Authority of Transport Regulation

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# Address by President
## Andrea Camanzi

Chamber of Deputies
24 July 2020

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Distinguished Guests, Ladies and Gentlemen,

first of all, let me thank the President of the Republic for his ongoing attention to our activities and for the honour that he has accorded us to present this Report to him. I wish to thank Parliament and, in particular, the President of the Chamber of Deputies for his words and for hosting us today. I thank all the authorities that are attending today and all those who are remotely connected with us on this occasion.

The seventh annual Report of the Transport regulation authority has a very special significance for at least two reasons.

**The Authority's seventh annual report at the conclusion of the first Board's mandate**

The mandate of the first Board is coming to an end; therefore, together with reporting on our activities in the last twelve months, I shall also take stock of the work carried out over the entire period of our mandate.

Covid emergency: an unprecedented crisis

Equally particular is the context in which I present this address, insofar as the latter is strongly influenced by the consequences of the Covid-19 pandemic and the persistent uncertainties about its future course.

An entirely exogenous factor, such as the threat to public health, has generated the sudden and simultaneous collapse of global supply and demand and triggered a serious economic recession. The competitive advantages of the companies that most benefited from the global value chain have turned into potentially critical issues.

In Italy, as in Europe, the crisis has overlapped with pre-existing economic difficulties in a context that is characterised by low growth rates, low propensity to innovation and a laborious search for responses to the challenges of climate change.

Covid emergency and the transport sector

At the beginning, the transport system was one of the vehicles of the spread of the virus. Today, this is among the industrial sectors that are most exposed to the consequences of the crisis, albeit to a different extent and in different ways depending on the mode of transport. On the other

hand, given its instrumental nature, it is also one of the sectors that may contribute the most to the recovery and benefit therefrom. To date, we do not have the necessary information to fully quantify and evaluate the structural effects of this phenomenon.

The effects of the pandemic on behaviour and the dynamics of transport markets

In the short term, the fear of contagion and emergency measures have changed people's mobility choices and have led, on the whole, to a drastic reduction in the number of journeys.

The first surveys on the evolution of demand in the different stages of the epidemiological emergency, including one conducted and published by the Authority, confirmed its different impact on occasional travellers, that are more concerned about the health risk, as opposed to regular travellers (and, in particular, commuters), who maintain a high propensity to use shared means of transport. To date absolute figures and trends both confirm this observation.

In the months of forced lockdown, while the transport infrastructure was largely unused, computer networks – once defined as '*information superhighways*' – were overloaded with data: a new raw material that, thanks to digital technologies, has led to permanent changes in the organisation of work and production. The virus has brought out these transformations, that affect all economic and administrative activities, both at the national and global levels, and lead to a necessary re-organisation of the transport sector, too. It is against this background that I present the final report on our mandate as first Board of the Authority.

Transport and "the new normal"

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**ART's uniqueness**

The legislator has entrusted the Authority with the original task of developing principles and criteria for the economic regulation of the sector and of ensuring their application. In doing so, the Authority has built up an important wealth of knowledge, that was acquired through the systematic collection,

consolidation and analysis of data, economic regulatory models, excellent professional skills and high credibility, including at European and international levels.

The Authority's choices and patrimony

Both in the development of the measures and in our organisation we have favoured, for all transport areas and while respecting the specificities of each industry, incentive regulation of investment and efficiency, as well as uniform accounting separation and regulatory accounting obligations that are useful to understand the multimodal development of the sector. Accordingly, we have set up our organisation by functions rather than by transport mode.

The Authority as a benchmark

Our methodology to determine the efficiency objectives of infrastructure managers is regarded as a benchmark; the Spanish Regulation Authority (CNMC), in particular, took inspiration from our model in the opening of the high-speed rail transport market to competition, in which, *inter alia*, Trenitalia has been a protagonist. After Italy, other EU countries set up national regulators with competences in several modes of transport. I refer here to Portugal, where the *Autoridade da Mobilidade e dos Transportes (AMT)* entered into operation in 2015, and to France, where, at the end of 2019, the existing regulatory body ARAFER became *Autorité de Régulation des Transports* (ART). The latter has not only taken on our same name, but also performs similar tasks, that are complemented by an original competence for data.

