

Contributo di ANAC allo sviluppo della “Framework for the Governance of Infrastructure” dell’OCSE*

24 febbraio 2020

Definitions

Please find below the Definitions section of the draft Recommendation:

"I. AGREES that, for the purpose of the present Recommendation, the following definitions are used:

Governance of infrastructure means the processes, tools, and norms used by government bodies to plan, make decisions and monitor the delivery and maintenance of public infrastructure.

Resilience means the capacity of systems to absorb a disturbance, recover from disruptions and adapt to changing conditions while retaining essentially the same function as prior to the disruptive shock (e.g. climate and geological hazards, industrial accidents, terrorist or cyberattacks).

Stakeholders are any interested and/or affected party, including: individuals, regardless of their age, gender, sexual orientation, religious and political affiliations; and institutions and organisations, whether governmental or non-governmental, from civil society, academia, the media or the private sector".

Development of a long-term strategic vision

Please find below the first section of the draft Recommendation:

"II. RECOMMENDS that Members and non-Members having adhered to the Recommendation (hereafter the "Adherents") develop and implement infrastructure governance frameworks in which Adherents should:

1. Develop a long-term strategic vision for infrastructure which:
 - a. is grounded upon shared ambitions for national and subnational development, enhancing the economic and social capital which underpins growth, competitiveness and public service delivery.
 - b. is informed by rigorous assessment of infrastructure needs and of how these needs should be prioritised and addressed.
 - c. is monitored, flexible and regularly updated to take into account the impact of technology and the evolution of infrastructure needs.
 - d. is fiscally sustainable, linked with budget allocations, and aligned with the medium-term expenditure framework, which provides assurance to the relevant stakeholders on the stable, multi-year availability of resources.
 - e. defines a coherent, predictable, legitimate and accountable institutional framework for infrastructure, in which relevant institutions are entrusted with clear mandates, ample decision making powers, right skills and competences, and sufficient financial resources.
 - f. is the product of a broad-base political consensus, based on clear assumptions, properly coordinated across levels of government, and takes necessary complementarities across sectors into account.

g. actively contributes to the achievement of long-term policy objectives, including national and international commitments on environment, gender equality, sustainable development and growth."

ANAC ringrazia l'ingegner Filippo Romano, dirigente dell'Ufficio vigilanza collaborativa e vigilanze speciali di ANAC, per aver risposto ai quesiti del questionario integrando con utili informazioni sulle "buone pratiche" italiane.

ANAC: We agree with the indicated strategy and provide some information on the Italian system, both at the central and local level.

Central level

Two distinct and competing instruments are envisaged:

- a) the general plan for transport and logistics, which bears the strategic policies for the mobility of goods and people, as well as the development of the country;
- b) multi-year planning documents which contain, among other things, the list of infrastructures and priority settlements for the development of the country.

Local level

Three-year plans for public works with indication of priority levels. Priority is given to works that are eligible for private financing. The three –years plans must indicate the financing funds.

Fiscal sustainability, affordability, and value for money

Please find below the second section of the draft Recommendation:

"II. RECOMMENDS that Members and non-Members having adhered to the Recommendation (hereafter the "Adherents") develop and implement infrastructure governance frameworks in which Adherents should:

2. Guard fiscal sustainability, affordability, and value for money through:

- a. developing a robust capital budgeting framework, identifying, measuring and regularly updating infrastructure expenditure in relation to both development of new infrastructure and maintenance and decommissioning of existing assets to be reported alongside of the budget documents.
- b. applying rigorous project appraisal and selection processes that privileges socioeconomic efficiency and fiscal sustainability at the national and subnational levels (taking into account economic, social, environmental and climate-related costs and benefits) and takes into account the full cycle of the project, noting that for projects that exceed a high investment threshold it is especially important to provide for an independent and impartial assessment to test project costing, risk management and projects' governance.
- c. selecting the delivery mode grounded in value for money and optimal allocation of risk between the parties, with no institutional, procedural or accounting biases for any particular delivery mode.
- d. ensuring a transparent and appropriate allocation of risks in the structuring of the project, along with a comprehensive and agreed plan for managing, monitoring and mitigating risks during the project lifecycle.
- e. informing decision-making on affordability of new projects and minimising sustainability risks by measuring and disclosing multi-year spending commitments, including running and maintenance costs,

off-balance sheet commitments and contingent liabilities resulting from infrastructure projects, and assessing the availability to fund such commitments in the expected time-frame".

