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The “SAPIN » legislation and its effects on tendering and competition in public transport in France »

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1. Foreword

French local governments are in charge of operating their own public urban transport networks. In most urban areas, a private company through a contract signed with the local authority operates the system.

Most of these contracts are now called “délégation de service public” (delegation of a public service or “dsp”). This concept was introduced in 1993 by the “SAPIN” legislation. The main goal of this legislation (that borrows its name from its author, the French Minister of Finance at the time) was to moralize public contracting.

After having presented the concept and the context within which it is used, this presentation will present the new compulsory tendering procedure introduced by the “Loi “Sapin” and its consequences in the operation of public transport networks.

A « dsp » is a contract through which a local authority delegates to a specialized company the operation of a public utility. This may involve or not the coordination of required works or financing. The company (“délégataire”) is in charge of all operations. It draws, within a significant number of years, a “substantial” part of its operating revenues from payments from the users. The length of the contract is thus linked to the size of the investments to be amortized and to the level of operating hazards.

This new legislation has now been implemented for several years and now is an appropriate time to appraise it.

2. Private operation of public services is common and traditional in France

2.1. A brief history: “dsp” is a logical outcome for public transport in France

2.1.1. 1944 – 1968: a period of urban re-development after the War.

In those 24 years, France’s cities and suburbs were re-built. A priority in public transport is given to the rehabilitation of the railway network that had been severely damaged.

Urban transport is not really an issue and is merely considered as an extension of interurban transport. In Paris as well as in most provincial cities, streetcars are being dismantled.

Public transport fleets are aged and outmoded.

The rural-urban migration phenomenon is one of the characteristics of this period. Trips that had traditionally been systematically made using public transport are more and more becoming individual trips. The automobile industry has become a priority of the reconstruction process with the 4 HP Renault or the 2 HP Citroën, which have become the French equivalent to the VW Beetle.

Urbanism and socio-cultural models adapt to the automobile environment. A Highway Trust Fund assigns most of the revenue from the gas tax to highways, including urban highways. During the fifties, most socio-economic indicators grow rapidly: the industry, the population,

the economy... The tertiary sector becomes predominant in the city centres. This increases the number, the frequency and the length of trips.

The third national Plan gives a clear priority to the automobile. 1000 kilometres of streetcar lines are dismantled in provincial cities as opposed to the creation of 110 kms of trolley lines and 250 kilometres of bus lines.

The contrast between Paris and other cities is striking. In Paris, the newly created RATP provides a real urban transport network. In the provinces, cities are more and more designed for the automobile.

In the early sixties, this trend remains dominant and the mathematical models imported by the French engineers from the United States legitimate the process: Colin Buchanan's "Traffic in Towns" confirms that the city can be designed for the automobile. In Paris, the very ambitious highway scheme does not prevent a substantial development of the public transport system. Because of growing rents in the city centre, the system is designed to bring the lower income white-collar workers who cannot afford them anymore to the growing number of intra-muros offices.

2.1.2. 1968 – 1973: the emergence of a new transport consciousness.

The degradation of the urban environment becomes an issue. The May 1968 social events, partly a consequence of this, also marks the beginning of anew awareness. During the preparation of the French fifth national plan, the decline of urban public transport is seen as a real danger for the urban centres.

A study shows that between 1968 and 1973, the number of public transport trips grows slower than population in the suburbs.

In the large urban areas, the problems created by automobile traffic reach a critical level. The commercial speed of buses in provincial towns decreases by more than 5% during this period. Urban development mainly corresponds to the building of major housing projects in the suburbs and those are not adequately served by the public transport systems.

Rail projects such as in MARSEILLE or LYON, already planned during this period, will only be built during the 6th National Plan. 400 MF are spent on experimental projects such as the monorail between LA DEFENSE and CERCY PONTOISE in PARIS, the VAL in LILLE and others. As a reaction to this general trend, average size local governments such as CHARTRES, LA ROCHE-SUR-YON, ANNECY, AURILLAC, BRIVE, ALBI, create their own public transport system from scratch.

The Ministry of Transport finances new transport planning studies. The first national Ministry of the Environment is created in 1971 and it is a symptom of the new awareness of urban inhabitants of the degradation of their living conditions. But it is no challenge to the powerful road administration.

Nevertheless, air pollution leads local governments to analyse and explain the links between the city, the automobile and public transport.

2.1.3. 1973 – 1982: the turning point.

The oil crisis has a direct effect on the urge to redevelop urban public transport. The “Versement Transport (V.T.)” is a new transport tax instituted in Paris in 1971 and it is extended to cities over 300.000 inhabitants in 1973 and to those of over 100.000 inhabitants in 1974. This tax is a percentage of all salaries paid by companies or institutions of over 9 employees and located within the corresponding urban area.

In 1975, V.T. represents 1343 MF in the PARIS Region and 380 MF in the rest of the country. It is thus only after 1973 that all modes of transport are consistently taken into account. The PARIS Region builds the RER (Regional Express Metro) and public transport networks are recreated in provincial cities.

In 1980, three modes of operation of public transport networks remain: direct operation by the local government (17), operation on behalf of the local government by a private company (58) and a variation of concessions (38). Pure concessions are not possible because fares cannot politically be increased enough to cover operating and investment costs. It is worth mentioning that the major French savings bank (Caisse des Dépôts) invents during that period the structure of “mixed-economy” operating companies within which local governments own more than 50% of the shares and the Caisse des Dépôts more than 33%. A subsidiary of Caisse des Dépôts then provides technical assistance to the mixed economy company and actually indirectly operates the network.

Because France has over 36000 municipalities, urban transport authorities are created and called transport organising authorities (“Autorités Organisatrices”). There are various kinds of such authorities.

In 1976, The National Government signed “development contracts” with local authorities in charge of transport. These contracts gave specific details on the quantity and nature of the improvements in public transport these local governments were planning for the following five years. Many started these improvements even before they signed the contracts.

