1997, Case T-106/95, *FFSA and Others v Commission*, which admitted the compensation of the additional costs incurred in performing the particular task assigned to the undertaking entrusted with the operation of a service of general economic interest when the grant of the aid is necessary for that undertaking to perform its public service obligations under conditions of economic equilibrium.

Thereby comes out a polyhedral scenario for the concessions, based indeed on risk, where very little space remains for the application by analogy of the discipline laid down on public procurement contracts, and even less for the common rules of private law.

What is certain is that the national law, particularly the case law, will have to make a huge effort of renewal and upgrade if it wishes to recover the lost ground and catch up with European law, which would want the concessions characterised by an operating risk, albeit sometimes reduced, such as not to ensure in any case the full remuneration of the concessionaire for the risks allocated to him.[273]

Being the positive law, both supranational and national, incomplete by its nature, is up to the judiciary fill the inevitable gaps showing off farsightedness and broadmindedness.

What it does not characterize the present state, where the concessions are frequently associated to procurement contracts (think of the claimed commutativity) on the basis of a misrepresentation of the concept of economic and financial equilibrium or are dissociated from them (think of the omnipresent trilaterality) by virtue of parochial or anachronistic logic. As was said, the result is a framework in which as need be it is used the analogy *legis* and/or *juris* towards the procurement contracts, or else the opposite, without fear of running into contradiction.

The matter of fact is that in the national context is not always given due weight to the operating risk as the *proprium* of the concessions.[274]

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[273] The very distinction between works cd. "hot", "tepid" and "cold" takes no account of a different allocation of the risks, but simply connotes the origin of the remuneration: in a few words, it is not for sure that the risk does not fall on the contractor when the public administration is to remunerate him.

[274] It did so, for example, the Council of State, Sect. V, 13 june 2012, n. 3474, where the judges of appeal considered as thoroughly lawful the annulment in self-defense of a resolution by which, at the expiry, had been renegotiated *ex post* a concession in order to correct the economic outcomes not favourable to the concessionaire in a project finance relating to burial cells (remained in a large part unsold).

The Council, confirming *in toto* the ruling of first instance (T.A.R. Napoli, Sect. I, n. 16862/2010), has pointed out that in the concession the risk of demand lies with the concessionaire and that the economic and financial equilibrium reached by the tendering through the competitive comparison can only be restored (as a result of the exceptional circumstances provided for in the concession or *ex lege*), but not renegotiated in terms wholly innovative (thereby undermining the early competition intervened *ab origine*).

In this sense, then, the concessions would be aleatory, and not only commutative.

Moreover, if the opposite were true, you would not have any distinction against the public contract: in the concessions there would be a different risk allocation *ex ante*, under the tendering and the contract, but the difference would come next to be cleared from the renegotiation that surreptitiously brings the contractual equilibrium back to that of the public procurement contracts (in a situation where the risk is substantially *tamquam non esset*).

What it means deny the European approach, most recently expressed in the Directive on concessions, according to which the risk allocation takes place generally during the competition (while is quite exceptional in the course of implementation, once it has intervened the Williamsonian "fundamental transformation"), acting as an incentive for the private operators to carry out at best their own performances.

Perhaps just because the risk is not an accustomed conceptual category for the classical jurists, or maybe because it has close relations with other institutions absorbing some of their contents.

It is certainly not very easy framing the risk in itself, let alone using it as a magnifier in order to classify the concessions, controversial and elusive as well, and distinguish them from the public contracts (these truly known and explored for a long time).

This has resulted in a return to the formalism of positive law.[275]

They are not immune even the European Directives which, overturning the theory that in the lasting contracts is more important the mutual interaction between the parties than the terms of agreement[276], do imprint a major contractual mark on public procurement, legitimizing only what is specifically included in the contracts signed (whether they be a public contract or a concession contract, since the public procurement consists of both in the EU law).

It is true that the EU Directives accept the argument that in the legal relationships of duration must be taken into consideration such an alteration of the contractual equilibrium which is not determined by the occurrence of the normal risk assumed by the parties upon stipulation, but is the effect of an event occurring afterwards and was neither foreseen nor foreseeable at the time of conclusion of the agreement.[277]

As mentioned, to the extreme flexibility that characterizes the award of the concessions is opposing a restriction of the cases in which it is permitted the renegotiation *in itinere*, so as not to nullify the previous competition and not to alter the competitive function.

Resurfaces the meaningfulness of the freedoms of movement – and the general principles derived thence – guaranteed by the European law, which if, on the one hand, seem to ensure fair play and open up the market, on the other hand, may affect the development of concessions by holding back private investments (we will see later that, anyway , there are other means to attract private capitals).

[275] Cf. Murray J. E. Jr., *Contract Theories and the Rise of Neoformalism*, Fordham Law Review 71(3), 10, 2002, p. 891: "Judicial discomfort with broad and unfamiliar norms that depart from vested understanding invites a resort to formalism, which "spares the lawyer or judge from a messy encounter with empirical reality" (Richard A. Posner, The Problems of Jurisprudence 41, 1990)".

[276] You can see *ex plurimis* Campbell D.; Harris D., *Flexibility in long-term contractual relationship: the role of cooperation*, Journal of law and society, 170, 1993, where it is argued that, instead of giving rise to prolonged and expensive negotiations in order to conclude durable all-encompassing contracts, however incomplete, it is preferable to focus on a negotiating structure inspired by a collaborative afflatus to allow the parties to resolve smoothly any hitches and mishaps.

[277] See the judgment of the EU General Court (Fifth Chamber) of 1 july 2010, in the Case T-53/08, *Italian Republic v European Commission*, where it was rejected the Italian defence about alleged State aids to an enterprise because they were not detected the characters of unforeseeability and extraordinariness of the supervenience.

By arguing *a contrario* it is possible to admit the public intervention to the rescue of the counterparty in accordance with the contract and in exceptional cases (likewise the *Eurotunnel* case: v. *supra*).

The European Union thus seems to have learned lessons from past experiences.

Yet in general it is prevailing the attitude of closure towards the cooperation of the parties during the execution of the relationship (outside of the predetermined ways).[278]

The public transactions so become the "vehicles" for principles of public accounting (for the feasibility and economy), as well as for *par condicio* (for the market efficiency) and superindividual instances (for the social and environmental efficacy), losing their essence of contracts to the extent that the parties are no longer holders of private autonomy.

This strong neoformalist push, aimed at protecting the common single market, tends to distance the parties rather than bring them closer.

The observation proves more fitting for concessions, where both parties take risks, but it should also make us reflect thoroughly on a really crucial point.

How to choose between public procurement contracts and concessions?

In light of what examined, has emerged the distinction between the two cases.

The next step is to understand what is the most viable option in practice.

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[278] See the judgment of EU General Court of first instance (Second Chamber, extended composition) of 16 march 2004, Case T-157/01, *Danske Busvognmænd v Commission*, concerning aid granted by States in regional public transport by bus.

In the case at issue the obligations to operate, carry and collect the fixed tariffs were not imposed unilaterally on the company nor this was obliged to provide its transport services in an unprofitable manner, contrary to its commercial interests.

It had voluntarily assumed those obligations once it had been successful in the tendering procedures, which did not provide for any State subsidies and in which it was free to participate or not, depending on its economic interests.

The transport services provided were paid for by the price it itself had proposed in its bids in the tendering procedures and which were included in the contracts subsequently concluded.

According to the EU Court it was therefore necessary to refer to those contracts – in which there was the possibility to insert additional clauses and make adjustments to take account of unforeseeable changes – to determine which payments would be likely to be authorised to finance the bus transport service.

The losses accumulated by the company were not occasioned directly and exclusively by the provision of transport services *per se*, but rather were the result of the general management of the undertaking, particularly from the submission of tenders with excessively low prices with a view to being the successful tenderer.

The Court has thus enunciated the inadmissibility of an "operating aid" to the management, that is coupled with the already examined judgments of the European Court of Justice considering as public contracts those contracts where it is operated the posthumous compensation for the contractors (see above), to which should be added the Commission Directive 2006/111/EC of 16 november 2006 on the transparency of financial relations between Member States and public undertakings as well as on the financial transparency within the private undertakings which have been granted special or exclusive rights by an EU country or that provide services of general economic interest (in particular for the setting-off of the operating losses; the forgoing of a normal return on public funds used; the provision of capital; the non-refundable grants or loans on privileged terms; the granting of financial advantages by forgoing profits or the recovery of sums due; and the compensation for financial burdens imposed by the public authorities).

In the doctrine see Casalini D., *Aiuti di stato alle imprese, servizi di interesse economico generale e criterio dell'investitore privato in economia di mercato*, Foro Amministrativo C.D.S., 2003, 2690 ss.; *id*., *Concessionario, organismo di diritto pubblico o gestore in house: chi sopporta il rischio economico della gestione delle autostrade?*, commento a T.A.R. Roma, Sez. III, 9 marzo 2009, n. 2369, Urbanistica e appalti 7: 882-889, 2009.

I do not claim to show the way, but rather to raise some dilemmas.

Into our national law there are in fact a number of structural criticalities that do highlight the excessive weight attributed to the decisions of the public administration.

Always rests with this latter the evaluation concerning not only the advantages of an economic nature that the entity would receive, on the basis of the general principle of good performance, but is up to it as well to identify the interests of the community to be met and the services to be provided in terms of efficacy and efficiency of the activity and economy of the management, in addition to the consideration of the impact on the territory.[279]

Must therefore be deduced that into the Italian context too many competences fall on the administration.[280]

[279] Art. 14 of D.P.R. 5 october 2010 n. 207 states that the feasibility study consists of an illustrative report containing the functional, technical, operational, economic and financial characteristics of the works to be done; the analysis of the status quo, in its possible architectural, geological, socio-economic, administrative parts; the description, for the preventive evaluation on the environmental sustainability and landscape compatibility of the intervention, of the requirements of the opus to be designed, of the characteristics and of the links with the context in which the intervention is included, with particular reference to the verification of the environmental, historical, archaeological, landscaping constraints interfering on the areas or on the real estate properties interested by the intervention, as well as the identification of any appropriate measures to preserve the environmental protection and the cultural and landscape values.

To this must be added the analysis of possible alternatives to the constructive solution identified and the verification of the possibility of realization through the contracts of public-private partnership.

When the feasibility study is placed at the base of tender, the general illustrative report containing the territorial and socio-economic framing of the area subject to the intervention (verification of the compatibility with urban planning instruments and analysis of the socio-economic impact) is accompanied by the analysis of the current supply and demand and the forecasting with respect to the catchment area and the estimation of the user needs, the analysis of project alternatives from the viewpoint of technological, organizational and financial choices, and the study of the environmental impact relating to the project solution identified and to the possible alternatives.

Furthermore, it is the very competence of the public administration drawing up the technical report containing the functional and technical characteristics of the works to be done; the summary analysis of the building techniques; the time schedule; the summary estimate of the overall cost of the operation; the project design documents.

Already from this list emerges how the task of the administration is highly complex, but art. 14 confers on the public administration even the drafting of the technical and economic documents containing:

1. the verification of the possibility of realization through a concession compared to a public contract;

2. the analysis of financial feasibility (costs and revenues) with reference to the construction phase and, in the case of concession, to the management phase;

3. the analysis of the economic and social feasibility (cost-benefit analysis);

4. the scheme of tariff system, in the case of concession;

5. and the essential elements of the draft contract.

It looks indeed excessive attributing to the public administration (even if fully efficient) such an accumulation of duties, especially when the risk capitals must be committed by private entities.

[280] It is recalled that the public works concessions, as a rule, have for their subject the final design, the executive design and the realization of public or public utility works, and works directly and structurally related to them, whilst only in the project finance and for strategic infrastructures the concessionaire addresses the entire design (preliminary, final, executive).

The application of this set of rules means that the public administration ultimately decides whether to implement a public procurement contract or a public concession, establishing moreover the essential contents of either.

As a result, the administration should be able to manage some complex operations.

Art. 93 of D.P.R. 5 october 2010 n. 207 regulates the levels of the design for public works contracts and concessions (cf. art. 16 L. n. 109/1994).

The design in the field of public works is structured in three levels of subsequent technical insights: preliminary, final and executive. It is permitted the omission of one of the first two levels of design as long as the next level contains all the elements required for the level omitted.

The preliminary design defines the qualitative and functional characteristics of the works, the framework of requirements to be met and specific performances to be provided and consists of a report explaining the reasons for the choice of the proposed solution on the basis of the assessment of any possible solutions, also with regard to environmental profiles and use of materials from the activities of reuse and recycling, as for its administrative and technical feasibility, ascertained through the necessary investigations of first approximation, of the costs to be determined in relation to the benefits provided, as well as in the graphic schemes for identification of the dimensional, volumetric, typological, functional and technological features of the works to be done.

The final design identifies thoroughly the works to be carried out in compliance with the requirements, criteria, constraints, with the guidelines and indications established in the preliminary design and contains all the elements necessary for the issuance of the necessary authorizations and approvals. Consists in a descriptive report of the criteria used for the design choices, as well as of the characteristics of selected materials and of the integration of works in the area; in the study of environmental impact if required; in the general drawings, at appropriate scale, describing the main features of the works, and of the architectural solutions, of the surfaces and volumes to be realized, including those for the identification of the type of foundation; in the studies and preliminary investigations necessary with regard to the nature and characteristics of the work; in the preliminary calculations of structures and systems; in a documentation descriptive of the elements of performance, technical and economic specified in the project; as well as in an estimated bill of quantities. The studies and investigations necessary, such as those geognostic, hydrological, seismic, agronomic, biological, chemical, the evaluations and surveys, are conducted to a level that would enable the preliminary calculations of the building and facilities and the development of the estimated bill of quantities.

The executive design, prepared in accordance with the final design, determines in every detail the works to be done and their envisaged cost and should be developed to a level of definition as to enable each element to be identified in the form, type, quality, size and price. In particular the project consists of the set of relations, executive calculations of structures and facilities and of the drawings in the appropriate scales, including any construction details, of the special conditions of contract, performance-related or descriptive, of the estimated bill of quantities and of the list of unit prices. It is drawn up on the basis of the studies and investigations made in the previous phases and any further studies and investigations, of detail or verification of the design assumptions, which are necessary and on the basis of the planoaltimetric surveys, measurements and staking out, findings of the subsoil services network. The executive design must be also accompanied by a specific maintenance plan of the *opus*.

In relation to this state of affairs, the document "5 simple suggestions, with immediate impact and at no cost, for the rationalization of the system of public contracts" in infrastructure projects, january 2012 (http://www.urbanisti.it/attachments/article/57/U&S_12001_5%20semplici%20proposte%20razionalizzazione%20contratti%20pubblici-1.pdf) shows that while in Italy, as inheritance of the Royal Regulation of 1865, we maintain three levels of design (preliminary, final and executive), with three approvals and an unnecessary lengthening of times, into the international context the design levels are two: *Preliminary* (which corresponds to our "final" project) and *Final Design* (that corresponds to our "executive" design).

By eliminating the preliminary design, would be achieved a rationalization of the decision-making process and savings in implementation time, without the risk of budget breakthrough during the design phase, because the funding decision thus would occur on the *preliminary* (our "final" project, which contains the field investigations) and the estimated cost between *preliminary* and *final* does not change in a substantial manner.

It must be able to evaluate the cost/benefit ratio that would involve the outsourcing through each contractual module of public-private partnership, the definition of the public policy objectives, and even the definition of an economic and financial plan with the forecasting of the costs of interventions and of the perspectives of return on the investments in respect of the financial resources of the public administration.

Then one has to wonder whether there really exists an omniscient entity of this kind and for which reason should be necessary to have recourse to the so-called "*outsourcing*".

What appears certain is that in Italy we need to rethink the concessions.

Let us leave aside for a moment all the interpretive issues examined (trilaterality, division of jurisdiction, aleatoriety, economic and financial equilibrium) and pay attention to the distinction between public procurement contracts and concessions.

If it has a rationale and a purpose, they are to bring about two different instruments that enable the public plexus to pursue the collective interests.

This means that there must be some ontological differences between the two cases, with correlated application of specific rules.

It is not sensible nor appropriate to provide the same mechanisms for both.

In the Italian legal system should be taken the opportunity of the transposition of the new EU Directives on public procurement in order to separate contracts and concessions, even doing better than the European legislator did in conceiving diversified disciplines.

Not so much about the competitive procedure for the award, as pretty much about the phases of the initial ideation and of the contractual execution.

De jure condendo, both in the first and the second profile, it might be useful to get ideas and cue from the art. 160-*ter* of the Code which, regulating the availability contract, offers numerous steppingstones to configure an European concession.

In first place, the party awarded with the contract of availability is paid with fees subject to monetary adjustment according to the price revision stipulated in the contract.

Is thereby settled the question of the revisional compensation of prices and rates.

In second place, the availability fee is paid only at the actual availability of the *opus* and is proportionately reduced or canceled during the periods of little or no availability of the same for maintenance, defects or any reason not falling within the risks borne by the contracting authority.

Is provided the possible acknowledgment of public contribution in course of work, even though limited to fifty percent of the cost of construction and to the case of transfer of ownership of the work to the contracting authority.

In the latter situation, the transfer price must be parameterized, taking into account the fees already paid and the possible contribution in course of work, at the residual market value of the work to be paid at the end of the contract.

Furthermore, the contracting party assumes all the risk – not only of availability – on the supply side, that is the risk of construction and technical management of the work for the period of making it available to the contracting authority.

The contract determines the modes for the distribution of risks between the parties, which may entail variations to the amounts due in case of any events affecting the project, the implementation or the technical management of the work, deriving from the occurrence of compelling rules or orders by public authorities.

Unless otherwise determined in the contract, the risks of construction and technical management of the work resulting from the failure or delay in issuing permits, opinions, authorizations, clearances and any other administrative act shall be borne by the awarding authority.

From the allocation of risks established by contract, therefore, it can descend that the contractor will not have to endure the alea of supply *ex lege* and for *factum principis* or else that he will have to shoulder the so-called "administrative risk".

Everything is so remitted to the contractual agreements between the parties and to the *lex specialis* for tendering.

The tender notice is published, putting out to tender a performance specification, prepared by the contracting authority, indicating, in detail, the technical and functional characteristics that must be ensured by the work built and how to determine the reduction of the availability fee.

The notice shall indicate the criteria, in order of the importance attributed to them, according to which it is to proceed in the comparative evaluation of the different offers submitted.

The contracting authority evaluates the bids with the criterion of the most economically advantageous tender.

The bids submitted should include a preliminary design which meets the technical requirements set out in the performance specifications and be accompanied by provisional and final bonds.[281]

To the availability contract shall apply the provisions concerning the requirements for participation in the procurement procedures and for qualification of economic operators.

It is obvious that the arrangements for participating in public competitions should be common to all public transactions, without distinction between contracts and concessions, as demonstrated by the new European Directives on public procurement.

It is instead not at all obvious attributing to each candidate the design and planning of the operation in response to the needs of the public administration, from which results the related responsibility of the same candidate for the risks taken on his own idea.

In this way the concession is returned its original function, involving the private sector and leaving the public administration to supervise (like in the case *Eurotunnel*).

The contracting authority may attribute to the successful tenderer the role of expropriating authority under the consolidated text set out in D.P.R. 8 june 2001, n. 327.

The final design, the executive project and any variations during construction are drafted by the successful tenderer, which takes charge of the entire implementation phase.

The successful tenderer has the right to introduce any variants aimed at a greater economy of construction or operation, in compliance with the performance specifications and with the rules and measures, in force and supervening, by public authorities.

It raises some concern the fact that the final design, the executive project and the variants during construction are to all effects approved by the contractor, upon notice to the contracting authority and, where required, to the other competent authorities.

Indeed, it seems fair to assign a certain freedom of initiative to the contractor, considered the operating risk assumed from him, such as the risk of failure or delay in the approval of design and of any variants by third authorities, but must be avoided substantial variations of the initial project in accordance with the provisions of the EU Directives. Moreover, must be excluded that it can give rise to a contractual alteration of the object with respect to what placed at the basis of the award.

[281] From the beginning of the provision by the contractor is due a security guaranteeing the penalties related to the failure or improper performance of all the contractual obligations relating to the making available of the work, to the extent of ten percent of the operating annual cost of exercise.

The failure to submit such security constitutes a serious breach of contract.

The testing activities, held by the contracting authority, verify the realization of the work in order to ascertain the punctual compliance with the performance specifications and with the rules and compulsory requirements, and enables the contracting authority, to this sole purpose, for modifications, variants and makeover of the works carried out or, insofar as are guaranteed the essential functional characteristics, to reduction of the availability fee.

The contract specifies, to safeguard the financing bodies too, the limit of reduction in the availability fee beyond which the contract is terminated.

The fulfilment of the commitments by the contracting authority remains in any case conditional on the positive control of the realization of the work and on its very provision in the manner prescribed by the availability contract.

In the end, while on the one hand it is guaranteed to the contractor the necessary freedom to exercise his right of management, on the other hand such freedom is balanced by the risk that the management is not profitable as a result of failures and contingencies.

The allocation of the risks – together with the provision of any public contributions, of the private design based on public needs, of the securities, of the penalties, of the transfer of public authority, of the final test by the public body – manages to create at the same time the conditions for the participation of the contractor and for his effective responsibility.

They finally find answer also the questions of the revision of prices and variants in the course of work, the one left to the contract and the others normally charged to the contractor, except as otherwise required by the parties, at least until the time of the public testing (moment after which to the risk of supply of the contractor adds the one of demand: if the work is testable and is not different from that contemplated, then can begin the phase of actual management on which depends the remuneration).

Therefore, following the investigation carried out, it is not correct stating that in Italy there is no European concession, but rather must be considered that it exists under the *nomen* of "availability contract".

The cases that to date appear under the label of "concession" are not always well qualified from a legal and juridical standpoint and raise a number of perplexities, as amply demonstrated herein.

From these premises we have ultimately to start for reforming the national law of concessions.

Premises that were very present in our system and then suddenly disappeared without leaving a trace.[282]

So, besides the contradictory semblance, we must jump into the past and dust off some old institutions to renew the concessions in Italy.[283]

[282] Art. 23 of R.D. 8 february 1923, n. 422 – Rules for the implementation of the public works – established that could be made concessions to private parties for the construction of public works, only when the concession also included the exercise. In the convention, which was to precede the concession decree, they had to be certain the price *à forfait* or the unit prices for the construction and, if necessary, all the conditions relating to the exercise. The determination of the price by means of arbitrators could be admitted only for supplementary or unforeseen works, while it was prohibited the clause of the payment of price with the method of the reimbursement of expenses.

See additionally the law 24 june 1929, n. 1137 – "Provisions on the public works concessions", repealed by art. 231, para. 1, lett. g), of D.P.R. 21 december 1999, n. 554 (repeal confirmed, with effect from 16 december 2009, by art. 2, para. 1, of D.L. 22 december 2008, n. 200).

A very brief law, of only six articles, which clashes with the plethoric rules of the Code of contracts and of the implementing regulation.

And yet in art. 1 it contained the quintessence of concessions.

They could be conceded for execution to provinces, municipalities, consortia and private subjects, public works of any nature, even independently from the exercise of the works themselves, and in the acts of concession could be arranged that the expenditure borne by the State was to be paid in a lump sum at the time of liquidation of the works or divided into not more than thirty constant annual installments, including capital and interest.

Not only was it provided the public contribution for the initial feasibility of the concession but also the allocation of the risk of any future modifications in the course of work execution: "Should it be necessary, for the supplementary and unexpected works, to set new prices, it will be done with an additional act, to be approved with the forms used for the concession. Nevertheless the total amount of the contributions will not be to exceed by more than one-fifth that expected before, remaining fully charged to the concessionaire any greater expense needed for the work".

Such a provision does not exist currently in our legal system.

Fortunately, I should say, because otherwise this doctoral thesis perhaps would have been useless.

[283] Just like it did recently, the Civil Cassation, Sect. I, 20 february 2015, n. 3455.

The dispute at issue has regarded an agreement between a municipality and a joint venture (cd. "Associazione Temporanea d'Imprese" – ATI) for the construction of a road axis, in particular its termination for breach of the granting administration.

The Court of Appeal confirmed the decision of the Tribunal that had declared it resolved observing: a) that the construction concession had been equated by L. n. 584 of 1977 to the public contract, in this case entrusted to the joint venture (ATI) on the basis of an executive design prepared by the same municipality; b) that on this body consequently fell the deficiencies of design, nothwithstanding the opposite provisions of the convention to be interpreted in a systematic way and according to the will of the contracting parties; c) that on the grantor fell the suspensions of the work, whose damages had been requested by the contractor through timely reserves, when he had felt the injurious effects thereof; d) that was to be paid also the revision of prices *ex* art. 33 L. n. 41 of 1986, with reference to the table in force at the time of the offer.

The municipality appealed to the Supreme Court, alleging the infringement of L. n. 1137 of 1929 s.m., artt. 1 ss., and charging to the ruling on appeal that it had examined the obligations of the parties to the convention and determined the related breaches on the assumption that, despite the name given to the same, it was a public works contract, to which the L. n. 584 del 1977 had equated the concession of only construction, while such an equalization was limited to the compliance with the award procedures required by the European Directives; and neither the L. n. 584 of 1977, nor the subsequent L. n. 406 of 1991 had modified the structural difference between the two institutions, nor changed the content of the concession of construction, characterized from the assumption by the concessionaire of powers of the grantor, as just that of the project preparation of the work. In addition, the municipality alleged the infringement of the artt. 1362 ss., 1218 and 1456 cod. civ. and censured the decision for having omitted the examination of the main provisions of the convention that did qualify the relationship as a concession of construction and charge any design obligation

to the concessionaire (particularly the failure to consider the content of the obligations assumed by the concessionaire under the provisions of the convention, completely ignored both in determining the onerousness of the works complained by the latter, and in the resulting responsibility for not having done them in a workmanlike manner), giving prevalence to provisions of contrary content without any justification and on the basis of an illogical juxtaposition between the criterion of literal interpretation, deemed irrelevant, and the others laid down by artt. 1363 ss. cod. civ.

Here it is how has expressed the Court of Cassation (ptt. 5-6-7 dir.): "All these complaints are well-founded. The appeal judges move from the premise that the concession of construction alone contained in the convention signed on 13 april 1990 has been equated to the public contract by L. n. 584 of 1977, in force at the time of the auction; and that therefore in conformity with this last contract the contracting authority should respond of the deficiencies of executive design and of the activities deriving therefrom: for this reason notwithstanding the contrary wording of artt. 1, 2, 8, 9, 10 and 20 of the same convention on the obligations and responsibilities of the concessionaire that had to be understood in function of his obligation to adhere to the executive project. Thus they have disregarded both the legislative framework then applicable to the institution, and the principles that it has drawn the constant jurisprudence of legitimacy, according to which: a) the concession of construction alone introduced by L. n. 107 of 1919, L. n. 1657 of 1926 and L. n. 1137 of 1929 is institution different than the public contract because the concessionaire does not assume the sole obligation to do the public work (that is to say to perform the simple material activities of building that), but in his typical figure he is vested with the powers and faculties of the granting entity, such as design of the work or works, direction of the same, surveillance, choice of contractors etc. (Cass. 4145/2003; 15687/2001); b) in this perspective the scope of the works concession has been expanded to include indistinctly all the phases of public works committed to the concessionaire, together with the realization of the work: from the technical and/or preparatory administrative activities, accessory and connected or however functional with respect to that implementation, such as the planning, the design, the acquisition of areas and authorizations, the implementation of the expropriation procedures, the conclusion of the contracts for the buildings to build, the vigilance on the progress of the works, and the testing; as far as to every other task, even though atypical that can further qualify compared to that of performing the work, but no stranger per se to the public contract (Cass. sez. un. 73/2000; 287 and 580/1999; 12622/1998); c) this distinction has not defaulted with the L. n. 584 of 1977 (as well as with the subsequent 406/1991) that has equated the two institutions only "for the purposes of the present law", containing the standards for adjustment of the award procedures to the Community Directives: in the case in fact observed from the the municipality of Bari, that, by following them, has awarded the concession after a competition of a restricted private invitation with Delib. 18 december 1989 (Cass. sez. un. 12166/1993; 12966/1991; 12221/1990). It should be added for completeness that such a legislation has changed only starting from the law on public works 109 of 1994, that in implementation of the Community Directive 89/440/EEC has provided in art. 19: "The public works referred to in the present law can be realized exclusively by means of public works contracts or concession...", qualifying the first ones as "contracts for pecuniary interest, concluded in writing between a contractor and a subject referred to in art. 2, para. 2, having as their object not only the execution of the public works referred to in art. 2, para. 1, but also "the executive design referred to in art. 16, para. 5, and the execution of the public works referred to in art. 2, para. 1..." (of which it has indicated the conditions). And by comparing to them in paragraph 2 the public works concession defined as "contracts concluded in writing between a contractor and a contracting authority, having as their object the final design, executive design and execution of public works and public utilities, and of works with them structurally and directly linked, as well as their functional and economic management" (Cass. sez. Un. 28804/2011; 19391/2012, 11022/2014). Therefore, only the new division, maintained firm in the subsequent Community Directives (cf. dir. 18/2004), and at last reaffirmed by cod. contracts approved with D.Lgs. n. 163 of 2006, has received the Community conception of "works concession", including in its category now unified all the "contracts for pecuniary interest, concluded in writing, having as their object, in compliance with the present code, the execution, or the executive design and execution, or the final design the executive design and execution of public works and public utilities, and of works with them structurally and directly linked, as well as "their functional and economic management", which are presenting the same characteristics of a public works contract except for the fact that the consideration for the works consists either solely in the right to exploit the work or in this right together with payment, in compliance with the present code. But in this case the same Court of Appeal has ascertained that at the time of the tender notice, of the Delib. for the award and of the convention as well, were in force the laws just mentioned on the construction concession, besides that L. n. 584 of 1977 which did not have changed the profound differences with the public works contract; so that the obligations and responsibilities assumed by the concessionaire – as

well as the entire convention 13 april 1990 – could not be identified in the light of the elements characterizing the latter contract, but rather inserting them into the effective legal instrument of a public nature of which the parties had intended to avail themselves: as indeed have confirmed about the relationship between the parties the recent decisions of this Court 18611 and 19228/2008 which, on the ascertained assumption that the concession of construction alone had entailed the transfer to the concessionaire of powers and faculties belonging to the Public Administration, have deemed the ATI Impregilo, to which had been delegated the accomplishment of the expropriations referred to in artt. 1 and 2 of the Convention, as unique responsible – or however co-responsible along with the municipality – of the illegal expropriations carried out to the detriment of the owners of the land occupied by Impregilo for the realization of the public work: thereby disproving the contrary conclusions of the judgment contested (pag. 15) for which the dispute on expropriations which had contributed to cause the suspensions of the works, was imputable (exclusively) to the administration grantor. It follows that also the stipulations of artt. 1, 2, 8, 9, 10 and 20 of the Convention, which, pursuant to the same judgment (point third), did specify the main obligations imposed on the concessionaire "related to the realization of the work", had to be evaluated and interpreted according to their literal wording, moreover consistent with the nature and content of the particular concession chosen by the parties (cd. systematic interpretation); and that mainly from their combined and overall reading had to be determined behaviours and responsibilities: and so appreciated the foundation as much of any failings alleged by the municipality in support of the rescission, as, conversely, of the legitimacy of the termination that the ATI has decided to draw from art. 1456 cod. civ.. Instead, certain of these provisions, such as that of art. 20, involving special burdens on Impregilo, they were ignored in the root by the Court of Appeal, while the meaning of the others has been consciously distorted in order to adapt it to a not well identified general principle – attributed to the public contract – of responsibility of the grantor for the design deficiencies (in the case not even identified), as well as for the requirements imposed by the authorities responsible for the safeguard of historical, artistic, archaeological and natural interests (pag. 9): principle in its turn justified in point of fact on the basis of the undisputed circumstance that the general executive project of the work had been prepared by the municipality grantor already at the time of the tender notice (cf. point first sent.). Which constituting, instead, a common situation both for the concessions of construction (cf. Cass. sez. un. 12221/1990), and to the public contracts less recent, did result totally irrelevant, as already observed by the United Sections of this Court (sent. 12966/1991), in order to attenuate or eliminate the diversity of function, and of legal regime too; and did not prevent the administration grantor from availing itself of that public law instrument so as to attribute to the concessionaire further and more specific programming and designing tasks (cf. artt. 2 and 10 conv. transcribed by the municipality) than the one already prepared: as indeed has come to recognize the same Court of Appeal, disproving its apodictic conclusion, where: a) has reproduced art. 4 of the convention on the basis of which "the works object of the building intervention entrusted to the concessionaire will have to be designed and realized in compliance with the urban planning schemes, with the projects of the administration and with the instructions and requirements set out in the specifications and in the special conditions" (pag. 8); b) has recalled (pag. 2) the overall obligation assumed by the ATI – of execution of the work "keys in hand", which even resulted decisive for evaluating behaviours and responsibility in the execution of the works, indicating the ultimate aim intended to achieve by the parties with the legal instrument chosen; c) has reported the invitations, during exercise, of the High Surveillance to the undertaking (pag. 9 sent.) to draw up the papers of refinement and adaptation of the design for the site preparation taking into account the historical, artistic, archaeological and naturalistic needs of which has been said; d) has justified "the diverse design choices" of the concessionaire compared to those of the executive project, with the need "to take account of the concrete local situation" (pag. 9): in blatant violation of the fundamental rule introduced in the public works contracts already from the L. 20 march 1865, n. 2248, art. 342, all. F), and maintained in the successive legislative provisions (cf. L. n. 109 of 1994, art. 25) which have always forbidden also the contractor (and even more so the concessionaire) to carry out whatever variations or works unrequested or not authorized by the administration customer, but introduced to his unilateral initiative, and therefore per se constituting breach of the obligations undertaken: for these reasons excluding the related right to any price increase or additional compensation, even by way of unjust enrichment of the customer, except for the hypothesis, here neither proposed, that the variations are "indispensable" for the execution of the work and they are met the other conditions set out in R.D. 25 may 1895, n. 350, art. 103: that is to say that they were deemed worthy of testing and that the total amount of the work, including the works not authorized, is within the limits of expenditure approved (Cass. 16366/2014; 18937/2012; 5278 and 15221/2007). Thence the contested judgment has not only implemented an instrument different from the one prepared and disciplined by the parties, but has also incurred the systematic violation of artt. 1362 ss. cod. civ. for having determined the obligations against them,

Which is not to revive those ancient legacies that have no reason to exist, such as the trilaterality or public law nature of the concession, but rather the good practices which, although at times, have characterised the concession under national law.[284]

If it is true that the distinction between public contracts and concessions have so far found an impediment in the definition of the latter ones as contracts *of the same type as a public contract* (with "*the same characteristics of a public contract*": cf. art. 3, para. 11-12, Code 163/2006), except for the fact that the consideration consists either solely in the right to exploit or in this right together with payment, it must be noticed that the latest European Directives have remedied this *impasse*.

Attention must be paid to the right (*rectius*: operating risk) of management of the concessionaire.

Italy now has a new opportunity to correct the mistakes made and adopt the proper perspective in the discipline of an institution, the concession, which actually does not exist except as a variation on the theme of public (and private) procurement contract.[285]

De jure condendo, it is therefore desirable to separate the discipline of these cases by providing a legislative guidance in principle and reserving the right space to bargaining, in line with the European framework.

In this part of the present study an attempt has been made to explain in broad terms the distinction between public contracts and concessions in the light of supranational and national laws to outline the dividing gaps (both between public contracts and concessions, as well as between jurisdictions and legal systems).

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and to the concessionaire in particular, according to an exegetical path not allowed by the aforementioned legislation, many times stigmatized by this Court (Cass. ever since 3853/1985; 1257/1983 ss.): such as that of use only fragments of clauses or provisions to be interpreted (in this case, of artt. 5 and 32 of the convention), or factual circumstances taken out of their context, and then fix the content of the opposite obligations on the basis of the sole atomistic consideration of the former or the latter ones in order to later examine "ex post" even the other main provisions of the convention so as to bring them back to harmony with the meaning aprioristically attributed to the circumstances considered as primary and decisive to identify the discipline given to the entire relationship by the parties".

So, according to the Court of Cassation, the homogenisation of public contracts and concessions, once clearly distinguished, is a recent conquest of the national law on the basis of the supranational one, which can in no case lead to the obliteration of the contractual content desired by the parties.

To tell the truth, already at the end of the last millennium, the European law had begun to formulate concessions as distinct from public contracts by virtue of the operating risk of the concessionaire (v. *supra*).

And this well before the European Directives of 2004 and the Italian Code of contracts of 2006.

[284] Besides law 24 june 1929, n. 1137, mention must be done of R.D. 14 september 1931, n. 1175, text unique for the local finance.

[285] The equalization of the concession to the public contract, for the purposes of judicial protection and not only, has intervened following L. n. 109/1994 s.m.i.: see in particular artt. 31, para. 4-*bis*, and 31-*bis*, para. 4. The situation has further worsened as a result of L. n. 166/2002.

In the next one we will try to demonstrate that the aforementioned instruments, which are thought to be distant and separate, in reality are not so always and however.

In fact, the hiatus between public procurement contracts and concessions seems to exist only at the antipodes (simple contracts and complex concessions), denoting instead the progressive approach of the two institutions along with the increase in riskiness and complexity of the transaction.

Unexpectedly is the public contract that ends up being attracted by the concessions toward a greater flexibilisation.

This is reflected in the public-private partnership (PPP), where the risks allocation and the cooperation of the parties rise to the cornerstones of the system and can lead to metamorphosis even a milestone like the public contract.

The discipline of public contracts under the PPPs in fact goes far beyond the original sphere of State accounting and market opening so as to be the propulsive thrust towards an efficient management of the *res publica* with a view to overcome the traditional administrative action based on authority, hierarchy and bureaucracy, as well as the mere competition.

It then becomes of utmost importance and essential the inclusion of those additional instances (economic, social and environmental) that are connected with as many operating risks which influence not only the processes and procedures, but also the basic philosophy of public procurement.

In this way, by adopting a perspective of such a kind, it is possible to study the risk in public transactions in order to understand its very essence and outline its contents.

The matter will come back at interest a little further on – when discussing of public procurement contracts and concessions in the framework of public-private partnership (PPP) – since it is not at all clear, in consideration of what happens in complex contracts, whether and how such a differentiation, focused on the operating risk of the private subject, as well as on the definitional level persists also on the procedural one.

Profile, this last, which indeed raises so many hermeneutic critical issues regarding the contractual execution of public contracts and concessions, because their distinction entails considerable repercussions on the rules to be applied (v. *supra*).

As you might guess, the border between the cases is not well defined nor definitive, centering upon a purely descriptive and largely subjective concept.[286]

It may be concluded the impossibility to fix once and for all the distinction between public contracts and concessions, but this is not a major drawback – as we will see in the following Part II *infra* – for the European law seems to provide the two cases with a common statute (therefore leaving every interpretative criticality to the national jurist).

