VOLUME 25, ISSUE 4 DECEMBER 2019

EUROPEAN PUBLIC LAW

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Wolters Kluwer

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RAPPORTEURS *(For full address details see the end of the issue)*

Risks and Risk Transfer in Concessions

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Keywords: Concession and PPP Contracts, risk

1 THE CENTRALITY OF RISK TRANSFER IN CONCESSION CONTRACTS AND THE DISTINCTION WITH THE PUBLIC WORKS CONTRACT

The term 'PPP' is an umbrella term to refer any kind of contractual partnership between a public authority and one or more private partner to construct an infrastructure and/or to provide a public services.[1] In the European Union legislation the term commonly used for such a form of public-private partnership is 'concession', which has been described as a direct link 'between the private partner and the final user: the private partner provides a service to the public, "in place of", though under the control of, the public partner'.[2]

The characteristics of this direct link have been noted for some time and have been illustrated by the European Commission since the interpretative communication of 2000 where a distinction between 'public works contract' and 'concession contracts' has been drawn.[3] That document clearly establishes that concession contracts have the following features: the concessionaire has got the right of exploitation by charging tolls or fees directly from those who use the structure built; the right of exploitation implies the transfer of the responsibilities of the operation; these responsibilities cover not only the construction because the concessionaire also bears the risk inherent in the management and use of the facilities.[4]

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1 Defines the PPPs a sort of umbrella term, A. C. L. Davies, *Public-Private Partnership in English Law, Nuove forme e nuove discipline del partenariato pubblico privato* 389 et seq. (A. Fioritto ed., Torino, Giappichelli 2017); about the origin and the evolution of PPPs based on the privatization process *see* C. H. Bovis, *Public-Private Partnership in the European Union* 66 et seq. (New York & London, Routledge 2014); Y. Marique, *Public-Private Partnership and the Law* (*Regulation, Institutions and Community*) 47 et seq. (Edward Elgar Publishing Limited, United Kingdom 2014).

2 European Commission, *Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions*, COM (2004) 327 final, para. 22.

3 European Commission, *Interpretative Communication on Concessions Under Community Law* (12 Apr. 2000).

4 C. Fouassier, *Vers un véritable droit communautaire des concessions?, Revue trimestrelle droit europeenne* 684 (2000); C. H. Bovis, *Risk and Public-Private Partnership, European Procurement & Public Private Law*

Cartei, Gian Franco. 'Risks and Risk Transfer in Concessions'. *European Public Law* 25, no. 4 (2019): 503–516.

In summary, in concessions it is the existence of risk inherent in exploitation which qualifies the concession as such, and this risk must be transferred to the concessionaire.[5] As far as the distinction between public works contract and concession is concerned, in the Commission's view, the arrangement is a public works contract and not a concession if the cost of the construction is borne by the awarding authority and the contractor does not receive remuneration from fees paid directly by those using the facility once it has been constructed.[6] Indeed, in cases where the expenses are reimbursed directly by the awarding authority without the dangers inherent in the management of the facility in question, risk is avoided and the contract must be qualified as a public works contract.

Despite these specifications concerning the notion of concession, controversy persists regarding its most important feature: the notion of risk. Beyond the normative definition, in fact, the provision presents uncertainties owing, at least in part, to the unclear evolution of that notion. The aim of this article is to analyse the notion of risk in European terms and show its principle implications in light of the Directive 2014/23/EU.

2 RISK ALLOCATION IN THE DIRECTIVE 2014/23/EU

If the risk appears as a logical consequence of the right of exploitation its concept was not completely defined until the directive 2014/23/EU.[7] In the absence of a normative definition the Court of Justice of the European Union (CJEU) has, on more than one occasion, made its own interpretative contribution.

Such an interpretation, based on the transfer of the risk to the contractor, has been confirmed on various occasions by the jurisprudence of the CJEU, according to which it is inherent in a concession contract that the awarding administration 'transfers the operational risk it runs entirely, or at least to a significant extent, to

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Review, n. 1, especially at 44 et seq. (2012); C. Queiroz & A. Lopez Martinez, *Legal Framework for Successful Private-Public Partnership*, in *The Routledge Companion to Public-Private Partnership* 85 et seq. (P. de Vries & E. B. Yehoue eds, Routledge, London and New York 2013); S. Braconnier, *La consécration du critère du risque opérationel dans le directive Concession, Contrats publics*, n. 141, Mar. 2014, at 26.

5 T. Prosser, *The Economic Constitution* 230 et seq. (Oxford, Oxford University Press 2014); this perspective had already been developed by the Court of Justice, 13 Oct. 2005, C-458/03, *Parking Brixen* (para. 40), according to which 'In the situation referred […] the service provider's remuneration comes not from the public authority concerned, but from sums paid by third parties for the use of the car park in question. That method of remuneration means that the provider takes the risk of operating the services in question and is thus characteristic of a public service concession'.

