

French Public - Private Partnerships (PPPs) law and culture

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Abstract

The present paper deals with the Public - Private Partnerships (PPP) in French law and their application in the field of culture. The concession model is a traditional mechanism of public constructions and public services delivery. France has operationally privatized its economy through this scheme, which therefore constitutes a significant tool of State interventionism. The recent similar tool, the PPP contract, has more similarities than differences against it. Some States, particularly France, have created and developed their own museums over the last three centuries and enhanced their heritage treasure, in a way opposite to the concession and to the PPP, although PPP has recently been in use. So, museums management is symmetrical to the public infrastructures one, from which it has started to borrow the PPP tool. It is recommended on international scale to systematically correlate, in law as well as in practice, sponsorship contracts to PPP contracts. Besides, PPP should respond to needs in scientific research, security guarding services for museums and archaeological sites as well as sustainable development projects.

Keywords. Concession, Public - Private Partnership (PPP) contracts, French legislation, cultural technical works and services, museums, cultural sponsorship.

1. Introduction: French PPPs and culture and their impact on international scale

France is a pioneer country not only in contracts of concession of public constructions or of the delivery of public services, to private contractors, but also in cultural infrastructures, mainly museums. Therefore, it would be interesting to make use of this national case to analyze a worldwide mechanism similar to concession contracts, the Public-Private Partnerships (PPPs), and their applications in the field of culture.

The hypothesis of the present paper is that the French PPP system is conducive to success in public competence fields, like the cultural one, and so it has a great significance on a comparative international scale.

2. The precedent of concession contracts and the PPPs

The first known case of concession contract has to do with a great civil engineering project for the people of Eretria, in Greece, in the 4th century BC. They hired a foreign engineer, Chairephanes, in an attempt to drain a marshy area, which the contract calls the lake of Ptechaiö, situated rather far from the city, at the heart of their territory. This project exemplifies the "Build-operate-transfer (BOT)" model, whose financing was undertaken by the contractor and his partners, who would take advantage of the land for ten years.

The concession contract was in use in the times of the Roman Empire and later, in various countries. In France, the concession acquired a particular significance due to the fact that in the period of the one-class (liberal) state, which was formed in the 18th century, the principle of the abstention of the state from any economic activity was strictly applied whilst the entities of local self-government enacted an active role to build up the welfare state. The sovereign ideology of this bourgeoisie-type state consisted in the economic initiative of private individuals, in an absolute form. The imposition of this principle led to the abolition of a great part of institutions of the absolute Monarchy, such as extended state lands and public enterprises (Flogaitis, 1991). Afterwards, when the French state wanted to develop some activities with a financial bargain, it had the strategy to make use of the concession model and so, in this sense, it never adopted the principle of full abstention from economy (state interventionism).

Anyway, it is to underline that the Revolution had initially the tendency of damaging monuments, as far as they represented the Ancient Regime, instead of protecting them as a part of the history and the architectural tradition of the country. The opposite movement was exemplified by the case of Louvre Palace, which nowadays constitutes one of the most important museums all over the world. That monumental Palace was converted to the headquarters of the Central Museums of Arts, in 1793, which initially aimed at gathering the royal collections that had been confiscated (Bonetti & Bruno, 2006).

From the decade of 1970 and on, the concession of public service has become actual once again, as a mechanism of public services management. For instance, when in 1982 France put an end to the state monopoly on television emissions, the law previewed their exploitation, and as a result the development and the promotion of culture, through the concession model. That development is quite indicative of the state interventionism as well as of the intrinsic relationship between traditional public monopolies, let alone the exclusive ones, and their functional privatization for a certain period of time through concession.

Finally, it is to signalize that the contract of concession and its current notion have been a typical product of the French legal system, having elaborated the notion of the concession of public constructions. The concession is a form of delegation of a public

service which is defined by article 3 of Law No. 2001-1168, of 11th December 2001 (MURCEF) as a contract within which a public authority delegates the operation of a public utility or infrastructure to a public or private entity whose revenues must substantially derive from the end-users of this utility or infrastructure. The legal framework for these types of contract is mainly the Sapin Law (Law No. 93-122 of 29th January 1993).

