



To ensure correct planning
and rigorous management
of public resources

A FOCUS ON PPP_s IN ITALY

8th Annual Meeting of Senior PPP Officials
23-24 March 2015, OECD Conference center, Paris

2015



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This document was prepared by the Working group on Public-Private Partnerships (PPPs), coordinated by the Italian Ministry of the Economy and Finance - the State General Accounting Department - General Inspectorate of Public Accounting and Finance. Contributors included representatives of: State General Accounting Department -General Inspectorate of Economic Affairs and General Inspectorate for Budget; Presidency of the Council of Ministers - Department for Planning and Coordination of Economic Policy; Italian National Anti-Corruption Authority (ANAC); Italian National Statistical Institute (ISTAT) - Central Department of National Accounting, Public Finance Service.

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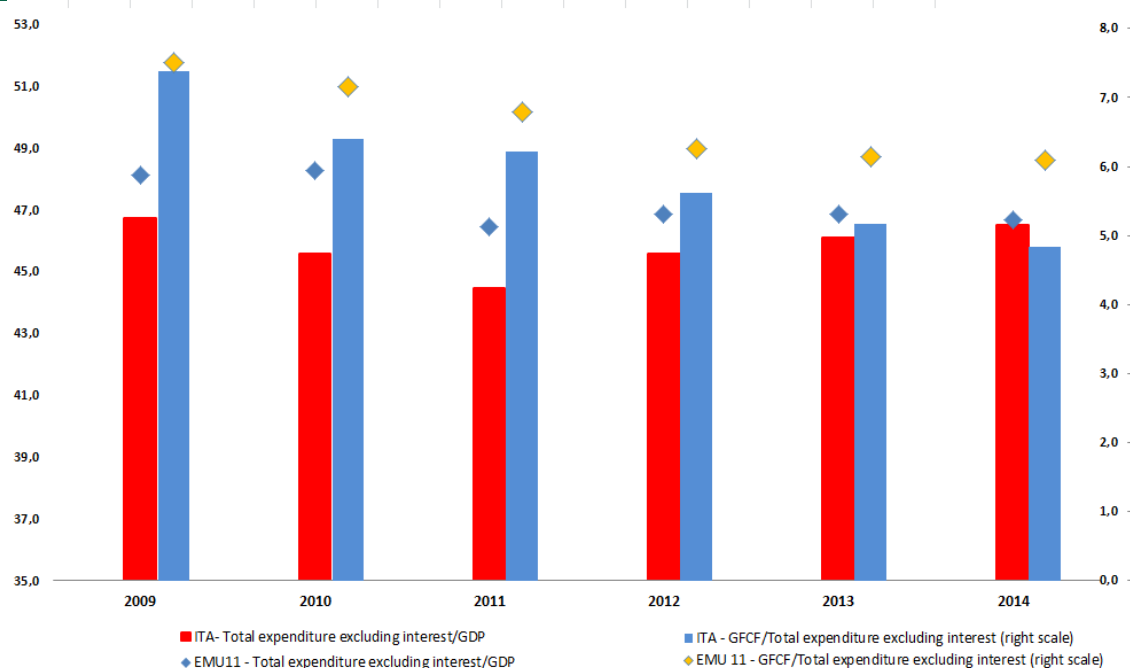
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I. INTRODUCTION

The use of public-private partnerships (PPPs) as a way to realise public investments has in recent years become increasingly widespread in the major European countries, following on from the early experience of PPPs in the United Kingdom. PPPs should bring savings in public resources and a faster realisation of works, resulting from the involvement of the private sector. However, they also present a risk, since any reclassification of a PPP contract in the government's accounts entails an increase in spending, with a consequent negative impact on the public finances.

In Italy, PPPs have only recently (2008) become regulated by the Code of Public Contracts (article 3 (15-ter)) following the development of the partnership market in the early 2000s (see Section II, *The PPP Market in Italy*). In recent years, though, Italian legislation has been amended several times in order to encourage the involvement of private capital in the realisation of public works under PPP arrangements (see *FOCUS: Recent regulatory changes to incentivise PPPs*), given the country's significant efforts to keep its accounts under control over the last five years and the scarcity of public resources available for investment (Figure I.1-1).

FIGURE I.1-1 : PUBLIC INVESTMENT EXPENDITURE IN ITALY VS EMU11* (%)



*The EMU11 does not include Italy.

Source: MEF calculations based on EUROSTAT (ESA2010) and AMECO data. AMECO source has been used for EMU11 variables relative to GFCF and total expenditure excluding interest.

The principal aim of this Report is to provide an overview of the PPP institutional set-up in Italy with respect to the OECD Recommendation of May 2012. The Report has the following structure:

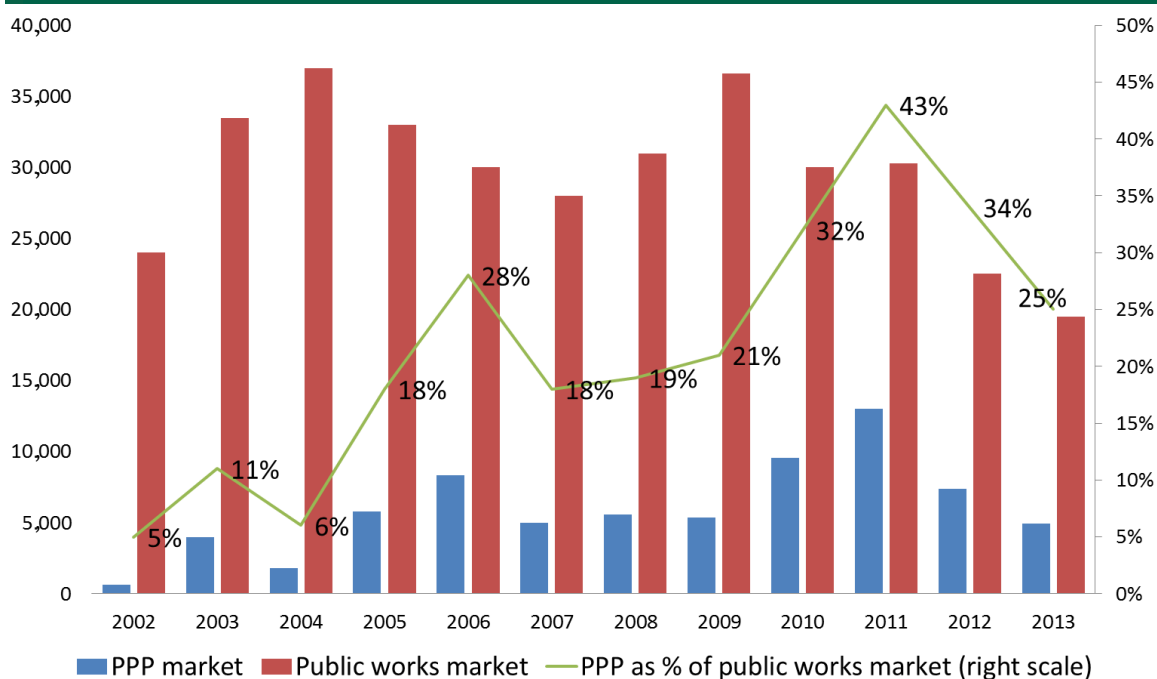
- Section I: provides an overview of the Italian PPP market;
- Section II: outlines the criteria used to record PPPs in national accounts and to evaluate whether a transaction is “off” or “on” balance sheet. The Section also focuses on risk allocation and government guarantees;
- Section III: sets out the activities undertaken in Italy, taking into account the principles of the OECD Recommendation. It presents the role of key public sector entities in PPPs; briefly describes the legal framework for PPPs (including a full draft of a PPP contract); provides information on both risk management and the monitoring system characterising the Italian experience.

II. THE PPP MARKET IN ITALY

The market for PPPs in Italy began to develop in the early 2000s, continuing up until 2006 when the value of tenders reached 28% of the value of public works (Figure II.1-1). The economic recession has not helped the development of PPPs. However, since 2010, the value of the PPP market has grown in relation to the value of the public works market, partly as a result of government measures to incentivise the use of partnerships for the realisation of public works. In 2011, the PPP market peaked at 43% of the public works market, with an average of 33.5% over the period 2010-2013 - well above the average for the preceding four year period (21.5%).

Yet although the ratio of PPPs to the overall public works market increased from 5% in 2000 to around 25% in 2013, the Italian PPP market has not reached the size of the two major European countries in the field (France and Great Britain).

