Il nuovo Codice dei contratti pubblici, tra innovazioni e criticità

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New Code of Public Contracts, between Innovations and Criticalities

DOI: 10.14609/Ti_1_17_5e

Keywords: **Code of Contracts Reform, Soft law, Feasibility Studies, Technical and Economic Feasibility Projects, Financial Bid, Public-Private Partnership.**

Abstract For more than one year, with the approval of Legislative Decree 50/2016, a continuous process of revision of the regulation on public works, supply and service contracts has been taking place. Contrary to what has happened until now, the legislature has decided not to replicate the classic model structured in implementing Code and Regulation. The choice is directed in comparisons of the so-called soft law, that no longer provides a Regulation, but a series of references to successive implementing Decrees and/or Guidelines. In addition to the debated theme of the binding normative character of a Guideline, traditionally associated with instruments of a voluntary nature and advice, one asks one's self if this choice should be rewarded for the innovations introduced, or if it should be reconsidered in function of the criticalities encountered from April 2016 to the present, that have already generated more than a hundred modification and integrations, also often through laws and/or decrees that have nothing to do with the Code of Contracts. Ignoring the more formal aspects, for effect of the New Code and its first corrective, the very recent Legislative Decree 56/2017, there are many technical themes that generate perplexity and opposing positions: the new articulation of the design levels, the elimination (at least formal) of the feasibility studies, the diffusion of the criteria of the most economically advantageous tender and the qualification of the contracting authorities and economic operators on the basis of a business and legality rating.

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INTRODUCTION

After approximately a decade, Legislative Decree no. 50/2017 of 19 April 2016 has reformed the world of public work, service and supply contracts, repealing the so-called De Lise Code (Legislative Decree 163/06 and successive amendments and integrations) and its implementing Regulation (Decree of the President of the Republic, hereafter referred to as D.P.R. 207/10 and successive amendments thereto). It regarded an important regulatory modification, both in formal terms and in content: from the legal point of view, the reform has been the subject of a broad theoretical discussion, and has seen the involvement of supporters and sceptics; from the content point of view, it can be said that it has truly been a 360° revision of the regulations.

The most significant innovation, for which the majority of workers were not prepared, is the soft law character of the regulatory instrument: they have always been used to a "classic" system, that derives from the Roman law, structure in Law and corresponding implementing Regulation, without which the Law could not be enacted. With Legislative Decree no. 50, this vision is disrupted, providing only the body of law to be implemented through subsequent ministerial decrees and/or guidelines, instruments (the latter) always used to disseminate guidelines and not legally binding obligations.

Consequently, with the approval of Legislative Decree no. 50, there has been a substantial revision of the old Code that, however, due to the so-called regulatory delay, was not able to immediately implement the arrangements. The repeal of the implementing Regulation, in fact, has only been partially accomplished, and is currently in progress, awaiting the issuing of all the regulations provided by the Code (in part guidelines, in part Ministerial Decrees). With particular regard to the Guidelines, the new Code has attributed the official role of author evaluator to the Italian National Anticorruption Authority (hereafter referred to as ANAC), performing a sort of centralization of the control, regulatory, publication and data transparency functions. This burden of duties, combined with the choice (which had characterised the regulatory modifications of the past) not to repeal the old Code and the old Regulation at the same time, with the publication of the new regulation, has brought about the lengthening of the total times. As of today, in fact, only 30% of the provisions have been issued (Salerno M., Il Sole 24 Ore, 16/05/2017) referenced in the text, and it is also for this reason that the path to completing the operation still seems long and complex (Salerno M., Il Sole 24 Ore, 17/05/2017), especially in the light of the recent amendments made to the New Code. The transition phase is, therefore, needed to avoid generating problems for economic operators, contracting stations and professionals with regulatory gaps. But problems have emerged in any case, because the character of the reform has generated a proliferation of reference acts and decrees, upsetting the classic structure, established over time, for all of the operators of the sector. Since last April, with a small "mystery" connected to the late journal publication (Salerno M., Il Sole 24 Ore, 28/04/2017), the first corrective to the code came into force, Legislative Decree 56/2017, that in 131 articles, has introduced 69 important amendments to the old text.

