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Working Party No. 2 on Competition and Regulation

INNOVATIONS AND COMPETITION IN LAND TRANSPORT

-- Note by France --

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This document reproduces a written contribution from France submitted for Item III of the 62nd meeting of the Working Party No. 2 on Competition and Regulation on 28 November 2016.

More documents related to this discussion can be found at: <http://www.oecd.org/daf/competition/competitionand-innovation-in-land-transport.htm>

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-- FRANCE --

1. French lawmakers have brought a number of innovations to the land transport sector, partly in response to market evolutions. These innovations are supported by the advisory and decision-making practice of the *Autorité de la concurrence*. This contribution focuses on the land transport of passengers whether by coach (1), by individual urban transport (2) or by rail (3).

1. The liberalisation of inter-regional coach transport

2. The *Autorité de la concurrence* undertook, on its own initiative, a sector inquiry on coach transport which led to the identification of measures to remove current obstacles, and a set of recommendations¹. Act no.2015-990 of 6 August 2015 for Growth, Activity and Equal Economic Opportunities, (hereinafter the “CAEC Act” included these measures. These new rules led to profound changes in the competitive landscape for coach transport in France, which had been underdeveloped.

1.1 A mode of transport hindered by regulatory restrictions

3. In 2013, the *Autorité de la concurrence* started on its own initiative examining the operation of the inter-regional coach transport services market. A number of factors were behind this initiative. First was the economic importance of the sector. In 2012, transport accounted for 14.1% of household budgets, for all modes of transport, in second place after housing. The *Autorité de la concurrence* considered that the opening of the sector to competition following the entry into force of a 2009 European regulation² had not produced optimal results. France had complied with its obligation to open up long distance domestic transport at a minimum level, limiting it to international cabotage³, while other States went further, by liberalising their national markets (United Kingdom, Germany).

4. Due to regulatory restrictions which encumbered their efficiency (operators needed to ensure, for each route, that domestic only passengers represented less than 50% of the turnover and the total number of passengers on the line), coach services accounted for a very low share of passenger transport in France in 2013 (approximately 0.0005% of the total number of long-distance journeys).

1.2 Recommendations for the implementation of a more open, transparent and simple regulatory framework

5. In light of these observations, the *Autorité de la concurrence* recommended that legislation be revised in order to open up coach services and offer consumers a low-cost service and new routes.

¹ Opinion no. 14-A-05 of 27 February regarding competition in the interregional coach transport market.

² Regulation (EC) No. 1073/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international market for coach and bus services.

³ Cabotage on international lines, set out in the 2009 European regulation mentioned above and authorised since 2011, allows international transporters to provide domestic services (route origin and destination located in the same country) on a cross-border line. This service is subject to prior authorisation from the State.

6. While investigating for its opinion, the *Autorité de la concurrence* consulted a number of market players, transport organization authorities and user representatives. It also held a public consultation from 13 November to 24 December 2013, which served to expand its initial recommendations.

7. The *Autorité de la concurrence* recommended liberalising the restrictions that were hindering deployment of this mode of transport, including abandoning cabotage restrictions, establishing automatic authorisation for lines over a specific distance threshold and clarification of the test of a breach of the economic balance for lines below the threshold⁴, multimodal sector regulation (rail and road transport) by an independent authority, a new regulatory framework and access conditions for coach stations.

1.2 *Ex ante assessment of the expected benefits of further opening up coach transport*

8. The *Autorité de la concurrence* conducted an *ex ante* assessment of the potential impact of its recommendations in order to help public policymakers. The assessment underscored the following:

- Increased purchasing power: coach ticket prices particularly cater to passengers who prioritise cost over journey times (pensioners, students, etc.). The cost of coach transport services also seems relatively stable compared to train ticket prices, for which yield management strategies are used;
- Increased jobs: lower costs boost business, by creating induced traffic (similarly to air transport following the arrival of low-cost airlines). This activity creates direct jobs (manufacture and sale of rolling stock) and indirect jobs (catering, hotels, recreational activities);
- Increased mobility: coach travel increases territorial coverage, particularly through cross-connections that are currently poorly served by existing public transport, and by opening new lines, including lines with low passenger numbers (start-up costs are considerably lower for coaches than for trains).