FIGURE II.1-1 : THE PPP MARKET (IN € MILLIONS AND % OF PUBLIC WORKS MARKET)

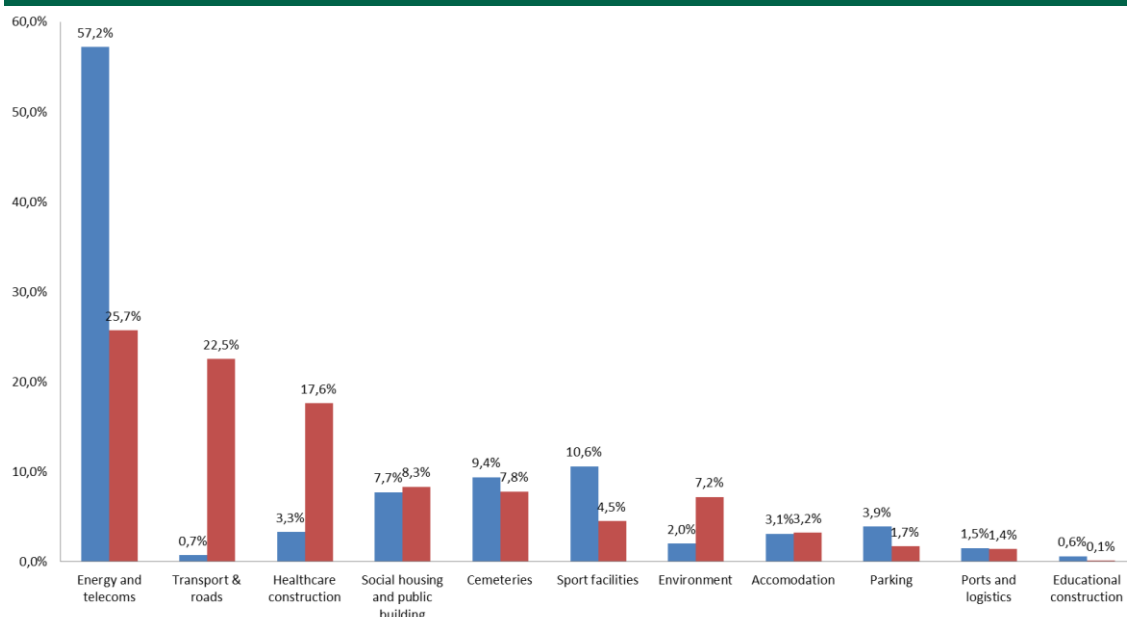


Source: DIPE elaborations on CRESME data

In terms of the **value of tenders called**, the PPP market grew steadily until 2011. However, in 2012, in line with the new decline in the state of the Italian economy, the value of these tenders fell by around 35% before falling still further in 2013 to reach a total of about 5 billion, equal to 25% of the total value of the public works market (Figure II.1-1).

In 2012 and 2013, the significant decrease in the amount of public works concessions played a crucial role in the fall in value of the PPP market. In the last year alone, concessions fell by more than half (from about €4.7 billion in 2012 to about €2.1 billion in 2013).

FIGURE II.1-2 : PPP - PUBLIC WORKS CONCESSIONS: DISTRIBUTION OF TENDERS BY SECTOR, 2013 (%)



Source: DIPE elaborations on CRESME data

In this context, build and operate concession contracts (whose breakdown by sector in 2013 is shown in Figure II.1-2) accounted for about 42% of the total value of PPP tenders in 2013, when in 2012 these contracts accounted for more than half of the PPP market. The highest values were seen not only in sectors where the revenues from operating the infrastructure come from charging users (energy and telecommunications, transport and roads), but also in some sectors where infrastructure is built for the direct use of the public authorities (mainly public building) and that are characterised by the payment of rents and by a higher government grant/investment cost ratio than in infrastructure subject to tariffs.

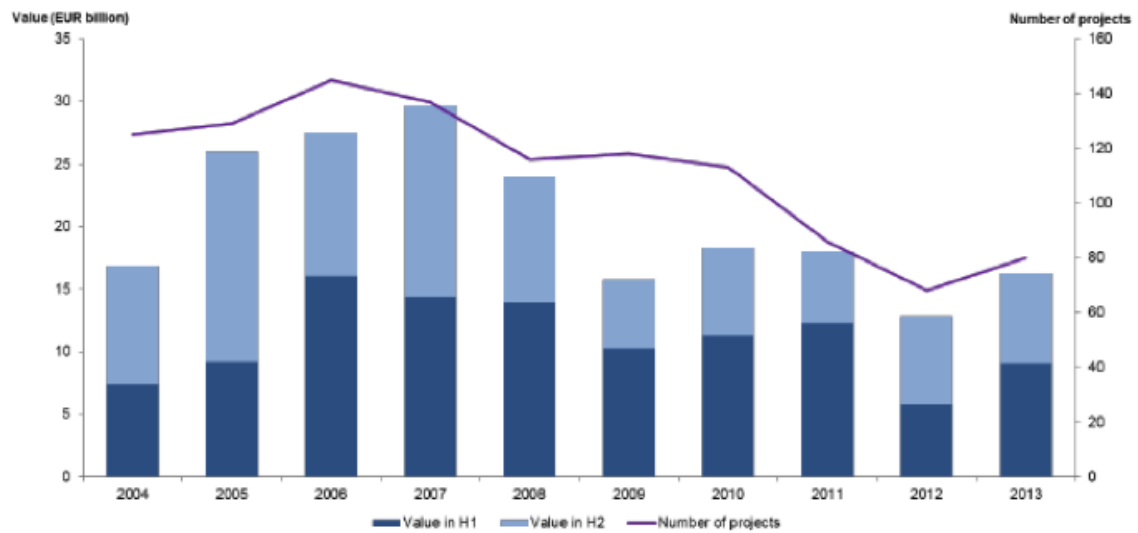
With reference to the **award phase**, since the early 2000s there has been a steady increase in awards of PPP contracts, from 84 in 2002 to 809 in 2013. Also in 2013 there was a slight increase (approximately 7%) in the number of contracts: from 766 contracts awarded in 2012 to 809 the following year, for a total value of about €6.03 billion (+37% compared to 2012). Even so, the percentage of contracts awarded out of the total number of tenders remains problematic.

Lastly, the situation in terms of **financial closing** is much more complex, because after reaching a high of 11 financial closings worth more than €10 million in 2007, as recorded by the European PPP Expertise Centre (EPEC), this fell to just one financial closing in 2009 and 2012 - the years in which Italy suffered its largest drops in GDP since the Second World War.

In 2013 the situation improved: EPEC recorded four PPP transactions that reached financial closing in 2013 (worth €4.4 billion) , taking Italy to second place after the United Kingdom (€6 billion).¹

¹ Source: EPEC Market Update 2013.

FIGURE II.1-3 : FINANCIAL CLOSING IN EUROPE FROM 2004 TO 2013 (NUMBER AND VALUE)



Source: EPEC

2014 data confirm a good performance: Italy had five financial closings for a worth of €1.1 billion.

III. HOW PPPs ARE TREATED IN NATIONAL ACCOUNTS

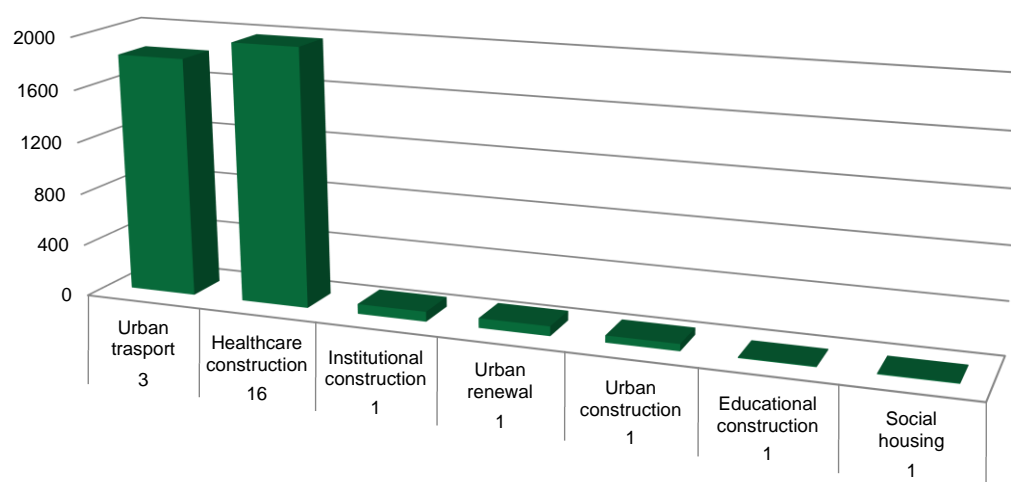
The use of PPPs in countries like Italy that have a high public debt and deficit to contain may offer an opportunity but it also presents a risk, since these transactions despite "formally" financed mainly by the private sector may fall "substantively" within the scope of the public sector.

Italy operates a system of ex-post assessment of partnership contracts for classifying infrastructure as "off" or "on" the national accounts. This applies mainly to infrastructure intended for direct use by the PA. The institution in charge of making this assessment is the Italian National Statistical Institute (ISTAT), which, as part of its functions, classifies PPPs in order to estimate their impact on Government deficit (and public debt). Following this assessment, a transaction that began as a partnership, with off-balance-sheet infrastructure costs, could turn out to be sustained *de facto* by the public partner, meaning it would be classified as on balance sheet, resulting in higher spending and a negative impact on the public finances.

III.1 CLASSIFICATION OF TRANSACTIONS FROM OFF TO ON BALANCE SHEET

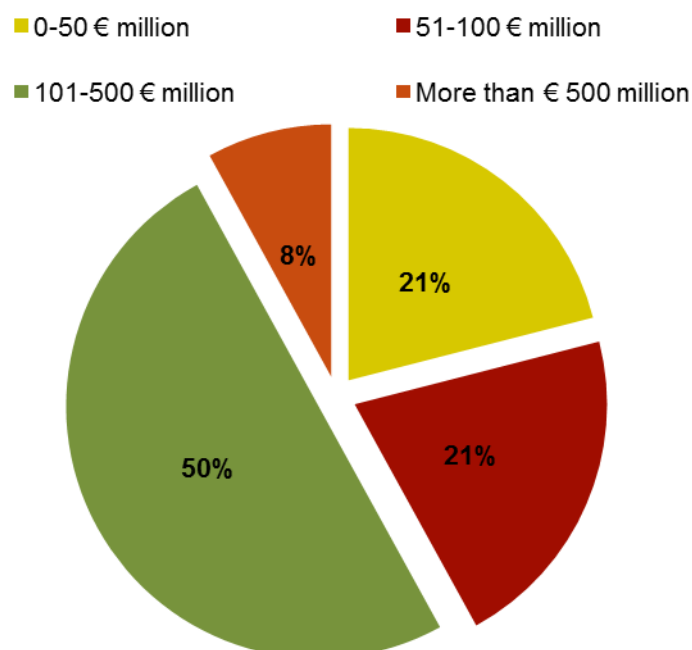
In particular, partnership transactions that fall into the categories indicated by the Eurostat Decision (2004) have been subject to a monitoring procedure since 2010.

