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EUROPEAN COMMISSION

# Complaint – Infringement of EU law

Before filling in this form, please read '*How to submit a complaint to the European Commission*':
https://ec.europa.eu/assets/sg/report-a-breach/complaints_en/
All fields with * are mandatory. Please be concise and if necessary continue on a separate page.

## 1. Identity & contact details

| | Complainant* | Your representative (*if applicable*) |
|---|---|---|
| Title* Mr/Ms/Mrs | Mr | Mr |
| First name* | Jonathan | Luca |
| Surname* | Amouyal | Amicarelli |
| Organisation: | TCI Advisory Services LLP | Allen & Overy Studio Legale Associato |
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| Language* | English | Italian |
| Should we send correspondence to you or your representative*: | ☒ | ☒ |

## 2. How has EU law been infringed?*

| | Authority or body you are complaining about: |
|---|---|
| Name* | Republic of Italy - Presidenza del Consiglio dei Ministri (C.F. 80188230587) |
| Address | Piazza Colonna, 370 - |
| Town/City | Rome (RM) |
| Postcode | 00187 |
| EU Country* | Italy |
| Telephone | N.A. |
| Mobile | N.A. |
| E-mail | presidente@pec.governo.it, uscm@palazzochigi.it, segrgen@governo.it |

### 2.1 Which **national measure(s)** do you think are in breach of EU law and why?*

On 14 August 2018 the "Morandi" bridge, a segment of the A10 motorway managed by the concessionaire Autostrade per l'Italia S.p.A. (**ASPI**), collapsed and 43 people died (the **Collapse**). By that date, the Italian Government has adopted a series of initiatives aimed at terminating the motorway concession with ASPI (the **Concession**) without paying the specific indemnity due in case of early termination of the Concession.

In pursuing such strategy, the Italian Government introduced Article 35 of Italian Law Decree 30 December 2019, No. 162, converted into law by Law 28 February 2020, No. 8 (**Milleproroghe**).

In essence, Article 35 of Milleproroghe, which is the object of this complaint, states that:

**(a)** in case of revocation, forfeiture or termination of motorway concessions, pending the conclusion of tender procedures for the appointment of a new concessionaire, for the time strictly necessary for its identification, ANAS S.p.A. (**ANAS**, i.e. the Italian company controlled by the Ministry of Infrastructures and Transports deputed to the construction and maintenance of Italian motorways) can take over the management of the

concessions and purchase the projects drawn up by the concessionaires upon payment of a consideration determined only taking into account the costs of design and of the intellectual property rights;

**(b)** upon termination of a motorway concession – even in case of concessions that were already in place *before* the entry into force of Legislative Decree 18 April 2016, No. 50 (the **Italian Public Contracts Code**) – the State shall pay only the amounts provided under Article 176 (4) (a) of the Italian Public Contracts Code (i.e. costs of the works already realised, net of the depreciation) while any concession's provision granting the concessionaire higher amounts, even if approved by law, shall be considered null and void; and

**(c)** the effectiveness of the revocation deed (*provvedimento di revoca*), implying the forfeiture or termination of the motorway concession, is not subject to the payment of the sums provided for by mentioned Article 176 (4) (a) of the Italian Public Contracts Code by the granting authorities: any contrasting conventional provision contained in the Concession is declared to be null and void.

In practice, Article 35 of the Milleproroghe introduces a retroactive regulation with the purpose of making the revocation easier for the Government. Also, Article 35 retroactively and unilaterally modifies material terms and conditions of the Concession substantially reducing the amounts of the indemnities due to ASPI in case of revocation.

Article 35 of the Milleproroghe is now being used by the Italian Government to obtain unfair advantages in the context of the negotiation with ASPI and its controlling shareholders Atlantia S.p.A. (**Atlantia**) aimed at reaching an agreement to avoid the revocation of the Concession. In fact, if an agreement is not reached, the Concession would be revoked and, on the basis of the consequences as regulated by Article 35 of the Milleproroghe, this would trigger the insolvency of ASPI and in turn of Atlantia. In other words, Article 35 of the Milleproroghe is still in place and is being used by the Government as a deterrent to force ASPI and Atlantia to accept the terms and conditions imposed by the same Government.