Hitherto we have talked about the risk as *discrimen* between public procurement contracts and concessions.[287]

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[286] According to the European law, as stated, "*The part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible*" (cf. art. 5 of the Directive 2014/23/EU *supra*) and so the operating risk faced by the contracting authority, even though very limited from the outset, must be assumed "*all, or at least a significant share*" by the contractual counterparty of the public administration (cf. ECJ, Sect. III, 10 september 2009, C-206/08, *WazvGotha*, better known as *Eurawasser*).

Therefore it rests with the national court to decide whether the transfer of risk to the concessionaire is significant and gives rise to a real risk of market implying potential losses for the same concessionaire.

Otherwise shall be recognized the qualification of public contract instead of concession.

[287]These, pursuant to the European law, are the two fundamental models of public procurement to which must be referred all the various contractual arrangements that have been formed over time (in this sense see also art. 53 of the Code).

The discourse *de quo* concerns in particular Italy, which knows a large number of institutions encoded by positive law: *locazione finanziaria* (leasing), *contratto di disponibilità* (availability contract), *affidamento di lavori mediante finanza di progetto* (project financing), *affidamento a contraente generale* (general contractor), *contratti di sponsorizzazione* (sponsorship contracts), in addition to the public contracts of works, services, supplies and concessions of work and/or services.

By way of example, it is mentioned the case of the *locazione finanziaria* or real estate financial lease, if you prefer, set out in art. 160-*bis* d.lgs. 163/2006.

The first paragraph of the current text provides that "For the realization, acquisition and completion of public works or public utility the purchasers […] may also use the financial lease contract, which is a *public contract* of works, except that these latter are merely accessory to the principal object of such contract" (italics added).

Art. 3, para. 15-*ter*, of the same Code instead ranks it explicitly among the various figures of PPP, list in which – it is worth repeating – is not included the *public contract*.

Thence, only one of the two things: either the financial lease does never constitute a *public contract* (of works, services and/or supply), in clear and outright contradiction with the notion laid down in the Code, or otherwise we must conclude that the PPP also comprises the public contracts.

It is undeniable that in general the real estate leasing, translational (*financial*) or in enjoyment (*operative*), includes no demand risk but shall bear, among others, those of construction and availability.

There is the risk that the lessor fails to carry out the work and make it functional to the public needs, but if succeeds in that he receives a full remuneration guaranteed by the public administration.

The result is its uncertain legal status as public contract or concession, in the opinion of this writer.

This is why it is useful to consider the PPP as an all-encompassing category of public procurement contracts and concessions.

In a partiallly different sense Fidone G., "Le concessioni come contratti complessi: tra esigenze di flessibilità e moltiplicazione dei modelli", in Cafagno M.; Botto A.; Fidone G.; Bottino G., *Negoziazioni pubbliche. Scritti su concessioni e partenariati pubblico-privati*, Giuffrè, Milano, 2013, pp. 292 and 298, leads back to the operating risk only the risk of demand, coming to say that the lease or availability contracts are PPPs, but not concessions.

So now the moment has come to see how the risk characterises the public-private partnership (PPP).

Part II: The allocation of risk in the PPP

Chapter I. PPP between public contracts and concessions in sovranational and national law

§1.1. PPP between public contracts and concessions in sovranational law

When a jurist has to prepare to face a discussion on the PPP the major impediment is given by the enormous stratification and variegation of the regulatory and disciplinary framework in which he or she has to operate.[288]

This causes, if not confusion, at least some areas of uncertainty.

[288] In this paper I have chosen to give priority to the supranational perspective, not only and not so much for the well-known principle of the primacy of EU law, but because of the speciousness of Italian law which, behind a hyper-regulation on the verge of paroxysm (on the topic please refer to Cartei G.F., "Le varie forme di partenariato pubblico-privato. Il quadro generale", in Cerrina Feroni G., *Il partenariato pubblico-privato: modelli e strumenti*, Giappichelli, Torino, 2011, to Travi A., "Il partenariato pubblico-privato: i confini incerti di una categoria", Ricchi M., "Il partenariato pubblico-privato: nuove competenze e nuovi strumenti di regolazione della P.A." and, especially, Fidone G., "Le concessioni come contratti complessi: tra esigenze di flessibilità e moltiplicazione dei modelli", in Cafagno M.; Botto A.; Fidone G.; Bottino G., *Negoziazioni pubbliche. Scritti su concessioni e partenariati pubblico-privati*, Giuffrè, Milano, 2013), is hiding the substantial ineffectiveness of the institution.

In particular, from the document of the Unità Tecnica Finanza di Progetto (UTFP), *Partenariato Pubblico Privato in Italia. Stato dell'arte, futuro e proposte*, 2010, emerges how the Italian PPP market, primarily through the award of concession contracts for the construction and management of public works, is representing approximately 20% of the total number of notices for public works (it was about 14% in 2003) with a percentage of award which is around 50%. There is greater reliance on PPPs for the construction of works of small and medium amount (up to 10 millions €), such as car parkings, sports facilities, schools, cemeteries and urban development projects. The areas affected by the construction of large PPPs projects (amount greater than 50 millions €) are mainly roads and highways, subways and hospitals. Besides the issues related to global phenomena, such as the international crisis, in Italy there are specific factors of context, requiring "national" answers: the need for clear and stable "rules of the game", especially with reference to the procedures for the award of PPP contracts, which could enable public and private operators to increase learning by doing in a framework of certainty; the strengthening of the expertise within the public sector, capable of developing contractual models appropriate to the technical, legal complexity and viability of PPP; the simplification of procurement procedures in order to meet the competition, improve the success rate of PPPs and increase the Value for Money (*i.e.* the convenience of investment for the public sector) in the completion of projects; the growth of private operators who are able – by size, experience and technical skills – to propose to the public sector innovative and financially sustainable solutions (as it happens, for instance, in the UK where the market of PPPs knows the presence of a series of incumbent specialized by sector: cf. Mosey D., *Early Contractor Involvement in Building Procurement Contracts, Partnering and Project Management* , John Wiley & Sons Inc, 2009; Blanc-Brude F.; Jensen O., *Competing for Public Sector Risk Transfer Contracts: Evidence from PFI Schools in the UK*, Contracts, Procurement and Public-Private Agreements, Paris, 2010).

To tell the truth, as shown by Ricchi M., op. cit., with regard to the domestic market of the PPPs, between 2002-2011, there has been a growth to ten times of the procedures issued, both in number and value, from 6% in 2002 to 45% in 2011.

Nevertheless the fact remains that at the EU level, Italy is far away – except for 2013 due to the Brebemi's exploit (although most of the stakeholders are substantially public and all the other issues exposed) – from the leader countries (UK, Netherlands, France) for transactions concluded: cf. EPEC, *Market Update. Review of the European PPP Market in 2012* and *First half of 2013*, as well as CMS, *PPP in Europe*, 2010.

All the more when one considers that both in the supranational and national law there is no real definition – neither a discipline *ad hoc* – of the public-private partnership (PPP).[289]

It will not escape the attentive eye of a keen observer that the PPP always appears accompanied by the inseparable companions "public contracts" and "concessions".

This is the case, for example, of:

- the Commission's Green Paper on "*Public-private partnerships and Community law on public contracts and concessions*" COM (2004) 327 final, Brussels, 30.4.2004)[290]

[289] See the Commission's Green Paper on "Public-private partnerships and Community law on public contracts and concessions" COM (2004) 327 final, Brussels, 30.4.2004, whose initial *incipit* is the following: "The term public partnership-private partnership ("PPP") is not defined at Community level. This term generally refers to forms of cooperation between public authorities and the world of business which aim to ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of a service".

Previously, in similar terms, expressed the Opinion of the Economic and Social Committee on the "Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships in Trans-European Transport Network projects" (98/C 129/14), pt. 2.4: "A PPP is a partnership between various public administrations and public bodies on the one hand and legal persons subject to private law on the other, for the purpose of designing, planning, constructing, financing and/or operating an infrastructure project. It is, however, inappropriate to impose a rigid definition of what a PPP is or should be, as each project will lead to a specific partnership according to project needs and characteristics, and the way in which public authorities decide to involve the private sector in the different project phases".

Finally has intervened the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Mobilising private and public investment for recovery and long term structural change: developing Public Private Partnerships COM (2009) 615 final, Brussels, 19.11.2009: "PPPs are forms of cooperation between public authorities and the private sector that aim to modernise the delivery of infrastructure and strategic public services. In some cases, PPPs involve the financing, design, construction, renovation, management or maintenance of an infrastructure asset; in others, they incorporate the provision of a service traditionally delivered by public institutions. Whilst the principal focus of PPPs should be on promoting efficiency in public services through risk sharing and harnessing private sector expertise, they can also relieve the immediate pressure on public finances by providing an additional source of capital. In turn, public sector participation in a project may offer important safeguards for private investors, in particular the stability of long term cash-flows from public finances, and can incorporate important social or environmental benefits into a project".

No one can fail to see how the perspective has changed over time: a fairly simplistic original setting has been replaced by a global and more aware vision of the PPPs and of their potential.

[290] See the Commission's Green Paper on "Public-private partnerships and Community law on public contracts and concessions" COM (2004) 327 final, Brussels, 30.4.2004, which "discusses the phenomenon of PPPs from the perspective of Community legislation on public contracts and concessions. Community law does not lay down any special rules covering the phenomenon of PPPs" (pt. 1.2.8).

Then stepped in the European Parliament's report on public-private partnerships and Community law on public procurement and concessions (2006/2043 (INI) 16.10.2006), that on the grounds of flexibility fostered – in PPPs as public contracts – awarding contracts by means of a competitive dialogue and invited the EU Commission to clarify the condition of "legal and financial complexity" in such a way as to allow the maximum possible room for negotiation, taking the view that legal and financial complexity can be assumed to be present in case of typical PPP features such as a life-cycle concept and a long-term transfer of risk to private operators; the same way – in PPPs as concessions – the European Parliament expected that the future legislation should allow public authorities, through flexible, transparent and non-discriminatory procedures, to

- the Communication from the Commission on *Public-Private Partnerships and Community Law on Public Procurement and Concessions*, COM (2005) 569 final, Brussels, 15.11.2005),

- as well as the Commission's Interpretative Communication "*on the application of Community law on Public Procurement and Concessions to institutionalised PPP (IPPP)*" (2008/C 91/02, Brussels, 12.4.2008).

The reason for such a state of things lies, firstly, in the fact that the European Union has noted the lack of interest from the operators for initiatives aimed at defining in detail the framework of PPPs at Community level.[291]

According to the Green Paper on PPPs of 2004, one of the few certainties in the sector is the distinction between partnerships "contractual" and "institutional" (*rectius*: "institutionalized"), depending on whether the partnership is developed through a contractual relationship between the parties or, conversely, through a legal entity ("SPV" – "*Special Purpose Vehicle*") third with respect to the original parties, albeit constituted or owned by them.

Secondly, it was deemed easier reusing the *acquis communautaire* matured in the field of public procurement contracts (especially) and concessions rather than having to start from scratch in the creation and dissemination of a new operating model focused on the PPP, withstanding the large gap between the practices of the different Countries.

It appears *ictu oculi* how the link between the PPP, public contracts and concessions is much more than a style formula by which entitle Community acts, subtending an intimate connection of the same from the outset.

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choose the best partner in accordance with a comprehensive approach to procurement (the life-cycle concept) and a competition between tenderers in terms of innovation resulting in efficiency gains via optimised risk-sharing, but above all asked for any legislation to clearly define concessions as distinct from public contracts and to lay down criteria objectively verifiable for the selection between the two instruments.

[291] See the Communication from the Commission on Public-Private Partnerships and Community Law on Public Procurement and Concessions, COM (2005) 569 final, Brussels, 15.11.2005, at § 2.3.1. entitled "No new legislation covering all contractual PPPs", where it is stated that "*All PPP set-ups qualify* – in as far as they fall within the ambit of the EC Treaty – *as public contracts or concessions*. However, as differing rules apply to the award of public contracts and concessions, there is no uniform award procedure in EC law specifically designed for PPPs. Against this background, the Commission asked stakeholders whether they would welcome new legislation covering all contractual PPPs, irrespective of whether they qualify as public contracts or concessions, making them subject to identical award arrangements (question 7 of the Green Paper). The consultation revealed significant stakeholder opposition to a regulatory regime covering all contractual PPPs, irrespective of whether these are designated as contracts or concessions. Therefore, the Commission does not envisage making them subject to identical award arrangements" (emphasis added).

So much that the above-mentioned Commission's Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – "Mobilising private and public investment for recovery and long term structural change: developing Public Private Partnerships" COM (2009) 615 final, Brussels, 19.11.2009 – has even set out *expressis verbis* that the "*PPPs are structured around a public contract or as work or service concessions*".[292]

Thereby ensues the impossibility of framing the institution of PPP without taking into account the influences arising from the continuous interactions between this one and the two different cases aforementioned.

On the ontological level, to be honest, it would result appropriate talking about "*Public-Private Partnerships*" (PPPs in the plural) as this macro-category does consist of a conceptual ensemble – homogeneous only in appearance, but in reality heterogeneous – of procurement procedures and contractual forms characterized by the commonality of the partnership between one or more public entities and one or more private subjects.

It is not, however, an unintentional omission or a shortage due to carelessness, but a conscious stance on the part of the Community's apparatus which, though feeling the need to shed light on the matter, is well aware of the very different legal and economic traditions firmly rooted in the Member States.

Community law – beyond the numerous acts of *soft law* dedicated to the theme of PPPs in general, which are limited to require the application of the law of public contracts or concessions and in any case of the rules and principles deriving from the Treaty – therefore prefers leaving their regulation to each State.[293]

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[292] Ruling lately confirmed in the working document of the Commission staff "Guide to the application of the European Union 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" SWD(2013) 53 final/2 Brussels, 29.4.2013.

[293] See the Opinion of the European Economic and Social Committee on the "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Mobilising private and public investment for recovery and structural changes in Long-term: developing public-private partnerships" COM (2009) 615 final (2011/C 51/12) in section 3.2.1:

"There is no specific definition of what is meant by PPP in the rules on public procurement, concessions and the execution of infrastructure projects. On closer examination, and taking into account the experiences of numerous countries which already use PPP, it would seem that the absence of any clear definition at EU level does not in any way impede the development of such operations or monitoring by EU authorities. If we are to deduce from the Commission's silence on this issue that it does not feel there is any need for a more precise definition, it would seem that the EESC may and should share this point of view, which leaves it up to the Member States to draw up a definition which is adapted and tailored to their own particular circumstances and practices".

§1.2. PPP between public contracts and concessions in national law

In Italy it is art. 3, paragraph 15-*ter*, d.lgs. 163/2006 – cd. "Codice dei Contratti" – that has groped for a definition: "*Ai fini del presente codice, i «contratti di partenariato pubblico privato» sono contratti aventi per oggetto una o più prestazioni quali la progettazione, la costruzione, la gestione o la manutenzione di un'opera pubblica o di pubblica utilità, oppure la fornitura di un servizio, compreso in ogni caso il finanziamento totale o parziale a carico di privati, anche in forme diverse, di tali prestazioni, con allocation dei rischi ai sensi delle prescrizioni and degli indirizzi comunitari vigenti. Rientrano, a titolo esemplificativo, tra i contratti di partenariato pubblico privato la concessione di lavori, la concessione di servizi, la locazione finanziaria, il contratto di disponibilità, l'affidamento di lavori mediante finanza di progetto, le società miste. Possono rientrare altresì tra le operazioni di partenariato pubblico privato l'affidamento a contraente generale ove il corrispettivo per la realizzazione dell'opera sia in tutto o in parte posticipato and collegato alla disponibilità dell'opera per il committente o per utenti terzi. Fatti salvi gli obblighi di comunicazione previsti dall'articolo 44, comma 1-bis del decreto-legge 31 dicembre 2007, n. 248, convertito, con modificazioni, dalla legge 28 febbraio 2008, n. 31, alle operazioni di partenariato pubblico privato si applicano i contenuti delle decisioni Eurostat*".[294]

As it can be seen quite clearly from the letter of the rule just reported, though having merely illustrative value, the *raison d'etre* of the legal *genus de quo* must be recognized in the progressive turning away from the traditional negotiating model of the public contract (the emblem is its conscious exclusion from the list above) where the public administration finances the private party selected by tender and the latter makes his performance.

[294] Translation of art. 3, para. 15-*ter*, Legislative Decree n. 163/2006 – "Code of Public Contracts":
"For the purposes of this Code, the "public-private partnership contracts" are contracts for one or more services such as design, construction, operation or maintenance of a public work or public utility, or the provision of a service, including in either case the total or partial financing to be borne by private individuals, in different forms, with allocation of risks under the requirements of the EU guidelines and regulations. PPPs may include, but are not limited to, the concession of works, the service concession, finanzial leasing, availability contract, the assignment of work through project financing, joint ventures. General contractor can also fit among the operations of public-private partnership where the payment for the realization of the work is in whole or in part delayed and linked to the availability of the work for the customer or third party users. Without prejudice to the obligations established under Article 44, paragraph 1-bis of the Decree-Law of 31 December 2007 n. 248, converted with amendments by Law 28 February 2008 n. 31, the contents of the Eurostat decisions apply to the operations of public-private partnerships".

Yet, despite appearances, it is not self-evident that the public contract is *tout court* excluded from the family of PPPs. If the Italian lawmaker opted for the exclusion of the public contract from the legal list reported, the European Union has always considered the same an integral part of the PPPs toghether with concessions.

Conversely, compared to other European Union Countries, into the Italian law have proliferated many forms of PPPs with related disciplines alongside.

But the main interest of the arrangement quoted is another: in stating that PPP contracts are characterized by an "*allocation of risks under the requirements of the EU guidelines and regulations*" the rule gives specific emphasis to the allocation of risk, particularly in the European conformation, as the *discrimen* of the PPPs.

It therefore becomes of paramount importance to consider what are the concrete requirements and existing addresses at EU level regarding the allocation of risk.

As we will see, being it based on risk, returns under discussion also the usual distinction between public contracts and concessions.

§1.3. PPP: characters of the institution

As a rule, between the various theories, it is customary identifying the essential elements of the PPPs in the so-called "*bundling*" (the overall performance so as to emphasize the complexity of the transaction), in the long duration of the relationship, in the transfer (*rectius*: allocation) of risk and, obviously, in the public-private partnership (*nomina sunt consequentia rerum*, ed.).

A sheer definition of PPP does not exist, unless you want to consider as such art. 3, para. 15-*ter*, d.lgs. 163/2006 above. So that, leaving aside the cosmological implications, could be used the hyperbolic expression "*áPPPeiron*".[295]

[295] See Commission's Green Paper on the "Public-private partnerships and Community law on public contracts and concessions" COM (2004) 327 final, Brussels, 30.4.2004, where are identified the elements which normally – not always and in every case – characterize PPPs:

• the relatively long duration of the collaboration, which involves a cooperation between the public partner and the private partner in relation to various aspects of a project to be undertaken;

• the method of financing the project, guaranteed by the private sector, sometimes by means of complex relationships between different subjects. Often, however, shares of public funding, sometimes very considerable, can be added to private finance;

• the important role of the economic operator, who participates at different stages of the project (design, development, implementation, funding). The public partner concentrates primarily on defining the objectives to be attained in terms of public interest, quality of services offered, pricing policy, and ensures the monitoring of compliance with these objectives;

As the reader will have certainly detected, it is deliberately omitted the recipient of the risk transfer in relation to the allocation referred to in the title of the present study.

It might seem strange to the most, but the reason for this omission lies in the deep complexity of the issue:

- *in primis*, with regard to the object, for the quantity and quality of relevant risks;
- *in secundis*, with reference to subjects, due to the different possible combinations;
- *in tertiis*, in relation to the modes, because of the reflections on the mechanisms for the allocation of risks.

Some are wishing that in the PPPs would operate the full transfer of risk to private individuals, just as it is widely believed about the concessions, only to having later to change their mind in front of a number of initiatives on the part of the European apparatus (in particular by the European Court of Justice: v. *supra*) intended to soften this assumption and also to put in place some measures to mitigate such risk transfer to the private subjects (guarantees and public funding: v. *infra*).

No one can fail to see how such an integral transfer results absolutely ephemeral as the private sector would assume responsibilities that, in the worst case, will return to fall on the public entity.

To tell the truth, is not surprising at all that the mechanism functions in the terms described, because otherwise it would not be clear which is the incentive for private individuals in order to bear the risks in projects very complex and with uncertain outcomes (like the TENs).

We have just seen, in summary, what are the characteristic features of the PPPs.

This must not be misleading since, after a more deep and thorough examination, will be noticed that each element lends itself to include both concessions and public contracts, at least those complex.

If the ultimate goal is to identify an idiosyncratic peculiarity of the PPPs, it can not but coincide with the allocation of risk.

• the allocation of risks between the public partner and the private partner, to which are transferred risks usually borne by the public sector. The PPP does not necessarily imply, however, that the private partner assumes all the risks, or the most significant part of the risks of the operation. The precise allocation of risks is done on a case by case basis, depending on the ability of the parties concerned to assess, control and manage the same.

As we will see shortly, it is the latter element – that is the allocation of risk – to better characterize the PPPs and become their real peculiarity.

Indeed, while the "*bundling*", the long duration of the relationship and the public-private interaction configure in an almost identical way for both public contracts and concessions, though they could not be present[296], the allocation of risk normally differs in the two cases.

Where the risk of the operation is placed primarily in the hands of the public entity, *nulla quaestio*: we are in the traditional field of classic public procurement contracts.

On the contrary, when a portion of the risk is transferred to the private partner, a paradigm shift is made in the direction of the concessions.

The issue is not trivial at all, not only with regard to the aspects of taxonomy and dogmatic classification, but also because it seems to produce some distortions in terms of the legal statute applicable.

In fact, as will be seen later, the very salient features of the discipline of PPPs – understood as the intersection of public contracts and concessions – are common and comparable in the two cases when they must confront with a series of relevant risks.

This is due to the fact that within the broad categories of "public contracts" and "concessions" there is a common land, the one of the complex (*rectius*: risky) contracts.

§1.4. PPP and risk: the rationale

When talking about risk the thought often runs automatically at the economic risk, but it is necessary investigating the polysemy of the latter concept just to understand what and how many factors actually affect the economics of a contractual operation by the public administration, especially if complex.

The issue arose in the context of the Trans-European Networks (TENs), in relation to which it has been noted the impossibility of financing them with public funds alone and the need to include, in addition to the skills, even private capitals.[297]

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[296] Refer to Iossa E.; Martimort D., *The Simple Micro-Economics of Public-Private Partnerships*, CEIS Research Paper 139, Tor Vergata University, CEIS, 2008, and *Risk allocation and the costs and benefits of public-private partnerships*, RAND Journal of Economics, RAND Corporation, 43(3): 442-474, 2012.

[297] See the Commission's Communication "Developing the trans-European transport network: Innovative funding solutions and Interoperability of electronic toll collection systems", COM (2003) 132 final.

Not by chance the following year was published the Commission's Green Paper on the "Public-private partnerships and Community law on public contracts and concessions" COM (2004) 327 final, Brussels, 30.4.2004.

After all, the networks are characterized by the great diversity of projects to be implemented, by their service life (sometimes of several centuries), by considerable risks (financial, technical, environmental, political, etc.) and thence by a rate of return on which they are heavy uncertainties.

The joint participation of public and private funding is, at present, the only means by which achieve the purpose of the implementation of those networks.[298]

There is indeed an essential part of public interest within the PPPs, as in every other manifestation of the administrative *agere*.

More specifically, the PPP shows itself intrinsically connected with the performance of services of general interest (economic, social, environmental).[299]

It is not so easy, therefore, provide an unambiguous answer to the age-old question concerning the *rationes* that lie behind the allocation of public-private risk as characteristic peculiarity of the PPP.[300]

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[298] The Commission presented the Communication "A budget for Europe 2020" COM (2011) 500, Brussels, 29.6.2011, in which are set out the guidelines of the financial perspectives for the period 2014-2020.

With particular reference to infrastructural interventions in the sectors of transport, energy and information technology and communication, the Commission points out in the first place as they appear essential to ensure a fully functioning single market.

For the 2014-2020 period, according to estimates, it takes about 200 billion € to complete the trans-European energy networks, € 250 billion for the technology ones and 540 billion € for transport.

[299] After reviewing the PPP in view of the need to find any funding for the development of networks, in the Green Paper on services of general interest COM (2003) 270 and in the White Paper on services of general interest COM (2004) 374, the Commission analyzes the PPPs under the different perspective of reaching the objectives of general interest.

The provision of services of general interest can be organized in collaboration with the private sector or be entrusted to private or public subjects. By contrast, defining the obligations and functions of the public service lies with the public authorities, which must maintain the necessary powers to ensure the effective implementation of the objectives of public policy and that the democratic choices are respected, taking into account the level of quality and costs associated with it.

[300] For a *summa* of the foregoing see the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Mobilising private and public investment for recovery and long term structural change: developing public-private partnerships COM (2009) 615 final, Brussels, 19.11.2009: "At EU level, PPPs3 can offer extra leverage to key projects to deliver shared policy objectives such as combating climate change; promoting alternative energy sources as well as energy and resource efficiency; supporting sustainable transport; ensuring high level, affordable health care; and delivering major research projects such as the Joint Technology Initiatives, which are designed to establish European leadership in strategic technologies. They can also boost Europe's innovation capacity and drive the competitiveness of European industry in sectors with significant growth and employment potential".

In the opinion by the European Economic and Social Committee on the Communication *de qua* (2011/C 51/12) are passed in review the arguments in favour of PPPs: allow a better sharing of risks between the public and private sector, the optimization of factor time, increasing the consistency of a project and, ultimately, the economic efficiency for the community.

There are several reasons – the so-called "3Es" (economy, efficiency, efficacy) – which, however, seem to coincide with the many evolutionary stages which had, over time, not only the concept of PPPs, but also that of the public evidence in general.

§1.4.1. The basic need for PPP: Economy

A first order of reasons surely results from the main objective of creating and consolidating the single European market both internally (to develop a functional network for the flows of goods and people *intra moenia*) and externally (to increase the level of competitiveness with the major competitors in the world: BRICST[301], Japan and U.S.).[302]

Already in the 1993 White Paper on "Growth, Competitiveness and Employment - The Challenges and Ways Forward into the twenty-first century", COM (93) 700 it was emphasized the need to equip the European Union (*illo tempore* still European Community) of the TENs (Trans-European Networks)[303], that could effectively unify the different components of the common market, and to reduce, if not eliminate, the disadvantages afflicting some of them (especially the countries of Central and Eastern Europe, so-called "CEECs).

The aim was to prepare the conditions for a better European cohesion through the installation of transport, energy and digital networks which would allow, at the same time, a greater homogeneity and a certain dynamism among the Member States.[304]

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[301] Acronym for Brazil, Russia, India, China, South Africa and Turkey.

[302] Cf. Communication from the Commission "Europe 2020. A strategy for smart, sustainable and inclusive Europe" COM (2010) 2020 final, Brussels, 3.3.2010, in particular pt. 3.

Lastly EPRS - European Parliamentary Research Service, *The Cost of Non- Europe in the Single Market* (Cecchini Revisited): An overview of the potential economic gains from further completion of the European Single Market, Author: Zsolt Pataki, European Added Value Unit, September 2014 – PE 510.981, concludes that a further depening of the Single Market could increase EU-28 GDP by an additional 5 to 8.63%, equivalent to between 651 bilion euro to 1.1 trilion euro of additional economic growth per annum.

[303] In Italy the term is translated as "Reti Trans-Europee" (RTE).

[304] For transport, see the European Commission's Green Paper "The Citizens' Network - Fulfilling the potential of public passenger transport in Europe" COM (95) 601 final, Brussels, 29.11.1995 and the subsequent Communication from the Commission to the Council and the European Parliament, the Economic and Social Committee and the Committee of the Regions on the public-private partnerships in trans-European transport network projects, COM (97) 453 final, Brussels, 10.09.1997.

In relation to the latter, it must be recalled that both the High-Level Group on Public-Private Partnership Financing of Trans-European Transport Network Projects – chaired by Commissioner Kinnock and asked to evaluate how the forms of public sector and private partnerships (PPPs) could help accelerating the implementation of the trans-European networks for the competitiveness and growth in Europe – and the Commission concluded that PPPs can play a key role in consideration of the constraints faced by public budgets, making available additional resources (especially for "hot" projects) and improving profitability, thus favouring the development of projects ever much closer to financial efficiency.

The same the Commission's Communication "Developing the trans-European transport network: Innovative funding solutions and Interoperability of electronic toll collection systems", COM(2003) 132 final,

Obviously, for this purpose it was necessary to encourage private investors to take part in such an operation of european breath mainly through the funding of those projects. To make it possible, they became necessary, on the one hand, the reduction of financial, administrative and environmental risks related to the planned interventions, on the other, the transfer of the same to the private sector.[305]

In this way, the entrepreneurial sector rises to the role of unavoidable partner from both a financial and technical-operational view, providing capital and know-how as well, but is also to serve as a filter with respect to the projects intended to achieve.

It follows that the main foundation of the genesis of the PPPs is certainly to be found in the implementation of the principles of subsidiarity and proportionality in their every declination:

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photographed this state of affairs: "Though the Community was given new powers over the planning of trans-European networks, these were not accompanied by a large enough financial package to build such networks. At the same time, beyond intentions, the Member States are running into problems as a result of budgetary constraints in financing the infrastructure identified in the European Parliament and Council Decision on guidelines for the development of the trans-European transport network, particularly the cross-border sections. A framework better adapted to these financing problems is needed to meet the challenges of building this infrastructure. The funds available – especially public funds (including Community funds) – are often poorly coordinated, making them less effective, while private investment remains highly selective and is far from sufficient to meet the funding requirements for building the network".

To promote a new culture of financing of transport infrastructures in Europe, the Commission has recognized the need for a "new approach" because the implication of private capitals requires innovative clauses, such as concession schemes (under which most of the risks are borne by the private investor on the basis of active demand management) or systems enabling private partners to be involved already in the project design phase, such as the the private initiative system or the organisation of opening to competition on the basis of general functional requirements (output specifications).

In its opinion of 20 november 2003 on the Communication from the Commission just mentioned, the Committee of the Regions highlighted the need of an appropriate regulatory framework for public-private partnerships in the TENs to ensure ongoing compliance with the principles of competition.

The Committee thus supported the objective of increasing private investment, but insisted for the Commission striving to prevent monopolistic tendencies by private companies in contracts and projects; supported the introduction of the European Company Statute, but urged people to keep close tabs on the activities of private enterprises in the context of public-private partnership, in order to nip in the bud the violations of competition rules; asked to integrate in the contracts of public-private partnership sustainable policies in the field of construction; invited the Commission to express in clear terms of policy about the fiscal implications of the various tax regimes applicable to the private companies participating in the PPPs (given that the undertakings concerned to participate in a PPP could turn their attention to the States with a more favourable tax regime, this would have been detrimental to the development of PPPs in the TENs at all, so that regional and local would not have had adequate access to private sector enterprises); recognized that the reluctance of private investors to expose themselves to the risks arising from participation in projects in the public transport sector could encourage the use of PPPs; also recognized the legitimate concerns by the public sector in relation both to the risks exposure arising from the participation in a public-private project, and to the extent of loss of control on large infrastructure projects that PPPs can sometimes bring about; finally urged the Commission to publish as soon as possible the Green Paper on public-private partnerships and to ensure that funding schemes incentivize from the outset of the project the use of mechanisms for calculating costs that take into account the entire life cycle of the work.

[305] See White Paper on "Growth, Competitiveness and Employment - The Challenges and Ways Forward into the twenty-first century", COM (93) 700 1993, *passim*, in particular pp. 29-30, 68-69, 76-77.

- between the European Union and the Member States (art. 5 TEU), given that the general framework is up to the former whilst going into detail lies within the others;
- between the public administration and private subjects (art. 118 Cost.) – *rectius*: between authority and liberty – because the ultimate goal is the synergy and coordination of their respective competences;
- between State and Market, as the ratio between the two spheres of intervention – always very fluid and extremely heterogeneous, depending on the context of space-time – has radically changed in recent years due to the progressive neoliberal turn that has now relegated the State, no more actor, as a mere regulator and controller of the Market.

So the European Union develops a pragmatic approach (*pragmatic joint approach*) intended to carry out projects in an integrated manner; and goes even further wanting to say that such an integration must be extended to all the stakeholders – that is to say public administrations (supranational, national, and local), enterprises (employers and employees), users (consumers and community) – since their roles are complementary in order to ensure the correct functioning of the internal market, the strengthening of the competitiveness and the promotion of economic growth as well as of economic and social cohesion.[306]

§1.4.2. The removal of the obstacles to PPP: Efficiency

A second set of reasons must be then identified in the progressive surfacing of the limited compatibility between the Community legislation and the scheme of the PPPs.

[306] See White Paper on "Growth, Competitiveness and Employment - The Challenges and Ways Forward into the twenty-first century", COM (93) 700, 1993, p. 96: "The changeover towards an information society is a very complex process requiring new forms of partnership and cooperation between the public and private sectors. In the measures proposed below, the principle of subsidiarity must be applied fully between the private sector and the public authorities and also between the Community authorities and the national administrations".

To this end, the European Commission stressed the importance of information technology and communication (ICT) and the training of professionals in the areas of interest (environment, energy, transport, leisure, arts, sports and assistance).

The considerations exposed above were confirmed by the Economic and Social Committee: reference is made, for example, to the opinions on the "Communication from the Commission to the Council and the European Parliament: Connecting the Union's transport infrastructure network to its neighbours - towards a cooperative pan-European transport network policy" (98/C 129/19) and on the "Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships in Trans-European Transport Network projects" (98/C 129/14).

On the topic of subsidiarity as the foundation of the PPPs, see Rizzo G., *La concessione di servizi*, Giappichelli, Torino, 2012, p. 85 ss.

This consideration emerges clearly ever since the Commission Green Paper on "Public Procurement in the European Union - Exploring the Way Forward", COM (96) 583, adopted on 27 november 1996 by proposal of the Commissioner Monti.

Therefore, if earlier the main focus was on finding an alternative solution to the solely public financing of the European public infrastructures, now the predominant task is that of understanding how to implement it.

The emphasized importance of private funding, as part of the efforts to increase investments in TEN infrastructures, has thus led the European Union to hearken unto the private sector organizations willing to invest risk capitals in the TEN projects on condition of overcome a number of obstacles still remaining.

It was, in essence, about finding ways to remove the obstacles to the private financing of TENs, which denoted a certain slowness of development compared with the Community's forecasts.

The obstacles, besides the difficulty of ensuring an acceptable return, consisted in the problem of non-commercial risks associated with the change of policy on the part of public authorities and also in the application of Community rules on public procurement, considered in some cases to be impediments to the participation of the private sector.[307]

Especially this latter was indicated by private parties as a limit of great importance, which prevented them from fulfilling the task of bring the necessary technical innovation and ensure the financial viability of projects.

Despite the initial rejection of such an assertion – since the ultimate goal of the EU Directives on public procurement is to create the conditions necessary to promote a fair and open competition and facilitate, surely not hinder, the participation of the private sector[308]–,

[307] In the Opinion of the Economic and Social Committee on the "Strengthening of the law governing concessions and public/private partnership (PPP) contracts" (2001/C 14/19) are counted the same legal and economic obstacles: refer in particular to the pt. 2.2.

[308] Cf. pt. 5.21 of the Commission's Green Paper on "Public Procurement in the European Union - Exploring the Way Forward", COM (96) 583: "The ultimate objective of the Community's public procurement directives is to achieve fair and open competition for procurement contracts in the internal market. Their aim is to facilitate and not to obstruct private sector involvement in projects. The Commission believes that the Community public procurement rules can facilitate private sector participation in Trans-European Networks, without any need, at this stage, to amend the existing legal framework".

Specifically, the problems reported by companies were related to the phase preceding the invitations to tender (reluctance of the private sector to engage in any kind of study or discussion prior to the publication of the notice, without the assurance of not being subsequently excluded from the contract award procedures), the allocation of concessions to consortia (which, by participating at their own risk, wanted to submit bids for concessions knowing that they could enter into contracts with their partners for the necessary supplies or services and works) and the negotiated procedure (if with the notice, general procedure only in special

the Commission has, however, found it helpful to clarify that discipline and to examine, with interested parties, the problems in order to remove all obstacles to the collaboration between the public and private sectors.

This is partly due to the contribution of the Economic and Social Committee that with its opinion on the Green Paper of 1996 has invited the EU to "*an overall and long-term assessment to be made of what should be the true objectives of a European public procurement policy. Such an assessment must therefore be very open and unrestricted. Such an assessment must also take account of the evolution in practice of markets and contractual procedures in Europe, especially as part of the growth in private funding of public facilities*".[309]

Invitation that the Committee repeats within its conclusions, where urges the Commission to promote new contractual arrangements based on the private investment in public infrastructures.

Worthy of note is without a doubt the emphasis placed on the superindividual implications always underlying the award of a public contract.[310]

The subject of discussion is the notion of "*good public procurement management*", notion about which the approach should be changing in favour of "*life cycle assessment*" and "*whole life costing*".[311]

From the profile of mere economic convenience by the winner's bid in the competition we are moving progressively toward a 360-degree assessment of the projects, involving also the populations, which in any case will be the final recipients of the benefits or drawbacks, depending on the outcome.[312]

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sectors, while as far as it concerned the classic ones was possible to make use of the negotiated procedure – with or without notice – only in very specific and exhaustively listed cases).

In Italy can be noted a poor translation: the reference is to be understood to public procurement in general, *id est* concessions and public contracts (not only to these latter). The original title of the Green Paper "Public Procurement in the European Union" concerns both the public contracts and the concessions.

[309] See ptt. 1.1-1.2 of the Opinion of the Economic and Social Committee on the Green Paper entitled Public procurement in the European Union: Exploring the way forward (97/C 287/20).

[310] Cf. pt. 2.3 pt. 2.3 *ibid*.: "The ESC also thinks it a pity that there is no real debate on the impact of good public procurement management. The ESC would like the Commission to study more closely the impact over time of EU rules in terms of competitiveness, budget savings, jobs and the quality of work done and services provided".

[311] Cf. pt. 2.4 *ibid*.: "The yardstick of price is not sufficient. Other factors may be involved: quality, respect for deadlines, environmental protection, workability, safety, in short the overall cost of operations in the long term".

[312] Cf. pt. 2.5 *ibid*.: "In some member states bids are tending to become abnormally low. This situation is bad for all concerned. It is society as a whole that eventually has to bear all the consequences:

Nonetheless, even besides the clarifications and the corrections aimed at removing the obstacles inherent to the PPPs, the Community legislation on public procurement had (and still has: v. *supra*) some shortcomings in relation to which it is not enough to remove but it is rather necessary to develop and integrate.[313]

§1.4.3. The improvement of PPP: Efficacy

The third and last stage, once identified the PPPs as ideal solution and recognized the possible extant obstacles, it resides in the implementation of appropriate tools.