INNOVATIONS OF THE CODE, EVEN IN THE LIGHT OF THE CORRECTIVE

In trying to summarise the principal amendments introduced by Legislative Decrees 50 and 56, a distinction can be made between general innovations, procedural innovations and specific innovations, of content and form for the operators involved in the process.

Following the European outcomes contained in community directives 2014/23/EU, 2014/24/EU and 2014/25/EU, transposed in Enabling Law 28 January 2016, the *most economically advantageous tender* (MEAT) becomes the prevalent contractor selection criteria, almost entirely setting aside the lowest price criteria. This certainly effects the speed and efficacy of the award procedure that,

concentrating mainly on the attention on the technical aspect, and less on the costs, causes a widespread lengthening of the award time for the contracting authorities. In parallel, the theme of the *composition of the evaluation committees*, which must be identified from a list provided by ANAC, which will establish an appropriate list sufficient to allow the rotation principle. The obligation of having committees made up of members external to the contracting authorities arises from works of a value over one million Euro and for services and supply above the minimum of the community threshold. Although the theme was the subject of a specific Guideline provided by ANAC, no. 5 "Selection criteria of the tender commissioners and registration of the experts into the obligatory National Register of the members of the selection boards" (ANAC Resolution no. 1190 of 16 November 2016), the procedure seems anything but lean for the contracting authorities, not having the direct power of choice of the commissioners, and having to comply with procedures and timing, both for the nomination and the corresponding activity of publication and transparency. Lastly, the cost aspect should not be underestimated, meaning the remuneration of the individual commissioners and the total cost, paid by the administration, for the nomination procedure. A factor that is difficult for the contracting authorities to manage specifically regards the role of the Project Manager in the selection boards: if, up until now, in some cases, it was the role of the president, now this possibility is clearly excluded. The corrective requires that the president be both external, and have neither performed, nor shall perform any function or technical or administrative mandate relative to the contract being awarded.

On the theme of the programming and planning of the works, the main regulatory operations are: for large projects, it introduces the recourse to public debate; the integrated tender is completely abolished for tender contracts, and, most of all, the old division into preliminary project/definitive project and executive project has been cancelled, and with it also the feasibility studies. Probably, also on the basis of recent experiences on the theme of strategic infrastructural works, the legislature has decided to introduce the theme of shared planning and design providing the recourse to the debate procedure for works that impact the territory and the environment, distinct by type and size, at a time still to be defined by Ministerial Decree. This procedure, previously experimented with success in other European countries, has been introduced into our system for the first time: specifically, it manifests as the convening of a conference, whose invitees are the administrations directly involved and the others with direct interests, during which the methods of public debate are defined, which must be concluded, in any case, within four months from the aforementioned conference. The opinion derived is not binding, but must be considered in the draft phase of the definitive project. As if to say that it is sufficient to have shared the intent, but that it is not necessary that it merge with the possibility or impossibility of performing the operation...

After years of use, sometimes with positive experiences, others less positive, the period of the *integrated tender* ends. In fact, the new Code establishes that it is not longer possible to resort to joint awarding of the planning and execution of works "with the exception of cases of award to the general contractor, project finance, concession, public-private partnership, or availability contract". Therefore, the contracts relative to works shall be awarded by competition for the executive project, while the possibility of awarding on the basis of a less advanced project level remains for concession contracts or for public-private partnership.

As regards the programming phase, the old standard governed the use of feasibility studies for the insertion of operations into the three-year program and into the annual list (Ministerial Decree of 24 October 2014, article 1, chapter 2), and also detailed the content with a normatively binding character (Decree of the President of the Republic 207/10, article 14, paragraphs 1 and 2). The new code, regulates the initial phase, called the "program of acquisition and planning of public works", by article

21, paragraph 3: “for works of a value equal or superior to 1,000,000 Euros, for the purpose of insertion into the annual list, the contracting authorities shall approve the project of *technical and economic feasibility* in advance” that, by replacing the preliminary project, defines the first level of project study.