According to public news, on on 14 July 2020 the Italian Government, ASPI and Atlantia reached and an understanding which should avoid the revocation of the Concession.

Such understanding is of serious concern for the Complainant (as well as for other Atlantia's long term investors; the **Investors**). Although the main terms of the to-be agreement are not publicly available and are under discussion, the understanding among ASPI, Atlantia and the Government came to light outside any legal framework. ASPI and Atlantia have been in fact forced by the Government to waive their rights (in particular, the rights of ASPI as a concessionaire) to avoid an illegitimate revocation, based on Article 35 of Milleproroghe. In particular, the agreement should entail that the majority of ASPI shares are acquired by the state-owned company Cassa Depositi e Prestiti. Based on these premises, also the execution of the agreement at issue, and in particular the conditions under which ASPI's shares will be acquired, are of serious concern for the Complainant, since there is no certainty as to the conditions under which the shares will be sold and, in particular, that the price will be fair and calculated under the applicable market standards, in order to avoid that the whole transaction results in a forced expropriation of ASPI's shares. This outcome would constitute a serious infringement of the investors fundamental rights set forth by the EU Law and it would have been achieved through Article 35 of the Milleproroghe which, for the reasons explained below, constitutes *per se* a blatant breach of the EU Law. Not to mention that, as the understanding reached with the Italian Government envisages the entrance of Cassa Depositi e Prestiti (the investments arm of the Italian State), the whole transaction may be considered as a disguised re-nationalisation of the motorway infrastructure, with the risk of an illegitimate expropriation. In fact, Atlantia has been already forced to choose between the sale to Cassa Depositi e Prestiti and a revocation based on the Milleproroghe that would entail lengthy, burdensome litigation proceedings.

It follows that if the Commission does not intervene, Article 35 of Milleproroghe, will be instrumental in obtaining in a disguised expropriation of the ASPI's shares by the State through Cassa Depositi e Prestiti.

## 2.2 Which is the **EU law** in question?

Milleproroghe, by unilaterally amending the Concession with the aim of revoking the same with a substantial reduction of the indemnity due to ASPI, constitutes a breach of a number of EU principles acknowledged by the EU Treaties and the European Court of Justice (**ECJ**).

**a) Principles of free movement of capital**

First of all, Milleproroghe violates the principle of free movement of capital, as enshrined by Article 63 of the Treaty of the Functioning of the European Union (**TFEU**).

The ECJ has clarified that "*in the absence, in the FEU Treaty, of a definition of the concept of 'movement of capital' […] the Court has therefore held that movements of capital […] include in particular 'direct' investments, namely investments in the form of participation in an undertaking through the holding of shares which confers the possibility of effectively participating in its management and control, and 'portfolio' investments, namely investments in the form of the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking (see Commission v Netherlands, paragraph 19, and Case C-171/08 Commission v Portugal, paragraph 49).*" (ECJ, Grand Chamber, 22 October 2013, joined cases C-105/12 to C-107/12, Staat der Nederlanden v. Essent NV and others).

Concerning those two forms of investment, the ECJ has stated that national measures must be regarded as 'impediments' for the purposes of Article 63 TFEU if they prevent or limit the acquisition of shares in the undertakings concerned or deter investors of other Member States from investing in their capital (see Case C-367/98 Commission v Portugal [2002] ECR I-4731, paragraphs 45 and 46; Case C-483/99 Commission v France [2002] ECR I-4781, paragraph 40; Case C-463/00 Commission v Spain [2003] ECR I-4581, paragraphs 61 and 62; Case C-98/01 Commission v United Kingdom [2003] ECR I-4641, paragraphs 47 and 49; Case C-174/04 Commission v Italy [2005] ECR I-4933, paragraphs 30 and 31; and Commission v Netherlands, paragraph 20).

There is no doubt that the provisions contained in Article 35 of Milleproroghe represent an 'impediment' to the free movement of capital, as they deter financial institutions from investing their capital in Atlantia / ASPI. The lack of clearly stated objectives pursued by the provisions in question and the lack of justification of the measures taken may introduce uncertainty on the concession system discouraging investments and, thus, unduly restricting the free movement of capital as defined above.

