REGULATION AND TARIFFS IN THE TRANSPORT SYSTEM: THE CASE OF LOMBARDY

Michele Giovannini *

Abstract.

Of the various sectors subject to regulation, the road and motorway network in particular has been subject in recent years to an intense regulatory and administrative decentralisation process, as a result of which frequent hypotheses of potential overlaps of governmental authority have arisen. The situation is therefore complex, and significant uncertainty remains even today. For example, on the matter of the power to determine the motorway tariffs, while some of the hypotheses are clearly of a regional nature, others remain firmly anchored to a prevalently centralist notion of relations between the state and the regions. This creates considerable problems in a sector whose development is also subject to incentives and monitoring at European Union level, not only because of the economic interests involved, but also and above all in terms of the need to contribute to a Europe-wide network with no boundaries or restrictions on traffic movements. The approach which has been taken by Lombardy Region over the last decade reflects the complexity to which we referred above, and should be examined due to the importance that it attributes to the achievement of consensus as the method that the regional, national and European institutions are expected to adopt in their development policies.

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* Assistant Professor of Administrative Law, Politecnico of Milan, Italy.

1. Introduction.

Around the turn of the century, the legislation, regulations and administrative rules on roads and motorways were subjected to a significant decentralisation process. This process is of interest from a number of viewpoints, while the many interests involved, both public and private, are frequently in open conflict, interwoven as they are in a complex scenario which is difficult to decipher on the basis of the traditional relationships between the public and private sectors.

With specific reference to motorways, the conflict is institutional first and foremost, involving the state and other central administrative authorities on the one hand and regional and provincial government bodies on the other. We need merely consider the determination of the general powers for the control of the sections and the related regulatory powers. Then, we have to consider the characteristics and role played by the bodies which grant the concessions, the limited companies in which there are state, regional or mixed shareholdings, whose ownership structure has an effect – even if only indirectly – on their relationships with the various institutional levels, as well as with the concession-holders and, above all, the users.

The matter of the regulatory powers of the regional authorities for the roads and motorways is a wide-ranging one, which has already to a certain extent been dealt with in general terms.

However, there are certain aspects which the most recent studies have not looked into in depth which are of determining importance if we are to understand if and to what extent the transfer of powers which began in the late nineties has in the meantime become a consolidated fact, and if it can effectively be taken seriously [1].

We may, for example, take the question of the determination of the tariffs, with a view to offering incentives to invest, simplifying the overall situation and the relationships with

[1] A hope which has been expressed in general terms for some time in doctrine. On this point, see L. Mariucci, R. Bin, M. Cammelli, A. Di Pietro, G. Falcon, *Il federalismo preso sul serio,* (1996).

the users. As is known, we are dealing of powers whose exercise is often shared at different levels of government, national, regional and European, directly or indirectly. This leads to a state of constant uncertainty with regard to the profitability of the economic investment made in creating infrastructure, which is therefore crucial in terms of achieving the objective laid down at European level of setting up a network with no boundaries or obstacles to the free movement of goods and passenger traffic [2].

The aim of these reflections is to consider the above aspects, with particular reference to the overlaps between the state regulations and those laid down by the Lombardy Region, which is one of the most highly developed regions in Europe and has, over the last few years, dedicated considerable attention to the question of investments in infrastructure, and in the planning of new sections of regional motorway in particular.

2. The regulation of the road and motorway network between the State, regions and local authorities.

At national level, the first organic legislative intervention based on a logic of explicit decentralisation of powers took place with the issue of legislative decree no. 112 of 31st May 1988, on the "Transfer of powers and administrative tasks from the state to the regional and local authorities, in application of Section I of law no. 59 of 15th March 1997".

Following this operation, pursuant to article 98 of the decree, the state continues to exercise a number of fundamental powers by agreement with the regional authorities, within the context of the Unified Conference under the terms of legislative decree no. 281 of 28th August 1997. These include, for example, responsibility for the planning of the road and motorway networks which form part of the major national and international connecting trunks, the collection and handling of information on the road network as a whole, the control of traffic movement, including the various road safety aspects, the determination and upgrading of the motorway tariffs and the approval of concessions for the construction and management of the

[2] As noted by M. Sebastiani, *Le infrastrutture di trasporto*, in P. Manacorda (ed.), *I nodi delle reti* (2010).

motorways, with all the consequent control aspects. At the same time, article 99 entrusts the regional and local authorities with all the administrative powers not expressly mentioned, such as the planning, design, construction, maintenance and management of the roads which do not form part of the national motorway and road network [3].

Article 101 states that these roads, formerly the property of the state pursuant to article 822 of the civil code, have been transferred to regional control on a definitive basis [4].

In real terms, the identification of the motorway and road network of national significance as defined in article 98, paragraph 2, has taken place in a number of successive stages. Firstly, by means of legislative decree no. 461 of 29th October 1999, later amended by the prime minister's decree of 21st September 2001, for the implementation of the terms of law no. 340 of 24th November 2000. And subsequently, by means of the prime minister's decrees of 21st February, 12th October and 13th November 2000, which effectively brought about the transfer of powers from the state highways body ANAS to the regional authorities, and refer to such factors as the personnel units to be transferred, the methods for the handover to the regions of the goods and properties required for the management and maintenance processes, the ways in which the regional and local authorities are to take over all the relationships formerly in the hands of ANAS, and so on.

