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# European Public Contracts and Contracts Celebrated in the Exercise of the Administrative Function in the USA Regarding Critical Communications Networks (SIRESP and FirstNet), a Comparative Perspective

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ADMINISTRATIVE LAW

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The present work, carried out in the context of the subject of Administrative Law, in the school year of 2020/2021, under the regency of Professor Doutor Vasco Pereira da Silva, has as its object the comparison between European Public Contracts and Contracts celebrated in the exercise of the administrative function in the United States of America, regarding critical communications networks and it was developed in collaboration with Kristin Jones from Lincoln Memorial University.

This paper will develop the concept of critical communications networks and their significance, identify and explain Public Contracts and the existing legislation to rule them, then focus on Public Private partnerships, using then SIRESP and FirstNet, the emergency communication networks of Portugal and the US, respectively, as a basis for comparison of PPP in the critical communication and, finally, present a problematical issue. The present work does not intend to reach any conclusion, but rather to expose the subject.

## **1. Critical Communications Network**

Critical communications can be defined as the ability of delivering and assuring communication means where conventional networks cannot meet the required demands of quality and reliability and the need for them to work in places or situations that are the most difficult, i.e., networks built for the public protection and disaster relief. Critical Communications are crucial to ensure public safety, as they are the core of the functioning of emergency services, which means that they are essential for the functioning and organization of first responders – ensuring that voice and data delivery meets mission critical standards on a commercial network is nearly impossible and has not been successful because commercial technology lacked a number of important capabilities, which is why public safety agencies must have dedicated and secure networks, in order to prioritize safety data. Their failure or interruption has serious impact on the job of saving lives.

## **2. Public Contracts**

It is of critical importance to assure the most efficient use of public funds when procuring services and goods. This can be done both before, with strict regulations and procedures, and after, with transparency on these spending.

As stated by Transparency International in their G20 position paper in 2015<sup>1</sup>, “Worldwide, procurement spending averages between 13 per cent and 20 per cent of gross domestic product. With such vast sums of money at stake, few government activities create greater temptations or offer more opportunities for corruption than public sector procurement. According to OECD estimates, corruption drains between 20 per cent and 25 per cent of national public procurement budgets. The UN Office on Drugs and Crime states that “a procurement system that lacks transparency and competition is the ideal breeding ground for corrupt behaviour”.

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<sup>1</sup> [https://www.transparency.org/files/content/activity/2015\\_TI\\_G20PositionPaper\\_PublicProcurement.pdf](https://www.transparency.org/files/content/activity/2015_TI_G20PositionPaper_PublicProcurement.pdf)

We will, in the next sections, analyse and compare how this is accomplished in the European Union and in the United States of America.

### **a. Public Contracts in the European Union**

In the European Union (EU), the procedure for public procurement is regulated by a European Directive (Directive 2014/24/EU<sup>2</sup>). This Directive specifies thresholds and specific procedures to be carried out when procuring services and goods by “State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law”.

This Directive is then transposed in each country’s own regulations (i.e., in Portugal it is translated in the Código dos Contratos Públicos<sup>3</sup>).

Also in this Directive, public procurement is encouraged to be done electronically, both to prevent unnecessary interactions between the parties, streamline the process, promote fair competition and facilitate the disclosure of information to the public.<sup>4</sup>

### **b. Public Contracts in the United States of America**

In the United States of America (USA), we have a distinction in federal and non-federal procurement.

Each state and local government has its own laws, regulations and policies.

For the federal government entities (“executive agencies”) which are defined as executive departments, military departments, independent establishments of the federal executive branch, and wholly owned federal government corporations, federal public procurement is governed by a number of statutes, Executive Orders issued by the President, the Federal Acquisition Regulation (“FAR<sup>5</sup>”) and agency regulations that supplement the FAR.

The U.S. Postal Service, the Federal Aviation Administration, and the Federal Deposit Insurance Corporation are not subject to the FAR but have procurement regulations that are similar to the FAR in many respects. Federal legislative and judicial branch agencies may choose to adopt the FAR, or elect to be governed by requirements similar to those contained in the FAR.