This modification certainly impacts the entire process of planning and programming of public works, even because it only interrupts an operating practice that has been in existence for over twenty years, is clearly the result of questions raised by the European Commission on weak design character of the feasibility study.

As far as the contracting authorities are concerned, then, in addition to the procedural changes noted above, there are also two interesting modification that fall into the view of rationalising and increasing the efficiency of the contract award process. The *qualification of the contracting authorities* system (article 38) is one of the most important innovations of the new text: like the economic operators, they must show that they comply with the predetermined requirements of ANAC, on the basis of the amounts and complexity of the contracts awarded and concluded. To get into the details of the future requirements for the formation of the list of qualified, and therefore, virtuous, public administrators, one must await a suitable DPCM from the government: indicatively, it regards the base requirements (among which may be considered the quality of the organisational structure, also in terms of the presence of employees with specific skills and/or personnel training and update system) and the award requirements, aimed, for example, at the implementation of measures of corruption risk prevention, quality management systems, etc. Another surely important element, which was introduced by Legislative Decree no. 50, is that of the aggregation between contracting authorities (article 37): the single administrations may directly manage only “small” awards, or those of a value of less than forty thousand Euros, for services and supply, and those of less than one hundred fifty thousand Euros for works. Beyond those limits, however, only administrations in possession of the ANAC qualification may continue to perform tenders, as they do now. All of the public administrations which do not meet the requirements for qualification and which, therefore, may not be interested into the national list, should apply to a central purchasing body to award a tender, a service or supply. This shareable regulatory restriction aims to push small Local Authorities, more or less voluntarily, to create synergies between them, and allows the identification, both in the aggregator and the expert, perhaps better able to offer administrative or technical support, for the purpose of completion and positive outcome of the procedure.

Even from the undertaking’s point of view, the new changes are numerous. The most significant, obviously in addition to the discussed theme of the 30% cap for subcontracts (Latour, G., Il Sole 24 Ore, 8/05/2017), to the inadmissibility of the use for specialised categories and the anticipation of the price (that, even if in the more restrictive version of Legislative Decree no. 56 that connects it, rightly, no longer to the estimated value of the tender, but to the award value, allows an increased minimum of liquidity for the undertakings), we find the corporate ratings and the anti-disruption methods.

On the basis of Article no. 83, chapter 10 “the corporate rating system and the relative award are established through ANAC, which takes care of the management, for which the Authority issues a specific certification, upon request, to the economic operators. *The aforementioned system is connected to reputational requirements, evaluated on the basis of quantitative, qualitative, objective and measurable indices, as well as on the basis of definitive assessments that express the structural ability and the trustworthiness of the undertaking.* With the corrective, the rating, whose aim is clear, takes on a voluntary nature and focuses on the evaluation of the quality of the business performance, beyond the SOA qualification. This case, too, demonstrates a regulatory revision because the decree

refers the determination of the principles and criteria for the formation of the list to ANAC, in a second phase. Finally, to discourage a race to win at the lowest price between the participating undertakings, conditioning phenomena of the free market through mechanisms of pre-determination of the anomaly threshold, the corrective has established that the calculation method is not indicated in the documentation of the race, but drawn by lot, between five available, in public session of the selection Committee.

