**Summary:** 1. Introduction. 2. The "PPP". 2.1. PPP European model. 3. Project financing. 4. Promoter. 5. Conclusions.

1. **Introduction.**
In the last twenty years, the Public Private Partnership (PPP) phenomenon is gaining an important role.

**Specializzata in professioni legali.**
Though the PPP approach was widely implemented in the late 1990s, private investment in public infrastructure can be traced back to the 18th century in European countries. A notable example is the concession contract for drinking water in Paris, where the water supply was operated by two private companies from 1985 to 2010, each serving one half of the city. In the 19th century, further cases of PPP are recordable, not only from European Community (e.g., the Suez Canal; Trans-Siberian Railway; Laibin B power station in Guangxi).

Looking at the other European experiences that already know a collaboration between public institutions and private societies, also Italy recently regulated PPP that presents undeniable advantages. Effectively, the Italian doctrine observes that the employment of private model to realize public projects, permits the improvement of structural works, general infrastructures and quality of services.

The use of private capital to implement public project is one of the best solution to solve Italian infrastructural deficiency.

In fact, in Italy infrastructural level is under European threshold. At national level, it is recognized that this new forms of collaboration could improve Italian infrastructural level that which had fallen very much behind schedule, mainly owing to a lack of funding.

The development of the PPP is also part of the more general change in the role of the State in the economy, moving from a role of direct operator to one of organizer, regulator and controller. The Italian legislator decides to discipline new conventions of collaboration between public administration (P.A.) and private individuals because the traditional public agreements called "contratto di appalto" (i.e. contract) and "concessione" (i.e. concession contract), did not satisfy all public needs.

Various factors explain the increased recourse to this new forms of financial collaboration:

- public wealth or resources deficiency;
- no technical proficiency, knowledge and skill able to provide to realize, manage and organize public works and essential public services;
- desire to benefit more in public life from the know-how and working methods of the private sector;
• the UE duties, that derives from Stability and Growth Pact draws up in 1999, impose on Italy the reduction of national investments in order to minimize public expenditure and national debt\(^1\).

In view of the budget constraints confronting Member States, it meets a need for private funding for the public sector. According to European policy, this is the priority to accomplish an economic and financial Union.

2. The “PPP”.

These are the reasons of great interest in alternative ways of financing big infrastructural projects and, in particular, in partnership between public and private individuals.

Due to a PPP diffusion in most of Member States, in 2004 Commission of the European Communities decide to issue “GREEN PAPER ON PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSION”\(^2\) where its principal elements are described.

According to UE commission:

1. The term public-private partnership ("PPP") is not defined at Community level. In general, the term refers to forms of cooperation between public authorities and the world of business which aim to ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of a service.

2. The following elements normally characterise PPPs:

• The relatively long duration of the relationship, involving cooperation between the public partner and the private partner on different aspects of a planned project.
• The method of funding the project, in part from the private sector, sometimes by means of complex arrangements between the various players. Nonetheless, public funds – in some cases rather substantial – may be added to the private funds.
• The important role of the economic operator, who participates at different stages in the project (design, completion, implementation,

\(^1\) It derives from Stability and Growth Pact draws up in 1999.

\(^2\) COM (2004) 327, 30 April 2004. According to “GREEN Paper” (8.) «[...] any act, whether it be contractual or unilateral, whereby a public entity entrusts the provision of an economic activity to a third party must be examined in the light of the rules and principles resulting from the Treaty, particularly as regards the principles of freedom of establishment and freedom to provide services (Articles 43 and 49 of the EC Treaty), which encompass in particular the principles of transparency, equality of treatment, proportionality and mutual recognition». 
funding). The public partner concentrates primarily on defining the objectives to be attained in terms of public interest, quality of services provided and pricing policy, and it takes responsibility for monitoring compliance with these objectives.

- The distribution of risks between the public partner and the private partner, to whom the risks generally borne by the public sector are transferred. However, a PPP does not necessarily mean that the private partner assumes all the risks, or even the major share of the risks linked to the project. The precise distribution of risk is determined case by case, according to the respective ability of the parties concerned to assess, control and cope with this risk.

