*courtesy translation*

Opinion no 2/2017

**Opinion released by the Transport Regulation Authority in its meeting of 24 March 2017 to the Ministry of Infrastructure and Transport on the draft ministerial decree implementing article 4 of legislative decree no 285 of 21 November 2005 on reorganising motor vehicle services under State responsibility.**

## 1. Preliminary remark

The draft ministerial decree provides for the regulation of the proceedings concerning the issuance of authorisations for the operation of scheduled services under State responsibility, implementing article 4 of legislative decree no. 285 of 21 November 2015 on reorganising regional motor vehicle services under State responsibility ("*Riordino dei servizi automobilistici interregionali di competenza statale*") (hereinafter: "legislative decree no 285 of 2005"). With the adoption of the new decree, the Ministry of Infrastructure and Transport intends to fully replace the regulatory framework already adopted for the implementation of the above-mentioned provision by Ministerial Decree no 316 of 1 December 2006, which would be repealed accordingly.

As indicated in the explanatory report accompanying the draft measure, the adoption of a new decree implementing legislative decree no. 285 of 2005 arises from the need to make some changes to the regulatory framework referred to in the aforementioned decree of the Minister of Transport no. 316 of 2006, in order to overcome, even in terms of simplification and clarity, some critical issues arising in its application.

Legislative decree no. 285 of 2005, implemented by the a.m. ministerial decree, has triggered the liberalisation of motor vehicle services under State responsibility, by introducing a system based on the issuance of authorisations for the provision of the service (subject only to the compliance with statutory requirements) with the exception of imposition of quotas and public contributions. This system replaces previous legislation on motor vehicle services under State responsibility dating back to 1939 (Law no 1822 of 28 September 1939), based on a concession scheme with exclusive rights of the service. The regulation introduced in 2005, as provided for in art. 1 of legislative decree no. 285, is aiming at: (i) contributing to meeting the demand for people's mobility; (ii) ensuring safety of travellers, quality of services offered and compliance with social security legislation; (iii) protecting competition among undertakings and market transparency.

The draft of the new ministerial decree implementing legislative decree no. 285 of 2005 was submitted to the Authority by the legislative services of the Ministry of Infrastructure and Transport, by note no. 25568 of 30 June 2016 (ART ref. 4811/2016 of 1 July 2016) for the purpose of obtaining its opinion.

In addition to the reports accompanying the draft decree, the Ministry's request included the preliminary opinion delivered on 9 June 2016 by the Council of State, which, inter alia, recognised the need to acquire the Authority's view and, in particular, its explicit ruling on the

mechanism provided for by art. 7 (2) of the draft decree, in order to verify the compliance with the requirement for issuing the authorisation under art. 3 (2) (m) of legislative decree no. 285 of 2005, whereby the applicant undertaking is required to "*propose a scheduled service which does not only cover the most profitable services*".

As a result of a preliminary inquiry by the Authority for the purpose of delivering its opinion, it was considered appropriate to carry out a survey on medium- and long-distance bus transport services. This survey, provided for by the Authority's Board with its decision no. 130 of 8 November 2016, was firstly aimed at analysing, also through consultation procedures, the organisation of the market of medium- and long-distance bus services, its evolution and impact on other modes and types of transport, which fall within the Authority's remit. In fact, it has been argued that only in the light of an extensive assessment of current market dynamics, it is possible to better understand the issues highlighted by the Council of State, with particular reference to the procedures for issuing authorisations for the operation of services under State responsibility, as contained in the draft ministerial decree implementing legislative decree no. 285, and to check whether these procedures are still consistent with the overall organisation of medium- and long-distance bus services, also following the introduction of EU provisions meanwhile adopted in this area (Regulation (EC) No 1073/2009).

By note no 8352 of 9 November 2016, the Authority informed the Ministry and the Council of State about the adoption of decision no 130/2016 initiating the survey, reserving the right to deliver its opinion upon conclusion thereof.

During the survey information was obtained through inquiries, studies and public reports, alerts and complaints to the Authority and hearings of major companies, most representative trade associations and the Ministry of Infrastructure and Transport.

Upon conclusion of the survey on 2 March 2017, the outcome of which is available on the Authority's website, the Authority delivered the present opinion on the draft ministerial decree, it being understood that the results of the survey have highlighted the need for an overall review of the regulatory framework as further explained below.

