Autorità di Regolazione dei Trasporti

Opinion No 3/2019

Opinion to the Ministry of Infrastructure and Transport delivered by the Transport Regulation Authority pursuant to Article 13-a of Decree-Law No 148 of 16 October 2017, converted, with amendments, into Law No 172 of 4 December 2017, as amended.

The Transport Regulation Authority (hereinafter: Authority or ART), at its meeting of 8 May 2019

whereas:

- by note dated 15 November 2018 (filed under ref. no. 9818/2018 on the same date) the Ministry of Infrastructure and Transport (hereinafter: MIT) sent a draft "*Cooperation Agreement between contracting authorities within the meaning of Article 17 of Directive 2014/23/EU and Article 13-a of Decree-Law No 148 of 16 October 2017, as amended, concerning A22 Brennero-Verona-Modena motorway section*", together with its annexes, governing, *inter alia*, the relationship between the grantor of the concession and the concessionaire for the operation of A22 Brennero-Verona-Modena motorway section, as well as for the design, execution and management of operations, which are described in Annex A to the a.m. Agreement, in order to obtain the Authority's opinion as provided for in Article 13-*a* (4) of Decree-Law No 148 of 16 October 2017 as amended;
- by note dated 16 November 2018 (filed under ref. no. ART 9905/2018 on the same date), the MIT sent the final version of the Economic and Financial Plan and the accompanying report sent by the Region Trentino-Alto Adige;
- by note dated 21 November 2018 (filed under ref. no. ART 10033/2018 on the same date), the MIT forwarded the opinion of DG GROW of the European Commission received on 20 November 2018, pointing out that the draft Cooperation Agreement is not incompatible with EU law on public procurement and concessions;
- in the light of the above, the Authority delivered its opinion No 10/2018, as referred to in Article 13-*a* (4) of Decree-Law No 148 of 16 October 2017, converted, with amendments, into Law No 172 of 4 December 2017, as amended. The opinion was sent to the MIT and published on the Authority's website;
- by Decision No 68/2018 of 28 November 2018, published in the Official Gazette on 28 December 2018, the Inter-ministerial Committee for Economic Planning (CIPE) approved the draft Cooperation Agreement and invited the MIT to implement, upon its conclusion, the requirements and recommendations set out by the Authority in its above-mentioned opinion No 10/2018;
- by Decision No 3/2019 of 17 January 2019, being currently registered, the CIPE also approved the criteria to calculate any net benefits achieved by the outgoing concessionaire Autostrada del Brennero S.p.A. from the expiry date of the concession to the takeover date by the new concessionaire, as well as their allocation, for regulatory purposes only, for the investments provided for in Article 8 of the Cooperation Agreement;
- by note ref. no. 0001559 of 5 February 2019 (filed under ref. no. ART 1142/2019), in response to the previous correspondence, the MIT transmitted the Authority, for the assessments under its remit, the simulations of the economic and financial plan carried out by the Region Trentino-Alto Adige, showing the financial non-sustainability of such simulations.

- by note ref. no. ART 1438/2019 of 12 February 2019, the Authority's offices, in order to ensure the completion of the preliminary inquiries for the adoption of the new opinion to be delivered pursuant to Article 13-*a* of Decree-Law No 148 of 16 October 2017, highlighted to the MIT a number of issues which, by affecting the projection of revenues and costs, significantly altered the economic and financial equilibrium of the four scenarios drawn up by the proposing entity, and provided guidance for the ensuing re-drafting of the economic and financial plan;
- by note ref. no. 0003305 of 12 March 2019 (filed under ref. no. ART 2414/2019), the MIT forwarded to the Authority a note from the Region Trentino-Alto Adige, together with the new economic and financial plan, financial and regulatory plan and explanatory report, which showed again an alleged financial non-sustainability of the project;
- by note ref. no. ART 2529/2019 of 15 March 2019, the Authority's offices informed the MIT that the new economic and financial plan (hereinafter also EFP) and financial and regulatory plan (hereinafter also FRP) were drawn up neither in accordance with Opinion No 10/2018, nor on the basis of all the information provided in note ref. no. ART 1438/2019; furthermore, the EFP/FRP contained a number of additional, significant and unpublished financial commitments leading to considerably higher financial requirements than those originally planned, as well as reductions in the previous traffic forecasts;
- by note ref. no. 0005193 of 2 May 2019 (filed under ref. no. ART 4360/2019), the MIT forwarded a new draft of "*Cooperation Agreement between contracting authorities within the meaning of Article 17 of Directive 2014/23/EU and Article 13-a of Decree-Law No 148 of 16 October 2017, as amended, concerning A22 Brennero-Verona-Modena motorway section"*, with annexes, including the EFP and FRP transmitted by the Region Trentino-Alto Adige on 30 April 2019, in order to obtain ART's opinion pursuant to Article 13-*a* (4) of Decree-Law No 148 of 16 October 2017, as amended;
- by note ref. no. 0005290 of 3 May 2019 (filed under ref. no. ART 4461/2019), the MIT sent, in replacement of the previous text, the final draft of the "*Cooperation Agreement between contracting authorities within the meaning of Article 17 of Directive 2014/23/EU and Article 13-a of Decree-Law No 148 of 16 October 2017, as amended, concerning A22 Brennero-Verona-Modena motorway section"*;
- the draft Cooperation Agreement consists of two parts:

  Part I — Cooperation Agreement between contracting authorities within the meaning of Article 17 of Directive 2014/23/EU;

  Part II — Terms and conditions for work implementation and management of A22 Brennero-Verona-Modena motorway infrastructure;

having examined the available documentation, sets out the following considerations with regard to the provisions of Part II of the Cooperation Agreement only, since the aforementioned paragraph 4 of Article 13-*a* of Decree-Law No 148/2017 empowers the Authority to issue an opinion on the concession contracts.

I. Legal and regulatory issues

The relevant legislation encompasses the following:

A. Article 37 of Decree-Law No 201 of 6 December 2011, converted, with amendments, into Law No 214 of 22 December 2011, as amended, that, in establishing the Transport Regulation Authority, in the context of the regulatory activities of public utility services referred to in Law No 481 of 14 November 1995, has, *inter alia*, set out under paragraph 2 (g) that *"with reference to the motorway sector"* the Authority attends to *"establishing, for new concessions as well as for those referred to in Article 43 (1) and, for matters falling within its remit, (2), toll charging systems based on the price-cap method, with determination of the productivity factor X every five years for each concession; defining concession schemes to be included in tender notices for management or construction, as well as tender schemes which motorway concessionaires are required to comply with for new concessions; defining optimal*

management areas of toll motorway sections so as to promote the plural management thereof and foster competition by comparison"; further relevant is paragraph 3 (c) of the same article;

B. Article 13-*a* (Provisions concerning motorway concessions) of Decree-Law No 148 of 16 October 2017, converted with amendments into Law No 172 of 4 December 2017, as amended, which provides, *inter alia*, as follows:
   - the functions of grantor of the concession for A22 Brennero-Modena motorway section, currently managed by Società Autostrada del Brennero S.p.A., whose concession expired on 30 April 2014, are carried out by the Ministry of Infrastructure and Transport;
   - the 30-year concession contract is concluded by the Ministry of Infrastructure and Transport with the regions and local authorities that have signed the Memorandum of Understanding of 14 January 2016; in their role as concessionaires these may also resort to existing or specially established in-house companies, the capital of which is not owned by private entities;
   - concession contracts are concluded, having obtained the opinion of the Transport Regulation Authority on the concession scheme, following CIPE's approval and in any case, with regard to the motorway infrastructure at issue, by 30 November 2018;

C. Article 2 of Directive 2014/23/EU of the European Parliament and of the Council on the award of concession contracts of 26 February 2014 (hereinafter Directive 2014/23/EU), which provides as follows:

   "1. This Directive recognises the principle of free administration by national, regional and local authorities in conformity with national and Union law. Those authorities are free to decide how best to manage the execution of works or the provision of services, to ensure in particular a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights in public services.

   Those authorities may choose to perform their public interest tasks with their own resources, or in cooperation with other authorities or to confer them upon economic operators.

   2. This Directive is without prejudice to the Member States' regimes of property ownership. In particular, it does not require the privatisation of public undertakings providing services to the public";

D. Article 17 (4) and (5) of Directive 2014/23/EU, which sets out as follows: *"A contract concluded exclusively between two or more contracting authorities or contracting entities as referred to in point (a) of Article 7 (1) shall fall outside the scope of this Directive where all of the following conditions are fulfilled: (a) the contract establishes or implements a cooperation between the participating contracting authorities or contracting entities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common; (b) the implementation of that cooperation is governed solely by considerations relating to the public interest; and (c) the participating contracting authorities or contracting entities perform on the open market less than 20% of the activities concerned by the cooperation.*

   For the determination of the percentage of activities referred to in point (b) of the first subparagraph of paragraph 1, point (b) of the first subparagraph of paragraph 3 and point (c) of paragraph 4, the average total turnover or an appropriate alternative activity based measure such as costs incurred by the relevant legal person, contracting authority or contracting entity as referred to point (a) of Article 7 (1) with respect to services, supplies and works for the three years preceding the concession award shall be taken into consideration.