In terms of effects, these measures already proved to have a harsh impact on current and potential investors in Atlantia and ASPI: besides the negative effects on the companies' value, the merit of credit of both Atlantia and ASPI has been dramatically downgraded, their debt being qualified as junk by major rating agencies. Furthermore, access to capital market for both companies is now precluded, so hindering future capital investments also in a forward-looking perspective.

From the investors' point of view, these measures seriously endanger the basic principles of the EU Capital Market Union. Indeed, under the instable and unpredictable business environment determined by the Italian authorities' measures, investors would have no trust anymore on the legal and regulatory framework and the respect of the rule of law in Italy.

**b) Principle of legal certainty**

Milleproroghe altered the regime on the basis of which the Concession was originally granted to ASPI and on the basis of which the latter and related investors planned their investments.

The lack of clear and precise rules of law predictable in their effect would also represent a breach of the principle of legal certainty and of legitimate reliance. Article 2 of TEU clearly provides that the European Union is founded on the rule of law and relies on law to ensure that its policies and priorities are realised in the Member States. The principle of legal certainty based on the rule of law is aimed at enabling the interested parties to ascertain their position in situations and legal relationships governed by law (ECJ, judgment of 5 May 2015, Spain v. Council, C 147/13, EU:C:2015:299, paragraph 79 and the case-law cited).

In the case at hand, the position taken by the Italian Government, lacking any reliable, factual and technical basis represents a violation of the partnership between the State and private investors, driven by the intention of the Italian Government to terminate the concession without paying the indemnity expressly provided for by the Concession in favour of ASPI.

**c) Principle of legitimate reliance**

This legislative amendment, following inconsistent and variable declarations by the Italian Government, represents also a breach of the principle of legitimate reliance, as a corollary of the principle of legal certainty. This principle, *inter alia*, prevents rule-makers from adopting legislative measures that frustrate the expectation of private citizens arising from previous agreements which have been adopted in application of specific law provisions.

Indeed, the fact that a measure may not be altered once it has been adopted by the competent authority constitutes an essential factor contributing to legal certainty and stability of legal situations in the national and EU legal order both for institutions and for persons whose legal or factual situation is affected by a decision adopted by those institutions. Only rigorous and absolute observance of that principle can guarantee that, subsequent to its adoption, a measure may be amended only in accordance with the rules on competence and procedure and, consequently, that the notified or published measure constitutes an exact copy of the measure adopted, thus reflecting faithfully the intention of the competent authority (Court of First Instance, Second Chamber, judgement of 27 February 1992, BASF AG and others v Commission of the European Communities, joined cases T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89).

In this respect, the ECJ stated that also that the principles of legal certainty and protection of legitimate expectation require that the legal rules are clear and precise and that their application is foreseeable for those who are subject to it (see sentence of 11 September 2019, C-676/17, EU: C: 2019: 700, paragraph 50 and the case law cited therein). Moreover, it has been clarified that the protection of legitimate expectations extends to any individual in a situation where public authorities have caused him to entertain legitimate expectations. In whatever form it is given, information which is precise, unconditional and consistent and comes from authorised and reliable sources constitutes assurances capable of giving rise to such expectations (ECJ, 3 December 2019, Case C-482/17).

Not a single circumstance led the financial investors that after months of silence and absent any consultation / announcement to ASPI, the Government could amend the Concession by law. In this respect, it should be noted that well-grounded case-law established that a national legislature infringes the principles of legal certainty and legitimate protection reliance should it adopt, suddenly and unpredictably, a new law that has an impact on the rights and expectations upon which someone has relied without providing for a transitional regime (judgment of 9 June 2016, Wolfgang und Dr. W.R.G., C-332/14, EU: C: 2016: 417, point 58).

In the case at hand, the Government accelerated the procedure for the revocation of the Concession after months of inactivity and following reassurances that an alternative to revocation was still possible. Unpredictably and without any prior notice to ASPI / Atlantia, on the wave of demagogic statements, in December 2019 the Government decided to amend the terms of the Concession so as to facilitate the procedure for revocation without indemnity.

