

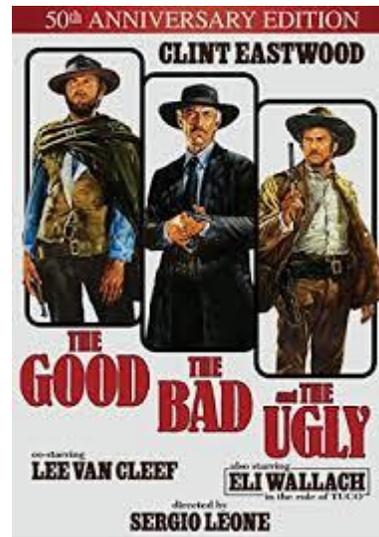
The PTA, The Monopolistic Operator and The Judge

How to increase legal certainty on the calculation of PSO compensation?

A French case study

Patricia Perennes, Transport vice director, in charge of rail PSO

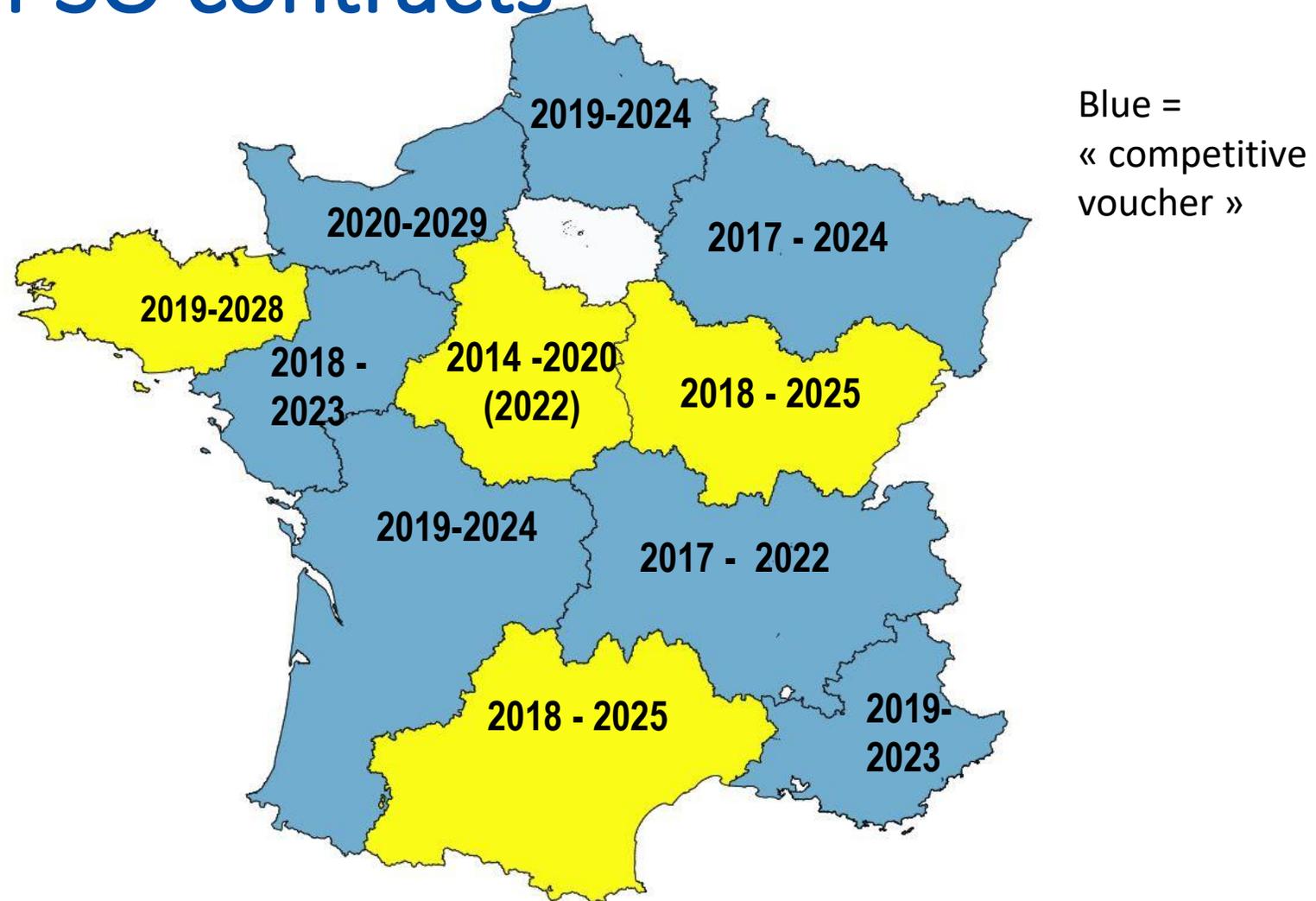
Région Centre-Val de Loire



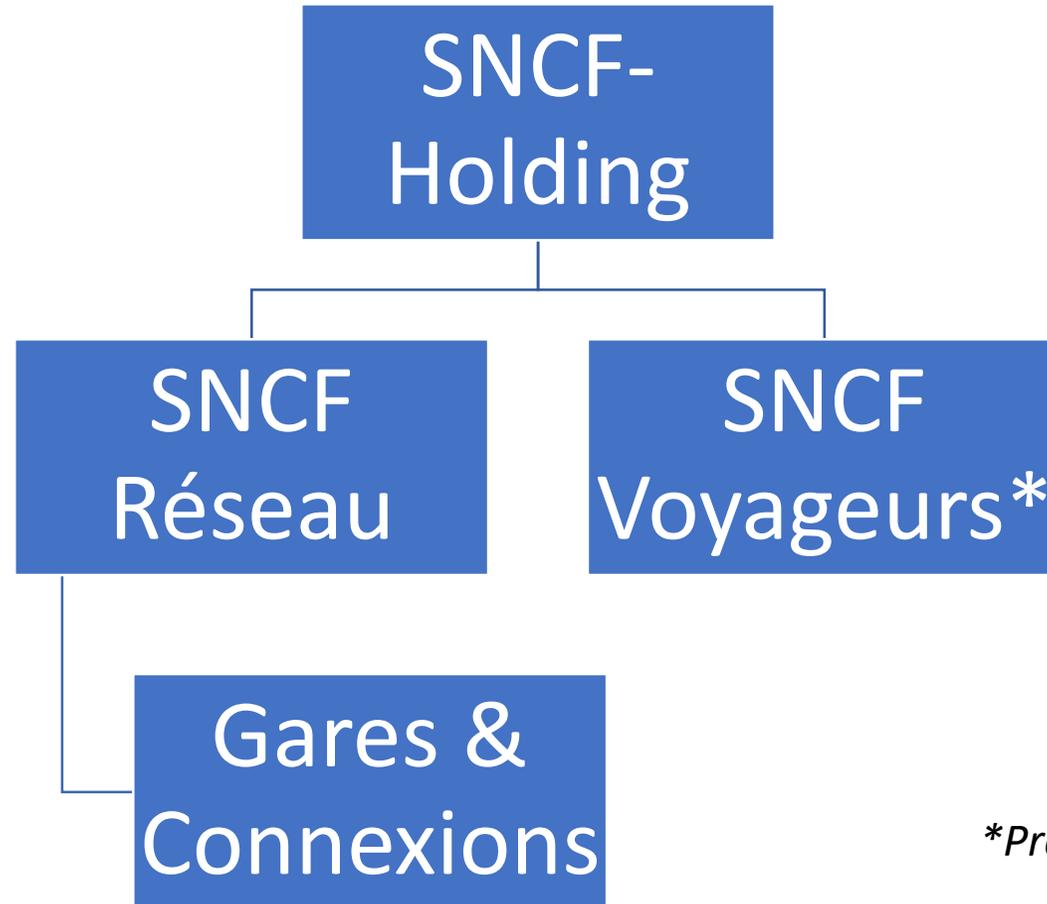
Context

- Focus on PSO (=not open access)
- **Since December 2019**, SNCF Voyageurs monopoly is over in France
- However, **till December 2023**, the Régions can still directly attribute a rail PSO contract to SNCF Voyageurs
- Up to now, SNCF Voyageurs is the only TOC in France (for PSO)
- Some Régions have started the competitive process
 - ✓ Provence Alpes Côte d'Azur, Hauts-de-France, Grand Est

Rail PSO contracts



Incumbent organization



**Previously SNCF Mobilités*

Rail PSO contract structure

- In France, rail PSO contracts are divided in two kinds of costs*:
 - ✓ C1: costs directly incurred by SNCF Voyageurs. They are set at the beginning of the contract, and are indexed during the lifespan of the contract
 - ✓ C2: external costs (rail infrastructures charges, taxes, etc.)
- Then you usually have an annual sales revenue objective (agreed upon by SNCF Voyageurs and the PTA) and a 50/50 split in case this objective is not reached (+ or -)*
- The compensation is therefore
 - ✓ $C1+C2-OR$

**This information is public and can be found in any PSO contract (public version of these contracts are available either on the website of the Regions or on demand)*

Overcompensation?

- 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, Article 4:

Public service contracts and general rules shall:

(a) clearly define the public service obligations with which the public service operator is to comply, and the geographical areas concerned;

(b) establish in advance, in an objective and transparent manner,

(i) the parameters on the basis of which the compensation payment, if any, is to be calculated, and

