



POLICY ROUNDTABLES

Methods for Allocating Contracts for the Provision of Regional and Local Transportation Services 2013

Introduction

The OECD Competition Committee debated Methods for Allocating Contracts for the Provision of Regional and Local Transportation Services in February 2013. This document includes an executive summary of the debate and the documents from the meeting: written submissions from: Bulgaria, Colombia, France, Indonesia, Ireland, Italy, Japan, Latvia, Lithuania, Peru, Poland, Russia, Spain, Chinese Taipei, Turkey, Ukraine, United Kingdom, United States, and BIAC as well as two expert papers and a summary of the discussion.

Overview

Many jurisdictions have introduced competition in the provision local bus services, either by allowing competition in the market between providers or by tendering the right to be the sole provider of these services on a route, or a number of routes. In some jurisdictions, however, these services are still provided by local authorities. The discussion reviewed recent country experiences and compared merits and limitations of different approaches, with a special focus on how to best structure and run tenders for these services so as to minimise costs, guarantee a good level of service and ensure that economies of scale are exploited.

The discussion also examined a recent reform proposal in the state of Victoria (Australia) aimed at easing restrictions on the number of taxi licences, while minimising the impact on the value of existing licences, and at increasing the quality of the service.

Related Topics

Taxi Services Regulation and Competition (2007)
Regulating Market Activities by the Public Sector (2004)
Access to Key Transport Facilities (2006)
Concessions (2006)
Structural Reform in the Rail Industry (2005)

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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

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**METHODS FOR ALLOCATING CONTRACTS FOR THE PROVISION OF REGIONAL AND LOCAL
TRANSPORTATION SERVICES**

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This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Methods for Allocating Contracts for the Provision of Regional and Local Transportation Services held by the Competition Committee (Working Party No. 2 on Competition and Regulation) in February 2013.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à la table ronde sur les méthodes d'attribution de marchés de services de transport régionaux et locaux qui s'est tenue en février 2013 dans le cadre du Comité de la concurrence (Groupe de Travail N° 2 sur la concurrence et la réglementation).

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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EXECUTIVE SUMMARY

By the Secretariat

Considering the discussion at the roundtable, the delegates' submissions, as well as the panellists' presentations and papers, several points emerge:

- (1) *Restrictions on the number of licences in taxi markets are a key impediment to competition and to the delivery of its benefits to consumers. Current reform proposals in the state of Victoria (Australia) aim to gradually increase competition in taxi markets by increasing the number of licences through the issue of an unlimited number of licences at a fixed price whose real costs will decline over time. This novel approach is likely to be politically acceptable, as the costs imposed on existing licence owners by the reform are relatively small and spread over time, while benefits will accrue more swiftly.*

Recent reform proposals in the state of Victoria (Australia) aim to solve competition problems caused by quantity restrictions in taxi markets in a novel way. The proposed changes to the licensing regime would induce a relatively slow, but full market opening. The slowness of the reform would avoid a sudden drop in the value of existing licenses and, thus, potentially costly compensations to current licence owners by the government. Barriers to entry would be gradually reduced by issuing an unlimited number of additional licenses at a fixed nominal fee. At the start this would be very close to the current value at which licences are sold on the market, but its value would decline in real terms over time. The discounted total value of existing licences would consequently be reduced relative to today's level, but this would happen slowly avoiding the steep drop that would result from an immediate full market opening. As a consequence the costs of the reform to existing licence holders and the government would be limited, while benefits are expected to materialize fast enough to create sufficient political momentum for the reform to receive support from the public.

- (2) *Price regulation is seen as necessary, but more competition on tariffs could be allowed.*

The proposed reform suggests that taxi fares should be deregulated in market segments where competition is likely to emerge without damaging the users, e.g. where taxis are pre-booked, while in areas where some form of price regulation remains necessary prices should not be fixed but only set as a maximum ceiling. The introduction of a more efficient and flexible price structure would allow prices to decline at non-peak time and may increase the willingness of taxis to perform short trips by allowing for higher fees for such trips.

- (3) *Local bus transport services have features that render, in most cases, competition for the market more appropriate than competition in the market.*

Competition for the market is the most common and, in many cases, the most appropriate form of competition in this sector, though some countries have chosen to allow competition in the market, in general on commercial viable routes. The reasons why competition is more effective when it focuses on obtaining the licences to provide the services, rather than directly on the users themselves are many-fold. Some the reasons that have mentioned are that passengers are mostly interested in the timing of service rather than in the nature of the provider, this creates strong

incentives for opportunistic behaviour by bus operators, i.e. to steal customers by changing their timetable at the last minute and arriving just before their rivals. Further, a number of routes are not commercially viable, but providing services on them may be important for social reasons. Subsidies are thus necessary. Tenders, if well designed, permit to determine whether subsidies are really necessary and at which level.

- (4) *To ensure all benefits of competition the tender procedure for the licences to provide bus services has to be carefully designed so as to guarantee a number of effective bidders.*

There is a strong consensus among the delegates that tenders do not automatically bring about the benefits of competition, but that a satisfactory outcome depends on their careful design. In particular barriers to bidding and entry need to be low, because effective tenders require that a sufficient number of bidders participate.

Barriers to bidding can generally be kept low through a transparent and non-discriminatory award procedure. The award criteria have to be clearly defined in advance and bidders must be well informed. Reduction in uncertainty from tender participation increases the incentives to submit a bid.

There is also some evidence that complex tender procedures deter bidders, in particular smaller ones, because they impose a high participation cost. If smaller bidders are to be effective competitors, tender procedures should be kept as simple as possible.

In addition, information about the award process should be collected by the awarding authorities and, as far as possible, made publicly available. When a body of ex-ante and ex-post performance data exists, this helps the awarding entities to acquire information on the bidders, to evaluate behaviours in subsequent bidding rounds thus identifying more easily any signs of collusion, and to improve the procedure over time. This data also helps potential participants to assess in advance how they are likely to fare against the criteria set in the bidding process and thus to better prepare their bids. In particular, new entrants benefit from this information as they have an information disadvantage compared to the incumbent. Both effects can decrease barriers to entry and increase the number of effective bidders. The collection of this information also ensures transparency and accountability about the award process. However, for the data gathering and analysis process to be useful and effective the awarding entity needs to be endowed with the appropriate skills.

Delegates further agree that effective tender procedures require the awarding authority to be able to exercise some discretion. This would allow it to “resurrect” bids that do not prima facie fulfil all tender criteria or to exclude bids that are not reliable (e.g. because clearly overoptimistic about their performance and unlikely to deliver). However, the use of any discretion should be done in a very transparent manner to avoid abuses and not create uncertainty, which may affect the participation rate. Discretion can be appropriately exercised if the awarding entity has the right expertise and competences and if does not act on flawed incentives (e.g. the desire to favour a specific bidder in which it has a financial interest). Importantly, if the awarding entity uses discretion, the decision-making process should be transparent to ensure accountability.

Tender processes can only be effective if the awarding entities do not have conflicts of interest. Conflicts of interest can result from the entity having a financial interest in one of the bidders. The more transparent the tender procedure and the clearer the award criteria, the more difficult it is for the awarding entities to act on the basis of flawed incentives. Effective ex post regulation will also make it more difficult to act on flawed incentives. In other words, if failure to fulfil the contract is penalized, there will be reduced incentives for a local authority to award the contract to a bidder

that may not be able to deliver at the conditions agreed at the time of the award. Therefore, if decision makers are “embedded” in a system of checks and balances, it is less likely that they can act on flawed incentives.

In summary, tenders that are simple, transparent and non-discriminatory and that specify clear award criteria tend to attract larger numbers of effective bidders. A good choice and hence a good and certain delivery of the services is ensured when the relevant decision makers are ex-ante well informed about the quality of the bidders, enjoy some discretion in the selection, which they exercise in a transparent and competent manner and they act on clear incentives to award the contract to the bidder that provides the best value for money.

- (5) *Barriers to entry and expansion in the markets for local bus services should be low to avoid preventing new entrants to bid.*

Barriers to entry and expansion potentially prevent new and smaller bidders from taking part in tenders. Some of these barriers can be mitigated through the appropriate design of the tender procedure and of the contracts so as to remove asymmetries between large and small bidders and between incumbents and new bidder.

In some countries, extensive contract terms are seen as a barrier to entry because they are closing up the market for long periods of time. However, since new and smaller operators need some long-term commitment to amortise their investments, contracts should not be too short. Hence the appropriate balance between these two requirements needs to be struck.

Delegates generally expressed the view that large-scale contracts, which include numerous routes, can create barriers to entry for smaller bus operators. Often large contracts are justified on the ground that they allow operators to exploit economies of scale. However, while it is difficult to determine the size of scale efficiencies in advance, reducing barriers to entry is important. An effective solution suggested by the experts is to tender small contracts (including one or very few routes), but to do so simultaneously. Hence, no artificial barriers to entry are created, but operators are allowed to group routes and take advantage of economies of scale to extent they consider it efficient.

Evidence on whether investments in buses, depots, and staff pose a significant barrier to entry seems to be mixed. Tenders in London appear to have a high participation rate and lead to good results even if staff and physical infrastructure have to be provided by the winner. The French system (outside Paris) fares considerably less well, although physical infrastructure is usually owned and provided by local authorities to the winners. This suggests that investments are not a crucial barrier to entry and that secondary markets for the necessary infrastructure can develop.

The amount of risk operators are required to bear can also generate barriers to entry. Small operators, and often also new entrants, like to have the option to shift the revenue risk to awarding entity, especially where fare levels are outside its control. Gross-cost contracts allow this because the operators bid to receive a specific amount to cover their costs (including some level of profit), while local authorities keep the fare revenues and bear the relative risk. In addition to reducing the risk faced by the winning operator, gross cost contracts also have the advantage of reducing the information asymmetry between new entrants and incumbents with regard to the level of the revenues. However, it might not necessarily be possible or desirable for all local authorities to bear the revenue risk. The alternative option is net-cost contracts, where the operator keeps also the revenues and relieves the local authority from this risk.

- (6) *The tender design should minimise the probability of collusion, as this can undo any of the benefits tenders can bring.*

According to the experts there is potentially a tension between open and transparent tender procedures, generally asked to ensure accountability and reduce information asymmetries, and the potential for collusion. The reason is that when bids are disclosed it is easier for colluding players to detect and punish deviating behaviours. However, clear award criteria and transparent procedures are likely to increase the number of effective bidders and this then makes it more difficult, *ceteris paribus*, to sustain collusion. In addition, if the tender is well designed and barriers to entry are kept low, more players are likely to take part in the tender and again there is less potential for collusion. Further a full information environment allows the awarding entity to have considerable information about the bidders and their behaviour and makes it easier to detect possible signs of collusion.

- (7) *When a contract is awarded and the winner becomes the sole provider of the service for a certain number of years it is necessary to ensure that safety and quality meet satisfactory. Adequate incentives and appropriate ex post monitoring are essential.*

Ensuring the quality of the services provided is not easy to achieve. Contracts that focus on a few performance criteria that are easy to observe and measure and that allow for some flexibility to respond to changes in transport users' needs seem to work best in ensuring good quality of service for the duration of the contract. Further contracts that include rewards, such as an extension of their duration, if given quality standards are met also appear to work well.

Additional incentives can be provided by having a clause that allows terminating the contract if there is severe underperformance. But the experts have highlighted that if there is no willingness to apply this clause and terminate the contract, providers have no incentives to fulfil the requirements of the contract and meet the required quality standards. Further, this may also lead to providers making very low bids to win the contract and then asking to renegotiate because they cannot deliver. If these behaviours are not sanctioned, tenders become ineffective in delivering the benefits of competition.

It follows that some form of ex post regulatory system needs to be in place to monitor the operators' performance, to ensure that standards are effectively met and to verify that are effectively contracts adhered to, before any reward or punishment is awarded.

- (8) *The legislative framework needs to support the use of competitive tenders in local transport markets. Advocacy from competition authorities can help.*

While it is recognised that the factors discussed above play a role in ensuring that tenders are successful, national legislation in the sector has to lay the ground by encouraging the use of competitive tenders for the allocation of licences in this sector. Many delegates reported that too often the existing legislation leaves ample room for the direct award of the contracts by local authorities and does not provide very specific indications on when and how to organise tenders. In many jurisdictions, especially within the EU, this has enabled local authorities to effectively defer the introduction of competitive tenders.

In this area advocacy by competition agencies can be every effective by: leading to better legislation, obtaining the annulations of anticompetitive decisions by awarding authorities, when the agencies have the power to challenge such decisions, and deterring awarding authorities from adopting non-transparent and non-competitive allocation procedures.

CALL FOR CONTRIBUTIONS



BETTER POLICIES FOR BETTER LIVES

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

Competition Committee

Working Party No.2 on Competition and Regulation

The Chairman

COMP/2012.140

19 November 2012

To all Competition Delegates and Observers

Re: WP2 Meeting on 25 February 2013

Dear Delegate/Observer,

In the October WP2 meeting it was decided to devote the February 2013 agenda to two main items:

- (i) a Roundtable discussion on the methods for allocating contracts/licences for the provision of local and regional transportation services; and
- (ii) a discussion of the Competition Authorities' annual reporting that will focus on the assessment of the impact of the enforcement and advocacy activities undertaken in the previous year.

On the first item, we shall share experiences on how contracts/ licences for the provision of local and regional transportation services are allocated. The main aim of this roundtable discussion is to understand the tendering/allocation mechanisms used in different jurisdictions to ensure greater competition in the provision of local and regional bus services and to examine the advantages and limitations associated with them. In addition, Prof A. Fels (Australian-New Zealand School of Government) will present the main policy conclusions that emerged from the inquiry on how best to regulate taxi services in the State of Victoria (Australia). The investigation was led by Prof. Fels and it has been completed in recent months.

The discussion on the allocation of contracts for local transport services will be driven by delegates' contributions. In addition we expect the participation of two experts: Prof Marco Ponti (Milan Polytechnic) and Dr Anne Yvrande (Sorbonne University). Please let the Secretariat know **by 15 December 2012** if you will be making a written contribution on this topic. Written submissions are due

by Friday, 18 January 2013. Failure to meet that deadline could affect the proper preparation of the discussion. To help you with your written contributions, I am attaching a number of detailed questions that you could answer to in your submissions. My suggestions are not intended to be restrictive or comprehensive, but just to provide some guidance. Delegations are encouraged to raise and address other issues, as well, based on their own experience.

The second item on WP2 agenda relates to the long-term strategic project on the evaluation of competition authorities' activities. This time we shall focus on how competition authorities regularly assess the *expected* impact on consumers of their enforcement and advocacy activities (or of subsets of them, e.g. all cartels), which methodologies, and in particular which assumptions and criteria, they rely upon, why these are different across jurisdiction and how greater uniformity could be achieved. An expert paper by Prof. Stephen Davies (East Anglia University) will serve as a basis for the discussion and will be circulated in advance of the meeting. Delegations are not requested to submit written contributions, but I shall ask some delegations that perform such assessment to present their experience. I also invite you to share any existing written material that you believe would be useful with the Secretariat in advance of the meeting.

In October it was also decided that some amendments could be made to the 2009 Recommendation on Competition Assessment, namely that the recommendation could be extended to include subsidies, state aid, and competitive neutrality, and that the role envisaged for competition authorities in the process of competition impact assessment could be strengthened. The Secretariat will circulate an amended version of the recommendation for comment before the next meeting. If you have any preliminary comments or drafting suggestions, please send them in writing to the Secretariat **by Friday, 30 November 2012.**

If you have any questions on the above, please contact Ms. Cristiana Vitale [Tel. +33 (0) 1 45 24 85 30; E-mail: cristiana.vitale@oecd.org] or Ms. Marianne Aalto [Tel: +33 (0) 1 45 24 89 73; E-mail: marianne.aalto@oecd.org].

Sincerely yours,



Alberto HEIMLER
Chairman
Working Party No.2 on Competition and Regulation

Some Suggested Issues and Questions for Consideration in Country Submissions

In many countries governments have tried to introduce competition in public transportation services by tendering them out to private suppliers. Different allocation mechanisms are employed and the characteristics of these mechanisms can considerably affect the outcome. Your written contribution should explain in some details how contracts for the provision of local and regional bus services are negotiated in your jurisdiction, the role competition plays in the provision of such services and/or in the choice of service providers, the results (in terms of efficiency and quality) that have been so far obtained.

In order to help you with the written contributions, please find below some questions that you should feel free to address in your submission. If there are differences between the market structures prevailing in the provision of local and of regional bus services please describe them and explain why they exist.

Methods for allocating contracts for the provision of local and regional bus services

1. Description of the industry and regulatory framework:

- *Are local and regional bus services in your jurisdiction provided directly by public authorities, by State- owned enterprises, by private operators, or by a combination of public and private operators?*
- *If private operators play a role in the provision of local and regional bus services, are contracts for specific routes exclusive or is there competition in the provision of the services (i.e. operators compete on specific routes not just to obtain the contract but also to provide the services)?*
- *Are public-private partnerships at all used for the provision of these services?*
- *Which body/institution has responsibility for ensuring the provision of these services (in terms of quantity and quality) and for the allocation of the contracts?*
- *Is the decision on the market structure and on how to allocate the franchise taken at the local level or is there a national legal framework?*
- *Who is in charge of regulating bus services, a local or a national authority? Is the regulator in charge of controlling for the quality of services (that the frequency of service is respected, that buses are sufficiently clean, etc.)?*
- *Is it easy for consumers to access the regulator and complain for bad services (this also requires that the consumer is well informed on the quality of services that he is expected to receive)? Do consumer complaints have an effect on the allocation mechanism?*
- *If there is competition in the provision of the service how has it been decided on which routes to allow it (e.g. has the profitability of the routes been assessed beforehand)?*

The remainder of the questions focus on the allocation of contracts for the provision of bus services to private providers.

2. Tendering process:

- *How are contracts awarded?*
- *How big is the discretion local authorities can exercise in selecting who to award the contract to?*
- *What are the dimensions over which potential bidders compete?*
- *Does the reputation of the franchisee (in terms of being a cost effective and a high quality service provider) play any role in the choice by local authorities?*

- *Are incumbents given any specific advantage in successive bids? And does being an effective and high quality service provider result in any benefit for him?*
- *How widely available is the information on costs and revenues for a given local area?*
- *Are renegotiations widespread?*
- *How is it ensured that prices of local transport services are reasonable and that the amount of subsidies is not too high?*
- *Are prices for local transport services regulated? And if so how?*
- *If there are multiple franchisees within a local market, is it ensured that prices are the same across service providers? If so how can competition for the market be made operational?*
- *Who ensures that the system is fully coordinated (in terms of timing/frequencies etc.)?*

3. Nature of the contracts awarded:

- *Are routes tendered individually/in small blocks or in large blocks? And why? How are routes grouped together?*
- *How long the contracts are and what is the rationale for the chosen length? Is the length of the contract fixed for all local authorities in your jurisdiction or is there some flexibility?*
- *How often are the contracts being renegotiated?*
- *Can the contracts be amended before they expire? For example if new routes or new frequencies have to be added in the course of the validity of the contract because demand changes, what happens? What is the process for amending the contracts?*
- *If there is competition, is service frequency an autonomous decision of service providers or is it imposed in the contract?*
- *Are all the costs incurred by the service provider covered? If not, which risks are allocated to the service provider (risk of change in demand, risk of cost increases, regulatory risk, etc.)?*
- *Do the contracts provide incentives to service providers to improve quality and increase safety? If so how?*
- *Do the contracts provide the incentive to provide high quality services close to the end of the franchise?*
- *If the winner of the bid uses the facilities, the equipment and the personnel of the existing local company, how are investment decisions made (who decides and who pays for new equipment, for example)? How free are the managers of the contracting company to reduce personnel or acquire new equipment? What are the outcomes that have been achieved?*

4. Execution of the contracts:

- *Who supervises the execution of the contracts?*
- *What mechanisms are there in place for disciplining contractors that do not deliver the services as expected?*

5. Outcome:

- *What has been the outcome so far in terms of prices, costs, quality and safety of the services provided by the licensees?*

- *If there is competition on specific routes, how successful has this been? What has been the outcome so far?*
- *Has the outcome been the one expected when the allocating mechanism was selected?*
- *Has the participation rate to the tenders been high? Has it dwindled over time?*
- *If an auction is used to award the contracts, how many bidders have participated to each bid on average so far? How often have outsiders (not the incumbents) been awarded contracts? Was the auction successful in identifying the efficient service provider?*
- *Are there plans to change the allocation mechanism? If so why?*

BULGARIA

1. Introduction

The Bulgarian Law on Protection of Competition (LPC) applies to all economic sectors, incl. transportation. Due to this, the Commission on Protection of Competition has dealt over the years with a number of cases related to the provision of transportation services, particularly to the allocation of contracts for local or regional transportation services, the use of bus station services, the regulation of taxi services. The sector specific national legal framework as regards the allocation of contracts for local and regional transportation services and the summary of the CPC case law in this area will be discussed in this submission.

2. Legal framework

The sector specific national legislation regulating the allocation of transportation services in Bulgaria includes the Automobile Transportation Act (ATA), Ordinance No. 2 of 15 March 2002 on the conditions and the procedure for approval of transport schemes and for carrying out public transportation of passenger by buses (Ordinance No 2) and Ordinance No. 33 of 3 November 1999 on the public transportation of passengers and cargo in the Republic of Bulgaria (Ordinance No 33). It should be noted, however, that the Bulgarian national transportation legislation is very much based on the provisions of EU law, for example the EU sector specific rules applicable to transportation, the rules applicable to public procurement procedures, the rules on state aid etc., because Bulgaria as EU Member State is required to observe these common rules.

3. Methods for allocating contracts for the provision of local and regional bus services

3.1 *General legal framework regulating transportation services*

The Ministry of Transport, Information Technology and Communications is the responsible body of the executive power, which is in charge of the management and control of the automobile transport of passengers and cargo in Bulgaria through the Executive Agency “Automobile Administration”.

Carrying out transportation services in Bulgaria is a licensed activity (Art. 6 ATA) and the conditions for obtaining a national license are detailed in Ordinance No 33. Under Art. 7, para 2 ATA and Art. 4 of Ordinance No 33, a national license for carrying out transportation of passengers or cargo on the territory of Bulgaria by automobiles with a Bulgarian registration is issued to persons registered under the Commerce Act when they meet the requirements for reliability (good reputation), professional competence and financial stability and are settled in Bulgaria¹.

The requirements for reliability are considered met if the managers of the transport activity of the companies have not been convicted for deliberate indictable crime or have not been deprived, with an

¹ EU licenses for transportation services are valid in Bulgaria.

enacted conviction, of the right to practice the transport activity. The requirements for professional competence are met if the managers of the company transport activity possess knowledge and experience acquired through attending educational courses or mastered in the transport activity, who have successfully passed written examinations on subjects determined by Ordinance No 33, and who have at least secondary education. The requirements for financial stability are considered met if the entrepreneur has enough resources to guarantee the normal start and functioning of the transport enterprise and has no liabilities for taxes and insurance payments, unless they are legally deferred. The financial stability of the carrier is determined by a formula set out in Ordinance No. 33, which takes into account the company's own capital/bank guarantee/insurance in relation to the number of the vehicles included in the license, multiplied by the equivalence in national currency of 9000 euro for the first vehicle and 5000 euro for each next vehicle. The value of the criterion for financial stability calculated as per the formula must be 1 or higher. The requirement for settlement is met where the entrepreneur is actually and permanently settled in the territory of the Republic of Bulgaria.

The licensed carriers can carry out transportation of passengers and cargo on the territory of the Republic of Bulgaria only by motor vehicles for which there are issued certificates for public transport of passengers or cargo, except in the cases when the transportation is carried out by EU license.

The Executive agency keeps register of the licensed carriers and of each vehicle included in the license. A vehicle can be included in only one license.

The license is personal and its duration is 5 years. It is subject to renewal for another 5 years upon application by the carrier.

Ordinance No. 2 of 2002 on the conditions and the procedure for approval of transport schemes and for carrying out public transportation of passenger by buses on its part details the procedures and is the main act regulating the public transportation of passengers according to approved transport schemes, which are municipal, regional and republican.

The municipal transport schemes – urban (main and additional) and interurban, include transportation lines within a single municipality and are drafted by the mayor of the municipality. Then, the mayor submits the proposal for the municipal transportation scheme for approval to the municipal council. The regional transport schemes are transportation lines on the territory of two or more municipalities. They are drafted jointly by the participating municipalities and then are submitted for approval by the regional governor. The republican transportation scheme includes all bus lines connecting end-points on the territory of two or more regions. The republican scheme is drafted by the Executive Agency “Automobile Administration” and is then submitted for approval to the Minister of transportation, information technologies and communications or to a delegated person.

After the approval of the regional and the republican transportation schemes an allocation is made for the lines and the routes, which each municipality can contract with carriers.

The timetables for the local public transport are agreed upon by the mayors of the municipalities concerned.

The Executive Agency “Automobile Administration” exercises control for the the application of the legal provisions regulating the public transportation services.

3.2 Allocation and contracting of public automobile transport services

Ordinance No. 2 of 2002, after its amendments in 2011, sets two procedures for contracting public automobile transport services:

- Granting contracts under Regulation (EC) No 1370/2007²
- Granting contracts after competition procedure

Granting contracts under Regulation (EC) No 1370/2007

The municipal council grants contracts for public transport bus services after a public procurement procedure under the Concessions Act or the Public Procurement Act and in compliance with Regulation (EC) No 1370/2007 in cases when the contracting authority envisages compensation for the transport companies for the costs incurred and/or when the contracting authority gives to the companies exclusive rights for the performance of a service of public interest. Awarding of contracts under Art. 5, p. 4 of Regulation (EC) No 1370/2007 is not allowed.

The municipal council may directly award a contract to the transport operator only in case the service provider is an internal operator. In case of direct award of a contract to an internal operator, the clauses of the contract shall include among others:

- Detailed description in a transparent way so as to avoid overcompensation of the:
 - Parameters, on the basis of which the compensation is calculated, if applicable;
 - Nature and the scope of the exclusive rights granted; if applicable;
- Mechanisms for the allocation of the costs, related to the provision of the services;
- Mechanisms for the allocation of the incomes from the sales of tickets;
- Norms and requirements for the quality of the service;
- Admissibility of subcontracting and the maximum admissible percentage of the value or the volume of the service under the provisions of Regulation (EC) No 1370/2007;

In case of direct award of the obligation for public transport service, the compensation should not be more than the sum, necessary to cover the net financial effect on the costs incurred and the revenue generated while fulfilling the public service obligation, taking into account the revenues from this activity that remain for the internal operator and a reasonable profit.

The duration of the contracts for awarding public transport service as a general rule may not exceed 10 years for intercity and city bus services. A possibility for contracts with duration of 15 years is previewed in certain, explicitly set cases.

The public procurement or concession granting procedures are subject to appeal.

The contracting authority is responsible for exercising control for the proper execution of the clauses of the contract for public transport service.

² Regulation (EC) No 1370/2007 of the European parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, OJ L 315/6 of 3.12.2007

Granting contracts after competition procedure

In cases where the above mentioned procedure is not applicable, the transportation contracts for approved transport schemes are awarded after competition procedure. For the lines of the municipal transport scheme the respective municipal council is responsible for the opening of the procedure, and for the lines of the municipal and republican schemes the competition procedure is held by the municipal councils of the two municipalities on whose territories the end points of the respective line are located.

The municipal council takes a decision for starting procedure for awarding the transportation service and then delegates the fulfilment of the decision to the mayor regarding the holding of the competition. The competition is opened by an order of the mayor of the municipality which determines, among others, the requirement to the candidates and the specific requirements (number of necessary and number of reserve automobiles in percentage ratio). The municipal council adopts decision on the admissibility criteria and the evaluation criteria. The criteria include requirements for ecological compliance of the vehicles; additional services in the vehicles (not applicable for intracity lines); prices and social benefits; equipment of the vehicles for transportation of persons with limited mobility; other criteria, as defined in the decision of the municipal council. The competition criteria cannot include requirements for providing transport service for free or at reduced prices without compensations being envisaged for that. With the amendment of 2011, Ordinance No 2 now puts an obligation on the municipal councils not to include in the competition documentation conditions or requirements that may prevent, restrict or distort competition.

The competition procedures for awarding contracts for public transport service are subject to appeal before the competent administrative court.

The mayor of the municipality exercises control for the proper execution of the public transport contracts.

4. CPC case law

As already pointed out, the CPC has adopted a number of opinion decisions since 2002 on the criteria for admissibility and evaluation of offers for competitions for provision of public transport services, held under the provisions of Ordinance No 2. It should be noted that the CPC opinion decisions are not enforcement decisions, but competition advocacy decisions and are therefore non-binding for the respective public body as provided for in the Law on Protection of Competition.

The CPC has consistently established in its competition advocacy case law a number of problems in the application of Art. 19, para 1 of Ordinance No. 2 related to the powers of the district councils to add at their own discretion other than the explicitly listed criteria for admissibility and evaluation of offers in the process of granting contracts for public transport services. Those discretion powers in setting additional criteria for admissibility and the evaluation of the offers are left to the local authorities as they better know the local situation.

The CPC case law shows however, that in a number of cases those additional criteria, which are left to the local authorities to determine, may lead to restriction of competition. Examples of such restrictive criteria are:

- Initiator for the opening of transportation line and traditional operator advantage;
- The candidates are to operate or to had operated public transportation lines in cities with population over 500 000 inhabitants;

- Experience in specific city;
- Declaration by the candidates that the motor vehicles which are part of the offers will not be used for other lines or cities;
- Court and tax registration of the operator in the district, which opened the competition procedure;
- The candidates are to be Bulgarian legal or natural persons, registered under Bulgarian Commercial Law;
- Imposing of minimum or maximum prices for the transportation service;
- Specific turnover;
- Incomes of the operator for the previous financial year with different points attributed proportionally to the amount of the income;
- Paid taxes for the last 3 years;
- Paid taxes and social payments in the previous financial year;
- Candidates to have VAT registration;
- Specific number of workers and buses requirement;
- Ownership of the buses requirement;
- Presence of own or leased garage and maintenance service facilities in the specific city;
- Hiring of local workers.

In 2009, with decision No. 1392/2009, the CPC adopted an opinion on the proposed amendments to the Ordinance No. 2 of 2002. In its opinion the CPC summarized its case law with respect to the anticompetitive criteria set by the municipal councils in competition procedures for awarding public transport contracts. The CPC also analyzed the competition problems arising from such discriminatory criteria.

The main conclusion from the CPC's analysis was that the discretion powers given to the municipal councils to set additional criteria for admissibility and evaluation of offers during competition procedures for provision of public transport services are included in order to allow the local bodies to take into account the specific needs as regards public transportation on the territory of the municipality. The CPC considers, however, that those additional criteria should refer only to the conditions for providing the service and its quality and in no way they should put restrictive and/or discriminatory conditions for participation and evaluation.

In its case law the CPC has established that the restrictive admissibility/evaluation criteria in the public transport competitions usually favor either local or big transport service providers. When the contracting authority for example sets admissibility/evaluation criteria that are "local" (local court/tax registration, hiring of local staff, local experience, etc.), those criteria not only contradict the national dimension of the transportation license and of the company and tax law regimes, but from the point of view of the competition law may lead to territorial restriction of competition. In cases when the local authorities

set high financial or previous experience criteria (e.g. high turnover and/or taxes paid, ownership and the number of buses), the markets for provisions of public transport services are closed for SMEs or new entrants for the duration of the respective contract. This is particularly true for local municipal transport services which are not very much financially and technically demanding, as usually the competitions are for 2-3 rather short local bus lines, which could be easily operated with the quality required even by a small transport company, thus allowing this company to establish its market position and in the final analysis increasing the number of market participants.

5. Conclusion

The CPC's constant and consistent competition advocacy interventions as regards the competitions for awarding public transport service contracts has led to amendments of the sector specific legal framework in Bulgaria, namely Ordinance No. 2 of 2002. A special provision was added aimed at ensuring free competition in the relevant market, namely the requirement for the municipal councils not to include in the competition documentation conditions or requirements that may prevent, restrict or distort competition.

COLOMBIA

1. Characterization of the transport sector in Colombia

Transportation represents a key sector in Colombia, as it is the center of the logistic services' chain. Its importance derives from the activities it covers, *i.e.* moving cargo and passengers between different regions of the country, which relies in the integration of the main production and consumption centers, definition of the marketing and distribution networks throughout Colombia and in many cases, determining the comparative and competitive advantages of the country's foreign trade.

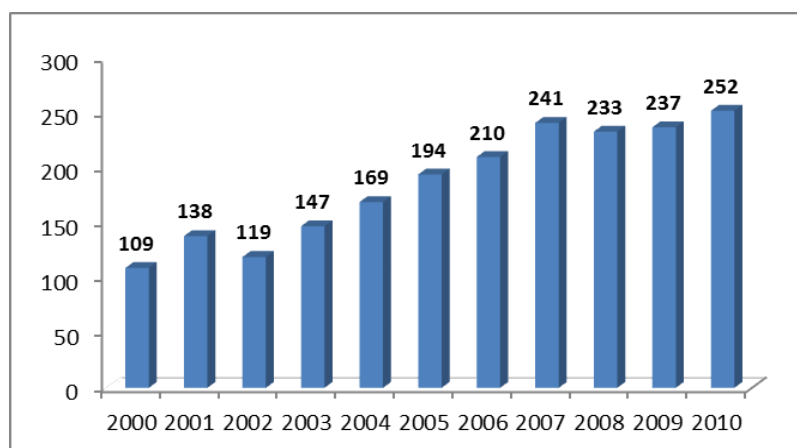
The impact that the transport sector has on the development of the Colombian economy is clear. As reported by DANE¹, by 2010 the share of transportation services and civil construction was 7.9% of the GDP, the highest in the last ten years. This is explained in part, by the growth of public and private investment in transport infrastructure which, on 2010, was 2.5 times above the average of the last 5 years.

According to international data on the ease of doing business, Colombia is ranked at position 45 among 185 countries. One of the main challenges for Colombia faces in the near future is to strengthen its road network and infrastructure, in order to significantly improve the conditions that foster trade relations, thereby stimulating its competitiveness. Thus it is expected to improve in terms of infrastructure, given that today the country is in 108 out of 144 countries. The goal is to increase more than 60% the roads in concession and to build 4.398 kilometers of highways over the next 5 years.²

As shown in Graph 1, there is an average annual growth of 9.4% and growth of 6.3% between 2009 and 2010 in the evolution of cargo mobilized in Colombia during the past decade.

Graph 1. Movement of National Cargo (Millions of Tons)

Source: Ministry of Transport



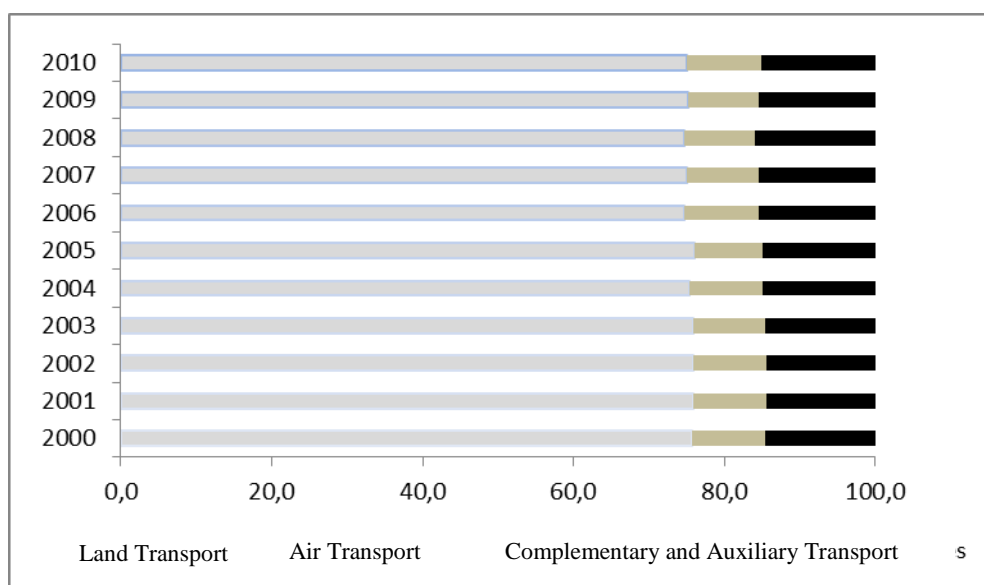
¹ National Administrative Department of Statistics.

² Taken from Informe Nacional de Competitividad 2012-2013.

On the other hand, Table 2 shows the development of the composition of GDP transport services. On average, from 2000 to 2010 land transport services have represented about 75.4% of total GDP in this sector, with non-significant variations in relative terms to GDP ratio associated with air transport, which exhibits an average share of 9.9%.

Graph 2. Distribution of GDP Transport Services, Constant Prices

Source: Ministry of Transport



It should also be noted that from 2007 to 2010 an average of 87.8% of the resources from public investment has been allocated to the maintenance and development of roads, something that has positively impacted the dynamics of land transportation. It is important to note that the level of investment in the transport sector increased from \$ 4.05 billion in 2007 to \$ 7.2 billion in 2010 (See table 1).

Table 1. Average Distribution of Public Investment in the Transportation Sector

Source: Ministry of Transport

SUBSECTOR	2007			2008			2009			2010	
	Appropriation	Commitment	Payment	Appropriation	Commitment	Payment	Appropriation	Commitment	Payment	Appropriation	Commitment
Land	89.95	90.17	89.77	84.58	84.9	86.94	86.02	88.95	89.26	84.81	89.33
Rail	0.24	0.15	0.2	2.12	2.01	2.41	3.79	0.67	0.9	5.87	0.95
Inland waterway	2.89	2.97	3.86	2.93	2.99	3.48	2.35	2.42	2.74	0.92	0.87
Air	4.33	4.11	3.96	8.75	8.48	5.79	7.23	7.3	6.67	7.73	8.1
Water	2.59	2.61	2.21	1.62	1.63	1.37	0.62	0.65	0.43	0.67	0.74
TOTAL	100	100	100	100	100	100	100	100	100	100	100

With regards to modal transport demand, Table 2 describes the evolution of the number of passengers using each of the modes: land, air, inland waterway and rail. At a national level, land passenger transportation represented on average 90.9% of people mobilized in the country between the years 1994-2010, which represents an average annual growth of 4.5% (see Table 2).

Table 2. Modal passenger Transportation

Source: Ministry of Transport

YEAR	NATIONAL					
	ROAD	AIR		TOTAL	WATERWAY	RAIL
		Aerotaxis and Regional	Regular Companies			
1994	N / A	581,541	7,420,065	8,001,606	2,334,373	N / A
1995	94,161,337	559,672	8,062,765	8,622,437	2,448,764	58,328
1996	95,742,237	696,725	8,294,040	8,990,765	3,118,362	256,879
1997	98,911,215	680,212	8,077,000	8,757,212	2,084,014	23,233
1998	100,364,439	625,365	7,950,308	8,575,637	2,843,661	203,553
1999	94,654,074	605,423	7,613,231	8,218,654	2,820,783	16,013
2000	98,448,963	684,719	7,466,331	8,151,050	2,980,213	50,215
2001	99,009,731	646,167	7,559,898	8,206,065	3,026,826	54,916
2002	99,570,498	630,243	7,731,586	8,361,829	3,329,199	36,695
2003	120,201,516	547,842	7,439,107	7,986,949	4,184,706	17,363
2004	128,893,186	483,467	7,690,762	8,174,229	3,531,395	494
2005	156,568,326	533,883	7,756,875	8,290,758	3,789,419	126,219
2006	164,118,093	537,124	8,342,928	8,880,052	3,572,263	15,347
2007	172,127,092	536,144	8,771,998	9,308,142	3,297,786	18,139
2008	168,021,219	574,975	8,948,165	9,559,140	3,543,441	250,798
2009	177,855,357	523,877	10,156,884	10,680,761	3,573,486	165,709
2010	175,260,455	707,118	13,235,146	13,942,264	3,588,554	183,942

The high share of land transport services demands a careful review of the features shown by some of the local passenger transportation models existing in different cities of Colombia. As of today, Colombia has at least seven mass transit systems in seven major cities: Bogotá, Cali, Medellín (Valle de Aburrá), Pereira – Dos Quebradas, Bucaramaga, Barranquilla and Cartagena.

Table 3. Interurban Massive Transport Systems in Colombia.

Source: Ministry of Transport

INTEGRATED SYSTEM OF MASSIVE TRANSPORT IN COLOMBIA	GENERAL INFORMATION OF THE PUBLIC CONTRACT		INTEGRATED SYSTEM OF MASSIVE TRANSPORT IN COLOMBIA	GENERAL INFORMATION OF THE PUBLIC CONTRACT	
MEGABUS – PERIRA - DOSQUEBRADAS	Coverage. Trips in public transport	46%	TRANSCARIBE S.A. – CARTAGENA DE INDIAS	Coverage. Trips in public transport	100%
	Passengers / peak hour	14.000		Passengers / peak hour	48.000
	Passengers / day	117.000		Passengers / day	475.102
	Fleet	1.100		Fleet	1.687
	Operation entry date	August 2006		Operation entry date	II Semester 2011
METROCALI S.A. – MIO – SANTIAGO DE CALI	Coverage. Trips in public transport	94%	TRANSMETANO – BARRANQUILLA	Coverage. Trips in public transport	32%
	Passengers / peak hour	26.882		Passengers / peak hour	29.533
	Passengers / day	902.400		Passengers / day	33.000
	Fleet	4.389		Fleet	3.427
	Operation entry date	March 2009		Operation entry date	July 2010
METROLÓNEA S.A. - BUCARAMANGA	Coverage. Trips in public transport	66%	TRNASMILENIO S.A. – BOGOTÁ D.C.	Coverage. Trips in public transport	26%
	Passengers / peak hour	31.000		Passengers / peak hour	193.500
	Passengers / day	60.000		Passengers / day	1.650.000
	Fleet	2.131		Fleet	21.000
	Operation entry date	February 2010		Operation entry date	Year 2000
METROPLUS S.A. – VALLE DE ABURRÁ (MEDELLÍN – ITAGÚÍ – ENVIGADO)	Coverage. Trips in public transport	60% (including Subway)	TRANSMILENIO SOACHA	Coverage. Trips in public transport	75%
	Passengers / peak hour	10.152		Passengers / peak hour	12.465
	Passengers / day	249.200		Passengers / day	89.615
	Fleet	7.500		Fleet	2.532
	Operation entry date	II Semester 2011		TOTAL: 8 MASSIVE TRANSPORT SYSTEMS	

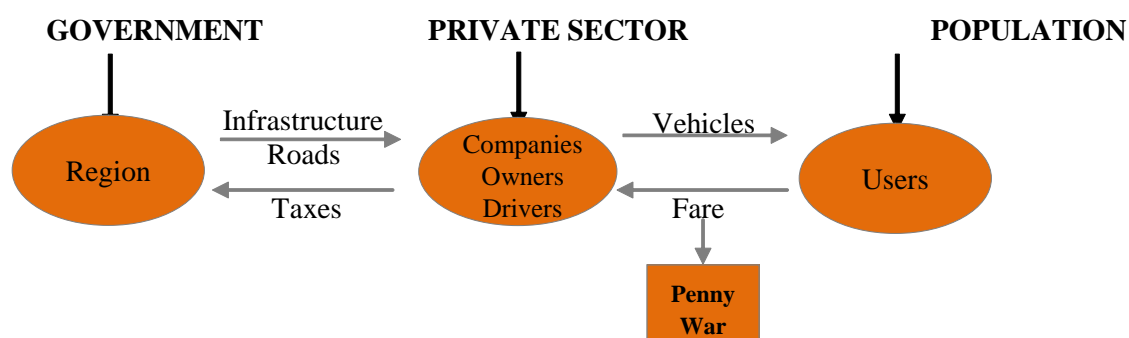
2. Transmilenio Case

To conclude this contribution, the experience of one of the model systems included above (i.e. *Transmilenio*) is worth mentioning, as it has been the reference model for other cities, both in Colombia and elsewhere. Bogotá, a city of more than 8 million people, with population density close to 210 people per 10.000 mts², with an average population growth rate close to 2.5% per year, decided to adopt an alternative system of public transportation in the late 1990's.

The adoption of the model derived in the recovery of around 285.500 mts² for pedestrian areas, plazas, sidewalks. A total of 3.149 parks, and 11 city parks were created, 295 kilometers of cycle routes were built, and a sustainable environmental goal for the city was achieved: the use of bicycles. According to local government's data, the city evolved from around 1% annual growth rates of bicycle use to an annual rate of above 4% as of today. What prompted this structural change? In terms of competition policy the answer represents a dilemma in its very utterance. Transmilenio was preceded by a slow, inefficient, inequitable, polluting and unfair transportation system. A system characterized by a low profitability price war that could easily be defined as a "penny war", in which government, private sector and general population shared a form of bilateral contracts, as presented in the table below. This prompted local authorities to adopt a more complex system but with a number of very interesting network externalities.

Traditional Transport – Social Diagram

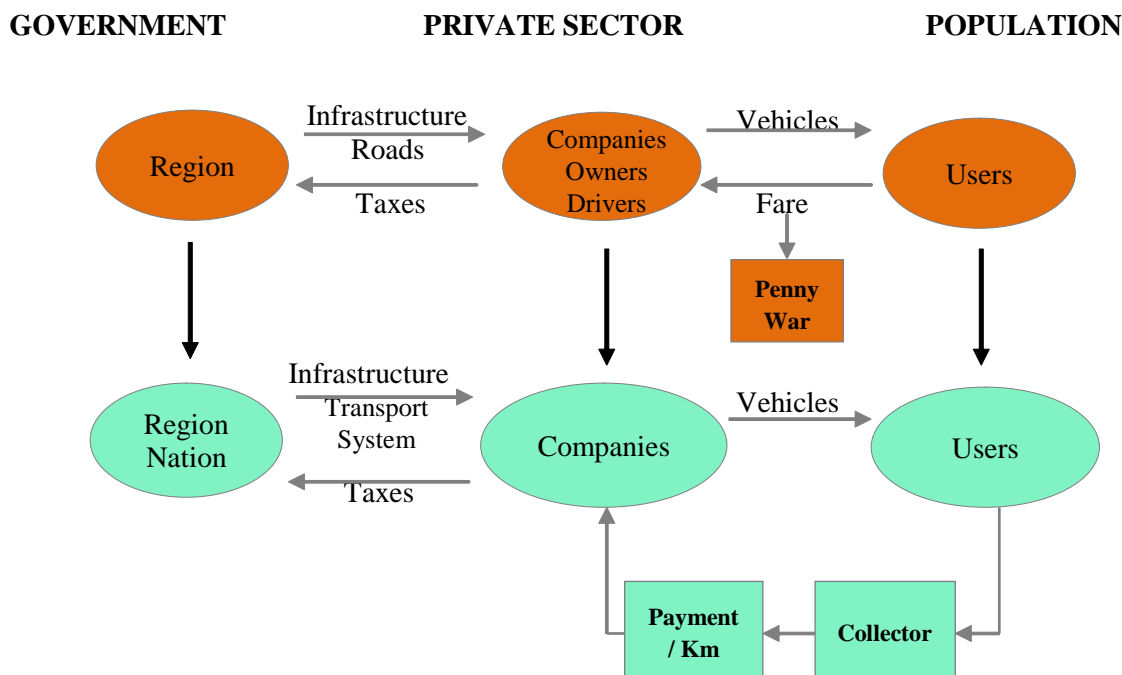
Source: Transmilenio S.A.



As shown in the upper and lower diagrams, there are significant differences in the design of each transportation model. While in the previous model the compensation of service providers where based on the number of users captured, which leads to an scenario of intense competition, compromising the security of passengers when providing the service., the Transmilenio model tends to be a centralized and time-coordinated mechanism in which the remuneration of service providers ends up being a function of the distance traveled and the time spent on the provision of the service.

Transmilenio Transport – Social Diagram

Source: Transmilenio S.A.



The transition from one model to the other suppressed competition within bus owners taking into account that competition was not efficient and was also generating a negative externality known as the “Penny War” in which consumer’s safety and of comfort where completely disregarded. New massive transportation systems like Transmilenio transfer competition on the market to competition for the market, as private companies compete for the adjudication of the right to provide the service through a public tender process. This process is intended to produce a more efficient outcome and a more beneficial system for consumers, as it does not reduce the number of passengers transported in a day while increasing the quality, safety and comfort of the service. However, as part of the analysis of public procurement processes, the Superintendence of Industry and Commerce, as the national competition authority, faces an important challenge in conducting an exhaustive search of a series of alerts that facilitate the identification of collusive actions at various stages of public procurement processes.

In this regard, within each of the specialties inherent in the various goods and services to be procured, there are some technical requirements, which in many cases represent an obstacle for the authority to easily identify possible cracks through which private or public agents may sneak anticompetitive agreements. This is the case of public procurement selection processes aimed to adjudicate the provision of transportation services and / or collection services.

Indeed, regardless of the precision, stealth and care with which the government’s prepares contractual requirements, there is always the risk that anti-competitive practices, particularly cartels, are occurring and may result in the adjudication of the public contract to a less efficient competitor.

Given the above, the Superintendence has applied and shared with various state entities warning signs in public procurement processes, which if detected, must be reported to the competition authority for investigation.

Considering the advantages and disadvantages as a whole in a transition to a regulated and controlled massive transport system, we may assert that the outcome has been positive in terms of civil organization, time/km, consumer's security, and even competition, which is now *for* the market and not *in* the market.

FRANCE
(Version française)

1. Description de l'industrie et du cadre réglementaire

Le terme « transport en commun de personnes » désigne au sens strict le transport de plus de 8 personnes, non compris le conducteur.

Le transport en commun de personnes peut s'effectuer à l'intérieur d'un Périmètre de Transports Urbains (PTU) : on parle alors de « transport urbain de voyageurs ». Hors de ce périmètre, on désigne ces services sous le terme générique de « transport interurbain de voyageurs ».

1.1 Le cadre juridique du transport public de voyageurs

a) Hors Ile-de-France

Les transports publics en France ont été organisés par la loi n° 82-1153 du 30 décembre 1982 d'orientation des transports intérieurs (LOTI). Cette loi a fixé un cadre général d'organisation du service public des transports et confié cette mission à l'Etat, aux collectivités territoriales et à leurs établissements publics. Un régime dérogatoire a été fixé pour l'Ile-de-France.

Aux termes de l'article L. 1211-1 du code des transports, l'élaboration et la mise en œuvre de la politique globale des transports sont assurées conjointement par l'Etat et les collectivités territoriales en tant qu'autorités compétentes pour l'organisation des transports et la gestion des infrastructures.

Dans ce cadre, les communes et les groupements de communes sont compétents pour l'organisation des transports urbains de voyageurs (dans le cadre d'un périmètre de transports urbains défini par elles et constaté par le préfet), les départements pour les transports interurbains de personnes, à l'exclusion des liaisons d'intérêt régional ou national, et les régions pour les services routiers réguliers non urbains d'intérêt régional.

Pour l'ensemble des services routiers, le cadre français dispose que l'exécution du service peut être assurée soit en régie par une personne publique, soit par une entreprise ayant passé à cet effet une convention à durée déterminée avec l'autorité organisatrice (délégation de service public ou marché public).

La loi du 29 janvier 1993, dite « loi Sapin », a précisé les conditions d'attribution des délégations de service public et introduit une mise en concurrence entre les opérateurs à travers des procédures de publicité. Le critère de différenciation entre les marchés publics et les contrats de délégation de service public a été précisé par la loi « MURCEF » du 11 décembre 2001.

Depuis 1999 (« loi Chevènement »), le regroupement de communes au sein d'Etablissements Publics de coopération intercommunale (EPCI) s'est fortement développé, tant par rapport au nombre de structures que de territoires concernés.

b) En Ile-de-France

La région Ile-de-France fait l'objet d'une réglementation spécifique, qui prévoit que la RATP est en situation de monopole pour assurer l'ensemble des transports collectifs de Paris et de sa proche banlieue (métro, tramway, bus)¹.

Le règlement CE n° 1370/2007 du Parlement européen et du Conseil du 23 octobre 2007, dit règlement «OSP» (pour « obligations de service public »), est entré en vigueur fin 2009. Il soumet, au terme d'une période transitoire et à l'exception de quelques cas expressément visés, l'attribution des contrats de service public de transports terrestres de voyageurs aux règles de mise en concurrence européennes.

La loi relative à l'organisation et à la régulation des transports ferroviaires (dite loi ORTF) du 8 décembre 2009, adoptée postérieurement à l'entrée en vigueur de ce règlement, organise une phase transitoire de 15 à 30 ans pour la majorité des services de transport public² avant l'introduction de procédures de mise en concurrence en Ile-de-France. L'article L. 1241-6 du code des transports dispose ainsi désormais que les contrats en cours dans cette région se poursuivent conformément aux règles applicables avant cette date, jusqu'au 1^{er} janvier 2025 pour les services routiers de transport, au 1^{er} janvier 2030 pour les services de transport par tramway et au 1^{er} janvier 2040 pour les services de transport par métro.

1.2 Les acteurs du transport public urbain et interurbain de voyageurs hors Ile-de-France

a) Les autorités organisatrices du transport urbain (AOTU)

Le Groupement des autorités responsables de transport (GART) a recensé en 2011 281 autorités organisatrices des transports urbains (AOTU).

Chaque autorité organisatrice de transport urbain, gouvernée par une ou plusieurs communes, définit la politique de transport de son agglomération et organise la fourniture des services publics de transport urbain. Elle dispose notamment d'une autonomie de décision sur les infrastructures de transport collectif, la définition des services (dessertes, fréquence, amplitude des horaires), les tarifs, et le choix du mode de gouvernance.

b) Les autorités organisatrices du transport interurbain

Les articles L. 3111-1 et suivants du code des transports définissent le régime juridique « du transport routier non-urbain de personnes ».

A l'échelon national, l'Etat est compétent pour organiser les services réguliers non urbains d'intérêt national en les conventionnant avec des transporteurs après avis des régions et des départements concernés.

A l'échelon régional, le Conseil régional a compétence pour inscrire au plan régional des transports les services routiers qui ne sont pas considérés comme d'intérêt national et qui sont situés sur au moins deux départements à l'intérieur d'une même région.

¹ Cf. art. L. 1241-1 et suivants du code des transports.

² Des lignes régulières hors Paris et communes limitrophes sont exploitées par des entreprises privées (OPTILE) sélectionnées par appel d'offres.

A l'échelon départemental, le Conseil général a compétence pour inscrire au plan départemental des transports les services routiers qui ne sont ni d'intérêt national, ni d'intérêt régional et qui ne relèvent pas des autorités compétentes pour l'organisation des transports urbains.

L'extension récente des plans de transport urbain (PTU) a entraîné une réduction importante du périmètre de compétence des départements, notamment au niveau des lignes scolaires. Les lignes interurbaines intégrées dans les PTU sont maintenant incluses habituellement aux appels d'offres de transport urbain.

c) Les opérateurs de transport public urbain et interurbain de voyageurs

Régies et Établissements publics à caractère industriel et commercial (EPIC)

Les autorités organisatrices peuvent décider de confier l'exploitation des services de transport à une régie.

Deux sortes de régies peuvent être créées par l'autorité organisatrice. Elles sont toutes les deux soumises aux règles de comptabilité publique.

- La régie directe : elle est dotée de la seule autonomie financière, mais ne dispose pas de la personnalité morale. Elle utilise les moyens en personnel et en matériel de la collectivité locale. Son directeur prépare et gère un « budget annexe » à celui de l'autorité organisatrice.
- L'EPIC : L'Établissement Public Industriel et Commercial est une régie dotée de l'autonomie financière et de la personnalité morale. Elle est dirigée par un conseil d'administration et un directeur, juridiquement distinct de la collectivité l'employant. Un règlement intérieur et un cahier des charges définissent leurs activités et leur champ d'intervention.

L'objet de ces régies est d'exploiter exclusivement les services de transport délégués par l'autorité compétente. Elles n'interviennent donc pas sur les marchés de transport extérieurs à leur zone de compétence.

Une proportion importante des régies de transport se sont regroupées au sein de l'association AGIR (Association pour la Gestion Indépendante des Réseaux de transports publics) dont le but est la réalisation de prestations d'étude et de conseil pour ses membres. L'objectif de cette association est de pallier l'une des importantes faiblesses des exploitants isolés : la capacité d'expertise, d'étude et de conseil qui est un coût fixe source d'économies d'envergure.

Opérateurs privés

Les opérateurs privés exploitent 91% des réseaux de transport urbain, les 9% restant revenant aux régies (GART 2011).

Quant à l'exploitation des réseaux interurbains, en 2011, 18% étaient exploités en régie (MEDDE-GART-UTP 2011).

Les deux principaux opérateurs privés de transport public urbain et interurbain hors Ile-de-France sont Keolis et Veolia-Transdev.

- KEOLIS³, filiale de la SNCF, est le « 1^{er} opérateur de transport de voyageurs en France » et est présent dans 13 pays. Il est présent sur toute la chaîne des déplacements (2^{ème} opérateur de vélos en libre service en France, « leader mondial » pour l'exploitation de tramway, gestionnaire d'autopartage, de navettes maritimes et aéroportuaires, opérateur majeur du stationnement via la filiale Effia).
- VEOLIA TRANSDEV, entité créée en 2011 à l'issue de la fusion entre Veolia Transport⁴, branche du Groupe Veolia Environnement, et Transdev, filiale du Groupe Caisse des Dépôts.
- RATP Dév, filiale de la RATP, qui, depuis 10 ans⁵, peut intervenir sur les appels d'offres de transport de voyageurs hors Ile-de-France.

Deux opérateurs privés sont également présents sur le marché du transport de voyageurs hors Ile-de-France :

- Le Groupe Vectalia France, filiale du Groupe espagnol Subus Grupo de Transporte, présent en France depuis 1998.
- Le Groupe Car Postal France, filiale de la Poste suisse, gère quelques réseaux urbains de petite taille ainsi que des activités interurbaines, essentiellement dans l'Est de la France. Ce Groupe est présent en France depuis 2004.

Quelques groupes régionaux indépendants interviennent par ailleurs dans le transport interurbain. On peut citer les Autocars Philibert et Ray FF en Rhône Alpes ou le Groupe Fast en Vendée.

2. Modes de gestion et procédures de mise en concurrence

2.1 Modes de gestion

a) Régie versus gestion déléguée

La LOTI (art. 7-II) prévoit deux modalités d'exécution du service public. Soit il est directement organisé par les collectivités territoriales et fonctionne dans le cadre du secteur public industriel et commercial (régie). Soit il est exécuté par une entreprise et, dans ce cas de figure, une convention est passée entre cette entreprise et l'autorité organisatrice compétente.

En 2011, les réseaux de transports publics urbains faisaient l'objet, pour 91 % d'entre eux, d'une gestion déléguée, dont une très grande majorité en délégation de service public (Graphique 1) :

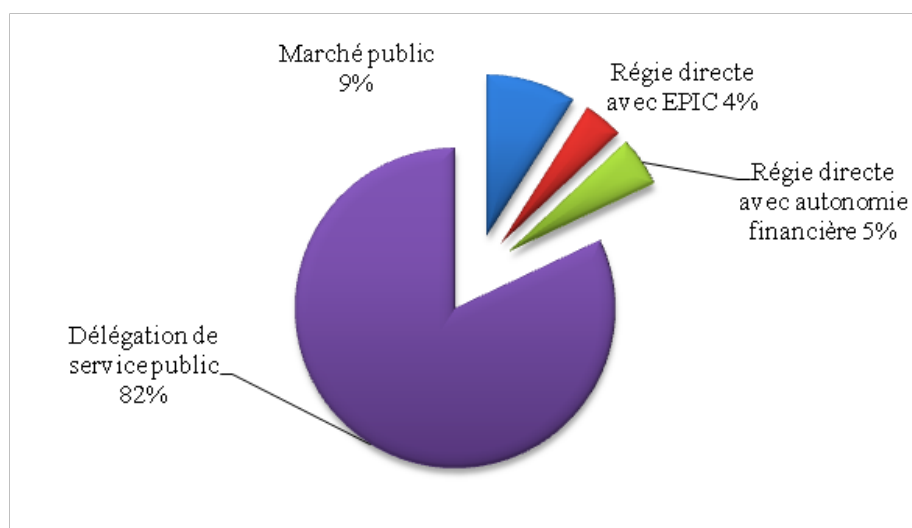
³ Les données sont extraites du Rapport d'activité 2011 du Groupe Keolis.

⁴ Décision 10-DCC-198 du 30 décembre 2010.

⁵ Loi n° 2000-1208 du 13 décembre 2000.

**Graphique 1 : Les modes de gestion dans les réseaux de transport urbain en 2010
(en % du nombre de réseaux)**

(Source : GART, L'année 2010 des transports urbains)



b) Types de contrats

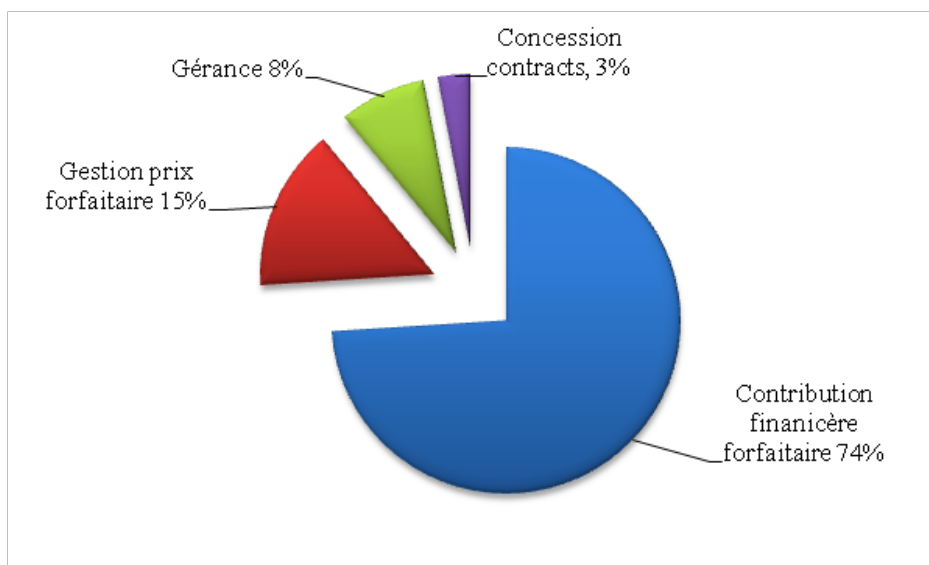
L'une des caractéristiques centrales du modèle français d'organisation du transport public urbain réside dans le fait que les autorités organisatrices, lorsqu'elles choisissent de déléguer le service, attribuent un droit exclusif à un opérateur sur l'ensemble du périmètre de transport urbain respectif. Autrement dit, il n'existe pas d'allotissement ; les autorités organisatrices attribuent un unique contrat pour l'ensemble du réseau. Ces contrats, d'une durée de 8 ans en moyenne, peuvent être classés en trois grandes catégories, se différenciant par la nature et la proportion des risques qu'ils font supporter aux contractants. La typologie classique de ces conventions (CERTU, GART), est en effet élaborée à partir des modes d'allocation des risques commerciaux et industriels, c'est-à-dire des risques sur recettes et sur charges. On distingue ainsi :

- les **contrats de gérance**, qui engagent l'AOT à supporter tous les risques, à la fois les risques associés aux coûts de production et ceux liés à la vente des services. Autrement dit, avec ce type de convention, l'AOT récupère toutes les recettes d'exploitation à l'issue de l'exercice et, en contrepartie, rembourse tous les coûts de l'opérateur ;
- les **contrats à prix forfaitaire**, qui font supporter à l'opérateur les risques industriels et à l'AO les risques commerciaux. Dans ce cas de figure, l'AO perçoit toutes les recettes et verse à l'exploitant un montant forfaitaire calculé *ex ante* à partir de ses prévisions de charges. L'écart entre les coûts effectifs et les coûts anticipés est donc à la charge du délégataire tandis que la différence entre les recettes anticipées et les recettes réalisées est supportée par l'AO ;
- les **contrats à contribution financière forfaitaire (ou compensation financière)**, appelé autrefois contrats aux risques et périls, qui font peser tous les risques d'exploitation sur l'opérateur. Selon cet arrangement contractuel, le déficit d'exploitation anticipé détermine le montant versé par l'AOT à l'exploitant. Au terme de l'exercice, si la différence effective entre les coûts et les recettes d'exploitation ne correspond pas au déficit anticipé *ex ante*, c'est donc à l'opérateur d'en supporter les conséquences.

Un 4^{ème} type, représentant une part marginale de l'ensemble des contrats, peut être utilisé : la convention de concession, dans laquelle l'exploitant se voit confier la responsabilité de réaliser les investissements et d'en supporter les risques, en sus des risques sur recettes et sur charges liés à leur activité d'exploitation.

**Graphique 2 : Les types de contrats dans les réseaux de transport urbain en 2010
(en % du nombre de réseaux)**

(Source : GART, L'année 2010 des transports urbains)



2.2 Procédures de dévolution⁶

Les AOT n'ayant pas choisi une exploitation de leur réseau de transport collectif par leurs propres services, c'est-à-dire par leur régie, ont obligation d'utiliser une procédure de mise en concurrence pour pouvoir signer un contrat de délégation avec une entreprise. Le marché public et la délégation de service public sont deux procédures qui ont explicitement pour objectif de sélectionner un exploitant. Elles organisent une concurrence « pour » le marché, qui peut permettre de faire révéler aux candidats leurs informations sur les coûts et la demande en mettant en œuvre « [les] principes⁷ [qui] permettent d'assurer l'efficacité de la commande publique et la bonne utilisation des deniers publics. » (art. 1er du Code des marchés publics). En pratique, la délégation de service public (DSP) offre davantage d'opportunités pour négocier non seulement les tarifs, mais également les conditions de l'exploitation du service de transport.

⁶ Pour plus de détails, voir le guide publié par le CERTU : *Dévolution des services publics de transport*, 2013.

⁷ D'une part, « les marchés publics respectent les principes de liberté d'accès à la commande publique, d'égalité de traitement des candidats et de transparence des procédures. » (art. 1^{er} du CMP). D'autre part, l'article L. 1411-1 du CGCT introduisant les délégations de service public, indique aussi que doivent être respectés les principes de transparence et d'égalité d'accès à la commande publique.

a) **Marché public versus délégation de service public : le choix entre deux conceptions des transports urbains**

La procédure de dévolution applicable aux transports urbains était, jusqu'en 1996⁸, uniquement la délégation de service public (DSP). Depuis, le législateur a confirmé dans la loi MURCEF n° 2001-1168 du 11 décembre 2001, que la procédure de DSP ne pouvait être mobilisée que lorsque la rémunération de l'exploitant est « substantiellement liée aux résultats de l'exploitation du service » (art. L. 1411-1 modifié du Code Général des Collectivités Territoriales). Dans le cas inverse, la procédure applicable est celle du Code des marchés publics (désormais CMP). En effet, dans l'esprit du marché public, la participation financière des voyageurs n'est qu'accessoire. Le prestataire est avant tout rémunéré par l'autorité organisatrice.

Il existe donc aujourd'hui deux procédures⁹ dont les philosophies et les caractéristiques diffèrent (cf. tableau 1), mais qui peuvent toutes les deux être appliquées pour la dévolution des services de transport urbain.

Tableau 1 : L'esprit des modes d'exploitation et d'attribution

	Marchés publics	Délégation de service public
Statut de l'AOT	Acheteur public	Délégant
Statut de l'exploitant	Titulaire de marché public	Déléataire
Bénéficiaire principal	L'autorité organisatrice	Les usagers
Objet	Prestations de service public	Le service public « clé-en-mains »
Rémunération	Principalement la subvention de l'AOT	Substantiellement assurée par l'exploitation

⁸ Arrêt du Conseil d'État du 15 avril 1996, Préfet des Bouches-du-Rhône, considérant les dispositions de la loi Sapin du 29 janvier 1993 relatives aux DSP (art. 38) : « [ces dispositions] ne sauraient être interprétées comme ayant pour objet de faire échapper aux règles régissant les marchés publics tout ou partie des contrats dans lesquels la rémunération du cocontractant de l'administration n'est pas substantiellement assurée par les résultats de l'exploitation ».