By intervening by law instead of adopting an administrative measure, it is clear that the strategy of the Government was aimed at immediately impacting on the terms and conditions in a more faster and incisive way. As such, the Government has been able to amend the Concession without any prior negotiation with ASPI and avoid a transitional regime for ASPI to find economic sources and resettle the business. Moreover, modifying the Concession through a legislative provision the effects would have been immediately applicable, with no need of any further implementation. Also, considering that legislative deeds are not immediately challengeable before the Italian Constitutional Court, the Government managed to make it more difficult for ASPI / Atlantia to challenge this provision through ordinary Court proceedings.

Notwithstanding this expedited procedure, after passing the law the Government remained silent once again for 7 months. As of today, while the Government formally declares that a settlement agreement with ASPI / Atlantia is possible, certain representatives of the Government keeps stating that the revocation of the Concession may be

still one of the possible options. Such a purpose is pursued outside substantive and procedural existing rules, in striking contrast with rule of law and due process principles. Needless to say, once implemented, withdrawal will nullify the value of all investments made in ASPI as well as in its controlling company, Atlantia.

**d) Principle of *pacta sunt servanda***

By virtue of Milleproproghe, the Government has unilaterally modified by law the terms and conditions of a concession in which the rights and duties of the parties were originally settled. This amendment, not preceded by a negotiation with ASPI, altered the economic and financial balance of the original agreement and is contrary to the principle of *pacta sunt servanda.*

It is clear that the Government is following the same approach that led the Commission to open infringement proceedings against Italy for the illegitimate unilateral amendment of the motorway concession regime by law. In that case, the Commission closed the infringement proceeding in 2008, but only after the Italian authorities took, and implemented by law, a formal commitment to respect for the future the principle *pacta sunt servanda* and, consequently, not to intervene unilaterally anymore on the economic terms of the existing concession contracts (including ASPI). The Commission Press Release of 16 October 2008 confirms that the new Italian law (Law No. 101/2008) adopted to close the infringement proceeding – codifying mutually agreed contracts – was apt to ensure legal certainty, "*in accordance with the principle of non-unilateral modification of the new sectoral arrangements*" (see Commission press release IP/08/1521).

Relying on this circumstance, from 2008 onward billions of Euros of financial investments have been made in both Atlantia (a listed company holding 88% of ASPI's capital with roughly 40% of floating capital) and ASPI. The measures envisaged by the Government affect all investors, including institutional investors as well as individuals, that had confidence in the value of the group and its chances of profitability.

More specifically, financial intermediaries having invested in Atlantia and ASPI manage capitals originating from different sources, including individuals, and certainly cannot be exposed to an unjustified political intervention from a single Member State, unduly affecting their assets' value. Moreover, Atlantia and ASPI are global players, relying on funds coming from the international capital market and, therefore, could be significantly jeopardised by an intervention of a single Member State making more difficult their access to financial resources.

In this respect, it must be reminded that in a Capital Markets Union, founded on Internal Market principles, cross-border capital flows should not be discouraged nor limited. The principles of legality (rule of law) and legal certainty (which includes the principle *pacta sunt servanda*) are crucial for ensuring a sound environment for capital investments. On the contrary, lacking a stable and predictable regulatory frame, future investments are discouraged; and actual investments are unduly affected, being exposed to "political" shocks, arbitrary impacting on their risk profile and value.

This is recognised by the same Commission that recently emphasized that "*a key objective in the Investment Plan for Europe is to create a more predictable, stable and clear regulatory environment to promote investments"; this is why "the Commission is committed to preserving and improving both a predictable, stable and clear regulatory environment and the effective enforcement of investors' rights*" (see Commission Communication "Protection of intra-EU investment" COM(2018)547 final).

It is important to remark that all those private and foreign investments in Atlantia and ASPI were driven by the confidence in the group and its management and were mainly grounded on what was supposed to be a clear, transparent and stable regulatory regime, a regime set by (i) specific law provisions, (ii) a concession contract approved by law (the approval by law was purposely meant to ensure legal certainty and to avoid unilateral modifications by State authorities). In addition, the financial community was aware of the fact that the ASPI motorway concession regime was revised in 2008, in view of addressing concerns raised by the EU Commission in the frame of an infringement proceedings against Italy.