In more recent times, PPPs constitute a new model of public procurement, in which public entities and private ones become contractors with a view to realizing a public construction or service. They have been introduced in the French legal order by Ordinance No. 2004-559 of 17th June 2004 and its implementing decrees. It is about administrative contracts under which the granting authority grants to a private entity - through a special company called "special purpose vehicle" (SPV)- the right to carry out the design, construction (or renovation/refurbishing), financing, operation, maintenance and management of public service assets.

According to the Green Book of the European Commission, published in 2004, the characteristics of a PPP are the following:

- The long-term contract
- The private sector financing (sometimes with the public support)
- The risk allocation between the two sectors.

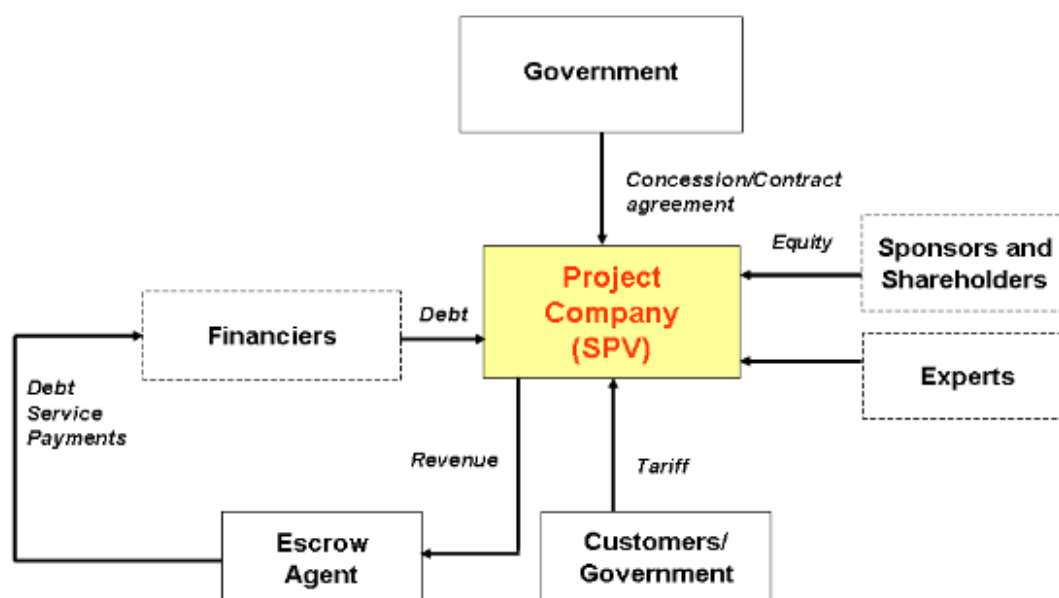


Figure 1. Typical structure of a PPP project. Source: Quium, 2011.

3. Classification and evaluation of PPPs

According to the aforementioned Green Paper, there are two types of PPP tool:

- Contractual PPPs, which have a specific objective and limited duration. Each PPP contract responds to very precise needs, therefore there are various kinds of contractual PPPs.
- Institutionalized PPPs, which imply the establishment of an entity held jointly by the public partner and the private partner. The joint entity thus has the responsibility of ensuring the delivery of a work or a service for the benefit of the public. The establishment of an institutionalized PPP can be done either through an entity in which public and private sectors jointly participate or through the partial privatization of an existing public company. Usually, the public partner controls the company either as a shareholder or through special rights it may hold and the private partner operates the service. This kind of cooperation between public and private partners can be proved to be very positive since the public partner keeps control over the infrastructure service, it may allow for service adjustment over time according to changing needs, conflicts are resolved internally and the public partner acquires know-how from the joint work with the private partner. In France, mixed companies look like the institutionalized PPPs, while this type doesn't exist so far, officially.

In French law there are three categories of partnerships:

1. Public-private partnership
2. Long term administrative lease: it is about a long-term lease granted by a local authority that entitles its private sector holder to proprietary rights on public land used for performing a public service.
3. Authorization of the temporary use: this category, being similar to the previous one, consists in the authorization of temporary use.