## 2. The Authority's responsibilities

As for the reorganisation of interregional motor vehicle services referred to in the draft ministerial decree, the Authority has been entrusted as follows:

- general responsibility for transport and access to infrastructures and for additional services as referred to in article 37 (1) of Decree-Law no 201 of 6 December 2011, converted, with amendments, into Law no 214 of 22 December 2011 (hereafter: Decree-Law no 201/2011);
- specific responsibility referred to in article 37 (2) (a) of Decree-Law no 201/2011, as for the national, local and urban passenger and freight mobility, including that related to stations, airports and ports;
- specific functions referred to in article 37 (2) (e) of Decree-Law no 201/2011 as for the definition of minimum rights and entitlements, including compensation, that may be claimed by users from service providers and infrastructure managers;

- specific responsibilities assigned pursuant to legislative decree no 169 of 4 November 2014 as for passenger rights in bus transport, as provided for by Regulation (EU) no 181/2011 of the European Parliament and of the Council, the scope of which includes regular services, defined as services which provide for the carriage of passengers by bus or coach at specified intervals along specified routes, passengers being picked up and set down at predetermined stopping points; in this respect the Authority supervises over the correct application of the Regulation, evaluates complaints in order to assess infringements of the obligations provided for by the Regulation, verifies the existence of infringements and imposes penalties.

## 3. Outcome of the market analysis arising from the Authority's survey

The survey allowed to outline the structure and developments of the market of medium- and long-distance bus services, as summarized below.

As at 31.10.2016, 145 undertakings were authorised to operate in the market. Most of them are small- and medium-sized enterprises, which are operating also in the contiguous sectors of local public transport and car-and-driver hire services.

The industry is on average concentrated (in 2016 the cumulative market shares of the top five operators were estimated at about 53%) with a steady increase in this concentration in recent years.

Traditionally, undertakings have devoted their supply to the connections between the South and North of the country and, in particular, to underserved areas. As a result of liberalisation, the supply of services has become more widespread, to better cover cross-sections (east-west of the Peninsula), on the Adriatic coast and from north to central Italy.

On the side of demand, with the exclusion of private car use and car-pooling services, bus and coach services cover 12% of medium and long distance journeys by collective means (compared to 17% of the journeys covered by medium and long-distance rail services under public service obligations - PSOs - and 71% by high-speed rail services) for an estimated total amount of 10 million travellers in 2016.

Users of medium- and long-distance road services are characterised by high price elasticity and low and moderate time value, while users mainly consist of students, elderly people and people with no car available or with a low income.

The business volume of the sector is estimated at about 200 million euros for 2016, with a significant and steady growth recorded in recent years (in 2012, turnover accounted for approximately 130 million euros); potential development of the segment is also positively assessed for the coming years.

With respect to intermodal competition, the operation of medium and long-distance bus and coach services is traditionally to be considered in competition with railways (in particular, medium- and long-distance universal services are entrusted to Trenitalia). This situation was already in place under the previous concession scheme. In recent years, intermodal competition also developed with respect to air services offered by the so-called low cost companies.

Intramodal competition in the sector has developed since 2014 after liberalisation with the access of new international operators such as Megabus (acquired by Flixbus in 2016) and Flixbus, which focused on new business models based on flexibility and price competitiveness, supply extension and high frequency of services. In particular, Flixbus has gained a 25% market share in 2016 (currently it is the first operator in the sector). Again in the field of intramodal competition, two further business models have recently developed in the market, although the supply is not very significant as yet: (i) services which are commonly known as bus sharing/bus pooling (i.e. "GoGobus") and (ii) low-cost services concerning "empty journeys" (i.e. "Trivabus").

Another element of competition in the current situation of interregional bus and coach services is the gradual expansion of private car-pooling services, such as BlaBlaCar and, in perspective, the access of medium-long distance buses provided by FSI group into scheduled transport services. The group, which is already operating in the market with its subsidiary Busitalia, has recently announced huge investments and acquisitions.

The first impact on the market as a result of the full liberalisation has been the entry of new operators with resulting increased demand thanks to the very low prices initially offered by the newcomers and their commercial strategies, including sales via the Internet. Increased demand was due also to the supply of new connections and new services on the same lines and to the improved quality of on-board services.