6 European Commission, *Interpretative Communication on Concessions Under Community law* (para. 2.1.2, n. 9), 12 Apr. 2000.

7 *See* M. P. Chiti, *Il Partenariato Pubblico-Privato e la nuova direttiva concessioni*, in *Finanza di Progetto e Partenariato Pubblico-Privato* 15 et seq. (G. F. Cartei & M. Ricchi eds, Napoli, Editoriale scientifica 2015).

the concessionaire'.[8] Where this does not apply, therefore, the contract must be classified not as a concession but as a public works or service contract.[9]

The notion of risk received ample consideration in EU Directive 2014/23/EU which defines a concession as a contract whose object is 'the procurement of works or services by means of a concession, the consideration of which consists in the right to exploit the works or services or in that right together with payment'.[10] It appears, then, that the notion of concession is treated as operating within a limited sphere, as a whole series of hypotheses excluding the presence of a concession attest[11]; amongst which it is worth noting that according to which 'Contracts not involving payments to the contractor and where the contractor is remunerated on the basis of the regulated tariffs, calculated so as to cover all costs and investments borne by the contractor for providing the service, should not be covered by this Directive'.[12] In this case, in fact, the contracting authority is to guarantee the recovery of the investment and the contractor is not exposed to any risk.

In any case, the 2014 Directive defines the notion of a concession contract as being based on the concept of risk,[13] particularly the concept of '*operating risk*'. In principle, this concept is very wide, because the concession, on the one hand, always implies 'the transfer to the concessionaire of an operating risk of economic nature involving the possibility that it will not recoup the investments made and the costs incurred in operating the works or services awarded under normal operating conditions even if a part of the risk remains with the contracting authority or contracting entity',[14] on the other hand, this risk should be 'understood as the risk of exposure to the vagaries of the market, which may consist of either a demand risk or a supply risk, or both a demand and supply risk'.[15]

To reiterate the breadth of the notion of operating risk the Directive highlights the fact that a situation is outside the scope of a concession contract whenever the contracting authority relieves 'the economic operator of any

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8 Case C-206/08, *Eurawasser*, para. 77; *see* R. Caranta, *I contratti pubblici* 170 et seq. (Torino, Giappichelli 2012); A. Huergo Lora, *El riesgo operacional en la nueva Ley de Contratos del Sector Pùblico, Nueva epoca*, n. 4, at 35 et seq. (2017).

9 CJEU, Case C-382/05, *Commission of European Communities*, para. 34, according to which 'it is clear from the case-law of the Court of Justice that a service concession exists where the agreed method of remuneration consists in the right of the service provider to exploit for payment his own service and means that he assumes the risk connected with operating the services in question'; Case C-437/07, *Commission of European Communities*.

10 Recital n. 11.

11 *See* recitals nn. 12, 13, 14, 15, 16.

12 Recital n. 17; *see* Bovis, *supra* n. 1, at 87 et seq.

13 A. Roman Marquez, *El riesgo en las concesiones de obras y servicios publicos: origenes, evolucion y situacion actual en el ordenamiento juridico comunitario*, in *Revista Espaňola de Derecho Administrativo* 449 (2017).

14 Recital n. 18.

15 Recital n. 20.

potential loss, by guaranteeing a minimal revenue, equal or higher to the investments made and the costs that the economic operator has to incur in relation with the performance of the contract'.[16]

3 IN PURSUIT OF RISK SHARING: THE UNCERTAINTIES CONCERNING THE NOTION OF RISK

It has been noted that the risk allocation between public and private partners has often been inappropriate, incoherent and ineffective.[17] It is difficult to deny its current relevance and it is, at the same time, difficult to deny that the notion of risk itself is still seen to be controversial. In this regard, although the text of the Directive seems to clarify many aspects of the norms concerning risk, it is useful to note that what is least certain, is the extent of the risk transferred to the concessionaire necessary to qualify a contract as a concession.[18]

In the first place, the Directive itself stipulates that the transfer of operating risk to the contractor need not be complete but may be partial. It may, in fact, be that the risk is limited from the outset without any preclusion of the qualification of the contract as a concession.[19] The Directive, indeed, provides that the right to exploit the works or services may be stipulated 'together with payment'.[20]

A major contribution to gauging the extent of risk has come from the CJEU, according to which:

> it must be stated that the risk of the economic operation of the service must be understood as the risk of exposure to the vagaries of the market, which may consist in the risk of competition from other operators, the risk that supply of the services will not match demand, the risk that those liable will be unable to pay for the services provided, the risk that the costs of operating the services will not fully be met by revenue or for example also the risk of liability for harm or damage resulting from an inadequacy of the service.[21]

This statement of principle, however, must be understood in light of other pronouncements of the CJEU. In the view of Court, in certain sectors of activity, like those involving public service utilities, subject to rules which may have the

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16 Recital n. 18; in a similar meaning *see also* recital n. 19, according to which 'Where sector-specific regulation eliminates the risk by providing for a guarantee to the concessionaire on breaking even on investments and costs incurred for operating the contract, such contract should not qualify as a concession within the meaning of this Directive'.