Upon the private partner's payment mechanism, PPP projects are classified into two categories:

1. Reciprocal projects: The principal repayment comes from the fees paid by the end-users for the use of the infrastructure or service provided. The height of the fees, the collection mechanism and the payback period are defined in the partnership contract. In some cases, the projects are partially reciprocal, as the private partner may be additionally reimbursed from the public entity (sponsored PPP).
2. Non-reciprocal projects: The principal repayment of the private partner is made from the Contracting Authority through regular payments, called availability payments. These payments are linked to the project's provision within deadlines as well as to its quality level, which means that the licensee is fully rewarded when his performances are superior to contractual standards (administrative PPP).

Besides, PPPs constitute a controversial issue in the scientific level, as implied by the following table of eventual advantages and disadvantages.

Table 1.PPP advantages - disadvantages.

Advantages	Disadvantages
Efficient and cost effective delivery of projects	Insecurity (Lack of co-operation)
Value for money	Poor value for money (Drafting, negotiating, consulting costs)
Normally speedy delivery of projects (Private sector management skills allow the project to be delivered ahead or on time)	Higher capital cost (Higher private borrowing)
Risk allocation (Risk transferred to the party that is best able to manage it)	Lack of contestability and competition (Few companies can technically and financially support PPP projects, therefore enjoying a monopoly)
Efficiencies from integrating design and construction of public infrastructure with financing, operation and maintenance/upgrading	Public sector staff concern (If a PPP replaces a public facility, this may result in concern about the public sector staff's terms and conditions of employment)
Long-term nature of contracts	Architects' marginalization (Absence of law relevant to their reimbursement)
Effective utilisation of state assets to the benefit of all users of public services	All taxpayers are charged with non-reciprocal projects cost (either they use them or not)
Output based specification (Contrary to the restrictive input specification of the conventional procurement)	Deficient output-specification
Innovation and diversity in the provision of public services	
Reduction in the public treasury (PPPs help reduce the capital demands on the public treasury for infrastructure development)	
High Tech projects (Private sector know-how)	

4. PPP pre-contract phase

In France, alternative contractual options in order to justify the use of a PPP contract are to be compared. In the first stage of the preliminary assessment procedure, an examination of the three following criteria takes place (Lichère et al., 2009):

- Complexity, usually for cultural projects
- Urgency,
- Efficiency, inserted with article 2 of Law 2008-735 and resembling to the British PFI/PPP *bestvalueformoney*.

The second stage consists of a comparative analysis, including financial efficiency and risk allocation, in order to come up with the final decision of the implementation in the PPP formula. By the end of the preliminary assessment, a relevant report justifies the choice of the procurement process.

Decree 2004-1119 (modified by Decree 2011-709) provided for the creation of a specialized governmental taskforce (*MAPPP*), which was established by the Minister of Economy and Finance. *MAPPP* is a light structure endowed with 8 staff members, set-up in May 2005 with a scope consisting in any sector, for the entire public sphere. It has been assigned a three-fold mission on partnership contracts:

- Information and promotion, through its interactive website and participation to industry events,
- Support to implementation through assistance to public procuring authorities in preparing & negotiating PPPs and methodological standard-setting,
- Validation of preliminary assessment (required for State-sponsored projects).

Similar bodies have been established by the Ministry of Defense, the Ministry of Justice (called *AMOTMJö*) and the Ministry of Health (called *MAINHö*) (*Réseau RAMAU*, 2009).

In Greece, Public Administration bodies are the *ICPPP* (Inter-ministerial PPP Committee), which is equivalent to *MAPPP*, and the *SSPPP* (Special Secretariat for Public Private Partnerships), which was set up with the adoption of the aforementioned Law 3389/2005 in order to provide *ICPPP* with the necessary support (Maniatis, 2008). According to article 9 of this law, the general principles applied during the selection of the SPV are the following:

- a. Equal treatment
- b. Transparency
- c. Proportionality
- d. Mutual recognition
- e. Protection of the public interest
- f. Protection of the rights of private individuals
- g. Free competition
- h. Protection of the environment and sustainable development

Contracts are awarded by the contracting authority either on the criterion of most economically advantageous bid or on the criterion of the lowest price.

