

# Introduction

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## 1 SETTING THE SCENE

Visitors leaving the John F Kennedy International Airport in New York are greeted with several signs asking them to ‘adopt a highway’. One of them reads: ‘Next 1 Mile – Jet Blue’. One could ironically say that American highways have many fathers.

This programme is an interesting example of public private partnership, which we can define, in a preliminary way, as a particular juridical arrangement in which one or more public authorities cooperate with private operators to carry out an activity of public importance, with substantial private financing and assumption of risk.<sup>1</sup>

In the case of the New York highways, which can stand as an example for many similar adopt-a-highway programmes all over the world, a private operator – here, an airline company – cooperates with a public authority – here, the New York City Department of Transportation – to carry out a publicly significant activity, such as the maintenance of a stretch of highway near the airport. In exchange for the economic investment and the operational contribution, the private sponsor receives the benefit of promoting its logo on the signs located at the sponsored highway section.

These road signs indicate a synergy between the public and the private spheres; they are the result of an agreement through which public infrastructures are maintained by a private operator.<sup>2</sup>

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<sup>1</sup> Since this is an introduction to the topics of the book, the readers will not find a detailed and exhaustive description of the juridical concepts dealt with at this point. For now, it is best to follow our reasoning, which uses examples taken from cases, legislation and experience, to enter into conceptual contact with public private cooperation.

<sup>2</sup> The adopt-a-highway programmes are a type of public private agreement that are quite widespread in the United States of America, through which public authorities in charge of the management of stretches of highway promote litter control and reduce the expenditure of public funds for litter control. These kinds of programmes are quite appreciated as they foster citizenship participation and a strong sense of community. The juridical outline of said programmes and the implications for the re-definition of the line between public and private governance of common goods are tackled in Martha Minow, ‘Partners, not rivals: redrawing the lines between public and private, non-profit,

As a consequence of the public private partnership, the public authority benefits from an entrepreneurial project which generates public value, sharing responsibility to meet the needs of the community. At the same time, the private operator profits from the involvement in an otherwise inaccessible dimension, namely the tasks reserved for public administrations.

The adopt-a-highway programme is only one example of the many positive synergies between public entities and the business world which universally satisfy common needs in different spheres of the economy, from infrastructure to education, environmental protection and cultural heritage.<sup>3</sup> Some other examples are presented below.

The women's literacy programme named '*Projet d'Alphabétisation Priorité Femme*', launched by the Senegalese government in the late 1990s,<sup>4</sup> is an interesting case from the field of education. This programme involved many small

and secular and religious' (2002) *BU Law Review* 1061. For an account of the difficulties that may be caused by the flanking of certain private organizations with public authorities, see the legal dispute that arose in 1996 regarding the request of the Ku Klux Klan to adopt a section of the Interstate 55 near St. Louis, Missouri. The refusal of the Missouri Department of Transportation to accept the application of this group, based on the history of unlawful violent and criminal behaviour of the Klan, was repealed in two grades of trial on constitutional grounds. See *Cuffley v. Mickes* (1999) 44 F.Supp.2d 1023; *Cuffley v. Mickes* (2000) 208 F.3d 702. The decision of the Courts was respected but the Missouri Legislature decided to name the stretch of highway adopted by the KKK the 'Rosa Parks Highway', in honour of the civil rights heroine from Alabama whose refusal to give up her bus seat to a white passenger in 1955 led to a boycott of the Montgomery's bus system and the start of the civil rights movement. For a comment, see Suzanne Stone Montgomery, 'When the Klan adopts-a-highway: the weaknesses of the public forum doctrine exposed' (1999) *Wash. U. Law. Q.* 557; Ray Leeper, 'The Ku Klux Klan, public highways and the public forum' (2000) *Communications and the Law* 39; Marybeth Herald, 'Licensed to speak: the case of vanity plates' (2001) *U. Colo. Law Review* 595; Mary Jean Dolan, 'Government speech' (2003–2004) *Hastings Const. Law Q.* 71; Alyssa Graham, 'The government speech doctrine and its effects on the democratic process' (2011) *Suffolk U. Law Review* 703.

<sup>3</sup> To introduce the reasoning on public private partnership, we chose to propose a selection of examples of successful projects in different economic fields. The cases presented have been chosen from experiences of public private partnership carried out around the world in the last thirty years, on the basis of their capacity to represent a concrete answer to the needs of local communities. Many more recent public private partnership projects have been launched after the ones cited in the text. Nevertheless, we chose to consider the ones with concrete results for the affected communities that could be evaluated and assessed by the scientific community.

<sup>4</sup> Bjorn H Nordtveit, 'Managing Public-private partnership. Lessons from literacy education in Senegal' (The World Bank, 2004); Helen Abadzi, 'Improving adult literacy outcomes: lessons from cognitive research for developing countries' (The World Bank, 2003); Peter Easton, 'Enhancing the contributions of adult and non-formal education to achievement of education for all and millennium development goals: Vol. I.

local providers, consisting mainly of local community-based organizations, both profit and non-profit, in implementing small-scale literacy projects covering courses in reading, writing, health and hygiene for local women in different villages. The private providers took on the costs of the organization and teaching, whereas the government's literacy department maintained responsibility for policy formulation, monitoring and evaluation,<sup>5</sup> as well as the authority to approve single projects. Because of its accomplishments, in terms of number of projects approved and women educated, the programme was taken as a best practice and replicated in Gambia, Burkina Faso and Guinea.<sup>6</sup>

In the arena of environmental and endangered species protection, in 2005 the International Finance Corporation – the private sector arm of the World Bank Group – signed a \$5 million grant for a public private partnership aiming at ensuring sustainable financing for the Komodo National Park in Indonesia.<sup>7</sup> The goal of the initiative was to protect the park's biodiversity, particularly the endangered species of the *Varanus komodoensis*, while providing tourist attractions for visitors wanting to explore the site, declared a World Heritage Site and a Man and Biosphere Reserve by the United Nations Educational Scientific and Cultural Organization (UNESCO).<sup>8</sup> The grant was provided to an Indonesian limited liability company jointly owned by The Nature Conservancy – an international non-profit organization active in the field of the preservation of diversity of life on earth – and an Indonesian private

Finding improved means of service provision in adult and non-formal education' (The World Bank, 2004).

