

# 1. Public private partnership: first steps towards a juridical definition

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## 1 BACKGROUND: THE PUBLIC PRIVATE PARTNERSHIP'S REVOLUTION – STRENGTHS AND WEAKNESSES

Public private partnership is the modern revolution of governance.<sup>1</sup>

Even in the uncertainty of its precise juridical definition, scholars agree on the fact that the 'cooperative venture between the state [*rectius*, the government] and private businesses'<sup>2</sup> – as public private partnership can be essen-

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<sup>1</sup> The innovative character of public private partnership in relation to methods of administrative action is particularly evident in Harvey Brooks, Lance Liebman, and Corinne Schelling (eds), *Public-private partnership: new opportunities for meeting social needs* (Bellinger, 1984); Guy Peters, *The future of governing: four emerging models* (University Press of Kansas, 1996); Jody Freeman, 'The private role in public governance' (2000) NYULR 543; Donald Kettl, *The global public management revolution: a report on the transformation of governance* (Brookings Institution Press, 2000); Stephen Osborne, 'Understanding public-private partnerships in international perspective: globally convergent or nationally divergent phenomena?' in Stephen Osborne (ed.), *Public-private partnerships: theory and practice in international perspective* (Routledge, 2000) 1; Pauline Vaillancourt Rosenau (ed.), *Public-private policy partnerships* (MIT Press, 2000); Darrin Grimsey and Mervyn Lewis, *Public private partnerships: the worldwide revolution in infrastructure provision and project finance* (Edward Elgar, 2004); William Novak, 'Public-private governance: a historical introduction' in Jody Freeman and Martha Minow (eds), *Government by contract: outsourcing and American democracy* (Harvard University Press, 2009) 23; Harsh Singh, *Creating vibrant public-private-panchayat partnership (PPPP) for inclusive growth through inclusive governance* (Academic Foundation, 2010); Derick Brinkerhoff and Jennifer Brinkerhoff, 'Public-private partnerships: perspectives on purposes, publicness and good governance' (2011) *Public Administration and Development* 2; Carsten Greve and Graeme Hodge, 'Contemporary public-private partnership: towards a global research agenda' (2018) *Financial Acc. and Man.* 3; Philipp Pattberg et al. (eds), *Public-private partnership for sustainable development* (Edward Elgar, 2012); Lisa Clarke, *Public-private partnerships and responsibility under international law: a global health perspective* (Routledge, 2016).

<sup>2</sup> Stephen H Linder, 'Coming to terms with the public-private partnership: a grammar of multiple meanings' in Pauline Vaillancourt Rosenau (ed.), n 1, 19.

tially described – has the radical force to break the historic dichotomy between the public and private sectors.<sup>3</sup>

Since the Justinian demarcation of public and private law,<sup>4</sup> the public private distinction has divided the juridical world ‘into two separate spheres that at least purport to be mutually-exclusive – something designated as public cannot at the same time be deemed to be private, and vice versa’.<sup>5</sup>

The idea of the public and private sectors merging and steadily cooperating is revolutionary, as it is based on – and fosters – the blending of the juridical schemes that represent the traditional distinction.

Indeed, public private partnership requires ‘government actors ... to think and behave like entrepreneurs, and business actors ... to embrace public interest considerations and expect greater public accountability’.<sup>6</sup>

The reported statement can be accepted, in our view, in the sense that there will never be equivalence between the scopes and modalities of public and private actions. However, it is necessary to specify that in a public private partnership there is a sharing of aims and the common elaboration of the activity of public interest. Still, the lucrative perspective that guides the businesses will never be the decisive element that moves the public administration in its decisions, which are always oriented to the pursuit of the general interests of the administrative community.

From another perspective, scholars outline that public private partnership grows in the crisis of the sovereignty of states over public law.<sup>7</sup> This crisis, from one side, leaves spaces for international actors: the international context is dominated by a network of public, private and non-profit entities cooperating for the implementation of commonly accepted values. In parallel, from another side, the national context asks for public private partnership to solve the issues of the lack of resources and skills necessary to respond to the

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<sup>3</sup> Ibid, 22; Novak, n 1, 25; Gavin Drewry, ‘Public-private partnerships: rethinking the boundary between public and private law’ in Osborne (ed.), *Public-private partnerships*, n 1, 57.

<sup>4</sup> Norberto Bobbio, *Democracy and dictatorship: the nature and limits of state power* (University of Minnesota Press, 1989) 1ff.

<sup>5</sup> Novak, n 1, 24.

<sup>6</sup> Linder, n 2, 20–1.

<sup>7</sup> The issue is explored by the Italian literature: Sabino Cassese, *Universalità del diritto* (Editoriale Scientifica, 2005); Sabino Cassese, *La crisi dello Stato* (Laterza, 2002); Sabino Cassese, *Lo spazio giuridico globale* (Laterza, 2003); Maria Rosaria Ferrarese, *Diritto sconfinato: Inventiva giuridica e spazi nel mondo globale* (Laterza, 2006); Luisa Torchia (ed.), *Attraversare i confini del diritto: Giornata di studio dedicata a Sabino Cassese* (Il Mulino, 2016).

increasing and pressing demands deriving from the population and to enhance private enterprises' initiatives as a form of social and economic inclusion.<sup>8</sup>

In truth, the cooperation between the public and the private sector is an old phenomenon.<sup>9</sup>

For centuries, public private partnership allowed public administrations to carry out their tasks, availing themselves of businesses' funding, experience and creativity. Since the nineteenth century, public private partnership has made it possible to complete works and provide services of public relevance: in France, national railways were built thanks to forms of cooperation between private and public bodies.<sup>10</sup> In the same period in the United Kingdom, building and management concessions were used to construct lighthouses.<sup>11</sup> In the 1930s, the construction of the first oil wells in Texas and Oklahoma was carried out through rudimentary forms of private finance initiative projects.<sup>12</sup>

However, the shift from cooperation, as a generic form of coordinated action between public and private entities, or of delegation of public power to private operators, to partnership as a juridical and logic structure, is far more recent.

The involvement of private actors in the shaping of public policies and in performing administrative activities began a slogan, theoretically supported

<sup>8</sup> The issue is noteworthy in those jurisdictions where normative limits have been internationally imposed to the debt capacity of the States. As a consequence of the economic crisis of 2008, many legislators established major expenditure restrictions to public administrations, which were forced to reduce their costs and state debt. In the European context, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), formally concluded on 2 March 2012, and effective on 1 January 2013, has imposed on all signatory states to enact rules in their national legal systems complying with the principles of the so-called 'balanced budget', according to which the amount of public expenditure of the state and of other public entities must correspond to tax revenues. This naturally imposes strict expenditure rules on administrations. In some European states this principle has also been enshrined in constitutional regulations. In Italy, for instance, Article 97 of the Constitution was amended with a further paragraph that states: 'public administration, being compliant with the legal system of the European Constitution, ensure a balanced budget and the public debt sustainability'. The same happened, for example, in Slovenia, where Article 148, para 2 of the Constitution, modified in 2013, stipulates that 'Revenues and expenditures of the budgets of the state must be balanced in the medium-term without borrowing, or revenues must exceed expenditures. Temporary deviation from this principle is only allowed when exceptional circumstances affect the state.'

<sup>9</sup> Joshua Newman, *Governing public-private partnership* (MQUP, 2017) 34ff.

<sup>10</sup> Joseph Jones, *The politics of transport in twentieth-century France, Montreal and Kingston* (MQUP, 1984).

<sup>11</sup> See Grimsey and Lewis, n 1.

<sup>12</sup> Federica Fabi, Renato Loiero, and Francesco Profitti, *Il partenariato pubblico-privato nell'ordinamento giuridico nazionale, comunitario ed internazionale* (Dike giuridica, 2015) 29.

by the New Public Management theories, which aimed to benefit from private sector innovation, to generate radical new synergies between the design and operation of assets, and to take advantage of private sector commercial discipline, so helping to modernize public services and obtain better value.<sup>13</sup>

In this context, and especially after the launch of the Private Finance Initiative in the United Kingdom in the 1990s,<sup>14</sup> public private partnership exploded globally as a method of governance of the community's needs, in a wide variety of sectors.<sup>15</sup>

The public private partnership's revolution was welcomed with enthusiasm by those who underlined the advantages of allowing the private sector to enter the management of ambits that were previously exclusively managed by public administrations, which forced public and private market operators to compare their procedures,<sup>16</sup> operational process and organizational structures and to generate pro-competitive behaviours, to reduce costs and to expand the coverage and quality of services.<sup>17</sup>

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<sup>13</sup> Giulio Napolitano, *Diritto amministrativo comparato* (Giuffrè, 2007) 241. Some fundamental contributions on the basic features of new public management theories are David Osborne and Ted Gaebler, *Reinventing government* (Ingrid Schneider Clemson University, 1992); Donald F Kettl, *The global public management revolution: a report on the transformation of governance* (Brookings Institution Press, 2000); Muhammad Shamsul Haque, 'New public management: origin, dimensions and critical implications' (2007) *Journal of Public Administration and Public Policy* 1; Christopher Pollitt, 'The new public management: an overview of the current status' (2017) *Journal of Public Management* 110.