When the contract is to be awarded upon the most economically advantageous bid, the contracting authority will examine and take into account, not only the economic parameters -which is the case of the lowest price criterion- but also various other parameters of the contract scope, such as quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running cost, cost-effectiveness, after sales service and technical assistance, delivery date and delivery period or period of completion and so on. These criteria must be clearly specified by the contracting authority, along with the relative weighting assigned to each of these.

The types of contract award procedure are the following:

- Open procedure: In this case, any private entity may submit a bid, provided that it may be qualified as able pursuant to the requirements of the invitation to tender.
- Restricted procedure: In case of a restricted procedure, any private entity may request to participate, provided that it is qualified as able. In the second stage, only these private entities meeting the qualification criteria are invited by the contracting authority to submit a bid.
- Competitive dialogue: The competitive dialogue is a new procedure introduced by EU Directive 18/2004. In case of particularly complex contracts, for which the contracting authority considers that the use of the open procedure or the restricted one will not permit the awarding of a particular contract, it may use the competitive dialogue procedure. It is widely used in France while in Greece the restricted procedure is usually chosen.
- Negotiation procedure: The contracting authority may use the negotiation in the following cases:
 - After the use of another type of procedure.
 - In exceptional cases involving works or services whose nature or various non-definable factors do not allow prior overall pricing.
 - In the case of service contracts, particularly intellectual services contracts.
 - In the case of work contracts for works performed exclusively for purposes of research, testing or development and not with the aim of ensuring profitability or recovering research and development costs.

5. PPP contracts execution phase

According to the Ordinance of 17th June 2004, a partnership contract must include various clauses relating to the duration of the contract, the risk allocation between the public authority and the private sector, the performance objectives assigned to the private sector, its remuneration, public service obligations, the public authority's control of the implementation of the contract, sanctions and penalties, modification or termination of the contract and dispute resolution. Regarding the disputes arising from the PPP contracts, it is remarkable that French law allows their

settlement, not only through arbitration but also in administrative courts ówhile trial is prohibited by Greek Law 3389/2005- and through alternative methods of prevention and resolution, such as conciliation and mediation. The Ordinance itself and the guidelines published by the Ministry of Economy detail the content of the contract clauses, but standard forms have not been developed.

As for the risk allocation, risks should be transferred to those who are able to control or mitigate them at the lowest cost. The public authority should not transfer to the private partner risks that are under the authority's control, without assuming risks that are out of its control. In the design of a contract, it is crucial to identify and allocate risks before the procurement stage. This should be done by constructing a risk matrix.

Table 2. Risk matrix. Source: Quim, 2011.

Category of risk	Description and possible effect	Allocation
Developmental risk	Insufficient preparatory tasks and project planning leading to delays in procurement and financial close	Government/ implementing agency
Sponsor risk	Financial strength (ability to participate with equity, can arrange third party equity, financially solvent and financial requirement does not exceed capacity, can provide limited recourse, if needed)	Government/ implementing agency
Cost overrun risk	During the design and/or construction phase, the actual project costs exceed the estimated cost	SPV/PP (can pass on to EPC contractor)
Category of risk Description and likely effect Mitigation measures Allocation Time overrun risk	Takes longer time to complete the project	SPV/PP (can pass on to EPC contractors)
Input supply risk	Raw materials and inputs not supplied in time or of less in quantity or of low quality, price escalation of inputs	SPV/PP (may pass on to input suppliers/ EPC contractor)