Speaking, then, about the main modifications that regard professionals, in addition to the previously cited theme of the elimination of feasibility studies and the preliminary project to introduce the technical and economic feasibility project, we find a much-anticipated innovation that regards the parameters decree: the ministerial charts, necessary to calculate the amounts to put based on the tender for the awarding of an engineering or architecture service, shall be used by the contracting authorities in the construction of the tenders, while up until now, this happened only at the discretion of the contracting authority. Legislative Decree no. 50, then, introduced the obligation to apply the Minimum Environmental Criteria (the so-called MEC) both in the project documents as well as tender, in particular for which regard the project technical specifications and award criteria. It regards a modification that, until now, has passed nearly unnoticed, and that has been acknowledged by very few contracting authorities, and therefore, few professionals: everyone has been waiting for a streamlining and/or a cancelling of the requirement due to the effect of the corrective, but this has not come about. Consequently, the obligation remains, and being a theme that involves the design of the operations, from the urban scale to that of building site, it is easy to see possible criticalities of application in addition to possible (even non-negligible) economic impacts (Rebaudengo, M., Prizzon, F., Matta, M., forthcoming publication). Lastly, the innovation of the digitized procedures: based on article 44, a decree not yet shared, will define the digitization methods of the procedures of all public contracts, also through interconnection and interoperability of the data. Alongside the theme of simplification and streamlining the information transmission processes is also the theme of Building Information Modelling; article 23, chapter 13 of the Code provides that the contracting authorities may already require, giving priority to the most complex operations, the use of specific electronic modelling methods and instruments. Also in this case, reference is made to a successive Decree which, as of today, has not yet entered into force, that defines, *without additional expended to the public finance [...], the methods and time lines of the progressive introduction of the compulsory character of the aforementioned methods through the contracting authorities, evaluated in relation to the type of work to award, and the digitalization strategy of the public administrations and the construction sector. The use of these methodologies constitutes an evaluation parameter of the award requisites [...]* for the formation of the list of qualified contracting authorities.

This process, introduced by the code, will probably be one of the more difficult to enact because it regards a change of view radically different than that of today, and most of all, requires the skills that the contracting authorities and/or the other operators of the sector do not possess; in the event of the choice of a training process for the employees of the sector to reach the goal of obligation provided in the first version of the legislation, the problem of the times and costs will surely be encountered, very protracted in the initial phase for both professionals, and even more for the contracting authorities.

THE NEW TECHNICAL AND ECONOMIC FEASIBILITY PROJECT: THE CHOICE OF THE ALTERNATIVE OR THE VERIFICATION OF THE MANAGEMENT SUSTAINABILITY?

The technical and economic feasibility project (TEFP) represents one of the most important innovations of Legislative Decree no. 50, incorporating the Feasibility Study (FS) and the Preliminary Project in a single document, which are cancelled by consequence. In awaiting the approval of the so-called "Level Decree" (currently circulated only in draft form, strongly rejected by the Council of State in its Opinion (Massari A., 2017) referred to Article 23 of the new Code, for the transitional phase mentioned in the introduction, Article 14 of the old regulation is still in force but the FSs no longer exist. At the moment, it seems that the theme of the evaluation of the technical and economic feasibility/sustainability is delegated to the feasibility project, although it is not yet known with certainty what that is. Perhaps an "old" preliminary project to which the content of a feasibility study will be added? Or a "design" feasibility study with more technical content of the past? The only sure elements derive from the corrective decree of Legislative Decree no. 56, that provides the possibility to redraft the TEFP in two phases: the first, simplified, concerning the Feasibility Document of the alternative designs (DOCFAP), useful in inserting the work in the program; the second, at the completion of the intended content. If it is believed that the FS made sense, most of all because it obliged the administrations to reflect on the public investment not only for the implementation phase, but also for the successive management phase, then we may ask how the New Code considers the economic-financial aspects within the TEFP. Today, the situation appears as such: for work of a value exceeding 10 million Euros, and for works for which "a pricing is intended", a drafting is requested of "a cost/benefit analysis", of "a cost/benefit analysis" and, even "a risk analysis" (the sensitivity analysis, also requested, is simple and certainly useful for identifying key variables of the investment). For works with a value below 10 million Euros, it is not clear what the Code requires: it would seem that nothing is requested for the economic-financial verification. It takes into account that works below that level represent, by number, more than 90% of the total, and by value, approximately 70%. (ANAC, Annual Report 2015 of 14/07/2016) (CRESME, "XXIVth CRESME Economic and Forecast Report - the 2017 building market of 18/10/2016).