17 European Court of Auditors, Special Report, *Public Private Partnerships in the EU: Widespread Shortcomings and Limited Benefits*, n. 09/2018, at 38 et seq.

18 For some critical notes on the directive proposal, *see* already A. Sanchez Graells, '*What Need and Logic for a New Directive on Concessions, Particularly Regarding the Issue of Their Economic Balance', EPPPL*, n. 7, at 100 (2012).

19 *See* recital n. 19.

20 *See* recital n. 11.

21 *See* Case C-274/09, *Privater Rettungsdienst und Krankentransport Stadler*, para. n. 37.

effect of limiting the financial risks entailed, it is enough that the risk transferred is 'a significant share, of the operating risk which it faces, in order for a service concession to be found to exist'.[22] The same principle was reaffirmed in another of the Court's findings, according to which 'While that risk may, at the outset, be very limited, it is necessary for classification as a service concession that the contracting authority transfer to the concession holder all, or, at least a significant share, of the risk which it faces'.[23]

This means, in the final analysis, that a concession need only entail the transfer of a significant portion of a risk, which is already limited at the outset.[24] This much is clear. There is, nonetheless, no explanation of how far this limitation of risk may extend. All of this seems inconsistent with the principles concerning concessions, because risk not borne by private enterprise will necessarily be borne, at least in part, by the public administration. It is not surprising, then, that the criterion arrived at by the Court has not found the favour of the European Commission, according to which 'This case law is still not sufficiently clear, in particular regarding the level of operating risk to be transferred to the economic operator so that a contract can qualify as a concession'.[25] This means that in each case it is necessary that, in order to ensure that the concessionaire operates efficiently, the amount of risk to be transferred be appropriate. Indeed, the private partner's risk has to be clearly defined and measured.

The 2014 Directive has, nonetheless, continued to make reference to the principles set forth by the CJEU where they provide that the transfer to the concessionaire of an operating risk may qualify as concession 'even if a part of the risk remains with the contracting authority',[26] and that 'The fact that the risk is limited from the outset should not preclude the qualification of the contract as a concession'.[27]

Secondly, in this formulation, the uncertainty as to the concept of operational risk may also be seen from another perspective. In contrast to that which applies to those subject to private law, it seems that operational risk in concessions does not apply under all circumstances, but is limited to '*normal operating conditions*'.[28] Moreover, concessions are long-term and complex contractual arrangements

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22 Case C-206/08, *Eurawasser*, para. 77.
23 Case C-348/10, *Norma-A Sia*, para. 45.
24 R. Caranta, *The Changes to the Public Contract directives and the Story They Tell About How EU Law Works,* Com. Mkt. L. Rev. 430 (2015); J. C. Laguna De Paz, *Los contratos administrativos de concesión de servicios y de servicios a los ciudadanos, Revista de Administración Publica*, n. 204, at 50 (2017).
25 Commission Staff Working Document, *Impact Assessment of an Initiative on Concessions*, Brussels, 20 Dec. 2011, SEC(2011), 1588 final (4.1.1).
26 *See* recital n. 18.
27 *See* recital n. 19.
28 *See* recital n. 18.

which are proportionate to the life cycle of the infrastructure[29]; it is consequently advisable to provide for adjustments over the period in which it is in force, above all when exceptional circumstances arise to which the private operator cannot respond. The normative formula 'normal operating conditions' is ambiguous and open to interpretations not consistent with the principles of the Directive, in particular, with the following: (1) an operating risk is 'the risk of exposure to the vagaries of the market'; (2) 'an operating risk should stem from factors which are outside the control of the parties'.[30]

This ambiguity is reflected in the legislation of some of the Member States. In Italy, for example, lawmakers have felt constrained to specify that 'normal operating conditions' is to be understood as 'the absence of unpredictable events'. Even this formula, however, does not overcome the difficulties in interpretation noted above.

4 TOWARD AN UNDERSTANDING OF RISK: THE SUPPLY RISK. A LESSON FROM SPAIN?

Uncertainty as to the meaning of operational risk itself remains a highly problematic issue. According to Article 5 of the Directive, operating risk encompasses 'demand or supply risk or both'. The definition of both types of risk is given as follows: *demand risk* is 'the risk on actual demand for the works or services which are the object of the contract'; on the other hand, *supply risk* is 'the risk on the provision of the works or services which are the object of the contract, in particular the risk that the provision of the services will not match demand'.