The legislator has in any case taken care to ensure a smooth transition from the old system to the new, by attributing significance to the differences which exist at regional level, especially in terms of the capacity to exercise the powers transferred to them. It is in this sense that we have to interpret article 6, paragraph 4, of legislative decree no. 419 of 29th October, which authorises ANAS, in accordance with the European regulations, to set up "mixed companies with the regional, provincial and local authorities for the design, construction and

[3] There is a large body of literature on this subject. In general, see F. Franchini, *Strade pubbliche, private e vicinali*, in *Noviss. Dig. It.* (1940) and following, A.M. Sandulli, *Autostrada*, 1 Enc. Dir. (1959), L. Orusa, *Strade e autostrade,* in *Dig. Disc. Pubbl.* (1999), G. Pasquini, *Le strade e la circolazione,* in S. Cassese (ed.), *Trattato di diritto amministrativo* (2003).

[4] E. Castorina, G. Chiara, *Beni pubblici. Articles 822-830* (2008).

maintenance of the roads within their territories, and to exercise the rights to design, build and maintain roads on behalf and in the interests of the regional, provincial and local authorities …". This solution has already been put into broad application in a number of northern Italian regions, such as Veneto and Lombardy [5].

This same method of interpretation also has to be applied to article 99, paragraph 2, on the basis of which the local bodies to which the powers have been transferred may entrust ANAS with the design, maintenance and management of the roads passed on to them under the terms of article 101, paragraph 1, on the basis of specific agreements reached pursuant to article 15 of law no. 241 of 7th August 1990.

Collaboration between local bodies by means of companies specially set up for the purpose is a widespread phenomenon in the current legislative situation [6]. The use of this model does not come without consequences of a systemic nature, especially in terms of the immediacy of management control by the reference bodies. It is in fact the management process (with its consequent responsibilities) which takes on particular significance in terms of the involvement and handling of regional and local interests.

For this reason, in addition to the reference to the company model, it is the regulations on the agreements which are of greatest relevance for our purposes, as these govern the of necessity temporary nature of the involvement of the state through ANAS. In other words, the direct and exclusive involvement of the state is justified due to the fact that the regions are unable to exercise the powers conferred upon them in a fully autonomous manner, and therefore require the support of ANAS.

This does not imply that the collaboration between the regions and ANAS will automatically be of a temporary nature. However, while the legislation acknowledges the need to identify various forms of collaboration among the bodies involved, it

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[5] We will return to this point below. We should point out, however, that there are three different concession-granting authorities in Lombardy, only one of which adheres to the mixed model referred to above, that is, Concessioni Autostradali Lombarde S.p.a. (CAL), jointly owned by Anas S.p.a. and Infrastrutture Lombarde S.p.a., all of whose shares are held by the region.

[6] M. M. Cammelli, in M. Dugato (ed.), *Studi in tema di società a partecipazione pubblica,* (2008). Among the recent works, also see M. Clarich, *Società di mercato e quasi-amministrazioni,* 1 Dir. Amm. 253 (2009).

prefers to lay the emphasis on the role of the regional authority, to avoid the setting up of dynamics that could slow down the decentralisation process, and with it the process for the structural and company conversion of ANAS.

Setting aside the various doubts as to interpretation provoked by this legislative intervention, the fact in any case remains that legislative decree 112/1998 is a fundamental step forward in this area. It brings about an initial link between ownership and management of the roads and entrusts the regions and the regional law with the power to lay down the reference regulations, in this way enabling them to play a driving role in the area of regional roads and motorways. Substantially speaking, this is a legislative intervention which has brought about a profound reform in the Italian road system, on the basis of the national, regional and local interests which it aims to satisfy [7].

3. Regional legislation and reform of section V of the Constitution: the case of Lombardy Region.

We now have to consider whether and to what extent the subsequent changes have confirmed or denied that the new situation is to be based on the role of the regions and local bodies.

This assessment is particularly interesting if we take the case of Lombardy Region, whose system was outlined by regional law no. 9 of 4th May 2001, a law that came into force prior to the reform of section V of the Constitution, approved in October 2001. In substantial terms, we have to consider the regional law in the light of what went before (legislative decree no. 112 of 31st May 1998) and after (constitutional law no. 3 of 18th October 2001) if we are to understand if and to what extent the national decisions have been denied, confirmed or even rendered obsolete at regional level.

We should make it clear right from the start that regional law 9/2001 appears to be decidedly regionalist in its focus. This is certainly the case in the areas of road safety and advertising, which are subject to section V of the law on regional control and monitoring and are based on the exercise of typically

[7] P. Urbani, *Il federalismo stradale tra* Anas *e Regioni: l'attività di service e la costituzione delle società miste,* 1 Reg. 43 (2001).

administrative powers, such as those regarding authorisations, permits, concessions and so on.

But above all, this is significant in terms of the planning and coordination of the regional road network. For example, according to article 3, paragraph 1, the regional authority lays down "… homogeneous criteria for the classification of the regional road network, with the exception of the national trunk routes …". These criteria also apply to the local and provincial road networks. Paragraphs 2 and 3 confer upon the local and provincial authorities the power to classify the roads, even though they are obliged, on the one hand, to adhere to the criteria laid down by the region, and, on the other, to submit their classification proposals to the regional government for approval.