In short, this confusion in the text, which hopefully will find greater clarity with the emission of the Decree on the levels of design and on programming, refers to an unresolved belief on the usefulness of economic verifications and on the role to attribute to them. In fact, it oscillates between requiring considerable insights that are only partially necessary, to not requiring anything for works of significant values. For the first questions, it refers to the risk analysis (instrument of a certain sophistication and cost, perhaps excessive for the purposes of a public investment), but most of all, this is incomprehensible, the fact that these analyses must be carried out for each of the "design alternatives" taken into consideration, including "option zero", the non-operation. Forgetting the cost for the contracting authorities that such a regulation brings about, it doesn't seem useful: in the selection phase of the alternative projects, from the economic point of view, it is sufficient to compare the different implementation costs, reserving more accurate feasibility checks just for the chosen alternative.

It's important to remember that the Feasibility Studies were introduced in the Italian regulation with decades of delay compared with other western countries, not for the choice between alternative projects, but in the effort to remedy a defect of the Public Administrations, which is to deal only with the completion of the work. In reality, the discussion should be overturned: a public investment is decided not for ribbon cutting or laying the first stone, but to offer a service, and the decision must be made with full awareness of the costs required to maintain this service over time (costs of personnel, management, adequate maintenance of the structure, etc.) Only in the face of the

demonstration of the ability to cover all these costs, and therefore guarantee the service over time, for which the work is built, does the investment deserve to be funded by taxpayers' money.

THE PROBLEM OF THE FINANCIAL BID IN THE CONTRACTOR SELECTION PROCESS

As previously mentioned, the MEAT should be the criteria used for awarding contracts, when the base amount of the tender exceeds one million Euros; for services and supplies, for amounts in excess of the community threshold (€209,000); for engineering and architecture services, in every award that exceeds €40,000. This obligation generates slower and more complex processes compared with those awarded to the lowest price (one single formula is used to calculate the points, and the same formula can also take into account the different interpolation methods of the values, not necessarily connected to a linear relationship (ANAC Resolution no. 1005/2016), and almost ignores the cost aspect of the work, from the moment that the economic operators mainly concentrate their attention on the technical aspects. This is also stipulated by the corrective, in the contents of article. 95, chapter 10-bis: *the contracting authority, in order to ensure the effective identification of the best price/quality ratio, values the qualitative elements of the bid and identifies the criteria so as to guarantee an effective competitive comparison on the technical profiles. To that end, the contracting authority establishes a maximum ceiling for the price score within the limit of 30%.* The direct effect is detectable by the crushing of the average tender markdowns, at the expense of the true identification of a solution that represents the best price/quality ratio: imagining an award procedure with a detailed design based on the tender, the economic operator will not be called upon to reflect on the company cost efficiency (markdowns on supplies, efficacy and productivity of the workers' teams, possible reduction in terms of the supplier distance and general expenses) as on the "technical allocation" of the work in question, with a view to improving performance and the characteristics, exploiting its company cost efficiencies to the maximum value of the order (the competition based value). If, in the past, there was criticism of the lowest price method, because it triggered anything-but-virtuous methods through the phenomenon of variations in the course of the work, with which the lowered bid was recovered, today, the mechanism, although different, leads substantially to the same result, forgetting that the lowered bids are important economies for the contracting authorities, that allow the financing of other operations.

When the formation criteria of the ranking is that of aggregation compensator, the calculation methods of the economic scores are many, for example, through the application of a method with linear, bilinear or non-linear interpolation (ANAC Resolution no. 1005/2016). In comparison with the first case, that directly proportionally attributes the scores in function of the difference between minimum and maximum markdown, the other two cited methods would be preferable because, in the case of bilinear interpolation, bids with excessive discounts are discouraged, from the moment that, for effect of the formula, they receive an incrementally reduced score, and limit the attributions of high differences, even for minimal waste (main problem of the linear method), with detectable criticality in the limitation of price-based competition. The application of non-linear methods, however, allows the contracting authority to choose whether to award greater or lesser discounts, acting on the type of formula chosen, in partial contrast with respect to what has been seen until now, or to the push towards contained rebates.

As stated, the application of the MEAT criteria generates slower procedures (ITACA, 2013) compared with cases awarded by lowest price: this is not only because an elevated number of tender participants is possible, but also because, in addition to longer times for the formation of the evaluation committee, a theme previously addressed, the application of the compensating aggregation method for the attribution of qualitative points, the most used by the contracting

authorities, requires the paired comparison of the alternatives for each criteria or sub-criteria, and for each commissioner. Although the number permitted by law must be odd, and not more than 5, even under the new rules for the formation of the commissions, and to shorten the times, ANAC recommends having committees consisting of 3 members, president included, almost as a confirmation of the fact that it is well aware of the bureaucratic burden placed on the contracting authorities.

