

## Concession Contracts and Public Private Partnership Contracts – Ordinary Contracts or a Legal Body that Lays the Premises of a New Discipline of Law?!

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History shows that since the beginning of time state formations have been aware of the fact that they have financial resources many times smaller than the needs of society for better infrastructural services. Since two thousand years ago, since the time of the Roman Empire, initial forms of contracts that we know today as concession contracts or public-private partnership contracts were applied. In the Roman Empire, a network of post offices was developed that accompanied the expansion of the Roman legions and was simultaneously associated with the construction of roads in all the provinces of the empire. Post stations located near small communities, near large horse stables, warehouses, workshops, hotels and military garrisons were built and managed by a private partner for an initial period of five years.

### **The main beneficiary sectors of concessions and PPP – snapshot of the current situation**

The statistics of the European Development Bank show that in Europe according to the data for 2021 the main beneficiary sector of public private partnership contracts is that of transport with a value of 6 billion euros of transactions, followed by the environment where over 866 million euros have been invested for 9 projects, all these projects implemented in France, and in third place is telecommunications with 3 projects that were related to broad-based Internet coverage and were also applied in France<sup>2</sup>.

In Albania is the same reality, where, according to the Annual Summary Report "Performance of Concession and PPP Contracts for the year 2021"<sup>3</sup>, published by the Ministry of Finance and Economy, it results that in total, the number of concession contracts /PPP approved until 2021 marks 228 contracts, but 5 of them have been resolved, as a result the current number of concession/PPP contracts in Albania is 223. The energy sector is the first beneficiary with 186 contracts from which 3 have been resolved and have a total value of 415.2 billion Lek. The second sector with the largest weight in terms of the value of the contracts is the transport sector, with 20 contracts in

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<sup>2</sup> European PPP Expertise Center, [https://www.eib.org/attachments/publications/epcc\\_market\\_update\\_2021\\_en.pdf](https://www.eib.org/attachments/publications/epcc_market_update_2021_en.pdf)

<sup>3</sup>Annual Summary Report "Performance of Concession and PPP Contracts for the year 2021" <https://finansha.gov.al/wp-content/uploads/2022/11/Raporti-Victor-i-Permbledhur-2021.pdf>

total with a total value of 100.6 billion Lek followed by the environment sector with 6 contracts in total with a value of 25.8 billion Lek, which consist of building the system waste processing, forest management, as well as the use of water resources.

### **Legal nature of concession contracts and PPP contracts**

Reality demonstrates that the public private partnership contract, regardless of the sector where it is applied, intersects with both public law and private law, so the clear positioning of this contract between these two main branches of law is important.

Contemporary doctrine revolves around the idea that public-private partnership relationships are founded on contracts of administrative or civil origin. Currently, there is a lot of talk about administrative contracts, the genesis of which can be found in ancient Rome, when the lands occupied by the Romans were returned to *Ager publicus* (property of the Roman state). The state transferred these lands to the use of the parties by means of a contract of public law, but which always had a derogatory clause from common law in the form of a praetorian order - *interdicta de precario* - which guaranteed the state the possibility to request the return of *ager publicus* by the parties at any moment without any restrictions or sanctions.

Mainly in European legal doctrines until a few years ago, concession and Public Private Partnership contracts, despite the permanent ambiguity regarding their legal regime, influenced by French doctrine, have tended to see these types of contracts closer to the sphere of administrative law than civil law, and even less considering it an independent discipline of law.

To approach a conceptualization that allows us to distinguish public-private participation contracts from other administrative contracts, we must consider that PPP contracts are one of the ways in which the state is connected to individuals (contractual relationship), usually companies, characterized, essentially, by their technical and financial complexity, for which the state contracts the financing, construction, development, operation and maintenance of an infrastructure work, for a period of time sufficient for the individual/private entity to recover the investment his and receive a reasonable profit (which can be determined in advance in the contract). In the end, ownership of the work reverts to the state. This contracting modality should be used only if none of the typical administrative contracts are suitable to perform the work or work for which the state needs.