<sup>14</sup> On the Private Finance Initiative in the United Kingdom see Richard Thomas, 'Private finance initiative: government by contract' (1997) *EPL* 519; Stephen Cirell, John Bennett, and Robert Hann, *Private finance initiative and local government* (London, 1997); Penny Badcoe (ed.), *Public private partnerships and PFI* (Sweet and Maxwell, 1999); Sue Arrowsmith, 'Public private partnerships and the European procurement rules: EU policies in conflict?' (2000) *CML Review* 709; Christopher Bovis, 'The private finance initiative (PFI) as the prelude of public private partnerships (PPPs)' (2006) *European Public Private Partnership Law Review* 24.

<sup>15</sup> John Dixon and Rhys Dogan, 'Hierarchies, networks and markets: responses to societal governance failure' (2002) *Administrative Theory and Praxis* 175; Jean-Etienne de Bettignies and Thomas W Ross, 'The economics of public-private partnerships' (2004) *Canadian Public Policy* 135.

<sup>16</sup> This element is also stressed in Canadian Council for Public-Private Partnerships, 'Public sector accounting for public-private partnership transactions in Canada' (Position Paper by the Accounting Task Force of the Canadian Council for Public-Private Partnerships, 2008).

<sup>17</sup> Lisa Grazzini and Alessandro Petretto, 'Public-private partnership and competition in health-care and education' (2014) *Italian Antitrust Review* 91. On the topic, see also Ake Blomqvist and Emmanuel Jimenez, 'The Public role in private post-secondary education: a review of issues and options' (Policy Research Working Paper 240, The World Bank, 1989); Harry A Patrinos, Felipe Barrera-Osorio, and Juliana Guàqueta,

In the United States, public private partnership was considered valuable as capable of mitigating the phenomena of bad management in public administrations and limiting the selfishness of business.<sup>18</sup> In this perspective, public private partnership has been intended as an instrument to support the constitutional value to ‘separate, divide, balance and most importantly distribute power’; and the counterbalance of public private initiatives providing services and goods to the administrated community has been considered as a ‘constitutional means of distributing authority ... offsetting public power with private distribution and checking private jurisdiction with public regulation’.<sup>19</sup>

With more practical justifications, public private partnership has been appreciated as a functional mechanism to access private capital for the construction of infrastructure and for transferring the management and the risk of the provision of public services to the private sector.<sup>20</sup>

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‘The role and impact of public-private partnerships in education’ (The International Bank for Reconstruction and Development; The World Bank, 2009).

<sup>18</sup> The perspective is thoroughly examined in Freeman and Minow (eds), n 1, 33.

<sup>19</sup> William J Novak, ‘Public private governance: a historical introduction’ in Freeman and Minow, n 1, 33.

<sup>20</sup> Among the more comprehensive studies on the topic, it is possible to quote Sanford Berg, Michael Pollitt and Masatsugu Tsuji (eds), *Private initiatives in infrastructure: priorities, incentives and performance* (Edward Elgar, 2002); Darrin Grimsey and Mervyn Lewis, ‘Evaluating the risk of public private partnership for infrastructure projects’ (2002) *International Journal of Project Management* 107; Li-Yin Shen, Andrew Platten, and Xiaopeng Deng, ‘Role of public private partnerships to manage risks in public sector projects in Hong Kong’ (2006) *International Journal of Project Management* 587; Grimsey and Lewis (eds), n 1; Ana Belen Alonso-Conde, Christine Brown, and Javier Rojo-Suarez, ‘Public private partnerships: incentives, risk transfer and real options’ (2007) *Review of Financial Economics* 335; Angie Ng and Martin Loosemore, ‘Risk allocation in the private provision of public infrastructure’ (2007) *International Journal of Project Management* 66; Francesca Medda, ‘A game theory approach for the allocation of risks in transport public private partnerships’ (2007) *International Journal of Project Management* 213; Efraim Sadka, ‘Public-private partnership: a public economics perspective’ (2007) *CESifo Economic Studies* 466; Gerd Schwartz, Ana Corbacho, and Katja Funke (eds), *Public investment and public-private partnership: addressing infrastructure challenges and managing fiscal risks* (Palgrave Macmillan, 2008); 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 Rouboutsos (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).

Some commentators stretched the concept of benefits received by public authorities from the private side through public private partnerships.<sup>21</sup>

In particular, it has been underlined that public authorities may profit not only from the receipt of private investments but also from the acquisition of the cognitive heritage composed of technical and scientific knowledge developed by private companies, which constitutes an enrichment of the public know-how and supports the efficiency of public administrations in the provision of services or in the realization of public works.<sup>22</sup>

More recently, however, faith in public private partnership has been questioned, on the basis of evidence of poorly managed projects which resulted in failures to deliver the expected result, both in economic and in social terms.<sup>23</sup>

The authors that have deepened the socio-economic aspects of the cases analysed have criticized public private partnership for being too privately oriented and not able to guarantee higher quality service provision, if compared to other more traditional public contracts.<sup>24</sup>

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<sup>21</sup> Enthusiasm for public private partnership as a beneficial instrument of development is shown *ex multis* in Alan Harding, 'Public-private partnership in urban regeneration' in Mike Campbell (ed.), *Local economic policy* (Cassell, 1990) 89; Adrian Webb, 'Co-ordination: a problem in public sector management' (1991) *Policy and Politics* 19; Philip Kotler, Donald H. Haider, and Irving Rein, *Marketing places* (Free Press, 1993); Ronald McQuaid et al., 'European economic development partnerships: the case of Eastern Scotland European Partnership' in Luiz Montanheiro et al. (eds), *Public and private sector partnerships: fostering enterprise* (Sheffield Hallam University Press, 1998) 355; Ramina Samii, Luk van Wassenhove, and Shantanu Bhattacharya, 'An innovative public-private partnership: new approach to development' (2002) GSDCR 991; Chris Huxham and Siv Vangen, *Managing to collaborate: theory and practice of collaborative advantage* (Routledge, 2005); John Hall, 'Private opportunity, public benefit?' (2005) *Fiscal Studies* 7; Timothy Besley, 'Public-private partnership for the provision of public goods: theory and an application to NGOs' (LSE STICERD Research Paper DEDPS No. 17, London 2008); Pattberg et al. (eds), n 1.

<sup>22</sup> The point was stated for instance by the Italian Consiglio di Stato in Cons. Stato, Adunanza Plenaria, 3 March 2008, No. 1.

<sup>23</sup> Among the others, see Carsten Greve and Graeme Hodge, 'Public-private partnership and public governance challenges' in Stephen Osborne (ed.), *The new public governance: emerging perspectives on the theory and practice of public governance* (Routledge, 2010) 149; Graeme Hodge, 'The risky business of public-private partnerships' (2004) *Australian Journal of Public Administration* 37; Judith Richter, "'We the Peoples" or "We the Corporations"?: Critical reflections on UN-business "partnerships"' (IBFAN, Geneva, 2003).

<sup>24</sup> On these points, see Stephen Syrett, 'The politics of partnership: the role of social partners in local economic development in Portugal' (1997) *European Urban and Regional Studies* 99; Robert Bennett and Andrew McCoshan, *Enterprise and human resource development* (Paul Chapman, 1993); John Bryson and William Roering, 'Applying private sector strategic planning to the public sector' (1987) *Journal of the American Planning Association* 9; Geert Teisman and Erik-Hans Klijn,

Even the capacity of public private partnership to bring innovation has been questioned on the basis of reports showing that, just as with public procurement, the private side, if not controlled, may seek shortcuts to maximize profits.

More generally, public private partnership has been regarded as a potentially disruptive instrument by those who fear that the entrustment of the private sector with public tasks could pose a threat to the pursuit of public values, given that businesses are eminently selfish and oriented towards outcomes that depart from the community's welfare.<sup>25</sup>

In the optic of public law researchers this is probably the harshest point to solve, as it is directly connected to the difficulty of overcoming the institutional distinction between public and private sectors with which we started this chapter.

Given that Western juridical society has developed on the basis of the dichotomy between the public and private spheres, how can the two dimensions coexist in a public private partnership and improve values for the community? Which parameters will have to change if we need to accept public private partnership as an institutional form of governance?