In addition, under the terms of article 3-bis, it is the region which "… promotes the setting up of the regional road register as a tool for the procurement, filing, updating and analysis of the information on the road network within the territory of the Lombardy Region …". For that purpose, the bodies which own the roads are obliged to pass on their information in this sense to the regional authority, partly on the basis of incentive and financing programmes and agreements to be stipulated between the various parties involved. It is the regional authority which manages the road register and the use and exchange of the information which it contains, by defining the most strictly technical aspects subject to regional government resolutions, and, on the basis of article 4, promotes the efficiency and safety of the regional road network and lays down the minimum maintenance standards, by agreement with the provincial and local authorities, to which the various bodies are obliged to adhere.

We should add that the regional authority, on the one hand, schedules the development of the regional road network by means of the methods and conditions laid down in the Regional Mobility and Transport Plan pursuant to article 9 of regional law no. 22 of 29th October 1998, and enables these to be applied by advancing or supplementing the resources transferred by the state for the purpose, as laid down in regional law no. 25 of 9th December 2003 on "Interventions in local public transport and roads". On the other hand, it plays an active role in the area of regional motorway concessions, which is one of the aspects of the administrative implementation of these scheduling activities.

On this subject, article 7 states that the regional government has the power to grant "… regional motorway concessions …" for "… the planning, construction and effective and economic management of the correlated works …", as well as the power to approve the related agreement and exercise "… control and monitoring powers over the concession-holders on the planning processes, the construction of infrastructures and supplementary and/or related works, adherence to the economic and financial frameworks, the application of the tariffs and the correct fulfilment of the obligations set out in the agreement in general, including those regarding payments and the impact limitation factors".

Then, in accordance with article 10, the regional government lays down a measure to determine "… the maximum toll tariffs for regional motorways and their reviews. The tariffs and their review parameters are determined specifically for each regional motorway on the basis of the specific social and territorial situations, and form part of the base for the concession award competition". Finally, on the basis of the terms of article 10 bis, and as introduced by article 1 a) of regional law no. 25 of 21st October 2004, recently amended by article 12, paragraph 3 c) of regional law no. 15 of 26th May 2008, the regional government may decide to confer many of the above powers to Infrastrutture Lombarde S.p.A., by means of specific agreements.

The regulatory framework which emerges from this brief description confirms that the system for the scheduling and development of the road network in the Lombardy Region is of a broadly regionalist nature. In the end, what this means is that regional law 9/2001 represents a decisive step forward with respect to the previous situation, based on legislative decree no. 112 of 31st May 1998.

At this point, it is possible to consider regional law 9/2001 in the light of the subsequent reform of section V of the constitution, as approved by constitutional law of October 2001. Given that the positive framework acknowledges that the regional authority plays a central role in this area, we will now consider whether Lombardy Region may be granted further freedom of action based on the above constitutional reform.

As we know, article 117 of the constitution states that the legislative power is exercised by the state and the regions in

accordance with the constitution and the restrictions deriving from the European legal system. Paragraph 2 of this article lists the areas for which the state has exclusive power, and which therefore have to be interpreted in the strict sense. In such areas, only the state has the power to lay down regulations of a legislative nature. In the same way, paragraph 4 attributes exclusive powers to the regions for the areas not expressly subject to state legislation. In such areas, only the regions have the power of legislative intervention. Paragraph 3 deals with the area between these two extremes, in which the state and regions have concurring powers, and then goes on to list the areas in which the regions have legislative powers for all aspects except the determination of the fundamental principles, which is the exclusive responsibility of the state [8].

The constitution makes no explicit reference to roads and motorways, but this area is covered in the list of paragraph 3, by means of the expression "major transport networks", which means that the legislative powers for such matters are conferred by the constitution upon the state and the regions, with all the difficulties that such a decision involves in terms of the correct marking off of the respective spheres of responsibility [9].

It is therefore difficult to determine in the abstract sense what the fundamental principles are for the correct division of the legislative powers over the roads and motorways between the state and the regions. In case law, some of the provisions of the new highway code, adopted by means of legislative decree no. 285 of 30th April 1992 and subsequent amendments, are regarded as such. For example, on the definition and classification of roads, article 2 lays down a number of rather narrow parameters from which it is difficult for the regional legislator to deviate – a position which is also shared by the Court of Cassation [10].

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[8] On the question of constitutional reform in general, see the Astrid *Position Paper*, *La riforma del titolo V della Costituzione ed i problemi della sua attuazione* (2002), in www.astrid-online.it.

[9] These difficulties are emphasised in F. Merloni, *Infrastrutture, ambiente e governo del territorio,* 1 Reg. 58 (2007).

[10] In the Court's interpretation (section I, 10th January 2005, no. 287) the highway code "*… by laying down the criteria for the classification of the roads on the basis of their construction and technical features and the type of use for which they are designed, offers a description in point B of a trunk road as one with separate carriageways divided by a central barrier, in which each carriageway has at least two*

This classification was confirmed by Lombardy regional law 9/2001, whose article 3 attributes to the region the power to lay down "… homogeneous criteria for the classification of the road network within the territory of the region …", while at the same time stating that the local and provincial authorities have to adhere to these criteria and that the regional powers may be exercised "… without affecting the road classification pursuant to article 2 of legislative decree no. 285 of 30th April 1992 …".