The HS market in Spain

Completing the EU regulatory and institutional framework for transport

This progressive institutional evolution towards a multimodal model reflects the much faster development of markets and demand for services. EU governments and institutions should therefore consider extending their consideration of the expected benefits of the single rail market to the transport sector as a whole. The regulatory framework of the latter should

be enhanced and the institutional framework re-designed in order to ensure its uniform application, as it has already been the case in telecommunications and energy.

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**ART's path in the Covid emergency**

The epidemiological emergency occurred two thirds into the time since submitting our last report to Parliament and has not interrupted our activities.

The unprecedented regulatory environment created by national and EU emergency measures, including the EU Commission's temporary state aid frameworks, keeps the Authority's role and tasks unchanged.

Emergency measures and economic regulation

Even before the adoption of measures to relaunch the economy under Decree-Law No 34 of 19 May 2020 ('Relaunch' Decree-Law), that provide for support, among others, in various transport areas, measures have been introduced to relieve citizens and businesses from burdens and obligations which were particularly heavy in the most severe period of the crisis. To the latter measures the Authority aligned its procedures, in particular as regards the calculation of deadlines.

Stress tests of economic regulation

Further, the Authority tested its regulatory tools against the need not to obstruct the achievement of the objectives of emergency legislation. The test confirmed the relevance and suitability of regulation in force to second the review of economic and financial plans, where necessary.

From the Authority's medium-term perspective, it is necessary to assess the effects of State aid and other public support measures on the competitive structure of transport service markets. The need for such assessment is shared by the regulatory bodies within IRG-*Rail* and, at international level, by the OECD.

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**Main areas of activity**

While I refer to the full Report that is being published today, I will now briefly review the main activities carried out by the Authority, that are divided into three sets of subjects.

**Access to infrastructure**

**Motorways**

The first concerns access to infrastructure and services and starts with an overview of activities related to the motorway sector.

Existing concessions

Decree-Law No 109 of 29 September 2018, converted into Law No 130 of 14 November 2018 ('Genoa' Decree-Law), has broadened the scope of the Authority's regulation in the motorway sector by extending it to the concessions in force. In this respect, we have completed the applicable toll charging model and applied it to 17 concessions whose regulatory period had expired, by structuring the relevant efficiency objectives according to their specific features. The model was illustrated to financial markets and infrastructure investment funds.

In two cases, following the setting of the charging system, at the request of the Ministry of Infrastructure and Transport, we also delivered opinions on the economic and financial plan. The first, relating to A24 and A25 motorway sections (*Strada dei Parchi*), was later included in the 'Relaunch' Decree-Law, which provides for the appointment of a commissioner and for *ad hoc* financing; as to the second one, concerning the Asti-Cuneo motorway section, the review process of the economic and financial plan has not been completed yet. For the remaining concessions in force, that are subject to the Authority's toll charging system, the awarding entity has not yet submitted the request for an opinion (as provided for by Article 43 of Decree-Law No 201/11) on the basis of final economic and financial plans.

Expired concessions and new awards

New concessions took different courses depending on the nature of the procedures chosen by the awarding entity.

In the north-west of the country, each of the sections covered by expired

concessions was shorter in kilometres than what is necessary to ensure economies of scale. In the tendering procedure, the awarding entity has therefore decided to merge them, in line with the Authority's definition of *optimal management area* (Decision no 70/2016). This is the case of the Piedmont and Val d'Aosta motorways and the Turin-Piacenza motorway, which were tendered in September 2019, as well as of the Tuscan-Ligurian motorways, for which a single tendering procedure was started in December 2019.