Our research agenda is directed to answering these questions, in order to contribute to a solution of the conundrum posed by the revolutionary institution of public private partnership.

Still, we deem it necessary to start from the analysis of the juridical essence of public private partnership and to provide a definition that is consistent with the modern evolution of the institution, which – as we will clarify over the next pages – can no longer be considered as limited to concession contracts.

With the described background behind us, we now take our first steps toward the (re)definition of the concept of public private partnership.

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'Partnership arrangements: governmental rhetoric or governance scheme?' (2002) *Public Administration Review* 197; Michael Spackman, 'Public-private partnerships: lessons from the British approach' (2002) *Economic Systems* 283; John Greenway, Brian Salter, and Stella Hart, 'How policy networks can damage democratic health: a case study in the government of governance' (2007) *Public Administration* 717; Lynne Sagalyn, 'Public private development. lessons from history, research and practice' (2007) *Journal of the American Planning Association* 7; Guido Codecasa and Davide Ponzini, 'Public-private partnership: A delusion for urban regeneration? Evidence from Italy' (2011) *European Planning Studies* 647.

<sup>25</sup> See Max Stephenson, 'Whither the public private partnership: a critical overview' (1991) *Urban Affairs Review* 109; Hodge, n 23; Carsten Greve and Graeme Hodge, 'On Public-private partnership performance: a contemporary review' (2017) *Public Works Management and Policy* 55.

## 2 THE VAGUENESS OF THE DISCOURSE ON PUBLIC PRIVATE PARTNERSHIP AND THE NEED TO RE-GAIN JURIDICAL PRECISION: LIGHTS AND SHADOWS OF PUBLIC PRIVATE PARTNERSHIP

As mentioned from the Introduction to this book, public private partnership is often discussed without the due juridical precision. The flexibility that characterizes the instrument, as well as its transnational character, make it extremely difficult to provide an unanimously accepted notion of the concept.<sup>26</sup> Moreover, public private partnership has been studied mostly under a technical or economic perspective,<sup>27</sup> which has contributed to the vagueness of its juridical debate. Yet, if we intend to assume an academic approach, we cannot avoid clarifying the conceptual framework in precise terms, taking back control of a concept that for decades has been discussed only in economic, technical or, at most, sociological terms. Re-appropriating (legally) precise definitions of public private partnership is therefore one of the first steps that we consider necessary to advance the reasoning on the dynamics and the consequents that it generates. This conceptual operation is extremely important to set the correct frame in which to develop our reasoning, which has to be carried out in an objective way, without ideological conditionings. In this regard, it is pivotal to stress that public private partnership is often at the centre of political discussions, being taken as an example of innovative governance.

Public private partnership often recurs in legislative slogans, debates, government initiatives and electoral speeches, being promoted as the new frontier of governance.<sup>28</sup> It is easy to understand why it is politically used: it conveys a positive image of mutual assistance and harmony, in which both the public and private sectors benefit from a fruitful relationship, acting in favour of the community's need. In essence, in public private partnership the public administration is regarded as modern and efficient, whereas the private operator carries out socially valuable activities. The optimism that surrounds

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<sup>26</sup> Interesting accounts on this point can be found in Carsten Greve and Graeme Hodge, 'Public-private partnerships: governance scheme or language game?' (2010) *Australian Journal of Public Administration* 8; Linder, n 2.

<sup>27</sup> See Introduction.

<sup>28</sup> For example, the French president Emmanuel Macron, in his speech at Sorbonne University on 26 September 2017 talked about partnership as a key element of the cooperation within the Eurozone. In the literature, an interesting account of the political dimension of public private partnership in the United Kingdom can be found in Matthew Flinders, 'The politics of public-private partnership' (2005) *The British Journal of Politics and International Relations* 215.

the concept is mirrored in the vocabulary that generally accompanies it: the expressions ‘cooperation’, ‘agreement’, ‘efficiency’, ‘risk allocation’, ‘fruitful relationship’, ‘participation’, ‘common goals’ and ‘exchange of expertise’ help promote the positive image of public private partnership as an emblem of progress and a good practice for public administrations. Nevertheless, if we intend to set up a theoretical discussion around the concept, we need to go beyond a general optimism, asking ourselves if public private partnership is just an evocative word or if it can be intended as a specific legal institution, with precise consequences and implications.

Evidence for a positive answer to this question, and, more generally, to the need to consider public private partnership as an autonomous legal concept, consists in the bewildering amount of legislation, regulations, guidelines and recommendations that globally treat public private partnership as a proper juridical phenomenon.<sup>29</sup>

Said juridical documents provide some important distinctive feature of public private partnership as a category of agreements that present recurring features, provoke precise consequences in the dynamics between the public and the private sphere, and require the application of common principles. These, in turn, impose a particular attention to the terms implied when discussing public private partnership, in order to avoid possible terminological misunderstanding.

An example of how the debate on public private partnership may be conditioned by a different terminological idea of the same item is provided by the recent critiques of public private partnership in Europe, at both a political and an institutional level.

As already anticipated, a certain scepticism towards public private partnership recently arose from the evidence of the difficulty faced by administrative authorities in efficiently managing this juridical instrument and transferring to the private sector substantial portions of the projects’ risks.

Recently, at a European level the ability of public private partnership to produce value and to be efficiently implemented by public institutions was strongly questioned.

The harshest opposition came in March 2018 from the European Court of Auditors, which published the Special Report No. 9/2018 entitled ‘Public Private Partnerships in the EU: Widespread Shortcomings and Limited Benefits’, warning public administrations to enter into public private partner-

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<sup>29</sup> A comprehensive list of public private partnership and concession legislations is provided by the Public Private Partnership Legal Resource Center of the World Bank Group at <https://ppp.worldbank.org/public-private-partnership/>, accessed 13 March 2019.

ship agreements only if sufficiently equipped and after a serious consideration of its most recurring issues, such as incorrect risk allocation, increase of costs due to financial renegotiations and diminished competition.<sup>30</sup>

Although said critiques have been directed at public private partnership in general, looking more closely at this report, as well as at many political debates over the failure of public private partnership, we see they only refer to one specific category of public private partnership: privately funded build and operate concession contracts. Said contracts have been for a long time identified with public private partnership due to their popularity in the United Kingdom, where privately funded projects to build, operate and maintain public infrastructures have been strongly adopted since the launch of the Private Finance Initiative in the 1990s.<sup>31</sup>

The terminological overlap between public private partnership and privately funded build and operate concession contracts – managed as Private Finance Initiative projects – is the consequences of a certain vagueness in the discourse of public private partnership which has allowed dangerous and ambiguous generalizations.

In hindsight, the issues pointed out in the mentioned Court of Auditor's Report No. 9/2018 strongly resemble the ones raised by the British Parliament in the last five years, which brought about the adoption of the Private Finance 2 Initiative.<sup>32</sup> Private finance initiative projects (and, analogically, public private partnership ones) have been criticized for increasing costs of finance

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<sup>30</sup> The report was anticipated by a few local Court of Auditors' accounts on the possible flaws of public private partnership. For example, in December 2017, the French Cour des Comptes published a report highlighting the inadequacy of the public private partnership policy adopted between 2006 and 2014 by the French Ministry of Justice for the construction and management of prison facilities; Cour des Comptes, 'La Politique Immobilière du Ministère de la Justice, Mettre fin à la fuite en avant' (Rapport public thématique, December 2017).

<sup>31</sup> Private Finance Initiative projects are described in the UK as follows: 'a company called a Special Purpose Vehicle (SPV) is set up by private sector investors. The SPV is responsible for the financing, construction and maintenance of an asset such as a school or hospital. The SPV borrows from banks et al. and contracts with construction and facilities management companies (who will often also be investors in the SPV). Once the asset is constructed, the public sector then pays back the SPV over the period of the contract (typically 25 to 30 years)'. UK House of Commons. Public Administration and Constitutional Affairs Committee, 'After Carillion: public sector outsourcing and contracting' (HC 748, published on 9 July 2018) <https://publications.parliament.uk/pa/cm201719/cmselect/cmpubadm/748/748.pdf>, accessed 13 March 2019.

<sup>32</sup> HM Treasury, 'PFI and PF2' (Report by the Comptroller and Auditor General, HC 718 Session 2017–2019, 18 January 2018).

for public investments;<sup>33</sup> leaving the substantial risks of the operation with the public authorities;<sup>34</sup> providing huge profits for the private operator without proper counterbalancing of public benefits;<sup>35</sup> being subject to frequent costly renegotiations;<sup>36</sup> and being extremely complex and long, thus implying high transaction costs.<sup>37</sup>

However, these critiques only concern private finance initiative projects and not public private partnership as an instrument of cooperation between the public and the private sector as a whole.