As for pricing, after the initial reduction, a partial realignment is currently under way according to all the parties consulted and to recent surveys.

As mentioned above, the economic impact of the new modes of competition arising from liberalisation was significant for existing undertakings in terms of lower profitability or reduction in market shares, as appropriate. Apparently, the entry of new operators led to a strategic repositioning by at least some incumbents through:

- supply of new lines;
- reorganisation of existing lines: supply of new journeys on same lines, but with different timeslots, frequency implementation;
- investments in new buses (Euro 6 and high-capacity), in own search, booking and ticketing systems, implementation of own app and marketing initiatives;
- opening of new sales channels with greater use of social channels;
- adoption of dynamic pricing policies.

Thus the market has undergone an expansion which was brought about, in addition to the entry of new operators and new business models, to the maintenance - in some cases - of the market positions held by already existing undertakings (which have adapted their business models).

The future competitive market evolution in compliance with safety and quality standards of services will certainly depend on the solution adopted for key regulatory issues arising from the survey.

## 4. Occurred implementing regulations and shortcomings of the current regulatory framework

The draft regulation at issue should fully replace the existing one adopted in 2006; it renews completely the implementation of the provisions contained in legislative decree no. 285 of 2005.

Even in the light of the above-mentioned survey it is quite obvious that legislative decree no. 285 of 2005 is not adequate with respect to the changed structure and the innovations and changes determining its development.

In particular:

- following the conclusion of the provisional period provided for the transition from the concession scheme to the authorisation system at the end of 2013, the liberalisation of interregional motor vehicle services under State responsibility, which is governed by legislative decree no. 285 of 2005, has been fully implemented;
- Regulation (EC) No. 1073/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international market for coach and bus services, and amending Regulation (EC) No 561/2006, while regulating international services within the EU, allows for picking up and setting down passengers at stopping points within the territory of a Member State, provided that the main purpose of the service shall remain the international passenger service; further, a consultation has been carried out on this Regulation from 14 December 2016 until 15 March 2017 for updating purposes;
- during the past two years, within the framework of the changed structure of this sector, which has been analysed in the previous paragraph, the market was accessed by operators characterised by an innovative business structure resulting from a combination of e-commerce technological platform and transport undertaking, being able to offer low-cost mobility on a very large network embracing the entire EU territory;
- article 37 of Decree Law no. 201/2011 established the Transport Regulatory Authority which was assigned responsibilities falling within the subjects covered by the regulations of this sector, as specified under (2) above.

### 4.1. Critical issues

The provisions of legislative decree no. 285 of 2005 which at present include quite critical issues as to the current structure of the sector are highlighted here below.

#### 4.1.a) the “three regions” criterion

The main feature of bus and coach services of national interest established by legislative decree no. 285 of 2005 with respect to the crossing of at least three regions, even in the light of the findings of the survey, does not seem to be fully functional to the dynamics of a rapidly expanding market, which is characterized by a variety of supply solutions to meet an increasingly differentiated demand. Indeed, supply policies and business marketing strategies of the undertakings in this liberalised industry lead to a segmentation of demand that appears to be no longer compatible with the administrative constraint of the crossing of at least three regions. In consideration of the nature of the Italian territory, this constraint may lead to too long

relationships (based on journey times) compared with the users' needs and may not meet latent mobility needs, even if on medium distances. The need to evaluate the introduction of a different criterion, which is more functional to ensure the necessary organisational flexibility to pursue efficiency and effectiveness in the management of a competitive service is worthy of consideration. In this respect, it would seem preferable to identify a linear criterion associated with the route length or the minimum distance between stopping points: this solution has been adopted in France, another major expanding EU market for bus and coach services (distance above 100 km) and Germany (distance between two stopping points of at least 50 kilometres, in addition to other requirements).

**4.1.b) Hindrances to access of new economic operators**

Furthermore, the condition for issuing the authorisation to the provision of the service provided for in art. 3 (2) (m) of legislative decree no. 285 of 2005, whereby the applicant undertaking shall "*propose scheduled services that do not cover only the most profitable services*" is a limitation which - as further explained in paragraph 7 as to the regulatory provision on the procedures for carrying out the verification of compliance - does not seem to be either necessary or proportionate to the current market structure which proved to work properly under conditions of full competition, as shown also by the outcome of the survey.