With regard to the sections covered by two expired concessions in the north-east, the awarding entity chose to directly assign the respective concessions to in-house companies. In both cases, the Authority has drawn up the concession scheme and exercised the advisory activity referred to in art. 13-a (4) of Decree-Law No. 148 of 16 October 2017 (*Urgent financial measures and undeferrable measures*, converted, with amendments, into Law No 172 of 4 December 2017). As for the motorways connecting Veneto and Friuli Venezia Giulia, whose concession expired in March 2017 and has been subjected to a commissioner's supervision, the procedure is not complete as yet. As for the Brenner motorway concession, that expired in April 2014, at the request of the Ministry of Infrastructure and transport, the Authority has elaborated all the relevant documents, including those necessary for the award by tendering procedure in the event of the unfruitful expiry of the 30 September deadline set by the law for the conclusion of the cooperation agreement with the beneficiaries.

Therefore, with reference to new concessions too, in the period of our mandate, no awarding procedure appears to have been completed.

The Court of Auditors' inquiry into motorways

We devoted careful attention to the motorway sector and implemented the legislature's intention to replace the different pre-existing systems with a single charging system that is stable, transparent and based on a strict and objective

method. Let me refer in this regard to the inquiry by the Court of Auditors, that in its final report (Decision No. 18/2019/G of 18 December 2019) highlighted the benefits expected from the application of the Authority's charging model, calling for its rapid introduction so as to rebalance the relations between the Parties involved.

**Airports**

With reference to the airport sector, we carried on with the exercise of our regulatory and supervisory activities concerning the charges, that are applicable by airport managing bodies under "ordinary" programme contracts; we completed the review of the charging models, that was planned since 2014. We also implemented Article 10 of Law No. 37 of 3 May 2019 laying down *Measures for compliance with the obligations deriving from Italy's membership in the European Union (European Law 2018)*, that extended the Authority's competences to airports under *ad hoc* programme contracts ('in derogation').

The new airport charging models

In the new models, with regard to the methods of allocation of the margins from ancillary activities, we have deemed it appropriate to accompany the dual till system with measures of greater transparency on the use of commercial revenues for the purpose of promoting air transport activities by means of aid. As to the efficiency objectives, the managing bodies will be required to justify any departures from the values defined by the Authority on the basis of objective indicators. The new models also provide for the possibility to launch a consultation procedure for the review of charges (not only at the end but) also during the regulatory period, for reasons related to emergency situations that are attested by the competent authorities. Regarding airports under programme contracts 'in derogation', while oversight activities were started following the approval of Article 10 of the above-mentioned Law No 37/2019, leading to alerts

and inquiries, the exercise of regulatory activities implies the conclusion of individual agreements between the Italian civil aviation authority (ENAC) and the airport managing bodies.

The opinions delivered by the Ministry of Infrastructure and transport and the Ministry of Economy and finance on the regulatory measures that were drawn up at the outcome of the consultation, enabled the Authority to finalise the models with some revisions. We especially welcome the call for enhanced cooperation with ENAC, which indeed has been sought after since the establishment of the Authority. In particular, cooperation is invoked with reference to the coordination between the definition of the charging dynamics, which is at the heart of economic regulation, and the programme contracts to which ENAC is (and remains) a party.

The expected entry into force of the models takes into account the extraordinary impact of the Covid-19 emergency on the air transport sector and, consequently, on the management of airports.

**Railways**

In the rail sector, the period of reference of this Report coincides with the completion of the liberalization of the single market, that was already open for freight, with passenger transport.

The economic equilibrium test

As of December 2019, EU licensed undertakings may apply for operations in any country in the Union. The service offered may also cover routes under public service obligations, provided that it does not compromise the economic equilibrium of the undertaking holding the relevant contract, in which case the authorisation may be denied. The latter derogation from the principle of market opening, that is provided for under Directive 2012/34/EU of the European Parliament and of the Council of 21 November establishing a single European railway area (‘Recast’ directive) and is governed by Commission Implementing Regulation (EU) No 1795/2018 of 20 November 2018, implies that the impact assessment of the proposal of

new services on existing contracts be based on a stringent and transparent methodology, to be developed by the regulatory body. In this regard, the Authority launched a consultation of the stakeholders (in progress at the time of writing), that has been drawn up with the primary consideration of the benefits expected from liberalisation. As already mentioned, public transport services and liberalised services will increasingly coexist. It is, therefore, necessary to ensure that the need to maintain the economic equilibrium of existing PSO contracts does not result in systematically preventing the operation of new and more efficient services, thereby limiting the final choice of users.