<sup>5</sup> Nordtveit (n 4) 1.

<sup>6</sup> Bjorn H Nordtveit, 'Use of public-private partnerships to deliver social services: advantages and drawbacks' (Centre for International Education Faculty Publications, 2004). In order to face what the United Nations Educational Scientific and Cultural Organization (UNESCO) has labelled as a 'global learning crisis' and to provide children of rural and indigenous populations, cultural minorities and conflict-affected countries with their fundamental right to education, many governments (such as Colombia, Pakistan, Peru, Philippines, Sierra Leone, Uganda and Venezuela) have engaged in the non-public sector to build schools and to manage the educational services. See: UNESCO, 'The global learning crisis: why every child deserves a quality education' (Program and Meeting Document, 2013).

<sup>7</sup> International Finance Cooperation, 'IFC supports management of Komodo National Park in Indonesia' (27 June 2005) <https://ifcextapps.ifc.org/ifcext/Pressroom/IFCPressRoom.nsf/0/7B5F1CD246F58BA18525702D004B681E?OpenDocument>, accessed 11 January 2019.

<sup>8</sup> Viviana Lujan Gallegos et al., 'Sustainable financing for marine protected areas: lessons from Indonesian MPAs. Case studies: Komodo and Ujung Kulon National Parks' (Environmental and Resource Management, 2005) [http://www.selfpas.it/libreria/Sustainable\\_Financing\\_of\\_MPAs-Komodo.pdf](http://www.selfpas.it/libreria/Sustainable_Financing_of_MPAs-Komodo.pdf), accessed 11 March 2019. See also Johannes Subijanto, 'Towards a sustainable Komodo National Park Management: a 2002 progress report' (The Nature Conservancy, 2002).

tourism enterprise which entered into an agreement with the Indonesian government, the park authority and the local communities to promote the park as a tourist destination and increase the net benefits to conservation and local development.<sup>9</sup>

As for the field of cultural heritage, a fruitful public private partnership was recently carried out by the Australian Federal Government. In this case, the project called for the requalification and reuse of the North Head Quarantine Station, a 30-hectare area outside Sidney of great historical and social significance containing many aboriginal sites. This was made possible thanks to a 20-year lease by the Federal Government and the public National Parks and Wildlife Service to a private investment group, which took on the responsibility of investing approximately \$6 million for the conservation of buildings, cultural landscape, infrastructure and movable heritage collection, as well as setting up a retreat centre, two restaurants, a conference and visitor centre, a theatre and parking spots.<sup>10</sup>

The above examples bring us close to the subject of our analysis, as they show forms of cooperation between the public and the private sector carried out in order to satisfy a community's needs (transport, education, environmental protection, culture) which can be easily qualified – at least in its general sense – as forms of public private partnerships. Said agreements allow public authorities to draw near to the administered communities as they enable governmental authorities to receive inputs from market operators or members of society, in a 'bottom-up' approach. Public private partnerships drag public administrations out from the isolation where they end up when they act with authoritative modalities and as 'monopolists' of the management of publicly relevant activities.

From an academic point of view, the blend between public and private inevitably also produces a juridical contamination of values, dynamics, principles, rules of action and parameters of responsibility, which has not been fully investigated by the literature on public private partnership. Our contribution is to analyse and decipher the elements and consequences of said interaction.

More precisely, this book intends to take a further step in this direction, providing a theoretical account of public private partnership as an instrument

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<sup>9</sup> International Finance Cooperation, n 7.

<sup>10</sup> Susan Macdonald and Caroline Cheong, 'The role of public-private partnerships and the third sector in conserving heritage buildings, sites, and historic urban areas' (The Getty Conservation Institute, 2014) 22. Different forms of PPP are commonly adopted in numerous parts of the world to enhance the value of historical and cultural assets. On the topic, see UNESCO, 'The Hangzhou Declaration placing culture at the heart of sustainable development policies' (Adopted in Hangzhou, People's Republic of China, on 17 May 2013).

of governance able to bend some of the principles of administrative action that are often unquestionably accepted across the board and, at the same time, to absorb the private sectors into a social dimension in which the subjective differences of the public and the private operators are blended, leaving space for the community's needs.

The path taken also leads our line of reasoning to analyse deeply the notion of 'public interest'.

In particular, we question whether said concept is still current and truly representative of a concerted public and private action through which the private actors' spontaneous ventures promote the protection of common goods.

Anticipating the outcomes of our researches on this specific aspect, we will argue for the need to overcome some of the dichotomies of the past, i.e. market versus government; public versus private; public values versus private values; economy versus protection of community's interest. We will relocate these features in a new environment and introduce the more 'subjectively neutral' dynamic of what we call 'governing common interest'. We will not only detect the need for a terminological change in the public law discourse. Rather, we will analyse the juridical – and formalistic – consequences of the shift provoked by public private partnership in relation to the principles governing the administrative action.

We will mention the 'community' on different occasions throughout the book, in relation to interests, initiatives and needs. We intend to clarify that in all those cases we will intentionally refer to an undetermined object, different from the concepts of citizenship.