Operatingrisk	Factors negatively impacting upon operation and available capacity such as, unreliable/ untested technology; increased cost of operation, lower capacity; nature and cost of O&M; inefficient operation	SPV/PP/ O&M contractor
Demand/ revenuerisk	Insufficient demand and/or revenue (due to low demand, leakage, competing facilities, capacity, price setting, augmentation)	SPV/PP; Government in case of PFI type or projects with off-take agreements with government
Changeintaxrates	Changes in tax law or policy that have negative effect on the private party, its assets, or the project	SPV/PP if changes were foreseeable and not discriminatory, otherwise government
Repatriation of capital and profit	Unable to repatriate capital or profit, currency convertibility and transfer	SPV/PP
ForceMajeure Naturalevents	Flood, earthquake, cyclone etc; closure of operation and negative effects on assets and project	SPV/PP
Category of risk Description and likely effect Mitigation measures Allocation Force Majeure- Politicalevents Disputebetweenparties	Change in law, expropriation, revocation of licences, permits etc, civil disturbance, war, non-default termination of contract. Non-compliance of contract provisions, or difference in interpretation of provisions	SPV/PP Government/ SPV/PP

Notes: EPC = Engineering, Procurement and Construction; IA = Implementation Agency; O&M = Operation and Maintenance; PP = Private party in contract with the IA or Government; SPV = Special purpose vehicle.

6. PPP and culture

Nowadays, it is getting more and more obvious that there is a crucial link between culture and economics. Cultural goods need economic support and a country's economy can be significantly improved by cultural heritage projects.

Cultural heritage in Greece is protected by Law 3028/2002 and in France by Decree 2004-178, while a public establishment (*ÉMOC*) is responsible for the supervision of all cultural projects. In the French legal order and the Greek one, there are various common practices, such as the adoption of Greek law 3658/2008, regarding measures for the protection of cultural goods (against criminality) and the relevant stricter penal provisions in the French legal order.

Below there is a chart of the distribution of PPPs upon sector in France.

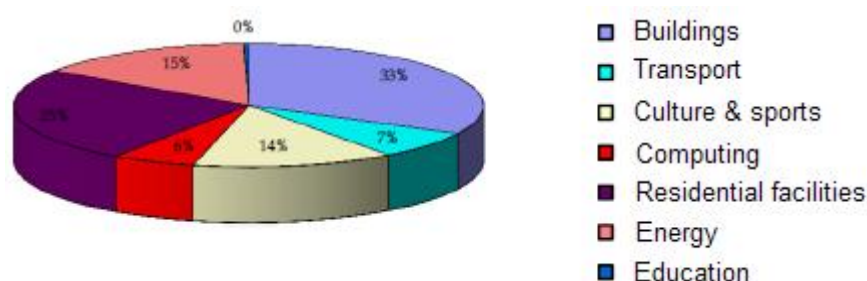


Figure 2: French PPP projects distribution upon sector.

Although the cultural projects are limited in comparison with those of the rest sectors, they still occupy a 14% of all the PPP projects and could therefore constitute a reference point for countries like Greece, with an extremely restricted quantity of PPP projects completed (as for the construction of the buildings), so far.

In early 2007, the first French cultural PPP contract in IT services was signed between the Palace of Versailles and the company Unilog. This project concerned the enhancement of the computers system, mainly for the ticket reservations. In May 2008, the direction of the public institution decided to break the contract due to continuous failures of the private company. There were several problems in the computing system, such as very slow booking system, scarcely updated website, long visitor queues, absence of touch screens etc.

Although the Ministry of Culture had promised the obsolete computing system replacement and a real technological revolution, in fact, Unilog proved to be unable to manage the new technological tools. The causes of this failure are, on the one side, the company's lack of know-how, on the other side, its acquisition from another company, Logica, which created a climate of uncertainty to the employees. So, some of them were led to the decision to leave the company at that crucial moment. Following the contract dissolution, the public entity involved undertook the ticketing system itself and, by the end of 2008, the system was completely restored.

This PPP project, despite its unfortunate ending, is worth studying, since its innovation covers many aspects, as follows:

- It is about a PPP project in the cultural field, so far unknown in countries endowed with important archeological treasures, like Greece, which could be encouraged to use the PPP tool in order to preserve and reclaim its cultural heritage.
- A possibility of virtual museum guiding would constitute a real innovation and example for imitation for many museums.
- The public partner of the project was a certified museum, under the official label "Museum of France". It is obvious that France is very well organized in museums matters, which could be taken into consideration by other states, like Greece, having not yet adopted a legal framework of obligatory certification of museums according to binding standards.
- The gardens of Versailles palace have been inscribed in the UNESCO World Heritage List, which indicates that the notion of heritage covers inter alia the physical heritage related to human intervention. France as well as other countries, like Greece, should promote their physical heritage, preferably as "open museums" and in combination with museums of conventional type. To date, this kind of heritage remains a marginal good in legal terms.