Twenty-four concession contracts were monitored by ISTAT from 2010 to 2014, broken down by sector as follows (Figure III.1-1): healthcare construction (16 projects); urban transport (3 projects); institutional construction (1 project); urban redevelopment (1 project); urban construction (1 project); educational construction (1 project); and social housing (1 project).

**FIGURE III.1-1 : ISTAT: PPPs MONITORED BY VALUE AND MAIN SECTOR, 2010-2014
(€ MILLIONS AND NUMBER OF CONTRACTS BY SECTORS)**

Source: ISTAT.

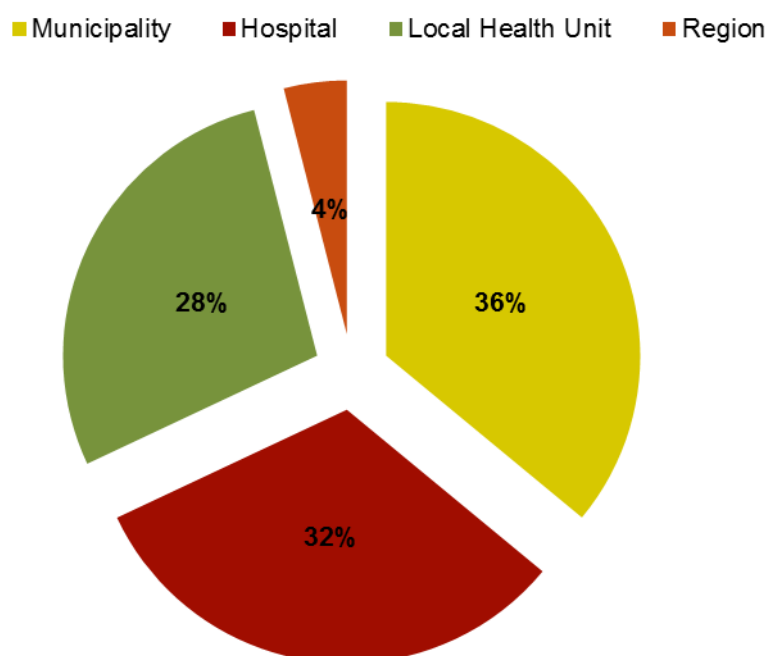
The total value of the contracts is approximately €4,000 million, at an average of around €168 million. Medium-sized contracts accounted for the bulk of them (Figure III.1-2).

FIGURE III.1-2 : CONTRACT VALUE CLUSTER (% DISTRIBUTION)

Source: ISTAT.

The main grantors are hospitals (9 units), followed by municipal authorities (8 units)(Figure III.1-3).

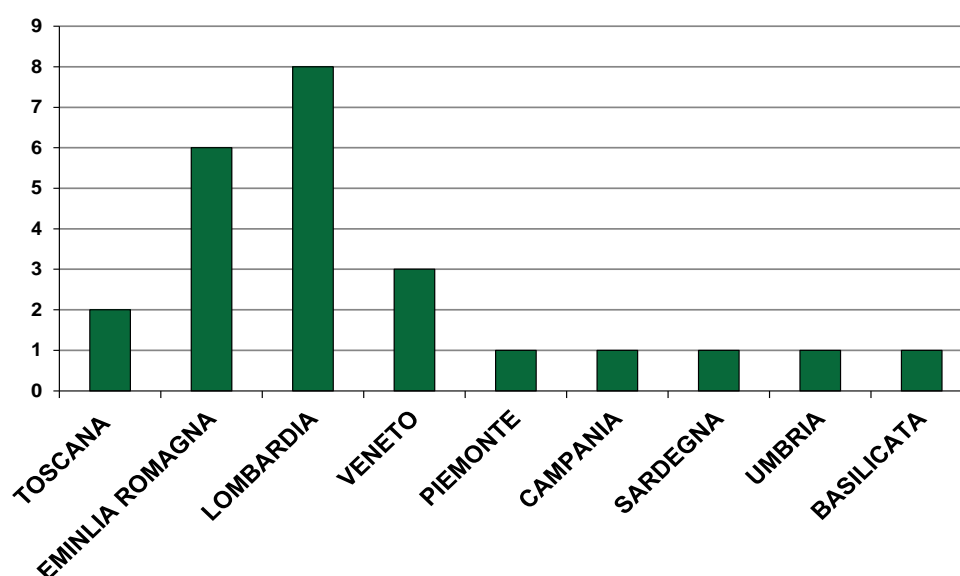
FIGURE III.1-3 : TYPE OF GRANTOR (% DISTRIBUTIONS)



Source: ISTAT.

The geographical breakdown shows that the northern regions are all well represented, unlike those of the South, despite the limited contribution from Campania and Basilicata (Figure III.1-4).

FIGURE III.1-4 : PPP BY REGION (NUMBER OF CONTRACTS)

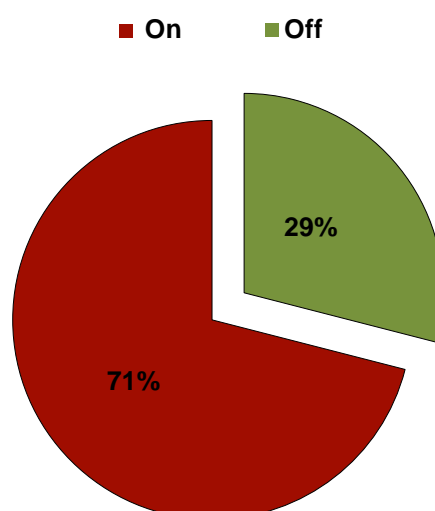


Source: ISTAT.

The on/off balance sheet assessment of the 24 contracts is mainly based on an analysis of risk allocation (see Section III.2), in light of European rules.² This analysis produced the following results:

- seventeen are "on balance sheet" contracts in which there is a substantial transfer of risk from the private sector to the public sector and therefore count towards government investments. The total value of the on-balance-sheet transactions is €3,500 million. This classification has led to an average annual increase in additional investments from 2005 to 2013 of around €110 million;
- there were seven "off balance sheet" contracts that do not see a substantial transfer of risk from the private sector to the public sector and therefore are not recorded in government accounts. The total value of the off-balance-sheet infrastructures is €500 million.

FIGURE III.1-5 : ON/OFF GOVERNMENT BALANCE SHEET (%DISTRIBUTION)



Source: ISTAT.

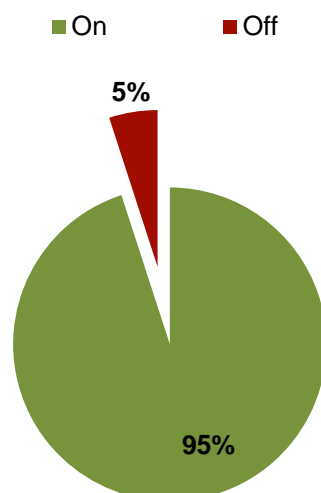
² The European System of National and Regional Accounts (ESA):

- Regulation (EC) No. 2223 (ESA 95), published on June 25, 1996.
- Regulation (EU) No. 549/2013 (ESA 2010), published on June 26, 2013.

Manual on Government Deficit and Debt (Implementation of ESA 1995 and ESA 2010), various editions. The latest edition dates November 2014.

The public contribution totals €2,200 million, of which around 95% is allocated to on balance-sheet projects (Figure III.1-6).

FIGURE III.1-6 : ALLOCATION OF PUBLIC CONTRIBUTIONS (% DISTRIBUTION)



Source: ISTAT.

ISTAT's assessment plays an important role in the correct classification of contracts in the national accounts, which shows the impact of the use of these instruments on budgetary balances.

III.2 THE IMPORTANCE OF RISK ALLOCATION AND GOVERNMENT GUARANTEES

Another crucial aspect is the optimal allocation of the different risks among the various entities involved in the project. Optimal allocation requires each of the operators involved to assume the risks they are best equipped to manage, as they have the technical and managerial skills to minimise the economic impact of adverse events.

Effective allocation of risks between private partners and the Public Authorities (PA) is also important for the purposes of calculating deficit and public debt, so it is essential in preventing the risk of PPP contracts being used to circumvent the limits set by European regulations.

Analysis of past experiences and data from the institutions that monitor this field in Italy reveal the main problems per type of risk:

- A) the **Construction risk** associated with the realisation of a project relates to events connected to the design, construction and completion of assets under a PPP, such as delivery delays, failure to meet construction specifications, significant additional costs, technical problems and negative externalities (including environmental risk) that result in the payment of compensation to third parties. In general, the **transfer of construction risk to the Concessionaire** is

very rare: almost always the agreement allows for variations during construction in the cases provided by law, resulting in a readjustment of the business plan; alternatively, in the case of variations worth more than 20% of the original value of the works, a separate contract is signed giving the concessionaire the additional right to not comply with the demands of the grantor or to not carry them out.