⁹ L'utilisation du contrat de partenariat public-privé reste exceptionnelle pour les transports urbains. A ce jour en France, les pouvoirs publics continuent de déterminer la politique de transport (grandes orientations, tarification, investissement) et d'en déléguer l'exploitation à des entreprises ou de l'assurer en régie. Malgré tout, l'introduction en France du Contrat de Partenariat (Loi 2003-591) ouvre la perspective d'un nouveau type de relations contractuelles public-privé. Un tel contrat autorise en effet une collectivité publique à confier à une entreprise la mission globale d'un service public tel qu'un réseau de transport urbain pris dans sa globalité (financement, conception, construction, maintenance et gestion). Ce contrat de partenariat se distingue de la délégation de services publics par le mode de rémunération et par la répartition des responsabilités entre l'entreprise et les pouvoirs publics. Les risques sont partagés entre toutes les parties au cours de la négociation préalable à la signature du contrat. Il diffère également des marchés publics dont la démarche est davantage centrée sur des choix techniques et qui présente l'inconvénient de manquer de flexibilité car elle interdit aux pouvoirs publics de discuter avec chaque candidat de tous les aspects du marché, ce qui constitue un obstacle important lorsque l'on considère des projets complexes. Par ailleurs, le contrat de partenariat est avancé comme un moyen de ne pas s'endetter puisque le financement est apporté par le partenaire privé. On peut penser qu'il pourra à l'avenir être mobilisé sur des opérations lourdes dans un réseau.

Malgré l'évolution réglementaire, le marché public est encore peu utilisé (cf graphique 1). Il s'agit simplement de la conséquence du choix très majoritaire des AOT de faire dépendre « substantiellement » la rémunération de l'exploitant du comportement des voyageurs.

En effet, le choix de la DSP, pour être légitime, implique que le risque financier pris par l'entreprise soit suffisamment important, que sa rémunération soit « substantiellement liée au résultat ». A l'inverse, la commande d'une prestation de service par un marché public implique que l'autorité organisatrice assume l'essentiel des risques financiers liés à l'exploitation. En particulier, la prise en charge du risque commercial¹⁰ apparaît comme un critère majeur de distinction dans le degré d'implication des parties. Mais plus généralement, la question centrale est celle de la répartition des droits de décision dans le détail de la définition du service : itinéraires, arrêts, horaires, types de véhicules ...

Le prestataire est, dans le CMP, centré sur la demande de l'AOT ; il n'a que des liens indirects avec d'autres acteurs économiques. A l'inverse, dans la DSP, l'autorité organisatrice agit au nom des usagers potentiels, et ne définit pas le cahier des charges en fonction de ses besoins propres. L'AOT doit donc s'assurer que l'exploitant satisfera les voyageurs potentiels dans les meilleures conditions, alors que le contrôle de toutes les transactions futures (voyage contre ticket) auxquelles elle ne participe pas est, *a priori*, relativement difficile ou coûteux.

Dans la DSP, l'exploitant n'est pas considéré comme un simple fournisseur. Il n'est pas uniquement « en mission » pour l'AOT, puisqu'il a un intérêt (financier) dans la réponse aux besoins de transport collectif. Il cherche à être une force de proposition et souhaitera certaines ouvertures pour discuter l'offre. On considère donc plutôt les exploitants en DSP comme des partenaires.

Or, comme dans tout partenariat, l'identité du partenaire importe. Le principe de l'*intuitu personae* a donc été retenu pour fonder la procédure de DSP. En conséquence, la DSP prévoit notamment que les offres seront « librement négociées » (art. L.1411-1 du CGCT). Les caractéristiques des services de transport urbain, qui peuvent être relativement complexes à planifier de manière pertinente sur toute la durée du contrat, y sont discutées. Cette négociation permet aux entreprises de faire des propositions sur la base de leurs connaissances techniques et managériales.

En revanche, les marchés publics n'accordent pas cette possibilité de négociation dans le cas standard¹¹. En effet, dès lors qu'il s'agit de sélectionner le prestataire d'un service donné, aucune négociation n'est nécessaire¹².

b) Le processus de choix de l'exploitant

Les quatre principales étapes des procédures de DSP et de marché public négocié sont les suivantes :

1. Publicité de l'appel à candidatures

¹⁰ L'arrêt du Conseil d'État du 30 juin 1999 (SMITOM du centre-ouest seine-et-marnais) considère par exemple qu'une rémunération assise à hauteur de 30% sur les recettes d'exploitation permet d'établir que l'exploitant est substantiellement rémunéré par les résultats d'exploitation. En outre, il semble ressortir de l'arrêt de la Cour administrative d'appel de Marseille (13 avril 2004, ville de Marseille) que le seuil de 20% serait insuffisant, à condition qu'il soit connu durant la procédure de DSP.

¹¹ « L'appel d'offres est la procédure par laquelle le pouvoir adjudicateur choisit l'attributaire, sans négociation, sur la base de critères objectifs préalablement portés à la connaissance des candidats. » (art. 33 du CMP)

¹² Toutefois, les procédures de marché publics utilisées pour la dévolution des services de transport urbain peuvent relever d'un cadre moins contraignant si l'AO le souhaite (procédure adaptée).

2. Examen des candidatures à l'envoi d'une offre (1 ou 2 mois après), puis envoi du document définissant les prestations requises aux candidats retenus
3. Examen des propositions¹³ par la commission d'ouverture des plis (en moyenne 2 mois après), qui fait son rapport à l'autorité organisatrice
4. Négociations (3 mois en moyenne), analyse finale des offres et choix de l'exploitant

Dans un marché public, la sélection des candidatures se fait sur la base de documents « permettant d'évaluer les capacités professionnelles, techniques et financières du candidat », et de documents « relatifs aux pouvoirs de la personne habilitée pour l'engager » (art. 45 du CMP). Les conditions sont donc définies très précisément¹⁴, et sont rassemblées dans les formulaires « DC4 » et « DC5 » traditionnellement demandés aux soumissionnaires de marchés publics.

Pour les DSP, de manière moins précise et détaillée, l'article L.1411-1 du CGCT stipule que « les candidats [sont] admis à présenter une offre après examen de leurs garanties professionnelles et financières (...) et leur aptitude à assurer la continuité du service public et l'égalité des usagers devant le service public ».

La comparaison des offres s'articule autour des propositions chiffrées (données techniques et financières) des offreurs. Toutefois, pour pouvoir fournir ces éléments, les offreurs doivent avoir une connaissance suffisante de la situation de départ, ce qui nécessite la communication des derniers rapports techniques d'activité (et leur bonne tenue), et notamment des « rapports du délégataire »¹⁵. En effet, la non communication des données élémentaires d'un audit du réseau par les candidats est un moyen détourné d'avantager l'exploitant en place. Le Conseil d'État (13 mars 1998, SA Transports Galiero) a par exemple été amené à rappeler que constitue une rupture au principe d'égalité des candidats le refus de communiquer le kilométrage du réseau et la masse salariale. De plus, depuis la loi n° 99-586 du 12 juillet 1999 (art. 62), l'article L. 1411-13 du CGCT oblige à mettre à disposition du public en mairie (et donc des candidats), les « documents relatifs à l'exploitation des services publics délégués », c'est à dire les documents relatifs à la consistance du réseau (lignes, kilométrages, horaires...), les rapports annuels de l'exploitant en place, et les documents relatifs aux personnels (bilan social, accords salariaux...). Les informations implicites ou les contacts avec l'autorité organisatrice restent le privilège de l'exploitant sortant, mais sont a priori moins indispensables¹⁶.

Par ailleurs, rien n'oblige, dans la loi Sapin, à la différence de ce qui est exigé pour un marché public, à afficher (ni même à fixer) les critères qui serviront à la sélection des offres. D'un point de vue concurrentiel, il est souhaitable que les AOT aillent au-delà des exigences légales en assurant la transparence quant aux critères de sélection (prix, politique commerciale, innovation, environnement, démarche qualité, image...), pour assurer une égalité entre les candidats, préciser les attentes de la collectivité et se donner ainsi les moyens de contrôler l'exécution de la DSP, et lever les suspicions éventuelles de favoritisme. C'est la raison pour laquelle il est fréquent que les AOT communiquent aux

¹³ Une audition orale des candidats par la commission d'ouverture des plis peut être organisée pour compléter les offres écrites.

¹⁴ « La liste de ces renseignements et documents est fixée par arrêté du ministre chargé de l'économie » (Art. 45)

¹⁵ Rendus obligatoires par l'article L. 1411-3 et définis à l'article R.1411-7

¹⁶ « Une autre limite importante à la communication des informations concerne l'obligation pour l'autorité délégante de respecter le secret commercial des affaires » (GART 2001, p. 142).

candidats, dans le cadre de la mise en œuvre de leurs obligations légales de publicité préalable, ou aux offreurs, dans le document de consultation, un certain nombre de critères plus ou moins généraux.

Enfin, la DSP et le marché public négocié se caractérisent par la possibilité offerte aux autorités publiques de négocier les offres (art. L.1411-1 du CGCT et art. 134 du CMP) avec certains candidats ou d'engager « librement toute discussion utile » (art. L.1411-5 du CGCT).

Dans la DSP, la négociation porte non seulement sur les tarifs – que l'AOT souhaite fixer au niveau le plus bas possible au bénéfice des usagers – mais également et surtout sur un certain nombre de détails relatifs à la complexité des services mis en concurrence. Les seules limites de la négociation sont celles de ne pas bouleverser¹⁷ l'économie du contrat, et de garantir la confidentialité des offres, des prix, et des savoir-faire. Les modifications au cahier des charges initial doivent être justifiées par l'intérêt du service public, et ne doivent pas donner lieu à un traitement discriminatoire entre les candidats (Conseil d'État, 29 avril 2002, Groupement des associations de l'ouest parisien). Concrètement, les principaux points de négociation concernent bien sûr les propositions financières, mais aussi les propositions techniques des offreurs et leur capacité à faire évoluer le service.

« Au terme des négociations (...), l'offre économiquement la plus avantageuse est choisie par la commission d'appel d'offres (...), en application du ou des critères annoncés dans l'avis d'appel public à la concurrence ou dans le règlement de la consultation. » (art. 66-IV du CMP). C'est ainsi que le CMP, toujours de manière relativement formelle et attentive à l'égalité de traitement des candidats, clôt la procédure de marché public négocié. Dans la DSP en revanche, aucune référence à des critères particuliers n'est mentionnée, la loi indique simplement : « au terme de ces négociations, [l'autorité] choisit le délégataire » (art. L.1411-1).

3. Bilan de la concurrence dans les transports urbains au regard de la pratique décisionnelle de l'Autorité de la concurrence

De nombreuses décisions de l'Autorité de la concurrence ont porté sur le secteur des transports collectifs et ont recensé certains obstacles à une concurrence effective. Le principal obstacle à la coordination de la fourniture de services publics par des mécanismes de marché tient à la difficulté à mettre effectivement les opérateurs en concurrence *ex ante*, c'est-à-dire à s'assurer de la participation d'un nombre suffisant de candidats, qui plus est crédibles et efficaces, à maintenir une pression concurrentielle sur les sortants et à éviter des comportements collusifs, comme le partage de marchés entre les participants. Ces difficultés sont réelles dans le secteur des transports collectifs urbains, dominé par un petit nombre d'opérateurs. L'Autorité de la concurrence suggère des solutions concrètes et pratiques pour y remédier au moins partiellement.

3.1 Difficultés de mise en œuvre de la concurrence pour le marché dans les transports urbains

a) Barrières à l'entrée

Comme le Conseil puis l'Autorité de la concurrence l'ont plusieurs fois indiqué, l'efficacité du mécanisme d'appel d'offres dépend en premier lieu de la capacité du donneur d'ordre à caractériser précisément le service qu'il souhaite voir réalisé et à établir des critères objectifs d'attribution lui

¹⁷ Le Conseil d'État est d'avis (16 septembre 1999, au sujet des concessions d'autoroute) que l'on peut modifier l'économie d'un contrat sans la bouleverser. Cette distinction n'est pas très claire mais s'exprime notamment dans le fait qu'un contrat d'affermage ne peut pas devenir une concession (Tribunal administratif de Dijon, 5 janvier 1999, association Auxerre écologie et Tribunal administratif de Grenoble, 25 février 2000, Préfet de Haute-Savoie).

permettant de comparer des offres alternatives. Si l'acheteur ne parvient pas à spécifier l'objet de l'appel d'offres avec précision, certains offreurs potentiels – en général les concurrents de l'opérateur sortant – peuvent être découragés de participer à l'appel d'offres en raison, entre autres, des coûts de recherche d'information qu'ils devraient supporter pour répondre à un tel appel d'offres. Comme l'a souligné l'Autorité, « *en améliorant la qualité des renseignements qu'elles fournissent, les AOT réduisent les coûts d'acquisition d'informations supportés par les transporteurs qui déposent une offre offensive. [Or], cette réduction de coûts (...) est de nature à inciter ces derniers à déposer plus d'offres offensives* »¹⁸.

L'Autorité de la concurrence a largement souligné qu'un des pré-requis pour que la concurrence pour le marché ait les effets attendus en termes de prix, de coût du service et d'incitation à l'innovation et à la qualité des prestations est qu'un nombre suffisant de candidats potentiels crédibles (c'est-à-dire susceptibles de faire des offres « intéressantes ») soient encouragés à y participer. Elle rappelait ainsi, dans la décision de concentration Veolia / Transdev¹⁹, que « (...) le coût de préparation d'une offre ou l'insuffisante qualité de l'appel d'offres peuvent dissuader des concurrents potentiels de se présenter ». Or, comme cela a été relevé dans cette même décision, une « *diminution du nombre de candidats aux futurs appels d'offres est susceptible d'emporter deux types d'effets : une détérioration en prix des offres remises aux autorités organisatrices de transport et un appauvrissement de la diversité des réponses produites dans le cadre d'appels d'offres* ».

Les exemples de barrières entravant la participation de candidats potentiels aux appels d'offres sont nombreux. Le coût de préparation de la réponse à l'appel d'offres en est une, déjà évoquée. Les barrières linguistiques limitant l'entrée de concurrents étrangers en sont une autre. Ainsi, comme le relevait l'Autorité dans la décision Veolia/Transdev, au sujet du marché des transports urbains, « *la spécificité du cadre juridique dans lequel sont organisés les appels d'offres, leur publication en langue française dans des journaux dont la diffusion est, hormis pour les appels d'offres lancés par les très grandes villes, limitée au territoire national ainsi que les délais de réponse relativement courts qui sont laissés aux candidats constituent des obstacles à l'entrée d'opérateurs étrangers sur ce marché* ». Or, dans un secteur comme les transports, l'existence de ce type de barrières est particulièrement dommageable, dans la mesure où elle peut dissuader l'entrée d'opérateurs étrangers pourtant aguerris aux exigences de ces marchés.

b) Avantage au sortant

Dans les marchés à appel d'offres, l'absence de concurrence lors du renouvellement des contrats est un enjeu majeur. A ce stade, le sortant peut en effet disposer d'un net avantage, ce qui constitue un obstacle important à l'effectivité de la concurrence.

Reprenant la grille d'analyse développée par P. Klemperer²⁰, l'Autorité de la concurrence a mis en évidence que dans le secteur des transports urbains les sortants disposent d'avantages certains sur leurs rivaux²¹.

Certes, dans ce secteur, le coût et les caractéristiques des actifs physiques ne constituent pas une barrière à l'entrée importante car les matériels roulants, qui représentent une part importante du capital

¹⁸ Décision 10-DCC-198 du 30 décembre 2010.

¹⁹ Décision 10-DCC-198 précitée.

²⁰ Klemperer, Paul (2004), *Auctions: Theory and Practice*, Princeton University Press. Also available at <http://www.paulklemperer.org/>, notamment cité dans le compte-rendu de l'OCDE de la table ronde de 2006 sur les marchés d'appel d'offres (<http://www.oecd.org/competition/cartelsandanti-competitiveagreements/38773965.pdf>).

²¹ Décision 10-DCC-198 précitée.

physique nécessaire pour assurer la fourniture du service, sont des actifs mobiles facilement transférables d'un réseau à l'autre et qui sont en outre, dans une large proportion, détenus par les autorités déléguées. Quant aux installations de base (terminaux et dépôts), elles sont la propriété des collectivités locales.

En revanche, l'expérience acquise par le sortant sur les caractéristiques du réseau et de la demande et sur les exigences du contrat le liant à l'autorité organisatrice (notamment sur le caractère plus ou moins contraignant des objectifs de qualité) lui procure un avantage indéniable sur ses rivaux²², comme l'a révélé le test de marché réalisé par l'Autorité de la concurrence²³.

L'indépendance entre la probabilité de succès à un appel d'offres et les résultats des appels d'offres passés, considérée comme une des conditions nécessaires à l'efficacité de la concurrence pour le marché²⁴, apparaît donc difficile à assurer dans le secteur des transports urbains²⁵.

Certes, des facteurs exogènes rendent le développement d'avantages au sortant inévitable et même souhaitable, si ces avantages permettent effectivement au sortant de proposer de meilleures offres que ses concurrents. Mais, si ces avantages résultent de comportements anticoncurrentiels du sortant, ou s'ils permettent au sortant d'abuser de sa position d'antériorité pour supprimer toute contestabilité des marchés concernés, leur effet sur la qualité de son offre est négatif.

c) Ententes horizontales

Dans le secteur des transports urbains, dont la structure est oligopolistique, le risque d'entente entre candidats aux appels d'offres est élevé, comme l'atteste la pratique décisionnelle du Conseil puis l'Autorité de la concurrence. Pas moins de neuf décisions ont sanctionné des ententes horizontales dans le secteur des transports collectifs terrestres depuis 2001²⁶. Les pratiques sanctionnées dans ces décisions reposent sur des stratégies de soumission concertées qui prennent plusieurs formes, certaines de ces formes pouvant parfois être cumulées.

Une première stratégie consiste à présenter des offres de couverture. Dans plusieurs affaires, l'Autorité a ainsi constaté que les entreprises concernées s'échangeaient des informations sur leur intention

²² Voir notamment sur ce point la décision 10-DCC-02 précitée.

²³ Décision 10-DCC-198 précitée.

²⁴ Voir sur ce point le rapport P. Klemperer (2005) précité.

²⁵ Les chiffres disponibles sur les résultats des derniers appels d'offres laissent cependant penser que le marché tend à devenir plus contestable. En effet, sur la période 2005-2010, sur 164 appels d'offres lancés par les AOTU, 30% n'ont pas reconduit le délégataire sortant. En outre, en 2010, 26% des AOTU (12 sur 46) ayant lancé un appel d'offres ont changé d'opérateur (enquêtes MEDDE-GART-UTP 2010).

²⁶ Décisions 01-D-13 du 19 avril 2001 relative à la situation de la concurrence dans le secteur du transport public de voyageurs dans le département du Pas-de-Calais, 01-D-77 du 27 novembre 2001 relative au secteur du transport scolaire dans le département de l'Indre, 02-D-59 du 25 septembre 2002 relative à des pratiques mises en œuvre dans le secteur des transports routiers de voyageurs dans le département de l'Ain, 03-D-46 du 30 septembre 2003 relative à des pratiques concernant un marché public de transport occasionnel d'élèves dans le département des Alpes maritimes, 04-D-30 du 7 juillet 2004 relative à des marchés publics de transport scolaire en Haute-Corse, 04-D-43 du 8 septembre 2004 relative à l'attribution de marchés organisés par la commune de Grasse dans le secteur des transports scolaires et périscolaires, 05-D-38 du 5 juillet 2005 relative à des pratiques mises en œuvre sur le marché du transport public urbain de voyageurs, 08-D-33 du 16 décembre 2008 relative à des pratiques mises en œuvre à l'occasion d'appels d'offres de la ville d'Annecy et du conseil général de Haute-Savoie pour le transport par autocar, 09-D-03 du 21 janvier 2009 relative à des pratiques mises en œuvre dans le secteur du transport scolaire et interurbain par autocar dans le département des Pyrénées-Orientales.

de soumissionner ou se communiquaient des projets de réponse aux appels d'offres afin d'établir des offres de couverture. De telles pratiques ont « *pour objet et pour effet de tromper les décideurs publics sur l'intensité réelle de la concurrence, de fausser l'exercice normal de la concurrence, notamment la fixation du prix des offres et de rendre artificiellement plus attractive l'une des offres établies en concertation* »²⁷. Ainsi, dans le secteur du transport public urbain, les trois entreprises en cause (Véolia, Transdev et Keolis) ont été sanctionnées pour « *s'être concertées pour limiter le jeu de la concurrence en simulant une concurrence qui n'existait pas en fait en déposant des offres de couverture* », c'est-à-dire, par exemple, « *en remettant des dossiers incomplets ou peu offensifs n'ayant à l'avance aucune chance d'être retenus* »²⁸. Les mêmes pratiques ont été mises en œuvre à l'occasion des appels d'offres de la ville d'Annecy et du conseil général de Haute-Savoie pour le transport par autocar²⁹ ou encore dans le secteur des transports périscolaires de la commune de Grasse³⁰.

La concertation peut aussi amener les entreprises à s'abstenir de soumissionner ou à retirer leur offre. Une telle stratégie de suppression d'offres ou d'abstention a par exemple été utilisée dans le secteur des transports publics urbains, où les entreprises « *s'abstenaient systématiquement de présenter des offres contre celle qui était titulaire du marché* »³¹.

Les accords peuvent enfin consister en une répartition du marché sur des bases géographiques, les entreprises prenant part à l'entente se réservant ou s'échangeant certaines zones.

3.2 Solutions préconisées par l'Autorité de la concurrence

a) Développement des compétences des autorités organisatrices

Les conséquences d'une spécification imprécise des contrats de services publics appellent au développement des compétences des autorités déléguées afin qu'elles soient en mesure de fournir des informations de qualité aux candidats potentiels. Comme l'indiquait l'Autorité, « *une plus grande professionnalisation des AOT, en ce qu'elle peut conduire à l'amélioration de l'information mise à disposition des répondants aux appels d'offres (notamment par le biais de cahiers des charges plus clairs et plus sophistiqués), peut effectivement avoir un impact positif en stimulant le nombre de candidats* »³².

Cette recommandation vaut en particulier pour le secteur des transports urbains, où la demande croissante d'inter-modalité, combinée à l'extension des périmètres de transport résultant du développement de l'intercommunalité, complexifie les appels d'offres. L'Autorité de la concurrence a ainsi pu préconiser que, dans ce secteur, les collectivités locales déléguées aient recours à des services d'assistance à maîtrise d'ouvrage (AMO) car ces services « *peuvent permettre de mieux identifier leurs besoins en matière de transport urbain [et] (...) ainsi favoriser l'amélioration des critères de sélection employés dans le cadre d'appels d'offres. Une telle amélioration pourrait [dès lors] conduire à une meilleure allocation des contrats de DSP* ».

²⁷ Décision 04-D-30 précitée.

²⁸ Décision 05-D-38 précitée.

²⁹ Décision 08-D-33 précitée.

³⁰ Décision 04-D-43 précitée.

³¹ Décision 05-D-38 précitée.

³² Décision 10-DCC-198 précitée.

b) Transférabilité des actifs

Des solutions peuvent être envisagées pour limiter l'avantage de l'opérateur sortant au terme du premier contrat et permettre aux acteurs du marché d'être des concurrents crédibles lors du renouvellement.

Une première solution, qui n'exclut pas les autres, consiste à introduire dans les contrats des clauses d'audit et d'inventaires des actifs en début et fin de contrat et à trouver des méthodes d'évaluation de ces actifs afin éventuellement de dédommager le sortant. Même lorsque la durée du contrat est inférieure à la durée de vie des actifs et que l'amortissement des investissements est par conséquent plus risqué, la parité entre offreurs, au stade de renouvellement du contrat, peut être rétablie s'il est possible de transférer facilement le capital utilisé par le premier contractant, c'est-à-dire s'il est possible d'évaluer ce capital et de le céder à d'autres enchérisseurs.

Par ailleurs, des clauses prévoyant le transfert du personnel d'une période à l'autre, c'est-à-dire d'un contractant à l'autre, peuvent également être introduites de manière à réduire les avantages comparatifs en termes de spécificité des ressources humaines de l'opérateur sortant. De même, les contrats peuvent incorporer des clauses de transfert de la propriété intellectuelle et des logiciels informatiques.

L'ensemble de ces solutions a pour ambition de clarifier les conditions de sortie du contrat des prestataires en place et de limiter les coûts d'entrée des nouveaux candidats aux appels d'offres.

Ceci étant, bien que le manque de parité entre offreurs soit une limite importante à l'efficacité de l'appel d'offres, il est important, lorsqu'on cherche à dépasser cette limite, de veiller à ne pas supprimer les incitations des contractants à investir. Si les actifs étaient totalement et aisément transférables, les opérateurs délégataires, pensant ne pas rester en place ou, en tous cas, ayant autant de chances que leurs rivaux de remporter le second appel d'offres, pourraient être dissuadés de réaliser les investissements nécessaires à la maintenance des infrastructures et à la fourniture d'un service de qualité en fin de contrat. On pourrait alors aboutir à des investissements cycliques qui seraient concentrés en début de contrat, ce qui nuirait à la qualité du service et annulerait tous les bénéfices attendus du recours à des opérateurs privés.

c) Création d'un fonds d'animation de la concurrence

Une des mesures innovantes sur laquelle l'Autorité de la concurrence s'est penchée et dont elle a autorisé la mise en œuvre est la création d'un fonds d'animation de la concurrence.

Lors de l'examen du projet de création de l'entreprise commune Veolia Transport / Transdev)³³, l'Autorité de la concurrence a estimé que la concentration envisagée était, entre autres, de nature à porter atteinte au bon fonctionnement de la concurrence pour le marché dans les secteurs du transport urbain hors Île-de-France. Elle a ainsi constaté que le rapprochement des deux filiales aurait pour effet, d'une part, de détériorer le niveau des offres sur le marché du transport public urbain dans 20 à 25% des cas, et d'autre part, d'appauvrir la qualité et la diversité des offres remises lors des futures mises en concurrence dans certaines zones.

Afin de remédier aux risques d'atteintes à la concurrence identifiés sur le marché des transports urbains, l'Autorité a obtenu des parties qu'elles prennent plusieurs engagements de cessions d'actifs répondant aux critères d'efficacité des remèdes qui ressortent de la pratique décisionnelle de l'Autorité.

³³ Décision 10-DCC-198 précitée.

De manière plus novatrice, l'Autorité a également validé l'engagement de financer la création d'un fonds d'animation de la concurrence à hauteur de 6,54 millions d'euros permettant, d'une part, d'indemniser de tout ou partie de leurs frais de réponse les candidats non retenus aux appels d'offres lancés pour les réseaux de transport dont Veolia Transport ou Transdev est l'opérateur sortant et, d'autre part, de financer les prestations d'assistance à maîtrise d'ouvrage des collectivités de petite taille.

Le financement de ces actions d'animation de la concurrence répond à l'analyse concurrentielle des effets unilatéraux de l'opération en termes de risques de réduction de l'intensité de la participation aux appels d'offres (voir également sur ce point la section III,1,b du présent document).

d) Allotissement des réseaux de transport urbain

S'interrogeant sur les moyens de stimuler la participation de candidats aux appels d'offres dans le secteur des transports collectifs, en particulier, urbains, l'Autorité de la concurrence a également été amenée à analyser les effets que pourrait avoir l'allotissement des réseaux³⁴.

L'allotissement consiste à décomposer un marché en plusieurs lots, soit par mode de transport, soit par ligne ou secteur géographique, et il est largement utilisé dans le secteur des transports interurbains. Pour le secteur des transports urbains, l'analyse, tant théorique qu'empirique, s'appuyant sur les observations de la mise en pratique de l'allotissement dans plusieurs grandes métropoles³⁵, suggère que celui-ci peut apporter des gains significatifs d'efficacité car il permet d'accroître la concurrence. Des opérateurs de petite taille sont en effet davantage susceptibles de répondre à des appels d'offres concernant quelques lignes d'un réseau que d'être candidats à l'exploitation du réseau entier. Comme le souligne l'Autorité, si l'exploitation de l'intégralité d'un réseau de transport urbain par un unique opérateur, qui est le mode d'organisation choisi en France, « permet (...) de bénéficier d'économies d'échelle, elle peut également conduire à un appauvrissement de l'offre, tant du point de vue du nombre d'opérateurs candidats aux appels d'offres que de celui de la qualité des services proposés. L'allotissement des réseaux, qu'il soit organisé suivant les modes de transports (métro, tramway, bus), ou bien de façon géographique, pourrait permettre de stimuler la concurrence, de faciliter l'entrée de nouveaux opérateurs et l'émergence de nouveaux services »³⁶. L'Autorité de la concurrence, dans le cadre de ses fonctions contentieuses, a examiné le caractère abusif de pratiques d'un délégataire de service public en position dominante³⁷. Sa décision a été confirmée par la Cour d'appel de Paris³⁸ : « en l'espèce, la SNCM, délégataire sortant, savait qu'il était sinon impossible, du moins beaucoup plus difficile aux autres compagnies de soumissionner sur une offre globale et qu'elle avait de fortes chances d'être la seule à le faire, [...] dès lors, en ne donnant pas à l'OTC les moyens de vérifier dès l'ouverture des plis sa compétitivité ligne par ligne, elle l'incitait à privilégier son offre globale, favorisant ainsi l'éviction des opérateurs dont les offres se limitaient à certaines des lignes ; [...] ce faisant elle portait atteinte à la concurrence par les prix et les mérites en profitant de sa qualité d'opérateur sortant en position dominante ; [...] en effet les chiffres donnés par le Conseil de la concurrence [...] montrent bien que le niveau de prix de l'offre de la SNCM d'août 2006 était supra-concurrentiel, ne reflétant pas les gains d'efficacité attendus d'une offre globale ».

³⁴ Avis 09-A-55 précité.

³⁵ Par exemple, Londres, Stockholm, Melbourne, Helsinki, Copenhague ou Adelaïde.

³⁶ Avis 09-A-55 précité.

³⁷ Décision n° 09-D-10 du 27 février 2009 relative à des pratiques mises en œuvre dans le secteur du transport maritime entre la Corse et le continent. La Cour de cassation a confirmé la compétence du Conseil de la concurrence pour sanctionner les pratiques (Cour de cassation, chambre commerciale, 21 juin 2011, SNCM, no F 10-15.754, no 634 F-D)

³⁸ Cour d'appel de Paris, 9 mars 2010, n° 2009/07930.

En outre, la fragmentation d'un réseau permet à l'autorité délégante, si tant est qu'elle en ait les capacités, de mettre en œuvre des méthodes de « *benchmarking* », c'est-à-dire de comparer les performances des différents opérateurs exploitant chacun des lots, ce qui peut s'avérer être un puissant outil de régulation³⁹.

Toutefois, l'exploitation par un seul opérateur de l'intégralité d'un réseau de transport urbain peut permettre de bénéficier d'économies d'échelle. Elle assure également la cohérence des services fournis sur le réseau (en termes de tarification et de billettique) et garantit l'interconnexion des différentes lignes constituant le réseau, alors que « *la multiplication de petits lots [génère] d'importants coûts de gestion* »⁴⁰. De même, dans le transport interurbain, « *[les autorités organisatrices] ont généralement intérêt à coordonner leur offre de transport pour assurer une bonne interconnexion entre les réseaux. (...) il ne peut [donc] être écarté qu'elles puissent trouver un intérêt à déléguer les différents marchés publics ou DSP de transport au sein d'une région à un seul groupe de manière à se décharger des questions de coordination entre les réseaux de transport* », comme le souligne l'Autorité de la concurrence dans la décision SNCF-CDPQ / Keolis-Effia⁴¹.

Comme le relève l'Autorité dans son avis sur le transport public terrestre de voyageurs⁴², « la perspective de l'allotissement des réseaux de transports urbains soulève un certain nombre de questions, relatives notamment à l'arbitrage entre d'une part, les gains d'efficacité attendus d'un accroissement de la concurrence, et d'autre part, les coûts potentiels liés à la coordination entre les différents délégataires des lots d'un même réseau ». En d'autres termes, les gains d'efficacité tirés de l'exploitation par lots des opérateurs concurrents ne l'emportent pas systématiquement sur les coûts liés à la coordination de ceux-ci.

Plusieurs études empiriques⁴³ ont cependant mis en évidence que, dans les réseaux urbains étendus, les bénéfices de la mutualisation de tous les modes de transport et de toutes les lignes ne compensent pas les surcoûts liés à la production par un monopole. En d'autres termes, les pertes d'économie d'échelle engendrées par la fragmentation du réseau sont plus que compensées par les gains liés au développement de la concurrence et de l'apprentissage que génère ce mode d'organisation, si toutefois l'allotissement s'accompagne d'un suivi par les autorités délégantes des performances des opérateurs.

Aussi, dans le contexte général d'un secteur concentré autour de quelques opérateurs, et compte tenu des résultats de nombreuses études empiriques, en accord avec plusieurs expériences internationales, engager une réflexion sur l'allotissement des appels d'offres de transport public semble plus qu'opportun, comme l'a indiqué l'Autorité de la concurrence dans l'avis 09-A-55.

³⁹ Comme l'a souligné le Conseil de la concurrence dans son analyse du marché du transport maritime entre Marseille et la Corse (Décision 09-D-10 du 27 février 2009), le dépôt d'offres globales portant de manière indivisible sur l'ensemble des lignes, c'est-à-dire sans présentation simultanée d'offres ligne par ligne, peut être une stratégie d'éviction de la part de l'opérateur sortant qui, en outre, limite la capacité de l'autorité délégante de comparer les différentes offres en concurrence.

⁴⁰ Décision 10-DCC-198 précitée.

⁴¹ Décision 10-DCC-02, précitée.

⁴² Avis 09-A-55, précité.

⁴³ Voir notamment le rapport du PREDIT *Risques et avantages de l'allotissement dans les transports publics urbains de voyageurs*, 2008.

FRANCE
(English version)

1. Description of the industry and regulatory background

Strictly speaking, the term "public transport" means transport of over 8 persons excluding the driver. Public transport may take place within an urban transport area (PTU): this is referred to as "urban passenger transport". Outside such areas, these services are described generically as "interurban passenger transport".

1.1 Legal structure of public passenger transport

a) Outside Ile-de-France

Public transport in France is organised by Law No. 82-1153 of 30 December 1982 on the organisation of domestic transport (LOTI). This law sets the general organisational structure for a public transport system that is managed by the State, the local authorities and their public institutions. An exception is made for Ile-de-France.

Under Article L. 1211-1 of the French transportation code, overall transport policy is decided and implemented jointly by the State and local authorities as the bodies empowered to organise transport and manage the infrastructure.

Within this structure, municipalities and inter-municipalities organise urban passenger transport (within the urban transport area defined by them and certified by the *préfet*, the State representative), counties manage interurban passenger transport – excluding lines of regional or national interest - and the regional authorities manage ordinary non-urban road services of regional interest.

For all road services, the legal framework provides that a service may be performed either under the management of a public body or by a company which has signed an agreement for a specific period with the organising authority (delegation of a public service or a procurement contract).

The Law of 29 January 1993, the "loi Sapin", specified the terms for allocation of public service delegations and introduced competitive tendering between operators. The criterion for differentiating between procurement contracts and public service delegation contracts was specified in the "MURCEF" law of 11 December 2001.

Since 1999 (the "loi Chevènement"), the grouping of municipalities as public establishments for inter-municipal cooperation (EPCIs) has significantly developed, both in relation to the number of structures and the areas concerned.

b) Within Ile-de-France

The Ile-de-France region is the subject of specific regulations which provide that the RATP - Autonomous Operator of Parisian Transport - has a monopoly over the supply of all public transport in Paris and its inner suburbs (metro, tramway, bus)¹.

Regulation (EC) No 1370/2007 of the European Parliament and Council of 23 October 2007, known as the "PSO" regulation (for "public service obligations"), came into force at the end of 2009. After a transition period and subject to certain express exceptions, it submits allocation of contracts for public passenger transport services by road and rail to European competition rules.

The Law on organisation and regulation of rail transport (the ORTF) of 8 December 2009, adopted after entry into force of this regulation, provides a 15 to 30-year transition phase for most public transport services² before introduction of competitive bidding in Ile-de-France. Article L. 1241-6 of the French transportation code provides that current contracts in this region will continue under rules applicable hitherto: until 1 January 2025 for road transport services, 1 January 2030 for tramway services and 1 January 2040 for metro services.

1.2 Participants in urban and interurban public passenger transport outside Ile-de-France

a) Urban transport organising authorities (AOTUs)

In 2011, the organisation of authorities responsible for transport (GART) identified 281 urban transport organising authorities (AOTUs).

Each urban transport organising authority, governed by one or more municipalities, determines the transport policy for its conurbation and organises the supply of urban public transport services. It has full independence in deciding public transport infrastructure, defining the scope of services (coverage, frequency, and schedules), prices and type of governance.

b) Interurban transport organising authorities

Articles L. 3111-1 et al. of the French transportation code define the legal status of "non -urban road passenger transport".

At national level, the State has the power to organise and contract regular non-urban services of national interest with transport providers after consulting the regions and counties concerned.

At regional level, the regional council may include in the regional transport plan any road service which is not considered to be of national interest and which serves at least two counties in the same region.

At county level, the county council may include in the county transport plan any road service which is neither of national nor regional interest and which is not the responsibility of urban transport organising authorities.

¹ Article L. 1241-1 et al. of the French transportation code.

² Some regular services outside of Paris and its bordering municipalities are offered by private enterprises (OPTILE) selected by tenders.

The recent extension of urban transport plans (PTUs) has entailed a major reduction in the powers of counties, especially over school transport lines. Interurban lines incorporated in PTUs are now usually included in urban transport invitations to tender.

- c) Operators of urban and interurban public passenger transport

Public industrial and commercial entities (EPICs)

Organising authorities may decide to grant operation of transport services to a public entity.

Two types of public entity may be created by the organising authority. They are both subject to public accounting rules.

- Direct public entity: it is financially independent but has no corporate personality. It uses the human and material resources of the local authority. Its director prepares and manages a budget additional to that of the organising authority.
- EPIC: a Public Industrial and Commercial entity is a financially independent public entity with a corporate personality. It is managed by an executive board and a director, legally separate from its local authority employer. Bye-laws and specifications define its activities and scope of action.

The purpose of these public entities is the exclusive operation of transport services delegated by the competent authority. They are not therefore involved in transport services outside their authorised areas.

A significant number of public transport entities belong to AGIR (independent management of public transport networks association) whose purpose is to carry out studies and advise its members. The association's objective is to circumvent one of the major weaknesses of sole operators: it provides expertise, studies and advice at a fixed price thereby saving its members substantial costs.

Private operators

Private operators run 91% of urban transport networks, the remaining 9% are run by public entities (GART 2011).

Regarding interurban networks, 18% were operated by a public entity (MEDDE-GART-UTP 2011).

The two main private operators of urban and interurban public transport outside Ile-de-France are Keolis and Veolia-Transdev.

- KEOLIS³, an SNCF subsidiary, is the "No. 1 passenger transport operator in France" and operates in 13 countries. It is involved in all travel sectors (No. 2 bicycle-sharing operator in France, "world leader" in tramway operation, managing car-sharing, sea and airport shuttles and acting as a major car park operator via its subsidiary Effia).
- VEOLIA TRANSDEV, an entity formed in 2011 after the merger between Veolia Transport⁴, a branch of Groupe Veolia Environnement, and Transdev, a subsidiary of Groupe Caisse des Dépôts.

³ Data from Groupe Keolis 2011 Financial Report.

⁴ Decision 10-DCC-198 of 30 December 2010.

- RATP Dév, a subsidiary of RATP which has, for the last 10 years⁵, been able to bid for passenger transport procurement contracts outside Ile-de-France.

There are two other private operators in the passenger transport sector outside Ile-de-France:

- Groupe Vectalia France, a subsidiary of the Spanish group, Subus Grupo de Transporte, operating in France since 1998.
- Groupe Car Postal France, a subsidiary of La Poste Suisse, which manages certain small urban networks and also has regional activities principally in eastern France. This group has operated in France since 2004.

There are a small number of independent regional groups in interurban transport. These include Autocars Philibert and Ray FF in Rhône Alpes and Groupe Fast in Vendée.

2. Competitive tendering procedures and management methods

2.1 *Management methods*

a) Public entity versus delegated management

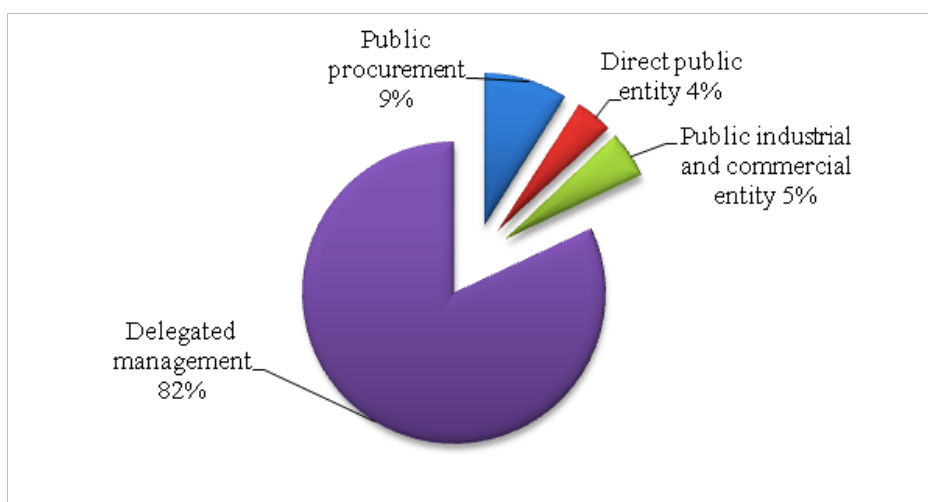
LOTI (art. 7-II) provides two methods for performing a public service. It may either be organised directly by local authorities and operated within a public industrial and commercial structure (public entity), or it may be performed by a company which signs an agreement with the competent organising authority.

In 2011, 91% of public urban transport networks were operated by delegated management, the vast majority via public service delegation (Figure 1):

⁵ Law No. 2000-1208 of 13 December 2000.

**Figure 1: types of urban transport management in 2010
(as a % of the number of networks)**

(Source: GART, Urban transport in 2010)



b) Types of contract

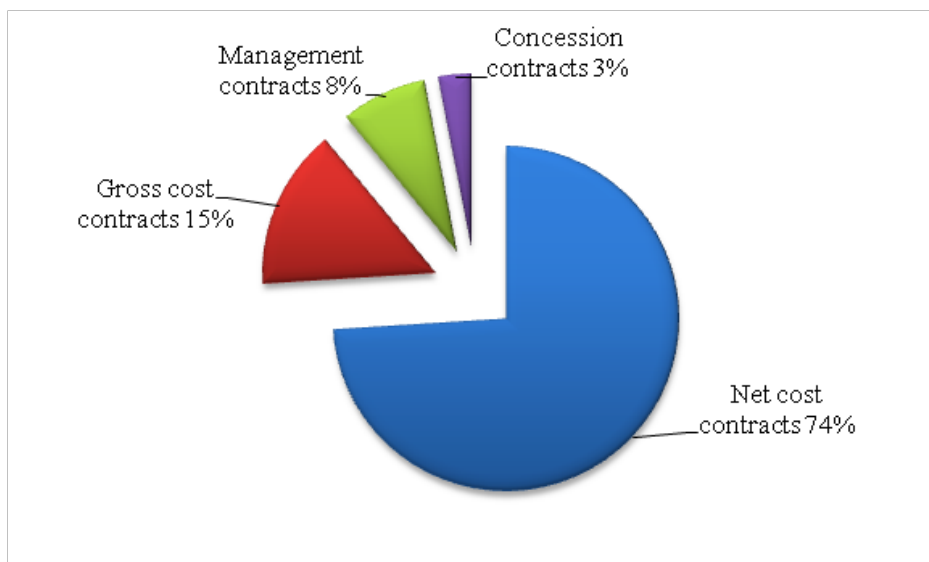
One of the main features of organisation of urban public transport in France is that when the organising authorities decide to delegate a service, they grant an exclusive right to an operator over the entire area of the urban transport concerned. In other words, separate lots are not awarded; the organising authorities allocate a single contract for the entire network. Contracts are awarded for an average of 8 years and fall into three major categories depending on the type and extent of risk they impose on the parties. Standard classification of such contracts (CERTU, GART) is based on the method of allocating commercial and industrial risks, i.e., income and cost risks. There are 4 contract types:

- **management contracts**, under which the transport organising authority (AOT) bears all risks, including those associated with production costs and the sale of services. Under this type of agreement, the AOT receives all operating income at the end of the accounting period and, in exchange, reimburses the operator's entire costs;
- **gross cost contracts**, under which the operator bears industrial risk and the AOT bears the commercial risk. In this case, the AOT receives all the income and pays the operator a specified sum calculated in advance and based on its costs forecast. Any variation between the forecast and actual costs is borne by the operator while any variation between forecast and actual income is borne by the AOT;
- **net cost contracts**, formerly called full-risk contracts, under which the operator bears all operating risks. Under this arrangement, the forecast operating deficit determines the amount paid by the AOT to the operator. At the end of the accounting period, if the actual difference between operating costs and income does not match the forecast deficit, the operator bears the loss.

The 4th contract type, representing a small percentage of all contracts, is a concession, under which the operator finances the investment required and bears the associated risk, over and above the income and costs risk of the operation.

Figure 2: types of contract in urban transport networks in 2010
(as a % of the number of networks)

(Source: GART, Urban transport in 2010)



2.2 Devolution procedures⁶

AOTs which choose not to run their public transport networks themselves, i.e., under their own management, are obliged to use a competitive bidding process before signing a delegation contract with a company. Procurement contracts and public service delegations are two procedures specifically designed to select an operator. They arrange a competition "for" the contract enabling disclosure to candidates of information on costs and demand by applying "[the] principles⁷ [which] ensure the effectiveness of public procurement and the proper use of public funds." (Art. 1, CMP - French Public Procurement Code). In practice, public service delegations (DSPs) offer greater opportunities for negotiating both prices and the terms for operating transport services.

- a) Procurement contract versus public service delegation: a choice between two conceptions of urban transport

Until 1996⁸, public service delegation (DSP) was the sole method applicable to outsource urban transport services. Parliament has since confirmed in the MURCEF Law No. 2001-1168 of 11 December

⁶ For more information, please refer to the CERTU guide, Devolution of public transportation services, 2013.

⁷ Art. 1 of the CMP provides that "procurement contracts must observe the principles of freedom of access to public procurement, equal treatment of candidates and transparency of procedures". Article L. 1411-1 of the CGCT (local government code) introducing public service delegations, also provides that the principles of transparency and equal access to public procurement must be observed.

⁸ Judgment of the French Conseil d'Etat on 15 April 1996, *Préfet des Bouches-du-Rhône*, when considering the provisions of the Sapin Law of 29 January 1993 on DSPs (art. 38): "[these provisions] shall not be construed as being a means to circumvent the rules governing public procurement in some or all contracts under which the remuneration of an operator contracting with the authorities is not substantially provided by the results of the operation."

2001, that the DSP procedure may only be used when the operator's remuneration is "substantially linked to the results of running the service" (art. L. 1411-1 as amended, French Local Government Code). In all other cases, the applicable procedure is that in the Public Procurement Code (CMP). Indeed, in the mindset of procurement contracts, the financial contribution provided by passengers is incidental. The operator is remunerated primarily by the organising authority.

There are now therefore two procedures⁹ with differing philosophy and features (cf. table 1), but which may both be applied to transfer urban transport services.

Table 2: Bases of operation and allocation methods

	Public procurement contracts	Public service delegation
AOT status	Public purchaser	Principal
Operator status	Procurement contract holder	Agent
Main beneficiary	Organising authority	Users
Objective	Provision of public service	"Turnkey" public service
Remuneration	Principally the AOT subsidy	Mainly provided by the operation

Despite regulatory advances, procurement contracts are still underused (cf figure 1). This is due to the majority of AOTs making the operator's remuneration "substantially" dependent on passenger behaviour.

Legitimate choice of a DSP implies that the financial risk taken by the operator is sufficiently great for its remuneration to be "substantially linked to results". On the other hand, obtaining services through a procurement contract implies that the organising authority will assume most of the financial risk associated with the operation. Responsibility for the commercial risk in particular¹⁰ appears to be a major distinguishing factor in the level of involvement of the parties. More generally, the central issue is the division of the right to decide the details of the service: routes, stops, timetables, types of vehicles, etc.

⁹ Use of public-private partnership (PPP) contracts is still the exception for urban transport. Currently, French authorities continue to decide transport policy (major policy decisions, pricing, investment) and delegate transport operation to companies or run it themselves. Nevertheless, the introduction in France of the Public-Private Partnership Contract (Law 2003-591) opens the door to a new type of public-private contractual relationship. Such a contract enables a public authority to give companies an overall public service assignment such as a full urban transport network (financing, design, construction, maintenance and management). Partnership contracts differ from public service delegations in their remuneration method and the division of responsibility between the company and public authority. Risks are divided between all parties during negotiations prior to signature of the contract. They also differ from procurement contracts whose process is more focused on technical matters and which also suffer from inflexibility as the public authority is forbidden from discussing the terms with each candidate – a major obstacle in complicated projects. Partnership contracts are seen as a means of avoiding indebtedness as the project is funded by the private partner. It may be used more in the future for major network operations.

¹⁰ The judgment, for example, of the French Conseil d'Etat on 30 June 1999 (*SMITOM du centre-ouest seine-et-marnais*) considered that remuneration of 30% of operating income showed that the operator was substantially remunerated from operating results. It appears from the judgment of the Marseille administrative court of appeal (13 April 2004, *ville de Marseille*) that the threshold of 20% is insufficient, provided that it is known during the DSP procedure.

In CMPs, the operator focuses on the AOT's requirements; there are only indirect links with other financial participants. In DSPs, however, the organising authority acts on behalf of potential users and does not define the specifications according to its own requirements. AOTs must therefore ensure that the operator will fulfil the needs of potential passengers in optimum conditions, while control over all future transactions (travelling with a ticket) in which it does not participate is relatively difficult or costly.

In DSPs, the operator is not considered as a simple supplier. It is not only "on an assignment" for the AOT as it has a financial interest in fulfilling the requirements of public transport. Its perceived role is to make proposals and seek opportunities during negotiations. DSP operators can therefore be seen as partners.

However, as in any partnership, the personality of the partner matters. The *intuitu personae* principle has therefore been adopted in the DSP procedure. Accordingly, DSPs provide that offers are "freely negotiated" (Art. L.1411-1 of the CGCT). The features of urban transport services, which may be relatively complicated to plan with precision throughout the term of the contract, are discussed during negotiations. Negotiation enables companies to make proposals based on their technical and managerial knowledge.

In contrast, standard procurement contracts do not give this right to negotiate¹¹. In selecting the provider of a given service, no negotiation is necessary¹².

b) Operator selection process

The four main stages of a DSP procedure and a negotiated procurement contract are:

1. Publication of invitations to tender
2. Examination of candidacies when bids are received (1 or 2 months later), then dispatch to the shortlisted candidates of the document defining the required services
3. Examination of bids¹³ by the committee which opens the envelopes (an average of 2 months later) and reports to the organising authority
4. Negotiations (3 months on average), final analysis of offers and selection of operator

In procurement contracts, selection of candidates is based on documents "enabling assessment of the candidate's professional, technical and financial capacity", and those "concerning the capacity of the candidate to commit itself" (art. 45 of the CMP). The conditions are therefore very precisely defined¹⁴, and are contained in forms "DC4" and "DC5" normally completed by procurement contract candidates.

With less precision and detail, Article L.1411-1 of the CGCT stipulates that for DSPs candidates may make an offer after examination of their professional and financial guarantees (...) and their capacity to ensure continuity of the public service and the equality of users of the public service ".

¹¹ "Invitation to tender is a procedure in which a procuring authority chooses the contractor without negotiation on the basis of objective criteria previously provided to candidates." (art. 33 of the CMP)

¹² However, the procurement contract procedures used for the delegation of urban transport services may be conducted under less restrictive conditions if the AO so wishes (adapted procedure).

¹³ Oral interviews with candidates by the envelope-opening committee may be arranged to supplement the written offers.

¹⁴ "The list of information and documents is set by order of the minister for the economy" (Art. 45).

Comparison of bids revolves around the quantified proposals (technical and financial data) of bidders. However, bidders must have sufficient knowledge of the initial situation to provide this information, requiring provision of the latest technical reports on the business (and their due retention), and especially the "delegated operator's reports"¹⁵. Non-provision of basic data for a network audit by candidates is an indirect means of benefitting the incumbent operator. The Conseil d'Etat (13 March 1998, *SA Transports Galiero*) pointed out that a refusal to provide details of the network mileage and payroll was a breach of the candidate equality principle. Moreover, since Law No. 99-586 of 12 July 1999 (art. 62), Article L. 1411-13 of the CGCT provides that "documents concerning operation of delegated public services", i.e., documents concerning the composition of the network (routes, mileage, timetables, etc.), annual reports of the current operator and personnel documents (human resources situation, wage agreements, etc.) must be made available to the public (and therefore to candidates). Implicit information or contacts with the organising authority are the privilege of the incumbent operator, but are generally less essential¹⁶.

Moreover, unlike the requirements for procurement contracts, nothing in the Sapin Law obliges disclosure (or even determination) of the criteria for selection of offers. From a competition viewpoint, it would be preferable for AOTs to go beyond legal requirements by ensuring the transparency of selection criteria (price, sales policy, innovation, environment, quality control, image, etc.) to ensure candidate equality and detail the local authority's expectations, thereby giving it the resources to monitor performance of the DSP and remove any suspicion of favouritism. For this reason, in compliance with their prior publication obligations, AOTs frequently provide candidates or bidders with a certain number of broadly general criteria in the consultation document.

Finally, both DSPs and negotiated procurement contracts give public authorities the possibility of negotiating offers (Art. L.1411-1, CGCT, and Art. 134, CMP) with certain candidates or "freely [entering] into any appropriate discussion" (art. L.1411-5 of the CGCT).

Negotiation of DSPs is based not only on prices – from the AOT viewpoint, the lowest possible for the benefit of users – but also and above all on certain details regarding the complexity of the services subjected to competition. Negotiation may not disrupt¹⁷ the financial equilibrium of the contract and must guarantee confidentiality of bids, prices and know-how, which are the sole restrictions on negotiation. Amendments to the initial specifications may only be for public service interests and must not entail any discriminatory treatment of candidates (Conseil d'Etat, 29 April 2002, *Groupement des associations de l'ouest parisien*). In practice, the main subjects of negotiation are obviously the financial proposals, but also the bidder's technical proposals and its capacity to develop the service.

"At the end of negotiations (...), the best financial offer is chosen by the tender committee (...) pursuant to the criterion or criteria stated in the public invitation to tender or in the consultation rules." (Art. 66-IV, CMP). The CMP thus closes the negotiated procurement contract procedure, always relatively formally and mindful of candidate equality. Conversely, no reference to particular criteria is made in DSPs, the law simply stating: "at the end of these negotiations, [the authority] chooses the delegated contractor" (art. L.1411-1).

¹⁵ Made obligatory by Article L. 1411-3 and defined in Article R.1411-7.

¹⁶ "Another major brake on provision of information is the obligation on the delegating authority to observe business confidentiality" (GART 2001, p. 142).

¹⁷ The Conseil d'Etat takes the view (16 September 1999, on the subject of motorway concessions) that the financial provisions of a contract may be amended without disturbing its equilibrium. This distinction is not entirely clear but is reflected in the fact that a lease cannot become a concession (Dijon administrative court, 5 January 1999, *association Auxerre écologie* and Grenoble administrative court, 25 February 2000, *Préfet de Haute-Savoie*).

3. Assessment of urban transport competition in the light of decisions by the French Autorité de la concurrence

Many Autorité de la concurrence decisions relate to the public transport sector and have disclosed certain obstacles to effective competition. The main obstacle to coordination of the supply of public services through procurement mechanisms is the difficulty in creating operator competition *ex ante*, i.e., ensuring participation by a sufficient number of candidates – both credible and effective – maintaining competitive pressure on incumbent operators and avoiding collusive arrangements such as participants sharing a procurement contract. These are real difficulties in an urban public transport sector dominated by just a few operators. The Autorité de la concurrence suggests concrete and practical solutions to at least partially resolve these problems.

3.1 Difficulties in implementing competition in urban transport procurement

a) Barriers to entry

As both the Conseil and Autorité de la concurrence have stated on several occasions, the effectiveness of the invitation to tender mechanism depends firstly on the ability of the procuring authority to describe precisely the service it wishes to provide and lay down objective allocation criteria enabling it to compare alternative offers. If the purchaser is unable to precisely specify the purpose of the invitation to tender, certain potential bidders – generally, competitors of the incumbent operator – may be discouraged from participating in the invitation to tender due to, *inter alia*, the cost of researching information to enable them to respond to such invitation to tender. As the Autorité has emphasized, "by improving the quality of information they provide, AOTs reduce the cost of information acquisition for transporters who file aggressive bids. [And], such cost reduction (...) is likely to encourage the latter to file more aggressive offers"¹⁸.

The Autorité de la concurrence has often underlined that one of the prerequisites for ensuring that competition for a procurement contract has the desired effect on prices, costs of service, incentive to innovate and quality, is that a sufficient number of credible potential candidates (i.e., likely to make "interesting" bids) is encouraged to participate. In its decision on the Veolia / Transdev monopoly¹⁹, it stated that "(...) the cost of preparing an offer or the insufficient quality of an invitation to tender may dissuade potential competitors from bidding". However, as stated in the same decision, a "reduction in the number of candidates in future invitations to tender is likely to have two results: a price deterioration in bids submitted to the transport organising authorities and less variety in responses to invitations to tender".

Barriers to participation in invitations to tender by potential candidates are numerous. The cost of preparing a response to an invitation to tender has already been referred to. The linguistic obstacle restricting participation by foreign competitors is another. As the Autorité commented in the Veolia/Transdev decision on the subject of urban transport procurement, "the specific legal framework in which invitations to tender are organised, their publication in French, in journals whose distribution is limited, save for those issued by major cities, to the domestic market, and the relatively short response times given to candidates discourage foreign operators from bidding in this sector". In a sector such as transport, such obstacles are particularly regrettable as they may dissuade bidding from foreign operators, even though they are experienced in the requirements of the sector.

¹⁸ Decision 10-DCC-198 of 30 December 2010.

¹⁹ Decision 10-DCC-198 *supra*.

b) Advantages for incumbent operators

In invitations to tender, the lack of competition on contract renewal is a major factor. At this stage, the incumbent operator may have a clear advantage which is a significant obstacle to effective competition.

Referring to the analytical tool developed by P. Klemperer²⁰, the Autorité de la concurrence showed that incumbent operators in the urban transport sector have clear advantages over their rivals²¹.

It is true that in this sector the cost and nature of physical assets are not a major obstacle to participation as rolling stock - which represents a significant part of the physical capital required for providing the service – is a mobile asset easily transferable from one network to another and is also usually owned by the procuring authorities. Basic facilities (terminals and depots) are owned by local authorities.

However, the experience acquired by the incumbent operator on the network's characteristics, demand and the requirements of its contract with the organising authority (including the more or less restrictive nature of quality targets) give it an undeniable advantage over its rivals²², as shown by the market test conducted by the Autorité de la concurrence²³.

Separation of the likelihood of success in an invitation to tender from the results of past invitations to tender, regarded as one of the essential conditions for effective market competition²⁴, therefore seems difficult to achieve in the urban transport sector²⁵.

Clearly, extraneous factors make development of advantages accruing to the incumbent operator inevitable, even desirable if such advantages enable an incumbent operator to post a better offer than its competitors. However, if such advantages lead to anti-competitive conduct by the incumbent operator, or if they enable the incumbent operator to abuse its position to negate the competitive aspect of the procurement concerned, the effect on the quality of its bid will be negative.

c) Cartels

In the urban transport sector – which has few competing operators – the risk of collusion between tender candidates is high as evidenced by the decision record of both of the Conseil and the Autorité de la concurrence. No fewer than nine decisions have penalised collusive agreements in the road public transport sector since 2001²⁶. The practices penalised in the decisions were based on organised bidding strategies in various forms, sometimes using more than one of these forms.

²⁰ Klemperer, Paul (2004), *Auctions: Theory and Practice*, Princeton University Press. Also available at: <http://www.paulklemperer.org/>, quoted in the report of the OECD 2006 round table on invitations to tender (<http://www.oecd.org/competition/cartelsandanti-competitiveagreements/38773965.pdf>).

²¹ Decision 10-DCC-198 supra.

²² On this point, see Decision 10-DCC-02 supra.

²³ Decision 10-DCC-198 supra.

²⁴ On this point, see the report by P. Klemperer (2005) supra.

²⁵ Available data on the results of the last tenders, however, seem to indicate that the market becomes more disputed. Indeed, between 2005 and 2010, out of 164 tenders launched by AOTUs, 30% didn't retain the incumbent. Moreover, in 2010, 26% of AOTUs (12 out of 46) that launched a tender have changed operators (studies MEDDE-GART-UTP 2010).

²⁶ Decisions: 01-D-13 of 19 April 2001 concerning competition in the public passenger transport sector in the county of Pas-de-Calais; 01-D-77 of 27 November 2001 concerning school transport in the county of Indre;

An initial strategy consists of bid-rigging. In several cases, the Autorité found that the companies concerned exchanged information on their bidding intentions or provided draft responses to invitations to tender so as to rig bids. Such practices "*are designed to deceive the procuring bodies as to the real extent of competition, pervert the normal competition procedure, particularly by bid-fixing and artificially making one of the rigged bids more attractive*"²⁷. In the urban public transport sector, the three companies concerned (Véolia, Transdev and Keolis) were penalised for "*having colluded to restrict competition by simulating a mythical competition by submitting rigged bids*", i.e., by, for example, "*making incomplete or tame submissions having no chance of succeeding*"²⁸. The same practices were used during invitations to tender for the city of Annecy and the Haute-Savoie county council for bus transport²⁹ and for extra-curricular school transport in Grasse³⁰.

Collusion may also lead companies to refrain from bidding or withdraw their bids. The tactic of withdrawal or refraining from bidding has been used in the urban public transport sector, where companies "*systematically refrain from bidding against the holder of the contract*"³¹.

Collusive agreements may also consist in dividing up the market geographically, cartel members expropriating or exchanging certain areas.

3.2 *Solutions recommended by the Autorité de la concurrence*

a) Developing the skills of organising authorities

The consequences of imprecise specifications in public service contracts require enhancement of the skills of delegating authorities to enable them to provide good quality information to potential candidates. As the Autorité observes, "*better AOT training to improve the information provided to tender candidates (especially clearer and more sophisticated specifications) could have a positive influence by stimulating the number of candidates*"³².

This recommendation applies particularly to the urban transport sector, where the growing demand for intermodal passenger transport combined with the extension of transport areas due to development of municipality combinations, complicates invitations to tender. The Autorité de la concurrence recommends for this sector that procuring local authorities should use project management support services (AMO) as these services "*could enable better identification of their urban transport requirements [and] (...) thereby*

02-D-59 of 25 September 2002 concerning practices used in passenger transport in the county of Ain; 03-D-46 of 30 September 2003 concerning practices in a public procurement contract for occasional transport of schoolchildren in the county of Alpes Maritimes; 04-D-30 of 7 July 2004 concerning school transport procurement contracts in Haute-Corse; 04-D-43 of 8 September 2004 concerning allocation of contracts organised by the municipality of Grasse for school and extra-curricular transport; 05-D-38 of 5 July 2005 concerning practices used in urban public passenger transport contracts; 08-D-33 of 16 December 2008 concerning practices used in invitations to tender for Annecy and the Haute-Savoie county council for bus transport; 09-D-03 of 21 January 2009 concerning practices used in school and regional bus transport in the county of Pyrénées-Orientales.

²⁷ Decision 04-D-30 supra.

²⁸ Decision 05-D-38 supra.

²⁹ Decision 08-D-33 supra.

³⁰ Decision 04-D-43 supra.

³¹ Decision 05-D-38 supra.

³² Decision 10-DCC-198 supra.

promoting improvement of selection criteria used in invitations to tender. Such improvement could [consequently] lead to better allocation of DSP contracts".

b) Asset transferability

Solutions could be envisaged to restrict the advantage of the incumbent operator on expiry of the initial contract and enable market players to be credible competitors on renewal.

A primary solution – which does not exclude the others - is to introduce clauses providing for asset audit and inventory at contract start and end, and find methods of assessing the value of assets to compensate the incumbent. Even if the term of the contract is less than the lifespan of the assets, thereby making depreciation of investments riskier, parity between bidders on contract renewal could be achieved if it is possible to easily transfer the capital used by the initial contractor, i.e., if the capital can be valued and transferred to other bidders.

Clauses providing for the transfer of personnel from one period to another, i.e., from one contractor to another, could also be introduced to reduce comparative advantages in relation to the human resources situation of the incumbent. Contracts could equally provide for transfer of intellectual property and software.

All such solutions are designed to clarify the contract exit terms for the current contractor and reduce the bid costs for new candidates in invitations to tender.

However, although inequality of bidders is a major brake on invitation to tender effectiveness, it is important when seeking solutions to this restriction not to discourage contractors from investing. If assets were totally and easily transferable, delegated operators considering potential withdrawal, or who believe they have the same chance as their rivals of winning the second procurement contract, might be dissuaded from making the necessary investment in infrastructure maintenance and provision of good quality services at the end of the contract. This could lead to cyclical investment concentrated at the beginning of the contract, harming the quality of the service and removing the benefits of using private operators.

c) Creation of a competitiveness promotion fund

One of the innovative measures on which the Autorité de la concurrence has focused, and whose implementation it has authorised, is the creation of a competitiveness promotion fund.

When examining the proposed merger between Veolia Transport and Transdev³³, the Autorité de la concurrence considered that the proposed concentration was, *inter alia*, likely to harm the due operation of market competition in the urban transport sectors outside Île-de-France. It found that the merger of two subsidiaries would reduce the level of bids in the urban public transport market in 20 to 25% of cases and reduce the quality and variety of bids submitted in future competitive processes in certain areas.

To remedy identified risks to competition in the urban transport market, the Authority obtained commitments from the parties concerning transfer of assets in accordance with remedial effectiveness criteria derived from decisions of the Authority.

More innovatively, the Authority has confirmed the commitment to finance the creation of a competitiveness promotion fund of 6.54 million Euros enabling firstly reimbursement of all or some of the bidding costs of unsuccessful candidates in invitations to tender issued for the transport network of which

³³ Decision 10-DCC-198 supra.

Veolia Transport or Transdev is outgoing operator, and secondly the financing of project management support services for small local authorities.

Financing of these competitiveness promotion measures is in accordance with the competitiveness analysis of the unilateral effects of operations in terms of the risk of reducing the extent of participation in invitations to tender (on this point, see also section III,1,b of this document).

d) Urban transport network allotment

When considering means of stimulating candidate participation in invitations to tender in the (especially urban) public transport sector, the Autorité de la concurrence also analysed the potential effects of dividing networks into lots³⁴.

Allotment consists of dividing the procurement contract into several lots, either according to the type of transport or by line or geographical area, widely used in the regional transport sector. For the urban transport sector, the analysis – both theoretical and practical – was based on observations of allotment application in several major cities³⁵, suggests that it could result in significant performance gains as it enables increased competition. Small operators are more likely to bid in invitations to tender for a few lines in a network than for the whole network. As the Autorité points out, while operation of an entire urban transport network by a single operator, which is the norm in France, "*enables (...) economies of scale to be made, it may also lead to reduced bids, both from the point of view of the number of candidates in invitations to tender and of the quality of the proposed services. Dividing networks into lots, whether according to transport methods (metro, tramway, bus) or geographically, could stimulate competition, facilitate the entry of new operators and the emergence of new services*"³⁶. In the course of its litigation functions, the Autorité de la concurrence examined the improper practices of a public service contractor in a dominant position³⁷. The Autorité's decision was upheld by the Paris Court of Appeal³⁸: "*in this case, SNCM, the incumbent operator, knew that it would be if not impossible, then much more difficult for other companies to submit a global bid and that it would, in all probability, be the only bidder, [...] as a result, by not giving the OTC the means of checking its competitiveness line-by-line on opening of the bid envelopes, SNCM encouraged it to focus on the global bid thereby fostering the exclusion of operators whose bids were restricted to certain lines; [...] in doing so, it negated competition both as regards prices and merit by taking advantage of its position as incumbent operator with a dominant position; [...] indeed the figures given by the Conseil de la concurrence [...] show clearly that the pricing in the SNCM bid of August 2006 was supra-competitive and did not reflect the improved performance expected from a global bid*".

³⁴ Opinion 09-A-55 supra.

³⁵ E.g., London, Stockholm, Melbourne, Helsinki, Copenhagen and Adelaide.

³⁶ Opinion 09-A-55 supra.