While the meaning of demand risk seems evident, this being the risk typical of concession contracts, whereby the remuneration of the concessionaire depends on the demand of the market (i.e. the amount of use of the structure or service), uncertainties are inherent in the meaning of supply risk.

As a result of the imprecision of the 2014 Directive, supply risk has been understood in often discordant terms.[31] Whereas some have identified such risk as equivalent to availability risk, being the risk which depends primarily on the degree of diligence of the concessionaire,[32] others have rejected this equivalence on the

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[29] *See* recital n. 68; regarding the complexity of this kind of contract, *see* recently T. Prosser & L. Butler, *Rail Franchises, Competition and Public Service,* Modern L. Rev. 32 et seq. (2018).

[30] *See* recital n. 20.

[31] An overview L. Hernandez Gonzalez, *The Evolving Concept of Works and Service Concessions in European Union Law*, Pub. Procurement L. Rev. 51 et seq. (2016); F. Goisis, *Il rischio economico quale* proprium *del concetto di concessione nella direttiva 2014/23/UE: approccio economico* versus *visioni tradizionali, Diritto amministrativo* 748 et seq. (2015).

[32] M. Ricchi, *I contratti di concessione 2.€*, in *Finanza di progetto e Partenariato Pubblico-Privato* (*Temi europei, istituti nazionali e operatività*), in *Finanza di Progetto e Partenariato Pubblico-Privato* 57, G. F. Cartei & M. Ricchi eds, Napoli, Editoriale scientifica 2015, at 30.

grounds that availability risk, because it depends on the activity of the concessionaire and is tied to the performance of the service, could not represent that typical of a concession contract, which must, rather, arise from factors which are outside the control of the parties.[33] With this sort of eventuality excluded, availability risk could not be covered by the Directive of 2014. Furthermore, such risk apparently entails inadequate fulfilment of the contract. This would, consequently, contradict the principle that 'Risks such as those linked to bad management, contractual defaults by the economic operator or to instances of *force majeure* are not decisive for the purpose of classification as a concession, since those risks are inherent in every contract, whether it be a public procurement contract or a concession'.[34]

Another thesis has recently maintained, given that no reference to availability risk appears in the considerations of the CJEU, that supply risk should also be tied to the unpredictable fluctuations in markets and, therefore, to demand risk and not to the concessionaire's ability to provide an adequate service according to qualitative and quantitative standards.[35]

Given the uncertainty as to the meaning of supply risk, it might be useful to recall the typologies of remuneration for concessions and to highlight the fact that there are circumstances under which supply risk has a specific relevance.[36]

The principle that the concessionaire does not receive remuneration directly from the awarding authority, but acquires from it the right to obtain income from the use of the facilities built is undoubtedly that most consonant with the European conception of operational risk since the Interpretative communication of the European Commission.[37] This has been affirmed by the CJEU itself, according to which: 'the difference between a service contract and a service concession lies in the consideration for the provision of services. A service contract involves consideration which is paid directly by the contracting authority to the service provider[38] while, for a service concession, the consideration for the provision of

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[33] A. Roman Marquez, *El riesgo en las concesiones de obras y servicios publicos: origenes, evolucion y situacion actual en el ordenamiento juridico comunitario*, in *Revista Espaňola de Derecho Administrativo* 461 et seq. (2017).

[34] *See* recital n. 20; in a very similar way, *see* Court of Justice, Case C-274/09, *Privater Rettungsdienst und Krankentransport Stadler* (n. 38); J. C. Laguna De Paz, *Los contratos administrativos de concesión de servicios y de servicios a los ciudadanos, Revista de Administración Publica*, n. 204, at 49 (2017).

[35] F. Goisis, *Il rischio economico quale* proprium *del concetto di concessione nella direttiva 2014/23/UE: approccio economico* versus *visioni tradizionali, Diritto amministrativo* 751 et seq. (2015).

[36] J. C. Laguna De Paz, *Los contratos administrativos de concesión de servicios y de servicios a los ciudadanos, Revista de Administración Publica*, n. 204, at 51 (2017); on the typologies of remuneration for concessions I. M. de la Riva, *Nuevos modelos de financiación de infraestructuras públicas, Revista digital de Derecho Administrativo*, n. 17, at 193 et seq. (2017).

[37] European Commission, *Interpretative Communication on Concessions Under Community Law* (2.1.2), 29 Apr. 2000; Bovis, *supra* n. 1, at 90.