2.1.4. 1982 – 1992, the beginning of decentralization.

During that period, a major law was enacted (Dec 30th 1982): the “Loi d'Orientation des Transports Intérieurs – LOTI- ” or “General Law on Ground and River Transport”.

It induces major changes in the urban and regional transport sector (except in the Paris Region). The main dispositions of LOTI for the urban transport sector are:

- A “right” to being transported for the users and for the population in general
- Policies in favour of public transport
- Organisation and operation of public transport networks
- The financing of public transport
- The restructuring of the “Urban Transport Perimeters”
- Urban mobility plans (PDU in French)

Responsibilities were from now being shared between the local government and the operator. The new role of the local authority in charge of transport was:

- To describe the level and the quality of public transport supply
- To define the conditions for its operation
- To set the conditions for its financing
- To choose its mode of operation and its operating company (through a bidding process)
 - It could operate the system itself, but only through a specially created local public company (with a separate budget and separate accounting) and with an appointed director who, even if he was a civil servant, had to be licensed to operate a passenger transport company (7% of all)
 - It could organise a bidding process leading to the selection of the “best” private company to operate the system (64% of all)
 - It could also create a “mixed-economy” company (in which case the public sector is required to own over 50% of the stock and not more than 80%). Such a company could operate the system just like a private company, even though the President of its board was almost always a local elected official (29% of all)

There were two main constraints in the contracts between local authorities and operating companies (in order to avoid the development of a goodwill):

- Their time-span was limited and was not to be too short or too long considering the scope of the investments to be made by the operating company
- The selected company could not sell them, even for free.
- They were automatically cancelled in case of the slightest change in the identity of the operating company (main stock holder for example).

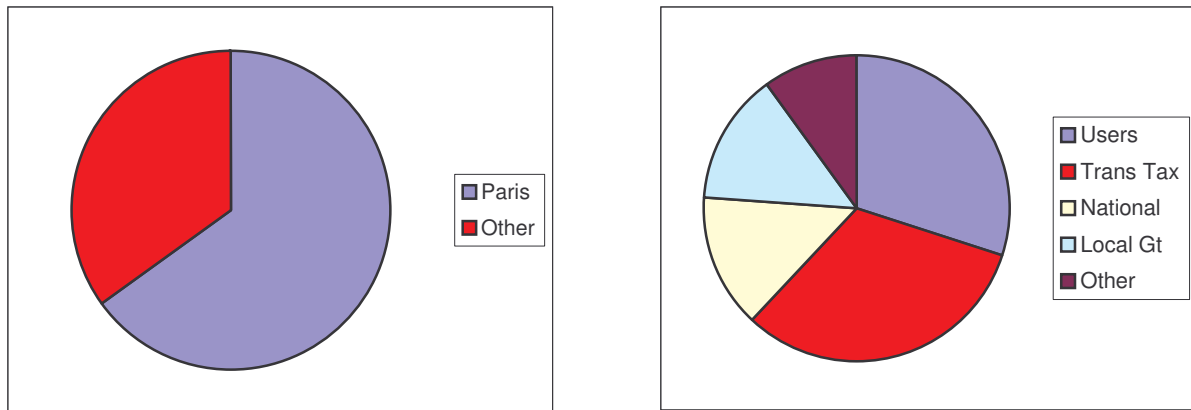
The legislation provides detailed terms of reference for the contracts. It specifies most characteristics of public transport supply, modalities for operations and modalities for financing, roughly following a standardized typology.

In paragraph 3 of article 7, it is specified that the cost of public transport must be paid in priority and in the following order by:

The users who pay fares according to tariffs set by law by the Local Authority LTA's (Local Transport Authorities) through grants and subsidies for investments or operations, according to the contract signed with the operator. They usually try to minimize this, even though it may be as much as 50% of the total cost of operating the system. More rarely, other indirect beneficiaries such as other local governments (Departments, Regions), Chambers of Commerce etc...

In 1990, total expenses of the public transport sector were about 7 billion USD (65% for the Paris Region and 35% for other urban areas in the country). About 30% of these expenses were paid by the users, 32% by private companies through the transport tax (“versement

transport”), 14% by the national government (grants and subsidies), 14% by local governments, 10% by other sources (advertising, other commercial products, bank-loans).



2.1.5. Since 1992: implementation of “SAPIN” law.

France is one of the few countries where private companies on behalf of LTA’s traditionally operate public transport networks. Great Britain is another but only since a few years.

Before 1993 (“SAPIN” Law) and mainly before 1981 (decentralization law), the private companies were mainly operating as “farmers”¹. They were paid a fixed yearly amount for their services and had no real financial stake in reducing costs or in increasing revenues, even though they still did so to some extent. The idea was that because this was a public service, Local Authorities covered the deficit.

This was a long way from the notion of goodwill that was the rule for passenger transport companies at the time when the activity was profitable (which remained the case for non urban companies until the early eighties). Such companies had “acquired” rights on the routes they operated until they ceased to be profitable and were abandoned or in some cases taken over by Local Governments as a consequence of the drastic increase in automobile ownership.

This “taking over” was made possible by the creation of the 1973 transport tax levied from all companies of over 9 employees within the “urban perimeters” of Local Authorities, which decided to do so. Various legislations have had a similar effect on non-urban transport, mainly because of the need to ensure an acceptable level of school bussing.

¹ The notion of « farming » or « farmer » is used here to mean an activity carried out on behalf of a local authority and paid by this authority with no general reference to the revenues yielded by the corresponding activity. In other words, in this paper, the « farmer » is the opposite of a « concessionnaire » who not only owns the infrastructure and all the equipment required by the service, but makes a profit that is a function of operation costs and external revenues from the users or other sources. A « farmer » is for us a company operating just like an « employee » of the local authority. We are aware that this is not the traditional meaning of the word « farmer » but it is useful to our demonstration to make such a distinction.