³⁷ Decision No. 09-D-10 of 27 February 2009 concerning practices used in the sea transport sector between Corsica and mainland France. The Supreme Court (Cour de cassation) upheld the jurisdiction of the Conseil de la concurrence to penalise the practices (*Cour de cassation, chambre commerciale*, 21 June 2011, SNCM, no F 10-15.754, no 634 F-D)

³⁸ Court of Appeal of Paris, 9 March 2010, no. 2009/07930.

Moreover, fragmentation of a network enables the procuring authority – if it has the resources – to implement benchmarking, i.e., compare the performance of the different contractors operating each lot, thereby providing a powerful regulation tool³⁹.

Nonetheless, operation of an entire urban transport network by a single operator can offer economies of scale. It also ensures consistency of network services (in terms of pricing and ticketing) and guarantees interconnection of the different lines of the network, while "*multiplication of small lots [generates] significant management costs*"⁴⁰. Similarly, in interurban transport "*[the organising authorities] generally have an interest in coordinating their transport offer to ensure good interconnection between networks. (...) It is [therefore] possible that they may have an interest in delegating different transport procurement contracts or DSPs within a region to a single group so as to avoid the problem of coordination between transport networks*", as the Autorité de la concurrence observed in the SNCF-CDPQ / Keolis-Effia decision⁴¹.

The Autorité stated in its opinion on public passenger road and rail transport⁴², "the question of allotment of urban transport networks raises a certain number of issues, including that of reconciling the expected performance gains from increased competition with the potential costs of coordination between different lot operators in the same network". In other words, performance gains from lot operation by competing operators do not systematically outweigh the cost of coordination.

However, several practical studies⁴³ of extensive urban networks have shown that the benefits of pooling all types of transport and all lines do not offset the extra costs associated with production by a monopoly. In other words, the loss of economies of scale generated by network fragmenting are more than offset by the benefits of increased competition and learning, which this type of organisation generates, provided that division into lots is combined with supervision of operator performance by the procuring authorities.

In the general context of a sector dominated by a few operators, and given the results of numerous practical studies – reflecting broad international experience – consideration of division into lots of public transport invitations to tender seems more than appropriate, as recommended by the Autorité de la concurrence in its opinion 09-A-55.

³⁹ As the Conseil de la concurrence observed in its analysis of the contract for sea transport between Marseille and Corsica (Decision 09-D-10 of 27 February 2009), the submission of global bids relating indivisibly to all network lines, i.e., without simultaneous bids on each individual line, could be a tactic by the outgoing operator to exclude rivals and also restricts the ability of the procuring authority to compare the different competing bids.

⁴⁰ Decision 10-DCC-198 supra.

⁴¹ Decision 10-DCC-02 supra.

⁴² Opinion 09-A-55, supra.

⁴³ PREDIT report *Risques et avantages de l'allotissement dans les transports publics urbains de voyageurs*, 2008.

INDONESIA

1. Introduction

Indonesia, specifically the Special Capital Region of Jakarta (hereafter calls “Jakarta”), is currently faced with problems of high growth rate for the use of private vehicles as a result of the low cost of using private vehicles, especially motorcycles. This resulted in decreasing demand on public transport. The modal split of public transportation then lessen from 50% in 1980 down to only 12.9% in 2010. To that end, the government is urged to revitalize the public transport management by improving regulations and increasing supervision and enforcement. The improvement and revitalization are urgent for the safety, security and comfort of passengers that has been neglected for many years.

Jakarta is characterized by a high increase of population, but declined growth. In 2006 population of Jakarta is about 8.96 million, and increased to 9.22 million in 2009. It is estimated that in the next five years, this number will reach to 9.75 million. The rate of population growth in the period 1980 and 1990 is equal to 2.42 percent per year, and continuously decline in the next decade (the period from 1990 to 2000) at a rate of 0.16 percent. The population growth has declined from 1.13 percent in the period 2000-2005 and 1.06 percent in the period 2005-2009. So, it appears that the city dwellers began to lead to the "old people" generation, meaning that the proportion of “young people” aged 0-14 years has begun to decline. When in 1990, the proportion of young people was still at 31.9 percent and in 2006 this proportion was declined to 23.8 percent.

Transportation issues in Indonesia are mostly caused by the increase of intensity and mobility of population movement from one area to other. For example for Jakartarian, people travel for 1.68 trip/person/day. This means that, the Jakartarian conducts 15 million daily trips. Not to mentioned trips by commuters from outside of Jakarta that enter or pass this capital. People tend to use private car to travel due to its low cost and level of convenience. The user for public transport then decrease continuously causing the modal split reduces from 50% in 1980 to 12.9% in 2010. Number of road and number of vehicles is also imbalanced. As a result, traffic jam becomes “new trademark” of Jakarta. Currently, there is 46 areas with 100 intersections that most likely cause congestion in Jakarta.

To serve the mobility of Jakartarian, the government provides two means of transport, namely PPD Bus and Transjakarta Bus. There are also city buses run by private companies, such as Mayasari Bhakti, Metro Mini, Kopaja, and Bialnglala which serve routes connecting various terminals in the capital. In general, models of transportation in Jakarta have covered a variety of modes, including public buses, small buses, rapid bus, rail, taxi, and public motorcycle. The problem is, percentage of public transport users in Jakarta steadily decline which reaches 3% per year. Transportation becomes expensive in Jakarta, and can reach 25-30% of monthly household expenditure.

2. Policy on public bus service

In general, Indonesian road transportation is regulated by several policies, including (i) the Law No. 14/1992 concerning Traffic and Road Transportation, (ii) the Gov.Regulation No. 41/1999 on Road Transportation, and (iii) the Ministerial Decree No. 35/2003 on Implementation of People Transportation on Road. The Law No. 14/1992 is replaced by Law No. 22/2009, but due to inexistence of the implementation regulation, the law is not fully implemented.

In the Law No. 14/1992, transportation is defined as the displacement of people and/or goods from one place to another by using vehicles. The road transportation network is a set of vertices and/or space linked by traffic space to form single network for the purposes of management of traffic and road transportation. The Law No. 14/1992 mandates that road transportation manages with the aim to realize many features, including safety, security, time effective, speedy, interchangeability, convenience, and affordability.

The implementation of traffic and road transportation in servicing public is performed by central government, local government, private enterprises, and or the society. There is clear separation of roles between parties involved. For aspects on policy, central government is responsible to manage regulations in road transportation. Local government also has similar opportunity, but limited to their region. Facilities and infrastructures are those responsible of central and local government. It will include many aspects such (i) determination of general plan for traffic and road transportation, (ii) management and traffic engineering, (iii) technical requirement, (iv) licensing for public transport, and (v) investigations for violations of licensing. Under this regulation, licensing for bus transportation is in the hand of government.

Based on regulation, the government must guarantee the availability of public transportation (including bus) for movement of people. Meeting the request for availability, the provision of bus services can be performed by public and private enterprises (operators). Bus service can operate within dedicated routes. A non-route bus service is dedicated by mean of tourism. The bus routes are set by Ministry of Transportation. It can be route between cities, regions/provinces, countries, or within the city itself.

So basically, bus service can be performed by any enterprises, including public enterprises, private, cooperative, and even a person. In order to perform such service, all enterprises should have the license for as a bus operator. This license is provided without due date as long the enterprise still perform its obligations. To gain the license, enterprises shall meet several requirements, namely tax registered, company's identification, declaration of domicile, license for work premise, and storage facility. Each proposal should be made to the Minister (of Transportation) and will be granted by dedicated local government. The license can be granted if they meet the requirement and there is available route to fulfil. To define whether there are still available routes to meet, government will define it based on the city planning, demand on bus service, ability of operators, availability of infrastructure, road's class, and interconnection between transportation. If the license is denied, the Minister should declare the reason for such denial. So, there is no bidding process in granting license for bus service. There is also no monopoly in certain routes for public bus service.

To maintain the balance of bus services, in anticipating population growth and development of the region, the government always conducts evaluation on the needs of additional bus on each route. The evaluation was done to determine number of bus and to define whether the route is open or closed to the addition of buses. The evaluation is done by considering number of trips, number of seats, actual load factor (minimum 70%), availability of appropriate terminal facilities, and the level of road service. Determination route license, vehicle requirements, and evaluation of additional vehicles for in the route is done by (i) the Minister of Transportation to cross-border route in accordance with the agreement between countries, (ii) the Director-General in the Ministry of Transportation, for route of more than one provinces, (iii) Governor for the inter-regional network through regions/cities in the province, and (iv) the Regent for the entire route in their region, and (vi) the Mayor, for the route within the City.

For the quality, the minimum standard of quality for bus service is set by the central government (Ministry of Transportation). Each local government may increase the standard quality that can be applied to their jurisdiction.

The law regulates the consumer's right and involvement in road transportation. Their contribution may take place in form of supervising the implementation, advising the relevant agency, and support. The consumer also have right to get safety and convinienity in bus service at reasonable price. Price for bus service is determined by the central government. Consumer complaint can be address to the Ministry of Transportation or national consumer agency. However, there is still no clear mechanism on public complaint on bus services.

3. Special provision for bus rapid transportation (BRT)

The law on transportation also regulates issues on bus rapid transportation (busway). The bus rapid is having specific lane which different than other public bus services. It also has specific route that cannot be served by other public bus services. Other public bus service may only serve as a feeder to the bus rapid service. The BRT is now deeming as one of the modern form of conventional bus services which exist in Indonesia for decades.

BRT was first implemented in Jakarta under the name of Trans Jakarta bus. It was then other local governments are also built BRT project in other areas such Bandung, Yogyakarta, Semarang and Pekanbaru. Each region implements different system in the management of BRT. It was depend on the local conditions, government policies, and possibility of social conflict that may arise from the application of the new transportation system.

Government assumes position as regulator in the management of BRT. They only sets standard of quality, service, and fares including subsidies. Operation of BRT is entirely done by private enterprises, leaving the concept of BRT development and management as the form of partnership between government and private sector. Application of competition for the market in selecting the operator of BRT will protect businesses opportunity to enter the market. However, not all policy areas comply with this principle. Various considerations, particularly those involving social conflict caused the local government to not apply proper bidding process in selecting the BRT operator.

Some local governments such Semarang, Bandung and Jogjakarta apply direct appointment mechanism for BRT operator. Designated operator is mostly new enterprise which a consortium of existing city transport operators. Some considerations of the local government in applying direct appointments mechanism are to (i) avoid social conflicts between BRT operators with other operators; (ii) reduce number of public transport; and (iii) protect local entrepreneurs.

Local government through the Local Transportation Office set the licensing for city transport, including local bus service. When the local government wants to adopt the BRT, the existing enterprises will directly be affected. BRT is a choice of transportation that is much comfortable, safe, and precise. If people prefer to use the BRT, then gradually the existing local transport business will suffer losses, and local enterprises will no longer existed. Therefore, the local government tends to form a consortium of existing local enterprises, especially those with a license that overlap with the BRT route. The consortium was appointed directly to be a BRT operator.

The local government's policy that points local consortium is a form of protection for local enterprises. If the bidding process is performed, local enterprises will have to compete with enterprises from outside. Under which reason, local government tends to directly appoint the operator.

The consortium scheme has been successfully implemented in Jogjakarta and Pekanbaru, two of 34 provinces in Indonesia. While in Bandung, the formation of consortium faced rejection from the city transportation operators who ultimately rejected the existence of BRT in Bandung. Until now, the BRT in Bandung cannot be operated. The appointment of consortium as BRT operator can positively reduce

congestion and support the environment, because by becoming the BRT operators, enterprises shall replace their bus with standard BRT bus. In other terms, this will rejuvenate the bus without significant burden to the number of public transport.

From the competition point of view, direct appointment of BRT operators avoids the principle of competition for the market. Direct appointment of BRT operator can limit opportunity to other enterprises that have capability to manage the BRT. The said local government policy has eliminated competition that could ultimately eliminate the chance for better service. Unlike the local government of Semarang, Bandung and Yogyakarta, local government of Pekanbaru Government do implement a bidding process in choosing their BRT operator. But unfortunately, the bidding seems just want to meet the rules, while the terms has been leading to certain business, namely TransMetro, which is a consortium of existing twenty six city transport enterprises. The consortium was chosen as to protect the existing city transport enterprises and avoid conflict that would arise if the city transport operators have to be contended with the BRT.

In addition to the selection of operator of BRT, an evaluation for the performance of operator also needs to be considered. If the government made direct appointment, it is feared there will be no improvement in the quality of services for the community. The government cannot use other operators that have potential to provide better services, than the appointed operator and can inhibit the development of potential innovation.

4. Conclusion

Basically the national regulation governed the appointment of private operators in organizing and carrying out the bus services is neutral to the issue of competition. There is no setting in the regulation which directly violates the principle of fair competition. Problem in the implementation and operation of bus services is mostly due to the absence of comprehensive regulatory framework for this problem. This missing link has led to the non uniform implementation of road transportation policy in various regions, and has potentially violated the principle of fair competition.

IRELAND

1 Background

The Irish Competition Authority welcomes the opportunity to make a submission on the allocation of contracts for the provision of local and regional bus services to the Competition Committee. Before we address the Competition Committee's questions, our submission will provide an overview of how the Irish bus service market works, the potential competition concerns arising in the relevant market and our previous recommendations to the Irish Government.

Before 2008, the Transport Act 1932 governed the operation of bus services in Ireland. It was designed to protect rail transport from competition from buses. To pursue this objective, the Transport Act 1932 prohibited the operation of scheduled passenger services except those granted a licence by the Minister for Industry and Commerce. Then EU Directive 1370/2007 came into force and required, from December 2009, that formal contracts be put in place providing for compensation plus a reasonable profit to be paid by the State for subsidised public service activities.

The 1370/2007 Directive led to the enactment of two pieces of new legislations, the Dublin Transport Authority Act 2008 ("the 2008 Act") and the Transport Regulation Act 2009 (the "2009 Act"). The two Acts established the National Transport Authority ("the NTA") as the statutory regulator for public passenger land transport services including bus, rail and taxi and provide the national legislative background for directly awarding public service contracts to the two state-owned operators.

Local and regional bus services in Ireland are provided by a combination of public and private operators. The bus network in Ireland comprises a mix of (a) Public Service Obligation ('PSO') bus services, (b) Licensed commercial bus services and (c) Rural Transport Services

1.1 PSO bus services

The PSO bus services have always been provided by two state-owned sister-companies - Dublin Bus, which provides local bus services in Dublin, and Bus Éireann which provides services outside Dublin. The current PSO bus services, consisting of the network of current Dublin Bus services (excluding airport and tour services) and the stage carriage, Dublin commuter and all city services (excluding Expressway of Bus Éireann), were "grandfathered" to these two companies in 2009 without a competition through two separate Public Transport Service Contracts to last until 2014. PSO services covered by the Public Service Contract do not fall within the licensing system and so do not require a licence.

Dublin Bus and Bus Éireann are wholly owned subsidiaries of Coras Iompair Éireann ("CIÉ"). CIÉ is a statutory body with ownership vested in the Minister for Transport, Tourism and Sports. It also provides rail services within Ireland, and operates Rosslare port.

Within the PSO network, there is one exceptional cutback in route where the service operator is a private company. Due to lack of state funding, one of the state-owned companies, Bus Éireann stopped its service between Urlingford and Portlaoise on September 2012. This service was within the PSO network covered by the Public Transport Service Contract. The National Transport Authority issued a public tender

for the service and awarded this route to a private company, M&A Coaches, which operates without a subsidy.

1.2 Licensed commercial bus services

Licensed commercial bus services are run by bus operators without a requirement for any public subsidies. The 2009 Act obliges all operators to be licensed if they are providing commercial public bus passenger services (“non-PSO”) and this rule applies equally to both private and state-owned companies. The National Transport Authority (the NTA) is responsible for issuing those commercial licences.

The licensed commercial bus services in Ireland seem to be a relative liberalised market. However, this market is very small, mainly airport services, interurban services (Expressway services) and a few express services. Up to the end of 2012, around 700 commercial bus service licences were issued by the NTA, which includes regular bus services, commuter bus services, interurban services, student buses services, specific targeted buses, tour buses, and venue services. Each licence covers one route, not a bundle of routes. Bus Éireann owns 35 commercial licences and Dublin Bus owns 5 commercial licences.

1.3 Rural Transport Services

Public Bus Passenger services in rural area are provided under the Rural Transport Programme. Many of these services are demand responsive services i.e., the route can be varied to pick up customers. These services are provided under the Rural Transport Programme (RTP) and in receipt of a state subsidy. The NTA is responsible for the RTP and is currently taking service reviews.

The RTP is delivered nationally through 35 community based groups, all of which are either not-for profit companies limited by guarantee or co-operatives. Journeys tend to be local in nature, with an average distance of about 15 miles and 76% of all journeys are delivered on a door-to-door basis, collecting people from their homes and assisting them to their destination (2010 figure).

1.4 School Bus Services

Another type of bus services worth mentioning is the school bus services, which are not within the remit of the NTA. For historical reason, the Department of Education is responsible for school bus services. School bus services support over 125,000 pupils and their families on a daily basis. The general service is operated on behalf of the Department of Education and Skills by Bus Éireann through School Transport Schemes with a number of grant schemes being operated directly by the Department of Education.

Expenditure on School Transport Schemes is around 166 million Euros for 2012. Bus Éireann carries out work on recruiting private sub-contractors, planning and managing the countrywide network on behalf of the Department of Education, and it also provide some school bus services itself.

It is not clear to the general public how and when the contract for the 2011-2012 school year was awarded to Bus Éireann, or whether the Department (or even Bus Éireann) should open up the public tendering for the School Transport Schemes. The Commission is assessing a State Aid complaint made by an association of private coach operator against Dublin Bus and Bus Éireann.¹

¹ <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:217:SOM:EN:HTML>

2. Perceived Competition Problems

2.1 *Lack of transparency on the directly awarded PSO services*

EU Directive 1370/2007 states “Directly awarded public service contracts should be subject to greater transparency”. It further defines: “‘Public Service obligation’ means a requirement defined or determined by a competent authority in order to ensure public passenger transport services in the general interest that an operator, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions without reward”.

In Ireland, the Public Service Contracts entered into recognised the entire pre-existing Dublin Bus network as being covered by the Public Service Contract as PSO services when the Public Service Contracts were first put into place in 2009. The public service contracts between the NTA and the operators state *“the Public Service obligation is based on securing network benefits. It is the characteristics of the network, for example, integration, interchange, ticket information, through ticketing, inter-available ticketing and accessibility between routes and service provided by the Operator and integrated with other public passenger transport services, which are being funded as the PSO. The PSO is not therefore the subject of individual routes or services but rather the wider characteristics of the network of public passenger transport services”*.

There are two questions arising from the PSO as defined by the Irish Public Service Contracts:

1. Whether the PSO should be defined as the entire pre-existing bus passenger network.
2. Whether profitable routes should be included in the defined PSO network

It is not clear that the PSO should be defined as the entire pre-existing bus passenger services network as described above by the Directive 1370/2007. Were the purpose of defining the PSO services as a network of public passenger transport services to realise the network benefits, it is not obvious the pre-existing Dublin Bus network is the most efficient public bus network possible. An efficient public bus network is designed to meet the consumers’ need at a greater economic efficiency. The importance of economic efficiency of the bus network is not described as one of the characteristics of the network in the NTA’s PSO definition.

Where the PSO is defined as the entire pre-existing bus network, and even if the pre-existing bus network is efficient, it is not clear whether profitable routes are included in this network. The current Public Service Contract is awarded as a single grant for the provision of a network of services, and a specific amount of subsidy is not attributed to a specific route or a bundle of routes. It is claimed that some of the routes covered by the Public Service Contracts can be made profitable. Without clear information, such as, the financial status and consumer demand of the routes covered by the PSO network, it is very difficult to design the most efficient public bus network.

The example of the service between Urlingford and Portlaoise (see Paragraph 1.6) suggests that avoidable subsidies may be being paid, since a private operator was willing to operate the service without subsidy where a PSO operator was not.

Under the current system, there are implicit cross-subsidies between profitable and loss-making routes. It is not clear how efficiently either type of route is being run and the extent to which competing operators could run the loss-making routes with a lower level of subsidy, or the profitable routes at lower fare levels, thus reducing costs to the State and to consumers, respectively.

2.2 Barriers for private companies to enter the bus services market

The Public Service Contracts operators do not provide separate accounts for subsidised routes and commercial routes. They may have more detailed accounting information internally on which routes are not profitable and to what extent. It appears that the Department of Transport, Tourism and Sports or to the NTA do not yet have such information. This information asymmetry creates barriers for private firms to apply licences to operate in the Greater Dublin Area. Without such information it is difficult for private firms to apply licences for routes:

1. which do not need state subsidies to operate but which lie within the PSO network; or
2. which may indirectly affect the profitability of routes within the PSO network.

Private firms cannot apply for licences to operate on routes that are covered by the Public Service Contract. The underlying principle of the direct award of a monopoly on these routes (which should in theory be socially desirable but loss making routes) is that allowing competition would further increase losses and therefore necessitate further subsidy. However, it is not clear that some routes covered by the current Public Service Contracts are genuinely loss-making.

In the case of applying for new licences, where private firms apply for licences to operate a brand new route, information asymmetry also creates difficulties for private firms. If the proposed new route takes customers away from routes covered by the Public Service Contract in the catchment area, it may reduce Dublin Bus's fare revenue from routes in this area. In this case, Dublin Bus may need more subsidies to run the routes in the catchment area. Therefore, one of the conditions for a new licence is to prove that there is "enough demand" for the proposed new route, so that the operation of the proposed new route will not negatively affect routes covered by the Public Service Contract in the catchment area. However, the licensee does not know the level of traffic on each existing route so may not be able to make this assessment.

In light of the "enough demand" criterion, if the NTA grants a licence to a brand new route operating in the catchment area of routes covered by the Public Service Contract, it must believe either that (i) the proposed brand new route could generate potential new customers in the catchment areas and/or (ii) routes operated by Dublin Bus in the catchment area do not need subsidies. However, in the absence of information on which routes require subsidies and which routes are profitable, it is difficult for the NTA to assess whether the proposed new route could reduce fare revenue of routes operated under the Public Service Contract by Dublin Bus in the catchment area. This kind of uncertainty indirectly affects private operators' decisions on whether to explore new routes in the area where Dublin Bus and Bus Éireann operate at present.

3. Competitive Tendering

Introducing competitive tendering could eliminate the perceived competition problems outlined in the previous chapter. Therefore, The Irish Competition Authority has previously recommended that the Irish Government introduce competitive tendering in the market for subsidised public transport services in the Greater Dublin Area.

There are many benefits associated with introducing competitive tendering for subsidised PSO services, provided that the system of competitive tendering is well designed. EU Directive 1370/2007 states that "*Studies carried out and the experience of Member States where competition in the public transport sector has been in place for a number of years show that, with appropriate safeguards, the introduction of regulated competition between operators leads to more attractive and innovative services*

at lower cost and is not likely to obstruct the performance of the specific tasks assigned to public service operators”.

Improved service quality, a more integrated transport system and greater value for taxpayer’s money are among the most quoted benefits associated with competitive tendering. Moreover, improved transparency associated with competitive tendering is close related to the perceived competition problem in the Irish situation. It could help the NTA to (i) improve the current bus network, (ii) identify the real cost of running each route under the PSO network and (iii) encourage private firms to provide commercial bus services.

An effectively designed tender process requires the NTA to define and describe the complex bus networks. Bus network design and scheduling of drivers and buses should be led by the needs of the passenger. Introducing competitive tendering could facilitate the NTA to develop the bus network by inviting bidders to suggest modifications to routes as part of their tenders.

Competitive tendering would enable the NTA to gather more information on what are the actual costs associated with operating a PSO bus service or a bundle of such services through formal or informal engagements with all potential bidders during the tendering process.

Competitive tendering in the PSO bus services market helps private operators to identify whether a potential route can be treated as a commercial route by the regulator, and ultimately issuing a licence. This reduces the uncertainty for private operators, encourages private firms to enter the commercial bus market and stimulates competition in the commercial bus services market.

Introducing competitive tendering for PSO bus services is one of our recommendations to the Government. While Legislation has been introduced to facilitate the introduction of competition in the PSO market, and the 2008 Act empowers the NTA to issue competitive tendering for the PSO bus services, only one such route has been tendered to date, and only where the PSO operator had withdrawn from the route.

Point 1.30 of the Irish Government’s Action Plan for Jobs 2012 is to “*review public transport regulation with a view to reform that will reduce costs via increased competition*”. After public consultation on the “Public Bus Service Contract” July 2012, we understand that the NTA made recommendations to the Irish Government on whether to continue to directly award the PSO bus services to the current operators or to open it to competitive tendering. The Irish Competition Authority has not seen the recommendations and the NTA is waiting for the Government to make the final decision.

4. Competition Committee Questions

4.1 Description of the industry and regulatory framework

Are local and regional bus services in your jurisdiction provided directly by public authorities, by States-owned enterprises, by private operators, or by a combination of public and private operators?

The 1370/2007 Directive led to the enactment of two pieces of new legislation, the Dublin Transport Authority Act 2008 (“the 2008 Act”) and the Transport Regulation Act 2009 (the “2009 Act”). The two Acts established the National Transport Authority (“the NTA”) as the statutory regulator for public passenger land transport services including bus, rail and taxi, and provide the national legislative background for directly awarding public service contracts to the two state-owned operators.

Local and regional bus services in Ireland are provided by a combination of public and private operators. The bus network in Ireland comprises a mix of (a) Public Service Obligation (‘PSO’) bus services, and (b) Licensed commercial bus services and (c) Rural Transport Services

PSO bus services

The PSO bus services have always been provided by two state-owned sister-companies - Dublin Bus, which provides local bus services in Dublin, and Bus Éireann, which provides services outside Dublin and interurban services. The current PSO bus services, consisting of the network of current Dublin Bus services (excluding airport and tour services) and the stage carriage, Dublin commuter and all city services (excluding Expressway of Bus Éireann), have been “grandfathered” to these two companies without a competition through two separate Public Transport Service Contracts until 2014. PSO services covered by the Public Service Contract do not fall within the licensing system and so do not require a licence. The NTA is currently considering whether to continue to directly award the PSO bus services to the current operators or to open it to competitive tendering upon the expiration of the current public service contracts.

Dublin Bus and Bus Éireann are wholly owned subsidiaries of Coras Iompair Éireann (“CIÉ”). CIÉ is a statutory body with ownership vested in the Minister for Transport, Tourism and Sport. It also provides rail services within Ireland, and operates Rosslare port.

Within the PSO network, there is one exceptional route where the service operator is a private company. Due to cutbacks in state funding, one of the state-owned companies, Bus Éireann stopped its service between Urlingford and Portlaoise on September 2012. This service was within the PSO network covered by the Public Service Contract. The National Transport Authority issued a public tender for the service and awarded this route to a private company, M&A Coaches, which operates without a subsidy.

Licensed commercial bus services

Licensed commercial bus services are run by bus operators without a requirement for any public subsidies. The Public Transport Regulation Act 2009 (“2009 Act”) obliges all operators to be licensed if they are providing commercial public bus passenger services (“non-PSO”) and this rule applies equally to both private and state-owned companies. The National Transport Authority (the NTA) is responsible for issuing those commercial licences.

The licensed commercial bus services in Ireland seem to be a relative liberalised market. However, this market is small, mainly airport services, interurban services (Expressway services) and a few express services. Up to the end of 2012, around 700 commercial bus service licences were issued by the NTA, which includes regular bus services, commuter bus services, interurban services, student buses services, specific targeted buses, tour buses, and venue services. Each licence covers one route, not a bundle of routes. Bus Éireann owns 35 commercial licences and Dublin Bus owns 5 commercial licences.

Rural Transport Services

Public Bus Passenger services in rural area are provided under the Rural Transport Programme. Many of these services are demand responsive services i.e., the route can be varied to pick up customers. These services are provided under the Rural Transport Programme (RTP) and in receipt of a state subsidy. The NTA is responsible for the RTP and is currently taking service reviews.

The RTP is delivered nationally through 35 community based groups, all of which are either not-for profit companies limited by guarantee or co-operatives. Journeys tends to be local in nature, with an average distance of about 15 miles, and 76% of all journeys are delivered on a door-to-door basis, collecting people from their homes and assisting them to their destination (2010 figure).

Are public-private partnerships at all used for the provisions of these services?

No

Which body/institution has responsibility for ensuring the provision of these services (in terms of quantity and quality) and for the allocation of the contracts?

The National Transport Authority (“NTA”) is the statutory regulator for public passenger land transport services including bus, rail and taxi. As to public bus services, the NTA shall, in accordance with Section 48 of the 2008 Act “*to ensure the adequacy of public passenger transport services in the general economic interest, enter into direct award contracts, which impose public services obligations with Dublin Bus and Bus Éireann to secure the provision of public bus passenger services within the Greater Dublin Area.*”

The 2008 Act provides the legislative basis for the contractual arrangement for the procurement of public bus transport service on a national basis. Sections 48 and 52 of the 2008 Act give Dublin Bus and Bus Éireann exclusive rights in respect of the provision of PSO services, and such contracts are issued by means of direct award. The 2009 Act’s primary purpose is to establish a modern system for the licensing of commercial public bus services on a national base.

Is the decision on the market structure and on how to allocate the franchise taken at the local level or is there a national legal framework?

There is a national legal framework as described above. Bus transport within the Greater Dublin Area (excluding airport and tour services), Dublin commuter services (which covers much of Leinster), all other city services (City of Cork, Limerick, Waterford and Galway) and stage carriage services are dealt with through this framework. Other services are provided by the market.

Who is in charge of regulating bus services, a local or a national authority? Is the regulator in charge of controlling for the quality of services (that the frequency of service is respected, that buses are sufficiently clean, etc.)?

The National Transport Authority regulates bus service through the Public Service Contracts and through issuing commercial licences. It also regulates public bus fares.

The Public Service Contracts contain performance standards for the services supplied by each operator, which including requirement for reliability, punctuality and quality of services. Section 6 of the Public Service Contracts describes the Performance Obligations and details of the Performance Obligations set out in Schedule B.

The NTA publishes its assessment of Performance Obligations on its website. These Performance Obligations include Punctuality (minimum of 95%), requirements of the frequency of services (various for weekday peak, non-peak, and weekend peak, non-peak ect), and cleanness and so on. Ten percent of the subsidy is performance-related and is reduced pro-rotata if the operators do not meet performance targets in relation to service levels and punctuality. Dublin Bus has missed one of the performance targets on a few occasions and the NTA has reduced the performance payment proportionately.

Is it easy for consumers to access the regulator and complain for bad services (this also requires that the consumer is well informed on the quality of services that he is expected to receive)? Do consumer complaints have an effect on the allocation mechanism?

Within the Performance Obligations mentioned in the previous question, there is one section regarding consumer complaints. The Public Service Contracts requires the operators to report to the NTA customer complaints by specified category. It is not clear what will the NTA do if the operators record an excessive number of complaints or do not respond to them.

If there is competition in the provision of the service how has it been decided on which routes to allow it (e.g. has the profitability of the routes been assessed beforehand)?

Competition is allowed where the route is not covered by the Public Service Contracts, i.e., the PSO routes.

Competition is allowed for commercial bus services, however it is a small market and only certain service qualify as commercial bus services, mainly airport services, interurban services (Expressway services) and few express services.

4.2 *Tendering process*

How are contracts awarded?

PSO services are directly awarded to Dublin Bus and Bus Éireann, with one exception where the route was issued through competitive tender (see Paragraph 1.6).

How big is the discretion local authorities can exercise in selecting who to award the contract to?

The Local Authorities do not have the right to award the contract.

What are the dimensions over which potential bidders compete?

Not Applicable

Does the reputation of the franchise (in terms of being a cost effective and a high quality service provider) play any role in the choice by local authorities?

Not Applicable

Are incumbents given any specific advantage in successive bids? And does being an effective and high quality service provider result in any benefit for him?

Not Applicable

How widely available is the information on costs and revenues for a given local area?

Not Applicable

Are renegotiations widespread?

Not Applicable

How is it ensured that prices of local transport services are reasonable and that the amount of subsidies is not too high?

Not Applicable

Are prices for local transport services regulated? And if so how?

Yes, the NTA has responsibility for regulating fares charged by public transport operators. For a fare increase, the operator must apply for approval to the NTA.

The NTA will consider all of the respective costs and revenues in considering any applications of fare increases. In its most recent fare determination, the NTA states that “*The Authority has determined the above fare changes as representing an appropriate balance between a contribution on the part of the operator in continuing to increase efficiency and reduce costs and the implementation of increased fares, as important elements that contribute towards maintain the integrity of the network of public transport services*”.²

If there are multiple franchisees within a local market, is it ensured that prices are the same across service providers? If so how can competition for the market be made operational?

Not applicable.

Who ensures that the system is fully coordinated (in terms of timing/frequencies etc.)?

The 2008 Act outlines that it is the NTA’s responsibility to ensure adequate public transport services. At operational level, the NTA has delegated this responsibility to the operators through the Public Transport Service Contract. “*The Operator shall, in so far as possible, and, in any event, without discrimination integrate all Services provided it with those of other public passenger transport services including by participating and complying with integration measures introduced by the Authority Under Chapter 3 of Part 3 of the Act of 2008*”.³

Following on a report on “Cost and Efficiency Review of Dublin Bus and Bus Éireann”, with the NTA’s approval, Dublin Bus has conducted the Network Directive Project which is aimed to improve the network design.⁴ Some Dublin Bus PSO services have been changed as a result of the Network Directive Project.

4.3 Nature of the contracts awarded

Are routes tendered individually /in small blocks or in large blocks? And why? How are routes grouped together?

The direct award contracts to Dublin Bus and Bus Éireann are in large blocks. The NTA’s reasoning for this is based on network effects. The public contract between the NTA and Dublin Bus defines the Public Service obligation (PSO) as “*the Public Service obligation is based on securing network benefits. It is the characteristics of the network, for example, integration, interchange, ticket information, through ticketing, inter-available ticketing and accessibility between routes and service provided by the Operator and integrated with other public passenger transport services, which are being funded as the PSO. The PSO is not therefore the subject of individual routes or services but rather the wider characteristics of the network of public passenger transport services*”.

One individual route was awarded by tender after the PSO operator had withdrawn.

How long the contracts are and what is the rationale for the chosen length? Is the length of the contract fixed for all local authorities in your jurisdiction or is there some flexibility?

² <http://nationaltransport.ie.cdn.ie/wp-content/uploads/2012/03/Consideration-of-applications-to-increase-cash-Leap-and-pre-paid-tickets-from-Dublin-Bus-Bus-Éireann-Irish-Rail-and-the-RPA-for-2013-November-2012.pdf>

³ Paragraph 3.4 of the public transport service contract.

⁴ Deloitte (2009) “Cost and Efficiency Review of Dublin Bus and Bus Éireann”.

The duration for Public Service Obligation Contract for public bus services is five years. The current Public Bus Service Contracts commenced on 1st December 2009 and will expire in December 2014. The NTA may amend or even terminate the contract at anytime unilaterally if it decides to issue competitive tendering for all or part of the PSO bus services. If the NTA decides to enter into a subsequent direct award contract for the public bus services when the current Public Contract expires in 2014, it shall invite and consider submission from all stakeholders.

Section 48 (6) (a) of the 2008 Act states that “the Authority shall determine the duration of public transport services contracts to which this Chapter applies subject to a maximum of 10 years in respect of public bus passenger services.”

It is not clear to the Competition Authority whether the NTA is required by the EU regulation 1370/2007 to open up the Public Service Contracts to competition in 2019. .

It is the NTA’ view that both Regulation 1370/2007 and the 2008 Act allow it to enter into a direct award contract with Dublin Bus post 2019 subject to Section 52 (6)(c)(ii) of the 2008 Act. “*where the Authority is satisfied that that the continued adequacy of the public bus passenger services can only be guaranteed in the general economic interest by entering into such direct awards*”. The NTA considers it satisfies section 2, Article 5 of EU 1370/2007 which allows to directly award public service contract to “an internal operator”.

How often are the contracts being renegotiated?

The contents of the contracts and the basis for maintaining them may be reviewed at any time by the NTA in consultation with the relevant company, however, a full review of the contract must occur at the end of the 5 or 10 year periods (as appropriate). Furthermore, the NTA may terminate the public service contract unilaterally at any time.

Although the NTA may amend the contract anytime, a formal review of the current direct award contract may be conducted at the end of this contract which is 2014. The 2008 Act and the 2009 Act provide the necessary legislative support to the NTA to renegotiate the current public service contracts or terminate it.

The NTA is currently considering whether it should enter into new direct award contracts with the current contracted parties or whether it should undertake competitive tenders in relation to some or all of the services. It has issued a public consultation to gather the public’s view on this. The Irish Competition Authority explained the benefits of competitive tendering and outlined some practical issues associated with implementing competitive tendering in our submission.

Can the contracts be amended before they expire? For example if new routes or new frequencies have to be added in the course of the validity of the contract because demand changes, what happens? What is the process for amending the contract?

Without prejudice to the powers of the NTA under section 51 and 52 of the Act of 2008, Dublin Bus and Bus Éireann may at any time propose a change to the services to the NTA.

Section 52 (6) (a) of the 2008 Act states “the Authority may at any time review a direct award contracts entered into under this section and may following such a review unilaterally make amendments to such contract.”

Section 52 (6) (b) of the 2008 Act states “The Authority shall carry out a review of any direct award contract entered into under this section which relates to the provision of public bus passenger services

where it considers that the maintenance of the contract, or any aspect thereof, may no longer be necessary to ensure the provision of the required level of such services and where such a finding is made, the Authority shall be entitled to unilaterally amend or terminate the contract as appropriates.”

Following a report on “Cost and Efficiency Review of Dublin Bus and Bus Éireann”, with the NTA’s approval, Dublin Bus has conducted the Network Directive Project which is aimed to improve network design.⁵ Some Dublin Bus PSO services have been changed as a result of the Network Directive Project.

There is no information available on the process for amending the contract.

If there is competition, is service frequency an autonomous decision of service providers or is it imposed in the contract?

Not applicable, but for the Urlingford case, service frequency is imposed in the contract.

Are all the costs incurred by the service provider covered? If not, which risks are located to the service provider (risk of changing demand, risk of cost increases, regulatory risk, etc.)

It is not clear which costs are covered by government funding and which are not. Both PSO operators have incurred a loss for the past few years. In July 2012 the Irish Government approved an additional €6 million to the CIÉ group (the parent company of Dublin Bus and Bus Éireann) additional to the PSO subsidies.⁶

Do the contracts provide incentives to service providers to improve quality and increase safety? If so how?

The Contracts outline the performance requirements that the companies must meet in return for the payment of a public subsidy. For example, in 2012 the subsidy payment is €69 million. A proportion of that payment is withheld each month and is only paid if the performance targets are met by Dublin Bus.

Do the contracts provide the incentive to provide high quality services close to the end of the franchise?

No.

If the winner of the bid uses the facilities, the equipment and the personnel of the existing local company, how are investment decisions made (who decides and who pays for new equipment, for example)? How free are the managers of the contracting company to reduce personnel or acquire new equipment? What are the outcomes that have been achieved?

This question does not apply to Dublin Bus and Bus Éireann.

For the one exceptional route between Urlingford and Portlaoise, there was no transfer of facilities, equipment and personnel from the previous company to M&A Coaches

4.4 Execution of the contracts

Who supervises the execution of the contracts?

⁵ Deloitte (2009) “Cost and Efficiency Review of Dublin Bus and Bus Éireann”

⁶ <http://www.irishtimes.com/newspaper/opinion/2012/0730/1224321093743.html>

The National Transport Authority.

What mechanisms are there in place for disciplining contractors that do not deliver the services as expected?

Withheld certain subsidy payment.

4.5 Outcome

What has been the outcome so far in terms of prices, costs, quality and safety of the services provided by the licensees?

There is no information available.

If there is competition on specific routes, how successful has this been? What has been outcome so far?

Not Applicable

Has the outcome been the one expected when the allocating mechanism was selected?

Not Applicable

Has the participation rate to the tenders been high? Has it dwindled over time?

Not Applicable

If an auction is used to award the contracts, how many bidders have participated each bid on average so far? How often have outsiders (not the incumbents) been awarded contracts? Was the auction successful in identifying the efficient service provider?

One route has been opened up for tendering. We understand that there were two bidders for the Urlingford to Portlaoise tender.

Are there plans to change the allocation mechanism? If so why?

At the moment, there is no allocation mechanism in place yet.

ITALY

Introduction

In 1997, Local Public Transportation services (LPT)¹ were subject to a reform aimed at introducing more competition in the sector.

In particular, the reform promoted “competition for the market” through public tendering of LPT concessions as well as privatization of publicly-owned incumbents.

Despite its pro-competitive approach, the reform has not led to a significant improvement of competition in the sector.

In particular, the introduction of competition for the market has been hampered by subsequent extensions of the reform’s transitional period and by the uncertainty over the applicable regulation, due to a complex inter-relationship between general rules on Local Public Services and LPT specific regulations.

More than 10 years after the introduction of the LPT reform, the degree of liberalization is still insufficient; too much protection is still granted to the incumbent publicly-owned service providers and the recourse to competitive tendering has been limited.

1. The regulatory framework of local transportation in Italy

The overall organizational and regulatory model designed for the LPT sector by the reform² was based on the following main pillars:

1. Regionalization of legislative, planning and financial responsibilities in organizing LPT services³; further decentralization from regions to provinces and local authorities of regulatory and administrative functions concerning sub-regional services⁴; determination by Regions and local authorities of the “minimum services” which must be guaranteed to all citizens and financed by the regional budget.
2. “Formal” privatization of publicly-owned incumbents (i.e. mandatory legal conversion by the end of 2000 of the so-called “special enterprises” into private-law joint-stock companies);

¹ The LPT sector encompasses urban and extra-urban transport systems and different transit modes, including road-transit (bus-lines) and rail-transit (tramway, subways, railways).

² See Law Decree n. 422/1997 as amended by Law Decree n. 400/1999.

³ Regions were also given the competence to plan, organize and regulate railways services of “regional and local interests” to be integrated and coordinated with other LPT services (buses, metro, tram).

⁴ Specifically, Regions are competent to regulate local rail transport, air, maritime and fluvial services and have a general competence in transportation planning; Provinces deal with bus transport’s regulation while local urban authorities (municipalities) are responsible for all LPT services that have an exclusive urban scope.

3. Adoption of mandatory competitive procedures (competitive tendering) for entrusting services from 2004 on. Adoption of the most economically advantageous tender criterion, according to which local authorities could also take into account qualitative or social criteria as well as price in awarding the concession⁵.
4. Mandatory adoption of “service contracts” between entrusting bodies and service providers, where fares, subsidies, performance standards, monitoring and contract enforcement mechanisms should be disciplined.

Several exceptions to the application of the public tendering provisions were introduced by successive laws, after the enactment of the reform, until 2008, when a new law was finally adopted, unifying the regime for all local public services of general economic interest (LPS), including LPT.⁶

The new legislation had the objective of promoting competition in the market whenever possible. As far as competition for the market was concerned, competitive procedures were singled out as the ordinary entrusting mechanism for LPT services. Recourse to *in-house* providing was allowed only in very exceptional circumstances and only if proved that recourse to the market was impossible. The Italian Competition Authority (ICA) was assigned mandatory advocacy power on local administrations’ decisions to award services⁷. In order to enhance the role of private undertakings, the law also required that when services were entrusted to a public-private company, the capital share held by the private partner would not be less than 40% and the private partner would be selected by way of a competitive procedure.

It was further added that *in house* providing could not cover more than 90% of the services; the remaining 10% having to be allocated by public tendering.⁸

However, the 2008 reform was repealed by a referendum held in 2011. A subsequent attempt by the Government to re-introduce a regulation of LPS inspired to the principles contained in the previous legislation⁹ was declared unconstitutional by the Italian Constitutional Court in 2012.¹⁰

As a result, now the awarding of LPT services must comply with the previous national sector legislation and the provisions of Regulation 1370/2007/CE¹¹. In particular, according to art 5 of the Regulation, “unless prohibited by national law, any competent authority may decide to provide public passenger transport services itself or to award public service contracts directly to a legally distinct entity over which the competent authority exercises control similar to that exercised over its own departments”.¹² Moreover, when competent authorities have recourse to a third party other than an internal operator, unless

⁵ For example: technical merit, investments plans, environmental characteristics of the vehicle fleet, after sales services, but also the application of social clauses concerning for example employment safeguards.

⁶ See Law Decree n.112/2008,converted into Law n. 133/2008. See also Law Decree n. 135/2009,converted into Law n.166/2009.

⁷ In particular, according to art. 23-bis of Law n. 133/2008, in cases of *in house* providing, local authorities had to justify their decisions on the basis of a market analysis, reporting the results of this study to the ICA for advance assessment.

⁸ See Art. 4-bis of Law Decree n.78/2009, converted into Law n.102/2009.

⁹ See art 4, Law Decree n. 138/2011, converted into Law n. 148/2011.

¹⁰ See Sentence of the Italian Constitutional Court n. 199/2012.

¹¹ Regulation entered into force in December 2009 with a 10 years transitional period.

¹² In addition the designated subject has to carry out the main part of its activity within the territory of the competent authority.

prohibited by national law, they may decide to award public service contracts directly rather than on the basis of a competitive tendering procedure.¹³

Art. 61 of Law n. 99/2009 and art 4-bis of Law Decree 78/1999 explicitly allows competent authorities to award service contracts in compliance with the said principles of Regulation 1370/2007/CE (anticipating the transition period), thus introducing the possibility to derogate from the provisions concerning competitive tendering contained in the previous legislation. However, *in house* providing must be limited to 90% of the services awarded.

Although the more ambitious attempts to liberalize the sector have failed, the last legislative interventions still introduce some significant measures able to stimulate greater market openness.

In particular, Art. 3-bis of Law 148/2011¹⁴, requires the reorganization of the local public services of economic relevance into “optimal territorial areas” capable of gaining economies of scale and scope – and invests the designated Authority with all the functions necessary for the organization and the development of the local public services.

Moreover, in Art. 34 of the Decree Law 179/2012¹⁵, it is stated that in order to comply with the European legislation, a Report on the entrustment of the service must be published on the Internet website of the local entrusting authority, stating the reasons for the form chosen to award the concession contract, providing proof of effective compliance with the requirements in the European regulation, and defining the public service and universal service obligations, indicating economic compensations (if provided for). Failure to conform with the above determines the discontinuance of the entrustment by the 31st December 2013.

Within this context, it is worth pointing out that the Italian Competition Authority has recently been empowered to challenge in court general administrative acts, regulations and provisions of any public administration harmful to competition.¹⁶

Indeed, the ICA has already made use of its powers to challenge administrative acts concerning tendering/public procurement in public services or granting of concessions/authorizations. In particular, as far as LPT services are concerned, in the month of December 2012, the ICA has started the procedure against the Campania Region concerning the temporary extension of direct award to Caremar Spa, the incumbent service provider of the regional maritime transportation service in the Gulf of Naples.¹⁷

¹³ Specifically, this may happen under the following circumstances: i) the contract’s scope is below determined ceilings (*de minimis rule*), ii) when emergency measures must be taken (in cases of disruption of services, for example), iii) when service contracts concern transport by rail, with the exception of other track-based modes such as metro or tramways.

¹⁴ Introduced by Law n. 27/2012.

¹⁵ Converted into Law n. 221/2012.

¹⁶ According to the renewed article 21-bis of the law n. 287/1990, the ICA may preliminarily issue recommendations to local administrations with respect to administrative acts, regulations and provisions which are considered to be harmful to competition. If local administrations do not comply with these recommendations within 60 days, the ICA can propose appeal before the competent administrative Court within the following 30 days.

¹⁷ See ICA (2012), Advocacy Report AS997, “*Regione Campania Delibera N. 502/2012*”.

A further important contribution to the completion of the regulatory system and to the improvement of competition in the sector is expected by the entry into force of the National independent regulatory authority for the transport sector, which will operate also in local public transport.¹⁸

3. Local Public Transportation services: state of art and effects of the reform after 15 years

For the time being, the Italian LPT sector remains highly fragmented with an abundance of local competent authorities (generally coinciding with local administrations) and service providers.

Moreover, local competent authorities remain saddled by a triple conflict of interest, as they are at the same time:

- i) owners of many of the incumbent service providers;
- ii) responsible for entrusting the services and controlling the enforcement of service contract.
- iii) in charge of designing and executing the tender procedures;

a) Ownership and governance

Undertakings operating in the LPT sector remain predominantly publicly owned, as the only requirement is a formal transformation into private-law companies of municipalities-owned incumbents. Indeed, in the last years there has been a moderate increase in the presence of private players, but mainly as a consequence of the acquisition of minority shareholdings in local public service providers (public-private partnership).

Thus, local administrations generally maintain, at a regional or sub regional level, full or partial ownership of the service providers.

This situation, which in several cases also implies vertical integration between network ownership/management and service provision does not favor competitive awarding of services.

b) Service contract requirements

Service contracts were intended to define reciprocal obligations in the relationship between local competent authorities and service provider regardless of the form used to award concessions (*in house* or *outsourcing*).

However, since the identification of “minimum/additional services” and “transit basins/areas” has not been carried out in all regions¹⁹, contracts mainly mirror former concessions to municipality-owned providers, both in terms of the services obligations and in terms of the geographical areas concerned.

It has to be highlighted that a clear specification of service contracts (in terms of services to be provided and compensation schemes) is a prerequisite for a wider participation in tendering procedures and is necessary in order to provide appropriate incentives for greater efficiency and for an adequate level of investments.

¹⁸ This Authority was established by article. 36 of Law 27/2012, modifying art. 37 of Law 201/2011.

¹⁹ Homogeneous criteria to define both minimum transport services and the size of transport basins were not identified at a national level.

As far as efficiency is concerned, it may be worth considering that local authorities generally require that new service operators should maintain current worker contractual conditions, thus making labor costs almost “exogenous”. Under these circumstances, the incumbent’s competitors participating in tendering procedures have less possibilities to make more competitive offers.

c) Service awarding

Regulatory uncertainty and continuous extensions of the 1997 reform’s transitional period have given local authorities some leeway for limiting competitive biddings.

Direct award and *in house* allotment to publicly-owned incumbents are still a frequent choice in the largest urban areas. As pointed out by the ICA in its advocacy activity²⁰, extensions of *in house* contracting have been granted too often and some times even disregarding the necessary requirements.²¹

In 2011, only 50% of bus, tram and metro services had been entrusted through competitive bidding.²²

Moreover, the participation in tender procedures has been rather low, the number of bidders being lower than three in nearly 70% of cases concerning all LPT services. Publicly-owned providers have won 90% of the bidding procedures. Thus, incumbents, either alone or in public-private partnerships (in 80% of cases), have generally maintained the service management.

Temporary grouping of companies (ATI) or consortiums, which could in a highly fragmented supply structure²³, facilitate the entry of new undertakings, have sometimes been used by incumbents as a tool to restrain competition.

As ascertained by the ICA, in some circumstances, ATI were used as a collusive device.²⁴ In 2007, several providers of bus services were fined by the ICA, as their cooperation had gone beyond the scope of temporary associations, and had mainly become a tool to partition the market and restrict competition.²⁵

²⁰ See among others ICA (2012) Advocacy Report AS988, “Proposte di riforma concorrenziale ai fini della legge annuale per il mercato e la concorrenza anno 2013”.

²¹ For instance, the ICA has pointed out the following problems: competitive selection of the private partner; extensions of *in house* without an ad hoc industrial plan; direct award or *in house* provision of services which were not clearly related to public service obligations; dimension of the transit basins, which were based on administrative boundaries rather than being designed in order to exploit economies of scale and scope. See, among others, ICA (2008) Advocacy Report AS468, “Affidamento di servizi pubblici locali aventi rilevanza economica secondo modalita’ c.d. *in house*” and, more recently, ICA (2012) Advocacy Report AS926, “Regione Molise - procedura ristretta per l’affidamento del servizio di trasporto pubblico locale extraurbano”.

²² See ASSTRA (2012) “Radiografia del TPL”; ICA (2008) Advocacy Report AS453, “Considerazioni e proposte per una regolazione proconcorrenziale dei mercati a sostegno della crescita economica” (Proposals for a pro-competitive regulation of markets to reinvigorate economic growth); further and ICA (2012) Advocacy Report AS988, quoted above.

²³ Fragmentation of suppliers is still very high (1.200 operators in 2007) with a relative modest scale, specifically in smaller areas.

²⁴ ICA (2001) highlighted the risk that “bidding for contracts in temporary associations could facilitate anti-competitive behaviour, providing companies with greater certainty as to the outcome of the bidding process, and thereby giving these agreements”.

²⁵ See ICA decision, case I657 (2007), “Servizi aggiuntivi di trasporto pubblico nel Comune di Roma”.

4. The ICA's advocacy activity concerning the LPT sector

In its most recent Advocacy Reports²⁶, the ICA has advocated the need to strengthen the liberalization process of the LPT sector through a new sector specific legislation. In particular, according to the ICA, it would be important to re-affirm that, depending on market situations, competent authorities have different possibilities to organize the provision of LPT services, including: i) competition in the market among several undertakings and ii) competitive tendering, subject to a clear definition of public service obligations. Within the limits set by the European legislation, direct award is also possible.

In the ICA's view, competition in the market between the public service provider and other undertakings is often possible. Should competition be proved to have a prejudicial impact on the possibility to meet public service requirements by the public service provider, other market players could indeed be required to contribute to the provision of public services, according to pre-determined compensation schemes.

The ICA has further recommended the re-introduction, within the context above, of the mandatory request for an opinion by local administrations (with more than 50.000 inhabitants) to the Authority, whenever the services are assigned without a competitive tendering.

Moreover, in its advocacy activity, the ICA has often recommended that "service contracts" should better identify obligations of service providers, particularly with regards to bundles of services to be offered, concerned geographic areas, service quality or social standards. An adequate specification of these aspects, as well as of compensation schemes, is necessary to promote a wider participation in tendering procedures.²⁷

With regard to the design of bidding procedures, the ICA considers that the following specific aspects should be taken into account:

- i) **Number of lots.** The number of lots should not be lower than the number of potential participants (to reduce the risk of collusion and market partitioning). However, "*tailor made*" tenders that would unduly restrain competitors from participating should also be avoided;
- ii) **Multidimensional or integrated provision of services.** The amount and the bundle of services to be provided should be consistent with the activity's minimum efficient scale. Effective economies of scale and scope should be assessed on the basis of a market analysis, taking into account both supply and demand side characteristics. This is crucial in order to avoid replicating the *status quo* and favoring operators that are already organized to perform multisectoral activities. Participants in tenders should be able to compete on single, distinct services;
- iii) **Inter-modal services provision.** The enhancement of efficiency and overall coordination in service mobility may well be achieved without requiring that the undertakings have both competencies in road and rail services, to the advantage of the rail incumbent;

²⁶ See ICA (2012), Advocacy Report AS988, "Proposte di riforma concorrenziale ai fini della legge annuale per il mercato e la concorrenza anno 2013", and ICA (2011), Advocacy Report AS901, "Proposte di riforma concorrenziale ai fini della legge annuale per il mercato e la concorrenza anno 2012".

²⁷ See ICA (1998), Advocacy Report AS125, "Trasporto pubblico locale; ICA (2001), Advocacy Report AS208, sussidi incrociati nel trasporto pubblico locale"; ICA (2003), Advocacy Report AS251, "Bandi predisposti dalla concessionaria servizi informatici pubblici – Consip spa"; ICA (2008) Advocacy Report AS449, "Affidamento ad un gestore unico del servizio tpl nella regione friuli venezia unica".

- iv) **Temporary groups of firms.** A more rigorous scrutiny for the admission of temporary groups of firms should be carried out and alliances be allowed only when operators prove not to be able to participate in the tender with stand-alone offers.

JAPAN

1. Introduction

Similar to the bus service operations in the metropolitan area, the basic regulatory framework concerning local and regional bus services in Japan is formulated by the Road Transportation Act (which is in the jurisdiction of the Ministry of Land, Infrastructure, Transport and Tourism (MLIT)). This Act adopts a prior permit system for the business of common omnibus operators¹ which includes local and regional bus services. The basic principle of the system is that anyone who meets the criteria can enter the business market.

Some regulatory frameworks regarding local and regional bus services in other countries are based on a bidding system whereby the operator who meets the publicly announced service criteria at the lowest price will be granted service rights. The competition principle is applied to the entry stage into the market. In contrast, the regulatory framework of Japan that is based on the Road Transportation Act is unique in the sense that it primarily encourages post-entry competition in the market.

In the following, we would like to provide an overview of the Road Transportation Act followed by an introduction to the exemption system from the Antimonopoly Act in the Road Transportation Act, with respect to local and regional bus service as well as the competition policy.

2. The Road Transportation Act

(1) Overview of the Road Transportation Act

The Road Transportation Act was substantially amended in 2002. Prior to 2002, in the business field of bus services, the supply and demand had been adjusted by the government and the license allocation system for respective service routes was adopted. Furthermore, the service route and service frequency were subject to approval, and the suspension or the abolishment of the services was subject to permission by the government. The grounds for such systems were the public nature of transportation business, the predisposition of the business to regional dominance and the importance of the safety of transportation. However, the quantitative restrictions that restrain competition became obsolete, and the voice to abolish the operator permit system that existed for the sake of adjusting supply and demand grew stronger. As a result, the Ministry of Transport decided to make a fundamental revision to the system and eliminated any regulations regarding supply and demand adjustment in the area of transport business including bus services.

For the amendment of the Road Transportation Act, a report submitted by the Council for Transport Policy argued that it is important to provide improved bus services through the promotion of competition that will bring about creativity of business operators. It further stated the necessity to stimulate competition by abolishing regulation regarding supply and demand adjustment to make market entry possible.

¹ “Common omnibus operators” means the business transporting passengers for value by vehicles upon demand.

In light of this report, the Road Transportation Act was revised, and this led to switching the traditional license allocation system for respective service routes to a permit system for each business operator. Furthermore, the system concerning the service route and the service frequency was changed from an approval system to a notification system. In addition, the fare and pricing system shifted to the approval system based on the upper-limit fare from just an approval system, and the implemented fare² within the scope of the upper-limit was to be notified. Also, for service routes entering a phase of inactivity or its elimination thereof was changed from a permit system to an advance notification system.

(2) The background and overview of the exemption system from the Antimonopoly Act in the Road Transportation Act

a. The background of the exemption system

The exemption system from the Antimonopoly Act in the Road Transportation Act has been established since 1951. Sharing of facilities, joint carriage, or any contract with regard to joint management or any agreement concerning other transportation that were approved by the Minister of Transport were exempt from the application of the Antimonopoly Act. However, no procedural stipulations which allow the Japan Fair Trade Commission (hereinafter referred to as the “JFTC”) to examine the exemptions were set.

Due to the amendment of the Road Transportation Act in 1997, the scope of the exemption was re-examined, and it was restricted to the following agreements;

1. Agreement regarding joint management for the maintenance of service routes
2. Agreement regarding joint management to set appropriate time tables

The exemption systems concerning agreements on the sharing of facilities or joint carriages were eliminated as they were deemed not to be an issue in terms of the Antimonopoly Act.

Furthermore, to prevent any abuse of the exemption system, procedural stipulations which allow the JFTC to examine agreements were established. In addition, criteria for approval were clearly defined in order to facilitate a careful examination by the Minister of Transport in approving that agreements would be exempt from application of the Antimonopoly Act. As a result, the four requirements which will be described in Paragraph b. were established.

b. Overview of the exemption system

Given the situation of the yearly decline in the demand for bus services, it is necessary to maintain and secure the service routes which are important and necessary for local residents in under-populated areas even if they have become unprofitable due to the decreasing demand.

Furthermore, for service routes with some competing operators, it is important for the customers to coordinate an established time table through operating bus services at regular intervals. Therefore, it is necessary for the operators to adjust the time table amongst themselves. However, since there is a possibility of violating Article 3 of the Antimonopoly Act (Unreasonable Restraint of Trade) when

² “Implemented fare” means notified fare and price within the scope of the upper-limit fare.

operators jointly manage³ with such an objective, the exemption system from the Antimonopoly Act with regard to joint management of the Common Omnibus Operators have been stipulated in the Road Transportation Act. The following two agreements are subject to the exemption system of the Antimonopoly Act:

1. Agreement on joint management in order to ensure passenger transport necessary for local residents in a route where it is expected to be difficult to continue the services due to a decreased demand for transport services (Article 18, item (i) of the Road Transportation Act).
2. Agreement on joint management in order to establish appropriate time tables that will increase the passengers' convenience. (Article 18, item (ii) of the Road Transportation Act).

The business operator needs to obtain an approval from the Minister of MLIT when intending to conclude an agreement, or alter the contents of the agreement. The requirements for approval are as follows (Article 19, paragraph (2) of the Road Transportation Act);

1. The contents of the agreement shall not unfairly impair the benefits of users.
2. The contents of the agreement shall not be unfairly discriminatory.
3. The contents of the agreement shall not unfairly restrict participation and withdrawal.
4. The contents of the agreement shall be kept to the necessary minimum for the purpose of the agreement.

When intending to grant an approval, the Minister of MLIT will have to consult with the JFTC (Article 19-3, paragraph (1) of the Road Transportation Act).

A time period has been established for agreements on joint management in order to keep them to the necessary minimum. Furthermore, operators have to get approval in case of applying for extending periods of agreements on joint management.

Currently, there are only three agreements which are exempt from application of the Antimonopoly Act with an approval from the Minister of the MLIT based on items (i) and (ii) of Article 18 of the Road Transportation Act.

3. Summary

The entry system of local and regional bus services allows anyone to enter the market as long as the operator meets the criteria for approval that is based on the Road Transportation Act.

Although the exemption system from the Antimonopoly Act exists in the Road Transportation Act, the requirements are very stringent. Consequently, it is highly restricted to specific matters including joint management in order to ensure passenger transport which is necessary for local residents in a route where it is expected to be difficult to continue the services due to a decreased demand for transport services.

³ "Jointly manage" means as follows: Adjustment of fare, price, service frequency and service routes will be decided between the operators. Also, the fare revenue will be pooled and will be allocated based on the comparison of service frequency, comparison of person per kilometer and sales volume.

LATVIA

1. Description of the industry and regulatory framework

Are local and regional bus services in your jurisdiction provided directly by public authorities, by State- owned enterprises, by private operators, or by a combination of public and private operators?

Local and regional bus services in jurisdiction of the Republic of Latvia are provided by a combination of public authorities and private operators.

If private operators play a role in the provision of local and regional bus services, are contracts for specific routes exclusive or is there competition in the provision of the services (i.e. operators compete on specific routes not just to obtain the contract but also to provide the services)?

The operators compete to provide the services for specific routes by participation in public procurement tender organized by the Road Transport Administration and by the city municipalities.

Are public-private partnerships at all used for the provision of these services?

Yes.

Which body/institution has responsibility for ensuring the provision of these services (in terms of quantity and quality) and for the allocation of the contracts?

In accordance with the laws and regulations, public road passenger transport services are organized by:

- The Ministry of Transport - developing transport policy and organizes the implementation of it, addressing public passenger transport funding issues, control of compensation for the use of State budget funds legality, efficiency and accuracy.
- The Road Transport Administration – responsible of the route network of regional intercity routes and organizes public transport services in the regional intercity routes, provide public transportation from the State budget funds allocated to administration, organizing the public procurement tenders for the services of regional intercity routes.
- The city municipalities – Manages the rout network in the urban transport routes within the administrative territory, organizes the services of the public transport route network in urban transport routes, submit proposals on public transport services in the competence of the organization's network to the Road Transport Administration or planning region, rational management of the state budget, local government budget and special budget allocated for public transport funding, provides its administrative territory with public transport stops construction and maintenance of infrastructure.
- The planning regions – Manages the route network of regional local routes in the interest of the city municipalities, including those of regional local routes which provide region movement

within urban areas according to the state budget for public transport services to the funds provided (after coordination with the local government and the Road Transport Administration). The planning regions are submitting a draft decision on the regional local route (route network) construction or modification to the Road Transport Administration for coordination. Submit proposals to the Road Transport Administration and the city municipalities of the Republic of the public transport services in the field of competence of the organization's network. Rational management of the state budget and local government budgets allocated to public transport funding.

Is the decision on the market structure and on how to allocate the franchise taken at the local level or is there a national legal framework?

There is a national legal framework –

1. The Law on Public Transport services (15.07.2007.);
2. The Regulation of services organization in a route network of public transport (05.08.2010./Nr.634);
3. The Regulation of granting and use of public transport services (19.09.2012./Nr.599);
4. The Rules about categories of the passengers, having the right to use the special tariff on lines of route network (01.09.2009./Nr.872).

Who is in charge of regulating bus services, a local or a national authority? Is the regulator in charge of controlling for the quality of services (that the frequency of service is respected, that buses are sufficiently clean, etc.)?

The Road Transport Administration, the city municipalities are in charge of regulating bus services. The Road Transport Administration and city municipalities include provisions of frequency of service and the maintenance of bus, etc. in the contracts with the operators.

Is it easy for consumers to access the regulator and complain for bad services (this also requires that the consumer is well informed on the quality of services that he is expected to receive)? Do consumer complaints have an effect on the allocation mechanism?

No information.

If there is competition in the provision of the service how has it been decided on which routes to allow it (e.g. has the profitability of the routes been assessed beforehand)?

The city municipalities and the planning regions are submitting proposals of the network (plan of routes), and the Road Transport Administration assess (take into account profitability of the routes) the proposals and approve the plan of the routes (network).

The remainder of the questions focus on the allocation of contracts for the provision of bus services to private providers.

2. Tendering process

How are contracts awarded?

Contracts are awarded by participation in the public procurement tenders organized by the Road Transport Administration or the city municipalities.

How big is the discretion local authorities can exercise in selecting who to award the contract to?

It depends on the tender requirements, the type of offer and past experience on commercial viability of carriers.

What are the dimensions over which potential bidders compete?

For example, the public procurement tender in 2008, for concession agreements for public passenger services by bus in regional intercity routes, had very high technical requirements because of the fact that these concession agreements were for twelve years and still are in force. The technical requirements were - bus average age of each subsequent contract year (except the first) should not exceed nine years, bus must be adapted to persons with disabilities, pregnant women and people with young children transportation, in the cabin passengers should be provided with the information of bus stops in visual and aural form, bus must be equipped with electronic route signs, the bus meets Euro 3 (or higher) environmental requirements laid down in EU legislation, etc. In the amendments the deadlines for requirements implementation are prolonged – which is not good for the development of competition in the public transport service market in Competition Council's view.

Does the reputation of the franchisee (in terms of being a cost effective and a high quality service provider) play any role in the choice by local authorities?

The main condition is that all tender requirements must be provided because of the fact that these requirements arise from the needs of society.

Are incumbents given any specific advantage in successive bids? And does being an effective and high quality service provider result in any benefit for him?

The incumbents receive a government grant for the offset losses which arises of public transport services.

The Law on Public Transport services (15.07.2007.) sets out that (Section 11): (1) Losses related with the provision of public transport services shall be reimbursed to the carrier:

1. in full amount from the resources intended in the State budget for such purpose – in routes of regional route network of inter-urban significance;
2. in full amount from the resources intended in the local government budgets for such purpose – in routes of a route network of city significance.

How widely available is the information on costs and revenues for a given local area?

Some of the information (the grant amount) is available in the Road Transport Administration webpage (<http://www.atd.lv>).

Are renegotiations widespread?

No information.

How is it ensured that prices of local transport services are reasonable and that the amount of subsidies is not too high? Are prices for local transport services regulated? And if so how?

Routes and prices calculation methodology for local transport services are regulated by the Ministry of Transport and its subsidiary bodies (The Road Transport Administration) according to Regulation of the Procedure to determine and compensate the public transport services-related losses and expenses and the public transport service tariffs (09.06.2012./Nr.341).

If there are multiple franchisees within a local market, is it ensured that prices are the same across service providers? If so how can competition for the market be made operational?

No information.

Who ensures that the system is fully coordinated (in terms of timing/frequencies etc.)?

The Road Transport Administration is responsible for supervision of the public transport services market.

3. Nature of the contracts awarded

Are routes tendered individually/in small blocks or in large blocks? And why? How are routes grouped together?

According to the Law on Public Transport services, Section 1, transport services are divided into the following categories:

- The urban transport route - the route to ensure the movement of the administrative boundaries of cities, as well as the closest city to the surrounding areas;
- The regional intercity route - a route that provides movement in the territory that is mainly from one administrative area to another administrative area, planning region or connecting cities;
- The regional local route - a route that ensures the movement of one region in the administrative territory and to the immediate surrounding areas or other regional planning within the region.

For example, the regional intercity route, is divided into 8 (eight) large blocks. For each of the block, the public procurement tender is organized by the Road Transport Administration. These 8 blocks were made taking into account functional significance, population and population density ranges, passenger flow, providing people access to jobs, educational institutions, etc., thus ensuring the public interest.