In this respect, it is necessary to take into account that the EU framework introduced by Regulation (EC) 1073/2009 for international carriage of passengers by coach and bus throughout the EU, does not provide for any similar limits or constraints for the request for authorisation by entities holding Community licenses.

The possibility of passengers being taken up and set down at stopping points within the territory of a Member State is allowed for these services, including the possible overlapping, in the national context, with the services referred to in legislative decree no. 285 of 2005. In such a competitive environment, keeping barriers to the access of undertakings wishing to operate national scheduled services could lead to "reverse" discrimination and, in any case, to a distortion of the competitive dynamics in the liberalised market.

## 5. Scheduled services overlapping with services subject to PSO: a different case

On the other hand, the safeguard of existing PSO contracts deserves specific mention.

In these cases, as provided for in Regulation (EC) No. 1073/2009 for international bus and coach services and as it is already the case in the domestic market of other EU countries, procedures are needed to evaluate, at the request of the awarding authorities, the impact of national transport services in a liberalised market, on national, regional and local services characterized by PSO, where the lines overlap in whole or in part.

A risk of overlapping of services of different type and nature may arise as a result of the revision of the Ministerial Decree referred to in art. 4 of legislative decree no. 285 of 2005, with reference to the new definition of "branch line", as it may occur that the sorting point between two regions (loading/unloading station) for market operators may overlap with the stops of operators subject to PSO.

With respect to these cases - and these cases only - in order to continue to ensure the economic and financial equilibrium of the contract subject to public service obligations, it would seem useful to supplement the regulatory framework by introducing proportionate and non-discriminatory restrictions to liberalised services, while providing for assigning to the Authority, on account of its independent nature, the power to assess whether the economic equilibrium of the overlapping public service contract is compromised. This would imply to lay down common rules as those already provided for railways under Article 12 (5) of legislative decree no. 112/2015 and Implementing Regulation (EU) No. 869/2014 of the European Commission of 11 August 2014 and for access to the international market for coach and bus services under Regulation (EC) No. 1073/2009, as mentioned above.

## 6. Latest regulatory developments and resulting restrictions to access

In accordance with the considerations under paragraph 4, it is worth highlighting the need for a careful evaluation, also for the purpose of its possible re-examination, of the provision introduced into legislative decree no. 285 of 2005 by Decree-Law no. 244 of 30 December 2016, the so-called "*Decreto Mille proroghe*" (art. 9 (2a)), upon approval of the relevant conversion law (law no. 19 of 27 February 2017). The provision introduces some specifications aimed at outlining the characteristics which must be met by a business association requesting the authorisation and sets out that "*[as for] interregional state-owned scheduled services, association of undertakings shall mean, for the purpose of this paragraph, a vertical or horizontal grouping of economic operators, whose mandatary/authorised representative carries out the main activities of road passenger services and the principals carry out secondary activities; horizontal grouping means a grouping in which economic operators provide the same services*". This provision, while ossifying in some specific groupings the associations of undertakings which are permitted to apply for authorisation to carry out scheduled services, without the support of traffic safety reasons, other and in addition to those already provided for by the legislation in force, constitutes a barrier to market access by operators - which to date have been operating under an association in a different form than the one envisaged in the new provision - to the detriment of the provision of services which is appropriate to users' mobility needs.

It should also be noted that the specific structure of the associations of undertakings which, following the introduction of the provision at issue, are permitted to apply for authorisation (in the form of vertical and horizontal grouping) is borrowed from that provided for by the relevant public contract legislation for the identification of undertakings participating in the tenders. In this respect, the application of rules relating to the Code on public works contracts, which in that case is watered down by the simultaneous and general provision of pooling/reliance, although they are relevant for the award of transport services subject to public service obligations (where competition for the market is in place), does not seem to be appropriate for the licensing regime relating to a liberalised sector, such as the regional motor vehicle services under State responsibility: in this case competition in the market is in place and the public administration is required to remove a legal limitation to the activity undertaking which has been statutorily provided to protect safety and environment interests, but certainly not competing economic interests.