1.4 *Detailed analysis which set out the key aspects of the reform introduced by the Government*

9. The Government adapted some aspects of the system proposed by the *Autorité de la concurrence*, but followed its recommendations in the CAEC Act of 6 August 2015, including:

- liberalisation of the inter-urban transport market: a distance threshold over which line authorisation is automatically granted, set at 100 kilometres;
- below this threshold, a monitoring of the risks on the economic balance of existing licensed lines is performed by an independent expert authority – the ARAF “railway watchdog”, which became ARAFER after its jurisdiction was expanded to include road transport⁵. Rather than an authorisation system, public authorities were given the opportunity for prior objection, which better serves coach companies in processing deadlines and the burden of proof;
- an ordinance on passenger coach stations and coach stop locations.

⁴ Cabotage services were subject to prior authorisation from the Ministry of Transport, and the main condition for authorisation was that they should not affect the economic balance of a pre-existing licensed line, particularly railway services. Under the system in force before the application of the CAEC Act of 6 August 2015, the Ministry refused around 40% of applications to open coach lines. Since application of the Act, opening a line over 100kms is automatically authorised; below the threshold, the transport organization authority may refuse to grant authorisation on the grounds that it may affect the economic balance of pre-existing licensed lines, supported by a compliant opinion from ARAFER.

⁵ The CAEC Act extended the jurisdiction of the *Autorité de Régulation des Activités Ferroviaires* (ARAF) to the regulation of the coach and passenger road transport services sector, transforming it into the *Autorité de Régulation des Activités Ferroviaires et Routières* (ARAFER, Rail and road regulatory body). ARAFER is an independent authority with powers to advise, inspect and sanction.

10. The Government referred the draft ordinance to the *Autorité de la concurrence* for opinion, which welcomed the proposals to develop existing facilities, harmonise access conditions for coach companies and give ARAFER powers regarding access to these facilities⁶.

11. An ex post assessment by ARAFER⁷, around 11 months after the CAEC Act⁸ entered into force measured the impact of the new system in terms of benefits for consumers, investments and jobs: 3.4 million passengers travelled by coach (compared to a total of 110 000 in 2013); 1 105 routes had been opened, connecting 193 towns or cities and airports; 1 400 direct jobs had been created in the industry. Furthermore, liberalisation of the market brought diversification in the activity of train ticket distribution, for which the *Autorité de la concurrence* also performed specific actions (see section 3.2 below), into the coach transport sector.

2. Highly regulated activities faced with disruptive innovations: the case of taxis and chauffeur driven cars

12. The *Autorité de la concurrence* has taken an active part, through its advisory role, in the heated debate around taxis and competition arising from the rapid development of passenger transport services using chauffeur driven cars.

13. Their business model uses independent service providers who use GPS data to respond to remote requests made in real time by customers. The result is a grey area between the legal monopoly of taxis, which are restricted to being hailed on public roads, and pre-booking, a segment which is open to competition.

14. The rapid growth of the chauffeur driven car sector, especially in the Paris area with Uber, the industry's global operator, has become a symbol of disruptive innovations using new technologies that rapidly change the state of competition in a highly regulated market.

2.1 A useful advisory role dealing with developments in the applicable regulatory framework

2.1.1 Draft decrees to structure the chauffeur driven car industry

15. On the subject of pre-booking chauffeur driven cars, the *Autorité de la concurrence* issued in 2013 an unfavourable opinion⁹ on a draft decree introducing a mandatory 15 minute delay between the booking time and the passenger's pick-up time on the grounds that the distortion of competition that it was likely to create was not necessary or proportionate to the general interest.

16. The French Administrative Supreme Court (*Conseil d'Etat*) issued an interim ruling to suspend this decree on 5 February 2014, also considering that the reasons for instituting such a delay provided insufficient justification in the light of the principle of freedom of commerce and industry¹⁰.

⁶ Opinion 16-A-01 of 15 January 2016 concerning a draft Ordinance on coach stations and coach stop locations.

⁷ <http://www.arafer.fr/wp-content/uploads/2016/11/Rapport-annuel-Autocars-gares-routieres-7novembre2016.pdf>

⁸ ARAFER, Transport and mobility watchdog, Analysis of the liberalised market of inter-urban coach services, 1st quarter 2016 Report. See also ARAFER press release of 13 June 2016 accompanying the publication of the report.

⁹ Opinion 13-A-23 of 16 December 2013 regarding a draft decree on the pre-booking of chauffeur driven cars.

¹⁰ Decree definitively struck down by EC, 17 December 2014, SAS Allocab et al, Nos 374525 and 374553

17. One year later, the *Autorité de la concurrence* made a number of recommendations¹¹ so that the chauffeur driven car profession (which includes new chauffeured vehicles working with mobile applications and traditional limousine vehicles offering luxury services to hotels or trade shows) would be treated on equal terms, issued suggestions around a number of new requirements (bank guarantee, administrative charge for notification within 15 days of any changes to the information submitted during registration on the chauffeur driven car register) – subsequently modified by the Government in line with the *Autorité*'s opinion - and expressed reservations on the requirement for chauffeur driven cars to return to their base after each journey. On this last point, the *Autorité de la concurrence* stated that the prevention of illegal cab hailing cannot use measures affecting competition on the pre-booking market, which is open to competition, but must use appropriate control mechanisms.