Furthermore, it is necessary to underline that, in the public contracts sector, private finance initiative projects are the types of agreement that most closely resembles public procurement.<sup>38</sup> Therefore, the mentioned critiques could

<sup>33</sup> In 2011 a review by the UK parliament's Treasury Committee found that 'The use of PFI has the effect of increasing the cost of finance for public investments relative to what would be available to the government if it borrowed on its own account'; Treasury Committee, 'Private finance initiative' (17th Report of Session 2010–12, HC 1146) 55.

<sup>34</sup> UK House of Commons. Public Administration and Constitutional Affairs Committee, 'Sourcing public services: lessons to be learned from the collapse of Carillion' (HC 748, published on 9 July 2018) <https://publications.parliament.uk/pa/cm201719/cmselect/cmpubadm/748/748.pdf>, accessed 13 March 2019.

<sup>35</sup> It is asserted that 'Early PFI projects often reported huge profits for investors who made money when they refinanced the project after the asset had been built. Once the asset is built and the project has moved to the maintenance phase, risk diminishes so that banks were willing to offer a lower interest rate for the project debt'. UK House of Commons. Public Administration and Constitutional Affairs Committee, 'After Carillion: public sector outsourcing and contracting', n 31. See also Comptroller and Auditor General, 'The refinancing of the Fazakerley PFI Prison contract' (Report by the Comptroller and Auditor General, HC 584 Session 1999–2000, 29 June 2000).

<sup>36</sup> *Ibid.*, 26.

<sup>37</sup> HM Treasury, 'The choice of finance for capital investment' (Briefing by the National Audit Office, March 2015).

<sup>38</sup> Indeed, as the most advanced literature on European public procurement has noticed in relation to the differentiation of procedures between the award of concessions from the ones related to public procurement (see Directive 2014/23/EU) 'concessions do not have special features that distinguish them in principle from other arrangements' and 'the general procedures, which already apply to non-concession arrangements with the same features, are adequate, and certainty could have been made clearly so simply by making available for all concessions the well-known negotiated procedure with a call for competition'. Sue Arrowsmith, 'Revisiting the case against a separate concessions regime in the light of the concessions directive: a specific directive without specificities?' in Fabian Amtenbrink et al. (eds), *The internal market and the future of European integration: Essays in Honour of Laurence W. Gormley* (CUP, 2019) 370, 395. As the author correctly points out, the specificities of concessions mentioned also in Recital 2 of Directive No. 23/2014, namely 'the exposure of the contractor to the economic risk of providing the services, long average duration, greater complexity and important contract value', can be found in many non-concession public

paradoxically be more easily referred to the public procurement sector rather than to forms of public private partnership different from concession-type contracts.

Indeed, concessions are defined by the European Commission as contracts ‘of the same type as a public contract except for the fact that the consideration for the works to be carried out or the services to be provided consists either solely in the right to exploit the construction or service, or in this right together with payment’.<sup>39</sup>

Therefore, they are usually affected by the same flaws as public procurement contracts: construction delays, renegotiations, claims and cost increases are factors that are typical across the entire sector of construction of public works.

Public private partnership is much more than that. It is a flexible concept that encompasses both concessions for infrastructure projects and social partnerships, along with sponsorships, forms of public private companies, joint ventures, management-and-operating contracts and leases.

Anticipating a more precise analysis that will be carried out in Chapters 4 and 5, we can affirm now that public private partnership differs from public procurement methods – and, to some extents, from concessions themselves – because it is capable of generating value for the community from the mutual undertaking of public and private actors in carrying out activities deriving from private initiatives and resources.

In public private partnership, the private sector becomes a valuable asset for the pursuit of public interests as it is the primary interpreter of the community’s interests. For this reason, it is involved by public authorities in the selection of the relevant interests and in the design of the answers to peoples’ needs.

As will be further debated, the recent national and international contexts of public private partnership forbid understanding public private partnership as limited to concession contracts or to the infrastructure sector.

The complexity of the juridical definition of ‘public private partnership’ should be treated with the due distinctions and the referred critique should

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contracts. Indeed, some privately financed infrastructure projects may not involve ‘sufficient risk overall for a concession’ whereas ‘important complexity and trust issues arise with many other contracts involving service provision to the public – for example, for housing management’. Ibid, 377. On this topic, see also, Sue Arrowsmith, *The law of public and utilities procurement* (2nd edition, Sweet and Maxwell, 2006) 6; Sue Arrowsmith, ‘Modernising the EU’s public procurement regime: a blueprint for real simplicity and flexibility’ (2012) *Public Procurement Law Review* 71.

<sup>39</sup> Commission, ‘Public private partnerships and Community law on public contracts and concessions’, COM (2004) 327 final, 5.

be more correctly intended to be addressed at concessions rather than public private partnership as a juridical concept.

Thus, we consider it important to regain the precision that is needed to correctly understand the juridical essence of public private partnership in all its contractual types. To this end, we begin our analysis with a semantic approach, deepening the meaning of the words that compose the expression 'public private partnership' and their conceptual background.

### 3 MOVING TOWARDS LEGAL PRECISION: A SEMANTIC APPROACH

#### 3.1 The Notion of 'Partnership': Cooperation versus Juxtaposition

The word 'partnership' is commonly used to indicate a cooperation between individuals that share resources and activities to achieve a common goal.<sup>40</sup>

In the social sphere, a partner is a life companion.

In the business world, the partner is a shareholder of the risks of a given undertaking.

In games, the partner is the one that forms a group with another player.

In international politics, the term is used to represent a form of integration.<sup>41</sup>

All these meanings have in common the stipulation of an agreement establishing a more or less structured and long-lasting cooperation between two or more entities which are undertaking mutual obligations and responsibilities in support of the alliance.

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<sup>40</sup> This notion has been further examined in different contexts, from economics to political sciences and psychology. See for example, Jakki Mohr and Robert Spekman, 'Characteristics of partnership success: partnership attributes, communication behaviour, and conflict resolution techniques' (1994) *Strategic Management Journal* 135.

<sup>41</sup> Several international treaties take this perspective: the North Atlantic Treaty establishing the North Atlantic Treaty Organization, in which Member States agreed to a mutual defence in response to an attack by an external nation because of a common goal of long-lasting peace, the Euro-Mediterranean partnership, the Lisbon Treaty, the EU-Russia Partnership and Cooperation Agreement as well as other regional policies that identify partnership as a fundamental tool of cooperation and socio-economic cohesion. Even the European Union has been considered by the doctrine as a form of partnership between countries. On this topic, see Gianni Bonvicini et al. (eds), *A renewed partnership for Europe* (Nomos Verlag, 1996), who highlights the importance of the notion of partnership in the 'Europeanization' process, and even considers the mass synonyms while referring to the discipline of the Structural Funds. The Cooperation between the Mediterranean Countries was determined by the 1995 Barcelona Declaration. In Italy, the Euro-Mediterranean partnership was deepened by Annalisa di Giovanni, *Il contratto di partenariato pubblico-privato tra sussidiarietà e solidarietà* (Giappichelli, 2012) 5ff.

This feature can be easily transferred to the juridical context as well.

Indeed, we could affirm that the word 'partnership' is used in a legal sense to identify a structured form of economic cooperation: partnership has been legislatively defined as 'the relation which subsists between persons carrying on a business in common with a view of profit'.<sup>42</sup>

The concept of partnership implies a few common characteristics, that can be traced in the legal literature.

Above all, a partnership evokes a strong form of agreement which binds the parties towards a common objective.

The partners are not interchangeable with external parties: 'no one can substitute a stranger in his place without the consent of the others'.<sup>43</sup> This element makes the agreement as stable as an association where 'two or more persons ... jointly own and carry on a business for profit'.<sup>44</sup> In the association, the parties coexist with their own roles and responsibilities and work together for the realization of the object of their contract, sharing roles, responsibilities and, eventually, losses.<sup>45</sup>

It is thus possible to state that the logic behind the legal concept of 'partnership' implies a cooperation, instead of a juxtaposition. In a cooperation, two or more parties commonly set objectives, timeframes, responsibilities and

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<sup>42</sup> UK Partnership Act, 1890, sec. 1.

<sup>43</sup> Mick Woodley, 'Partnership' in *Osborn's concise law dictionary* (11th edition, Thomson Reuters, 2009) 300. Interestingly, some authors underline that the partnership has a strong objective connotation, blurring the subjective features of the members that compose it into the performance of activities related to a specific project, which assumes defining relevance. See, on this point, James Dunn, 'Transportation: policy-level partnerships and project-based partnerships' in Vaillancourt Rosenau (ed.), n 1, 77; Joop Koppenjan and Bert Enserink, 'Public-private partnerships in urban infrastructures: reconciling private sector participation and sustainability' (2009) Public Administration Review 284.