Even cases of force majeure are not always contractually limited: general reference is made to "events" whose occurrence gives the concessionaire the right to change the schedule by an amount of time corresponding to the duration of the force majeure event; if the effect of the delay means that the business plan needs to be altered then the concessionaire is entitled to revise it.

If delays and obligations related to archaeological findings carry an increase in costs and an extension in expected timeframes that have an effect on the economic indicators underpinning the business plan, then in some cases these are valid grounds for the automatic adjustment of the business plan. This right to offset the archaeological "variable" is also unlimited: both in the post-award planning phase and during the actual performance of the contract. In such cases, construction costs are always borne solely by the grantor. The agreement almost always allows variations during construction in the cases provided by law, with the corresponding adjustments to the business plan.

Essentially, the construction risks found in PPP transactions are attributable to:

- a) Higher costs in the planning phase (preliminary, definitive and executive) due to:
 - procedural delays attributable to the Grantor;
 - procedural delays attributable to the Concessionaire;
 - refusal of permits attributable to the Grantor;
 - refusal of permits attributable to the Concessionaire;
 - planning deviations attributable to the Grantor;
 - planning deviations attributable to the Concessionaire;
 - variations attributable to the Grantor;
 - variations attributable to the Concessionaire.
- b) Higher costs during the realisation of the project due to:
 - failure to comply with timetable attributable to the Grantor;
 - failure to comply with timetable attributable to the Concessionaire;
 - suspensions of work attributable to the Grantor;
 - suspensions of work attributable to the Concessionaire;
 - variations in the course of the work attributable to the Grantor;
 - variations in the course of the work attributable to the Concessionaire;
 - deviations from the plan attributable to the Concessionaire;
 - increased costs of raw materials.

Risks associated with the economic management of the project ("post-completion risks"), which are typically identified as follows:

B) Availability risks are related to the Concessionaire's ability to guarantee the availability of the infrastructure and the provision of the services according to the agreed contractual conditions, both in terms of volumes and of quality standards (lack of performance). Therefore these occur when unsatisfactory levels of performance result in the partial or total unavailability of certain services, or services that do not meet the quantitative and qualitative criteria specified in the concession agreement and related management specifications. The following situations have been found in PPP contracts in Italy:

- a) the performance specifications set out minimum quality standards below which significant penalties are charged to the Concessionaire;
- b) the performance specifications do not provide for penalties charged to the Concessionaire for non-performance or partial performance of the provision of services;
- c) the performance specifications do not provide for sufficient operational activities.

Also in this case, analysis of transactions has revealed a partial transfer of availability risks to the Concessionaire. For projects where the private party builds and manages the infrastructure in return for payments made by the public partner, the penalties are sometimes not automatic or effective, and sometimes no clauses for the termination (automatic or otherwise) of the concession are included or introduced, even in the event of the poor quality of the service provided. For projects executed under the concession model, however, effective algorithms were found that connect the tariff payment to the availability and quality of the service.

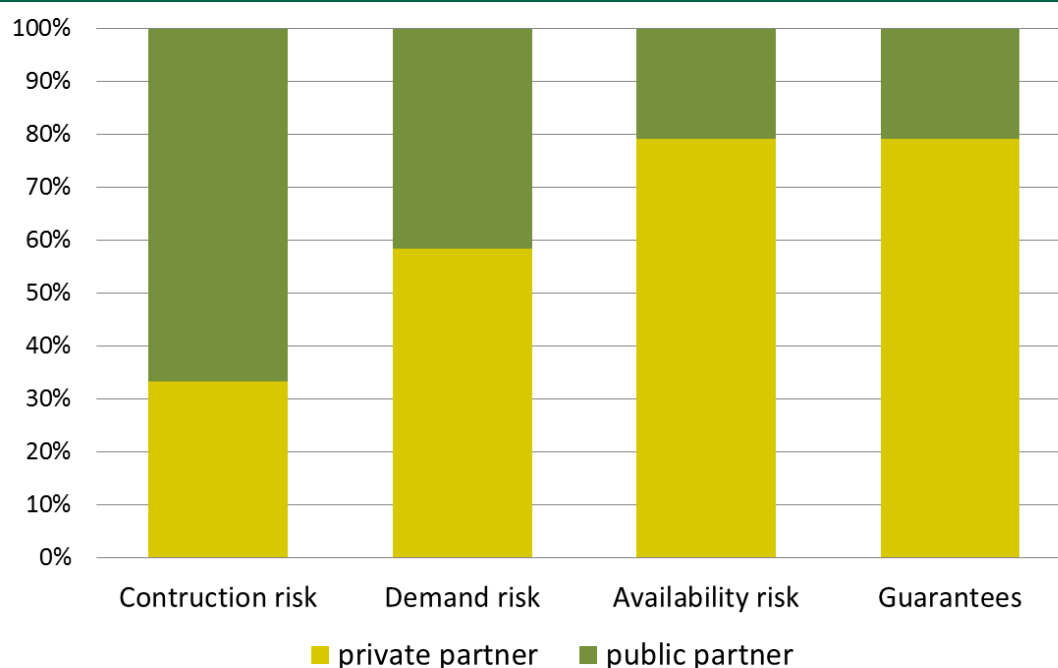
C) The Demand risk originates from the variability of demand (above or below the level expected at the moment when the PPP contract was signed), regardless of the quality of the services provided by the Concessionaire and dependant on other factors such as the existence of more convenient alternatives for users, new market trends, the economic cycle or technological obsolescence.

Example:

The grantor supplements any revenue shortfalls if effective demand is lower than expected.

In the Italian case it is also worth distinguishing between the transfer of demand risks to the Concessionaire by type of project: for concession projects, demand risk is transferred entirely to the Concessionaire (the agreements do not provide for any guaranteed payment for minimum traffic levels and always provide for the sharing of any extra profits from traffic volumes exceeding the expectations set out in the business plan, as well as the residual operating profits); in PFIs (where the public authorities are the main buyers of the service), there is always a minimum threshold at which the grantor intervenes to re-balance the business plan by taking up the lack of user demand, thereby creating a "take or pay" tariff system.

FIGURE III.2-1 : RISK SHARING AND PUBLIC GUARANTEES



Source: ISTAT.

In order to reduce the risk of reclassification from off balance sheet to on balance sheet, while also improving control of public accounts, it would be advantageous if the PA could only use partnerships after having performed, ex ante, a thorough cost-benefit analysis compared to other procedures,³ and if it performed correctly "designed" transactions with an effective allocation of risks between the parties, in line with Eurostat Decision 2004.

Finally, it should be noted that since they are highly complex transactions, they are often the preserve of a small number of experts working in the field. This causes a lot of mistrust towards such transactions from awarding authorities, causing serious problems in awarding the associated contracts and low bidder participation.

See ANNEX 1 to get a deeper understanding of ISTAT methodology in PPPs classification.

³ As recommended by the OECD in the second principle.

FOCUS: government guarantees, risk allocation and treatment in national accounts

The crucial factor for the classification of PPP transactions in the institutional sectors of the National Accounts is identifying how risks are allocated between the private and the public operator. If the risks are allocated to the private operator, this leads to the investment cost and the bank financing required to be booked to the institutional sector Non-Financial Corporations, S.11 under ESA2010.

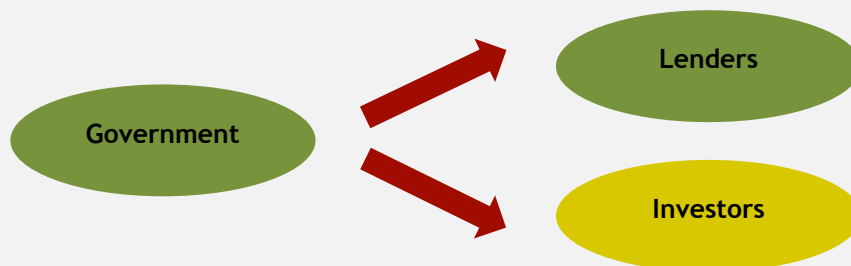
In recent years, for the purposes of proper recording of PPPs in the national accounts there has been increased scrutiny of the presence or absence of financial guarantees granted, explicitly or implicitly,⁴ by the public partner to the private partner. If the partnership contract provides for the grantor (PA) a financial guarantee, it must be considered whether the guarantee assigns the public partner a high degree of responsibility/risk compared to the private operator (concessionaire). This could result in a transaction being reclassified as an investment borne entirely by the public operator.

It is also important to carefully evaluate the existence of any "guarantees" with lenders, even when these are not explicit, since also in this case altering the distribution of risk in a PPP project would result in a statistical reclassification, with the asset to which the PPP contract refers being allocated to the PA's balance sheet (see the Eurostat Manual on Government Deficit and Debt 2014, section "VI.4.3.6 Government Guarantees (60-68)).

State guarantees often take the form of commitments in the PPP contract between the Government and the private partner



Rather than through separate agreements between the government and lenders/investors



Government guarantees are those guarantees offered directly to the financiers of a PPP project, as summarised in the following table:

⁴ For example, the concept of "assignment of receivables...(...)" could be seen to carry a form of implicit guarantee. For further details, see paragraph VI.4.3.66.