2.1.2 *Draft decree establishing fixed call-out fees and fixed fares for taxi rides between Paris airports and within the city of Paris*

18. The *Autorité de la concurrence* first commended the steps forward taken in the measures proposed for taxis and consumers, even recommending that this fixed fare principle could also be extended to other major destinations, including those outside Paris. The measure is aimed at protecting consumers but also seeks to deal with a distortion of competition since, unlike chauffeur driven cars, taxis were not able to offer fixed rate fares, a pricing approach that is very popular with users of chauffeur driven car services.

19. However, the *Autorité de la concurrence* also issued a number of recommendations in its opinion¹². These included the need to set up a statistical tool for the taxi business, an essential prerequisite for assessing how regulations for the profession need to evolve. In this instance, it was felt that the lack of sufficiently reliable and comprehensive data on the taxi business had a negative impact on the method which the Government uses to set fixed fare levels. The Parliament and the Government used this recommendation, first in the bill on the regulation of the public passenger transport sector (see section 2.2 below), then by planning for the creation of a sector observatory under the Ministry of Transportation's statistics department.

2.1.3 *Draft decree on the creation of a taxi register*

20. The proposed register is like a platform, which will be State-operated, with the aim of collecting data on the real-time availability and geolocation of taxis and using this data for electronically booking taxis via applications or search engines.

21. The *Autorité de la concurrence* welcomed this plan¹³, with some reservations:

- Compliance with taxi hailing market conditions, i.e. no charging for the way to the pick-up point, introduction of a limited geolocation radius, universality of service involving presentation to the client of all the geolocated taxis without discrimination by taxi company, protection of the client's freedom of choice of taxi, prohibition for taxi drivers to refuse a ride;
- Guarantee of a clear separation between taxi hailing market and pre-booking market services.
- The *Autorité de la concurrence*'s objective was to ensure that the planned platform, which is reserved for taxis and publically funded, does not lead to distortion of competition on the pre-booking market. These recommendations were followed in the final decree adopted¹⁴.

¹¹ Opinion 14-A-17 of 9 December 2014 regarding a draft decree on public individual passenger transport.

¹² Opinion 15-A-07 of 8 June 2015 regarding a draft decree and a draft regulation on individual public passenger transport.

¹³ Opinion 15-A-20 of 22 December 2015 on a draft decree and a draft regulation on a national taxi availability register.

2.2 *A bill before Parliament on individual urban passenger transport*

22. Two years after Act no. 2014-1104 of 1 October 2014 on taxis and chauffeur driven cars, a new bill on the regulation, accountability and simplification of the public transport of individuals¹⁵ is now being examined by Parliament.

23. This parliamentary initiative aims first and foremost to prevent the use of the “occasional services” system under the Domestic Transport Framework Act of 30 December 1982 (LOTI), which was originally intended to cover the lack of public passenger transport in rural areas, but now offers a loophole for the chauffeur driven car system.

24. Beyond access conditions to the profession, the bill also includes a number of measures that specifically govern the relations between booking platforms (and particularly taxi booking services and chauffeur driven car mobile applications) and their professional transport company clients.

25. Article 1 establishes new requirements for booking platforms to check that drivers and professionals providing the passenger transport service comply with their obligations in terms of access to the profession and activities concerned, and the transport contracts with the individuals they transport. These obligations are defined in a regulatory text, which was adopted after an opinion from the *Autorité de la concurrence*. At this point of the discussions, whether or not to include carpooling services (such as Blablacar) in the scope of this measure is being debated in both chambers of Parliament.

26. Article 2 establishes the principle for submission of documents or data by persons working in the public individual passenger transport sector to be used for analysing the service, the volume of activity and the extent to which intermediaries are used. Procedures are set out in a decree of the *Conseil d’Etat* adopted after an opinion by the *Autorité de la concurrence*. The same article requires the competent authorities to publicise or communicate to interested parties “any useful information on the economy of the public individual passenger transport sector.” This measure can be understood in light of the recommendation repeatedly made by the *Autorité de la concurrence* to establish a statistical monitoring tool on the taxi business, especially with a view to aligning service quotas with actually observed needs¹⁶.