It should always be borne in mind that the "heart of the administrative contract" which justifies its existence is precisely the public interest. Administrative contracts and specifically public private partnership contracts allow the public administration to procure works, services, supplies and goods that it needs in order to ensure the continuity of the public service, fulfilling the public interest. However, in fulfilling its activity, the public administration and the state must maintain the balance between the public interest and that of individuals<sup>4</sup>, and in this spirit come the provisions of Article 10 of the Code of Administrative Procedures of 1999, which provided that: " *The public administration, in the exercise of its functions, protects in every case the public interest, as well as the constitutional and legal rights and interests of private persons*". If we refer to the current Albanian Code of Administrative Procedures of 2015, we will not find an explicit expression of the prevalence between public and private interest, but the same spirit is preserved in the provisions of articles 1, 4, 12, 119/1 and 123.

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<sup>4</sup> Article 119/1 Law no. 44/2015 "Code of Administrative Procedures" which expressly provides that the public body enters into administrative contracts for the realization of a public interest which the public body serves.

In this line of ideas, we note the participation of the private sector in projects that are considered to be beneficial for the whole community or have a social impact that exceeds purely individual benefit, where the assumed risk of contracting with the state is minimized, mainly in what refers to financing, maintaining the economic-financial equation of the contract, regime and public legal prerogatives, in function of the realization of the project, through figures of private law, apparently "mixed", but with certain guarantees given as a partner of the state, in order to simplify the procedures of the public contracting regime.

From the above we can conclude that public private partnership contracts are a type of contract with increasing dynamics due to the ever more frequent use by governments, taking different forms and specifications and the "suit of administrative law" does not fit to them, but even the elements and tools of private law are not sufficient to characterize them completely. Another invincible argument for the "sui generis" nature of these contracts is related to the specific way provided for the resolution of disputes, where in most countries of the world, including Albania, after concluding a public-private partnership contract, the parties usually foresee to resolve their resolutions before arbitration courts. Resolving disputes through an alternative, non-judicial way such as arbitration, means that the same legal provisions, which are not administrative in nature, apply both to the private party contractor and to the public administration as contracting authority. As a result, the public administration enjoys the same contractual freedom enjoyed by private law persons, and moreover, the public administration does not have the prerogative to unilaterally terminate the contract.

From the above, it can be concluded that concession and PPP contracts require not only a more precise conceptual delimitation but also a more careful use, paying special attention to the drafting of these contracts and the creation of a responsible institutional framework with clear prerogatives for its regulation, monitoring and control. From the above, exists an immediate necessity for the creation of a new branch in the field of law, which regulates relations in the field of concessions and public-private partnership, being justified as a necessity of the reality of world economies which since the 1980s have increasingly appealed to the use of these contracts and the inclusion of private financing in policies, infrastructure and public works, providing technology, innovation, and better quality of services in real time for citizens who are the focus of every public administration body anywhere in the world.

### **The Albanian legal framework dedicated to concessions and PPPs**

Despite the archival data according to which the first tar concession contract in the Albanian territories dates back to 1855, approved by the decree of the Sultan from the High Gate, which gave a French company the use of the Selenica's tar for 99 years, the concessions and PPPs in Albania according to the modern concept were implemented only after the post-communist period from 1992 in several forms focused mainly on: privatization of enterprises; Public Procurement Contracts performed on the basis of the Law on Public Procurement 7971/2015; concession contracts performed on the basis of law no. 7973/1995 for concessions and participation of the private sector in the public sector and in other forms such as rent, usufruct or other models on the use of property.

The legal framework dedicated to concessions and PPP is very complex, being based like all legal disciplines on the Constitution, where in article 11/1 it is clearly provided that: *"The economic system of the Republic of Albania is based on private and public property as well as on the market economy and in the freedom of economic*

activity", coordinated with the social objectives of the Albanian state provided for in Article 59 of the Constitution of the Republic of Albania.

The hybrid nature of the concession and PPP contracts is also clearly reflected in the sources of law, where, in addition to the Constitution, the primary source of law are the Civil Code, the Code of Administrative Procedures, the laws on concessions and public-private partnerships, specifically the 1995 Concessions Law, the law of 2006 and the law 125/2013 "On concessions and public private partnership" as amended, the Albanian judicial decisions and those of the European Court of Human Rights as well as the contract laws which have been approved in the Albanian Assembly, a series of concession contracts, as well as the decisions of the Council of Ministers in their implementation.

