Decision of the French Council of State of 27 November 2020, No 431748

Rail transport – Contracted transport services – Possibility of introducing increases in charges to cover the fixed costs of the network, subject to their sustainability (Article L.2111-25 of the Transport Code, interpreted in accordance with the objectives of Article 32 of Directive 2012/34/EU) – Notion of sustainability – Methods of assessment – In the present case, possibility for the Transport Regulatory Authority (ART) to issue a conditional assent – Elements likely to be taken into account in the assessment of the market's capacity to bear the increases.

It follows from the first and third paragraphs of Article L.2111-25 of the Transport Code, Article 31 of Decree No 2003-194 of 7 March 2003 and Articles 6 and 6-1 of Decree No 97-444 of 5 May 1997 that increases in charges for passenger transport services under a public service contract, known as ‘contracted services’, intended to cover, in addition to the cost directly attributable to the operation of the rail service, all or part of the fixed costs of the network, may be introduced subject to their sustainability, i.e. the market's capacity to bear them.

It follows in particular from the third paragraph of Article L.2111-25 of the Transport Code, both before and after the entry into force of Order No 2019-183 of 11 March 2019, interpreted in accordance with the objectives of Article 32 of Directive 2012/34/EU of 21 November 2012, that, in order to give its opinion on the proposed pricing, and in particular on these increases, the Transport Regulatory Authority (ART) must take into account the existence of a financial contribution by the organising authorities to the operation of these services; it must ensure that the proposed tariffs do not jeopardise the economic equilibrium of the public service contracts for the market segment in question, by imposing on railway undertakings increases that they cannot bear or, in the case of compensation of charges by the organising authorities, by providing for increases at a level that could lead them to take measures that could significantly affect the use of the infrastructure in this segment.

SNCF Réseau's tariff proposal for the 2020 service timetable includes a 2.4% increase in the market charge, for which the rail transport organising authorities are responsible by virtue of the public service contracts that currently bind them to the railway companies, and a 2.4% increase in the access charge.

The ART based its view that these increases, which corresponded to the forecast trends defined in the performance contract concluded between the State and the SNCF, were not sustainable and could only be considered sustainable if they were reduced to a level of less than or equal to 1.8%, on the one hand, on the impossibility for the performance contract to take precedence over the rules and principles of pricing resulting from Directive 2012/34/EU and its transposition texts, and, on the other hand, on the fact that these increases exceeded both the ceiling for increases in the regions' operating expenses, set at 1.2% by the State, and the change in the harmonised index of consumer prices (HICP), set at 1.8%, while SNCF Réseau did not demonstrate the financial capacity of the regions and Ile-de-France Mobilités to assume them.

The Authority, whose remit is not limited in this respect to approving or rejecting proposed tariffs, was free to issue a favourable assent to the proposed increase if it considered that it could not issue a favourable assent, provided that the increase was reduced to a level below the threshold at which it considered that it should issue an unfavourable opinion in the light of the assessment criteria to be applied.
in accordance with Articles L.2111-25 and L.2133-5 of the French Transport Code, in particular the criterion of sustainability.

The Authority was not obliged to consider the projected fee changes as sustainable solely on the grounds that they corresponded to the increase in the ‘passenger toll scale’ provided for in the performance contract concluded between SNCF Réseau and the State pursuant to Article L.2111-10 of the Code, since it is only up to the Authority to take this contract into account, and it was able to take the HICP into consideration in its analysis of the market’s capacity to bear the projected increases.

However, by requiring SNCF Réseau to demonstrate the financial capacity of the organising authorities to cope with the projected increases, by making the ceiling on the increase in the regions’ operating expenditure a determining factor in assessing the sustainability of the increase in mark-ups and by considering that any increase in mark-ups to a level higher than the change in the consumer price index could not be regarded as sustainable whereas it was only up to the Authority, in the case of contracted transport services, for which the market’s capacity to bear the increases cannot be assessed in the same way as for freely organised services subject to competition, to take account of the assessment factors mentioned in point 1, the Authority erred in law.