How long the contracts are and what is the rationale for the chosen length? Is the length of the contract fixed for all local authorities in your jurisdiction or is there some flexibility?

For example, according to the order of Cabinet of Ministers on the public transport services by bus route network of the regional intercity route (20.05.2008./Nr.265), the concession agreements of the regional intercity routes transport can be concluded for 12-year period.

How often are the contracts being renegotiated?

The Road Transport Administration and the city municipalities are entitled to decide the frequency of changes.

Can the contracts be amended before they expire? For example if new routes or new frequencies have to be added in the course of the validity of the contract because demand changes, what happens? What is the process for amending the contracts?

Contracts can be renegotiated and/or amended before they expire – routes and tariffs can be changed, new requirements can be included in the amendments of the contract by the initiative of the Road Transport Administration, but in view of the Latvian Competition Council it is not recommended and it must be avoided.

If there is competition, is service frequency an autonomous decision of service providers or is it imposed in the contract?

The Road Transport Administration is responsible for service frequency imposition in the concession agreements and amendments.

Are all the costs incurred by the service provider covered? If not, which risks are allocated to the service provider (risk of change in demand, risk of cost increases, regulatory risk, etc.)?

Losses related with the provision of public transport services shall be reimbursed to the carrier from the resources intended in the State budget.

Do the contracts provide incentives to service providers to improve quality and increase safety? If so how?

Contracts do not provide incentives to service providers.

Do the contracts provide the incentive to provide high quality services close to the end of the franchise?

No information.

If the winner of the bid uses the facilities, the equipment and the personnel of the existing local company, how are investment decisions made (who decides and who pays for new equipment, for example)? How free are the managers of the contracting company to reduce personnel or acquire new equipment? What are the outcomes that have been achieved?

No information.

4. Execution of the contracts

Who supervises the execution of the contracts?

The Road Transport Administration is responsible for supervision and execution of the contracts.

What mechanisms are there in place for disciplining contractors that do not deliver the services as expected?

The Road Transport Administration is responsible for this subject matter.

5. Outcome

What has been the outcome so far in terms of prices, costs, quality and safety of the services provided by the licensees?

The Latvian Competition Council did monitoring of public transport services by bus in the regional intercity routes (completed 14.12.2012.).

The main conclusions were:

Competition between public transport providers in the Republic of Latvia is only possible through participation in national and local public procurement tenders organized for the relevant services.

Concession agreements for regional intercity network parts/ routes have been concluded for twelve years, which means that during this period of time, free competition is not developing between service providers. In Competition Council's view, contracts should be concluded for shorter period of time to reduce restrictions on competition and to ensure free and development-oriented competition in the public transport services market by bus.

Barriers to enter the market were - high technical requirements and the Latvian territory division into 8 (eight) large blocks. Barrier setting is partly justified by the high quality and reliable service to consumers.

Contracts for public transport services in the regional intercity routes have been amended - quality requirements for the implementation of extension, changed routes and fare rates, changes in expected profits and losses. In Competition Council's view, if the requirements that are in force after the amendments would be put at the beginning (in the public procurement tender rules), "smaller" service providers would have the chance to participate and possibly win the tender for public transport services by bus in the regional intercity routes in one of the blocks. The reason – in some of the amendments of the contract, the requirements are reduced. Amendments of the contracts must be reduced.

The purpose of Regulation Nr.1370/2007 is to guarantee the provision of services of general interest which are among other things more numerous, safer, of a higher quality or provided at lower cost. This purpose is also included in The Law on Public Transport services (15.07.2007.) which also sets out that (Section 11):

- (1) Losses related with the provision of public transport services shall be reimbursed to the carrier:
 - 1) in full amount from the resources intended in the State budget for such purpose – in routes of regional route network of inter-urban significance;
 - 11) from the resources intended in the State budget for such purpose – in routes of a regional route network of local significance;
 - 12) from the resources of local governments – in routes of a regional route network of local significance for that part of the order of public transport services, which exceeds the framework of the State budget resources intended for the provision of such services;
- 2) in full amount from the resources intended in the local government budgets for such purpose – in routes of a route network of city significance;

- 3) in full amount from the resources intended in the local government budgets for such purpose – in routes of a route network of city significance, if losses have been caused due to the observation of the tariffs specified by a local government.

Current market of public transport services is strictly regulated by public authorities - the Ministry of Transport, Road Transport Administration and Planning Regions and public transport services under concession agreements are provided by private corporations. Accordingly, effective competition in the relevant market can't exist. However, if the public transport services market would not be regulated by the public authorities, companies would operate only for commercially viable routes and public interests would not be provided.

The Law on Public Transport services aims to provide citizens with access to public transport services, not economic benefits. The law provides that the route network should be designed to meet the population's demand for public transport services and network to ensure the opportunity to attend educational institutions, medical institutions, the workplace, as well as state and local authorities. The Road Transport Administration has the jurisdiction to divide network in blocks- updating and adapting the real needs of the population and demand.

Under the conditions of the tender rules the carriers were free to form their own cooperative choice-participation in the public procurement tender for each of the block was possible to "smaller" carriers and how they contribute to the co-operation depended only on the same carriers. Almost all applicants who submitted joint proposals, formalized their cooperation, which formally is considered as permissible horizontal cooperation agreements.

Resulting from public procurement tenders, services are provided to public – the people. In such cases, public authorities, which organizes the procurements are to be considered only as "intermediaries" because purchases are funded from the public - the taxpayers who are recipients of the service, thus it is reasonable to provide sufficient transport safety and comfort by installing a high-quality road transport requirements in the concession agreements.

If there is competition on specific routes, how successful has this been? What has been the outcome so far?

-

Has the outcome been the one expected when the allocating mechanism was selected?

-

Has the participation rate to the tenders been high? Has it dwindled over time?

-

If an auction is used to award the contracts, how many bidders have participated to each bid on average so far? How often have outsiders (not the incumbents) been awarded contracts? Was the auction successful in identifying the efficient service provider?

No information.

Are there plans to change the allocation mechanism? If so why?

The Road Transport Administration is responsible for this subject matter.

LITHUANIA

1. Description of the industry and regulatory framework

Ownership

Local bus services¹ are provided by a combination of public and private operators. There is no regulation at the national level regarding which – public or private – operator can provide bus services. The institution organizing a tendering process cannot give privileges or discriminate operators based on the ownership (see: part 2, “Award of contracts”). Therefore, both public and private operators can be entitled to provide these services. Besides, there are no limitations as to which public-private partnerships could be forbidden from such activity. However, the Competition Council does not possess any information about the existence of such partnerships in practice.

Regulation

When a route starts and ends in the territory of the same municipality a license to engage in local carriage of passengers is issued by the municipal institutions or institutions authorized by them. In individual cases the route may be extended, upon agreement with the State Road Transport Inspectorate, along the territories of two neighbouring municipalities (the territories of city municipalities not inclusive).

By law, the municipal institutions or institutions authorized by them are responsible for the allocation of contracts and for the supervision if carriers' activities are in compliance with the requirements set for road transport by legal acts. However, more detailed responsibilities of the carriers in order to ensure the provision of these services can be foreseen in the regulations passed by municipality.

The officers of the road transport activities control services of municipal institutions or the officers authorized by them have the right to stop and inspect, in their territory and in the territory of the neighbouring municipalities, passenger vehicles operating on local routes as well as the documents of the crew of the vehicles and documents mandatory for the carriage of passengers and luggage, including passenger and luggage tickets, and compliance with the work and rest regimen by the crews. The carriers must pass rules regarding crew's behaviour towards customers. The supervision of the crew's activities, the control of the passengers and their luggage can also be carried out by the carriers themselves or other persons authorized by them.

Consumers' affairs

All service operators must provide passengers with information regarding its contact details. In case of disobedience (the requested information is not given or it is incorrect), the officers of the road transport activities control services of municipal institutions must inform the carrier and municipal institutions or the institutions authorized by them about the failure to comply with the rules. Therefore, in case of complaints, consumers could turn to the service provider – the carrier. There are no specific regulatory provisions

¹ There are no regional bus services in Lithuania, only local (urban and suburban), long-distance and international bus services. Therefore, the information provided will refer to local bus services only.

regarding the consumers' right to turn to the regulator. It is to be assumed that general rules regarding the rights of a person to apply to a public institution are applied in this case. The regulator, accordingly, has the right to request information from the carrier. Under the regulatory framework, infringements may lead to the termination of the contract or it may not be extended.

2. Tendering process

Award of contracts

In practice, institutions responsible for tendering process for the performance of public passenger transport services tend to award public operators directly by granting exclusive rights.

However, it must be noted that under the Regulation No 1370/2007, for the performance of the public passenger transport services, the carriers are selected on the basis on competition or directly granting the operator an exclusive right and/or compensation if it is not prohibited by national law. Based on this, the Competition Council takes the view that the provisions of Article 4 of the Law on Competition of the Republic of Lithuania² are to be regarded as such a prohibition to grant exclusive rights without a competitive procedure (the relevant matter is now being forwarded to the Constitutional Court of the Republic of Lithuania). Thus, the Competition Council maintains the position that the municipal institutions or institutions authorized by them must select the carriers for public and non-public local regular transport services based on competitive procedure which must be organized on equal, transparent and non-discriminative terms.

In case a tender is organized, the potential bidders compete over price, qualification parameters and other criteria announced in the tender documents. There is no obligation for the institutions organizing the competitive procedure to announce the costs and revenues for a given local area. The institution organizing the tender cannot set conditions which are not necessary and could weaken the competition between potential bidders. Having that in mind, it is questionable whether criteria such as the reputation of the franchisee (in terms of being a cost effective and a high quality service provider) could play an important role in the process of competition because they can be hard to measure.

Pricing and compensation

The prices of local transport are regulated by the council of the municipality, with a possibility to set different prices for different routes. The prices must be revised not less than once in a year. Under the regulation the price must be based on the costs, changes of revenues and obligations foreseen in the service contract between the carrier and the institution.

Carriers receiving public subsidies are obliged to present information on loss or profit so that there would be no over-subsidization.

Even in cases when there is not just one franchisee in the local market the prices usually are the same for all the franchisees. In this case the competition for the market is made operational by granting exclusive rights to service providers in a specific route after the competitive procedure. However, as it was mentioned, the council of the municipality can also decide to set different prices for different routes based

² This article forbids the entities of public administration to adopt legal acts or other decisions which grant privileges to or discriminate against any individual undertakings or their groups and which give rise to or may give rise to differences in the conditions of competition for undertakings competing in the relevant market, except where the difference in the conditions of competition cannot be avoided when the requirements of the laws of the Republic of Lithuania are complied with.

on the same criteria already mentioned: costs, changes of revenues and obligations foreseen in the contracts between the carrier and the institution.

Coordination

The municipal institutions or the institutions authorized by them must ensure that the system is fully coordinated (in terms of timing/frequencies etc.). The carriers can give suggestions to institutions regarding this question matter.

3. Nature of the contracts awarded

Scope

The national regulatory framework does not specify whether routes should be tendered individually, in small or in large blocks.

The institution concerned must follow terms of equality, transparency and non-discrimination during the tendering process.

The service provider does not have a right to autonomously decide on the service frequency, it is set by the institution responsible for the tendering process.

Duration

Under the Regulation No 1370/2007, the contract for public services cannot exceed more than 10 years. The maximum length of the contract is therefore fixed for all local authorities. Each municipality is free to choose the length of the contract within this limit. In case a certain bus service is not regarded as a public service under the Regulation No 1370/2007, there are no specific provisions set by the national legislation as regards the length of the initial contract. The national legislation only explicitly sets limits to the length of extension of a contract: the contract can be extended by a maximum of 5 years if the carrier complied with conditions of contract and other legal acts, regulating the road transport services. The extension must be made on the same conditions as the previous contract.

Renegotiation

Any of the parties can initiate the renegotiation of the contract process. The Competition Council does not have data regarding the frequency of how much or how often the contracts are being renegotiated.

The national regulatory framework foresees only the process when institutions suggest of making changes in the contract. In case the institution proposes to extend, shorten or make any other changes in the route, to add or cancel the number of bus stops or to make the route more frequent, the carrier must get this proposal in written and answer within 7 days whether it agrees or not (it can also propose a different date when the changes could come into effect). If one does not agree with the proposal, the institution must organize a new competition and within 3 months time must cancel all permits that the carrier had in the route, except when the carrier refuses with the proposal to make the route more frequent. In case the frequency must be changed, the parties must agree with the changes. If the carrier does not agree with the suggested changes, the competition would be organized only for the purpose of picking the carrier for the additional trips.

Costs

The legal acts, regulating road transport services, do not foresee which party – the institution or the carrier – is covering costs leaving this issue to be decided based on the contract law. However, in case of the cost increase the rate for the service could be changed by the municipality council.

Incentives

The carriers are responsible for the safe and most comfortable trip. A municipality can pass stricter rules regarding transportation of passengers and their luggage if there is an interest of the society. However, the contract itself can regulate this question matter as well. Therefore, it is also for the parties to decide if the carrier is provided with incentives to improve quality or safety of the service. As an example, the parties can agree that in case the carrier will suffer costs in order to improve the quality of public services, the price of 1 km fixed in the contract would be indexed. The quality of service should in any case be not less than parties agreed in the contract, otherwise non-compliance with the contract will lead to refusal to extend it. However, there is no obligation for the institution to extend the contract even if the carrier fulfilled all obligations which could mean that operators are not motivated that much to take initiative and improve the quality of service and safety.

Cooperation

The winner of the bid can use facilities, the equipment and the personnel of the existing local company if the contract and the permit issued based on that contract do not say otherwise. The local company's facilities, equipment and the personnel must meet the same requirements as the winner of the bid. The winner and existing local company must have cooperation agreement where parties should agree on investment decisions. However, the cooperation contract cannot oppose the contract made between the winner of the bid and the institution.

4. Execution of the contracts

The contract is a mix of rights and obligations meaning that institution's right correspond the carrier's responsibility and *vice versa*. Therefore, it is for the parties to control the execution of the contracts. From the municipality's part, the municipal institutions or the institutions authorized by them must supervise the execution of the contract.

In case the contractors do not deliver the service as expected, institution responsible for the supervision of the contract, firstly, sends a claim to another party asking to deliver the services as it was agreed. If the ground for the claim is not eliminated, the institution can unilaterally terminate the contract if it was an essential breach of the contract. The termination of contract means the termination of permits. The carrier which permits were quashed cannot participate in the competitions organized by this institution for a year.

5. Outcome

The Competition Council is not in possession of data regarding the outcome in terms of prices, costs, quality and safety of the services provided by the licensees. Moreover, it is not responsible for the formation of policy of road transport services. Therefore, the Competition Council does not have information regarding the expected outcome of the existing allocation mechanism or the plans to change it.

PERU

1. Description of the industry and regulatory framework

In the early nineties, Peru underwent a process of institutional modernization and economic reforms. In the case of public transportation, these reforms included the establishment of free competition for the determination of prices and free temporary access of natural or legal persons as service providers^{1,2}, as well as the importation of used vehicles.

The main business model developed in this sector is one based on private firms which have a license for a particular route and contract individual operators who provide the service, often driving their own vehicles.³

According to a report by the Peruvian Ombudsmen⁴, as a result of the above mentioned conditions and a weak regulation in the sector, nowadays urban transportation services in Peru and, particularly, in Lima is characterized by the following:

- Transport supply has exceeded demand.
- Given that there are more vehicles than needed; operators violently dispute passengers, which increases the risk of traffic accidents.
- No operator can increase prices since there is always another one that may undercut him. Therefore, revenues are insufficient to cover the costs of operation and maintenance and operators cannot invest in the renewal of their units.
- Employment conditions are bad, operators usually work shifts of more than 12 hours.
- Congestion.

In this context, the Metropolitan Municipality of Lima (MML)⁵ is currently implementing a plan to reorder the urban transportation system. The plan includes granting authorizations in unsaturated routes (traditional system) and granting concessions through public tenders in saturated routes. The area within

¹ Legislative Decree N° 651, given on 24th July 1991.

² According to Law N° 27181, General Law on Land Transportation and Traffic, in unsaturated areas, a firm must have an authorization in order to provide local and/or urban transportation services. In the case of saturated areas, a concession is granted for the provision of transportation services.

³ World Bank (2006). *Perú: La oportunidad de un país diferente, próspero, equitativo y gobernable*. Washington D.C. Cited in: Defensoría del Pueblo (2008). *El Transporte Urbano en Lima Metropolitana: Un desafío en defensa de la vida*. Available in: <http://ditoe.minedu.gob.pe/Materiales%20DITOE/B14.pdf>

⁴ Defensoría del Pueblo (2008). Op. cit.

⁵ The MML is the local government of Lima, the Peruvian capital. However, according to the Decentralization Law (Law N° 27783), the MML has political, economic and administrative autonomy, as well as powers of a regional government within the province.

MML which is directly involved in this process is the Urban Transport Management. Furthermore, MML has two decentralized entities with administrative autonomy which are also involved in the regulation of urban transportation services: Protransporte Metropolitan Institute (Protransporte) and the Metropolitan Investment Fund (Invermet).

The main reform under implementation is the Integrated Public Transport System (ITS), which is characterized by the physical and operational integration of payment methods and rates.

ITS has four components: (i) the high capacity segregated corridors system, also known as Cosac; (ii) the railway transportation system⁶; (iii) the complementary corridors system⁷, and (iv) regular transportation services (via authorizations). The latter component is provided via authorizations, while the other three are provided via authorizations or concessions.⁸

The implementation of Cosac I (also called Metropolitano), is one of the most important reforms implemented in the urban transportation system in Lima in the last years. It aims at providing transportation services in high capacity buses within a corridor that crosses the city of Lima from north to south, crossing 16 of the 43 districts of Lima. Furthermore, the MML is developing investment studies for Cosac II, which will cross the city of Lima from east to west.

Cosac I consists of four management units:

- The **Management and Control Center** is responsible for planning, managing and controlling the system operation. In other words, it sets out buses requirements in corridors and determines the frequencies and average speed of the buses, taking into account the demand for the service. This unit is currently administered by Protransporte.⁹
- The **Passenger Transport Unit** is responsible for the acquisition and operation of buses. These functions are currently delegated to four private firms: Consorcio Lima Bus Internacional, Lima Vías Express S.A., Consorcio Grupo Plaza de Inversiones S.A. - Consorcio Grupo Empresarial 9 and Consorcio Perú Masivo.
- The **Collection Unit** is responsible for the sale, recharge, distribution and validation of the means of access to the system. It is also in charge of the management and custody of revenues until their delivery to the Trust. This unit is currently granted to a private firm (ACS Solutions Perú S.A.).
- The **Trust** is comprised of the assets acquired thanks to the sale of the means of access to the system. The trustee in charge of its administration is Cofide, a mixed economy company¹⁰ which currently operates as a second-tier development bank.

⁶ It is worth mentioning that the railway transportation system is currently under the administration of Autonomous Authority of the Electrical System of Mass Transportation in Lima and Callao, which belongs to the Ministry of Transport and Communications.

⁷ Nowadays, the bidding process for the complementary corridors systems is being organized. However, some authorizations for urban transportation services remain valid.

⁸ Source: Ordinance N° 1613 of MML.

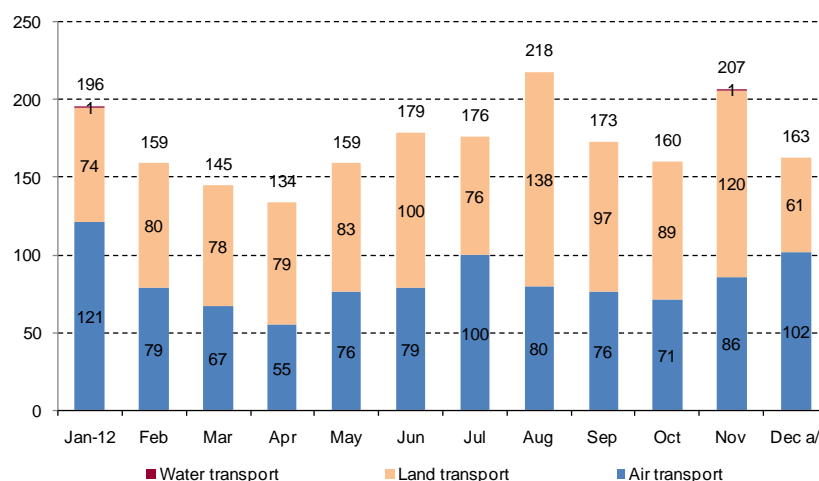
⁹ It should be mentioned that activities related to overseeing the functioning of buses are coordinated with Invermet.

¹⁰ 98,7% of Cofide's capital is owned by the Peruvian State, while the other 1,3% belongs to the Andean Development Corporation (CAF).

There are several ways in which complaints for bad services in the sector can be handled. If the complaint is related to the traditional transport system, it can be handled by the Transport Regulation Sub Management (a unit within the Urban Transport Management). If the complaint is related to the service provided by Cosac I, it can be handled by Protransporte. Additionally, MML also has a Citizen Defense Management, which tracks and channels the complaints of citizens to the organs, decentralized organizations and companies of MML.

Furthermore, Indecopi, as the national consumption authority, is in charge of enforcing the Consumer Protection Act (Law N° 29571) and other laws that protect consumers from unsuitable goods and services, from deficiencies or lack of information and for consumption discrimination. Graph 1 presents the claims associated to transport services that were received in the Citizen Service of Indecopi¹¹ in 2012. As we can see, in the last year, 1 224 claims were related to land transport.

Graph 1: Claims associated to transport services received in the Citizen Service of Indecopi, 2012



a/ Preliminary.

Source: Citizen Service of Indecopi.

2. Tendering process

As we mentioned before, under the traditional system, authorizations are given to firms that wish to provide urban transport services. Nonetheless, MML is currently implementing a plan to reorder the urban transportation system, which included the concession to private firms of two management units of Cosac I, the Passenger Transport Unit and the Collection Unit. The tendering process for both of these units was in charge of Protransporte.

The tendering process for the Passenger Transport Unit included awarding the operation of four sets of buses (Table 1 presents the requirement of buses for each operating area¹²) and consisted of two phases.

¹¹ The Citizen Service of Indecopi is responsible for channeling and integrating the services of functional and administrative areas, providing information on procedures and requirements for accessing services provided by all the areas of the institution, as well as resolving consumption controversies through conciliations, by means of the delegation of functions on the part of the Consumer Protection Commission.

¹² Upon the end of the franchise, the buses acquired and operated by the service providers will be given to Protransporte, who will organize a new tendering process and award the buses and the operation of the system.

In the first phase, potential bidders had to demonstrate compliance with certain requirements, such as experience in the operation of similar systems and the existence of a social capital of USD 1,5 millions, among other legal requirements.

Table 1: Number of buses required in the tendering process for the Passenger Transport Unit of Cosac I

Set	Operating area	Articulated bus		Conventional bus 12 m		Conventional bus 8,5 m	
		Minimum	Maximum	Minimum	Maximum	Minimum	Maximum
1	South	75	90	38	57	-	40
2	North 1	75	90	38	57	-	27
3	North 1B	75	90	19	29	54	81
4	North 2	75	90	73	110	-	19
	Total	300	360	168	253	54	167

Source: Concession contract for the Transport Service of Cosac I.

In the second phase, bidders that met the requirements of the first phase were qualified according to a formula that combines the following elements:

- A factor that measures how much the firm has been affected by the rearrangement of routes implemented due to the implementation of Cosac I (*A*).
- The tendered value per kilometer in the main route (*TM*)
- The tendered value per kilometer in feeder routes (*TF*).¹³

Furthermore, according to what is established in Law N° 28242, National Productive Development Promotion Act, additional points were awarded to bidders who committed to carry out works and buy goods produced in the country.

As we mentioned before, the franchise was awarded to four private firms: Consorcio Lima Bus Internacional, Lima Vías Express S.A., Consorcio Grupo Plaza de Inversiones S.A. - Consorcio Grupo Empresarial 9 and Consorcio Perú Masivo.

Unlike the traditional system in which prices for transport services are determined in the market, prices in Cosac I are determined by the Coordinator Consortium¹⁴, according to the formulas included in the annex of the concession contract. In case there is no agreement among the members of the Coordinator Consortium, Protransporte can set the price of tickets in Cosac I, without appeal. Nowadays, the price for the service provided in the main route of Cosac I is PEN 2,00¹⁵ (regardless of the firm providing the

¹³ The formula for the determination of the score of each bidder is:

$$Score_i = (0,93*FTM_i + 0,07*FA_i)*0,75 + 0,25*FTF_i$$

Where: $FTM_i = (TM \text{ of the lowest bid}) / TM_i$

$FA_i = (A \text{ of the lowest bid}) / A_i$

$FTF_i = (TF \text{ of the lowest bid}) / TF_i$

¹⁴ The Coordinating Consortium is made up of representatives of each one of the operators of the Passenger Transport Unit and the Collection Unit.

¹⁵ Approximately, USD 0,78.

service or the distance traveled), while the average price of urban transport services under the traditional system is PEN 1,28.¹⁶

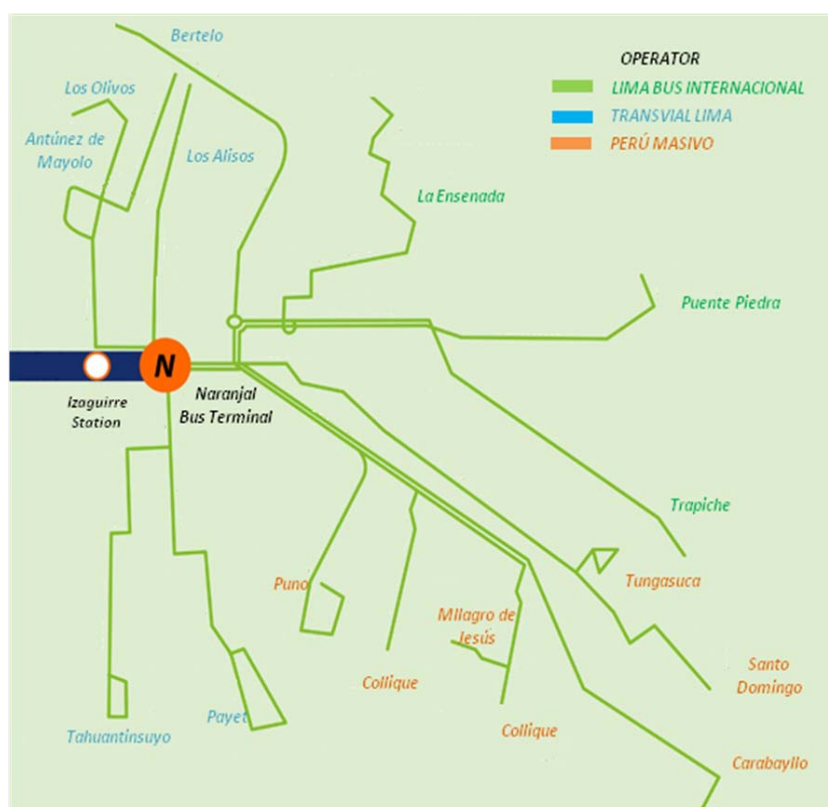
3. Nature of the contracts awarded

Cosac I connects 16 districts of Lima using two route groups, the main route and feeder routes. The main route is an exclusive corridor that runs from south to north and vice versa, and is composed of three sections (south, central and north). The feeder routes are routes that are designed to transport users from remote terminals to the main route through transfer operations.

In the main route, regular and nonstop services are provided. The four operators of the Passenger Transport Unit provide all the services under an equitable allocation based on the number of buses owned by each operator.

On the contrary, feeder routes are distributed among the operators: Lima Vías Express S.A. is in charge of the four feeder routes located in the south of the city; while the 16 feeder routes located in the north of the city are distributed among the other three operators (see Graph 2).

Graph 2: Distribution of Cosac operators in feeder routes in the North of Lima



Source: Protransporte.

Protransporte is in charge of the allocation of routes, frequencies, etc., in coordination with the operators and taking into account the demand of the service.

¹⁶ Approximately, USD 0,50.

According to the concession contract, the duration of the grant is 12 years since the beginning of the operations of each firm. The contract also states that the grant can be extended, if requested by the operator at least one year before the expiration of the contract and after the evaluation of Protransporte.

The concession contract also states that both the grantor and the operators have a mutually beneficial financial relationship. Nonetheless, it provides that both are entitled to a reestablishment of this equilibrium when any of the following events occurs as a result of a legislative change¹⁷:

- The total annual costs of the operator increase or decrease in more than 10% with respect to the previous year.
- The total annual revenues of the operator increase or decrease in more than 10% with respect to the previous year.
- The combined effect of changes in total costs or revenues is higher than 10% with respect to the previous year.

Regarding the quality of the service, the concession contract states that the operators are obliged to comply with technical requirements and minimum quality standards specified in the annexes of the contract. Furthermore, they must provide the service without discrimination, pay for any damage and establish a telephone hotline for inquiries and complaints.

Finally, it should be mentioned that with the implementation of Cosac I, a group of bus transport providers under the traditional system was retired. The concession contract establishes that at least 25% of the workers hired by the operators must be workers who lost their jobs due to the implementation of Cosac I.

4. Execution of the contracts

The concession contract of Cosac I states that Protransporte is entitled to inspect or arrange inspections by technical auditors and/or accountants to the facilities, equipment, files and other data from the operators, without hindering the provision of the service. Supervision activities are performed in coordination with Invermet¹⁸.

The contract also states that Protransporte can impose sanctions and penalties for infringements, which are defined as any act or omission which affects the system operation, the appropriate formation of prices, equality and opportunity in access to information, protection to users, transparency in the system, the orderly development of the market and, in general, any violation of relevant laws and regulations. Sanctions depend on the gravity of the infringement¹⁹ and may include both fines and the suspension or disqualification of the driver or person responsible for the infraction.

¹⁷ This includes a change in the interpretation of relevant laws.

¹⁸ Invermet is in charge of monitoring compliance with the obligations established in the concession contract, its Regulations and other relevant laws, either directly or through third parties.

¹⁹ Minor infringements receive a fine of 0,5 to one tax unit (approximately, USD 720 to 1 439); serious infringements receive a fine of two to five tax units (approximately, USD 2 878 to 7 195) and very serious infringements receive a fine of six to 10 tax units (approximately, USD 8 634 to 14 391).

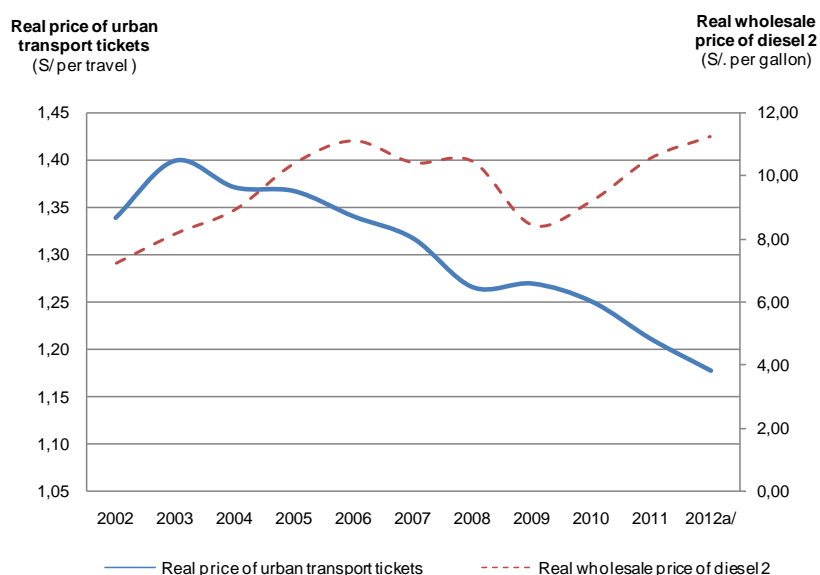
5. Outcome

To date, there has only been one tendering process for Cosac I. Six bidders were qualified to pass the first stage of the process and four of them were chosen for the provision of transport services in Cosac I.

The impact of the implementation of Cosac I on prices, costs, quality and safety of the services provided by the licensees has not been evaluated yet. Nonetheless, the operation of Cosac I constitutes an improvement in the quality of life of the citizens of Lima.

As we mentioned before, the characteristics of the operation of the traditional transport system in Lima had resulted in low quality of service, basically because revenues are insufficient to cover the costs of operation and maintenance. In fact, as can be seen in Graph 3, between 2003 and 2012, the real wholesale price of diesel 2 (one of the most widely used fuels in buses that operate in Lima under the traditional system) has increased in 4,54% per year, on average; while the real price of urban transport tickets has decreased in 1,28% per year, on average.

Graph 3: Real price of urban transport tickets and real wholesale price of diesel 2



Source: National Institute of Statistics and Informatics.

In comparison, Cosac I offers a higher quality service in an exclusive corridor (main route), it has a speed controlled system, pilots are trained professionals and stations are equipped with a camera surveillance system and security personnel.

POLAND

1. Introduction

Polish competition authority (UOKiK) does not have extensive experience with the issues concerning organization of local and regional transport services. Even though the transport sector is well represented in the jurisprudence of UOKiK, competition cases rarely require precise and extensive information about the organization of local passenger transport services. The sector has been the subject of a market study by UOKiK in 2008, however, which gathered such information with respect to 5 areas (mid-sized cities and one large agglomeration), allowing for some generalizations concerning organization of local and regional bus services. It needs to be taken into account, however, that the legal framework has changed slightly (though not dramatically) since 2008, the markets are still evolving, and some of the possible problems may not have reached UOKiK.

2. Legal framework

The legal framework for transport services is established by two acts: the Act of 16 December 2010 *on public collective transport* which sets out rules for public passenger transport and Act of 6 September 2001 *on road transportation* which provides general framework for road transportation services, both passenger and cargo. According to the *Act on public collective transport*, public collective passenger transport is organized by local government entities corresponding to the area where such transport is provided. Local transport is therefore organized by communes (*gminas*), regional by voivodships, while the responsibility for organizing national and international transport falls on the minister for transportation. The duties of the organizer include planning, organizing and managing public collective transport.

The most important principles of collective public transport foresee that the means of transportation are fit for passenger transport, meet applicable technical norms and are properly marked, schedules are properly displayed at the bus stops and terminals, boarding takes place exclusively at the stops foreseen in the schedule, tariffs are publicly available at bus terminals and on buses and discounts foreseen by law (e.g. for students or the disabled) are respected.

Organizers are responsible, inter alia, for analyzing demand for public transport, safeguarding its proper functioning (making sure that bus stops and terminals are maintained to standards, integrated ticket systems function properly and passengers have adequate access to information), regulating conditions of access to transport infrastructure (bus stops and terminals), regulating distribution of tickets, as well as for tendering and contracting collective public transport services. The organizer may delegate all or part of the duties concerning public collective transport organization to a third party, which, however, may not be a public transport operator or be linked to such an operator in a way that could compromise impartial performance of the delegated tasks.

The organizer may appoint a public transport operator on the basis of a tender, provide those services directly or, in some circumstances, conclude a contract without a tender. The latter is possible for:

- contracts whose average yearly value is lower 1 mln EUR or their volume is less than 300 000 km (in case of SMEs with no more than 23 buses, the above-mentioned thresholds are doubled),

- public transport services which are to be provided by an internal entity (i.e. an entity controlled by the local government),
- situations, where there is a risk of a serious disruption of services and fast organization and conclusion of a tender is not feasible.

Contracts may be concluded for a period of up to ten years (fifteen for rail and sea transport). Their essential elements (23 of them) are specified in the *Act on public collective transport*. Granting exclusive rights for a given route is explicitly forbidden.

Independent providers of transport services may be present in the market side by side with public collective transport operators. Following the *Act on road transportation*, providing transport services is subject to licensing requirements, which include a certificate of professional qualification on the part of at least one member of the firm's management, as well as sufficient financial means (9000 EUR for first bus/truck and 5000 EUR for the following ones). To be able to enter a given route (i.e. to receive from the organizer a confirmation that a new service has been notified), they have to notify the organizer, in particular as to the route and the period for which they are going to serve it. The carrier must also provide the organizer, among others, with the information concerning schedule, bus stops, terminals and vehicles to be used for the service and a copy of a transport license.

Before notifying the organizer, the carrier must co-ordinate the access to transport infrastructure (bus stops and terminals) with owners of the latter. The infrastructure owners (usually local governments) should be notified of the proposed service and other details of the planned route. The infrastructure owners grant access to it if free capacity is available and if the new route does not threaten the traffic organization or safety. Access fees paid by carriers are capped by law: at 0,05 PLN (ca. 0,012 EUR) per vehicle stop at a bus stop and 1 PLN (ca. 0,25 EUR) per vehicle stop at a terminal.

The organizer refuses the confirmation (permit) for a new service or revokes an existing one, if the carrier has flagrantly infringed the principles of public transport's functioning, the conditions on which the service is provided (its schedule in particular) or the principles of access to bus stops, has transferred the confirmation to a third party or failed to carry out services for reasons for which he is responsible.

Public transport operators, as well as other carriers who provide services in the relevant area are obliged to inform the organizer each year about the number of complaints and procedures for addressing them. Passengers also have the right to complain to the organizer directly. In addition, Inspectorate for Road Transport, as one of its tasks, carries out inspections of carriers, checking whether they comply with the law (e.g. whether the means of transport used comply with the regulations, whether stops are made only at the designated bus stops, etc.).

3. Practical functioning of public transport in Poland

The legal framework for public transport is relatively flexible and allows for several models. On the one hand, local transport may be carried out exclusively by the government, which will both organize and provide transport services, using its own means of transportation. On the other hand, local authorities may satisfy themselves with the role of an organizer, laying out the transport plan and awarding, on the basis of competitive tenders, contracts for transport services. This model seems to be particularly prevalent in large cities and agglomerations, where co-operation between different communes is essential for creating a co-ordinated transport network and economies possible from contracting out transport services may be large.

In the market organizer model, the transport needs of the population are first assessed and calls for tender announced. Depending on the specificity of the planned routes, a single tender may encompass one

or several routes. Contracts are usually very prescriptive, specifying minimum quality requirements, leaving price as the decisive factor in choosing a provider. Time for which contracts are awarded may also vary, depending on investment requirements, preferences of the organizer or other reasons. Failure to abide by the terms of the contract and in particular to maintain the agreed standards of service is subject to penalties. Complaints can be lodged with the organizer, who has procedures for dealing with them. We understand that the contracts are subject to a general contract regime, which allows them to be renegotiated, should essential circumstances change. Transport service operators that provide services contracted for by the organizer may include both municipal and private undertakings (or public undertakings owned by a different municipality).

Costs of the public transport are covered through ticket sales and, should those fall short, subsidies from the local government. The balance between the two depends on the priorities (e.g. encouraging citizens to use public transport instead of cars) and financial strength of the local government. Local authorities are equipped with powers to regulate prices – by issuing resolutions introducing price caps, but also, as they organize collective public transport or own/control local operators, they may control prices directly.

Public collective transport, especially in smaller cities and towns, is often supplemented with independent carriers, who provide services, usually along main roads linking towns and cities with nearby places. They rarely form a full-blown transport network, in competition with the public one. An exception seems to have been Lublin, a city of 400 thousand in eastern Poland, where for several years private transport providers covered large parts of the city and were a realistic alternative to the municipal operator. Currently, after reorganization and a switch to an organizer model, a majority of passenger transport in Lublin is provided under the organizer system, by carriers chosen in a public tender procedure.

Independent operators who want to compete with services provided within municipal systems face several obstacles. They do not enjoy subsidies and their income comes exclusively from ticket sales, which allows them to service only the most profitable routes. As a result, private carriers rarely achieve scale and coverage that would make them attractive to heavy users of public transport, who may require access to various parts of a given town. This leaves occasional users, who do not buy network tickets, as their customer base. Numerous and small-scale independent operators may also face problems with setting up a revenue-sharing scheme, which makes them less likely to be able to offer network tickets that could compete with those of the municipal transport provider.

Due to the above-mentioned constraints, independent operators are more prevalent in smaller towns, where scale is not of essence, and in feeder and inter-town traffic. Legal framework, which allows for relatively easy entry, seems also to be a factor in limiting collective transport price increases, as it allows – at least in some markets – independent providers to offer passengers an alternative, in case prices rise sufficiently.

As the regulatory framework places much of the power to shape the collective transport market in the hands of local authorities, it is possible for inefficient organizational models to be chosen by the latter. Inefficient internal providers may be appointed as public transport operators, municipal operators may also offer the lowest bid in a tender organized by their owner, only to be subsidized later if their revenues fail to cover costs. It is difficult to assess how widespread such phenomena may be, but given popular pressure for low public transport prices and potential or actual pressure from independent providers, local governments seem to have good incentives to organize such services efficiently.

4. Competition law enforcement

As mentioned, over the last decade there has been a substantial number of complaints and cases concerning passenger transport markets. Aside from local cartels, problems in this sector include predatory pricing, discriminatory access or refusal of access to essential infrastructure, such as bus stops and terminals, as well as unfair or discriminatory access conditions.

Predatory pricing allegations are usually made in the context of local inter-town traffic. Facing a new entrant, an incumbent introduces price cuts for a period sufficient to drive the competitor out of the market. Price cuts may be supplemented with acts of unfair competition, like introducing out-of-schedule buses that arrive directly before competitor's scheduled stops, to "steal" customers. Predatory pricing allegations can, however, also be made in the municipal transport context. In one of the cases, a local collective transport operator complained to the competition authority that an independent operator resorted to predatory pricing on two lines. An investigation showed that on one of the lines the defendant was not dominant, while the second line was generally profitable and much of the rationale for maintaining it was social – the defendant started the line after requests from local community leaders.

Most frequent antitrust problems with access to infrastructure concern setting discriminatory access charges by the owners of bus terminals, local authorities refusing access to bus stops without objective justification or unfair allocation of bus stops' maintenance costs among carriers (which places the burden disproportionately on some of the carriers or entails costs that should by law be borne by the owners of bus stops, not the carriers).

5. Summary

Regulatory framework for public collective transport in Poland seems to allow competitive forces to shape the market – transport operators are often chosen in tenders and may be subject to competition from independent service providers. This model seems to serve Polish consumers well and the relatively large incidence of antitrust complaints in the passenger transport market may be considered a testimony to its vibrancy – for restrictive practices to take place, there must first appear some competitive pressure.

RUSSIA

Description of the industry and regulatory framework

a) Public transport is of the most important industries in the Russian Federation. Share of paid public transport services among the total amount of paid public services in Russia accounts for more than 20%.

Thus, motor transport has a considerable share in the structure of passenger transportation.

According to Articles 4 and 5 of the Federal Law № 259-FZ of 08.11.2007 “Regulations of motor transport and in-city electric transport” transportation of passengers and luggage, goods is performed by means of in-city, suburban, inter-city, international commuter routes and are subdivided into scheduled (regular) services, charter services and taxi transportation.

In-city regular services include transportation of passengers and luggage within certain geographical area by public transport.

These means of transportation is intended first of all for the use of citizens with low income and to provide for territorial integrity of cities and accessibility of all communal utilities and areas; and in-city public motor transport performs a number of important social functions.

Regular passenger and luggage transportation are subdivided into:

1. transportation of passengers with getting on and off only at the specified stops on the regular transportation route;
2. transportation of passengers with getting on and off only at any possible point on the regular transportation route if it is not prohibited by official driving standards and road regulations (hail and ride services).

In this particular market the passenger transportation service by means of in-city public transport is the good in question. The market is segmented according to its geographical area and transportation route. Transportation services are provided by the entrepreneurs who act on their own initiative and free will and their activities are aimed at getting profit from provision of transportation services.

Additional the market can be segmented according to means of transportation used, i. e. by bus, trolleybus, tram or route taxi (minibus).

As a rule there are several public transport companies in large cities, thus the market of public transportation is potentially competitive. Different types of passenger transportation can be interchangeable in case their routes coincide

Chartered transportation and taxi cannot be substitutes of public transport because of the differences in pricing policy and target group.

Majority of in-city public transport markets are highly concentrated as in each segment there is a large transportation company who is the main player in the market and as a rule it is a state or municipal company.

Suburban or intercity public transport markets have practically the same characteristics.

b) Establishment and maintenance of public transport in the Russian Federation is under the control of subjects of the Russian Federation (suburban or intercity (inter-municipal) public transport) and local authorities (within the geographic area of the populated area, municipality or city district).

The Federal Law № 184-FZ of 06.10.1999 “On general principles of establishment of legislative (representative) and executive state authorities of the subjects of the Russian Federation” and Federal Law of 06.10.2003 № 131-FZ “On general principles of establishment of local authorities in the Russian Federation” regulate the powers of the authorities and as well as lay on them responsibilities to organize and maintain the public transport system.

Relatively recently adopted Federal Law of 08.11.2007 № 259-FZ “Regulations of motor transport and in-city electric transport” and the Resolution of the Government of the Russian Federation № 112 of 14.02.2009 (based on the law) “On assertion of the Rules of transportation of passengers and luggage by motor and in-city electric transport” do not define concept of establishment and organization of transport services.

The basis legal act regulating the aspects of establishment and running of motor transport services for customers is the departmental Order of the Ministry of the motor transport № 200 adopted on 31.12.1981 “on approval of the rules of establishment of motor transport services” (the documents dates back to Soviet era and as a consequence do not reflect the actual up to date situation). Analysis of this document indicates the establishment of motor transport services includes systematic study passenger traffic and elaboration of efficient routes in correspondence to it.

According to point 34 of these rules the responsibility to systematically observe, examine and analyze the passenger traffic was entrusted to motor transport enterprises. The result of the analyses is used as the basis for development and correction of route scheme, particular routes, timetables, intervals and etc. and is used for improvement of services especially at “rush hour”.

However these rules are the only document regulating this sphere at the present time (and there are no up to date legislative alternatives) and they are used with consideration of the changing situation and conditions which is proved by the judicial practice.

Systematic observation, examination and analysis of the passenger traffic as well as efficient adjustment of efficient route network is entrusted to motor transport enterprises (according to the Rules). However the establishment of the transport system is under the control of executive authorities of the subjects of the Russian Federation and local authorities. As a consequence the new regulations should be adopted which will legally define responsibility of the executive authorities of the subjects of the Russian Federation and local authorities to examine, analyze and elaborate (adjust) passenger traffic.

The analysis of the draft law № 423427-4 “On establishment of motor transport services with regular routes in the Russian Federation” (adopted in the first round) indicates that such provision as discussed above is not included. Thus this legislative deficiency should be eliminated during the second round of adoption at the State Duma.

The basis of the modern route network was established at the soviet time and it is quite obvious that the executive authorities of the subjects of the Russian Federation and local authorities do not act as fast and necessary to adjust the network for efficient service for needs of population.

The current legislation does not contain the definition of the term “route network”. According to the current legislation, the route network is not subject to mandatory publication. Part 1 of Article 789 of the Civil Code of the Russian Federation provides only for publication of the list of organizations that need to carry out shipping operations recognized as shipping operations by public transport. However, till the present a list of such organizations has not yet been published, and the order of the publication has not been determined either.

The new draft law refers to the Register of Routes of Regular Communication, which is maintained by local authorities (in respect of municipal routes), executive authorities of the constituent entities of the Russian Federation (in respect of inter-municipal routes), and the federal executive body authorized by the Government of the Russian Federation (in respect of routes among the subjects of the Russian Federation). The concept of the “Register of Routes of Regular Communication” has not been yet defined.

According to the FAS Russia’s opinion, it would be more appropriate to develop and *to publish a single system of transport communications and road and street networks, which would be in alignment with the planning structure of the settlement and the surrounding area, rather than to elaborate and to publish a route network and route registers.*

To meet the emerging needs of the passengers (in some cases due to the commissioning of new residential areas) carriers often independently develop new routes and schemes and apply to the relevant authorities with a request to open, or to change, a route and to approve certificates of developed routes. However, carriers face state authorities’ refusals, which usually base their decision on the fact that the routes overlap, which, in their opinion, has a negative impact on road safety.

Moreover, experience has shown that such refusals are often unreasoned. They are not based on the federal laws, and, therefore, they create unnecessary obstacles to carriers in the operations and are recognized by the courts as a violation of Part 1 of Article 15 of the Federal Law of 26.07.2006 No.135-FZ “On Protection of Competition”.

The draft law “On the Fundamentals of Organization of Transport Services on Routes of Regular Shipping Services in the Russian Federation” (or the Regulation on Passenger Transport by Means of Road and Urban Surface Electric Passenger Transportation to be accepted in accordance with the draft law and to be approved by the Government of the Russian Federation) should set a clear procedure for the opening, the change and the closing of routes, and the grounds for issuing a refusal.

In the draft law accepted in the first reading there are two cases of refusal in the opening (change) of routes of regular service:

1. non-compliance of a regular route with the requirements for the organization of routes of regular communication established by the Rules of Organization of Passenger Transportation;
2. failure of the budget of the Russian Federation, and of a municipality to provide subsidies to carriers under the current Law.

Furthermore, the second reason for refusal in the opening (change) of routes is provided for all types of traffic, without exception, and the draft law provides for two types of traffic: regular service carried out on the basis of state and municipal orders using rates approved by the state authorities of the Russian

Federation and local government, and, therefore, the provision of subsidies to carriers, and other regular services performed with the use of tariffs set by the carrier.

Thus, the second case of refusal in the opening (change) of routes may not be applied to those routes, which are opened at the initiative of carriers, and transportation on these routes are provided without subsidies, which is to be specified in the Law.

As for the first case of refusal, the Rules shall contain clear and specific requirements to organization of regular routes. A refusal to open (change) routes must be reasoned and based on evidence. Otherwise, the refusal will create unnecessary obstacles to the operations of economic entities.

According to the Estimated Program of Legislative Work of the State Duma of the Federal Assembly of the Russian Federation for the Spring Session in 2012 in Terms of Draft Laws for Priority Review, approved by the Resolution of the State Duma of the Federal Assembly of the Russian Federation dated 13.01.2012 No.16-6 DG after nearly a five-year break, the second reading of the draft federal law No.423427-4 "On the Basics of the Organization of Public Transport Services on Regular Routes in the Russian Federation" was scheduled for May 2012, but so far it has not been considered.

The FAS Russia hopes that these issues will be resolved by adopting a law that establishes a common approach of the authorities and bodies of local self-government to organization of public transport services.

2. Distribution to Private Suppliers of Contracts on Rendering the Passenger Services by Means of Road Transportation

As it was said before, the institutional framework of the transport services in the constituent entities of the Russian Federation and the municipalities are defined by the legal acts of the constituent entities of the Russian Federation and the municipalities.

The said authorities shall be entitled to carry out admission of the carriers to the servicing of regular passenger routes on the basis of an agreement by establishing competitive or other conciliatory proceedings. *At the federal level, the obligation of competitive distribution of routes is not established.*

However, many regulations adopted by regions in this field have common standards. The basis for such legal acts is the rendering of regular passenger services on the basis of an agreement concluded between the carriers and the authorized body in the field of public transport services. In the absence of such an agreement, the services may be recognized illegal, and the carrier may be subject to administrative liability under the law of a subject of the Russian Federation.

A district or city government supervises the transport agencies and organizations which serve the population of a district or a city, coordinates routes and schedules of local transport, and draws companies and organizations to transport services on a contract basis.

Passenger services are rendered by transport organizations and individual entrepreneurs. Service providers are business entities of various forms of ownership, which render passenger services on the basis of relevant licenses.

As the field of public transportation is regulated on the regional and local levels, the practice has no single approach and requirements to the issues associated with an exclusive contract and the development of competition in the rendering of services. This also applies to the principles of selection of carriers, and the conditions of conducting tenders, building lots, and determining the winners.

It should be noted, however, that the attitude to tenders as a tool of selection of participants which does not restrict competition has been formed only in recent years. Prior to that, a position dominated among market participants and regulators, which consisted in the recognition of such tenders held by local administrations, which contradicted the antimonopoly legislation and restricted the rights of the carrier holding a license to carry out business activities.

The general principles and requirements for trading are established by law.

The antimonopoly requirements to tenders established for local authorities are determined in paragraphs 1 and 2 of Article 17 of the Law “On Protection of Competition”, which prohibit:

- coordination of operations of bidders in a tender by the organizers of the tender or the customers;
- creation of preferential conditions in a tender to a bidder or several bidders, including through access to information, unless otherwise provided by the federal law;
- violation of the procedure for determining the winner or winners of the tender;
- participation of the tender organizers or customers and (or) employees of the tender organizers or employees of the customers;
- restriction of access to participation in the tender not provided by the federal laws or other regulations.

Paragraph 4 of Article 17 establishes that violation of these rules is grounds for a court to find relevant tenders and transactions concluded afterwards void, including by the claim of the antimonopoly authority.

In accordance with Article 447 of the Civil Code of the Russian Federation, tenders are held in the form of an auction or a competitive tender. The person who offered the best conditions is declared a winner by the decision of the competition committee which is pre-assigned by the tender’s organizer. The competitive tender, which was attended by only one party, is deemed invalid.

The procedure of the tender for the selection of carriers to arrange transport on designated routes, is usually regulated by the acts of the authorized body of a subject of the Russian Federation. Such act determines the order of formation of the competition committee, the dates of the competitive tender, the conditions of admission of candidates to the competitive tender, the selection criteria, and the order of formation of lots.

Generally, a competitive tender is held in respect of municipal and inter-municipal (suburban) routes.

The regulations of the subjects of the Russian Federation establish the competence of the authorized body for the supervision over execution of a contract by a carrier.

The issue of legality of the tender by placing the state, municipal order to carry out transport services is controversial in the absence of federal regulation. In many cases, court decisions indicate that the competitive tenders for the right to carry transport services on the specified routes by their nature are not the placing of an order by means of holding a competitive tender for the provision of services for public use by the budget, because such tender is performed at the expense of citizens themselves and does not provide for spending budget funds of a public entity.

In general, organization of passenger transport by means of road transportation is based on the contract concluded upon the end of a tender. The rules are established by public entities independently with the basic legal requirements.

Tenders

During the past few years Russian competition authorities repeatedly treated cases closely associated with passenger's vehicle transportation tendering process (including both the right to provide public transport services on regular municipal itinerary and the right to serve the regular passenger transportation routes). (hereinafter – the “tendering”).

Currently, the necessity of tendering for carrier which provides transportation services on a specific itinerary is undeniable by the authorities, although such tendering procedure is not stipulated by the legislation.

At a federal level, there are no any other acts or rules determining unified demands for such tendering. Furthermore, courts of different levels and districts repeatedly tried cases concerning actions of tendering organizers in respect of carriers, and their decisions are not always definitely evaluate actions of authorities.

Case study

The Stavropol Regional Office of the FAS Russia considered the case against the Government of the Stavropol Region based on the signs of violating part 1 Article 15 of the Federal Law No. 135 FZ “On Protection of Competition”.

The Government of the Stavropol Region has enacted the Resolution No. 170-p dated 05.05.2001 “On Introduction of Changes in the Resolution of the Government of the Stavropol Region No 256-p dated on 04.08.2010 “On the Actions for Implementation of the Law of the Stavropol Region “On the Organization of the Public Transport Services in the Stavropol Region”, such amendments add plus 7 points (evaluation criteria) to the participants of a tender for the availability of their own production facilities. Such amendments restrict equal terms for all other participants of the tender in case they do not have their own production facilities.

The scoring is based on the use of production facilities and it does not take into account such criteria as quality and timeliness of regular servicing and appropriate repair of vehicles. Such scoring gives odds to large business entities that usually own the mentioned facilities.

However the ownership is not a major point of consideration of the quality of work or service. Both federal and regional legislation don't gear traffic safety with the quality of services provided by the owners.

In accordance with Part 25 of the Resolution of the Government of the Stavropol region No. 256-p, the highest possible number of points which the carrier can get is 28. Meanwhile, 7 of such points (or 25 %) provides for the availability of production facilities. So, the participant of the tender who possesses the production facilities scores has an advantage over other participants and becomes the bid winner.

The Stavropol Regional Office of the FAS Russia found that the Government of the Stavropol Region violated Part 1 of Article 15 of the Federal Law No. 135 FZ “On Protection of Competition”.

The court of appeal confirmed the position of the competition authority.

Auctions

Different economic spheres have different requirements for organization and conducting the auction. It helps to create a fertile competitive environment for business entities on the goods' markets and regulate the activity of government bodies. It also forbids the latter to create preferences for certain business entities.

Based on the practice of consideration of business entities applications in respect of bid organizers actions, the FAS Russia notes that generally carriers do not agree with the terms and conditions of auctions (e.g. tender documentation) and the activity of tender commissions in case of specific facts of scoring.

Case study

The Krasnodar Regional Office of the FAS Russia considered the case against the Transport Department of the Krasnodar Region (hereinafter – the Department) based on the signs of violating Part 1, Article 15 of the Federal Law No. 135 FZ “On Protection of Competition”.

In the course of consideration of case materials the Krasnodar Regional Office of the FAS Russia determined that the Department had sent the letter No 60-1614/11-04-07 dated 01.04.2011 to OJSC “Svetlogradskoe ATP” concerning the conclusion of a contract (hereinafter – the Letter of 01.04.2011).

In this letter the Department persuades OJSC “Svetlogradskoe ATP” to negotiate an administrative agreement for regular bus passenger traffic among several regions of the Russian Federation (hereinafter – the Agreement).

In case of refusal to negotiate the Agreement the Department reserves the right to revoke approved timetables and route registration certificates. Such acts will remove the carrier from the list of regular bus passenger traffic routes among several regions of the Russian Federation.

In an application to the letter dated 01.04.2011 addressed to the JSC "Svetlograd Auto-transport Enterprise" Department detached a draft of the contract "for regular passenger transitions on the interurban bus route of regular communication between the constituent entities of the Russian Federation," the route "Stavropol -Gelendzhik", "Stavropol-Anapa" "Svetlograd-Krasnodar", "Svetlograd-Anapa".

The antimonopoly body, recognizing the Department's actions mentioned above to be a violation of Art. 15 of the Law on Protection of Competition, proceeded from the following basis.

In accordance with the paragraph 1 art.421 of the Civil Code of the Russian Federation, citizens and legal entities are free in a contract formation.

Coercion to a contract formation is not permitted, except the cases when the responsibility of a contract formation is provided by the Civil Code, the law or the obligation voluntary accepted.

In its turn, Russian law does not provide that the contract formation by the letter dated 01.04.2011, is an obligation for JSC "Svetlograd Auto-transport Enterprise" transportation on interurban bus route of regular communication between the constituent entities of the Russian Federation, it means that the rejection of the contract formation is not the ground for recall of direction passports agreements, in accordance with which JSC "Svetlograd Auto-transport Enterprise"'s transportation is carried out.

In the case of law violation the letter of the Department includes the threats of negative consequences for JSC "Svetlograd Auto-transport Enterprise" in the case of the regret of contract formation. It means the

exclusion of the information about the carrier and its directions from the general registry of regular bus routes between constituent entities of the Russian Federation".

The threat of the recall of direction passports agreements could deprive of "Svetlograd Auto-transport Enterprise" the right to carry transportation on the directions mentioned above. It would lead to the restriction or elimination of competition in the interurban transportation market.

Department of the Federal Antimonopoly Service in the Krasnodar region recognized the actions of the Department in the letter № 60-1614/11-04-07 from 01.04.2011 "On the conclusion of the contract to be a violation of 2 Part 1 of Art. 15 of the Law on Protection of Competition and, and issued an order for the removal.

Courts of all three instances supported the position of the antimonopoly body.

Price policy

In accordance with the law the state regulation of prices (tariffs) for the carriage of passengers and luggage by all forms of public transport in the city, including the underground, and suburban (excluding railways) is carried. In this case, it is all about the municipal (intracity) transportation.

Authorities of constituent entities of the Russian Federation have the right to establish state regulation on the transportation of passengers and luggage by intraregional and interregional (intersubjective) routes. In practice, tariff regulation on intersubjective routes is not performed, the tariffs are set by the carrier.

Among the standard tender conditions there are: experience, existence of vehicles in a certain amount and with certain environmental requirements, the number of offenses, the existence of a technical base and etc. The legitimacy of setting by the Administration of some conditions is often a subject of litigation.

Moreover, normative acts of the constituent entities of the Russian Federation set the requirement to include one or more directions in lots. In the latter case it is possible to set combination of profitable and non-profitable directions.

Contracts with carriers on the results of the tender are usually urgent, concluded for a period of several years, with possible extension.

Annex to the contract is the direction passport with the traffic schedule.

A contract sets the responsibility of the parties for compliance. As a rule, contracts contain provisions which imply legal procedures of dispute resolution.

In order to improve the market regulation, the development of common rules now the work is carrying to form the legal framework: a draft of a federal law is developed on transport service organizations in different market segments. One of such a bills is passed in the first reading by the State Duma of the Federal Assembly of the Russian Federation in 2007. In this bill the requirements for competition in the transport routes is reflected to prevent the monopolization of markets. Antitrust authorities advocate adoption of these acts as soon as possible.

The ways of law improvement on organization of public transport services

The FAS Russia established numerous facts of violation of antitrust law by government authorities of the constituent entities of the Russian Federation and local governments in the sphere of organization of regular passenger transportation by road to the urban, suburban and inter-municipal routes.

The practice of the FAS Russia shows the need to improve at the federal level legislation on the public transport services organization, in so far as establishing united requirements for the organization of public transport by civil authorities.

FAS Russia considers to be right to develop a standard document which defines procedures and conditions of the tenders. It would be binding on implementation by local governments and public authorities, which are responsible for organizing the transport of passengers by automobile transport on their territory.

FAS Russia had sent to Ministry of Economic Development of RF its proposals to initiate the formulation the model rules of tenders for a contract of carriage of passengers and luggage by automobile transport to the urban, suburban and intermunicipal routes, which sets the basic principles of access of market entities to the market of passengers and baggage by automobile transport, as follows:

- 1) Obligation to hold tenders as a tool of competitive selection of the carriers offering service on a particular route;
- 2) A unified procedure for tendering, including:
 - Public access to information about a tender (notice and tender documentation);
 - The mandatory requirements entities should met to apply for participation in a tender;
 - Requirements for technical equipment of applicants to participate in a tender, a road transport (equipment of buses with global satellite navigation systems, the availability of reserve buses, etc.);
 - An exhaustive list of documents submitted by applicants for participation in the competition;
 - Requirements for building lots, providing the opportunity to small and medium-sized businesses and individual entrepreneurs (one lot - one route) to participate in a tender;
 - Uniform rules of evaluation and comparison of applications for participation in a tender on the criteria which characterizes the quality of services (including the availability of equipment for handicapped, technical equipment, which enhances passenger comfort, the life of the vehicle, etc.);
 - The conditions for choosing the winner with an equal number of points;
 - The order and duration of contracts concluded by the results of a tender;
- 1) Transportation provision for privileged category of citizens during the tender time.
- 2) It should be noted that the cancellation of state regulation of tariffs for the carriage of passengers and luggage by automobile for intra-and inter-regional (inter-republic within the Russian Federation) routes, including taxis, and passenger and luggage public transport of all models in the city, including the metro, and suburban (excluding railways) would be an incentive for development of competition on the market of passenger automobile transport.

The possibility of regulating these tariffs is provided by the Government of the Russian Federation Decree dated March 7, 1995 № 239 "On measures of state regulation of prices (tariffs)." However, this

provision is in conflict with the provisions of the Federal Law of December 28, 2009 № 381-FL "On the basis of state regulation of commercial activities in the Russian Federation" (hereinafter - the Law on Trade). According to paragraph 4 of Article 8 of the Trade Act, if federal law provides the state regulation of prices for certain goods (extra charges to its price), a price of such goods (extra charges to its price) are installed in accordance with the federal laws and also adopted in accordance with regulation acts of federal level and (or) regulatory acts of local government.

At the same time, the federal law providing the introduction of state regulation of inter-regional and intra-regional passenger transport tariffs is not available.

According to the author, the draft "On the Fundamentals of public transport service organization on the regular routes in the Russian Federation" (or taken in accordance with it Regulations of passenger automobile transport and urban surface electric passenger transport, claiming by the Government of the Russian Federation) should set clear procedures of opening, modification and closing of direction, as well as the reason of refusal to open (change) directions.

The bill, passed in the first reading, two cases of refusal to open (change) regular direction are foreseen:

- 1) Mismatch of regular route direction to the requirements for regular transportation direction organization, established by the Rules of public transportation organization;
- 2) Shortage of budget resources of constituent entity or municipality to provide transport operators with donations in accordance with the law.

Moreover, the second case of refusal to open (change) direction is provided for all the types of transportation, without exceptions, and the draft envisages two types of transportation: regular service, carried out on the basis of state and municipal orders using tariffs approved by the state authorities of the constituent entities of the Russian Federation and local government, and, respectively, providing carriers donations, and other regular services, performed with the use of tariffs set by the carrier.

Thus, the second case of refusal to open (change) the directions cannot be applied to those directions, which was opened at the initiative of carriers and transportation in accordance with which perform without donations, which should be specified in the law.

As for the first case of refusal to open (change) directions, it is necessary to write in the specific requirements for of regular communication routes organization in the Rules of the passengers transportation. Refusal to open (change) direction should be reasoned with evidence. Otherwise refusal will create unnecessary obstacles to the actions of economic entities.

In an exemplary program of legislative work of the State Duma of the Federal Assembly of the Russian Federation during the spring session of the 2012 in a field of the draft for priority review, approved by the Resolution of the State Duma of the Federal Assembly of the Russian Federation dated 13.01.2012 № 16-6 State Duma after nearly five-year break, the second reading of the Federal Law № 423427-4 «On the basis of public transport services organization in the regular directions in the Russian Federation" was scheduled on May 2012 but so far the draft has not been considered.

FAS Russia believes that these issues will be resolved with adoption of a law which establishes a common approach of the authorities and bodies of local government to the organization of public transport services.

SPAIN

1. Introduction:

Among the functions of the National Competition Commission (Comisión Nacional de la Competencia, hereinafter "CNC"), as provided in article 26(1) (b) of Competition Act (Ley de Defensa de la Competencia) 15/2007 of July 3rd, 2007, is the advocacy of effective competition in the markets, in particular by means of "drafting general reports on sectors, as the case may be, with proposals for liberalisation, deregulation or regulatory amendment". Thus the function of competition advocacy involves regulatory activities of the Public Administrations guided by principles seeking effective competition in the markets, as well as making society aware of the advantages deriving therefrom.

The transport sector has been discussed in several occasions by the CNC.

Although Inland Transport Development Act 16/1987 of 30 July 1987 (Ley de Ordenación de los Transportes Terrestres, or "LOTT"), leaves open the possibility of using other systems to provide the service, the truth is that, for historical and economic reasons, a concession scheme has been chosen. This system grants exclusivity in a route for provision of passenger transport services by road.

A concession is a form of indirect management of a public service whereby the government grants a monopoly to an individual or legal person for management of a service of an economic nature through a government contract. From an economic point of view this system is only justifiable if, first of all, there are sound economic reasons for concluding that monopolistic operation is more efficient and secondly, if, as has already been stated by the CNC, there is real competition "for the market", in such manner that barriers to entry thereto are eliminated and there is competitive pressure at the time of the bid.

These circumstances may exist in the case of transport of passengers by road. On certain routes it may be that provision of quality services is only profitable if the operator is assured exclusive operation. Nevertheless, the diversity of existing routes suggests that this need not to be true in all cases.

The type of transport analysed is a public service, provided by an undertaking through a public bid for the corresponding exclusive governmental concession. The concession system makes competition "in the market" impossible, because there is a single service provider and the price of the service is conditioned by the governmental concession. There can only be competition "for the market", in the form of the public bids for award of the concessions. This competition "for the market" in turn is diminished by the existing barriers to access the concession market. These include, inter alia, lengthy concession terms, asymmetrical information, the possibility that the regulator may be "captured" by the concessionaire undertakings, the preferential treatment received by prior concessionaires when a new bid is held, etc.

2. Background:

The CNC has made several studies.

In both its 1993 and 1995 CNC reports recommendations were made designed to ensure competition in the framework of the concession system, and for adoption of measures for deregulation of bidding procedures.

1993 CNC Report:

In its 1993 Report on "Political remedies that may foster free competition in services and reduce the damage caused by monopolies", the CNC recommended maintaining the concession system for this kind of transport. But it believed that the system must satisfy certain requirements:

- The existence of real competition "for the market".
- A maximum 10 year time limit on the term of concessions.
- Flexibility regarding vehicles, frequencies, hours and stops, with appropriate mechanisms to compensate for variations, controlled by the granting authority.
- It also suggested other changes, including:
- Strengthening inspections to avoid unfair behaviour.
- For trips over long distances, permission to board passengers en route up to a given percentage of the capacity of the vehicle, always guaranteeing that would not result in disappearance of nearby routes.
- On an experimental basis, opening a regular line to multiple operators.
- Elimination of the system of maximum numbers of vehicles in discretionary passenger transport by bus.