Interstate relations with international elements that mainly present the concession contracts and those of public-private partnership, can provide as source of right also foreign legal norms. We are referring here mainly to foreign laws subject to regulation in contracts concluded between the contracting authority of the Albanian state and the foreign Concessionaire. These contracts often refer to English law, mainly in the case of concessionary agreements in the field of aviation, where the regulation by foreign, concretely English legislation is clearly provided for in the "regulating law" section.

However, the main legal framework that regulates concession and PPP contracts is Law 125/2013 "On Concessions and Public Private Partnership", recently amended in 2019 with substantial amendments in terms of increasing the role of the Ministry responsible for the economy and finances in the evaluation and approval of concessions/PPP since before the announcement of the concession/PPP awarding procedure; after the negotiation of the contract with the operator declared the winner and before its signing. But in order to ensure the proper exercise of competences in this field, as evidenced in one of his articles dedicated to concessions and PPP, Professor A. Angjeli<sup>5</sup>, it is extremely important to provide well-qualified human resources for the evaluation of concession and PPP projects from the legal view, as well as for the evaluation of the financial risk analysis including their effective monitoring. The increase of human capacities, training and the exchange of know-how with entities such as UNECE, IMF or the World Bank in this field constitute a long-term investment and guarantee for the smooth progress of work in this sector.

On the other hand, we cannot leave without mentioning the latest developments in Albania, where with the opening of Albania-EU negotiations after the holding of the First Intergovernmental Conference in July 2022 and after the bilateral meetings, as well as the completion of the screening process, the legislation dedicated to public procurement and to public private partnership concessions as part of chapter 5 "Public Procurement" will have to be aligned with EU directives and therefore we will have a series of legal changes which will be mainly focused on strengthening processes and capacities monitoring, increasing transparency, ensuring competition and increasing value for citizens in implementation of PPP projects.

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<sup>5</sup> Academic, Ten questions and answers related to PPPs, link: [Dhietë pyetje e përgjigje për Partneritetin PublikPrivat\(PPP\)](https://www.panorama.com.al/Dhiet%C3%ABe_pyetje_e_pergjigje_p%C3%ABar_Partneritetin_PublikPrivat(PPP)) ([panorama.com.al](https://www.panorama.com.al))

### **The other side of the coin – Failed cases of concessions and PPPs**

Until now, this study has paid special attention to the importance of PPPs and concessions for policymakers and citizens, highlighting the positive aspects that these types of contracts bring to the economy, giving breathing space to every economic and banking system on the one hand, and ensuring citizens in short time to qualitative services.

But what are the main risks to which we are exposed in case of implementation of short-sighted policies, mismanagement of the concessionary projects or PPPs? In order to illustrate these issues below we will bring some of the cases of failure of PPP contracts in Europe as follows:

- The so-called "Castor"<sup>6</sup> project would be the largest offshore gas storage plant in Spain. However, the plant caused more than 1,000 earthquakes in an area that, in the past, did not suffer from seismic activity. Despite never being used, the Castor<sup>7</sup> project has so far cost Spain 3.28 billion euros, an amount currently set to be paid for through increased gas bills. This includes €1.35 billion that was paid as unfair compensation to the private companies involved when the facility was taken into public ownership. The earthquakes threatened the health and well-being of citizens in Spain. Poor planning and lack of due diligence account for not identifying these risks. In the project, there is no assessment of the impact on the environment, especially for seismic risks by the Ministry of Environment<sup>8</sup>.
- Nya Karolinska Hospital Solna, Sweden<sup>9</sup>. Swedish authorities awarded sole bidder Swedish Hospital Partner a PPP contract to build and manage Nya Karolinska Solna Hospital. It was claimed to be "one of the most advanced hospitals in the world" but now, especially after the COVID-19 test, it is known as "the most expensive hospital in the world" which, despite the costs, is still not fully operational due to technical failures.
- The new court of Paris in France<sup>10</sup>. In 2009, the French Ministry of Justice announced plans for a new Court in Paris, as the previous building was old, small and did not meet the security standards. In 2012, a public private partnership was agreed with a special purpose entity called Arélia. The PPP contract that was concluded was quite controversial and was criticized by the French Senate and the Independent Court of Auditors because it was too expensive, complex and lacked transparency. The construction of the court was awarded with PPP until 2044, with a total cost of 2.3 billion euros. However, experts fear that the cost will increase over time. Despite being one of the governments with the most experienced legal department in the world, this PPP contract has proved to be extremely complex and difficult to monitor, causing the Independent Court of Audit to come out in 2017 with a report assessing that: PPPs should not be used for prisons and judicial system buildings or properties.