Access to service facilities and rail-related services

By consolidating previous measures and innovating so as to comply with EU requirements – in particular, with Article 13 of the Recast directive and with Commission Implementing Regulation (EU) No 2177/2017 of 22 November 2017 – we have regulated access to the so-called first- and last-mile service facilities (e.g. railway stations, maintenance centres, freight terminals and port facilities) and to the services provided in these facilities, including shunting. These facilities and services are of fundamental importance for the development of the national and EU logistics system. The measures adopted ensure certainty in the relationship between the parties (operator of service facilities, undertakings providing the services and their customers) and a transparent and correct sharing of their responsibilities. In the procedure, technical and economic features and access conditions to related services have been for the first time filed and catalogued concerning approximately 500 facilities.

The review of the rail charging system

As for the rail charging system, the first regulatory period, that was adopted by the Authority in 2015, is coming to an end; it has been addressed, *inter alia*, by two recent judgments of the Council of State (Section VI, Nos 4215 and 4216 of 1 July 2020) which, in line with the

respective first-instance rulings confirmed its overall architecture.

The development of the market for open-access passenger and freight transport services, the increase in traffic volumes and the more intensive use of network capacity, that were achieved by applying the current charging system, have induced us to maintain that system and intervene only where necessary, to adapt it to the new legislation introduced by the IV railway package.

Adequate levels of separation

As the vertical integration of the infrastructure manager is still in place, key issues are its independence, in order to prevent discriminatory behaviour, and the correct allocation of operating profits, which may not accrue to the holding and are to be re-invested in the development of the infrastructure, thus limiting the need to draw on public contributions. Any revision of the current system is to be directed to these purposes.

Lastly, I refer to the proposal for a Regulation that was presented by the EU Commission on 19 June 2020 [COM(260)2020] to introduce temporary derogations from the legislation on access to rail infrastructure and services contained in the 'Recast' directive, thereby providing a EU emergency regulatory basis for the operators concerned.

**Ports**

The outcomes of the first monitoring of the application of the regulatory measures on access to port infrastructure, that were adopted by the Authority in 2017, present a fragmentary and problematic scenario with regard to the application of regulatory criteria and principles and their integration into operating rules: the issue is *inter alia* confirmed by the complaints that we receive. In view of the forthcoming second monitoring cycle, sharing these findings will help highlighting these criticalities and hopefully favouring their solution.

A necessary reform

The creation of the EU single transport market requires that at least the land side of ports be integrated in a unitary economic regulatory model encompassing procedures of access to infrastructure and service facilities, award port concessions, access and use of railway and motorway network to promote combined transport. In terms of governance, the complaints that the Authority receives point to the need that the functions of economic regulation be separated from those of the awarding entity: a principle that should be considered as already acquired on the basis of existing rules. Last but not least, over a year after the entry into force of Regulation (EU) No 2017/352 of the European Parliament and of the Council of 15 February 2017, establishing a framework for the provision of port services and common rules on the financial transparency of ports, the provisions contained therein are still not implemented; equally unheard is the call that the Authority be designated as the body in charge of handling complaints on port charging policies, in line with the competencies entrusted to it more generally under its statutory law.

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**The regulation of local public transport services**

Let me turn to the second set of subjects, that concerns the awarding procedures and setting of tariffs, charges and fares for local public transport services (LPT).

Regulation of local public transport services by road

With reference to awarding procedures of LPT services by road, the Authority has concluded the review of regulatory measures adopted in 2015. For the part relating to the charging system, in particular, we applied criteria that are common to other areas of regulation, in particular in the field of investment incentives and return on invested capital.