The momentum of this phase is given by the Communication from the Commission "Public procurement in the European Union" COM(1998) 143 final, Brussels, 11.03.1998 and from the observation that "*the current legal framework does not exist for its own sake but in order to attain the benefits of the single market in the area of public procurement. Rules, policy and enforcement should follow reality rather than the other way round*".[314]

From one side, it can be seen the establishment and simplification of more flexible procedures, especially the competitive dialogue[315] – to avoid dysfunctions in the awarding.

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faulty building work, company failures and higher prices due to contract supplements or the extra work made necessary. Such practices also distort competition between firms and endanger working conditions and jobs. A european public procurement policy today cannot ignore this problem and must try and find solutions to it".

[313] See pt. 3.8 of the same opinion, in which the Committee asked the Commission to reconsider its approach about concessions to make them more autonomous with respect to the definition of works contract: "The question of concessions should also be examined in depth, given that their award must be transparent and subject to objective criteria. *There are fundamental differences between a concession and a contract: object, duration, terms for financing, management methods and the extent of liability*. To encourage the spread of such contracts the Commission could study what form of legal tool should be used for their implementation" (emphasis added: reference can be made to what precedes, Part I *supra*).

[314] Again a mistake in the italian translation: the reference is meant to public procurement in general.

By the way, aware of the significant changes that have occurred since the publication of the first Directives in the '70s, the Commission feels the need to give a new orientation to its policy by improving the legal framework, simplifying the complexity of the legislation and introducing more flexible procedures.

[315] The introduction of the competitive dialogue at Community level was characterized by a troubled, to say the least, journey. In the above-mentioned Communication of 1998, COM(1998) 143, pt. 2.1.2.2, the Commission noted that "especially in the case of particularly complex contracts in areas that are constantly changing, such as high technology, purchasers are well aware of their needs but do not know in advance what is the best technical solution for satisfying those needs. Discussion of the contract and dialogue between purchasers and suppliers are therefore necessary in such cases. But the standard procedures laid down by the "traditional" Directives leave very little scope for discussion during the award of contracts and are therefore regarded as lacking in flexibility in situations of this type.

The Commission will therefore propose amendments to the existing texts of the Directives with a view to making procedures more flexible and allowing dialogue in the course of such procedures and not just in exceptional circumstances. It will propose a new standard procedure, the competitive dialogue, which would operate alongside open and restricted procedures and would replace the existing negotiated procedure with prior publication of a notice. The conditions and the rules under which contracting authorities would be allowed to use this new procedure and the details of the procedure itself will have to be spelt out and will be based *inter alia* on the principles of transparency and equal treatment. The only remaining exceptional procedure would then be a direct-agreement procedure, the conditions for the application of which must be construed strictly, in line with the case law of the Court of Justice".

And from the other side, the framing of certain phenomena, such as concessions or public service contracts and the other partnerships between public and private parties (PPPs), in order to reconcile them with the smooth functioning of the internal market.[316]

Beneath a further profile, are discussed the conditions under which environmental[317] and social[318] criteria can be taken into account in public procurement.

But the story of the competitive dialogue had an entirely different course mostly due to a net *revirement* by the Community plexus in the drafting of the Directive n. 18 of 2004: "The initial version of the Directive provided, in fact, in place of the competitive dialogue the use of a "private negotiation" with prior publication of a contract notice. This approach has been criticized in the course of the discussion of the Directive (see in particular the Committee of the Regions in its opinion of 16.05.2001 in OJ C 144/24) and finally replaced in the final version. See in this respect the provisions of the Council's common position in OJ 24.06.2003 C 147 E/132 - Amendment 9, insofar as it provides that: "*The council has not been able to accept this amendment. It has agreed to introduce a new procedure instead of creating a new case for the negotiated procedure with prior publication...*". In doctrine v. R. SCREPANTI - G. PASQUINI *Le procedure: i nuovi strumenti di flessibilità* in *Le nuove direttive europee sugli appalti pubblici* di L. FIORENTINO - C. LACAVA *cit.* 75 ss." (cf. Urbani P.; Passeri L., *Guida al codice dei contratti pubblici* (D.Lgs. 12 aprile 2006, n. 163, D.Lgs. 26 gennaio 2007, n. 6, D.Lgs. 31 luglio 2007, n. 113 e Corte cost. 23 novembre 2007, n. 401), Giappichelli, Torino, 2008, p. 155).

[316] In the mentioned 1998 Communication COM (1998) 143, pt. 2.1.2.4, the Commission dealt with the treatment of concessions and other forms of public-private partnership (PPP) to permit the development of such partnerships while ensuring the compliance with the rules of competition and the fundamental Treaty principles. Being regulated by a Directive only the works concessions, the issue of legal certainty was raised for service concessions, contracts for public services, or other partnerships.

In order to achieve a simplification and a clarification of the applicable rules, the Commission proposed to develop, in a first stage, an interpretative document intended to clarify and specify the rules and principles applicable to concessions and, at a later time, amendments to the EU Directives in order to cover all forms of concession not yet regulated.

In this context, the Commission also proposed to examine other forms of public-private partnership in order to determine to what extent the rules on public contracts were or were not an appropriate regulatory environment to ensure compliance with the provisions of the Treaty while allowing the development of such forms of cooperation. This was to ensure that the choice of partners would have taken place after an open Community-wide competition with a prior publication and the application of a minimum of procedural rules that, in response to a need for flexibility, would have allowed an extensive use of dialogue between stakeholders, respecting, however, the principle of equal treatment. Moreover, taking into account the legitimate concerns expressed by some operators, it would be scheduled for the selected consortium, the ability to directly sign contracts with its partners, provided that the existence of such contracts had been announced during the award procedure.

[317] In the above-mentioned Communication of 1998, pt. 4.3, the Treaty of Amsterdam electing environmental objectives as a priority of the Union, the Commission stressed that the Community law and, in particular, the Directives on public procurement offer many possibilities to consider environmental protection in the public administration purchases, from the definition of the products or services to be purchased (*e.g.* technical specifications, selection and/or award criteria, performance conditions) to the exclusion of candidates. In general, however, the Commission recalled that the aim of public contracts remained essentially economic and that, therefore, it was essential to determine, for each awarding procedure, the environmental elements, related to the products and services requested, to be taken into account.

See "Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement", COM (2001) 274 final, Brussels, 4.7.2001.

[318] In the above-mentioned Communication of 1998, pt. 4.4, the Treaty of Amsterdam erecting, among the priorities, the elimination of inequalities, the need to combat all forms of discrimination and the promotion of equality between men and women, the Commission stated, besides the possibility of including the obligation to comply with the existing labour law – in particular the Community social legislation and that

Takes form the idea that the objective of the optimal use of public money does not exclude a priori to take into account the ecological and social aspects and the consumers protection, provided the compliance with Community law, particularly with the principles of transparency and non-discrimination, as well as with the rules on public procurement.

The social-environmental policy, after the Treaty of Amsterdam, so ends up getting a fundamental importance for the European Union.

It aims, among other things, to obtain a high level of environmental, occupational and social protection, as well as of consumers, for which the realization of a more effective policy in public procurement can have positive effects, in particular through better quality services and more cost effective infrastructures.[319]

Either way, at the conclusion of the Communication *de qua*, the Commission fixed on the calendar 1998, two appointments absolutely worthy of mention: a communication on the concessions and problems associated with the trans-European networks (TENs), which later has become the well-known interpretative communication on concessions under Community law, 29 april 2000 (2000/C 121/02), and a reflection on the problems associated with the different forms of PPP, which came to light following a substitute intervention by the Economic and Social Committee, who has decided to draw up an own-initiative opinion about the "Strengthening of the law governing concessions and public/private partnership (PPP) contracts (2001/C 14/19).[320]

Thus it is closed, for the moment, this quick *excursus* on the historical evolution of public procurement into the EU law.

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of the International Labour Organisation (ILO) – to consider the pursuit of social goals in the public purchases (as a condition for the realization of public contracts awarded, aimed at promoting women's work, or for the protection of certain disadvantaged groups, or for the so-called "positive actions", that is to use a public contract as a means to achieve a certain goal, for example, the establishment of a limited market for production units employing disabled people) and in the exclusion of candidates.

See the Commission's Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement, COM (2001) 566 final, Brussels, 15.10.2001.

[319] In the above-mentioned Communication of 1998, pt. 4.5, the Commission saw the need to take in greater account the consumers in the EU public procurement policy, especially with regard to the promotion of transparency and dialogue with consumers' organizations.

See Alberti C., *Tutela ambientale, politica sociale e appalti: verso uno sviluppo sostenibile del Mercato unico. Primi interventi interpretativi della Commissione Ce*, Rivista trimestrale degli appalti 1: 161-181, 2002 (www.osservatorioappalti.unitn.it).

[320] Both examined in the Chapter I, paragraph §1.2, of Part I (v. *supra*), to which reference should be made.

Chapter II. Sustainable PPP (SPPP)

As we have tried to outline in the sections above, the evolution of public procurement at European level[321], in adherence to the transformation in Union of the plexus *communautaire*, has gradually shifted its focus from the mere market competition to the inclusion of additional instances of economic, social and environmental mold (so-called "three pillars").[322]

And this happened in accordance to a substantially biphasic path in which, to a first reactive phase, mostly to remedy the existing problems and eliminate them (avoiding any discrimination between the Member States during the opening of the single market), followed a proactive phase for the promotion of the general objectives to be achieved in the future through a long term vision soothing the so-called "myopia of the market".[323]

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[321] For an overview of recent developments in public procurement at European level in relation to the revaluation of certain needs of the administrations (such as the social, environmental ones and innovation), needs previously sacrificed in the name of a rigid and exaggerated protection of competition, refer to Cozzio M., "Prime considerazioni sulle proposte di direttive europee in tema di Public Procurement" and D'Aleo E., "La revisione delle direttive sui contratti pubblici: criticità e prospettive", in Cafagno M.; Botto A.; Fidone G.; Bottino G., *Negoziazioni pubbliche. Scritti su concessioni e partenariati pubblico-privati*, Giuffrè, Milano, 2013.

[322] Title XVIII of the TFEU, entitled "Economic, social and territorial cohesion" and consisting of Articles 174-178, makes clear the pursuit of these objectives by both the Union and the Member States.

Already in the Commission Communication "A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development" (Commission's proposal to the Gothenburg European Council) COM (2001) 264 final, Brussels, 15.5.2001, had been recognized that economic growth, social cohesion and environmental protection must go hand in hand with a view to achieve well-being of the society as a whole. To this end, according to the Commission, a new political leadership is necessary to coordinate and involve all the interested parties, public and private (being citizens and businesses, ultimately, that make changes in the patterns of consumption and investment needed to achieve sustainable development).

In order to do so, according to the Commission, we need a more open political process, marked both by a systematic and timely dialogue (in particular with representatives of consumers, the interests of which are often neglected, as well as with third Countries), and investments in science and technology for the future (encouraging innovation can develop new technologies able to use fewer natural resources, reduce pollution or risks to health and safety, and which are less expensive than before).

In doctrine is peacefully received the possibility of considering socio-environmental factors as elements of judgment in the purely economic-political choices. On this subject, please refer to: Arrow K.J., *Political and Economic Evaluation of Social Effects and Externalities*, NBER Chapters, in: The Analysis of Public Output, pages 1-30, National Bureau of Economic Research, Inc., 1970; Arrow K.J.; Cropper M.L.; Eads G.C.; Hahn R.W.; Lave L.B.; Noll R.G.; Portney P.R., Russell M.; Schmalensee R.; Smith V.K.; Stavins R.N., *Is There a Role for Benefit-Cost Analysis in Environmental, Health, and Safety Regulation?*, American Association for the Advancement of Science 272: 221-222, 1996; Arrow K.J.; Cropper M.L.; Eads G.C.; Hahn R.W.; Lave L.B.; Noll R.G.; Portney P.R., Russell M.; Schmalensee R.; Smith V.K.; Stavins R.N., *Benefit-Cost Analysis in Environmental, Health, and Safety Regulation: A Statement of Principles*, American Enterprise Institute, The Annapolis Center, and Resources for the Future, 1996; Arrow K.J.; Amartya K.S.; Kotaro S., *Handbook of Social Choice and Welfare*, vol. I, North-Holland, 2002.

[323] The apogee has definitely coincided with the Green Paper on the modernization of EU public procurement, opened with a public consultation in january 2011, by which the European Union has launched a review of the EU public procurement to increase its efficiency and effectiveness (closely intertwined with the objectives of the Europe 2020 Strategy).

The basic idea is that the *best price* does not always mean the *best cost*.

The market *as a limit* (*i.e.* the negotiated terms or conditions of performance must comply with Community law and in particular shall not discriminate directly or indirectly against non-national tenderers) leaves room to the market *as an opportunity* for innovation and increased consideration of the economic, social and environmental issues.[324]

To this end, becomes absolutely imperative the concept of sustainable development and its close connection with public transactions, in particular with the PPPs.

It is customary to speak of "*Sustainable Public Private Partnership*" (SPPP) and of "*Sustainable Public Procurement*" (SPP).[325]

And not just in relation to the substantive terms (*i.e*. the actual consideration of non purely economic matters), but above all to the procedural ones (*i.e*. the involvement of all the stakeholders correlated).[326]

Losada F., *The Green Paper on the modernization of public procurement policy of the EU: Towards a socially-concerned market or towards a market-oriented society?*, Oñati Socio-legal Series 2(4), 2012, p. 73, realizes that "The Green Paper creates a link between some of the social objectives of the Europe 2020 strategy and public procurement in such a way that their promotion comes from using the purchasing power of Member States "to procure goods and services with higher 'societal' value in terms of fostering innovation, respecting the environment and fighting climate change, reducing energy consumption, improving employment, public health and social conditions, and promoting equality while improving inclusion of disadvantaged groups" (European Commission 2011, p. 33-34). How are these political objectives translated into the technical terminology required to de-politicize them and thus avoid the risk s inherent to politics? The Green Paper proposes two different strategies, basically related to "how to buy" and "what to buy". The former establishes some procedural requirements guaranteeing a certain degree of social or environmental protection, while the latter grants such protection via substantive requirements, *i.e.* through the way the works, services or supplies to be hired protect such issues. In any case, both procedural and substantive requirements imposed by public authorities in order to foster some environmental or social protection cannot mean that the state aid rules (articles 107 to 109 TFEU) are somehow not observed".

[324] Cf. Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions "Pre-commercial Procurement: Driving innovation to ensure sustainable and high quality public services in Europe" COM (2007) 799 final, Brussels, 14.12.2007: "The public sector in the EU, as elsewhere in the world, is faced with important societal challenges. These include ensuring high quality affordable health care to cope with the impacts of an ageing population, the fight against climate change, improving energy efficiency, ensuring higher quality and better access to education, and more effective dealing with security threats.

Addressing such challenges can require new and better solutions. New equipment will be needed e.g. to perform cutting-edge medical research, undertaking early diagnosis of diseases and finding new treatments, to reduce energy consumption in buildings and public transport, to protect citizens from security threats without intruding on their privacy. Some of the required improvements are so technologically demanding that either no commercially stable solution exists yet on the market, or existing solutions exhibit shortcomings which require new R&D. By developing forward looking procurement strategies that include R&D procurement to develop new solutions that address these challenges, the public sector can have a significant impact on the mid to long term efficiency and effectiveness of public services as well as on the innovation performance and the competitiveness of European industry".

[325] On the point see Dragos D.; Neamtu B., *Sustainable Public Procurement: Life Cycle Costing (LCC) in the New EU Directive Proposal*, European Public-private Partnership Law Review 1: 19, 2013.

In summary, it is necessary to improve communication and mobilize citizens and businesses.

The main challenges for sustainable development, indeed, require a comprehensive and cross-sectoral approach. The concrete actions in specific areas must be based on the mentioned principles of economy, efficiency, effectiveness and the EU policies should aim at maximizing the contribution they provide to the strategic objectives.

§2.1. The strategic use of public procurement

In all new public procurement directives adopted in 2014 is present this recital[327]: *Public procurement plays a key role in the Europe 2020 strategy, set out in the Commission Communication of 3 March 2010 entitled 'Europe 2020, a strategy for smart, sustainable and inclusive growth' ('Europe 2020 strategy for smart, sustainable and inclusive growth'), as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council and Directive 2004/18/EC of the European*

[326] See Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions "Public procurement for a better environment", COM (2008) 400 final, Brussels, 16.7.2008 as well as Communication from the Commission "Europe 2020. A strategy for smart, sustainable and inclusive growth" COM (2010) 2020 final, Brussels, 3.3.2010.

Finally see the proposal for a Decision of the European Parliament and of the Council on a General Union Environment Action Programme to 2020 "Living well, within the limits of our planet", Brussels, 29.11.2012 COM (2012) 710 final 2012/0337 (COD), then merged in the Decision No. 1386/2013/UE of the European Parliament and of the Council of 20 november 2013, by which it was adopted a general program of EU action in the field of environment for the period until 31 december 2020 ("Seventh Environment Action Programme" or "7th EAP"). In particular, at art. 3, has been determined that the Union and the Member States are responsible – according to the principles of conferral, subsidiarity and proportionality – for the adoption of appropriate actions for the purpose of achieving the objectives established in the 7th EAP and that the public authorities at all levels implement the 7th EAP in partnership with economic operators, the social partners, representatives of civil society and private citizens.

[327] Cf. recital n. 2 of the Directive 24, n. 4 of the Directive 25 on procurement in the utilities sectors, and n. 3 of the Directive 23 on concessions.

Like to point out – not for a mere question of translation, but rather of science of translation – that in the English text appears the expression "public procurement" erroneously translated, as repeatedly stated, in Italy as "appalti pubblici" which stands for "public contracts". The reason is simple: by using that translation are excluded above all the concessions, what leads to the paradox if you think about the Directive on them.

Recital n. 95 (see also 123) of the Directive n. 24 as the n. 100 (see also 129) of the Directive n. 25 stress the importance of public procurement in order to achieve the objectives of the Europe 2020 strategy for smart, sustainable and inclusive economy.

On the topic can be found in Cozzio M., "Prime considerazioni sulle proposte di direttive europee in tema di Public Procurement" and D'Aleo E., "La revisione delle direttive sui contratti pubblici: criticità e prospettive", in Cafagno M.; Botto A.; Fidone G.; Bottino G., *Negoziazioni pubbliche. Scritti su concessioni e partenariati pubblico-privati*, Giuffrè, Milano, 2013.

Parliament and of the Council should be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement, and to enable procurers to make better use of public procurement in support of common societal goals. There is also a need to clarify basic notions and concepts to ensure legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.

The crystallization of the strategic use of public contracts and concessions confirms the foregoing and indeed, if ever there was the need, amplifies the strong political connotation assumed by the public procurement at European level.

Concerning the environmental component, the most obvious reference is to the cd. "*Green Public Procurement*" (GPP).[328]

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[328] See "Interpretative Communication of the Commission on the Community law on public procurement and the possibilities for integrating environmental considerations into public procurement", COM (2001) 274 final, Brussels, 4.7.2001.

The above-mentioned Communication COM (2008) 400 defines the Green Public Procurement (GPP) as "a process whereby public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life cycle when compared to goods, services and works with the same primary function that would otherwise be procured".

Here, too, it is worth remembering – as also pointed out by the Communication itself – that GPP refers both to public contracts and concessions, without distinction of any kind, and in general to all public contracts both above and below EU threshold. Suffice to say that among the areas, in respect of which were enucleated the GPP criteria, there are buildings, transport, and energy: areas usually covered by concessions.

On this subject, refer to Spagnuolo F., *Il green public procurement e la minimizzazione dell'impatto ambientale nelle politiche di acquisto della pubblica amministrazione*, Rivista Italiana di Diritto Pubblico Comunitario 2: 397, 2006; Gaverini F., *Attività contrattuale della p.a. e protezione dell'ambiente: gli appalti verdi*, Rivista Giuridica dell'Edilizia 5-6: 153, 2009; Appolloni A.; D'Amato A.; Wenjuan C., *Is Public Procurement Going Green? Experiences and Open Issues*, 2011; Colosimo C., "L'oggetto del contratto, tra tutela della concorrenza e pubblico interesse" in Comporti G.D., *Le gare pubbliche: il futuro di un modello*, Editoriale Scientifica, Napoli, 2011; Antonioli M., *Consensualità e tutela ambientale fra transazioni «globali» e accordi di programma*, Diritto Amministrativo 4: 749, 2012; Fidone G., *Gli appalti verdi all'alba delle nuove direttive: verso modelli più flessibili orientati a scelte eco-efficienti*, Rivista Italiana di Diritto Pubblico Comunitario 5: 819, 2012; Cucuzza G., *La strategia europea per lo sviluppo sostenibile e gli acquisiti pubblici verdi*, XL Meeting of Study of the Ce.S.E.T.: 203-211, Firenze University Press (www.fupress.com/ceset), 2013; Clarich M.; Fidone G., *La considerazione di variabili ambientali nella scelta del contraente (i cd. appalti verdi)*, relation at the conference "Il diritto degli appalti pubblici all'alba delle nuove direttive comunitarie" at the Chamber of Deputies, Rome, 15 november 2013; Kunzlik P., *Green Public Procurement - European Law, Environmental Standards and 'What To Buy' Decisions*, Journal of Environmental Law, Oxford University Press, 2013.

In particular, on the voluntary nature of GPP, see Bratt C.; Hallstedt S.; Robèrt K.-H.; Broman G.; Oldmark J., *Assessment of criteria development for public procurement from a strategic sustainability perspective*, Journal of Cleaner Production 52: 309-316, 2013: "Being a market-based instrument, GPP is intended to provide incentives for both procurers and suppliers to change their decisions and product portfolios on a voluntarily basis. The GPP is a policy instrument that aims at encouraging the use of increasingly effective environmental requirements in public procurement. Its potential lies in that suppliers and supply chains are given incentives to gradually and innovatively move the production in a direction that can be foreseen with regards to communicated requirements".

More generally, however, the principle of integration laid down in Article 11 TFEU (ex Article 6 TEC), provides that the requirements associated with the environmental protection should be integrated into the definition and implementation of policies and actions of the Union, in particular with a view to promoting sustainable development.[329]

With reference to social issues – besides pointing out that the TFEU contains a specific title on social policy, the X (artt. 151-161) – it is sufficient to note that the EU is engaged on several fronts: some actions are targeted at implementing the European potential for full employment through improved quantity and quality of employment, providing and managing change and adapting to the new working environment, exploiting the potential of the knowledge and promoting mobility; others are based on modernizing and improving social protection, promoting social inclusion, strengthening gender equality and fundamental rights and the fight against discrimination; there are also initiatives to prepare for enlargement and to the promotion of international cooperation, which aim at ensuring that social dialogue can contribute to meet the various challenges that will arise.[330]

The authors show that the substantial failure of GPP is due to numerous factors, in some cases, endogenous (inability of the public administration), in some others exogenous (fear of complaints): "However, several studies point to the uptake of green procurement being slow and that innovative solutions are weakly supported by public procurement (Foray et al., 2011; Centre for European Policy Studies, 2012). Acquisitions cost is still the predominant criterion for awarding public contracts and the EU target of having 50% of all public tendering procedures green by 2010 has not been met (Centre for European Policy Studies, 2012). Public procurers still tend to stick to past practices (Palmujoki et al., 2010) and in a recent study of construction contracts in Sweden it was shown that environmental evaluation criteria are rare, and if they exist, they seldom seem to affect the outcome of the evaluation (Varnäs et al., 2009). Suggested reasons for the slow implementation of GPP in general are lack of top level support and thus legitimacy, lack of individual commitment and competence, internal incapacity to see long-term costs instead of only the purchasing price, unclear, complex legislation, fear of appeal by suppliers who did not win the contract, and also a desire to simplify the tendering procedure (Walker et al., 2008; PricewaterhouseCoopers et al., 2009; Varnäs et al., 2009; Palmujoki et al., 2010; Swedish Environmental Protection Agency, 2010). Moreover, procurement is rarely used as a support and driver of innovation and value creation (Foray et al., 2011). According to Preuss (2005) and Meehan and Bryde (2011), there is, above all, a discrepancy between rhetoric in corporate policy statements and missions and the organizational reality of supply chain management and procurement practices".

About the limits of GPP see also Marklund P.-O.; Lundberg S.; Brännlund R., *Assessment of Green Public Procurement as a Policy Tool: Cost-efficiency and Competition Considerations*, 2009.

For an empirical analysis of the phenomenon within the EU, it should be read Centre for European Policy Studies (CEPS) and College of Europe, *The uptake of Green Public Procurement in the EU27*, submitted to the European Commission, DG Environment, Brussels, 2012.

[329] Given that the TFEU dedicates to the environment the Title XX (Articles 191-193), must be said that the new European Directives on procurement, to recitals 91 (Dir. n. 24) and 96 (Dir. n. 25) recall specifically art. 11 TFEU stating that the contracting authorities contribute to the environmental protection and promotion of sustainable development for their contracts by getting the best quality/price ratio.

[330] See White Paper on Social Policy - A Way Forward for the Union COM (94) 333 final, 27 july 1994, where it is stated *expressis verbis* that "Europe needs a blueprint for the management of change", Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions "Agenda for Social Policy", COM (2000) 379 final, Brussels,

For the purposes of consideration of social and environmental issues into a public contract, it is important to highlight the problem of risks associated with the different variables descending from the decision of the public administration to give recognition to this or that element which affects the realization of the public purchasing.

At the stage concerning the choice of the contractual object the administration is in fact free to take into consideration environmental and social aspects, choosing a product or service respondent to its objectives; whether and to what extent this is realized in practice depends on the level of awareness and knowledge by the administration.[331]

28.6.2000, and the Commission's Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement, COM (2001) 566 final, Brussels, 15.10.2001.

The administration has a wide range of possibilities for the definition of contractual clauses on social matters in the execution of the contract, such as, for example, the obligation to hire the unemployed, particularly the long-term, or to implement training for unemployed young people or for the performance of the service; the obligation to implement measures to promote equal opportunities between men and women or ethnic or racial diversity; the obligation to comply with the provisions of the ILO conventions on the place of performance of the obligation; the obligation to recruit a number of people with disabilities larger than required by the national legislation of the Member State in which takes place the performance of the contract or by that of the contract holder.

With specific reference to Italy, can be reported the Ministerial Decree (MATTM) 6 june 2012, "Guide for integrating social considerations into public procurement", where there is an interesting procedure of structured dialogue ("dialogo strutturato" - pt. 3) for the social criteria, that, in compliance with art. 154 of the TFEU, provides for the construction of a process of facilitation between the contracting authority and its suppliers, through which the size of social responsibility within the field of public procurement grows.

The structured dialogue aims at the objectives of improving knowledge relating to working conditions and respect for human rights all along the supply chain, to convey signals of attention on social standards along the same chain, and to allow monitoring of the application of social criteria, including the activation of any corrective mechanisms in case of non-compliance.

Here, again, it is worth remembering that the category refers to public contracts as to concessions, without distinction of any kind, and in general to all public contracts.

For a historical reconstruction on the evolution of the social item and the related inclusion in the activities of public institutions by virtue of the relationship of interdependence between the economic and the social dimension in the process of European integration and unification of the market, refer to Alberti C., *Tutela ambientale, politica sociale e appalti: verso uno sviluppo sostenibile del Mercato unico. Primi interventi interpretativi della Commissione Ce*, Rivista trimestrale degli appalti 1: 161-181, 2002 (www.osservatorioappalti.unitn.it); McCrudden C., *Using public procurement to achieve social outcomes*, Natural Resources Forum 28: 257-267, 2004; Cerbo P., *La scelta del contraente negli appalti pubblici fra concorrenza e tutela della «dignità umana»*, Foro Amministrativo T.A.R. 5: 1875, 2010.

[331] The new EU legal framework for public procurement contracts further helped to clarify the ways whereby public purchasers can include environmental and social considerations into their procedures in the name of the EU strategy for sustainable development that combines economic growth, social progress and environmental protection.

To date, all the three new EU Directives contain general principle provisions which require the Member States to take appropriate measures to ensure that economic operators comply with the obligations relating to the environmental, social and labour obligations laid down by Union as well as national law, collective agreements or by the international provisions of environmental, social and labour law: refer to art. 18, para. 2, of the Directive n. 24, equivalent to art. 36, para. 2, of the Directive n. 25, as well as art. 30, para. 3, of the Directive n. 23, to which add the recitals 37 (Dir. n. 24), 52 (Dir. n. 25), 55 (Dir. n. 23) on the adequate integration of environmental, social and labour requirements in public procurement procedures; recitals 39 (Dir. n. 24), 54 (Dir. n. 25), 57 (Dir. n. 23) on the implementation of the obligations in the field of

Although *ictu oculi* this brief overview on the strategic use of public procurement may seem redundant, the purpose of the same is not sterile at all.

Just think about the problem of complex contracts: being characterized by uncertainty and non-trivial risks (unlike the purchase of mass-produced goods in series), such contracts – incomplete by their nature – have at least two orders of criticality.

The first stems from the fact that they are very often based on *output* (not *input*), with the result that both on the demand side and supply side still remains a huge scope for modeling the bid and to assess its merit.

The second, which follows from the first one, can be found in the dynamics of the relationship in place: if we detect the fluidity of the contractual object (and related risks) already into the bidding and award stage, during the execution phase the risk and volatility of the performances negotiated are even more accentuated.

Could therefore coexist several and different private proposals in response to the needs of the public purchaser: how to evaluate the cost/benefit ratio, that is to say the risks, and on who they should fall?

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environmental, labour and social law into contractual clauses; recitals 40 (Dir. n. 24), 55 (Dir. n. 25), 58 (Dir. n. 23) on the vigilance regarding compliance with the provisions of environmental, social and labour law; recitals 41 (Dir. n. 24), 56 (Dir. n. 25), 59 (Dir. n. 23) on the allowance by the Directives for application of measures necessary to protect public morality and security, health, human and animal life, or the preservation of plants or other environmental measures, particularly in the perspective of sustainable development, provided that such measures are compatible with the TFEU.

As it is known, the general stages of procedure suitable to host instances of socio-environmental or social nature can be:

- the definition of the object (in Italy art. 2 of Legislative Decree n. 163/2006 states that the principle of cost-effectiveness can be, to the extent that it is expressly permitted, subordinated to criteria inspired by social needs, as well as the protection of health and environment and the promotion of sustainable development);
- the definition of the requirements and the technical or functional specifications, which should allow the opening of public procurement to competition as well as the achievement of the objectives of sustainability and accessibility: see recitals 74-76 (Dir. n. 24), 83-84 (Dir. n. 25), as well as art. 36 of the Directive on concessions (Dir. n. 23); in particular, for eco-labeling cf. recital 75, art. 43-44 (Dir. n. 24), equivalent to recital 85 and art. 61-62 (Dir. n. 25); for environmental management systems cf. recital 88 and art. 62 (Dir. n. 24), equivalent to recital 93 and art. 81 (Dir. n. 25);
- the definition of award criteria and/or performance conditions including environmental, social or innovation-related issues concerning the works, supplies or services at any stage of their life cycles: cf. recitals 92, 93, 94, 97, 98, 99 and art. 67, 70 (Dir. n. 24), recitals 97, 98, 99, 102, 103, 104 and art. 82, 87 (Dir. n. 25), as well as recitals 64, 65, 66, 73 and art. 36, 41 (Dir. n. 23).

However, the condition of a connection with the object excludes contractual criteria and conditions relating to the general business policy, which can not be considered as a factor that characterizes the specific process of production or provision of the works, supplies or services being purchased.

It remains to show that the compliance with the obligations in the field of environmental, social and labour law imposed on the contractor extends to its subcontractors: cf. recital 105 and art. 71 (Dir. n. 24), recital 110 and art. 88 (Dir. n. 25), as well as recital 72 (Dir. n. 23).

Both parties, be them public or private, present information gaps as they can not know precisely what will happen in the future and, for that reason, must rely on the expertise of others in a spirit of mutual trust.[332]

Otherwise there is the risk of not to reach appropriate solutions that meet the functional needs of the public administration, and this not only from the technical point (*i.e.* quality of performance), as economic and financial view (*i.e.* adherence to the costs agreed in the contract), but also from the logistical one (*i.e.* respect of the times and places).

In order to mitigate and avoid these problems, the public procurement procedures have gradually developed an approach at the same time elastic and comprehensive, moving away from the purely mercantile matrix that had originated them.[333]

So has emerged the awareness that the invisible hand of the market can not function *per se* in the context of public procurement, having to be incorporated further instances that can not be neglected under any circumstances.

The simple rule that the administration shall specify a set of criteria to be met – operation in which it maintains a certain degree of freedom, while still holding the direct relationship between the subject matter of the contract and the award criteria – sees as an essential prerequisite the economic advantage, brought about by competition, to the contracting authority.

The *punctum dolens* lies in the restricted consideration about the recipient of the economic advantage, having to point out that the public body is established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character (borrowing the definition of "bodies governed by public law").

It follows, in some ways, the incompatibility of a markedly liberal vision with the public nature of the customer.[334]

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[332] The cd. "atmosphere" mentioned by O. E. Williamson: cf. "Mercati e gerarchie", p. 182 ss., in Nacamulli R.C.D.; Rugiadini A., *Organizzazione e mercato*, Il Mulino, Bologna, 1985.

[333] We are now far from the *Beentjes* judgment of 20.9.1988, C-31/87, in which the Court of Justice had stated that in order to achieve the objectives of the EU Directives, which is to ensure the development of effective competition in the field of public works contracts, the main interest is subtended to the principle of equal treatment of all tenderers.

For the Court, however, had any clause required the contractor, for the execution of a works contract, to employ a certain number or percentage of long-term unemployed or young apprentices, without imposing unemployed or apprentices in a given region or connected to a national institution, the clause would not in themselves constitute discrimination against tenderers from other Member States.

[334] A certain doctrine – cf. Edquist C.; Hommen L., "Public technology procurement and innovation theory", in Edquist et al., *Public Technology Procurement and Innovation*, Kluwer Academic Publishers (2000) – distinguishes between *Direct Procurement* (based on the intrinsic needs within the organization),

It is right there, in the public nature of the client, that lies the peculiarity of public procurement: the objective of *par condicio* can not stifle the other instances of which public bodies are innately bearers.

More than the economic benefit for the public administration in the absence of discrimination, the aim should be the prohibition of discrimination based both on economic or non-economic considerations.[335]

This means that the real goal is to get the best result for the communities, involving them in the administrative activity and representing effectively their instances.[336]

This also means to let the general interests, the same as the Europe 2020 Strategy, enter inside of public procurement and, consequently, to shape the procedures in order to obtain solutions of the type "*triple win*".

The most striking implication of these devices is certainly not the result of a petty demagogy, but rather stems from the already mentioned finding that the best price does not always correspond to the best cost, assertion that is well suited to the cases in the news that have come to the fore (just think about the movement "*No-Tav*" in Italy and France, or to the group "*Keep Hasankeyf Alive*" against the Ilisu dam in Turkish Kurdistan).

Cooperative Procurement (based on shared needs among users of the public and private sector), and *Catalytic Procurement* (based on the needs of other end users external to the organization). Please refer to Hommen L.; Rolfstam M., *Public procurement and innovation: towards a taxonomy*, Journal of public procurement 9(1): 17-56, 2009.

This distinction, although relating to public procurement in technology, does not seem to consider the immanence of the public interest – in the sense of the community, not only of the public administration – as an indefectible element of the administrative *agere*.

[335] See Case C-380/98, 3.10.2000, *University of Cambridge*, paragraph 17 – in which the Court refers to the judgments in Case C-44/96, 15.1.1998, *Mannesmann*, paragraph 33, and Case C-360/96, 10.11.1998, *BFI Holding*, paragraphs 42 and 43 – and Case C-237/99, 1.2.2001, *Commission vs. French Republic*, paragraphs 41 and 42, where the Court of Justice stressed that the EU Directives' aim is to avoid the risk that the national tenderers or applicants are preferred in the allocation of contracts by contracting authorities as well as the possibility that a body financed or controlled by State, local authorities or by other bodies governed by public law could be guided in their decisions by non-economic considerations.

[336] In addition to citing the famous decision of 17 september 2002 in Case C-513/99 *Concordia Bus*, about ecological criteria (allowed as long as connected with the subject of the contract, expressly mentioned in the *lex specialis* for tender and respectful of all the fundamental principles of Community law and, particularly, the principle of non-discrimination) – in which the Court, while stigmatizing an unrestricted freedom of choice on the part of the contracting authority, stated that the principle of equal treatment shall not prevent to take into consideration criteria related to environmental protection for the mere fact that the transport company owned by the contracting authority is among the few companies that have the ability to offer a bus fleet satisfying those criteria – it is only right to point out the Union *revirement* in relation to the "Reserved contracts".

Despite the initial attitude of closure according to which quotas of contracts reserved for certain categories of suppliers would be incompatible with the public procurement Directives, the new EU Directives continue the process already started by the precedents in 2004 (first codification of reserved contracts): cf. recitals 36, 93, 98-99 as art. 20 and 76 for ordinary sectors (Dir. n. 24); recitals 51, 88, 103-104 as art. 38 and 93 for utilities (Dir. n. 25); recitals 65-66 and art. 24 for concessions reserved (Dir. n. 23).

After all, it seems unreasonable to measure the feasibility of a transaction, *a fortiori* if public, forgetting to calculate the additional costs of the socio-environmental externalities and the protests of the people (even wanting to leave out the "*nimby*" syndrome, it is undeniable that the possible delays and unforeseen events caused in course of execution represent operational risks of which you can not omit the assessment if you want to have a realistic estimate of the costs of implementation.

§2.2. Innovation and Total life cycle cost (TLCC)

Beside the strategic use of public procurement as just outlined there is another one.

That is the incentive for technological development in general and in particular the so-called "*eco-innovation*".[337]

[337] The term "tecnologia ambientale" (*Environmental Technology*) means any technology designed to avoid or reduce the environmental impact at all stages of the life cycle of products and activities.

Innovation is the cornerstone of the EU strategy to promote growth and create jobs by 2020.

As it is apparent from EIO and CfSD, *Eco-Innovate! A guide to eco-innovation for SMEs and business coaches*, Eco-Innovation Observatory, funded by the European Commission, DG Environment, Brussels, 2013, EU countries will have to invest, by 2020, 3% of GDP in R&D (1% of public funding, 2% of private investment) with the goal of creating 3.7 million jobs and achieve an annual increase in GDP of around € 800 billions.

Art. 173 (ex Article 157 TEC) of Title XVII of the TFEU, dedicated to the industry, provides that, in order to ensure the conditions necessary for the competitiveness of EU industry, as part of a system of open and competitive markets, the Union and the Member States shall speed up the adjustment of industry to structural changes, encourage an environment favourable to initiative and to the development of undertakings throughout the Union, particularly small and medium-sized enterprises (SMEs), encourage an environment favourable to cooperation between undertakings, and – what is most interesting here – foster better exploitation of the industrial potential for policies of innovation, research and technological development (see Title XIX of Treaty on the Functioning of the European Union, Articles 179 to 190, and Communications from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions "More Research and Innovation - Investing for Growth and Employment: A Common Approach" COM (2005) 488 final, Brussels, 12.10.2005, "Putting knowledge into practice: A broad-based innovation strategy for the EU" COM (2006) 502 final, Brussels, 13.09.2006, "Europe 2020 Flagship Initiative. Innovation Union" COM (2010) 546 final, Brussels, 06.10.2010, "Horizon 2020 - Framework Programme for Research and Innovation" COM (2011) 808 final, Brussels, 30.11.2011).