<sup>44</sup> Brian A Garner, 'Partnership' in *Black's law dictionary* (9th edition, Thomson Reuters, 2009) 1230. The concept of mutual benefit implied in the partnership is evident in the definition provided by Robert Holland, 'The new era in public-private partnership' in Paul Porter and David Sweet (eds), *Rebuilding America's cities: roads to recovery* (Center for Urban Policy Research, 1984). Other definitions underline a more altruistic aim of the partnership, oriented towards the enhancement of general welfare: see Harding, n 21; Nick Bailey, 'Towards a research agenda for public-private partnerships in the 1990s' (1994) Local Economy 292.

<sup>45</sup> Mick Woodley, 'Partnership' in *Osborn's concise law dictionary* (11th edition, Thomson Reuters, 2009) 300. See also Nathaniel Lindley, *A treatise on the law of partnership* (1881, 8th edition, Sweet and Maxwell, 1912), where it is argued that 'an agreement that something shall be attempted with a view to gain, and that the gain shall be shared by the parties to the agreement, is the grand characteristic of every partnership', 1. The element of risk sharing is evident in the definition provided by John Allan, *Public-private partnership: a review of literature and practice* (Regina, 2001).

activities; they join forces and exploit the different competences and experiences; they share a common goal, work towards the same achievements, solve together the issues that may arise and decide how to share risks and benefits. There is no substitution of tasks and responsibilities but a coexistence of both.

For this reason, as we will more adequately explain in Chapter 4, public private partnership can be differentiated from the concepts of privatization, contracting out and delegation, which all rely on the substitution of the private sector with the public one. Nevertheless, said alternatives to direct public action do not entail cooperation and joint management with the private sector but only functions of programming and control. In contrast, public private partnership entails a strong involvement of both public authorities and the private sector in the execution of a specific activity, for which the concept has been considered as the successor of privatization.<sup>46</sup>

In this sense, public private partnership can be seen as a modern form of governance which resiliently adapts to the changed dynamics of the society and the legal framework, where the traditional binary separations that dominated the legal debate for centuries can no longer hold.<sup>47</sup>

### 3.2 The Public Private Antinomy and the Logic of Compromise

The expression ‘public private’ is a linguistic antinomy, meaning the association of two words of conflicting meaning. As we have already affirmed, the idea of putting the two concepts together is revolutionary as it contrasts with the sharp separation between the public and private worlds.

The term ‘public’ evokes a collective dimension, the coexistence of a plurality of individuals organized in a social structure. The adjective can be referred to anything ‘relating or belonging to an entire community, state or nation’.<sup>48</sup>

In the context of public private partnership, the term refers to public authorities, that is ‘bodies or persons exercising functions for public benefit rather than private profit, such as local authorities’.<sup>49</sup> Public bodies are entities that have been entrusted with the care of interests belonging to the community and

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<sup>46</sup> Linder, n 2, 20ff.

<sup>47</sup> On this point, see Jeff Weintraub and Krishan Kumar, *Public and private in thought and practice: perspectives on a grand dichotomy* (University of Chicago Press, 1997).

<sup>48</sup> Brian A Garner, ‘Public’ in *Black’s law dictionary* (9th edition, Thomson Reuters, 2009) 1348. A similar acceptance of the public partners is assumed by McQuaid et al., n 21. For a broader discussion on the possible definition of public authority, see further n 50.

<sup>49</sup> Mick Woodley, ‘Public authority’ in *Osborn’s concise law dictionary* (11th edition, Thomson Reuters, 2009) 332.

armed with the power to impact the individuals' sphere of interests in respect of the rule of law. They can only act within the limits of the norms that provide a framework for their activity in the pursuit of the public interest.<sup>50</sup>

By reason of its institutional function, 'the public sector draws attention to public interest, stewardship, and solidarity considerations. It is ... orientated toward social responsibility and environmental awareness ... It has local knowledge and experience with difficult-to-serve populations.'<sup>51</sup>

Conversely, the adjective 'private' refers to a single individual or to its sphere of activities, relationships and interests. The adjective refers to anything 'relating or belonging to an individual, as opposed to the public or the govern-

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<sup>50</sup> This feature of public authorities can be found in all the legal systems which acknowledge the supremacy of parliament over the government. In common law countries a strong influence was exercised by Albert Venn Dicey, *Introduction to the study of the law of the constitution* (1885, Liberty Fund, 1982), as it is possible to infer from Richard A Cosgrove, *The rule of law: Albert Venn Dicey, Victorian jurist* (The University of North Carolina Press, 1980); Paul Craig, 'Dicey, unitary, self-correcting democracy and public law' (1990) *Law Quarterly Report* 106. See, for an American account, William F Willoughby, *The government of modern states* (The Century company, 1919); Ernst Freund, *Administrative powers over persons and property: a comparative survey* (University of Chicago Press, 1928); Frank J Goodnow, *Politics and administration: a study in government* (1900, Taylor and Francis, 2017). In Continental Europe, the idea of the legislative power being a condition and a base of administrative activity was affirmed in the nineteenth century, to be deepened and consciously elaborated in the first half of the 1900s. Luca Mannori and Bernardo Sordi, *Storia del diritto amministrativo* (Laterza, 2011) 260ff. On the different receptions of the legality principle, it is possible to refer to the contribution of Charles Eisenmann, 'Le droit administratif et le principe de légalité' (1957) *C. d'E., Etudes ed documents* 29. A modern account of the principle in the context of the European Union can be found in Alexander Türk, *The concept of legislation in European Community law: a comparative perspective* (Springer, 2006) and, with a more critical approach, in Leonard F M Besselink, Frans Pennings, and Sacha Prechal (eds), *The eclipse of the legality principle in the European Union* (Wolters Kluwer, 2011). For the global perspective see Carol Harlow, 'Global administrative law: the quest for principles and values' (2006) *EJIL* 187; Giacinto Della Cananea and Aldo Sandulli, *Global standards for public authorities* (Editoriale Scientifica, 2012). That being clarified, it is important to note that the principle of legality is not an obstacle to public authorities' ability to act on the basis of their private law legal capacity, which according to the juridical literature that has looked most closely at these concepts, is to be recognized to all legal entities, both public and private. In this sense, see Sara Valaguzza, *Società miste a partecipazione comunale: ammissibilità e ambiti* (Guiffirè, 2012) and the bibliography cited at 45ff.

<sup>51</sup> Pauline Vaillancourt Rosenau, 'The strengths and weaknesses of public-private policy partnership' in Vaillancourt Rosenau (ed.), n 1, 217, 218. See also David Osborne and Ted Gaebler, *Reinventing government* (Addison-Welsey, 1992) 24.

ment'.<sup>52</sup> In the context of public private partnership, the term refers to private entities, meaning individuals or juridical persons acting in the market on the basis of their free economic initiative, and driven by the interest of making profits.<sup>53</sup>

As has been pointed out in the legal and economic literature, 'the private sector is ... creative and dynamic ... better at performing economic tasks, innovating and replicating successful experiments, adapting to rapid change, abandoning unsuccessful or obsolete activities and performing complex or technical tasks'.<sup>54</sup>

Hence, even at a semantic level, it is possible to detect the fundamental legal issue of public private partnerships: an intrinsically collective and altruistic dimension (the public) encounters an individual and egocentric one (the private).

In any form of partnership, the different inclinations of the parties continue to exist and create both friction and synergies.

When a partnership is 'public private', the friction could become an evident collision, as it brings two spheres that are intrinsically divergent into contact.

In order to achieve a common goal, the two partners must find a compromise, meaning that they have to renounce portions of their interests in order to live together and jointly work in the same direction. The peculiarities of the public and the private spheres will necessarily have to be reciprocally placed in the background if the two parties want to merge in partnership.

A metaphor could be helpful to explain this process: in any love affair, two partners with their own distinct features, beliefs and inclinations must smooth out some aspects of their characters if they willingly decide to agree to live together for a reasonably long period of time. It is a compromise. Likewise, in a public private partnership, the public administrations and the private party must give up bits of their identity if they willingly decide to enter a long-lasting structured legal relationship. Here, though, the 'union' and its compromise are more difficult to achieve, since any jurisdictional limits are imposed by norms and principles that curb the freedom of public administrations to act and that

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<sup>52</sup> Brian A Garner, 'Private' in *Black's law dictionary* (9th edition, Thomson Reuters, 2009) 1315.