[38] *See* to that effect CJEU, Case C-458/03, *Parking Brixen*, para. 29.

services consists in the right to exploit the service, either alone, or together with payment'.[39] Upon closer examination, however, the situation is more complex.

From its inception, in fact, the 'concessive model', characterized by the direct link between the private partner and the final user and based on charges levied on the users of the service, did not cover all the contractual models the State may present to the market for the realization of public works through recourse to private funding. Suffice it to note the experience of what is generally called *Private Finance Initiative* (*PFI*) and its policy context in English law where the private partner designs, builds, finances and operates a public facility over a long period of time in exchange for periodical payments from the public authority using the facility to deliver public services.[40]

There may, therefore, be cases in which the remuneration of the concessionaire is drawn from the use of the infrastructure or service but is paid in full by the awarding authority. This sort of arrangement is frequent and is usually described as a 'shadow toll'. It applies whenever the private party provides the resources necessary to finance and infrastructure project in the construction phase and receives in exchange from the public administration a remuneration in accordance with, and proportionate to, the actual traffic and use of that infrastructure, which means it is determined only after the conclusion of the contract.[41] Under such circumstances the demand risk is not the only relevant risk, since the concessionaire also runs an availability risk when the delivery of the service proves inferior to the standards of quality prescribed.

There is another sort of arrangement in which availability risk may be relevant and, consequently, apply. There are some forms of infrastructure, for example hospitals, schools and prisons, referred to as 'cold infrastructures', in which no demand risk is foreseen. Indeed, here it makes no sense to speak of competition, market trends or business cycle. Here, too, the monetary return for the expenses of the private party comes not from fees paid by users but from the public administration itself.[42]

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39 CJEU, Case C-206/08, *Eurawasser*, para. 51.

40 *See* European Commission, *Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions*, COM (2004) 327 final, para. n. 23, according to which "In other types of set-up, the private partner is called on to carry out and administer an infrastructure for the public authority (for example, a school, a hospital, a penitential centre, a transport infrastructure). The most typical example of this model is the *PFI* set-up. In this model, the remuneration for the private partner does not take the form of charges paid by the users of the works or of the service, but of regular payments by the public partner. These payments may be fixed, but may also be calculated in a variable manner, on the basis, for example, of the availability of the works or the related services, or even the level of use of the works". Referring to DBFO arrangements based on payments from the public authority, *see* Davies, *supra* n. 1, at 389 et seq.; for a more detailed overview, Bovis, *supra* n. 1, at 76 et seq.

41 I. M. de la Riva, *Nuevos modelos de financiación de infraestructuras públicas, Revista digital de Derecho Administrativo*, n. 17, at 205 seq. (2017).

42 *See* F. L. Hernàndez Gonzalez, *The Evolving Concept of Works and Service Concessions in European Union Law*, in Pub. Procurement L. Rev. 57 (2016), according to which "That is why we consider that *supply risk* may not by itself be a criterion for identifying concessions, unless it is a work or service

Such an arrangement does not reflect the traditional concept of concessions. Nonetheless, it seems difficult to affirm that the 2014 Directive entirely excludes that possibility. On the contrary, it would seem to be provided for in the Directive, where it prescribes that 'it should be made clear that certain arrangements which are exclusively remunerated by a contracting authority or a contracting entity should qualify as concessions where the recoupment of the investments and costs incurred by the operator for executing the work or providing the service depends on the actual demand for or the supply of the service or asset'.[43] In these cases, too, where, for the reasons noted above, it seems impossible to detect any demand risk, a crucial factor could be the availability risk, relating to the ability of the concessionaire to meet the requirements of the quality of the service and to deliver the agreed volume.

Spanish law provides a clear example of the possibility that the concessionaire might assume only the supply risk and not the demand risk. Within the framework governing concessions contracts contained in the recent law of 8 November 2017, no. 9, whereby Spain applied the directives 2014/23/EU and 2014/24/EU, European principles that characterize that contract as regards the obligations and rights of the concessionaire and the notion of operating risk are defined.[44] As regards the financial gain from the service performed, Article 267 expressly stipulates that the concession holder may receive compensation for his own service from the users or from the public administration. In the latter case the sum is to be paid in relation to the degree of availability offered by the concessionaire or by the use on the part of the public, according to the particular provisions of the contract in question.

Still clearer is the reference to availability risk where the provision expressly states that the concessionaire may be compensated with 'pagos por disponibilidad', a formula clearly alluding to a system of payment from the public administration whereby, in place of the actual demand, what counts is the level of quality and accessibility of the services offered through the management of the infrastructure as stipulated contractually and covered by automatic penalties in case of violations of the parameters fixed.[45]

It seems thus confirmed that in a concession contract whenever the party paying for the service is the public administration, operational risk may take the form of availability risk.