THE MAIN STATE GUARANTEES

Revenue or usage guarantees

Guaranteed minimum service charges (French assignment model/German model)

Change of law/regulation undertakings

Termination payments

Debt assumption undertakings

Residual value payments

They can assume two main forms: financing guarantees and refinancing guarantees.

Loan Guarantees

Through these guarantees, the PA offers lenders a coverage of debt service in case the private partner is unable to repay it.

These guarantees can be:

- "acceleratable" or of an "instalment" type. With acceleratable guarantees, the lenders have the right to require the PA providing the guarantee to immediately pay the entire outstanding debt resulting from the payment default of the private partner. With guarantees payable in instalments, the PA will only pay the instalments of the outstanding debt as and when required by the original terms of the loan;
- "partial" or "full". With partial guarantees, the PA may only guarantee some of the lenders or a fraction of the debt of the private partner. With full guarantees, the coverage would encompass all the lenders and/or all of the debt incurred by the private partner;

Refinancing guarantees

These guarantees are used in cases where lenders are not in a position to provide finance at a reasonable cost and for a period compatible with the cash flow profile of the PPP project and the duration of the contract. These public guarantees help address the concern that the financial crisis and the new banking regulatory requirements will make long-term commercial funding more expensive and scarce.

With these instruments, the Government undertakes to repay the lenders if the PPP company cannot refinance its debt when it comes close to maturity. Equally, if the PPP company manages to refinance its debt, but on more onerous terms, the Government is committed to pay the difference. As with loan guarantees, the issues of fullness and ranking of the Government's obligations are important design features.

Refinancing guarantees have become important as a result of the emergence of the so-called "mini-perm" financing during the financial crisis. In a "mini-perm", the tenor of the PPP project's senior debt is significantly less than the duration of the PPP contract. This means that refinancing will be necessary at a relatively early stage.

IV. THE PRINCIPLES OF THE OECD RECOMMENDATION (2012) ON PUBLIC-PRIVATE PARTNERSHIPS AND PUBLIC GOVERNANCE

The OECD Recommendation of May 2012 identifies three principles to ensure that PPPs “are affordable, represent value for money and are transparently treated in the budget process”⁵ and, at the same time, for guiding public and private agents on the correct use of the PPP tool.

Briefly, the three principles are geared towards the following objectives:

A. improving countries' PPP governance structures. To this end, they should establish a clear, predictable and legitimate institutional framework supported - preferably within central government - by competent and well-resourced authorities;

B. grounding the selection of PPP projects in “Value for Money”;

C. ensuring the transparency of the budgetary process for activities under the partnership, in order to minimise financial risks and ensure the integrity of the procurement process.

While Italy has not developed methodologies for establishing the Value for money assessment tool, action has been taken on the first and third principles. For example, several pieces of legislation (see *FOCUS: Recent regulatory changes to promote PPPs*) have been introduced to incentivise PPPs while also establishing some constraints, in line with Eurostat rules.⁶ *At the same time, several institutional initiatives have been launched in the wake of the OECD Recommendations, providing a concrete response to them.*

IV.1 FIRST PRINCIPLE: THE ROLE OF THE INSTITUTIONS IN PROMOTING PPP

Italy has no single PPP Unit anchored in the Central Budget Authority responsible for the planning, ex ante and ex post financial assessment (including for macroeconomic purposes⁷), monitoring and supervision of PPPs. Each of these activities is split between different institutions (see Table IV.1-1).

⁵ OECD (2012), Recommendation of the Council on *Principles for Public Governance of Public-Private Partnerships*, May, p.5.

⁶ For the purposes of public finance, regulating contractual relationships in accordance with the Eurostat rules is a *conditio sine qua non* for avoiding the risk of the ex post classification of a PPP asset from off balance sheet to on balance sheet. See previous Section.

⁷ “The Central Budget Authority should assure that capital investments are aligned with the government’s short and medium term macroeconomic stability targets”. See OECD (2012), *ibidem*, p. 10.

TABLE IV.1-1 - MAIN RESPONSABILITIES ON PPPS BY INSTITUTION

Institution	Main Responsibilities
RGS(MEF)	<p>The State General Accounting Department (RGS) of the Ministry of the Economy and Finance (MEF) is responsible for fiscal control including the monitoring of Government investment expenditure. In this context:</p> <ul style="list-style-type: none"> ✓ it is responsible for recording expenditure for public works in its own database (PA database- BDAP)⁸, within which a special dataset on PPPS will be developed; ✓ it coordinates an inter-institutional working group on drawing up a standardised PPP contract; ✓ it coordinates an inter-institutional working group to look into the current state of PPPs in Italy, in order to highlight critical issues and to find possible solutions; ✓ it is responsible for the examination and financial approval of legislation on infrastructure, including rules covering PPPs, as well as participating in the Interministerial Committee for Economic Planning (CIPE) on behalf of MEF.
ISTAT	<p>The Italian National Statistical Institute (ISTAT), Central Department of National Accounting, Public Finance Service, is responsible for calculating and publishing statistics on the budget deficits of the public authorities. Since the Eurostat decision "Treatment of public-private partnerships" of 2004, ISTAT has been responsible for assessing the correct classification of PPP contracts and consequently their impact on the deficit under the rules set out in the EU's ESA 2010 Regulation.</p>
ANAC	<p>The Italian National Anti-Corruption Authority (ANAC) works to prevent corruption and ensure transparency in the public authorities. Its responsibilities as regards public contracts were acquired by ANAC (see article 19 of Italian Decree-Law 90/2014) after the closure of the Italian Authority for the Supervision of Contracts for Works, Services and Supplies (AVCP). ANAC has the following responsibilities as regards PPP contracts:</p> <ul style="list-style-type: none"> ✓ monitoring the regularity of procurement procedures; ✓ monitoring compliance with the principles of equal treatment, non-discrimination, transparency, free competition, cost effectiveness and efficiency; ✓ monitoring performance quality; ✓ monitoring the execution of the contracts; ✓ informing the Government and Parliament of serious breaches of the law; ✓ making proposals to Government for the amendment of legislation on public contracts; ✓ exercising sanctioning powers; ✓ monitoring the system for classifying economic operators.

⁸ See the following link: <http://www.rgs.mef.gov.it/VERSIONE-I/Attivit--i/Spesa-per-le-opere-pubbliche/>

DIPE (PCM)	<p>The Department for Planning and Coordination of Economic Policy (DIPE) (part of the Presidency of the Council of Ministers - PCM) has the following responsibilities in the field of PPPs:</p> <p>a) Public Utilities and Infrastructures Regulation Unit (NARS):</p> <ul style="list-style-type: none">- protecting the public finances by assessing:<ul style="list-style-type: none">✓ agreements and business plans for key infrastructure - road and highway sector, airports, railways, shipping and more generally strategic infrastructures;✓ procedures to readjust business plans;✓ tax relief measures allocated under article 18 of Law 183/2011;✓ tax credits pursuant to article 33 of Decree-Law 179/2012;- approval of planning contracts and agreements between State and private concessionaires in accordance with article 36 of Decree-Law 1/2012. <p>b) PPP Task Force (UTFP):</p> <ul style="list-style-type: none">✓ assisting the public authorities;✓ assessing strategic projects (the "Strategic Infrastructures Law");✓ collecting data and monitoring transactions covered by the "Eurostat 2004" decision;✓ promoting PPPs and driving cooperation with entities and institutions.
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IV.1.1 Working groups on PPPs: the standard model agreement

The issues outlined in Section II reflect, in part, the lack of guidelines and appropriate standardisation of build-and-operate concession contracts. Pre-preparing the clauses to be negotiated by the parties would favour a clear and efficient allocation of risks and the bankability of PPP projects, while also reducing information asymmetries between the parties. Standardised contractual clauses can play a fundamental role in preventing the use of PPPs as a tool to circumvent spending ceilings and fiscal rules.

Considering these needs, an inter-institutional working group (**WG**)⁹ on PPPs was set up in 2013. The WG's activities are coordinated by the State General Accounting Department at the Ministry of the Economy and Finance, in accordance with the instructions of the OECD Recommendation, which gives a central role to the

⁹ The Group includes internal representatives of RGS and external members of: ISTAT - of National Accounting- Public Finance Service; the Presidency of the Council of Ministers - Department for Planning and Coordination of Economic Policy - NARS and UTFP; CDP S.p.a. and SDA Bocconi School of Management.

institution in charge of supervising the national budget, tasking it with assessing submitted documentation and monitoring all phases of the process.

The working group has begun a medium-term project to develop a "model" contract for the realisation in partnership of public works, with particular focus on PFIs (hospitals, prisons, schools, etc., which receive greater attention from Eurostat) where the private partner that builds and operates the infrastructure provides services directly to the public counterparty and derives its revenues primarily from unitary payments from the public agent.

Standard clauses should not only give a real boost to promoting the use of PPPs in the construction of public works - by providing, among others, a clear term of reference for some financing-sensitive matters- but should also encourage the adoption of practices and initiatives that will reduce the grounds for litigation, which in Italy are behind the high mortality rate of these agreements at the procedural stage. Finally, they should enable the authorities themselves to stay within proper boundaries - including in terms of the public finances.

When selecting a benchmark for the model agreement, the Group decided to start with build-and-operate concessions for public works (article 143 et seq. of the Code of Contracts), bearing in mind that many of the standard clauses will also be applicable to other contract types.