The 1981 law on decentralization has transferred total power to local governments on public transport and as an average they are paying today about half of the cost of urban and interurban public transport and are able to do so mainly with the levying of the transport tax.

Since these new legislations, and particularly since the “SAPIN” law, public transport operators, which had gotten used to being merely “service” companies, are gradually becoming again classical profit oriented operating companies.

Approved in 1993, the “SAPIN” law is mainly focused on the moralization of public bidding. It includes a section on the delegation of the operations of public services such as water distribution and public transport. One of the consequences of these new legislations, apart from procedural changes, has been to encourage the operators to minimize costs and optimise revenues by setting within the new contracts, a fixed annual public contribution to operations (this contribution actually generally decreases every year of the contract).

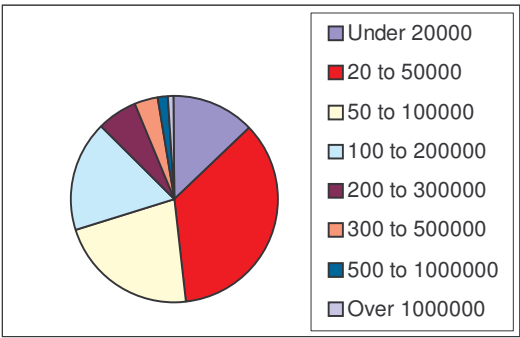
These new contracts make it possible for local authorities to plan exactly the cost of public transport for each year. Given the amount the operators are guaranteed to receive each year, they are now able to function just like a common private company receiving its revenues from its customers. If they do well and increase ridership, they make more profit. If they reduce operating costs with the same level of service, they also increase their profits. They can for example get a better deal from their tire supplier or from their fuel supplier.

Throughout the bidding process, one of the major stakes in the competition is thus the level of the yearly contribution from the Local Authority. The operating company that offers the same level of service for a lower yearly contribution has a good chance of winning the tender.

2-2- The regulatory and institutional framework in France makes it easier to adapt the systems to the needs of the users.

In spite of their small size, 30 French local Authorities have created an urban transport network even though they cannot levy the transport tax (they have to be over 20000 inhabitants to do so). The following table shows the number of LTA’s of each size:

Size of the LTA	Number
Under 20000	30
20 to 50000	81
50 to 100000	51
100 to 200000	40
200 to 300000	15
300 to 500000	8
500 to 1000000	4
Over 1000000	2



In 1999, private companies operate about 3 networks out of 4 in the new “SAPIN” mode (“Délégation de Gestion de Service Public” or “Delegation of the Operation of the Public Service”). MARSEILLES is the only large city where the operator remains the City and PARIS the only where the major operator is owned by the Central Government (RATP).

2.2.1. Local Transport Authorities (LTA's)

The population of France is about 60 million inhabitants over about 550 000 square kilometres (110 /sq meter). There are, in France, four levels of Government with elected bodies at each level: the municipality, the Department, the Region and the Nation. LOTI in 1982 described the responsibility of each level in the transport field.

There are about 36 000 communes municipalities in France. This is the first (“lowest”) level of Government. This is the level in charge of urban public transport. Of course, all municipalities are not urban and also most urban areas are made of more than one municipality. Therefore, the association of most municipalities of a given urban area formed LTA's. The councils of these municipalities have voted to delegate their powers over public transport to the LTA's council.

There are about 100 “Departments”, which are the next larger level of Government. They are in charge of all surface and non-rail transport within their boundaries and outside LTAs. This roughly corresponds to school bussing and a few non-urban bus lines.

There are 22 regions. They are in charge of all transport routes crossing a Department line and of all regional rail lines.

The National Government is in charge of all public transport routes that cross-Region lines and of all international routes. This represents most of French transport supply, especially for the rail mode.

2.2.2. Public transport organisation, outside the Paris Region

The LTA operates the public transport system within the boundaries of its municipalities.²

For example, Lyon is the central city of an LTA created with 25 neighbouring but independent municipalities. Unlike most others, this LTA (which is called the Urban Community of Lyon or COURLY) was forced by the National Government like eight other Urban Communities in France. Its total population is 1,2 Million, more than twice that of the City of LYON.

Some municipalities such as MARSEILLES have decided to operate their urban public transport network alone (although in the recent past, MARSEILLES also has agreed to cooperate with a few neighbouring towns).

In France, in spite of these fairly strong local authorities in the public transport sector, the National level still controls the limits of fare increases and defines general overall urban transport strategies.

There is a national association of LTA's called GART³, which has technical, political and lobbying functions.

² The physical limits of the LTA are called the Urban Transport Perimeter « Périmètre des Transports Urbains » and is mainly a legal concept : within this perimeter, an urban public transport service has to be supplied.

³ « Groupement des Autorités Responsables des Transports »

2.2.3. The operating companies.

There are three main corporations in the urban public transport sector. Their histories are different, but mergers of smaller companies created them. Each is now part of a larger service corporation intervening in other fields such as water distribution or waste disposal. The National Railway Company also has a subsidiary in the urban transport sector but it is much smaller.

VIA Transport is the largest company operating in France. It is a subsidiary of a Bank (PARIBAS). It is now for sale by this Bank and because this is common knowledge, it weakens its commercial capacities. VIA-GTI represents today about 30% of all public urban transport activity including the networks of LILLE and LYON.

CGEA is the second largest operator in France and the first private public transport company in the world. It is a subsidiary of VIVENDI, a French service corporation that also owns about 30% of the French telephone networks and the major water distribution and waste treatment companies. VIVENDI used CGEA, a previously small public transport company as the leading name to buy out a few large operators such as CGFTE in urban transport, CFTA or GAGNEREAU in non-urban transport. CGEA is the mother company of CONNEX Rail, the largest private British rail operating company. In France, CGEA operates about 20% of the urban networks.