The first cultural PPP project in France consists in the construction of a new cross-border Catalan theatre in Perpignan, which was inaugurated in October 2011. The project for this theatre was carried out jointly by Perpignan and the city of Salt in Spain in order to offer to the public a shared season of shows and co-productions, as well as a cross-border festival. The theatre's mission is to open its doors to all audiences, thanks to a varied programme of performing arts, classical, contemporary, or current (theatre, music, dance, circus, and opera).

Moreover, the construction of the Museum of Civilisations from Europe and the Mediterranean (MuCEM) in Marseille, which has been in use since 2013, included the Fort Saint-Jean, a sort of "museum-walk", connected to the main building through a bridge. The Biarritz Marine Museum is another PPP project, inaugurated in December 2011, which constitutes a scientific approach to oceanography. The heat balance of the building is noteworthy, as it needs no winter heating or summer air-conditioning.

Besides, a PPP service has to do with the digitization of cultural works, available in the site <http://gallica.bnf.fr/>. Over the last years, the National Library of France has contracted with various private partners with a view to digitizing French cultural heritage works, such as newspapers, magazines, audiovisual material, photographs, manuscripts, coins, medals and musical scores.

There are a few more projects, such as the renovation of the zoo in the Park of Bois de Vincennes, which reopened in April 2014 and the museum Camille Claudel in Nogent-sur-Seine, to be inaugurated soon.

7. Cultural sponsorship in law and practice

Definitions of sponsorship vary and the practice has been described as *“an investment in cash or in kind activity, in return for access to the exploitable commercial potential associated with that activity”* (Fabien, 2010). In Greece, Law 3525/2007 defines cultural sponsorship as a pecuniary or non-pecuniary economic benefit consisting in kind, immaterial goods or services, for the enhancement of concrete cultural activities or purposes of the sponsee. Sponsors' motive is to strengthen their corporate image through the identity of social responsibility. They may also take a profit from the consequent tax exemption, as it happens in most countries of the European Union and of North America (Maniatis and Kapralou, 2012). Anyway, the sponsor acquires no right to interfere into the form or the content of the activity on the matter, in virtue of the principle of the independence of the producer involved.

It is to signalize that the question of the law success or dysfunctions for cultural sponsorship has not received considerable research attention. This lack of in-depth analysis may be partly attributed to the fact that some countries have recently adopted the relevant legislation. Indeed, there is an important legislative trend on the matter, as it is the case of France and Greece. France, contrarily to other countries, such as the U.S.A. and the United Kingdom, ignored for a long time the private sponsorship and institutionalized it very recently, let alone in a *“shy”* way (Mirieu de Labarre, 2006). Nevertheless, cultural sponsorships in France have been particularly successful, consisting even in rewards for information to the authorities investigating crimes related to cultural heritage and artistic treasures.

In this context, it is highly recommended on international scale to systematically correlate, in law as well as in practice, sponsorship contracts to PPP contracts. It is to underline that both contractual types are not only new in the legislative level but also comparable within the following scheme of the history of public infrastructure and cultural goods (mainly heritage) management, from 18th century and on, in the Western world, mainly in France (Table 3).

It is to underline that the State has adopted the operational privatization (not the transmission of the property) of its infrastructures through concession of public works and of public services and, very recently, slightly through concession and mainly through the variation of the concession, the PPP. Contrarily to this development, it has acquired a new branch of non-lucrative nature, consisting of museums. This case of growth of the public sector has been combined with traditional methods, such as state property, construction by making use of the traditional public works law instead of concessions etc. The fact that concessions remain almost fully dissociated from the management of museums is attributed mainly to the legally non-lucrative nature of museums. Anyway, some secondary potential functions of a museum, such as parking, restaurants, bookshops, should be regarded as potential reciprocal scopes of a public contract.

