Autorità di Regolazione dei Trasporti

Opinion No 4/2019

Opinion to the Ministry of Infrastructure and Transport issued 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 23 May 2019

whereas:

- by Decision No 133/2018 of 19 December 2018, at the closure of the proceeding initiated by Decision No 3/2018 of 25 January 2018, the Authority approved the toll charging system based on the price cap method with determination of the productivity factor X every five years for the award of the in-house management of the following motorway sections: A4 Venice-Trieste, A23 Palmanova-Udine, A28 Portogruaro-Conegliano, A57 Mestre ring road for the relevant part and A34 Villesse-Gorizia junction, pursuant to Article 13-a of Decree-Law No 148 of 16 October 2017;
- by note ref. no. 11045/2018 of 20 December 2018, the Authority's offices forwarded to the Ministry of Infrastructure and Transport (hereinafter: MIT) the above-mentioned Decision No 133/2018 and its annexes for follow-ups, highlighting that the Ministry should later forward to the Authority, before transmission for approval of the Inter-ministerial Committee for Economic Planning (CIPE), the draft agreement for the award in question, including its annexes, for the Authority to deliver its opinion as required by law;
- in reply to the a.m. ART's note, by note of 8 May 2019 (filed under ref. no. ART 4747/2019) the 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 the following *motorway sections: A4 Venice-Trieste; A23 Palmanova-Udine; A28 Portogruaro-Conegliano; A57 Mestre ring road for the relevant part; A34 Villesse-Gorizia junction*", together with its annexes, governing, *inter alia*, the relationship between the grantor of the concession and the concessionaire for the management of the motorway sections in question, as well as for the design, execution and management of works, which are described in Annex A to the a.m. Agreement, in ordinance 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;
- 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 the motorway infrastructure covered by the Agreement;

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 deliver 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 the motorway sections A4 Venice-Trieste, A23 Palmanova-Udine, A28 Portogruaro-Conegliano, A57 Mestre ring road for the relevant part and A34 Villesse-Gorizia junction, currently managed under an extension arrangement by Società Autovie Venete S.p.A., whose concession expired on 31 March 2017, 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 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, after CIPE's approval, having obtained the opinion of the Transport Regulation Authority on the concession scheme;

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 ordinance 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".

Furthermore, for the purpose of the award of the concession at issue, the following special provisions apply:

K. Article 5(2) of Law No 225 of 24 February 1992, in the version in force before 2012, provides as follows: *"The works to be carried out during the declared state of emergency following the events referred to in Article 2 (1) (c) shall be implemented also by means of ordinances derogating from any existing provisions, within the limits and in accordance with the criteria set out in the decree declaring the state of emergency and in compliance with the general principles of the legal system...".*

L. Article 6-b of Decree-Law No 79 of 20 June 2012, converted, with amendments, into Law No 131 of 7 August 2012, namely:

   a) paragraph 1, where it is provided that, *inter alia*, "... *the effects of the decision of the Council of Ministers of 11 July 2008 concerning the traffic and mobility sector in the motorway axis Corridor V of A4 motorway, Quarto d'Altino-Trieste section and Villesse-Gorizia motorway junction... including the effects of: a) Decree of the President of the Council of Ministers of 11 July 2008, published in the Official Gazette No 175 of 28 July 2008, following decrees of the President of the Council of Ministers of 12 December 2009, 17 December 2010 and 13 December 2011, published in the Official Gazette No 2 of 4 January 2010, No 3 of 5 January 2011 and No 300 of 27 December 2011, and ensuing ordinances of the President of the Council of Ministers No 3702 of 5 September 2008, and No 3954 of 22 July 2011, published in the Official Gazette No 213 of 11 September 2008 and No 185 of 10 August 2011, respectively,…"* shall remain unaffected;

   b) paragraph 2, which sets out that "*The amendments introduced by Decree-Law No 59 of 15 May 2012, converted, with amendments, by Law No 100 of 12 July 2012, under Article 5 of Law No 225 of 24 February 1992, shall not apply to extraordinary administrations operating under the measures referred to in paragraph 1 of this Article. Furthermore, the provisions of Article 3 (2) of Decree-Law No 59 of 15 May 2012, converted, with amendments, into Law No 100 of 12 July 2012 shall not apply to such administrations.*"