<sup>53</sup> The transnationally accepted constitutional value of economic freedom is particularly evident in Barry R Weingast, 'The economic role of political institutions: market-preserving federalism and economic development' (1995) *Journal of Law, Economics, and Organization* 1; Bernard H Siegan, *Economic liberties and the constitution* (2nd edition, Routledge, 2009); James Gwartney and Robert Lawson, 'The concept and measurement of economic freedom' (2003) *European Journal of Political Economy* 405.

<sup>54</sup> Vaillancourt Rosenau (ed.), n 1, 218.

specify the distinctive features and forms of entrepreneurial activity. Still, as we will further analyse (see Chapter 7), public private partnership is able to modify significantly the principles of administrative actions. Indeed, if the public administration welcomes and engages in a common initiative, the rules and principles that guide its actions consequently change.

The study of the modalities, characteristics and limits of said compromise, and of the modifications that it produces on the rules and principles of administrative law, is, in our opinion, one of the most interesting fields for an in-depth legal analysis of public private partnership. Indeed, we believe that it will be possible to comprehend the phenomenon only if we understand the dynamics that bring the public and the private dimensions together and, subsequently, the consequence of said process.

In the modern scenario, characterized by the crisis of the traditional juridical schemes, public and private actors come together driven by centripetal forces.

The failure of the welfare state because of scarcity of resources, loss of national sovereignty and increasing social demands brings public authorities to turn to modern instruments of government and to find allies in the private sector, as well as to escape from a situation of isolation that prevents them performing their tasks.

Conversely, the increasing attention of consumers to the social and environmental issues that are related to production and development necessarily pushes businesses to adopt altruistic approaches and carry out social practices to gain competitive advantage in the market.

Therefore, we could affirm that public authorities seek the private sector to escape from their isolation, which brings about the involvement of private actors in the selection and definition of public interests. Meanwhile, private actors may be interested in carrying out altruistic tasks and taking on policies of corporate social responsibility because the market imposes on them a need to care about social and environmental issues. The mentioned dynamics will be discussed in the following sections.

## 4 REASONS (AND ADVANTAGES) OF PUBLIC PRIVATE PARTNERSHIP

### 4.1 Driving Public Authorities out of Their Isolation

Public administrations face numerous issues, such as prioritizing the most significant needs to satisfy an always-increasing public demand; balancing conflicting interests often in a condition of information asymmetry; facing the formalism of regulation and the fragmentation of the normative context; and acting within a lack of economic resources and shortage of personnel.

In order to fulfil their responsibilities, public administrations may find it advantageous to look for additional capacities<sup>55</sup> and to test new institutional arrangements,<sup>56</sup> both by carrying out an inner public reorganization and by initiating alliances with non-governmental actors that see a potential business in taking care of any activities in the interest of the community.

In this way, public private partnership can become a phenomenon that increases the quality and promptness of administrations in fulfilling pressing social demands.<sup>57</sup>

To do so, public administrations open the doors to external entities, asking for help to perform their duties. It is possible to say that public private partnership allows public authorities to get out of their isolation in the satisfaction of public needs.

Indeed, the absolute monopoly over the means to satisfy the ever-increasing requests coming from the administered community, in different public sectors, is a burden for public authorities. Public private partnership offers public administrations an opportunity to share said burden with private actors, which

<sup>55</sup> Frank Biermann and Klaus Dingwerth, 'Global environmental change and the nation state' (2004) *Global Environmental Politics* 1, 3.

<sup>56</sup> Frank Biermann et al., 'The overall effects of partnerships for sustainable development: more smoke than fire?' in Philipp Pattberg et al. (eds), *Public-private partnership for sustainable development* (Edward Elgar, 2012) 45. In this perspective, it is worth mentioning the interactive governance theory, which focuses on the connections between public, private and community actors in dealing with the satisfaction of societal needs. The topic is examined more closely in Jurian Edelenbos, 'Institutional implications of interactive governance: insights from Dutch practice' (2005) *Governance* 111; Tony Bovaird, 'Beyond engagement and participation: user and community co-production of public services' (2007) *Public Administration Review* 846; Jacob Torfing, *Interactive governance: advancing the paradigm* (Oxford Scholarship, 2012); Jurian Edelenbos and Ingmar van Meerkerk (eds), *Critical reflections on interactive governance: self-organization and participation in public governance* (Edward Elgar, 2016); William Voorberg et al., *Does co-creation impact public service delivery? The importance of state and governance traditions* (2017) *Public Money and Management* 365.

<sup>57</sup> On the challenges faced internationally by public administrations underneath the pressure of the public demand for services, see Leigh Robinson, *Following the quality strategy: the reasons for the use of quality management in UK public leisure facilities* (1999) *Managing Leisure* 201; John I Mwita, 'Performance management model: a systems-based approach to public service quality' (2000) *The International Journal of Public Sector Management* 19; Sandford Borins, 'Leadership and innovation in the public sector' (2002) *Leadership and Organization Development Journal* 467; Arawati Agus, Sunita Barker, and Jay Kandampully, 'An exploratory study of service quality in the Malaysian public service sector' (2007) *International Journal of Quality and Reliability Management* 177; Claudia Carvalho and Carlos Briton, 'Assessing users' perceptions on how to improve public services quality' (2012) *Public Management Review* 451.

are direct interpreters of the needs of the community (to which they belong) and generally more creative than public entities. In this manner, public administrations find ways to respond to critiques of backwardness and the scarce quality of administrative action.

To exit from responsibility isolation is, from the point of view of the public agent, a fundamental motive to engage in public private partnerships, both in political and managerial terms.

The described process is noteworthy from a public law perspective because it negates the monopoly of government apparatus on the achievement of social outcomes,<sup>58</sup> and, consequently, extends administrative law concepts, such as accountability, to the private sector.<sup>59</sup>

As a matter of fact, through public private partnership private actors share part of their accountability for the care of public tasks on the basis of an agreement with public authorities.<sup>60</sup>

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<sup>58</sup> As is evident from the reading of studies on private participation to public policies, among which see: Albert O Hirschman and Robert H Frank, *Shifting involvements: private interest and public action* (Princeton University Press, 2002); Adam McCann et al. (eds), *When private actors contribute to public interests: a law and governance perspective* (Eleven, 2014); Lez Rayman-Bacchus and Philip R Walsh, *Corporate responsibility and sustainable development: exploring the nexus of private and public interests* (Routledge, 2015).

<sup>59</sup> The issue is underlined especially in Graeme Hodge, 'Accountability in the privatised state' (2004) *Alternative Law Journal* 4; John Forrer et al., 'Public-private partnerships and the public accountability question' (2010) *Public Administration Review* 475; Jean Shaoul, Anne Stafford, and Pamela Stapleton, 'Accountability and corporate governance of public private partnerships' (2012) *Critical Perspectives on Accounting* 213.

<sup>60</sup> Charles Gilbert, 'The framework of administrative responsibility' (1959) *The Journal of Politics* 373; Sidney A Shapiro, 'A delegation theory of the APA' (1996) *Admin. Law J. Am. U.* 89; Björn Bartling and Urs Fischbacher, 'Shifting the blame: on delegation and responsibility' (2012) *The Review of Economic Studies* 67; Ryan E Carlin and Shane P Singh, 'Executive power and economic accountability' (2015) *The Journal of Politics* 1031. In this sense, public private partnership is quite different from the experiments of social co-responsibility particularly analysed by the German literature, where the private sector and the public authorities are seen as equally responsible for the actualization of values shared by the community deriving from the pluralistic character of the society and of the juridical framework. See Eberhard Schmidt Aßmann, 'Verwaltungsverantwortung und Verwaltungsgerichtsbarkeit' (1976) *VVDStRL* 227; Rainer Pitschas, *Verwaltungsverantwortung und Verwaltungsverfahren* (Monaco, 1990), 235 ss.; Michael Sachs, 'Bürgerverantwortung im demokratischen Verfassungsstaat' (1995) *DVBl* 873; Andreas Voßkuhle, 'The reform approach in the German science of administrative law' in Matthias Ruffert (ed.), *The transformation of administrative law in Europe* (Sellier, 2007) 89; Gunnar F Schuppert, 'Verwaltungswissenschaft im Kontext' in Armin von Bogdandy, Sabino Cassese, and Peter M Huber (eds), *Handbuch Ius Publicum Europaeum* (OUP, 2011) 479.

Moreover, if administrative authorities are created and entrusted with power to perform specific tasks of public importance, sharing their power with the private sector means giving up portions of authority in favour of parties that are not democratically accountable and that are motivated by economic interests.

In this sense, it is possible to affirm that public authorities lose portions of their sovereignty in favour of private entities that take on the responsibilities of helping them in the performance of public tasks. Public private partnership makes it acceptable for public authorities to share their powers and responsibilities for the pursuit of public interests with private parties.