Finally, the principle *pacta sunt servanda* is still being violated by the Government. As a matter of fact, the threat of a revocation (at the worsening conditions set out by Milleproroghe) is being used to force ASPI and Atlantia to waive the rights deriving from the Concession and to accept the conditions imposed by the Government, despite the

existence of an agreement (the Concession) and lacking any ascertainment as to any liability of ASPI or Atlantia for the Collapse. .

**e) Principle of non-retroactivity**

The Italian Government, amending retroactively the legislative framework on the basis of which the concession was negotiated, is also dramatically jeopardising the investments of institutional investors that planned their allocation of capital on the assumption that rules were clear, transparent and stable and not amendable upon discretion of the Government at any time.

In particular, Milleproroghe not only applies retroactively to relationships which fell under the application of laws other than those that the Italian Government now forces to apply to ASPI, but it also lacks of any indication as to the temporary application of the provisions contained therein. As it is, it is immediately applicable with no need of any further implementation and it does not even provide for a transitional regime.

This appears in blatant contrast with the principles stated by the ECJ. In fact, a new legal rule applies from the entry into force of the act introducing it, and it does not apply to legal situations that arose and became definitive before that act entered into force. In theory legal situations already become definitive may be subject to the principle of the non-retroactivity of legal acts, only if the new rule is accompanied by special provisions which specifically lay down the conditions for its temporal application (C-15/19 - Azienda Municipale Ambiente, 14 May 2020, see, to that effect, judgment of 26 March 2015, Commission v Moravia Gas Storage, C-596/13 P, EU:C:2015:203 paragraph 32 and the case-law cited).

In other words, even assuming that Milleproproghe introduced a legitimate measure (but this is not the case), it could be applicable to the new motorway concessions agreements arranged from the entry into force of Milleproproghe onwards. On the contrary, the new terms and conditions of motorway concessions introduced by Milleproroghe could not be applicable to agreements already in force. At least, the Government had to envisage a transitional regime applicable to the concessions in place, so that the motorway concessionaire had enough time to revise the economic and financial plan on the basis of which the original concession was awarded.

**f) Principle of fair competition, non-discrimination and impartiality**

In the third indent of the Milleproroghe, the Government provided that ANAS would immediately replace ASPI in the management of the motorway under concession.

The step-in of a government-owned company in the management of the infrastructures built and currently operated by ASPI would result in a breach of the rules governing competition under EU law. As a matter of fact, ANAS, in its capacity of public-owned main road network concessionaire and incoming motorway concessionaire, would illegitimately benefit from the works and know-how of ASPI (upon the payment of a tiny amount for the intellectual rights and the projects design) even if it has not been awarded with the relevant motorway concession following an open and tender procedure with other competitors. It is also clear that the intention of the Government was to disguise a revocation – allegedly justified by the satisfaction of the public interest – with the expropriation of the concessionaire. This initiative is in blatant contrast with the principle of impartiality of the administrative action.

What is even worse here is that the new concessionaire appointed by the Government is the same entity that had under management an infrastructure (the Aulla bridge) which collapsed in April 2020 due to bad maintenance. However, as of today, no similar measures nor claims by the Italian government have been taken *vis-à-vis* ANAS. The different approach of the Government had towards ASPI provides clear evidence of the violation of non-discrimination principles.

By creating a sort of legal privilege in favour of ANAS, the Government is also violating the core principles of the European Treaties and the Charter of Fundamental Rights (**CFR**). In particular, art. 41 of CFR clarifies that every person has to have his or her affairs handled impartially, fairly and within a reasonable time. This includes the right of every person to be heard, before any individual measure which would affect him adversely is taken. Also, art. 10 of the TFEU provides that one of the main aims of the EU is to combat discrimination at any level. Such principles led the EU rule-makers to create the basis for the fair competition and the common market. In this context, it is

important, to recall that the principles of equality before the law and non-discrimination require that comparable situations should not be treated differently and that different situations should not be treated equally unless such treatment is objectively justified (judgment of 11 June 2020, C-634/18 - Prokuratura Rejonowa w Słupsku; see also judgment of 3 May 2007, Advocaten voor de Wereld, C-303/05, EU:C:2007:261, paragraph 56).