The “social clause” and EU Commission Pilot

These measures too contain the “social clause”, that was already provided for the new award of maritime cabotage services; the topic is currently being examined jointly with the EU Commission in the framework of a Pilot

that concerns, in fact, the relevant national legislation provided for by Article 48 (7) (e) of Decree-Law No 50 of 24 April 2017, converted with amendments into Law No 96 of 21 June 2017 on *"Financial urgent measures, initiatives to support local entities, further measures for earthquake-hit areas and development measures".*

The pillars of LPT regulation

The LPT regulation that was adopted by the Authority is complemented by measures concerning awarding lots and areas of public service obligations, minimum quality standards and, with reference to regional rail transport, the measuring of the efficiency of contract management. Over time, we have observed a widespread propensity of awarding entities to apply the objective and transparent parameters of efficiency and quality set out in our regulation. In some cases, however, these entities are less engaged in analysing the degree of market competitiveness on which basis to award public services on an exclusive basis. Recent relevant examples concern

Maritime cabotage

maritime cabotage. In this respect, we believe that the Covid-19 pandemic cannot be appealed to in order to justify decisions to extend contracts whose expiry dates are known since the beginning.

**Taxi services**

In the field of taxi services, the Authority carried on its advisory activities upon the request of municipalities for the determination of the number of licences. In those cases in which local and regional authorities did not comply with the Authority's opinions, we decided to refer the matter to the Regional Administrative Court of Lazio and exercised the powers of *locus standi* provided for under statutory law.

Worth mentioning in this area is the recent judgement of the Council of State, that affirmed the anti-competitiveness of exclusivity clauses in favour of radio taxi stations contained in existing agreements between cooperatives and taxi drivers (Section VI, No 3503 of 4 June 2020). Such clauses are a recurring subject of the opinions delivered by the Authority, in which it

advocates the freedom of taxi-licence holders to organise their activities and of their customers to choose from among available services. One of these opinions was addressed to the Competition Authority concerning the case ruled by the Council of State (Opinion No 13/2017) referred to above. The same issue was addressed, *inter alia*, by the 2015 Authority's Recommendation on scheduled and non-scheduled services and technology mobility platforms.

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**Passengers' and users' rights**

The third set of issues concerns the protection of passengers' and users' rights. It refers to the exercise of both the *ex ante* regulatory powers of the Authority and to its supervisory functions in the implementation of the relevant EU Regulations.

The minimum rights of passengers and users

As to the former, with reference to the setting of users' minimum rights, we have adopted *ad hoc* provisions concerning the submission of complaints in sea transport. We have further carried out supervisory activities on equivalent measures in the field of rail transport under public service obligations. In particular, in several cases, we challenged railway undertakings for their non-compliance with the requirements concerning the protection of persons with reduced mobility and the compensation in case of disruptions and travel passes. Two of the fifteen initiated sanctioning proceedings are in progress, whereas for the others the Authority decided to submit the commitments made by the undertakings concerned to a market test.

Supervision on the enforcement of EU Regulations

With regard to the enforcement and supervision of EU legislation for the protection of passengers' rights in rail, bus and sea transport, the increasing trend of complaints (which may be submitted to the Authority only upon having unsuccessfully lodged a first-instance request with the carrier) can be explained with the passengers' increased awareness of their rights. At the same time, it points to the improvement to be carried out by carriers in order to ensure that the safeguards provided for in the Regulations are fully

complied with.

Vouchers and ticket refund

This area of activity was recently concerned by the problematic provision in general terms under domestic emergency legislation of the possibility to grant vouchers *in lieu* of the refund of the ticket price in the event of cancellation of the journey by the carrier. Based on EU Regulations, the choice to accept this option or not, rests exclusively with the passenger; thus, in carrying out its related supervisory powers, the Authority will take action to ensure full application of rights descending from EU law and disapply, where necessary, conflicting domestic legislation.

Both in the setting of *ex ante* regulation and in enforcing EU Regulations, we have mobilised all the powers provided for by the law and, in particular, those related to sanctioning in cases where it was not otherwise possible to induce carriers to reimburse or compensate passengers for the infringement of their rights.

It rests with the economic regulatory body a duty to encourage the virtuous conduct of regulated parties, even more than to impose sanctions. The outcome of our activity provides evidence on which basis to investigate the relationship between the behaviour of service providers and existing levels of competition in the different market segments. It remains to be assessed whether the opportunistic inclination of undertakings (moral hazard), that may take the form of repeated infringements of passenger rights' legislation, payment of reduced fines (which implies acknowledgement of the infringement), and selective use of legal remedies depending on the penalty amount, increases with the possession and exercise of market power.