   Where, because of the date on which the relevant legal person, contracting authority or contracting entity was created or commenced activities or because of a reorganisation of its activities, the turnover, or alternative activity-based measure such as costs, are either not available for the preceding three years or no longer relevant, it shall be sufficient to show that the measurement of activity is credible, particularly by means of business projections.";

E. Article 5 (6) and (7) of Legislative Decree No 50 of 18 April 2016, as amended (hereinafter Code) which, in line with the provisions of Directive 2014/23/EU, provide as follows:

"6. A contract concluded exclusively between two or more contracting authorities shall fall outside the scope of this Code where all of the following conditions are fulfilled:

(a) the contract establishes or implements a cooperation between the participating contracting authorities or contracting entities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;

(b) the implementation of that cooperation is governed solely by considerations relating to the public interest;

(c) the participating contracting authorities or contracting entities perform on the open market less than 20 % of the activities concerned by the cooperation.

7. For the determination of the percentage of activities referred to in paragraph 1 (b) and paragraph 6 (c), the average total turnover or an appropriate alternative activity-based measure such as costs incurred by the relevant legal person, contracting authority or contracting entity with respect to services, supplies and works for the three years preceding the concession award shall be taken into consideration.";

F. provisions referred to in Part III (*Concession Contracts*), Chapter I, of the Code (Article 164 et seq.);

G. Article 178 (1) of the Code, which provides as follows: *"1. For motorway concessions which have expired on the date of entry into force of this Code, the grantor of the concession, that has not yet done so, shall draw up the invitation to tender for the award of the concession, in accordance with the public tendering procedures laid down in Part III of this Code, within a mandatory period of six months from that date, without prejudice to the possibility of in-house award pursuant to Article 5. In the event of in-house award within the meaning of Article 5, the award procedures shall be completed within 36 months of the entry into force of this Code. Without prejudice to the provisions for the award of concessions referred to in Article 5 of this Code, the extension of motorway concessions shall be prohibited";*

H. Article 178 (8-*c*) of the Code, that, with regard to motorways in one or several regions, provides as follows: "*Motorway concessions relating to motorways in one or several regions may be awarded by the Ministry of Infrastructure and Transport to in-house companies of other public administrations, including those established for that purpose. To that end, a control which is similar to that referred to in Article 5 on the above in-house company may be exercised by the Ministry of Infrastructure and Transport through a committee governed by an ad hoc agreement pursuant to Article* 15 *of Law No 241 of 7 August 1990, that exercises on the in-house company the powers referred to in Article 5";*

I. Article 17 (1), (2) and (3) of Directive 2014/23/EU regulating the in-house providing, transposed into national law by Article 5 (1) to (5) of the Code, that sets out as follows:

"A concession awarded by a contracting authority or contracting entity as referred to in point (a) of Article 7 (1) to a legal person governed by private or public law shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

(a) the contracting authority or contracting entity exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;

(b) more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or contracting entity or by other legal persons controlled by that contracting authority or contracting entity; and

(c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

A contracting authority or contracting entity as referred to in point (a) of Article 7 (1) shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph of this paragraph, where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person. That control may also be exercised by another legal person, which is itself controlled in the same way by the contracting authority or contracting entity.

2. Paragraph 1 also applies where a controlled legal person which is a contracting authority or contracting entity as referred to in point (a) of Article 7 (1) awards a concession to its controlling contracting authority or contracting entity, or to another legal person controlled by the same contracting authority or contracting entity, provided that there is no direct private capital participation in the legal person being awarded the concession with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

3. A contracting authority or contracting entity as referred to in point (a) of Article 7 (1), which does not exercise over a legal person governed by private or public law control within the meaning of paragraph 1 of this Article, may nevertheless award a concession to that legal person without applying this Directive where all of the following conditions are fulfilled:

(a) the contracting authority or contracting entity as referred to in point (a) of Article 7 (1) exercises jointly with other contracting authorities or contracting entities a control over that legal person which is similar to that which they exercise over their own departments;

(b) more than 80% of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authorities or contracting entities or by other legal persons controlled by the same contracting authorities or contracting entities; and