Non-federal government entities, such as states, municipalities, regulated utilities, universities and other public or quasi-public institutions and entities often have procurement codes or policies that have some similarities to FAR-based procurements. These entities develop their own processes and procedures which are often geared towards maximizing competition, ensuring fairness to persons competing for contracts and providing some type of independent

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<sup>2</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on Public Procurement and Repealing Directive 2004/18/EC

<sup>3</sup> Decreto-lei n.º 18/2008, de 29 de Janeiro, in its most recent version (Resol. da AR n.º 16/2020, de 19/03)

<sup>4</sup> In Portugal, this is done by Portal BASE (<https://www.base.gov.pt/base4>)

<sup>5</sup> <https://www.acquisition.gov/browse/index/far>

or quasi-independent forum for review of challenges or complaints about possible deviations from policies and procedures in the award of a contract.

As for transparency, The Federal Funding Accountability and Transparency Act of 2006 (FFATA) required that federal contract, grant, loan, and other financial assistance awards of more than \$25,000 be displayed on a publicly accessible and searchable website to give the American public access to information on how federal funds are being spent<sup>6</sup>.

### **3. Public Private Partnerships (PPP)**

The transformation of social systems that took place during the 20th century, as a result of which the State took on new functions, including productive functions, to meet social and public needs, led at the same time to a large increase in public spending. In response, there has been a change in understanding as to the role of the State in the economy and, more generally, as to how to satisfy collective needs.

The similarity between certain activities carried out by private entities and those underlying the provision of certain public services has led to the conclusion that it is also possible to take advantage of the traditionally better management capacity of the private sector in public services, improving the quality of the service provided and generating considerable savings in the use of public resources.

One of the internationally recognized and tested ways in which the State can obtain such management skills is by establishing lasting relationships with private parties, in the form of public-private partnerships (PPP), in which the risks - particularly technological and operational risks - with which they are more familiar and better qualified to handle are transferred to them.

These PPP are characterized by:

- The duration of the relation
- The financing model for the project
- The role of the partners in the definition, design, management, and funding
- The risk distribution

PPP were traditionally used in physical infrastructure (roads, tolls and railroads), but have since migrated to numerous other areas (communication, hospitals, universities, etc.).

In this section, we will compare the PPP models in the EU and the USA.

#### **a. European Union**

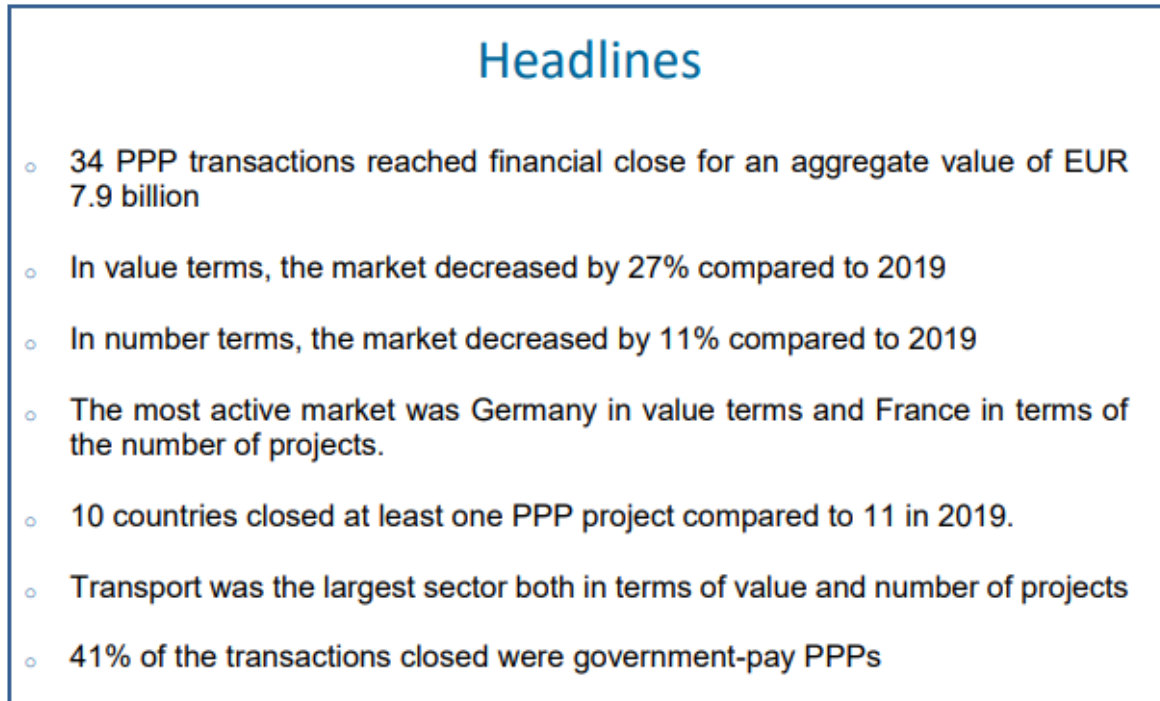
In the European Union, there is no specific legal framework regarding PPP, although they are recognized Union bodies under Article 185 of Council Regulation. Some forms of PPP fall