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**Acknowledgements**

At this point in the presentation of the Report I would like to express my thanks to all those who contributed to establishing the Authority, determining its orientation and achieving the results obtained so far.

In the first place, I thank the members of the Board, Barbara Marinali and Mario Valducci, with whom I shared the extraordinary opportunity to set up a new institution. I wish to thank my Head of Cabinet, Luisa Perrotti, for her resolution, lucidity and competence in assisting me since the very start of our activities. Together with the Board members, my thanks go to the Secretary General, Guido Improta, for his tireless work and coordination of the Authority's directorates, to the Chief Economist, Carlo Cambini, the Legal Advisor, Giulio Veltri, the managers, experts, the Secretary of the Board and all the staff, in particular, the President's spokesman and the assistants, together with the Guarantor of Ethics, the Audit Committee, the Evaluation and Strategic Control Committee and the Advisory Board. After seven years, we share practice and routine of work; we are also united in the fond and loving memory of our dear colleagues Veronica Sepich and Mario Atzori, who recently passed away. I thank the City of Turin, the *Politecnico di Torino* and the Customs agency that host us, the Prime Minister's Office, the Ministry of Infrastructure and transport, the Ministry of Economy and finance and the other ministries, the Council of State, the Regional Administrative Courts of Piedmont and Lazio and the State Attorney, the other independent administrative authorities, the *Guardia di Finanza* and all the institutions with which we have cooperation protocols in place.

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**Taking stock**

Seven years is a quite considerable length of time to witness significant developments in terms of regulation, evolution of the sector and of the associated legal system, as well as major changes in markets, businesses and strategies thereof. Let me quote just two examples.

Market changes

When the Authority was first established, technology platforms and integrated mobility services (i.e. Mobility as a Service, MaaS) were not yet a topical issue. Today, the regulator may not disregard their impact on the structure and functioning of regulated markets. Conversely, in the absence of an economic regulatory model of open access services, the separate management of railway infrastructure in vertically integrated groups, that was then a topical issue both in Italy and in Europe, now arises in completely different terms in the light of the "essential functions" of the infrastructure manager provided for under the IV railway package.

The market has also grown in size while its modal split and ownership structure have changed. The issues of digitalisation, quality of services, environmental sustainability and not least, public health, have become prominent.

Legislative developments

A number of legislative changes were introduced since the adoption of the law establishing the Authority under Article 37 of Decree-Law No. 201 of 6 December 2011, converted into Law No 214 of 24 December 2011, as amended.

With regard to sector-related legislation, let me recall the amendments concerning airports, motorways and ports under by Decree-Law No 133 of 12 September 2014, converted with amendments into Law No 164 of 11 November 2014 ('Unlock Italy' Decree-Law), those concerning the transposition of the Recast directive and of the IV railway package, that were introduced in 2015 and 2018, respectively, those provided for by the a.m. Decree-Law No 50/2017 on local public transport and, for motorways, those contained in the Genoa Decree-Law, also mentioned above.

Further amendments were aimed at avoiding the consequences of EU infringement procedures, such as the review of the governance of port authorities (legislative decree No 169 of 4 August 2016, as later amended)

and the extended competences of the Authority to the airports under programme contracts 'in derogation', pursuant to the a.m. Law No 37/2019. In 2014 and 2015 the Authority was entrusted with new tasks in the field of the protection of EU passenger rights in rail, bus and sea and inland waterway transport. Last but not least, let me refer to the legislative amendments concerning all independent administrative authorities, that are contained in Article 22 of Decree-Law No 90 of 24 June 2014, converted into Law No 214 of 11 August 2014 ('Madia' Decree-Law) and, more recently, to those regarding the increase in the staffing plan and the amendment to the Authority's financing rules under Decree-Law No 109/2018.

