Autorità di Regolazione dei Trasporti

Decision No 113/2022

Individual proceeding initiated by Decision No 21/2022 of 9 February 2022 against Rete Ferroviaria Italiana S.p.A. Adoption of prescriptive measure pursuant to Article 37(3) and (9) of Legislative Decree No 112 of 15 July 2015 concerning the methodology for the allocation of the funds referred to in Article 73 (4) of Legislative Decree No 73 of 25 May 2021, converted, with amendments, into Law No 106 of 23 July 2021.

The Authority, at its meeting of 14 July 2022,

HAVING REGARD to Article 37 of Decree-Law No 201 of 6 December 2011, converted, with amendments, into Law No 214 of 22 December 2011, which established, within the framework of the regulation of public utility services pursuant to Law No 481 of 14 November 1995, the Transport Regulation Authority (hereinafter also: "Authority" or "ART");

HAVING REGARD to Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (recast), as amended by Directive (EU) 2016/2370 of the European Parliament and of the Council of 14 December 2016;

HAVING REGARD to Legislative Decree No 112 of 15 July 2015 implementing Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (Recast), as amended by Legislative Decree No 138 of 23 November 2018, and in particular Article 37 (1) (2) (3) and (9) thereof, pursuant to which:

- "*1. The regulatory body is the Transport Regulation Authority which exercises its responsibilities in rail transport and access to related infrastructure pursuant to Article 37 of Decree-Law No 201 of 6 December 2011, converted, with amendments, into Law No 214 of 22 December 2011, Article 37 of Decree-Law No 1 of 24 January 2012, converted, with amendments, into Law No 27 of 24 March 2012, Directive 2014/34/EU of the European Parliament and of the Council, and the present decree*;"

- "*2. Without prejudice to the provisions of Article 28 (7) concerning disputes relating to the allocation of infrastructure capacity, each applicant shall have the right to appeal to the regulatory body if it believes it has been treated unfairly, discriminated against or is in any other way aggrieved, and in particular against decisions adopted*

by the infrastructure manager or, where appropriate, by the railway undertaking or the operator of a service facility concerning:

a) the network statement in its provisional and final versions;

b) the criteria set out in it;

c) the allocation process and its result;

d) the charging scheme;

e) the level or structure of infrastructure charges which it is, or may be, required to pay;

f) arrangements for access in accordance with Articles 12 and 13;

g) access to and charging for services in accordance with Article 13 and 17;

g-a) traffic management;

g-b) renewal planning and scheduled or unscheduled maintenance;

g-c) compliance with the requirements, including those regarding conflicts of interest, set out in Articles 11, 11-a, 11-b and 11-c;"

- "3. Without prejudice to the powers of the national competition authority to secure competition in the rail services markets, the regulatory body, subject to the provisions of article 37 (2) and (3) of Decree-Law No 201 of 6 December 2011, converted, as amended, into Law No. 214 of 22 December 2011, shall have the power to monitor the competitive situation in the rail services markets, including in particular the market for high-speed passenger services, and the activities of infrastructure managers referred to under letters (a) to (g-c) of paragraph 2. In particular, the regulatory body shall verify compliance with letter (a) to (g-c) of paragraph 2 on its own initiative and with a view to preventing discrimination against applicants. It shall, in particular, check whether the network statement contains discriminatory clauses or creates discretionary powers for the infrastructure manager that may be used to discriminate against applicants";

- "9. The regulatory body shall consider any complaints and, as appropriate, shall ask for relevant information and initiate consultations with all relevant parties, within one month from the receipt of the complaint. It shall decide on any complaints, take action to remedy the situation and inform the relevant parties of its reasoned decision within a pre-determined, reasonable time, and, in any case, within six weeks from receipt of all relevant information. Without prejudice to the powers of the national competition authority for securing competition in the rail service markets, the regulatory body shall, where appropriate, decide on its own initiative on appropriate measures to correct discrimination against applicants, market distortion and any other undesirable developments in these markets, in particular with reference to letters from (a) through (g-c) of paragraph 2";

HAVING REGARD to Decree-Law No 73 of 25 May 2021, converted, with amendments, into Law No 106 of 23 July 2021 on *"Urgent measures related to the COVID-19 emergency, for businesses, employment, youth, health and territorial services"* (hereinafter also: "Decree-Law No 73/2021" or "*Sostegni-bis* Decree" and, in particular, Article 73 on "*Urgent measures in the field of transport*", that provides as follows under paragraphs 4 and 5:

- "*4. In order to support the recovery of rail traffic and in view of the persistence of the COVID-19 epidemiological emergency, additional expenditure accounting for EUR 150 million for the year 2021 is authorised in favour of Rete Ferroviaria Italiana SpA. The funds referred to in the first sentence of this paragraph shall be deducted by Rete Ferroviaria Italiana from the total net costs relating to the services of the minimum access package in order to provide, from 1 May 2021 to 30 September 2021, up to the maximum amount of the allocation referred to in the first sentence, a reduction of the charge for use of the railway infrastructure up to 100 % of the part exceeding the coverage of the cost that is directly linked to the provision of the railway service referred to in Article 17 (4) of Legislative Decree No 112 of 15 July 2015, for rail passenger services that are not subject to public service obligations and for rail freight services. The charge for use of infrastructure on which the reduction referred to in the second sentence of this paragraph is applied, is determined on the basis of the existing regulatory measures defined by the Transport Regulation Authority referred to in Article 37 of Decree-Law No 201 of 6 December 2011, converted, with amendments, into Law No 214 of 22 December 2011"*;

- "*5. Any remaining resources, as part of those referred to in paragraph 4, also resulting from reductions in traffic volumes as compared to those provided for in the 2016-2021 regulatory plan and related to the period from 1 May 2021 to 30 September 2021, shall be intended to compensate the national railway infrastructure manager for the lower income resulting from the revenue of the charge for use of the railway infrastructure in the same period. By 15 November 2021, Rete Ferroviaria Italiana Spa shall submit a report on the implementation of paragraph 4 and of this paragraph to the Ministry of Sustainable Infrastructure and Mobility and to the Transport Regulation Authority*";

HAVING REGARD to the rules of procedures for initial implementation of decision-making proceedings falling under the remit of the Authority and for stakeholders' participation (hereinafter also referred to as the "rules of procedure"), approved by Decision No 5/2014 of 16 January 2014, and in particular to Article 6 thereof;

HAVING REGARD to the rules of procedure for the conduct of sanctioning proceedings falling under the remit of the Authority, adopted by Decision No 15/2014 of 27 February 2014, as amended, which applies congruently for the sole purpose of ensuring the rights of participation in these proceedings;

HAVING REGARD to the Authority's Decision No 21/2022 of 9 February 2022, notified on the same date under ref. no. 2659/2022, initiating an individual proceeding against Rete Ferroviaria

Italiana S.p.A. (hereinafter also referred to as "RFI" or "Company"), for the adoption of a prescriptive measure, as the case may be, pursuant to Article 37 (3) and (9) of Legislative Decree No 112/2015, for the re-determination of the applied methodology and, accordingly, for the application of a new allocation methodology, in relation to the funds referred to in Article 73 (4) of Decree-Law No 73 of 25 May 2021, converted, with amendments, into Law No 106 of 23 July 2021;

HAVING REGARD to the note under ART ref. no. 4647/2022 of 9 March 2022, whereby the Company, in addition to its request for a hearing, made certain clarifications and observations, pointing out, *inter alia*, that:

- "Article *73 of Decree-Law No 73/2021 authorised the expenditure of EUR 150 million payable to the Infrastructure Manager in return for the reduction, for the period from 1 May to 30 September 2021, of the charge for use of the railway infrastructure up to 100 % of the part exceeding the coverage of the cost that is directly linked to the operation of the rail service (so-called "B component" of the charge), paid by railway undertakings providing passenger services that are not subject to public service obligations and by railway undertakings operating in the freight sector (so-called charge reduction)*";

- Having noted — on the basis of the estimates of the expected traffic volumes — that the fund accounting for EUR 150 million allocated under the a.m. Legislative Decree to cover the 100% reduction of the above-mentioned part of the charge was insufficient, by note of 10 June 2021, the infrastructure manager brought also to the attention of the Authority the need to identify the criteria to be adopted for the application of the provision in question, proposing two alternative options for this purpose.