Milleproroghe and the subsequent assignment of the management of the motorway to ANAS constitute the clear violation of all these principles. Without any ascertainment of causes and liabilities for the Genoa's event, the Government is depriving a company of all its resources in favour of the same State owned-company that did not demonstrate to be able to provide the safety and the maintenance of the motorways.

Finally, the will to violate the principles at issue is still evident in how the recent understanding among ASPI, Atlantia and the Government has been reached: as a matter of fact, under the threat of an illegitimate revocation, the companies are being forced to sell (under conditions that are all but clear) to a state-controlled company (Cassa Depositi e Prestiti).

**g) Principle of reasonable duration of an administrative procedure**

Finally, it is a general principle of EU law that the conduct of an administrative procedure should be of reasonable duration (judgement of the General Court of 22 April 2016, Italian Republic v European Commission, T-60/06; see also judgment of 27 November 2003 in Regione Siciliana v Commission, T-190/00, ECR, EU:T:2003:316, paragraph 136).

In this respect, it is fundamental to quote the opinion of the Advocate General Jacobs of 22 March 2001 delivered in case C-270/99 P, whereby he states that "*it must be recognised, as a starting-point for consideration of the appellant's argument, that slow administration is bad administration. There is no doubt that the principles of good administration require the Community administration,* ***in all procedures which may lead to the adoption of a measure adversely affecting the interests of one or more individuals, to avoid undue delay and to ensure that each step in the procedure is carried out within a reasonable time following the previous step****. Moreover the Charter of fundamental rights of the European Union, while itself not legally binding, proclaims a generally recognised principle in stating in Article 41(1) that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union*".

The delay of the Government in adopting a resolution in relation to ASPI's dossier is inevitably compromising the existence of ASPI and Atliantia themselves. It suffices to say that in August 2018, certain representatives of the Italian Government publicly expressed their intention to revoke or in any case terminate the Concession, regardless of the outcome of the on-going investigations. Therefore, immediately after the collapse of the bridge, the Italian Government formally commenced the administrative procedure which (only apparently) concluded in July 2020 with no revocation but with and understanding that could result in a a disguised expropriation. Atlantia and ASPI are being forced to sell their shares to Cassa Depositi e Prestiti under the threat of a (illegitimate) revocation that would lead the companies to face long-lasting an uncertain litigation proceedings, without even being in the position to benefit of the indemnities that would be due under the Concession, because the latter was retroactively impaired by the Milleproroghe.

During these two years, the approach of the Government has been inconsistent and unpredictable. By way of an example, at the very beginning, it announced the revocation of the concession by means of an administrative measure. Few months later, certain ministerial representative publicly declared that a possible way out could be represented by the exclusion of one of the main shareholders from the company (i.e. Edizione S.r.l., owned by the Benetton family). Later on, the Government announced that the concession would be withdrawn by means of a legislative provision.

In the last few weeks, after months of silence, the Government resumed the ASPI dossier and declared to be in the process of adopting a revocation measure. As of today, it is still unclear if the Government will adopt such measure and the timing provided for the conclusion of this procedure, as the case may be. In the meantime, this controversial approach of the Government is determining a continued drop of the share value of ASPI and Atlantia. This scenario will be further aggravated when considering the outstanding ASPI's 10 billion debt that – in case of concession

revocation - will be face an unavoidable default, with additional consequences on bondholders and the capital market.
In light of the above, it is crucial a prompt and effective intervention of the EU Commission in view of restoring the respect of the proper functioning of Internal Market, in particular free movement of capital as provided by Article 63 TFEU.

## 2.3 Describe the problem, providing facts and reasons for your complaint* (max. 7000 characters):

The Complainant is filing this claim in its capacity of shareholder of Atlantia S.p.A. (**Atlantia**), the company controlling ASPI, the main Italian motorway concessionaire by virtue of a concession granted by the Ministry of Infrastructure and Transports in 2007 (the **Concession**). In particular, TCI is an institutional, long-term investor, and is a large shareholder of Atlantia.

The complaint aims at drawing the Commission's attention on the conduct carried out by the Italian authorities, following the collapse of the Morandi's bridge located in Genoa on 14 August 2018.