TRANSDEV is the third largest operator in France. It is a subsidiary of the publicly owned Caisse des Dépôts et Consignations (CdC), one of the largest savings and investment bank in the world. CdC first started this as a federation of “mixed economy companies” within which the main shareholder was LTA’s. TRANSCET (the previous name of TRANSDEV) brought technical assistance to these “mixed economy companies”. This was consistent with the times when operators were merely “farmers”. Today, TRANSDEV is very similar to its competitors and operates large networks such as TOULOUSE, GRENOBLE or NANTES. With 26 networks, TRANSDEV operates also about 20% of the urban networks.

There are a few smaller companies such as CARIANE (subsidiary of the French National Railways – SNCF – and VERNEY, a subsidiary of MICHELIN.

About 40 urban networks of various sizes are still operated by independent companies, but they often use the technical assistance of one of the five mentioned above.

2.2.4. Public transport in the Paris Region (Ile de France).

The Paris Region, including Paris and its suburbs is by far the largest French metropolitan area (10.8 million inhabitants, almost 20 % of the population of France). Institutionally, its status is different, and the organisation of Public Transport in Ile de France is very specific. LOTI does not apply and the LTA (which is called STP – Syndicat des Transports Parisiens - is controlled by the National Government (12 members out of 24) as well as both the main operators (RATP and SNCF). On STP’s board, there are also representatives of the Regional (elected) Council and of the eight Departmental (elected) Councils. Its President, whose vote is determinant, is the Regional Prefect, appointed by the national government. The main financial source (97%) is the transport tax, which is obviously very large in this Region.

STP is responsible for the choice of transit routes, transport operators, transport operation mode, fare policy, approval and management of the transport operator budgets (however, if it is consistent with regulatory frame for transport co-ordination, municipalities of the Region are allowed to sign single agreements with operators already registered in the transport plan, if they intend to improve their own public transport services).

STP, unlike the other LTAs, receives very substantial financial aid from the National Government for all for major mass transit capital investments. Once STP has approved a given project, the corresponding investments are funded after being reviewed and approved by the “Fonds de Développement Economique et Social – FDES” which is a national organization coordinating different relevant ministries.

In Ile de France, there is a bilateral National Government/Region contract, which defines the main steps of the projects to be implemented and their financing for a five-year (plan) period. There is a project to change this so that STP is more like other LTAs, but the National Government would still be in control.

2.2.5. Relations between LTAs and operators

2.2.5.1. Standard LTAs (outside Ile de France)

Outside Ile de France, 10% of the operators are public, 15% are “mixed economy companies” and 75% are private companies. 90% of the urban networks are thus not directly operated by the LTA. Among those, 30% are operated by VIA, 20% by CGEA and 20% by TRANSDEV.

A change of operator occurs when the contracts expire. These contracts are usually much longer (up to 30 years) when there is a mass transit system such as a metro. In most other cases contracts are for about five years and thus there is a new tender at the end of each period. In most cases, the contract changes but not the company. This is one of the phenomena we have observed since the implementation of the SAPIN law.

2.2.5.2. STP (Ile de France)

The two main operators are RATP and SNCF.

RATP operates the urban metro, part of the Regional Express System (RER) and all the central bus lines. It also performs all studies related to the development of its system, including infrastructure and rolling stock. It has an international division that is meant to develop urban transport operation activity in other countries or more recently in other parts of France such as MULHOUSE or LILLE where RATP brings technical assistance to the local operators.

SNCF operates all suburban rail lines and part of the Regional Express System (RER). Its most recent line is METEOR, which connects two main Paris Suburban Railway Terminals (Gare de l’Est and Gare Saint-Lazare). Its subsidiary, CARIANE, also operates outer bus lines.

APTR and ADATRIF are two organisations of companies operating bus lines in the Greater Paris Region, within the periphery, or from the periphery to the centre as feeder lines to

RATP and SNCF. Their members are either local independent companies, or subsidiaries of VIA, CGEA, TRANSDEV or CARIANE. They carry approximately 20 % of the overall Ile-de-France region regular bus line ridership.

2.2.5.3 The contracts between LTAs and operators

The contracts are very similar to classical concessions, except there is the explicit yearly fixed contribution from the LTA (most of the resources coming from the transport tax). As in most concessions, the operating company can make profits or losses, but there are usually upper and lower limits to this so that risks are actually shared to a variable extent between the LTA and the operator.

Depending on the contracts, this can include investment risks and/or operations risks.

The contracts usually provide indications to the required steps to be taken at its termination. The length of the contract is usually related to the amortization of the investments made by the operator at the beginning. As mentioned above, except when heavy mass transit investments are made, it rarely exceeds five years, so that at the end of this period, the new operator or the LTA usually has to buy these investments from the previous operator for their remaining value (usually rolling stock and sometimes terminals or depots).

When there are justified delays in signing the new contract, the previous contract may be extended by the LTA for a maximum of one year.

The contract must include the following clauses:

- general characteristics of public transport supply, including schedules and the description of the various routes and lines
- the fare structure and the conditions for its variation (within the legal limits)
- financing issues
- the obligation of both parties toward the users
- the description of a general monitoring procedure for the use of public funds

Every year, before June 1st, the operator is required to issue a report, accounting for its overall activity and the quality of the service provided.

In addition, the contracts also usually include a clause describing the conditions for terminating or renegotiating its general terms before its contractual end.

Most new contracts are signed with a fixed yearly contribution from the LTA and provide upper and lower limits for the financial risks of the operators. But even when this is not the case, the “farmer” type contracts are almost never chosen any more. The operators’ revenues are always a function of their ability to improve productivity or to increase ridership or other forms of revenue. Specific operating ratios are used to measure this such as veh.km/salaries, total cost per km etc...