M. The Decree of the President of the Council of Ministers of 11 July 2008 laying down the "*Declaration of the state of emergency in the traffic and mobility sector on the motorway axis Corridor V of the A4 motorway, Quarto d'Altino-Trieste section and Villesse-Gorizia motorway junction" which provides for*

the state of emergency "to speed up the procedures for the construction of the third lane of the A4 motorway, Quarto d'Altino-Trieste section and Villesse-Gorizia motorway junction and the high-speed and high-capacity railway route...";

N. Ordinance No 3702 of the President of the Council of Ministers of 5 September 2008 (hereinafter Ordinance) concerning *"Urgent civil protection measures to address the emergency in the traffic and mobility sector on the motorway axis Corridor V of the A4 motorway, Quarto d'Altino-Trieste section and Villesse-Gorizia motorway junction"*, and in particular:

- Article 1 (1) providing that: *"The... Commissioner-Delegate... shall provide for the following:*
  a) construction of the third lane on the motorway section A4 Quarto D'Altino-Villesse, and adaptation to the motorway section of Villesse-Gorizia junction;
  b) implementation of the works on the motorway section A4, Quarto D'Altino-Trieste or on the Villesse-Gorizia junction or the interconnected motorway system, provided for in the concession agreement between Autovie Venete S.p.A. and ANAS S.p.A., that are considered essential to address the a.m. state of emergency;
  c) construction of works under the responsibility of entities other than the concessionaire Autovie Venete S.p.A., on account of planning needs and financial resources of such entities, that are in any case aimed at relieving congestion in the area affected by the declaration of the state of emergency referred to in this ordinance;
- paragraph 2, establishing that "*The Commissioner-Delegate shall carry out all the initiatives aimed at the prompt execution of the works referred to in paragraph 1 and may adopt, in place of the persons with ordinary jurisdiction, the acts and measures necessary for the urgent execution of the works.*"
- Article 6 (2), setting out that "*If, following the approval of the final project or during the planning and implementation stage of the works referred to in Article 1, over-expenditure arises as compared to the total amount provided for in the economic and financial plan annexed to the agreement concluded between the concessionaire Autovie Venete S.p.A. and ANAS S.p.A. on 7 November 2007, the concessionaire, no later than 30 days of communication by the Commissioner-Delegate, will include these amounts into a new economic and financial plan and determine the equilibrium thereof*";

O. The Decree of the President of the Council of Ministers of 21 December 2018, that extended until 31 December 2020 the state of emergency in the traffic and mobility sector on the motorway axis Corridor V of the A4 motorway, Quarto d'Altino-Trieste section and Villesse-Gorizia motorway junction.

<u>*Exercise of the Authority's functions*</u>

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 3/2018 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 133/2018 of 19 December 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

Preliminary remark

Point (j)

Please note that the quoted text referring to the exiting version of paragraph 2 (g) of Article 37 of Decree-Law No 201 of 6 December 2011, shall be adapted as follows:

"with reference to the motorway sector, 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;".

Section I. Remarks on the articles

Article 8-a (SCOPE)

Paragraph 1

With regard to the rules laid down in paragraphs 1 and 2 concerning the application of the ordinary regime under the legislation in force, it should be firstly noted that the primary and secondary legislation especially regulating the emergency phase underlying the draft agreement under review, are related to the implementation of works and, therefore, may be referred exclusively to the stages of design and execution of these works.

As regards primary legislation, this is shown by Article 5 of Law No 225/1992 that, in the original version currently applicable pursuant to Article 6-b (2) of Decree-Law No 79/2012, under paragraph 2 provides that "*the works to be carried out during the state of emergency... shall be implemented also by means of an ordinance derogating from any existing provisions*"; with regard to secondary-ranking sources, in support of the assumption, the Decree of the President of the Council of Ministers of 11 July 2008 declaring the state of emergency, indicates that its purpose was to "*... speed up the procedures for the construction of the third lane of the A4 motorway on the Quarto d'Altino-Trieste section and the Villesse-Gorizia motorway junction...*".

