

PUBLIC-PRIVATE PARTNERSHIP: TOWARDS MORE FLEXIBILITY WITH REGARD TO THE AMOUNT OF PUBLIC CONTRIBUTION?

The public-private partnership is traditionally based on the transfer of the operating risk, linked to the execution of works or the management of services, to the economic operator. If this transfer is missing or is nullified by contractual provisions or other acts of the public administration, we fall instead into the model of the public procurement contracts and the operation cannot be accounted for off-balance sheet.

To ensure the effective transfer of risk to the private party, the 2016 Public Contracts Code established that any public contribution, in the form of money, assets, public guarantees or other funding mechanisms borne by the public administration, may not exceed a certain percentage threshold of the total investment cost, including any financial charges (Article 180, paragraph 6, Legislative Decree No. 50 of 18 April 2016).

In the original structure of the Code, the threshold in question was set at 30%; then it was raised to 49% with the corrective decree of 2017 (Legislative Decree No. 56 of 19 April 2017).

The importance of compliance with the threshold set by Law has been underlined in the following years by numerous decisions of the Court of Auditors, also for the purposes of the proper accounting of partnership operations.

In particular, the Court of Auditors of Emilia-Romagna called the attention of the public administrations *"to an overall assessment of the deal they intend to conclude with the private party, extended to the entire system of clauses, guarantees and financial charges"* (see opinions Control Section no. 3 of 21 January 2021 and no. 200 of 30 September 2021).

The regulatory and jurisprudential framework just described, characterised by particular rigidity, now seems to be heading for a paradigm shift as a result of the National Recovery and Resilience Plan (NRRP).

First of all, the extraordinary allocation of European resources under the NRRP has raised the issue of whether these resources are subject to the 49% threshold. On this point, the National Anti-Corruption Authority rendered an important opinion through Resolution No. 432 of 20 September 2022, clarifying that non-repayable European resources (the so-called grants) can be considered excluded from the 49% perimeter, since they are not subject to the Italian State's obligation of repayment.

Secondly, the draft of the new Public Contracts Code (currently being examined by the competent parliamentary committees) does not contain any quantitative limit on the monetary value of the risk that the partnership transaction must transfer to the private party, deferring to Eurostat's decisions regarding the percentage threshold of the possible public contribution.

Lastly, it should be noted that, according to a recent draft of a decree-law containing further regulatory measures to promote the implementation of the NRRP, the maximum public contribution could soon be raised to 70 per cent for projects included in the NRRP, the Complementary National Plan (*Piano nazionale complementare - PNC*) and the Integrated National Energy and Climate Plan (*Piano nazionale integrato per l'energia e il clima - PNIEC*), as well as more generally for projects of EUR 10 million or less.

If this rule were to be confirmed, the public-private partnership instrument would undoubtedly become more attractive to the market, not only in the context of the NRRP.

The firm will closely follow the forthcoming regulatory developments and remains at your disposal for any further information.

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