ANAC: We agree with the indicated strategy and provide some information on the Italian system to improve the Public Private Partnership and Concessions.

The publication in the Official Gazette no. 206 of 3 September 2013 of the Inter-ministerial Economical Programming Committee (CIPE) Guidelines (resolution n.1 of 18 February 2013) made operational the regulatory provisions contained in art. 18 of the 2012 Stability Law (Law No. 183/2011), aimed at promoting the creation of strategic infrastructures within the project finance system. The recipients of the concessions are contracting parties of the various types of public-private partnership contract, including public works concessionaires. The aforementioned article 18 provides that the non-refundable contribution paid by the public entity to ensure the achievement of the balance of the Economic-financial Plan, is replaced, in whole or in part, by three different concessions that can also be used cumulatively by the foster companies of a concession for the construction and management of infrastructure works. The tax discounts in question are represented by the compensation of the aforementioned contribution with the income taxes or the VAT credit generated during the concession period, or by the recognition to the concessionaire of a contribution in the operating account equal to the amount of the rent concession. The aforementioned incentives can be granted to new infrastructures of national strategic interest still to be implemented for which there is no economic sustainability, as well as to infrastructures already entrusted (i.e. those for which, at the date of entry into force of Law no. 221/2012 - December 19, 2012 - the concession agreement has been approved) or in the course of assignment (for which the contract notice has already been published on December 19, 2012) if it is necessary to restore the balance of the economic-financial plan. The amount of the public grant and the terms and modalities for the use of the incentives are set as a tender basis for the identification of the concessionaire and subsequently reported in the concession contract to be approved by decree of the Minister of Infrastructure and Transport, in agreement with the Minister of Economy and Finance. In any case, the maximum amount of the public contribution, including the facilitating measures (both expressed in terms of current value), cannot exceed 50% of the investment cost. In particular, for new works, the amount of the public contribution is set as a tender basis for the identification of the concessionaire; the evaluation of the proposals will therefore take place on the basis of their ability to reduce the contribution of public money.

With Guidelines no. 9 - Monitoring of contracting authorities on the activity of the economic operator in public private partnership contracts - the National Anti-Corruption Authority has provided indications to the market on the correct implementation of the PPP. In Particular, ANAC Guidelines provide that for each PPP operation the contracting authorities carry out: a) the analysis of the risks associated with the construction and management of the work or service covered by the PPP contract, in order to verify the possibility of transferring to the economic operator; b) the risk of availability or demand risk of services rendered, and c) the operational risk for the concession. The transfer of these risks is a necessary condition for the legal classification of the contract as PPP and for the consequent possibility of applying the PPP special procedures.

The revision of the budget cannot be partial and must concern all deviations from the indicated economic values and financial balance. Any deviations falling within the risks allocated to the private party must be rebalanced with charges and / or compensation paid by the party itself. Moreover, in order to be able to

correctly monitor the operator's activity, it is necessary that the clauses contained in the contract are correctly defined in compliance with the contents of the offer, taking into account the characteristics of each specific type of PPP transaction put in place.

The PPP contract must include the awarded offer and the matrix of the risks.

Before publishing the call for tender, project must be validated by an independent body and subsequently approved by the decision maker.