To conclude, the theme of the adequacy test of the bids, regards both the terms of determination of the anomaly threshold, and congruity of labour costs indicated.

In fact, on the basis of the recent corrective decree (article 95, chapter 10), the contracting authorities must verify, before the award, that the personnel costs indicated in the bid are not lower than the minimum wage. Relative to the definition of the anomaly threshold, different routes are taken based on the award criteria: in cases of award to the most economically advantageous tender, the congruity is evaluated *for those bids that present both points relative to the price, and the sum of points relative to the other evaluation elements, both equal or superior to four fifths of the corresponding maximum points provided in the tender announcement*. (article 97, chapter 3).

With regard to cases awarded based on lower price, today, permitted by effect of the corrective decree for works of up to € 1,000,000, the definition of the anomaly threshold occurs at the time of the tender, applying the anti-disruption method, or through a calculation procedure drawn by the Project Manager or the commission from among the five indicated by the Code article 97, paragraph 2. In all cases, the value of the threshold is obtained from the mathematical average of the markdown percentage of all the permitted bids, with some variations: in three cases out of five, the so-called *wing-clipping* is used, therefore excluding ten or twenty percent from the calculation, rounding up to the higher unit, respectively of the bids with the greatest and lowest markdowns. In two of these cases, the value obtained in this way is increased (letters a) and e) of the mathematical average difference of the markdown percentage that exceeds the aforementioned average; in the case (letter e), the difference is resized for effect of the multiplication by a coefficient, less than 1, drawn again during the tender; in the third, the mathematical average is maintained unchanged or reduced (letter b) in function of an attribution rule (even or odd) of a determined numeric value of the sum of the markdowns. In the last two rules provided by the Code (letters c and d), the calculation is easier because it determines the threshold by increasing the mathematical average of the markdown percentage of all the bids permitted by 15 or 10%. At first glance, the complexity of the calculation of some methods facilitates the impossibility of predetermining the threshold, but it is not so clear if the determination of such a “variable” value (absolute differences between one method and another, even above 2%) is truly able to discriminate the true anomalies. So much so, that if not all methods tend to increase the mathematical average, it is not possible to associate the concept of abnormal bid to that which presents an excessive markdown value.

THE NEW CODE AND THE PUBLIC-PRIVATE PARTNERSHIP

According to article 3 of the New Code, a PPP (public-private partnership) contract may be defined as the contract for pecuniary interest, stipulated in writing, by which one or more contracting authorities confers to one or more economic operators, for a period determined in function of the duration of the amount of the investment or the fixed financing method, a complex of activities, consistent in the creation, transformation, maintenance and operations management of a work in exchange for its availability, or its economic exploitation, or the provision of a service connected with the use of the same work, with assumption of risk according to the methods identified in the contract, by the operator. The theme of the partnership was and is a central theme in the reform of

the Code of contracts, before, and in the approval of the corrective decree, now. The elements moved by the European Directive 2014/23 have required a consistent regulatory operation, specifically on the theme of risk allocation (Vecchi V., Il Sole 24 Ore, 05/02/2016).

There are many risks connected with the creation of a work, independently from its nature (if public or public-private): beginning from *general project risk*, for example, bureaucratic or political risk that brings about a lengthening of the pre-construction times; *construction risks*, that consider the respect of delivery deadlines of the work, the estimated cost and the project standards; *availability risk*, linked to the capacity of the operator to manage the work and service in a correct way; *demand risk*, when the lack of respect of the earnings forecast is linked to external factors that do not depend of the quality of the service provided, *other specific risks* of a financial, regulatory, political, authorisation nature, etc. that may intervene in the course of the year. The new European system of national and regional accounts of Eurostat has again introduced the *risk of residual value and obsolescence* linked, for example, to the fact that if the partnership contract provides for the redelivery of the work at the end of the concession, the purchase or takeover price may be lower than expected and, and the *operational risk*, to compulsorily transfer to the private subject.