(c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

For the purposes of point (a) of the first subparagraph of this paragraph, contracting authorities or contracting entities as referred to in point (a) of Article 7 (1) exercise joint control over a legal person where all of the following conditions are fulfilled:

(i) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities or contracting entities. Individual representatives may represent several or all of the participating contracting authorities or contracting entities;

(ii) those contracting authorities or contracting entities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; and

(iii) the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities or contracting entities";

J. Article 15 of Law No 241 of 7 August 1990 governing the agreements between public administrations, that provides as follows:

"*1. Even outside the situations provided for in Article 14, public administrative authorities may at any time enter into agreements among themselves with a view to laying down rules governing cooperation in activities of common interest.*

2. These agreements are subject to the provisions laid down in Article 11 (2) and (2-a) , insofar as applicable. As of 30 June 2014, in order to be valid, the agreements referred to in paragraph 1 shall be signed with digital signature, pursuant to Article 24 of Legislative Decree No 82 of 7 March 2005, with advanced electronic signature, within the meaning of Article 1 (1) (q-a) of Legislative Decree No 82 of 7 March 2005, or with another qualified electronic signature. The implementation of this provision shall

not result in new or increased charges for the State budget and shall be made with human, instrumental and financial resources provided for by the legislation in force".

Exercise of the Authority's functions

The Authority issued the regulatory acts falling under its remit with the following decisions:

i) by Decision No 70/2016 of 23 June 2016, it defined the optimal management areas of toll motorway sections, providing, *inter alia,* that the grantor of the concession, in the procedures for the award of the concession, or for the amendment of its essential elements, takes into account the levels of structural efficiency [*omission*];

ii) by Decision No 2/2018 of 25 January 2018, it initiated a procedure to determine the toll charging system to be included in the new agreement;

iii) by Decision No 73/2018 of 18 July 2018, it approved the toll charging system, based on the price cap method and with determination of X productivity factor every five years.

II. Remarks by the Authority

Section I. Remarks on the articles

Article 8 (SUBJECT)

Paragraph 2:

With reference to Measure 14.1 (b) of Annex A to Decision No 73/2018, the investments to be carried out should also include those referred to under (a), (c), (d), (e), (f) and (g), since there is no reason why the same principle set out by paragraph 2, namely that the cost of the investment may be included in the charge only if it results from the approval of the final project, should not apply to such investments. In this respect, the wording of the agreement does not include any specifications concerning the investments that are not mentioned.

Paragraph 3:

The article provides that the investments referred to in paragraph 2 (l) of the same Article 8[1] *"are included only for planning purposes and will be eligible in the charge upon validation of the technical sheet and the preliminary project — net of the financial benefits referred to in point (y) of the Preamble to this Cooperation Agreement - only if, after Cooperation Agreement has become effective, they are considered by the Steering and Coordination Committee as necessary for motorway activities or in any case compensatory, up to 2% of the value of all the investments referred to in Article 8.1, of the externalities suffered by the territories as a result of the motorway upgrading. This condition shall always apply to: (i) investments relating to the entry route to the motorway axis very close to motorway toll stations; (ii) investments concerning major suburban routes, including those alternative to the motorway axis, which can improve the overall road layout of the territory crossed by the motorway; (iii) investments concerning alternative roads to the motorway section that are effective and essential to accommodate car traffic in the event of a motorway blockage, both for extraordinary planned works and for unforeseeable emergencies; (iv) investments, including in urban areas, which involve a clear improvement of the access road system to the motorway axis".*

In this regard, reference is made to the assessments already made on pages 13 and 14 of Opinion No 10/2018 with reference to the "WORKS FOR THE UPGRADING OF THE ORDINARY ROAD NETWORK SERVING THE

[1] i.e. "WORKS FOR THE UPGRADING OF THE ORDINARY ROAD NETWORK SERVING THE MOTORWAY AXIS".

MOTORWAY AXIS", which are also included in new Annex M) to the Agreement, that reproduces the indications of Schedule (l)-12 of Annex A.

Further, in the exercise of its powers, the grantor of the concession has qualified, with a special contractual provision, the types of investment referred to under *(i), (ii), (iii)* and (*iv)* above as investments that improve the ordinary road network serving the motorway axis, in order to supplement the conditions for eligibility in the charge, with following impact on its level for users. Actually, it should be noted that, if the measures referred to in paragraph 2 (l) of Article 8 were not considered in full for charging purposes, there could be an annual linearised charging increase of + 0,12% until the end of the concession, instead of + 1,10 % provided for in the regulatory financial plan which was lately sent.