Contracts signed today (in the framework of the SAPIN law) are of three main kinds:

- contracts with a yearly financial contribution from the LTA (“contribution forfaitaire”)
- contracts at a fixed yearly price (“garantie de recettes”)
- “farmer” type contracts (“gérance”).

Type 1: contracts with a yearly financial contribution from the LTA (“contribution forfaitaire”)

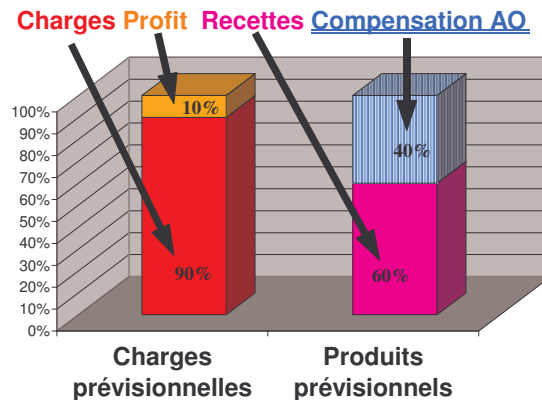
The LTA pays a fixed yearly amount to the operator. This amount may vary during the course of the contract, but such a variation is known in advance and specified in the contract itself.

Other clauses may be included such as:

- a compensation for social discounts to specific categories of users when the LTA requires them: the elderly, the handicapped, the unemployed etc...
- a formula for sharing profits or losses in the event they reach a given level

TYPE 1 CONTRACTS: FINANCIAL BALANCE FOR THE OPERATOR

(the blue section is the object of the tendering process)



“Charges”: operating costs
 “Recettes”: revenues from users
 “Compensation AO”: contribution of the LTA
 “Charges prévisionnelles”: planned costs
 “Produits prévisionnels”: planned total revenues

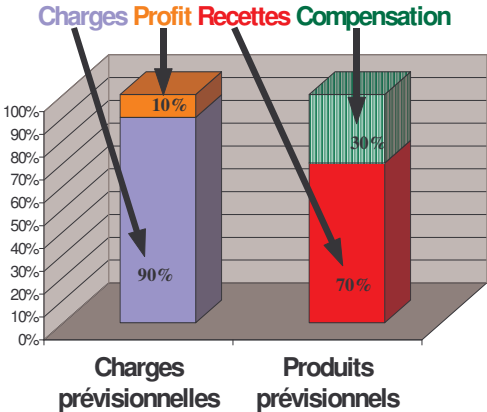
Type 2: Contracts at a fixed yearly price (“garantie de recettes”)

During the bidding process, the operators estimate the cost of operating the system. The LTA chooses the best offer and the contract is based on this estimation of the cost by the operator, whether it is accurate or not. There may be bonuses or penalties related to the measured quality of the service or to the increase in ridership.

The main characteristic of this type of contract is that the incentive is to reduce costs rather than to increase ridership. It is usually chosen by LTAs that want to maintain a minimum transport supply at the best operating cost.

TYPE 2 CONTRACTS: FINANCIAL BALANCE FOR THE OPERATOR

(the blue section is the object of the tendering process)



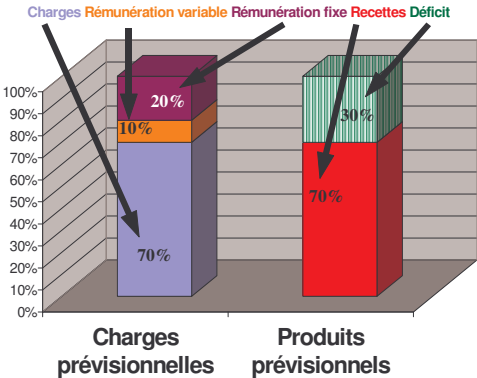
Type 3: “Farmer” type contracts (“gérance”).

These are now considered old-fashioned contracts: they correspond to the previous generation of public transport contracts. But they are a little different from those of the past decade because they usually include some level of operating risk. The principle is that the LTA compensates the operations’ deficit within the limit of the annual budget it has approved.

The operator's turnover is actually proportional to the size of the public bus network. There usually is a formula to induce the operator to improve productivity and to increase ridership.

TYPE 3 CONTRACTS: FINANCIAL BALANCE FOR THE OPERATOR

(the purple and orange sections are the object of the tendering process)



In 1998, there were:

- 32% type 1 contracts
- 37% type 2 contracts
- 20% type 3 contracts
- 11 % others (direct operation by LTA)

2.2.6. Other European countries

A 1997 European research project, called ISOTOPE, compared the urban transport organization of different European countries.

There are two main categories of countries: those where the initiative is mainly public and those where it is a competition among private companies.

It has shown that, in certain countries, the initiative comes from the authority, with a legal monopoly, and in the others, it is a market initiative.

When it is public, it may be through concession to private companies (HELSINBURG - Sweden), or through central planning with competitive tendering (COPENHAGEN – Denmark). When the ownership is public, there may be a form of concession limited to operations like in many French cities, or the network may be operated directly by the local government (BRUSSELS – Belgium).

When it is private, it can be free competition (MANCHESTER – Great Britain), or through licenses to private companies (SETUBAL – Portugal) or to public ones (KÖLN – Germany).

2.3 Side effects of decentralization

The 1981 law on decentralization mainly had two effects:

- The rising of large urban transport corporations such as CGEA, VIA-GTI or TRANSDEV
- The take over by these three companies of most urban transport contracts enabling them to control the market

Because of the relatively high technological level required to operate an urban transport network (unlike non-urban lines), smaller companies cannot keep up with technological improvements and either they pay for the technical assistance of the larger ones, or they are bought by them.

As a consequence, the three leaders largely control the market. There is an unspoken agreement that they really only compete to win networks operated by smaller companies or directly by LTAs.