The value of a fundamental principle may also be attributed to the provisions of the highway code on the construction, protection and safety of the roads, as well as to planning at national level, the distribution of resources by the state, the technical and construction specifications of the infrastructures, the minimum standards which have to be satisfied, the connection and distribution functions at inter-regional level and related control processes, and so on.

Substantially speaking, these are principles which the 1998 legislation reserved for the state, not so much in terms of their semantic significance as with regard to the national importance and dimensions of the road network in question. This approach was therefore reviewed with the introduction of the primary regional regulations, as a result of which some of the decisions taken have in actual fact anticipated the most recent situation introduced by the constitutional reform.

The regulatory framework which has been in force up to now therefore obliges us to carry out a series of practical assessments geared towards ascertaining the essential factors of the single rules in principle which are submitted to the examination of the court. This means that such assessments are of uncertain outcome, with results which cannot be taken for granted. Indeed, the growing disagreement between the state and the regions over the ambiguity inherent in the division or concurrence of powers makes it extremely difficult to come up with a single interpretation of the problem [11].

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lanes and paved surfaces, with no direct intersections, coordinated lateral access to the lateral properties, reserved for use by only certain categories of motor vehicle, with special spaces for use by other categories of vehicle and special access areas with deceleration and acceleration lanes …. and in addition, if a road is to be classified as a main trunk road …. specific start and end of road signs are required …".

[11] G. Vesperini, *Le autonomie locali nello Stato regionale,* 3 Reg. 672 (2007).

For example, in assessing the legitimacy of a regional law laying down "guidelines for the technical design of energy production, distribution and consumption systems", the court, while acknowledging the value as a general principle of the state regulations, found in favour of the law challenged by emphasising that – in accordance with the terms of article 29 of legislative decree 112 of 31st May 1998 – the only technical rules which constitute a general principle and therefore restrict the regional legislator are the essential ones applicable to energy production, distribution and consumption systems [12].

The assessment of this essential nature is therefore a constant in constitutional case law, even though at times it does not take place in wholly explicit terms. For example, in declaring an excessively detailed state law unconstitutional, the court recently found, and in so doing inferred that the principles involved were of a non-essential nature, that the entire margin for action and manoeuvre on the part of the regional legislator had been eroded, as a result of which the powers of the region had been compromised [13].

The activity of regulating the road network does not take place solely through the use of the legislative source. A significant part of the regional road system is in fact determined by the administrative activities of the region and the other territorial bodies. With regard to such activities, the interpretation which emphasises the role played by general principles is in fact incompatible with the text of the constitution.

As we know, article 118 of the constitution, which completes the work begun by legislative decree 112/1998, introduced a general criterion for the allocation of administrative powers on the basis of the principles of subsidiarity, differentiation and adequacy. On the basis of this criterion, the administrative powers are always attributed to the level of government closest to the citizen, unless they have to be exercised in a unitary manner, in which case they will be attributed to the provinces, metropolitan areas, regions and state. In the constitutional sense, then, it is possible that such unitary requirements will have the effect of passing an administrative

[12] Constitutional Court, 13th January 2004, no. 7.
[13] Constitutional Court, 23rd November 2007, no. 401.

power all the way along the territorial hierarchies of government to the point of reaching state level itself [14].

However, this hypothesis deviates so far from the terms laid down in the constitution that we have to introduce a series of measures and precautions to temper its effects and implications. In this sense, the Constitutional Court states that, if the exercise of an administrative power at state level is to be compatible with the constitution, there have to be sufficient reasons for the unitary exercise of the power in question [15].

According to the court, the law which confers the power on the state is "…..adopted following procedures which guarantee the participation of the levels of government involved by means of instruments of faithful collaboration, or in any case has to ensure sufficient mechanisms of cooperation for the effective exercise of administrative powers …." [16]. This law "…. may aspire towards crossing the threshold of constitutional legitimacy only when there are regulations in place which lay the necessary emphasis on concerted action and lateral coordination, that is, on the necessary understandings, all of which factors have to be based on the principle of good faith …" [17]. Once again, in application of the principle of faithful cooperation in the area of understandings, the court affirmed that the parties have to undertake genuine negotiations. Indeed, "… the instrument of understanding between state and regions is one of the possible ways of putting the principle of faithful cooperation into action …. in the form of a joint determination of the contents of the deed by equals …" and has to take place "…. by means of repeated negotiations geared towards overcoming the differences that prevent an agreement from being reached, without in any circumstances reducing the activity of joint determination of the understanding to the level of a mere consultancy process" [18].

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[14] L. Violini, *I confini della sussidiarietà: potestà legislativa "concorrente", leale collaborazione e strict scrutiny,* 3 Reg. 587 (2004).

[15] C. Bertolini, La sussidiarietà amministrativa, ovvero la progressiva affermazione di un principio, 2 Dir. Amm. 940 (2007).

[16] Constitutional Court, 13th January 2004, no. 6.

[17] Constitutional Court, 1st October 2003, no. 303, recently confirmed by Constitutional Court, 14th March 2008, no. 63.

[18] Constitutional Court, 20th January 2004, no. 27. On this point, see S. Agosta, *La leale collaborazione tra Stato e regioni* (2008).

In the end, what we see emerge from the above is a legal framework which is perfectly compatible with a policy of "credible" transfer of legislative and administrative powers for the regulation of the regional road networks from the state to the regions and the other territorial bodies. However, it would seem that this aspect is not always adequately perceived.