In any case, this is without prejudice to the necessary compliance with the general provisions of measure 13.1 of Annex A) to Decision No 73/2018.

On the other hand, with regard to the recovery of the financial benefits referred to under (w) of the preamble to the Cooperation Agreement[2], taking into account the clarifications in Annexes E and F to the Agreement, the following is noted:

- on the basis of what can be inferred from the investment dynamics referred to in line 41 of the worksheet *"RFP Notional items construction"* contained in the excel version of Annex E, the aforementioned recovery appears to take place in the last 4 years of the concession period, i.e. from 2046 to 2049, actually determining, in financial terms, the non-recovery of those benefits in full. In this regard, by updating the amounts recovered from 2046 to 2049 at the WACC rate, the actual value is approximately EUR 25 million lower than the financial benefit to be recovered, accounting for EUR 164,84 million, with a resulting increase in the charging levels for the entire concession period;
- the recovery methods used seem to differ from the alleged correlation of the above-mentioned financial benefits to the measures referred to in paragraph 2 (l) of Article 8, given that, on the basis of what can be inferred from the worksheet "*Concession Investment Plan*" contained in the *excel* version of Annex E, they are scheduled for the period from 2020 to 2039 only.

Article 9 (OBLIGATION OF THE CONCESSIONAIRE)

Paragraph 2:

Apparently, letter (gg) has not taken into consideration the points made in the Authority's Opinion No 10/2018 which referred to the need to supplement the final sentence as follows: *"The charges of such takeover... shall be recognised for charging purposes where they are related to reversible assets"*.

Paragraph 14:

The wording has not taken into consideration the Authority's opinion No 10/2018 where it was suggested to insert a termination clause, which is set out below for immediate reference:

"Pursuant to and for the purposes of Article 1456 of the Civil Code, the Cooperation Agreement shall be terminated if the concessionaire fails to fulfil that obligation within the agreed period, namely:

If the concessionaire fails to fulfil its obligation with a single payment by means of... (means of payment) no later than thirty days of the conclusion of this Cooperation Agreement, the grantor of the concession shall give notice of the decision to terminate the Agreement by indicating the elements concerning the assessment of non-compliance, setting the deadline of... [specify the number of days] within which the concessionaire must submit by certified email a statement of reasons for non-compliance.

After the period referred to above without the concessionaire having submitted any statement, or the reasons given have not been accepted by the grantor of the concession, the latter shall inform the concessionaire by certified email, no later than [specify the number of days] of the non-compliance, that it intends to apply the

[2] mistakenly indicated as letter (y) of Article 8.3 of the text sent on 3 May 2019.

express termination clause. Upon receipt of such statement the termination applies automatically".

Article 16 (EXPIRY OF CONCESSION TERM)

Paragraph 1

Despite the remarks already made in ART's opinion No 10/2018, the expiry of the concession terms continues to be applied, although this no longer complies with the legislation under the Public Contracts Code, directly applicable to motorway concessions, which refers to the termination for non-compliance of the concessionaire with its obligations.

Further, in the second subparagraph of paragraph 1, a link is established between "chargeable non-compliance" and "obligations which have become objectively possible", which appears unclear and, as such, leads to different interpretations. It is suggested, therefore, to specify the case which is intended to be regulated, by providing that non-compliance chargeable to the concessionaire is referred to the contractual obligations.

Finally, the provision contained in paragraph 5, setting out that in the event of failure to identify the incoming concessionaire, the responsibility of the takeover is borne by the grantor of the concession, appears to be contrary to the provision referred to in Article 178 (7) of the Public Contracts Code, which is of a mandatory nature.

Article 18 (AUTHORISATIONS FOR SUBJECTIVE AND/OR OBJECTIVE AMENDMENTS OF THE CONCESSIONAIRE)

As already highlighted in ART's opinion No 10/2018, although the provisions of the Cooperation Agreement (relevant to the rules laid down in Article 175 (2) of the Public Contracts Code) are apparently consistent with a private concessionaire, they do not appear to be compatible with the specific case in which, albeit in various respects, only public entities are involved. Divisions, mergers, etc. mainly involve market operators, rather than the local public entities of the Cooperation Agreement or the in-house company which must likewise be composed exclusively of public entities. With reference to paragraphs 6, 7 and 8, in particular, the provisions requiring that control always remain in the hands of a public entity are contrary to Article 13-a of Decree-Law No 148/2017, which requires that the entire capital be publicly owned.