In the EU the potential of public procurement as a driver for the green economy has been highlighted for the first time in 2000s: cf. Commission's Interpretative Communication on "Community law on public procurement and the possibilities for integrating environmental considerations into public procurement", COM (2001) 274 final, Brussels, 4.7.2001 and Communication from the Commission to the Council and the European Parliament entitled "Integrated Product Policy - Building on Environmental Life-Cycle Thinking" COM (2003) 302 final, Brussels, 18.6.2003, in which appeared the concept of "*Life-Cycle Thinking* ", namely the possibility of taking into account all the costs incurred during the whole life of a product ("from the cradle to the grave") and it was recommended to Member States to adopt national action plans in favour of this type of solutions. Finally, has come the Commission Recommendation of 9 april 2013 on the use of common methods to measure and communicate the life cycle environmental performance of products and organisations (2013/179/UE).

In doctrine see: Dutz M.A; Sharma S., *Green Growth, Technology and Innovation*, The World Bank, Poverty Reduction and Economic Management Network, Economic Policy and Debt Department, Policy Research Working Paper 5932, 2012; Edquist C.; Zabala-Iturriagagoitia J.M., *Public Procurement for Innovation as mission-oriented innovation policy*, Research Policy 41: 1757-1769, 2012; Hoppe E.I.; Schmitz

The purpose of this last is to implement new technologies in order to reduce the overall costs and reduce the waste of resources by means of efficiency gains, so that it aims at the combination of smart growth, sustainable development and social inclusion.

The two topics referred to in the heading of the paragraph thus go hand in hand.[338]

And the *trait d'union* coincides with the problematic issue of risk, or rather, of its allocation among the various (direct or indirect) participants to a public purchasing.

If, in fact, from the substantial point of view, there are many instances that must be included in the action of the administrative plexus, not less important becomes the dynamic profile of the instruments through which pursue the interests of the moment.

With reference to the societal-environmental policy, in completion of the foregoing, it is necessary in particular to account for the possibility of considering all the costs of the life cycle of the product or service.[339]

P.W., *Public-private partnerships versus traditional procurement: Innovation incentives and information gathering*, MPRA Paper No. 41966 (online at http://mpra.ub.uni-muenchen.de/41966/), 2012.

[338] It is no coincidence that the new European Directives on public procurement have expressly defined both concepts.

The "*life cycle*" refers to all consecutive and/or interlinked stages – including research and development to be carried out, production, trading and related conditions, transportation, utilisation and maintenance – throughout the existence of the product or the work or the provision of the service, from raw material acquisition or generation of resources to disposal, clearance and end of service or utilisation: cf. art. 2, para. 1, n. 20 (Dir. n. 24), equivalent to art. 2, para. 1, n. 16 for utilities sector (Dir. n. 25); and also recitals 92, 95, 96, 97 and art. 67, 68 (Dir. n. 24), recitals 97, 100, 101, 102, and art. 82, 87 (Dir. n. 25), as well as recital 64 and art. 36 (Dir. n. 23).

The life-cycle costs include the costs incurred by the contracting authority or by others (such as investigation into the development, production, transportation, use and maintenance and end-of-life disposal costs) and costs assigned to environmental externalities (emissions of greenhouse gases and other pollutants as well as other costs related to climate change mitigation), provided that can be monetised and monitored. The social costs of the life cycle can also be considered therein.

The term "*innovation*" indicates instead the implementation of a new or significantly improved product, service or process, including – but not limited to – the processes of production, building or construction, a new marketing or organizational method in business practices, workplace organisation or external relations inter alia with the purpose of helping to solve societal challenges or to support the Europe 2020 strategy: cf. art. 2, para. 1, n. 22 (Dir. n. 24), equivalent to art. 2, para. 1, n. 18 in the utilities sectors (Dir. n. 25) and art. 5, para. 1, n. 13 on concessions (Dir. n. 23), but also recitals 35, 47, 48, 49, 95 (Dir. n. 24) and 42, 57, 58, 59, 100 (Dir. n. 25), as well as cons. 73 and art. 41 (Dir. n. 23).

[339] As already mentioned, the best price does not mean unequivocally best cost: "One of the most important barriers to innovative procurement is failure to distinguish between direct purchasing cost and overall cost. The best overall value of procurement is realised through calculating life-cycle cost or even through the contribution of innovation to overall economic growth. The most economical procurement is an important clause for public funds and should by no means be eliminated but policies should highlight longer term aspects of return on public investment, like life-cycle costs, capturing high-technology markets etc. Gathering intelligence and calculating risks are inputs in this process and lead again to the crucial issues of training and professionalization" (Fraunhofer ISI – Institute Systems and Innovation – Research, *Innovation and Public Procurement. Review of Issues at Stake*, Study for the European Commission (No ENTR/03/24), 2006).

There are in fact a number of risks – especially of natural origin and social related or linked to technological development – that can not be adequately taken into account when a strictly venal analysis of the performance is undertaken, so that becomes very important to use a calculation method ensuring a global vision.

Furthermore, an unavoidable element is surely the remuneration of the operation (*i.e*. who bears the associated risks): depending on the actual kind of contract chosen in the specific case, the costs will fall at first on the public sector and/or the private subjects, but ultimately always on the collectivity.

There are basically three types of interaction between risk and innovation needs:

- *Highly uncertain procurement*/*High risk procurement* refers to the case of extreme novelty of the job as it performs a *market initiation*, namely the creation of a new market (*Development*);[340]

In practice, however, we must register a little use of the system *de quo* compared to the usual ones: "Life Cycle Costing (LCC) and Total Cost of Ownership (TCO) methods are not frequently used by public authorities. The most commonly used criterion is still the purchasing cost (64%), followed by a mix of the latter and LCC or TCO (30%); and finally, by the predominant use of LCC/TCO (6%)" (Centre for European Policy Studies (CEPS) and College of Europe, *The uptake of Green Public Procurement in the EU27*, submitted to the European Commission, DG Environment, Brussels, 2012).

Colangelo R., *Total life cycle cost e Risk analysis: Come migliorare l'efficacia del Procurement*, Il Giornale della Logistica 10: 32-35, 2011, highlights that the method of the "*Total Cost of Ownership*" (TCO) shows only a part of the costs incurred, *i.e*. the outer and deterministic ones (costs for acquisition, accessories and for use), while in reality must also be considered indirect costs, due to the use of internal resources, and the probabilistic ones, arising from the risks associated to the purchase. To this end it is necessary to adopt a more comprehensive approach, namely the "*Total Life Cycle Cost*" (TLCC), which includes all the elements of cost even if probabilistically characterized by risk. To such risks correspond in fact as many cost items: risk prevention, damage repair, non-achievement of the targets in terms of performance, timing and costs. Consequently, must be exerted a risk management action (the "*Risk Management*") through analysis and mitigation of the events – in particular if severe and difficult to predict like the natural and social ones (cd. "*Black Swan Risks*") – that may affect the object of the provision. The measures can be designed to prevent the risks from occurring (prevention), to reduce their impact (protection), to allocate them to others (transfer).

[340] This is the case of pre-commercial contracts and partnerships for innovation.

With regard to the former ones, see the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Pre-commercial Procurement: Driving innovation to ensure sustainable and high quality public services in Europe" COM (2007) 799 final, Brussels, 14.12.2007, accompanied by the annex document of the Commission services "Commission Staff working document: example of a possible approach for procuring R&D services applying risk-benefit sharing at market conditions, *i.e*. pre-commercial procurement" SEC(2007) 1668, Brussels, 14.12.2007, and recital 47 of the new ordinary procurement Directive (Dir. n. 24), equivalent to the recital 57 in the utilities sectors (Dir. n. 25).

On this subject, see Nulli M., *Gli appalti precommerciali*, 2013 (www.osservatorioappalti.unitn.it), who does not fail to note that also in this case there is the problem of terminology, repeatedly reported in the present study, about the translation, in the more limited scope of "public contract", of the original "pre-commercial procurement". These contracts are in fact a form of pre-commercial public-private partnership in which the core is given by the cooperation between the public client and many economic operators. According to the author, "the approach to pre-commercial contract is a great stimulus for innovation, as it increases the levels of investment, encourages the adoption of related policies on research and development

- *Medium risk procurement* regards the diffusion of existing solutions or extending them to a different sector through an operation of *market escalation* (*Adaptation*);
- *Low risk procurement*, finally, matters to those activities of *market consolidation* requiring less adaptation (*Standardisation*).

The last two categories are probably the ones that better fit public contracts and concessions, in which the object of competition is a technical and economic proposal/offer (whereas in the first case there will probably be a prototype of innovation).

Either way, there is a common feature to all the three typologies above-mentioned: it is the importance of sharing the benefits and risks.[341]

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and at the same time reduces the risks by the sharing of the risks and benefits of research and development that seem necessary to develop the innovative solutions, as more efficient than those available on the market. Public authorities may well get a double result: on the one hand, provide services of general interest to the community in a more rapid and innovative way; on the other hand, offer companies a range of opportunities to conquer new markets and business leadership".

In relation to the second ones, namely the innovation partnerships, cf. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Partnering in Research and Innovation", COM (2011) 572 final, Brussels, 21.09.2011 and recital 48 and art. 31 of the new ordinary procurement directive (Dir. n. 24), equivalent to the recital 59 and art. 49 in the utilities sectors (Dir. n. 25). If the need to develop innovative products, services and works – and then to buy the supplies, services or works that result therefrom – can not be achieved using solutions already available on the market, contracting authorities may establish a partnership for innovation.

It is a long-term contract, to which are applicable the procedural rules on competitive procedure with negotiation and the sole award criterion is the best quality/price ratio.

Still Nulli M., op. cit., notes that "the special procedure of the (European) partnership for innovation, is structured in the long term, combining development and purchase of new, innovative works and services through the sequence of steps in the process of research and innovation in a manner very similar to pre-commercial procurement. Moreover, the European Partnerships for innovation, although not being public-public nor public-private partnerships according to Community sources, are anyway foreordained to provide: (1) a framework that aggregates subjects of different policy areas, sectors and countries, simplifying and optimizing the use of existing instruments; (2) in order to integrate or initiate actions on both the demand side and the supply side in the whole cycle of research and innovation, where innovation is not only that generated by research but it can be organizational and social; (3) with the effect of encouraging trades and ensure a high level of political commitment to implement the measures agreed. Partnerships for innovation, in other words, will have to connect supply and demand with the task of overcoming the technical, legal and operating obstacles that prevent innovation in Europe. This special procedure, which also refers to innovative solutions non-available on the market, can not be sought to prevent, restrict and distort competition".

[341] Another time Nulli M., op. cit., highlights the metamorphosis to which becomes subject the public evidence of pre-commercial contracts, but the same considerations may apply to complex contracts in general: "the matrix (procedure), the trajectory (path) and the perspective (current or potential results) characterize in the frame of risks and benefits sharing this institution, which is choice (not only) of the contractor but also exploration of possible innovation, and, consequently, changing the function of the procedure, change the roles of (public) customer and (private) contractors. It can not, in fact, escape that, should we intend the public evidence as the selection of the only contractor through a process of strict separation of roles between contracting authorities and candidate undertakings in view of a predefined exchange, in the open evidence we highlight not only the presence of several contractors, but also the coexistence of exchange of utility and mutual cooperation, the degree of cooperation instead of the separation between public and private and the achievement of a good of life, which can not be limited to the final prototypes, but look at the new frontiers of the knowledge transferred and cogenerated".

Thereby ensues the need for a change into the inner workings of procurement both in terms of the competences of public officials and on that of the *modi operandi* as well (importance of the circulation of information, mutual learning, dialogue and negotiation extended throughout the course of the procedures).

At conclusion and completion of the above, also to clarify the reasons that led to this brief review on the evolution of public procurement at the EU and, then, national level, I have to gloss that it was intended to lay the basis for what does represent the true soul of this paper, which is the examination of risk allocation – *rectius*: risks (now more properly and with good reason, we need the plural form) – among the various *genera* of public procurement contracts and their *species* to understand what happens when the risk element comes into play and which remedies are provided for by the law and by the doctrine.

The ultimate goal of PPP wishes to be the encouragement of private contribution, especially economic and financial, so that it is quite necessary to prepare the conditions for the private investments to be feasible.

Otherwise, given the normal aversion to risk, no private investor would be willing to contribute in the first person – except for the limited benefits of the multiplier effect or philanthropy cases – to the realization of the collective needs.

Chapter III. PPP as common area of (complex) public contracts and concessions

In the beginning was analyzed the evolutionary path which has covered, mainly at EU level, the phenomenon of public-private partnerships (PPPs), briefly describing their characteristics (bundling, long-term, public as well as private risks and investments) and highlighting the fact that the legal science is still struggling on the actual texture of the "*á*PPP*eiron*".[342]

In the practice it has arisen the belief that the public-private partnership (PPP) coincides with the concession, remaining excluded *tout court* the public contract (v. *supra*).

It is a wrong generalization that needs to be clarified.

To clarify and correct this mistake had better start with a basic premise: the risk that we have seen marking the concessions, distinguishing them from the public contracts, continues to perform its function as distinguishing criterion also within the PPP.

Much, if not all, depends on the allocation of risks in effect.

Hence, the PPP comes to be the "keystone" of the system facilitating the hard task of the interpreter who has to discern between public contracts and concessions.

Let me explain: although the cohabitation of contracts and concessions in the PPPs can make it appear *prima facie* even more difficult to determine the boundary between the two cases – subject to different disciplines, it is worth remembering (v. *supra*) –, the fact that these coexist therein does actually cause major repercussions of regime by attenuating the reciprocal diversity.

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[342] Hodge G.A.; Greve C., *Public – Private Partnerships: An International Performance Review*, Public Administration Review, 67 (3), 545-58, 2007, give an account of the debate on the concept of PPPs.

A reconstruction quite satisfying is the one made by Hathorn M., "IPSASB: Service Concession Arrangements", in Corbacho A.; Funke K.; Schwartz G., *Public Investment and Public-Private Partnerships: Addressing Infrastructure Challenges and Managing Fiscal Risks*, Palgrave MacMillan, 2008, pp. 245-246: "The term "public-private partnership" is described in a number of ways by various organizations around the world. The common characteristic of these descriptions is that a PPP is an arrangement between public and private sector entities related to the delivery of a public sector asset and/or services associated with a public sector asset. In this way, PPPs are an alternative to traditional procurement methods used by public sector entities as a means to accomplish a public duty or responsibility. Unlike traditional procurement methods, in a PPP arrangement the risks associated with the underlying project are generally allocated between the public sector entity and the private sector entity. These risks commonly include construction risk, availability risk, demand risk, operational and maintenance risk, residual value risk, and financing risk. "PPP" is an umbrella term used to refer to arrangements that apply this broad concept of the public sector engaging the private sector to assist in delivering public sector assets and/or services".

The author has the merit to focus attention on the allocation of the risks showing how the various PPP models are characterized by the direct involvement of the private sector, which assumes the risks and receives a consideration of various types (variable or fixed payments, availability fees, shadow tolls, usage tariffs).

The PPP, whose *ubi consistam* must be identified in the collaboration between public and private parties in relation to projects of high complexity, then configures an area common to contracts and concessions, creating a sort of "statute for complex contracts".[343]

Of course, such statute does not constitute a monolithic and static *quid*, but rather a fluid and magmatic matter characterized by two souls: contracts and concessions.[344]

Therefore can be inferred some common traits that weaken the asymmetries.

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[343] In this sense could be reported the Spanish example which has opted for a minimalist discipline of the PPPs setting them up as an all-encompassing category which includes the contracts of special complexity, to be assigned by competitive dialogue and with remuneration borne by the public administration (cf. artt. 11, 134, 313 and 314 RDL 3/2011).

The objective is to ensure an amount of legal certainty sufficient to guarantee the security of the private counterparty, to whom, however, the risks are not necessarily to be transferred in a prevalent manner.

Refer to Tornos Mas J.; Del Mar Martinez Martinez M., "Las concesiones en el dercho español. Concesión de obra pública y colaboración público-privada", in Cafagno M.; Botto A.; Fidone G.; Bottino G., *Negoziazioni pubbliche. Scritti su concessioni e partenariati pubblico-privati*, Giuffrè, Milano, p. 70 ss., 2013.

[344] As highlighted in the literature, the phenomenon of PPPs does not seem suitable for a proper legal definition because in it converge different experiences, characterized by a certain complexity in subjective, objective, and functional terms.

According to Raganelli B., "Pubblico, Privato e Concessioni in Europa", in Cafagno M.; Botto A.; Fidone G.; Bottino G., *Negoziazioni pubbliche. Scritti su concessioni e partenariati pubblico-privati*, Giuffrè, Milano, 2013, p. 215, "is inevitable that will fade those rigid distinctions, typically continental, among substantial legal categories. It requires a functional perspective, as suggested by those jurisdictions that have decided to frame the phenomenon, defining open contractual figures that provide flexible tools to the sector operators and public administrations. Whatever their definition, however, in the relationships of Public Private Partnership the fundamental objective for the administration is the selection of the "best contractor", able to propose the best offer and to ensure, after the conclusion of the contract, the proper execution of the same, as correct performance".

On the same wavelength, as pointed out earlier in the text, are also placed the Union institutions, which have labeled public contracts and concessions as PPPs.

Among the jurisdictions that have codified the PPPs must be registered the appropriate choice of *soft law* acts adopted by the United Kingdom in order to not force so hard for something that is fluid and dynamic by nature: cf. Rangone C., *Flessibilità procedurale e aderenza al diritto Ue nel Regno Unito*, Intervention at the Conference - Procurement: a look on Europe - organized by IGI in Rome, 17 november 2011 (www.osservatorioappalti.unitn.it).

Worthy of note is also the predisposition on the part of the *Joint Construction Tribunal* (JCT), bipartisan organization representing public and private subjects, of standard contractual models into which are then to be included the specific clauses and agreements of the case (on this point, please refer to Mosey D., *Early Contractor Involvement in Building Procurement Contracts, Partnering and Project Management*, John Wiley & Sons Inc, 2009, p. 42: "The publication of standard form building contracts, in particular the JCT forms now available for over 75 years, has enabled large numbers of contractual relationships to be concluded in a short space of time and with minimal cost involved in drafting or negotiation").

On the other side it should be noted the Italian experience that has produced a specious discipline much larger than the effective use of PPPs in practice (emblematic is the mentioned case of project finance): "The Legislator is choosing the path of the multiplicity of models coded and typed as opposed to the road of the flexibility of contracts and procedures. The law predetermines the contractual models and award systems, trying to replace with them the discretionary power of the administration (to be exercised in the identification of a tailor-made contract or of the award procedure best suited to the case), which in theory and if well used allows greater efficiency. Therefore, the tendency is to influence *ex ante* the choices of the administration with detailed procurement procedures and with pre-determined contractual models" (in such terms Fidone G., "Le concessioni come contratti complessi: tra esigenze di flessibilità e moltiplicazione dei modelli", in Cafagno M.; Botto A.; Fidone G.; Bottino G., op. cit., p. 287).

On second thought, that looks like a reasonable conclusion when you consider the difficulty of separating the cases *de quibus*, on the one hand, and the constant reappearance of the umbilical cord binding the same cases, on the other hand.

In this way the legal system prevents the possible purposes of circumvention above mentioned, switching them off in the bud, and avoids any manipulation of the instruments.

The question is interesting because it highlights the renewed teleological-functional imprinting that characterizes the public procurement, especially if complex, first as a means of promoting the interests of the parties (according to the principle of sound management, as well as of competition and impartiality).[345]

This can be desumed *de plano* from the new EU Directives on public procurement which give back to public contracts their fundamental role, that of authentic negotiating methods to allocate the risks involved in a transaction of public interest.

Automatically the circumstance, from public contracts and concessions, is reflected in the PPPs. Consequently, the PPP provides an important opportunity to fill the content of the concept of risk, *per se* soaked with remarkable facets (*species, quantum, quomodo*), which is seen to be a carrier of relevant legal aftermath not only on the taxonomy, but also on the policy of the law and on the science of administration.[346]

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[345] This last profile becomes absolutely relevant as the functional perspective is the one that allows to frame the phenomenon, defining flexible and fluid contractual figures with the ultimate goal of selecting the best contractor not only for what concerns the best value for money but especially in terms of overall well-being. The strategic use of public procurement has precisely the mission to achieve further goals with respect to the impartiality of public administration and free competition in the single market, aiming to consolidate superindividual instances derived from sensitive interests of the community.

What has just been stated finds confirmation in the new EU Directives on public procurement.

Particularly, art 19 Dir. 2014/23/EU, artt. 76-77 Dir. 2014/24/EU and artt. 93-94 Dir. 2014/25/EU provide a special regime for awarding public contracts relating to specific services (for example: health, social and cultural services).

Member States shall put in place national rules for the award of these contracts in order to ensure that contracting authorities comply with the principles of transparency and equal treatment of economic operators. Member States are free to determine the procedural rules applicable as long as such rules allow contracting authorities to take into account the specificities of the services in question.

The Member States shall inedeed ensure that contracting authorities may take into account the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, as well as the involvement and empowerment of users and innovation.

Besides the reserved contracts for certain services, Member States may also provide that the choice of the service provider shall be made on the basis of the tender presenting the best price-quality ratio, taking into account quality and sustainability criteria for social services.

[346] Cf. the already mentioned Commission's Green Paper on the Public-private partnerships and Community law on public contracts and concessions COM (2004) 327 final, Brussels, 30.4.2004, para. 2.3.1, pt. 45: "The success of a PPP depends to a large extent on a comprehensive contractual framework for the project, and on the optimum definition of the elements which will govern its implementation. In this context,

It follows a peculiar characterization of the risk from different points of view depending on whether it has to do with a complex contract or concession.

Normally you look at the public contract as a contract financed entirely from the public administration, in which the private operator is limited to participate in a competition set from the public administration itself and to perform the services awarded.

As shown in the preceding pages, conversely, in the concessions, the candidate must prepare a business plan that predetermines the return on his own investments committed and, to this end, is actively involved with the public administration in conceiving the award procedure and the contract.

In the midst of the two situations lies the possible payment of a *pretium* charged to the public administration, by way of compensation to the concessionaire, which can limit the operating risk but not eliminate it on the whole.

This is an idea that has developed in practice starting from the "usual" conditions.

But it is not the only possibility: some others can be imagined, especially in the case of complexity (*rectius*: riskyness) of the purchasing.

We know now, based on the teachings of the Court of Justice and the EU Directives, that the *discrimen* between public contracts and concessions is the greater operational risk in the hands of the concessionaire, which bears the uncertainty (albeit sometimes reduced) to not achieve a balanced budget in the economic operation.

This does not exclude that the private financing can also relate to the contract.[347]

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the appropriate assessment and optimum distribution of the risks between the public and the private sectors, according to their respective ability to assume these risks, is crucial. Also important are mechanisms to evaluate the performance of the titular holder of the PPP on a regular basis. In this context, the principle of transparency requires that the elements employed to assess and distribute the risks, and to evaluate the performance, be communicated in the descriptive documents, so that tenderers can take them into account when preparing their tenders".

[347] As happens in the UK with the so-called "*Private Finance Initiative*" (PFI), where the private sector is normally paid in full from the public administration with periodic payments following the successful completion of the performances: cf. Spackman M., *Public–private partnerships: lessons from the British approach*, Economic Systems 26: 283-301, 2002; Froud J., *The Private Finance Initiative: risk, uncertainty and the state*, Accounting, Organizations and Society 28(6): 567-589, 2003; Corner D., *The United Kingdom Private Finance Initiative: The Challenge of Allocating Risk*, OECD Journal on Budgeting 2006 – volume 5 – no. 3 (http://www.oecd.org/gov/budgeting/43479923.pdf).

After all, the resolution of the European Parliament of 16 october 2006 on public-private partnerships and Community law on public procurement and concessions (2006/2043 (INI)), already provided for that: "the purpose of PPP contracts is to enable public authorities to benefit from the design, construction and management skills of private enterprises and, *if necessary*, from their financial skills" (recital G; emphasis added).

The idea of a public contract financed by the contractor via private capitals is not just a suggestion.

The difference is in the fact that the investment of the private contractor would result in an advance for the benefit of the administration with the obligation to repay in full (dynamics very similar to the one that characterizes some cases of lease and availability[348]).

In essence, once completed the work, the contractor would have no operational risk in management – typical of concessions – as the public administration will ensure the total return on the capital invested, aside the normal business alea of failures and irregularities.

What that in truth already characterizes to some extent the public contract, where the contractor does finance the *opus* with own means (besides possible initial payments) and is then remunerated for states of development until the final settlement.

The huge benefit to the public administration would be the possibility, for example, to postpone the payment of the amounts to the positive acceptance of the work; whilst the drawback would be given by the likely greater expensiveness of the operation instead.[349]

For Italy, this could be a solution to the drop of public investment in the sector. On this point cf. Santilli G., *Grandi opere al palo: Italia ultima nella Ue* - Il Sole 24 Ore - 18 may 2014, who notes that the national expenditure on public investment has fallen from 3,5% of GDP in 1981 to 3,1% in 1991 to 2,4% in 2001 to 1,7% today which will decline to 1,4% in 2017, while of the 37 major strategic works planned in the last 15 years only 11 have reached the finish line and are in operation: "The most embarrassing datum for the system, the index of the country's credibility abroad on these issues, however, is the comparison between us and Europe in terms of public investment expenditure. There is no economist – be him of Keynesian or neo-liberal school - which does not argue that we must make a strong slimming cure on the current expenditure to rather save the capital expenditure. A fundamental problem of mix. In Italy the opposite happens: we have given up one of the great engines of the economy for not being able to cut waste and privileges in the current State machine. From 2009 to 2013, investments have been cut by 34%, while the primary current expenditure is increased by 1, 7%. Ten years that give the idea of the moving back of the country on the axis of growth. From 2004 to 2013 updated Eurostat data say that France spent in investments 606.9 billion, Germany 383, the United Kingdom 367.9, Spain 336.1, Italy 335.2. In 2004, Italy was second behind France, for almost the entire decade, year after year, remained in last place, since 2011 has overcome Spain which, after a long ride, has drastically cut public spending. In 2013, expenditure amounted to 27.2 billion, 11.4 billion less than what it spent in 2009. Between 2004 and 2011, while Italy lost 19.6%, Germany grew by 30.7%, France 26%, UK 19%" (http://www.ilsole24ore.com/art/notizie/2014-05-18/grandi-opere-palo-italia-ultima-ue-081012.shtml). See also Iossa E.; Antellini Russo F., *Potenzialità e criticità del Partenariato Pubblico Privato in Italia,* Rivista di Politica Economica, SIPI Spa, 98(3): 125-158, 2008.

Should be conceived some new ploys to remedy the gradual desertification of public investment: one, certainly not the only one, can be the reinterpretation of the contract in a way more similar to concessions with private financing and correlated greater procedural flexibility in the award competition.

[348] Please refer to Fidone G., *Dalla locazione finanziaria al contratto di disponibilità: l'evoluzione del contratto di leasing immobiliare pubblico = From the 'locazione finanziaria' to the 'contratto di disponibilità': the evolution of the immovable property leasing contract with a public administration,* Foro Amministrativo T.A.R. 3: 1039, 2012, to Fantini S., *Il partenariato pubblico-privato, con particolare riguardo al project financing ed al contratto di disponibilità*, updating of the administrative judges, held in Rome, at the T.A.R. Lazio, on days 2 and 3 of july 2012 (published in www.giustizia-amministrativa.it), and also to the determination of the AVCP, 22 may 2013, n. 4, *Linee guida sulle operazioni di leasing finanziario e sul contratto di disponibilità*.

[349] On this point Blanc-Brude F.; Goldsmith H.; Välilä T., *Ex Ante Construction Costs In The European Road Sector: A Comparison Of Public-Private Partnerships And Traditional Public Procurement*, EIB, Economic and Financial Report 01/2006 (http://www.eib.org/attachments/efs/efr_2006_v01_en.pdf)

Could be assumed another scenario worthy of mention, too.

Traditionally, the amount of the public contract is considered to be just money[350], but the onerousness of such a contract could also be assured, as is the case of concessions, through a right of exploitation in kind (ownership or enjoyment).

Think, for example, about the case of a contractor that carries out a public parking and gets a share of the same by way of compensation for the work performed; or to the case of a contractor who receives the land on which then realize a building plan agreed with the public administration; or, again, to a contractor who is conferred an asset cleared from the State property.[351]

In all the hypothesis described, both those relating to the private finance of the contract and those relating to the payment in kind of the contractor, as well as the various combinations of the two, there is the absence of a real private operational risk (except for construction and admitted a market value of compensation equivalent to the performance).

Here, in fact, it is not to exploit the performance in the uncertainty of the market, because the contractor has a "vested" right on assets (*in cash* or *in kind*)[352] with a certain intrinsic value (after all, even in the concessions the possibility of using goods in kind by way of consideration seeks to discount the money price).

It should derive the theoretical correctness of the classification as public contracts, on the assumption that the risk of building, as a rule, falls on the contractor.

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show how the additional costs due to the higher cost of money for private parties as opposed to the public ones (at least in conditions of institutional stability) is offset by the efficiency of implementation.

In the area of roads the use of PPPs longer, expensive, and involving the private financing results essentially equivalent to those of traditional procedures: in essence, the additional costs in time and resources "upstream" in the PPPs have proved practical to be substantial alternatives to the higher costs which did occur "downstream" in the traditional contracts, but with the advantage of time certainty.

[350] The only provision of positive law which provides *expressis verbis* the consideration in money is the art. 1655 cod. civ. on the procurement contract in private law, about which see in doctrine Pennalisico M. "Il corrispettivo" in Cuffaro V., *I contratti di appalto privato*, in Trattato dei contratti diretto da P. Rescigno ed E. Gabrielli, Utet, 2011, p. 120 ss. and bibliography indicated therein.

[351] In the previous legislation the paragraph 5-*ter* of art. 19 L. 11 february 1994, n. 109, (added by art. 3, paragraph 9, L. 18 november 1998, n. 415), stated that in total or partial place of the sums of money constituting the consideration of the public contract, the tender notice could provide for the transfer to the contractor of the ownership on immovable property belonging to the contracting authority as far as they did not have any longer functions of public interest.

That transfer was to take place as soon as approved the test certificate of the works, unless the notice provided an earlier time for entering into the possession of the property.

Now an analogous discipline is contained in the paragraphs 6-12 of art. 53 of the Code.

[352] For an illustration of the forms "in kind" and "fiscal" of the public contribution in Italy please see Ricchi M., "Il partenariato pubblico-privato: nuove competenze e nuovi strumenti di regolazione della P.A." in Cafagno M.; Botto A.; Fidone G.; Bottino G., *Negoziazioni pubbliche. Scritti su concessioni e partenariati pubblico-privati*, Giuffrè, Milano, 2013, pp. 327-329.

But we need to investigate further the issue of the risk to get greater clarity.

The margin of error depends on the actual allocation of the risks, which are reflected not only on the mode and amount of remuneration.

What is certain is that operating risk should be investigated in several respects.

We have already seen those concerning the *quomodo* and the *quantum*; at this point remains to be examined the *quid* of risk.

First, we must take into account the objective (project) and subjective (participants) risk. Second, it is relevant the general profile of the contribution by the private subject (capital and/or labour) in relation to public procurement. More in detail, indeed, should be determined to which performance in practice corresponds the private contribution of capital and/or labour. Finally, after identifying the risks inherent in public procurement contracts, are to be noted the implications and effects on the procedures.

§3.1. The various kinds of risk: the *quid* of risk

There is, in short, a virtual intersection between the dogmatic categories of contracts and concessions when the risk involved with the contract is not trivial.

Complexity, in essence, means risk: not only related to the object (project to be implemented), but also to the subjects (public administration, participants to competition, contracting parties, third parties).[353]

From the intricate interweaving of the two components come out the risks to be allocated. An empirical study conducted in the UK has identified three levels of risk: *macro, meso, micro*.[354]

[353] On this subject, refer to Akintoye A.; Beck M.; Hardcastle C.; *Public-Private Partnerships: Managing Risks and Opportunities*, Blackwell, 2003; Alonso-Conde A.B.; Brown C.; Rojo-Suarez J., *Public private partnerships: Incentives, risk transfer and real options*, Review of Financial Economics 16(4): 335-349, 2007; Loosemore M., *Risk allocation in the private provision of public infrastructure*, International Journal of Project Management 25(1): 66-76, 2007; Priemus H.; Flyvbjerg B.; van Wee B., *Decision-Making on Mega-Projects. Cost–Benefit Analysis, Planning and Innovation*, Edward Elgar, 2008; Demirag I.; Khadaroo I.; Stapleton P.; Stevenson C., *Risks and the financing of PPP: Perspectives from the financiers*, The British Accounting Review 43(4): 294-310, 2011; Brinkerhoff D.W.; Brinkerhoff J.M., *Public-private partnerships: perspectives on purposes, publicness, and good governance*, Public Administration and Development 31(1): 2-14, 2011.

[354] Cf. Bing L.; Akintoye A.; Edwards P.J.; Hardcastle C., *The allocation of risk in PPP construction projects in the UK*, International Journal of Project Management 23, 2005, p. 27: "The *macro* level of PPP/PFI risk comprises risks sourced *exogenously*, i.e., external to the project itself. This level focuses on the risks at a national or industry level status, and upon natural risks. The risks at this level are often associated with political and legal conditions, economic conditions, social conditions and weather. In essence, these risks arise from risk events occurring beyond the system boundaries of a project, but whose consequences cross the project boundary to impact upon the project and its outcomes.

The result is a very varied and quite exhaustive picture which does demonstrate that, on the one hand, the qualitative and quantitative systematic of risks in public procurement becomes the pivot of the matter in view of the Pareto optimization and, secondly, that these risks should be allocated, managed and mitigated in an appropriate manner so as not to run into the opposite result, *i.e*. the total inefficiency of public procurement transactions.

It is thus easy to see that the possible risks comprised in a public operation are unquestionably superior (in number and size) to those that can materialize in a private hypothesis, given the diverse set of underlying instances in the first one (v. *supra*).

Heterogeneity that is reflected, as mentioned, both on the object as on the subjects.

In relation to the first segment, emerge all the possible criticalities enclosed in the performance to be carried out in practice: *Design*; *Finance*; *Build*; *Develop*; *Own*; *Lease*; *Operate*; *Maintenance*; *Transfer* of the property.[355]

The *meso* level of PPP/PFI risk includes risks sourced *endogenously*, i.e., risk events and their consequences occurring within the system boundaries of the project. These represent the PPP/PFI implementation problem, involving issues such as project demand/usage, location, design and construction and technology.

The *micro* level of PPP/PFI risks represents the risks found in the stakeholder relationships formed in the procurement process, due to the inherent differences between the public and private sectors in contract management. These are also *endogenous* risks, but differ from *meso* risks in that they are party-related rather than project-related. The main reason for proposing this risk category rests on the fact that typically the public sector has social responsibility, while the private sector is profit driven" (original italics of the authors).

To the category *Macro* belong to the following risks: *Political and government policy* (Unstable government, Expropriation or nationalisation of assets, Poor public decision-making process, Strong political opposition/hostility); *Macroeconomic* (Poor financial market, Inflation rate volatility, Interest rate volatility, Influential economic events); *Legal* (Legislation change, Change in tax regulation, Industrial regulatory change); *Social* (Lack of tradition of private provision of public services, Level of public opposition to project); *Natural* (Force majeure, Geotechnical conditions, Weather, Environment).

The category *Meso* include the following risks: *Project selection* (Land acquisition (site availability), Level of demand for project); *Project finance* (Availability of finance, Financial attraction of project to investors, High finance costs); *Design* (Delay in project approvals and permits, Design deficiency, Unproven engineering techniques); *Construction* (Construction cost overrun, Construction time delay, Material/labour availability, Late design changes, Poor quality workmanship, Excessive contract variation, Insolvency/default of sub-contractors or suppliers); *Operation* (Operation cost overrun, Operational revenues below expectation, Low operating productivity, Maintenance costs higher than expected, Maintenance more frequent); *Residual risk*.

Finally, in the category *Micro* appear the following risks: *Relationship* (Organisation and co-ordination risk, Inadequate experience in PPP/PFI, Inadequate distribution of responsibilities and risks, Inadequate distribution of authority in partnership, Differences in working method and know-how between partners, Lack of commitment from either partner); *Third party* (Third Party Tort Liability, Staff Crises).

Further classifications of the risks inherent in the public contracts can be found in Poschmann F., *Private Means to Public Ends: The Future of Public-Private Partnerships*, C.D. Howe Institute Commentary, Toronto, C.D. Howe Institute, 2003, and Monteiro Rui S., "PPPs and Fiscal Risks: Experience of Portugal", in Corbacho A.; Funke K.; Schwartz G., *Public Investment and Public-Private Partnerships: Addressing Infrastructure Challenges and Managing Fiscal Risks*, Palgrave MacMillan, 2008, pp. 128-130.

[355] Please refer to the document of the United Nations Economic Commission for Europe (UNECE) - *A Guide to Promoting Good Governance in Public Private Partnerships*, presented to the International

At each performance is corresponding a range of related risks.

It will then be the attribution of these latter to the public or the private party, even their sharing in percentage, that determines the legal classification of the transaction in turn as a contract or a concession.

The same is true with regard to the risks associated with the various subjects that can participate directly or indirectly in the operation.

In addition to the public administration, which can never be absent, appear numerous other subjects.

In first place, are to be considered the candidates to the public purchasing, which can in some cases contribute to the definition of the object of competition – *ergo* to the qualification as a contract or a concession – and, in any case, entail the risk of litigation (very high in Italy) judicial or not.

Here, in reality, the risks do extend far more than you can imagine because, as it comes out from economic studies applied to the law[356], the participants in the competition tend to act selfishly, exploiting any weaknesses of the others, especially of the client, and maximizing their own profit.[357]

Secondly, one should consider the competitor who wins the contract.

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conference on knowledge sharing and capacity building on promoting successful Public Private Partnerships in the Unece region, Tel Aviv, Israel, 5-8 June 2007, pp. 2-5.

Wishing to hypostatize a sort of progression from a concession to a contract, it may be the following: DB (Design and Build)/OM (Operation and Maintenance); LDO (Lease-Develop-Operate); BOT (Build-Operate-Transfer); BFM (Build-Finance-Maintain); DBO (Design-Build-Operate); DBFM (Design-Build-Finance-Maintain); DBFO (Design-Build-Finance-Operate); DBFOM (Design-Build-Finance-Operate-Maintain); BOOT (Build-Own-Operate-Transfer); Concession.

As it can be seen, regardless of the specific subject-matter (work and/or services), there is no unique pattern for public procurement contracts and concessions insofar as the various intermediate forms lend themselves to set up a concession as well.