The project is a "work in progress" that involves the WG examining and trying to deal with some crucial issues including the following:

- allocation of design/ construction risk, availability risk and, when appropriate, demand risk;
- transparency between the public and private partners in terms of obligations, responsibilities and benefits;
- definition of a clear set of rules related to potential construction delays and cost overrun;
- key performance indicators and related system of penalties for failure to comply with relevant standards;
- business plan and rebalancing procedure;
- contract termination.

In the coming months, the WG will continue by tackling significant questions such as guarantees, early termination of PPP contract, etc.

In parallel, to facilitate the use of this agreement, the WG is preparing a **Report** illustrating the content of its articles, an annex containing **definitions** of terms used in the contract and a **risk allocation matrix** (Table IV.1-2) which will set out the relevant articles and paragraph references for each type of risk.

TABLE IV.1-2 - EXTRACT OF RISK MATRIX

Primary Risk	Specific type of risk	Responsible Agent	Articles of agreement
PLANNING AND CONSTRUCTION RISK	Risk that the work is not completed according to the timeframes, costs and agreed specifications	Planner, builder/SPV	
	- Legislative risks Political – legal Risk that unexpected legislative changes contractually result in higher costs	Public partner	14.9 b) (ii)
	Regulatory framework Risk of changes in the regulatory framework that governs the provision of the services under the contract	Public partner	14.9 b) (ii)
	Tax regulations Risk that the entity is subject to different tax treatment	SPV or shared	

IV.1.2 Recent regulatory changes

Italian legislators only added PPPs rules to the Code of Public Contracts in 2008. Subsequently there were few other significant interventions. However, in recent years, the necessity to satisfy two distinct needs - infrastructure building and fiscal consolidation - has boosted the use of PPPs for infrastructure development in Italy. The following *FOCUS* sets out the recent measures adopted and indicates the relevant pieces of legislation:

FOCUS: recent regulatory changes to promote PPPs

Tax relief measures	Law 183/2011	article 18 (1,2) the government grant for SPVs can be reduced and/or cancelled through a fiscal compensation mechanism: SPVs benefit from introduced tax rebates ("IRAP" local corporation tax and VAT) instead of receiving the grant. The fiscal benefit and the government grant cannot exceed 50% of the investment cost.
	Decree-Law 179/2012 (Law 221/2012)	article 33(1) (as amended by two further DLs) in order to enhance new PPP infrastructure projects which are considered "strategic" at national level, the private partner can benefit from IRES (corporate tax) and IRAP tax credits. This tax relief measure applies for works with a minimum value of €500 million.
	Decree-Law 69/2013 (amending article 33(1) of Decree-Law 179/2012)	article 19 (3a) the minimum value previously set at €500 million, is reduced to €200 million.
	Decree-Law 133/2014 (amending article 33(1) of Decree-Law 179/2012)	article 11 the threshold is further reduced from €200 to €50 million and the reference to the strategic importance of the infrastructure is eliminated.
Bankability and financing incentives	Decree-Law 69/2013 (Law 98/2013)	article 19(1a) introduced amendments to the Code of Public Contracts concerning rules on PPPs and especially on concessions of public works. These provisions were designed to favour the bankability of PPP projects.
	Decree-Law 1/2012 (Law 27/2012)	article 41 introduces the possibility for companies to issue project bonds; article 43 possibility of using project financing to build prison infrastructures;
Availability Contract	Decree-Law 1/2012 (Law 27/2012)	article 44 introduction of the "availability contract"

IV.2 SECOND PRINCIPLE: VALUE FOR MONEY AND RISK ALLOCATION

Project finance has been used as a way to deal with the lack of public resources, but without adequate prior assessment of the affordability and financial sustainability of the investment. Before starting a procedure for selecting the promoter or the concessionaire, public authorities do not perform thorough assessments to ensure greater efficiency and lower costs compared to a traditional contract, and do not use a "quantitative" method to optimise costs, typical of the 'Value for Money' (VfM) approach.

In the context of public contracts and, in particular, of PPP procedures, legislators have set about identifying appropriate ways to allow the PA to weigh up the cost-effectiveness and suitability of the legal instrument to be used. In this regard, the third correcting act (Legislative Decree 152/2008) of the Code of Public Contracts made it mandatory for public authorities intending to undertake project finance transactions under article 153 of the Code to prepare feasibility studies.

The feasibility study¹⁰ contains technical and economic tests and is a key tool that, via checks on technical feasibility and economic and financial sustainability, can identify a real "business case" for going to tender as a way to generate value. Therefore, in addition to containing a description of the functional, technical, operational, and economic and financial characteristics of the work to be performed, it must also include an analysis of possible alternatives to the solution identified.

Properly identifying and allocating risks is essential in order to effectively undertake a PPP (as opposed to using other legal instruments, such as a tender).

Assessing the risks to transfer to the private partner is therefore crucial for evaluating the cost effectiveness of a project finance or PPP transaction: the public authorities should only transfer to the private sector those risks that the private partner - due to its technical/specialist knowledge or skills and previous experiences - is able to minimise in terms of the likelihood of its occurrence or of the negative economic impact arising from such events. Clear separation of tasks, entrusting the construction and the subsequent operation of the works - but above all, the need to repay the investment with the cash flows generated - encourage the private partner to operate with the maximum efficiency and efficacy.

For the purposes of correct interpretation of the "risk factor" in a complex procedure like a PPP, the five steps set out below are necessary for guaranteeing an appropriate use of the "risk management approach" (as also presented in the document: "Risk Allocation and Contractual Issues" produced by Partnerships Victoria in 2001).

¹⁰ The Authority for the Supervision of Public Contracts for Works, Services and Supplies (AVCP, now superseded by the Italian National Anti-Corruption Authority - ANAC) had set the contents of feasibility studies in Decision 1/2009. Subsequently, article 14 of the New Regulations (Italian Presidential Decree 207/2010) for the Execution and Implementation of the Code reiterated what it should include, adding the need to verify the possibility of the project being performed through PPP contracts pursuant to Article 3(15-ter) of the Code and, in particular, if the feasibility study is to be used as the basis for a tender, the need to verify the possibility of the project being performed through a concession or a contract.

(i) Risk identification

The process of identifying all the risks relevant to the project;

(ii) Risk assessment

Determining the likelihood of identified risks materialising and the magnitude of their consequences if they do materialise;

(iii) Risk allocation

Allocating responsibility for dealing with the consequences of each risk to one of the parties to the contract, or agreeing to deal with the risk through a specified mechanism which may involve sharing the risk;

(iv) Risk mitigation

Attempting to reduce the likelihood of the risk occurring and the degree of its consequences for the risk-taker;

(v) Monitoring and review

Monitoring and reviewing identified risks and new risks as the project develops and its environment changes, with new risks to be assessed, allocated, mitigated and monitored. This process continues during the life of the contract.

With specific reference to the hypothesis of risk mitigation using a risk matrix defined by the parties, some further information is provided below, identifying the possible mitigating actions:

(1) **Administrative risks:** delays and/or extra costs deriving from the administrative procedures connected to the realisation of the works (authorisations, permits, audits, etc.) should be borne by the public partner.

(2) **Planning risks:** errors in the executive planning stage that cause delays or extra costs or difficulties in guaranteeing the required performances, especially in terms of facilities and energy.

The agreement should provide for the private partner to prepare the planning documents, at its own responsibility and expense, in compliance with all relevant regulations in force, taking into account of any requirements and guidance provided by the grantor. If there are errors or omissions in the plan that impede, in whole or in part, the completion of the project or its use, then the private party shall incur the costs of the relevant adjustments required and also compensate the grantor for any damages awarded in relation to these errors or omissions.

(3) **Construction risk:** delays and/or extra costs in the construction of the infrastructure (failure to comply with the project timetable or performance levels, budget overruns, third-party liability problems, bankruptcy of subcontractors, inadequate technology, etc.).

The agreement should provide that failure to comply with the timetable leading to delays in the completion of the work will not result in the extension of the term of the agreement itself, thus resulting in a reduction of the operational period, except in some special cases. Penalties should apply in case of delays attributable to the private party, except in these same special cases.

The risk should also be partially covered by the readjustment of the business plan, if the removal of underground utilities and interferences (or delays in their removal that are not attributable to the private partner) entail construction costs above a certain amount. Furthermore, equivalent risk coverage applies in the event of adjustments not due to planning errors or omissions carrying additional costs for the Concessionaire above a certain amount; in such cases, the changes will be borne by the Grantor if the private party cannot locate the necessary financial resources to support these costs.

(4) **Financing risk:** changes to the terms and/or conditions for obtaining the financial resources to sustain the project.

(5) **Market risk:** possibility of changes in demand (above or below the level expected when the PPP contract was signed), regardless of the quality of the performance of the private partner. These changes could result from factors such as the economic cycle, the emergence of new market trends, changes in the preferences of end users or technological obsolescence.

The agreement should not include public sector guarantees in relation to this business-related issue, which therefore remains the sole responsibility of the private partner. It may be appropriate to include a benefit sharing clause if changes in the costs of structuring the project and the profitability thereof result in operating margins higher than assumed in the business plan put forward in the tender.

(6) **Operational risk:** failure to provide the services required in the operational phase.

The agreement should include penalties for services not provided or that fail to meet the expected quality/quantity standards.

(7) **Force majeure risks:** an increase in costs or timescales or changes in construction conditions or conditions in which the services are performed due to unpredictable and uncontrollable events for both contractual parties.

The agreement should cover events or circumstances that prevent the private partner from fulfilling its obligations, stating that if these events result in greater costs for the private partner above a certain amount then it will be entitled to readjust the business plan.