Coordinated framework of the economic regulation of transport

The Authority's horizontal regulatory model reflects these developments; with its adoption we aimed at preserving the coordinated framework of independent economic regulation of transport, as it was provided for under the statutory law, in the context of a wider scenario aimed at ensuring market liberalisation. These purposes are expressly referred to in some rulings of the Constitutional Court (Judgment No 41 of 15 March 2013) and of the EU Court of Justice (Judgment of 4 October 2013, C-369/119) concerning us. In passing the torch at the end of our term of office, I would like to highlight some issues that affect the achievement of this project and its further development.

**Open issues**

Concession relations

The first issue pertains to the concessions relations with regard to which the Authority adopts regulatory models and charging systems.

As the distinction between airports under programme contracts 'in derogation' and other airports, in respect of which the Authority exercises regulatory and supervisory functions, was removed under the law, it became apparent that the necessary revision of the contracts in order to encourage investment may be hindered by the contracts themselves; the Authority is not party to these agreements, since it took over the functions

carried out by ENAC and not the contractual engagements that the latter had entered into.

Similarly, the removal of the distinction between new and existing motorway concessions under the law has brought up the unresolved question of the asymmetry characterising the relationship between awarding authorities and concessionaires; the latter is not related to the exercise of the economic regulatory tasks of the Authority. Precisely in the motorway sector, the conclusions of the Court of Auditors' inquiry mentioned above and the rulings of administrative courts (more recently, the judgment of the Regional Administrative Court of Valle d'Aosta No 22 of 26 June 2020) draw the attention of the actors involved to the clear need to rebalance the positions of the parties to the concessions-contract with a view to pursuing the public interest. We have further appreciated that the Minister of Infrastructure and transport included the "*overall review of the conventions governing concession relations*" in the political priorities for the year, that were adopted on 23 June 2020.

The scope of judicial review

The second question relates to the scope of judicial review, to be obviously addressed without in any way calling the principle of effective protection into question. The distinction of the respective functions of the judiciary and of independent regulatory authorities is acknowledged: the latter are entrusted with regulation, according to sector-specific technical and economic methodologies, that are assessed and applied with guarantee of independence; the judicial authority is tasked with verifying and judging whether the regulation complies with statutory rules and principles.

From the perspective of the independent regulator, it is essential that the balance described above be maintained in order to ensure the certainty of the rules governing the operation of the market, which values stability. Uncertainties could indeed be generated by the perception that the rules, in

order to be definitive, imply, in any case, a ruling by the court; thereby the judge becomes empowered to rely on verification bodies and replace the independent authority, according to the model of "full jurisdiction" that prevails in the different and characteristic area of issuing sanctions.

It should be clearly reaffirmed that *ex ante* regulation is a very different issue from the exercise of sanctioning powers, which are also entrusted to the Authority. Recourse to full jurisdiction, therefore, requires utmost prudence and caution in order to prevent that the tendency to verifying the *trustworthiness* – i.e. the reliability and credibility of the decision of the administrative authority, other than the reasonableness and proportionality of its acts – that is justified in sanctioning matters, extends to the different area of regulation, thus undermining the effectiveness of administrative action and, *de facto*, hindering the ability of the independent authority to efficiently and authoritatively steer markets towards competitiveness. I refer to specific cases where rulings by higher courts, both ordinary and administrative, are pending.

ART's funding

The third question concerns the need that the independence of the regulatory body be also substantiated in the availability of adequate and stable financial resources.

Against this need, the number of pending appeals regarding the obligation to contribute to the financing of the Authority, in which the latter is defendant, remains significant. This is notwithstanding the fact that Decree-Law No 109/2018, enacting a Constitutional Court's ruling (Judgment No 69 of 7 April 2017) has better defined the perimeter of the entities that are subject to the payment of the contribution and specified that the obligation rests on the transport companies operating in markets for which the Authority has actually exercised its powers or completed the

activities provided for by the law, without introducing any distinction depending on the degree of market liberalisation.

Significantly, applicants include undertakings that, while claiming that they do not fall among the entities that are required to pay the contribution to the Authority's operation, do invoke its regulatory action.

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**The new frontiers of economic regulation**

In addition to unresolved issues, new challenges lie ahead concerning regulation and its techniques.

Digital innovation and green economy on the EU agenda

Today, the transport industry, in its various forms and modalities, intersects both action priorities of the European Union: digital innovation and the green economy. This opportunity for change is not to be missed by the sector.