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<sup>6</sup> <https://www.usaspending.gov/>

under the regulation for Public Contracts. Others are based on a concession contract, which is regulated by a Directive<sup>7</sup>.

Nonetheless, as we can see in the picture below<sup>8</sup>, PPP in Europe represent a very large investment.



#### **b. United States of America**

There is no uniform statutory definition of Public-Private Partnerships (PPP) in the United States. There is also “the lack of a national legislative standard allowing public-private partnerships. Each state makes its own laws. Some states such as California, Virginia, and Texas have robust PPP legislation allowing for private delivery and maintenance of infrastructure across different public sectors. Other states are just starting to enable PPPs and using pilot projects to test the waters”<sup>9</sup>. At the Federal level, PPP must be approved at each sector, sometimes at a very specific level (like the use of PPP for the Native Hawaiian Housing block grant program<sup>10</sup>)

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<sup>7</sup> Directive 2014/23/EU of the European Parliament and of the Council of 26 February 20 on the award of concession contracts

<sup>8</sup> Review of the European PPP Market in 2020  
[https://www.eib.org/attachments/epec/epec\\_market\\_update\\_2020\\_en.pdf](https://www.eib.org/attachments/epec/epec_market_update_2020_en.pdf)

<sup>9</sup> Sluger and Satterfield, ‘How Do You Like Your Infrastructure: Public or Private?’ (2010) p.12, available at: [www.ncppp.org/wp-content/uploads/2013/03/PS-2010-HowDoYouLike.pdf](http://www.ncppp.org/wp-content/uploads/2013/03/PS-2010-HowDoYouLike.pdf).

<sup>10</sup> [24 CFR § 1006.335 - Use of nonprofit organizations and public-private partnerships. | CFR | US Law | LII / Legal Information Institute \(cornell.edu\)](#)

The Government Accountability Office defines a public-private partnership as “a contractual arrangement that is formed between public and private-sector partners. These arrangements typically involve a government agency contracting with a private partner to renovate, construct, operate, maintain, and/or manage a facility or system, in whole or in part, that provides a public service. Under these arrangements, the agency may retain ownership of the public facility or system, but the private party generally invests its own capital to design and develop the properties. Typically, each partner shares in income resulting from the partnership. Such a venture, although a contractual arrangement, differs from typical service contracting in that the private-sector partner usually makes a substantial cash, at-risk, equity investment in the project, and the public sector gains access to new revenue or service delivery capacity without having to pay the private-sector partner.”<sup>11</sup>

The National Council for Public-Private Partnerships currently recognizes 18 types of PPPs, in two main categories, as show below<sup>12</sup>.

<i>PPPs for new construction</i>	<i>PPPs for existing facilities and services</i>
Design–build	Operate and maintain
Design–build–maintain	Operate, maintain and manage
Design–build–operate	Buy–build–operate
Design–build–operate–maintain	Enhanced-use leasing
Design–build–finance–operate–maintain	Lease–develop–operate
Design–build–finance–operate–maintain–transfer	
Build–operate–transfer	
Build–own–operate	
Developer finance	
Lease/purchase	
Sale/leaseback	
Tax-exempt lease	
Turnkey	

<sup>11</sup> [GGD-99-71 Public-Private Partnerships: Terms Related to Building and Facility Partnerships \(gao.gov\)](https://www.gao.gov/publications/ggd-99-71)

<sup>12</sup> National Council for Public-Private Partnerships, ‘Types of Partnerships’, [www.ncppp.org/ppp-basics/types-of-partnerships/](http://www.ncppp.org/ppp-basics/types-of-partnerships/).