- "*These solutions, as it is known, granted a 100 % reduction of the B component from 1 May until the allocated fund has been fully spent (option A) or a lower reduction to be determined in order to ensure coverage for the entire period from 1 May to 30 September 2021 (option B)"*;

- The available forecasts of the infrastructure manager at the time of the choice of the allocation methodology of the charge reduction showed a substantial invariance in the distribution of the reduction between the two market segments concerned by Decree-Law No 73/2021 in the two different scenarios, as the distribution of volumes in the May-August period (60 % pax open access - 40 % freight) was almost the same as in the May-September period (59 % pax open access - 41 % freight), with a 1% deviation which, in our opinion, did not appear to distort competition in the railway market;

- "*(...) in order to proceed, the infrastructure manager has identified option A as the most suitable solution because: (i) on the one hand, it ensured substantial continuity with the way the previous measures of charge reduction were applied; (ii) on the*

other hand, it ensured a more stable framework for beneficiary undertakings in terms of accounting management, by reducing the possibility that any adjustments be made only in September;"

- *"In its reply sent on 5 August 2021, the Authority, while tending towards the application of the criterion under option B, ruled out that the exercise of one or the other of the two proposed options [...] would lead to significant distortions within the relevant markets, since the total amount of financial support payable to each railway undertaking would vary to a very limited extent by adopting the first or the second criterion*";

- "*... concerning the methodology applied by the infrastructure manager to reduce the charge, as communicated to the concerned undertakings on 21 July 2021, the RUs made no remarks, nor requested a different methodology to ensure equal coverage for the entire period considered by the provision in question*";

- "*[the] scenario outlined on the basis of the forecasts was also substantially confirmed with reference to the final data drawn from the PIC_WEB system, which showed a difference between the two scenarios accounting for 1 % (58 % pax open access - 42 % freight in the period from May to August, 59 % pax open access - 41 % freight). The substantial invariance between the two scenarios, based on volumes and by market segments, was also confirmed at the level of distribution of the charge reduction, with a difference between the two scenarios again around 1 % (Scenario A: 80 % pax open access - 20 % freight, Scenario B: 81 % pax open access - 19 % freight), due to a greater recovery of passenger traffic*";

HAVING REGARD to note under ART ref. no. 4710/2022 of 10 March 2022, whereby, acceding to the submitted request, the Company was invited to a hearing with the Surveillance and Enforcement office on 21 March 2022, at 10:00 a.m.;

HAVING REGARD to note under ART ref. no. 5315/2022 of 17 March 2022, as later supplemented by note under ART ref. no. 5389/2022 of 18 March 2022, whereby RFI forwarded the participants' list and the documents relevant to the hearing;

HAVING REGARD to the minutes of the hearing, placed on the file with note ref. no. 5481/2022 of 21 March 2022, during which the Company provided further details, pointing out, in particular, that:

- *"... for the Company there is no significant difference between the two allocation methodologies already illustrated to the Authority that would lead to unequitable and discriminatory allocation for the recipient undertakings"*;

- *"with reference to the assumptions underlying the allocation of resources, it is underlined that they should have addressed an emergency situation which would*

justify the application of "A" methodology as compared to the "B" methodology as it was regarded as timelier";

- "in relation to the methodological assumptions about how the equilibrium was ensured in relation to an entire market segment and not in relation to each individual undertaking (...), the data available to the Company showed that they were irrelevant with respect to the two methodologies at issue... The choice of "A" methodology, in particular, was intended to support railway undertakings in the short term on the basis of non-final data at that time (...) the data show a gap between the freight segment and the passenger segment accounting for 0.3 % in favour of the former";

- "there is a need to identify, at the end of the proceeding referred to in Decision No 21/2022, appropriate elements to make the allocation of resources binding, including to avoid that any objections be raised by undertakings";

- "in the ongoing proceedings, timing constitutes a criticality in so far as already in August, given the modest amount involved, the Authority favours option "B", given the little difference with option "A";

HAVING REGARD to the note filed under ART ref. no. 10189/2022 of 13 April 2022, whereby, in compliance with the deadline set at the hearing, the Company transmitted the balance data resulting from the allocation of the resources by applying the "B" methodology, as compared to what had been already allocated with the "A" methodology, with precise indication of the data referred to each railway undertaking, both for the freight segment and for the passenger segment, as supplemented with the results arising from the adjustments provided for in ART's Decisions no 58/2021 and no 175/2021, highlighting that:

- "(...) it has first amended/supplemented the previously sent charge-related data with the results arising from the adjustments provided for in ART's Decisions no 58/2021 and no 175/2021, thus determining the new amount of the charge for the period from May to September 2021';

- "the data related to the adjustment resulting from the allocation of the resources referred to in the aforementioned Decree were later processed, by applying the so-called "B" methodology, compared to what had already been allocated with the so-called "A" methodology (as resulting from PIC and in any case included in the file), with precise indication of the data related to each railway undertaking concerned, both for the freight and passenger segments, and for each month of reference";

HAVING REGARD to the preliminary findings relating to the proceeding at issue, as communicated with note under ref. no. 13722/2022 of 31 May 2022 addressed to RFI, subject to approval of the Board on the same date, pursuant to Article 6 (4) of the rules of procedure;

HAVING REGARD to note under ref. no. 14713/2022 of 16 June 2022, whereby the Company, following the communication of the findings of the inquiries, sent a note stressing that:

- "*... it will apply the new methodology for the allocation of the funds (...) taking as a reference the databases of the period from 1 May to 30 September 2021, available in PIC_WEB on the date of publication of the final decision (...)*";

HAVING REGARD to the investigation report drafted by the Surveillance and Enforcement office;

HAVING CONSIDERED the above-mentioned report and, in particular, that:

1. based on the documents on file, RFI, in the allocation of the funds provided for in Article 73 (4) of Decree-Law No 73/2021, applied a methodology (or, more correctly, the so-called "A" methodology granting a 100% reduction of the B component of the charge until the resources allocated under the "*Sostegni-bis"* Decree have been fully spent), which led to unequitable results between the various transport segments and, in particular, between the individual railway undertakings receiving the so-called "Ristori Covid" (Covid-related economic reliefs), in so far as the railway undertakings which achieved a higher increase in the traffic volumes between August and September were subject to a greater impact, to the benefit of the railway undertakings whose traffic volumes, on the other hand, remained stable in the same period;
2. in this respect, the analysis of the final traffic data in relation to the allocated resources showed that the application of the so-called "B" methodology, granting a reduction of less than 100 % determined so as to cover the entire period indicated by the *Sostegni-bis* Decree, with any adjustment to be made in the month of September on the basis of the volumes actually achieved by the railway undertakings falling within the scope of the provision in question, would have produced a more useful effect on both the open access passenger segment and the freight segment in terms of proportionality of the discounts applied in relation to the actual traffic flow in the period of reference;
3. the verification of the final traffic data for the period from 1 May to 30 September 2021 showed that the two allocation methods proposed by the Company do not produce the same effects and do not generate irrelevant deviations. The application of the so-called "B" methodology, compared to the so-called "A" methodology, shows not only an increase in the funds to the railway undertakings accounting for EUR 471,844.00, but also a systematic re-determination of the amounts granted on account of the traffic volumes recorded from the first to the last day of the subsidised period;
4. similarly, in view of the impact of Decisions no 58/2021 and no 175/2021 on the application of the charge relating to the minimum access package to the national railway infrastructure in the period concerned, it should be taken into account

that, in systemic terms, the application of the so-called "B" methodology, compared to the so-called "A" methodology, generates an almost widespread positive differential, that can be estimated in EUR 2,172,916.00, to the benefit of railway undertakings in both the open access passenger segment, to a greater extent, and in the freight segment, albeit to a lesser extent;

5. furthermore, the allocation criteria underlying the application of the so-called "B" methodology appear to be in line not only with the wording of Article 73 (4) of Decree-Law no 73/2021, but also with the rationale underlying the allocation of resources to support a given sector for a specified period, in so far as they ensure that the effects of those measures are distributed in an equitable and proportional manner among the beneficiaries;

6. on the other hand, concerning the circumstance highlighted by the Company that "*in the ongoing proceedings, timing constitutes a criticality in so far as already in August, given the modest amount involved, the Authority favours option "B", given the little difference with "A"*" (see page 2 of ART ref. no. 5481/2022), it should be pointed out that, with reference to the rules laid down in Article 73 of Decree-Law no 73/2021, the Authority is not entrusted with *ex ante* responsibilities in the determination of the allocation criterion, which lies within the exclusive remit of RFI, but is rather entrusted with the *ex-post* monitoring of the competition in the rail services market;