This, for many commentators, may pose a threat in terms of subordination of public interest matters to private bias, thus provoking the need for a stronger democratic legitimation of said kinds of juridical operations.<sup>61</sup> And indeed, even in practice it is possible to capture the potential risks of this action by just imagining a private proposal to transform a run-down but historically relevant portion of a city into an amusement park, or to exploit a province's natural resources to produce cosmetic products. In those cases, the economic lever may remove governance over publicly relevant decisions from administrative authority.

Nevertheless, some scholars have stressed how public private partnership is able to promote a new concept of democracy, not pre-legitimized with norms elaborated by elected representatives but arising from the direct consensus of the community towards the outcome of a specific activity:<sup>62</sup> a 'participative' democracy substituted for the representative one.

In this sense, it is necessary to recall that public private partnership is based on the interactions between government and market, between authority and freedom. If the benefits deriving from the unification of public and private strengths are acknowledged, then the way is paved for a common governance in which the community is the protagonist of the management of its own needs.

Moreover, to escape from the isolation in which the public administration is often left, as both victim and perpetrator, means following a strategic and cultural direction that points at preferring cooperation to antagonism, solidarity

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<sup>61</sup> See William Leach, 'Collaborative public management and democracy: evidence from Western Watershed Partnerships' (2006) *Public Administration Review* 100; Magdalena Bexell, and Ulrika Mörth (eds), *Democracy and public-private partnerships in global governance* (Palgrave Macmillan, 2010); Pattberg et al., n 1.

<sup>62</sup> See, in particular, Mathias Amilhat, 'Contractualisation, négociation, consensualisme: nouvelles approches du droit public' (2018) *Revue française de droit administratif* 1, where the process is read in the light of the thoughts expressed in Jürgen Habermas, Isabelle Aubert, and Katia Genel, 'La démocratie a-t-elle encore une dimension épistémique? Recherche empirique et théorie normative' (2013) *Participations* 151; Jürgen Habermas, *Droit et démocraties* (Nrf Essais, Gallimard, 1997).

and reciprocal satisfaction to selfishness and the contractual creation of value to litigation and inefficiency.

#### 4.1.1 The promotion of participatory democracy

Public private partnership allows public authorities to overcome their limits by establishing fruitful relationships between institutions, economic operators and civil society, thus enabling them to respond to the increasingly complex needs of modern communities.

Public private partnership's ability to involve private operators in the selection of the relevant needs to be satisfied through administrative action implements a more direct approach to the principle of democratic participation.<sup>63</sup>

Indeed, through public private partnership public authorities can involve citizens in political and administrative policy making: citizens and economic operators, as primary interpreters of the needs of the administered community, are able to propose their innovative solutions to public administrations that are competent for their satisfaction.

In this way, private actors become participants of the formation of public interest and promoters of administrative activity, in a virtuous cycle where the supply of public needs is quick and effectively responsive to the demand which generated them. In turn, public administrations find new roads in their duty to govern and in the selection of efficient methods of addressing public needs, relying on the fact that the private company would not generally embark on a counter-productive and inefficient activity.

Through public private partnership, governments are able to face societal complexities by developing interrelations with citizens and organized groups, thus gathering the many different interests and perceptions and more easily evaluating the possible courses of administrative action: 'in these self-organizations, societal actors take the initiative and aim to develop ideas and projects on their own, without (much) interference from governmental and political institutions. In this way, bottom-up initiatives of empowered and highly educated citizens emerge today that are no longer fully initiated,

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<sup>63</sup> Sherry Arnstein, 'A ladder of citizen participation' (1969) *Journal of the American Institute of Planners* 216; Carole Pateman, *Participation and democratic theory* (CUP, 1970); Paul Hirst, *Associative democracy: new forms of economic and social* (Wiley-Blackwell, 1994); Benjamin Barber, *Strong democracy* (UC Press, 2004); Donatella della Porta, *Another Europe* (Routledge, 2009); Fabio de Nardis, 'Challenges to democracy and the opportunity of a new participatory governance in the era of trans-local societies' (2014) *Journal of Communication* 71, 84.

conditioned and controlled by government.<sup>64</sup> The described dynamics results in a public private co-creation of value.<sup>65</sup>

The last-mentioned concept indicates the production of a benefit for the community which is carried out by public institutions and private actors in partnership. This, according to the authors who have most analysed said forms of governance, produces both social innovation<sup>66</sup> – since new and more efficient answers to the needs of the community derive from the same stakeholders who are the holders of social demands – and government responsiveness, given that the involvement of the ‘customers’ in the design of the service provision system increases the level of satisfaction.<sup>67</sup>

Indeed, if private companies are excluded from participating in the government of social demands, they will be more inclined to accuse governments of being inefficient and abandon them to face the claims arising from the community alone.

If, on the other hand, private operators are called on through public private partnership to take a leading role in social and economic life, they will be more inclined – also in order to protect their image in the market – to propose innovative solutions and to find synergies rather than generating conflicts.<sup>68</sup>

Responsiveness and effectiveness in delivering answers to social needs thus becomes the method to legitimize public private partnership in a way that puts the authorities responsible for public decisions and the administered community in direct contact.

<sup>64</sup> Jurian Edelenbos and Ingmar van Meerkerk, ‘Introduction: three reflecting perspectives on the interactive governance’ in Edelenbos and van Meerkerk, n 56, 1, 3.

<sup>65</sup> Tony Bovaird, ‘Beyond engagement and participation: user and community co-production of public services’ (2007) *Public Administration Review* 846; John Alford, *Engaging public sector clients: from service-delivery to co-production* (Palgrave Macmillan, 2009); Bram Verschuere and Victor Pestoff (eds), *New public governance, the third sector and co-production* (Routledge, 2012); John Alford, ‘The multiple facets of co-production, building on the work of Elinor Ostrom’ (2014) *Public Management Review* 299; William Voorberg, Victor Bekkers, and Lars Tummars, ‘A systematic review of co-creation and co-production, embarking on the social innovation journey’ (2015) *Public Management Review* 1333; William Voorberg et al., ‘Does co-creation impact public service delivery? The importance of state and governance traditions’ (2017) *Public Money and Management* 365.

<sup>66</sup> Eric von Hippel, *Democratizing innovation* (MIT Press, 2005); Christian Bason, *Leading public sector innovation: co-creating for a better society* (The Policy Press, 2010); Eva Sørensen and Jacob Torfing, ‘Enhancing collaborative innovation in the public sector’ (2011) *Administration and Society* 842.

<sup>67</sup> Voorberg, Bekkers and Tummars, n 65.

<sup>68</sup> Bjorn Nordtveit, ‘Use of public-private partnerships to deliver social services: advantages and drawbacks’ (Center for International Education Faculty Publications, 2004).

The involvement itself of citizens and private operators in the performance of activities reconnected to public needs is a consequence of a new way of looking at administrative action and the relationship between the public and private spheres. The concepts of authority, imperativeness, self-governance and auto-determination and monopoly over the public interest that have dominated the discourse of administrative law for decades are now giving way to a shared choice and management of public needs.

In this new dimension, the image of an imperative and authoritative public administration, distant and insensitive to private actors' needs gives way to the appreciation of a more harmonious picture in which the differences between public and private actors are not seen as impossible obstacles, but as strengths and instruments of good governance.<sup>69</sup>

## 4.2 Responsible Enterprises

The business world, as such, is physiologically sensible to society, as it has the role of examining and intercepting the needs and the interests of the community to which it is addressed, intended as a totality of potential addressees of its own activity. Therefore, business may play a fundamental role in pursuing actions that, alongside public authority actions, are directed at the general welfare.

However, the function of businesses is different from those of government and public administrations. If the latter are, as said, institutionally bound to pursue public interests, businesses may or may not carry out activities that intercept the public interest.

This occasional encounter could happen on the basis of a legal obligation, as in the case of legislative obligations to hire a specific number of disabled persons in certain enterprises<sup>70</sup> and of the requirement to acquire certifications of compliance with environmental standards of practices.<sup>71</sup> Also, the mentioned occasional encounter could be provoked by a strategic vision of

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<sup>69</sup> See Fritz Scharpf, 'The European social model: coping with the challenges of diversity' (2002) *Journal of Common Market Studies* 645; Luisa Torchia, *Il governo delle differenze: Il principio di equivalenza nell'ordinamento europeo* (Il Mulino, 2006); Fabio Giglioni, *Governare per differenza: Metodi europei di coordinamento* (Edizioni ETS, 2012).

<sup>70</sup> For instance, see Italian Law 12 March 1999, No. 68 and Legislative Decree 14 September 2015, No. 151.