Although traditionally used in big infrastructure projects (hard economic infrastructures in the table below), PPP have been increasingly used in other types of infrastructures as well.

*Table 1: Types of Infrastructure*

	Hard	Soft
<b>Economic</b>	<ul style="list-style-type: none"> <li>▪ Roads</li> <li>▪ Motorways</li> <li>▪ Bridges</li> <li>▪ Ports</li> <li>▪ Railways</li> <li>▪ Airports</li> <li>▪ Telecommunications</li> <li>▪ Power</li> </ul>	<ul style="list-style-type: none"> <li>▪ Vocational training</li> <li>▪ Financial institutions</li> <li>▪ R&amp;D</li> <li>▪ Facilitation</li> <li>▪ Technology transfer</li> <li>▪ Export assistance</li> </ul>
<b>Social</b>	<ul style="list-style-type: none"> <li>▪ Hospitals</li> <li>▪ Schools</li> <li>▪ Water supply</li> <li>▪ Housing</li> <li>▪ Sewerage</li> <li>▪ Child care</li> <li>▪ Prisons</li> <li>▪ Aged care homes</li> </ul>	<ul style="list-style-type: none"> <li>▪ Social security</li> <li>▪ Community services</li> <li>▪ Environmental agencies (EPA)</li> </ul>

#### 4. PPP in the context of emergency communication

It is commonly recognized that providing emergency communication is a direct responsibility of the government. But telecommunications are a fast moving sector, with constant need for updating and operation, and government is not well suited for such a task. This creates the perfect opportunity to use the PPP models we saw above, in which the government enters in a partnership with a private entity (or a group of private entities) that will supply both the funding and the operation of the project.

We will look at two examples of such partnerships in Portugal and the USA, analyzing both similarities and differences between them.

##### a. Portugal – SIRESP

In Portugal, the network for the command, control and coordination of communications in all emergency and security situations is called SIRESP (Sistema Integrado de Redes de Emergência e Segurança de Portugal), and was defined as a “unique system, based on a single shared national infrastructure”<sup>13</sup>.

After a public tender, the winning company was established to operate the network (SIRESP, SA)<sup>14</sup> having as shareholders five private entities, which in turn reported to the Internal

<sup>13</sup> Resolução do Conselho de Ministros n.º 26/2002

<sup>14</sup> Resolução do Conselho de Ministros n.º 74/2006



Administration Ministry (MAI) as the managing entity. The mission of SIRESP, SA is planning, managing, maintaining and modernizing the SIRESP network<sup>15</sup>. This partnership, with a duration of 15 years, imposed on SIRESP, SA, the initial cost of building the network while the government maintained oversight by its managing entity.

After a series of shareholder changes, including the government itself entering as shareholder, SIRESP, SA become fully owned by the state<sup>16</sup>, although some services are still provided by private companies.

SIRESP, SA has a dedicated executive management team, nominated by the government for 3-year mandates, that are public managers<sup>17</sup> and coordinate with the Minister of Internal Administration.

#### **b. United States of America – FirstNet**

FirstNet Authority is an independent authority within the U.S. Department of Commerce. Authorized by Congress in 2012, its mission is to develop, build and operate the nationwide, broadband network that equips first responders to save lives and protect U.S. communities.<sup>18</sup>

The faults in communications systems used by first responders were made clear at the 9/11 attacks on New York. From there, pressure from the public to create a nationwide network that all agencies could use and operate across led to the creation, in 2012, of the First Responder Network Authority.

The First Responder Network Authority (FirstNet Authority) is the federal entity charged with overseeing the creation and delivery of the FirstNet network, and was created in February 2012<sup>19</sup>. The law allocated 20 megahertz of spectrum and \$7 billion to establish a broadband network dedicated to the nation's first responders and gave the First Responder Network Authority the mandate to build, operate, and maintain that network. The inaugural meeting of the FirstNet Board took place on September 25, 2012.<sup>20</sup>

It then took the FirstNet Authority 5 year of consulting with federal, state, tribal and public safety entities to develop a Request for Proposal (RFP) to deploy a nationwide wireless broadband network for first responders, which was then awarded to AT&T, the second largest mobile operator in the US.