1995 CNC Report:

The later 1995 CNC report, "Competition in Spain: Status and new proposals", insisted that it would be appropriate to deregulate this area, emphasising the importance in bids of tariffs and the number of trips, nonetheless indicating that awarding too many points to tariffs could result in the presentation of reckless bids and the consequent grant of concessions to certain proposals of very doubtful economic viability.

Merger file:

During a merger file (Case C 106/07, National Express/Continental Auto/Movelvia), approved on 2007, the CNC perceived problems in the sector. As a consequence, it commended a study to analyse the regulatory framework for access to the market for regular and ongoing passenger transport by bus, and proposed a series of improvements allowing achievement of real and effective competition in this market.

In-depth 2008 CNC¹ report:

To make the report, the CNC achieved a complete study of the bus transport sector. The CNC held meetings with the Ministry of Public Works, with transport companies and with the regional governments (Autonomous Communities)² that had conducted their own public tenders.

¹ http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=34752&Command=Core_Download&Method=attachment

² In Spain the regions are called *Comunidades Autónomas* and they have some legislative powers.

In addition, the CNC studied both national and European legislation in order to verify its observance by the protocol.

As far as the European legislation is concerned, regulation No. 1370/2007 of the European Parliament and of the Council of October 23rd, 2007 on Public Passenger Transport Services by Rail and by Road, allows the setting of maximum tariffs and limits the duration of public service contracts to a maximum of 10 years for public service bus or coach contracts. But thereafter it establishes the possibility of extending such contracts for up to a maximum of half of the original duration, if the grant of the extension is justified by amortisation of the assets used or the costs deriving from an extreme outlying geographical situation. In cases of exceptional investment in infrastructure, to support viable amortisation thereof, the Regulation opens the possibility that there may be contracts with longer durations, without specifying the limit. To guarantee transparency in the latter case, the competent authority must send the contract to the Commission within the term of one year after execution thereof, with details of the factors justifying its longer duration.

With regard to the national legislation, the regulatory framework for passenger transport by rail in Spain basically is in LOTT, developed by Royal Decree 1211/1990 of September 28th, 1990, which approved its Regulation (ROTT).

In order to engage in any business related to public transport of passengers by bus one must first achieve status as an authorised transport undertaking. In addition, depending on the kind of transport provided, a license is required, as is a governmental concession or authorisation.

These concessions, which are granted to undertakings, are exclusively for services on predetermined routes.

The terms of State concessions under the LOTT are established in accordance with the characteristics and needs of the service, based on the terms for amortisation of vehicles and facilities. They may not be less than 6 years nor greater than 15 years. ROTT adds that these terms take into account the level of traffic, potential profit and other circumstances deriving from the economic study of the operation.

Moreover, the regulatory framework in the Autonomous Communities is not uniform. Various Autonomous Communities not having their own regulations are governed by State legislation (LOTT), while others have established their own regulations.

Thus, the Autonomous Communities of Cataluña, País Vasco, La Rioja, the Canary Islands, Castilla-La Mancha and Aragón, by their own laws, have regulated both intercity transport within the Autonomous Community and urban and/or metropolitan transport. For their part, the Autonomous Communities of Galicia, Andalucía, Navarra, Valencia, Madrid and Castilla y León by law have regulated urban and/or metropolitan transport. The others, according to the available information, do not have their own legislation and are governed by the LOTT as a supplemental rule.

In any event the Autonomous Communities follow the structure of the concession model, as contemplated in the regulation of the LOTT, on a so-called general basis. In the Autonomous Communities having their own regulation of intercity transport, in any case, the terms of the concessions are from 6 to 15 years, as in the case of State concessions.

Furthermore, it is clear that the Ministry of Public Works has promoted a certain degree of deregulation. But various factors counsel a re-examination at this point to determine if that process is advancing in the right direction and with the required intensity. First, because of the EU Regulation 1370/2007 on Public Passenger Transport Services by Rail and by Road. Second, because within a relatively short period of time practically all of the State concessions shall be renewed. And third, and

intimately related to the foregoing, because the general guidelines that shall govern bidding for renewal of concessions have been agreed in a **Protocol** (agreed guidelines for concessions and other administrative issues) signed in 2007 between the Ministry of Public Works, trade unions and some transport companies. The Protocol set a series of criteria for preparation of future bid conditions for bids called by the State that affect competition in the market. This naturally has implications for development of competition.

The LOTT and the ROTT do not contain specific evaluation criteria for bid conditions. Rather they only establish a series of very general specifications for them. In particular, the bid conditions must incorporate a series of minimum conditions. Among them are indication of the traffic and routes defined for the roads to be used in the service, the schedule for providing the service, which must indicate the minimum number of trips and the complementary ones, the minimum number of vehicles and the characteristics thereof, the tariff system and the term of the concession, among others. These conditions are of three types:

- Essential: they must be respected by bids. Variations thereof may not be introduced (for example those related to traffic or the term of the concession).
- Minimum: they are also mandatory, but if they are respected the bids may improve upon them (such as those related to the number and characteristics of vehicles, the number of trips and the schedule).
- By way of guidance: these are conditions that may be freely changed by the bidders (among them are tariffs, terms for amortisation and hours of service).

Regarding the terms of the contracts the Protocol by way of exception provides that they may be increased when necessary to recover investment in the infrastructure necessary for the service.

Regarding the establishment of tariffs, the Protocol requires that the bid conditions establish a bid tariff.

Demonstration of technical competence of bidding companies is to be adapted to each concession, in accordance with the interval of annual passenger-km. In any event, ownership (or possession pursuant to a financial lease) of a number of buses that must be at least 50% of those the bid conditions estimate to be necessary for the concession must be included, as must a showing of at least five years of experience in providing regular passenger transport services by road using a number of buses not less than 50% of those estimated by the bid conditions to be necessary for the concession. Nonetheless, in this regard it must be noted that the bid conditions published subsequent to the Protocol reduce the experience requirement to three years.

To summarise, bids presented by companies participating in the bid process shall be evaluated in accordance with the items in the following table. Each of them is susceptible of achieving the indicated score.

FACTOR	POINTS
1. Technical characteristics of vehicles	38
-Safety and comfort	26
- Energy efficiency, environmental protection (efficient driving courses, compliance with UNE EN ISO 14001 standard, consumption, etc.)	8
- Lesser age of vehicles (below the limits indicated in Table 9)	4
2. Customer service and marketing	13
- Special customer service and marketing measures (reservation and sale of tickets by Internet or telephone, 24 hours per day, SMS information to users, free newspapers and beverages on board, indemnification for delays, trip insurance)	8
- Accessibility for those with reduced mobility	5
3. Working conditions of drivers (training, stability and employment of women)	4
4. Measures to ensure continuity of public service	24
- Facilities (bus stations, parking facilities held by bidding companies. The companies must provide evidence of availability of the facilities throughout the life of the concession).	4
- Commitment to absorb personnel of former concession holder on the same conditions as under the replaced concession	20
5. Measures to improve quality of service	9
- Number of trips (only a maximum of 5% over those authorised upon expiration of the prior concession shall be taken into account, unless that concession was authorised to make trips having different qualities ¹⁹ , in which case increases of up to 10% may be taken into account)	5
- Quality of service (UNE EN 13816 standard). This standard combines the ratings of quality service by the customer and the supplier. It evaluates aspects such as compliance with commitments; capacity to adapt service to changing demand; security, competence, credibility and kindness evidenced by the supplier; supplier's capacity to communicate with the customer, etc. It also takes tangible matters such as maintenance of facilities and equipment	4
6. Price	10
-Tariffs	10
7. Other improvements	2
TOTAL	100

Given the generic nature of these conditions, the bid conditions for renewal of concessions have been established based on criteria of administrative evaluation. In this context, the governmental agency that is to decide regarding grant of a concession ends up with an excessive degree of discretion, as regards both establishment of criteria and their application.

This system establishes entrance barriers due to several reasons: long-term concessions, the possibility of allowing extensions on the concession period, the right of preference enjoyed by the previous holder (in the rating additional points are added) and the high value to quality in tenders at the expense of other key variables such as price and frequency. Indeed, we must ensure a minimum level of quality and safety but we must let the market operate freely.

Through the studies that were public and transparent, the CNC created a greater obligation and obtained public support to the recommendations.

The CNC in its report published the problems that were reflected in the protocol.

Bidding framework:

There was an aspect that profoundly influenced the competition framework in the sector. This was the design of concessions based on the principle of cross subsidies. Many of the routes were not profitable. Over time this had resulted in such routes being incorporated, by unification or annexation, into other profitable routes, in such manner that concessionaires took responsibility for deficit routes in exchange for operating others that were profitable.

This scheme based on cross subsidies was not without problems. The unification of profitable and unprofitable routes meant that travellers on one route had to subsidise other routes. This unification of routes led to loss of transparency in route information. The CNC did not know the true cost of providing service on the deficit route. Furthermore travellers on the profitable route were paying to support the service provided on other routes.

In any event, the concession still remained a temporary monopoly, and as such if the concession scheme was chosen it required strengthening of the measures to foster competition in bidding. On a general basis, for all routes, regardless of profitability, through the bidding it attempted to ensure very high service quality levels at the cost of restricting competition regarding other basic variables, such as price and frequency. This resulted in excessive interference with development of market conditions. Having assured minimum levels of quality and, of course, safety, competition should have been allowed to function in all of its dimensions. It should have been the market that determined the characteristics of the bid based on user preferences and competitive pressure.

Duration of concession:

The long terms of concessions were one of the most significant regulatory barriers. They acted as time limits on competition for access to the business of regular passenger transport by bus.

Logically, the term should have established a balance between recovery of investment and the guarantee of provision of services which, in an environment of free competition, may have proven to be unprofitable. Nevertheless, the principal assets for operation of the service were mobile and divisible, and the costs that had to be incurred were relatively recoverable. Therefore the excessive durations of concessions in this sector, which occasionally have been in excess of 20 years, were not justified. Because the concession holder during the term of the concession acted as a monopolist, if the term was excessively long it may have reduced the incentive to incorporate improvements in the productive process that reduced

costs and improved service, and also increased the risk that there may have been a "capture of the regulator".

The LOTT allowed a duration of between 6 and 15 years. Nevertheless, as regards State concessions, the Protocol described above required that the duration of the concession be between 8 and 12 years, depending on the size of the concession and the term necessary to recover investments. These terms may have been increased in exceptional circumstances, up to the maximum of 15 years permitted by law, if required for amortisation of investments.

The Protocol also permitted vehicles assigned to a concession that had expired to continue to be used under the new concession.

The situation was even more worrisome at the regional level. Various Autonomous Communities had granted more extended concession terms, on some occasions up to 25 years, under their own legislation, in general as a result of extensions of the original term of the concession.

One of the specific ways a concession operator may have sought amendment of the original time conditions of the concession was by an application for extension which was particularly dangerous since it may have become a mechanism of unreasonable closing.

At the State level the current legislation since the effective date of the LOTT did not contemplate the possibility of authorising extensions of concession terms.

In any event, in the judgment of CNC Council, both the excessive duration that at times may have been achieved by concessions, and the remaining possibility of extension, were contrary to the premise justifying adoption of this market organisation model: the required systematic, periodic and non-discriminatory opening of the market for the various concessions to competition, with the advantages deriving from competition.

Nevertheless, it was important to emphasise the following exception set forth later in the Protocol:

"By way of exception, the terms indicated in the foregoing table may have been increased when necessary for appropriate recovery of investment in infrastructure required for the service, always within the limits established by Spanish and European legislation in effect from time to time".

The CNC Council could not question the scope underlying the exception so established in the Protocol. But it must have been insisted that, because somewhat shorter terms of concessions result in clear advantages for competition, such a generic exception was not justified. The factors associated with the asserted minimum profitability requiring a longer term for recovery of investment must have been specified.

To conclude, the duration of concessions was a key element in preserving market competition. Although at the State level shorter durations had been proposed, what was clear was that the Protocol did not take advantage of the entire possible margin of reduction. It maintained terms that were little justified from the point of view of the investments required by this business.

Scoring criteria in bid conditions:

- Experience required of bidders to show technical competence.

Although it has been improved since five years were required at the beginning, the requirement remained that, if the service subject to bid has not therefore been provided, it was shown that the

bidder had three years of experience immediately prior to the call of the bid, providing a service that was, at least, regular transport of passengers by road, special or general, requiring the use of a number of buses not less than 50% of the number that was to be used in the concession.

This requirement resulted in unjustified exclusion of discretionary transport companies.

Discretionary transport had a multitude of enterprises that were small and even medium-sized. But they had sufficient experience and demonstrated competence. Thus this experience requirement that focused on regular transport only was discriminatory and non-proportional. It was an insurmountable entry barrier, contrary to the guarantee of equal treatment of all capable candidates not affected by any grounds for prohibition.

- Preferential right of concession holder in renewal of concession.

A possible disincentive to entry of third party operators that remained today and operated as a decisive barrier to access to the market was the preferential right the current concession holder enjoyed, other conditions being equal, upon renewal of the concession.

But the possible benefits that may have been brought by continuity of service, presumably satisfactory, or the savings of change costs for the government and consumers that possibly may have resulted from continuing with the prior concession holder, did not outweigh the advantages that would have resulted from suppression of this kind of clause:

In the first place, in bids for renewal there would have been greater assurance of transfer of possible competitive advantage from the existing concession holder to the consumer when presenting the offer, because the concession holder, had not being able to rely on its preferential right to win the award, would have been required to compete more vigorously for that award.

In the second place, it would have eliminated the appearance of a possible "closing" of the concession to other competitors, thus providing incentive for the presentation of competitive bids from those inclined to confront the current concession holder.

Another preference given by the Protocol to concession holders was the exemption of their vehicles from the age requirements during the first three years of the new concession. This was a clear additional advantage against other bidders that was not justified by the general interest.

Because the margin for price competition barely existed, the preferential right became the determining factor in the result of the bid.

- Low weighting of tariffs and frequency.

In the scoring established in the Support Protocol for the elements of the bid, what stood out was the low weight given to economic factors by comparison with the weight given to technical characteristics and the commitment to absorb the former concession holder's personnel.

From the point of view of competition law, which must have prevailed, it must be noted that, given the prohibition in the ROTT of making reckless offers, and the standard requiring that bids made must have not been exclusively on the basis of economics, it was not appropriate to give a matter as decisive as tariffs and frequency of trips no more than 15 percentage points out of 100, 10 for tariffs and 5 for frequency.

Therefore, what was clear was that the design, with so little play for improvements, resulted in all bids seeking the award to be presented at an identical minimum price, in order to obtain the maximum number of the scarce points in play. Thus price competition for the concession was limited and equalised by this determinative and most original mechanism.

This manner of controlling bids, had the purpose and effect of preventing price competition, benefiting concession holders, who also enjoyed the decisive preferences for continuing the service as described above, with the typical effects on economic efficiency and service quality, against the general interest and, in particular, the interest of the users of that means of transport, who would have remained captives of a more closed and shared market.

- Takeover of personnel by new concessionaires.

The Support Protocol and the bid conditions for bids called in September 2007 assigned a high level of 20 points to takeover of staff of the expiring concession. This was the equivalent of making it absolutely mandatory if one wishes to win the bid.

The inclusion of this clause went beyond the appropriate content of conditions establishing administrative clauses because from a subjective point of view it affected third parties other than the parties to the agreement, the workers of the prior concession holder providing the services that were the subject matter of the agreement. And from an objective point of view because the subject matter of the clause was purely of an employment nature. It was a part of the status of the worker, so it belonged to the social jurisdiction.

Furthermore the unilateral imposition by the governmental authority of a clause requiring takeover of employees resulted in a change in the employment situation of the workers, without respecting the course of union negotiations.

- Scoring of facilities of bidding companies

The LOTT and the ROTT as a general rule made it mandatory for transport undertakings to use the bus stations for all intercity transport services. In their use there could be no discrimination or favourable treatment of any undertakings.

Nevertheless, the Protocol assigned 4 points to the facilities held by the bidding companies for the provision of their services.

But the current legislation provided that there may be no discrimination against possible undertakings as regards use of bus stations. Therefore the Protocol again was scoring a factor foreign to the concession. Also taking into account that, obviously, existing operators (in particular the large ones) had more facilities than new entrants, we were faced by another factor unnecessarily complicating the entrance of new operators, above all the smaller ones and those newly entering the business.

- Scoring of safety and comfort

We must emphasise the excessive discretion the Protocol gives to some factors. This resulted in each set of bid conditions adapting the sub-factors based on non-objective criteria. The Protocol provided no specific guidelines on how to distribute these points over the various aspects thereof. Furthermore qualitative aspects should have been appeared in the Technical Specifications for the bid, which not all routes had the same quality and comfort requirements, and that imposing

excessive requirements may have provided disincentives to entry of new operators for routes that already were not very profitable.

Amendments, transfers and unifications of concessions.

The ROTT authorised the government, ex officio or upon request of a party, to amend concessions by way of expansion and annexation. The LOTT in turn provided that amendments of concessions that resulted in expansion of routes or annexations shall have only been approved when they constitute mere adjuncts to the principal service, which must have been provided as a part of the same operation as the latter, or when they were not of sufficient size for independent economic operation.

The LOTT contemplated the possibility of transfers of concessions. In addition, government was allowed to order unification of concessions. But these amendments, transfers and unifications may have resulted in increases in market share distorting market conditions, without the changes having been analysed from a purely competition point of view. In the future it would be appropriate for both the Ministry of Public Works and the competent regional authorities to request a report from the competition authorities on the possible impact on competition conditions of modifications, transfers or unifications of concessions.

Revision of the LOTT:

Nowadays, the LOTT is currently being revised in the Parliament and the CNC has made a report³ (version in Spanish) which makes the following recommendations:

- To provide all necessary information about the structure of the service and the costs trying to compensate the asymmetry in favour of the current incumbent.
- To exclude all type of remuneration to the Public Administration for access to the management of the service, to the extent that it may increase the price.
- To require separate accountability for those operators who hold more than one contract, so as to allocate costs and revenues to the corresponding contracts.
- Not to force the bidders to assume costs incurred by the previous contractor.
- To provide adequate weight to the tariff.
- To impose to the Public Administration the obligation to analyze concrete economic proposals prior to the eventual rejection of the tender.
- To remove any undue preference for the incumbent facing contract renewal.
- To link the duration of contracts to strict amortization of assets necessary to develop the service during the term of the contract.
- To avoid extensions of contracts in general, and in any case when they are not covered by the cases strictly envisaged under Community law.

³ http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=158448&Command=Core_Download&Method=attachment

- In the case of loss-making routes, to set compensations to the incumbent, which have to be transparent, adhered to strict cost resulting from the provision of the service and do not involve cross subsidies supported by users of other services.

Monitoring reports:

Following the publication, the CNC evaluated its impact both in the national and regional level. As a consequence, in order to reflect these conclusions, the CNC realized two monitoring reports in 2010: a national⁴ one (version in Spanish), which showed that some problems have been solved and a regional⁵ one (version in Spanish), which showed that the main problem of the extensions in the concession system has not been solved.

2010 monitoring Report at national level:

At the national level, after the publication of the CNC report, the Ministry of Public Works made certain amendments to the Protocol (second version), with the consent of the other signatories, taking into account some of the CNC recommendations.

The following changes that have been made to the Protocol are highlighted in the 2010 CNC Report:

- Elimination of the requirement that bidders have a certain size of concessions. This has broadened the spectrum of companies that can compete (although imposing requirements that may be disproportionate).
- Increased weight to tariffs (10 to 15 points) and frequency of the service (5 to 8 points) within the assessment criteria for the award of tenders.
- Reducing the weight assigned to takeover of staff of the expiring concession.

Nevertheless, other aspects that the report had cited as a barrier to competition persist, namely:

- The maximum score limits to the tariffs offered and frequency and the mechanism for determining such limits.
- The length of some of these concessions, over 10 years, although it is within the maximum applicable national standards, it is still excessive, compared to the general limits of the EU regulation that entered into force in December 2009.
- The preferential right of concession holder in renewal of concession is maintained in case of similar dealer deals assessment, provided such similarity to 5% of total possible score.

After analyzing the changes, the CNC considers that the revised version of the Protocol, as, consequently, new condition bids continue to be highly unsatisfactory from the point of view of competition.

⁴ http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=80631&Command=Core_Download&Method=attachment

⁵ http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=80633&Command=Core_Download&Method=attachment

The evidence obtained from the results of the bids held under both the first version of the Protocol and the amended one reveals that the competitive game in those contests is very poor.

In conclusion, the CNC considers that the framework, and hence the new bid conditions that have been designed, continue to be unsatisfactory from the competition point of view. The evidence obtained from the results of the bidding procedures that have taken place make the CNC affirms that there is very little competition in the bidding procedures. Unless drastic changes are made in future bidding procedures, the conditions for competition would be very similar to those already analysed. The changes have reduced requirements of previous experience, increased weight of price and frequency in the tenders, reduced weight of subrogation of employees. However, changes were not enough. If competition in the procedure for accessing the concessions is restricted or eliminated, the renewal of the concessions by the current concessionaires is being perpetuated without sufficient competitive tension. Moreover, there is a small number of effective competitors and little margin of competition among effective offers.

As a consequence, the CNC made a series of recommendations:

1. Eliminate the current preferential right of concession holder in renewal of concession.
2. The granting of a greater relative weight to the two main variables of consumer choice, tariff and service frequency.
3. Modifying the existing stop mechanism when given highest score in relation to the above tariff and frequency criteria.
4. The accordance of the deadlines for concessions' duration with the general provisions of the EC Regulation 1370/2007, and its modulation according to the amortization of the investment needed to develop the activity.

2010 monitoring Report at regional level:

Concerning the regional level, after observing the actions taken by many autonomous communities in recent years in relation to the concessions granted by them, the CNC considered that the autonomous communities have been arbitrating mechanisms in order to grant extensions of these concessions to the current concessionaires by various regulatory instruments. If the advances at national level can be described as limited, in the case of the autonomous communities, their actions did not even go that far. In general their concern had been to close the market, trying to eliminate any hint of deregulation, even though compliance with EU rules demands it. The major obstacle found from the competition point of view was the length of concessions.

Most regions had enacted rules that extended concessions. Such was the case of the Canary Islands, La Rioja, Madrid, Cataluña, Castilla y León, Islas Baleares, Valencia, Murcia, Aragon, Asturias, and Galicia.

This process may have been influenced by the entry into force on December 3rd, 2009 of the EU Regulation 1370/2007 which sets stringent requirements for the extension of concession terms. The EU Regulation provides a transitional regime under which, the award of such concessions by fair tendering procedures shall be verified from December 3rd, 2019, until then, it allows an adaptation process.

Regional regulations, mostly laws, allowed under different nomenclature, the extension of the concessions to the current concession holder, usually justifying it in the necessity to improve and modernize regular public transport passenger's services, or to rearrange the concession map. Sometimes the terms granted were absolutely disproportionate, exceeding 10 and even 15 years. Furthermore, it was

considered that, once adopted EU Regulation 1370/2007, the implementation of these extensions also contravened the principles and spirit of the regulation.

The EU Regulation provided a longer term in two specific cases: "If justified by the costs arising from a particular geographical situation," or "If justified by the amortization of capital in relation to an exceptional infrastructure inversion, rolling stock or vehicles and the contract had been awarded in a fair competitive tendering procedure", although in the latter case the public service contracted and the elements justifying its longer duration should have been forwarded to the European Commission.

Finally, regarding the possibility of extension, the regulation provided that "in case of disruption of services or the immediate risk of such a situation, the competent authority may have adopted an emergency measure in the form of direct award or a formal agreement to extend the public service contract, or a requirement to provide certain public service obligations "(Article 5.5). However, direct award is not yet allowed in the LOTT.

That is why many regional governments have been quick to extend the terms of their concessions through legislation adopted during the time period between the adoption of the EU regulation and its entry into force. The CNC judged that the different regional governments could and should have opted for less restrictive of competition, such as the use of bids to award concessions.

Jurisdictional challenge:

Since the mayor problems identified in the CNC reports have not been resolved in the regional level, the CNC has followed several steps to enforce its recommendations.

First, the CNC filed several request to some regions to adjust their public tenders in transport sector to competition criteria.

However, lacking a satisfactory response by the regional Governments, the CNC, by virtue of the power conferred in article 12.3 of the Spanish Competition Act, initiated two processes to challenge autonomic regulations before the competent Courts (against Galicia and Valencia). In particular, under article 12.3 of the Spanish Competition Act, the CNC may challenge before the competent Courts those administrative acts and regulations from which restrictions to competition are derived: "The CNC is legally authorised to bring actions before the competent jurisdiction against administrative acts and regulations from which obstacles to the maintenance of effective competition in the markets are derived".

This was the first time the CNC had made use of this legal mechanism and marked the continuance through the courts of its competition advocacy efforts in the sector since the publication of the CNC Reports.

In its judgement of October 22nd, 2012, Valencia High Court of Justice upheld the judicial review appeal filed by the CNC, annulling Decree 24/2010 of January 29th, 2010 of the regional government Council on the plan to modernise concessions of regular public road transport of passengers. The court underlined that the Decree was at odds with EU law, specifically Regulation (EC) No 1370/2007 of the European Parliament and of the Council of October 23rd, 2007 on public passenger transport services by rail and by road. This Regulation establishes a maximum duration of ten years for bus concessions and exceptionally permits the extension of such concessions upon their expiry for no more than half of the original term. However, the instrument under challenge (now annulled) enabled extensions to be granted lasting until 31 December 2023.

The court therefore held that the continued existence of this instrument as part of Valencia's regional legal system would have “a perverse effect on competition without any basis in European or national law” and thus annulled Decree 24/2012.

As far as Galicia is concerned, original CNC claim was rejected on non-substantive grounds. The CNC has resorted to the *Supreme Court* in the expectations that substantive analysis be carried out and so the original court decision be overruled.

Additionally, it has had a deterrent effect since no government has developed such scheme since.

CHINESE TAIPEI

1. Introduction

In preparing this submission, the Fair Trade Commission (hereinafter “the FTC”) consulted with competent authority of transport, Ministry of the Transportation and Communication (MOTC).

2. Description of the industry and regulatory framework

Bus services in Chinese Taipei can be divided into “highway bus carriers” and “urban bus carriers”, and both are, in principle, open to private companies. However, when the bus service is unable to be operated by private sector, the government will take charge. Every bus carrier is required to apply for approval before operating bus services and stopping the operation. All applications are reviewed by the central competent authority (MOTC) or the local competent authority at the municipal government or county/city level.

The number of highway bus companies for each route is determined by the competent authorities. As a rule, each route is open for one bus company. If the vehicles or equipment of the bus company cannot meet the demand for public transport, or if a section of the route is essential for other highway bus companies to connect the two ends of their bus routes, the competent authority may approve two or more highway bus companies to operate along the same route. As for urban bus services, the local competent authorities will decide, based on the percentage of urban population and the demand for vehicles use and equipment in public transport, whether one or more operators should run along the same route¹.

The MOTC shall evaluate the service quality of highway bus companies in accordance with the “Regulations for Evaluation of Public Transportation Operations and Services” and the results will be used as a reference to improve the highway bus carriers’ operation and service quality. The evaluation results can also enable consumers to choose between service providers and the competent authorities to reward or punish the businesses accordingly. The evaluation of urban bus carriers is conducted by local government, including the municipality or county/city. The results, besides being made available to the public, are taken into account when determining the route reallocation in the future, operating deficit subsidization plans, and other public transportation funding plans.

Consumers are able to access to the evaluation results through government information channels or public media. The Article 19 of the “Regulations for the Administration of Automobile Transportation” provides that, the name of the driver and license plate number shall be displayed at a visible spot by the driver seat or the doors. The phone number of the bus company as well as the phone number for filing complaints with the competent authority shall also be displayed, and moreover, the name of the driver and the phone number for filing complaints with the competent authority shall be displayed above the license plate on the back end of the bus. This measure provides a channel for consumers to file their complaints easily with the regulatory authority.

¹ Article 41 of the “Highway Act” and Article 35 of the “Regulations for the Administration of Automobile Transportation”.

3. Tendering Process

To determine a given route for operation, bus operators should first propose route plans according to market demand, but government agencies may also propose the route plan in line with the public transportation development policy. The applicant will then apply to the local competent authority, and the application will be forwarded to the Highway Bus Operation Review Committee (hereinafter referred to as the “Review Committee”) organized by the Directorate-General of Highways (DGH) of the MOTC for consideration. The Committee will recommend the DGH to open the route for private operation if all requirements are met.

Regarding the tender process, the DGH is required to publicly announce the routes to be opened for private operation, the expiration date of the license, the duration of preparatory operations, and other related matters to solicit interested parties to participate in the tender. Each bidder has to submit a business plan to the DGH, and the plan will be forward to the Review Committee for evaluation. The decision made by the Review Committee must be approved by the MOTC before the winning bidder starts operation. The plan must include 1) business capacity – performance record, corporate image, and management team composition; 2) operation plan – age and comfortableness of the vehicles used in service, safety record, on-board equipment and devices as well as services; 3) route and terminal and stop/station arrangement, parking lot arrangement, vehicle maintenance; and 4) financial capability and others. Bidders may provide the profitability assessing description (cost and profit estimation) of the route in the business plan. The Review Committee will award the route operating right to the most qualified bidder in consideration of the aforesaid criteria. The winner will then begin the preparatory operations within a specified period and launch the operation on the day when the “Bus Route Operation License” takes effect. The same procedure is applied for urban bus routes under the jurisdiction of the local competent authority in accordance with the self-governance regulations.

As a rule, bus fare is proposed by the Bus Transportation Trade Association and related unions and then submitted to the competent authority (the Transportation Fare Review Committee of MOTC) for approval. No adjustment can be made without approval in advance. However, highway and urban bus companies are allowed to set the fares within the price range approved by the competent authority and should submit them to the competent authority for reference. The same procedure applies when adjustments are made².

3.1 Case: Four bus companies collectively reduced service frequencies and increase price of discount tickets by running a joint operation along the Kaohsiung-Kenting route

Although bus fares require the approval of the competent authority, concerted action is not exempted from scrutiny under the Fair Trade Act (FTA). Concerted practices may still violate the FTA when bus associations or companies establish mutual understandings through contract, negotiation or other measures to jointly determine the fares. Furthermore, bus companies may also violate the FTA by engaging in other activities that lead to restrictive or unfair competition.

In May 2005, the FTC received several complaints alleged that the four independent bus operating companies between Kaohsiung and Kenting planned to operate jointly from June 2005, and cancel the discount on commuters’ monthly tickets as well as reduce the frequency for non-long-distance bus service.

After the FTC’s investigation, it was found that most commuters traveling between Kaohsiung and Kenting rely on the bus services provided by the four bus companies. Two of them started a joint

² Article 42 of the “Highway Act”, Article 10 and 45 of the “Regulations for the Administration of Automobile Transportation” and Article 8 of the “Public Transportation Development Act”.

operation, approved by the DGH, on Provincial Highway 17 between Kaohsiung and Kenting from August 20, 1997. The said companies received the approval in 2002 to extend the joint operation until August 19, 2007. The other two bus companies operated independently, and obtained the approval of the competent authority to begin their bus operations independently between Kaohsiung and Kenting on Provincial Highway 88 from July 1, 2007.

Since 2002, as a result of the continuous losses, the high-ranking executives of these four bus companies began to discuss the possibility of cooperation during meetings and eventually reached an agreement between March and April in 2005. They set up a joint service center to establish a joint schedule, unify the fares and issue tickets or passes. The joint operational program was implemented on June 1, 2005. It was noted that the said joint operation was never submitted to the competent authority for approval.

The FTC also found that, before the collusive agreement, the four bus companies dispatched 428 scheduled bus services in total per day and the fares varied by the class of bus, but only 314 buses services were dispatched (a decrease of 26.6%) and the fares were fixed after joint operation. The two companies operating independently via Provincial Highway 88 also adopted the fixed fare even though it is different from the fare of Highway 17. Furthermore, the four companies originally offered different discounts on monthly-student-and-commuter tickets, but they gradually increase the price of discount tickets by up to the same level after joint operation.

In terms of the revenue of each bus company from June 2005 to February 2006, the total revenue indicates that these companies did not decrease as a result of the 26.6% cut in the frequency of services. Except one company that suffered a decline in its revenue, the remaining three companies made significant progress in monthly revenue.

The FTC concluded that since the four bus companies were the major bus service providers between Kaohsiung and Kenting, they were competitors in the relevant market and should compete each other by offering more favorable fares, bus services at more intensive frequencies or better service quality to attract passengers. However, the said four bus companies, through negotiations to establish joint-scheduled bus services, not only adopt the same fares and discount on student-and commuter monthly tickets, but also issue tickets together. The conduct in the form of price fixing and limitation of production, where restricts each other's business activities was a concerted action in violation of the Paragraph 1, Article 14 of the FTA. In addition to a cease and desist order, the FTC also respectively imposed administrative fines of NT\$1,400,000, NT\$920,000, NT\$920,000, and NT\$570,000 on them.

4. Nature of the contracts awarded

Except for additional buses dispatched at times to relieve temporary high passenger loads, highway bus companies are required to seek approval from the competent authority for their regular service frequency and the information is to be listed on the operating license. Urban bus operators are also required to follow the same procedure to apply for approval of the local competent authority.

Normally, an operating license for a bus route is valid for five years but it does not entitle a bus company to operate exclusively. With the approval of the Review Committee, the licenses for subsidized routes opened for bid are valid for three years. As for operations on special subsidized routes in accordance with certain policies with the approval of the Committee, the licenses will be good from one to five years. Bus companies may apply for permission to extend the existing operating licenses one year before the expiration date. Those service providers, who are capable of providing efficient and quality services, are likely to obtain the permission for an extension as a result of their higher scores on performance evaluation. The competent authority may make new public announcements to seek interested parties to

apply for the license to operate the bus routes which the incumbent service providers do not apply for an extension before their licenses expire. However, on the basis of past experiences, it is not a common situation.

Highway bus companies can also apply for route change or service frequency revision before the operating license expires, but the new route or service frequency must be permitted under related regulations. According to the procedure for amending contract, the local competent authority has to invite related agencies and the operators to review the application for new routes before the revision is approved. All disputes are to be submitted to the Review Committee for consideration. Service frequency changes are under the jurisdiction of the local competent authority alone. As for urban bus routes, the proposed changes are processed by the competent authority of the local government according to the self-governance regulations.

Except subsidy for loss-making routes that serve remote areas, fuel subsidy, and vehicle allowance covered by the government in consideration of improving public transportation, highway bus companies are responsible for the costs of their bus operations, including the risk of change in demand, cost increase, regulatory change and so on. The amount of the subsidy is calculated according to the equations in the related regulations. The ratio of the subsidy for companies operating the same route may be determined in accordance with the operating performance, such as management environment, management efficiency, and the MOTC is responsible for the subsidies. Meanwhile, subsidization for urban bus companies is to be handled by the local government according to the self-governance regulations.

In Chinese Taipei, all bus transportation companies are privately-owned. Hence, the facilities, equipment and personnel are the assets of the operators. As mentioned above, the competent authority may make new public announcements to seek interested parties to apply for a license when existing bus companies do not apply for an extension to operate before their licenses expire. Bidders are required to propose their business plans by following the established procedure, and operate accordingly once they are awarded the contract. The winner of the bid who intends to use the facilities, equipment and personnel of the original operator will have to negotiate with the original operator on their own to make the purchase and take responsibility for the investment risk. The competent authority will not be involved.

5. Execution of Contracts and Outcomes

Execution of contracts for highway bus routes is under the supervision of the central competent authority, and that of urban bus routes is under the local authority in the municipality or county/city government. Article 77 of the Highway Act provides that the competent authority may impose a fine of no less than NT\$9,000 nor more than NT\$90,000 on bus companies that fail to provide expected services or violate related regulations. Depending on the severity of the violation, the competent authority may also suspend the bus registrations for one to three months or suspend part or all of the operation and revoke the registration of vehicles operating illegally, or repeal the automobile transportation business license and revoke the registration of all business vehicles.

No bus route contract has been awarded through an auction in Chinese Taipei. The route rights belong to the state, and the competent authority may repossess the operating right should an operator have poor performance or its operation against the public interest or traffic safety and fail to improve within a given period. Currently, the right to operate bus routes cannot be sold. Depending on the profitability of each route and the number and capacity of the bus companies in the region, normally there are one to four bidders in the tender. In addition to competition among bus service providers, bus companies may face competition from other carriers operate along specific routes. Bus service operators often make strategic adjustments to adapt themselves to demand changes in the market. Most operators have been able to

maintain stable operations. Only a few competitors have suffered losses and exited from the bus industry. So far, the allocation mechanism has brought results that meet the expectations.

Chinese Taipei will review bus transportation policy constantly and establish more efficient and liberal approaches to allow more participants to compete in the market or provide service on more routes.

TURKEY

In Turkey, market structure and regulations in local and regional transport services differ from each other. Thus, the topics will be presented in two separate sections.

1. Local Transport System

Within the boundaries of Turkey local transport system is usually provided by many transport modes and different vehicles, depending on the geographic feature, population and transportation needs of each province. Intra-city buses, minibus, taxi, service buses and in some cities subway trains, tramway, ferries, suburban trains, if any, are the main type of vehicles used for local transportation. Local transportation is an important issue especially in the densely populated big provinces of Turkey where both central government and local authorities are seeking to promote mass transportation.

Regarding the regulation of the market, both central and local authorities play the main role for providing and regulating the local transport needs of their territories. As to the passenger transport within the boundaries of a province¹, a provincial traffic commission -headed by the governor or deputy governor and composed of representatives from municipality, police force, gendarmerie, national education, road provincial directorates relevant chambers of Tradesman under the Turkish Chauffeurs and Automobile Drivers Federation and universities- is formed. For ensuring the traffic coordination within the boundaries of metropolitan municipalities, Transport Coordination Center (UKOME-TCC) organized under the Metropolitan Municipality and headed by the Mayor of Metropolitan Municipality plays the pivotal role. According to the Metropolitan Municipality Act No. 5216, municipalities have duties for preparing city transportation plan, planning mass transportation services and establishing coordination; determining the quantity of mass transportation vehicles, ticket fees and tariffs, the timing and routing of these services. They have also related with operating and delegating these services to third parties. For the intra-city bus services, both competition for the market and competition in the market structure can be created. Considering the transportation plan and population density in some cities where local authorities are unable to provide sufficient transport services, private intra-city buses can also operate in addition to the public bus services. In this situation, the routes that private intra-city buses work are determined by local authorities and distributed after a tendering process. Participants may bid for several routes. The services are usually awarded to the private sector for 10-15 years. The local authority may take a lump sum payment, may receive a yearly revenue based on the income of the private bus firms, or may use both collecting methods with a certain degree. After a tender process, the winners are chosen from the highest bidders and a contract is signed between the successful bidders and the local authority. The conditions regarding the quality of the service, terms for the routes, time schedules, prices, driver training processes and sanctions for unfulfilled conditions are all arranged within the contract. Both public and private intra-city buses can provide services on the same routes. In local transportation, route and time coordination is ensured by TCCs and the time schedule is prepared for preventing any overlapping to the extent possible. The prices of intra city transportation services except for taxis, minibuses, and service-buses are

¹ In Turkey, every city has its municipality administration. Some provinces that are bigger in terms of population and the level of urbanization are named as Metropolitan Municipality. Today, there are 29 Metropolitan Municipalities out of 81 provinces.

determined by TCC decisions, regardless of whether the services are provided by the local authority or by private firms.

In some cases, local authority completely withdraws from providing public transport services and transfers these services to private firms by contracting out. Similar to the competition in the market situation, the terms regarding the provision of the service are determined by the TCC decisions and a contract is signed between the parties.

Opening local transportation services to competition certainly increases the service and vehicle quality. However, it is not possible to talk about strong competition between private and public buses since pricing, routing and service frequency terms are determined by TCC. Virtually, the main aim by opening the market for private parties is not to achieve competition in the market but to increase capacity for mass transportation.

In Turkey, taxi, minibus and service bus service are already carried out by private entities. As for the minibuses and taxis, these service providers are considered “tradesmen and craftsmen” and are represented by “drivers and automobile business chambers” nationwide. In addition to the intra-city buses working on the basis of regular frequency and specified line stops, there is another kind of transport mode called ‘minibuses’ which carries fewer passengers than buses but operates on a more frequent basis. The routes for minibuses are also determined by TCC, but the tariffs are set by the chambers of the minibus drivers. In practice, minibus prices are usually set close to the intra-city bus tariffs, sometimes they may be a little higher than the price of the bus services. Minibuses can also operate on the same routes as intra-city bus services. Turkish Competition Authority (TCA) has not dealt with this sector directly in any of its examinations so far.

Taxis are also important component of the local transport especially in the big provinces of the country. The number of taxis that can operate is limited through license-plate restrictions. This limitation is brought by the Decision of the Council of Ministers numbered 10553 and dated 02.04.1986. According to this Decision, those who are a member of one of the drivers and automobile businesses chamber can get a valid taxi license plate and trade the license. After taking population growth and transportation plan of a district and/or province into consideration, the Traffic Commission and TCC of that province give written information to the Ministry of Internal Affairs about the needs of that area. After the approval of the Ministry, these licenses are allocated through a tendering process. Since the number of taxis that can operate is restricted, an economic rent is emerged and this can be seen from the high prices levels when the licenses traded in the secondary market.

The prices of taxi service are calculated as a sum of a fixed cost and a variable cost of the distance covered. It is an issue of debate that taxi numbers relative to population numbers have tended to decline over time, so demand on the peak time can not be fulfilled and the high amount of the monopoly rent paid for the licenses is transferred to the taximeter fares paid by consumers. Another result of this alleged tendency is that unlicensed taxis enter into the market. This result acts against the expected benefit from the license restriction regulation which aims to reduce the number of vehicles, thus reduce traffic congestion, air pollution, etc. Moreover, the private car usage also rises. TCA has not dealt with this sector directly in any of its examinations so far. Yet, conducting a preliminary study to analyze whether the license restriction causes price increase in the taxi fares is on the agenda.

There is also the practice of service-buses in the country. The service buses are the ones dedicating their transportation service only to specific company employees or school students. Service buses are also subject to license restriction. Service bus companies are working according to the service procurement agreements signed between them and the client companies/schools. Companies/schools can purchase the transportation service through tendering or direct procurement. Routes and the price of the service are

determined by the service agreements, depending on the needs for those using the service. For school services, TCC announces a price ceiling on the basis of specified distance intervals. TCA has, so far, conducted four preliminary investigations in relation to the claims that companies infringed competition through price agreements or bid rigging. However, none of the relevant conducts resulted in further inspections due to lack of evidence.

2. Regional Transport System

For the regional passenger transport, Ministry of Transport, Maritime Affairs and Communications is responsible for shaping general transportation policies of the country and is the main regulator of the sector. Powers and responsibilities assigned to the Ministry of Transport, Maritime Affairs and Communications have been transferred to Ministry's Regional Directorates. Regional Directorates have powers to determine eligibility qualifications, supervise those and permit the operations. In exercising such powers, the goal is to ensure that land transport activities are carried out in accordance with economic, technical, social and national security needs and purposes, and that services are in harmony with other transport services. Natural or legal persons who would like to deal with in intercity passenger transport services via buses are obliged to receive an authorization certificate from Ministry of Transport, Maritime Affairs and Communications. There is not any limitation for the number of licenses for inter-city passenger transport and different licenses should be obtained for the provision of different services. While issuing an authorization certificate in inter-city passenger transportation via buses, the licensing conditions are as follows: the applicant must have compulsory individual accident insurance for seats, must be a member of group of carriers in the chamber of commerce, must have legal personality, must have at least 150,000 TL (approx. 70,000 Euros) working capital, and buses by which the transport shall be performed must have more than 25 seats.

In inter-city passenger transports via highway, price setting is left to carrier firms in accordance with the provisions of the relevant regulation. But it is established that tariffs introduced are subject to approval by the regional directorates and companies are not allowed to set ticket prices above the approved prices. However, the regulation permits that a 30 percent discount may take place over the prices set. Also, in lines where transportation takes place, Ministry of Transport, Maritime Affairs and Communications also sets a price floor under which level companies cannot set the prices. The aim of the price floor regulation is to prevent practices like predatory pricing in the market. Carrier firms are obliged to comply with tariffs for a minimum of four months and maximum of one year, and it is provided that price changes shall not take place during some specific days such as religious holidays and bank holiday periods.

The number of bus firms dealing with inter city passenger transportation at the national level is high, which leads to low market shares. As of January 2013, the number of D1 authorization certificates (for those who engage in regular intercity passenger transport via buses) issued by the Ministry of Transport, Maritime Affairs and Communications is 334 and there are 68.142 buses in the market. Therefore, the figures may be interpreted in a way that the sector presents a competitive structure.

There are investigations conducted by the TCA upon miscellaneous complaints that undertakings operating in the sector violated the Competition Act through horizontal price agreements. For instance, as a result of a complaint filed to the TCA in 2005, it was established that the undertakings operating in the province of Nevşehir concluded a price agreement and restricted competition so that the TCA decided to impose fines for the undertakings that engaged in the conduct².

In another case, it was claimed that the undertaking operating Izmir intercity bus terminal (IZOTAŞ) had set a lower price limit for bus travel fares. During the investigation period it was detected that IZOTAŞ

² Decision dated 31.5.2006 and numbered 06-38/478-130.

forced the undertakings using the terminal services to sign protocols leading the termination of price competition. In these terminal service protocols, IZOTAŞ demanded bus companies to adapt the bus service schedules it had set. The relevant market was defined as the intercity bus terminal management within the province of Izmir. In the market, operating terminal services are subject to the Municipality permission. During the investigation period, within the boundaries of Izmir there were only three bus terminals two of which were small scaled terminals belonging separately to two bus companies and which were only servicing to their own brand. As a result, IZOTAŞ was the only terminal who was serving several undertakings performing intercity bus services from Izmir to other destinations. As a result, the TCA decided that IZOTAŞ was in a dominant position in intercity bus terminal management market in Izmir and abused its dominance in the terminal services market to restrict competition in intercity bus services market³.

³ Decision dated 11.1.2007 and numbered 07-01/1-1.

UKRAINE

Local and regional bus services in Ukraine can be provided by both state-owned enterprises and private operators. But in reality, almost 90% of transportation services are provided by private operators. On certain bus routes, many different operators provide their services, both private and state-owned. However, in case if several transportation service providers are appointed to the same route, the competition between them will be quite limited because the servicing of the route by such operators will be separated in time by the bus schedule.

The national authority that ensures the proper implementation of government policy on security for land transport is the State inspection of Ukraine on land transport security. The inspection's activities are controlled and coordinated by the Cabinet of Ministers of Ukraine through the Minister of infrastructure of Ukraine.

At the same time, the Council of the Ministers of the Autonomous Republic of Crimea, as well as regional state administrations develop a network of regional bus routes for public use on their respective territories, and execute supervision over adherence to automobile transport legislation.

The bodies of local self-governments develop a network of local bus routes for public use and execute supervision over adherence to automobile transport legislation on their respective territories.

Provision of public bus transportation, as well as supervision over the fulfillment of transportation service providers' obligations is done by the State inspection of Ukraine on land transport security (on international, intercity, suburban public bus routes that go beyond the borders of any single region), by the Council of the Ministers of the Autonomous Republic of Crimea and regional state administrations (on intercity and suburban public bus routes that don't go beyond the borders of any single region), by district state administrations (on suburban public bus routes that don't go beyond the borders of any single district), and by city state administrations (on urban public bus routes).

The same authorities execute supervision over execution of the contracts; regulate bus services by regulating the prices, controlling the quality of services, etc.; decide on which routes to allow competition; take all decisions on the development of the bus transportation system.

The Ministry of infrastructure of Ukraine ensures that the system of bus transportation is fully coordinated.

Any consumer can complain to a regulator (most often it is done in writing) in case he or she has any kind of claims to a transportation service provider. The regulators are: State inspection of Ukraine on land transport security, The Council of the Ministers of the Autonomous Republic of Crimea, regional state administrations, and local self-governments.

The Council of Ministers of the Autonomous Republic of Crimea, regional state administrations, Kyiv and Sevastopol city state administrations regulate tariffs for the transportation of passengers and luggage by buses on suburban, intercity, and intraregional bus routes.

Also, the Council of Ministers of the Autonomous Republic of Crimea, regional state administrations, Kyiv and Sevastopol city state administrations, executive bodies of Lviv and Kriviy Rig city councils regulate tariffs for the services of urban transportation by subway, bus, tram, and trolley.

However, there are no mandatory requirements to maintain the same level of prices across service providers.

To ensure that prices of local transport services are reasonable and the amount of subsidies isn't too high, the Antimonopoly committee of Ukraine had been persistently suggesting to the Ministry of transport and communications of Ukraine to develop a Methodology for the calculation of tariffs for public road transport, which was approved by the Ministry on 17 November 2009.

We believe that at present, the economic activity of operators of bus transportation in Ukraine can not be considered effective in terms of costs, prices, quality and safety of the services provided. The market needs to be liberalized, and the respective legislation needs to be harmonized with European legislation.

However, it should be noted that contradictory to global and European practices, the contract (or a permit) between a state authority and a transportation service provider only gives the provider the right to provide its transportation services on a particular route. The operator acquires the right to set tariffs for passenger transportation (except for the cases where the tariffs are regulated by the government), the frequencies of service, and acquires the obligation to provide free transportation services to concessionary passengers.

Such concessionary transportation services have to be compensated by the government, but in reality they aren't because of the lack of funding. Therefore, the operators have to cover the costs of providing transportation services to concessionary passengers themselves, which translates into constant rising of transportation tariffs.

However, it should be noted that a certain group of consumers (in particular, those receiving concessionary benefits) prefer municipal transport for the reason of lower tariffs and the lack of any kind of a limit on the number of concessionary passengers. For other categories of consumers, the choice is not limited.

To eliminate this factor which affects the competition in the bus transportation, a transition from a system of public benefits to targeted subsidies is required.

The guidelines for tendering of the bus routes have been approved by the Resolution of the Cabinet of Ministers of Ukraine on December 3, 2008.

Decisions on allocation of permits for passenger transportation are taken based on the Law of Ukraine "On automobile transport" and the Guidelines for tendering a public bus route.

According to Article 43 of the Law of Ukraine "On Automobile Transport" the selection of a carrier on a bus route may be undertaken only on a competitive basis.

According to Article 44 of the Law of Ukraine "On Automobile Transport", bodies of local self-governments and executive authorities can grant a transportation service provider the permission to provide bus services on a certain bus route for up to five years.

Therefore, bus route operators compete during the tendering process of a particular bus route. The routes can be tendered either individually or in groups. Lately, the participation rate to the tenders has increased.

The decision to conduct a tender is made by the government authority that's conducting it. The basic criteria that the government authority uses are the following: ensuring the profitability of the transportation services provider, while at the same time ensuring that consumers on unprofitable routes and concessionary passengers are serviced through the use of cross-subsidization scheme.

A tender commission is formed with the purpose of evaluating the parties that are competing for the contract. The contenders are rated based on a points system. Local authorities aren't limited in their choice of a bus route operator.

The dimensions over which the potential bidders compete are the following: price, quality of service (this includes adherence to the frequencies of service, condition of transportation vehicles, etc.), availability of additional services.

However, the information on costs and revenues for a given area is not publicly available.

The reputation of a franchisee also plays an important role in the authorities' choice of a service provider.

Renegotiations (termination of contracts) are used by respective authorities in case of inability of a service provider to fulfill the terms and conditions of the contract.

The maximum duration of a contract that can be concluded with a provider of bus transportation service is 5 years. However, the exact length of a contract is decided by the organizer of the tender.

Amendments to the contracts are made only in case of minor rerouting or similar minor changes. If major changes have to be made, or new routes need to be added, a new tender is conducted.

Regarding the frequency of service, a generally widespread practice is that the operators negotiate the service frequencies with the authorities. The frequency of service has to be approved by the respective authority.

Continual improvements of the quality of services is welcomed and approved by the government authorities that are responsible for the organization of bus transportation services. The criteria for the safety of transportation are stipulated by the license terms.

For the purpose of disciplining the contractors, the following mechanisms can be used: revocation of a permit, breach of contract, revocation of the license, etc.

As mentioned earlier, we believe that the adoption of best European practices in the field of bus transportation would have a positive effect on Ukrainian market.

Furthermore, the creation of transparent mechanisms for the distribution of international cargo transportation permits, as well and for the tendering of national and international bus routes will contribute towards the creation of a more competitive environment in the market of transportation services. It will also contribute towards the improvement of ecological safety and energy efficiency of transport vehicles, as well as further development of road transport infrastructure.

It is also necessary to move from a system of provision of privileges in the field of bus transportation to targeted subsidies.

UNITED KINGDOM

Methods for allocation of contracts for the provision of local and regional bus services in Great Britain (excluding London)

This paper provides an overview of the allocation of contracts for the provision of bus services in Great Britain. It begins by setting out the context and overarching framework for the provision of local bus services before outlining tendering processes. It then considers the outcomes of these arrangements as well as regulatory measures in this area. It also considers the Competition Commission's Local Bus Services Market Investigation (published December 2011).¹

The arrangements described in this submission relate to Great Britain, excluding Greater London. Different arrangements apply in Greater London where services have not been deregulated; instead they operate on a tender system where private bus operators bid for the contract to run a specific route for a specified period of time, usually five years. The letting process is managed by Transport for London (TfL). In addition, bus services in Northern Ireland have not been deregulated.

The current framework for the provision of local bus services has arisen from deregulation under the Transport Act 1985. For the previous 50 years, the level of service provision on every bus route in Great Britain had been controlled by Traffic Commissioners (individuals appointed by the Secretary of State with responsibility for a geographical region), and since 1968 the vast majority of local bus operations had been in public ownership. Under the 1985 Act, local bus services were to be provided commercially, with direct public support being confined to services which the local authority deemed to be socially necessary. The 1985 Act set in train a process which started with the deregulation of the industry in October 1986 and involved the progressive privatization of most local bus operations in Great Britain outside of London.

The provision of local bus services is now largely in private ownership, although a few local authorities still retain ownership of municipal bus companies. Since the industry was deregulated in the 1980s, bus operators have been able to design and develop their own commercial services and set their own fares. However, bus operators still work within a framework of regulation involving both national and local government, which includes the requirement for all bus services to be registered with the Traffic Commissioner. There is significant support to bus services and passenger travel through a subsidy scheme (the Bus Service Operators Grant, which is currently under review), concessionary fare schemes (giving free or discounted travel to eligible passengers) and the procurement of supported services.

The national governments set policies relevant to local bus services in England, Scotland and Wales (aspects of bus policy and regulation differ between these countries but for the purposes of this note the situations are broadly similar), and provide direct funding support to the industry and set the framework for additional funding at a local level.

Local Transport Authorities (LTAs, such as County Councils, Unitary Authorities or Integrated Transport Authorities (ITAs) for metropolitan counties) are responsible for setting and implementing overall strategies and policies for transport within their areas. LTAs can enter into certain formal or

¹ <http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/local-bus-services-market-investigation/final-report-and-appendices-glossary>.

informal arrangements with bus operators relating to the nature and standard of delivery of commercial services (see paragraphs 0 to b)). Recently, LTAs have played an increasing role in influencing bus services through their own local policies and through schemes, both voluntary and statutory, under which they can enter into arrangements with local bus operators. Proposed changes to Bus Service Operators Grant, to devolve a proportion of funding to LTAs, would further increase their influence.

1. Background to allocation of contracts

Bus operators, outside London, are generally able to identify where and when they wish to run bus services, and to set their own fares. They are able to provide services in competition with other bus operators, including municipal bus operators. All bus services must be registered and their operation may be restricted under certain circumstances (see paragraph 0 and 0).

LTAs have a duty (apart from non-metropolitan district councils which have a power) to secure the provision of public transport services that they consider appropriate to meet social needs and that would not otherwise be provided or would not be available to a desired standard, i.e. services that are not seen as commercially viable. They have a duty to take account of the needs of elderly and disabled people in making this assessment.

It is for the LTA to formulate policies to allow it to determine the level of services it considers to be appropriate, taking account of its objectives. Different LTAs will therefore differ in their decisions on the number and type of services to procure, depending on the level of provision of commercial services, local circumstances (for example, the extent of social need for public transport) and their own priorities and policies. Different types of services may be procured: scheduled services (for example, to serve rural or remote areas or areas with a significant social need for public transport); services to transport schoolchildren and students; park-and-ride services; and demand-responsive services. Services can be procured for a whole route or for part of a route, and similarly for the whole of the timetable or just certain days or times of day (such as Sundays or late evenings). Supported services are funded by LTAs drawing on local government funds and so there is no specific allocated budget for tendered services. Therefore, LTAs will need to determine what level of support for such services is appropriate in the light of their overall budgets and priorities.

Where authorities are procuring such services, they are generally required to invite competitive tenders from operators. Competitive tenders are intended to enable authorities to award the contract to the most economically advantageous tender and to achieve best value. There are exceptions to the requirement to tender for up to three months where action is urgently required for the purpose of: maintaining an existing service; securing a service which has ceased to exist; or securing a service to meet a public transport requirement which has arisen unexpectedly and ought to be met without delay. There is also a de minimis level below which a tender is not required or the processes which need to be followed, if tendering, can be relaxed. Any bus operator can be eligible to bid for a contract provided it has the appropriate licence and resources to operate the service.

Other than the procurement of supported services, there are other policy initiatives that exist or have been used in the past to encourage the desired provision of bus services:²

² Voluntary partnership arrangements have not been formalized in legislation in Scotland although there are numerous voluntary agreements between operators and local authorities there. There are also important differences in the standards that can be set in statutory schemes and in the nature of Quality Contract Schemes in Scotland.

1. Under voluntary partnership schemes, an operator may make commitments (such as to run additional services or improve the quality of services), and the LTA also makes commitments – for example, for infrastructure improvements such as bus prioritisation measures. Under statutory quality partnerships, similar commitments are made by the parties but operators who are not participating in the scheme are not allowed to use the scheme’s facilities. There are also qualifying agreements between bus operators where operators can cooperate under certain circumstances (such as to align service timings and to integrate service timetables). Local authorities can also establish multi-operator ticketing schemes. All these measures have to pass a competition test.
2. As an alternative to the deregulated market, there is ability for an LTA to introduce a quality contract scheme. This allows the LTA to determine routes, fares, quality standards and frequencies in specified areas, and the LTA puts the quality contract out to tender, where the successful bidder gains exclusive rights to provide services to the LTA’s specification, and other commercial services are not allowed in that area. No quality contracts are yet in existence and so we do not discuss this further, although there are two proposed schemes, in the West Yorkshire, and Tyne and Wear Integrated Transport Authority areas.
3. The national governments have also run specific initiatives to help develop local bus services, particularly in rural areas. Example include schemes to provide start-up funding to new bus services that had the potential to become commercially viable, or schemes to stimulate the development of innovative ways of meeting accessibility and social inclusion needs in urban deprived areas, for example demand-responsive services and taxibuses. These schemes have been intended to provide temporary funding, and where successful they could become part of mainstream funding from local authorities and other sources or establish new viable commercial services. The 2012 Better Bus Areas fund is a Department for Transport (DfT) scheme aimed at local councils working in partnership with local bus operators, who bid for funds for measures to increase bus use in busy urban areas (for example through bus priority measures, better ticketing and infrastructure improvements). Twenty four local transport authorities were awarded just under £70 million in March 2012.

2. Tendering processes

In deciding which tender to accept, LTAs must have regard to a combination of economy, efficiency and effectiveness; the implementation of the policies set out in the bus strategy; and the reduction or limitation of traffic congestion, noise or air pollution.³ Furthermore, where tenders are in excess of EU financial limits the local authority must comply with the EU procurement rules.

While one of the major factors in how potential bidders compete for contracts is price, there is also competition on other dimensions, depending on the degree to which the LTA has chosen to specify the aspects of the contract or to leave them open, and the extent to which LTAs are prepared to consider non-compliant bids.⁴ Thus LTAs can take account of the quality of service offered in the bid (for example, the type and quality of vehicles used), the ability of the operator to promote the service, and the reputation of the operator in terms of its track record. However, the LTA determines the exact way in which bids will be

³ [Section 89, 1985 Act.](#)

⁴ This is where an operator additionally proposes as an alternative, different formulations of the services which it thinks the LTA might find to provide a more effective or cheaper service. For example, it might offer a more frequent service or longer hours of operation, or a lesser service if it believes it can offer this with much greater cost effectiveness.

assessed. Some LTAs will also negotiate with operators after bids have been received in order to improve them.

Incumbent operators are not given any specific advantages in repeat bids and there is no evidence that LTAs grant incumbents preferential assessment. Of course, incumbent operators might be seen as a lower risk for LTAs in awarding contracts, or may have greater local market knowledge. Indeed there is some evidence that they do have an advantage in winning repeat contracts, but this could simply be because they are best placed to bid competitively (e.g. their depots may be in an appropriate location).

Two-thirds of LTAs said that they provide revenue and patronage data to all prospective bidders where it is available, such as at re-tenders of existing services. Some LTAs have not always provided such information, and it may not be available in the case of new services or where commercial routes have been deregistered and it is being tendered for the first time. LTAs are advised that it is best practice to collect and provide such information.

For tendered services, LTAs have the ability to specify the fares that will be charged. Some take advantage of this (for example, in the Merseytravel ITA area, where fares on supported services are maintained at levels lower than typical commercial service fares), but instead, most LTAs seem to specify that fares should be in-line with commercial fares for similar services in that area. Exactly how that is implemented can vary but typically an operator will be required to follow the same prices as its own commercial services and that it must honour its own multi-trip tickets and any applicable multi-operator tickets.

LTAs can design the contracts that are to be awarded (for example, in terms of routes served, service timings or hours of operation) to a greater or lesser extent of detail. They will then invite applications, in some cases granting operators freedom to suggest patterns of services, and sometimes allowing additional, non-compliant propositions that the operator may judge could more effectively or efficiently meet the LTA's needs. LTAs are not obliged to ensure that there is a coordinated or integrated transport system in their area, given that the bus market has been deregulated. However, they are likely to make efforts to advise and promote a coordinated and integrated service, and there are tools available to LTAs to do this, including partnerships and agreements, and statutory schemes (see paragraph a)), as well as through the design of supported services.

3. Nature of the contract awarded

It is very common for more than one contract for a particular route to be issued in a tender round and for bundled bids to be allowed. We understand only a small minority of LTAs never allow operators to make bids for bundles of routes in a contract. However, most LTAs also require bids to be expressed at a single route level, thus potentially allowing contracts to be spread amongst multiple operators. The extent to which LTAs offer multiple contracts at once and allow or accept bundled bids is at the LTA's discretion. Some will see opportunities for efficiencies and for integrated working, and some will see opportunities to promote significant market entry into an area. There have been some instances of LTAs offering large blocks of services in one round.

The length of contract (other than temporary and de minimis contracts) can extend up to eight years, and may have an initial period with the possibility of extension. LTAs take a judgement on whether they want to offer longer contracts which will be attractive to operators, or whether they want to maintain the option to market test the contracts more frequently.

Tenders can be offered either on a minimum-subsidy or minimum-cost basis (sometimes bidders are able to specify which basis they prefer). In the a minimum-subsidy case, in exchange for a guaranteed

subsidy, the successful operator bears the revenue risk if demand is lower than expected. However, they then have a strong incentive to encourage patronage through service promotion and offering a high quality service. Under a minimum-cost scheme, the bus operator does not retain revenues, but instead its costs are covered by the tender payments, and it is held to account through tight definition of the standards of service it is required to offer. This can be effective where contracts are seen as risky or unknown, but the LTA then bears the revenue risk of the service. Most LTAs largely or solely offer minimum subsidy contracts.

Typically, tenders will specify minimum standards of service provision and vehicle type, including compliance with any safety standards, environmental standards and so on. To the extent that bids may exceed these standards, this may be part of the assessment of the winning bid. We are not aware that further incentives to improve environmental standards and safety during the life of the tender are typically part of the contract. The incentive to improve quality will arise from the revenue incentives in minimum-subsidy contracts, and the extent to which an operator's track-record will influence future contract awards and also uptake of its commercial services by consumers.

In Great Britain, normal practice is for the bidding company to supply the vehicles, staff and facilities to operate the services. In a very few cases, LTAs have invested in vehicles and/or depot facilities that could be used by a successful bidder. This is unusual. Rival operators do not normally have any rights to use the facilities, equipment and personnel of incumbent operators.

4. Execution of the contracts

The execution of the contract will be supervised by the LTA to ensure compliance with the terms of the contract. In addition, the operator will be subject to the normal regulatory arrangements such as the supervision of the Traffic Commissioners in relation to conduct, service registration and adherence to registered service timetables, and VOSA regarding vehicle safety.

5. Outcomes

In the financial year ended 2010, local authorities in England and Wales (excluding London) spent £462 million⁵ in net public transport support of which the bulk accounts for spend on supported services.⁶ Supported services represented 27 per cent of the total mileage (by distance operated) of all local bus services in Great Britain (excluding London) in 2011/12. The average payment by LTAs to bus operators per kilometre was £0.90.⁷ There was substantial variability in the level of expenditure on supported services by absolute amount and in relation to kilometres operated across the countries and regions of Great Britain. There have been reductions in the number of services supported in recent years for budgetary reasons, and a few LTAs have removed all funding of supported services (the latest DfT figures for England indicate a drop in net public transport support between 2010 and 2012).

⁵ The source of this information can be found at: www.dft.gov.uk/pgr/statistics/datatablespublications/public/bus/support/bus0502.xls and <http://wales.gov.uk/docs/statistics/2011/110126wts2010ch8ency.pdf>. We have not identified comparable figures for Scotland.

⁶ The figures also include administration costs and inter-authority transfers and some support for non-local services, meaning that a small proportion will not reach local bus operators.

⁷ The mileage and spend per kilometre figures are CC calculations based on 2007 data.

The Competition Commission, in its Local Bus Services Market Investigation (published December 2011)⁸ gathered information from 91 LTAs including data on 7465 tenders issued over the previous five years. This was analysed to indicate outcomes from the tender processes and also to indicate what aspects of local markets and the design of tenders and the assessment process influenced the number of bidders for the contract and the prices that were achieved.

Looking at cases where contracts were re-tendered, there was a mix of experience on pricing. In 30 per cent of cases, tender prices reduced, in 51 per cent they increased. DfT publishes statistics on the average price increase for contracts renewed on a like for like basis, which were renewed in the previous 12 months. This showed substantial annual price increases up to around 2006, with prices falling since 2009 (these figures include Greater London).⁹

Across the sample, 12 per cent of contracts received only one bid. On average, just under four bids were received per contract.¹⁰ The CC found that for re-tendered contracts (used so that contracts could be compared in terms of the proportionate change in price), the difference between the current winning bid and the winning bid for the previous contract was on average lower if the number of bidders was higher. The number of bidders for contracts was found to depend on aspects of the tender (for example, bids were diminished for off-peak and rural services, and where only part of a route or some hours of service were being tendered). The number of operators present in an area also influences the number of bidders for tenders although the attached coefficient was small.

The quantitative and qualitative analyses found evidence that the following aspects of tender design would reduce the number of bidders or the degree of competition between them for contracts:

- Use of short contract periods;
- Use of either minimum-subsidy or minimum-cost contracts without allowing the option of bidding on the other basis;
- Not providing all relevant information to bidders (such as historic patronage data).

In addition there was some (weaker) evidence that other aspects of tender design can also impede competition for tenders:

- not considering non-compliant bids;
- use of point-scoring systems to assess bids; and
- requiring operators to accept other operators' tickets.

Operators also complained about complex, time consuming or bureaucratic procurement practices, which can increase the cost of bidding and deter bids, particularly for small operators.

DfT has begun to develop guidance to LTAs on best practice for procurement of bus services, which in part reflects these findings.

⁸ <http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/local-bus-services-market-investigation/final-report-and-appendices-glossary>.

⁹ See <https://www.gov.uk/government/organisations/department-for-transport/series/bus-statistics>, Table BUS0504.

¹⁰ This is consistent with DfT statistics on the average number of bids per tender in Great Britain (including London) showing an average of 3.6 to 4 bids per tender between 2009 and 2011, See , Table BUS0504.

Some LTAs have taken initiatives to encourage more bidders, particularly through building relationships with local operators.