The fundamental distinction does not lie therefore in the performance, but rather – as taught by the EU Court of Justice – in the risk allocated in the concrete practice.

And that could encourage the mentioned inference that even the public contracts are compatible with private funding, as long as the risk of recoup the investment is limited or almost null.

[356] Many authors have dealt with the issue, but the most famous is the Nobel Prize Williamson O.E.: *Le istituzioni economiche del capitalismo: imprese, mercati, rapporti contrattuali*, Franco Angeli, Milano, 1992; *I meccanismi del governo. L'economia dei costi di transazione: concetti, strumenti, applicazioni*, Franco Angeli, Milano, 1996.

[357] Refer to Raganelli B., *Partenariato Pubblico Privato e opere pubbliche in Europa. La ricerca di un equilibrio tra regole e flessibilità* (in particular p. 27), conference I-COM "Procedure di scelta del contraente e modelli di affidamento nei rapporti di Partenariato Pubblico Privato: il caso delle infrastrutture", Rome, 29 october 2008; *id*., "Pubblico, Privato e Concessioni in Europa: alcuni limiti della disciplina", in Cafagno M.; Botto A.; Fidone G.; Bottino G., *Negoziazioni pubbliche. Scritti su concessioni e partenariati pubblico-privati*, Giuffrè, Milano, 2013(particularly at p. 223) and bibliographies indicated therein.

Even though the winner is not exempt from the selfish inclinations just mentioned, he finds himself in a position of advantage or disadvantage depending on the actual type of contract is entering into with the public administration and according to the vicissitudes that will take place afterwards.

There is not a viable solution valid in absolute, so the risk will comply with the various choices made in the negotiations by the counterparties (counterparties that comprise not only a public administration or more and one or more contractors, but also the lenders, subcontractors and consultants).

Finally, there is the problematic relationship with third parties, which may include: the community members involved in the operation, the subjects which may be damaged, and taxpayers in general.

Also in this case the various interactions between counterparties and third parties will depend on the specifications of the case about who has to bear what risks and in which percentage.

All the risks discussed herein have the peculiarity to be variable and changing, according to a diachronic perspective, with the consequential need for evaluation both during the competition and the contract design, as in the execution of performances.

Is the only way to distinguish public contracts and concessions within the PPP.

At this point, verified the true extent of the risk in the PPP, we can say a few words on an issue that seems worthy of consideration.

It is clear that the complexity of the matter goes far beyond the construction, demand and availability risks listed in the Eurostat decision of 11 February 2004 – "*Treatment of public-private partnerships*".[358]

The most immediate consequence is the apparent inability to deem that decision as a general "manifesto" of the risks in public procurement.[359]

[358] Refer to the documents of the Unità Tecnica Finanza di Progetto (UTFP), *Partenariato Pubblico – Privato per la realizzazione di opere pubbliche: impatto sulla contabilità nazionale e sul debito pubblico. Decisione EUROSTAT 11 Febbraio 2004 "Treatment of public-private partnerships"*, Rome, june 2004, and EPEC, *Eurostat Treatment of Public-Private Partnerships: Purposes, Methodology and Recent Trends*, 2010.

[359] In these terms are the determination of the AVCP, 11 march 2010, n. 2, *Problematiche relative alla disciplina applicabile all'esecuzione del contratto di concessione di lavori pubblici*; and Goisis F., *Concessione di costruzione e gestione di lavori e concessione di servizi*, Ius Publicum, 2011; *id*., *Rischio economico, trilateralità e traslatività nel concetto europeo di concessioni di servizi e di lavori*, Diritto Amministrativo 4: 703, 2011.

If anything it is to be construed a breviary on the accounting treatment of PPPs in relation to the allocation of certain risks assumed by the contractual parties: the focus is primarily on the ownership of the asset, that is to which party belongs primarily the property – in the economic, not legal, sense – of the same.[360]

In this regard, it does not take into consideration the risks that are not directly associated with the assets and considers to be allocated those risks attributed to each party in a predominant way (over 50%), using as indexes, in case of doubt, the extent of public funding ("in kind" included), the presence of government guarantees and the establishment of a redemption price out of market.

The decision addresses the issue of long-term contracts concluded between a private partner and the public administration in cases where this last is the main purchaser of the goods and services provided, whether the demand be originated from the same public party or from third parties (*e.g.* public services, such as health or education, or road infrastructure systems with shadow tolls).

Were the private partner to bear the construction risk (such as delay in delivery, non-compliance with the standards of the project, increased costs; technical drawbacks of the work, failure to complete the work), besides at least one of either availability (contractual services agreed upon, by volume and for standard quality) and demand risk, the assets should be recorded outside the balance sheet for government (*off balance*), having not to be classified as public capital assets.

If instead the asset is classified in the budget (*on balance*), the initial outlay for the construction will have a negative impact on the overall debt of the State.

The classification has important consequences on the public deficit and debt[361], but the profile most interesting to the present discussion is the methodological discrepancy of statistical and accounting practices with respect to the case law of the European Court of Justice on the risks involved.

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[360] For statistical and accounting purposes, there are only two alternatives: either the property is public or it is private. See on the subject Hemming R., "PPPs: Some Accounting and Reporting Issues", in Corbacho A.; Funke K.; Schwartz G., op. cit., p. 235 ss.

[361] The scarcity of public resources and, therefore, the desire to avoid that the asset has an impact on government deficit and debt is one of the major motives for invoking the PPP: on the point cf. Maskin E.; Tirole J., *Public–private partnerships and government spending limits*, International Journal of Industrial Organization, 26(2): 412-420, 2008.

In this regard Hawkesworth I., *Making the right choice for the right reason*, OECD Observer n. 278, march 2010, hopes that the PPP shall be used in view of the cd. "*value for money*".

While this latter, in order to distinguish the concessions from the public contracts, has set an operational risk which can even be reduced *ab origine*, the former adopts the cd. "*Risk and reward criterion*" privileging substance over form.

Such substantialist criterion, in line with the new Directive 2014/23/EU, not only implies that the risk of the non-government partners must exceed the margin of profit, going even to affect the equity capital and investors, but it presupposes furthermore the ownership of the asset to be accounted *on/off balance*.

It follows a significant quali-quantitative difference between the two interpretations, also because of the different points of view used.

In the first case a reduced risk can be sufficient in order to have a concession, while in the second for the purpose of ruling out the asset from the public budget it is necessary that the risk transferred to the private sector exceeds the threshold of that retained by the public administration.

As it is evident, the differences of both object (economic operation; infrastructure) and method (reduced risk; prevalent risk), as well as function (distinction between contracts and concessions; accounting treatment of PPPs), creates some confusion.

It is therefore appropriate to make some due clarifications: firstly, since both public contracts and concessions are located within the PPP, it is clear that the Eurostat decision can not serve to distinguish them; secondly, referring to the construction of infrastructures, it is not adequate to fit the public services; thirdly, the three main categories of risks (construction, availability and demand) do not cover the broad spectrum of factors that affect the outcome of a public procurement transaction.

The decision *de qua* proves yet to be useful in that, if, on the one hand, confirms the possibility that in the PPPs the user of performances can be the same public administration, on the other hand, it helps the recognition of the so-called "cold", "tepid", "hot" works.[362]

Acknowledging that fall within the PPP not only the hot works (whose cost is reimbursed by the cash flows), but also those tepid (in which there is a public contribution as compensation) and even the cold ones (where the public administration is the main buyer of the performances, regardless of the destination of these to itself or others), means admitting an extension of PPP that goes far beyond the accounting regime of the same,

[362] On which reference should be made to the aforementioned AVCP determination, 11 march 2010, n. 2, *Problematiche relative alla disciplina applicabile all'esecuzione del contratto di concessione di lavori pubblici*.

incorporating all those cases that, although they do not require the private financing or do provide public guarantees and incentives which obliterate it, are entailing a very significant private involvement in the design and implementation of the operation.

The effect produced is that, should the private risk be beneath the 50% threshold, the asset must be in the public budget; certainly does not occur its ouster from the PPP.[363]

The intent is to avoid those elusive practices of disguising certain transactions with the sole intention of lightening the public budgets of these days, thereby discharging the burden of investments on future generations.

Nonetheless, the transactions in which the financial contribution from the private sector is below the equal threshold still belong to the *genus* of the PPP.

The reason is soon said: it is not always cost-effective the predominant or exclusive transfer of the financing risk to the private parties.[364]

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[363] Both the Commission's Green Paper on the Public-private partnerships and Community law on public contracts and concessions COM (2004) 327 final, Brussels, 30.4.2004, and the Communication from the Commission to the European Parliament, the Council, the European Economic and social Committee and the Committee of the regions - Mobilising private and public investment for recovery and long term structural change: developing Public Private Partnerships COM (2009) 615 final, Brussels, 19.11.2009, provide, as method of financing, the normal sharing of public funding and private funding, often in variable tranches and with the prevalence of the first.

The ultimate goal of the PPPs is the promotion of efficiency through the sharing of the risks and the exploitation of the expertise of the private sector, being this able to be a source of additional capital.

Then the correct interpretation of the art. 3, paragraph 15-*ter*, of d.lgs. 163/2006 – pursuant to which "the «public-private partnership contracts» are contracts for one or more services such as design, construction, operation or maintenance of a public work or public utility, or the provision of a service, including in each case the total or partial financing to be borne by private individuals, in different forms, with allocation of risks under the requirements of the EU guidelines and regulations. […]the contents of the Eurostat decisions apply to the operations of public-private partnerships" – can only be in the sense of defining a family of contracts that provide one or more performances (usually including the financing, but exceptionally it may be missing) by the private contractor selected, who assumes a variety of risks affecting, on the one hand, the classification of the contract as a public procurement contract or concession and, secondly, the accounting or not in the public budget.

In terms consistent with the above see Goisis F., *Concessione di costruzione e gestione di lavori e concessione di servizi*, Ius Publicum, 2011, according to which "does not seem possible to come to affirm that art. 3, co. 15 *ter*, of the Code really wanted to enforce compliance with the criteria of the Eurostat decision, as condition (necessary and sufficient) for a contractual relationship to access the nature (not only of partnership not incident on public budgets, but also) of real concession" and Ricchi M., "Il partenariato pubblico-privato: nuove competenze e nuovi strumenti di regolazione della P.A.", in Cafagno M.; Botto A.; Fidone G.; Bottino G., *Negoziazioni pubbliche. Scritti su concessioni e partenariati pubblico-privati*, Giuffrè, Milano, 2013, p. 338: "Presses remembering how the "allocation of risks under the requirements of the EU guidelines and regulations" is the principal obligation charged to public administration and, instead, the resulting public off-balance can be a secondary effect".

[364] A similar option causes the allocation of an additional cost resulting from the premium demanded by the private party to bear the risk of the financing, premium that, in the case of incorrect allocation, accentuates the extraction of rents and removes the incentive effect of the capital at risk.

The allocation of risks seeks to attribute them, both for quantity and quality, to those who are better able to manage them and at the lowest cost.

The assessment can only be done on a case by case basis.

Consequently, the funding does not affect so much the status of complex contracts, to which the new European Directives on public procurement in fact devote very similar procedural mechanisms.

In the face of concessions always connoted by private funding (at least partial), although you may also have the case of traditional procurement financed by the public administration (yet with a significant private contribution in the implementation of the public purchase: think about the flexible procedures of competitive dialogue and negotiated procedures, with or without prior notice, in addition to the partnerships for innovation), even the public contract will normally be funded by the private parties.

Thus the inclusion of public contracts in the PPP subject them to a metamorphosis.

As many times reported, the difference between public contracts and concessions consists in the different operating risk assumed by the private contractor: while in the latter it is possible the non-recouping of investments, in the former he does not run this risk.

Nothing precludes the private parties from advancing the resources needed for the realization of a project of public interest in the procurement contracts (as, in effect, happens in the UK with the PFI and in Italy with the real estate leasing and the availability contract).

Moszoro M.; Gasiorowski P., *Optimal Capital Structure of Public-Private Partnerships*, IMF Working Paper 1/2008, show how the best output of the private sector in terms of performance should be combined with the lower cost of money for the public sector.

Therefore, we could have PPPs with prevalent or total public funding.

On the private financing of PPP as a general rule, please refer to De Bettignies J.-E.; Ross T.W., *Public-Private Partnerships and the Privatization of Financing: An Incomplete Contracts Approach*, 2007. Queen's School of Business Research Paper No. 02-08.

Chapter IV. From the allocation to the management and mitigation of risk

So far the central theme of the present study has been the allocation of risk, with all its influences on various aspects of public procurement (from the distinction between public contracts and concessions to the accounting treatment, through the strategic use of public procurement).

At a closer examination, however, one realizes that under the procedural side – right as happened in relation to the concessions – the allocation of risk does not represent well the concrete ways by which can be governed a matter so insidious.

For its own innate nature the PPP refers mostly to complex business operations of high specialty and expensiveness, connected to large capital movements.

It is therefore necessary an adequate strategy for managing complexity.

And is indeed here that the risk, as a factor discriminating between well-conducted operation or bankruptcy, but also as an economic opportunity, becomes a valuable resource to be handled with care and attention. From the transfer of risk we shift to the allocation and management of risks in the PPPs.

This is a practice that the Anglo-Saxon world already knows for a long time and that involves a radical rethinking of national public procurement contracts in view of grafting the practices of different matrix from the common law.[365]

It follows a series of effects of no small importance.[366]

The allocative activity in fact reveals itself as the management and mitigation of risks in the PPP.

With regard to the first function, *i.e.* the management, it is necessary to point out that the new European Directives on public contracts and concessions provide substantially for the same treatment to complex (*rectius*: risky) contracts.

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[365] On the point see Rangone C., *Flessibilità procedurale e aderenza al diritto Ue nel Regno Unito*, Intervention at Conference - Procurement: a look on Europe - organized by IGI in Rome, 17 november 2011 (www.osservatorioappalti.unitn.it).

[366] Already in 1997, Tucci M., *Appalto e concessione di pubblici servizi. Profili di costituzionalità e di diritto comunitario*, Cedam, Padova, pointed out that the increasingly massive entrance of the Community rules in some areas of public law, as is the case of public contracts, on the one hand has challenged the supremacy always maintained in the past by the public administration within a series of legal relationships with the private sector (emblematic, in the case of the concession, the power of unilateral revocation) in view of a greater balance of interests and, on the other hand, has given rise to the need of having to reconcile distant legal and cultural traditions in order to introduce adventitious practices into established systems.

Nowadays such a wind of change is felt even stronger in the light of what exhibited herein.

Then we could speak of an "European statute on PPPs", made up of the flexible procedures for the award and by the general rules on the execution of contracts.[367]

This has a positive effect in the case of mixed contracts or of – to tell the truth, much more probable – uncertain legal classification.[368]

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[367] As regards the innovation partnerships and the concessions has already been said previously.

With regard to public contracts, the new EU Directives of 2014, nn. 24 (ordinary procurement) and 25 (utilities), reaffirm some assumptions and introduce important changes.

In the ordinary sectors (and in the special ones as well) the recitals 42-45 (59-60) and artt. 26, 29-32 (44, 47-49) confirm the need to adopt flexible procedures when the object of competition is not "*off the shelf*" and the competitive comparison with the candidates can be helpful in defining and awarding the contract.

Except for the admission of variants in the *lex specialis* pursuant to art. 45 Dir. 24 and art. 64 Dir. 25, remains firm the subsequent prohibition of modifications to the substantial elements of the object of tender and bidding.

In spite of the confirmed general applicability of the negotiated procedure with prior publication in the special sectors, however, in the ordinary ones the latter and the competitive dialogue represent tools available only in prescribed situations (albeit more loose than their predecessors laid down in the Directive n. 18 of 2004: cf. art. 30).

Now it is possible to utilize a competitive procedure with negotiation or a competitive dialogue, in addition to the already known case of unsuccessful tender (which gives rise to a negotiated procedure without a public invitation), when:

- the contracting authority's requirements can not be met by solutions readily available and/or imply design or innovative solutions;
- the contract can not be awarded without prior negotiations due to special circumstances (nature, complexity or financial and legal setting) or because of the risks associated;
- the technical specifications can not be established with sufficient precision by the contracting authority with reference to a standard, an European Technical Assessment, a common technical specification.

If you make a comparison with the preceding conditions, it is easy to see how the European Union has acknowledged the need for means of *good governance* when the economic operation is risky.

The public administration so must be enabled to address the complexity by means adequate for the purpose (as evidenced by the need to take this into account in setting the terms of tender: cf. art. 47 Dir. 24, equivalent to art. 66 Dir. 25, for the receipt of tenders and requests to participate, and art. 42 Dir. 24, equivalent to art. 60 Dir. 25, for the technical specifications in terms of performance or functional requirements).

Within both sectors the artt. 40 and 58 introduce the new-come "Preliminary market consultations" for the preparation of the contract and to inform economic operators of the planned procurement.

To this end, the contracting entities may seek or accept advice from experts or independent authorities or market participants. Such advice may be used in the planning and in the execution of the procurement process, provided that it does not have the effect of distorting competition and do not involve a violation of the principles of non-discrimination and transparency.

Actually, it is not exact to speak of an out-and-out innovation since it is the refreshment of the technical dialogue – set out in the previous Directives nn. 17 (recital XV) and 18 (recital VIII) of 2004 – which, it is recalled, did consist of a dialogue with the world of business, generally applicable in the phase preliminary to the possible call for a competition where the competent institution did not know how to convert its necessity in a materially effective solution. Irrespective of the private or public initiative underlying the technical dialogue, in any case was to be ensured genuine competition, so as to prevent abuse.

To date remains still the inner limit that the one selected for the advice at that stage will inevitably be advantaged in the competition or, if in danger to be excluded from it, will decide not to carry out the advice: on the point see Krüger K., *Ban-On-Negotiations in tender procedures: undermining best value for money?*, Journal of public procurement 4 (3), 2004, in particular p. 415.

The *extrema ratio* is as usual the negotiated procedure without notice (artt. 31, para. IV-V, Dir. 23; 32 Dir. 24; and 50 Dir. 25), in which the exclusivity must be justified by artistic, technical, economic and legal reasons.

With regard to the execution of contract, lastly, reference is made to Part I *supra*.

The elasticity must characterize the rules governing the entire procedural *iter* that goes from the conception of object, to the selection of contractor, until the contract design (as we have seen, conversely, the execution phase has a certain rigidity under the EU Directives, to counterbalance the aforementioned elasticity at the outset).[369]

To this end, as a rule, the public administrations shall provide information on their needs in terms of *output*, through performance specifications, and shall indicate the requirements, the objective criteria and the minimum elements that can not be changed nor in the competition nor in the course of execution of the contract.

In the PPP, the private counterparty assuming risks that would belong to the public administration, must be allowed not only his participation in the various stages of project development[370], but also the presence of moments of dialogue and negotiation with him during the competition.[371]

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[368] On the theme see the artt. 20-23 of the EU Directive on concessions n. 23 of 2014.

When a contract is inseparable, it is established the rule of the prevalence of public contracts (both ordinary and special sectors) on the concessions, whilst there is greater balance between concessions and contracts for defense and security.

The attraction of the concession parts of mixed contracts in the contracts law does not conflict with the view taken in the present study about the approach of the contracts to the concessions in complex contracts: it seems entirely reasonable that are applicable the more detailed rules concerning requirements, terms, publications and criteria (at least for the fact that they have some consolidation in practice).

Set aside the novelty of the regulation of concessions, with the consequent physiological running, there is the desire to avoid the repetition of the elusive aims which have characterized the institution in the past (v. *supra*).

[369] Refer to Cafagno M., "Vincoli di gara e affidamenti concessori nel diritto europeo", in *Finanza di progetto. Temi e prospettive*, edited by G.F. Cartei e M. Ricchi, Napoli, Editoriale scientifica, 2010; Cafagno M., *Flessibilità e negoziazione. Riflessioni sull'affidamento dei contratti complessi*, relation at the conference "Il diritto degli appalti pubblici all'alba delle nuove direttive comunitarie" at the Chamber of Deputies, Rome, 15 november 2013, in Rivista Italiana di Diritto Pubblico Comunitario 2: 991-1019, 2013

In particular, about contract design, see Iossa E.; Spagnolo G.; Vellez M., *Best Practices on Contract Design in Public-Private Partnerships*, The World Bank, Policy report, 2007; and Athias L., *Political Accountability, Incentives, and Contractual Design of Public Private Partnerships*, IDHEAP/SPAN, University of Lausanne, 2008.

[370] Please refer to Lawther W.C., *Flexible procurement approaches that facilitate relationship change and negotiation: the use of the invitation to negotiate*, Journal of Public Procurement, 2007.

Indeed, in the literature is increasingly gaining ground the cd. "*Early Contractor Involvement*" (ECI): cf. Van Valkenburg M.; Lenferink S.; Nijsten R.; Arts J., *Early Contractor Involvement: A new strategy for 'buying the best' in infrastructure development in the Netherlands*, 3rd International Public Procurement Conference, Amsterdam, 2008; Mosey D., *Early Contractor Involvement in Building Procurement Contracts, Partnering and Project Management*, John Wiley & Sons Inc, 2009; Walker D.H.T.; Lloyd-Walker B., "Understanding Early Contractor Involvement (ECI) procurement forms", in Smith, S.D (Ed) *Procs 28th Annual ARCOM Conference*, 3-5 September 2012, Edinburgh, UK, Association of Researchers in Construction Management, 877-887, 2012.

[371] The interaction between auction and negotiation in allocative proceedings has been studied by several authors. Please refer to Bulow J.; Klemperer P., *Auctions versus Negotiations*, American Economic Review 86(1): 180, 1996; Bajari P.; Tadelis S., "Incentives and Award Procedures: Competitive Tendering vs. Negotiations in Procurement", in *Handbook of Procurement*, N. Dimitri, G. Piga and G. Spagnolo, 121, 2006;

Additionally, it is useful the provision of appropriate features to better manage the risks (cd. "*risk management*"), as they proved to be the best practices in terms of risk registration and initial assessment through team work (creating a "project team" *ad hoc*, composed of public and private subjects), possibly via the use of consultants and specialized organizations (EPEC in Europe, in Italy the UTFP).[372]

Thanks to the prior sorting of the risks may be conceived clauses to deal with any contingency, to be included into contracts, thus avoiding the re-negotiation "prohibited" by the European Directives above a certain threshold and except for certain cases.[373]

The PPPs are, in fact, a *modus operandi* marked by the acquisition of high-quality services through the appropriate risk sharing between public and private actors in long-term contracts, based on *outputs* rather than on inputs, and usually *multi-tasking* (including a "package" of performances, the so-called "*bundling*").

Bajari P.; McMillan R.; Tadelis S., *Auctions versus Negotiations in Procurement: An Empirical Analysis*, Journal of Law, Economics and Organization, 2009. In particular, for the national literature, see Contessa C.; De Salvo N., *La procedura di dialogo competitivo fra partenariato pubblico-privato e tutela della concorrenza*, Urbanistica e appalti 5: 501, 2006; Gaspari F., *Il dialogo competitivo come nuovo strumento negoziale e la sua (asserita) compatibilità con la finanza di progetto*, giustamm.it (published on 1.3.2007); Mascolini A., *Il dialogo competitivo. In arrivo un nuova procedura che cambierà la gestione degli appalti pubblici complessi*, Progetto&Pubblico, 2007; Ricchi M., *Negoauction, discrezionalità e dialogo competitivo (Una teoria per l'affidamento dei contratti complessi di PPP)*, www.giustizia-amministrativa.it, 2008; Vinti S., *Il dialogo competitivo: troppo rigido nella fase creativa, poco regolato in quella comparativa*, giustamm.it (published on 1.4.2009).

[372] Cf. Fischer K.; Jungbecker A.; Alfen H.W., *The emergence of PPP Task Forces and their influence on project delivery in Germany*, International Journal of Project Management 24(7): 539-547, 2006; Mosey D., *Early Contractor Involvement in Building Procurement Contracts, Partnering and Project Management*, John Wiley & Sons Inc, 2009; Bottazzi M., *Attività di analisi dei rischi e trasferimento nella redazione dei bandi (cenni)*, report presented at the seminar on the subject "Redazione dei documenti di gara" held in Milan on 14 october 2013 under the initiatives of the Observatory on public contracts at the Specialization School for Legal Professions Bocconi University (www.osservatorioappalti.unitn.it).

[373] We have seen how the new EU Directives devote to contracts and concessions the same discipline of the changes *in fieri*.

If it is true that this demonstrates the approach of the two cases when the purchase is extremely complex and there is a risk of contingencies, it is equally true that there is a significant issue underlying.

Within the limits set by the EU Directives for the renegotiation is necessary to determine the aleatory or commutative nature of the concessions.

While the contracts are peacefully commutative (even too much, to the point that the risk of construction falls on the private in a very reduced manner), the risk that characterizes the concessions might militate in favour of the aleatory nature of the same, thence eliminating in the bud any possible renegotiation (at least with regard to the risks allocated specifically into the hands of the concessionaire, while for the others it seems legitimate to imagine the possibility of restoring the economic and financial balance in accordance with the contract or *ex lege*).

It is not clear, anyway, how much the risk actually affects the concessions, especially in light of the case law (both supranational and national) and of the new European Directives (v. *supra*).

What is clear is that, whereas faced with complex contracts, it should be adopted a perspective adhering to mitigate *ex ante* the risks and to encourage the private involvement in view of the success of the operation of PPP.

The complexity is manifested and extended because each element corresponds to an infinite number of variables: not always it is convenient the private financing, as well as bundling can often be counterproductive.[374]

Furthermore, exist factors like the influence costs[375] and the corruption[376], without forgetting the impact of third parties (individuals or collectivities)[377], which sometimes can even overturn the outcome of a PPP.

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[374] On this subject please refer to Iossa E.; Martimort D., *Risk allocation and the costs and benefits of public-private partnerships*, RAND Journal of Economics, RAND Corporation, 43(3): 442-474, 2012.

On the problem of the positive and negative externalities and on the correct assessment of the elements affecting a PPP refer to Iossa E.; Martimort D., *The Simple Micro-Economics of Public-Private Partnerships*, CEIS Research Paper 139, Tor Vergata University, CEIS, 2008.

On the phenomenon of the cd. "*overcontracting*", namely the establishment of contracts much complete as possible in order to use express terms to stimulate non-contractual aspects see Iossa E.; Spagnolo G., *Contracts as Threats: on a Rationale For Rewarding A while Hoping For B*, CEIS Research Paper 147, Tor Vergata University, CEIS, 2009.

Other interesting insights can be found in Hammami M.; Ruhashyankiko J.F.; Yehoue E.B., *Determinants of Public-Private Partnerships in Infrastructure*, International Monetary Fund, IMF Working Paper, pp. 1-39, 2006; Phang S.-Y., *Urban rail transit PPPs: Survey and risk assessment of recent strategies*, Transport Policy 14: 214-231, 2007; Jin X.-H.; Zhang G., *Modelling optimal risk allocation in PPP projects using artificial neural networks*, International Journal of Project Management 29: 591-603, 2011; Chou J.-S.; PingTserng H.; ChiehLin; Chun-PinYeh, *Critical factors and risk allocation for PPP policy: Comparison between HSR and general infrastructure projects*, Transport Policy 22: 36-48, 2012; Xu Y.; Sun C.; Skibniewski M.J.; Chan A.P.C.; Yeung J.F.Y.; Cheng H., *System Dynamics (SD)-based concession pricing model for PPP highway projects*, International Journal of Project Management 30: 240-251, 2012.

[375] They are called "*influence costs*" the costs due to wasted resources and distortion of the decisions. On the topic can be found in Milgrom P.; Roberts J., *Economia, Organizzazione e Management*, Il Mulino, Bologna, 1997, *passim*, in particular pp. 299, 371 and 401.

[376] Doni N., *A Comparison of Alternative Procedures for the Selection of the Private Partner in PPP Projects*, 2007, shows that the procedural flexibility guaranteed by negotiation with the candidate loses its competitive value in the context of market closed and characterized by a high rate of corruption.

In their turn Iossa E.; Martimort D., *Post-Tender Corruption and Risk Allocation: Implications for Public-Private Partnerships*, CEIS Research Paper 195, Tor Vergata University, CEIS, 2011, emphasize how the risk of corruption may also emerge during the execution of the contract, nullifying the previous transparent and fair competition.

Finally, reference is made to Klitgaard R., "Public-private collaboration and corruption", in Pieth M., *Collective Action on Anti-Corruption* (2012), Basel Institute on Governance. Prepared for the CBS-Sauder-Monash conference on public-private partnerships, Copenhagen Business School, 26-27 September 2012.

[377] Another profile of the PPP as a new order structure, at least in the intentions of the EU, concerns the direct involvement of the population in the strategic decisions that may be the subject of demonstrations and protests (just think of the movement "No-Tav" in Italy and France or the group "*Keep Hasankeyf Alive*" against the Ilisu dam in the Turkish Kurdistan), notably in order to avoid them: cf. Andres L.A.; Guasch J.L., "Negotiating and Renegotiating PPPs and Concessions", in Corbacho A.; Funke K.; Schwartz G., op. cit., p. 226: "to make new PPP programs sustainable, the social aspects causing the backlash need to be addressed through better communication to create popular support. It is essential to promote the program's infrastructure improvements, advertise the initiative, manage the expectations that the program may have on the *status quo*, and realistically argue the cost benefit trade-off of the program. Communication must not only justify the programs, but also periodically inform the public about the progress of the program, as well as about any changes or problems. Not only must the reforms be successful, but that success must also be communicated through greater transparency to provide a safeguard against corruption at all levels and to obtain greater popular support; through greater fairness and support to those adversely affected in the design of the transaction; and through the incorporation of social policies, such as social tariffs and financial assistance to

If the intent is to involve the private sector not only in terms of know-how but also of capitals, then the allocation and management of risks must be accompanied with appropriate mitigation strategies *ex ante*. Yet this might undermine the incentives inherent in the PPP: it is worth to repeat that the allocation of risks is intended primarily to enhance the efficiency through the careful allocation of costs.

Are in fact recognizable some instruments to mitigate risk in the PPP that seem to contradict the mission, evoked by most, of encouraging private investment and avoiding public funding *in toto*: starting from the multiplier effect[378], through the public finance[379],

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those adversely affected by the programs, for instance those losing their jobs. Programs or policies should be implemented to support users and workers, and affected communities must be part of the strategy of a successful program from the start. Initiatives should be launched and supported from the bottom up in areas and locations where the benefits and costs will be incurred".

In the same terms – namely the need for an "*ethic of care*" in respect of third parties concerned – is Yseult M., *Public-Private Partnerships and the Law: Regulation, Institutions and Community*, Edward Elgar, 2014. Reference is also made to Galetta D.U., *Il diritto ad una buona amministrazione europea come fonte di essenziali garanzie procedimentali nei confronti della pubblica amministrazione*, Rivista Italiana di Diritto Pubblico Comunitario 3-4: 819, 2005; *id*., *Diritto ad una buona amministrazione e ruolo del nostro giudice amministrativo dopo l'entrata in vigore del Trattato di Lisbona*, Diritto Amministrativo 3: 601, 2010; and De Grazia D., *L'evoluzione della disciplina dei servizi pubblici nella prospettiva della tutela degli utenti* (http://www.academia.edu/3199484/Levoluzione_della_disciplina_dei_servizi_pubblici_nella_prospettiva_della_tutela_degli_utenti).

In this regard, be noted that the Italian draft law S/1678 – delegation for the implementation of the Directives 2014/23/EU, 2014/24/EU, 2014/25/EU – expressly provides, on the one hand, the involvement of the holders of qualified interests in the decision-making processes of the administration aimed at programming and awarding public contracts and concessions, as well as during the execution of the contract; on the other hand, forms of public debate, modeled on the French *débat public*, for the local communities of the areas affected by the construction of large infrastructure projects that have an impact on the environment or on the regional planning.

[378] Cf. Opinion of the European Economic and Social Committee on the Proposal for a Council Regulation (EC) amending Council Regulation (EC) No. 2236/95 laying down general rules for the granting of Community financial aid in the field of trans-European networks (98/C 407/23), pt. 5.3: "the term «multiplier effect» is intended to indicate the perceived likelihood that where public financing is limited the injection of Community funds will in itself generate additional private financing".

As clearest evidence of this, in the document "Connecting Europe Facility" (2011), the package that includes the new EU guidelines on financing the trans-European transport TEN-T for the period 2014-2020, it is definitely pointed out that in order to achieve the 250 billion euros needed to complete the core network "The 31.7 billion euros allocated to transport under the Connecting Europe Facility of the MFF (Multi Annual Financial Framework) will effectively act as "seed capital" to stimulate further investment by Member State to complete the difficult cross border connections and links, which might not otherwise get built. There is a very strong leverage effect from TEN-T funding. Experience in recent years shows that every 1 million euros spent at European level will generate 5 million from Member State governments and 20 million from the private sector" (http://ec.europa.eu/transport/newsletters/2013/10-18/newsletter-2013-10-18-print_en.htm).

In the end, a portion of public financing – hence of risk – is inevitable.

[379] About the EU's contribution to PPP projects can be found in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Mobilising private and public investment for recovery and structural change in the long term: developing public Private Partnerships COM (2009) 615 final, Brussels, 19.11.2009 (pt. 3).

The principles governing EU funding for the years 2014-2020 are laid down in the Regulation (EU) No. 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the

subsidies[380] and guarantees[381], unto the *bail-out* of operations in a state of difficulty or crisis[382], it is clear that the economic risk, especially because of the activities particularly sensitive to the general public, in effect, is never transferred outright to the private sector.[383]

Connecting Europe Facility, amending Regulation (EU) No. 913/2010 and repealing Regulations (EC) No. 680/2007 and (EC) No. 67/2010.

Other funding opportunities, as well as the Structural Funds and the Cohesion Fund of the EU, are those of the European Investment Bank (EIB), among which include the Tool for Structured Finance Facility (SFF) and the Loan Guarantee Instrument for TEN transport projects (LGTT), and the national ones.

Finally, though not a question of public funding, it is only right to mention the contribution of the private sector through project bonds under the supervision and guarantee of the EIB in order to reduce risks: cf. Mataluni F., "Il finanziamento delle concessioni attraverso il mercato: il Project Bond", in Cafagno M.; Botto A.; Fidone G.; Bottino G., *Negoziazioni pubbliche. Scritti su concessioni e partenariati pubblico-privati*, Giuffrè, Milano, 2013, p. 644 ss., and Quaranta A., *Project Bond: un nuovo strumento per il rilancio delle infrastrutture?*, Ambiente e sviluppo 4: 339, 2013.

[380] In particular, as regards the tax relief measures made in Italy, please refer to Gentiloni Silveri S., "Il coinvolgimento dei finanziatori nei contratti di partenariato pubblico-privato e l'opzione per "l'accordo diretto", in Cafagno M.; Botto A.; Fidone G.; Bottino G., op. cit., pp. 547-551.

As mentioned, significant tax relief measures are covered by art. 18 L. 12 november 2011, n. 183, and art. 33 Decree-Law 18 october 2012, n. 179, converted with amendments by L. 17 december 2012, n. 221 (v. Part I *supra*).

[381] Which may include the guarantees of all or part of the credits and debts of the private operator, the guarantee of a minimum return or minimum demand, the refinancing guarantee or warranty of payments at the end of the contract. In this respect Medda F., *A game theory approach for the allocation of risks in transport Public-Private Partnerships*, International Journal of Project Management 25(3): 213, 2007, shows that if the collateral substantially comes to cancel out the risk of loss may arise phenomena of moral hazard and adverse selection.

Please refer to Cori R.; Paradisi I., "La fase di esecuzione del contratto di concessione di lavori pubblici", in Cafagno M.; Botto A.; Fidone G.; Bottino G., op. cit., pp. 593-595, for the italian scenario and, in general, to Goldsmith H., "Combining PPP with EU Grants", in Corbacho A.; Funke K.; Schwartz G., *Public Investment and Public-Private Partnerships: Addressing Infrastructure Challenges and Managing Fiscal Risks*, Palgrave MacMillan, 2008, pp. 173-187, as well as al documento di UTFP and, *Le garanzie pubbliche nel PPP. Guida alla migliore valutazione, strutturazione, implementazione e gestione*, august 2011 (the original version in English, *State Guarantees in PPPs, A Guide to Better Evaluation, Design, Implementation and Management* is available on the website of EPEC).

[382] Ehrhardt D.; Irwin T., *Avoiding Customer and Taxpayer Bailouts in Private Infrastructure Projects: Policy toward Leverage, Risk Allocation, and Bankruptcy*, World Bank Policy Research, Working Paper No. 3274, 2004, show that excessive risk-transfer rates on the private contractor end up increasing his debt, resulting in increased costs for users and greater risk of default.

One could speak – let me use this slang expression – of "boomerang effect" (emblematic are the remembered events of Eurotunnel and motorways in Lombardy: v. Part I *supra*).

On this point writes Ricchi M., "Il partenariato pubblico-privato: nuove competenze e nuovi strumenti di regolazione della P.A." in Cafagno M.; Botto A.; Fidone G.; Bottino G., *Negoziazioni pubbliche. Scritti su concessioni e partenariati pubblico-privati*, Giuffrè, Milano, 2013, p. 323: "Whereas in the Anglo-Saxon countries, in case of failure, the condition of the takeover of the Public Administration in all the obligations of the project company and in the acquisition of the assets is expressly specified contractually, in the Italian system is preferred to ignore the failure scenario and flatter with the irresponsibility of Pa. Instead, in case of default not only the Public Administration is obliged to pay the value of the work within the limits of its enrichment but also - and this depends on the degree of essentiality of the service that the infrastructure must ensure - to support the maintenance and operational costs of the service that can not be interrupted. Therefore, it is necessary to ensure in the contract the predetermination or the criteria for predetermining the compensation by the Public Administration in the event of failure of the project company and in general of all the cases of terminating the contract before the expiry especially with regard to the so-called "financial costs". The ultimate responsibility of the Public Administration in taking over public works and supporting their costs should not dissuade to undertake PPPs, but rather to do so by acquiring the necessary expertise".

The rationale is obvious enough.

Aside the situation of general crisis that is marking the current historical period (which has resulted in a contraction of the circulating capitals, depleting not only the public resources but also the loans from financial institutions) and given the normal adversity to risk on the part of the operators, it appears clear that no one would dare to embark on interventions such complex and uncertain, as are the PPPs, without assurance, both economic and administrative, from the counterparty.

This circumstance makes no wonder if you only think about the great variety of instances, even superindividual, underlying the public procurement and for the amount of factors that can affect the final outcome.

Determining who will be in charge of certain contingencies and to what extent becomes of paramount importance.

Just to give some examples, you should cite the various phenomena of "*capture*" that can occur within a PPP transaction.

The public plexus can remain bound to contracts subject to obsolescence or decide, for electoral motivations, to continue projects ill-conceived after predictions turned out to be wrong; the private party may have to face the political or administrative second thoughts and reactions of the affected communities; then it can happen that the community get poor service and high prices.

