

The Delegation of Public Services in France
An Original Method of Public Administration:
Delegated Public Service

International Public Sector Occasional Paper

International Federation of Accountants

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PREFACE

The Public Sector Committee (PSC) is a standing committee of the Council of IFAC formed to address, on a coordinated worldwide basis, the needs of those involved in public sector financial reporting, accounting and auditing. In this regard, the term “public sector” refers to national governments, regional (e.g., state, provincial, territorial) governments, local (e.g., city, town) governments and related government entities (e.g., agencies, boards, commissions and enterprises).

The PSC has been given the authority, on behalf of the Council, to issue standards, guidelines, studies and occasional papers on financial reporting, accounting and auditing in the public sector.

Occasional papers are intended to provide information that contributes to some segment of the body of public sector financial reporting, accounting and auditing knowledge. They are aimed at providing new information or fresh insights into public sector issues and generally result from research activities such as literature searches, questionnaire surveys, interviews, experiments, case studies and analyses.

The PSC believes that the issue of such occasional paper pronouncements will contribute to the development of public sector financial management and accountability throughout the world.

This occasional paper describes the specific framework designed in France to manage the relationship between a government entity and a private sector entity contracted to deliver a certain service, and to ensure an adequate level of information and accountability.

The Delegation of Public Services in France

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CHAPTER 1: INTRODUCTION

1. Government services can be provided in various ways. Usually they are delivered directly by government agencies. In some cases they can be contracted to private sector entities for them to deliver the public service under agreed conditions.
2. The public service can be said to be “delegated”. Such delegations occur, at the local authority level, in diverse fields such as water distribution, waste management and heating. Delegations are subject to special rules, and are contractual arrangements which balance the interests of the delegating authority and the private enterprise responsible for delivery of the service. Examples of collaborative arrangements of this type exist in other countries (Australia, Canada and New Zealand for example). This occasional paper describes the specific framework designed in France to manage the relationship between the parties and to ensure an adequate level of information and accountability.

CHAPTER 2: DEFINITIONS

NOTION OF PUBLIC SERVICE

3. French law makes a distinction between two types of public service:
 - public services of an administrative nature; and
 - public services of an industrial or commercial nature.
4. Public services of an administrative nature are those which, by their very nature, form part of the core local government functions. They are operated on the basis of public authority prerogatives, and involve an administrative relationship with the user — a relationship which is either partially or totally non-commercial.
5. In contrast, public services of an industrial or commercial nature are activities conducted under the conditions of a public service, but which can be managed by private companies. They involve services that result in a commercial relationship between the service provider and the user of the service.
6. The distinction between the two types of public service does not completely correspond to the public services which can or cannot be delegated. It is a natural assumption that the majority of industrial or commercial type services can be delegated to private companies. However, what is less obvious is that certain public services of an administrative nature can also be delegated. This is indeed the case for public services such as the collection of domestic waste, and a number of cultural and social activities.
7. Public services can be categorized in other ways. Firstly, between commercial and non-commercial public services — this does not necessarily correspond to the distinction between administrative and industrial/commercial public services. Secondly, a distinction can be made between public services involving users, and those where there are no individually identifiable users. Public services that have no individually identifiable users include the police, national defense and so on, where the services are provided for the entire community.
8. The term “public service” is used rarely in the literature of European law. The European treaties give little attention to public services — references to “services of general economic interest” are far more frequent. Article 90.2 of the Treaty of Rome requires an enterprise responsible for the management of a service of this type to be subject to the rules of competition, although within limits designed to prevent application of these rules from impeding the accomplishment of the mission of the enterprise.
9. The European Commission attempted to define the notion of public service for the first time in 1996. However, this notion is most frequently expressed by the Commission, and, more generally by members of the European Union, as “service of general interest”. Service of general interest may well be synonymous with public service, but only in terms of functional, and not organic acceptance (which defines public service as a public structure responsible for the execution of a public service mission), the latter being a more particular French speciality. Service of general economic interest can be equated to public service of an industrial or commercial nature. In the European sense, public service refers to a service provided and not an organization. Finally, the term “universal service” can be equated with the obligation to provide a minimum public service in terms of its functional acceptance. None of these terms or definitions have yet been finalized, and will continue to be clarified through the evolution of European Union (EU) law, and European Court of Justice (ECJ) jurisprudence.
10. French law defines the functions which authorities, and specifically local authorities, are obligated to provide. The regional authority basic texts set out the mandatory expenditure for each municipality. A

local authority is under an obligation to set up the corresponding services, where the achievement of its mission calls for the provision of these services to users. These services include public education, mandatory welfare aid and action, roading, water supply, and the collection and processing of waste. These mandatory public services can take the form of administrative, or industrial or commercial type services.