4. Institutional pluralism, with equality still to be achieved.

It is therefore correct to say that the new constitutional view of the division of legislative and administrative powers between the state, regions and local authorities not only has the effect of consolidating the powers of Lombardy Region already laid down in regional law 9/2001, but could even go beyond the regulations in force for the identification of new operating methods that may be adopted by the Region in the regional highways sector of interest.

There appears in any case to be no doubt that the sphere of influence of the regions has expanded in recent years, especially in terms of the capacity to satisfy the expectations of the public directly and otherwise. This is how things stand in Lombardy, where the Region strongly controls and regulates a segment of such economic importance and we can only acknowledge the legitimacy and power of that deed of synthesis and political representation par excellence which is the regional law. This solution, as we have seen, is backed up by the new constitutional layout, and is a factor which undoubtedly legitimises the administrative activity implemented when the legislative provision is applied.

We need merely consider the determination or approval or tariffs or the act by means of which third parties are granted concessions to design, build and manage a given section of motorway.

On the matter of the nature and characteristics of tolls, there is wide ranging, but not yet defined, debate, mainly due to the

absence of a clear regulatory indication [19]. According to one position in case law on motorway tariffs, the obligation to pay tolls has to be regarded as a payment in exchange for the use of the motorway, with the consequence that the tariff has the nature of a service rendered in exchange for another service [20]. A different view has it that the payment of the toll does not create a contractual relationship between the user and the manager, and simply involves a payment imposed on the user to entitle him to make use of a public service [21].

Whether or not it is possible in legal terms to pin down a single set of regulations which may be applied to the concession or the methods for the exercise of the power to set, approve or review the tariffs, and taking into consideration the diversity that is inevitable given the multiplicity of parties, tender competitions and agreements between the issuer and holder of the concessions, what we have to emphasise is the undoubtedly administrative nature of activities of this kind, with all the consequences ensuing in terms of the legal system which applies and any disputes that might arise [22].

This is especially relevant in terms of the relations with the higher level sources, as the validity of the activity in question depends on the correct interpretation of these. In this sense, the role played by the regional law takes on determining importance, and this is perfectly in line with the terms laid down by regional law 9/2001 and regulation no. 4 of 8th July 2002, which are entirely unequivocal on the matter of tariff-setting powers [23].

It is true, however, that the administrative process of setting the motorway tariffs continues to be significantly

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[19] G. Sanviti, *Prezzi e tariffe,* item 1 Dig. Disc. Pubbl. 511 (1996), C. Savastano, *Pedaggio,* in *Enciclopedia del Diritto* (1982), L. Musselli, *Direttive comunitarie e creazione amministrativa di un mercato dei servizi pubblici,* 1 Dir. amm. 130 (1998).
[20] Court of Cassation, section III, 13th January 2003, no. 298, TAR Lazio, Rome, 3rd September 1998, no. 2251.
[21] Court of Cassation, joint sections, 7th August 2001, no. 10893, Court of Cassation, section I, 20th September 2002, no. 13770.
[22] State Council, section IV, 23rd January 2007, no. 399, State Council, section IV, 13th March 2008, no. 1094 with note by C. Guccione, *La qualificazione giuridica delle società concessionarie di autostrade,* 3 G. D. A. 975 (2008).
[23] As we have already seen pursuant to article 10 of regional law 9/2001. On this point, see C. Guccione, *La disciplina regionale delle concessioni autostradali,* 3 G. D. A. 1025 (2002).

influenced by the involvement of CIPE (the Interministerial Committee for Economic Planning) [24], which issues binding directives on the review of the agreements applicable to the concessions and, as a consequence, on the tariffs.

CIPE is therefore in a position of considerable importance within the system, empowered and, to a certain extent, privileged by the consolidated tendency in administrative case law [25]. The importance of CIPE and, with it, the presence of the state, has also been reaffirmed by the recent law decree of 8th April 2008 (converted into law no. 101 on 6th June 2008), whose article 8-duodecies, paragraph 2, approves " … all the framework agreements with Anas S.p.a. which have already been signed by the motorway concession-holders …" and states that each subsequent amendment or addition to the agreements are approved as laid down in law decree no. 262 of 3rd October 2006, converted into law no. 286 on 24th November 2006.

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[24] More specifically, under the terms of article 11 of law no. 498 of 23rd December 1992, "… the Interministerial Committee for Economic Planning (CIPE), on the recommendation of the Ministry for Public Works and by agreement with the Ministry for the Treasury, Balance Sheet and Economic Planning, issues directives ….. for the review of the agreements and additional deeds applicable to motorway concessions, and, from 1994 onwards, the review of the motorway tariffs, taking into account the financial plans, cost of living fluctuations, volumes of traffic and the productivity indicator figures. The motorway tolls are set in accordance with the CIPE directives by means of a decree by the Ministry for Public Works, acting in agreement with the Ministry for the Treasury, Balance Sheet and Economic Planning ….". In applying this regulation, CIPE created the mechanism for the setting of the tariffs by means of resolutions 65/1996, 319/1996 and 39/2007. On the problems arising out of this system, see G. Coco, M. Ponti, *Riflessioni per una riforma della regolazione nel settore autostradale,* in C. De Vincenti, A. Vigneri (ed.), *Le virtù della concorrenza* (2006), 307.