Using the term 'community' we intend to bring public private partnership into a dimension of social and political inclusion. In fact, we think that in the context of globalization, migratory flows and economic and cultural circulation, the role of public institutions transcends formal distinctions.

Public authorities, both local and central, are at the front lines in ensuring that 'primary goods' such as health, equality and human dignity, as well as public values like justice and solidarity, are recognized among all persons employed in the public authority sphere of competence and surveillance. Therefore, when we refer to common interest or common needs in the text, we refer to a category of people – not necessarily citizens – that are in a determined space and time, as direct recipients (and, through public private partnership, active protagonists) of welfare production.

## 2 THE ACADEMIC LINES OF REASONING ON PUBLIC PRIVATE PARTNERSHIP

The literature examining public private partnerships is largely concerned with the economic and social aspects of the phenomenon.<sup>11</sup>

Some recurring questions that have inspired academic investigation are: in which sector of the economy is public private partnership most commonly adopted? In which countries was public private partnership most successful? Which type of enterprise most often seems to be a suitable partner for the administration? Which economic results have public private partnership delivered in a specific sector?

Research has shown that, for instance, infrastructure and energy contexts are particularly interesting test fields for public private partnership, especially in developing countries, and that, in a global perspective, big enterprises are more suited to maximizing the value resulting in a partnership with the public sphere.

Starting from the observation of public private partnership's massive spread in the modern economy and of the intrinsic complexity in terms of variety of juridical schemes and interactions among the involved parties, the legal liter-

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<sup>11</sup> Among the most noteworthy monographs are: Pauline Vaillancourt Rosenau (ed.), *Public-private policy partnerships* (MIT Press, 2000); Akintola Akintoye, Matthias Beck, and Cliff Hardcastle, *Public-private partnerships: managing risks and opportunities* (Wiley-Blackwell, 2003); Darrin Grimsey and Mervyn Lewis (eds), *The economics of public private partnerships* (Edward Elgar, 2005); Akintola Akintoye and Matthias Beck, *Policy, management and finance of public-private partnerships* (Wiley-Blackwell, 2008); Abdelhalim Boussabaine, *Risk pricing strategies for public-private partnership projects* (Wiley-Blackwell, 2013); David Maurrasse, *Strategic public private partnership* (Edward Elgar, 2013); Eduardo Engel, Ronald Fischer, and Alexander Galetovic, *The economics of public-private partnerships: a basic guide* (CUP, 2014); Mark Claypool and John McLaughlin, *We are in this together: public-private partnerships in special and at-risk-education* (Rowman and Littlefield, 2015); Malcolm Morley, *The public-private partnership handbook: how to maximize value from joint working* (Kogan Page, 2015); Carsten Greve and Graeme Hodge (eds), *Rethinking public-private partnerships: strategies for turbulent times* (Routledge, 2016). A more technical approach is taken in Herbert Robinson et al., *Governance and knowledge management for public-private partnerships* (Wiley-Blackwell, 2009); Graeme Hodge, Carsten Greve, and Anthony Boardman (eds), *International handbook on public-private partnerships* (Edward Elgar, 2010); Cyril Chern, *Public private partnerships: practice and procedures* (Routledge, 2017). The social element of the analysis is predominant in Nikolai Mouraviev and Nada Kakabadse (eds), *Public-private partnerships in transitional nations: policy, governance and praxis* (Cambridge Scholars Publishing, 2017); Adam Masters, *Cultural influences on public-private partnerships in global governance* (Palgrave Macmillan, 2018).

ature has also recently shown a keen interest in the phenomenon, which has been studied from different perspectives.

International law experts have underlined how public private partnership has been increasingly adopted as a new mechanism to solve governance deficits in dealing with pressing global issues, with special reference to the Sustainable Development Goals.<sup>12</sup>

Noting that transnational public private partnerships are commonly used as methods to carry out activities that normally fall within the domain of states and international organizations – for example, improving water infrastructures, protecting endangered species, fighting the growing risks of diseases – some scholars have questioned the democratic legitimacy of said alliances<sup>13</sup> and analysed their consequences in terms of responsibility under international public law.<sup>14</sup>

Significant findings resulting from this research show that the problem-solving capacities and effectiveness of public private partnership are an important source of legitimacy and accountability, and that the source of democratic legitimacy, even in transnational hybrid forms of cooperation, lies within the public law type of rules that apply to the decisions taken and the activities carried out.<sup>15</sup>

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<sup>12</sup> Particularly interesting, in this perspective, is the systematic analysis conducted in Philipp Pattberg et al. (eds), *Public-private partnership for sustainable development* (Edward Elgar, 2012). See also Harsh Singh, *Creating vibrant public-private panchayat partnership (PPPP) for inclusive growth through inclusive governance* (Academic Foundation, 2010).

<sup>13</sup> Pattberg et al., n 12, 165ff.; Nikiforos Meletiadiis, *Public private partnerships and constitutional law: accountability in the United Kingdom* (Routledge, 2018).

<sup>14</sup> Lisa Clarke, *Public-private partnerships and responsibility under international law: a global health perspective* (Routledge, 2016). For a discussion on how public private partnerships are treated in WTO litigation, see Gregory Shaffer, 'Defending interests: public-private partnerships in WTO litigation' (2004) TDM 4; Amrita Bahri, *Public private partnership for WTO dispute settlement* (Edward Elgar, 2018).