The great majority of bus services are provided commercially rather than by supported services. LTAs will not generally offer support for bus services where there is a commercial alternative and hence there is little likelihood of competition between supported and commercial services (unless the overlap is on a small or insignificant part of the route). Indeed an LTA is likely to cancel a contract for supported services were an overlapping commercial service to be launched, as during those hours of operation there would be no case for supporting that service. The provision of bus services on a commercial basis (with support for socially necessary services that are not commercially viable) is established in England, Scotland and Wales. In the same Competition Commission report, the commercial market was generally seen functioning reasonably well although some detriment was found to arise due to an absence of head-to-head competition in many local markets (arising because of local market concentration or barriers to entry). Where head-to-head competition was found, benefits from sustained competition were observed, most clearly in increases in the number, and frequency, of services run by commercial operators compared to where the market structure in a local area was more like a monopoly. However there were, in some instances, cases of operators adopting tactics when facing competitors, such as substantially increasing services, changing timings and cutting fares in an unsustainable manner so as to try to cause rivals to exit the market.

6. Regulation

The bus industry is subject to regulation by the Traffic Commissioners. Local bus operators are required to hold a Public Service Vehicle operator's licence granted by the Traffic Commissioner for their Traffic Area; the applicant must be of good repute, be professionally competent and have appropriate financial standing.

All commercial and supported local bus services outside London must be registered with the Traffic Commissioner for the relevant 'Traffic Area'. Bus operators are required to give notice to their local Traffic Commissioner of an intention to commence a local bus service. In general, a 56-day notice period is required in England and Wales (with a further 14 days in Scotland), although the Traffic Commissioner has discretion to accept shorter periods.

The operator must then run the bus service according to the specification in the registration, including adherence to timetables.

Traffic Commissioners can determine 'traffic regulation conditions' at the request of an LTA, which then apply to all local services in the area (or to a particular class of service). Such conditions may be imposed only when required to prevent dangerous traffic conditions, reduce severe traffic congestion or reduce noise and air pollution, and these conditions may limit the number of vehicles which may be used, the frequency at which vehicles may be operated or where and for how long a vehicle may stop or turn. The effect of these conditions may be to restrict the potential for competition in circumstances where the maximum number of permitted vehicles is already operating in a specified area, thereby preventing a potential operator from launching a competing service.

Traffic Commissioners also have powers available to address issues of unfair competition between bus operators.

The Traffic Commissioners receive complaints from the public and industry, for example in relation to failure to run services or deviation from the published timetable, use of unsafe vehicles, congestion or dangerous practices. We understand that Traffic Commissioners use complaints as a major factor in determining whether to open investigations into bus operators.

UNITED STATES

1. Overview of Urban Bus Services

The vast majority of U.S. urban bus systems were privately owned until the 1960s, when municipalities and regional authorities started granting private carriers exclusive franchises to operate specific routes. Public utility commissions regulated fares and service level on these routes. Congress passed the Urban Mass Transit Act in 1964, granting subsidies to public agencies that provided mass transit. As a result, over the next decade almost all transit systems were taken over by state and local governments or public agencies.¹ The trend reversed in the 1980s, when the federal government reduced its funding and started to require public transit agencies to cooperate more with the private sector.² States like California and Colorado were pioneers in the partial or full privatization of urban bus services.

Today, the majority of U.S. local bus networks are still operated by municipalities or public agencies. For example, in 2009, 62.3 percent of local transit agencies were operating their bus network themselves, 13.1 percent were contracting out part of the operations, and 24.6 percent had contracted out their entire operations.³ Over the past five years, the trend has been towards slightly more partial contracting and less direct operating.⁴ However, there is a great variety of systems for providing urban bus services across U.S. states and municipalities, and regulation of those services similarly varies.

Examples of publicly-operated bus services include New York City, where the Metropolitan Transportation Authority (MTA) is a public-benefit corporation chartered by the New York State Legislature in 1965. The MTA Bus Company (New York City Transit is the division of MTA operating public buses) was created in 2004 to assume the operations of seven bus companies that operated under franchises granted by the New York City Department of Transportation. The takeover of the lines began in 2005 and was completed in 2006. MTA Bus is responsible for both the local and express bus operations of the seven companies, consolidating operations, maintaining existing buses, and purchasing new buses to replace the aging fleet currently in service.⁵

¹ See Randal O'Toole, *Fixing Transit, The Case for Privatization*, Cato Institute, November 2011, at 2-3, available at <http://www.cato.org/sites/cato.org/files/pubs/pdf/PA670.pdf>; see also National Center for Transit Research, *Analysis of Contracting for Fixed Route Bus Service*, Jun. 2011, at 3, available at <http://www.nctr.usf.edu/wp-content/uploads/2011/08/77923.pdf>.

² See Karen Trapenberg Frick, Brian Taylor, Martin Wachs, *Contracting for Public Transit Services in the US: Evaluating the Tradeoffs, Privatisation and Regulation of Urban Transit Systems*, OECD International Transport Forum, 2008, at 53, available at <http://www.internationaltransportforum.org/Pub/pdf/08rt141.pdf>; see also National Center for Transit Research, *Analysis of Contracting for Fixed Route Bus Service*, Jun. 2011, at 3-4, available at <http://www.nctr.usf.edu/wp-content/uploads/2011/08/77923.pdf>.

³ See National Center for Transit Research, *Analysis of Contracting for Fixed Route Bus Service*, Jun. 2011, at 36, available at <http://www.nctr.usf.edu/wp-content/uploads/2011/08/77923.pdf>.

⁴ *Id.*

⁵ See Public Transportation for the New York Region, The MTA Network, available at <http://www.mta.info/mta/network.htm>.

In Chicago, the Regional Transportation Authority (RTA) is considered a special purpose unit of local government and a municipal corporation of the State of Illinois. RTA includes “Pace,” which was created by the 1983 RTA Act to unify the numerous disparate suburban bus agencies that existed at that time. In doing so, fares, branding, and management were made consistent throughout the region.⁶

Other public agencies have been relying more on contracting over the past 10 to 15 years, at least for part of their operations. Such combinations of public and private operators in one local network are often driven by the necessity for transit agencies to cut their expenses by giving up routes that are not profitable, opening niche opportunities for private operators with different cost structures.

For example, in New York City, as MTA had to give up a number of routes and bus stops over the past decade to cut costs, private carriers, regulated by the city, emerged to serve the public’s transit needs in the areas abandoned by MTA. In Los Angeles, part of the bus network (8 routes) was contracted to Veolia, a multinational, France-based company in 2008.⁷ Privately-provided commuter buses that operate during peak hours and offer customer-oriented routes with limited stops and coach amenities to suburban employment destinations such as the Silicon Valley are well developed in the San Francisco Bay area.⁸ In the Boston Bay area, private commuter buses and the Massachusetts Bay Transportation Authority work closely together.⁹ A partnership also exists between large employers and the transit agency in Seattle.¹⁰ In Denver and San Diego, some of the bus routes are operated by private carriers under contracts with the Regional Transportation District, a public agency. Examples of urban bus networks entirely outsourced include the operation of the bus system in Nassau County (Long Island, NY), which was contracted to Veolia in 2012. In the framework of this public-private partnership, the County retains ownership of the buses and buildings and Veolia operates the buses. Although Veolia can make recommendations, the County regulates fares and bus routes.¹¹ Veolia has similar arrangements operating the bus systems in the cities of Phoenix and Las Vegas.

The recent trend has been toward full contracting in newer, developing transit systems; partial contracting is generally used in larger, already developed transit systems. When contracting only part of their services, agencies tend to select only specific lines, which are usually the less profitable, often outlying areas with lower ridership.

2. Overview of the Intercity Bus Industry

With the advent of the interstate highway system in 1956, and with incomes growing, more Americans were able to own automobiles. As a result, many moved to the suburbs, and the U.S. intercity

⁶ See Regional Transportation Authority, available at <http://rtachicago.com/about-the-rta/overview-history-of-the-rta.html>.

⁷ See *Veolia Transportation Wins Downtown DASH in Los Angeles*, Nov. 13, 2008, available at http://www.veoliatransportation.com/pdfs/Downtown_Dash_Contract.pdf.

⁸ Krute Singa, Jean-David Margulici, *Privately-Provided Bus Services, Role in the San Francisco Bay Area Regional Transportation Network*, California Center for Innovative Transportation, University of California Berkeley, Mar. 2010, at 3, 6, 8, available at <http://cdm15025.contentdm.oclc.org/cdm/singleitem/collection/p266401col14/id/4558/rec/2>.

⁹ *Id.*, at 14.

¹⁰ *Id.*, at 13.

¹¹ See *Nassau Approves Veolia Bus Contract*, Dec. 13, 2011, available at <http://archive.longislandpress.com/2011/12/13/nassau-approves-veolia-bus-contract/>.

bus system declined.¹² Through the 1970s, reduced ridership and governmental controls on pricing and routes made the bus industry economically unsustainable.¹³ As part of a wider movement in the 1980s and 1990s to deregulate the U.S. transportation industry, the Bus Regulatory Reform Act of 1982 largely deregulated the intercity passenger bus market.¹⁴ The regular-route sector, based on a hub-and-spoke service from brick and mortar bus depots, declined further. A series of mergers consolidated the traditional bus industry into a single national carrier, Greyhound.

However, the 2001 terrorist attacks and the heightened security in airports, followed by the sharp rise in oil prices in 2006 and the rebirth of urban business districts, have increased the appeal of the intercity bus.¹⁵ Since 2006, the intercity bus industry has averaged an annual growth rate of approximately 7 percent.¹⁶ Most notable is the establishment of point-to-point¹⁷ bus service along busy corridors by small operators.¹⁸ These bus services are often characterized by low fares, street-corner pick-ups, on-board wifi service and electrical outlets, and electronic ticketing systems. Due to the popularity of these buses, the larger carriers (Greyhound¹⁹ and Megabus²⁰) have started to offer similar services on their standard bus routes. Intercity bus service in the U.S. is provided by private operators, and does not involve the contracting or franchise operations sometimes found in local transportation services.

3. Regulation by the Surface Transportation Board

The Surface Transportation Board (STB) has jurisdiction over certain company structure, financial and operational matters of interstate passenger buses. STB regulation of interstate passenger bus service focuses mainly on competition within the industry – specifically on pooling of services or earnings and on mergers and acquisitions. With respect to the former, STB approval is required for pooling and dividing traffic, services, or earnings.²¹ Pooling is allowed if it will promote better service to the public or economy of operation and will not unreasonably restrain competition. A carrier may participate in an arrangement approved by or exempted by the STB without the approval of any other federal, state, or municipal body. A

¹² Joseph P. Schwieterman, Lauren Fischer, Sara Smith, and Christine Towles, *The Return of the Intercity Bus: The Decline and Recovery of Scheduled Service to American Cities, 1960–2007*, Chaddick Institute for Metropolitan Development, Chicago, 2007, at 3-4, available at <http://las.depaul.edu/chaddick/docs/Docs/IntercityBusStudy.pdf>.

¹³ *Id.*

¹⁴ Remaining regulation of interstate buses, see 49 U.S.C. § 13501, is carried out by the Secretary of Transportation and the Surface Transportation Board (STB). The STB’s regulation focuses on combinations and pooling, while the Secretary’s licensing and registration focus on safety.

¹⁵ *Supra*, note 2, at 4.

¹⁶ Joseph P. Schwieterman, *The Intercity Bus Rolls to Record Expansion: 2011 Update on Scheduled Motor Coach Service in the United States*, Chaddick Institute for Metropolitan Development, Chicago, 2011, at 3, available at http://las.depaul.edu/chaddick/docs/2011-2012_Reports/The_Intercity_Bus_Rolls_to_Record_Expans.pdf.

¹⁷ These buses are also termed “curbside” service.

¹⁸ Mostly “metropolitan areas separated by 175 to 300 miles in the East and Midwest.” See Joseph P. Schwieterman, Lauren Fischer, Sara Smith, *2008 Update on Intercity Bus Service: Summary of Annual Change*, Chaddick Institute for Metropolitan Development, Chicago, 2008, at 3, available at http://las.depaul.edu/chaddick/docs/Docs/2008_Update_on_Intercity_Bus_Service.pdf.

¹⁹ Greyhound, together with Peter Pan, operates the point-to-point bus company BoltBus.

²⁰ Megabus, which is owned by British Stagecoach, operates its own point-to-point service.

²¹ 49 USC § 14302.

carrier participating in an approved or exempted arrangement is exempt from the antitrust laws and from all other law, including state and municipal law, as necessary to carry out the arrangement.²²

With respect to mergers and acquisitions, federal law²³ requires STB approval for carriers whose aggregate gross operating revenues for the prior year exceeded \$2 million. The STB will approve a transaction when it finds that the transaction is consistent with the public interest. In doing so, the STB must consider at least:

1. the effect of the proposed transaction on the adequacy of transportation to the public;
2. the total fixed charges that result from the proposed transaction; and
3. the interest of carrier employees affected by the proposed transaction.

With either pooling agreements or mergers and acquisitions, the STB can maintain continued oversight of an approved transaction. It can impose conditions on approval, and with respect to mergers and acquisitions, it can provide interim approval authority. STB approval provides an automatic antitrust exemption and preemption from other federal, state and local laws.

4. Rate and Route Regulation

Generally, rates and services are not regulated. But carriers must establish reasonable “through routes”²⁴ with other carriers of the same type and individual and joint rates applicable to those routes. The STB has the authority to prescribe through routes and related conditions.²⁵ Federal law provides a strong federal preemption of state and local regulation relating to scheduling, rates, and service.²⁶

5. Recent Antitrust Enforcement and STB Regulation

5.1 *Twin America LLC*

The Antitrust Division of the U.S. Department of Justice (Division) has had very little antitrust enforcement activity related to regional and local bus service.²⁷ The Division recently challenged a joint venture involving hop-on, hop-off tourist buses in New York City, however.²⁸ On December 11, 2012, the Division and New York State Attorney General filed a civil antitrust lawsuit against a tour bus joint venture formed by Coach USA Inc. and City Sights LLC alleging that the joint venture, known as Twin

²² 49 USC § 14302(f).

²³ 49 USC § 14303.

²⁴ A “through route” is an arrangement (1) between connecting carriers, (2) for the offering of a transportation service, (3) from a point on the line of one carrier to a point on the line of the other carrier. Simply stated, there must be an origin by the first carrier, interchange and delivery to the second carrier and final delivery by the second carrier. *See, e.g., Carolina Clinchfield & Ohio Railway Co. v. Southern Railway Co.*, 299 I.C.C. 335, 337 (1956).

²⁵ 49 U.S.C. § 13705.

²⁶ 49 U.S.C. § 14501.

²⁷ Section 5(a)(2) of the Federal Trade Commission (FTC) Act expressly exempts from the FTC’s jurisdiction “common carriers subject to the Acts to regulate commerce.” 15 U.S.C. § 45(a)(2).

²⁸ *See* press release Justice Department and New York Attorney General File Antitrust Lawsuit against New York City Tour Bus Joint Venture of Coach USA and City Sights, December 11, 2012, *available at* http://www.justice.gov/atr/public/press_releases/2012/290136.htm.

America LLC, had resulted in higher prices for hop-on, hop-off bus tours in New York City. The complaint said that the formation of Twin America gave Coach and City Sights a monopoly over the more than \$100 million New York City hop-on, hop-off bus tour market and enabled Coach and City Sights to increase prices to consumers by approximately 10 percent for tourists visiting some of New York City's leading attractions, including the Empire State Building, Times Square, and Central Park. The lawsuit seeks to dissolve the joint venture and impose other relief to restore competition and redress the anticompetitive effects of the parties' conduct.

The complaint states that prior to the joint venture, two firms accounted for approximately 99 percent of the hop-on, hop-off bus tour market in New York City: Coach, the long-standing market leader through its "Gray Line New York" brand, and City Sights, a firm that commenced operations in 2005. From 2005 until the 2009 creation of the joint venture, the parties engaged in vigorous head-to-head competition on price and product offerings that directly benefitted consumers. The complaint said that no other operator of hop-on, hop-off bus tours in New York City has entered or expanded their services to sufficiently replace the competition lost through the parties' combination in the more than three years that Twin America has been operating.

The transaction forming Twin America was not required to be reported under the Hart-Scott-Rodino Antitrust Improvements Act. As a result, the Division did not learn about the joint venture until after it had been consummated. The New York State Attorney General began investigating Twin America shortly after its March 2009 formation, however, and issued subpoenas seeking information about the joint venture. Shortly after the subpoenas were issued, Coach and City Sights delayed the state's antitrust investigation by asserting that the Twin America transaction was within the exclusive jurisdiction of the STB, whose approval would exempt the parties' transaction from the antitrust laws. In early 2012, after more than two years of proceedings, the STB denied approval of the transaction as not in the "public interest," and directed the parties to either dissolve Twin America or terminate minimal interstate operations that provided the basis for STB jurisdiction. Coach and City Sights chose the latter option and continue to operate the joint venture.

5.2 *Peter Pan Bus Lines, Inc. – Pooling – Greyhound Lines, Inc.*

Another recent matter involved a dispute between competing bus companies that operate in the Northeast United States. In 1997-98, the STB gave its approval for Peter Pan Bus Lines, Inc. and Greyhound Lines, Inc. to pool bus operations between New York City, and Washington, D.C.; Philadelphia; Boston; and Springfield, and authorized intermediate stops. In 1997, the STB found that the pooling parties had offered substantial evidence to justify the pooling of their operations between destination cities, including low passenger loads caused by overlapping services. The carriers argued that pooling would reduce excess capacity, eliminate unnecessary duplication of facilities and staff, and allow for capital improvements to provide better service. The STB concluded that for each application, the sharing arrangements would foster improved service to the public and economy of operation and would not unreasonably restrain competition.²⁹

²⁹ The Division filed comments with the STB in 1997 opposing the application to pool the operations of these carriers between New York City and Washington, DC. The comments argued that there was a substantial likelihood that the proposed pooling agreement would unduly restrain competition. Peter Pan and Greyhound were the only bus lines that provided scheduled transportation between New York City and Washington, DC. The Division argued that if the pooling agreement were approved, bus service between those cities would be provided by what is in effect one company. The Division's comments noted that there was no evidence that service from other common carrier modes of transportation -- trains and airplanes -- nor rented or privately owned automobiles, would provide effective competition to the provision of scheduled bus service by the pooled companies on this route. As a result, the pooled companies would

In 2008, the pooling parties unveiled “BoltBus,” a new curbside passenger pick-up and drop-off service. Before BoltBus, they had served passengers only at terminals or bus stations. Another competitor, Coach USA, Inc. (Coach), which also offers a competing curbside service through its subsidiary Megabus Northeast, LLC (Megabus), objected to the BoltBus service and asked the STB to reopen the pooling proceeding to stop the competing curbside service. Coach argued that the BoltBus service fell outside the scope of the 1997 authorization. The STB rejected Coach’s attempt to block the BoltBus service, concluding that it did not expand the pooling parties’ shared service on a new route or into a new geographic territory.³⁰

In March 2011, the pooling parties announced new services, notifying the public that they would soon establish a hub in Newark, N.J. providing daily buses from Newark to Baltimore and Washington (and the reverse), with curbside pick-up and drop-off. The pooling parties announced that they were also planning to offer pooled service between Newark and Boston, between Newark and Philadelphia, and between Philadelphia and Boston. Coach again challenged these new pooled services as exceeding the scope of the STB’s approval, but its challenge was unsuccessful. Instead, the STB found that these new services were permitted because they are more efficient ways of providing already-authorized services in a market where bus competition is flourishing.

The central issue in the case was whether the services now offered by the pooling parties fell within the scope of the earlier approvals. Over time, the business model evolved from a hub-and-spoke network to one where curbside service became more attractive and desired. The STB found that the new direct services by the pooling parties do not present a competitive problem and were within the scope of its prior approval. Furthermore, the STB determined that the risk of anticompetitive harm to the intercity bus market was minimal, and that competition in the market was flourishing. Indeed, in 2011, the STB found that, since authorizing the original pooling agreements, the number of bus companies providing intercity services in the Northeast had grown significantly, equipment had improved, bus fares had decreased, and competition had steadily expanded.

The STB found that, consistent with the National Transportation Policy,³¹ it would be illogical to condition the approval of Peter Pan and Greyhound’s application to pool bus operations between Boston and Philadelphia on the condition that the buses stop, no matter how briefly, in New York, because they can already pool their other buses from Boston to New York and from New York to Philadelphia. It concluded that allowing the pooling parties to provide direct service between the previously approved cities encourages innovative, competitive, and efficient transportation services, benefitting consumers. The STB found that it was not its role to protect Coach from the introduction of a more efficient service that will plainly benefit the public. It determined that the number of existing competitive transportation alternatives and the ease of new entry (as shown by the many recent entrants) to the intercity bus market in the Northeast precluded the pooling parties from engaging in anticompetitive behavior, such as collectively raising rates to supracompetitive levels.

likely raise bus fares above competitive levels. The STB order approved the Peter Pan - Greyhound pooling application subject to the condition that they file periodic reports on the fares they charge for service between the points in their pooling agreement. The STB noted the pervasive intermodal competition in the market for intercity passenger travel and the declining position of intercity buses in this market, and stated that the Division had not submitted sufficient countervailing evidence with respect to the Washington-New York route.

³⁰ *Peter Pan Bus Lines, Inc.—Pooling—Greyhound Lines, Inc. (April 2011 Decision)*, MCF 20904, *et al.* (STB served Apr. 20, 2011).

³¹ 49 U.S.C. § 13101.

BIAC

The purpose of this paper is to provide brief remarks rather than a full contribution, as the aim of the WP 2 roundtable of 25 February 2013, “to understand the tendering/allocation mechanisms used in different jurisdictions to ensure greater competition in the provision of local and regional bus services and to examine the advantages and limitations associated with them”, is mainly informative. However, BIAC wishes to take advantage of this roundtable to remind the Committee of some basic principles which are important to the business community, and is grateful to be given this opportunity.

Our points relate to concerns that were already discussed in the recent past: at the 14 October 2011 meeting of the Competition Committee, BIAC recommended an extensive discussion on the subject of what the European Union calls “services of general economic interest” (SGEI). We therefore welcome this first roundtable on one of the most topical examples of SGEI.

Indeed local bus and coach transport services are run either directly by state- (or local government-) owned enterprises (SOE) or by private companies to whom some forms of universal service obligations (USO) are imposed. There is nothing wrong with this in principle as it is generally the response to market failures (e.g. in cases where the bus service is the replacement of a railway service which had to be stopped because of insufficient profitability). Although the required investments are not huge, often the services cannot be operated on a profitable basis unless subsidised, because of regulated prices, timetable and safety constraints, etc. Again, there is nothing wrong with this in principle since government intervention may well be required to maintain infrastructure networks beneficial to the whole economy, or so that certain sub-groups of citizens can have access to important basic services at affordable prices.

BIAC’s general position in these matters has consistently been that it neither opposes nor encourages in principle either SOEs or state aids, which may be justified by broader policy concerns or necessary because of market failures, as long as competitive neutrality is preserved. However, BIAC insists on two important conditions: maintaining a level playing field between SOEs and private companies, including by regulation ensuring that competition law is enforced on SOEs on the same terms as private industries; and limiting the harmful distortions of competition that may result from state aids by defining and enforcing clear rules. In the case of local or regional bus transport, public-sector enterprises are generally owned, and public aid generally granted, by local or regional governments rather than by national governments as such, so it is up to the state authorities to enact these conditions and monitor their implementation.

The most advanced set of rules in this respect is probably the European “new SGEI package” completed in April 2012, which is based on the doctrine of the European Court of Justice as established in the *Altmark* decision of 24 July 2003, defining four conditions under which compensation for SGEIs can be exempted from the régime of state aid control:

- that the universal service obligation in consideration of which it is granted is clearly defined;
- that its parameters are objective, transparent and established in advance;
- that it should not exceed cost and a reasonable profit;

- that it is determined either through public procurement or “on the basis of the costs of a typical well-run company”.

BIAC considers this constitutes a reasonable basis for a policy, which could be emulated by those other jurisdictions which do not have an appropriate set of rules in that respect. However, there are a number of issues deserving attention, for instance the definition of the “general economic interest” (which may vary greatly from country to country), the economic definition of a “typical well-run company”, and the practicalities of the exercise of controls over the contractors’ operations.

BIAC recognizes that competitive public tenders for the award of local or regional transport service franchises can promote efficiency and reduce cost. Public transport agencies that establish competitive tenders for transport services nearly always do so with the objective of reducing cost. Indeed, competitive tenders have been estimated to reduce cost by 60% in some cases, with a mean cost reduction of 39.5% per vehicle kilometre as compared to non-competitive services.¹ Other studies showed improvement in service levels by 25%.² Thus, the benefits of competitive tenders are well-demonstrated, but the challenges of establishing tenders also should be understood. Public tendering requires strong planning and commitment by a transport agency and can face opposition, for example, from incumbent operators, political constituencies and trade unions.

Naturally, franchises for local and regional bus transport services should be awarded in conditions that meet the key factors which business would look for in a good tendering mechanism. This implies that it be transparent, including as to the parameters for evaluating bids and deciding on the outcome and award of the licences, be open to all qualified potential bidders, deal with bids and bidders fairly and without discrimination (whether between public and private, local or foreign enterprises), be managed professionally by qualified evaluators, and minimise transaction costs by avoiding unnecessarily onerous requirements.

Another remark that may be submitted is that the award of bus transport services contracts and more generally the sector’s activity should be supervised at national (as opposed to local) level, preferably by dedicated, independent regulatory authorities, for two reasons. First, in many cases, bus and coach services are dependent on efficient and consistent connections with other transport modes (the so-called “intermodality”), principally railways, often run by SOEs which are also competitors on road transport and which enjoy, therefore, a strong competitive advantage compared to “pure” road transport companies. The other reason why supervision at national level may be desirable is that the decision-making power for awarding contracts is often in the hands of local government which is perhaps more vulnerable to short-term political considerations.

Although dealing with local services, bus and coach transport is more and more open to international competition. This makes the requirement of a level-playing field (a constant concern of BIAC) an increasing necessity, implying both the international convergence of policies and the prevention of discriminations in the contract award processes. This is why BIAC is particularly appreciative of the OCDE’s effort to draw the competition agencies’ attention and to bring harmonization to these matters.

¹ See, e.g., US. Competitive Tendering Cost Analysis, September 1999, available at http://www.thredbo-conference-series.org/downloads/thredbo6_papers/thredbo6-theme6-Cox-2.pdf.

² Id.

**AUCTION PROCEDURES AND COMPETITION IN PUBLIC SERVICES:
THE CASE OF URBAN PUBLIC TRANSPORT IN FRANCE AND LONDON* ****

Paper by Miguel Amaral, Stéphane Saussier and Anne Yvrande-Billon

Abstract: In many countries, governments are pushing for the introduction of competition in the organization of public services and more broadly in public procurement. The development of public-private partnerships throughout the world is a good illustration of this trend. In order to foster competition, competitive tendering through the use of auctions is now common. Nevertheless, competition for the field must be organized. Depending on the rules of the game chosen, introducing competition for the field may or may not be successful. In this paper we investigate two alternative models for organizing local public services, namely the French and the London models of urban public transport. Few competitors and collusive behaviours, with increasing costs, characterize the French model, while the London model, as far as we have seen, exhibits better results, by using the transparency of auction procedures and the discretionary power of the regulator as two complementary instruments to foster competition and prevent anti-competitive behaviours.

Key Words: public services, transportation, franchise bidding, public-private partnerships, collusion, corruption, auctions. JEL Codes: H0, H7, K00, L33

Introduction

In many countries, governments are pushing for the introduction of competition in the organization of public services and more broadly in public procurement (Armstrong and Sappington 2006). The development of public-private partnerships around the world is a good illustration of this trend. In order to foster competition, competitive tendering through the use of auctions is now common and the European Union is seeking to introduce directives to encourage the use of competitive tendering procedures in member countries. The objective of using auction procedures is to replace competition *in* the field by competition *for* the field, leading private operators to operate public services at a competitive price without loss of quality.

Nevertheless, theoretical developments have taught us that this intuition behind the use of tendering procedures is in many respects too simple, notably because such procedures are not immune to corruption and/or collusion. In fact, the use of competitive tendering does not assure intense *ex ante* competition but rather it could be associated with a small number of competitors due to the way it is organized. Furthermore, when the number of competitors increases, the incentive to corrupt the public authorities is greater so there is no certainty that competition “kills” corruption and collusion (Bliss, Di Tella 1997). That is why competition for the field *must be organized*. Depending on the rules of the game chosen, introducing competition for the field may or may not be successful.

When it comes to the organization of public services through public-private partnerships, collusion and corruption behaviours have been widely studied, especially in less developed countries (See for example Engel *et al.* 2006 and Guasch 2004 for empirical evidences). However, developed countries are

* We would like to thank for their financial support in conducting this study the Law and Justice French Mission – Economic Attractiveness of Law program -(http://www.gip-recherchejustice.fr/aed_va.htm).

** Electronic copy available at : <http://ssrn.com/abstract=1109115>

not spared. The annual global corruption barometer¹ published by Transparency International points out the disparity among European countries. France ranks 18th in the world with a corruption index of 7.4 out of 10, while other European countries rank even lower. For instance Poland, Greece and Italy rank 63rd, 54th and 45th respectively, with corruption indexes of 3.7, 4.4 and 4.9. This is confirmed by data collected by the World Bank measuring the control of corruption (Kaufmann, Kraay, Mastruzzi 2006). Collusion behaviours, that reflect another strategy to bypass competition, are also present and difficult to control by the national competition councils. Few data and measures exist. Even so, several cases appear regularly and are sanctioned (See Albano *et al.* 2006 for empirical evidences concerning Europe). More problematic is the fact that, depending on the way competition is organized and on other exogenous parameters, collusion and corruption could go hand in hand, suggesting that when corruption of public entities exists, it may help sustain collusion strategies (Lambert-Mogiliansky, Sonin 2006).

To illustrate the importance of the way competition for the field is organised, we study the case of urban public transport services in London and France². Both London and France are characterized by an obligation to organize tendering procedures for local public services – this is even called an anti-corruption requirement in France. The French case is interesting because it clearly illustrates that the rules of the game imposed on competitors are crucial and may not foster competition nor prevent anti-competitive behaviours (the three main operators in urban public transport in France were condemned by the French Council of Competition in July 2005 to pay more than 12 million euros for collusive strategies). Using data on the organization of bids and their results in terms of cost and competition, we suggest that several mechanisms exist, which may explain the differences observed between France and London in terms of performances. More precisely, we show that the auction procedure chosen in London is the combination of transparent procedures (to prevent corruption and provide incentives for private operators to bid), discretionary power of the regulator and incentives for private operators to participate (bids are organized on a route-by-route basis in order to encourage the participation of many competitors and hence prevent collusive strategies). We then point out that these characteristics of the London tendering procedure are a key determinant of the performance differential observed between France and London. The paper is organized as follows. We first recall the theoretical developments concerning the efficiency of the tendering procedure when collusion and corruption are crucial issues (Part 1). We then present the French and London bus tendering model (Part 2) followed by an analysis of their performance (Part 3). We continue with a discussion of the results and a conclusion.

1. Transparency, Discretion and Degree of Competitiveness: a Brief Survey

With the development of competitive tendering in public services industries, the performance of public procurement procedures with respect to the promotion of competition has given rise to a rapidly growing amount of economic literature. This literature mainly stresses the incidence of auction design. Less developed are the determinants of collusion and corruption in public auctions. However, as argued by Klemperer (2002), collusion between bidders should be a major concern for auction designers. Moreover, as shown by Lambert-Mogiliansky and Sonin (2006), corruption and collusion often go hand in hand. A complete review of such determinants is beyond the scope of this article. Our objective in this section is to focus instead on the competitive effects of a few of the crucial aspects of procurement procedures, namely the transparency of the procedure, the level of discretionary power of the auctioneer and the degree of competitiveness of the environment.

¹ <http://www.transparency.org>

² We limit our analysis of the English urban transport sector to London because in the rest of the country, most of urban public transport activities are deregulated. Alternatively, for the French case, we do not include Paris in our data because urban transport in this city is operated by a public entity.

1.1. *Transparency of the Procedure*

The first difference between auction procedures is the level of transparency. Transparency refers to the ability of bidders to know and understand the actual processes by which contracts are awarded. Hence, a transparent procedure implies both that the award criteria are clearly and objectively defined and that a record of the award process is easily accessible. Transparency of procurement processes has an ambiguous effect on competition and favouritism.

Indeed, on the one hand, a lack of transparency regarding the selection criteria and the attribution rules may discourage potential new entrants to participate as it is a source of great uncertainty (Zupan 1989, Baldwin, Cave 1999, Bajari *et al.* 2004). Moreover, opacity may increase risks of capture and favouritism and therefore facilitate corruption (Caillaud 2001).

On the other hand, as pointed out by Stigler (1964, p. 48), “*the system of sealed bids, publicly opened with full identification of each bidder’s price and specification is the ideal instrument for the detection of price-cutting...collusion will always be more effective against buyers who report correctly and fully the prices tendered to them*”. Thus, transparency of procurement processes may facilitate collusion since partners can promptly identify and punish defecting firms.

As pointed out by Albano *et al.* 2006, a fully opaque disclosure policy, which hides all information from bidders, would make collusion difficult to sustain. However, procurement agencies generally operate on behalf of the public and they simply could not afford a fully opaque disclosure policy. This would strengthen the risk of corruption. This may explain why most of the empirical literature highlights that procuring authorities choose usually to rely on transparent procedures (see, for instance, Domberger *et al.* 1986, Domberger *et al.* 1987, Domberger, Rimmer 1994), although the degree of transparency may significantly differ among countries. Thus, as emphasized by Lambert-Mogilianski and Sonin (2006, p. 900), “*measures aimed at combating favouritism can facilitate collusion and vice versa*”.³ Furthermore, a partial disclosure policy is practically equivalent to a fully transparent one (Albano *et al.* 2006). This suggests that, because a fully opaque disclosure policy is impossible, a fully transparent one may be a good way to prevent corruption. Other instruments should then be used to prevent collusion behaviours, if necessary.⁴

1.2. *The Discretionary Power of the Public Bodies*

It is widely recognized that, in public procurement, when some of the important dimensions of the trade relationship are non-contractible, this generates major risks for opportunistic behaviour and may lead to an inefficient outcome for a buyer. Manelli and Vincent (1995) or Bajari and Tadelis (2001) for instance, show that in the presence of non-contractible qualitative aspects, auctioning leads selecting firms to produce goods at the lowest cost but with the lowest level of non-contractible quality. In such a context, allowing a public buyer to exercise his discretion to exclude dubious providers *ex ante* and/or punish opportunistic suppliers *ex post* is seen as desirable and efficient, especially in repeated procurement (Kim 1998, Doni 2006, Calzolari, Spagnolo 2006). In a context of frequent contracting, limiting participation by

³ This point is well known and recognized by the French Council of Competition, a fact that is stressed in Decision n° 00-A-25, November 20, 2000. The Council suggests that there might be an optimal level of transparency and defends the French position consisting of retaining the information concerning non-winning bids. This is not the position retained in London, as we will see.

⁴ One should keep in mind that such a transparent policy would foster competition and increase the number of potential bidders. With an increase in bidders, collusion strategies are more difficult to sustain. We will come back to this issue later.

introducing a pre-qualification stage⁵ for instance and/or by providing credible threats of exclusion during contract execution would indeed encourage firms to respect their reputational commitment to high non-contractible quality. As put by Compte, *et al.* (2005, p. 9), “*a common justification for [discretion over the selection process⁶] is that there may be quality concern over the way the contract will be handled, and that the bureaucrat may better assess the relative quality of each firm’s offer*”. In the same vein, one can add that allowing the public buyers certain discretion may prevent the adverse effects of the winner’s curse as it gives them the right not to select overoptimistic or apparent aggressive offers. More broadly, discretionary rules in procurement laws and guidelines can be motivated by the consideration that they allow the intervening auctioneer to clear up ambiguities. Several arguments in favour of discretion in public procurement auctions can therefore be found in the literature.

At the same time however, the literature on procurement also includes works revealing the adverse effects of discretion. First, if discretion is surely facilitates the enforcement of non-contractible quality standards as mentioned above, it is however likely to induce collusion. Using discretion to reduce the potential number of trading partners and/or hinder an unfaithful contractor indeed encourages and facilitates collusive behaviours between the selected suppliers. The choice of a level of discretionary power hence recalls a rather general trade-off between enforcement of non-contractible quality and collusion (Calzolari and Spagnolo 2006).⁷

Moreover, another important risk associated with the presence of discretion over the allocation process is corruption. As shown by Burget and Che (2004) for instance, the more an auctioneer is able and willing to manipulate his evaluation of contract proposals in exchange for bribes, the more corruption hinders the efficient allocation of resources. In other words, the inefficiency cost of corruption increases with the auctioneer’s discretionary power, whether corruption translates into favouritism as in Burget and Che (2004) or whether it results in making collusion sustainable as in Lambert-Mogilianski and Sonin (2006) or Compte *et al.* (2005). These authors indeed show that corruption, defined as self-interested abuse of discretion to extract rents, provides a mechanism to enforce collusion. Therefore, depending on the form of discretion (e.g. providing the opportunity to resubmit, not choosing the lowest-bidding firm, restricting the number of participants, etc), one might expect collusion and corruption to go hand in hand in public procurement instead of the classical trade-off between collusion and corruption.

One important thing to note is that the drawbacks associated with the discretionary power of public bodies might be reduced with fully transparent auction procedures and fully transparent *ex post* evaluations of the performance of private operators operating services. The discretionary power of public bodies could then be viewed as one instrument to prevent collusion, counterbalancing the transparency of the procedure aiming at preventing corruption. Transparency of the procedure and the discretionary power of public bodies might then be viewed as complementary instruments to organize competition for the field.⁸

⁵ Developments in multidimensional auction theory provide interesting insights to this issue (see Che 1993, Cripps and Ireland 1994, Branco 1997). In particular, Branco (1997) shows that, with bidders cost correlated, a two-stage bid evaluation system, where the quality is negotiated after the winner have been found, may secure high levels of non-contractible quality.

⁶ What the authors have in mind is a common form of discretion in which the bureaucrat is allowed to choose a firm even if its offer was not the lowest.

⁷ As will be discussed later, few quality-related aspects are non contractible in the urban transport public service.

⁸ The use of a transparent procedure in conjunction with high-powered public bodies might also be a way to generate credible regulation without any rigidity, thus resolving the rigidity/flexibility trade-off of regulation.

1.3. Degree of Competitiveness of the Environment

The objective of using auction procedures is to replace competition in the field by competition for the field. The intuition is that an increase in competition (*i.e.* in the number of bidders) should encourage more aggressive bidding, so that, in the limit, as the number of bidders increases, prices decrease toward efficiency prices (Holt 1979; MacAfee and MacMillan 1987). It is even argued that in public procurement auctions attracting additional entries might be more important “*since the informational demands for computing optimal mechanisms are substantial and the computation involved are complex, it is often worthwhile to devote resources to expanding the market than to collecting the information and making the calculations required to figure out the best mechanism*” (Bulow, Klemperer 1996, page 180).

The classical hypothesis according to which increasing competition yields lower prices, which only holds true for private value auctions (Hong, Shum 2002)⁹, also suggests that the degree of competitiveness of the environment affects the probability of collusion and corruption. It is indeed assumed, and theoretically founded, that the higher the number of bidders, the lower the risk of collusion (Porter, Zona 1993).

The theoretical effect of competition on corruption is nevertheless more ambiguous. Indeed, the conventional wisdom is that increased competition leads to lower corruption since it reduces rents. The presumption is that no bribes can occur in markets where perfect competition prevails, where there are no excess profits from which to pay the bribes. To put it differently, “*less competition means firms enjoy higher rents, so that bureaucrats with control rights over them [...] have higher incentives to engage in malfeasant behaviours*” (Ades, Di Tella 1999, page 982). However, on the other hand, less competition also means that it is more valuable for the public to avoid corruption and therefore that there is a greater incentive for a regulatory response (Bliss, Di Tella 1997, Laffont, N’Guessan 1999). Higher rents indeed imply that the public would be more apt to rewrite the bureaucrat’s contracts and spend resources trying to control them.

Thus, since the market structure affects the level of rents, it also determines the level of corruption but its effect appears to be theoretically ambiguous. Empirically however, most of the literature shows that policies aimed at making markets more competitive play a role in controlling corruption (Celentani, Ganunza 2002).

We have yet to find a way to structure competitive tendering for public services that would foster competition and prevent anti-competitive behaviours. Nevertheless, these three interdependent elements, namely, the transparency of the procedure, the discretionary power of the public bodies and the competition levels, are at the core of the story. In any case, a large number of competitors might be viewed as a *necessary condition* to organize competition for the field. As this *ex ante* level of competition is not exogenous and is linked to how the procedure is organized, we assume that a transparent procedure, coupled with the discretionary power of the public bodies, could be an efficient way to organize competition for the field and prevent collusion and corruption behaviours as much as possible.

The French and London bus tendering models illustrate this point.

2. The Bus Tendering Models of London and France – What are the differences?

The bus tendering models of London and France appear as two different ways of organizing competition for the field. If, in both models, the organization of the public service is the responsibility of the local governments and is not centrally planned, two different strategies are clearly reflected. Firstly,

⁹ See Compte 2004 for one exception.

London auctions take the multiple-unit auction format, while the French model is simply a single-object auction. Indeed, the Londonian network is unbundled and bidders can submit bids on any number of routes and routes packages, whereas in France only one operator operates each network so that bidders submit bids on an entire network. Secondly, the London organization is based on the existence of a regulator with a discretionary power counterbalanced by the fact that the selection process is transparent with an emphasis on the development of competition through the use of “small size” and “package” tendering processes. The French organization is instead based on a bilateral agreement, with no regulator, the discretionary power of the local governments, a low level of transparency and an emphasis on scale economies through the use of a “big size” tendering process. In this section, we present the two systems before reviewing their results in section 3.

2.1. *The London Model*

With 800 routes serving an area of 1,630 square kilometres and more than 3.5 million passengers a day, the bus network is an essential element for the support of the city’s economic and social activities. As a consequence, the operation of the London bus routes market, valued at 600 million Pounds per year, has deserved particular attention, especially since the reform of 1984.

2.1.1. *The 1984 Reform*

The regulatory framework, the contracting mode and the form of ownership within the London bus market have all evolved over the past 20 years as a consequence of the London Regional Transport Act of 1984. Prior to the reform launched by the Act, a publicly owned and subsidised company provided bus operations in London. London Transport (LT), which had no competition. In the mid 1980s however it was decided that, in London, the industry should remain regulated but that competitive forces should be introduced *via* a bus route tendering regime¹⁰ in order to increase efficiency and reduce financial assistance from public funds. Consequently, in 1985, LT created an operational subsidiary known as London Buses Limited (LBL), which was then split into 13 locally based subsidiaries. In the same year, LT also set up the Tendered Bus Division to begin the process of competitive tendering. This required LBL’s subsidiaries to compete against operators in the private sector for the opportunity to run individual bus routes. As a step towards the reform of the sector, LBL subsidiaries were privatised in 1994. The introduction of competition for the market and the involvement of the private sector have therefore been gradual. The first tenders took place in 1985 and until 1994 competition for the right to serve the market was between the public sector subsidiaries of LBL and an emerging group of private bus operators.¹¹ In the early stages the routes available for tender were very short, they were peripheral routes requiring few vehicles to operate so as to facilitate the entry of small independent operators (Glaister, Beesley 1991). Progressively, more and more routes became available for tender such that, by the end of 1995, half of the network had been tendered at least once¹² and, in the beginning of 2001, all the bus miles operated were supplied through tendered contracts.

2.1.2. *The Tendering Process and the Auction Format*

Since 1995, an invitation to tender is issued by the regulator (Transport for London – TfL-, the former LT) every two or three weeks so that about 20% of the London bus network is tendered each year. The invitation covers several routes, usually in the same area of London, and provides a detailed description of

¹⁰ The reform was more radical outside the greater London area since bus operations throughout Great Britain were entirely privatised and deregulated.

¹¹ National Bus Company operators, municipal operators and other private operators.

¹² Non-tendered routes remain operated by the subsidiaries of LBL under a negotiated block grant.

the service to be delivered (e.g. service frequency, vehicle type, network routes). The contract to operate each bus route is generally for five years, with possible two-year extensions (TfL 2006). The regulator then selects a set of prequalified bidders¹³ who are authorized to submit sealed bids for individual routes and/or for combinations of routes. Since most of the contracts are based on gross cost¹⁴, the bids must reflect an annual price for which the bidder accepts to provide the service. The criterion for selection of a winning bid is the “best economic value” meaning that the contract is awarded to the lowest price bidder but that other qualitative factors may also be considered. Thus, for instance, promises of extra off-peak or Sunday services or promises of new vehicles may be considered and lead to the selection of a bidder who is not the lowest.

The auction format adopted for the London bus routes market is a variant of a combinatorial first price auction. Indeed, bidders can submit bids on any number of routes and route packages. For instance, a bidder can submit a bid on a package without submitting a bid on the individual routes included in the package. However, bidders cannot bid more for a single package than the sum of the stand-alone bids of that package. The auction format therefore implies that bidders are committed by their route bids, meaning that stand-alone route bids implicitly define a package bid with a value equal to the sum of the route bids. This rule was motivated by the regulator’s wish to detect and exploit economies of scale and scope despite the fragmentation of the network. The auction system adopted in London is therefore an attempt to reach two contradictory objectives. On the one hand, the unbundling of the network is expected to encourage the participation of small bus operators, and consequently to foster competition. On the other hand, the possibility of bidding for packages of routes should make it possible to benefit from coordination synergies and economies of scale and scope.

2.1.3 *The Role of the Regulator*

The regulator (TfL) has a crucial role in this model. He ensures the proper execution of contracts and, since few routes are still operated by public companies, he collects data on many different contract service aspects (time schedule, driving quality, cleaning of the buses, etc.) and benchmarks private operators with their public competitor. Furthermore, the regulator has a strong discretionary power that takes several forms. The crucial ones are 1/bidders can be automatically disqualified if, should they win the bid, their market share is too high and 2/incumbent bidders are explicitly preferred. The fact that incumbent bidders are preferred sometimes leads the regulator, after reviewing the bids, to ask the incumbent for a second offer (if his offer is close to the winning bid) for him to win the bid. This is not unusual and is clearly stated by the regulator. Furthermore, for each tender, the regulator publicly presents all the bids and explains his final choice.¹⁵

2.2. *The French Model*

2.2.1. *A Decentralized Model*

Since 1982, responsibility for the organization and the management of urban public transport has been decentralised to the local authorities¹⁶ (LAs from now on). In other words, this means that there is no national regulator for this sector. The LAs therefore have the authority to define the characteristics of the

¹³ Pre-qualified operators are selected according to their financial and operational capacity.

¹⁴ That is to say that the operator receives a fixed fee for the service, the revenues from fares accruing to the regulator

¹⁵ All information is available, tender-by-tender, on the regulator’s Web site.

¹⁶ The local authority can be any municipality or association of municipalities. Various legal forms of associations coexist (see GART 2002 for more details on this institutional aspect).

service to be procured and choose the mode of organization of their urban public transport system. More precisely, they define the network route, schedules and fares as well as the amount of subsidies given to the sector. In each urban area, the urban public transport services are supplied by a single operator and for a given period of time. The LAs can nevertheless choose between several modes of organization for the procurement of these services. They may decide to operate the service directly, in which case the operator is a public administration. They may also choose to delegate the operation to a mixed company¹⁷ (“*société d’économie mixte*”) or a private one and they must then select a type of contractual arrangement from four main types which differ in their risk-sharing rules and hence in their payment schemes. In 98% of the cases¹⁸, the delegation contracts are operating franchise agreements, in which the franchisees do not own the equipment (depots, buses, etc...), invested in by the LAs. A complete description of the organisational setting and contractual schemes of the French UPT is provided in Roy and Yvrande-Billon (2007). In a nutshell, the range of contracts¹⁹ can basically be reduced to a trade-off between cost-plus contracts (also called management contracts), under which both production and revenue risks are borne by the local authority, and fixed-price contracts (either gross or net cost contracts), under which the operating firm supports at least part of the risks. About 70% of local operators are private and are owned by three large companies, two of them private and the third semi-public. These companies, with their respective type of ownership and market shares in terms of number of networks operated, are Keolis (private, 32%), Transdev (semi-public, 19%) and Veolia Transport²⁰ (private, 22%). In addition there is an association of small local firms, AGIR (private, 11%), and a few independent companies (private, 16%).²¹

2.2.2. *The 1993 Law Against Corruption*

Until 1993, the legal framework did not oblige local authorities to select their operator through a competitive tendering process. In other words, municipalities did not have to select their provider of public services by referring to objective criteria defined by law, as would be the case in a strict competitive tendering process that would require to choose the bidder proposing the lowest fee for a given level of quality. Of course, the usual practice established by the legal doctrine and the jurisprudence was to award provision contracts *via* negotiation with one operator and according to the *intuitu personae* principle – a principle that means that local authorities legally have the freedom to choose their operator on the basis of mutual trust. Moreover, at that time, contracts were granted to operators for five-year periods and were usually renewed by tacit agreement. Therefore, before 1993, the French model of organization of local public services was characterized by little competition for the field and the great discretionary power of the authorities.

However, following several corruption affairs, a new law (the ‘Sapin’ Act) was promulgated in 1993, introducing major changes in the institutional framework of the UPT sector. This Act, which aimed at preventing corruption and enhancing competition between operators, has made the use of competitive tendering for delegated management compulsory and has provided explicit and detailed rules governing the attribution process. Moreover, with this law, the automatic renewal of contracts no longer exists. However, the competitive tendering legislation has neither forbidden negotiation within the procedure, nor called into question the *intuitu personae* principle.

¹⁷ In this case, the majority of the capital stock (at least 51% and at most 82%) is under public control

¹⁸ The remaining 2% correspond to concessions, that is to say contractual arrangements under which the operator makes investments.

¹⁹ The average duration of contracts was 8 years in 2002 (CERTU 2003a)

²⁰ The former name of the company was Connex

²¹ Source : CERTU (2003a)

2.2.3. The French Auction Procedure

Since 1993, local public service providers are selected according to a three-step procedure (Institut de la Gestion Déléguée 1999; CERTU 2003b):

-Step one: Pre-qualification of Bidders. First, the public authority publishes a call for application in which the service to be procured is roughly described. It then draws up a list of candidates that may submit a bid. The selected candidates are those able to provide financial and professional²² guarantees.

-Step two: Bids. Second, the local authority provides the pre-qualified bidders with a consultative document which may contain a more or less detailed description of the technical characteristics of the service (routes, schedules, fleet, personnel...) ²³, some financial information (annual reports, balance sheets...), as well as indications concerning the pricing conditions and the type of contractual arrangement the local authority intends to adopt. On the basis of the information given in this document, the selected candidates make their bid.²⁴

-Step three: Negotiation and Selection of the Final Provider. The local authority then chooses one or several bidders with whom it enters into separate negotiations to determine the detailed contractual terms. At the end of the negotiations, the public authority chooses the final provider.

What is important to underline is that local authorities are now bound by the ‘Sapin’ Act to periodically launch an invitation to tender but are not bound to select the final set of bidders or the ultimate winner according to objective and precisely predefined criteria like the level of subsidies required by bidders. Local authorities are neither required to mention selection criteria in their consultative document, nor bound to rank them, if specified (Institut de la Gestion Déléguée 1999). Finally, in accordance with the *intuitu personae* principle, local authorities are not obliged to adopt the rule for selecting the lowest or even the best bid as in traditional auctions. The current French legislation still gives them the freedom to choose their utilities’ providers, considering that the assessment of the most suitable bidder is complex and cannot rest only on quantifiable criteria. Their selection criteria can therefore include subjective elements such as the reputation of the bidder or the confidence he inspires. This does not mean that the choice of the co-contractor can be totally discretionary and extraneous to the public interest. Legally, local authorities must to be able to justify their choice before unsuccessful bidders and their decision is controlled at the regional level. However, the justification of their choices is not made public for confidentiality reasons and, since the selection criteria, or the rules of the tendering game, are not precisely defined *ex ante*, the motives behind their choice are hardly verifiable *ex post*.

The second original feature of this attribution mechanism is that it combines two modes of selection that are usually considered as substitutes, namely competitive bidding and negotiation (Bulow, Klemperer 1996). The literature on procurement, in recent developments, views auction and negotiation as alternative ways to select a provider of goods or services, each one presenting its own advantages and limits (Manelli, Vincent 1995, Bajari, McMillan, Tadelis 2004). Thus, while competitive bidding is perceived to select the lowest bidder and prevent biased awarding of contracts, it may have some highly undesirable self-selection consequences and fail to respond optimally to *ex post* adaptation. On the contrary, negotiation may lead to

²² As reported by the CERTU (1997, 1998, 2003c), the most frequent cause of rejection of an application is the absence of experience in networks of comparable size.

²³ Local authorities have great latitude in the description of the services since the law does not define the level of details they must provide.

²⁴ But they can also decide not to participate. Indeed, those who are authorized to submit a bid are not bound to make one.

corruption and favouritism but it may allow local authorities and contractors to spend more time discussing the design of the contract and the characteristics of the service to deliver, therefore reducing the risk of *ex post* opportunistic haggling. Consequently, negotiation is advocated when the service is complex that is when *ex post* adaptations are expected, while competitive tendering is the recommended awarding mechanism for services that are simpler to describe (Bajari, McMillan, Tadelis 2003).

In fact, the two models might reveal good results concerning their capabilities for preventing collusion and corruption behaviours and fostering competition. The London process gives good incentives for bidders to enter into the game (*i.e.* increased competition) with safeguards implemented to prevent collusion (*i.e.* public benchmark; discretionary power of the regulator) and corruption (*i.e.* transparency of the process). The French model provides fewer incentives for bidders to enter into the game, at least for small size bidders but takes care of scale economies. Opacity of the bidding process and the size of the auctions might be considered as factors that helps prevent collusion behaviours by destabilizing such strategic behaviours (Albano *et al.*, 2006) but without any insurance concerning *ex ante* competition. It is thus hard to disqualify one model over the other *ex ante*.

Table 1. Auctions Procedures and Objectives of the Two Models

<i>Objectives</i>	<i>French Model</i>	<i>London Model</i>
Fostering Competition through the increase of the number of competitors	-	- Small size auctions - transparency of the process
Avoiding Collusion Behaviors	- Big size auctions - Opacity of the process - Discretionary power of the LAs	- Discretionary power of the regulator - Public benchmark
Avoiding Corruption Behaviors	-	- Transparency of process
Exploiting economies of scale and scope	- Big size auctions	- Combinatorial auctions

3. The London and French Bus Tendering Models – What are the Results?

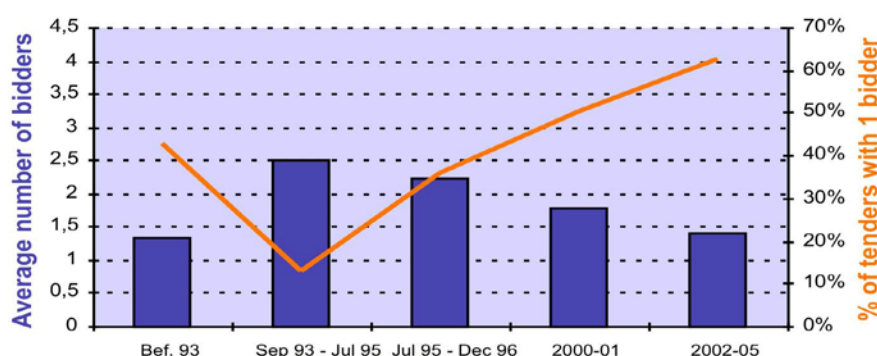
We saw that the London and French models are two candidates for organizing competition for the field, with their own rationality. In this section, our objective is to investigate the consequences of these two contrasting models.

3.1. Auction Procedures and the Number of Competitors

The first point to stress is that the level of competition should not be taken as granted. It is largely endogenous, depending on the rules of the game chosen to organize tenders. As we noted above, the London model is shaped to foster competition, at least to increase the number of competitors (*i.e.* to provide incentives for competitors to bid effectively). This is not the case in the French model.

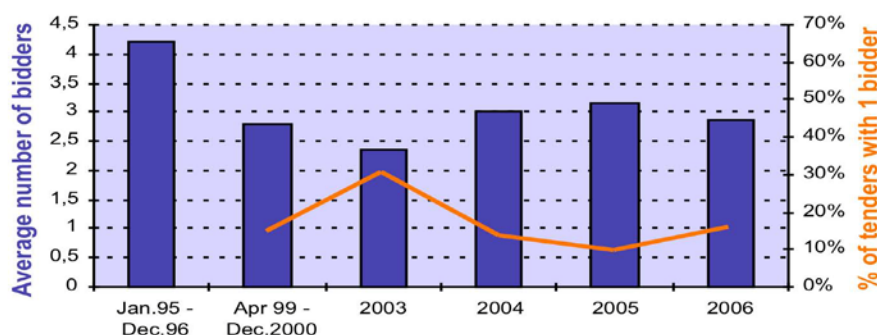
This results in two contrasting situations. On the one hand, few bidders and a decreasing number of bidders through time characterize the French case (Figure 1). On the other hand, the London case is characterized by a large number of potential bidders and effective bids (Figure 2).

Figure 1. Number of bidders in France



Source: GART 2005

Figure 2. Number of bidders in London



Source: 690 tenders from August 1999 to September 2006 / TfL.

One could argue that the low level of competition characterizing the French model is related to the fact that French local authorities organize larger-size auctions. This argument must be qualified since, as highlighted by tables 2 and 3, the average number of vehicle-kilometers per operator in London is higher than the average number of vehicle-kilometer supplied in French networks (this result holds even if we consider only French networks with more than 250,000 inhabitants). As an example, the number of scheduled vehicle-kilometer was 88 million for Arriva Group in 2005, whereas in Lyon (one of the biggest French UPT network), the operator supplied less than 47 million vehicle-kilometers in 2006.

Table 2. Statistics on the number of vehicle-kilometers (1,000) supplied in French UPT networks (year 2006)

Size of the network	Obs.	Mean	Std	Min.	Max.
Resident population > 250,000	22	15,643.41	9,571.97	6,038	46,649
100000 < resident population < 250,000	39	4,608	2,024.26	1,667	10,152
Resident population < 100,000	76	908.33	559.65	108	2,511
Total	137	4,327.74	6,537.20	108	46,649

Source: CERTU (2007)

Table 3. Number of scheduled bus-kilometers per operator in London (year 2005)

	<i>Total scheduled vehiclekilometres (1,000)</i>
<i>Arriva Group</i>	88,376
<i>Go Ahead Group</i>	81,121
<i>Stagecoach Group</i>	73,459
<i>First Group</i>	70,600
<i>Metroline</i>	62,606
<i>Trandev</i>	44,341
<i>National Express</i>	21,477
<i>Other Operators</i> ²⁵ (8)	20,795
<i>Average number of vehicle- kilometers per operator</i>	30,851.67

Source : London Assembly Transport Committee (2005)

Also, the competition intensity differential between the two models cannot be explained by the existing differences in investments responsibilities. Indeed, given that buses are mobile and that a well functioning second-hand market exists for such assets, investments are easily redeployable. Besides, the London model is, in fact, characterized by higher barriers to entry since, on the contrary to the French model, investments in rolling stock are made exclusively by private operators.

Consequently, one can reasonably argue that the main determinant of the *ex ante* degree of competition is neither the size of auctions nor the investments responsibilities, but rather the way local authorities combine transparency and discretion over the selection process. It is interesting to note that the promulgation of the ‘Sapin’ Act in March 1993 (*i.e.* the obligation for local authorities to organize tendering) had an immediate impact on the degree of *ex ante* competition since the number of bidders significantly increased after 1993. Such a law can be viewed as an increase in transparency procedures. However, this effect has progressively become blurred. Indeed, the number of networks receiving only one bid has increased since 1995 and consequently the average number of bidders has continuously decreased.

Furthermore, from a database provided by the CERTU (CERTU 2003a), we were able to evaluate the proportion of operators that were replaced between 1995 and 2002. The results of our estimations indicate that out of the 123 bidding procedures recorded over 7 years in a sample of 165 networks, 88% have led to the renewal of the incumbent, that is to say 12% have translated into a change of operator. This must be compared with London, where only 63,5% of incumbent contracts were renewed between 1999 and 2006.²⁶

These results must be interpreted carefully. Firstly, the decreasing average number of bidders and the high rate of incumbent renewals must be related to the extent of the networks and the resulting concentration of the market. The massive extension of the areas served by public transport (+40% of km² between 1991 and 2002 which corresponds to an increase of 7.5% in the population served (UTP 2002, 2003)) and a resulting increase in the volume of services supplied (+17% of vehicle-kilometres over the period), explains why the market has been concentrated over the period to be dominated by three large groups (CERTU 2000), and consequently why the potential for competition has been limited *de facto*.

²⁵ Blue Triangle Buses; HR Richmond; Docklands Minibuses; ECT Bus; Sullivan Bus & Coach; Central Parking System of UK; CT Plus; East Thames Buses.

²⁶ This concerns 115 renewed contracts.

Furthermore, the proportion of operators that have been replaced is likely to be a very imperfect indicator of the competitive pressure in the UPT sector. We can consider that the incumbents have renewed most of their contractual arrangements by proposing better bids than their competitors. Whereas it is reasonable to view a change of operator as the result of a better bid from a new winning entrant, it is simplistic to deduce from the absence of changes that the tendering procedures had no effects. As already suggested, the incumbents may have faced competitive pressures during the bidding procedure and reduced the level of subsidies they asked for compared to what they were receiving before, all else held constant. The results of the recent competitive tendering process in the city of Lyon are very illustrative of this argument. Indeed, to renew its contract, the incumbent, Keolis, facing fierce competition from a new entrant in the area, RATP Développement, at the negotiation stage, had to reduce its original bid by 300 millions Euros: his final bid was 1,542 millions Euros, compared to the 1,841 millions Euros proposed at the beginning of the attribution process (*Les Echos*, 7-8 janvier 2005). Unfortunately, since we do not have any information regarding the offers made by bidders, we are not able to verify whether there was a massive renewal among incumbents because their bids were better than those of their competitors.

However, given the low number of bidders and the increasing number of procedures with only one bidder, one can suspect that incumbents did not face fierce competition and therefore were probably not required to considerably reduce their offers.

3.2. Auction Procedures and Anti-competitive Behaviours

In addition to reducing competition, the French rules for organizing tenders also provide, indirectly, an adequate situation for collusion behaviours to be sustained. This is no longer an interrogation; the French model was not immune to such behaviour. A recent investigation by the French Competition Council (Conseil de la Concurrence 2005) revealed the existence of a cartel between the three leading operators, namely Keolis, Transdev and Connex, which have been imposed fines of 5% of their turnover in France (French Council of Competition, Decision n°05-D38, July 5th, 2005). The investigation, which focused on 122 market attribution procedures organized between 1996 and 1999, discloses that the three companies consulted each other in order to divide the market among them. The Competition Commission recorded that these companies coordinated their bidding policy and exchanged information concerning their strategies and the bids they had already made to be selected. Moreover, not only did the companies explicitly agree not to compete with each other, but they also controlled the attribution of at least 27 markets by threatening potential entrants that could disturb their anti-competitive game. Finally, the Commission has shown that, on several markets, the three companies agreed either not to participate in the bid or to withdraw before the final decision by the local authorities and that, when several ring members bid, only one was a serious bidder, the others submitting phony higher bids.

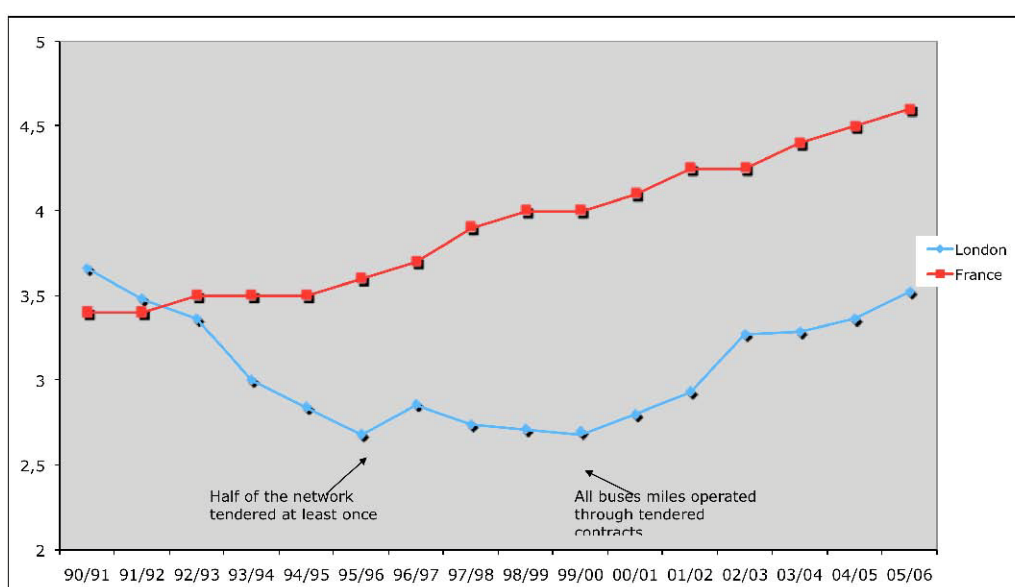
As concluded by the Commission, this anti-competitive game has certainly led companies to impose their price on local authorities who consequently have had to bear higher charges than those which would have resulted from a competitive functioning of the market. One can therefore reasonably assume that the small average number of bidders, the high rate of incumbent renewals and the absence of cost reductions are at least partly due to the existence of collusive practices.

3.3. Auction Procedures and Operating Costs

In parallel with the way competition for the field is organized in London and in France, it is interesting to see how cost has evolved over time, since the London reform (Figure 3). Figure 3 must be interpreted with caution. Indeed, as the available data do not allow us to control for the various determinants of cost levels (*e.g.* price and quality of inputs, networks' exogenous characteristics, service quality, etc.), we only intend to explain the evolution of costs. Nevertheless, this work proves to be fruitful.

It is indeed surprising to observe that, by the beginning of the 90's, operating costs were very similar in France and in London, but have then followed a very different trend, at least until 2001. Whereas the introduction of a tendering process in London has been followed by a decrease in operating costs until 2001, in France, it is striking to observe that the introduction of the "Sapin" Law has changed nothing with regard to costs. This may be due to the fact that, in London, the period 1990 and 2001 corresponds to the progressive replacement of the former public firms by private operators while in France, operators were already private before the promulgation of the Law. This difference might also explain why, since 2001, that is once nearly all the Londonian network was operated by private operators, costs have started to rise. In other words, the introduction of competitive tendering appears to be beneficial in terms of cost reductions if it is coupled with private operators' entry. If private operators are not new entrants in the bidding game, competitive tendering seems unlikely to lead to fierce competition for new market shares.

Figure 3. Bus operating cost per vehicle kilometre (euro at 2005 prices)²⁷



Sources: France: CERTU-GART-UTP yearly reports; London: Department for Transport, (2002 & 2006), "A bulletin of public transport statistics GB".

3.4. Contractual Design and Quality

The evolution of contractual design is another important aspect to explain the trend of costs, in particular the cost increase in London since 2001. The number of bidders, the rate of incumbent renewals, the power of the public bodies require keeping in mind that operators are not only disciplined by market forces but also by contractual agreements. In other words, competitive tendering is not the only device to incite operators to be efficient; contractual schemes as well as the distribution of property rights may constitute a complementary tool. What is then interesting to note is that, since the 1970's, there has been a tremendous change in the type of contracts chosen by French local authorities to govern their relationship with external contractors. More precisely, as illustrated in Table 4, for three decades, the proportion of local operators regulated by cost-plus (*i.e.* management) contracts have drastically decreased, local authorities preferring to turn to more high-powered incentives contracts (*i.e.* fixed-price contracts).

²⁷ The operating costs do not include operators' profit margins.

Table 4. Evolution of the proportion of local authorities using management contracts

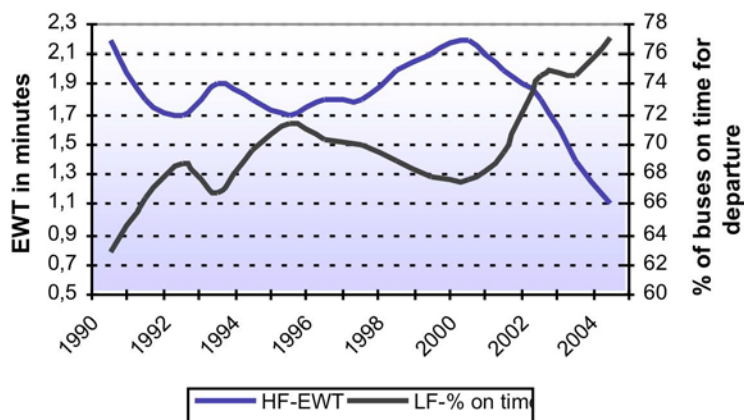
Decade	1970's	1980's	1990's
Average proportion of management contracts	100%	60%	25%

Sources: CERTU (2003a), GART (2002)

Several empirical studies dealing with the performance impact of contractual choices in utilities have demonstrated that high-powered incentive regulatory schemes (e.g. fixed-price contracts) lead to higher cost efficiency than cost-plus contracts (see for instance Kersten 1999, Gagnepain 1998, Gagnepain, Ivaldi 2002, Perrigne 2002, Piacenza 2006).

