

Regulatory Framework

While the Concession law or PPP law or in their absence the investment law of a country is generally considered the most authoritative statement of government policy toward private participation, it often seems quite general to the private investor. In most countries, the host government will promulgate regulations or other subordinate legislation to complement the general law.

In addition, governments will also establish procedures and create instruments and institutions, which together constitute what is called a regulatory framework. That framework represents an important instrument to implement the governmental policy for the sector concerned.

Different options have been used in domestic legislations to set up a regulatory framework for PPP infrastructure projects: what does it aim to achieve and how.

There are two main regulatory models that are used worldwide, the independent regulator model which prevail in Anglo-Saxon tradition countries, and the public service concession model, also called the regulatory contract, based on French experience. There is also an hybrid version of the two which has in fact become the most common regulatory governance model in most developing and transition economies that have created new regulatory systems.

As these are discussed in detail in Module 3-> PPP Policy Framework -> Legal and Regulatory, this Section will not address how the regulation is produced, but only underline that the regulatory framework does produce substantive rules, which have to be taken into account by private investors, in addition to the statutory instruments, constitutions, laws and subordinate legislation, which have been described here above.

Implementation regulation and agencies

Because the rules applicable to infrastructure operation often allow for a degree of discretion, some third party or body is required to interpret and apply them, monitor compliance, impose sanctions and settle disputes arising out of the implementation of the rules.

The matters on which regulatory agencies have to arbitrate range from normative responsibilities (eg rules on the award of concessions and conditions for certification of equipment) to the actual award of concession; the approval of contracts or decisions proposed by the regulated entities (eg a contract on network access conditions for new and existing customers); the definition and monitoring of an obligation to provide certain services; the oversight over public service providers (in particular compliance with license conditions, norms and performance targets); price setting or adjustments; automatic and non automatic cost pass-through mechanisms; other decisions about tariffs levels and structure; investment or connection obligations and reviews; accounting systems; vetting of subsidies, exemptions or other advantages that could distort competition in the sector; quality of service standards; periodic reporting requirements.

In many countries a governmental agency will carry out this task. Such a body is often separate from the regular government ministries and takes the form of an inter-ministerial committee or an independent agency with representatives from various interested ministries. Some countries give this power to their ministry of planning, and a few of the more developed nations authorize specific ministries to screen investments within their particular sectors of activity. Thus the Ministry of Transportation might have the exclusive right to screen a highway or other transport project.

In other countries such matters will be regulated in a detailed concession contract between the public authority and the private sector operator, without there being a separate regulator (hence its name of regulation without a regulator), but under the supervision of administrative courts which have over the years imposed a set of established principles governing the sector.

Standards

International and local standards complement host country laws and regulations to provide guidelines for several aspects of the construction, operation and maintenance of a project. They are discussed in Module 3 -> Sector Planning and Strategy -> Planning and Policy Making -> Technical and Performance Standards.

A duty to operate in accordance with “good industry standards”, for example in the toll road industry, means to act according to those practices, methods, and techniques that are from time to time accepted for use in the international toll road industry. Such “standards” are commonly used in prudent engineering and operations in order to operate and maintain equipment similar to the toll road project’s facilities lawfully, safely, efficiently and economically in similar circumstances.

While such “standards” are usually industry standards referred to in contractual clauses to identify a party’s obligations under a construction or operation and maintenance agreement, standards can derive from investment treaties, international custom and international conventions that set minimum levels for more humane issues such as workplace conditions, child labor, and environmental protection.