<sup>15</sup> Muhittin Acar, *Accountability in Public-private partnerships: perspectives, practices, problems, and prospects* (Verlag Dr Müller, 2009); Magdalena Bexell and Ulrika Mörth (eds), *Democracy and public-private partnerships in global governance* (Palgrave Macmillan, 2010). Other publications provide a comprehensive account of public private partnership in terms of policy management, capturing its main strengths and flaws as a juridical instrument. See Abby Ghobadian et al. (eds), *Public-private partnership: policy and experience* (Palgrave Macmillan, 2004); Graeme Hodge and Carsten Greve, *The challenge of public-private partnership* (Edward Elgar, 2005); Yseult Marique, *Public private partnerships and the law* (Edward Elgar, 2014); Christopher Bovis, *Public-private partnership in the European Union* (Routledge, 2018); Margaret Chon et al., *The handbook of public-private partnerships, intellectual property governance, and sustainable development* (CUP, 2018). As for the Italian literature, an insightful study on the state and quality of the modern national democracy is

Other authors have preferred a case-study approach, focusing their attention on a specific ambit of public private partnership applications to tackle the practical sector-specific issues posed by this instrument and to provide suggestions for policy improvements.<sup>16</sup>

The studies on public private partnership in the sectors of transport and energy infrastructures,<sup>17</sup> affordable housing,<sup>18</sup> sport facilities,<sup>19</sup> homeland security,<sup>20</sup> health care<sup>21</sup> and water management<sup>22</sup> have demonstrated the versatility and flexibility of said juridical arrangement and normalized it as a method of governance in the most diverse areas of public activity.

The scholars who attempted a more theoretical reconstruction focused their attention on the progressive erosion of the boundaries that traditionally separate public and private law.

The intersection between public and private is a relatively recent but already widely discussed phenomenon.

The spill-over of the public into the private and vice versa has contaminated the theories, which have consequently started to identify and articulate

contained in Franco Bassanini et al. (eds), *Il mostro effimero. Democrazia, economia e corpi intermedi* (il Mulino, 2019).

<sup>16</sup> See, *inter alia*, Duncan Cartlidge, *Public private partnership in construction* (CRC Press, 2006); Julian Teicher and Bernadine Van Gramberg (eds), *Sharing concerns: country case studies in public-private partnerships* (Cambridge Scholars Publishing, 2013); Joshua Newman, *Governing public-private partnership* (MQUP, 2017); Domenico Crocco (ed.), *Public private partnerships: the PPP guide* (Cedam, 2018).

<sup>17</sup> Among the many publications, we cite Germa Bel, Trevor Brown, and Rui Cunha Marques (eds), *Public-private partnership: infrastructure, transportation and local services* (Routledge, 2014); Stefano Caselli, Veronica Vecchi, and Guido Corbetta (eds), *Public private partnership for infrastructure and business development: principles, practices, and perspectives* (Palgrave Macmillan, 2015); Athena Roumboutsos (ed.), *Public private partnerships in transport: trends and theory* (Routledge, 2015); Jeffrey Delmon, *Public-private partnership projects in infrastructure: an essential guide for policy makers* (2nd edition, CUP, 2017).

<sup>18</sup> Geoffrey Payne (ed.), *Making common ground: public-private partnerships in land for housing* (London, Practical Action, 1999); Nestor Davidson, *Affordable housing and public-private partnership* (Intermediate Technology Publications Ltd, 2016).

<sup>19</sup> Judith Grant Long, *Public-private partnerships for major league sports facilities* (Routledge, 2012).

<sup>20</sup> Nathan Busch and Austen Givens, *The business of counterterrorism: public-private partnerships in homeland security* (Peter Lang, 2014).

<sup>21</sup> Heather Whiteside, *Purchase for profit: public-private partnerships and Canada's public health care system* (University of Toronto Press, 2015).

<sup>22</sup> Rui Cunha Marques and Carlos Oliveira Cruz, *Public-private partnership in the water sector: from theory to practice* (IWA, 2018).

a common ground of principles and a shared area, where the traditional public private dichotomy is brought into harmony.

The European administrative law literature has considered the progressive mutual approach of the public and private sectors as a method applied by public administrations to answer the so-called '*crise de la modernité juridique*'.<sup>23</sup> This crisis is characterized by the demise of some of the fundamental conceptual pillars of public law, such as the supremacy of the state as interpreter of the community's interests,<sup>24</sup> the completeness and self-sufficiency of the normative framework,<sup>25</sup> and the necessity for public administration to refer only to hierarchical methods of action.<sup>26</sup>

Prominent scholars have underlined that the dissatisfaction with the efficiency of administrative actions brought a radical shift from the hierarchical and imperative paradigms and top-down logics to more fluid and horizontal paradigms. From the organizational point of view, some renowned French scholars have remarked that network schemes have substituted pyramid-style

<sup>23</sup> The expression is taken from Pascal Idoux, 'Dynamique contractuelle et dynamique délibérative dans le renouvellement des méthodes d'action publique' in Guylain Clamour and Marion Ubaud-Bergeron (eds), *Contrats publics: Mélanges en l'honneur du professeur Michel Guibal* (Montpellier Université, II, 2006). On the same topic, see also Paul Amselek, 'L'évolution générale de la technique juridique dans les sociétés occidentales' (1982) RD Publ. 275.

<sup>24</sup> The issue is looked at more closely in Jacques Chevallier, *L'État post-moderne* (LGDJ, 2008) 139ff.; Thierry Revet, 'Droit législatif, droit réglementaire et droit néo-corporatif du contrat' (2004) *Revue des contrats* 607. See also Paolo Grossi, *L'ordine giuridico medievale* (Laterza, 1995) and Paolo Grossi, *L'invenzione del diritto* (Laterza, 2017), where the author states that the law is not something that is imposed on the community from the top down, but it naturally springs from a society, coming from its history, values and collective consciousness.