27. Finally, Article 3 prohibits exclusive dealings between booking centres and transport companies and equivalent practices which seek to restrict the use of multiple intermediaries by a transport company¹⁷. Violations of this restriction are to be punished by the *Autorité de la concurrence* and subject to an individual exemption system (application assessed on a case-by-case basis by the *Autorité de la concurrence*) and via regulations (the *Autorité de la concurrence* issuing a favourable opinion on the draft regulation). The legislator’s goal is to free up the relations between booking centres and drivers by enabling “multihoming”, a factor that removes the barriers that prevent new centres from coming on the market and increases competition.

¹⁴ See Decree no. 2016-335 of 21 March 2016 on the national taxi availability register.

¹⁵ Logged by the Office of the President of the National Assembly President on 21 June 2016.

¹⁶ See Opinions 13-A-23 of 16 December 2013 and 15-A-07 of 8 June 2015, cited above. See also Opinions no. 05-A-02 of 24 January 2005 and 09-A-51 of 21 October 2009 on the draft decree amending Decree no. 87-238 of 6 April 1987 to regulate taxi journey prices.

¹⁷ “Art. L. 420-2-2. – Are hereby prohibited, agreements, concerted practices and unilateral practices with the object or effect of substantially preventing or restricting approved companies from performing public individual passenger transport services, or occasional public transport services with light vehicles, such as:
“1° Simultaneously using a number of intermediaries or other booking platforms for the provision of its vehicles with a view to perform said services;
“2° Notwithstanding Article L. 3142-6 of the French transport code, marketing the transport services it performs;
“3° Promoting, via external signs on the vehicle, one or more transport offers, including those that it offers without an intermediary.”

3. Opening rail transport to competition: the challenge of access to intangible strategic infrastructure

3.1 *The recent reform of railway governance as part of the progressive liberalisation of passenger rail transport markets*

28. After referral by the Government, the *Autorité de la concurrence* issued an opinion on the railway reform bill in October 2013¹⁸. In practice, the new organisation of the railway sector proposed by the Government involved the creation of a public railway group and aimed to replace the organisation created in 1997 which was made up of two separate entities, *Réseaux Ferrés de France* (RFF), responsible for infrastructure, and SNCF, responsible for transport operation. Now the public railway group is headed by a state-owned industrial and commercial establishment (EPIC) named “SNCF”, that includes a first EPIC responsible for infrastructure management (“*SNCF Réseau*”), and a second EPIC responsible for operating rail transport services (“*SNCF Mobilités*”).

29. This new organisational structure, similar to a group of vertically integrated companies, gave rise to a number of observations from the *Autorité de la concurrence* with a view to ensuring that the reform reconciles the expected economic performance with the required preservation of competition. These recommendations fall into three categories: (i) increase the independence of the company responsible for managing the network and infrastructure, particularly by transferring to that company the management of service infrastructure (including responsibility for freight and passenger stations), (ii) implement protective measures ensuring the impartiality of the holding company at the head of the new railway group and a precise definition of its missions, (iii) increase the powers of the industry regulator.

30. Following the enactment of the bill subject to referral¹⁹, the *Autorité de la concurrence* had the opportunity to examine the conditions of application, as part of preparing its opinion²⁰ on some decrees setting the scope of the missions of the three EPICs of the new public railway group. The *Autorité de la concurrence* recommended increasing guarantees of the independence of the network operator, particularly for “core functions”, clarifying the missions of the head EPIC – especially for functions shared between *SNCF Mobilités* and *SNCF Réseau*-, and increasing supervisory resources and tools for the industry regulator, ARAF. Finally, the *Autorité de la concurrence* highlighted the risk of a conflict of interest in the management of passenger stations under *SNCF Mobilités*, as it had done in its opinion of 2013, and recommended either transferring the stations to *SNCF Réseau*, or establishing increased guarantees of independence with regard to the appointment of the director for stations and operation of the independent department that he or she heads up. Some of these recommendations were followed by the Government.

3.2 *Support in opening up the sector downstream of the value chain: the issue of train ticket sales*

31. Following a complaint from a travel agency with regard to the train ticket distribution system and access to the SNCF computerised booking system, the *Autorité de la concurrence* looked into the issue of “intangible” strategic infrastructure such as computerised booking systems, and their important role in competition in this sector²¹.

¹⁸ Opinion no.13-A-14 of 4 October 2013 on the railway reform bill.

¹⁹ Railway Reform Act no. 2014-872 of 4 August 2014.

²⁰ See Opinion no. 15-A-01 of 6 January 2015 on draft decrees in application of the railway reform act.