[25] For example, on the basis of the decision by TAR Lazio, Rome, section III, 5th October 2005, no. 7832, with reference to the powers of CIPE, and given the elasticity of the criteria determined by the law, by means of which " … CIPE has been granted the power to lay down the guidelines for the review of motorway tariffs, this committee is legally entitled to set up a system based on a dual principle, the first of which is of an ordinary nature and is used for the annual determination of the tariff increases, which vary with the increase in traffic values, and the second extraordinary, linked to the financial plans drawn up by the service concession holders at the start of the concession agreement, or in the event of amendments to, or the transfer of, the agreement itself … ".

While CIPE plays a central role in the exercise of specific powers, such as the determination of the tariffs, at general level the presence of Anas SpA in the legal relationship set up between the granting body and the licence-holder continues to be decisive for the correct division of responsibility for the motorway system between the state and the regions [26].

As we know, the state-owned Anas S.p.a. is subject to public control by the Ministry for Infrastructures and the Ministry for the Economy and Finance. This control regards not only the governance of the company, by means of the appointment of the chairman and members of the board of directors, but also and above all its operations, by, for example, approving the economic and financial plan, the interventions at infrastructure level on the road and motorway network, and, especially, the agreements with the concession-holders.

It is in this latter aspect, however, that we see the most significant 'original' feature of the system.

At national level, ANAS continues to be an issuer of concessions, for the construction and management of motorway sections and the services to be supplied to the users. These concessions are issued to private companies, as in the case of *Autostrade per l'Italia Spa.*, or to companies in which the public sector has an interest, sometimes through ANAS itself. In this latter (and more frequent) case, then, ANAS is both issuer and holder of the concession at the same time, with all the consequences which ensue – given the absence of a sector monitoring body – in terms of observance of the principle of separation between the regulator and the manager [27].

Certainly, the main justification of the running of the system by the State is the fact that ANAS possesses the organisational structure and performs its tasks in accordance with the legislation. However, this is compatible with a system which is centralised in terms of the planning of the operations, classification of the motorway sections, the resources used, the

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[26] For an in-depth discussion on the role and nature of Anas S.p.a., see N. Rangone, *Le società a partecipazione pubblica nel settore dei trasporti: profili di diritto nazionale,* in M. Cammelli, M. Dugato (ed.), *Studi in tema di società a partecipazione pubblica,* cit. at 6.

[27] Even though the context is to a certain extent different, see G. della Cananea, *Privatizzazioni senza autorità di regolazione?*, 1 G. D. A. 490 (1997).

setting of tariffs and the control of the activities and responsibilities of the management body. However, it becomes more difficult to understand within a system in which the regional authority has seen an expansion in its legislative and administrative powers, to the extent that it becomes the central core around which the regulation of the motorway sections ought to rotate.

At regional level, the presence of ANAS takes a multiplicity of forms and is structured in different ways. In Lombardy, there are three issuers of concessions, one controlled by the state, one by the region and one mixed (with state and regional control).

ANAS, as will be explained in greater detail below, issues the concessions for the motorways already in operation and the future *Tirreno-Brennero (TiBre)* motorway. *Concessioni Autostradali Lombarde S.p.a. (CAL)*, jointly owned by ANAS and *Infrastrutture Lombarde*, grants the concessions for the future *Pedemontana Lombarda, Brebemi* and *TEEM* [28] motorways. Finally, Infrastrutture Lombarde S.p.a., wholly owned by the region, grants the concessions for the future *Cremona-Mantova*, *Broni-Pavia-Mortara* and *Interconnessione Pedemontana-Brebemi (IPB)* motorways.

It is therefore only in this latter case that the granting body has no connection with ANAS. This means that the relationships set up by Infrastrutture Lombarde in carrying out its tasks, including those with the various concession-holders, are entirely subject to the regional regulations.

In all the cases referred to above, the agreements with the concession-holders are fully operational. However, in most of these, the motorways involved have still to be completed and are located entirely (or at least mainly) within the regional boundaries, as laid down in articles 2, 3 and 6 of regional law

[28] In accordance with the terms of article 1, paragraph 979, of the law of 27th December 2006 (the 2007 Finance Act), which transferred the granting functions and powers attributed to ANAS for the construction of Pedemontana, Brebemi and TEEM "… to a public body taking over all the rights and obligations on the construction of the motorway infrastructures, which will be set up as a company partly controlled by Anas Spa and partly by Lombardy Region or an organisation wholly owned by this latter".

9/2001, and will fall within the definition set out in article 1, paragraph 2, of regional law no. 4 of 8th July 2002 [29].

We cannot underestimate these two aspects when reassessing the relationship between the state and Lombardy Region on the regulation of the sector, especially with regard to the powers to amend the agreements and determine the tariffs, operations which the system continues to submit to the directives (and approval) of CIPE, especially due to the presence of ANAS, in clear conflict with the terms laid down at regional level.

This is particularly the case with CAL, in which the involvement of ANAS takes place through its shareholding only, which is insufficient to shore up the relationship, significantly unbalanced as it is towards the centre of the system, contrary to principles which are now consolidated even at constitutional level[30].

5. Changes to the existing motorway tariff.

We therefore have to reassess the regulation of the sector in the light of the changes in the relationship between the centre and the periphery.

However, any increase in the regional powers for the setting of the tariffs for the motorway network of Lombardy must of necessity take into consideration the terms of the existing concessions and the agreements applicable to them, including the financial plans and tariff review conditions. In the abstract sense, this limit has no effect on the powers of the region, but does compromise its ability to exercise these in full.