The allocation, managment and mitigation of the risk must therefeore serve to avoid such criticalities, preparing, ever since the conceiving of the project, all the cautions which are needed in view of the satisfaction of the interests of each party involved.

And that irrespective of the fact that the concessionaire bears a risk more significant than the contractor, because the distinction between public contracts and concessions is not the cause – but rather the effect – of the different allocation of risks.

Once the risks have been adequately analyzed, mitigated, and allocated a priori, during the contractual execution we will witness the actual differentiation of discipline between public procurement contracts and concessions for what concerns the consequences of possible contingencies.

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[383] Moreover, there are mechanisms that allow for flexible adaptation *in fieri* such as, for instance, the variation of the contractual duration, the adjustment of prices and restore of the overall economic and financial equilibrium. Their scope, however, is severely restricted by the regulations to the predisposition of contractual clauses *ad hoc* or to the conditions *ex lege* (v. *supra*).

Chapter V. The risk in PPP: paradox or panacea?

The title of this final section may seem a bit flashy, certainly rhetorical, but it intends to recall two vivid expressions which have been used to describe the ratio between risk and PPPs.

Whenever you hear talking of the so-called "*Public Private Partnership Paradox*", this actually refers to the budget accounting anomaly according to which the public plexus is much more rich as much risk retains.[384]

In reality, it is simply a bad practical application of accounting tools when they have to do with the systemic risk of the cash flows related to a PPP.

It is not very much interesting to point out the accounting problem itself but the message underlying: on the basis of circumstances the risk, or rather its allocation, can be a source of gain or loss.

The doctrine complains about the fact that continues to prevail an accounting logic, which, on the one hand, aims only at lightening the current public budgets and, on the other hand, considers the PPPs in a quantitative and formalistic perspective poorly suited to a political tool for managing complexity.

In this respect has been coined the term "*accountingization*".[385]

Very often has been given more importance to the quantitative assessment of the risks rather than to the qualitative one, ignoring the systemic risk and uncertainty that have a profound effect on the effective allocation of risks and, therefore, on the final result of the economic operation. Not everything can be measured with a complex algorithm or by a simple mathematical formula: the accounting logic shows many shortcomings.[386]

The real paradox of the PPP, should you want to find one, is indeed another.

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[384] Cf. Gray S.; Hall J.; Pollard G., *The Public Private Partnership Paradox*, 2010.

[385] Reference is made to Broadbent J.; Gill, J.; Laughlin, R., *Identifying and controlling risk: The problem of uncertainty in the Private Finance Initiative in the UK's National Health Service* (2005), (http://roehampton.openrepository.com/roehampton/bitstream/10142/12451/1/broadbent%20identifying.pdf), Critical Perspectives on Accounting 19(1): 40-78, 2008.

Refer to the document of the Unità Tecnica Finanza di Progetto (UTFP), *Partenariato Pubblico – Privato per la realizzazione di opere pubbliche: impatto sulla contabilità nazionale e sul debito pubblico*, Rome, january 2011.

[386] Examples of predictions turned out to be unreliable are provided in Brenck A.; Beckers T.; Heinrich M.; von Hirschhausen C., *Public-Private Partnerships in New EU Member Countries of Central and Eastern Europe: An Economic Analysis with Case Studies from the Highway Sector*, Public Sector Management and Regulation Working Papers WP-PSM-08, Reprint from EIB Papers, 10(2): 82-112, 2005.

For the purposes of consolidation and development of the single market and of European cohesion, the EU has repeatedly stressed the need to involve private capitals in the implementation of the TEN (Trans-European Networks), through forms of PPP, since the financial requirement (estimated at about € 1.000 billions[387]) can not be covered by public funds alone.

Moreover, the PPP should get to rise, in principle, as a remedy – just like panacea – to the European infrastructure's gap in general (not only with regard to the TENs), but there are still several obstacles to be overcomed.[388]

Surely is axiomatic that, in front of the impossibility of financing the infrastructures in the public interest exclusively by means of public resources, the only possible alternative is resorting to the private contribution.

To this end, originally it was thought that would have been enough bestow public funding intended to cover partially, to the minimal extent mostly, the works in such a way as to attract private capital and thence would have sprung a "multiplier effect" in favour of new investors.

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[387]Exactly equal to EUR 970 billion until 2020: cf. Regulation (EU) No. 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility, amending Regulation (EU) No. 913/2010 and repealing Regulations (EC) No. 680/2007 and (EC) No. 67/2010.

[388] It is now widely believed that "PPPs are not a miracle solution: for each project it is necessary to assess whether partnership really adds value to the specific service or public works in question, compared with other options such as concluding a more traditional contract" (cf. Communication of the Commission on PPPs and Community Law on Public Procurement and Concessions, COM (2005) 569 final, Brussels, 15.11.2005).

On the topic see also the European Parliament resolution on public-private partnerships and Community law on public procurement and concessions (2006/2043(INI)), 16.10.2006 ("To sum up, PPPs are no panacea. They are difficult to plan, implement and run"); UNECE - *A Guide to Promoting Good Governance in Public Private Partnerships*, Tel Aviv, Israel, 5-8 June 2007, Part I: The Misconceptions, p. 9 ("PPPs are all embracing *panaceas* that can be implemented all at once irrespective of the competence, knowledge and skills on the part of governments: PPPs are very complex but Governments have been eager to start as quickly as possible without pacing themselves. Such a myth lead to countries with no experience of PPPs to launch numerous projects before they have the capacity and knowledge, leading them often to repeat the mistakes of those who started earlier"); Thomas S.Ng.; Wong Yoki M.W.; Wong James M.W., *Factors influencing the success of PPP at feasibility stage – A tripartite comparison study in Hong Kong*, Habitat International 36(4), 2012, p. 423 ("Despite being extensively applied in both developed and developing countries since 1970s, PPP is not a *panacea* as the interests of the government, investor and society may vary significantly (HMTreasury, 2000). Identifying and balancing the interests of all stakeholders in an open and equitable manner thus becomes a major challenge when determining whether PPP is a feasible and the most value-for-money approach for delivering public facilities and services. The problem is aggravated as stakeholders' interests may change over time due to such forces as political pressure, organisational change and social behaviour. When a PPP scheme fails to meet the conflicting expectations of any parties, the government might have to consider buying out the facility for retendering or own operation, and the results could be protracted negotiation and compensation (Dailarni & Klein,1997). Therefore, it is imperative to examine what contributes to the success of a PPP scheme from the corresponding views of the government, investor and society"). Emphasis added.

The plan does not seem to have worked: in part because of the situation of global crisis that has arisen in the recent years, in part for intrinsic weaknesses.

One implication not to be underrated is that the allocation of risk in the PPPs, in order to be truly functional, must ensure a certain economic equilibrium.

This latter is the condition necessary, but not sufficient, in view of the private participation in the financing of infrastructure that are not achievable solely by the public administration. An *incipit* necessary, but not sufficient.

The management and mitigation of risk are equally necessary, too.

In the first place, must be considered all the implications of collective nature (economic, ecological, social) inevitably present in the area in question.[389]

Secondly, one can not hope for a private intervention in such risky sectors of the economy unless are provided in advance the conditions to do so.[390]

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[389] It is first of all necessary to examine "upstream" the possible interferences between the interests of the public administration, the private interests, the collective interests.

See the opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council amending Decision No. 1639/2006/EC of the European Parliament and of the Council establishing a competitiveness and innovation framework program (2007-2013) and Regulation (EC) No. 680/2007 laying down general rules for the granting of Community financial aid in the field of trans-European transport and energy networks, COM (2011) 659 final - 2011/0301 (COD) (2012/C 143/27), pt. 3.7: "*The objective in launching the planned risk-sharing instrument should not simply be to achieve the greatest possible leverage effect to mobilise additional investment funds from private sources; it must also be ensured that the proposed instrument does not counteract policy decisions and social agreements aimed at sustainable economic, environmental and social goals*. The investment projects launched by project bonds must not, for example, be based on disregarding social, environmental and quality standards. Execution of these projects must take due account of the quality of construction and maintenance, environmental sustainability, compliance with collective agreements and the place-of-employment principle, the need to support small and medium-sized enterprises, to promote innovation and to calculate costs on the basis of lifecycle costs, the social and environmental conditions of the drafting process, and the need to guarantee accessibility for people with disabilities, provided these factors can be objectively verified and are based on non-discriminatory criteria. It must be ensured that users are not burdened with excessive fees, particularly those who need to make frequent, or even daily, use of certain transport infrastructure, and especially if no alternative infrastructure is available" (italics added).

[390] Cf. UNECE - *A Guide to Promoting Good Governance in Public Private Partnerships*, Tel Aviv, Israel, 5-8 June 2007, p. 42: "3. Governments should provide support to projects in order to lower the risk the private sector assumes. One of the central objectives in structuring a concession agreement should be to strike a suitable balance in terms of risk allocation. This is especially true in large scale construction projects such as the Trans European Networks. Here massive private sector investment is being sought. However the private sector will not accept the various commercial risks for these projects, including:

- The risk that in the promotion and development stage of the project, there is still no guarantee that the project will take place;
- The high-risk construction phase due to the likelihood of cost overruns throughout the lifetime of the project and;
- The uncertain revenues once a project starts operating and the potential for policy changes to undermine the viability of the project.

The whole PPP challenge revolves around the injection of sufficient public sector resources into a project to lower risks sufficiently to stimulate the desired levels of private sector investment. If the public

And, in fact, have been thus taken some corrective measures, such as project bonds, subordinated and mezzanine loans, EU and EIB guarantees (to which must be added the national measures).[391]

Certainly, creating the economic conditions for the private participation in the PPPs is a prerequisite that cannot be disregarded.

Still remains to be seen what is the legal regulation of the PPP understood at the same time as a tool for managing the complexity and, above all, as a combination of public contracts and concessions. The theme has partially lost importance as a result of the adoption of the Directive on concessions as these are now entirely object of positive law.

Nevertheless, on the background remains the question of the distinction between public procurement contracts and concessions that, according to the case law of the European Court of Justice and the new Directive 2014/23/EU, must be identified in the operating risk, albeit reduced from the outset, taken by the concessionaire.

On the one hand, the admission of a reduced risk in concessions, on the other hand, the inclusion in the PPPs of the public contracts (and so of a certain procedural flexibility), produce a striking attenuation of the gap between the two cases.

Perhaps the truth is that the distinction serves to keep separate the standardized contracts from the risky concessions, having to operate in totally different ways according

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sector does not plough enough resources or fails to offer other ways of lowering commercial risk, then projects such as TENS will not be realized as desired. The key challenge therefore for governments is to achieve an optimal allocation in the various risks and to mitigate, where possible, the risks assumed by the private sector by providing the necessary support to make the project attractive to the private sector".

[391] All the more when you consider that, in the the opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council amending Decision No. 1639/2006/EC of the European Parliament and of the Council establishing a competitiveness and innovation framework program (2007-2013) and Regulation (EC) No. 680/2007 laying down general rules for the granting of Community financial aid in the field of trans-European transport and energy networks, COM (2011) 659 final - 2011/0301 (COD) (2012 / C 143/27), the Committee argued that the EIB and the EU budget should not only provide a guarantee against the risks, but also participate adequately in the benefits obtained (cd. "*benefit sharing*"): see pt. 4.2.

Think of the Volkswagen model, a classic example of successful PPP between public and private, or about the institutionalised partnerships in general (*e.g.* the cd. "mixed" companies with public-private capital).

Yet it does not fit with the subject of the recent opening by the new Directives to private capital in the *in house*: cf. art. 17 Dir. 2014/23/EU, art. 12 Dir. 2014/24/EU and art. 28 Dir. 2014/25/EU. In this case, the participation of certain private economic operators to the capital of the body controlled is made compulsory by national legislation, in accordance with the Treaties, on the mandatory condition that it is a participation that does not involve control or power of veto and that does not confer decisive influence on the decisions of the controlled legal person.

In short, the private shareholder would only be a financial partner with no right of *voice*.

Something that is difficult to reconcile with the ultimate goal of the public-private partnership, namely the sharing of both the subjective components to the implementation of operations in the general interest.

to the characteristics of the transaction; conversely, when the risks increase in proportion to the complexity of the operation, like in the PPPs, not only it is reasonable to adopt similar procedural cadences but also readjusting the institutions for the purposes to fulfil.

Consequently, if the sector rules can provide for a limitation of the risk which yet does not exclude the concessions, the same way we could imagine a public contract financed by the contractor in view to recoup the total investment, except for the risk of realization against him (as in the leasing and PFI contracts).[392]

This would be a useful incentive to the counterparties of the public administration, with positive effects in terms of "natural selection" of firms (besides discouraging malpractice and malfeasance): only the firms really interested and able to accomplish and bring to conclusion the contract will participate in the competition.

The risk is neither a panacea nor a paradox in the PPPs, but only one variable to be handled properly.

The quintessence of the PPP is ultimately the application of the *golden rule* that the risk should be allocated to the party best able to manage it and at the lowest cost – considered the attitude of willingness, neutrality or aversion to the same risk – on the basis of an equitable sharing of costs and benefits.[393]

In other words: "*fair risk and benefit sharing*".[394]

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[392] Of course, as stated, the private funding does not exclude the public contribution in various forms (price, loan, guarantee, tax relief, and so on).

What matters is that the public disbursements, except for exceptional cases, take place in the initial operations (cd. "*ramp up*") or, however, in such a way as to avoid the cd. "*ratchet effect*" and maintain a strong incentive on the private party that assumes the risks of implementation (as happens, for example, in the "*Cession de créances*" in France and in the "*Forfaitierungsmodell*" in Germany).

[393] This should be done on a case-by-case basis with a very careful analysis of the costs and benefits for all the parties and interested subjects.

It is not always convenient transferring certain risks to the private or transfer them above a certain threshold. Should be carefully considered each option and the alternatives: on the point cf. Christiansen H., "The OECD Principles for Private Sector Participation in Infrastructure", in Corbacho A.; Funke K.; Schwartz G., op. cit., p. 143 ss., and Hawkesworth I., *From Lessons to Principles for the use of Public-Private Partnerships*, OECD report, 2011.

[394] On the point see Hammami M.; Ruhashyankiko J.F.; Yehoue E.B., *Determinants of Public-Private Partnerships in Infrastructure*, International Monetary Fund, Working Paper, 2006, pp. 19-20: "Neither governments nor private firms alone are likely to have the resources to build essential infrastructure and bear all of the risks. Hence, the scope for mutually beneficial partnerships between public and private sectors should involve an allocation of rights between partners as well as a corresponding allocation of risks. Too many government rights will scare away potential private investors; too few will probably result in customers or taxpayers having to bail out unscrupulous private investors. Too many risks assumed by governments will likely put unjustified pressures on taxpayers; too few will prevent potential private investors from participating in the venture".

Final annotations

At the end of this long discussion that has touched a variety of topics, pending among different jurisdictions, I think it is appropriate to carry out some closing reflections.

It is not possible to summarize the reasoning developed in the preceding pages in a few lines, as it was not possible to investigate properly all the topics, so I will provide some insights which, in my humble opinion, deserve attention.

The starting point from which we took the moves is the new phenomenon of PPPs, of which we hear about more and more often, and that has recently concentrated the efforts of legal science in the field of public procurement.

But from a legal standpoint the PPP *per se* does not mean very much, at least into the European Union, since in essence it consists of both public contracts and concessions, as regulated by the respective EU Directives and from the domestic legislation.

As you will have no doubt guessed, therefore, the most immediate conclusion that is reached at the end of this work can only be a reinterpretation of the institutions of public contract and concession in the light of the new phenomenon PPP. Global phenomenon[395], should be remembered, that here was discussed mainly under Community and national law.

[395] As examples of application of the PPPs around the world may be mentioned the following: Farlam P., *Assessing Public-Private Partnerships in Africa*, The South African Institute of International Affairs, Nepad Policy Focus Series, Working Together Report 2, 2005; Shen L.-Y.; Platten A.; Deng X.P., *Role of public private partnerships to manage risks in public sector projects in Hong Kong*, International Journal of Project Management 24: 587-594, 2006; Singh L.B.; Kalidindi S.N., *Traffic revenue risk management through Annuity Model of PPP road projects in India*, International Journal of Project Management 24: 605-613, 2006; Abednego M.P.; Ogunlana S.O., *Good project governance for proper risk allocation in public–private partnerships in Indonesia*, International Journal of Project Management 24: 622-634, 2006; Hodge G.A.; Greve C., *Public – Private Partnerships: An International Performance Review*, Public Administration Review 67 (3), 545-58, 2007; Wibowo A.; Mohamed S., *Risk criticality and allocation in privatised water supply projects in Indonesia*, International Journal of Project Management 28: 504-513, 2010; Ke Y.; Wang S.Q.; Chan A.P.C.; Lam P.T.I., *Preferred risk allocation in China's public–private partnership (PPP) projects*, International Journal of Project Management 28: 482-492, 2010; Chung D.; Hensher D.A.; Rose J.M., *Toward the betterment of risk allocation: Investigating risk perceptions of Australian stakeholder groups to public private-partnership tollroad projects*, Research in Transportation Economics 30: 43-58, 2010; Lee C.H.; Yu Y.-H., *Service delivery comparisons on household connections in Taiwan's sewer public–private-partnership (PPP) projects*, International Journal of Project Management 29: 1033-1043, 2011; Xu Y.; Yeung J.F.Y.; Chan A.P.C.; Chan D.W.M.; Wang S.Q.; Ke Y., *Developing a risk assessment model for PPP projects in China — A fuzzy synthetic evaluation approach*, Transport Policy 22: 36-48, 2012; Chen C.; Hubbard M., *Power relations and risk allocation in the governance of public private partnerships: A case study from China*, Policy and Society 31: 39-49, 2012; Iseki H.; Houtman R., *Evaluation of progress in contractual terms: Two case studies of recent DBFO PPP projects in North America*, Research in Transportation Economics 36: 73-84, 2012; Hwang B.-G.; Zhao X.; Jiang Shu Gay M., *Public private partnership projects in Singapore: Factors, critical risks and preferred risk allocation from the perspective of contractors*, International Journal of Project Management, 2012.

The leitmotiv used herein, that is the allocation of risk (*rectius*: of the risks) allows an exhaustive and overall analysis of the various constituents of the institutions under investigation.

First, what is left out of the PPP is not the public contract in itself but in its usual meaning of standardized contract that underlies a procurement trivial and from the market (so-called "*off-the-shelf*").

In such cases it is obvious to expect a wholly publicly financed and guaranteed payment because of the lack of significant risks for both public and private parties.

Conversely, when you have to do with a contract more complex (in terms of economic, legal, environmental, social, or technological innovation), it seems reasonable to expect a distribution of the risks in accordance with the particular attitudes of the agents involved.

As a result, both the funding and the implementation of the contract are affected by the change in the degree of difficulty.

This means, in theory, that even the public contract may be financed and carried out by private parties, just like a concession, but on the condition of being repaid in full by the same public administration and/or third party users.

Therein lies the difference with respect to the concession, which instead requires a higher operational risk in the performance management by the private party.

In such a way it seems to assume importance the fact that a public contract or a concession has been chosen, provided that is respected the allocation of risks to the parties.

It is true that the *discrimen* between contracts and concessions has been identified by the defining rules in the operating risk, as interpreted by the European Court of Justice, but it is equally true that this latter, after an initial hermeneutical rigidity, has then adjusted its target thereby weakening the ideological value attributed to the risk and acknowledging to the public administrations the possibility of choosing the most suitable instrument in order to meet their needs.[396]

[396] Now the art. 2 of the new Directive on concessions, entitled "Principle of free administration by public authorities" recognizes the principle that national, regional and local authorities can freely arrange the execution of their work or services in accordance with national and EU law, deciding the best way to ensure a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights in public services.

After all, just like it is not easy to define the risk, is not always easy to distinguish public contracts and concessions.

The criteria suggested by the Court of Luxembourg are the modes of compensation and the regulation of sector: from their intersection is determined the risk allocation, *ergo* the specific nature of the transaction.

Nonetheless, in the matter of PPPs, they do not seem very useful as are inconclusive (also because the mutual influences between the two species are particularly acute).

Since the PPPs are contracts that presuppose significant risks, specially managed and mitigated, then would we have either concessions with reduced risk or public contracts with guaranteed remuneration?

Of course, the qualification will depend on the particular case, but what is important to emphasize is the commonality of a fundamental aspect.

Earlier reference was made to the cd. "*fair risk and benefit sharing*".

This principle is subject to two forms: one theoretical and the other pragmatic.

The first puts in crisis the ordinary way of looking at interpersonal relationships.[397]

With the entering into crisis of the stereotypical model of the agency (so-called "principal-agent"), where rival subjects act as driven by sharply conflicting interests for the sole purpose of exploiting the weaknesses of the others and maximizing their personal gain, in the PPPs this is destined to be replaced by a model focusing on relational and honest cooperation of the parties involved.[398]

Which means to confirm the process of gradual learning underlying every activity that goes beyond the capabilities of individuals suffering from information asymmetry, however offsetting the space for moral hazard, in favour of the union of intents for the success of a joint operation.

In the second place, therefore, we must adopt a collaborative model marked on the concept of team ("*project team*"). Sometimes this means setting up a joint venture with third parties (SPV), some other times instead it is to put in place a number of measures aimed at establishing a relationship of active cooperation and a climate of mutual trust.[399]

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[397] Cf. Perrow C., *Economic theories of organization*, Theory and Society 15(1-2): 11-45, 1986.

[398] On this point see Campbell D.; Harris D., *Flexibility in long-term contractual relationship: the role of cooperation*, Journal of law and society, 170, 1993; Halachmi A., *Public-Private Partnerships (PPP): A Reality Check and the Limits of Principal-Agent Theory*, 4th International Conference on Public Management Challenges in the 21st Century, University of Macau and the Macau Foundation, 2010.

[399] A good example is the cd. "*benefit sharing*", namely the share of any profits and benefits.

Here the discussion is a bit complicated for the fact that there is not only one risk, but there are many risks (technical, financial, legal, administrative, political, environmental, systematic) to be taken into account, and that each risk corresponds to a cost (the cost *ex se* or the premium payable to those who bear it, from designers to builders through insurers and financiers, and so on).

The golden rule in matters of risk is that it must be attributed to those who are able to manage it better and with the least possible sacrifice in terms of time, cost, quality.

It seems quite far-fetched to believe in the existence of a subject who alone is able to cope with all the potential variables inherent in a project with a high degree of difficulty (despite the wide use of the *general contractor* in Italy); at most, it can be assumed that such a subject arise from the union of the experience and skills of the various stakeholders.

It is important to remember – giving for ascertained that the classical view of the contract as an agreement of wills, comprehensive and having the force of law, now clashes with modern times – that if, on the one hand, the neoclassical theory of contract establishes the incompleteness of the same, on the other hand, the relational theory has come to admit that the contractual relationship goes far beyond what "put down in writing" and from paper moves into reality, materialising in a bundle of interpersonal relationships.

The effective demonstration of what just said stands exactly in the field of PPPs, where the best practices reached by the most pioneering countries imply some form of "*partnering*" (already evoked in the *nomen omen* "Public-Private Partnerships").[400]

In our legal system art. 265, para. I, n. 4, R.D. 14 september 1931, n. 1175, T.U. for the local finance, already provided, in lieu of the fee payable for the concession, the participation of the municipality or province in the profits of the enterprise. Even before, art. 285 L. 20 march 1865, n. 2248 (Annex F) established, for the concessions of railways to private industry, the rule that, after a certain start-up period of the infrastructure, the Government had the right to a share in the profits every time the accounts of the concessionaire would have proved an annual result exceeding 10% than the previous five years. Either way, the Government could waive the sharing by imposing tariffs reduction to the concessionaire.

Finally stepped in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Mobilising private and public investment for recovery and long term structural change: developing Public Private Partnerships COM (2009) 615 final, Brussels, 19.11.2009: "Successful PPPs need to be designed to allow private partners the potential to generate a return proportionate to the risks they undertake. Since risks are shared with public partners, returns should also be shared. Bidding processes must be competitive and require an appropriate regulatory and financial framework at national level. Public entities should have flexibility in the types of agreements they can conclude, and retain the possibility to award contracts according to value for money, provided for by the best mix of private and public risk allocation".

[400] Please refer to Parker D.; Hartley K., *Transaction costs, relational contracting and public private partnerships: a case study of UK defence*, Journal of Purchasing & Supply Management 9: 97-108, 2003; Clifton C.; Duffield C.F., *Improved PFI/PPP service outcomes through the integration of Alliance principles*, International Journal of Project Management 24: 573-586, 2006; Lewis, M.; Zheng, J.; Roehrich, J.K., *The*

With particular regard to the risks allocation we are usually in the habit of speak of "*joint risk management*".[401]

This includes the identification, allocation and management of risk.

The sequence is carried out in full partnership between the public administration and the other stakeholders, including even the relevant community.

Hence, it is completely twisted the pattern – so far dominant in public procurement and beyond – pursuant to which the public administration addresses the market for making a certain performance (*input*) via rigid mechanical procedures in which dialogue and negotiation are the exception, not the rule.

The reasons behind the failure of this scheme are so many and varied that they would deserve special research activities (influence costs, corruption, shortages intrinsic to the procedures and organizations,…). Therefore I confine myself to analyze the profile of inadequacy and dysfunction about the allocation of risk.

The principal-agent model, assuming otherness of roles and hierarchy of the parties, denotes some allocative limits when facing highly complex and risky operations.

The advantages of the relational model instead do consist in the exploitation of the various specialties of the individuals involved, creating synergies and reducing transaction costs ever since the beginning of the operation.

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dynamics of contractual and relational governance: Evidence from long-term public–private procurement arrangements, Journal of Purchasing & Supply Management 14: 43-54, 2008; Mosey D., *Early Contractor Involvement in Building Procurement Contracts, Partnering and Project Management*, John Wiley&Sons Inc, 2009; Iossa E.; Rey P., *Building Reputation for Contract Renewal: Implications for Performance Dynamics and Contract Duration*, CEIS Research Paper 155, Tor Vergata University, CEIS, 2010.

Picozza E., "I contratti della pubblica amministrazione tra diritto comunitario and diritto nazionale" in *I contratti con la pubblica amministrazione*, trattato dei contratti diretto da P. Rescigno and E. Gabrielli, a cura di C. Franchini, vol. I, Utet, Torino, 2007, pp. 49-50, confirms the need to rethink the category of public evidence proceedings in application of a system actually "collaborative" between public and private. Lastly see in doctrine the pretty lucid analysis carried out by the same author, "Le concessioni nel diritto dell'Unione Europea. Profili and prospettive", in Cafagno M.; Botto A.; Fidone G.; Bottino G., *Negoziazioni pubbliche. Scritti su concessioni and partenariati pubblico-privati*, Giuffrè, Milano, 2013, pp. 32-33: "The term partner, in common language, means something more than just a contractor, or an associate of the company. Indicates a travel and adventure companion, someone to share the project with, its implementation, its risks, disappointments, failures, successes and especially expectations. To achieve this there is not a code that takes: we need to share an emotional and not only rational world. In this sense also militate the most recent results of the application of neuroscience to the law, or in a simple word, the same neurolaw. [...]In strictly legal terms, the agreement resulting from the partnership seems to have to go beyond the narrow confines of the legal transaction or contract, and set its characteristic features on the total cooperation of the parties, both for the realization of the project, as well as for the effective management of the infrastructure itself".

[401] Activities that may concern the prevention of risks (*ex ante risk management*) and/or adaptation after their realization (*ex post risk management*).

The public tendering procedures for the selection of contractors change appearance: the market is not asked for a predetermined *input* any more, but for an *output* responsive to the needs of the case in turn. It is up to the market providing a satisfactory answer whose development will be agreed with the public administration step by step.

The risks then become the object of a careful analysis and are allocated in an authentically shared way, according to a dialogic method in which gains great importance the communication, not only internal but also external (as mentioned, even the involvement of populations is planned).

The trend in question does coincide with the philosophy at the base of the Italian Law on Administrative Proceedings, L. n. 241 of 1990, which opens a window towards a new conception of the administrative apparatus and its *modus agendi* by allowing more space for the consensual and private law activities of the administration.[402]

The PPP takes place precisely in the grey area between the contractual and administrative activities of the public administrations, whereas these latter must identify their counterparties using competitive procedures but must also negotiate with them the terms of agreement.

Then we witness a trade-off between competition and collaboration on varying of complexity and riskyness, which, as a rule, brings about a cooperative approach through competitive dialogue and negotiation but may, in exceptional cases, go as far as the *extrema ratio* of private treaty.

Another aspect not to be overlooked is found in game theory.

The so-called "Nash equilibrium" indicates that very condition in which no party can benefit by an unilateral deviation from an assumed behaviour.

Nevertheless, as taught by Nash, and limpidly demonstrated by the well-known "prisoner's dilemma", there are competitive equilibria and cooperative equilibria.[403]

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[402] Simplification tools, such as the conferences of services (artt. 14, 14-*bis*, 14-*ter*, 14-*quinquies*), enable the easier management of the complex matters related to public contracts and concessions by involving stakeholders outside the normal modes of intervention in the proceedings (artt. 7, 9, 10): therefore even here finds confirmation the link between complexity and plurality.

[403] Refer to Gambarelli G., *Giochi competitivi e cooperativi: per applicazione a problemi decisionali di natura industriale, economica, commerciale, militare, politica, sportiva* (with a contribution of G. Owen), Giappichelli, Torino, 2003, Fisher L., *Rock, Paper, Scissors: Game Theory in Everyday Life*, Basic Books, 2008.

Without forgetting that "the first purpose of contract law is to enable people to cooperate by converting games with noncooperative solutions into games with cooperative solutions" (Cooter R.; Ulen T., *Law and Economics*, Addison Wesley, 4th ed., 2004, p. 198).

These points of equilibrium require different conditions and entail diverse results.

It is consequently not at all indifferent adopt a strategy rather than another.

In relation to the PPPs, while not neglecting the competitive one in the early stages, must be privileged the collaborative methodology that continues even during the execution (subject to the fetters that bind the renegotiation under EU Directives).

As we have seen, however, the risks depend on the performances included in the contract and on the interests, even superindividual, to be pursued.

Circumstances which do not find the right response in the Italian legal context, where to the dogmatic conservatism adds a positivistic drift (worsened by a division of jurisdictions which, although bonded by the increasing resort to the common private law, give often rise to conflicts of *res judicata* and contrasts in case law).

If, on one side, it becomes absolutely reprehensible the domestic hyper-regulation that tends to multiply the models of public procurement contracts in the face of European Union bipolarity[404], on the other, we need to reflect on the value assumed by the trilateral relationship in our system due to the osmosis from public service to concessions.

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[404] Cf. Fidone G., *Dalla locazione finanziaria al contratto di disponibilità: l'evoluzione del contratto di leasing immobiliare pubblico = From the 'locazione finanziaria' to the 'contratto di disponibilità': the evolution of the immovable property leasing contract with a public administration,* Foro Amministrativo T.A.R. 3: 1039, 2012: "in front of the new interventions and those of the past, the present discipline of these instruments (think of the project finance but also to the same public leasing) to say the least is confused and contradictory and, in some cases, impractical.

The introduction of the availability contract has confirmed the tendency of the Legislator to over-regulation and typifying of the various contractual models, each with its own peculiarities, both for the award of the contract and for its execution.

This choice appears in contrast with that of other European countries, which tend to leave to the administrations the power to custom build an operation of PPP in the context of a general and elastic model of partnership contract, governed by the law in its more general aspects and that becomes the benchmark and contour. In these countries, such as France, England and Spain too, the rules on PPPs dictate a few general principles, according to EU guidelines, and the operators may manage to identify in the particular case the contractual model that best suits the operation.

Conversely, our Legislator shows to believe that the many possibilities of reality can all be covered *ex-ante* by the rule and framed in type models. Instead of leaving to the discretionary power of the public administrations the identification of the contract model that is best suited to the individual case, in accordance with the general principles of PPP (such as that of the necessary transfer of risk), the Legislator claims to typify in detail all the contractual forms and to multiply their disciplines. The result are complex and imprecise disciplines, which rather than promote the use of the new contracts that are introduced seem to hinder it, because of the difficulties of interpretation and application".

Comes to mind a famous aphorism of Ennio Flaiano: "In Italy the shortest line between two points is the arabesque. We live in a network of arabesques".

The impression is precisely this, namely that the law claims to regulate in detail the matters, in such a way as to provide an "instruction manual" to the operators, with the aim to give a semblance of legitimacy.

No matter if in effect the discipline provided is not functional for the purpose and does not shelter from the underworld.

The trilateral relationship should be reinterpreted in the light of the new capacity acquired by the third parties: it is no longer possible to merely recognize the existence of the so-called "*nimby*" syndrome, having nowadays emerged a greater consciousness and awareness among individuals.[405]

Indeed, although it is sometimes the case, the role of the third is not of simple performance user that is charged with the remuneration of the contractor, but of acquainted subject participating in the economic operation as a stakeholder.

At this point, it is absolutely clear the role played by the PPP as a political and economic means for the management of complexity, within the EU and beyond.

To reach solutions cd. "*triple win*", that is to say shared by public administration, businesses and communities, it is necessary to adopt a method of public procurement which does ensure the highest social welfare.[406]

We must sooner or later realize that the contract, even when it involves a public entity, remains a contract, by nature act imbued with the management of interests: cf. Ledda F., "Per una nuova normativa sulla contabilità pubblica", in *Studi in onore di Antonio Amorth. Scritti di diritto amministrativo*, Vol. 1, Giuffrè, Milano, 1982.

Whenever the form obliterates the substance, it becomes impossible to achieve the intended objectives.

On this point is reported the thought of Pototschnig U., *I pubblici servizi*, Cedam, Padova, 1964, p. 35: "the typical problem of administrative law is not to capture the structure of the single performances, but rather to set the proceeding modes of the administrative action in relation to the purposes to be achieved and, at the same time, to ensure the suitability of that proceeding to achieve the same purposes".

[405] The above-mentioned cases of the movement "No-Tav" in Italy or group "*Keep Hasankeyf Alive*" (against the Ilisu dam in the Turkish Kurdistan) show a social mobilization that goes far beyond the local geography, bringing together masses of people even across the borders.

In any case, there is an increasing number of constitutions of committees and membership groups in order to counter, more or less peacefully, the realization of public infrastructure (just think to the events related to the organization of the football World Cup 2014 in Brazil).

Besides, as mentioned, sustainable development has become a necessity and people have access to more and more "*information channels*" – to say it as Arrow – in relation to the actions of land transformation (the emblem is the Convention on Access to Information, Public Participation in decision-making and Access to Justice in Environmental Matters, made in Aarhus, Denmark, on 25 June 1998, to which have followed, at Community level, the Directive 2003/4/EC on public access to environmental information and the Directive 2003/35/EC, which concerns public participation in environmental procedures).

[406] Cf. OECD, *Public-Private Partnerships - In Pursuit of Risk Sharing and Value For Money*, 2008 and TUAC Secretariat, *PPPs – In pursuit of fair risk sharing and value for the people?*, 13 april 2010.

See Blasini A., *Nuove forme di amministrazione pubblica per negozio: i «Social Impact Bonds»*, Rivista Trimestrale di Diritto Pubblico 1: 69, 2015, with specific regard to the recent *Social Impact Bonds*, contractual operations in which: one or more private investors, coordinated by a promoter-broker, finance certain activities of social interest according to a program-convention with a public administration, which commits to remunerate the services provided only in the event that the activity agreed upon has achieved the objectives punctually defined in the program-convention.

So the structure of "*Social Impact Bond*" provides for the involvement of five typologies of subjects: a public administration body, one or more investors, a broker-promoter, one or more service providers related to the third sector and an independent valuation entity.

And this is not for political propaganda or petty demagoguery, but because otherwise the risks – and therefore the costs – of procurement become unsustainable.[407]

The foregoing leads to further considerations on the general economic-legal-social evolution of the terraqueous globe, with particular reference to the European context and with an eye to the national level.

In relation to Italy, we shall take as a starting point the rules on public accounting of the State (R.D. 18 november 1923, n. 2440, and R.D. 23 may 1924, n. 827), approved in a totalitarian regime and primarily aimed at controlling all over the impartiality and cost-effectiveness of the public administration whenever contracting with private individuals.

It is not surprising that the situation at the beginning of the last century was the one just described: it came out of a World War and the recession had led to the establishment of a totalitarian State that, by definition, aspired to have control on everything and everyone, especially on its own *longa manus*.

As it is known, this requirement has been later implemented in the Constitution text and descends even today from art. 97 of Constitution, which sets the standards of impartiality and good performance of the public administration, on the one hand, and by artt. 3-41 Cost., which advocate the social equality, equal treatment and the prohibition of discrimination.

In the '50s it then emerged the Community authority, first with the European Coal and Steel Community (ECSC) and afterwards as European Economic Community (EEC), which finally became the European Union in 1992.[408]

The structuring of this financial instrument does not provide for the right to the return on investment nor a fixed remuneration, but rather the shift from the public administration to the private investors of the economic risk of the program and the mechanism of payment (postponed) generates a yield of variable nature linked to the results of social impact that can be achieved (cd. "*pay for results*").

The logic of the *Social Impact Bond* lies in the ability to align all the participants around a result of social impact: all the interests, despite their diversity, in accordance with the negotiating Regulation, converge towards an objective of public interest of which the public administration is exclusive holder.

[407] Insofar materialising the cd. "*Madison's Nightmare*": cf. Richard B. Stewart, The University of Chicago Law Review, Vol. 57, No. 2, Administering the Administrative State (Spring, 1990), pp. 335-356.

As indeed it seems to have happened for the Lombardy highways (BreBeMi, Pedemontana, TEEM), where the conception neither competitive nor shared of the operations has led to unfortunate effects.

[408] The signing of the Treaty of Rome in 1957 gave birth to the European Economic Community (EEC), which flanked the European Coal and Steel Community (ECSC) and the Euratom (European Atomic Energy Community).

Subsequently, with the signing of the Maastricht Treaty in 1992, the EEC was transformed into the European Community (EC), now European Union (EU).

From the beginning has been pursued the creation of the single market through three instruments: the so-called freedoms of movement (of services, people, goods and capital), the discipline of competition and the limitation of State aid to companies.[409]

The hiatus existent, not only from the chronological point of view, between the European *Economic* Community and the European *Political* Union is not trifling.

The first stage, mainly aimed at creating an internal market that could allow the economic upturn (even in this case it came out from a World War), has been followed by a second phase aimed at creating a single market (able to compete with other world powers, the so-called "BRICST") and characterized by the progressive approach to "A people's Europe", at least in the teleological terms[410], including social and environmental objectives (cd. "*Linkage*").

To these two stages of continental development correspond as many connotations of public procurement contracts and concessions.

In the first, as mentioned, the keyword is competition, no doubt.

In this regard, it is worth remembering that the first EU directive on procurement was the Council Directive 71/305/EEC of 26 july 1971 concerning the coordination of procedures for the award of public works contracts.