The conclusions drawn by the states themselves but also by the World Bank for the failure of these cases are mainly focused on the following arguments:

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<sup>6</sup> Prepared by Marta Conde, Josep Nualart, Monica Guiteras and Alfons Pérez, "Observatori del Deute en la Globalitzaci (ODG)

<sup>7</sup> [www.thecorner.eu/news-spain/spain-economy/spain-inflation-up-to-6.1-in-february-core-inflation-at-40-year-high-of-7.7/104801](http://www.thecorner.eu/news-spain/spain-economy/spain-inflation-up-to-6.1-in-february-core-inflation-at-40-year-high-of-7.7/104801)

<sup>8</sup> [Guarantees \(eib.org\)](http://Guarantees(eib.org))

<sup>9</sup> [SEK 237 billion to companies behind NKS | SvD](http://SEK-237-billion-to-companies-behind-NKS-1-SvD)

<sup>10</sup> [The juicy "PPP" for prisons and courts, it's over \(parismatch.com\)](http://The-juicy-PPP-for-prisons-and-courts-it-s-over-parismatch.com)

- Regarding the construction of the hospital in Sweden, the PPP costs applicable in the health sector are extremely high and may pose a threat to the entire health system. Moreover, special attention should be paid to the terms of reference of hospital equipment, the technology of which is constantly updated, while the granting of concessions or long-term PPPs over 20 years leads to the creation of large and gigantic hospitals but with outdated technology or non-functional creating the "white elephant" phenomenon.
- In the case of other projects, including the Castor project or that of the Paris Court, there is a marked lack of transparency and a state surveillance activity that leaves much to be desired. The lack of transparency always leads to well-founded suspicions of corrupt actions to the detriment of citizens.
- Another argument that predetermines the success or failure of a concession or PPP project is the lack of experience of the concessionaire. In the case of the Castor project, this was fatal because the implementing party not only did not have the experience and the right portfolio of works, causing over 1000 earthquakes in the first year, but what is more flagrant was the lack of environmental impact assessment, especially in terms of seismic risks.
- Another fact that can lead to the failure of a concession contract or PPP, although it cannot be noticed in the first years of operation, is the bad drafting of contractual provisions, as a result of which the state is burdened with financial unaffordable costs.

### **The new dimension of PPPs where value for money is devalued before value for people and value for the future**

To date, PPPs have traditionally focused on quantitative evaluation, giving key importance to the concept of "Value for Money" when it came to evaluating a PPP project proposal. But the recent challenges faced by the PPPs (Covid-19, climate change, etc.) especially in developing countries have led to a consensus to pay special attention to the expected results, mainly in terms of addressing the needs of citizens who are impacted by PPP projects.

In 2015, the United Nations adopted 17 sustainable development goals as part of the 2030 Agenda for Sustainable Development, which called for the use and expansion of partnerships between the public and private sectors. At its International Forum on PPPs in March 2016, UNECE clarified that PPP models that put the public interest first should be identified and well promoted.

UNECE recognizes that "Investment in infrastructure in general is a key driver of development and social progress, creating new jobs, higher productivity and boosting trade. Such investments can directly eradicate poverty by achieving, among other things, universal access in infrastructure and have a more effective delivery of public services, such as health and education services, renewable energy and water and sanitation."

Considering the new reality, UNECE has developed the definition of this new concept by defining PPPs in a new light as: "*a people first public private partnership is a long-term contractual relationship between public and private sectors where the essential purpose is providing added value to citizens, where we have a commitment to serve citizens and protect communities, in the areas where the project is developed, always keeping in mind the interests of the people*".