Article 19 (ECONOMIC AND FINANCIAL PLAN)

In paragraph 4, the reference to "acts of third parties" should be deleted, since not any conduct of third parties is to be excluded from the concessionaire's liability, e.g., a subcontractor. On the other hand, where the act of the third party that is "not related" to the concessionaire by a contractual relationship is relevant, this falls in any case under the cases of force majeure.

In paragraph 5, with regard to the examples of force majeure, the provision of "systemic market crisis" seems too general and misleading and should therefore be deleted.

In paragraph 11, it is noted that no account has been taken of the suggestion contained in ART's opinion No 10/2018, according to which the reference to the penalties referred to in Article 19 (13) (b) should be deleted, as the provision for penalties cannot apply in the event of withdrawal following the failure to reach an agreement on the revision of the EFP, in line with the provisions of the last part of Article 165 (6) of the Public Contracts Code.

In paragraph 12, in view of the powers conferred upon ART as the economic regulatory authority for the transport sector, including motorways, any mention to NARS[3] should be removed, or be referred to functions

[3] Consultancy Unit for the Implementation and Regulation of Public Utilities (TN)

of advice and support to CIPE[4].

In paragraph 15, after the words "letter (g)" it is suggested to insert the words "... and under Article 43 (1), (2) and (2-a)".

Article 19-a (REVENUE SHARING ARRANGEMENT)

Paragraph 1:

The article provides that "*if as a result of the application of this arrangement it is not possible to ensure the expected cash flows in a situation of economic and financial equilibrium as indicated in the existing regulatory financial plan (RFP) and economic and financial plan (EFP), the notional items will be allocated immediately so as to ensure that the economic and financial equilibrium is maintained and the concessionaire's obligations are complied with, it being understood that the recovery of these notional items will take place after the financing provided for in the Financing Contract is fully repaid in compliance with the principle of economic and financial neutrality*".

This provision does not seem to be justified and is such as to frustrate the effectiveness of the arrangement provided for under point 26 of the charging system defined by ART in line with the powers conferred upon it (Annex A to Decision No 73/2018), concerning the treatment of higher revenues achieved in the previous regulatory period as a result of the mere accounting of actual traffic volumes that are higher than those expected.

As provided for in the revenue-sharing arrangement, the issue in question concerns the (however partial) absorption of extra-profits resulting from the above-mentioned higher revenues; therefore, as they are extra-profits, their partial absorption can in no way affect the economic and financial equilibrium of the concession; for this purpose, it is only necessary for the concessionaire to allocate those extra-profits to an *ad hoc* fund as soon as they are achieved.

Article 22 (AVERAGE UNIT CHARGE)

Paragraph 8

In Article 22 (8), with reference to the rules governing the mark-up, the following issues are highlighted.

Firstly, from a formal point of view, the reference to Directive 1999/62/EC should be harmonised with the reference to the Legislative Decree implementing the Directive, as amended, namely with the reference to Article 3 (11) of Legislative Decree No 7 of 25 January 2010[5].

[4] Inter-ministerial Committee for Economic Planning (TN)

[5] *11. In exceptional cases concerning infrastructure in mountainous regions, and after informing the Commission, for the purpose of the verification of compliance pursuant to Article 7-f, paragraph 3 of Directive 1999/62/EC, introduced by Article 1 of Directive 2011/76/EU, a mark-up may be added to the infrastructure charge levied on specific road sections which are subject to acute congestion, or the use of which by vehicles is the cause of significant environmental damage, on condition that: (a) the revenue generated from the mark-up is invested in financing the construction of priority projects of European interest, identified in Annex III to Decision No 661/2010/EU, pursuant to article 58 of Regulation (EU) No 1315/2013, as well as of projects referred to the core network as identified on the basis of the above Regulation No 1315/2013, which contribute directly to the alleviation of the congestion or environmental damage and which are located in the same corridor as the road section on which the mark-up is applied; (b) the mark-up does not exceed 15% of the weighted average infrastructure charge calculated in accordance with paragraphs 7 and 9, except where the revenue generated is invested in cross-border sections of priority projects of European interest involving infrastructure in mountainous regions, in which case the mark-up may not exceed 25%; (c) the application of the mark-up does not result in unfair treatment of commercial traffic compared to other road users; (d) a description of the exact location of the mark-up and proof of a decision to finance the construction of priority projects referred to in point (a) are submitted to the Commission in advance of the application of the mark-up; (e) the period for which the mark-up is to apply is defined and limited in advance and is consistent, in terms of the expected revenue to be raised, with the financial plans and cost-benefit analysis for the projects co-financed with the revenue from the mark-up.*