The rationale of that Directive was to be seen in the full realization of the freedom of movement codified in Community law and in the efficiency of the market through cross-border competition between enterprises under *par condicio*.

Thus begins the season of privatization and liberalization, as opposed to the italian municipalizations of early '900 ("Legge Giolitti" of 1903 and subsequent T.U. of 1925)[411], which yet does not represent the end of statism.

There are still areas which can not be ignored by the government: they are the cd. *market failures* – dominant positions, monopolies, monopsonies, special and exclusive rights, State aids, public goods/services and utilities, and externalities as well – whose

[409] Cf. De Vergottini G., *Liberalizzazione dei servizi nell'Unione Europea*, Enciclopedia Treccani, 2009 (http://www.treccani.it/enciclopedia/liberalizzazione-dei-servizi-nell-unione-europea_(XXI-Secolo)/).

[410] For an overview of the effective or alleged democratic deficit in the functioning of the EU, please refer to Sementilli L., *A 'Democratic Deficit' in the EU? The reality behind the mythmore*, 2012 (http://www.academia.edu/1508020/A_Democratic_Deficit_in_the_EU_The_reality_behind_the_myth).

[411] The rules to which reference is made are, respectively, L. 29 march 1903 on the direct assumption of public services by the municipalities and R.D. 15 october 1925, n. 2578, T.U. of the laws on the assumption of public services by the municipalities and provinces.

Please refer to Spadoni B., *I servizi pubblici locali. Dalla municipalizzazione alla liberalizzazione*, 3 february 2003 (http://www.dirittodeiservizipubblici.it/articoli/articolo.asp?sezione=dettarticolo&id=20).

economic and social regulation, and sometimes even their management, can not help but be up to the authorities of the sector.[412]

Between 1979, the year of the first elections via direct universal suffrage for the European Parliament, and 1992, the year of the Maastricht Treaty (which marks the transition from the EEC to the EU), we see the radical change that characterizes today's public procurement contracts and concessions.

Such a transformation from economic to political plexus in fact involves the consciousness that nor the cost-effectiveness alone, on the one hand, neither the efficiency, on the other hand, are able to ensure the efficacy of public action and the solidarity between Member States, in view of the successful promotion of the economic, social and territorial cohesion pursuant to art. 3 (ex Article 2) of the TEU.[413]

Has thence intervened a second Community phase, in which attention is also paid to the communities and whose pillars are identified in the economy, society and environment: one might say, in short, "economic democracy".[414]

It passes from the administrative law of each Member State to the competitive law of the single market, unto the mixture of the second one with the administrative law of the Union, *summa* of the administrative law of the States: the circle is closed.

That has been a strained choice, once encountered the limits of both competition (the already mentioned "market failures") and regulation (information asymmetries and pitfalls in the control).

Furthermore, the people's right to a good administration invariably presupposes the need to adopt sustainable strategies for development, growth and innovation in order to implement the social utility and avoid dysfunctions such as the "*nimby*" syndrome.

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[412] On the topic can be found in Stiglitz J.E., *Economia del settore pubblico*, Hoepli, Milano, 1989, *id*., *Il ruolo economico dello Stato*, Il Mulino, Bologna, 1992.

[413] On "participative democracy" within the EU (art. 11 TEU) see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Smart Regulation in the European Union COM (2010) 543 final, Brussels, 10.8.2010 and Communication from the Commission – Towards a culture of consultation and dialogue. General principles and minimum standards for consultation of interested parties by the Commission COM (2002) 704 final, Brussels, 11.12.2002.

[414] Losada F., *The Green Paper on the modernization of public procurement policy of the EU: Towards a socially-concerned market or towards a market-oriented society?*, Oñati Socio-legal Series 2(4), 2012, p. 78, agrees on the fact that the ultimate EU's aim is the "consecution of a European polity, but such a step cannot be taken in a tacit way and merely because of economic reasons. The risk that entails the subordination of all other values or principles to the praiseworthy goal of European integration has been pointed out by Giandomenico Majone (2009): the price to be paid is democracy".

The watchword at this stage becomes "collaboration".

And the emblem is the public-private partnership (PPP).

As been said over and over, in the intention of the EU apparatus and not only there, it is an instrument for political and economic management of complexity, whose main objective is to involve all actors and stakeholders in the process (public administration, economic operators, and communities) in order to minimize information asymmetries and transaction costs: the so-called "*revolution of rights*".[415]

The repercussions of such a development are of the utmost importance, especially for a reactionary and misoneist country like Italy which in deference to the Community primacy has to face this clear integration "from above".

Among the national distrust on the public plexus, always in the headlines for scandals and episodes of malpractice and/or malfeasance, and the difficulty in engaging practices from completely different legal traditions, assuming, however, high competences and professional skills that seem not corresponding to the traditional Italian public servant (more bureaucrat than manager), the question arises whether this time we will be able to take the occasion or if we will lose yet another opportunity to show us abreast of the times, in line with the "living law".

After the season of liberalization and privatization, in fact, we have entered the era of public-private partnership.

We will see if the Beautiful Country will succeed in making the cultural revolution required by the new global impulse and finally get out of the doldrums in which has been too long imprisoned by legacies, parochialism, corporations and lobbies (in Italy never ruled). Or if the hyper-regulation of the PPPs will restrain their development in the bud; or, even, if the PPP will prove to be another brainchild of the financial *gotha*, in connivance with the bureaucratic and administrative machinery, to speculate on future generations.

It takes to hope that it is not so, that the PPPs are a new way of conceiving the "*public procurement 2.0*" so that it could finally manage to modernize the public contract (especially if complex) and emancipate the concession (in all its declinations).

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[415] For this purpose, see the UE "Your-Voice-in-Europe" webportal (http://ec.europa.eu/yourvoice/).

The importance of using appropriate "*information channels*" – as a remedy to the uncertainty arising from the various and possible "*states of the world*" – is on several occasions stressed by Arrow K.J., *The Economic Implications Of Learning By Doing*, The Review of Economic Studies 29 (3): 155-73, 1962; *id*., *Risk Allocation and Information: Some Recent Theoretical Developments*, Working Papers 302, Queen's University, Department of Economics, 1978.

As we have seen, both in the supra-national and national law still persist, in fact, some legacies:

- in the first one deriving from the genesis of the concession as an offshoot of the public contract (with effects, for example, on the EU discipline of renegotiation);
- in the second one originated by the two souls that mingle and cancel one another (it was shown how the administrative tradition and the common private law, also by virtue of the division of jurisdictions, turn out an incoherent framework in Italy).

So who's writing, in the light of the motley views that took place about the topic, has the awareness that this is an unusual reinterpretation of the PPP, in some ways obvious (the analysis of the concession) for others innovative (the inclusion of complex contracts), however experimental.

Either way, without any presumption, the fact does remain that the arguments put forward here can be deemed worthy of interest, at least in a problematical and critical view; in the end, as John Locke wrote: "*New opinions are always suspected, and usually opposed, without any other reason but because they are not already common*".[416]

[416] Locke J., *An Essay Concerning Human Understanding*, Dedicatory epistle to the Earl of Pembroke, 1689.

Bibliography

References
(in alphabetical order by author)

- Abas P., *Errore di previsione e sopravvenienza contrattuale: un'indagine comparatistica*, Rivista trimestrale di diritto processuale civile 3: 787, 2011.
- Abdellaoui M.; Luce D.R.; Machina M.J., *Uncertainty and risk. Mental, formal, experimental representations*, Springer, 2007.
- Abednego M.P.; Ogunlana S.O., *Good project governance for proper risk allocation in public–private partnerships in Indonesia*, International Journal of Project Management 24: 622–634, 2006.
- Aiello G., *Assunzione del rischio operativo e sostenibilità economico-finanziaria nel nuovo sistema concessorio*, relation to the seminar: "Il recepimento della direttiva concessioni (2014/23/UE): L'*in house providing* e il rinnovo dei rapporti esistenti", 9 march 2015, at the Chamber of Deputies, Rome.
- Akintoye A.; Beck M.; Hardcastle C.; *Public-Private Partnerships: Managing Risks and Opportunities*, Blackwell, 2003.
- Alberti C., *Tutela ambientale, politica sociale e appalti: verso uno sviluppo sostenibile del Mercato unico. Primi interventi interpretativi della Commissione Ce*, Rivista trimestrale degli appalti 1: 161–181, 2002 (www.osservatorioappalti.unitn.it).
- Alesio M., *Anche se la controparte riscuote un corrispettivo da terzi quel contratto si configura come «concessione di servizi»*, Diritto & Giustizia, 147, 2009.
- Alonso-Conde A.B.; Brown C.; Rojo-Suarez J., *Public private partnerships: Incentives, risk transfer and real options*, Review of Financial Economics 16(4): 335–349, 2007.
- Ambrosoli M., *La sopravvenienza contrattuale*, Giuffrè, Milano, 2002.
- Antonioli M., *Consensualità e tutela ambientale fra transazioni «globali» e accordi di programma*, Diritto Amministrativo 4: 749, 2012.
- Antonioli M., *Vigilanza e vigilanze tra funzione e organizzazione*, Rivista Trimestrale di Diritto Pubblico 3: 673, 2013.
- Appolloni A.; D'Amato A.; Wenjuan C., *Is Public Procurement Going Green? Experiences and Open Issues*, 2011. Available at SSRN.
- Arjoon S., *Striking a Balance Between Rules and Principles-based Approaches for Effective Governance: A Risks-based Approach*, Journal of Business Ethics 68: 53–82, 2006.
- Athias L., *Political Accountability, Incentives, and Contractual Design of Public Private Partnerships*, 2009. Available at SSRN.
- Atiyah P. S., *An introduction to the law of contract*, Oxford: Clarendon Press, 1961.
- Arrow K.J., *Alternative Approaches to the Theory of Choice in risk-taking situations*, Econometrica 19: 404–437, 1951.
- Arrow K.J., *Social Choice And Individual Values*, Wiley, New Tork, 1951 (2nd ed. 1963).
- Arrow K.J., *The Economic Implications Of Learning By Doing*, The Review of Economic Studies 29 (3): 155–73, 1962.
- Arrow K.J., *Uncertainty And The Welfare Economics Of Medical Care*, American Economic Review, 53 (5): 941–973, 1963.
- Arrow K.J., *The Role Of Securities In The Optimal Allocation Of Risk-Bearing*, Review of Economic Studies, 31: 91–96, 1964.
- Arrow K.J., *The Organization of Economic Activity: Issues Pertinent to the Choice of Market versus Non-market Allocation*, in Analysis and Evaluation of Public Expenditures: The PPP System, 1: 47–64, Washington, D.C., Government Printing Office, Washington, 1969.
- Arrow K.J.; Lind R.C., *Uncertainty and the evaluation of public investment decisions*, American Economic Review 60: 364–78, 1970.
- Arrow K.J., *Political and Economic Evaluation of Social Effects and Externalities*, NBER Chapters, in: The Analysis of Public Output, pages 1–30, National Bureau of Economic Research, Inc., 1970.
- Arrow K.J., *Limits Of Organization*, Norton, New York, 1974.
- Arrow K.J., *Risk Allocation and Information: Some Recent Theoretical Developments*, Working Papers 302, Queen's University, Department of Economics, 1978.
- Arrow K.J., *The Theory of Risk-Bearing: Small and Great Risks*, Journal of Risk and Uncertainty, Springer, 12(2-3): 103–11, 1996.

- Arrow K.J.; Cropper M.L.; Eads G.C.; Hahn R.W.; Lave L.B.; Noll R.G.; Portney P.R., Russell M.; Schmalensee R.; Smith V.K.; Stavins R.N., *Is There a Role for Benefit-Cost Analysis in Environmental, Health, and Safety Regulation?*, American Association for the Advancement of Science 272: 221–222, 1996.
- Arrow K.J.; Cropper M.L.; Eads G.C.; Hahn R.W.; Lave L.B.; Noll R.G.; Portney P.R., Russell M.; Schmalensee R.; Smith V.K.; Stavins R.N., *Benefit-Cost Analysis in Environmental, Health, and Safety Regulation: A Statement of Principles*, American Enterprise Institute, The Annapolis Center, and Resources for the Future, 1996.
- Arrow K.J.; Amartya K.S.; Kotaro S., *Handbook of Social Choice and Welfare*, vol. I, North-Holland, 2002.
- Ascarelli T., *Aleatorietà e contratti di borsa*, Banca borsa e titoli di credito I, 1958.
- Astone F., *L'influenza del diritto comunitario* (Report from the Workshop about "Il nuovo Codice dei contratti pubblici: prime riflessioni", Lamezia Terme, 18 may 2006), giustamm.it 2006.
- Athias L., *Political Accountability, Incentives, and Contractual Design of Public Private Partnerships*, IDHEAP/SPAN, University of Lausanne, 2008. Available at SSRN.
- Axelrod R., *The Complexity of Cooperation: Agent-Based Models of Competition and Collaboration*, Princeton University Press, 1997.
- Bajari P.; Tadelis S., "Incentives and Award Procedures: Competitive Tendering vs. Negotiations in Procurement", in *Handbook of Procurement*, N. Dimitri, G. Piga and G. Spagnolo, 121, 2006.
- Bajari P.; McMillan R.; Tadelis S., *Auctions versus Negotiations in Procurement: An Empirical Analysis*, Journal of Law, Economics and Organization, 2009.
- Baldassare F.; Labroca A.S., *Public procurement: gli acquisti pubblici fra vincoli giuridici e opportunità gestionali*, Franco Angeli, Milano, 2013.
- Baldi M.; Fasano S., *Il "rischio d'impresa" nelle operazioni di project financing*, Urbanistica e appalti 7: 803, 2012.
- Balestra L., *Il contratto aleatorio e l'alea normale*, Cedam, Padova, 2000.
- Balestreri A.M., *L'applicabilità di meccanismi revisionali ai contratti di concessioni di servizi*, Urbanistica e appalti 4: 393, 2009.
- Balocco G., *Il principio di corrispondenza delle quote per lavori nell'ambito dei PPP: il nuovo corso inaugurato dalla Plenaria*, Urbanistica e appalti 6: 665, 2014.
- Barcellona M., *L'"idea del sociale" nella teoria del diritto privato: il caso italiano (ma non solo)*, Rivista trimestrale di diritto processuale civile 3: 717, 1997.
- Barcellona M., *I nuovi controlli sul contenuto del contratto e le forme della sua eterointegrazione: Stato e mercato nell'orizzonte europeo*, Europa e diritto privato 1: 33–58, 2008.
- Bellagamba L., *Il Comune di Roma e l'affidamento in concessione, di servizio e non di lavori, della manutenzione stradale e di servizi annessi*, in www.appaltiecontratti.it, 20 january 2006.
- Bellagamba L., *Il Consiglio di Stato ribalta la tesi del T.A.R. Lazio: possibile la concessione di servizio per la manutenzione stradale*, in www.diritto.it, 6 marzo 2008.
- Berionni L., *I contratti pubblici di rilevanza europea: il discrimen tra appalto e concessione, tra incertezze normative ed oscillazioni giurisprudenziali*, Diritto del Commercio Internazionale 3: 731, 2013.
- Berionni L., *L'applicabilità delle norme del Codice dei contratti pubblici alle concessioni di servizi – The applicability of the provisions of the public procurement Code to service concessions*, Foro Amministrativo 7-8: 1913, 2014.
- Bianchi T.; Ponzone L., *La Corte di giustizia torna sulla distinzione tra concessione di servizi e appalto di servizi*, Diritto comunitario e degli scambi internazionali, 279–288, 2010 (www.osservatorioappalti.unitn.it).
- Bing L.; Akintoye A.; Edwards P.J.; Hardcastle C., *The allocation of risk in PPP construction projects in the UK*, International Journal of Project Management 23: 25–35, 2005.
- Blanc-Brude F.; Goldsmith H.; Välilä T., *Ex Ante Construction Costs In The European Road Sector: A Comparison Of Public-Private Partnerships And Traditional Public Procurement*, EIB, Economic and Financial Report 01/2006 (http://www.eib.org/attachments/efs/efr_2006_v01_en.pdf).
- Blanc-Brude F.; Jensen O., *Competing for Public Sector Risk Transfer Contracts: Evidence from PFI Schools in the UK*, Contracts, Procurement and Public-Private Agreements, Paris, 2010 (http://jensenblancbrude.com/wp-content/uploads/2012/03/Blanc-Brude-and-Jensen-Long-term-public-private-risk-transfer-contracts.pdf).
- Blasini A., *Nuove forme di amministrazione pubblica per negozio: i «Social Impact Bonds»*, Rivista Trimestrale di Diritto Pubblico 1: 69, 2015.
- Bratt C.; Hallstedt S.; Robèrt K.-H.; Broman G.; Oldmark J., *Assessment of criteria development for public procurement from a strategic sustainability perspective*, Journal of Cleaner Production 52: 309–316, 2013.

- Brenck A.; Beckers T.; Heinrich M.; von Hirschhausen C., *Public-Private Partnerships in New EU Member Countries of Central and Eastern Europe: An Economic Analysis with Case Studies from the Highway Sector*, Public Sector Management and Regulation Working Papers WP-PSM-08, Reprint from EIB Papers, 10(2): 82–112, 2005.
- Boselli A., *Rischio, alea ed alea normale del contratto*, Rivista trimestrale di diritto e procedura civile, 769–795, 1948.
- Bottazzi M., *Attività di analisi dei rischi e trasferimento nella redazione dei bandi (cenni)*, relation at the conference "Redazione dei documenti di gara", Milan, 14 october 2013 (www.osservatorioappalti.unitn.it).
- Brinkerhoff D.W.; Brinkerhoff J.M., *Public-private partnerships: perspectives on purposes, publicness, and good governance*, Public Administration and Development 31(1): 2–14, 2011.
- Broadbent J.; Gill, J.; Laughlin, R., *Identifying and controlling risk: The problem of uncertainty in the Private Finance Initiative in the UK's National Health Service* (2005), (http://roehampton.openrepository.com/roehampton/bitstream/10142/12451/1/broadbent%20identifying.pdf), Critical Perspectives on Accounting 19(1): 40–78, 2008.
- Brosio G., *La teoria economica dell'organizzazione*, Il Mulino, Bologna, 1989.
- Bruno C., *La questione delle sopravvenienze: presupposizione e rinegoziazione*, Giustizia civile 5: 235, 2010.
- Bulow J.; Klemperer P., *Auctions versus Negotiations*, American Economic Review 86(1): 180, 1996.
- Buttarelli G., *Il partenariato pubblico privato nella governance dell'ente locale*, quaderni di paweb n. 7, september 2010 (www.paweb.it)
- Cacciari A., *Concessione e affidamento dei servizi pubblici*, report at the annual meeting of Associazione Culturale Articolo 111 on the topic "*Società pubbliche e controllo giurisdizionale*", Milan, 5 may 2013 (www.osservatorioappalti.unitn.it).
- Cacciavillani C., *Sull'azione per l'efficienza delle amministrazioni e dei concessionari di servizi pubblici*, giustamm.it ((published on 11.11.2011).
- Cafagno M., *Lo Stato banditore. Gare e servizi locali*. Giuffrè, Milano, 2001.
- Cafagno M., "Vincoli di gara ed affidamenti concessori nel diritto europeo", in *Finanza di progetto. Temi e prospettive*, a cura di G. F. Cartei e M. Ricchi, Napoli, Editoriale scientifica, 2010.
- Cafagno M., *Flessibilità e negoziazione. Riflessioni sull'affidamento dei contratti complessi*, relation at the conference "Il diritto degli appalti pubblici all'alba delle nuove direttive comunitarie" at the Chamber of Deputies, Rome, 15 november 2013, Rivista Italiana di Diritto Pubblico Comunitario 2: 991–1019, 2013.
- Cafagno M.; Botto A.; Fidone G.; Bottino G., *Negoziazioni pubbliche. Scritti su concessioni e partenariati pubblico-privati*, Giuffrè, Milano, 2013.
- Calvieri C., *Concessione e appalto di servizio pubblico come contratti pubblici nei c.d. settori speciali ex esclusi. Il caso del trasporto pubblico locale*, in federalismi.it n. 17/2007.
- Campbell D.; Harris D., *Flexibility in long-term contractual relationship: the role of cooperation*, Journal of law and society, 170, 1993.
- Canfora L., *La democrazia. Storia di una ideologia*, Laterza, Bari, 2004.
- Capantini M., "I servizi pubblici tra ordinamento nazionale, comunitario ed internazionale: evoluzione e prospettive", in Massera A., *Il diritto amministrativo dei servizi pubblici tra ordinamento nazionale e ordinamento comunitario*, Pisa, 2004 (www.astrid-online.it).
- Capurro T., *La clausola di ius variandi tra giudizio di validità e sindacato sull'esercizio del diritto*, Contratto e Impresa 6: 1341, 2013.
- Caranta R., *I contratti pubblici*, Giappichelli, Torino, 2012.
- Caranta R., *La Corte di giustizia ridimensiona la rilevanza del rischio di gestione*, Urbanistica e appalti 3: 287–298, 2012.
- Cartei G.F., *Il rischio di costruzione del concessionario segue la disciplina generale del contratto di appalto*, 2012, giustamm.it ((published on 11.1.2012).
- Cartei G.F., *Il principio di equilibrio economico finanziario e la disciplina del contratto di concessione*, Urbanistica e appalti 2: 129–138, 2012.
- Casalini D., *Aiuti di stato alle imprese, servizi di interesse economico generale e criterio dell'investitore privato in economia di mercato*, Foro Amministrativo C.D.S., 2690, 2003.
- Casalini D., *Concessionario, organismo di diritto pubblico o gestore in house: chi sopporta il rischio economico della gestione delle autostrade?*, commento a T.A.R. Roma, Sez. III, 9 marzo 2009, n. 2369, Urbanistica e appalti 7: 882–889, 2009.
- Cassese S., *I servizi pubblici. Finanza pubblica e privata*, Trattato di diritto amministrativo, Diritto amministrativo speciale, Tomo III, Giuffrè, Milano, 2003.
- Cassese S., *Il diritto amministrativo: storia e prospettive*, Giuffrè, Milano, 2010.

- Cavallo Perin R., "Concessione di pubblici servizi e pluralità di produttori", 135–143, in Caia G., *I servizi pubblici locali, evoluzioni e prospettive*, Rimini, Maggioli, 1995.
- Cavallo Perin R., *La struttura della concessione di servizio pubblico locale*, Giappichelli, Torino, 1998.
- Cerbo P., *La scelta del contraente negli appalti pubblici fra concorrenza e tutela della «dignità umana»*, Foro Amministrativo T.A.R. 5: 1875, 2010.
- Cerrina Feroni G., *Il partenariato pubblico-privato. Modelli e strumenti*, Giappichelli, Torino, 2011.
- Cesàro V. M., *Clausole di rinegoziazione e conservazione dell'equilibrio contrattuale*, Edizioni scientifiche italiane, Napoli, 2000.
- Chen C.; Hubbard M., *Power relations and risk allocation in the governance of public private partnerships: A case study from China*, Policy and Society 31: 39–49, 2012.
- Chong E.; Staropoli C.; Yvrande-Billon A., *Auction versus Negotiation in Public Procurement: Looking for Empirical Evidence*, Université Paris1 Panthéon-Sorbonne, Post-Print and Working Papers, 2010.
- Chou J.-S.; PingTserng H.; ChiehLin; Chun-PinYeh, *Critical factors and risk allocation for PPP policy: Comparison between HSR and general infrastructure projects*, Transport Policy 22: 36–48, 2012.
- Chung D.; Hensher D.A.; Rose J.M., *Toward the betterment of risk allocation: Investigating risk perceptions of Australian stakeholder groups to public private-partnership tollroad projects*, Research in Transportation Economics 30: 43–58, 2010.
- Clarich M.; Fidone G., *La considerazione di variabili ambientali nella scelta del contraente (i cd. appalti verdi)*, relation at the conference "Il diritto degli appalti pubblici all'alba delle nuove direttive comunitarie" at the Chamber of Deputies, Rome, 15 november 2013.
- Clarizia A., *Concessioni, concessioni di servizi e project financing*, Report to Congress on the Code of contracts, LUISS, 19 june 2006, giustamm.it (published on 29.9.2006).
- Clarizia A., *Un confronto sulle "filosofie" di recepimento delle direttive "appalti" nei paesi dell'Unione europea*, Report to Congress A.I.G.A. "Codice De Lise. Efficienza e garanzie nei contratti della PA: un difficile equilibrio", Lecce, 27-28 october 2006, in giustamm.it 2006.
- Clifton C.; Duffield C.F., *Improved PFI/PPP service outcomes through the integration of Alliance principles*, International Journal of Project Management 24: 573–586, 2006.
- Coase R. H., *Impresa, mercato e diritto*, Il Mulino, Bologna, 1995.
- Coduti C.F., *Appalto pubblico o concessione di servizi? La Corte enfatizza il criterio del rischio*, Rassegna dell'Avvocatura dello Stato 2: 81, 2007.
- Colangelo R., *Total life cycle cost e Risk analysis: Come migliorare l'efficacia del Procurement*, Il Giornale della Logistica 10: 32–35, 2011.
- Colosimo C., "L'oggetto del contratto, tra tutela della concorrenza e pubblico interesse" in Comporti G.D., *Le gare pubbliche: il futuro di un modello*, Editoriale Scientifica, Napoli, 2011.
- Comporti G. D., *Lo stato in gara: note sui profili evolutivi di un modello*, Il diritto dell'economia 2: 231, 2007.
- Contessa C.; De Salvo N., *La procedura di dialogo competitivo fra partenariato pubblico-privato e tutela della concorrenza*, Urbanistica e appalti 5: 501, 2006.
- Contessa C., *Le regole applicabili alle concessioni di servizi fra peculiarità disciplinari e lacune normative*, Urbanistica e appalti 12: 1437, 2010.
- Cooter R.; Ulen T., *Law and Economics*, Boston: Pearson Addison Wesley, 4th ed., 2004.
- Corbacho A.; Funke K.; Schwartz G., *Public Investment and Public-Private Partnerships: Addressing Infrastructure Challenges and Managing Fiscal Risks*, Palgrave MacMillan, 2008.
- Cori R., *La concessione di servizi*, in giustamm.it, 6, 2007.
- Corner D., *The United Kingdom Private Finance Initiative: The Challenge of Allocating Risk*, OECD Journal on Budgeting 2006 – volume 5 – no. 3 (http://www.oecd.org/gov/budgeting/43479923.pdf).
- Cox Jr. L.A., *Risk Analysis of Complex and Uncertain Systems*, International Series in Operations Research & Management Science, Vol. 129, Springer, 2009.
- Cristina F., *Le nuove direttive sugli appalti pubblici e le concessioni*, Giornale di diritto amministrativo 12: 1135, 2014.
- Cucuzza G., *La strategia europea per lo sviluppo sostenibile e gli acquisiti pubblici verdi*, XL Incontro di Studio del Ce.S.E.T.: 203–211, Firenze University Press (www.fupress.com/ceset), 2011.
- Cuffaro V., *I contratti di appalto privato*, in Trattato dei contratti diretto da P. Rescigno ed E. Gabrielli, Utet, 2011.
- D'Alberti M., *Concessioni e concorrenza*, in Autorità garante della concorrenza e del mercato, temi e problemi, Istituto Poligrafico e Zecca dello Stato, Roma, 1998.

- D'Alpaos C.; Vergalli S., *Time Overruns in Public Procurement and Concession Contracts: Penalty Fee and Option Value to Delay*, Review of Environment, Energy and Economics (Re3), March 2014.
- Daube D.; Vollrath S.; Alfen H.W., *A comparison of Project Finance and the Forfeiting Model as financing forms for PPP projects in Germany*, International Journal of Project Management, 2007.
- De Bettignies J.-E.;Ross T.W., *Public-Private Partnerships and the Privatization of Financing: An Incomplete Contracts Approach*, Queen's School of Business Research Paper, 2007. Available at SSRN.
- De Chiara A., *Dai servizi pubblici ai servizi di pubblica utilità: evoluzione della morfologia giuridica dell'interesse pubblico e riflessi sulle situazioni soggettive*, relation at conference "La tutela giurisdizionale nei confronti del potere amministrativo e "le ragioni" dell'interesse pubblico", Siena, 12-13 june 2009.
- De Gaudio L., *L'obbligo di take-or-pay: qualificazione e gestione delle sopravvenienze*, Contratti 6: 605, 2013.
- De Grazia D., *L'evoluzione della disciplina dei servizi pubblici nella prospettiva della tutela degli utenti* (http://www.academia.edu/3199484/Levoluzione_della_disciplina_dei_servizi_pubblici_nella_prospettiva_della_tutela_degli_utenti).
- De Vergottini G., *Liberalizzazione dei servizi nell'Unione Europea*, Enciclopedia Treccani, 2009 (http://www.treccani.it/enciclopedia/liberalizzazione-dei-servizi-nell-unione-europea_(XXI-Secolo)/).
- Del Signore G., *Profili civilistici del franchising: una proposta interpretativa*, Giurisprudenza di merito 2: 430, 1997.
- Delfini F., *Autonomia privata e rischio contrattuale*, Giuffrè, Milano, 1999.
- Demirag I.; Khadaroo I.; Stapleton P.; Stevenson C., *Risks and the financing of PPP: Perspectives from the financiers*, The British Accounting Review 43(4): 294–310, 2011.
- Di Giandomenico G.; Riccio D., *I contratti speciali: I contratti aleatori* - Trattato di diritto privato diretto da M. Bessone, vol. XIV, Giappichelli, Torino, 2005
- Di Martino M., *La Corte censura la qualificazione di una procedura di affidamento di servizi secondo l'ordinamento nazionale*, Rivista di Diritto pubblico comparato ed europeo 4: 1907–1911, 2007.
- Dipace R., *I contratti alternativi all'appalto per la realizzazione di opere pubbliche* (relation at conference "L'appalto tra diritto pubblico e diritto privato", Roma, 10 ottobre 2008), giustamm.it (published on 20.10.2008).
- Doni N., *A Comparison of Alternative Procedures for the Selection of the Private Partner in PPP Projects*, 2007. Available at SSRN.
- Dragos D.; Neamtu B., *Sustainable Public Procurement: Life Cycle Costing (LCC) in the New EU Directive Proposal*, European Public-private Partnership Law Review 1: 19, 2013. Available at SSRN.
- Dutz M.A;. Sharma S., *Green Growth, Technology and Innovation*, The World Bank, Poverty Reduction and Economic Management Network, Economic Policy and Debt Department, Policy Research Working Paper 5932, 2012. Available at SSRN.
- Ecker F., *Information Risk and Long-Run Performance of Initial Public Offerings*, Gabler, 2008.
- Edquist C.; Zabala-Iturriagagoitia J.M., *Public Procurement for Innovation as mission-oriented innovation policy*, Research Policy 41: 1757– 1769, 2012.
- Ehrhardt D.; Irwin T., *Avoiding Customer and Taxpayer Bailouts in Private Infrastructure Projects: Policy toward Leverage, Risk Allocation, and Bankruptcy*, World Bank Policy Research, Working Paper No. 3274, 2004. Available at SSRN.
- Fantini S., *Il partenariato pubblico-privato, con particolare riguardo al project financing ed al contratto di disponibilità*, updating of administrative judges held in Rome, at TAR Lazio, on days 2 and 3 july 2012 (published in www.giustizia-amministrativa.it).
- Farlam P., *Assessing Public-Private Partnerships in Africa*, The South African Institute of International Affairs, Nepad Policy Focus Series, Working Together Report 2 2005.
- Feliziani C., *Il rapporto tra liberalizzazione e regolazione al vaglio della Corte di Giustizia*, Foro Amministrativo C.D.S. 3: 787, 2011.
- Feliziani C. *Responsabilità della pubblica amministrazione senza colpa? Riflessioni a margine di una recente sentenza Corte di Giustizia*, Foro Amministrativo C.D.S. 10: 3015, 2011.
- Ferrari V., *Il problema dell'alea contrattuale*, Edizioni scientifiche italiane, Napoli, 2001.
- Fidone G., *Dalla locazione finanziaria al contratto di disponibilità: l'evoluzione del contratto di leasing immobiliare pubblico = From the 'locazione finanziaria' to the 'contratto di disponibilità': the evolution of the immovable property leasing contract with a public administration,* Foro Amministrativo T.A.R. 3: 1039, 2012.
- Ferraro V., *La disciplina della concessione nel diritto europeo: i principi giurisprudenziali e la sistemazione realizzata con la direttiva 2014/23/UE*, Rivista Italiana di Diritto Pubblico Comunitario 3-4: 835–866, 2014.

- Fidone G., *Gli appalti verdi all'alba delle nuove direttive: verso modelli più flessibili orientati a scelte eco-efficienti*, Rivista Italiana di Diritto Pubblico Comunitario 5: 819, 2012.
- Fischer K.; Jungbecker A.; Alfen H.W., *The emergence of PPP Task Forces and their influence on project delivery in Germany*, International Journal of Project Management 24(7): 539–547, 2006.
- Fisher L., *Rock, Paper, Scissors: Game Theory in Everyday Life*, Basic Books, 2008.
- Flume W., *Rechtsgeschäft und Privatautonomie*, Hundert Jahre deutsches Rechtsleben, I, Karlsruhe, 1960.
- Foldes L.P.; Rees R., *A Note on the Arrow-Lind Theorem*, American Economic Review, American Economic Association, vol. 67(2), 1977.
- Frignani A.; Mendelsohn M., *Il contratto di franchising: le proposte legislative travisano il modello comunitario?*, Contratti 1: 64, 1998.
- Froud J., *The Private Finance Initiative: risk, uncertainty and the state*, Accounting, Organizations and Society 28(6): 567–589, 2003.
- Gabrielli E., *Alea e rischio nel contratto. Studi*, Edizioni scientifiche italiane, Napoli, 1997.
- Gabrielli E., *Dottrine e rimedi nella sopravvenienza contrattuale*, conference of 29 march 2012, Faculdade de Direito da Universidade de São Paulo, intended for the *Volumem en homenaje al profesor Fernando Hinestrosa*, Jus Civile (http://www.juscivile.it/contributi/01%20-%20Enrico%20Gabrielli.pdf).
- Gaiani L., *Project financing: problemi aperti in materia contabile e di reddito di impresa*, Fisco 32: 3136, 2014.
- Galetta D.U., *Il diritto ad una buona amministrazione europea come fonte di essenziali garanzie procedimentali nei confronti della pubblica amministrazione*, Rivista Italiana di Diritto Pubblico Comunitario 3-4: 819, 2005.
- Galetta D.U., *Diritto ad una buona amministrazione e ruolo del nostro giudice amministrativo dopo l'entrata in vigore del Trattato di Lisbona*, Diritto Amministrativo 3: 601, 2010.
- Gallo D., *Finanziamento dei servizi di interesse economico generale e aiuti di stato nel diritto comunitario*, Rivista Italiana di Diritto Pubblico Comunitario 5: 893, 2007.
- Gambarelli G., *Giochi competitivi e cooperativi: per applicazione a problemi decisionali di natura industriale, economica, commerciale, militare, politica, sportiva* (con un contributo di Guillermo Owen), Giappichelli, Torino, 2003.
- Gaspari F., *Il dialogo competitivo come nuovo strumento negoziale e la sua (asserita) compatibilità con la finanza di progetto*, giustamm.it (published on 1.3.2007)
- Gaverini F., *Attività contrattuale della p.a. e protezione dell'ambiente: gli appalti verdi*, Rivista Giuridica dell'Edilizia 5-6: 153, 2009.
- Gazley B.; Kyung Chang W.; Bingham, L.B., *Collaboration and Citizen Participation in Community Mediation Centers*, Review of Policy Research 23(4): 843–863, 2006.
- Gentili A., *La replica della stipula: riproduzione, rinnovazione, rinegoziazione del contratto*, Contratto e Impresa 2: 667–724, 2003.
- Giannelli A., *La concessione di servizi: verso un'interpretazione estensiva del concetto di rischio di gestione*, Urbanistica e appalti 10: 1276, 2007.
- Giannelli A., *Esecuzione e rinegoziazione degli appalti pubblici*, Editoriale Scientifica, Napoli, 2012.
- Giovagnoli R., *È servizio pubblico solo l'attività rivolta direttamente a soddisfare le esigenze dell'utenza*, Urbanistica e appalti 12: 1393, 2006.
- Goisis F., *Concessione di costruzione e gestione di lavori e concessione di servizi*, Ius Publicum, 2011.
- Goisis F., *Rischio economico, trilateralità e traslatività nel concetto europeo di concessioni di servizi e di lavori*, Diritto Amministrativo 4: 703, 2011.
- Gray S.; Hall J.; Pollard G., *The Public Private Partnership Paradox*, 2010. Available at SSRN.
- Grimsey D.; Lewis M.K., *Are Public Private Partnerships value for money? Evaluating alternative approaches and comparing academic and practitioner views*, Accounting Forum 29 (4), 345–78, 2005.
- Grossi P., *Società, Diritto, Stato. Un recupero per il diritto*, Giuffrè, Milano, 2006.
- Guasch J. L.; Laffont J. J.; Straub S., *Renegotiation of concession contracts in Latin America*, World Bank Policy Research Working Paper 3011, Washington DC, 2003.
- Guasch J. L.; Laffont J. J.; Straub S., *Renegotiation of concession contracts: a theoretical approach*, in Review of Industrial Organization, 2006.
- Guasch J. L.; Straub S., *Renegotiation of infrastructure concessions: an overview*, Annals of Public and Cooperative Economics 77(4): 479, 2006.
- Guglielmi G., *Le Reti transeuropee di trasporto e il loro finanziamento*, Contribution to the Group ASTRID on the European budget – 3 november 2009 (http://www.astrid-online.it).