The fact that the Commissioner's extraordinary powers and responsibility relate to the design and construction of infrastructure works is also evidenced by the analytical description of those works in Article 1 of the Ordinance. It must be concluded that the state of emergency and the ensuing powers of the Commissioner-Delegate resulting from the Ordinance do not cease, from the point of view of the relationship between the grantor of the concession and the concessionaire, at the end of the emergency period, but rather at the time of completion of the works and of the ensuing acts aimed at proving that the work has been carried out to the highest standards (technical and administrative testing and decree of the Commissioner-Delegate).

Therefore, it must be concluded that the emergency status and the ordinary regime are intended to operate alternatively, since the distinction for the application of the ordinary or emergency rules depends on whether the works have been completed or not, respectively. For example, the rehabilitation of the Villesse-Gorizia motorway junction (work with code P.75 P.94), having now been completed and defined (cf. page 32 of Annex A to that Agreement), is to be considered as excluded from the special regime and therefore falling under the ordinary regime of the new concession relationship (see also below).

Consequently, once the works have been carried out, the construction costs and the related depreciation plan must be placed outside the emergency status, except for the situations referred to in Article 6 (2) of the Ordinance.

It follows, therefore, that, contrary to what is established by the provisions at issue as to the disapplication of Articles 19 and 25, that disapplication does not appear to be consistent with the purposes, powers and responsibilities and, in general, with the legislative framework governing the state of emergency, since the financial and economic plan and the annual adjustment of the average unit charge, for the reasons set out above and subject to the exception of Article 6 (2) of the Ordinance, are based on the ordinary relationship between the grantor of the concession and the concessionaire.

Finally, the disapplication of Article 9 (Obligations of the concessionaire) does not seem to be consistent with this reconstruction, since the obligations laid down therein, beyond certain specific points, which are referred to in the section of this opinion concerning Article 9, appear to be applicable even under the emergency situation, as they concern works already carried out (e.g., maintenance) or obligations which do not interfere with the powers of the Commissioner-Delegate.

Accordingly, paragraph 1 should be amended, in so far as it regulates the return to the ordinary regime, and paragraph 2, as it contains provisions which are not consistent with the above.

To the contrary, Article 5 (2) of Law No 225/1992, in the version applicable to the present case, and Article 1 (1) and (2) of the Ordinance show that the state of emergency and the extraordinary powers of the Commissioner-Delegate appear to be limited to the stages of design and implementation, as demonstrated by the use of the term "*works to be carried out*" both in the primary source (cf. Article 5 of Law No 225/1992) and in the implementing ordinances.

On the other hand, regarding the provision for the disapplication of Article 32 during the state of emergency, it should be noted that Annex K, referred to in the article, contains penalties which appear to be of immediate application, except for Chapter 4 (Penalties on design), Chapter 5 (Penalties on work execution) and the first paragraph of Chapter 2.1, concerning extraordinary maintenance projects. In addition, it is necessary to amend the third sentence of Chapter 2.1, replacing the reference to ART's Decision no 73/2018 with ART's Decision No 133/2018.

Finally, in the light of the above and based on Annex B to the draft Agreement, the works marked with codes P.92 Nuovo Casello autostradale (new tollbooth) Meolo, P.75 P.94 Adaptation of Villesse-Gorizia motorway junction, P.76 P.101 section Quarto d'Altino-San Donà di Piave cannot be included in the provision at issue since they have already been completed, tested and approved by the Commissioner-Delegate by Decree No 328 of 24 March 2017. The ensuing removal of those works from the list referred to in letter B will imply that the related construction costs, and the management of those works, will therefore be subject to the ordinary regime and consequently to ART's regulatory measures pursuant to the following Article 25.

However, account shall be taken of the provisions of Article 6 (2) of the Ordinance, with regard to any excess expenditure arising from the design and implementation of the works covered by the commissioner system.

Paragraph 3

The provisions of this paragraph are not contrary to the foregoing, since they regulate the different situation in which, at the end of the state of emergency, if no further extension is made, the works are not completed in whole or in part.