In London, the initial contracts were net cost contracts. But, since 2001, quality incentive contracts have been introduced and will be generalized progressively. These contracts are mainly gross cost contracts with bonuses and penalties depending on the observed quality. Furthermore, such contracts specify that there will be an extension to the contract duration (from 5 to 7 years) if quality indicators are good. This might explain the increase in the operating costs observed since 2001 in London. In 2006, 635 quality incentive contracts have already been awarded. Only 93 previous gross cost contracts remain and will soon be replaced. Such contracts show that, for the most part, quality is contractible in urban public transport. Furthermore, quality indeed increased in London since their introduction (See figure 4).

Figure 4. Excess Waiting Time (EWT) on High Frequency (HF) routes and % of on-time departures for Low Frequency (LF) routes²⁸



Source : London Travel Report 2005

4. Conclusion

In this paper we investigated two alternative models for organizing local public services, namely the French and the London model of urban public transport. We highlighted the main differences between the two models in relation to their propensity to foster competition and prevent anti-competitive behaviours (*i.e.* collusion and corruption). Few competitors, with increasing costs and collusive behaviours

²⁸ There is no precise schedule for buses on High Frequency but there are a number of buses per hour. There is a precise schedule on Low Frequency routes.

characterize the French model while the London model, as far as we have seen, exhibits better results, by using the transparency of auction procedures and the discretionary power of the regulator as two complementary instruments to foster competition and prevent anti-competitive behaviours. This way of organizing competition for the field in local public services could be useful for practitioners as well as theoreticians to uncover an efficient way to organize such public services.

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A NEW APPROACH TO TAXI LICENCE REFORM - THE VICTORIAN TAXI INDUSTRY INQUIRY PROPOSAL

Paper by Allan Fels¹ and Warwick Davis²

1. Summary

The State Government of Victoria, Australia launched an independent review of its taxi and other small passenger vehicle services in May 2011. The genesis of the review was strong and consistent feedback from customers of poor service – commonly in the form of mediocre driver standards, a lack of availability at peak times and low reliability.

An exhaustive 18 month inquiry followed, which touched on all aspects of taxi market structure, conduct and performance. The Inquiry engaged deeply with industry, experts and users to understand the causes of the industry's problems and to develop long-lasting solutions.³

The Inquiry found that there is no simple panacea to produce a better taxi service in Victoria. The Inquiry's proposed package of reforms addresses the causes of poor performance, and offers consumers some immediate benefits while taking a longer-term view about the reform process. The proposed reforms take account of the various interests, including those of taxi licence owners, taxi operators and drivers, while maintaining a strong focus on increasing competition and improving service and accountability.

A key question for the Inquiry was to what extent the problems in the industry were linked to the restrictive taxi licensing regime that has existed in Victoria since the Great Depression of the 1930s. Since that time, the government has restricted the number of licences on issue.

The Inquiry's analysis found that, while not the only cause of poor performance, restrictive licensing and poor performance were indeed linked. A key reason is that licence scarcity means that much of the economic value created by the industry is simply being extracted by owners of perpetual licences – the great majority of whom no longer operate taxis. Improvements to efficiency or service that are widely available are reflected in an increase in licence rental fees and therefore licence values. So when, for example, there is an improvement in efficiency or service such as a fall in the cost of fuel, this most often triggers a rise in licence rental fees and licence values. The licence rental fees, which account for some 20 per cent of the fare, are then recovered from consumers. This system acts not only against consumer interests, but also offers no benefit to taxi operators or drivers.

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³ The draft and final reports, together with a number of technical papers, are available on the Inquiry's website, www.taxiindustryinquiry.vic.gov.au

The Inquiry considered a number of options to lessen the impact of licensing restrictions on industry performance. This included full “open entry”; that is allowing any qualifying person to obtain a licence at no charge or the administrative cost. For various reasons discussed in this paper, the Inquiry’s proposal was not open entry, but that any qualified person can obtain a licence at a price of \$20,000⁴ per year. This would remove the quantitative restriction on the number of licences. Further, this price would be fixed; that is, not indexed to inflation; and so would decline in real terms over time.

At the commencement of the Inquiry, perpetual taxi licences in Melbourne had a market value of over \$500,000.⁵ The owner of the licence could ‘assign’ or lease that licence for around \$30,000 per year, and around 80 per cent of licences were assigned. The impact of the licensing proposal will be to cap the assignment price to no more than \$20,000 per year, as any tendency for the price to rise will be met by an increase in demand for the new licences. In areas outside of Melbourne, the same broad policy was proposed, but at lower prices reflecting the lower licence prices in these areas.

This proposal has some important benefits compared to standard approaches to licensing reform. It does not entirely devalue taxi licences, yet sets a path for them to become of diminishing importance to service delivery in the medium-to-longer term. It avoids the need for governments to actively determine how many new taxi licences need to be issued to keep up with demand, and avoids the need for governments to be involved in setting licence prices, provided the price is fixed (with no indexation). It encourages more entry by current operators and drivers, while for those who fear ‘excessive entry’, the price of \$20,000 a year should act as a deterrent. It reduces the pressure for fare increases, and ensures that governments – and therefore taxpayers – can appropriate the benefits of licence scarcity rather than existing taxi licence owners.

The Inquiry concluded that relaxing entry controls is by itself not a panacea for delivering efficient and competitive taxi markets. An additional focus on the price, quality of service and safety post-liberalisation is required. In some instances, the Inquiry recommended tighter regulation to improve performance. Licensing reform was therefore just one part of a complete package of reforms designed to re-shape the industry towards one that is more competitive and accountable to consumers for the services it provides. Nonetheless, the Victorian proposal on licensing is an important contribution to the policy debate on taxi licensing, providing a path forward for taxi regulatory reform that is more moderate and flexible than the usual alternatives considered.

2. The Victorian Taxi Industry Inquiry

On 28 March 2011, the Victorian Government established an independent inquiry into the Victorian taxi and hire car industry. Announcing the inquiry, the Victorian Premier, Ted Baillieu, identified a number of problems with the industry and stated:

*It is obvious that the current industry structure and regulation has failed. It has entrenched a lack of accountability for on-the-ground taxi services by the major industry participants.*⁶

The Premier nominated key tasks for the inquiry, including: improving low levels of public confidence, providing better security and support services for drivers and safety for customers, and

⁴ This is the price for the Melbourne taxi zone, which currently accounts for around 80 per cent of total licences in Victoria and around 70 percent of Victoria’s population of 5.6 million people.

⁵ At current exchange rates \$1AUD = \$1.03USD.

⁶ Office of the Premier of Victoria, Media Release, ‘Taxi services reform to commence with industry inquiry’, March 2011.

ensuring drivers were properly trained and knowledgeable. The Premier indicated that he expected the inquiry to address 'long-standing and deep-rooted' issues and to recommend 'sweeping reforms' to the industry.

In this paper, we describe the issues giving rise to the Inquiry, provide some details of the taxi industry in Victoria and its regulation, before analysing the proposed licensing reforms.

3. Issues leading to the Inquiry

The primary source of the concern about the industry's performance was the quality and safety of taxi services. The Inquiry was not directed specifically to address taxi and hire car licensing, although there was also some recognition that structural problems in the industry, including overly-intrusive and anti-competitive regulations, were contributing to the performance concerns.

Introducing the legislation to establish the Taxi Services Commission in June 2011, the Minister for Public Transport, Terry Mulder MP observed:

Victorians are fed up with the never-ending problems in the taxi industry and the appalling reduction in levels of service over recent years ... While many taxi operators and drivers do a good job, the problems driving customer dissatisfaction are clear: the long queues for a taxi in the Melbourne CBD and other entertainment districts on a Friday or Saturday night, drivers who do not know where to go, taxis that do not turn up, drivers who will not accept a short fare, violent incidents and unsafe behaviour.

Victorians are embarrassed when a dirty taxi or a poorly trained driver gives international visitors an unfavourable first impression of Melbourne. They are angry when they hear that taxi licences cost up to half a million dollars while taxi drivers are earning less than the minimum wage.⁷

These concerns were supported by empirical data on customer satisfaction and complaints.

In May 2011, the commencement of the inquiry was accompanied by media reports of the Victorian Department of Transport Customer Satisfaction Monitor recording the lowest levels of satisfaction with taxi services since the survey began in 2005. Key problems identified in the Monitor included difficulties in obtaining taxis off the street and at ranks, a lack of information about taxis and poor passenger experiences.

There was a significant increase in formal passenger complaints about taxi services lodged with the industry regulator, the Victorian Taxi Directorate, in recent years, with the number of complaints trebling between 2004 and 2010.⁸

This evidence was also anecdotally supported by longstanding concerns about the performance of taxi services raised through formal and informal channels by taxi users, business and tourism groups, community organisations and local councils, as well as by many industry participants.

While there was clearly a strong focus in the Inquiry on the performance on the industry in Melbourne (where more than 80 per cent of licensed Victorian taxis operate), service problems were also evident in areas outside of Melbourne.

⁷ Parliament of Victoria, Legislative Assembly, 2 June 2011.

⁸ See chapter 5 of the Inquiry's draft report.

These markets outside of Melbourne have a number of distinguishing features. These include smaller market sizes, less developed public transport networks, proportionately higher demand by elderly customers, high rates of pre-booked services compared to rank and hail work, higher market concentration of networks and a model of operation dominated by owner-drivers.

The major issues facing country and regional markets included the poor availability of services in some locations, the dominance of local networks (and high network charges), the cost burden imposed by the current regulatory framework and the lack of potential for competition due to licensing restrictions. The inquiry found that country and regional markets had experienced only modest growth in supply of taxi services, with a number of constraints preventing the growth of businesses, service innovation and competition.

4. The work of the Inquiry

Commencing in May 2011, the Inquiry's investigation included a comprehensive community engagement strategy to ensure that as many Victorians as possible had an opportunity to contribute their views on the future of taxi and hire car services. The strategy included seeking formal submissions from the Victorian community, distributing customer and industry surveys, conducting visits and consultations across the State, and hosting specialised forums for taxi drivers, hire car operators and mobility disadvantaged taxi users.

The inquiry conducted and commissioned research into the Victorian taxi and hire car industry and into the operation and reform of the industry in other places around the world. The inquiry also collected and analysed an unprecedented amount of data about the industry and undertook detailed modelling using this data.

The Inquiry issued a detailed draft report in May 2012. As well as the draft report, the inquiry released a major background paper, several issues papers and a number of technical reports.⁹ Active social media platforms were maintained for the duration of the inquiry.

In the first phase of its work, the inquiry received almost 400 submissions from the Victorian public. Following the release of the draft report in May 2012, the inquiry received a further 1,370 submissions, mostly from individuals.

The Inquiry supplied its final report to the Victorian Government in September 2012, and it was publicly tabled in the Parliament of Victoria in December 2012. The Government is currently considering its response to the Inquiry, and this is expected in the near future.

The broad approach adopted by the Inquiry was to start with the public concern about the quality of service and to analyse its causes and cures, rather than to start with the traditional concerns of economists about the licensing restrictions and their effects on supply. This approach, heavily promoted through the media, built public support for the reform package, despite public and behind-the-scenes opposition from taxi networks, licence holders and some operators (but few drivers).

⁹ These are available at www.taxiindustryinquiry.vic.gov.au

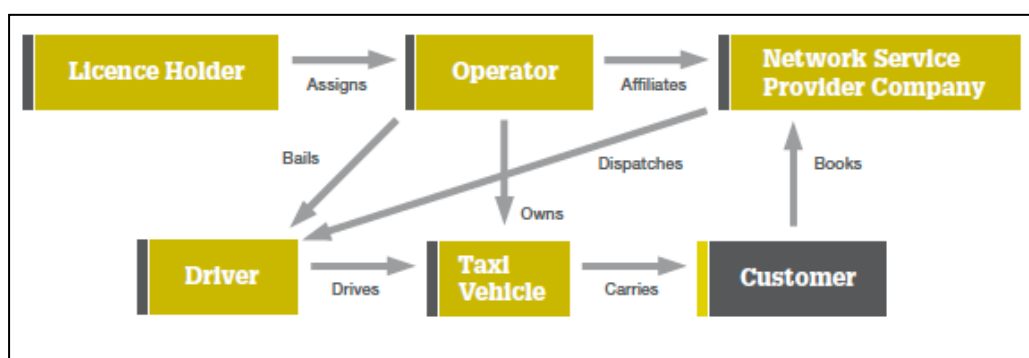
5. Features of the Victorian Taxi industry and its regulation

5.1 A brief overview of the industry

Taxi and hire car services in Victoria are delivered through an intricate web of legal, commercial and economic arrangements involving taxi and hire car licence holders, taxi operators, drivers, taxi booking networks, payment system providers and many others.

Some of these key relationships are summarised in Figure 2.

Figure 1: Key participants in the taxi industry



- *Taxi licence holders:* Victoria's 3,500 taxi licence holders have acquired their licences either by purchasing them from another licence holder ('perpetual licences') or by purchasing a licence from the Victorian Government. The majority of taxi licence holders are not required to operate the licensed taxi themselves: they can 'assign' the right to operate a vehicle under the licence to a taxi operator, and around 80 per cent of licences in Melbourne are assigned.
- *Taxi Operators:* An individual, incorporated body or association, or a partnership that operates one or more taxis, is known as an operator. Some operators own the taxi licence, while others have been assigned the right to operate a vehicle under a licence by a licence holder. Taxis may be driven by the operator themselves or 'bailed' (rented) to drivers.
- *Network service providers (or booking networks):* Under current regulations, each taxi must be affiliated by its operator to a taxi booking company or depot, known as a NSP, for receipt and dispatch of bookings and to connect to an emergency alarm system. NSPs' key public role is the taking of bookings and the dispatch of bookings to drivers. A series of mergers and acquisitions has resulted in the majority of control of the NSP industry in Melbourne vesting with two major networks. In other zones, local monopolies are common.
- *Drivers:* Drivers provide the face-to-face transport service to customers. There are approximately 15,000 active taxi drivers in Victoria, of which more than 12,000 work in the Melbourne metropolitan area. Most taxi drivers 'bail' a taxi from an operator, generally negotiating a revenue split of the total fares taken during their shift (historically, this has been 50:50). Typically, bailee drivers are responsible for their own holiday and sick pay, superannuation and for paying GST and income tax to the Australian Taxation Office. Some operators and licence holders also drive their own taxis, but these are a minority of taxi drivers

These services operate within a complex regulatory framework that has both shaped the industry and evolved in response to the development and expansion of the industry over time.

Taxi and hire car services are a small but important part of transport services in Victoria, representing approximately seven per cent of total public transport patronage in metropolitan Melbourne and about 32-35 million trips in Victoria annually. They provide flexible, 'point-to-point' transport that gives people a level of mobility not offered by other services such as trains, trams and buses. They are critical to the business, social and recreational lives of Victorians and make an important contribution to Victoria's liveability.

Taxis and hire cars play a critical role in Victoria's tourist industry, giving visitors their first and last impressions of our state and having a major impact on the long term 'brand' of Melbourne and Victoria. The industry also makes a substantial economic contribution to Victoria, generating annual revenue of between \$700 and \$800 million.

5.2 Regulation and its reform

Many elements and features of the current regulatory regime for taxis and hire cars in Victoria extend back more than a century, contributing to a regulatory environment that is complex, piecemeal and outdated.

While some reforms have been undertaken, the industry's basic operating model has not changed significantly since the 1980s and some structural and operational aspects remain unchanged since the 1920s and 1930s.

The core elements of current regulation include:

- Restrictive licensing of taxis, including zoning of taxis to licence areas and licensing of 'taxi-like' vehicles which might otherwise substitute for taxi services.¹⁰
- Requirements for taxis to be connected with a radio booking network, which dispatches bookings to drivers.
- Regulation of fares able to be charged by taxis. Fares are fixed, not maximums.
- Regulation directed at ensuring vehicle and driver safety.
- Regulation directed at maintaining vehicle and driver quality.

Since the 1980s, a number of inquiries and reviews have recommended major reform of the taxi industry designed to improve its performance, including removing restrictions on licence numbers. Recommendations proposing less restrictive licensing arrangements have largely been ignored.

Reforms undertaken by successive Victorian governments in the last 20 years have resulted in some improvements to the performance of the taxi industry and lifted standards in some areas, most notably safety. But the failure to deliver fundamental regulation and structural reform of the industry has left many longstanding problems unaddressed. Moreover, a climate has been created in which it is believed that the industry interest will be put ahead of the public interest. The delay in reform has been associated with a rise in licence values, making serious reform harder. Finally, for these and other reasons, significant restrictions on competition other than just licensing have grown with the result that a pro-competitive

¹⁰ Some Australian jurisdictions (not Victoria) have adopted formula-based approaches for issuing licences. These methods link numbers of licences to population size and growth or waiting times and similar performance criteria.

reform packages requires a lot more than licensing reform – a theme pursued in detail in the Inquiry’s reports.

5.3 *Identifying the causes of poor industry performance*

As indicated earlier, the Inquiry found unsatisfactory service outcomes for metropolitan Melbourne taxi users, most notably:

- Drivers lacking knowledge, experience and a customer service orientation
- Shortages of taxis at peak times and in some locations
- Unreliable taxi booking services from networks
- Unsatisfactory provision of services for taxi users with a disability.
- Fares that offered poor ‘value for money’
- Little innovation to better serve changing customer needs

The Inquiry then identified structural and other features that contribute to these poor service outcomes.¹¹ The main features included:

- Restrictive taxi and hire car licensing, which kept prices higher than necessary, restricted demand at peak times, limited innovation and created a significant regulatory burden. As well as limiting entry of taxis, taxi and hire car licence conditions have the effect of restricting competition between taxis and hire cars (and between taxis and hire cars and other forms of transport). Regulation of hire car vehicle standards restricts entry of hire cars, and also restricts competition between hire cars and taxis.
- A highly concentrated market for booking network services, and regulations forcing all operators to connect to booking networks, which have allowed these networks to collect affiliation fees with little incentive to provide good service to taxi operators.
- Fare controls, which reduce competition between taxi operators, stifle innovation by service providers that could potentially allow different kinds of services (whether lower or higher quality) with a different fare structure (such as fares that do not vary with time or distance travelled). Further, the regulated fare structure appeared to be creating distortions in how drivers treated fares of different types. For example, the current fare structure favours longer trips over shorter trips. This contributes to service refusals, and also to inefficient vehicle utilisation – manifested in long queues of empty taxis at Melbourne airport.
- Misdirected, and often excessively burdensome, regulation of service safety and quality which contributes to the problems confronting the industry.
- Poor driver remuneration and other conditions, which were a function of ‘bailment’ arrangements that severely curtailed the industry’s ability to improve the pay, service performance and conditions of drivers in any substantial way. Hourly earnings are about half the minimum Australian wage.

¹¹ These features were addressed in detail in Section D of the Inquiry’s draft report.

The Inquiry's proposed package of reforms aimed to fix these core problems.

5.4 *The package of reforms*

The Inquiry's reform package pursued three core aims:

- Increasing and improving the supply of taxis and hire cars.
- Restoring consumer trust in the taxi industry.
- Boosting demand and competition in taxi and hire car services.

Licensing reform, though critically important, was far from the end of the reforms proposed by the Inquiry. The Inquiry recognised that relaxing entry controls is by itself not a panacea for delivering efficient and competitive markets. Other complementary pro-competitive reforms are required, as is a clear focus on regulation of prices and quality of service.

The inquiry's key reforms are summarised below. A full list of the final 139 recommendations is available in the Inquiry's final report.

5.5 *Increasing and improving supply*

These reforms aim to remove restrictions on the number of taxis and hire cars on the road, encourage greater competition and innovation in the market for pre-booked services and open up more opportunities for entry into the taxi and hire car markets.

Key reforms proposed were:

- New taxi licences would be available at a price, and not restricted in number. Licences would be available at any time to approved applicants at a fixed annual price that would not be indexed.
- Hire car licences would be available at a reduced one-off price of \$40,000 (unindexed), and the luxury car requirement lifted.
- Rationalising existing taxi zones from over 100 to four, and aligning these with hire car zones.
- Promoting a wider range of vehicles able to be used as taxis and hire cars by lifting the existing restrictions on the type of vehicles that can be used, and introducing a limited subsidy to encourage the uptake of purpose-built taxi vehicles.
- Removing the requirement for taxi operators to affiliate with a network, and replacing this requirement with outcomes-based safety regulations on operators.
- Minimising the entry and approval requirements for networks, to lower barriers to entry to new networks including those using new forms of technology.

5.6 *Restoring consumer trust in the industry*

These reforms focused on lifting driver quality and service standards through better training, testing and remuneration of taxi drivers. Taxi operators and booking networks will be made more responsible for

the services they and their members provide; information about service performance will be readily available to consumers; and there will be clear avenues to resolve complaints.

Key reforms proposed were:

- A package of measures to improve the industry's ability to attract and retain good, experienced drivers – including more stringent entry requirements, an independent Knowledge exam for drivers in the Melbourne and Urban zones and replacing unfair bailment arrangements with a mandatory Driver Agreement that provides for a 55/45 split of the fare box (up from 50/50).
- A shift to outcomes-focused regulation that places greater responsibility on the industry for performance, while removing duplication and giving networks and operators greater flexibility in meeting prescribed outcomes.
- New licence holders will not be able to assign the rights of any new licences they purchase that are issued directly from the Government, and therefore they will be responsible for meeting the service standards applicable to their vehicles and the drivers they engage.
- A suite of reforms to significantly improve the accessibility of taxi services, including a new centralised booking service for wheelchair-accessible taxis.
- Recommendations to build a much more effective industry regulator with good governance arrangements, appropriate resourcing and sound monitoring and enforcement practices.

5.7 *Boosting demand and competition*

These reforms focused on increasing fare competition, a better fare structure, and allowing taxi operators to develop new and more flexible services, provide more personalised services and complement public and community transport services. These opportunities will also provide the potential to raise industry revenue and operator income. These reforms were proposed in the context of a demand study which showed that at current price and service levels, a one percent rise in price would lead to a one percent fall in demand.¹²

Key reforms proposed were:

- The replacement of fare regulation with fare notification and publication in country areas.
- A two-stage process to move from fare regulation to fare competition in Melbourne, with fares changing from being prescribed fixed amounts to maximum fares in the short term.
- The removal of impediments to the introduction of group hire services, such as taxi shuttles and share rides with flat fees.
- A major fare restructure, including an increase in the flagfall and a reduction in the price per kilometre in the Metropolitan zone (to address short fare refusals).

¹² The Hensher Group, *Demand for Taxi and Hire Car Services in Melbourne, Victoria*, April 2012. Available at: http://www.taxiindustryinquiry.vic.gov.au/_data/assets/pdf_file/0008/67652/DemandForTaxiAndHireCarServices-HensherGroup-PDF.pdf

6. The Inquiry's approach to licensing reform

6.1 *The case for licensing reform*

The Inquiry's analysis identified that restrictive taxi licensing was a major barrier to better industry performance, and that serious and long-lasting reform would be impossible without it.

There are four major reasons why restrictive licensing harms the interest of consumers¹³:

- Restricting the number of vehicles restricts availability and lengthens waiting times, which is particularly significant at times of peak demand.
- The restrictions allow licence owners to earn economic rent reflecting the licence scarcity. These rents must be recovered from taxi users as higher fares. In Melbourne, these rents of \$30,000 per year make up some 20 percent of the average taxi revenue of \$150,000.¹⁴ There is a flow-on effect from these economic rents. This is that there is little room left in the fare to pay drivers adequately or to improve the quality of cars to make service improvements. This is especially pertinent given the demand elasticity referred to in paragraph 0.
- By raising the cost of market entry, restrictions prevent service innovation and in particular the servicing of market niches.
- Restrictions impose a significant regulatory burden on the government which faces ongoing pressure to not release more licences.

There are also other detriments from restrictions which may be significant. Inevitably, the restrictions make it more difficult for a wider range of people, including drivers, to operate their own businesses. Further detriments result from related regulations that are, to some extent, a function of the restricted licensing regime. This includes taxi zoning regulations and restrictions on the operation of hire cars.

The inquiry considered that the possible benefits from entry controls but found each of the purported reasons to be unconvincing. There is no specific 'market failure' that is addressed by entry controls that could not be more directly addressed using other regulatory controls that are less restrictive (an example is safety regulations).

The Inquiry therefore found that quantitative restrictions to the entry of suitably qualified persons or organisations to the taxi and hire car industry should be removed, and that in principle there was a case that entry should be 'free' or at administrative costs only.

The Inquiry pointed out that these findings were consistent with findings of reviews in other jurisdictions, and noted that a number of OECD countries had removed or loosened supply restrictions on taxis. The results of these reforms overall have been positive, with reduced waiting times, increased consumer satisfaction and, in some cases, falling prices being observed.¹⁵

¹³ These reasons are analysed in detail in Chapter 10 of the Inquiry's draft report.

¹⁴ This occurs even though fares are regulated.

¹⁵ OECD, *Taxi services: Competition and regulation*, [DAF/COMP\(2007\)42](#), 2007, p.8. See also Chapter 9 of the Inquiry's draft report.

6.2 *Developing a workable licensing reform option*

Even though existing regulations on entry of new taxis may not be justified, an immediate move to a full open market would undermine market values of existing licences, and essentially drive these to zero. With current values for perpetual licences around \$500,000 in Melbourne and over \$300,000 in many areas outside of Melbourne, this would impose severe losses on licence holders. Some of these licence holders will not have obtained excessive returns on their licences in the past, having acquired them well after restrictive licensing was first introduced.¹⁶ The Inquiry was unwilling to recommend a full open market without some measures to offset the losses licence holders would suffer.

The Inquiry considered many different licensing reform proposals. The reform models considered have some similar features. They usually imply some loss to licence owners to benefit consumer interests, through lower fares or greater availability of taxis. They differ in the following key respects:

- the speed at which benefits are delivered to consumers
- the size of compensation afforded to licence owners
- the affordability of the proposal to government

The other options that were considered – and ultimately rejected – by the Inquiry are now discussed.

6.3 *Full licence buy back*

One alternative was simply to recommend that the Government buy back all of the existing licences at the market price ('full buy back'), and then issue new licences at no charge. Even aside from Government budgetary limitations, the Inquiry considered that full buy-back approaches are very difficult to justify on a number of grounds. One issue is that the returns or yield on the market value of licences is relatively high because it factors in risk, including the risk that changes in licensing or other kinds of regulation (such as changes to fares) will reduce licence returns. By paying out the full licence value, the Government would effectively be fully compensating all licence owners for the risk that has been priced in to the price – akin to paying out all bets on a horse race before the race has been run.

6.4 *A partial licence buyback and re-issue scheme*

This approach would be similar to the full buy-back scheme, but only offer licence holders partial compensation. All licences would be cancelled and existing licence owners would be offered something less than market value as compensation. New licences would be issued at a price that funds the compensation.

Partial buyback schemes have more appeal than full buy out schemes. First, it implies a lower cost of reform to consumers and/or government.¹⁷ Secondly, it can provide immediate consumer benefits by getting 'more taxis on the road'.

¹⁶ In the economic literature, this problem has been referred to as the 'transitional gains trap'. Gordon Tullock, "The Transitional Gains Trap", *The Bell Journal of Economics* Vol. 6, No. 2, Autumn, 1975, pp. 671-678.

¹⁷ An example of such a scheme is proposed in Rex Deighton-Smith, *Reforming the Taxi Industry in Australia*, National Competition Council Staff Discussion Paper, November 2000.

The difficulties with implementing this approach are non-trivial. First, defining the dollar amount and scope of the buyback is difficult and involves judgements that are somewhat arbitrary and inequitable between different groups of licence holders.¹⁸ Second, the size of the consumer benefit is ultimately dependent upon the new licence price that is set. A new licence price that would induce substantial new entry would not provide a significant level of compensation for licence holders. Thirdly, cancelling all existing licences would create a considerable degree of industry disruption. A final issue was that it was not obvious how the approach, on its own, of getting more taxis on the road in the short term would do anything to address the key problem of driver quality.

6.5 Issuing free licences or shares of licences to existing licence owners

Under this approach, owners of valuable licences would receive a further licence or part-licence to essentially offset the fall in capital value of their licence. Issuing new licences (or partial licences) with proceeds to go to existing licence owners was also considered and modelled by the inquiry. The biggest difficulty with these approaches is that their effect on licence values (and actual compensation) is very difficult to predict. The Inquiry's modelling suggested that these approaches could lead to very steep reductions in licence value and significant falls in vehicle productivity. For example, issuing all existing owners of valuable Melbourne licences with another licence (around 2,500 licences) would reduce the value of licences to close to zero. Unless this approach was accompanied by significant fare reductions, 'excessive entry' is plausible. Nor would this kind of approach offer the potential for drivers to receive more, or provide a long term path to fewer entry restrictions.

6.6 Selling a set percentage of new licences each year until no more are demanded

Another alternative is to release a set percentage of licences, say 5 or 10 percent per year, with sale proceeds to go to existing licence owners. The Australian Industry Commission recommended this approach in its 1994 report on Urban Transport.¹⁹ This approach does provide a path to a less restrictive market. However, as with the approach of offering new licences to existing licence holders, it is very difficult to predict what level of compensation this will offer existing licence holders. Experience also suggests that the industry, after a year or two of such liberalisation, would be successful in blocking further releases on that scale.²⁰

6.7 Releasing licences at administrative cost after an extended period

This approach would allow for some compensation based on the earning potential of the restricted licences until the deregulation occurs. Although in principle providing for a staged entry process in the future (such as deregulating fully in 10 years' time) is appealing because it offers greater certainty, it would be essentially impossible for a government to commit to and implement. Once again there are problems concerning the practical durability of this approach to reform.

¹⁸ For example, approaches that set payments on the basis of historical purchase price can help to ensure that overall returns on licences are 'reasonable', but do not take account of individual circumstances (for example, if an owner is heavily dependent on the income derived from the licence).

¹⁹ Industry Commission, *Urban Transport*, Commonwealth of Australia, Melbourne, 1994.

²⁰ This is consistent with the reforms proposed in the 1980s in Victoria (the Foletta report) and in the 2000s under Victoria's response to National Competition Policy reforms. In both cases, significant and ongoing releases of licences were recommended, and which were later curtailed. See Chapter 6 of the Inquiry's draft report for a detailed analysis of past reform efforts.

6.8 *Releasing new licences based on demand assessments and other key performance indicators*

This method was preferred by industry in their submissions to the Inquiry, and is in use in other Australian and international jurisdictions in various forms. The essence of the approach is that new licences are issued in response to changes in market conditions that would support more licences, for example, growth in population or income. The perceived benefits of this approach are that it would remove the political pressures associated with issuing new licences. It also would create minimal detriment to existing licence holders and could mean that the costs of the restrictions on licences would not significantly increase over time. The flipside of these benefits is that this approach offers less for consumers in the longer term, and creates a substantial risk – depending on how well it is implemented – that the restriction is not effectively addressed and licence values will continue to rise. It is interesting to note that when governments in Australia have issued more licences in accordance with estimated changes in market conditions, taxi licence values have often risen rather than fallen, as might be expected. This might be due to one or both of the following effects: that the proposals are too modest in scale, or because the policy triggers confidence in the industry that the government has no serious intentions of reform.²¹

6.9 *The preferred licensing proposal*

As indicated in section 2.4, there are two critical features of the Inquiry's alternative proposal to deal with the restricted licensing system.

The first feature is that the proposal is to change the nature of the restriction. That is, a change from a restriction on the number of licences available to a policy whereby any qualified person can purchase a new taxi or hire car licence from the Government at a fixed price. The price proposed by the inquiry for a taxi licence will be set as an annual payment. This will effectively cap existing licence rental prices for perpetual licences in the private market.

The second critical feature is that the price is to be fixed over time. That is, it will not be indexed to inflation and will therefore decline in real terms.

The inquiry considers its approach of selling licences on the counter at a fixed price strikes the best balance between the considerations outlined above, as it offers significant implicit compensation for licence owners, at relatively low cost to government and delivers some immediate benefits to consumers (particularly through some entry and improving driver quality). These benefits are further discussed in section 3.4.

6.10 *What price for new licences?*

The Inquiry proposed a \$20,000 per year fee for new Melbourne licences after careful consideration of the balance between consumer interests, licence holder interests and taxi driver interests.²²

Around 80 per cent of licences in Melbourne are assigned or rented to operators, who currently pay around \$30,000 per year to the licence owner. Selling new licences for \$20,000 will mean that the rental price of existing licences will fall, freeing up around \$10,000 which could be used to either (a) promote new entry of taxis or (b) improve driver remuneration or (c) improve other aspects of service quality.

²¹ This seems to be an unusual case in economics of an increase in quantity supplied causing a rise in prices!

²² Lower fees were set in areas outside of Melbourne reflecting lower licence prices (and associated rental values or operating returns). This varied from \$16,000 per year in major urban centres to \$3,000 per year in rural areas.

The inquiry considered that it was more important to focus in the short term on improving the prospects of drivers, particularly driver remuneration which is at very low levels. Setting the new licence price at \$20,000 means those operators that currently rent or assign licences can increase payments to drivers by a significant amount, without a fare increase.

A second issue for the inquiry was to assess whether the approach represented a reasonably moderate approach to reform that would provide for many licence owners to earn reasonable returns on their licences even after the reform.²³ This was important to ensure that the reform was implementable, as the Inquiry took the view that widespread compensation was likely to be neither desirable nor feasible.

The inquiry has, however, noted in its final report that there may be grounds for the Victorian Government to consider providing further targeted assistance to licence owners who experience significant financial difficulties due to the implementation of the licensing reform package. This kind of targeted approach is preferred to raising the new licence price, which would benefit all licence owners irrespective of their individual circumstances.

7. The economic effects of the Inquiry's proposal

7.1 Impact on licence prices

Offering an unlimited number of new taxi licences at a price will cap the annual rental returns on existing perpetual licences to that price. For example, a taxi operator in Melbourne will pay no more than \$20,000 per year to a perpetual licence owner, and the operator will now have the option of acquiring a \$20,000 annually-payable licence issued by the Victorian Government.

The price of perpetual licences will therefore fall until the return earned from holding the licence is no higher than the alternative of buying a licence with an annual fee of \$20,000.²⁴

The impact of the proposed policy on existing perpetual licence values will depend upon how licence owners discount returns and, in particular, how they discount future returns will depend upon: (1) returns available on other assets; and (2) the risk associated with earnings from taxi licences in the future. Different investors will have very different perceptions of these things, meaning it is difficult to give a precise answer about likely discount rates and therefore licence values.

Based on evidence collected during the course of the Inquiry, the Inquiry concluded that a return of around seven to eight per cent was a reasonable benchmark for an investor, implying a market licence price of between \$250,000 and \$300,000.

It is important to note that the Inquiry's proposal provides a form of implicit compensation for existing licence holders, at least relative to a situation where licences were free. Of course, this compensation comes at a cost to consumers. Currently around \$120 million per year is paid by consumers to support licence values, and under the Inquiry's proposal this would drop to around \$80 million.

²³ The Inquiry estimated the internal rate of return (IRR) earned by licence owners in various 'cohorts' by year of licence purchase. The IRR calculation takes account of purchase price and cash returns plus the final asset value (in this case, the post-reform licence value). Even *after* the implementation of the reform, over 40 percent of Melbourne perpetual licence owners will have earned an IRR of 10 per cent or more. See pages 210-211 of the Inquiry's final report.

²⁴ This assumes that operators can make \$20,000 per year from operating the taxi. If that was not the case, then the licence value will fall to a level consistent with that lower stream of income. No new licences would be acquired at the \$20,000 annual price.

7.2 *The benefits of the licensing proposal for consumers, government and the industry*

The Inquiry identified nine key benefits of its proposed licensing reform for consumers, government and taxpayers.

7.2.1 *Reduces the restriction in the short term, and eliminates it the longer term*

A key feature of the licensing approach is that it fixes the price of new licences in nominal terms. This means that in real terms, the price of the licence will fall. Eventually, the cost of the licence will become a negligible part of taxi operation. We estimate this may take many years – how long depends on prevailing inflation – but within 20 years we expect the real licence value will be only around one-third of current levels.²⁵

The obvious benefit of the removal of the restriction on supply is the lower waiting times and increased numbers of trips that will eventuate at high demand times – trips which currently go unserved. But there are other benefits that may exceed these in importance, related to the greater potential for service innovation.

7.2.2 *Provides a moderate level of compensation to existing licence owners*

The Inquiry's analysis suggested that there were no strong legal or economic arguments that would favour compensating licence owners for the likely reduction in licence value following the proposed reform. Victoria has long had provisions in its licensing legislation²⁶ which make explicit that the issue of more licences would not be grounds for compensation. However, a move to an open market – with licences granted for no fee to qualifying applicants – could impose financial hardship on licence owners. The new licensing policy described above offers a moderate level of 'compensation' to licence owners. In many cases, this will result in licence owners achieving total returns on their licence purchases that are reasonable. Where this is not the case, it does not rule out additional assistance being offered by government on a more targeted basis (e.g. for those that have purchased very recently and are more likely to be in some financial hardship).

7.2.3 *Limits excessive entry*

In markets that have removed entry controls entirely, entry has sometimes been much greater than anticipated at the time of the entry relaxation. In some instances, particularly where entry of new taxis has been allowed at no charge, but fares have been maintained at their pre-reform level, entry has been perceived as "excessive". By this it is meant that the marginal benefits of additional taxis (on waiting times and trips) have been very low, and below the costs of entry. This appears consistent with reform experience in jurisdictions that removed entry barriers entirely such as Ireland and Amsterdam. Maintaining a (significant) price barrier to entry in the short term reduces the possibility of an excessive influx of new taxis.

7.2.4 *Reduces costs of determining optimal number of licences*

Allowing for licences to be available at any time places judgements about taxi demand in the hands of those in the industry, or new entrants to the industry. This means there is no need for the government to determine the appropriate criteria for the release of new taxis.

²⁵ At 3 percent average inflation the licence would be worth \$147,000 in today's dollars.

²⁶ Section 90 of the *Transport (Compliance and Miscellaneous) Act 1983* (Vic)

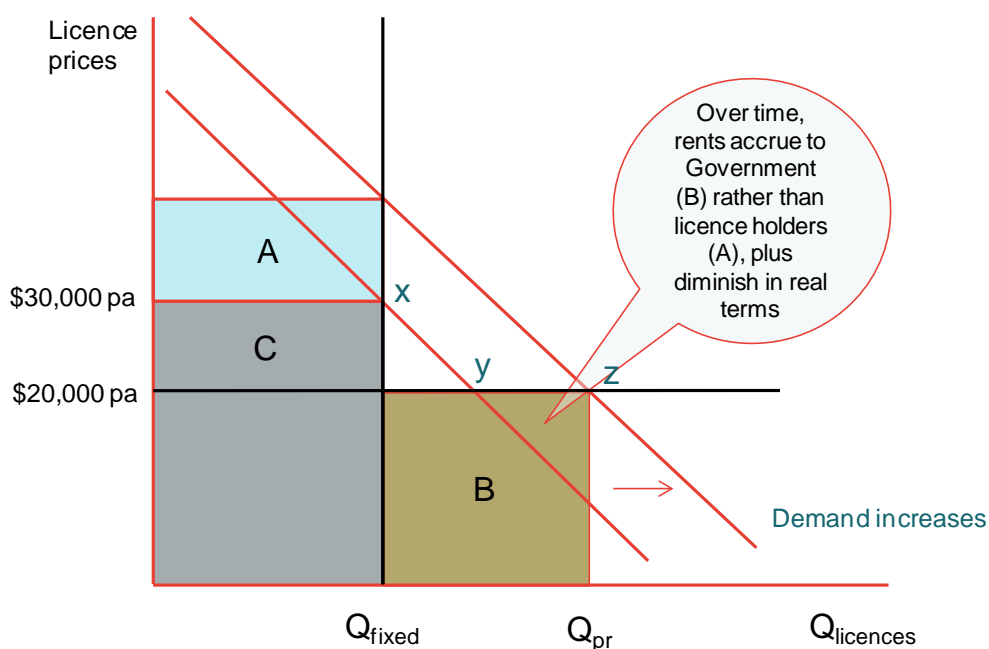
This is important as governments are always subject to ongoing lobbying by existing licence owners about the “need” for new taxi licences. Nor is it obvious that this can be resolved by linking new licences changes increases in taxi “demand”. Changes in taxi demand are driven by many different factors that are not straightforward to measure and commonly-used proxies for taxi demand (such as consumer income) are often not closely linked to actual taxi demand.

7.2.5 *Government now captures scarcity rents*

A feature of restrictive licensing regimes is that they allow the benefits of growth in taxi demand to accrue to existing taxi licence owners. More taxi demand increases the value of holding a licence and therefore its price. Changing the licensing approach to one based on price means that a shift in demand for taxi licences is reflected in increased number of licences, with the payments for these licences going to the Government. This means the ultimate beneficiaries of reform are taxpayers as well as taxi users, who benefit from increased supply.

This effect is demonstrated in Figure 2 Starting from a position ‘x’, where the quantity of licences is fixed and annual rental prices are \$30,000 per year, the reforms move the industry down the demand curve for licences to a point ‘y’. An increase in taxi demand is then shown. Under a fixed quantity regime, a shift in demand creates profits represented by ‘A’, which accrue to licence holders in the form of a higher rental price for the licence. Under a fixed price regime, the same shift results in an increase in the issue of new licences (to Q_{pr}) and new rents accruing to government of ‘B’ (associated with ‘z’). The loss of ‘A’ and ‘C’ represents the loss in the value of licences.²⁷

Figure 2: The effect of changing from quantity to price restrictions in the market for taxi licences



²⁷ ‘B’ is largely a transfer of ‘A’ from licence owners the Government. ‘C’ represents a transfer from licence owners primarily to drivers, who (via regulation) achieve an increase in earnings share from the taxi, and also to new entrants.

7.2.6 *Stops pressure for fare increases*

Rises in the rental price of licences puts pressure on fares to rise. Fixing the price of licences in nominal terms removes that pressure. Although it is often recognised that it is circular to put licence rental fees into fare determinations, in Victoria as in other jurisdictions fares have implicitly allowed for recovery of licence rental fees – otherwise licences would have no value.

7.2.7 *More money goes to those who provide service*

Taxi operators and drivers only receive 80 per cent of the revenue from the taxi, with licence owners capturing the other 20 percent. This share will increase in the short term as the proposed new licence price is below the prevailing market rental price, facilitating some new entry and better driver remuneration. This should particularly aid owner-drivers wishing to make a career out of taxi driving. The share will increase further in the longer term as the licence values are fixed while revenues will continue to rise.

7.2.6 *Improving the potential for price competition*

Commonly, the case for fare controls is made reflecting the limited scope for competition in certain market segments, such as in situations where consumers procure taxi services at a rank or hail a taxi off the street. In this sense, the economic case for regulating taxi fares does not hinge on restrictive licensing policies. Nonetheless, the removal of entry controls can be considered a necessary condition for removal of fare controls, if not a sufficient condition. In some situations, such as where markets have a very high proportion of pre-booked work (this characterises many markets outside of Melbourne) removal of entry controls can support removal of fare controls.

7.2.8 *Increase market efficiency and reduce unethical behaviour*

As taxi licences are traded and leased, a role for taxi licence brokers has emerged in Victoria. However, their role has been a source of considerable contention in the industry. The Inquiry examined evidence which suggested that there was a high degree of price dispersion for essentially identical licences. This is suggestive of market inefficiency and / or exploitative conduct by brokers, which can lessen the efficiency of taxi market operation.²⁸ The Inquiry's proposal of having licences available on the counter at a fixed price should increase the efficiency of the licence market and eliminate problems associated with inefficient trading and exploitation of licence owners or taxi operators. The availability of licences will provide a firm option for taxi operators and a benchmark price for licence owners.

7.3 *Ensuring an enduring reform*

An issue with the Inquiry's proposed licensing reform is that a significant portion of the benefit of the reform is deferred. There will be some new entry and benefits to drivers in the short term, but the benefits from lower licence prices primarily flow through in the longer term as the real value of licences fall. This delay in benefit potentially allows for the reform to be overturned before the full benefits of the reform are achieved.

The key factor to the success of the licensing reform will be the price at which new licences are sold. Setting this price too high initially will deter any new entry and deliver little reform benefit. Allowing the price to rise over time will destroy the longer-term benefits from reform. The Inquiry's proposals to set the new price below the market price, and to fix this price in nominal terms, deal with the problem at a

²⁸ This evidence is further discussed and examined in Appendix A to the Inquiry's draft report.

superficial level but it will be vital for this price to be strongly committed to, ideally in government legislation.

The work of Patashnik²⁹ (2010) also stresses that in order for reforms to endure, existing industry structures must be re-configured and winners from reform found that will continue to support the ongoing reform process. Taxi drivers are one potential group of winners from reform, particularly those that acquire their own licences. These owner-drivers will have little interest in keeping licence prices high; in contrast, for this group high licences prices are a burden and they will press for reductions in licence prices over time. Significant proposed changes to the industry regulator should also create impetus to deliver and embed the reforms.

8. Conclusion

Any reform of the taxi industry, and indeed any other industry where regulatory arrangements have created beneficiaries, is challenging. Nonetheless, the Victorian taxi industry has found itself in a situation where regulation is stifling industry performance and the fundamental basis for it must be questioned.

Although licensing reform is not the complete answer to an improved taxi service, the Victorian Taxi Inquiry has shown that (a) existing licensing approaches are connected to poor service performance, and are detrimental to consumers and to the industry generally and (b) that effective reform of taxi licensing is possible within a framework that maintains some value in taxi licences.

²⁹ Eric Patashnik, *Reforms at Risk: What happens after major policy changes are enacted*, Princeton University Press, 2008.

ROUNDTABLE ON METHODS FOR ALLOCATING CONTRACTS FOR THE PROVISION OF REGIONAL AND LOCAL TRANSPORTATION SERVICES

Summary of Discussion

The Chairman opened the session announcing the presentation of Prof. Fels, who recently chaired a government commission on the review of the taxi industry in the State of Victoria (Australia). He explained that this review was a good example of a competition impact assessment: it required to identify the ways by which a set of regulations could be changed so that competition could be promoted and enhanced, to formulate a number of options and to assess the impact of the different ones and to make final policy recommendations. The measures that were recommended were initially not the most obvious. This showed that impact assessments can be very useful and are not necessarily a way to simply rationalise one's intuition regarding the best policy options.

Prof. Fels emphasised that he would focus on issues concerning the pro-competitive allocation of licences in taxi industries. However, he explained that many anti-competitive restrictions, not just on licences, existed in Victoria. Hence, in order to eliminate all competition problems in the industry, more than licensing reform would be necessary.

When licenses are involved policy makers typically focus on supply restrictions that may lead to shortage at peak times and cause prices to rise. However, the review of the Victoria's taxi industry was not specifically focused on the need for a licensing reform, but was initiated because of general dissatisfaction with the quality of service. Accordingly, the terms of reference were broad. Eventually, it became clear that the problems were rooted in competition problems and that a licensing policy reform had to be part of the solution.

The problems that spurred the review concerned the quality of the taxi driver, as well shortage in supply and unreliable booking services at night peak times as well as in certain more remote areas. Safety issues concerning both drivers and passengers were also raised. Reliable surveys indeed, showed low customer satisfaction. Despite these problems, the value of licences in Victoria was high and had been rising at an average rate of 16 % p.a. over the last decade, largely unaffected even by the financial crisis. This suggested a serious lack of competition.

An analysis of the market structure found that the key problem was the restrictions on the issuing of new taxi licenses. This kept constrained the supply of taxis and led to long waiting times. This was made worse by the fact that fares were fixed, at times being too low to induce supply and at times leaving no scope for competition. The fixed fee structure together with the set-up of the industry created an inherent incentive to lobby for fare increases: Operators paid annual license fees to the owners of the licenses to run the taxis and paid hired drivers. Their interest was then to pay drivers as less as possible and not invest to improve their quality. Therefore, only low quality drivers were attracted to the industry. In addition, there was a considerable amount of unduly prescriptive quality and safety regulations.

The commission made a wide range of recommendations aimed at:

- a) increasing the supply of taxis and hire cars through licensing reform,
- b) restoring trust and confidence in the industry by improving the quality of the taxi drivers (through pay raises and stronger health and safety rights), by better regulating booking networks and through improved quality and safety regulation, and
- c) increasing competition through a pro-competitive revision of fare setting rules.

In terms of the reform of the licensing regime, a number of well-known options were rejected by the commission because they would not have been acceptable politically, either because they would have caused a very rapid decline in the value of the existing licenses or because the government's compensation to license holders would have been too high. Other options were rejected because they would effectively have deferred the reform and this might have given the time to the industry to subvert it. Also, some of these options would not have satisfactorily solved the issue of the quality of the drivers.

Hence the Commission proposed to offer new licenses at a moderate price (20,000 Australian dollars per year). This price was to remain fixed in nominal terms over time so that the value of the license was to decline in real terms. As licenses were currently leased for 30,000 Australian dollars per year, it was expected that the value of the licenses would fall by about two-thirds in 20 years assuming 3% inflation rate. In the commission's view, this represented a moderate loss for license holders and would thus be politically acceptable.

The expected benefits were that the restrictions in the supply of licences was reduced in the short term and removed in the long term. The reform would allow entry, albeit not excessive entry. The fall in the cost of the licenses would take also pressure off fares.

In terms of fares, the Commission proposed that these should not be kept fixed anymore, but set at a maximum so that discounting was possible where market conditions allowed for it, *e.g.* with pre-booking. On the other hand, for some market segments prices would be allowed to increase to avoid refusal to supply or price controls removed altogether, as competition was expected to work effectively on its own (in the market for pre-booked trips in remote areas).

The government was currently considering the commission's findings and recommendations. Speaking on the chances of long-term success for these reforms, since some of the benefits of reform would not accrue immediately, Dr Phelps explained that it was important to create new interest groups that had a stake in perpetuating the new system. Drivers would for instance be in favour of the reform because their remuneration would increase as a result of it.

The chairman thanked Prof. Fels for the presentation and opened the roundtable discussion on local bus transportation services.

The chairman said that competition in the market was not appropriate for local bus transportation services. Passengers do not commit in advance to a specific service, but choose on the spot what service to take depending on their immediate needs. This creates strong incentives for opportunistic behaviour between bus operators, for example by changing timetable at the last minute to arrive ahead of their rivals, which leads to timetable instability and dangerous speed-racing. He mentioned that when full bus deregulation was introduced in the UK in 1985 and free entry was allowed in the market, severe timetable instability had ensued. He therefore claimed that competition for the market was the most appropriate and indeed the most common form of competition in local bus transportation services.

He then explained that this roundtable would be articulated in three parts:

1. jurisdictions would share their experiences in design and implementation of tenders and in the design of ex-post regulation;
2. jurisdictions would explain how they had used advocacy powers to promote competition in these markets, and
3. jurisdictions would report about recent antitrust cases in these markets.

The chairman suggested to start with France which has been organised tenders since 1993. He briefly explained that in the French system the operators typically operated buses, terminals and depots that were owned by local authorities. He then asked two specific questions: first, winning whether suppliers brought their own employees or hired those previously used by the incumbent and second, whether this allocation system had actually led to lower costs and higher quality.

The delegate from France first wanted to point out that the large number of private operators in France was not necessarily an indication of effective competition. She explained that there were effectively only five major players providing these services across the country. Three of them had entered the market ten-fifteen years ago. These operators had persistently coordinated their tender bids over the period 1996-1999, as analysed in a 2005 decision by the French competition authority. Such agreements had effectively neutralised any benefits that competition for the market was able to bring.

The delegate also explained that, as the Chairman had correctly pointed out, the key assets were owned by the local authorities and were transferred between operators as one won a contract, the same applied to bus drivers. This limited the barriers to entry. However, the management was typically not transferred, with potentially disruptive results. Municipalities had therefore a disincentive to award the contract to new operators. Further new operators had to establish a reputation, and this barrier to entry was particularly high, as the local authorities did not have the expertise to verify the information given to them by the operators.

In terms of the outcome, costs had risen by 25% over the last 15 years and revenues covered only 31% of these costs relative to 51% in 1995. Therefore, urban bus transportation services were largely subsidised (around €100 per inhabitant per year). There were no service quality indicators available, which made it difficult to provide a picture of the impact on this dimension.

In conclusion, the French delegate said that tenders were good for competition, but simply having tenders sufficient to ensure effective competition. It was essential that tenders were organised so as to ensure transparency, objectivity and non-discrimination. Therefore, there had to be sufficient expertise to carry them out, competition authorities had to be notified if there was suspicion of collusion, and barriers to entry and expansion had to be kept low. Encouragingly, after a period in which 45 % of tenders received a single bid, recently participation to tenders seemed to have increased.

The chairman thanked the French delegate and said he wanted to return to the French experience after the UK's presentation. The chairman explained that the UK was the only jurisdiction that had experienced both models of competition: competition in the market in the whole country countries, except for London and Northern Ireland, and competition for the market in London.

The delegate from the UK explained that although most bus services outside London had been deregulated, the expectation had not been that this would address all the relevant social, environmental and economic objectives. Consequently, the industry was still subject to a variety of regulations and subsidies were still supplied in order to ensure appropriate levels and patterns of supply, and to guarantee a certain level of quality and safety. For example ten regional traffic commissioners had powers to ensure that

operators registered and adhered to timetables, to intervene where there was congestion or bunching of services or any dangerous driving behaviours, and to guarantee that competition was on fair terms.

The delegate from the UK then explained that funding for about GBP 1.5 billion had been funnelled into the industry in 2010 and 2011 through:

- a) the bus service operator's grant,
- b) the concessionary fare schemes, and
- c) the "supported-services" schemes, which supported services which were commercially not viable but socially desirable.

In terms of outcomes, the results overall seemed positive. However, the Competition Commission's review in 2010-2011 – the Local Bus Services Market Investigation (excluding London and Northern Ireland) – showed that competition was not always fully effective. Markets were concentrated, with the largest operators in an area typically accounting for around 70% of services, with rare instances of head-to-head competition on particular routes. Where there was a local monopoly operator, it tended to run less frequent services and not to operate on marginal routes.

Yet, there were now many examples of stable and effective competition between bus operators. Competition nowadays tended to focus on prices more than on timetables. In particular, the kind of pre-emptive behaviour described by the chairman at the start was no longer possible: all changes to the timetables required a 56 day notice period, so that rapid changes in services could no longer occur. In addition, bus operators were monitored to ensure they adhere to the timetable. Operators in violation of their commitments could get their license revoked.

The chairman asked how the subsidies for unprofitable services were determined.

The delegate from the UK said his understanding was that the bus operator's grant was set at a level designed to just act as a stimulus to bus use. Then, where services were found to be unprofitable and would be withdrawn, these would be subsidised if necessary. The duty to do this had notably been interpreted quite differently by the various local authorities.

The chairman now asked about the local bus service market investigation undertaken by the Competition Commission in 2010-2011. He wanted to know why the OFT had referred this sector to the Competition Commission and what the outcome of the investigation had been.

The delegate from UK answered that the OFT had asked the Competition Commission to look at this sector because of several concerns. Firstly, the cost of the contracts seemed to be increasing more rapidly than the operators' costs. Secondly, there seemed to be a limited number of bidders in some areas and it was unclear whether this was because operators were deterred from bidding or because of barriers to entry were too high. Thirdly, operators may have the incentives to abandon profitable commercial routes in order to receive subsidies. Fourthly, local authorities' approach in managing the tender process was possibly influencing the outcome.

The investigation had found that indeed in some tenders the participation rate was low. It had also found that there were more bidders, especially small ones, when the amount of information operators had about costs and demand conditions was higher, when the procurement rules of the local authority were clearer and less complex (as local authorities had some discretion in how to formulate these rules) and when contract periods were longer.

These findings potentially implied difficult trade-offs for local authorities. At the moment, the Department of Transport in England, along with their Scottish and Welsh equivalents were working on best practices guidance for local authorities in conducting tenders, building on the evidence from the review of the Competition Commission.

The chairman thanked the delegate from the UK and invited the representative of the London transport authority, Transport for London (TfL) to talk about the London market.

Claire Kavanagh first described the key features of the London market. The development of a transport strategy for London was one of the Mayor's key responsibilities and TfL ensured that its objectives were met.

TfL is responsible for the planning and the scheduling of the routes and for the infrastructure and the equipment. It also monitors closely all aspects of service quality, carries out research on customer needs and level of satisfaction, and advises the Mayor on the level of the fares.

The routes were nowadays all tendered by TfL, while the Mayor set the fares. The private contractors tendered for the services and then ran and managed those services to the standards set by the authority with their own assets, *i.e.* buses, garages, depots, and their staff.

In terms of how the tendering worked, any operator wishing to bid to operate a route in London had to become an approved supplier through a prequalification system which imposed high-level checks on their financial stability, management capability and safety record. Only these approved suppliers can bid for contracts. During the tendering process further checks are made.

Each route is tendered as an individual contract, but individual contracts are offered in batches. This provides the necessary flexibility to encourage new and quite small operators to enter the market, while allowing big operators to exploit economies of scale by bidding for several routes. The contracts are five-year long with a possible two-year extension when certain targets are met. Prior to re-tendering, routes are reviewed and if necessary replanned.

Tenders are evaluated on a number of criteria related both to quality, safety, financial stability and cost.

Such a contracting system has been in operation for a long time. In 1985, when local bus services for the rest of Great Britain were deregulated, it was decided to employ a different approach in London. At the beginning only some individual routes were tendered to the private firms, which then competed against public companies. By 1994 however, all public companies were privatised.

Since 1985 several different types of contracts had been experimented with. Initially, contracts were based on gross cost. This seemed sensible when the tendering system was first introduced, as it was a simple type of contract with the operator stating the price it would require for providing the required services and the authority simply paying that price and retaining the revenue from the fares. However, these contracts put too little emphasis on quality to be really satisfactory.

The next type of contract was based on net costs, where the operator retained the fare revenues. This created difficulties as most of the revenues came from passengers using some sort of cards, *i.e.* daily or weekly passes, which required a system for allocating revenues between operators. In addition, no incentives for quality were provided. Also this type of contract was thus phased out.

A new better type of contract was the so-called quality-incentive one, based on gross costs with bonus payments and deductions depending on the degree of out- or under-performance with respect to given

targets. If targets were exceeded there was also the possibility of a two-year contract extension – a dimension of reward liked by operators. The performance targets incentivised the operators to offer reliable services. Each route has its own targets that depended on the specific characteristics of the route (*e.g.* the level of congestion).

The authority also monitors other quality dimensions through customer satisfaction surveys.

In terms of how competition had evolved, twenty years ago many more small companies were present, nowadays the London market is dominated by seven large companies who operated over 95 % of the network. An interesting aspect is that some of these operators are large semi-public companies, *e.g.* Abellio is owned by the Dutch railway operator and Arriva is owned by Deutsche Bahn. Despite this the degree of competition was considered satisfactory: on average for the last few years there have been three bids per tender. In addition, with the introduction of the quality incentive contracts in 2000, the reliability of bus services has steeply improved.

The chairman thanked Clare Kavanagh and asked how the current competitive market structure had been arrived at. The expert explained that this had happened over time. First, nine years of tenders mixed with public provision of services slowly brought new players into the market on a route-by-route basis and by the time the whole market was privatised about 50% of the network was already serviced by private operators. Nine separate companies were then privatised by the government and sold off to different buyers to maintain competition.

In addition, the chairman wished to understand whether the costs of having a large fleet of buses posed a barrier to entry. The expert said that smaller operators had access to a vehicle leasing market, which allowed them to obtain the assets they needed.

The chairman thanked the expert and said that two alternative ways of tendering had been presented so far, *i.e.* the French model and the London model. In France, the operator received the fare revenues and subsidies were part of the tender or negotiated afterwards. In London the operator did not receive the fare revenues, but only a compensation for its costs. Therefore, the level of the subsidy was not determined through the tender and was dealt with by public authorities. Since there were more bidders in tenders in the UK than in France, the chairman asked Prof. Yvrande-Billon whether some conclusions on the relative efficiency of the two systems could be drawn.

Prof. Yvrande-Billon said that her studies on the outcomes of the two tendering systems (the one used in London and the one used in France, outside of Paris) showed that the London one had led to better results. In France for example there were fewer bidders than in London: between the mid-1990s and 2011 there had been an average number of 1.9 bids in France compared to 2.8 in London.

While two bidders may in principle be enough, the problem with France was, until recent years, that 60 % of tenders had only one bidder. In London, this figure was 16%. The numbers in France had improved recently, most likely due to the 2005 decision of the French competition authority referred to earlier.

Prof. Ponti added that not just the number of the bidders was an indication of competition problems, but also their identity. If always the same player won a contract, there was clearly a serious lack of competition.

Prof. Yvrande-Billon answered that between the mid-1990s and 2005 the renewal rate for incumbents was 90%, but if the years after the decision were taken into account it went down to 70%, a number comparable with London. However, a high rate of incumbency renewal in itself was not necessarily an indication that competition did not work, as the incumbent may keep winning because it was the most

efficient provider. Instead, the combination of a high incumbency renewal rate and only one operator bidding was highly problematic.

In terms of market outcomes, unit operating costs had risen substantially in France between 1990 and 2006. The unit operating costs in London had stood roughly at par with those in France in the beginning, then they had fallen for six - seven years and then they had began rising between 2006 and 2011. Nevertheless in 2011 these costs were still below the level they had reached in the early 1990s. In other words, the obligation in France for local authorities to use competitive tendering had not resulted in a decrease in operating costs, but had rather led to a continuous increase, while in London overall there had been a reduction in costs.

She then explained that these may be due to three major differences:

- a) The transparency of the procedure, *i.e.* the ability of bidders to clearly know and understand the actual processes by which contracts are awarded - in London, even when the authority did not award the contract to the bidder with the lowest price, it was publicly stated why it was so and which criteria had determined the choice. This reduced the uncertainty, provided support to improving the bids and increased the incentive to bid.
- b) The degree of discretion in the evaluation of the bid, combined with the level of expertise and monitoring capacities of authorities - in London, it was clearly stated how the operators fared against the criteria specified in the tenders, which ensured consistency. This was ensured through a substantial amount of expertise, data collection capacities, operator monitoring and benchmarking *e.g.* on the efficiency of operators. The public availability of all of this information allowed the operators to learn from past experiences and improve their bids.
- c) The design of the tenders - in London routes were tendered individually to reduce barrier to entry, whereas in France large blocks of routes were awarded together.

The chairman thanked Prof Yvrande-Billon. He then asked how the market had developed – he presumed that initially there was a single public operator for each of the 200 local networks that exist in France and wanted to know how it came about that there were four major firms today. Prof Yvrande-Billon explained that this was probably due to the fact that there were a few private big multi utility companies that had contracts with the municipalities to run their services even before tenders were introduced. Hence, the law introducing competitive tendering changed the way contracts were allocated, but not the identity of the companies providing the services.

Prof Ponti asked whether discretion could be desirable in a regulatory context. Prof Yvrande-Billon argued that with tenders, discretionary power could be a way, for instance, to disregard bids from bidders being over-optimistic hoping then to renegotiate. Hence a combination of transparency and discretion is crucial.

The chairman gave the floor to Spain to discuss the promotion of competition in intercity bus transportation services through advocacy.

The delegate from Spain began his presentation by saying that the case he was going to illustrate showed how advocacy by competition authorities could influence legislation.

In 2007, in order to deregulate the market, the Spanish Ministry for Public Works, trade unions and transport companies had agreed on a Protocol that outlined the criteria to be employed in allocating concessions for the provision of local bus services and prescribed the relative weights that should be applied to these criteria.

The competition authority analysed this Protocol in a report released in 2008, which noted that:

- concession terms were very long, thus creating significant barriers to entry;
- little importance was attached to tariffs and to the frequency of service, in comparison with criteria like technical infrastructure and the supervision of personnel; and
- local administrations had too much discretion in the choice of the bidder.

As a result the Ministry made certain amendments to the Protocol giving significantly more weights to tariffs and frequency of services as award criteria. However nothing was done with respect to the excessive length of some of the concessions.

At the regional level, none of the issues identified by the competition authority had been resolved by 2010. Therefore the authority filed several requests to regions to amend their public transport tendering processes. However, due to lack of satisfactory responses, the competition authority challenged in courts the processes adopted in Galicia and Valencia.

Regarding Valencia, the relevant legislation was annulled because it was deemed anti-competitive. As far as Galicia was concerned, the authority's request was rejected due to the lack of substance of the charges made. However, the competition authority has appealed the decision to the Supreme Court in the hope that a more substantive analysis will be carried out and the decision overruled. The cases anyway have had a considerable deterrent effect since no other community has developed similar schemes.

The chairman thanked the delegate from Spain and turned to Italy. In Italy the reform of local transportation services had started in 1997, but a Supreme Court decision in 2012 had annulled these changes and had brought Italy back to where it was in 1997. The chairman asked why Italy was struggling so much to introduce competitive tendering with public services.

The delegate from Italy thought that one important problem was that the local authorities were often owners of the incumbent service providers while, at the same time, responsible for entrusting the service to the best supplier, and for deciding the procedure that would ensure that. Also, due to many successive legislative interventions, there had been uncertainty regarding the objectives to be achieved with respect to local transport.

A further element that hindered the introduction of competitive tendering was the existing European legislation. In several public services industries, the European legislation had given strong impulses to liberalising reforms at national levels. This was not the case with local bus transport. In this sector the European regulation explicitly allowed for the direct award of contracts, provided certain conditions were met. In Italy, European legislation had been transposed into national law in a way that encouraged local authorities to postpone the introduction of competitive tenders and to keep awarding directly the contracts without any transparent competition.

Despite these problems, the situation was better than 15 years ago because the Italian competition authority now had the ability to challenge anti-competitive administrative acts in court. For example, the authority had recently initiated a procedure against the municipality of Rome as this had awarded the local public transport services to the publicly owned incumbent until 2019 without specifying important contractual aspects, notably public service obligations and financial compensations. This important case could lead to further interventions in the sector.

The chairman added that the problem with European legislation was that it was too generic, for example no details were given on how tenders should be organised. This left considerable discretion to the local authorities and had led in Italy to badly organised tenders. He then gave the floor to Prof Ponti to describe the Italian model in more detail.

Prof. Marco Ponti restated that one of the key problems in Italy were the flawed incentives of the local authorities due to their controlling, or having a stake, in companies providing bus services. Although the market had been formally opened to competition, opposition had been strong and effective: incumbents had won 99% of the tenders, sometimes hiding behind a new name. It was also notable that there was no pressure on service providers: no provider had been allowed to go bankrupt or been punished for underperformance in the last 50 years. Further, under local legislation, it was often not possible to change existing labour contracts, which limited the outcomes of tender procedures.

He discussed in detail the case of Lombardy. In this region a new law had required tenders to have a minimum size, which meant that often more efficient small operators could not bid.

Further, he reported that an independent transport regulator had been created, but over a year after the relevant law had been approved the body had not yet been set up, because of opposition from the regulated companies and of political disagreements.

In terms of outcomes, the delegate from Italy estimated that the total unit cost of labour in the public sector was double that in the private sector. He also explained that in purchasing power parity terms, fares were among the lowest in Europe and therefore the level of subsidies was very high.

Moreover, there were misallocations in that services were offered which were not demanded. The current financial crisis created further misallocations, as state transfers had been reduced, services had been reduced rather than fares increased. Finally, there was widespread regulatory capture. The Italian competition authority had tried to ameliorate the situation, *e.g.* to intervene against local associations which were officially formed to avoid competition. It had also tried to intervene against the way tenders were organised in Milan and Turin, but without success.

The results of competitive tenders, when these were properly run, were potentially impressive: in Tuscany costs had been reduced by one third. However, due to political pressure, the outcome of the tender was annulled later on.

In terms of recommendations, in Italy should:

- quickly set up the independent regulatory authority,
- introduce competition for public funds, *i.e.* relatively more funds should go to administrations that promoted competitive tenders,
- eliminate conflicts of interest for municipalities,
- make use of gross cost contracts to reduce the information asymmetry for new entrants, as these made information on demand unnecessary,
- keep the size of the tendered lots small, while allowing for combinatorial bids, so that the market could determine the true extent of the economies of scale, and
- make publicly available the information on the costs and benefits of these services.