This partnership, labeled as “*Record-breaking public-private partnership will modernize emergency communications infrastructure, saving lives, protecting communities, and creating*

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<sup>15</sup> <https://www.siresp.pt/sobre-nos/missao/>

<sup>16</sup> Decreto-Lei 81/A, de 17 de Junho de 2019

<sup>17</sup> Decreto-Lei n.º 39, de 28 de Julho de 2016

<sup>18</sup> <https://firstnet.gov/about>

<sup>19</sup> <https://www.congress.gov/112/plaws/publ96/PLAW-112publ96.pdf>

<sup>20</sup> <https://firstnet.gov/about/history>

*jobs*<sup>21</sup> is materialized in a 25-year agreement between FirstNet and AT&T whose broad terms are:

- FirstNet will provide 20 MHz of high-value, telecommunications spectrum and success-based payments of \$6.5 billion over the next five years to support the Network buildout;
- AT&T will spend about \$40 billion over the life of the contract to build, deploy, operate and maintain the network, with a focus on ensuring robust coverage for public safety;
- Additionally, AT&T will connect FirstNet users to the company's telecommunications network assets, valued at more than \$180 billion.

The management model for FirstNet consists of an executive management team composed of 8 members, a board of directors and a Public Safety Advisory Committee (PSAC).

“The First Responder Network Authority FirstNet Board is a team of highly-skilled, highly motivated individuals with a cross-section of expertise who are committed to making the nationwide public safety broadband network a success. Representatives include the Secretary of Homeland Security, the Attorney General, and the Director of the Office of Management and Budget as permanent members. The remaining members are selected by the Secretary of Commerce and have public safety, technical, network, and/or financial expertise.”<sup>22</sup>

“PSAC consists of members representing all disciplines of public safety as well as state, territorial, tribal, and local governments. PSAC also has at-large members and federal members. The mission of the PSAC is to assist FirstNet in carrying out its duties and responsibilities.”<sup>23</sup>

## 5. Problematical Issue

After discussing the particular type of public contract designated by public-private partnerships, we tried to show the benefits of such cooperation, both financially and operational.

There are, however, some issues arising from these types of partnerships, that we will list and explain here, without claiming to show a solution for them.

In the public view, most PPP are seen not as they were intended, but merely a way for private entities to profit enormously. Being long-time contracts (in the examples above for critical communications we have 15 and 25 years, but sometimes they are even longer) the public sees them as a way for the private entities to keep benefiting. How can PPP be made more transparent and enhance their view for the public?

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<sup>21</sup><https://2014-2018.firstnet.gov/news/firstnet-partners-att-build-wireless-broadband-network-americas-first-responders>

<sup>22</sup><https://firstnet.gov/about/board>

<sup>23</sup><https://firstnet.gov/about/psac>

The idea above can be even furthered when the notion of risk is not well defined and shared between the public and the private. For example, in Portugal, some PPP on road tolls are based on an expected number of vehicles to pass through and when that number is not reached, the public part has to compensate the private, bringing, in fact, all the risk to the public sector and not the private. How can the risk management process be built to evenly split risk and reward between both parties?

Also, as PPP are desirable business to the private entities, they are often regarded, even more than short term public contracts, as potential for corruption between the private parties and the government officials that choose them. How can this process be made more transparent and reliable?

One other issue that arises with PPP, mainly in new technological services, is the obsolescence. The contracted goods and services can change dramatically over the course of the partnership, either in technical specifications or cost. How can one accommodate that in the partnership?

From another perspective, the PPP must also be good business for the private entities. No private entity would enter a PPP if it was not a good business decision. So, in general, PPP have to generate some profit. How can we balance this profit to make sure it is desirable enough to the private partners, but that does not impose too much public spending?

Finally, the PPP, despite the long-term nature, will eventually come to an end. By that time, if the reason still exists, the question of the renewal arises. If the business is good, the private partner will want to continue, with the benefit of experience. But the public partner may wish to consult the market again, trying to lower costs or get better services. How to cope with these two seemingly contradictory clauses?

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