Considering the successful experience of other European countries, PPPs should be used subject to a prior assessment of their cost-effectiveness compared to other traditional forms of procurement. PPPs are characterised by high transaction costs: they are too costly to be used for less valuable projects and therefore justifiable solely in the event of transactions of a certain value.

IV.3 THE IMPORTANCE OF THE VALUE OF THE CONCESSION

The estimated value of a concession not only affects administrative decisions in terms of cost-effectiveness and efficiency, but also the above-threshold or below-threshold classification of the work to be carried out, the tender procedure, the requirements requested of participants and, more generally, the rules applicable to the public procedure to award the concession.

Traditionally, grantors in Italy have usually chosen the simplest way of estimating the value of the concession: simply using the value of the cost of the works. However, this approach - albeit straightforward and immediate - seems to

underestimate the value of the concession, which is influenced above all by the nature of the operational phase.

Directive 2014/23/EU of the European Parliament and of the Council, dated 26 February 2014, on the procurement of concession contracts, appears to remove all doubts over this issue. After indicating in the first paragraph the threshold of €5,186 million for the application of the Directive, article 8(2) sets out the calculation methods to be used:

"The value of a concession shall be the total turnover of the concessionaire generated over the duration of the contract, net of VAT, as estimated by the contracting authority or the contracting entity, in consideration for the works and services being the object of the concession, as well as for the supplies incidental to such works and services."

When calculating the estimated value of the concession, contracting authorities or other contracting entities shall, where applicable, take into account:

- the value of any form of option and any extension of the duration of the concession;
- revenue from the payment of fees and fines by the users of the works or services other than those collected on behalf of the contracting authority or any other contracting entity;
- payments or any financial advantage, in any form, made by the contracting authority or by any other contracting entity to the concessionaire, including compensation for compliance with a public service obligation and public investment subsidies;
- the value of grants or any other financial advantages, in any form, from third parties for the performance of the concession;
- revenue from sales of any assets that are part of the concession;
- the value of all the supplies and services that are made available to the concessionaire by the contracting authorities or contracting entities, provided that they are necessary for executing the works or providing the services;
- any prizes or payments to tenderers.

In the Code of Public Contracts, the central rule that establishes the method for calculating the estimated value of public contracts (e.g. concessions) is article 29(1), under which: "The calculation of the estimated value of public contracts and concessions of public works or services is based on the total amount payable net of VAT, as assessed by the contracting authorities".

Article 29 does not refer to the value of the work for estimating the contract, but to the total amount payable (to the concessionaire) excluding VAT, which is essentially the same as total turnover in consideration for the works, services and supplies, as described in the Concessions Directive.

The value of a concession contract should therefore comprise the amount paid by the contracting authority to the concessionaire as consideration for the construction of the public infrastructure and for the provision of services to the community.

Under article 143(3) of the Code of Contracts "The consideration paid to the concessionaire consists, as a rule, solely in the right to operate and economically exploit all the works realised." The main consideration is, indeed, the right to operate the asset (for financial gain), which may (inadvertently) be accompanied by a price paid by the contracting authority in any form. This aspect of the mutual

agreement is also confirmed by the Italian Revenues Agency in its Resolutions (e.g. No. 295/02).

In conclusion, to estimate whether the value of a concession contract is above or below the threshold of €5,278 million an estimate of the total amount that the concessionaire will receive should be used. This approach seems to be largely in line with the spirit of the EU legislation and can make the value identified more realistic. However, in the absence of clear legislation, there is a risk that it could cause issues in its interpretation/application, especially as regards identifying the actual value used as the basis for the tender and, consequently, access to the financial market by the concessionaire or the awarding authority, as well as in terms of identifying the value to be paid to the latter if the concession is broken off. As such, prompt action from Italian lawmakers on taking a decision on this issue would be welcome.

The ability to estimate turnover or what the concessionaire receives as payment could be calculated by discounting the concessionaire's expected revenues or adding them together, although the second solution would appear unrealistic even if it is immediate.

IV.4 THIRD PRINCIPLE: ASSESSMENT, MONITORING, TRANSPARENCY AND LEGALITY

Improving the efficiency of public capital spending is at the heart of Legislative Decrees 228 and 229 of 29 December 2011.

They introduce a systematic vision and an integrated approach to economic and financial planning, to evaluation and accounting of public works, and to information systems, with the aim of improving decision making over public investments and the allocation and management of financial resources. The starting point was an analysis of needs and demand, enhancing and streamlining the CIPE's role in order to define priorities, while taking into account the resources available, through:

- each government ministry's "Multi-year planning document";
- evaluation of works, as part of the planning process;
- two special funds in each Ministry's budget, for allocating the resources destined, respectively, to the planning and realisation of public works;
- automatic disinvestment in the case of works not begun in the planned time frame;
- monitoring in order to track public works from budget to realisation, to make the entire cycle transparent.

The public works monitoring system of the State General Accounting Department (RGS) of the Ministry for the Economy and Finances (MEF) is based on this approach. As of the end of January 2015, all public authorities (PA) and the recipients of funding for the construction of public works will send the RGS's PA database (BDAP) the first financial, physical and procedural information about the works.¹¹ This will result in a complete information set for evaluating the allocation and management of financial resources, while assisting with the planning and evaluation of the works themselves.

Legislative Decree 229/2011 also sets out to implement the "single submission" principle, whereby information already present - in whole or in part - in other PA databases need not be resubmitted but are received by MEF directly from these databases.¹² This is possible thanks to the interaction between systems that record different periods or aspects of the same project, which prior to the adoption of Legislative Decree 229/2011 could not have been achieved. Indeed, this is exactly what that law provides for, setting out a precise hierarchy between the two main codes used for recording information:

- the CUP (single project code, issued by the Presidency of the Council of Ministers);
- the CIG (public tender ID code, issued by the Italian National Anti-Corruption Authority (ANAC) - formerly the AVCP)

and stating that the CIG cannot be issued by ANAC without the CUP. This represents an essential nexus in terms of database interoperability: linking the CUP and the CIG means it is possible to match up planning information and items of expenditure on

¹¹ The requested data set is based on the standard information required under the National Strategic Framework 2007/2013.

¹² For example, the exchange of information between MEF and AVCP databases is agreed in a memorandum of understanding signed on 3 August 2013.

the State budget (associated with the CUP) with information relating to the awarding of the works and contracts (associated with the CIG), thus covering the entire life cycle of the investment.

Development of the monitoring system will also enable interconnections with other systems/databases that collect information associated with the CUP and/or the CIG, such as the electronic invoice system. These types of interactions will increasingly relieve public administrations of wasting time with statistics due to having to send similar data on the same subject to different databases, on repeated occasions and at different times.

The monitoring system set out in Legislative Decree 229/2011 was first trialled in October 2013 as part of the works ordered by Decree-Law 69/2013 - article 18 (the "unblock the construction sites" clause), making it possible to verify the on-time completion of the administrative procedures required for each project, under penalty of cancellation of the financing granted.

Plans have been made to extend the monitoring of public works to include public-private partnerships: it is essential for the government to be able to assess the ability of the private partner to respect the obligations assumed and, consequently, to apply the penalties set out in the contract.

More specifically, for works considered to be of strategic national interest (largely awarded through PPPs), that are included in a special Plan and approved by the CIPE, we note that ANAC (formerly AVCP) has been working since 2010 with the Italian Chamber of Deputies - through its central Observatory - to monitor the implementation of on-going contracts and the progress of the work.

Based on the information gathered over the years, ANAC has set up a database for collecting and organising existing documents in view of the annual publication of a report. The database has subsequently evolved into the SILOS information system (Information System for the Law on Strategic Works) that, through a simple interface, allows data to be added and viewed online. The system is, in fact, available on the portal and on the website of the Chamber of Deputies¹³.

The analysis of progress on implementing the plan pays particular attention to the works ordered by the CIPE. The annual report includes factsheets containing: a description of the characteristics and history of the project; a reconstruction of the estimated cost based on the official sources referenced; the financial situation, outlining the public and private funding, as well as the various sources of financing and remaining requirements; the progress made with the project. The part of the fact sheet covering the progress made with the project is written by ANAC on the basis of data provided by the Project Manager and includes: the planning level achieved (preliminary, definitive and executive); award of the work; execution of the work, and in particular the progress of the works themselves; and any disputes or changes.

¹³ See <http://silos.infrastrutturestrategiche.it>

FOCUS: ANAC's work on PPPs - monitoring and guidelines

As part of its supervision of public contracts, the Italian National Anti-Corruption Authority (ANAC– formerly the AVCP) analysed the planning, construction and management of major infrastructures including hospitals, motorways, toll roads, metro systems, tram networks, rapid mass transport infrastructure, power plants and waste-to-energy plants, whose value varied roughly from €100 million to €2 billion. These experiences add to those from ANAC's own supervisory activities on many PPP contracts, including those of more modest dimensions.

The aim of the AVCP's inquiries – as well as obtaining information needed to prepare methodological guidelines to help contracting authorities – was to verify the correct application of existing legislation (Code of Public Contracts and Law 109/94) and compliance with the rules set out in the Eurostat Decision of 11 February 2004 on the allocation of risks between the grantor and the concessionaire. This is a matter of paramount importance, since the effectiveness of such transfers may have a tangible effect on the future indebtedness of the grantor administration.