### **Future predictions and future value**

The COVID pandemic situation and the impacts of climate change have revealed the fragility of long-term PPP projects that have an operational horizon of many years. The extended periods of implementation of a PPP project require authenticity and guarantees in the future as well.

Future proofing is described as the process of predicting the future and developing methods to mitigate its impacts. Future-proofing when adopted in PPP planning adds a layer of resilience to projects and aims to increase their sustainability and longevity. Future-proofing leans toward flexibility planning strategies that accommodate future events and changes while ensuring infrastructure facilities are not prematurely depreciated. It can also be related to building infrastructure that will be resilient to future adverse weather events (force majeure) that are occurring with increasing intensity and frequency. Future-proofing also adds value to infrastructure in the sense that investors are more likely to invest in infrastructure that has integrated elements that increase project sustainability and the financial viability of their investment.

The future evaluation of PPP projects should be qualified, qualitative and not only quantitative. Currently, new innovative methodologies of quantitative assessment are being developed all over the world allowing the processing of comprehensive social, economic - financial inputs, which cumulatively address Value for Money, Value for People and the notion of Value for the Future.

In 2021, UNECE published its people-first PPPs (PfPPP) assessment methodology and user guide for a self-assessment tool that allows PPP project proponents to carry out a quantitative and qualitative PfPPP assessment. This methodology aims to provide a common language for a basis of understanding of PfPPPs by all project stakeholders. The self-assessment toolkit should be used during project identification, development and implementation. It provides standards for evaluation that include: access and equity; economic effectiveness and fiscal sustainability; environmental sustainability and resilience; replicability; and stakeholder engagement.

### **The notion of value for people**

The new UNECE<sup>11</sup> Guiding Principles envisage the notion of "Value for People" (VfP) where projects should: address critical challenges facing humanity; the fight against hunger and poverty; promoting human well-being by increasing access to essential services; addressing a social agenda that promotes social cohesion; overcoming inequalities; and achieving gender equality and women's empowerment. Furthermore, projects must avoid all forms of discrimination based on race, ethnicity, creed and culture. Projects should bring flexibility to infrastructure and mitigate risks by adapting to climate change, reduce carbon dioxide emissions in order to develop more sustainable production and consumption models.

There is no doubt that PPPs can help countries achieve the Sustainable Development Goals if Value for People becomes a central perspective of their implementation. Implementers should be aware that each country has its own specific goals for the SDGs and therefore PPP project implementation strategies and adopted models should be tailored to specific priorities designed to maximize positive impacts on their citizens and to mobilized the support of civil society.

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<sup>11</sup> [Homepage | UNECE](#)

**The immediate challenges in the field of concessions and PPP for Albania:**

1. Lack of doctrine and training of civil servants, magistrates and corporate employees on the evaluation of concession and PPP projects, as well as the implementation and monitoring of these projects. Institutions such as the School of Public Administration, the School of Magistracy or the provision in the curricula of the faculties of law and economics for second-level students are more necessary for the preparation of human resources and the strengthening of human capital.
2. Guide manuals and recommendations in the field of concessions and PPPs prepared by international institutions such as the IMF, the World Bank or UNCITRAL and UNECE are not sufficient as the analysis of the Albanian context in this field is required, so the publication of studies should be promoted and encouraged in this field.
3. Legal framework amendments dedicated to public procurement and concession contracts and public private partnership contracts not only as a result of the European integration process and negotiations where legal alignment with European Union directives is required but also other legal amendments which ensure more analytical, evaluation and monitoring prerogatives for contracting authorities.
4. accordance of due importance to these contracts as well as the creation of a new discipline of study, the right of concessions and public-private partnerships, having specific subjects, legal norms and sources, but also specific sanctions which meet all the premises for the creation of an independent discipline of law or economic science.
5. Increasing of public legal education activities on concession contracts and PPPs by state institutions in order to inform citizens as taxpayers and mainly journalists in order to understand the basic concepts and avoid disinformation or misinformation of citizens.
6. Increasing transparency about concession and PPP contracts as well as broader public consultation with the aim of preliminary assessment of the possible impact that these types of contracts can bring on society.

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