From a substantive point of view, the above-mentioned provision recognises, in exceptional cases, the application of a toll mark-up for specific motorway sections in relation to infrastructure located in mountainous areas and after notification to the European Commission. Before analysing the additional legal conditions laid down in the aforementioned Legislative Decree, it should be noted that no provisions are contained in the Agreement with regard to the prior notification to the European Commission, nor is there any provision in the event that the European Commission verifies the non-compliance within the meaning of Article 7-f, paragraph 3 of Directive 1999/62/EC. As regards the legal basis, it should be firstly noted that toll mark-up must be related, as expressly stated in Article 3 (11) of the above Legislative Decree, to "specific road sections", where, in the present case, it appears to be extended to the entire infrastructure; secondly, the provision must be related to infrastructure located in mountainous areas, whereas, in the present case, the mark-up is also extended to the plain sections of A22 motorway. On the other hand, as regards the specific conditions set out under (a), (b), (c) and (e) of Article 3 (11) above, the following should be noted: concerning letter (a), which connects the toll mark-up to the implementation of priority projects of European interest, as well as to projects relating to the core network identified on the basis of Regulation (EU) No 1315/2013, no reference to those characteristics is made under Article 22 (8), nor is there any reference to the evidence that would prove such inclusion. As regards letter (b), laying down the maximum percentages for the toll mark-up, no reference is made to such percentages, since it is fully undetermined whether and how the mark-up should be applied. Concerning letter (e), requiring a time-limit for the application of the mark-up, no reference thereto is included in the draft Agreement.

Paragraph 9:

With reference to the "*mark-up for the implementation of priority initiatives of European interest*", it is provided that *"Pending the drawing up of the specifications, the implementation of the priority initiatives of European interest referred to in Article 22.8 shall be financed with the resources referred to in Articles 9.14 and 9.15 of this Cooperation Agreement*", i.e. through (i) resources set aside under tax exemption arrangements, up to 12 months from the date on which the cooperation agreement takes effect, in the fund referred to in Article 55 (13) of Law No 449 of 27 December 1997, (ii) additional annual allowances to be set aside pursuant to Article 55(13) of Law No 449/1997 and Article 4 of the Memorandum of Understanding concluded on 14 January 2016 by the Ministry of Infrastructure and Transport (MIT) with the regions and local authorities concerned[6].

This provision seems to be contrary to the functional restriction laid down in Article 55 (13), which requires its exclusive use for the renewal of the railway infrastructure through the Brenner and the construction of the associated tunnels and rail connections and related infrastructure to Verona station node. The restriction at issue could be lifted only by a source of equal rank, certainly not by an agreement.

In those circumstances, without prejudice to the powers of the grantor of the concession concerning the use of the resources described above, an *ad hoc* contractual clause should be introduced which, in the event of non-application of the mark-up in question, provides for the automatic repayment to the State of the allowances of such fund that have been used in contrast to the original destination.

In the absence of such a clause, the provision referred to in paragraph 9 would be contrary to the eligibility criteria laid down in ART's charging system (Annex A to Decision No 73/2018), according to which only annual allowances expressly intended to ensure cross-financing of the Brenner—Verona railway project are eligible for inclusion in the charge.

[6] These allowances amount to EUR 34.5 million per year for the entire concession period.

Article 24 (TARGETED PRODUCTIVITY GAIN FROM IMPROVED EFFICIENCY)

Paragraph 2:

The paragraph specifies that "*if, as a result of the charge update following the first regulatory period, the charge determined pursuant to this Cooperation Agreement reaches such a level that it is not possible to secure the expected cash flows in a situation of economic and financial equilibrium as indicated in the existing regulatory financial plan (RFP) and economic and financial plan (EFP), the notional items will be immediately allocated so as to ensure that the economic and financial equilibrium is maintained and the concessionaire's obligations are complied with, it being understood that the recovery of these notional items will take place after the financing provided for in the Financing Contract is fully repaid in compliance with the principle of economic and financial neutrality*".

This provision is in clear and stark contrast to the productivity recovery mechanism that is provided, in strict compliance with Article 37 (2) (g) of Decree-Law No 201 of 6 December 2011, converted, with amendments, into Law No 214 of 22 December 2011, as amended, under the combined provisions of points 17 and 19 of ART's charging system (Annex A to Decision No 73/2018), for all regulatory periods following the first.