Efficient and effective procurement of infrastructure projects
Please find below the third section of the draft Recommendation:

"II. RECOMMENDS that Members and non-Members having adhered to the Recommendation (hereafter the "Adherents") develop and implement infrastructure governance frameworks in which Adherents should:

3. Ensure efficient and effective procurement of infrastructure projects by:
 - a. using competitive, transparent and efficient procurement processes for infrastructure, and limiting the use of exceptions and single-source procurement, including for associated professional services.
 - b. promoting sustainability by selecting contractors based on criteria combining quality and price elements and including, where relevant, an assessment of costs incurred throughout the life-cycle of the asset.
 - c. implementing a risk-based approach in project procurement and implementation, developing, where possible, tools to identify risks of all sorts and bring them to the attention of relevant personnel, providing an intervention point where prevention or mitigation is possible.
 - d. carefully evaluating available delivery modes against previously defined clear criteria based on projects' characteristics and the use of value for money analytical tools to compare assessment of service delivery options.
 - e. ensuring that the procurement workforce has the capacity to continually deliver value for money efficiently and effectively by providing attractive, competitive and merit-based career options and providing tools to improve skills and competences for procurement officials.
 - f. engaging in transparent and regular dialogues with suppliers and business associations to present public procurement objectives and to assure a correct understanding of markets capacity.
 - g. holding contractors accountable for project specification and professional standards, when applicable, and designing a strategy for contract re-negotiations to account for evolving conditions.
 - h. integrating public procurement into overall public finance management, capital budgeting and services delivery processes."

ANAC: In Italy, for infrastructure works beyond the threshold, the most economically advantageous bid procedure is applied, according to which the contract is awarded to the best proposal in terms of quality and price. As mentioned above, ANAC Guidelines provide that for each PPP operation the contracting authorities carry out: a) the analysis of the risks associated with the construction and management of the work or of the service covered by the PPP contract; b) the risk of availability or demand risk of services rendered, and c) for concessions, the operational risk. The transfer of these risks is a necessary condition for the legal classification of the contract as PPP and for the consequent possibility of applying the PPP special procedures.

As already stated, the revision of the budget cannot be partial and must concern all deviations from the indicated economic values and financial balance. Any deviations falling within the risks allocated to the private party are rebalanced with charges and / or compensation paid by the party itself. Moreover, in order to be able to correctly monitor the operator's activity, it is necessary that the clauses contained in the contract are correctly defined in compliance with the offer, taking into account the characteristics of each specific type of PPP transaction put in place.

The PPP contract must include the awarded offer and the matrix of the risks.

Stakeholder engagement

Please find below the fourth section of the draft Recommendation:

"II. RECOMMENDS that Members and non-Members having adhered to the Recommendation (hereafter the "Adherents") develop and implement infrastructure governance frameworks in which Adherents should:

4. Ensure systematic and effective stakeholder engagement through:
 - a. ensuring provision of information and "proactive" measures by the government to disseminate information and allow for continuous and open dialogues that are broad-based, involving relevant stakeholders in planning, decision-making and oversight.
 - b. integrating consultation processes that are proportionate to the particular characteristics of the project (e.g. size, political sensitivity, and impacted population) and take account of the overall public interest and the views of the relevant stakeholders through a disciplined, upfront stakeholder mapping and analysis, which can ensure engagement efforts cost-effectively to include relevant groups in decision making.
 - c. ensuring meaningful stakeholder engagement with communities, users and impacted people to collaborate during all phases of the project life-cycle and ensure debate on the main economic, fiscal, environmental and social impacts of the project".

ANAC: The stakeholder engagement can be ensured by the publication of the relevant planning documents and project and by ensuring a public discussion before the final decision concerning the infrastructure.

In Italy, all programming documents, i.e. the general plan of transport and logistics, and the multi-year planning documents are published, and stakeholders can obtain official copies of them.

Public Administrations are obliged by the PP law (Legislative decree n. 50/2016) to publish on their websites the feasibility projects relating to large infrastructural and architectural works of social importance, having an impact on the environment, on the city or on the structure of the territory, as well as the results of the public consultation, including the records of the meetings and discussions with stakeholders. The contributions and records are published, with equal evidence, together with the documents prepared by the administration and relating to the same works.