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concession for which remuneration cannot be determined by the amount of use, as may be the case with hospitals, schools, prisons, etc. ('cold infrastructure'). In these cases, there is a concession provided that recoupment of the investments made and the costs incurred by the dealer is not guaranteed".

43 *See* recital n. 18.

44 *See* Art. 257 ss.

45 *See* Art. 267, para. 4; A. Huergo Lora, *El riesgo operacional en la nueva Ley de Contratos del Sector Pùblico, Nueva epoca*, n. 4, at 49 (2017).

5 TRANSFER OF RISK AND BALANCE SHEET TREATMENT OF PPPs CONTRACTS. THE AMBIGUITY OF THE ITALIAN EXPERIENCE

Another plausible explanation for the uncertainty regarding the notion of operational risk lies in the overlap it exhibits between two originally distinct sets of norms.[46] On the one hand, the European Directive of 2014, upheld by the jurisprudence of the CJEU, seeks to avoid treating as a concession a contract with the characteristics of a procurement contract. On the other hand, there are those regulations designed to guarantee transparency and proper accounting in public finances in the EU – enshrined in Regulation No. 549/2013 of the European Parliament and of the Council of 21 May 2013 – for recording a PPP contract on or off the balance sheet of the relevant government entity.

A sharp distinction should be drawn between concessions and public-private partnerships (PPPs) in national accounts. Indeed, in contrast to the requirements of the Directive, whereby 'in a concession contract, government makes no regular payments to the partner, or such payments, if they exist, do not constitute a majority of fees received by the partner', in the case in question, which concerns PPP contracts, 'the final users do not pay directly (i.e. in a way proportional to the use of the asset and clearly identified only for this use) or only for a minor part (and generally for some specific uses of the asset), for the use of the assets for which a service will be provided'.[47] So when a public authority is the direct source of the majority of the revenues that the private partner is entitled to receive, we need to apply the rules set out not in the Directive, but in the European system of accounts to record the economic substance of the PPP contract, as complemented by the Manual on Government Deficit and Debt.[48]

Precisely because these contracts represent an expense for public administrations and often entail little or no demand risk, insomuch as the only user is the public administration, one must understand when this kind of contracts can lead to

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[46] J. C. Laguna De Paz, *Los contratos administrativos de concesión de servicios y de servicios a los ciudadanos, Revista de Administración Publica*, n. 204, at 50 (2017); M. P. Chiti, *Il Partenariato PubblicoPrivato e la nuova direttiva concessioni*, in *Finanza di Progetto e Partenariato Pubblico-Privato* 9 et seq. (G. F. Cartei & M. Ricchi eds, Napoli, Editoriale scientifica 2015).

[47] *See* Manual on Government Deficit and Debt (Implementation of ESA 2010), at 332; *see also* Eurostat, *A Guide to the Statistical Treatment of PPPs*, Sept. 2016, at 22; for a comparative review *see* J. L. Guasch, *Procurement and Renegotiation in Public Private Partnershipin Infrastructure* (*Evidence, Typology and Tendencies*), in *Law and Economics of Public Procurement Reform* 130 et seq. (G. Piga & T. Tatrai eds, Oxford, Routledge 2018).

[48] S. Van Garsse, K. Van Gestel & K. McKenzie, *PPP-Contracts: On or Off Government Balance Sheets?, EPPPL*, n. 1, at 4 et seq. (2017); Y. Marique & S. Van Garsse, *Public-Private Co-operation and Judicial Review. A Case Study from European Infrastructure Projects,* Eur. L. Rev. 4 (2018; forthcoming); Bovis, *supra* n. 1, at 74; J. Kitsos & A. Maniatis, *Les concessions dans le cadre de la directive 2014/23/UE, Revue de droit de l'Union européenne*, n. 2, 192 et seq. (2018).

an off-balance-sheet treatment. To this end, in order to understand whether an asset falls within the definition of a PPP and whether or not to apply the rules for assessing the statistical treatment of PPP arrangements, we must refer to the principles laid down by Eurostat since 2004.[49] In fact, to determine whether an asset involved in a public-private partnership is classified off a government balance sheet the private partner must bear the construction risk and at least one of either the demand or the availability risk.[50] Consequently, here too 'a central element in the correct classification of the PPPs is the transfer of risks'.[51]

In this sense risk is certainly a notion common in equal measure both to concessions and to PPP contracts. However, in the judgment of Eurostat that notion is not called as 'operational risk' as in the directive of 2014, but is, rather, subdivided into the three definitions of 'construction risk', 'demand risk' and 'availability risk'.[52] Construction risk refers to any event regarding the timing of the consignment of the work, its non-completion, defective planning or cost overruns; demand risk is often transferred by means of payments based on shadow tolls[53]; whereas availability risk refers to the eventuality that private partner not be able to fulfil its contractual obligations in terms of either the volume or qualitative standards prescribed.[54]