Often, even though they are aware of this “agreement”, the LTA’s do not mind because for various reasons, they are satisfied with their operator. But this situation is illegal. Like in most western countries, there is an “anti-trust” law in France. There even is a national administration, with local offices, that is supposed to sit in tender committees and check that the competition is real. But this is very hard to really control, because the companies try to conceal this situation.

But articles 85 and 86 of the Rome Treaty allow non French European companies to take part in bidding processes in France and for the first time, in 1999, a non-French (Spanish) operator entered the French market by winning the contract for the urban transport network of PERPIGNAN, a town of 100000 in the South of France, at the Spanish border.

3. The “SAPIN” Law.

We have described the institutional situation of Urban Transport Operation in France and we have mentioned the importance of a new legislation enacted in 1993 in this respect, the “SAPIN” Law. We mentioned that one of the main goals of this legislation was to improve real competition in the franchising of public services such as water distribution, or public transport, mainly because the decentralisation process, giving more power to the local level, had led to a certain level of corruption. Has it really achieved its goal? Will it really improve competition in the future? What effect will it have or has it had on the “agreement” between the three leading corporations in the urban public transport sector?

Before 1993, LTAs were totally free to choose the company they preferred without any competition, even though in most cases there was a bidding process. This was due to the fact that they usually owned the infrastructure (terminals etc...) and often the rolling stock and that they merely franchised operations. Urban public transport was thus not submitted to the general code⁴ public authorities have to follow in France to buy equipment or services.

The “SAPIN” law (Mr. SAPIN was a socialist Minister of Finance) was meant to moralize public bidding, especially for public services. Before the enactment of the Law (early nineties), major corruption had been uncovered and scandals had erupted and had been largely described by the press. This corruption happened in various fields such as waste disposal, water distribution and also public transport. The names of high-level executives of the major corporations involved in those fields were mentioned. The courts sentenced some of them, some served jail time...

But the main focus of the courts was on local elected officials who used their elected positions to get richer or to obtain various advantages such as free travel or free high priced gifts. Actually, even a Minister of the central Government went to jail. The political parties had actually set up highly sophisticated private entities, which had as their sole activity the gathering of funds from companies bidding for urban public services...

⁴ « Code des Marchés Publics » : a code that describes in great detail the rules that have to be followed by public authorities in France (national or local) for the purchase of goods or services. This code is very strict and is based on « fair » competition. Usually, the cheapest good has to be purchased if the quality is equivalent and has the characteristics described in the terms of reference of the tender.

This is why Michel SAPIN submitted his legislation to the French Parliament which voted in favour of this with a fairly large majority: which deputy or which senator could claim that he was not against corruption?

The Law has a very clear (and simple) objective. It is for “clarity in public tendering” and “against corruption in public services”. In the field of urban public transport, it has introduced a compulsory tendering process.

It has introduced real changes in the relationship between LTAs and operators, but six years after its enactment, all changes are not yet clear but it is still possible to draw preliminary conclusions.

For the first time in France, this law sets a framework for local authorities to choose the best way to run a public service. It is not dedicated to the transport sector but it applies to it. In theory, it helps the LTAs to make the “best” choice given the local framework: public or private operation and in the latter case by the best company, with the best service at the best price...

3.1. Main features of the Law.

Voted on January 29th 1993, it defines the rules for delegating the operation of public services by local governments or by the national administrations.

The main difference with the general “code” (code des marches publics) described above is that it allows public entities to negotiate with one or more of the bidding companies in order to finalize the best contract for the “delegation of the public service” (and not necessarily the cheapest as was required by the code). This notion of “delegation of the public service” is the central concept of this law.

Since this law, there is a clear distinction between the purchase of equipment or straightforward and one shot services (such as repairing or cleaning a street, building a parking lot etc...) and the delegation of public services (such as operating a parking lot, or urban public transport). The law has actually introduced tendering where it did not exist before: operating a local publicly owned museum for example is now a “delegation of a public service”. A “delegation” usually involves some form of responsibility, on behalf of the public authority, towards the users.

Some of the main principles are:

- The delegating authority must be able to control all expenditures by the operator which implies clear, complete and simple accounting,
- The delegating authority must be able to control, in conjunction with citizens and users, the adequateness and quality of the service provided
- The operator must be free to operate as it chooses within the general framework of the initial terms of reference
- The operator has to produce a yearly report to the local authority including all financial and technical required information on the operation of the service

- As a consequence, at the end of the contract, the local authority has to be able to sufficiently master the financial and technical elements of the service to prepare the new terms of reference in the best interest of the citizens and the users

In 1999, there is still a debate for certain services as to whether they should be provided through the “code des marches publics” or in application of the “SAPIN” law. The Conseil d’Etat (National Legal Council) ruled on April 15th 1996 that the distinction was that the “delegation of a public service” (SAPIN law) is required whenever the cost of operation is substantially covered by the price (“fare”) paid by the users. One of the consequences of this for example was that it ruled out school bussing as being a “delegation”. It is nevertheless relatively subjective because the word “substantially” does not necessarily mean “mainly”.

One of the main difficulties in the implementation of the law is the very notion of “public service” which no law has ever defined, just like the general notion of “public interest”. These notions keep changing and a given service may be considered “public” at one time and “private” at another. Although education is an example of a service the State cannot delegate, it remains a good example of this debate and of this relatively political nature: if education is a public service, what is the status of private schools? It is obvious that if they were not profitable, they wouldn’t exist. For the same reason, the same debate could take place if urban public transport was profitable and did not require financial public participation. This situation would of course imply a drastic increase of fares and is not realistic in France at this time, but it has its advocates.

3.2 A recent study on the preliminary impacts of the “SAPIN” law.

In 1998, CERTU, a national ministerial technical institution dedicated to urban transport and networks performed a study⁵ involving 22 LTAs that had gone through a “SAPIN” tendering procedure. Several observations were made during this study and some preliminary conclusions may be drawn.