Article 9 (OBLIGATIONS OF THE CONCESSIONAIRE)

Paragraph 1

The provision, in so far as it is related to the works referred to in Article 8.1 (A) alone, is not fully coordinated with the provisions of Article 8-a (3)(i) and (ii), since it should also regulate the possible revival of the ordinary regime for the design and construction of works which, although falling within the remit of the Commissioner-Delegate, were not fully or partly carried out at the expiry of the state of emergency.

Paragraph 2

In letter (c), as regards the obligations related to the different project stages to be carried out by the concessionaire, the provision of such obligations for the implementation of the works under Article 8 (1) should be referred to the works mentioned in letter A) of that article (works falling within the remit of the concessionaire) and, as regards the works referred to in letter B) (works falling within the remit of the Commissioner-Delegate), only those which were not fully or partly completed at the expiry of the state of emergency should be indicated.

Paragraph 2 (gg)

Considering the provisions of point 2.16 of Annex A to the Authority's Decision No 133/2018, it is recommended that the fourth line, after the word "grantor of the concession", provides for the following sentence *"The charges of such takeover... shall be recognised for charging purposes where they are related to reversible assets".*

Paragraph 9

The Cooperation Agreement, as it stands, seems to be difficult to coordinate with the provisions of Article 13-a of Decree-Law No 148/2017, which indicates the public entities that first concluded the Memorandum of Understanding of 14 January 2016 and will consequently sign the above Agreement. On the other hand, a clause allowing a redistribution of shares and/or units within the same local and regional authorities that have signed the above Memorandum of Understanding, would appear consistent with the legislative provision.

Article 13 (THIRD-PARTY LIABILITY AND INSURANCE)

Paragraph 1

It should be provided that the insurance coverage for the events referred to in paragraph 1 be reviewed in the cases where the amount of the works and/or extraordinary maintenance works to be carried out is subject to changes related to the revision of the EFP for new investments. It should be further provided that the grantor of the concession determines the insured sum which forms the basis of the new policy.

Article 16 (EXPIRY OF CONCESSION TERM)

Paragraph 1

In general terms, it is noted that the institution of the expiry of the concession term, used in the article, has been deleted from the Code (cf. art 176 (7)); with a view to the privatisation of the relationship between the grantor of the concession and the concessionaire, an express reference is now made to the Civil Code, concerning the institution of the termination for non-compliance of the concessionaire.

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,

could lead 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 mandatory in nature.

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

Although, on the one hand, the provisions of the Cooperation Agreement (relevant to the rules laid down in Article 175 (2) of the Code) are apparently consistent with a private concessionaire, on the other hand they do not appear to be compatible with the specific case in which, albeit in various respects, only public entities are involved. Instead, divisions, mergers, etc. only 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)

On account of this article and, in particular, of the provisions of paragraphs 1 and 2, it is suggested that the title of the article be amended into “ECONOMIC AND FINANCIAL PLAN and REGULATORY FINANCIAL PLAN (EFP/RFP)”.

Paragraph 3

The design-related risk shall be borne by the concessionaire only and exclusively for the works referred to in Article 8 (A) and/or for those works referred to in Article 8 (B) of the same article, for which the design process has not been completed with the definition of the three project stages referred to in Article 23 of the Code during the period of the state of emergency.

Paragraph 4

In the light of the provisions of Article 8-a (Scope), it is suggested to add, after the words “*in Article 8*”, the following words *“.1 A. Works falling under the concessionaire’s responsibility, i.e. 8.1 B., in relation to works that have not been carried out, in whole or in part, upon expiry of the state of emergency*”.

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.

Paragraph 5

Regarding the examples of force majeure, the provision of “systemic market crisis” seems too general and

misleading and should therefore be deleted.

Paragraph 7

In line with the remarks concerning Article 8-a, the provision in question should be supplemented by specifying that these are the works referred to in Article 8, letter A and/or the works referred to in letter B of the same Article for which the construction process has not been concluded, in whole or in part, upon expiry of the state of emergency.