If we are to understand whether or not the region has margins for intervention and, if so, what these are, we have to start from the general situation, as widely understood and perceived.

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[29] This is the regulation containing "Procedures for regional motorway concessions", article 1 of which lays down that the regional motorways are "… *motorway infrastructures, with at least two lanes in each direction, an emergency hard shoulder, carriageways separated by a physical barrier and slip roads and turn-offs at various levels which are located entirely within regional territory, mainly used to handle regional traffic, not subject to national concessions, subject to regional planning, for which the regional authority itself organises the concession procedure …".*

[30] M. Cammelli, *Amministrazione (e interpreti) davanti al nuovo Titolo V della Costituzione,* 4 Reg. 1273 (2001).

The motorways which run through Lombardy Region can substantially be subdivided into two main categories.

On the one hand, we have the motorways already in operation, which are managed by six concession-holders, on the basis of differing concession relationships and agreements. These are: *Autostrada del Sole* (A1), *Serenissima* (A4), *Milano Serravalle* (A7), *Autostrada dei Laghi* (A8 and A9), *Autostrada dei Vini* (A21), *Autostrada del Brennero* (A22), and the Milan West (A50), East (A51) and North (A52) Ring Roads.

On the other hand, as we have already seen, there are the motorways to be built in the future, which are also managed by different companies on the basis of a variety of concession agreements, in this case: *Brebemi*, *Cremona-Mantova*, *Pedemontana Lombarda*, *Ipb*, *TiBre*, *Tem* and *Broni-Pavia*.

There are significant differences between these two categories, starting from the tariff setting procedures, which are by no means uniform. If, for example, we analyse the tariffs laid down for the existing motorways, we can see that considerable differences may apply to the same category of vehicle. For some of the future motorways, on the other hand, the average tariffs applied to the existing motorways in 2008 are almost doubled [31].

Any intervention by Lombardy Region on the existing tariffs has to be hypothesised first and foremost with a view to limiting these differences, which, in the eyes of the user, are difficult to comprehend.

But there is a further difference between these two situations, based on the role played by the region in the handling of the concessions and the agreements applicable to them. As we have already seen, in both cases, any intervention by the region for the amendment of the tariff conditions has an effect on an existing agreement.

However, unlike the situation of the existing motorways, the regional authority has an interest – to some, more or less direct, extent – in the concession issuing body for the future motorways, while the Lombardy Region has no involvement, even of an indirect nature, in the legal relationships with the

[31] See *Rapporto finale sulla regionalizzazione delle tariffe*, by the Lombardy Regional Research Institute, (2009).

concession issuing bodies for the existing motorways, beyond the fact that sections of these roads cross the regional territory.

As we have already seen, this aspect has an influence on the determination of the party with general entitlement to regulate the concession relationship. In this case, however, the problem is affected by the terms of the concession agreements, to which, as we know, access is not a simple matter [32].

In general terms, however, we should point out that administrative case law tends to place the emphasis on the nature of the agreements between the concession issuer and holder and the decisions on motorway tariffs. This nature cannot be called into question even by the regional legislator, in the exercise of the institutional prerogatives of the region for the planning and development of its motorway network.

In this sense, when it declared the illegitimacy of the deeds by means of which *Strada dei Parchi Spa*. ordered – and ANAS authorised – an increase in the tolls for the A24 and A25 motorways run by *Strada dei Parchi Spa*, TAR Lazio stated that "… any change in the overall conditions imposed on the concession-holder either requires a new agreement or, at the very least, a new financial plan with a redetermination of the tariff review criteria, or leads to a conflict with the commitments taken on, and, unless there is a specific motive, cannot justify the implementation of the agreement and the original financial plan in terms of tariff reviews …" [33].

In other words, in the case of the motorway concessions currently in force, especially those which apply to the existing motorways, it would appear that the regions do not have the power to amend the tariff review process for the sections of motorway within their territory. The introduction of new tariff mechanisms in a legal relationship which was set up on the basis of different conditions and factors alters the balance of the contract bond and, by bringing about a change to the financial plan, forces the parties to reconsider the entire economic structure of their agreement. This position in case law is based on the acceptance of

[32] G. Ragazzi, *I signori delle autostrade* (2008).
[33] TAR Lazio, section III, 5th October 2006, no. 9917, with a note by G. Balocco, 1 Urb. App. 249 (2007),.

the central role played by the will of the parties within contract relationships [34].

On this subject, however, we have to consider a recent pronouncement by the State Council on the basis of which, "… in civil law, the act of determining the tariffs requires measures by authorities which, irrespective of the law (articles 1339 and 1419 of the civil code), might have an effect on the utility contracts …" [35]. If this interpretation is correct, which remains to be seen, the substance of the matter, for our purposes, remains unchanged. Even if we do sustain that the legislator is not barred from intervening right from the start, due to conflict with the will of the parties as initially manifested, we must in any case acknowledge that such an intervention is only valid as an addition to the governance of the contract, which means that any innovation on the part of the legislator must at least be backed up by the willing renegotiation of the entire economic structure of the agreement by the parties.