7. on this point, it should be finally underlined that the Authority's "preference" for "B" methodology (see note under ART ref. no. 12202/2021 of 5 August 2021) was not derived from a detailed analysis of the final traffic data, as they were unavailable in that circumstance, but rather from the interpretation of the legal provision which provided for the allocation of resources to support the transport sector;

8. in other words, it has been observed that the provision in question clearly defines the objective scope of application of the supporting measure, as both the period of application (from 1 May 2021 to 30 September 2021) and the ceiling to the total amount that can be granted to railway undertakings (EUR 150 million) are accurately defined, while no precise value is assumed for the amount of the reduction, but rather a ceiling (up to 100 % of the B component of the charge);

HAVING ASSESSED that the so-called "B" allocation methodology, supplemented by the effects of Decisions no 58/2021 and no 175/2021, as compared to the already applied "A" methodology, allows more equitable results to be achieved between the various transport segments and, in particular, between individual railway undertakings, in terms of proportionality of the reductions applied in relation to the actual traffic flow in the period of reference;

HAVING CONSIDERED that the conditions are met for the adoption of a prescriptive measure addressed to Rete Ferroviaria Italiana S.p.A. to re-determine the applied methodology and, accordingly, apply a new allocation methodology, concerning the funds referred to in Article 73 (4) of Decree-Law no 73 of 25 May 2021, converted, with amendments, into Law no 106 of 23 July 2021;

HAVING CONSIDERED it appropriate, to correct undesirable developments in the rail services market, including in the light of the findings of the assessments of the data transmitted by the Company in its note under ART ref. no. 10189/2022, to require Rete Ferroviaria Italiana S.p.A. to:

- apply, in relation to the funds referred to in Article 73 (4) of Decree-Law no 73/2021, the so-called "B" methodology as illustrated in the table annexed to ART ref. no. 10189/2022 of 13 April 2022;
- update the charge-related data for the period from May to September 2021 by applying the adjustments provided for in ART's Decisions no 58/2021 and no 175/2021;

HAVING CONSIDERED it reasonable to set a 60-day deadline for the implementation of the prescriptive measure to re-determine the applied methodology and, consequently, apply the new allocation methodology, in relation to the funds referred to in Article 73 (4) of Decree-Law no 73 of 25 May 2021, converted, with amendments, into Law no 106 of 23 July 2021, as identified above;

in view of the above

HAS ADOPTED THE FOLLOWING DECISION

1. on the above-mentioned grounds, it is assessed that the methodology applied by Rete Ferroviaria Italiana S.p.A. to allocate the funds referred to in Article 73(4) of Decree-Law no 73 of 25 May 2021, converted, with amendments, into Law no 106 of 23 July 2021, is inappropriate;

2. for the grounds set out above, which are deemed to be referred to in full herein, Rete Ferroviaria Italiana S.p.A. is required to re-determine the applied methodology and, consequently, apply a new allocation methodology, pursuant to Article 37 (3) and (9) of Legislative Decree no 112 of 15 July 2015, as amended by Legislative Decree no 138 of 23 November 2018;

3. for the grounds set out above, which are deemed to be referred to in full herein, Rete Ferroviaria Italiana S.p.A. is accordingly required to:

   a) apply, in relation to the funds referred to in Article 73 (4) of Decree-Law no 73/2021, the so-called "B" methodology as illustrated in the table annexed to ART ref. no. 10189/2022 of 13 April 2022;

   b) update the charge-related data for the period from May to September 2021 by applying the adjustments provided for in ART's Decisions no 58/2021 and no 175/2021;

4. Rete Ferroviaria Italiana S.p.A. is granted a 60-day deadline to implement the prescriptive measures referred to under the previous point; by the same deadline, Rete Ferroviaria Italiana S.p.A. shall provide the Authority with appropriate documentation proving the implementation of the aforementioned measures;

5. this measure is notified to Rete Ferroviaria Italiana S.p.A., transmitted to the Ministry of Sustainable Infrastructure and Mobility, in accordance with its remits, communicated to the railway undertakings concerned and published on the website of the Authority.

Against this decision, within the statutory time limits, judicial appeal may be brought before the competent Regional Administrative Court or extraordinary appeal lodged with the President of the Republic.

Turin, 14 July 2022

The President
Nicola Zaccheo

(digitally signed pursuant to
Legislative Decree no 82/2005)