11. Actions of local authorities are subject to the rule of general interest. The basic laws governing the operation of, and functions provided by, the local authorities define, for each category, a principle of general functions. However these laws also stipulate that this principle is limited to territorial considerations based on local interest. This means that the public services provided by local authorities are normally intended exclusively for user members of the local community.
12. The laws regulating the assignment of functions to local authorities allocate specific functional areas to each authority. The areas of service are exclusive in some cases, and shared in others. In other instances, they are shared between local authorities and other authorities having broader functions, under the control of the administrative jurisdiction. In this situation a local authority must first check that its intervention is not subject to sanction.
13. Likewise, jurisprudence stipulates that in a case where a given function is assigned to a local co-operative institution, that the local authority members of this institution are no longer entitled to undertake this function on a direct basis.

PUBLIC SERVICE MANAGEMENT METHODS

14. Local authorities are used in this study to illustrate the notion of delegation. Local authorities have the choice between a number of different management methods. A distinction can be made between two major categories of method for the implementation of public services.

Direct local authority management

15. The term “local authority management” (*gestion en régie*) is used to describe circumstances where control is exercised by a local authority on a direct basis, or through a structure under its direct control. This method can take a number of different forms:
 - “direct local authority control” (*régie directe*) — control is exercised by the local authority itself, and no autonomous management bodies are involved;
 - “direct control with financial autonomy” (*régie dotée de l'autonomie financière*) — this structure, as provided for by the regional authority general code of practice, involves administrative bodies (operating board acting in an advisory capacity and director), which do not have individual legal status. The decision-making bodies are the deliberative assembly and the executive of the regional authority concerned;
 - local public corporations, such as:
 - a) direct control involving financial autonomy and the status of a legal entity — this form of control, the character and method of operation of which are defined in the regional authority general code of practice, has the character of a public corporation with its own Board of Directors and Chairman;
 - b) public inter-communal co-operative corporation — to which the local authority member of the public corporation has transferred its functions. The public corporation must determine its own method of management which, if it has opted for direct management, can take the form of direct control, direct control with financial autonomy, direct control with financial autonomy and the status of a legal entity, or that of a specific public corporation;

- c) local public corporation with a special status — to which the right to operate has been assigned, and which is controlled directly by the local authority.
16. The provision of public services can be effected by a public purchase contract, namely a contract entered into in accordance with the provisions of the regional authority general code of practice. This is the equivalent of direct local authority management combined with the provision of a service or services. This provision of services can cover a greater or lesser part of the range of functions to be provided.
 17. The regional authority general code of practice applies to contracts concluded by the State, public corporations of an administrative nature, and local authorities and their public corporations, whether the latter are of the administrative or industrial or commercial type.
 18. The distinction between delegated public service and contracts for the provision of public services subject to the regional authority general code of practice, has not yet been fully clarified. In practically all cases reference to jurisprudence is essential before a decision can be taken.