**7. Proposals for modification of the draft Ministerial decree**

Given the above as to the economic and legal context, it is worth examining in more detail the critical issues arising from the wording of the provision in the draft decree.

In its opinion the Council of State has indicated, in particular, the need for an explicit ruling of the Authority on the mechanism outlined in art. 7 (2) of the draft decree for the verification of the requirement referred to in art. 3 (2) (m) of legislative decree no. 285 of 2005, which stipulates that the applicant undertaking shall "*propose a scheduled service that does not cover only the most profitable services among the existing ones*".

The mechanism provided by art. Article 7 (2) of the draft decree, which has not been amended compared with that already provided for in the existing ministerial decree, provides that "*with respect to the compliance with the requirement that the proposed scheduled service does not cover only the most profitable services among the existing ones, the competent office of the Directorate General compares the service programme of the proposed scheduled service and the existing ones and, where it establishes a full identity of traffic relations between two services and verifies that the service period and days coincide partially with those of the existing service, informs the companies in charge of scheduled services about the procedures to be followed to perform the proposed scheduled service in order to obtain useful information for assessing the existence of the above-mentioned requirement*".

In this respect, under paragraph 4 of its opinion, the Council of State provides that "This is a mechanism whose relevance for the purpose of ensuring the principle underlying the primary source is obscure, if not actually negative. Even the provision of a notice to the undertaking operating the service about the proposal submitted by the competitor, far from being a means of achieving more efficient solutions, is likely to become a barrier to market access. The provision of the following paragraph may be read accordingly: "*within ten days of receipt of the notice referred to in paragraph 4, the companies entered into the national list, within the framework of the scheduled service they operate, provide information in order to show in which periods or days the service is more profitable*". The idea of a procedure where the undertaking holding a license is heard about the proposal of the competitor – applying for that license - is at least technically and legally unusual, but it is even less understandable from an economic viewpoint, since the competition takes place among operators in the market, not among those who are already operating in the market and those who intend to enter the market."

It has been already mentioned, in the preliminary considerations, that the basic structure of the rule as provided for by the primary source is inadequate.

While the requirement, apparently intended to protect already operating firms from opportunistic behaviours of new entrants, could find a rationale at the time the rule was issued since the liberalisation took place in the presence of existing concessions which remained unchanged for a given transitional period, it does not appear to be appropriate any more in the current situation: indeed, the new competition regime is now fully operational, as the transitional period - in which the exercise of the activity continued to be allowed also on the basis of concessions already existing on the date of the entry into force of the above-mentioned legislative decree no. 285 of 2005 - has been terminated since 1 January 2014.

Indeed, art. 9 of legislative decree no. 285 of 2005 regulating the transitional regime has provided for the validity of the concessions of scheduled services issued pursuant to law no. 1822 of 1939 until 31 December 2013, stipulating as from 1 January 2014 the lapse of the concessions granted to undertakings which at that date did not meet the requirements for issuance of the authorisation or did not apply for authorisation (rectius: the transitional period was originally provided until 31.12.2010, subsequently extended by article 5 (7b) of Decree-Law no. 194 of 2009, converted, with amendments, into Law no. 25 of 2010).

Therefore, the existing requirement for issuing authorisations to new entrants, whereby the proposed scheduled service should not cover only the most profitable services, does not appear to be economically or legally justified and, even though it cannot be implicitly concluded that the relevant provision should be repealed for manifest inconsistency with the current regulatory framework, it is expected that the legislator provides for its explicit removal.

Even during the hearings with the operators, which were consulted in the course of the survey, the requirement under art. 3 (2) (m) of legislative decree no. 285 of 2005 was referred to among the provisions imposing constraints which are not fully consistent with a correct competition among the companies operating in the sector and was considered no longer applicable in consideration of its full liberalisation. Further, the application procedures provided for the verification of compliance with this requirement have been considered as inadequate, including in relation to the absence of market monitoring.

After this preliminary observation, it may be observed de iure condito that the methods laid down in art. 7 (2) of the draft regulation to assess the profitability requirements of the scheduled services proposed by the applicant company cause further injury to new entrants, as it has already been noted by the Council of State in its opinion, by favouring "strategic" behaviours by already existing operators, which are requested to report on the lower or greater profitability of their own lines. In this respect, the draft regulation provides that the acquisition of useful elements for assessing whether the profitability requirement is in place, takes place through a procedure whereby the companies already operating in the market are informed by the Ministry which is responsible for issuing authorisations on how the new entrant will carry out the scheduled service, such as information on the service operating programmes.