Can these risks be associated with operational risk? The answer is not simple due to the problematic distinction between that risk and the risks common to all public contracts.[55] In addition we have to pay attention to the silence of the Directive on the point in question. Can this silence be interpreted as a limiting of operational risk to demand risk, with the exclusion of construction risk and availability risk from the notion of risk found in the 2014 Directive?[56]

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49 Eurostat, *Treatment of Public-Private Partnership* (11 Feb. 2004); A. Huergo Lora, *El riesgo operacional en la nueva Ley de Contratos del Sector Público*, Nueva Epoca, n. 4, at 40 et seq. (2017).

50 Van Garsse, Van Gestel & McKenzie, *supra* n. 48, at 7 et seq.

51 C. H. Bovis, *Risk in Public-Private Partnerships and Critical Infrastructure,* Eur. J. Risk Reg., n. 2, at 201 (2015); about the importance this rule has had in the UK experience *see* NAO (National Audit Office), Report by the Comptroller and Audit General, *PFI and PF2* (12 Jan. 2018).

52 Bovis, *supra* n. 51, at 203.

53 Van Garsse, Van Gestel & McKenzie, *supra* n. 48, at 5 (n. 9); *see* Eurostat Clarification Note, *The Statistical Treatment of PPP Contracts* 4 (2016), according to which to qualify as a PPP project "there must be regular unitary payments to the private partner through availability or demand fees by government and not by the users of the asset (if the users pay for the use of the asset, this would be a concession and not a PPP)".

54 With the consequence that if the availability risk is incurred by the private partner there is the possibility for the public administration to apply penalties as determined by the contract.

55 A. Huergo Lora, *El riesgo operacional en la nueva Ley de Contratos del Sector Público*, Nueva Epoca, n. 4, at 42 (2017).

56 For this perspective *see* A. Roman Marquez, *El riesgo en las concesiones de obras y servicios publicos: origenes, evolucion y situacion actual en el ordenamiento juridico comunitario*, in *Revista Española de Derecho Administrativo* 464 et seq. (2017).

This uncertainty is reflected in Member State legislation applying the 2014 Directive. Italian law offers an emblematic and problematic example, as the Decree-law no. 18, April 2016, n. 50 makes a distinction between concessions contracts[57] and contracts of public-private partnership.[58]

In both types of contract, risk plays a fundamental role and a survey of the normative definitions contained in Article 3 seems to indicate that the concept of 'operational risk' may be broken down into the trinity of 'construction risk', 'demand risk' and 'availability risk', each of which with a definition in line with those fixed in the Eurostat pronouncement of 2004. Comparable clarity, however, does not emerge from the text of the Decree-law no. 50/2016, wherein the aforementioned taxonomy of risk is, inexplicably, confined to PPP contracts.[59] In addition, where, with regard to concessions, the provision expressly uses the term 'operating risk', with regard to PPP contracts it uses the more generic term 'risk'. It might thus seem doubtful that the concept of risk be the same for both types of contract, which would mean that the notion of 'operating risk' were limited to concessions. This, however, makes little sense, because within the section of the regulation concerned with PPP contracts one finds the idea of 'project finance', which in Italian law is none other than a concessions contract.[60]

The root of this uncertainty is probably to be found in the singular evolution the notion of a PPP has undergone in Italian law: in the absence of an EU-wide normative definition, in Italy this notion has developed from a general notion in previous legislation into a concept entirely distinct from that of the concession in current legislation.[61] Actually, as we have noted above, concessions and PPP contracts, while governed by partially distinct norms, do have one notion in common, that of risk, which it does not seem possible to separate into different notions according to the contractual model applied from one case to the next.

On the other hand, one must be careful not to over-emphasize the difference between concession contracts and PPP contracts. The PPP contract, in fact, remains a category subject to no specific definition at the European level. This very lacuna leaves an opening for European statutes to provide for such regulations and to tie them to those concerning concessions.[62] In this connection it is useful to

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57 Arts nn. 164–178.
58 Arts nn. 180–191.
59 Art. 180.
60 Art. 183.
61 G. F. Cartei, *Rischio e disciplina negoziale dei contratti di concessione e di partenariato pubblico-privato, Rivista trimestrale di diritto pubblico*, n. 2, at 610 et seq. (2018).
62 Emblematic is the Spanish experience: whereas the preceding Real Decree Law 3/11 on public sector contracts provided for PPP contracts (*Contratos de colaboracion entre el sector publico y privado*) the recent law no. 9/2017 no longer recognizes that category, which is thus subsumed under the general norms concerning concessions.