As mentioned above, this complaint aims at challenging the measures adopted, for two years now, by the Italian authorities in the motorways concession sectors and which culminated in the adoption of the Milleproroghe Decree, as a last resort for the Italian Government to revoke the Concession without having to pay to ASPI the indemnities provided under the Concession. The unilateral intervention carried out by the Italian Government deprived the concessionaire and its shareholders/investors of their substantial and procedural rights and guarantees.

We hereby wish to clearly bring to your attention on all the facts, acts and measures committed and adopted by the Italian Government and which have led to the violation of the most important European principles that all the EU Member States had to comply with and, consequently, have caused serious harm to the Complainant and the entire investing community.

More specifically, as this Authority might already be aware, after the Collapse, the Government started taking certain actions, driven by mere political and propaganda reasons, that had (and have) dramatic effects on Atlantia's and ASPI's investors (including privates). In particular:

- certain representatives of the Italian Government publicly declared the intention to revoke or, in any case, terminate the Concession, without paying any indemnities, even if they were due under the Concession. The above despite no causes and liabilities for the Collapse had been ascertained (the relevant investigations are still ongoing). Other erroneous and misleading public declarations (e.g. speculations that ASPI's tariffs are higher than the other European countries or that ASPI did not perform its maintenance plan) were spread after the event, to the evident detriment of ASPI, Atlantia and their investors.

- Starting from September 2018, despite having been unreasonably excluded by the reconstruction of the Morandi Bridge, ASPI committed to invest, by 2023, 2 billion euros in network maintenance, of which 550 million euros only in 2020. Indeed, as of today, more than 300 maintenance sites are active on the national network. These activities are possible only thanks to the €900 million loan made available by the shareholder Atlantia, since, following the adoption of Milleproroghe, the merit of credit of both ASPI and Atlantia was downgraded to "junk" level, which consequently blocked access to financing for both the companies.

- In July 2019 the Government required an opinion to an inter-institutional working group, appointed by the Ministry of Infrastructure, on the possibility for the Government to withdraw the Concession. This opinion showed that the revocation of the Concession, as announced by the Government, would not be legally possible unless under the legal framework in force at the time (i.e. before Milleproroghe) and that, by doing so, the Government would have faced risk of litigation and to pay damages for billions of Euros.

- In July 2019 the deputy Prime Minister (Mr. Di Maio) publicly stated that the Concession would have been revoked and that, consequently, Atlantia would have been considered as an "ailing firm" (società decotta). Again, such statement – delivered in the absence of any ascertainment on facts, causes and liabilities – dramatically impacted

ASPI's and Atlantia's private and institutional investors as well as investors potentially interested in investing in a listed company like Atlantia.

- Once the Government realised that they could not revoke the Concession without a substantial risk of succumbing in the subsequent litigation proceedings, having to pay billions among indemnities (as provided under the Concession) and compensations to be paid to the companies for the damages suffered, the Government decided, in December 2019, to adopt the Milleproroghe.

- With Art. 35, the Government illegitimately and willingly circumvent the application of the Concession provisions, providing legal ground for the withdrawal from the Concession without paying the indemnities due on the basis of the Concession. It is self-evident that the provision adopted by the Italian government, devoid of any reliable, factual and technical basis, constituted a violation of the Concession and of the partnership between State and private investors as well.

- In the last few weeks, after months of silence from the Milleproroghe, the Government resumed ASPI's dossier and on 13 July declared to be in the process of adopting a revocation measure. Not surprisingly (again), this lead to a dramatic plummeting of Atlantia's share value in Piazza Affari, marking a 15.2% drop in one single day.

- On 14 July, in the Council of Ministers scheduled to adopt a final decision on the revocation, the intention of the Prime Minister (in a fashion akin to threat), were to revoke the concession if ASPI did not accept all the conditions proposed by the Government. Therefore, the Italian Government reconsidered the re-nationalisation option. ASPI was forced to submit new settlement proposals. Reportedly, the Government reached an understanding with the companies, whose contents are not publicly available. What is sure is that the agreement was driven by political reasons and was reached outwith any legal framework, in breach of the principles of transparency and legal certainty. Atlantia was forced to choose between (a) accepting the reduction of its shares in ASPI, in favour of Cassa Depositi e Prestiti; or (b) have the concession revoked, having to face lengthy and uncertain litigation proceedings.