3.2.1. The sample

6 of the LTAs studied are a single municipality and 16 are constituted by more than one municipality.

The population of these LTAs is as follows:

Less than 20 000 inhabitants	2
Between 20 000 and 50 000 inhabitants	8
Between 50 000 and 100 000 inhabitants	4
Between 100 000 and 300 000 inhabitants	8

The 22 LTAs studied are not the largest ones in France. They are mainly small or average size urban areas.

⁵ CERTU : Centre d’Etudes sur les Réseaux, les Transports, l’Urbanisme et les Constructions Publiques. « Centre for Studies on urban planning, transport, utilities and public constructions ». CERTU is largely financed by the National Government to perform such studies.

Before the tendering process, 13 out of 22 had a national company as its operator. There were 7 type 1 contracts, 6 type 2 contracts, 8 type 3 contracts and one instance where the LTA operated the network itself.

Such a sample is not representative of the national situation (22% type 3 contracts and not 36%).

Duration of the previous contract :

Less than 3 years	1
3 years	1
4 years	1
5 years	4
6 years	7
7 years	2
8 years	1
9 years	2
10 years and more	3

Most of the contracts last between 5 and 7 years.

3.2.2. Main lessons from the survey

The first lesson is the duration of the new tendering procedure : it lasts an average of 8.5 months.

In 4 cases the procedure lasted less than 6 months, and in 4 others more than 12 months.

To prepare the terms of reference and the negotiation with the selected operator (s) (second step of the procedure), two thirds of the LTAs a technical and/or economic assessment of the previous contract, and 6 of them hired an external consultant for a complete audit (technical, financial, economic and legal).

The auditing process sometimes led to a substantial change in the substance of the tendering (new or modified routes, different rolling stock, introduction of new rights of way, better coordination with other transport modes etc...) mainly because the consultant brought his independent and new approach to the local transport scheme.

3.2.2.1. The first step of the tender : the choice of operators allowed to compete.

In most cases, there were 4 national candidates and one local or foreign. The main 3 corporations were almost always candidates and in 11 LTAs, only national companies were candidates.

Usually, all candidates remain for the following step of the procedure, except when it is clear that the candidate is not sufficiently technically or financially strong.

3.2.2.2. The second step of the tender: actual bidding.

Companies had between 4 and 8 weeks to bid. Their proposals could be very different technically, but they had to be supported by relevant and realistic considerations and data.

Number of actual proposals:

1 proposal	In 8 cities
2 proposals	In 5 cities
3 proposals	In 5 cities
4 proposals	In 4 cities

There were much less proposals than accepted candidates. It can be assumed that some candidates already knew in advance they would not actually make a proposal, and some others decided not to so after informal discussions with other candidates or with the LTAs representative.

Actually, in over 1/3 of the tenders, only one final proposal was received by the LTA, which made the comparison somewhat difficult...

Following the law, the proposals were analysed (often with the help of an external consultant) by a commission with five members (all local elected officials from municipalities of the LTA).

3.2.2.3. The final step: negotiation with the chosen operator (s):

Number of remaining candidates.

The number of candidates remaining after the first proposals were analysed and with which the SAPIN commission negotiated is as follows:

1 candidate	14 LTAs
2 candidates	5 LTAs
3 candidates	2 LTAs
4 candidates	1 LTA

In two third of the cases, the LTA negotiated with only one candidate. It shows that this final step is probably the most important in this new procedure.

In a few cases (5), 2 candidates remained for this final discussion and the final choice was only made after a lengthy bargaining with both.

Final discussion with more than 2 candidates is very rare (only 3 LTAs in this sample).

Local vs. National candidates.

7 of the companies taking part in the final discussion (among 34) were local.

Object of the negotiation.

Financial issues are the most common in this step (21 cases) and technical issues less common (11 cases).

Change of operator.

The operator changed in one third of the cases only.

Change of type of contract.

The type of contract was changed also in one third of the cases and always toward type 1.

This trend is not only a consequence of the SAPIN law. It can mainly be explained by the will of an LTA to give more autonomy and responsibility to its operator and to transfer most financial, technical and social risks to him in order to better plan the municipalities’ and the LTA’s budgets.

But it appears that the new law encouraged such changes.

Duration of the new contracts.

7 are shorter, 6 have the same duration, and 9 are longer, the average length being 6.5 years.

This is not a major change from the previous situation. The reason is that in LTAs where public transport investments are mainly limited to renewing the rolling stock, there is really no need to extend a contract as long as when the operator is lead to make major investments.

Opinion of the LTAs executives on the implementation of the SAPIN law.

It was favourable in 20 cases. The advantages mentioned were:

A better preparation of the terms of reference	9
A sounder competition	5
More direct involvement of the LTA in the choice	5
Financial control	4
Less corruption	4
Better and more thorough negotiation	1
Clarification of the roles of the two parties	1

The disadvantages mentioned were:

More constraints, and administrative procedures	9
Duration of the procedure	4
More corruption	2

3.3 Consequences of the law

3.3.1. Privatisation and competition is a trend in Europe for public services, but not so much in France

As a consequence of the recent EEC legislations, in many member countries, there is a trend towards liberalisation of public transport. The extreme case study of Great Britain is unique, but other countries are following this trend such as Italy where the previously public companies are trying to keep their networks.

The case study of PERPIGNAN (already mentioned) will probably give a better insight in the real effects of the law. It is to be analysed by CNAM in the close future.

A field analysis will be performed to help understand the real reasons for this unusual choice of a non-French company to operate the network on July 1st 1998. The signed contract is of type 2. The Deputy Mayor of PERPIGNAN when asked, gives the following explanation:

“ The winner had the best offer financially and technically. He is now committed to modernize the fare collection technology and to install a GPS within the buses for improved regularity and safety. The final offer was for 5 million USD per year as opposed to 7 million for the offer by VIA-GTI, the previous operator.”