look to the European Court of Auditors, which places concessions contracts in the general category of PPPs.[63]

6 CONCLUDING REMARKS

Analysis of the notion of risk leads to some closing considerations looking to the principle that risks need to be allocated to the party that is best capable of managing them. This principle, though not expressed in the 2014 Directive, is well known and alludes to the necessity that the risk incurred should not be transferred to the private partner at any price or to achieve a profitable accounting treatment.[64] Rather, the risks of the project are to be clearly identified and allocated to the party which is best suited to manage them.[65] Otherwise, the danger is that when a risk poses a problem conflicts arise between the parties to the contract, with financial implications for the public partner or an excessive exposure to risk for the private partner.

It is important, nonetheless, to note that opting for a PPP or a concession contract can yield optimal results only if there is sufficient competition in the market. Only, in fact, where there is lively competition can the public authority determine the best conditions under which to award the contract and avoid a sort of dependence on the private partner that places the administration in a weaker negotiating position. It is, at the same time, understood that the long duration and high costs of these contracts require particular diligence on the part of the administration, which must verify beforehand the genuine convenience of turning to such types of contract by means of a prior comparative analysis of the alternative options.[66] A commonly used tool is the Public Sector Comparator to assess the costs and benefits of the contractual choice in comparison with a traditional form of procurement contract and its protection of the public interest.

In this framework the configuration of a concessions contract and its distinction from PPP contracts should not be too emphatic. A sharp distinction between

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[63] European Court of Auditors, Special Report, *Public Private Partnerships in the EU: Widespread shortcomings and limited benefits*, n. 09/2018, at 12 et seq.; for the past *see* European Commission, *Interpretative Communication on Concessions Under Community Law* (2.1.2), 12 Apr. 2000.

[64] *See* OECD, *Recommendation of the Council on Principles for Public Governance of Public-Private Partnerships* (May 2012), which says that 'By "best" managed is meant the party for whom it costs the least to prevent the risks from realising, or for whom it costs the least to deal with the consequence of realised risk'.

[65] This observation recurs in the literature; S. Arrowsmith, *The Law of Public and Utilities Procurement* 1, at 41 (London, Sweet & Maxwell 2014); Bovis, *supra* n. 51, at 207, according to which "Efficient risk allocation dictates that risk must rest with the most able party to retain".; Davies, *supra* n. 1, at 393; A. Massera, *Il quadro della trasposizione delle direttive europee tra obblighi di armonizzazione e opportunità di riordino della normativa nazionale, con particolare riferimento alle concessioni di lavori e di servizi*, ivi, 38.

[66] European Court of Auditors, Special Report, *Public Private Partnerships in the EU: Widespread Shortcomings and Limited Benefits*, n. 09/2018, at 37.

concessions and public-private partnerships is clear in national laws, less so in the 2014 Directive. Moreover, the very distinction between concession and PPP contracts does not appear particularly strong in the European context.[67] While, indeed, it appears to be strengthened in Italian law, it has recently been discarded in Spanish law and subsumed under concessions. Precisely the variation in juridical categories induces one to consider the demands of the administrative experience in question and to highlight the necessity that the notion of risk be tailored to the characteristics of the infrastructure that the administration intends to realize.

Consequently, despite certain interpretations to the contrary, it appears difficult to deny that there are correlations between operational risk in concessions and the risks in PPP contracts. Actually, the formulation of the notion of operational risk adopted in Article 5 of the 2014 Directive, and the reference it makes to supply risk, show that a concession contract cannot be associated with demand risk alone. Moreover, that provision itself expressly prescribes that operating risk can encompass 'demand or supply risk or both', which seems to indicate that operational risk can also be no more than supply risk. On the other hand, where the directive refers, as well, to arrangements remunerated exclusively by the contracting authority,[68] it seems clear that it is referring to a PPP contract. This seems to explain the usefulness of not dividing the notion of risk, making distinctions based on who uses the facility or on forms of financing.

In this perspective even the definition of operational risk must not be understood in abstract terms but in reference to the structure to be realized, a structure that may simultaneously be the object of distinct contracts, concessions and PPPs contracts, limiting demand risk in the former to situations into which market demand may be factored as prevalent and characterizing the latter as subject to supply related risk, specifically availability risk tied to the volume or quality of the services to be rendered.

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[67] S. Braconnier, *La consécration du critère du risque opérationel dans le directive Concession, Contrats publics*, n. 141, mars 2014, at 26 et seq.; J. Kitsos & A. Maniatis, *Les concessions dans le cadre de la directive 2014/23/UE, Revue de droit de l'Union européenne*, n. 2, 2018, at 195.

[68] Recital n. 18.