The fact that this information is available to the competitors of a new entrant produces in itself an undue competitive advantage which may distort market mechanisms, such as through deterrent practices to market access based on variation of price, quality or quantity sold, which are adopted to prevent or make the entry of potential competitors more burdensome. Further, the mechanism for checking the existence of the requirement provided for in the draft ministerial decree is considered ineffective as it actually entrusts incumbents with the assessment of the entry of the newcomer, thus weakening the effectiveness and value of the role of the Ministry of Infrastructure and Transport as to this assessment.

As to the "merit" of the evaluation of the requirement set out in art. 3 (2) (m) of legislative decree no. 285 of 2005, which will be verified according to implementing procedures defined by the Ministerial Decree, it is considered appropriate, de iure condito, that they be implemented so as to reduce the constraining effects. In addition to avoiding the involvement of incumbents in the assessment of the requirement, as already mentioned, a solution could be to better circumscribe, through the regulatory tool, the concept of exclusive demand for "more profitable services", by freeing it from its purely economic meaning and making it equal to a case of "unfair

competition", i.e. characterised by predatory or emulative objectives, so as to exclude the possibility of a market economic control by means of creating barriers to access. In line with this interpretation, it would be also appropriate to involve the Authority in this evaluation process, in order to ensure a technical and independent appraisal.

A few additional remarks on the draft ministerial decree are worth mentioning, even though they relate to lesser aspects than those set forth so far.

As to the procedures for issuing authorisations, the draft decree should be an opportunity for simplification targeted at reducing the processing time for the new bus line to begin its operation. In Italy, this procedure appears to be time-consuming and burdensome compared to other EU countries (France and Germany) where a comparable authorisation system one is in place, as well as with respect to the way in which the liberalised market operates. This threatens both to delay the entry of new competitors and extend the response time of the incumbents. Therefore, it is welcomed that by law no. 19 of 27 February 2017, upon conversion of "*2017 Mille Proroghe Decree*", legislation has been passed with respect to the assessment of the existence of the requirements for service security and regularity pursuant to paragraph 2 (g) of legislative decree no. 285 of 2005, so as to ensure reduced administrative burdens on businesses.

As regards the changes to be introduced by the new ministerial decree for simplifying the burden for applicant companies, it would be desirable to unify at a single contact point the ministerial structures of reference for private companies, as highlighted by the Council of State, too, in par. 5 (2) of its opinion. In this respect, it is noted that this need represents a request for simplification which is strongly felt by the operators, as resulting from the outcome of the consultation carried out in the framework of the Authority's survey.

Another unjustified burden on operators appears to be the obligation to send data on fares broken down by relationship, fare type and direction for the purpose of publication on the Ministry's portal. Since there is no longer a reference fare, as most companies adopted "dynamic" pricing criteria (prices increasing with vehicle occupancy) and time-limited low-cost deals, the wording of the draft ministerial decree could be adapted by including in the report the more flexible reference to "charging systems" in place of "fixed price" of the service.

Lastly, the draft decree deserves a few remarks with reference to EU and national legislation on passenger rights travelling by bus, whose compliance is supervised by the Authority pursuant to legislative decree no. 169/2014 based on specific powers to assess infringements and impose penalties on service providers.

In particular, with regard to Article 12 of the draft decree on "Communication of commencement of operation and information to travellers", it is considered appropriate to introduce a clearer link with the legislation on passenger rights' protection, as noted also by the Council of State under paragraph 6 of its opinion where, in addition to legislative decree no. 169 of 4 November 2014, it was explicitly referred also to the information obligations provided for users' protection under Regulation (EU) No. 181/2011 of the European Parliament and of the Council of 16 February 2011 on passenger rights in bus transport and amending Regulation (EC) 2006/2004.

The above additional provision, besides providing a proper link with EU legislation on users' rights would clarify that in no way does the compliance with the provisions of the decree cancel the fulfilment of the information obligations of the service providers to the users.

The President
Andrea Camanzi