At the same time in SPAIN, VIA-GTI was offering to operate Spanish networks at incredible low prices, and the PERPIGNAN officials decided there was no real fro them to pay so much more just to keep a French operator.

Basically, the strategy used in PERPIGNAN by the Spanish operator was very similar to the strategy used by VIA-GTI in SPAIN: strong commercial action, investments by the operator (about one million USD), accepted “industrial” operating risk.

The duration of the contract in PERPIGNAN is 9 years. Today it seems that the Spanish operator is not making losses. Actually, it seems that ridership is increasing. This situation is very unusual because in most cases foreign candidates are not allowed to follow the second step of the procedure and to make a proposal. In the rare cases when they are allowed to, they are never selected for the third step (negotiation).

It is likely that the Prefect, representing the National Government, would have probably opposed this choice if it had been based merely on the geographical origin of the candidate (PERPIGNAN is on the Spanish border), but after analysing the process, it appeared that the choice was based on sound technical and financial comparisons.

It will be interesting to compare the case of PERPIGNAN not only to other French LTAs, but also to Spanish cities where it seems Spanish operators make less efforts than in PERPIGNAN. A follow up of the tenders in MILAN, FLORENCE and ROME in ITALY will also be very useful for the same reason.

3.3.2 Effects on building new metros and light rail systems in France

Another presentation will deal in depth with this aspect during this conference.

In theory, the SAPIN law was expected to induce more building of transport infrastructure in French urban areas: it is almost always impossible to follow a proposed budget and a proposed planning for such projects and its political weight should have brought to this procedure a good audience.

Four urban transport concessions in France in the past 15 years seem to have no real future as such.

Two of them (Orlyval in the PARIS Region and the VAL in Toulouse) have been bought back by the LTA. In the first case, the reason was a large gap between forecasted ridership and actual ridership. In the second case, it was the exact opposite...

A third project (GRENOBLE) is a case of a sort of “double concession”, comparable to a BOT, but it is legally under dispute.

The fourth project (STRASBOURG) is generally considered as successful. The operator is a mixed economy company (the LTA holds more than 50% of the stocks).

Apart from ROUEN (where there is a concession for the streetcar system called the “METROBUS” and CLERMONT-FERRAND, 15 other LTAs are considering light rail or LRT’s but none of those are considering a concession.

3.4 The European legal framework

2.4.1. The present situation is uncertain

If an LTA wishes to build and/or operate a new line or network, it is not always obvious whether it should apply the SAPIN law or the “code des marches publics”. We described above what the theoretical difference is. As we showed, the interpretation of the word “substantial” is debatable.

If the “wrong” procedure is chosen (and only the Prefect can eventually decide this), the risk is the cancelling of the entire procedure, whatever its cost, by the administrative judge. The direct effect may be, apart from the cost, a possible discontinuity of the public service and great political damage for the following elections.

But the interpretation of the rules is not easy, whether at the national level, nor at the European level.

At the national level, jurisprudence can be based on a few remarkable court rulings.

In the case of DOUAI in 1994, the judge ruled that in the case of a contract where the operator takes part of the financial operating risk, the SAPIN law should be applied.

The debate is clearly whether the level of coverage of operating costs by direct revenues from the users is the real issue (does “substantial” mean 30%, 50%...?) or if it is the notion of financial and operating risk

The question is not solved and the European legislation does not either provide an answer. It actually ignores the French notion of “delegation” introduced by Michel SAPIN.

The European framework is mainly based on 4 “Directives” approved in 1992 and 1993. The main objective of the European Commission is to widen the scope of national public contracting. In order to achieve this, competition is considered as an important means: to enable competitive suppliers to identify new markets and thus to enable a better allocation of public resources improving quality and preventing corruption.

3.4.2 The current clarification process.

The situation needs to be clarified, and several efforts have recently been made, or are going to be made.

The National Government of FRANCE considering that school bussing is massively financially supported by public authorities (the Departments) decided that the SAPIN law did not apply in this case, even though part of the revenues (but not a “substantial” part) come almost always directly from the users.

A new law is now in preparation in FRANCE. It will clarify all procedures by defining precisely the differences between the two procedures.

The European Commission is not opposed to the French conception of “delegation” of public services. A “directive” is in preparation to clarify the notion and the rules of public contracting. Part of this directive will deal with “concessions” and this should help in the French context or at least lead to consistent court rulings.

As a conclusion, it seems that the relative flexibility of the SAPIN law will be used as a model, at the National and European levels to finalise in the coming years a French and European framework for the delegation of public services and particularly urban public transport.

4. General Conclusion.

The history of urban public transport in France has led to the birth of large urban transport corporations that operate urban transport networks on behalf of Local Transport Authorities (LTAs). The decentralisation law of 1981 has given authority to the local level for the choice of the mode of operation of urban public transport and for the choice of the operator.

Because, just like in the case of other urban public services, this led to deviant behaviours on the part of the elected officials in charge and on the part of the companies, the French Minister of Finance, Michel SAPIN had a specific legislation voted by the French Parliament, this legislation introduced the legal notion of delegation of the operation of urban public transport networks.

This law, describing the compulsory procedure required to choose an operator (“délégataire”), allows in theory the LTA to choose the best solution according to the local context and to its

own criterion. It also encourages more competition among the operators and is meant to lead to the best proposal in the framework of an open competition.

In this respect, it is correct to state that the SAPIN law is a real improvement in the French institutional framework.

But this law has not had a revolutionary effect on the French urban public transport sector: the market shares of the three main corporations have not substantially changed and only one foreign company took over a French in the past six years.

It should be expected that changes will occur with the opening of a real European urban transport market, which is to be expected in the coming years. Because of their history and of their strong position acquired world-wide based on their French experience, it is likely that the large French corporations will play a major role.

Short vitae of the authors.

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