Delegated management

19. Direct management and delegated management correspond to two intrinsically different methods of delivering public services.
20. Delegated management is a system where the delivery of a public service is assigned to a third party. The term “delegated management” however can have a more restrictive meaning, namely that of “delegation of public service” as it appears in the law of 29 January 1993 (Sapin law). Under this meaning of the term, the delegation of public service corresponds to a contractual procedure that differs from that provided for by the French public procurement code.
21. The term “delegated management” applies to a contract concluded for the delivery of a public service, where the remuneration of the delegatee is largely dependent on operating results, and where management of the service is entrusted to a legal entity which can be a private company, individual, local semi-public company, association, another local authority or a public corporation not controlled by the delegating local authority (delegator).
22. Traditionally, the distinguishing feature between delegated public service and other types of contract, including public procurement contracts, has been the direct payment of fees to the operator by users. Although this feature does not resolve all questions relating to the distinction between the two types of contracts, it has provided a relatively simple criterion for local government and supervisory authorities to apply. A more recent Order in Council (15 April 1996, Prefect of the Bouches-du-Rhône department v. commune of Lambesc) states that delegation is characterised by the fact that remuneration of the delegatee must be largely dependent on operating results. This decision has raised doubts concerning whether certain types of contract traditionally regarded as involving the delegation of public service, are included in the delegation category from a legal perspective.
23. Indeed, for the judge, it is the content of a contract and not the way the parties have described it that determines its nature. If a contract genuinely concerns a concession or lease, there is no doubt concerning its inclusion in the public service delegation category. If the contract is of a management, public service concession or public works contract type, its inclusion in one or other of the two categories is determined on the basis of the jurisprudential definition described above.
24. Progressive clarification by jurisprudence of what is meant by the notion of delegation is clearly required.
25. The choice of delegated management as the method of delivery does not necessarily mean that the local authority may not act, indirectly, as the operator providing the service. It may do so where the delegatee is either:

- a local semi-public company which is a private business corporation with a special status, in which local authorities may have an equity interest of between 51 and 80%. This special status is defined by the law of 13 July 1983. In the context of delegated public service, semi-public companies are regarded as ordinary business corporations, and are consequently subject to the same obligations as such corporations; or
- an association placed under the control of the local authority.

In both cases, the local authority sets up a separate legal entity which it then controls.

26. A choice of delegated management is the first step in the procedure provided for by the law of 29 January 1983.

ACTIVITIES WHICH CANNOT BE DELEGATED

27. Both jurisprudence and administrative doctrine stipulate that local authorities may not delegate their “régalien” (official governmental) functions. All activities relating to defense, justice and the police are normally provided by the State, although local authorities are also required to contribute. These functions must therefore be undertaken directly by the local authorities, which cannot then delegate the tasks involved.
28. Public education services cannot be delegated, either the actual education or the supervision of children. On the other hand, ancillary activities to this public service, such as school canteen services, can be delegated by local authorities. In the same way, hospital (medical care) and mortuary services may not be delegated. Here also, the canteen and similar ancillary services of a hospital may be delegated to a private company.
29. The collection of tax revenue cannot be delegated to a private company. This means that the distinction between tax revenue and non-tax revenue must be clearly defined. The notion of fiscal dues, obvious in the case of principal taxes collection, which is provided for by law, is on occasions less clearly applicable. Reference in such cases must be made to jurisprudence.
30. Finally, administrative jurisprudence dictates that a local authority cannot fully delegate any of its functions. Even in a delegated management system, it must retain ultimate control. The extent of this delegation is limited by jurisprudence, although the latter is not yet fully clarified. Even when delegated, a public service remains a public service, and it is essential that the authorities responsible for providing public services, namely the local authorities, retain at least partial control.
31. Where there are no users of a service, the service cannot be delegated. Delegated management cannot be undertaken without identified users.
32. There are also domains where delegation can only occur to certain categories of legal entity.
33. In terms of welfare, the management of certain statutory social security services can only be delegated to the local welfare centre.
34. As regards gas and electricity distribution, current legislation only authorizes public service delegation agreements with State-owned establishments (Electricité de France and Gaz de France). These two public entities enjoy a legal monopoly under the terms of the nationalization law of 8 April 1946, except for agencies or assimilated production and distribution services which were left unchanged. This situation may well change in the future as these two sectors are being opened to competition under the terms of EC directives.

CHAPTER 3: PUBLIC SERVICE DELEGATION PROCESS

35. Where a local authority is authorized to entrust the provision of a public service, which is normally its direct responsibility, to an outside enterprise, a contractual relationship is established between the delegatee and the delegating local authority.