*(ii) the nature and extent of any exclusive rights granted,
in a way that prevents overcompensation.*

- How to increase legal certainty on the calculation of PSO compensation?
- How to make sure “C1” costs are not overcompensated, since there are no market mechanisms?

Ruling n°1705056, Tribunal Administratif de Marseille, 15 octobre 2019, SNCF vs Provence Alpes Côte d'Azur

- Context: In 2017 and 2018 SNCF Voyageurs and the PTA (Région Provence Alpes Côte d'Azur) were not able to agree on the total cost of rail PSO
- So the PTA decided, and voted, « unilateral prescription » deciding unilaterally , based on analysis realized by a consultant, how much money is required for rail PSO
- SNCF V brought the case into court

➤ *« (...) le mécanisme de détermination des charges prévues dans la convention 2007/2016 ne peut être regardé comme répondant aux exigences des dispositions du règlement précité (...) »*

= One cannot say that the contract provisions (2007-2016) apply by the PSO regulation

➤ *« (...) de par leur caractère forfaitaire, [ces dispositions] ne permettent pas à l'autorité organisatrice de s'assurer de la juste évaluation de la compensation de service public (...) »*

= Charges are a lump-sum/a fixed amount. Because of that the PTA can make sure that compensation is adequate

➤ *« (...) SNCF Mobilités bénéficie de droits exclusifs pour la fourniture de services de transport ferroviaire, la compensation financière qui lui est attribuée doit être justifiée sauf à être qualifiée d'aide illégale par la Cour de justice de l'Union européenne »*

= SNCF have a monopoly for rail PSO contracts. Therefore, the compensation given to SNCF should be substantiated. If not, this compensation can be recharacterized as an illegal state aid

Food for thought

- Does it implies that all the French rail PSO contract are illegal? Or only the “old” ones?
- What role can play negotiation between SNCF Voyageurs and the PTA?
- Should the compensation be set by an independent third party to avoid over compensation ?