This point does not appear to be denied by the most recent changes to the regulations. Article 8-duodecies, paragraph 2, of law decree no. 59 of 8th April 2008, converted into law no. 101 of 6th June 2008, lays down the *ex lege* approval of all the framework agreements with Anas S.p.a. which had already been signed with the motorway concession-holders on the date when the decree came into force. We might ask ourselves if and to what extent this act of approval by the national legislator might affect the contractual significance of the framework agreements already signed, with a consequent shift of the problem under discussion here to a different level of conflict between sources, that is, the level of state law versus regional law, rather than that of law versus agreement. What we cannot deny is that this approval means that these agreements become subject to the procedure laid down in article 2, paragraphs 82 and following, of law decree no. 262 of 3rd October 2006, converted into law no. 286 of 24th November 2006, on amendments or additions to agreements granting access to motorway concessions.

On the possibility of changes to the tariffs applicable to the regional motorway concessions, article 10, paragraph 2, of

[34] C. M. Bianca, *Diritto civile, vol. 3,* (1996).

[35] State Council, section IV, 23rd January 2007, no. 399.

Lombardy regional law 9/2001 states that, "The concession and the financial agreement applicable to it, as specified in article 7, paragraph 3, also identify the cases and the methods whereby the tariffs and/or the duration of the concession are reviewed, following changes to the reference parameters on which the concession is based, or in the event of amendments to the reference regulations". Again, as specified in paragraph 5 b), the tariffs set by means of the agreement are subject to review in the event of changes to other parameters laid down in the agreement itself.

The need to adhere to the existing terms of the agreement restricts the margins of intervention of the region, at both regulatory and administrative level, and its powers in this sense are only likely to extend beyond these margins upon the expiry of the existing concessions. This conclusion does not come without consequences, given that the expiry of the concessions held by the motorway companies currently operating in Lombardy is due to take place within a period of time ranging from 2011 to 2050.

Within this situation, however, we have to acknowledge that the region does have the power to act in relation to the bilateral nature of the relations between the parties to the concession agreement. The intention of bringing about a consensus between the parties may only succeed when the power of the authority, both legislative and otherwise, encounters limits.

The implementation of a general power to review the motorway tariffs therefore cannot be separated from the use of the legal tools which normally back up the decisions reached by public powers, planning agreements and service conferences first and foremost, as governed by law no. 241 of 7th August 1990. The attempt to achieve consensus between institutions clearly has to be backed up by a similar striving for consensus between these latter and the main players in the regional motorway market, with whom agreement has to be reached on the changes to the existing concession relationships.

The possibility of introducing a single method for the setting of regional toll motorway tariffs, to avoid distortions due to excessive differences between the various tariff plans, also has to be considered from the point of view of the consensus situation. In a situation of this kind we have to admit that, even if full consensus between the parties is not reached, the regional

authority could go ahead with the operation in any case, by setting a homogeneous level of tariffs payable by the users and taking on responsibility for compensating the concession-holders, either directly or through other forms of relief, for the variations brought about by increases or other possible fluctuations, by means of a system which may or may not be subject to maximum limits.

This option, exercised on the existing agreements and solely to the benefit of the users, should certainly deserve to be explored in greater detail, especially if we consider its potential for the simplification of the regulatory framework and the creation of greater transparency in the exercise of a public power.

6. Conclusions.

With the adoption of legislative decree 112/1998, the regulations applicable to roads and motorways have been subject to an organic and consistent process of decentralisation of powers towards the regional authorities and local bodies. This process was later completed by the reform of section V of the constitution, which redrafted the relationships between the state and the regional and autonomous local authorities, starting from a new division of legislative powers.

Almost simultaneously with the constitutional review of 2001, Lombardy Region, by adopting regional law 8/2001 on the "Planning and development of the regional road network", significantly extended the powers of the regional authority for the planning, coordination, development and safety of the regional road network, with particular reference to the regional motorways and the concessions system, including the power to set tariffs. The resulting framework fully confirms the legislative policy decisions taken at the turn of the century, and gives Lombardy Region a broad-ranging power to manage the regional motorways.

However, the state continues to exert a significant influence over the way in which the sector is regulated, in this way limiting the role of the regional authorities, even in situations in which the exclusively regional nature of certain motorways dictates greater adherence to the spirit of the reforms in question. This is particularly evident with reference to the power to approve the

agreements and tariffs, which, as we know, is exercised by CIPE, in cooperation with the relevant ministries.

There are various concurring factors which bring about this situation, but none of them is founded on a sufficiently solid or positive legal base. A determining role is played by Anas S.p.a., which is a concession-holder and issuer on the one hand, or a concession issuer or simple shareholder on the other, a situation which is favourable to the re-emergence of the state level in the regulation of exclusively regional motorways.

The changes in the relationship between the state and the regions make it essential to alter course in a decisive manner, especially in the case of reviews of (or simple changes to) the tariffs, whose diversification within the region appears to be excessive and difficult for the users to comprehend. On the other hand, a unilateral modification of the existing agreements, some of which are not due to expire for some time to come, cannot be taken into consideration.

This is particularly valid in the case of the motorways scheduled for construction in the future, the situation is to a certain extent different, even though the direct intervention of the regional authority is in this case too subject to the level of effective implementation of the concession agreement.

In the end, due to the complexity of the legal relationships in the motorway sector, no solution is to be found solely in the links between the various legal sources. This fact confirms that the real administrative innovation takes place through the planning capacity of the public powers with a view to taking into account the interests of the parties involved and procuring their prior consent.