

FRANCE'S RAIL PASSENGER TRANSPORT SERVICES: LIBERALISATION ON ITS WAY?

16 DECEMBER 2020 • ARTICLE



Liberalisation of rail passenger transport services in France is becoming a reality: several regions have published concession notices, while others are preparing to follow suit in the coming months. More interestingly, bidders have now submitted their expressions of interest for the projects launched by the *Grand Est* region. The composition of the consortia, as far as it can be anticipated to date, gives useful information, and raises several questions, on the structuring of projects of this new type.

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TIMETABLE FOR LIBERALISATION

After the opening to competition of the rail freight and international rail passenger markets, France has passed a law for a new railway pact¹ that provides for a timetable for said liberalisation as follows:

- From 3 December 2019 to 24 December 2023, the French State may award public service contracts for national rail passenger transport services ("*Intercités*"), after a call for tenders;
- From 3 December 2019 to 24 December 2023, the French "*régions*" (public local entities, acting as public transport authorities) may award public service contracts for regional rail passenger transport services (TER – "*trains express régionaux*") after a call for tenders, or provide such services themselves;
- The public service contracts already entered into before 25 December 2023 between the French State or French regions and SNCF Mobilités (France's historic, incumbent operator) shall continue until the end of their term, which shall not exceed ten years (i.e. 24 December 2033); and
- From 25 December 2023, the French State, as well as French *régions*, shall launch a competitive tendering procedure to award public service contracts for rail passenger transport services.

In addition, a specific timetable is provided for the opening to competition of rail passenger transport lines serving the Île-de-France region (i.e. Paris and its suburbs).

CONCESSION AS THE CONTRACTUAL FORMAT FOR PUBLIC SERVICE CONTRACTS FOR RAIL PASSENGER TRANSPORT SERVICES

Concessions under French law

The French legislature has chosen concessions as the contractual format for public service contracts for rail passenger transport services. The legal framework of such contracts is well established and French public entities (both national and local) have used it for decades, if not centuries. Concessions are regulated by the French Public Procurement Code (*Code de la commande publique*) which derives mainly from EU Directive 2014/23/UE.² In this respect, a services concession contract means a contract for pecuniary interest by means of which one or more public authorities entrust(s) the management of services to one or more economic operators involving the transfer of the operating risk in exploiting those services ("*transfert du risque d'exploitation*"), the consideration of which consists either solely in the right to exploit the services or in that right together with payment from the public entity, taking into account the economics of each concession project.

"A concessionaire may be awarded subsidies, as long as said subsidies do not eliminate the operating risk that must be borne by the concessionaire."

The transfer of the operating risk to the *concessionnaire* must be real and, therefore, expose it to market vagaries. Any potential estimated loss incurred shall not be merely negligible. In other words, the *concessionnaire* is considered to assume operating risk if, under normal operating conditions, it is not assured of amortising the investments or costs it has incurred in connection with the operation of the service.

A *concessionnaire* may be awarded subsidies (by the grantor of the concession and/or other public entities), as long as said subsidies do not eliminate the operating risk that must be borne by the *concessionnaire*. In case of *force majeure* or hardship, the *concessionnaire*, as any other holder of a public contract under French law, is entitled

to compensation by its public counterpart of part of the costs suffered as a consequence of said event. Under a concession for regional rail passenger transport services, the public authority is entitled to terminate the contract if this is deemed to be in the public interest.

Concessions for rail transport of passengers: which scope?

Concessions for rail passenger transport services will naturally cover passenger transport services (including the ticketing system as the case may be), but the *concessionnaire* may also be in charge of the regeneration of a part of the rail infrastructure (and of the maintenance workshops), for operating complementary road passenger transport services and maintaining related infrastructure as well as acquiring and maintaining the rolling stock.

The choice of concessions and the diversity of responsibilities potentially assigned to concessionaires have lead to several types of players expressing their interests and forming consortia to bid for the award of such contracts including not only rail operators (including France's historic national incumbent operator via subsidiaries), but also investment funds (some of them state-owned) and construction firms, the last being familiar with public contracts and infrastructure projects.

UNANSWERED QUESTIONS

Complementary elements must also be taken into consideration as the structuring of these projects, and the corresponding allocation of risks, are at stake:

- The possibility that new players (including non-French entities), having been awarded a concession for regional rail passenger transport services, may replace SNCF Mobilités that has had a monopoly for decades, naturally involves further key topics such as:

– the transfer (to the public transportation authority and at their demand) of the rolling stock and maintenance workshops used in majority for the service which is the subject of the concession³ (with the exception of maintenance workshops exclusively dedicated to heavy maintenance) and which were previously used by SNCF Mobilités – in return for compensation and with a supply of stock of spare parts, etc.; such transfer entails the transfer to the public authority of the rolling stock acquisition contracts concluded between SNCF Mobilités and the manufacturer. The latter may not oppose this transfer of contract;

– the transfer of data/information related to (i) public rail passenger transport services from the company that used to provide such services to public authorities launching a competitive tendering procedure and to (ii) the elements necessary for the operation of rolling stock transferred by SNCF Mobilités; and

– the transfer of employment contracts in the event of a change of the company operating a public rail passenger transport service (i.e. SNCF Mobilités employees).

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On all this, the cooperation of SNCF, which may also be a competitor for the award of concessions, will doubtlessly be key as it will impact the transparency of the tender procedures, the quality of the tender documents and *in fine* the quality of the bids.

- The directions chosen by the *régions*, in terms of perimeter and level of services, will also have a great impact in the structuring of the concessions: they will directly impact the level of traffic which may be expected, the type of rolling stocks to be used (existing, new, refurbished) and *in fine* the amount of capex, the duration of the concessions and the allocation of risks between the parties (sponsors, operator, public entity). In this respect, we know that investment funds may in some cases show appetite for demand risk and may be very useful as catalysts to structure projects which require the combination of very different industrial/technical and financial expertise. Lenders will need to make themselves comfortable with the sustainability of the revenue from these concessions and the potential positioning of owners and operators of rolling stocks remains uncertain, keeping in mind that France has still not ratified the "*Luxembourg Protocol to the convention on international interests in mobile equipment on matters specific to railway rolling stock*".

CONCLUSION

Those participating in the liberalisation of France's rail sector, whether already active there or new entrants wishing to get into the French market, can count on a few certainties and entertain justified hopes. Let us hope that the next tender processes will contribute to allaying their doubts which, to date, remain substantial.

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[1] Law no. 2018-515 dated 27 June 2018 for a new railway pact

[2] EU Directive 2014/23/EU of 26 February 2014 on the award of concession contracts

[3] The majority use of a maintenance workshop is assessed on the basis of the volume of activity devoted to the maintenance of rolling stock assigned to the public service contract, compared with the volume of activity devoted to the maintenance of the railway rolling stock of the other users of this workshop.

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