Co-ordination of infrastructure policy across levels of government

Please find below the fifth section of the draft Recommendation:

"II. RECOMMENDS that Members and non-Members having adhered to the Recommendation (hereafter the "Adherents") develop and implement infrastructure governance frameworks in which Adherents should:

5. Co-ordinate infrastructure policy across levels of government through:
- a. designing and implementing investment strategies tailored to the place the investments aim to serve.
 - b. adopting effective instruments for co-ordinating across national and subnational levels of government, such as co-financing arrangements, contracts between levels of government, formal consultation processes, national agencies or representatives, working together with subnational areas, or other forms of regular inter-governmental dialogue .
 - c. providing incentives and/or seek opportunities for co-ordination among regional and/or local governments to match public investment with the relevant geographical area, including through contracts, platforms for dialogue and co-operation, specific public investment partnerships, joint authorities, or regional or municipal mergers.
 - d. strengthening capacities for public investment and promoting policy learning at all levels of government, ensuring adequate financial resources, professional skills, and sound institutional framework to ensure effective vertical and horizontal coordination".

ANAC: The goal of the Italian national and regional programming is also to coordinate the different public entities in planning infrastructures.

On the occasion of national financing of co-financing infrastructures, regional entities are invited to present projects to the competent ministry in order to obtain financing funds. This is another example of consultation and coordination at different geographic level.

Regulatory Framework

Please find below the sixth section of the draft Recommendation:

"II. RECOMMENDS that Members and non-Members having adhered to the Recommendation (hereafter the "Adherents") develop and implement infrastructure governance frameworks in which Adherents should:

6. Promote a legitimate, coherent, efficient, and predictable regulatory framework by:
- a. providing evidence-based tools for regulatory decisions, including stakeholder consultation, economic, fiscal, social and environmental impact assessment and ex-post evaluation.
 - b. clearly identifying policy goals, and evaluating whether regulation is necessary and how it can be most effective and efficient in achieving those goals.
 - c. considering means other than regulation and identify the trade-offs of the different approaches analysed to identify the best approach.
 - d. supporting co-ordination between supranational, national and subnational regulatory frameworks.
 - e. conducting systematic programme reviews of the stock of significant regulation relevant for infrastructure projects, including consideration of costs and benefits, to ensure that regulations remain up to date, cost justified, cost effective and consistent, and that deliver the intended policy objectives.
 - f. promoting good governance of regulatory agencies in order to ensure sustainable tariff setting, overall regulatory quality, and greater confidence from the market (e.g. independence; accountability; scope of action; enforcement; capacity and resourcing)".

ANAC: The regulatory framework fosters free competition among economic operators, and an economic, fiscal, social and environmental impact assessment. Therefore, it is important to draft manuals or guidelines that provide interpretation and harmonization of the different laws. In Italy, ANAC has been charged by the anticorruption law to adopt Guidelines in the field of Procurement and PPP to help stakeholders in managing the regulatory framework.

Manage threats to integrity

Please find below the seventh section of the draft Recommendation:

"II. RECOMMENDS that Members and non-Members having adhered to the Recommendation (hereafter the "Adherents") develop and implement infrastructure governance frameworks in which Adherents should:

7. Implement a whole of government approach to manage threats to integrity through:

- a. defining a risk-based approach to map, mitigate and address fraud and corruption entry points at each stage of the infrastructure project cycle.
- b. an adequate degree of transparency throughout the project life-cycle to ensure that disclosure of relevant information is timely and available to the public.
- c. promoting the integrity of bidding companies and enforcing high standards of conduct for public officials, including clear rules and guidelines on preventing and managing conflict of interest.
- d. effective oversight throughout the project cycle with effective internal control and external audit in all stages of the infrastructure project.
- e. the detection of integrity violations and effective enforcement mechanisms that provide clear channels to report wrongdoing, offering protection for whistle-blowers, and ensuring that reporting mechanisms and protection is available to all stakeholders, public and private sector employees, and citizens.
- f. ensuring that the understanding of integrity risks is comprehensive, by integrating responsible business conduct and risk-based preventive due diligence into the infrastructure project life-cycle".

ANAC: According the UNCAC, transparency is the best tool to fight corruption. In Italy, an independent Agency (ANAC) has been established to prevent and fight corruption as requested by UNCAC. ANAC is charged with supervisory and regulatory powers in the area of public procurement, notoriously the most sensitive to corruption risks. According to the anticorruption law (Law 190/2012) and legislative decrees n. 33/2013 and 39/2013, ANAC adopts a three-year anticorruption strategy plan in which it provides indications on how to prevent corruption in the sensitive areas. Based on ANAC's Strategy Plan, each Public Administration must adopt their own three-year plans containing an evaluation of all risks and the adoption of measures to minimize those risks. ANAC also supervises the implementation of the law on Conflicts of interest. Particular provisions on conflicts of interest are provided by the Public Procurement (PP) law (during the awarding phase) and by the Presidential decree on Code of Conduct. A special law on the integrity of the bidding companies has been adopted since 2001.