With regard to the interests of the regulatory body, this opportunity implies, *inter alia*, greater integration of digital infrastructure with mobility and logistics services. The availability and use of data for regulation are no longer an option. We welcome that the 'Streamlining' Decree-Law introduced a clear obligation onto concessionaires to provide public administrations with the data collected in the exercise of the concession, and we trust that data will have to be made available in a structured way and online.

"Contextual regulation"

But there is more to it. In a situation where data become "data flows", the material difference between action and the document recording such action is overcome. The frontier is, therefore, that of "contextual regulation" (or "regulation through data") that brings with it the need to systematically address its legal aspects and create opportunities for experimentation (*sandboxes*). Such a challenge is beginning to be addressed by initiatives of the French Government in various public service areas, including transport, and has for some time featured in OECD work.

Regulation and environmental sustainability

In terms of environmental sustainability, regulation already provides for quality requirements of services and incentives on the remuneration of investment in goods that have a positive impact on pollution. One example is the possibility of modulating airport charges according to the degree of aircraft pollution. Another one, not yet applied, could be that of granting a higher return on the investment needed to provide charging stations of electric vehicles along road and motorway networks. The challenge rests in developing these tools and working out other ones.

Passenger behaviour and emergency costs

Against this framework, the epidemiological emergency adds factors of complexity affecting both the passengers' behaviour, that are influenced by the fear of contagion, and the higher costs borne by providers of mobility services, due to the sub-optimal use of capacity and the need to provide adequate means and procedures to ensure tracing.

Opportunities for service quality and protection of rights

New opportunities arise too. While respecting privacy protection, transport companies may record information and passengers' behaviour for the purpose of public health protection. The ensuing identification of the load factor enables to target tariff evasion, better estimate potential demand, measure the quality of service in real time and assess its cost-effectiveness. Passengers' rights, too, can be protected in real time and online, with administrative simplification both for the regulatory body and for the transport companies concerned. Last but not least, the EU Commission's '*Next generation EU*' recovery plan explicitly stipulates that the extraordinary investments resulting from the pandemic be used to ensure the transition to greater sustainability. For transport and logistics, this involves promoting rail traffic and clean mobility in European cities and regions. Hence the increased need to develop appropriate economic regulatory tools in order to 'cross the environmental frontier'.

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**Closing remarks**

On 16 July 2014, upon presenting our first Report to the Parliament, I pointed to the fact that we had started sailing upwind and in uncharted waters, being guided by a lighthouse only: that of independence to ensure equity, transparency, predictability and stability of our regulation. Today, we present the seventh Report in times of pandemic.

There's no way out of the crisis by assuming that 'return to normal' is possible: a "new normal" lies ahead of us.

Against an inevitably increased presence of the State in the economy, classical questions become salient again, such as where the frontier lies between emergency measures — which are *per se* authoritative and public in nature — and the market. New questions also arise that are linked to the current contingency and the risk of a second wave of the pandemic: given the need to protect public health, what is the room for discretionary choices of the State in steering the economy of the country under much worse conditions than in the period before the epidemiological emergency, with higher unemployment, public debt, new consumer behaviour and a widespread sense of uncertainty, including on expectations.

In the acute stage of the pandemic, in our action we have accompanied public policy decisions. Looking forward, regulation is, more than ever, called upon to increase the awareness of choices by providing measurement of economic values involved and comparing effects.

On the other hand, it is necessary to pull the lever of change. Not all the knots that today appear as unresolved issues can be untied by addressing merely regulatory transport issues; solutions, as we have seen, often involve wider institutional and legal reforms.

The description of the open issues and of the relevant strategic context recalls the words from 'Letters *to a young poet'* by Rainer Maria Rilke: *"Lebe jetzt die Fragen. Vielleicht lebst du dann allmählich, ohne es zu merken, eines*

*Tages in die Antwort hinein" ("... Live the questions now. Perhaps then, someday far in the future, you will gradually, without even noticing it, live your way into the answer")*.

I am sure the Authority will be able to find answers and go farther.

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