<sup>25</sup> The theory of institutionalism, firstly elaborated in Santi Romano, *L'ordinamento giuridico* (Quodlibet, 1917), contributed to design the idea of a legal framework composed not only of normative commands but of plural entities emerging naturally from society. For a modern comment, see Norberto Bobbio, 'Teoria e ideologia nella dottrina di Santi Romano' in Norberto Bobbio, *Dalla struttura alla funzione* (Laterza, 1977) 168ff.; Massimo La Torre, *Norme, istituzioni, valori: Per una teoria istituzionalistica del diritto* (Laterza, 1999); Giuseppe Lorini, *Dimensioni giuridiche dell'istituzionale* (CEDAM, 2000); Maria Lucia Tarantini, *Istituzionalismo e neoistituzionalismo: questioni e figure* (Giuffrè, 2011).

<sup>26</sup> Antonio Amorth provided a first deep and comprehensive account of the private law activity of public administrations as a typical method of administrative action in Antonio Amorth, 'Osservazioni sui limiti dell'attività amministrativa di diritto privato' (1939) *Archivio di diritto pubblico* 89. According to the author's view, administrative activity could not be considered as a unity, being necessary to distinguish between the activity directed at obtaining a certain public interest and the residual one, where it was possible to admit the dominance of private law.

schemes,<sup>27</sup> as external private stakeholders become involved in the public domain through mechanisms of consensus and negotiation.<sup>28</sup>

In parallel, several fundamental Italian works have delved deeper into the models of administrative action,<sup>29</sup> analysing how imperative measures have ceded the stage to new models based on the value of the participation in the administrative procedure,<sup>30</sup> administrative discretion<sup>31</sup> and on agreement.<sup>32</sup>

<sup>27</sup> Jean-Marie Pontier, *Le droit administratif et la complexité* (AJDA, 2000) 187; François Ost and Michael van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit* (FUSL, 2002).

<sup>28</sup> André de Laubadère, 'Administration et contrat' in *Mélanges offerts à Jean Brethe de La Gressaye* (Editions Bière, 1967) 453. Giandomenico Falcon underlined the importance of the application of the principles and rules of public law to the conclusion of an agreement by a public administration in Giandomenico Falcon, *Le convenzioni pubblicistiche: Ammissibilità e caratteri* (Giuffrè, 1984); Giandomenico Falcon, 'Convenzioni e accordi amministrativi', *Enciclopedia Giuridica Treccani*, IX (1988) 4. See also Yves Jégouzo, 'L'administration contractuelle en question' in *Mouvement du droit public, Mélanges F. Moderne* (Daloz, 2004) 547; Yves Gaudemet, 'Pour une nouvelle théorie générale du droit des contrats administratifs: mesurer les difficultés d'une entreprise nécessaire' (2010) RD Publ. 313; Mathias Amilhat, 'Contractualisation, négociation, consensualisme: nouvelles approches du droit public' (2018) Revue française de droit administratif 1.

<sup>29</sup> Mario Nigro's attention to the subjective position of the private in front of the exercise of administrative power, both during the administrative procedure and in the judicial review are pivotal to this process. See Mario Nigro, *Le decisioni amministrative* (Jovene, 1953); Mario Nigro, *Giustizia amministrativa* (Il Mulino, 1976); Mario Nigro, 'Procedimento amministrativo e tutela giurisdizionale contro la pubblica amministrazione (il problema di una legge generale sul procedimento amministrativo)' (1980) (now in Mario Nigro, *Scritti giuridici*, Giuffrè, 1996, II, 1427). The author was also one of the first to rightly express the possibility that public administration could choose to adhere to private law rules, as appears clearly in Mario Nigro, 'L'amministrazione tra diritto pubblico e diritto privato: a proposito di condizioni legali' (1961) Foro it. (now in Mario Nigro, *Scritti giuridici*, Giuffrè 1996, I, 495). In this regard, it also seems necessary to recall Riccardo Villata, *Autorizzazioni amministrative e iniziativa economica privata. Profili generali* (Giuffrè, 1974), which represents an essential contribution to understanding how administrative power can impact on the free economic initiative of the market.

<sup>30</sup> Feliciano Benvenuti contributed to affirming an equal role of the private actor and of the public authority, even in the context of the administrative procedure, thanks to the warranties imposed by the administrative law, in Feliciano Benvenuti, 'Eccesso di potere amministrativo per vizio della funzione' (1950) Rass. dir. pubbl. 1; Feliciano Benvenuti, 'Funzione amministrativa, procedimento, processo' (1952) Rivista trimestrale di diritto pubblico 118.

<sup>31</sup> The elaboration of the concept of administrative discretion which currently dominates the way in which the Italian academia refers to the relationship between law and exercise of public power can be found in Massimo Severo Giannini, *Il potere discrezionale della Pubblica Amministrazione: concetto e poteri* (Giuffrè, 1939).

<sup>32</sup> In the Italian literature, particular attention to the modern legal issues posed by the new forms of public private interaction is already personally devoted in Sara

Moreover, the erosion of the boundaries between the public and the private sphere that has affected numerous aspects of the administrative organization and activity has prompted academics to ask questions about the modernity of traditional concepts and views, characterized by an outdated and limited perception of the forms of governance.

The struggle with the absence of a structured theoretical framework in which to insert new hybrid forms of governance can be detected, above all, in the studies regarding the private management of ‘common goods’, which has been defined not in relation to their private or public ownership but to their functionality to satisfy the needs of the community.<sup>33</sup>

Said writings deal with the specific arena that we intend to examine more closely; therefore, they are an important point of reference for comparison and inspiration in the part of this book in which we reconstruct the essential fea-

Valaguzza, ‘Pubblico e privato nell’organizzazione’ in Barbara Marchetti (ed.), *Pubblico e privato oltre i confini dell’amministrazione tradizionale* (Cedam, 2013) 99 and – with specific reference to public private partnership – in Sara Valaguzza, *Sustainable development in public contracts: an example of strategic regulation* (Editoriale Scientifica, 2016) 18. On the same topic see Giampaolo Rossi, ‘Pubblico e privato nell’economia semi-globalizzata. L’impresa pubblica nei sistemi permeabili e in competizione’ (2014) *Rivista Italiana di Diritto Pubblico Comunitario* 1.