²¹ *Autorité de la concurrence*, Decision no. 14-D-11 of 2 October 2014 on practices in the train ticket distribution sector.

32. This intangible strategic infrastructure can indeed serve as a powerful tool for dominating the transport market. Incumbent operators can also be tempted to implement various strategies for excluding their competitors by creating discriminatory access conditions around display rules and pricing conditions for third party companies. In this case, the complainant expressed concern about the advantageous relations between SNCF and its subsidiary “voyages-SNCF.com”, and the strategy used to prioritise it in the sale of train tickets, to the detriment of competing travel agencies.

33. Transport tickets for SNCF's railway activity are distributed via several sales channels: direct channels, including channels belonging to the incumbent operator (stations, self-service terminals, SNCF shops or the voyage-SNCF.com website), and indirect channels, via third party travel agencies. Travel agencies act as authorised representatives of SNCF and are paid via a commission system defined in a 2009 agreement between SNCF and the Syndicat National des Agences de Voyages (French Travel Agencies' Union, SNAV).

34. To sell SNCF train tickets, travel agencies must be able to access the SNCF computerised booking system (the *Résarail* database which contains information on timetables, available seats, prices of SNCF rail passenger transport services). They connect to the centralised system via technical interfaces called Ravel and WDI, the use of which is billed by SNCF.

35. In February 2009, the *Autorité de la concurrence* had already determined that access to the SNCF booking system²² was essential for travel agencies. In particular, the *Autorité de la concurrence* stated that the fact that *Résarail* holds “information that cannot be duplicated and is essential to the sale of train tickets” led it to consider that “*Résarail* is essential for the sale of train tickets.”

36. Given the legal monopoly of SNCF on passenger train transport, its effective quasi-monopoly for cross-border train transport and the essential nature of the SNCF computerised booking system, it is required to allow non-discriminatory access of third party companies, including travel agencies, to its *Résarail* database. The *Autorité de la concurrence* considered that SNCF had abused its dominant position by facilitating access of its voyages-SNCF.com subsidiary to its booking system to the detriment of its competitors, and issued a financial penalty of EUR 5 million (Euros) for the incumbent operator, obtaining significant commitments on its part regarding access conditions to its booking system.

37. In this case, the *Autorité de la concurrence* observed that travel agencies were granted less advantageous conditions than the SNCF subsidiary, voyages-SNCF.com, in terms of conditions regarding payment to SNCF for accessing the *Résarail* database, which were considered to be unusually complex, and display conditions, since the SNCF.com website did not display train times but linked directly to the voyages-SNCF.com website for this information. Finally, the *Autorité de la concurrence* investigation services discovered that voyages-SNCF.com had the capacity to find out the sales and technical strategy of competing travel agencies, given the lack of clear separation between the SNCF subsidiary responsible for collecting *Résarail* access requests. Given this information, and in line with its decision-making practice, the *Autorité* felt that these practices were likely to constitute an abuse of a dominant position.

3.3 *Commitments to ensure non-discriminatory access for travel agencies*

38. In order to remedy these concerns about competition, SNCF proposed a set of twelve commitments which were submitted for consultation by industry players for a period of one month on 28 April 2014.

²² *Conseil de la concurrence* (which became *Autorité de la concurrence*), Decision no. 09-D-06 of 5 February 2009 regarding practices used by SNCF and Expedia Inc. in the online travel sales sector.

39. Following this public consultation phase and once they had been improved in a hearing, the technical commitments proposed by SNCF were considered to meet the competition concerns such that they would prevent voyages-SNCF.com from benefiting from preferential treatment over its competitors.

40. SNCF undertook in particular to:

- Apply homogeneous payment conditions to all competing travel agencies and voyages-SNCF.com. Reducing the cost of access to some interfaces will make it easier for travel agencies to sell all SNCF transport services (including iDTGV and Ouigo), like voyages-SNCF.com, but also include offers from other transporters (especially for international journeys);
- Ensure the confidentiality of requests made by travel agencies competing with voyages-SNCF.com through a substantial reform of SNCF's organisation in order to end communication between voyages-SNCF.com and its sister company which collects travel agency requests to access the ticket distribution system;
- Change its SNCF.com website so that it no longer gives an advantage to its voyages-SNCF.com booking website

41. As part of opening up passenger rail transport to competition, these commitments should enable agencies capable of combining services from all rail, air and/or road transporters to emerge. For example, we note the rise in companies competing with voyages-SNCF.com, such as Captain Train, which has 1.8 million users and was bought for EUR 200 million by its British competitor, Trainline.