So, in this context the partnership between public administration and private societies became necessary to develop works’ project. Furthermore, it is a good choice to resort to private conventions because it’s the place where the opposite interests found agreement.

In effect, it is important to underline, that generally P.A. signs agreement with private company to satisfy public aims but the practical experience shows that PPP reaches best results thanks to capitals, know-how and working methods of the private sector.

In this way it is possible to realize a complex procedure in which there are at the same time: design, finance, build, operate and maintenance.

2.1. PPP European model:
In Italian legal order, the Legislative Decree n. 152/2008 introduce a PPP agreement’s definition changing the Code of public contracts³.

3 In this way, the Italian Code of public contracts, d.lgs. n. 163/2006 defines the PPP at the paragraph 3, 15-ter: «Ai fini del presente codice, i “contratti di partenariato pubblico privato” sono contratti aventi per oggetto una o più prestazioni quali la progettazione, la costruzione, la gestione o la manutenzione di un’opera pubblica o di pubblica utilità, oppure la fornitura di un servizio, compreso in ogni caso il finanziamento totale o parziale a carico di privati, anche in forme diverse, di tali prestazioni, con allocazione dei rischi ai sensi delle prescrizioni e degli indirizzi comunitari vigenti. Rientrano, a titolo esemplificativo, tra i contratti di partenariato pubblico privato la concessione di lavori, la concessione di servizi, la locazione finanziaria, il contratto di disponibilità, l’affidamento di lavori mediante finanza di progetto, le società miste. Possono rientrare altresì tra le operazioni di partenariato pubblico privato l’affidamento a contraente generale ove il corrispettivo per la realizzazione dell’opera sia in tutto o in parte posticipato e collegato alla disponibilità dell’opera per il committente o per utenti terzi. Fatti salvi gli obblighi di comunicazione previsti dall’articolo 44, comma 1-bis del decreto-legge 31 dicembre 2007, n. 248, convertito, con modificazioni, dalla legge 28 febbraio 2008, n. 31, alle operazioni di partenariato pubblico privato si applicano i contenuti delle decisioni Eurostat».
Project financing (PF) represents one of the main applications of PPP. Also private individuals have a stake in finance public projects given that they make profits from the work management, that permits to recover their investments. PA and private subjects have different aims: the first one, aimed to integrate public resources (financial, professional and managerial) in order to better or innovate the offer for a public service for the community, while private societies want to obtain a compensation of the resources invested in the initiative. So, economic operator decides to invest their capitals in works for the community only if the management produces cash flows that repay and reward him for his investments and services. This characteristic implies that the private can finance only projects that produces cash flows.

Generally, project finance can be defined as:

«a financing operation of a specific economic unit in which the sponsor is willing to consider, from the outset, the cash flow and the profit of the economic unit as the source for funds which will allow the loan to be repaid and the activity of the economic unit as a collateral guarantee on the loan» (Nevitt, 1987)\(^4\).

This institution was born in Anglo-Saxon countries, in particular in the USA in the 20’s, in petrochemical and electricity sectors\(^5\) but it developed in Italy during the 1990s because of public economic funds were insufficient to build infrastructures and so it was more convenient to finance public works with private economic resources\(^6\).

The presentation of a project by the private with all elements required represents the conjunction between p.a. and societies. In effect, generally

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\(^5\) In effect, in the XII-XIV century the Frescobaldi, Florentine bankers financed the English monarchy to exploit Devon’s silver mine, with the guarantee for them, for a year, to control the silver mining. Other examples of private financing are: Colombo’s expedition in 1492 and India’s Company were financed by the monarchy that were repaid by the travel’s wealth) and it increases with the transition to a liberal economy (for example, the build of English Channel, the so called “Eurotunnel” was realized with p.f.).