<sup>33</sup> In the international literature, the topic was elaborated on the basis of the fundamental argument of Elinor Ostrom, *Governing the commons: the evolution of institutions for collective action* (Political Economy of Institutions and Decisions, 1990); Elinor Ostrom, Roy Gardner, and James Walker, *Rules, games and common-pool resources* (The University of Michigan Press, 1994); Elinor Ostrom, ‘Reflections on the commons’ in John Baden and Douglas Noonan (eds), *Managing the commons* (Indiana University Press, 1998) 95; Elinor Ostrom, *Design principles and threats to sustainable organizations that manage commons* (Bloomington, 1999); Elinor Ostrom et al., *The future of the commons: beyond market failure and government regulation* (The Institute of Economic Affairs, 2012). For a comment, see, *inter alia*, Fred Foldvary, *Public goods and private communities* (Edward Elgar, 1994); Simon Kemp, *Public goods and private wants* (Edward Elgar, 2002); Amy Ludlow, *Privatising public prisons: labour law and the public procurement process* (Hart, 2015); Brigitte Unger, Daan van der Linde, and Michale Getzner (eds), *Public or private goods?* (Edward Elgar, 2017). As for the Italian account, we mention the recent works of Stefano Nespore, ‘Tragedie e commedie nel nuovo mondo dei beni comuni’ (2013) *Riv. giur. ambiente* 665; Dereck Wall, *The sustainable economics of Elinor Ostrom: commons, contestation and craft* (Routledge, 2014); Marco Bombardelli (ed.), *Prendersi cura dei beni comuni per uscire dalla crisi: Nuove risorse e nuovi modelli di amministrazione* (Università degli Studi di Trento, 2016); Daniel Cole and Michael McGinnis (eds), *Elinor Ostrom at the Bloomington School of Political Economy: Vol. 3, A framework for policy analysis* (Lexington Books, 2017); Marco Bombardelli, ‘La cura dei beni comuni: esperienze e prospettive’ (2018) *Giorn. dir. amm.* 559; Gianfrancesco Fidone, *Proprietà pubblica e beni comuni* (ETS, 2017); Calogero Micciché, *Beni comuni: risorse per lo sviluppo sostenibile* (Editoriale Scientifica, 2018).

tures of public private partnership and of the consequent activity of governance of common interests.

### 3 THE STARTING POINT: THE PROBLEMATIC DEFINITION OF PUBLIC PRIVATE PARTNERSHIP

Numerous international documents, monographic works or scientific articles on public private partnership start with a simple question: what is public private partnership?

The need to define this concept is emblematic, if we think that it is neither new – some examples of the phenomenon can be traced back to the nineteenth century<sup>34</sup> – nor unknown.

Yet, the question is not without meaning, considering that public private partnership is a complex phenomenon, present in many forms and in different jurisdictions all over the world.

The need to set a common ground of understanding is therefore essential to develop a line of reasoning on the theoretical aspects of the concept.

Nevertheless, the attempt to define public private partnership is complicated by the fact that the institution rose and spread from the physiological and, in our view, positive interactions between market, society, businesses, community – as a whole and individuals – the public sphere and its institutions and public bodies.

In this perspective, the issue of the definition of public private partnership is as important as it is complex. Indeed, to define public private partnership requires us to have initially dealt with and resolved the most delicate relationships of modern democracies, namely the ones between economic activity and public bodies, between private and public values, between autonomous and external management of the community's needs, and between public interest and private interests.

Given the above-mentioned complexity, for decades public private partnership initiatives have been carried out without a specific discipline, on the sole basis of an instinctive interpretation of the general principles of good administration.

The subsequently enacted laws, regulations and acts of soft law thus mirror the elasticity of the concept, which leaves the market operators free to propose innovative solutions that fall within the general category of public private

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<sup>34</sup> An interesting summary of the historical context of the birth of public private partnership can be found in Newman, n 16, 34. See also Joseph Jones, *The politics of transport in twentieth-century France* (MQUP, 1984).

partnership. As a matter of fact, the involvement of private solutions in the management of public tasks requires a departure from the rigid regulations imposed for public procurement.

The above-described approach is particularly evident in the European dimension, where instead of a general regulation on public private partnership it is possible to find practical recommendations contained in acts of soft law. Since 2003, the European Commission has enacted guidelines,<sup>35</sup> green papers<sup>36</sup> and acts of soft law to describe the state of the art regarding the application of public private partnerships in the Member States on the basis of the analysis of practical cases, providing general indications to administrations and financial institutions, more than a structured discipline. Among the most relevant recommendations is the indication of the altered role of public administrations, from ‘actors’ to ‘supervisors’; the need to ensure competition in the selection of the private partner; and the problematic protection of public interests from the requests of the financing entities.

Some relevant aspects of public private partnership were then expanded on by green papers that considered public private partnership as an efficient tool for procurement.<sup>37</sup>

Lastly, in 2014 the European legislator in Directive 2014/23/EU set out rules for the awarding of concession contracts for works and services, considering it neither feasible nor useful to provide a general and unitary discipline of the *genus* public private partnership in the presence of a solid framework for its most basic types, namely concession contracts.<sup>38</sup>

Even outside the European context, in many jurisdictions the definitions of public private partnership are either so wide that they can comprehend basically any form of public private cooperation – as for example in the United Kingdom, where in 2008 HM Treasury affirmed that ‘PPPs are

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<sup>35</sup> Commission, ‘Guidelines for a successful public-private partnership’, COM (2005) 569.