The chairman thanked the expert from Italy. He announced that due to lack of time only members countries would be given the floor to present their contribution to the Roundtable. He acknowledged the effort observers had made in preparing their submissions and he regretted having to skip their presentations.

He gave the floor to Japan. He explained that the Japanese Road Transportation Act had been changed in 2002 to allow greater competition in the supply of local transport and as a result the traditional system of tendering route by route was changed to allow entry to all providers which had a licence. The chairman wanted to know how this system worked in practice, *e.g.* who chose the frequencies and the routes to ensure that service coverage was acceptable and why Japan had switched to this system.

The delegate from Japan explained that licensed bus operators can freely choose the routes to operate and the frequency of the services, but that the Act enables the Ministry of Transportation to intervene and to order bus operators to change routes or timetables if this is deemed necessary to meet consumers' needs. Also, there exists a local consulting body comprised of the local government, licensed bus operators and the Ministry of Transportation that guarantees that coverage and frequency of the services are overall satisfactory.

The chairman thanked the delegate from Japan and gave the floor to the Turkish delegation. His understanding was that in Turkey there were a public and a private bus network operating side by side. The chairman wondered how it was determined which routes were available to the private providers, whether private suppliers received subsidies, and how subsidies were determined.

The delegate from Turkey responded that the regulator was in charge of determining which services should be provided and at which price. Local authorities with the help of the Transport Coordination Centre decide whether to tender a service to private operators. Private services are usually provided on commercially viable routes, while public services are offered on non-viable routes. For this reason private companies do not receive any subsidies. Routes are tendered individually or in small blocks, as decided by the Transport Coordination Centre. The Department for Transport monitors whether contractual conditions required are fulfilled.

The chairman turned to Poland, which had a model similar to the Turkish one. He therefore asked the same question.

The delegate from Poland explained that public operators operate routes that are commercially not viable and private operators the viable ones. For example, in large cities where networks are complex and municipal services have to be subsidised, private operators would typically not operate. On the other hand, in small towns where services did not need high levels of subsidies, private operators were common. Also, private operators often serviced intertown or intercity links. He also said that private operators, though they do not receive subsidies, can get reimbursed for legally binding discounts, *e.g.* discounts for students. The level of quality of their services is contractually specified, with sanctions if the agreed level is not met – an approach similar to one used in London.

The chairman invited Russia to talk. The Russian delegate reported that there had been competition problems with tenders for bus services. For example, the federal competition authority had challenged the government of the Stavropol region for the violation of federal competition law, because it had passed a resolution that had made tenders discriminatory and thus anti-competitive. The delegate said that these kinds of problems would soon be resolved by a new federal law, which is currently being drafted. This law establishes a common approach for the organisation of tenders for public transport services run by regional and local authorities.

The delegate from Chile, a judge at the Competition Tribunal of Chile, wanted to discuss the experience for the city of Santiago. He explained that all the systems discussed today had been implemented in the city at some point, but they had all failed. This was not because the systems were wrong, but because they had not been implemented properly. For example in the mid-90s, services were provided by private operators and tickets were paid by users in cash on each bus. In 2006 a multi-ticket system combining bus with subway was adopted, ending the “cash-on-the-bus” system. A clearing house had been set up to ensure that operators got their revenue share. However, fare evasion on buses went up massively and large deficits ensued.

The chairman thanked the delegate from Chile. The example of Chile aptly closed the discussion on tendering processes because it showed once again how difficult it was to design and run tenders so as to ensure that they produced benefits. He then moved to advocacy.

The chairman moved on to describe what happens in Dublin, where services on the entire local bus network are provided by two publicly-owned companies. The rationale for the choice to exclude the private sector has been that many routes are not commercially viable and that to fully exploit network externalities the network needs to run be run as a whole. However, he remarked, it is not clear whether such a system really benefits consumers. The Irish competition authority has proposed to change the system, as it claims that there is no evidence that most routes are non-viable and that network efficiencies are so large to justify this approach. It has suggested introducing competitive tendering to identify which routes are commercially viable, to reduce the subsidies and to ensure better satisfaction of consumers’ needs.

The chairman then asked the Irish competition authority which model of tendering it has effectively proposed.

The delegate from Ireland explained that the competition authority had only recommended to the Irish government to introduce a tendering process for the provision of public bus services in Dublin, but that it had not proposed any specific model. He reported that so far there has been no response from the government on the proposal. The delegate also explained that the authority considers that transparency on the costs and demand levels is an essential pre-condition for a successful tendering process. At the moment, because there was a lot of cross-subsidisation between routes, there is no clear information available.

The chairman next turned to BIAC (Business and Industry Advisory Committee). He asked BIAC to comment on whether transport regulators should be national or regional. The BIAC delegate explained that local authorities had to take three types of decisions with respect to bus transportation services:

1. whether to provide the services themselves or to out-source them,
2. when to subsidise them and by what amount, and
3. how to allocate the contracts.

He held that these decisions had to be regulated at some higher level and that this should be done at regional level – as it was the case in the UK (outside of London). One reason for this is coordination because local bus services are often connected to other, wider, transport networks, in particular railway transports. Another reason is political: local authorities are more vulnerable to local political considerations, possibly resulting in discrimination against certain bidders in tenders. Another reason is that local authorities can lack the expertise and the resources to design the tenders and monitor the contracts.

The chairman now moved the discussion to recent antitrust enforcement cases in the sector. He mentioned the experience of Chinese Taipei and the US.

In Chinese Taipei the competition authority had uncovered and stopped a cartel in local bus services.

In the US instead the surface transportation board (“STB“), the US-regulator of bus services, allowed two companies to pool their bus operations between various large cities in 1997-1998. The STB had justified its approval of this scheme on that ground that it would produce substantial benefits by reducing excess capacity and avoiding the unnecessary duplication of facilities and staff. It had further claimed that the pool would not unreasonably restrain competition. The Department of Justice had opposed the STB decision because it was created a monopoly position on some routes, but to no avail.

The chairman asked why the Department of Justice had not prevailed, given that its arguments against the pooling arrangement were so strong. The delegate from the US explained that the STB, like many regulatory agencies in the US, employs a public interest standard. This standard considers not only the impact on competition but also other criteria. The Justice Department did not manage to refute all the arguments brought by the STB to support its decision. Interestingly, the STB decision has recently become irrelevant. Entry by low cost operators has occurred, weakening the market power that had been acquired by the pooled operators.

The chairman thanked the delegates and ended the roundtable discussion on local bus transportation services.

SYNTHÈSE

Par le Secrétariat

À la lumière des débats de la table ronde, des notes présentées par les délégués et des exposés et notes des experts, il convient de retenir les points suivants :

- (1) *Restreindre le nombre de licences de taxi accordées constitue un obstacle essentiel à la concurrence sur ces marchés qui empêche les consommateurs de tirer parti des avantages qu'elle procure. La réforme actuellement proposée dans l'État de Victoria, en Australie, a pour but d'y intensifier progressivement la concurrence. Pour ce faire, elle prévoit d'augmenter le nombre de licences en faisant en sorte qu'elles soient délivrées en quantité illimitée et à un prix fixe dont le coût réel baissera avec le temps. Selon toute vraisemblance, cette approche originale sera acceptable politiquement car elle n'induirait qu'un coût relativement faible, réparti sur une longue durée, pour les détenteurs actuels de licences, tandis que les avantages de la réforme se feront sentir plus rapidement.*

Les pistes de réforme proposées récemment dans l'État de Victoria (Australie) ont pour but de régler de manière innovante les problèmes de concurrence que posent les restrictions quantitatives qui ont cours sur le marché des taxis. Les modifications qu'il est proposé d'apporter au régime d'octroi des licences conduiraient à une ouverture très progressive mais totale du marché. En s'échelonnant sur une longue période, la réforme éviterait une chute brutale de la valeur des licences existantes, et donc le versement à leurs détenteurs actuels d'indemnités potentiellement onéreuses par les pouvoirs publics. Les obstacles à l'entrée seraient progressivement abaissés grâce à la délivrance d'une quantité illimitée de licences supplémentaires à un prix nominal fixe. Dans les premiers temps, ce prix serait très proche de celui auquel les licences s'échangent actuellement sur le marché, mais sa valeur diminuerait en termes réels au fil du temps. La valeur totale actualisée des licences en circulation deviendrait donc inférieure à ce qu'elle est aujourd'hui, mais cette évolution serait lente, et n'aurait donc pas pour corollaire la chute brutale qu'entraînerait une ouverture immédiate et totale du marché. La réforme n'aurait donc qu'un coût limité pour les détenteurs actuels de licences et les pouvoirs publics, tout en portant ses fruits assez rapidement pour créer une dynamique politique suffisante en faveur de la réforme et rallier les suffrages de l'opinion publique en ce sens.

- (2) *La réglementation des tarifs est jugée indispensable mais les autorités pourraient admettre une plus grande concurrence à cet égard.*

La proposition de réforme suggère de déréglementer le tarif des courses sur les segments de marché, comme celui de la réservation de taxis, où la concurrence jouera vraisemblablement sans léser les utilisateurs. En revanche, lorsqu'une certaine forme de réglementation des prix reste nécessaire, elle suggère de ne pas fixer les tarifs mais d'opter pour un simple plafonnement. La mise en place d'une structure tarifaire plus efficace et plus souple permettrait aux chauffeurs de baisser leurs tarifs aux heures creuses et à l'inverse de les augmenter pour les petites courses, ce qui pourrait sans doute les inciter davantage à ne pas les refuser.

- (3) *Étant donné les caractéristiques des services de transports locaux par bus, la concurrence pour remporter le marché est dans la plupart des cas plus indiquée que la concurrence sur le marché.*

La concurrence pour remporter le marché est la forme de concurrence la plus courante et, dans la plupart des cas, la plus indiquée dans ce secteur, même si certains pays ont décidé de permettre à la concurrence de s'exercer sur le marché, généralement sur les lignes commercialement viables. Plusieurs raisons expliquent que la concurrence soit plus efficace lorsqu'elle s'exerce pour l'obtention des concessions de transport plutôt que directement pour attirer les usagers. L'une de celles qui ont été évoquées est le fait que les horaires de desserte sont un critère plus important pour les passagers que la nature de la société de transports. Les opérateurs sont donc fortement incités à adopter un comportement opportuniste, autrement dit à ravir des clients à leurs concurrents en modifiant leurs horaires au dernier moment pour les devancer de peu. Par ailleurs, un certain nombre de lignes ne sont pas viables commercialement mais leur desserte peut être importante sur le plan social. Il est donc nécessaire de les subventionner. Les appels d'offres, s'ils sont bien conçus, permettent de déterminer s'il est véritablement nécessaire de prévoir des subventions, et à quel niveau.

- (4) *Pour tirer pleinement parti du jeu de la concurrence, la procédure d'appel d'offres pour les concessions de transport par bus doit être bien pensée, de façon à garantir la participation d'un certain nombre de vrais soumissionnaires.*

Les délégués s'accordent largement à dire que le simple fait de lancer un appel d'offres ne suffit pas à s'assurer à coup sûr des bienfaits de la concurrence ; il convient pour cela que la procédure soit soigneusement pensée. Il faut notamment que les obstacles à la soumission et à l'entrée soient peu élevés car, pour que les appels d'offres soient efficaces, il est nécessaire qu'un nombre suffisant de candidats y répondent.

Une procédure d'adjudication transparente et non discriminatoire permet généralement d'éviter que les obstacles à la soumission ne soient élevés. Les critères d'adjudication doivent être clairement définis à l'avance et les soumissionnaires doivent être bien informés. Moins les entreprises auront de doutes sur le processus de candidature, plus elles seront incitées à participer à l'appel d'offres.

Certains signes tendent par ailleurs à montrer que des procédures d'adjudication complexes dissuadent les candidats, notamment les petites entreprises de transport, en raison de leur coût de participation élevé. Pour que les petites entreprises exercent une réelle concurrence, ces procédures doivent être aussi simples que possible.

Il est en outre conseillé aux autorités adjudicatrices de collecter des informations sur le processus d'attribution et les rendre publiques dans la mesure du possible. Lorsqu'il existe des données sur les performances *ex ante* et *ex post*, les entités adjudicatrices peuvent plus facilement s'informer sur les soumissionnaires, évaluer les comportements lors des appels d'offres ultérieurs – et donc déceler plus facilement tout signe de collusion – et améliorer la procédure avec le temps. Ces données aident également les éventuels participants à estimer en amont leur situation dans le processus d'adjudication au regard des critères énoncés, et donc à mieux préparer leurs offres. Ces renseignements sont particulièrement précieux pour les nouveaux entrants, qui sont désavantagés, sur le plan des informations dont ils disposent, par rapport aux entreprises déjà en place. L'un comme l'autre, ces effets peuvent réduire les obstacles à l'entrée et accroître le nombre de vrais soumissionnaires. Collecter ces informations permet aussi de garantir la transparence du processus d'adjudication et donc à l'entité adjudicatrice de rendre des comptes. Néanmoins, pour que la collecte et l'analyse des informations soient utiles et efficaces, il est nécessaire que l'autorité adjudicatrice dispose des compétences appropriées à cet égard.

En outre, les délégués s'accordent à dire que, pour être efficace, la procédure d'appel d'offres doit laisser une certaine latitude à l'autorité adjudicatrice, comme celle de « rattraper » des offres qui avaient été écartées de prime abord car elles ne satisfaisaient pas à l'ensemble des critères, ou d'exclure les offres à la fiabilité douteuse (par exemple lorsqu'elles témoignent manifestement d'un optimisme excessif sur les performances du soumissionnaire et qu'il est improbable que celui-ci réussisse à tenir ses engagements). Toutefois, tout pouvoir discrétionnaire ne doit être exercé que dans la plus grande transparence afin d'éviter les abus et l'émergence d'incertitudes susceptibles d'affecter le taux de participation. Pour que ce pouvoir soit exercé correctement, il faut que l'autorité adjudicatrice dispose des connaissances spécialisées et des compétences nécessaires et qu'elle ne se laisse pas influencer par des considérations biaisées (comme le souhait de privilégier un soumissionnaire particulier dans lequel elle détient une participation financière). Chose importante, si l'autorité adjudicatrice décide de faire usage de son pouvoir discrétionnaire, le processus de décision doit être transparent pour que l'autorité en question soit alors à même de rendre des comptes.

Les appels d'offres ne peuvent être efficaces que si les autorités adjudicatrices ne sont confrontées à aucun conflit d'intérêts. Ces conflits peuvent survenir si l'autorité détient une participation financière dans l'une des entreprises soumissionnaires. Plus la procédure d'appel à la concurrence est transparente et les critères d'adjudication clairs, plus les autorités adjudicatrices auront de mal à se laisser guider par des considérations inadéquates. Il en ira de même si la réglementation *ex post* est efficace. Autrement dit, si le non-respect des engagements contractuels est sanctionné, une collectivité territoriale sera moins incitée à attribuer le marché à un soumissionnaire qui pourrait ne pas s'avérer en mesure d'honorer ses obligations aux conditions convenues au moment de l'adjudication. De ce fait, s'ils agissent dans le cadre d'un système qui prévoit des mécanismes de contrôle automatique, les décisionnaires risquent moins de se laisser influencer par des incitations biaisées.

Pour résumer, les appels d'offres simples, transparents, non discriminatoires et qui sont assortis de critères d'adjudication clairs attirent généralement davantage de vrais soumissionnaires. Pour être assurés de faire le bon choix, et donc d'obtenir des prestations fiables et conformes aux engagements contractuels, les autorités doivent être au préalable bien informées de la qualité des soumissionnaires, bénéficier d'une certaine latitude lors de la sélection – et en faire usage de manière transparente et compétente – et être guidées par des considérations qui les incitent clairement à retenir le soumissionnaire dont l'offre se traduira par une optimisation de la dépense publique.

- (5) *Sur les marchés de transports locaux par bus, il est nécessaire que les obstacles à l'entrée et à l'expansion soient faibles afin de ne pas dissuader la candidature d'éventuels nouveaux entrants.*

Les obstacles à l'entrée et à l'expansion peuvent dissuader les nouveaux entrants et les petites entreprises de participer aux appels d'offres. Certains de ces obstacles peuvent être abaissés par la conception même de la procédure et des contrats, afin de réduire les asymétries entre petits et grands soumissionnaires et entre acteurs déjà en place et nouveaux entrants.

Dans certains pays, la longue durée des concessions est considérée comme un obstacle à l'entrée car elle entraîne une fermeture prolongée du marché. Toutefois, les nouveaux ou les petits opérateurs ayant besoin d'un engagement à long terme pour amortir leurs investissements, les contrats ne doivent pas être de trop courte durée et il convient donc de trouver le juste équilibre.

Globalement, les délégués estiment que les concessions de grande ampleur, qui portent sur de nombreuses lignes, peuvent faire obstacle à l'entrée de petits opérateurs de bus. Ces marchés

importants sont souvent justifiés par le fait qu'ils permettent à ces transporteurs d'exploiter des économies d'échelle. S'il est toutefois difficile de déterminer par avance l'ampleur de ces économies il importe aussi de réduire les obstacles à l'entrée. Les experts avancent une solution efficace à cet égard, consistant à lancer simultanément plusieurs appels d'offres pour de petites concessions (portant sur une ou quelques lignes seulement). Ce procédé ne crée aucun obstacle particulier à l'entrée mais les opérateurs peuvent regrouper les lignes et tirer parti des économies d'échelle s'ils estiment cette solution efficiente.

Au vu des éléments dont on dispose, il est difficile de savoir si les investissements à réaliser (bus, dépôts et effectifs) constituent un obstacle sérieux à l'entrée. Les appels d'offres lancés à Londres semblent bénéficier d'un taux de participation élevé et obtenir de bons résultats même s'il appartient à l'adjudicataire de fournir les effectifs et les infrastructures physiques. Le système français (hors de Paris) fonctionne largement moins bien malgré le fait que les infrastructures physiques soient généralement détenues par les collectivités territoriales qui les mettent à la disposition des adjudicataires. Il semblerait donc que les investissements ne soient pas un obstacle incontournable à l'entrée et que des marchés secondaires pour les infrastructures nécessaires puissent se développer.

Les risques encourus par les opérateurs peuvent également constituer un obstacle à l'entrée. Les petits opérateurs, comme c'est aussi souvent le cas des nouveaux entrants, aiment avoir la possibilité de transférer le risque de baisse des recettes à l'autorité adjudicatrice, notamment lorsqu'ils n'ont aucun pouvoir décisionnaire sur les tarifs de transport. Cette répartition des risques est possible dans le cadre de contrats à prix forfaitaire car les opérateurs reçoivent alors un montant donné, destiné à couvrir leurs coûts (et à leur assurer un certain bénéfice), tandis que les collectivités territoriales perçoivent les recettes et assument le risque qui en découle. En plus de réduire le risque que doit supporter l'adjudicataire, ce type de contrats présente l'avantage de réduire l'asymétrie des informations concernant le niveau des recettes entre les nouveaux entrants et les opérateurs en place. Néanmoins, toutes les collectivités territoriales ne peuvent ou ne souhaitent pas toujours supporter ce risque. L'autre solution consiste à avoir recours à des contrats à contribution financière forfaitaire, aux termes desquels l'opérateur conserve aussi les recettes, soustrayant ainsi la collectivité territoriale au risque qui s'y rapporte.

- (6) *La procédure d'appel d'offres doit être conçue de manière à réduire au maximum le risque de collusion, sous peine de perdre tous les avantages de la mise en concurrence.*

Selon les experts, il peut y avoir une certaine tension, s'agissant des procédures d'appel d'offres ouvertes et transparentes, qui sont généralement censées soumettre l'autorité adjudicatrice à une obligation de rendre des comptes et s'accompagner d'une réduction des asymétries d'information, d'une part et le risque de collusion qu'elles induisent d'autre part. En effet, lorsque les offres sont rendues publiques, il est plus facile pour les entreprises se livrant à la collusion de déceler et de sanctionner les écarts par rapport au comportement collusoire. D'un autre côté, des critères d'adjudication clairs et des procédures transparentes auront probablement pour effet d'augmenter le nombre de vrais soumissionnaires, ce qui, toutes choses égales par ailleurs, complique la perpétuation de la collusion. De plus, si l'appel d'offres est bien conçu et que les obstacles à l'entrée sont faibles, le nombre de candidats qui y répondront sera plus élevé, ce qui réduira là encore le risque de collusion. Enfin, lorsque toutes les informations sont disponibles, l'autorité adjudicatrice dispose d'une quantité considérable de renseignements sur les soumissionnaires et leur comportement, ce qui facilite la détection d'éventuels signes de collusion.

- (7) *Lorsqu'un contrat est attribué et que l'adjudicataire devient le seul prestataire pour un certain nombre d'années, il est indispensable de veiller à ce que la sécurité et la qualité de ses services soient satisfaisantes. Il est essentiel que les incitations soient adéquates et qu'un contrôle ex post approprié soit effectué.*

Garantir la qualité des prestations tout au long de la durée de la concession n'est pas aisé. Les contrats qui semblent y parvenir le mieux sont ceux qui définissent un petit nombre de critères de performances faciles à observer et à évaluer et qui permettent de s'adapter avec une certaine souplesse à l'évolution des besoins des usagers. Un autre type de contrats, qui prévoient une récompense – comme la prolongation de la concession – en cas de respect de certains critères de qualité, semble également efficace.

Il est possible de renforcer les incitations des prestataires en faisant figurer, dans le contrat qu'ils concluent, une clause qui en prévoit la résiliation si les résultats par rapport aux objectifs visés sont gravement insuffisants. Les experts ont toutefois souligné que si l'autorité adjudicatrice n'est pas déterminée à appliquer cette clause et à mettre effectivement fin au contrat, les fournisseurs ne seront pas incités à satisfaire à leurs obligations et aux critères de qualité requis. Elle peut en outre inciter les prestataires à soumettre des offres très basses afin de remporter le marché, puis à demander une renégociation des conditions, faute de pouvoir tenir leurs engagements d'origine. Lorsque de tels comportements ne sont pas sanctionnés, les appels d'offres ne permettent pas de tirer avantage de la mise en concurrence.

Ainsi, il est indispensable de mettre en place, dans une certaine mesure, un mécanisme de réglementation *ex post* afin de contrôler les performances des opérateurs, de s'assurer que les critères de qualité requis sont réellement respectés et de vérifier que les engagements contractuels sont effectivement honorés, avant de récompenser ou de sanctionner les prestataires.

- (8) *Le cadre législatif doit favoriser les appels à la concurrence sur les marchés des services de transport locaux. Il peut être utile que les autorités de la concurrence mènent des activités de promotion à cet égard.*

S'il est admis que les facteurs évoqués ci-dessus jouent un rôle pour assurer que les appels d'offres donnent de bons résultats, la législation nationale en matière de transports doit créer les conditions requises en encourageant les collectivités territoriales à recourir à ces procédures pour attribuer des licences dans ce secteur. De nombreux délégués ont indiqué que la législation en vigueur laisse trop souvent une grande latitude aux collectivités territoriales qui peuvent attribuer directement ces marchés, sans préciser clairement quand et comment organiser des appels d'offres. Dans bien des pays, notamment au sein de l'UE, les collectivités territoriales ont ainsi pu différer l'introduction de procédures d'appel d'offres.

Les activités de promotion des autorités de la concurrence dans ce domaine peuvent être très efficaces en contribuant à améliorer la législation, en permettant à ces autorités d'obtenir – lorsqu'elles ont le pouvoir de s'y opposer – l'annulation de décisions anticoncurrentielles prises par les entités adjudicatrices et en dissuadant ces dernières d'adopter des procédures d'attribution non concurrentielles et dénuées de transparence.

TABLE RONDE SUR LES MÉTHODES D'ATTRIBUTION DE MARCHÉS DE SERVICES DE TRANSPORT RÉGIONAUX ET LOCAUX

Compte rendu de la discussion

Le président a ouvert la séance en annonçant la présentation du professeur Fels, qui a récemment présidé une commission gouvernementale sur l'examen du secteur des taxis dans l'État de Victoria (Australie). Il a expliqué que cet examen constituait un bon exemple d'évaluation des effets de la concurrence : il obligeait à recenser les façons de changer un ensemble de réglementations pour encourager et renforcer la concurrence, à proposer plusieurs solutions et à évaluer leurs répercussions, et à recommander la politique devant être finalement suivie. Les mesures recommandées ne s'étaient pas imposées d'elles-mêmes au départ. Cela signifiait que les évaluations des effets de la concurrence peuvent être très utiles et ne sont pas forcément un moyen de simplement rationaliser les intuitions des uns et des autres concernant les meilleures solutions possibles.

Le Prof. Fels a précisé qu'il se concentrerait sur les questions concernant l'octroi, selon des modalités favorisant la concurrence, de licences dans la profession de chauffeur de taxi. Il a toutefois expliqué qu'il existait dans l'État de Victoria de nombreuses entraves à la concurrence et pas seulement à l'octroi de licences. Par conséquent, pour éliminer tous les problèmes liés à la concurrence dans cette branche d'activité, il faudrait faire plus qu'une simple réforme du système de licences.

S'agissant des licences, les responsables politiques prêtent habituellement attention aux restrictions de l'offre qui peuvent conduire à une pénurie dans les périodes de pointe et provoquer une hausse des prix. Or, l'étude concernant les taxis de l'État de Victoria ne portait pas spécifiquement sur la nécessité d'une réforme du système de licences, mais avait été provoquée par un sentiment de mécontentement général à l'égard de la qualité du service. L'objet de l'étude était donc plus large. Au bout du compte, il était apparu que les difficultés avaient pour origine des problèmes de concurrence et qu'une réforme de la politique de concession de licences devrait faire partie de la solution.

Les problèmes à l'origine de l'étude concernaient la qualité des services de taxi, plus l'insuffisance de l'offre et le manque de fiabilité des réservations aux heures de pointe, le soir, ainsi que dans certaines zones isolées. Il s'y ajoutait une certaine insécurité pour les chauffeurs comme pour les personnes transportées. Des enquêtes dignes de confiance faisaient ressortir un niveau de satisfaction peu élevé chez les clients. En dépit de ces problèmes, les licences coûtaient cher et leur prix avait augmenté en moyenne de 16 % par an au cours de la décennie écoulée sans que la crise financière ait eu la moindre incidence sur lui. Cela signifiait un sérieux manque de concurrence.

Une analyse de la structure du marché a permis de constater que le principal problème tenait aux restrictions mises à la délivrance de nouvelles licences de taxi, ce qui avait pour effet de comprimer l'offre et d'engendrer des temps d'attente importants. Pour aggraver les choses, les tarifs étaient fixes, parfois trop bas pour stimuler l'offre et parfois tels qu'ils interdisaient toute concurrence. L'existence d'un barème fixe et le mode même d'organisation du secteur encourageaient certains à faire pression pour que l'on augmente les tarifs : pour pouvoir exploiter des taxis, les opérateurs versaient des droits de licence annuels aux détenteurs d'une licence et engageaient des chauffeurs contre un salaire. Leur intérêt était alors de rémunérer ces derniers le moins possible et non d'investir pour améliorer la qualité de leur service. En

conséquence, seuls des chauffeurs d'une qualité médiocre étaient attirés par le métier. Il existait en outre une pléthore de règlements inutilement rigides en matière de qualité et de sécurité.

La commission a émis un large éventail de recommandations ayant pour objet :

- a) d'accroître l'offre de taxis et de voitures de location par une réforme du système de licences ;
- b) de rétablir la confiance dans le secteur en améliorant la qualité de service des taxis (par une augmentation des salaires et un renforcement des droits en matière de santé et de sécurité), en réglementant mieux les circuits de réservation, et en améliorant la réglementation concernant la qualité et la sécurité ; et
- c) de développer la concurrence par une révision des règles de tarification qui favorise le jeu de la concurrence.

Concernant la réforme du régime de licences, la commission a rejeté plusieurs options qui n'auraient pas été politiquement acceptables, soit parce qu'elles auraient entraîné une baisse rapide de la valeur des licences en vigueur, soit parce que le dédommagement à verser par le gouvernement aux détenteurs d'une licence aurait été trop élevé. D'autres options ont également été rejetées parce qu'elles auraient retardé pour de bon la réforme, ce qui aurait pu donner à la profession le temps suffisant pour la contourner. De plus, certaines de ces options n'auraient pas apporté de réponse satisfaisante à la question de la qualité du service fourni par les chauffeurs.

La commission a donc préconisé de proposer les nouvelles licences à un prix raisonnable (20 000 dollars australiens par an). Ce prix devrait rester fixe en valeur nominale, de manière que la valeur des licences baisse en termes réels. Comme les licences étaient actuellement délivrées au prix de 30 000 dollars australiens par an, on prévoyait que la valeur des licences diminuerait d'environ deux tiers en 20 ans dans l'hypothèse d'une inflation de 3 %. De l'avis de la commission, cette solution se solderait par une perte modérée pour les détenteurs d'une licence et serait donc politiquement acceptable.

Elle aurait pour avantage une réduction à court terme, et une disparition à long terme, des restrictions relatives à l'offre de licences. La réforme ouvrirait l'accès à de nouveaux venus, mais pas en nombre excessif. De même, la baisse du coût des licences réduirait les pressions pesant sur les tarifs.

S'agissant des tarifs, la commission a préconisé de ne plus maintenir de tarifs fixes, mais de les établir au niveau maximum de manière que l'on puisse offrir des remises lorsque les conditions du marché s'y prêteraient, par exemple au moment d'une réservation. D'autre part, pour certains segments de marché, il faudrait permettre aux prix d'augmenter pour éviter un refus de fournir, ou supprimer carrément les contrôles des prix, car la concurrence remplirait logiquement son office (sur le marché des courses réservées dans les zones isolées).

Le gouvernement était en train d'examiner les conclusions et recommandations de la commission. Concernant les chances de succès de cette réforme sur le long terme, sachant que certains de ses effets ne se feraient pas sentir immédiatement, le Dr Fels a expliqué qu'il importait de créer de nouveaux groupes ayant intérêt à ce que le nouveau système se perpétue. Les chauffeurs, par exemple, appuieraient la réforme puisqu'elle entraînerait un relèvement de leurs rémunérations.

Le président a remercié le professeur Fels de son exposé et ouvert la table ronde à un débat sur les services d'autobus locaux.

Le président a déclaré que la concurrence ne jouait pas correctement sur le marché des services d'autobus locaux. Les voyageurs ne s'y prenaient pas à l'avance pour utiliser un service précis, mais

décidaient au dernier moment du service qui leur convenait en fonction de leurs besoins immédiats. Cela créait de fortes incitations à des comportements opportunistes entre les compagnies d'autobus, qui pouvaient, par exemple, changer leurs horaires à la dernière minute pour arriver avant leurs concurrents, et ces comportements engendraient une instabilité des horaires ainsi qu'un phénomène dangereux de courses de vitesse. Le président a rappelé que, lorsque le transport en autobus a été déréglementé au Royaume-Uni en 1985 et que l'accès au marché est devenu libre, une grande instabilité des horaires s'est ensuivie. Selon lui, la « concurrence pour le marché » constituait donc la forme de concurrence la plus appropriée et, d'ailleurs, la plus courante dans les services d'autobus locaux.

Il a indiqué ensuite que la table ronde s'organiserait en trois volets :

1. les pays feraient part de leur expérience concernant la préparation et l'exécution des appels d'offres, et la conception des réglementations rétroactives ;
2. puis les pays expliqueraient comment ils avaient usé de leurs capacités de sensibilisation pour encourager la concurrence sur ces marchés ; et
3. les pays rendraient compte d'affaires récentes survenues sur ces marchés au chapitre des mesures antitrust.

Le président a proposé de commencer par la France, qui recourait aux appels d'offres depuis 1993. Il a expliqué que, dans le système français, les opérateurs exploitaient généralement des autobus, des terminaux et des dépôts dont les collectivités locales avaient la propriété. Puis il a posé deux questions précises, à savoir si, premièrement, les fournisseurs retenus amenaient leur propre personnel ou s'ils reprenaient les travailleurs précédemment employés par l'entreprise en place, et si, deuxièmement, ce système d'attribution des marchés avait effectivement conduit à baisser les coûts et à améliorer la qualité.

La déléguée de la France a d'abord tenu à souligner que le grand nombre d'opérateurs privés en France n'était pas nécessairement synonyme d'une concurrence efficace. Elle a expliqué que ces services n'étaient fournis en fait que par cinq grandes entreprises à travers le pays. Trois d'entre elles étaient entrées sur le marché entre dix et quinze ans plus tôt. Ces opérateurs avaient régulièrement coordonné leurs offres entre 1996 et 1999, ainsi que l'avait observé l'Autorité française de la concurrence à l'occasion d'une décision rendue en 2005. En réalité, ces accords avaient neutralisé les avantages qu'une concurrence pour le marché aurait pu apporter.

La déléguée a également expliqué que, ainsi que le président l'avait justement indiqué, les actifs les plus importants étaient détenus par les collectivités locales et étaient transférés entre opérateurs au profit de l'adjudicataire ; il en allait de même pour les chauffeurs d'autobus. Cela limitait les obstacles à l'entrée. En revanche, il n'y avait pas de changement de direction, ce qui pouvait perturber l'exploitation. Les municipalités n'étaient donc pas incitées à attribuer les marchés à de nouveaux acteurs. De plus, les nouveaux opérateurs devaient se tailler une réputation, obstacle à l'entrée particulièrement important vu que les collectivités locales n'étaient pas compétentes pour vérifier les renseignements qui leur étaient fournis par les opérateurs.

Pour ce qui était des résultats obtenus, les coûts avaient augmenté de 25 % en 15 ans, et les recettes ne couvraient que 31 % de ces coûts, contre 51 % en 1995. Par conséquent, les services d'autobus urbains étaient largement subventionnés (à hauteur de quelque 100 euros par habitant et par an). Comme il n'existait pas d'indicateur de qualité du service, il était difficile d'avoir une idée des répercussions sur ce plan.

En conclusion, la déléguée de la France a dit que les appels d'offres étaient une bonne chose pour la concurrence, mais ne suffisaient pas à garantir que le jeu de la concurrence s'exerce pleinement. Il était

essentiel d'organiser les appels d'offres de manière à assurer transparence, objectivité et absence de discrimination. Cela demandait par conséquent des compétences suffisantes, les autorités de la concurrence devaient être avisées au moindre soupçon de collusion, et il convenait de limiter les obstacles à l'entrée et à l'expansion des marchés. Signe encourageant, après une période au cours de laquelle 45 % des appels d'offres avaient débouché sur une seule soumission, le taux de participation aux appels d'offres semblait avoir augmenté récemment.

Le président a remercié la déléguée de la France et ajouté qu'il désirait revenir sur l'expérience française après l'exposé du Royaume-Uni. Le président a expliqué que le Royaume-Uni était le seul pays à avoir connu les deux modèles de concurrence : la concurrence sur le marché à l'échelle de tout le territoire, sauf à Londres en Irlande du Nord, et la concurrence pour le marché à Londres.

Le délégué du Royaume-Uni a expliqué que la plupart des services d'autobus en dehors de Londres avaient été déréglementés, mais que l'on n'avait pas attendu de cette décision qu'elle remédie à tous les problèmes sociaux, environnementaux et économiques du secteur. En conséquence, celui-ci était toujours assujéti à tout un ensemble de règlements, et on continuait d'octroyer des subventions pour garantir une offre suffisante et adaptée, ainsi qu'un certain niveau de qualité et de sécurité. Par exemple, les dix commissaires régionaux du trafic avaient les pouvoirs pour veiller à ce que les opérateurs s'inscrivent et adhèrent aux horaires adoptés, pour intervenir en cas d'engorgement ou de concentration de services, ou tout autre comportement de conduite dangereuse, et pour garantir que la concurrence s'exerce de façon loyale.

Le délégué du Royaume-Uni a ensuite expliqué qu'environ 1.5 milliard de livres avaient été injecté dans le secteur en 2010 et 2011 par les voies suivantes :

- a) aide aux exploitants de lignes d'autobus ;
- b) régime de tarifs préférentiels, et
- c) régimes de « services aidés », destinés à soutenir les services commercialement non viables mais socialement utiles.

Quant aux résultats obtenus, ils semblaient globalement positifs. Cependant, il ressortait de l'étude réalisée par la Commission de la concurrence en 2010-2011 – enquête sur le marché des services d'autobus locaux (hors Londres et l'Irlande du Nord) – que la concurrence ne s'exerçait pas toujours pleinement. Les marchés étaient concentrés : les plus gros opérateurs locaux assuraient en moyenne quelque 70 % des services, et on n'enregistrait que quelques rares exemples de concurrence frontale sur des axes particuliers. Lorsqu'une entreprise locale bénéficiait d'une situation de monopole, la fréquence de passage était souvent moins élevée et les lignes secondaires n'étaient pas desservies.

Néanmoins, les exemples ne manquaient pas aujourd'hui d'une concurrence constante et efficace entre compagnies d'autobus. Désormais, la concurrence tend à porter davantage sur les prix que sur les horaires. En effet, les comportements d'accaparement évoqués par le président au début n'étaient plus possibles : tout changement d'horaire devait être annoncé 56 jours à l'avance, de sorte que les dessertes ne pouvaient plus être modifiées du jour au lendemain. De plus, on s'assurait que les opérateurs respectaient l'horaire. Ceux qui ne tenaient pas leurs engagements risquaient de perdre leur licence.

Le président a demandé comment étaient déterminées les subventions accordées pour les services non rentables.

Le délégué du Royaume-Uni a répondu que, pour ce qu'il en savait, l'aide octroyée aux compagnies d'autobus était fixée à un niveau conçu pour simplement encourager l'utilisation de l'autobus. Ensuite, si

des services se révélèrent non rentables et risquaient de disparaître, une subvention était accordée en cas de besoin. Cette obligation avait clairement été interprétée de façons très différentes par les diverses collectivités locales.

Puis le président a souhaité en savoir plus à propos de l'enquête sur le marché des services d'autobus locaux réalisée par la Commission de la concurrence en 2010-2011. Il a demandé pourquoi l'OFT avait saisi la Commission au sujet de ce secteur, et à quoi l'enquête avait abouti.

Le délégué du Royaume-Uni a répondu que l'OFT avait demandé à la Commission de la concurrence de se pencher sur ce secteur pour répondre à plusieurs préoccupations. Premièrement, le coût des marchés semblait augmenter plus rapidement que les coûts des opérateurs. Deuxièmement, le nombre de soumissionnaires apparaissait limité à certains endroits et il fallait déterminer si c'était parce que les opérateurs étaient dissuadés de faire une offre, ou parce que les obstacles à l'entrée étaient trop importants. Troisièmement, les opérateurs trouvaient peut-être intéressant d'abandonner des lignes commerciales rentables pour toucher des subventions. Quatrièmement, la façon dont les collectivités locales géraient le processus d'appel d'offres influait peut-être sur son issue.

L'enquête avait montré qu'en effet, quelques appels d'offres attiraient peu de candidats. Elle avait aussi montré que plus les opérateurs fournissaient de renseignements sur les coûts et l'état de la demande, plus les règles fixées par la collectivité locale pour la passation des marchés étaient claires et simples (les collectivités locales jouissant d'une certaine liberté pour l'établissement de ces règles) et plus le contrat était passé pour une longue durée, plus le nombre de soumissionnaires augmentait.

Ce constat pourrait se traduire par des compromis difficiles pour les collectivités publiques. Dans l'immédiat, le département anglais des Transports et ses homologues écossais et gallois préparaient un guide de bonnes pratiques en matière d'appels d'offres à l'intention des collectivités publiques, en s'appuyant sur les données tirées de l'enquête de la Commission de la concurrence.

Le président a remercié le délégué du Royaume-Uni et invité la représentante de l'administration des transports de Londres, Transport for London (TfL), à brosser un tableau du marché londonien.

Claire Kavanagh a d'abord présenté les grandes caractéristiques du marché londonien. L'élaboration d'une stratégie des transports pour Londres faisait partie des principales responsabilités du maire et TfL s'assurait que ses objectifs étaient atteints.

TfL était chargé de la planification et de l'organisation des itinéraires ainsi que de l'infrastructure et du matériel. De plus, il contrôlait de près la qualité du service sous tous ses aspects, effectuait des recherches sur les besoins et le degré de satisfaction des clients, et conseillait le maire en matière de tarifs.

Les lignes étaient toutes attribuées par TfL, et le maire fixait les tarifs. Les entreprises privées répondaient aux appels d'offres, puis exploitaient et géraient les services en conformité avec les normes établies par la collectivité locale en utilisant leurs propres actifs (autobus, garages et dépôts) et leur personnel.

Concernant le fonctionnement des appels d'offres, tout opérateur souhaitant soumissionner pour exploiter une ligne d'autobus à Londres devait être agréé en tant que fournisseur aux termes d'une procédure qui comportait une vérification approfondie de sa stabilité financière, de ses capacités de gestion et de son niveau de sécurité. Seuls ces fournisseurs agréés pouvaient soumissionner. Pendant le processus d'appel d'offres, d'autres vérifications avaient lieu.

Chaque ligne était proposée sous la forme d'une tranche distincte, mais les différentes tranches étaient offertes par lots. Cette formule apportait la souplesse nécessaire pour encourager les entreprises nouvelles

et relativement petites à entrer sur le marché, tout en permettant aux grosses entreprises de tirer profit des économies d'échelle en soumissionnant pour plusieurs lignes. Les contrats étaient signés pour cinq ans, avec prolongation possible de deux ans lorsque certains objectifs étaient atteints. Avant le lancement d'un nouvel appel d'offres, les lignes étaient passées en revue, et redéployées en cas de besoin.

Les offres étaient évaluées sur la base de plusieurs critères concernant à la fois la qualité, la sécurité, la stabilité financière et le coût.

Ce système de passation des marchés fonctionnait depuis longtemps. En 1985, lors de la déréglementation des services d'autobus locaux dans le reste de la Grande-Bretagne, il a été décidé de suivre une démarche différente à Londres. Au début, seules quelques lignes particulières ont été attribuées à des sociétés privées, qui se sont alors trouvées en concurrence avec des entreprises publiques. Mais, en 1994, toutes les entreprises publiques avaient été privatisées.

Depuis 1985, plusieurs types de contrats avaient été expérimentés. Les premiers avaient pour base le coût brut. Cela semblait logique au moment du lancement du système d'appel d'offres, car il s'agissait d'un type de contrat simple dans lequel l'opérateur indiquait le prix qu'il pratiquerait en contrepartie des services demandés, la collectivité acquittant simplement le prix en question et encaissant les recettes tarifaires. Mais ces contrats mettaient trop peu l'accent sur la qualité pour être tout à fait satisfaisants.

Le type de contrat suivant était fondé sur les coûts nets, et les recettes tarifaires revenaient à l'opérateur. Ce système créait des difficultés, car le plus gros des recettes provenait du prix payé par les détenteurs d'une carte de transport journalière ou hebdomadaire, ce qui obligeait à trouver une formule pour la répartition des recettes entre les opérateurs. De plus, il n'existait aucune incitation à fournir un travail de qualité. Cette forme de contrat a donc fini par disparaître elle aussi.

Un nouveau type de contrat, mieux adapté, dit « contrat pro qualité », était fondé sur les coûts bruts et prévoyait le versement d'un bonus ou des retenues sur les recettes selon que les objectifs étaient atteints ou non. En cas de dépassement des objectifs, le contrat pouvait être prolongé de deux ans, forme de récompense que les opérateurs appréciaient. Les objectifs de performance encourageaient les opérateurs à fournir un bon service. À chaque ligne correspondaient des objectifs précis, qui dépendaient de ses caractéristiques (notamment du degré d'engorgement).

Par ailleurs, l'autorité réalisait des enquêtes de satisfaction auprès des clients pour vérifier d'autres facettes de la qualité.

S'agissant de l'évolution de la concurrence, on dénombrait, 20 ans plus tôt, beaucoup plus de petites entreprises, alors qu'aujourd'hui le marché londonien était dominé par sept grandes sociétés qui exploitaient plus de 95 % du réseau. Fait intéressant, certains de ces opérateurs étaient de grandes entreprises parapubliques : ainsi, Abellio appartenait à la société de chemins de fer néerlandaise et Arriva à la Deutsche Bahn. Malgré tout, le niveau de concurrence était jugé satisfaisant : au cours des dernières années, chaque appel d'offres avait suscité trois soumissions en moyenne. De plus, depuis l'entrée en vigueur des contrats « pro qualité » en 2000, la fiabilité des services d'autobus s'était nettement améliorée.

Le président a remercié Claire Kavanagh, à qui il a demandé comment on en était arrivé à cette structure de marché ouvert à la concurrence. L'experte a expliqué que cette structure s'était imposée avec le temps. Premièrement, après neuf années de coexistence entre appels d'offres et fourniture par des acteurs publics, de nouveaux intervenants étaient arrivés peu à peu sur le marché, desserte par desserte, et lorsque la totalité du marché avait été privatisée, environ 50 % du réseau étaient déjà exploités par des opérateurs privés. L'État avait alors privatisé neuf sociétés distinctes, qu'il a cédées à différents acheteurs pour entretenir la concurrence.

Par ailleurs, le président a voulu savoir si les coûts inhérents à un parc d'autobus de grandes dimensions constituait un obstacle à l'entrée. L'experte a répondu que les petits opérateurs pouvaient louer des véhicules, ce qui leur permettait de se procurer le matériel dont ils avaient besoin.

Le président a remercié l'experte en rappelant que, jusque là, deux modes d'attribution des marchés avaient été évoqués, le modèle français et le modèle londonien. En France, l'opérateur encaissait les recettes tarifaires et des subventions étaient prévues dans l'appel d'offres ou négociées après coup. À Londres, l'opérateur n'encaissait pas les recettes tarifaires mais était seulement dédommagé des coûts encourus. Le niveau des subventions n'était donc pas déterminé lors de l'appel d'offres, mais convenu avec les collectivités publiques. Comme un plus grand nombre d'entreprises répondait aux appels d'offres au Royaume-Uni qu'en France, le président a demandé au professeur Yvrande-Billon si l'on avait pu tirer quelques conclusions sur l'efficacité relative des deux systèmes.

Le professeur Yvrande-Billon a répondu que, selon les conclusions de son étude sur les deux systèmes d'appels d'offres (celui de Londres et celui utilisé en France, à l'extérieur de Paris), le système de Londres donnait de meilleurs résultats. En France, par exemple, les soumissionnaires étaient moins nombreux qu'à Londres : entre la moitié des années 90 et 2011, on avait enregistré une moyenne de 1.9 soumission en France, contre 2.8 à Londres.

En théorie, deux soumissionnaires suffisaient, mais le problème était que, en France, jusqu'à récemment, 60 % des appels d'offres donnaient lieu à une seule soumission. A Londres, on ne dépassait pas 16 %. En France, la situation s'était améliorée depuis peu, fort probablement du fait de la décision prise en 2005 par l'autorité française de la concurrence, évoquée plus tôt.

Le professeur Ponti a ajouté que non seulement le nombre de soumissionnaires, mais aussi leur identité, pouvaient apporter des indications sur d'éventuels problèmes de concurrence. Le fait que les marchés soient toujours remportés par la même entreprise était clairement le signe d'un sérieux manque de concurrence.

Le professeur Yvrande-Billon a répondu qu'entre la moitié des années 90 et 2005, le taux de renouvellement des fournisseurs avait été de 90 %, mais qu'il tombait à 70 % si l'on prenait en considération les années postérieures à la décision de 2005, taux comparable à celui de Londres. Cependant, un taux de rotation élevé n'indiquait pas forcément, en soi, une défaillance du jeu de la concurrence, car il pouvait arriver qu'une même entreprise remporte tous les marchés pour la raison qu'elle est la meilleure de toutes. En revanche, lorsque le taux de renouvellement des fournisseurs était élevé et qu'en même temps, un seul opérateur répondait aux appels d'offres, on pouvait sérieusement s'inquiéter.

Concernant les résultats observés sur le marché, les coûts d'exploitation unitaires avaient nettement augmenté en France entre 1990 et 2006. À Londres, ils étaient restés globalement au même niveau qu'en France dans un premier temps, avant de diminuer pendant six ou sept ans, puis de remonter entre 2006 et 2011. Néanmoins, en 2011, ils demeuraient inférieurs à ce qu'ils avaient été au début des années 90. Autrement dit, l'obligation faite aux collectivités locales en France de recourir aux appels d'offres concurrentiels n'avait pas fait baisser les coûts d'exploitation ; au contraire, ils avaient continué de s'accroître, alors qu'à Londres ils avaient globalement diminué.

Mme Yvrande-Billon a ensuite expliqué que cette situation pouvait avoir pour cause trois différences importantes :

- a) La transparence de la procédure, c'est-à-dire la capacité des soumissionnaires de bien connaître et comprendre les modes d'attribution des marchés : à Londres, même lorsque l'autorité ne retenait pas l'offre la moins disante, les résultats de l'appel d'offres et les critères qui avaient motivé le

choix étaient annoncés publiquement. Cela avait pour effet de réduire l'incertitude, d'encourager les soumissionnaires à améliorer leurs offres et d'inciter les entreprises à soumissionner.

- b) Le degré de latitude dont jouissent les autorités pour apprécier les soumissions, conjugué à leur niveau de compétence et à leurs capacités de contrôle : à Londres, il était clairement dit dans quelle situation les opérateurs se trouvaient par rapport aux critères définis dans les appels d'offres, ce qui était une garantie de cohérence. Cela exigeait de grandes compétences, un savoir-faire en matière de collecte de données, un suivi des opérateurs et l'utilisation de données de référence concernant, par exemple, l'efficacité des opérateurs. La mise de toutes ces informations à la disposition du public permettait aux opérateurs de tirer les enseignements d'expériences passées et d'améliorer leurs offres.
- c) La conception des appels d'offres : à Londres, l'attribution des lignes faisait l'objet d'appels d'offres séparés pour limiter les obstacles à l'entrée, tandis qu'en France des ensembles de lignes étaient attribués d'une manière groupée.

Le président a remercié le professeur Yvrande-Billon. Puis il a demandé comment le marché avait évolué ; selon ce qu'il imaginait, il y avait au départ un seul opérateur public pour les 200 réseaux locaux qui existaient en France, et il a voulu savoir comment il se faisait que l'on comptait actuellement quatre grandes entreprises. Le professeur Yvrande-Billon a expliqué que cela était probablement dû au fait qu'un petit nombre de grandes sociétés généralistes privées signaient des contrats de services avant même l'introduction des appels d'offres. En conséquence, la loi créant les appels d'offres avait modifié le mode d'attribution des marchés, mais pas l'identité des entreprises qui fournissaient les services.

Le professeur Ponti a demandé s'il était souhaitable de ménager une latitude d'action dès lors que l'on parlait de réglementation. Le professeur Yvrande-Billon a répondu que le pouvoir d'appréciation offrait un moyen, par exemple, d'écarter les soumissionnaires qui présentent des offres trop optimistes dans l'intention de les renégocier ultérieurement.

Le président a donné la parole au représentant de l'Espagne pour que l'on aborde la question du travail de sensibilisation comme moyen d'encourager la concurrence dans les services d'autobus interurbains.

Le délégué de l'Espagne a commencé son exposé en disant que l'exemple qu'il allait présenter montrait en quoi le travail de sensibilisation accompli par les autorités de la concurrence pouvait influencer sur la législation.

En 2007, dans le but de déréglementer le marché, le ministère espagnol des Travaux publics, les syndicats et les sociétés de transport s'étaient entendus sur un protocole qui énonçait les critères à employer pour l'attribution des concessions de services d'autobus locaux, et les facteurs de pondération à appliquer à ces critères.

L'autorité de la concurrence a analysé ce protocole dans un rapport paru en 2008 qui contenait les observations suivantes :

- la durée des concessions était extrêmement longue, ce qui engendrait d'importants obstacles à l'entrée;
- on accordait peu de place aux tarifs et à la fréquence des dessertes en comparaison de critères comme l'infrastructure technique et la supervision du personnel ; et

- les administrations locales jouissaient d'une trop grande latitude dans le choix du soumissionnaire.

En conséquence, le Ministère a apporté certaines modifications au protocole pour donner beaucoup plus de poids aux tarifs et à la fréquence des dessertes en tant que critères d'adjudication. Cependant, rien n'a été fait en ce qui concerne la durée excessive de certaines concessions.

Au niveau régional, aucun des problèmes soulevés par l'autorité de la concurrence n'avait été réglé en 2010. L'autorité a donc adressé plusieurs demandes aux régions pour qu'elles changent leur processus d'appels d'offres relatif aux transports publics. Mais, faute de réponses satisfaisantes, l'autorité de la concurrence a contesté devant les tribunaux les processus adoptés en Galice et à Valence.

A Valence, la législation en cause a été abrogée parce que jugée anticoncurrentielle. En Galice, la demande de l'autorité a été rejetée, les accusations portées n'étant pas suffisamment fondées. Mais l'autorité de la concurrence a interjeté appel auprès de la Cour suprême dans l'espoir d'une analyse plus poussée sur le fonds et d'un renversement du jugement rendu. Quoiqu'il en soit, ces affaires ont eu un effet dissuasif énorme, puisque qu'aucune autre collectivité n'a mis sur pied de régime semblable.

Le président a remercié le délégué de l'Espagne, avant de se tourner vers celui de l'Italie. Dans ce pays, la réforme des services de transport locaux avait commencé en 1997, mais un jugement de la Cour suprême avait frappé ces changements de nullité en 2012 et ramené l'Italie au stade où elle se trouvait en 1997. Le président a demandé pourquoi l'Italie avait autant de difficultés à instaurer des appels d'offres concurrentiels dans les services publics.

Le délégué de l'Italie a répondu que, à son avis, un problème important tenait au fait que les collectivités publiques étaient souvent propriétaires des entreprises de transport en place mais que, en même temps, elles avaient pour mission de confier les services aux meilleurs fournisseurs et de définir la procédure qui convenait pour ce faire. En outre, après une succession d'interventions des législateurs, une incertitude s'était créée quant aux objectifs à atteindre en matière de transports locaux.

Autre élément qui bloquait l'instauration d'appels d'offres concurrentiels : la législation européenne en vigueur. Dans plusieurs branches des services publics, la législation européenne avait donné une forte impulsion aux mesures de libéralisation au niveau national. Ce n'était pas le cas des services d'autobus locaux. Dans ce secteur, la législation européenne autorisait explicitement l'attribution directe de marchés, à certaines conditions. En Italie, la législation européenne avait été transposée dans le droit national en des termes qui encourageaient les collectivités publiques à retarder l'instauration d'appels d'offres concurrentiels et à continuer d'attribuer directement les marchés, au mépris de la transparence et du jeu de la concurrence.

Malgré ces problèmes, la situation était meilleure que 15 ans plus tôt, parce que l'autorité italienne de la concurrence était désormais compétente pour contester devant la justice les actes administratifs anticoncurrentiels. Ainsi, l'autorité avait récemment engagé une procédure contre la municipalité de Rome parce que celle-ci avait confié jusqu'en 2019 les services de transport public locaux à l'entreprise publique en place en passant outre à des aspects contractuels importants, notamment les obligations de service public et les compensations financières. Cette affaire importante pourrait déboucher sur d'autres interventions dans le secteur.

Le président a ajouté que le problème posé par la législation européenne tenait à son caractère trop générique, aucune indication n'y étant donnée quant à la façon d'organiser les appels d'offres, par exemple. Cela laissait une très grande latitude aux collectivités publiques et avait donné lieu en Italie à des

appels d'offres très mal organisés. Le président a ensuite donné la parole au professeur Ponti pour qu'il fournisse plus de détails sur le modèle italien.

Le professeur Marco Ponti a répété que l'un des grands problèmes que connaissait l'Italie résidait dans un manque de motivation des collectivités publiques, dû au fait qu'elles possédaient un pouvoir de contrôle ou un intérêt dans les entreprises qui fournissaient les services d'autobus. En dépit de l'ouverture officielle du marché à la concurrence, l'opposition avait été forte et efficace : les fournisseurs historiques avaient remporté 99 % des adjudications, en se cachant parfois derrière une nouvelle raison sociale. Il fallait également signaler que les prestataires de services ne subissaient aucune pression : en 50 ans, aucun fournisseur n'avait été laissé faire faillite, ni sanctionné pour cause de mauvais résultats. En outre, aux termes de la législation locale, il était souvent impossible de modifier les contrats de travail, ce qui limitait les résultats à attendre des appels d'offres.

M. Monti s'est ensuite étendu sur le cas de la Lombardie. Dans cette région, selon une nouvelle loi, les postulants devaient avoir une certaine taille, ce qui signifiait que, fréquemment, de petits opérateurs pourtant plus performants ne pouvaient concourir.

Par ailleurs, un organe de réglementation des transports indépendant avait été créé mais, plus d'un an après la promulgation de la loi correspondante, cette instance n'avait pas encore vu le jour, à cause de l'opposition des entreprises réglementées et de différends politiques.

Concernant les résultats enregistrés, le délégué de l'Italie a estimé que le coût unitaire du travail total était deux fois plus élevé dans le secteur public que dans le secteur privé. Il a aussi expliqué que, à parité des pouvoirs d'achat, les tarifs étaient parmi les plus bas de l'Europe et qu'en conséquence les subventions se situaient à un niveau très élevé.

Il s'y ajoutait des anomalies dans l'attribution des marchés, certains services étant offerts alors que personne ne les avait demandés. La crise financière en cours créait d'autres anomalies du même type : les transferts de l'État ayant diminué, on avait réduit les services au lieu d'augmenter les tarifs. Enfin, on se heurtait à un détournement généralisé de la réglementation. L'autorité italienne de la concurrence avait tenté d'améliorer la situation en intervenant, par exemple, contre les associations locales qui s'étaient officiellement constituées pour éviter la concurrence. Elle avait également essayé d'intervenir contre la façon les appels d'offres étaient organisés à Milan et Turin, mais sans succès.

Les résultats des appels d'offres concurrentiels, quand ces derniers étaient correctement réalisés, pouvaient se révéler impressionnants : en Toscane, les coûts avaient diminué d'un tiers. Malheureusement, à cause de pressions politiques, les résultats de l'appel d'offres avaient été annulés ultérieurement.

Pour ce qui est des recommandations à formuler, l'Italie devrait :

- mettre rapidement en place un organe de réglementation indépendant ;
- introduire une dose de concurrence pour l'obtention des fonds publics, en faisant en sorte que davantage de crédits aillent aux administrations qui favorisent les appels d'offres concurrentiels ;
- éliminer les conflits d'intérêts pour les municipalités ;
- opter pour les contrats fondés sur les coûts bruts afin de réduire l'asymétrie d'information au détriment des nouveaux venus, parce que ces contrats rendent inutiles les informations relatives à la demande ;

- attribuer de petits lots, tout en autorisant les regroupements de soumissions, afin que le marché puisse déterminer l'ampleur réelle des économies d'échelle ; et
- rendre publiques les informations sur les coûts et avantages de ces services.

Le président a remercié l'expert de l'Italie. Il a annoncé que, faute de temps, seuls les pays membres pourraient prendre la parole pour présenter leur contribution à la table ronde. Il a remercié les observateurs pour le travail que la préparation de leur communication leur avait donné, en regrettant de ne pouvoir entendre leur exposé.

Il a alors cédé la parole au représentant du Japon. Il a expliqué que la Loi japonaise sur les transports routiers avait été révisée en 2002 pour permettre à la concurrence de se développer dans l'offre de transport locale, à la suite de quoi le système traditionnel d'adjudication ligne par ligne avait été modifié afin que tous les fournisseurs détenteurs d'une licence puissent participer. Le président a désiré savoir comment ce système fonctionnait dans les faits et, notamment, qui choisissait les fréquences et les itinéraires dans le souci d'assurer des dessertes acceptables, et pour quelle raison le Japon était passé à ce système.

Le délégué du Japon a expliqué que les compagnies d'autobus détentrices d'une licence étaient libres de choisir les itinéraires et la fréquence de leurs dessertes, mais que la loi permettait au ministère des Transports d'intervenir et d'ordonner aux opérateurs de modifier leurs itinéraires ou leurs horaires si cela est nécessaire pour répondre aux besoins des consommateurs. Il existait en outre un organe consultatif local composé de représentants de la collectivité locale, des opérateurs détenteurs d'une licence et du ministère des Transports, qui s'assurait que la couverture et la fréquence des dessertes étaient globalement satisfaisantes.

Le président a remercié le délégué du Japon et donné la parole à la délégation turque. Selon ce qu'il avait compris, un réseau d'autobus public et un réseau privé coexistaient en Turquie. Le président se demandait de quelle façon on décidait quelles lignes étaient confiées aux fournisseurs privés, si les entreprises privées recevaient des subventions, et comment les subventions étaient fixées.

Le délégué de la Turquie a répondu qu'il appartenait à l'organe de réglementation de déterminer les services à fournir et leur prix. Les collectivités locales décidaient, avec l'aide du Centre de coordination des transports, s'il convenait d'adjuger une desserte aux opérateurs privés. Les services privés étaient généralement fournis sur les lignes commercialement viables, et les services publics sur les lignes non viables. Pour cette raison, les entreprises privées ne recevaient aucune subvention. Les lignes étaient adjugées séparément ou en petits lots, selon ce que décidait le Centre de coordination des transports. Le Département des transports vérifiait si les conditions contractuelles étaient respectées.

Le président s'est tourné vers le représentant de la Pologne, pays qui appliquait un modèle semblable à celui de la Turquie. Il a donc posé la même question.

Le délégué de la Pologne a expliqué que les opérateurs publics exploitaient les lignes commercialement non viables et les opérateurs privés les lignes viables. Ainsi, dans les grandes villes où les réseaux étaient complexes et dont les services étaient subventionnés, les opérateurs privés étaient normalement absents. En revanche, dans les petites villes où les services n'avaient pas besoin d'être fortement subventionnés, les opérateurs privés étaient chose courante. De plus, les opérateurs privés assuraient souvent les liaisons urbaines ou interurbaines. Le délégué a ajouté que les opérateurs privés, bien qu'ils ne reçoivent pas de subventions, pouvaient obtenir le remboursement des remises légalement obligatoires qu'ils accordaient, par exemple aux étudiants. Le niveau de qualité de leurs prestations était défini dans le contrat, et ils s'exposaient à des sanctions lorsque le niveau convenu n'était pas atteint, politique similaire à celle en vigueur à Londres.

Le président a ensuite invité le représentant de la Russie à prendre la parole. Le délégué de la Russie a indiqué que des problèmes de concurrence s'étaient posés dans le cas d'appels d'offres concernant des services d'autobus. L'autorité fédérale de la concurrence, par exemple, avait reproché au gouvernement de la région de Stavropol d'avoir enfreint la loi fédérale sur la concurrence parce qu'elle avait adopté une résolution qui rendait les appels d'offres discriminatoires et, donc, anticoncurrentiels. Le délégué a précisé que les problèmes de cette nature seraient réglés sous peu par une nouvelle loi fédérale, en cours de rédaction. Cette loi instaurerait une approche commune pour l'organisation des appels d'offres visant les services de transport public assurés par les collectivités régionales et locales.

Le délégué du Chili a souhaité faire un exposé sur l'expérience vécue à Santiago. Il a expliqué que tous les systèmes dont on avait parlé ce jour avaient été plus ou moins mis en œuvre, mais qu'ils avaient tous échoué, non pas parce que les systèmes étaient mauvais, mais parce qu'ils n'avaient pas été appliqués correctement. Au milieu des années 90, par exemple, les services étaient assurés par des opérateurs privés et les usagers payaient leur ticket en espèces en montant dans l'autobus. En 2006, un système multi-transport combinant autobus et métro avait été adopté, qui avait mis un terme au système de paiement dans l'autobus. Une chambre de compensation avait mise sur pied pour garantir aux opérateurs qu'ils percevraient leur part des recettes, mais la fraude dans les autobus avait beaucoup augmenté, causant d'importants déficits.

Le président a remercié le délégué du Chili. L'exemple présenté concluait opportunément la discussion sur les processus d'appels d'offres, parce qu'il montrait une fois de plus combien il était difficile de concevoir et de réaliser des appels d'offres de manière avantageuse. Puis le président a abordé la question de la sensibilisation.

Le président a commencé à brosser un tableau de la situation à Dublin, où l'ensemble des services d'autobus locaux étaient assurés par deux entreprises publiques. L'exclusion du secteur privé s'expliquait par le fait que beaucoup de lignes n'étaient pas commercialement viables et que, pour que les externalités de réseau puissent être pleinement exploitées, il fallait que le réseau soit géré comme un tout. Cependant, le président a-t-il observé, il n'était pas certain qu'un tel système profite vraiment aux consommateurs. L'autorité irlandaise de la concurrence avait proposé de changer de système, parce que selon elle, rien ne prouvait que la plupart des lignes n'étaient pas viables, et parce que le réseau était suffisamment efficient pour justifier cette approche. Elle préconisait d'instaurer des appels d'offres concurrentiels pour déterminer quelles lignes étaient commercialement viables, pour réduire les subventions et pour mieux satisfaire les consommateurs.

Le président a ensuite demandé à l'autorité irlandaise de la concurrence quel modèle d'appels d'offres elle avait effectivement proposé.

Le délégué de l'Irlande a expliqué que l'autorité de la concurrence avait uniquement recommandé au gouvernement irlandais de procéder par appels d'offres pour les services d'autobus publics et qu'elle n'avait proposé aucun modèle précis. Il a indiqué que le gouvernement n'avait pas encore répondu à la proposition. Le délégué a également expliqué que, pour l'autorité, la transparence sur les coûts et le niveau de la demande constituait une condition indispensable au succès des appels d'offres. Actuellement, du fait du nombre de subventions croisées entre les lignes, on ne disposait pas de données suffisamment claires sur la question.

Le président s'est ensuite adressé au Comité consultatif économique et industriel auprès de l'OCDE (BIAC). Il lui a demandé d'expliquer si les instances de réglementation des transports devraient être nationales ou régionales. Le délégué du BIAC a répondu que les collectivités publiques devaient prendre trois types de décisions concernant les services de transport et voir, en l'occurrence :

1. si elles devaient fournir les services elles-mêmes ou bien les sous-traiter ;
2. quand les subventionner et à quelle hauteur ;
3. comment attribuer les marchés.

Il a ajouté que ces décisions devaient être encadrées à un niveau supérieur, c'est-à-dire au niveau régional, comme c'était le cas au Royaume-Uni (en dehors de Londres). En effet, une coordination était nécessaire parce que les services d'autobus locaux étaient souvent connectés à d'autres réseaux de transport plus vastes, notamment à des réseaux ferrés. Une autre raison était politique : les autorités locales étaient soumises à des considérations politiques locales, ce qui pouvait entraîner une discrimination à l'encontre de certains soumissionnaires. Troisième raison, les autorités locales pouvaient manquer de compétences et de ressources pour concevoir les appels d'offres et assurer le suivi des contrats.

Le président a ensuite orienté la discussion sur des cas récents d'application des lois antitrust dans le secteur. Il a évoqué l'expérience du Taipei chinois et des États-Unis.

Au Taipei chinois, l'autorité de la concurrence avait découvert et éliminé en entente dans des services d'autobus locaux.

Aux États-Unis, le Surface Transportation Board (STB), organe de réglementation des services d'autobus, avait autorisé deux compagnies à regrouper les dessertes qu'elles assuraient entre diverses grandes villes en 1997-1998. Le STB avait justifié l'approbation de ce système par le fait qu'il apporterait beaucoup d'avantages en réduisant l'excédent de capacité et en parant aux doubles emplois inutiles de matériel et de personnel. Il avait estimé en outre que le regroupement ne restreindrait pas la concurrence outre mesure. Le Département de la justice s'était opposé à la décision du STB parce qu'elle créait une situation de monopole sur certaines lignes, mais sans grand effet.

Le président a demandé pourquoi le Département de la justice n'avait pas eu gain de cause compte tenu de la solidité de ses arguments contre cet accord de regroupement. Le délégué des États-Unis a expliqué que le STB, comme beaucoup d'organismes de réglementation du pays, appliquait une norme axée sur l'intérêt public. Cette norme tenait compte non seulement des incidences sur la concurrence, mais également d'autres critères. Le Département de la justice n'avait pas réussi à réfuter tous les arguments avancés par le STB pour étayer sa décision. Fait intéressant, la décision du STB avait récemment perdu de sa pertinence. En effet, des opérateurs à bas coût étaient entrés sur le marché, ce qui avait affaibli la puissance commerciale acquise par les deux compagnies regroupées.

Le président a remercié les délégués et mis fin à la table ronde sur les services d'autobus locaux.

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