STEPS PRECEDING THE SIGNATURE OF A PUBLIC SERVICE DELEGATION CONTRACT

36. A local authority wishing to delegate a service is under an obligation to prepare documentation in support of its intention. The law does not stipulate the information to be provided, however, certain data (such as the nature of the service and the reasons for the decision to delegate the service) must be supplied to the deliberative assembly required to rule on the delegation arrangement, so that it is sufficiently well informed to make its judgment.
37. Since the Sapin Law (law of 29 January 1993) came into force, the public service delegation process has developed similarly to a select public procurement call for tenders implemented in two phases. The first phase involves selection of candidates qualified to submit tenders, and the second phase involves selection of the tender offering the best terms. The call for tenders must be published in two official gazettes. The content of this notice is based on the information provided to the deliberative assembly by the local authority, with the addition of technical information enabling candidates to prepare their tenders. At a later stage of the candidate selection procedure, a document is distributed to the candidates, describing all the resources which will be provided by the local authority for the delivery of the public service by the selected delegatee. It also includes a description of the constraints associated with the public service to be delegated, which the candidate delegates must take account of in their tender documents. These constraints include investments to be made, work contracts to be taken over, and specific regulations relating to the delegated public service itself.
38. The deliberative assembly then validates the choice of the candidate selected by the local authority, and notice of the contract award must then be published. The deliberative assembly is responsible for taking the decisions concerning the proposed candidate, and for the contract under which the public service is to be delegated.

DELEGATION CONTRACT

39. An essential part of the delegation of a public service is a written document setting out all the obligations of the two parties. This document is a form of administrative contract.
40. A public service delegation contract must comply with all relevant common law regulations. These regulations apply even if not written into the contract. It is normally advisable to divide the contract into two parts, with the first containing the statutory clauses relating to organization of the service, and the second the actual contractual clauses.
41. The clauses of the contract must make it possible to identify the precise nature of the service for which the delegatee is responsible. The activity must therefore be defined with care, to avoid any subsequent dispute about the nature of the service. The date on which the delegatee assumes its responsibilities must also be indicated in the contract.
42. The contract must contain a clause that sets out the operating conditions for the service. These operating conditions must comply with the basic principles of public service:
- ***continuity of service*** — all users of a public service are entitled to regular, continuous operation of the service;

- *equality of access* — all users must be able to access the public service under equal conditions; and
- *equality of treatment*.

All these principles must be written into the contract.

43. The contract must also set out details of all work to be performed and investments to be made to ensure operation of the service. In the case of certain repair work, appropriate clauses should specify the allocation of expenses between the local authority and the delegatee. In all cases, all assets associated with the delivery of the service must be returned to the local authority at the end of the contract, whether with compensatory payment or not.
44. The period of the contract must be stated. This period must be fair to the delegatee, in that it must be sufficiently long, among other considerations, to justify the investments made. The period of the contract must also be of sufficient length to enable the delegatee to achieve a degree of financial equilibrium.
45. The last key area concerns the financial conditions governing the public service delegation contract. The charges set by the delegatee must not be discriminatory (principle of equality associated with a public service), but must be appropriate in both economic and social terms. Due to the difficulty of determining the anticipated costs of the service, public service delegation contracts frequently stipulate a price range for the period of the contract. This avoids the need to draft additional clauses each time the initial scale of charges is found to be no longer appropriate for the delegatee. The delegatee may also require subsidies from the local authority to cover investments, or to be in a position to charge rates that are accessible to all economic units. The amount and frequency of subsidy payments must be written into the contract.

OBLIGATIONS OF THE DELEGATEE

46. The delegatee is responsible for provision of the service on behalf of the local authority. The delegatee must therefore report on the provision of the service to the local authority concerned, with the authority entitled to carry out inspections, and to sanction the delegatee, as and when necessary. The authority for the local authority to apply sanctions is a characteristic feature of public procurement contracts.
47. The delegatee must operate the service in accordance with the specifications in the call for tenders and written into the contract. Any claim about operation of the service will be made to the delegatee. The service provided could result in a number of risks, and the delegatee must take the necessary steps regarding appropriate insurance. The delegatee is also responsible for risks relating to management of the service and for ensuring the balanced financial situation of the activity with which it is entrusted. However, the risk is increasingly shared between the delegatee and delegator with respect to certain eventualities.