<sup>36</sup> Commission, ‘Green paper on public-private partnership and community law on public contracts and concessions’, COM (2004) 345.

<sup>37</sup> Commission, ‘Interpretative communication on the application of community law on public procurement and concessions to institutionalised public-private partnerships’, COM (2007) 6661; Commission, ‘Mobilising private and public investment for recovery and long term structural change: developing public private partnerships’, COM (2009) 615; Commission, ‘Green paper on the modernisation of EU public procurement policy: towards a more efficient European procurement market’, COM (2011) 15 final; European Parliament, ‘Resolution on public-private partnerships and Community law on public procurement and concessions’ (2006/2043(INI)).

<sup>38</sup> Mario Pilade Chiti, ‘Il partenariato pubblico-privato e la nuova direttiva concessioni’ in Gian Franco Cartei and Massimo Ricchi (eds), *Finanza di Progetto e PPP: temi europei, istituti nazionali e operatività* (Editoriale Scientifica, 2015), 12.

arrangements typified by joint working between the public and private sectors. In their broadest sense, they can cover all types of collaboration across the private-public sector interface involving collaborative working together and risk sharing to deliver policies, services and infrastructure<sup>39</sup> – or limited to specific contractual forms, such as concessions, as in Cambodian, Chilean, Chinese, Costa Rican, Croatian, Liberian and Lithuanian law.<sup>40</sup>

Generally speaking, the idea of public private partnership revolves around the concept of ‘cooperation’ to deliver services and infrastructures. Something that, although it points the questioner in the right direction, is not adequately able to distinguish the phenomenon of public private partnership from other forms of collaborative delivery of works and services, carried out through public procurement contracts, in the forms of collaborative contracting.<sup>41</sup>

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<sup>39</sup> HM Treasury, ‘Infrastructure procurement: delivering long-term value’ (2008).

<sup>40</sup> Two additional examples are the Japanese Act on Promotion of PFI enacted in July 1998 (see Fumio Shinohara, *Perspectives on private finance initiative (PFI) in Japan: the impact on administrative reform* (1998) Social Infrastructure and Public Services. NLI Research, 117 and Turkey, where the legislation on public private partnership is still highly fragmented, despite the vitality of the instrument, especially in the infrastructure sector. See Uğur Emek, ‘Turkish experience with public private partnerships in infrastructure: opportunities and challenges’ (2015) Utilities Policy 120. A few legislations only consider public private partnership as applied in some strategic sectors: this is the case, for example, in Indonesia where the presidential regulation No. 67 only allows partnerships for transportation; roads; water; potable water distribution; waste water; telecommunications; electric power; oil and natural gas. In other countries such as Singapore or Colombia a threshold of a minimum value is set for projects considered by the specific discipline as PPPs. The Colombian legislator established a specific discipline of PPP as a tool mainly aimed at the realization of infrastructure. Article 1 of Law No. 1508 of 2012 defines PPPs as ‘a private capital linkage instrument, which are embodied in a contract between a state entity and a natural or legal person under private law, for the provision of public goods and their related services, which involves the retention and transfer of risks between the parties and payment mechanisms related to the availability and level of service of the infrastructure and/or service’. Articles 3 and 6 of the mentioned law limit the field of application of the rules there contained to building contracts and management of infrastructure, above a specific threshold and for the minimum duration of 30 years.

<sup>41</sup> In the United Kingdom, numerous standard models of collaborative contracts were drafted in order to produce synergies between the client, the contractor, the designer, the subcontractor and the other actors of a specific project or programme. If applied to public procurement, said contracts would produce a collaborative and integrated environment, similar to the one that is possible to imagine when describing public private partnership. For a more thorough account, see David Mosey, *Early contractor involvement in building procurement: contracts, partnering and project management* (Wiley-Blackwell, 2009); David Mosey, ‘The origins and purposes of the FAC-1 framework alliance contracts’ (2017) *International Construction Law Review*. For an Italian perspective of the application of said contract types to public procure-

This is why, as we affirm starting in Chapter 1, additional elements are needed to give a precise account of the specific features of public private partnership, provided that the intention is to characterize it as an autonomous juridical concept, encompassing different *species* of the same *genus*.

Therefore, we will not limit the concept of public private partnership to the concept of concession, which is only one of the many *species* of partnership agreement. We will analyse how public private partnership exhibits logical and juridical features that justify the existence of a specific juridical category.

In this regard, the international legal framework has helped provide relevant content for the definitions.

As discussed in Chapter 2, after the 2002 Johannesburg World Summit on Sustainable Development, public private partnership was enthusiastically recognized as a tool for sustainable development, especially useful in transnational partnerships for the provision of essential infrastructures in less developed countries.<sup>42</sup>

The international debate clearly shaped the national discipline of the concept, as highlighted in Chapter 3. In some jurisdictions, the potential of public private partnership in producing value for the community according to the sustainable development principle has been highly exploited, giving importance to bottom-up initiatives of common goods management and service provision.

These interesting experiences demonstrate the need for a definition able to include different perspectives and conceptualizations.

This is evident, for instance, in France, where the legislation of 2015 – now embedded in the ‘*Code de la commande publique*’<sup>43</sup> – modified the concept of ‘*marché de partenariat*’ in order to be applicable to diversified types of contracts, not necessarily characterized by private investments, and in Italy, whose discipline of public private partnership can be considered particularly advanced, since it disciplines the many different modalities of public private interaction aimed at satisfying public interests.