\(^6\) This particular figure was utilised in Italy in order to build Naples’ Central business area and Naples’port: Porto Fiorito.
speaking\(^7\) the inevitable characteristic of PF is the project and not the subject\(^8\) because only the first one produces cash flows that repaid the loan. From juridical point of view, project financing is a complex financial operation made up of a number of contracts (concession, financing, contracting, supply, guarantee, building and maintenance) that the Italian legislator qualifies as specifically a kind of building and management concession contract but it is very difficult to give it a unequivocal definition\(^9\). For this reason, the Italian law concerning PF changes over and over again. This is due to the fact that this procedure regards not only juridical world, but also economic, financial, and technical range: as well known, there are sectors influenced by technological progress. This few elements show that PF is something more of a simple financial procedure but a method to realize great infrastructural projects, until now State’s prerogative. In Italy, from 1998 to date there were many of legislative changes that need to be taken into account. They are briefly discussed in the following Table.

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<th>Italian Laws</th>
<th>Novelty aspects</th>
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<td>n.418/1998</td>
<td>For the first time, this law introduces PF in Italy and give it a systematic regulation; It introduces promoter’s figure; It regulated PF award procedure. It includes PF in PPP contracts;</td>
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\(^8\) In this meaning, Autorità per vigilanza sui lavori pubblici, Determinazione 18 luglio 2000, n. 34: unlike the traditional financing to a company owner based on subject’s economic and financial balance, project financing is based on corporate earnings prospects and cash flows expected by a specific initiative. So, public infrastructures are built with project financing because it generates cash flows di gestione and it is able to satisfy public needs.

\(^9\) Code of public contracts, paragraph n. 153, 1: «Per la realizzazione di lavori pubblici o di lavori di pubblica utilità, [...] le amministrazioni aggiudicatrici possono, in alternativa all’affidamento mediante concessione ai sensi dell’articolo 143, affidare una concessione ponendo a base di gara uno studio di fattibilità, mediante pubblicazione di un bando finalizzato alla presentazione di offerte che contemplino l’utilizzo di risorse totalmente o parzialmente a carico dei soggetti proponenti». 7
<table>
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<th>Law</th>
<th>Description</th>
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<td>n. 144/99</td>
<td>It establishes the UTFP (Unità Tecnica della Finanza di progetto), a special authority with the role of assistance to PA in the application of PF procedures.</td>
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<td>n. 433/2001</td>
<td>It introduces supplementary rules in special sectors.</td>
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<td>n. 166/2002</td>
<td>It introduces new rules to encourage PF: in particular, the right of first refusal or pre-emption (in Italian “diritto di prelazione”) and the possibility for the privates to present proposals in PA planning period.</td>
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<td>n. 62/2005</td>
<td>This law, after Commission UE’s procedure in the event of infringements of competition n. 2001/2182, introduces new rules of publicity in order to inform other competitors of the promoter’s privilege.</td>
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<tr>
<td>d.lgs. n. 163/2006</td>
<td>The Contract Code recognizes the previous rules and extends it to the services.</td>
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<tr>
<td>d.lgs. n. 113/2007</td>
<td>The most important innovation of this law was the abolition of the right of first refusal or pre-emption.</td>
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<tr>
<td>d.lgs. n. 152/2008</td>
<td>It gives more importance to promoter.</td>
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<tr>
<td>d.l. n. 70/2011</td>
<td>It introduces the right of first refusal for the PF strategic infrastructures procedures if it is provided in the tender notice.</td>
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<tr>
<td>d.l. n. 1/2012</td>
<td>It introduces new regulations in theme of feasibility report</td>
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<tr>
<td>d.l. n. 83/2012</td>
<td>It introduces new rules.</td>
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Many private subjects are involved in PF procedures:
4. Promoter.
Promoter is the most important figure during this procedure. Since the start of the procedure, he takes an important role: he is the bidder. In the second part, after the adjudication, he becomes the contractor and so manages the public work.
In most cases the concession contractor will found a project company, or another company with a patrimonial autonomy, to realize the project and make the specific income for the creditors. Effectively, one of the most important feature of this financial operation, is represented by an independent juridical company (SPV – Special Purpose Vehicle), that ensures the project legal, economic and financial independence. It permits to separate the project cash flow from the assets of the subjects involved into the project and it also establishes the so called “ring fence”. Italian law evolution – in consideration of the European economic and juridical observations\(^{10}\) has influenced the private role as a promoter.