Table 3. Phases of public infrastructure and cultural heritage management.

Phase of the period	Public infrastructure management (progress to operational privatization)	Public cultural heritage and arts management (creation and growth of the museums branch of the public sector)
18 th century - 21 st century		
1	State monopolies	Royal collections & buildings (palaces)
2	Concessions	Cultural heritage and arts public museums endowed with former royal collections and buildings (palaces)
3	Concessions and their new variation: ppp contracts	Cultural sponsorship contracts and concessions and ppp contracts for cultural activities and museums

Very recently, there is a tendency of institutionalization of the participation of the private sector, through innovative types of contracts, like the cultural sponsorship and the PPP. So, it is obvious that nowadays PPPs gain ground, not only in the normal field of public infrastructures against concession contracts but also in the heritage field, exemplified by state libraries and museums, against donations and sponsorships. The challenge of the legal and managerial future is to incorporate traditional tools, like the donation contracts, and recently institutionalized tools, like the cultural sponsorship contracts, within the mechanism of PPP contract and its ancillary agreements.

National PPP legislations could include a detailed reference to sponsorship contracts as potential ancillary agreements of each PPP contract, particularly for non-reciprocal scopes. This is plausible particularly for cultural projects needing financial back from big enterprises, such as programmed archaeological public excavations that are dissociated from contracts methodology not only of PPP model but also of public works one. For instance, in Greece, although Presidential Decree 99/1992 refers to archaeological excavations through either direct execution or contract award, the second alternative is very rare.

Sponsorships could support culture in other ways too, for example in the offer of a reward to potential informants of cultural law crimes. The Greek State promised this kind of payment in order to receive information regarding the National Gallery theft, occurred in Athens, in January 2012.

8. Conclusion: the question of convergence of PPP and sponsorship for sustainable development

To sum up, France has operationally privatized its economy through the archetype scheme of concession and the modern variation of PPP contract, which both

constitute a significant methodology of state interventionism in combination with private initiative (alternative contracting out). It is to pay special attention to the fact that over the last three centuries it has created and developed its own museums and enhanced its heritage treasure, in an opposite way, although slightly concession and mainly PPP have recently been in use. So, museums management is symmetrical to the public infrastructures one, from which it has started to borrow the PPP tool.

It is obvious that the hypothesis of the present paper, namely that the French PPP system is conducive to success in public competence fields, has been almost fully verified, although the cultural field needs a special approach, as it is by nature particular and extremely sensitive. So, the French experience may be regarded as very significant, on a comparative international scale, without disregarding the parallel efforts of other countries to benefit from the same tool.

Due to their innovative nature, PPP projects could include new scopes, such as computer services, security services for museums and archaeological sites, scientific research, sustainable development and enhancement of the protection of natural heritage and ecological building construction. Finally, it is important to enhance national PPP laws by correlating them with the sponsorship legislation with a view to encouraging private financing of PPP projects, such as inter alia the archaeological public excavations that could promote cultural heritage and boost the economy. As a result, it is worth making the step towards a new paradigm of the Contracts Law, mainly through the convergence of PPP and sponsorship.

However, France has not been exempted from problems as far as the acceptance of the PPP model is regarded, from 2014 and on, due to a failure relevant to a hospital PPP (Braconnier, 2015). Anyway, it has made no use of this model for nuclear energy technical works and the direction of prisons (Maniatis et al., 2016). The phenomenon of contracted out prisons, associated with PPPs, causes important reactions on international scale, as in the case of the High Court of Justice in Israel, which accepted the petition against privatization of prisons in 2009 whilst the eventuality of contracted out prisons remains blocked in this country (Simmons and Hammer, 2015). Last but not least, regarding the lessons to be learned from the Greek experience with PPPs, what can be noticed for certain is that many of the advantages of PPPs in using private-sector finance have been eroded during the sovereign fiscal crisis linked with the banking crisis (Kitsos, 2015).

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