For the purpose of the activity described above, the Authority created a supervisory procedure based on targeted and thorough research (now included in a draft update on reporting requirements known as "SIMOG 4") following a checklist set out below:

A) **GENERAL INFORMATION:** three-year plan and an extract annual list, which includes the project; Notice or call for tenders; General descriptive report of the project; Decision to contract; Documentation of forms of publicity, including pre- and post-information; Tender documents and letter of invitation; Tender reports; Inter-departmental conference; Model agreement used as basis for the tender; Report on changes to the project for the declaration of public interest; Approvals and feasibility study (where applicable) of the preliminary, definitive and executive plans, of the agreement and the remaining documents relating to the project; Report on the professionals responsible for supervising the project, both for the contracting authority and the concessionaire (who does what and matrix of responsibilities); progress report.

B) **COMMUNICATION OBLIGATIONS:** Proof of compliance with the obligations on informing the Authority's Observatory and the UTFP, pursuant respectively to Code of Public Contracts and the Circular from the Office of the President of Council of Minister dated 28.02.2008.

C) **SPECIFIC CONCESSION DOCUMENTS:** Concession contract, with associated annexes; Agreement and subsequent additions; Business plan, with explanatory report, additional documents and associated approvals; Summaries of any checks by the contracting authority on the cost-effectiveness of using project finance instead of a tender, with a description of the method used and the outcome (where appropriate specify "not performed"); and on the characteristics of the project company, if formed; and on the financing methods for the project, both for the contracting authority and the concessionaire; and on guarantees provided, with related documentation; and on the method for allocating construction risk, demand risk, availability risk, planning and financial risks; and also filling in the following synopsis table indicating for each of the risks the exact article of the agreement or other administrative or technical contract documents (performance specifications) under which the transfers of the various risks are explicitly agreed.

TABLE IV.4-1 - SYNOPSIS OF RISKS – TO BE COMPLETED BY THE GRANTOR

LIST OF MAIN RISKS	ALLOCATION OF RISKS ACCORDING TO THE CONTRACTING AUTHORITY (*)			STATE THE ARTICLES OF THE AGREEMENT THAT, ACCORDING TO THE CONTRACTING AUTHORITY, PROVE THE TRANSFER OF RISKS		INDICATE THE EXACT PARTS OF OTHER DOCUMENTS THAT PROVE THE TRANSFER OF THE RISK, ENABLING THEIR EASY LOCATION IN THE LISTED DOCUMENTS	
	TO THE PA	TO THE CONCESSIONAIRE	NOT DEFINED	TO THE PA	TO THE CONCESSIONAIRE	TO THE PA	TO THE CONCESSIONAIRE
CONSTRUCTION							
DEMAND							
AVAILABILITY							
PLANNING							
FINANCIAL							

(*) PLACE AN ASTERISK IN THE BOXES BELOW TO INDICATE THE RISK TRANSFERRED

D) **ACCOUNTING:** Accounts of the contracting authority (extract) showing how the project is recorded in the accounts, both in financial and cash-flow terms;

E) **EXECUTION PHASE:** Report on variations to the works and other details, and on any problems found in terms of deviations from time scales and investment costs, compared to the timetable for the initiative annexed to the contract;

F) **ADDITIONAL DOCUMENTS:** deemed useful to shed light on problems with the project, including insights and reflections on the regulations governing the project and what improvements could be made, including with regard to the Authority's supervision of PPPs.

Obtaining this information would give the Authority an overview of actual and objective contractual obligations, not simply those that are declared.

In order to facilitate the use of PPPs by contracting authorities, bearing in mind the operational difficulties related to a lack of adequate know-how (in most cases the public authorities are uncertain about PPPs while smaller authorities lack expertise and are not assisted by external consultants), taking into account the data available in the Database of National Public Contracts (BDNCP), ANAC can:

- help by verifying the level of satisfaction with the transparency obligations to which the authorities are bound, which involves guaranteeing to all potential offerors a level of publicity sufficient to open up the market for public works partnerships;
- monitor the impartiality of the award procedures and compliance with the principle of non-discrimination, designed to allow foreign companies to participate in the tenders;
- assist through the preparation of general documents that provide help and guidance to the contracting authorities about the use of PPPs.

The Authority has already taken action through Resolutions 1/2009¹⁴ and 2/2010¹⁵, which are subject to a preliminary consultation for review and amendment, and shortly the Authority will publish a new consultation on partnerships.

The instructions that the Authority can provide are not only useful in terms of greater transparency in partnerships, since the public sector's actions are channeled towards pre-established models and procedures, but also in the sense of making it easier to use contractual forms that are better suited to the complexity of the operations to be carried out.

¹⁴ See http://www.avcp.it/portal/public/classic/AttivitaAutorita/AttiDellAutorita/_Atto?ca=3665

¹⁵ See http://www.avcp.it/portal/public/classic/AttivitaAutorita/AttiDellAutorita/_Atto?ca=4174

This applies in particular to competitive dialogue as a procurement procedure suitable for particularly complex operations (those relating to PPPs generally are). Contracting authorities can already use competitive dialogue for project finance, which is enshrined at EU and national level and use of which is not precluded by the current Code.

ANAC also ensures transparency through constant supervision of compliance with the provisions of article 33(1) of Italian Law 190 of 6 November 2012: *"With reference to the proceedings referred to paragraph 16(b) [awarding works, services and supplies] of this article, contracting authorities are in all cases required to publish the following information on their websites: the offeror; the subject of the tender; the list of operators invited to tender; the winner of the contract; the amount of the award; the time for completing the work, service or supply; and amounts paid. No later than 31 January each year, this information (relating to the previous year) is published in summary tables made freely downloadable in a standard open digital format that enables the data to be analysed and processed, including for statistical purposes. The public authorities send this information in digital format to the AVCP, which publishes them on its website in a section freely available to all citizens, categorized according to the type of contracting authority and by region. The Authority sets out the relevant information and the method of transmission in a resolution. No later than 30 April of each year, the AVCP sends the Court of Auditors the list of public authorities that have failed to send and publish, in whole or in part, the information under this paragraph in a standing digital open format. Article 6(11) of the code referred to in Italian Legislative Decree 163 of 12 April 2006 applies."*

V. MAIN AREAS OF INTERVENTION

Although Italy does not have a long tradition of PPP arrangements, the country has been conducting a major overhaul of public policy in this field since 2008. Nevertheless, there is still plenty of scope for improvement.

The critical issues highlighted in the above Sections need to be faced and overcome in order to significantly increase the use of PPPs. First, the OECD Recommendation points out the advisability of establishing a unique PPP Unit within the Central Budget Authority with ultimate responsibility for the PPP contract and its operation over the whole of the project's life ("In line with the government's fiscal policy, the Central Budget Authority should ensure that the project is affordable and the overall investment envelope is sustainable", p. 16 OECD Rec.). If that is not possible, it is necessary to achieve a close relation among all institutions involved in PPP evaluation and monitoring. Greater coordination among such institutions could also help overcome a number of shortcomings with regard to the public governance of PPPs.

Another key condition to enhance PPP projects regards its specific legal and regulatory framework. Simple, clear and sound rules should be put in place to remove obstacles, particularly with regard to the greater involvement of private capital in funding PPP projects. Furthermore, this would bring also benefits in terms of lower transaction costs, would ensure appropriate regulatory controls, and would also provide legal and economic mechanisms to prevent contract disputes.

Frequent litigation creates a number of impediments to the efficient functioning of the PPP tool. For instance, because of frequent litigation over the appointment of the contractor, it takes too long to award project finance contracts (between one and seven years) compared to public contracts and to complete so-called "double tenders". In other cases, there is a very high percentage of projects that, once awarded, fail to reach financial close within the required time. This results either in the project being halted or in the works being completed in a piecemeal fashion, thereby exposing the public partner to subsequent litigation. This increases the cost of the works and results in the business plan being amended at the expense of the public partner.

Frequent changes in legislation as well as legislative bills issued but still not enforced should be avoided too. This proved to be the case with Legislative decree No 228/2011 aimed at optimising the decision-making process applicable to public works through ex-ante selection and ex-post evaluation of works, arrangements and resources.

The regulatory framework should be improved by simplifying PPP approval procedures. At present, it takes too long to award contracts, due in many cases to the complexity of procedures. Data from the Italian National Anti-Corruption Authority (ANAC) show that in the period 2010-2012 a high proportion

(approximately 60%) of project finance tenders were not awarded. Moreover, due to the need to plan "interfering works" and various approval obligations, even before work begins, there are very long periods between the appointment of the concessionaire (winner of the public tender) and completion of the final and executive plan (two to six years).

As a final point, PPPs are not subject to value for money review in Italy: before starting a procedure for selecting the promoter or concessionaire, public authorities do not perform thorough assessments to ensure greater efficiency and lower costs compared to a traditional contract, limiting themselves to "qualitative" audits and failing to apply the value for money approach. For instance, the evaluation criteria for selecting the two best offers to review with the promoter usually allocate very low scores to the return from the project (expressed as the Internal Rate of Return in the draft business plan); this is contrary to the spirit of a system based on the project's ability to generate wealth. On the contrary, the value for money methodology implies that public authorities are entitled to choose the most suitable investment method, in order to yield most value, and to decide whether the PPP is the best option for a specific investment project.

Such discretionary power for public authorities requires a strong political and legislative commitment. As public authorities currently have a limited role in choosing the best investment method, the lack of value for money approach is probably one of the most critical issue that requires a prompt intervention.