\(^{10}\) In effect, law n. 109/1994, article 37-ter, paragraph 1, introduced promoter’s right of first refusal or pre-emption - i.e. the right for the promoter to became the contractor, if he adapts his proposal to public administration’s one. But, as it was observed, this particular right allowed to choose the contractor without a public tender, imposed by European law in order to respect the principle of competition. For this reason, European Commission initiated an infringement procedure against Italy (n. 2001/2182). While the procedure went on, italian law changed in order to satisfy European requests. Law n. 62/2005 introduced appropriate measures of advertising in order to inform the others competitors about the right of first refusal. After that, this discipline was transferred into the Code of public contract, decree n. 163/2006, that implemented directives 2004/17/CE and 2004/18/CE: articles from 152 to 160 regulate project financing. In 2007, Italian legislator deleted the right of pre-emption. After the Code, European Commission initiated a second infringement procedure against Italy (n. 2007/2309) because, even if the right of refusal was repealed, other aspects were in contrast to European principles (but Court of Justice of the European Union had not take this on board with
For this reason, he lost his central part in all procedure: in effect, in the past the promoter introduced a project that followed the public administration’s triennial planning; now he introduces an offer after the P.A. announce tender notice. In these particular cases, the PA is the promoter and the private proposal is based on the feasibility study. In the public initiative procedures there is a degradation of the private role as a promoter that fallow more and more PA’s specific requests and so in this cases the private becomes the promoter only at the end of the adjudication. If this complies effective competition and par condicio’s principles that have to characterize public tender, at the same time it’s to the detriment of the private incentive and shows a inutility of these procedures compared to the traditional concession contracts of building and management of public works. Surely, European principles like effective competition, par condicio, equality in tendering procedure guarantee independence and neutrality choice by P.A. Moreover, this allows to control competitors behavior. Besides, competition can reduce also the successful tender’s profit margin, and so as a consequence P.A can obtain best planning solutions and convenient contractual terms. However, in Italy there is an important incentive and privilege for the promoter that is the right of first refusal or pre-emption (in Italian “diritto di prelazione”). To one side, this particular right could be an unwanted restriction of competition but on the other side it could incentive private individuals. In fact, in some cases the aspirant promoter/the candidate o be promoter has the risk to does not succeeded in became the contractor.

5. Conclusions.

sentence, sez. II, 21 february 2008). So, Italian law changes again in 2008 with decree n. 152: first af all, it includes PF among the cases of PPP in article 3 paragraph 15; secondly, this decree emends the procedure of PF’s selected tender - focused on the promoter’s choice - regulating three different procedures, two of which are at public initiative (for one of it, there is the right of first refusal) and the other one is at private initiative; thirdly, the private operator can participated at public programming phase by presenting proposal not included yet in planning, and public administration is obliged to examine it (art. 153, paragraphs 19 e 20). Finally, in 2011 with decree n.70, legislator has modified again art. 153, paragraph 19, in order to highlight promoter’s figure. In this cases, contracting authority has to put private’s preliminary project at the basis of tender procedure at which also private – called promoter – can participate.
All these considerations underlines that Italian discipline of project finance is still influenced by a very old point of view on the relations between Public Administration and private economic operators. In fact, there is not a real private business initiative because the projects must be based on PA economic planning. In effect, in Italy the aim of politic integration prevails on horizontal subsidiary principle (it means that decisions should be taken at the level closest to the population).

In conclusion, we will see in the future if Italy will exploit the advantages of private know-how as for Anglo-Saxon experience because project finance could ensure a rapid development of infrastructure and raise efficiency and effectiveness of standards being supplied.