The above measures have seriously threatened the fundamental principles of the EU Capital Market Union.

With the understanding reached with the Companies the Government, aims at acting in violation of EU principles. Threats of an illegitimate revocation forced the same companies to accept all terms and conditions set out by the Government. There is the risk that the sale of ASPI's shares will be in violation of all applicable market principles, resulting in an illegal expropriation.
In light of all the above, the Complainant asks for this Authority's intervention (as happened in 2006) to bring the infringement of all the principles listed under section 2.2 to an end. Italy should be invited to carry out the sale of ASPI's shares based on clear and transparent procedures, in compliance with the law and applicable market standards.

## 2.4 Does the Country concerned receive (or could it receive in future) EU funding relating to the subject of your complaint?

○ Yes, please specify below ⊗ No ○ I don't know

## 2.5 Does your complaint relate to a breach of the EU Charter of Fundamental Rights?

The Commission can only investigate such cases if the breach is due to national implementation of EU law.

⊗ Yes, please specify below ○ No ○ I don't know

As better explained in paragraph 2.2., the attitude of the Government towards ASPI / Atlantia violates the principle of good administration enshrined under art. 41 of the CFR, pursuant to which every person has to have his or her affairs handled impartially, fairly and within a reasonable time.

## 3. Previous action taken to solve the problem*

Have you already taken any action in the Country in question to solve the problem?*

**IF YES**, was it: ⊗ Administrative ○ Legal ?

3.1 Please describe: (a) the body/authority/court that was involved and the type of decision that resulted; (b) any other action you are aware of.

Between December 2019 and July 2020, TCI tried to contact the following authorities in order to be heard in relation to the Atlantia / ASPI dossier:
1) Letter to the Ministry of Finance Mr. Gualtieri on 21 July 2020;
2) Letter to the Ministry of Transports Mr. De Micheli on 21 July 2020;
3) Letter to the General Director of Treasury Mr. Rivera on 21 July 2020;
4) Letter to the Ministry of Finance Mr. Gualtieri on 13 December 2019;
5) Letter to the Prime Minister Mr. Conte on 10 December 2019;
6) Letter to the Ministry of Transports Mr. De Micheli on 13 December 2019; and
7) Letter to the Ministry of Finance Mr. Gualtieri on 10 January 2020.

3.2 Was your complaint settled by the body/authority/court or is it still pending? If pending, when can a decision be expected?*

None of the abovementioned authorities has ever replied to TCI requests.

**IF NOT** please specify below as appropriate

○ Another case on the same issue is pending before a national or EU Court
⊗ No remedy is available for the problem
○ A remedy exists, but is too costly
○ Time limit for action has expired
○ No legal standing (not legally entitled to bring an action before the Court) please indicate why:

○ No legal aid/no lawyer
○ I do not know which remedies are available for the problem
○ Other – specify

## 4. If you have already contacted any of the EU institutions dealing with problems of this type, please give the reference for your file/correspondence:

○ Petition to the European Parliament – Ref:……..
⊗ European Commission – Ref:.Ares(2020)3173016
○ European Ombudsman – Ref:……..

○ Other – name the institution or body you contacted and the reference for your complaint (e.g. SOLVIT, FIN-Net, European Consumer Centres)

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| On 7 January 2020 TCI sent a letter to EU Commissioners Ms Vestager (Competition) and Mr. Dombrovskis (Financial Stability, Financial Services And Capital Markets Union). TCI received a reply only from the office of Mr. Dombrovskis (ref No Ares(2020)341631) on 30 June 2020. This latter reply contained only a request to TCI to file a complaint pursuant to the format of this template. |

## 5. List any supporting documents/evidence which you could – if requested – send to the Commission.

⚠ Don't enclose any documents at this stage.

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| In addition to the documentation that this Commission may deem relevant for opening an infringement procedure, TCI could provide a copy of all the letters sent to the EU and national authorities listed under par. 3. and 4. above. |

## 6. Personal data*

Do you authorise the Commission to disclose your identity in its contacts with the authorities you are lodging a complaint against?

⊗ Yes ○ No

⚠ *In some cases, disclosing your identity may make it easier for us to deal with your complaint.*