The Code defines (article 3) *operative risk* as that *linked to the management of works or services on the demand side, or the bid side, or both, for which, in normal operating conditions, the recovery of investments made or costs incurred for the management of the works or services subject of the concession is not guaranteed.* The part of the risk transferred to the private subject must bring about an effective *exposition to the market fluctuations such that each potential estimated loss suffered by the dealer is not purely nominal or negligible*, admitting that, in normal operating conditions (article 165, chapters 1 and 2), *the variations relative to the costs and revenues subject of the concession effect the equilibrium of the business plan. The variations must be, in each case, able to significantly affect the actual net value of the whole of the investment, the costs and revenues of the dealer. Economic and financial equilibrium is the precondition for the proper allocation of risks.* This is where a correct analysis of the supply and demand is important, especially in cases of partnership (but also applies to public works), for the purposes of a valid business plan, that requires strong input data, and not unpredictable and simplified estimates. Conventionally, also in the European scope, it is considered that an operation may be classified as public-private partnership only if the private partner accepts the construction risk and at least one of the other two principal risks (availability or demand). In these terms, the regulatory modification introduced by Legislative Decree no. 56 seems a bit strange, which raises the threshold of public contribution from the previous ceiling of 30% to 49%: also according to the outcome of the Council of State, this would seem to be in contradiction *with the risk allocation criteria*.

Continuing in the PPP theme, two interesting aspects have emerged that are linked to the reform of the Code of Public Contracts: the possibility that concessions and partnerships are regulated separately with an appropriate code, and the introduction of new instruments classified as public-private partnerships. Although the intent to separate the two different themes may be shared (tenders and concessions-partnerships), for effect of the currently enforced soft law, it is believed that this may happen in certainly lengthy times, given the need to first complete the regulatory revision begun one year ago, and currently blocked at a level of 30%... Finally, with regard to the new PPP instruments provided by the Code, in addition to previously noted project financing, leasing and availability contract, true types of contracts also used in the past with good results, *horizontal subsidiarity* (article 189) and *administrative bartering* (article 190) have been inserted. It clearly involves instruments of primarily social value, to which the new code should have dedicated less space, referring, in this case, to a pertinent ANAC document in the form of a Guideline: in fact, it seems inconsistent that the

Code contains precise operational indications for the execution of these contracts, and refers to successive acts and regulations for the definition of the content of three project levels. In this sense, a Guideline would have better been able to address the actions of the single Local Authorities which, at least now, have difficulty in applying the content of the two cited articles of the Code

FINAL CONSIDERATIONS

The revision of the old De Lise Code is considered an important regulatory modification, both in formal terms and in content. The choice to intervene with the soft law instrument, that does not seems fully shared even by the same jurists, is certainly problematic if seen from the point of view of the operators: they know only some of the modifications introduced in detail, of which, as of today, only 30% of the measure referred to in the text have been enacted. In this confusion of regulatory provisions, Guidelines, ministerial decrees, corrective decrees follow the corrections, the integrations and the specifics, sometimes also through laws not closely connected to the Code of Contracts: all this compels economic operators, planners and functionaries of the contracting officials to constantly monitor the documents officially published and their successive updates. Even in the presence of surely interesting new elements, the lack of clarity of some timely events of the regulation often do not allow a fluid application, and obliges an analysis, more judicial than technical, of the problem. In some parts, it has emerged that there is almost a desire to cancel the past practice, without reflecting on the quality of some procedures: a design recommendation document, and no longer a preliminary document for design process, an alternative design feasibility document and no longer a feasibility study (assuming that the parallelism can be sustained...) and more, a technical and economic feasibility project, and no longer a preliminary project. It regards general procedural innovation and specific new content, but how far do these changes go towards real simplification? Perhaps when the framework of the regulations in place is completed, one may understand if the entire process has been improved in terms of efficiency of the operators involved, the efficacy of the operations and streamlining of the cost.

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