Evidence informed infrastructure decision making

Please find below the eighth section of the draft Recommendation:

"II. RECOMMENDS that Members and non-Members having adhered to the Recommendation (hereafter the "Adherents") develop and implement infrastructure governance frameworks in which Adherents should:

8. Make use of evidence informed infrastructure decision making, by

- a. putting in place systems that ensure a systematic collection of relevant data and institutional responsibility for analysis, dissemination, and learning.
- b. disclosing relevant data to the public in an accessible and understandable format, and in a timely fashion.
- c. harnessing digital technologies and data analytics to understand performance, and take preventive actions to respond to risks and adapt control activities.

- d. ensuring that data is collected over the entire lifecycle of the infrastructure project, including construction, operation, maintenance and disposal.
- e. encouraging the production of data at the right subnational scale to inform investment strategies and produce evidence for decision-making".

ANAC: The PP Italian law establishes the monitoring of public contracts by ANAC. All managers of public contracts are obliged to send the information concerning the procedures to the ANAC database (under the penalty of a monetary sanction) and this information are shared with other public administrations (i.e. Ministry of economy for electronic advance payments). The database contains information since the year 2000 and is considered a European Best Practice. The analysis of the collected data allows ANAC and other entities to design and adopt preventive actions.

Asset performance throughout its life

Please find below the ninth section of the draft Recommendation:

"II. RECOMMENDS that Members and non-Members having adhered to the Recommendation (hereafter the "Adherents") develop and implement infrastructure governance frameworks in which Adherents should:

- 9. Make sure the asset performs throughout its life by:
 - a. optimising life-cycle costs and asset quality through ensuring effective monitoring, operation, maintenance and decommissioning.
 - b. ensure that the design of price and quality regimes foster asset maintenance and adequate performance through the entire life cycle.
 - c. preparing policy documents on the expected performance of regulated assets throughout its life-cycle and delivery.
 - d. making sure that monitoring of the performance of the assets is undertaken, including by regularly reviewing the value and depreciation of assets, and their impact in the accounts.
 - e. preparing and effectively managing the end of infrastructure contracts (e.g. public procurement, PPP and concession contracts) and the transition to any new arrangement, ensuring that ex-post evaluation of value for money is carried out and used in the decision-making process".

ANAC: In order to ensure that the final evaluation of a project is well done, a certification body must be involved before the final approval of the project by the Public Administration. Moreover, the aspects of the maintenance of lifecycle of the infrastructure can be deal by utilizing the Building Information Modelling (BIM) for the project. In Italy we adopted a very strict legislation about the adoption of BIM.

Critical infrastructure resilience

Please find below the tenth section of the draft Recommendation:

"II. RECOMMENDS that Members and non-Members having adhered to the Recommendation (hereafter the "Adherents") develop and implement infrastructure governance frameworks in which Adherents should:

- 10. Strengthen critical infrastructure resilience by:
 - a. setting-up a multi-sector governance structure for critical infrastructure resilience.

- b. understanding complex interdependencies and vulnerabilities across infrastructure systems to prioritise resilience efforts.
- c. establishing trust between government and operators by securing risk-related information-sharing.
- d. building partnerships to agree on a common vision and achievable resilience objectives.
- e. defining the policy mix to prioritise cost-effective resilience measures across the life-cycle.
- f. addressing transboundary dependencies in critical infrastructure systems by coordinating policies with neighbouring countries and beyond".

ANAC: The risk matrix of an Infrastructure indicated in the Guidelines of ANAC reduces the risk of construction of infrastructures, establishing trust between the government and the operators by securing a risk-related information-sharing. Anyway, the legal framework must allow the Public Administration to adopt variants (under specific circumstances) to strength the critical infrastructure resilience.