Paragraph 9

The proposed wording could lead to uncertainties of application in relation to the way the ECP/RFP is revised. Therefore, it is suggested, by analogy with the following Article 19.15, to refer to Article 37 (2) (g) of Decree-Law No 201 of 6 December 2011 and clarify that those methods of revision are referred to in the charging system set out in Annex A to Decision No 133/2018 of the Authority.

Paragraph 10

It should be noted that the correct allocation of risks, which the grantor is assumed to have assessed as complying with the relevant guidelines approved by the National Anti-Corruption Authority, implies that new laws and regulations must have a direct impact on the economic and financial equilibrium of the concession. The term "mediated" seems too vague and capable of frustrating the correct allocation of risks.

Paragraph 12

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 should be removed, or be referred to functions of advice and support to CIPE.

Paragraph 13

The reference to the penalties referred to in (b) should be deleted, since such penalties cannot be provided for in the event of withdrawal following the failure to reach an agreement on the revision of the EFP, in line with the provisions of Article 165 (6) of the last part of the Code.

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 133/2018), 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 2

The last line shall be supplemented as follows:

*"*The toll charging system is based on the Authority's Decision No 133/2018 and is set out in Annexes H-2), H-3) and H-4) to this Cooperation Agreement."

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 133/2018), 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 ordinance to achieve the economic equilibrium.

This provision should therefore be deleted.

Article 26 (REWARD/PENALTY SYSTEMS)

Point 3 highlights the need to remove the entire sentence following the words "Cooperation Agreement", since the envisaged penalties, concerning the quality of the service, do not fall within the operational scope of the special regime, as it is further demonstrated by Article 8-a which, in the context of the provisions to be disapplied, does not mention Article 26.

Article 27 (Design)

Paragraph 1

In line with the remarks on Article 8-a, the provision at issue shall be supplemented by specifying that these works must be those referred to in Article 8 (A) and/or the works referred to under letter B) of the same

Article for which the construction process has not ended, in whole or in part, upon expiry of the state of emergency.

Paragraph 7

The relevant paragraph of Article 8 should be specified.

Article 28 (TIME-LIMIT FOR SUBMISSION OF DESIGNS)

Paragraph 3

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.

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

Article 30 (VERIFICATION AND TESTING)

Paragraph 2

In line with the remarks on Article 8-a, the provision at issue must be supplemented by specifying that these works must be those referred to in Article 8 (A) and/or those referred to under letter B) of the same Article for which the construction process has not ended, in whole or in part, upon expiry of the state of emergency.

Article 33 (PENALITY ON INVESTMENT EXECUTION)

This provision is not coordinated with the measure contained in Article 8-a which disapplies, for the period of the state of emergency, the penalty system for non-implementation of investments. It follows that the provision in question must be supplemented by an indication that these works must be those referred to in Article 8 (A) and/or those referred to under letter B) of the same Article for which the construction process has not ended, in whole or in part, upon expiry of the state of emergency.

Article 38 (CHARTER OF SERVICES)

In this respect, an explicit reference should be made to the Authority's powers regarding the rights and entitlements, including compensation, that may be claimed by users from infrastructure managers, as referred to in Article 37 (2) of Legislative Decree No 201/2011 and in Article 8 of Legislative Decree No 1 of 24 January 2012, converted, with amendments, into Law No 27 of 24 March 2012.

Section II. Comments on economic and financial plan

The Economic and Financial Plan (Annex E to the Agreement) is drawn up by the concessionaire in accordance with ART's charging system (Annex A to Decision No 73/2018).

The level of the indicators[1] set out in the "*Dashboard"* included 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.

***

In the light of the above considerations, the Opinion referred to in Article 13-bis(4) of Decree-Law No 148 of 16 October 2017, converted, with amendments, into Law No 172 of 4 December 2017, as amended, is delivered.

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

Turin, 23 May 2019

The President
Andrea Camanzi

[1] i.e.:

- average DSCR (Debt Service Cover Ratio) equal to 1.45;
- minimum LLCR (Long Life Cover Ratio) equal to 1.53;
- project IRR (Internal Rate of Return) equal to 7.06;
- shareholders' IRR (Internal Rate of Return) equal to 6.01%;
- debt repayment 8 years in advance of the end of the concession;
- never negative cash flow.