<sup>71</sup> Of the kind discussed in Paul Humphreys et al., 'Integrating environmental criteria into the supplier selection process' (2003) *Journal of Materials Processing Technology* 349; Anna Nagurney and Fuminori Toyasaki, 'Supply chain supernetworks and environmental criteria' (2003) *Transportation Research Part D: Transport and Environment* 185.

business. Indeed, enterprises may find it convenient to adhere to said kinds of policy because they may be imposed either by soft regulation or by specific markets, such as the public procurement one. The phenomena of green and social public procurement are indeed based on the concept that enterprises, in order to contract with public administrations imposing specific criteria in their tenders, would be pushed voluntarily to adopt policies and behaviours that are beneficial for the community in which they operate.<sup>72</sup>

Also, businesses may voluntarily direct their efforts to creating social or environmental value because they consider it either convenient for their economic strategy or right from an ethical point of view. Furthermore, economic studies of what is known as corporate social responsibility have highlighted the advantages, both social and economic, that come from the involvement of private operators in initiatives for the community.<sup>73</sup>

According to these findings, especially in times of economic crisis, the enterprises that are better suited to success are the socially responsible ones, meaning the enterprises that, as well as respecting the law, are also strongly accountable towards the community for their work.<sup>74</sup>

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<sup>72</sup> Among the most complete contributions on the topic, it is possible to quote Charles Edquist et al. (eds), *Public technology procurement and innovation* (Kluwer Academic Publishers, 2000); Christopher McCrudden, 'Using public procurement to achieve social outcomes' (2004) *Natural Resources Forum* 257; Sue Arrowsmith and Peter Kunzlik (eds), *Social and environmental policies in EC procurement law* (CUP, 2009); Sue Arrowsmith 'A taxonomy of horizontal policies' (2010) *Journal of Public Procurement* 149; Roberto Caranta and Martin Trybus (eds), *The law of green and social procurement in Europe* (DJØF Publishing, 2010); Geo Quinot, 'Promotion of social policy through public procurement in Africa' in Sue Arrowsmith and Geo Quinot (eds), *Public procurement regulation in Africa* (CUP, 2013).

<sup>73</sup> To cite only a few significant contributions: Archie Carroll, 'Corporate social responsibility: evolution of a definitional construct' (1991) *Business and Society* 1; Abigail McWilliams and Donald Siegel, 'Corporate social responsibility: a theory of the firm perspective' (2001) *Academy of Management Review* 1; Dirk Matten and Jeremy Moon, 'Corporate social responsibility' (2004) *Journal of Business Ethics* 323; Andrew Kakabadse et al. (eds), *Corporate social responsibility: reconciling aspiration with application* (Palgrave Macmillan, 2006); Charlotte Walker-Said and John D Kelly (eds), *Corporate social responsibility? Human rights in the new global economy* (University of Chicago Press, 2015); Andreas Rasche, Mette Morsing, and Jeremy Moon (eds), *Corporate social responsibility: strategy, communication, governance* (CUP, 2017).

<sup>74</sup> Particularly interesting, in the mentioned sense, are the considerations expressed by the Italian literature on the topic. See, in particular, Marco Vitale et al., *Responsabilità nell'impresa* (Piccola Biblioteca d'Impresa Inaz, 2010); Giorgio Carbone, Angelo Ferro, and Marco Vitale, *Spiritualità nell'Impresa* (Piccola Biblioteca d'Impresa Inaz, 2011); Vittorio Coda et al. (eds), *Valori d'impresa in azione* (Egea, 2012). These authors express the view according to which the responsible enterprise is the one which

Studies on corporate social responsibility affirm that the idea that private businesses only pursue the logic of profit is simply wrong. Or, at least, enterprises that only pursue profit do not have a strategic vision for their future and are not able to realize a harmonic complementation between all the dimensions that characterize the society they are part of.<sup>75</sup> Furthermore, enterprises that acknowledge their role as protagonists of the active society and responsible suppliers of social needs are the ones that have a better chance of succeeding in situations of harsh competition.

In the described context, public private partnership is a precious instrument which recognises and promotes businesses as protagonists of society's welfare and creators of public value.

Still, we need to clarify why businesses should be moved to enter into a partnership with public authorities for the creation of public value.

Besides ethical reasons, enterprises may find it convenient to pursue general interests and intercept the public administration responsible for their care.<sup>76</sup> Indeed, private operators may look at public private partnership because they are interested in occupying a sector of the market that otherwise would be reserved to the public authorities.<sup>77</sup> To advance a proposal to an administration gives a strong competitive advantage over competitive enterprises, because of the possibilities disclosed by the partnership with the subject (the public entity) institutionally responsible for the performance of specific public tasks.<sup>78</sup>

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not only observes the laws but which also embarks in socially valuable activities, being accountable towards the community.

<sup>75</sup> See in particular Marco Vitale, *L'impresa irresponsabile: Nelle antiche radici il suo futuro* (ESD, 2014), where it is affirmed that enterprises that pursue only their profit have a low rate of survival on the long term. Differently, sound businesses are the ethically correct ones.

<sup>76</sup> Julien Damon (ed.), *Intérêt général: Que peut l'entreprise ?* (Institut Montaigne, Paris, 2013) 81.

<sup>77</sup> A similar statement can be found in International Monetary Fund, '*Public-private partnership*' (Washington DC, 2004), where it is affirmed that 'Public-private partnerships (public private partnerships) refer to arrangements where the private sector supplies infrastructure assets and services that traditionally have been provided by the government', 4. Similarly, the European Commission defined public private partnership as '[a]greements that transfer investment projects to the private sector that traditionally have been executed or financed by the public sector'. Commission, Directorate-General for Economic and Financial Affairs '*Public Finances in EMU – 2014*' (2014) 144.

<sup>78</sup> The concept is expressed in Peter Drucker, 'Converting social problems into business opportunities: the new meaning of corporate social responsibility' (1984) *California Management Review* 53; Lance Liebman and Harvey Brooks (eds), *Public private partnership: new opportunities for meeting social needs* (American Academy of Arts and Sciences, 1984).

It is important to stress that this reason is present not only for the realization of infrastructural works. For instance, sponsorship contracts are a clear example of how private operators may abandon the logic of profit maximization to contribute to the creation of public value. In these agreements, businesses intend to exploit a social obligation contracted in favour of society in economic terms. The institution of a local green transportation system or the refurbishment of historic buildings in exchange for the possibility to display its image is an economically valuable bargain for an enterprise willing to expand its social image.

This brief example also brings us to affirm that public private partnership can only thrive between virtuous actors. In theory, no public administration would want to associate its 'public' image with an ethically unsound business. Conversely, no sound business would make any proposal to an inefficient or corrupt administration, because otherwise its company name would be affected by the partnership. In this sense, it is possible to affirm that public private partnership promotes virtuous behaviour, both from the public and the private side.

## 5 CONCLUSION

Our journey to the exact qualification of the juridical identity of public private partnership – which is useful to avoid the misunderstandings that often populate the debate on said concept – started with the semantic examination of the term 'partnership' and of the public private antinomy.

The first analysis brought us to highlight the revolutionary and 'emotional' strength of public private partnership, which holds together two different and traditionally contrasting dimensions.

The presence of both entities in a partnership requires finding a compromise, the dynamics of which are still unclear and which will be defined only after a reconfiguration of the juridical concept of public private partnership.

In order to start a reasoning on the motives that could bring the two dimensions together, we advanced two theories on why public authorities should involve private actors in the performance of public tasks, and why, conversely, private operators should be interested in pursuing general interests. We proposed that public authorities need to seek aid in the private sector especially to get out of the normative monopoly over the care for specific tasks. Consequently, public authorities allow synergies with the private sector that are legitimized by their efficiency in responding to social needs, according to the idea of participatory democracy.

Furthermore, we affirmed that, based on the economic literature on corporate social responsibility, private operators may have strong economic incentives to associate their images with public authorities, and, more generally, to

care about general interests. This, in turn, promotes virtuous behaviour from both sides.

These intuitions can be helpful in setting up the guidelines for our analysis of the features of public private partnership as applied in the economic and juridical context. Given the wide application of public private partnership as a global phenomenon, it is correct, in our opinion, to approach the analytical study from the wider dimension of international relationships, before concentrating on the local scenario. The international dimension of public private partnership is indeed interesting because of the number of relevant legal documents that provide a juridical connotation to the instrument and place it in a strategy achieving public values, within the dimension of sustainable development. Said documents provide a wide and more comprehensive notion of public private partnership, which is less contextualized by the specific features of single jurisdictions, and therefore helps us to set our analysis starting from a wider perspective.

Therefore, we will begin our journey from the international dimension, before tightening our focus on the features of public private partnership in national contexts.