- Halachmi A., *Public-Private Partnerships (PPP): A Reality Check and the Limits of Principal-Agent Theory*, 4th International Conference on Public Management Challenges in the 21st Century, University of Macau and the Macau Foundation, 2010.
- Hammami M.; Ruhashyankiko J.F.; Yehoue E.B., *Determinants of Public-Private Partnerships in Infrastructure*, International Monetary Fund, IMF Working Paper, pp. 1–39, 2006. Available at SSRN.
- Hodge G.A.; Greve C., *Public – Private Partnerships: An International Performance Review*, Public Administration Review 67 (3), 545–58, 2007.
- Hommen L.; Rolfstam M., *Public procurement and innovation: towards a taxonomy*, Journal of public procurement 9(1): 17–56, 2009.
- Hoppe E.I.; Schmitz P.W., *Public-private partnerships versus traditional procurement: Innovation incentives and information gathering*, MPRA Paper No. 41966 (online at http://mpra.ub.uni-muenchen.de/41966/), 2012.
- Hwang B.-G.; Zhao X.; Jiang Shu Gay M., *Public private partnership projects in Singapore: Factors, critical risks and preferred risk allocation from the perspective of contractors*, International Journal of Project Management, 2012.
- Iaione C., *La nozione codicistica di contratto pubblico*, giustamm.it (published on 24.5.2007)
- Iossa E.; Antellini Russo F., *Potenzialità e criticità del Partenariato Pubblico Privato in Italia,* Rivista di Politica Economica, SIPI Spa, 98(3): 125–158, 2008.
- Iossa E.; Martimort D., *The Simple Micro-Economics of Public-Private Partnerships*, CEIS Research Paper 139, Tor Vergata University, CEIS, 2008.
- Iossa E.; Martimort D., *Post-Tender Corruption and Risk Allocation: Implications for Public-Private Partnerships*, CEIS Research Paper 195, Tor Vergata University, CEIS, 2011.
- Iossa E.; Martimort D., *Risk allocation and the costs and benefits of public-private partnerships*, RAND Journal of Economics, RAND Corporation, 43(3): 442–474, 2012.
- Iossa E.; Rey P., *Building Reputation for Contract Renewal: Implications for Performance Dynamics and Contract Duration*, CEIS Research Paper 155, Tor Vergata University, CEIS, 2010.
- Iossa E.; Spagnolo G., *Contracts as Threats: on a Rationale For Rewarding A while Hoping For B*, CEIS Research Paper 147, Tor Vergata University, CEIS,2009.
- Iossa E.; Spagnolo G.; Vellez M., *Best Practices on Contract Design in Public-Private Partnerships*, The World Bank, Policy report, 2007.
- Iseki H.; Houtman R., *Evaluation of progress in contractual terms: Two case studies of recent DBFO PPP projects in North America*, Research in Transportation Economics 36: 73–84, 2012.
- Jin X.-H.; Zhang G., *Modelling optimal risk allocation in PPP projects using artificial neural networks*, International Journal of Project Management 29: 591–603, 2011.
- Kahneman D.; Tversky A., *Prospect Theory: An Analysis of Decision Under Risk*, Econometrica, 47(2): 263–291, 1979.
- Ke Y.; Wang S.Q.; Chan A.P.C.; Lam P.T.I., *Preferred risk allocation in China's public–private partnership (PPP) projects*, International Journal of Project Management 28: 482–492, 2010.
- Khazaeni G.; Khanzadi M.; Afshar A., *Fuzzy adaptive decision making model for selection balanced risk allocation*, International Journal of Project Management 30: 511–522, 2012.
- Klitgaard R., "Public-private collaboration and corruption", in Pieth M., *Collective Action on Anti-Corruption* (2012), Basel Institute on Governance. Prepared for the CBS-Sauder-Monash conference on public-private partnerships, Copenhagen Business School, 26-27 September 2012.
- Knight F.H., *Risk, Uncertainty, and Profit*, Hart, Schaffner & Marx; Houghton Mifflin Company, 1921.
- Krüger K., *Ban-On-Negotiations in tender procedures: undermining best value for money?*, Journal of public procurement 4(3): 397–436, 2004.
- Kunzlik P., *Green Public Procurement - European Law, Environmental Standards and 'What To Buy' Decisions*, Journal of Environmental Law, Oxford University Press, 2013.
- Lacava C., *Le nuove procedure, la partecipazione e l'aggiudicazione*, relation at the conference "Il recepimento delle nuove direttive sui contratti pubblici" at the Chamber of Deputies, Rome, 19 january 2015, in Giornale di diritto amministrativo 12: 1141–1150, 2014.
- Laffont J.-J.; Martimort D., *A theory of incentives in procurement and regulation***,** The MIT Press, 1993.
- Laffont J.-J.; Martimort D., *The Theory of Incentives: The Principal-Agent Model*, Princeton University Press, 2002.
- Laffont J.J.; Tirole J., *Adverse Selection and Renegotiation in Procurement*, The Review of Economic Studies 57(4): 597, 1990.

- Landoll D.J., *The Security Risk Assessment Handbook A Complete Guide for Performing Security Risk Assessments*, CRC Press Inc, 2005.
- Lawther W.C., *Flexible procurement approaches that facilitate relationship change and negotiation: the use of the invitation to negotiate*, Journal of Public Procurement, 2007.
- Ledda F., "Per una nuova normativa sulla contabilità pubblica", in *Studi in onore di Antonio Amorth. Scritti di diritto amministrativo*, Vol. 1, Giuffrè, Milano, 1982.
- Leggiadro F., *Concessione e appalto: il nocciolo duro della distinzione*, Urbanistica e appalti, 11: 1423–1432, 2007.
- Lee C.H.; Yu Y.-H., *Service delivery comparisons on household connections in Taiwan's sewer public–private-partnership (PPP) projects*, International Journal of Project Management 29: 1033–1043, 2011.
- Lewicki R.J.; Barry B.; Saunders D.M.; Minton J.W., *Negotiation*, McGraw-Hill/Irwin, 4th ed., 2003.
- Lewis, M.; Zheng, J.; Roehrich, J.K., *The dynamics of contractual and relational governance: Evidence from long-term public–private procurement arrangements*, Journal of Purchasing & Supply Management 14: 43–54, 2008.
- Linka A.N.; Scott J.T., *Public/private partnerships: stimulating competition in a dynamic market*, International Journal of Industrial Organization 19: 763–794, 2001.
- Lipari M., *Il rischio nell'appalto e l'alea normale del contratto*, Giustizia Civile II: 223–240, 1986.
- Loosemore M., *Risk allocation in the private provision of public infrastructure*, International Journal of Project Management 25(1): 66–76, 2007.
- Losada F., *The Green Paper on the modernization of public procurement policy of the EU: Towards a socially-concerned market or towards a market-oriented society?*, Oñati Socio-legal Series 2(4): 60–82, 2012. Available at SSRN.
- Losch R., *Competitive Dialogue and Negotiated Procedure in the Public Sector Directive 2004/18/EC*, Conference Paper for the 3rd public procurement Ph.D. conference, Nottingham University, 2007.
- Luminoso A., *Codice dell'appalto privato*, Giuffrè, Milano, 2010.
- Macario F., *Adeguamento e rinegoziazione nei contratti a lungo termine*, Jovene, Napoli, 1996.
- Macario F., *Clausola di rinegoziazione del prezzo* (nota a Cass. civ. Sez. III, 26 febbraio 2014, n. 4557), Contratti 4: 381, 2014.
- Mangiameli S., *I servizi pubblici locali*, Giappichelli, Torino, 2008.
- Marklund P.-O.; Lundberg S.; Brännlund R., *Assessment of Green Public Procurement as a Policy Tool: Cost-efficiency and Competition Considerations*, 2009. Available at SSRN.
- Marchegiani G., *Alcune considerazioni in merito al c.d. "Partenariato pubblico-privato (PPP)"*, giustamm.it (published on 9.3.2006).
- Maresca D., *La modificazione sostanziale dei contratti di concessione di lunga durata durante l'esecuzione: commento alla direttiva europea 2014/23/UE*, Diritto del Commercio Internazionale 3: 749, 2014.
- Marino I. M., *Aspetti propedeutici del principio giuridico di precauzione*, relation at the conference about "La precauzione nella Pubblica Amministrazione", 14 december 2009, at the Centro Interdipartimentale di Ricerca e Servizi per le decisioni giuridico-ambientali e la certificazione etica d'impresa dell'Università degli Studi di Padova, giustamm.it (published on 15.3.2011).
- Martinelli F.; Santini M., *La scelta del concessionario di pubblico servizio tra affidamento "intuitu personae" e procedura ad evidenza pubblica*, Urbanistica e appalti 9: 1016, 2001.
- Martins Cravinho A.; Cunha Marques R.; Oliveira Cruz C., *Public private partnerships for wind power generation: The Portuguese case*, Energy Policy 39: 94–104, 2011.
- Mascolini A., *Il dialogo competitivo. In arrivo un nuova procedura che cambierà la gestione degli appalti pubblici complessi*, Progetto&Pubblico, 2007.
- Masera S.R., *Appalto pubblico di servizi e concessione di servizi nella giurisprudenza comunitaria*, Urbanistica e appalti, 5: 579–585, 2008.
- Maskin E.; Tirole J., *Public–private partnerships and government spending limits*, International Journal of Industrial Organization, 26(2): 412–420, 2008.
- Marasco P. G., *La rinegoziazione e l'intervento del giudice nella gestione del contratto*, Contratto e Impresa 3: 539, 2005.
- Massera A.; Taccola C., "L'uso del contratto nel diritto dei servizi pubblici", in Massera A., *Il diritto amministrativo dei servizi pubblici tra ordinamento nazionale e ordinamento comunitario*, 265–285, Pisa, 2004.
- Mastragostino F., *La collaborazione pubblico-privato e l'ordinamento amministrativo: dinamiche e modelli di partenariato in base alle recenti riforme*, Giappichelli, Torino, 2011.
- Mattalia M., *I partenariati pubblici privati per il superamento della crisi economica*, lexitalia.it n. 2/2013.

- Mauceri T., *Sopravvenienze perturbative e rinegoziazione del contratto*, Europa e diritto privato 4: 1095, 2007.
- Mauro E., *La giurisprudenza di Lussemburgo sul rischio gestionale quale criterio discretivo tra concessioni e appalti*, Rivista Italiana di Diritto Pubblico Comunitario 5: 1183, 2011.
- Mazzamuto M., *Riparto di giurisdizione. Rapporti tra Ssn e strutture private accreditate. Procedure di evidenza pubblica e contratto*, Giurisprudenza Italiana, 10, 2012.
- McCrudden C., *Using public procurement to achieve social outcomes*, Natural Resources Forum 28: 257–267, 2004.
- McCubbins M.D.; Schwartz T., *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, American Journal of Political Science 28: 165–179, 1984.
- Medda F., *A game theory approach for the allocation of risks in transport Public-Private Partnerships*, International Journal of Project Management 25(3): 213, 2007.
- Milgrom P.; Roberts J., *Economia, Organizzazione e Management*, Il Mulino, Bologna, 1997.
- Moliterni A., *Il regime giuridico delle concessioni di pubblico servizio tra specialità e diritto comune*, Diritto Amministrativo 4: 567, 2012.
- Montedoro G.; Giordano M., *I Servizi pubblici locali fra diritto interno e comunitario*, in Giustizia Amministrativa n. 5/2007, 1107 ed in giustamm.it, 2008.
- Monteferrante L., *Il diritto dei contratti conquista gli accordi*, Urbanistica e appalti 8: 955, 2006.
- Monzani S., *Il trasferimento al privato del rischio economico di gestione quale tratto distintivo della concessione rispetto all'appalto di servizi e le conseguenze in tema di normativa applicabile*, Foro Amministrativo C.D.S. 1: 243, 2013.
- Morbidelli G., *Il principio di legalità e i cd. poteri impliciti*, Diritto Amministrativo 4: 703, 2007.
- Mosey D., *Early Contractor Involvement in Building Procurement Contracts, Partnering and Project Management* , John Wiley & Sons Inc, 2009.
- Moszoro M.; Gasiorowski P., *Optimal Capital Structure of Public-Private Partnerships*, IMF Working Paper 1/2008. Available at SSRN.
- Musolino G., *L'appalto pubblico e privato*, vol. I-II-III, UTET, Torino, 2002.
- Murray J. E. Jr., *Contract Theories and the Rise of Neoformalism*, Fordham Law Review 71(3), 10: 869–913, 2002.
- Neri V., *Il «rischio economico» negli appalti e nelle concessioni di servizio pubblico*, Il Corriere del Merito, 6: 681–687, 2010.
- Nacamulli R.C.D.; Rugiadini A., *Organizzazione e mercato*, Il mulino, Bologna, 1985.
- Napolitano G., *Servizi pubblici e rapporti di utenza*, Cedam, Padova, 2001.
- Nicolò R., *Alea* (voce), *Enciclopedia del diritto* I: 1024–1031, Giuffrè, Milano, 1958 (now in *Scritti giuridici* II: 1421, Milano, 1980).
- Nicolussi A., *Sezioni sempre più unite contro la distinzione fra obbligazioni di risultato e obbligazioni di mezzi. La responsabilità del medico.* (nota a Cass. civ. Sez. Unite, 11 gennaio 2008, n. 577), Danno e Responsabilità 8-9: 871, 2008.
- Nulli M., *Gli appalti precommerciali*, 2013 (www.osservatorioappalti.unitn.it).
- Occhiena M., *Gli appalti pubblici e la semplificazione impossibile*, Il diritto dell'economia 26, n. 81: 521–535, 2013 (www.osservatorioappalti.unitn.it).
- Oliveira Cruz C.; Cunha Marques R., *Contribution to the study of PPP arrangements in airport development, management and operation*, Transport Policy 18: 392–400, 2011.
- Pagani I., *Riparto di giurisdizione in materia di revisione dei prezzi e condizioni per ritenere sussistente il presupposto riconoscimento revisionale*, Urbanistica e appalti 8-9: 904, 2014.
- Parker D.; Hartley K., *Transaction costs, relational contracting and public private partnerships: a case study of UK defence*, Journal of Purchasing & Supply Management 9: 97–108, 2003.
- Passalacqua M., *Concessione di servizio pubblico e cooperazione: nuove prospettive per un istituto antico*, in www.ddp.unipi.it, 2002.
- Patti F. P., *Collegamento negoziale e obbligo di rinegoziazione*, Nuova Giurisprudenza Civile 2: 117, 2013.
- Pavesi A., *Concessioni: aspetti problematici*, Laboratorio dei contratti pubblici, www.contratti-appalti.it, 2009.
- Peirone F., *La scelta del concessionario di servizi = The selection of the service concessionaire,* Foro Amministrativo C.D.S. 2: 541, 2013.
- Pennazio R., *Distribuzione del rischio e inidoneità all'uso della res vendita* (nota a Cass. civ. Sez. II, 30 maggio 2013, n. 13612 e Sez. II, 12 ottobre 2012, n. 17485), Giur. It. 12: 2476, 2013.

- Perfetti L.R., *Diritto ad una buona amministrazione, determinazione dell'interesse pubblico ed equità,* Rivista Italiana di Diritto Pubblico Comunitario 3-4: 789, 2010.
- Pericu G.; Romano A.; Spagnuolo Vigorita V., *La concessione di pubblico servizio*, Giuffrè, Milano, 1995.
- Perrow C., *Economic theories of organization*, Theory and Society 15(1-2): 11–45, 1986.
- Peters L.,*Una legge per il franchising*, Diritto commerciale internazionale 2: 323, 2004.
- Phang S.-Y., *Urban rail transit PPPs: Survey and risk assessment of recent strategies*, Transport Policy 14: 214–231, 2007.
- Picozza E., "I contratti della pubblica amministrazione tra diritto comunitario e diritto nazionale" in *I contratti con la pubblica amministrazione*, Trattato dei contratti diretto da P. Rescigno e E. Gabrielli, a cura di C. Franchini, vol. I, Utet, Torino, 2007.
- Picozza E., "Appalti pubblici di servizi e concessioni di servizi pubblici", in *Gli appalti pubblici di servizi: con il commento articolo per articolo del D.lg.vo 17 marzo 1995, n. 157*, a cura di E. Picozza, Maggioli, Rimini, 1995.
- Polackova Brixi H.; Irwin T., *Public-private Partnerships in the New Eu Member States. Managing Fiscal Risks*, World Bank Working Papers, World Bank Publications, 2007.
- Poschmann F., *Private Means to Public Ends: The Future of Public-Private Partnerships*, C.D. Howe Institute, 2003.
- Pototschnig U., *I pubblici servizi*, Cedam, Padova, 1964.
- Priemus H.; Flyvbjerg B.; van Wee B., *Decision-Making on Mega-Projects. Cost–Benefit Analysis, Planning and Innovation*, Edward Elgar, 2008.
- Protto M., *Le concessioni di servizi pubblici sono escluse dall'ambito di applicazione delle direttive comunitarie sugli appalti pubblici*, Urbanistica e appalti 1: 47, 2001.
- Quaranta A., *Project Bond: un nuovo strumento per il rilancio delle infrastrutture?*, Ambiente e sviluppo 4: 339, 2013.
- Raganelli B., *Partenariato Pubblico Privato ed opere pubbliche in Europa. La ricerca di un equilibrio tra regole e flessibilità*. Convention I-COM "Procedure di scelta del contraente e modelli di affidamento nei rapporti di Partenariato Pubblico Privato: il caso delle infrastrutture", Rome, 29 october 2008.
- Rangone C., *Flessibilità procedurale e aderenza al diritto Ue nel Regno Unito*, Intervention at the Conference - Appalti: uno sguardo sull'Europa - organized by IGI in Rome, 17 november 2011 (www.osservatorioappalti.unitn.it).
- Raiffa H.; Richardson J.; Metcalfe D., *Negotiation analysis. The science and art of collaborative decision making*, Harvard University press, 2002.
- Renna M., *Il regime delle obbligazioni nascenti dall'accordo amministrativo*, Diritto amministrativo, 270, 2010.
- Ricchi M., *La regolazione di una operazione di partenariato pubblico-privato*, Rivista amministrativa, 169, 2007 (www.osservatorioappalti.unitn.it).
- Ricchi M., *Negoauction, discrezionalità e dialogo competitivo (Una teoria per l'affidamento dei contratti complessi di PPP)*, www.giustizia-amministrativa.it, 2008.
- Ricchi M., *La nuova Direttiva comunitaria sulle concessioni e l'impatto sul Codice dei contratti pubblici,* Urbanistica e appalti 7: 741–757, 2014.
- Rizzo G., *La concessione di servizi*, Giappichelli, Torino, 2012.
- Roberts P., *The Economist Guide To Project Management*, Profile Books Ltd, 2012.
- Romano S., *L'ordinamento giuridico*, Sansoni, Firenze, 1945.
- Rubino D., *L'appalto*, in Trattato di diritto civile italiano diretto da F. Vassalli, VII, 3, Utet, Torino, I ed., 1946.
- Salvago S., *La ripartizione della giurisdizione negli appalti pubblici = The breakdown of jurisdiction in public works contracts*, Giustizia Civile 11-12: 771, 2013.
- Sanchez Graells A., *The continuing relevance of the general principles of EU public procurement law after the adoption of the 2014 Concessions Directive*, University of Leicester School of Law Research Paper No. 15-12. Available at SSRN.
- Sandulli M.A., *Il partenariato pubblico privato istituzionalizzato nell'evoluzione normativa*, report presented at the school of specialization in studies on public administration, Bologna, 23 january 2012, in federalismi.it n. 3/2012.
- Santoro P., *Gli appalti pubblici: nozione comunitaria e tipologie negoziali*, Foro Amministrativo 4: 1282, 1998.
- Santoro S., *Le oscillazioni dei prezzi negli appalti e nelle concessioni: rimedi e prospettive,* Relation to IGI Convention - Rome, 28 april 2004, in giustamm.it.

- Scarpa D., *Ricostruzione ermeneutica della hardship clause nel diritto positivo italiano*, Contratto e impresa 4-5: 951, 2013.
- Schaeffer P.; Loveridge S., *Toward an Understanding of Types of Public-Private Cooperation*, Public Performance & Management Review 26: 169–189, 2002.
- Scotti E., *Organizzazione pubblica e mercato: società miste, in house providing e partenariato pubblico privato*, Diritto Amministrativo, 4: 915, 2005.
- Sementilli L., *A 'Democratic Deficit' in the EU? The reality behind the mythmore*, 2012. (http://www.academia.edu/1508020/A_Democratic_Deficit_in_the_EU_The_reality_behind_the_myth)
- Sgubin C., *La difficile applicazione del diritto comunitario agli istituti tra appalto e concessione*, giustamm.it (published on 8.6.2009).
- Shavell S., *Risk sharing and incentives in the principal and agent relationship*, Bell Journal of Economics 10: 55–73, 1979.
- Shen L.-Y.; Platten A.; Deng X.P., *Role of public private partnerships to manage risks in public sector projects in Hong Kong*, International Journal of Project Management 24: 587–594, 2006.
- Sicchiero G., *Buona fede e rischio contrattuale*, Contratto e Impresa 4-5: 919–943, 2006.
- Singh L.B.; Kalidindi S.N., *Traffic revenue risk management through Annuity Model of PPP road projects in India*, International Journal of Project Management 24: 605–613, 2006.
- Sobhiyah M.H.; Bemanian M.R.; Kashtiban Y.Kh., *Increasing VFM in PPP power station projects – Case study: Rudeshur gas turbine power station*, International Journal of Project Management 27: 512–52, 2009.
- Soverino L., *I servizi pubblici nell'Euroregione: nuove prospettive di diritto comunitario per la cooperazione transfrontaliera, tra Consiglio d'Europa e potere estero delle Regioni* (a proposito del Regolamento CE 1082/2006), Rivista Italiana di Diritto Pubblico Comunitario 1: 17, 2009.
- Spackman M., *Public–private partnerships: lessons from the British approach*, Economic Systems 26: 283–301, 2002.
- Spadoni B., *I servizi pubblici locali. Dalla municipalizzazione alla liberalizzazione*, 3 february 2003 (http://www.dirittodeiservizipubblici.it/articoli/articolo.asp?sezione=dettarticolo&id=20).
- Spagnuolo F., *Il green public procurement e la minimizzazione dell'impatto ambientale nelle politiche di acquisto della pubblica amministrazione*, Rivista Italiana di Diritto Pubblico Comunitario 2: 397, 2006.
- Spangaro A., *L'equilibrio del contratto tra parità negoziale e nuove funzionalizzazioni*, Giappichelli, Torino, 2014.
- Stigler G.J., *Mercato, informazione, regolamentazione*, Il Mulino, Bologna, 1994.
- Stiglitz J.E., *Economia del settore pubblico*, Hoepli, Milano, 1989.
- Stiglitz J.E., *Il ruolo economico dello Stato*, Il Mulino, Bologna, 1992.
- Taglianetti G., *La distinzione tra appalto e concessione e l'(in)applicabilità dell'art. 84, comma 10, d. lgs. n. 163 del 2006 alle concessioni di servizi*, Foro Amministrativo T.A.R. 7-8: 2308, 2011.
- Taglianetti G., *I limiti del contributo pubblico e il rischio di gestione nelle procedure di project financing*, Rivista Giuridica dell'Edilizia 1: 168, 2013.
- Tang L.Y. Shen Q.; Cheng E.W.L., *A review of studies on Public–Private Partnership projects in the construction industry*, International Journal of Project Management 28: 683–694, 2010.
- Tarullo S., *Buone prassi e continuità dell'amministrazione pubblica,* Diritto Amministrativo 1-2: 149, 2013.
- Thomas S.Ng.; Wong Yoki M.W.; Wong James M.W., *Factors influencing the success of PPP at feasibility stage – A tripartite comparison study in Hong Kong*, Habitat International 36(4): 423–432, 2012.
- Tirelli M., *The evaluation of public investments under uncertainty*, Research in Economics 60: 188–198, 2006.
- Tirole J., *Procurement and Renegotiation*, The Journal of Political Economy 94(2): 235, The University of Chicago Press, 1986.
- Todinov M.T., *Risk-Based Reliability Analysis And Generic Principles For Risk Reduction*, Elsevier Science, 2006.
- Tonetti A., *Il Decreto "Salva Italia"*, Giornale di Diritto Amministrativo 3: 229, 2012.
- Torricelli S., *Il mercato dei servizi di pubblica utilità. Un'analisi a partire dal settore dei servizi a rete*, Giuffrè, Milano, 2007.
- Trimarchi P., *Causalità e danno*, Giuffrè, Milano, 1967.
- Trimarchi P., *Il contratto. Inadempimento e rimedi*, Giuffrè, Milano, 2010.
- Trubiani F., *La rinegoziazione contrattuale nel diritto privato europeo*, Obbligazioni e Contratti 2: 134, 2012.
- Trubiani F., *La rinegoziazione contrattuale tra onere ed obbligo per le parti*, Obbligazioni e Contratti 6: 447, 2012.

- Tucci M., *Appalto e concessione di pubblici servizi. Profili di costituzionalità e di diritto comunitario*, Cedam, Padova, 1997.
- Ubaldi A., *Procedura negoziata senza pubblicazione del bando di gara tra discrezionalità tecnica e tutela della concorrenza*, Foro Amministrativo C.D.S. 10: 2724, 2013.
- Urbani P.; Passeri L., *Guida al codice dei contratti pubblici* (D.Lgs. 12 aprile 2006, n. 163, D.Lgs. 26 gennaio 2007, n. 6, D.Lgs. 31 luglio 2007, n. 113 e Corte cost. 23 novembre 2007, n. 401), Giappichelli, Torino, 2008.
- Van Valkenburg M.; Lenferink S.; Nijsten R.; Arts J., *Early Contractor Involvement: A new strategy for 'buying the best' in infrastructure development in the Netherlands*, 3rd International Public Procurement Conference, Amsterdam, 2008.
- Villata R., *Pubblici servizi. Discussione e problemi*, Giuffrè, Milano, 2008.
- Vinti S., *Il dialogo competitivo: troppo rigido nella fase creativa, poco regolato in quella comparativa*, giustamm.it (published on 1.4.2009).
- Von Neumann J.; Morgenstern O., *Theory of Games and Economic Behavior*, Princeton, NJ. Princeton University Press, 1953.
- Walker D.H.T.; Lloyd-Walker B., "Understanding Early Contractor Involvement (ECI) procurement forms", in Smith, S.D (Ed) *Procs 28th Annual ARCOM Conference*, 3-5 September 2012, Edinburgh, UK, Association of Researchers in Construction Management, 877–887, 2012
- Warwick B., *The Handbook Of Risk*, John Wiley & Sons Inc., 2003.
- Wibowo A.; Mohamed S., *Risk criticality and allocation in privatised water supply projects in Indonesia*, International Journal of Project Management 28: 504–513, 2010.
- Wideman M.R., *Project And Program Risk Management. A Guide To Managing Project Risk And Opportunities*, a publication of the Project Management Institute, 1992.
- Williamson O.E., *The Economics of Internal Organization: Exit and Voice in Relation to Markets and Hierarchies*, The American Economic Review 66 (2): 369–377, Papers and Proceedings of the Eighty-eighth Annual Meeting of the American Economic Association, 1976.
- Williamson O. E., *Le istituzioni economiche del capitalismo: imprese, mercati, rapporti contrattuali*. Franco Angeli, Milano, 1992.
- Williamson O.E., *I meccanismi del governo. L'economia dei costi di transazione: concetti, strumenti, applicazioni*, Franco Angeli, Milano, 1996.
- Xu Y.; Yeung J.F.Y.; Chan A.P.C.; Chan D.W.M.; Wang S.Q.; Ke Y., *Developing a risk assessment model for PPP projects in China — A fuzzy synthetic evaluation approach*, Transport Policy 22: 36–48, 2012.
- Xu Y.; Sun C.; Skibniewski M.J.; Chan A.P.C.; Yeung J.F.Y.; Cheng H., *System Dynamics (SD)-based concession pricing model for PPP highway projects*, International Journal of Project Management 30: 240–251, 2012.
- Yseult M., *Public-Private Partnerships and the Law: Regulation, Institutions and Community*, Edward Elgar, 2014.
- Zhang X.; Chen S., *A systematic framework for infrastructure development through public private partnerships*, IATSS Research, 2012.
- Zheng J.; Roehrich J.K.; Lewis M.A., *The dynamics of contractual and relational governance: Evidence from long-term public–private procurement arrangements*, Journal of Purchasing & Supply Management 14: 43–54, 2008.

Dossier
(in chronological order)

- UTFP, *Partenariato Pubblico – Privato per la realizzazione di opere pubbliche: impatto sulla contabilità nazionale e sul debito pubblico. Decisione EUROSTAT 11 Febbraio 2004 "Treatment of public-private partnerships"*, Rome, june 2004.
- Fraunhofer ISI – Institute Systems and Innovation – Research, *Innovation and Public Procurement. Review of Issues at Stake*, Study for the European Commission (No ENTR/03/24), 2006.
- UNECE - *A Guide to Promoting Good Governance in Public Private Partnerships*, Tel Aviv, Israel, 5-8 june 2007.
- OECD, *Public-Private Partnerships - In Pursuit of Risk Sharing and Value For Money*, 2008.
- UTFP, *Partenariato Pubblico Privato in Italia. Stato dell'arte, futuro e proposte*, 2010.
- UTFP, *Partenariato Pubblico – Privato per la realizzazione di opere pubbliche: impatto sulla contabilità nazionale e sul debito pubblico*, Roma, january 2011.
- EPEC, *Eurostat Treatment of Public-Private Partnerships: Purposes, Methodology and Recent Trends*, 2010.

- CMS, *PPP in Europe*, 2010.
- TUAC Secretariat, *PPPs – In pursuit of fair risk sharing and value for the people?*, 13 april 2010.
- UTFP and EPEC, *Le garanzie pubbliche nel PPP. Guida alla migliore valutazione, strutturazione, implementazione e gestione,* august 2011 (la versione originale, in lingua inglese, *State Guarantees in PPPs, A Guide to Better Evaluation, Design, Implementation and Management* is available on the website of EPEC).
- "*5 simple suggestions, with immediate impact and at no cost, for the rationalization of the system of public contracts*" in infrastructure projects, january 2012 ("5 semplici proposte, d'impatto immediato e a costo zero, per la razionalizzazione del sistema dei contratti pubblici" in progetti d'infrastruttura, January 2012, http://www.urbanisti.it/attachments/article/57/U&S_12001_5%20semplici%20proposte%20razionalizzazione%20contratti%20pubblici-1.pdf)
- Centre for European Policy Studies (CEPS) and College of Europe, *The uptake of Green Public Procurement in the EU27*, submitted to the European Commission, DG Environment, Brussels, 2012.
- EPEC, *Market Update. Review of the European PPP Market in 2012* e *First half of 2013*.
- EIO and CfSD, *Eco-innovate! A guide to eco-innovation for SMEs and business coaches*, Eco-Innovation Observatory, funded by the European Commission, DG Environment, Brussels, 2013.
- EPRS - European Parliamentary Research Service, *The Cost of Non- Europe in the Single Market* (Cecchini Revisited): An overview of the potential economic gains from further completion of the European Single Market, Author: Zsolt Pataki, European Added Value Unit, September 2014 – PE 510.981.

Jurisprudence
(in chronological order)

➢ EU General Court of First Instance:

(Third Chamber, extended composition) of 27 february 1997, Case T-106/95, *FFSA and Others v Commission*; (Second Chamber, extended composition) of 16 march 2004, Case T-157/01, *Danske Busvognmænd v Commission*; (Fifth Chamber) of 1 july 2010, Case T-53/08, *Italian Republic v European Commission*.

➢ European Court of Justice:

26 april 1994, C-272/91, *Lottomatica*; 10 november 1998, C-360/96, *BFI Holding*; Sect. VI, 7 december 2000, C-324/98, *Telaustria*; Sez. II, 30 may 2002, C-358/00, *Buchhändler-Vereinigung*; Sect. I, 13 october 2005, C-458/03, *Parking Brixen*; Sect. II, 27 october 2005, Joined Cases C-187/04 and C-188/04, *Commission v Italian Republic*; Sect. III, 27 october 2005, C-234/03, *Contse*; Sect. I, 6 april 2006, C-410/04, *ANAV*; Sect. I, 18 january 2007, C-220/05, *Auroux*; Sect. II, july 2007, C-382/05, *Commission vs. Italy*; Sect. III, 13 november 2008, C-324/07, *Coditel Brabant*; Sect. III, 13 november 2008, C-437/07, *Commission vs. Italy*; Sect. IV, 11 june 2009, C-300/07, *Hans & Christophorus Oymanns*; Sect. III, 10 september 2009, C-206/08, *WazvGotha*; Sect. III, 15 october 2009, C-196/08, *Acoset*; Sect. III, 25 march 2010, C-451/08, *Helmut Müller*; Grand Chamber, 13 april 2010, Case C-91/08, *Wall AG*; Sect. III, 10 march 2011, C-274/09, *Stadler*; Sect. II, 10 november 2011, C-348/10, *Norma-A*; Sect. II, 11 july 2013, C-576/10, *Commission/Netherlands*.

➢ Constitutional Court:

n. 226 of 19 june 1998; n. 401 of 23 november 2007.

➢ Civil Justice:

- Tribunal Milano, 27 may 2009; Tribunal Enna, 9 february 2010.

- Cass. Civ., Sect. I, 26 november 1984, n. 6106; Cass. Civ., Sect. II, 12 march 1992, n. 3013; Cass. Civ., Sect. I, 9 april 1994, n. 3342; Cass. Civ., Sect. II, 13 february 1995, n. 1559; Cass. Civ., Sect. I, 23 november 1999, n. 12989; Cass. Civ., Sect. II, 23 february 2001, n. 2661; Cass. Civ., Sect. I, 13 february 2003, n. 2146; Cass. Civ., Sect. III, 19 october 2006, n. 22396; Cass. Civ., Sect. III, 25 may 2007 n. 12235; Cass. Civ., Sect. I, 20 february 2015, n. 3455.

- Cass. Civ., Sez. Un., 3 august 2006, n. 17573; Cass. Civ., Sez. Un., 6 may 2005, n. 9391; Cass. Civ., Sez. Un., 14 february 2008, n. 3518; Cass. Civ., Sez. Un., 3 april 2009, n. 8113; Cass. Civ., Sez. Un., 27 may 2009, n. 12252; Cass. Civ., Sez. Un., 1° july 2009, n. 15381; Cass. Civ., Sez. Un., 26 january 2011, n. 1773; Cass. Civ., Sez. Un., 5 april 2012, n. 5446; Cass. Civ., Sez. trib., 12 november 2014, n. 24095.

- Administrative Justice:

- T.A.R. Bologna, Sect. I, 10 april 2001, n. 303; L'Aquila, 2 october 2001, n. 583; Salerno, Sect. I, 28 november 2001, n. 1501; Venezia, Sect. I, 3 june 2003, n. 3130; Venezia, Sect. I, 30 november 2005, n. 4114; Roma, Sect. II, 11 may 2007, n. 4315;, Milano, Sect. III, 8 may 2007, n. 2580; Bolzano, 8 april 2008, n. 129; Catania, Sect. III, 18 february 2009, n. 369; Bari, Sect. I, 17 february 2009, n. 315; Perugia, Sect. I, 11 june 2010, n. 369; Firenze, Sect. II, 6 july 2010, n. 2313; Roma, Sect. II-*quater*, 27 october 2010, n. 33046; Firenze, Sect. II, 20 december 2010, n. 6781; Genova, Sect. II, 2 february 2011, n. 184; Milano, Sect. III, 12 october 2011, n. 2419; Perugia, Sect. I, 1 december 2011, n. 389; Milano, Sect. III, 16 december 2011, n. 3200; Roma, Sect. II-*quater*, 11 january 2012, n. 239; Trieste, Sect. I, 26 january 2012, n. 33; Perugia, Sect. I, 6 march 2012, n. 73; Latina, Sect. I, 7 march 2012, n. 195; Genova, Sect. II, 28 march 2012, n. 430; Brescia, Sect. II, 10 april 2012, n. 618; Bari, Sect. I, 12 april 2012, n. 716; Napoli, Sect. I, 3 may 2012, n. 2014; Catania, Sect. III, 30 may 2012, n. 1422; Roma, Sect. II-*ter*, 8 june 2012, n. 5221; Roma, Sect. III, 27 june 2012, n. 5863; Lecce, Sect. III, 1º august 2012, n. 1444; Genova, Sect. II, 3 september 2012, n. 1157; Milano, Sect. III, 13 september 2012, n. 2310; Bari, Sect. I, 11 october 2012, n. 1756; Bari, Sect. I, 9 november 2012, n. 1907; Torino, Sect. I, 19 december 2012, n. 1365; Torino, Sect. I, 9 january 2013, n. 2; Napoli, Sect. I, 15 january 2013, n. 313; Roma, Sect. II, 13 february 2013, n. 1555; Roma, Sect. II-*bis*, 15 april 2013, n. 3801; Brescia, Sect. II, 18 april 2013, n. 363; Ancona, Sect. I, 8 november 2013, n. 808; Trento, Sect. I, 31 january 2014, n. 30; Firenze, Sect. II, 28 february 2014, n. 409; Roma, Sect. III, 22 july 2014, n. 8001; Roma, Sect. III, 2 september 2014, n. 9292; Napoli, 22 october 2014, n. 5409; Milano, Sect. I, 20 november 2014, n. 2778; Napoli, Sect. II, 5 february 2015, n. 887; Napoli, Sect. II, 13 april 2015 n. 2086.

- Council of State (Consiglio di Stato), Sect. VI, 6 september 2000, n. 4688; Sect. V, 4 may 2001, n. 2518; Sect. V, 30 april 2002, n. 2294; Sect. IV, 15 may 2002, n. 2634; Sect. V, 22 july 2002, n. 4012; Sect. IV, 14 june 2005, n. 3114; Sect. V, 11 march 2005, n. 1035; Sect. IV, 30 may 2005, n. 2804; Sect. V, 27 january 2006, n. 236; Sect. V, 14 february 2006, n. 7461; Sect. VI, 5 june 2006, n. 3333; Sect. V, 21 june 2007, n. 3318; Sect. V, 1° august 2007, n. 4270; Sect. V, 14 april 2008, n. 1600; Sect. V, 20 august 2008, n. 3994; Sect. V, 5 december 2008, n. 6049; Sect. V, 11 may 2009, n. 2864; Sect. V, 12 june 2009, n. 3750; Sect. VI, 4 august 2009, 4890; Sect. V, 2 november 2009, n. 6709; Sect. V, 13 july 2010, n. 4510; Sect. V, 11 august 2010, n. 5620; Sect. V, 15 november 2010, n. 8040; Sect. V, 25 november 2010, n. 8231; Sect. V, 24 march 2011, n. 1784; Sect. V, 20 april 2011, n. 2447; Sect. VI, 20 may 2011, n. 3019; Sect. V, 23 may 2011, n. 3086; Sect. V, 6 june 2011, n. 3377; Sect. III, 8 july 2011, n. 4128; Sect. III, 19 july 2011, n. 4362; Sect. V, 9 september 2011, n. 5068; Sect. VI, 27 december 2011, n. 6835; Sect. V, 10 january 2012, n. 39; Sect. III, 1° february 2012, n. 504; Sect. V, 3 may 2012, n. 2531; Sect. V, 3 may 2012, n. 2537; Sect. V, 13 june 2012, n. 3474; Sect. VI, 26 june 2012, n. 3764; Sect. V, 5 july 2012, n. 3941; Sect. VI, 4 september 2012, n. 4682; Sect. V, 18 october 2012, n. 5359; Sect. VI, 10 december 2012, n. 6297; Sect. V, 16 january 2013, n. 236; Sect. VI, 21 june 2013, n. 3378; Sect. V, 11 october 2013, n. 4979; Sect. V, 12 november 2013, n. 5421; Sect. IV, 13 march 2014, n. 1243; Sect. V, 23 april 2014, n. 2052; Sect. V, 30 april 2014, n. 2249; Sect. V, 14 july 2014, n. 3669; Sect. V, 1° december 2014, n. 5915.

- Council of State (Consiglio di Stato), Ad. Plen., 18 june 2002, n. 6; 6 august 2013, n. 19; 7 may 2013, n. 13; 30 january 2014, n. 7.

- Court of Auditors (Corte dei Conti) reg. Abruzzo, Sez. giurisd., 24 january 2012, n. 27.