It should be recalled that the charging system developed by the Authority, with reference to the operational charge component, is based on the identification of the initial maximum charging level and on the application, at that level, of the price cap method, with determination of the productivity factor X every five years, as established by the Authority. In this context, the correct application of the model, as already stated in ART's Opinion No 10/2018, implies the need for the concessionaire to appropriately adjust the level of its costs, optimising its production processes in line with the targeted productivity gain set out in Article 24 of the draft Cooperation Agreement, in order to achieve the economic equilibrium.

This provision should therefore be deleted.

Article 28 (TIME-LIMIT FOR SUBMISSION OF DESIGNS)

Paragraph 3

Regarding Article 28 (3), the suggestion contained in ART's Opinion No 10/2018, whereby the provision for expiry of the concession term (or rather, termination, see comments on Article 16), at least as a first instrument of coercion, seems to exceed the purpose and principle of proportionality, has not been implemented.

In the alternative, it is therefore suggested to provide for an increasing penalty system.

Article 38 (CHARTER OF SERVICES)

In this respect, an explicit reference should be made to the measures adopted by the Transport Regulation Authority pursuant to Article 37 (2) of Legislative Decree No 201/2011.

Section II. Comments on economic and financial plan

It should be firstly noted that the Economic and Financial Plan (Annex E to the Agreement) has been revised by the concessionaire based on the assumptions contained in the previous EFP sent to the MIT in March 2019, duly supplemented by the adoption of the following comments, referred to in letter ref. no. 2529/2019:

- application of a 3.91% efficiency rate on all types of operating costs;
- calculation of extra-profits from ancillary activities considering, among the eligible costs, the sub-concession fee calculated by applying a 20% rate to the related revenues;
- calculation of the initial average unit charge for the charge dynamics consistent with that resulting from

the charges in force in 2018 for the different types of traffic and route, weighted on the respective traffic volumes;

- evaluation of the shareholders' internal rate of return (IRR equity) considering the recovery of the equity value at the end of the concession;
- precise calculation of financial charges for guarantees provided for in the Agreement;
- update of the rate of return on invested capital, the value of which, for the first regulatory period, is currently set at 6.92% (nominal pre-tax).

The level of the indicators[7] set out in the "*Output Summary"* worksheet in the excel version of Annex E appears appropriate to ensure the equilibrium of the economic and financial plan, as the conditions of economic equilibrium (banking sustainability or bankability) and financial equilibrium (financial sustainability or profitability) are both in place at the same time, as defined in Article 3 (1) (fff) of the Code of Public Contracts, as well as in ANAC's Guidelines No 9 on "*Monitoring of the contracting authorities on the activity of the economic operator in public private partnership contracts*", published in the Official Gazette — General Series No 92 of 20 April 2018.

It should be clarified that these indicators are also impacted by the inclusion in the Plan, among the cash flow requirements, of capital contribution accounting for EUR 100 million to Autostrada Regionale Cispadana, and of a subordinated loan to the same company amounting to EUR 107.1 million, which has been repaid by the end of the concession. In this respect, the grantor of the concession shall verify compliance with Directive 2014/23/EU.

Although it is irrelevant for the purposes of the economic and financial equilibrium of the concession, the EFP/RFP last submitted present, as compared to the version addressed by ART's opinion No 10/2018, a total reduction in the planned traffic volumes for the concession period (from 171 billion to 161 billion vehicles*km). While acknowledging that this variation is supported by an updated transport analysis supporting the estimates (Annex I to the Agreement), it must be noted that the above-mentioned decrease in volumes inevitably leads to the determination of significantly higher unit charging levels for users.

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In the light of the above considerations, the Transport Regulation Authority hereby delivers its opinion as referred to in Article 13-a (4) of Decree-Law No 148 of 16 October 2017, converted, with amendments, into Law No 172 of 4 December 2017, as amended.

This opinion is sent to the Ministry of Infrastructure and Transport and published on the Authority's website.

Turin, 8 May 2018

The President

Andrea Camanzi

[7] i.e.:

- average DSCR (Debt Service Cover Ratio) equal to 1.46;
- minimum LLCR (Long Life Cover Ratio) equal to 1.54;
- project IRR (Internal Rate of Return) equal to 7.32;
- shareholders' IRR (Internal Rate of Return) equal to 4.14%;
- debt repayment 2.5 years in advance of the end of the concession;
- never negative cash flow.