As we will see, however, in most cases, the definitions of public private partnership provided by the national legislators still do not adequately reflect the complexity of the phenomenon.<sup>44</sup>

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ment, please refer to Sara Valaguzza, *Collaborare nell'interesse pubblico: Perché passare dai modelli antagonisti ai contratti collaborativi* (Editoriale Scientifica, 2019).

<sup>42</sup> United Nations, ‘Report of the World Summit on Sustainable Development’ (New York, 2002).

<sup>43</sup> See Ordonnance No. 2018-1074 of 26 November 2018.

<sup>44</sup> Only a few definitions of public private partnership consider the relevance of the public interest which the economic operation should be intended to satisfy. This is the

In particular, what is missing is a thorough analysis of the intricacies deriving from what we consider the most interesting feature of public private partnership, namely the mixture of tasks and responsibilities resulting from the involvement of citizens and economic operators in the performance of administrative activities directed at the satisfaction of the community's interests.

This is the reason why, in the coming pages, the definitions of public private partnership will be analysed and re-discussed with a critical perspective, on the basis of a theoretical reconstruction of the issues embedded in the concept, in order to capture its essential juridical identity. In doing so, we will try to be neither imprisoned nor influenced by the myopic approaches we have frequently faced in dealing with public private partnership, also at a regulatory level.

#### 4 THE PERSPECTIVE ADOPTED IN THE BOOK

Unlike other forms of private involvement in publicly significant activities, such as volunteer work, which are aimed at taking care of the community's interests from the 'demand' side, in public private partnerships the private operator shifts to the 'supply' side as it works alongside the public administration entrusted with a specific task to carry out an activity that satisfies a need of the community.

Thus, after a reconstruction of a satisfying juridical definition of 'public private partnership', the most significant aspect that we want to investigate in this book is the genetic mutation created by the fusion between the public and the private spheres.

In particular, we are interested in a deeper look at the process by which public administration shares portions of authority and responsibility with a private operator, in the performance of a publicly significant activity.

The following questions inspired our research and will run through the narrative: what is a public private partnership? What distinguishes public private partnership from other forms of public private cooperation? How can private operators act within an ambit that is usually reserved for the exercise of public power? Can public administrations renounce their function of protector of the public interest, and share this function with a private operator? If so, how does administrative law integrate the changes produced by a different management of the public interest? Is the notion of public interest still capable of representing this modification? Can a private entity pursue an interest which is different

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case of the Russian Federal Law No. 224/2005, the Slovenian public private partnership Act (ZJZP) of 2006, and the Brazilian PPP law No. 12.111/2009. See Chapters 3 and 4.

from the corporate one? How can private operators act in pursuit of common interests?

In order to answer these questions, we logically divide our line of reasoning into two parts: the first includes a detailed description of the phenomenon, and the second is devoted to reconstructing its theoretical foundations and to presenting a systematic reconstruction of public private partnership.

We start from a semantic approach, examining the meaning of the terms composing the expression 'public private partnership' and consequently putting them in the context of socio-economic and institutional relationships.

This approach leads us to highlight the reasons and advantages for embarking on a public private partnership, from both the public and the private side (Chapter 1).

Subsequently, we conduct a complex analysis in order to capture the juridical meaning of public private partnership as applied in both the international (Chapter 2) and national (Chapter 3) dimensions. In doing so, we are able to detect some characteristic but general elements which compose public private partnerships as a juridical phenomenon.

Given the global dimension of the phenomenon and the across-the-board juridical characteristics that appear in jurisdictions of different legal traditions, we do not limit our analysis to the European dimension; instead we try to build a broader theoretical reasoning on the basis of the common characteristics of public private partnership drawn from the transnational laws, regulations and experiences that we considered more relevant to our dissertation.

The assessment of the central features of public private partnership opens a second field of analysis related to the definition of the concept by comparing and contrasting it with similar figures (Chapter 4).

With the distinctive elements detected in Chapters 1, 2, 3 and 4, we introduce a schematic and very technical proposal identifying all the singular components able to constitute an authentic definition of public private partnership. Our proposal builds a step-by-step definition that comprehensively mirrors all the multiple dimensions in which the phenomenon is present (Chapter 5).

The definition reached therefore paves the way for examining the remaining problem of defining the roles of private and public parties in relation to the concept of 'public interest'.

In verifying whether the merging of the public interest with private ones can bring about a new category of interest, we critically discuss whether the expression can be aligned with the conceptual revolution provoked by the spread of public private partnership (Chapter 6). We then argue that there is a need to look for a new category, which is objectively characterized by its relevance to the community's interests more than by the public subjective element that belongs to the administration involved in the partnership.

We name this new category of interests ‘common’, in order to stress its objective qualification. In this perspective, ‘common interests’ are shared between public administrations and private operators and determined, in their genetic essence, by the interaction between the public authority and the social and economic reality.

Finally, we develop the conclusion of the research, analysing the consequences that the spread of public private partnership has on administrative action and principles at large (Chapter 7). In the last chapter, all the outcomes of the multiple parts of the juridical reasoning we analysed more closely are circularly re-examined and deployed in a systematic approach to the phenomenon.

Generally, we notice that through public private partnership a new form of interaction between public and private spheres emerges which implies the abandonment of the traditional isolation of the public administration in managing the needs of the community. Public private partnership gives birth to a relationship as complex and thrilling as often found in business, team game or love affairs, all situations in which sharing of information, common planning and mutual satisfaction should be present.

Even though the entire book is a result of the authors’ common ideas and shared approach, Chapters 1, 6 and 7 are attributable to Sara Valaguzza, while Chapters 2, 3 and 4 are attributable to Eduardo Parisi, with the Introduction and Chapter 5 jointly attributable.