INSPECTION AND REVIEW OF OPERATING CONDITIONS

48. The contract must include provisions for the local authority to inspect the activities of the delegatee. These provisions include:
 - a schedule of dates for meetings which provide the opportunity, for example, to review operating conditions; and
 - the dates by which the delegatee must submit annual reports on its activity to the local authority. These reports must provide both financial data and information on the quality of the service provided (see chapter 4 below).
49. Regarding the review of operating conditions, it may be appropriate to provide for meetings at three to five year intervals, in order to examine various factors associated with the delegated activity, and isolated or

other noteworthy problems which might impair operation of the service. The review of operating conditions should occur throughout the period of the contract, in particular where controversy or concern has arisen as a result of a decision taken by the local authority. Recourse to mediation is the option most frequently adopted, bearing in mind that any review typically leads to an additional clause to the contract. Should a review of operating conditions result in an increase exceeding 5% of the remuneration of the delegatee, the matter must be brought before the deliberative assembly to obtain approval.

TERMINATION OF THE CONTRACT

50. A service delegation contract terminates at the end of the period agreed in the contract. Each contract should define the procedures for managing contract termination, in particular with respect to the reconditioning of equipment, and procedures for inventory and hand-over of assets.
51. Sometimes contracts can be terminated prior to the contractual termination date. Furthermore, French common law recognizes the right of a delegator local authority to cancel the contract on a unilateral basis for reasons of general public interest. This right is recognized even in the absence of a specific clause, although it is preferable to provide explicitly for this situation, and provide for compensation of the delegatee. In the case of unilateral cancellation of a contract for reasons of general public interest, the compensation paid should cover the following:
 - take-over of fixed assets which the delegatee has not had sufficient time to depreciate in full;
 - expenses associated with the interruption of certain contracts (work contracts, supplier contracts, etc.);
 - loss of earnings; and
 - impairment of corporate image, in certain cases.
52. In most cases, it is prudent to include provisions of this type in the contract. Occasionally, cancellation of the contract can result from a misdemeanour on the part of the delegatee, and provision for the application of sanctions to the delegatee should be provided for in the contract. Sanctions vary according to the gravity of the misdemeanour. For example, a financial sanction would be applied in the case of repeated lateness with submission of the annual report. However, an extended interruption of the public service would represent a major misdemeanour, leading to cancellation of the contract with no compensatory payment.

CHAPTER 4: MONITORING DELIVERY OF THE DELEGATED PUBLIC SERVICE: DELEGATEE'S ANNUAL REPORT

53. Monitoring of delivery of the contract has been a traditional weakness in public service delegation arrangements.
54. Local authorities frequently think that their responsibility is met once the public service delegation contract has been signed. However, having entrusted the delivery of a public service to a delegatee in no way removes the need for the local authority to maintain a close watch. On the contrary, effective delegated management of a public service requires a close relationship between delegator and delegatee, organized on the basis of a number of events which can have an impact on the life of the contract.
55. The length of contracts necessitates a continuous relationship between delegator and delegatee; this relationship should be based on clarity and transparency but need not always be formalized. The nature of public service delegation demands the development of mutual confidence between the two parties: ongoing collaboration being essential for effective delivery of the service. The annual report submitted by the delegatee provides the opportunity to review this relationship, and consequently constitutes a key aspect of the relationship.
56. The law of 8 February 1995 requires the delegatee to present an annual report covering the financial statements, quality of service and execution of the service in accordance with the distinctions established by the law.

FINANCIAL STATEMENTS

57. The delegator authority must find all the information it needs in the financial report and financial statements presented by the delegatee. In the event of an audit, the authority should be able to relate the financial data included in the report about the delegated service, with the balance sheet and notes also included in the report.
58. The delegator authority must be familiar with all aspects of the delegated public service, and monitor the cost of this service. It should be in a position, on termination of the contract or in the event of breach of contractual obligations, to take over delivery of the service on a direct control basis, or entrust delivery to another delegatee, following another call for candidates and tender procedure.
59. The local authority must be able to compare the full cost under conditions of direct control, with that under conditions of delegation. The information supplied by the delegatee must be such as to assist the local authority to undertake a comparative financial study of this type.
60. A key concern of the local authority is to maintain its capacity for judgment while not losing sight of the notion of "externalized" public service. It must also be able to recognize when it no longer has adequate resources to take over direct control, thus losing the capability to provide the service in question itself.
61. The purpose of presenting the financial statements is for the delegatee to demonstrate compliance with the terms of the contract, and enable the reader of the statements to understand the balance reached by the contract. Contracts signed prior to the law of 8 February 1995 will often be amended in order to include the obligation, under the terms of the contract, of financial reporting appropriate for the delegation arrangement concerned, and to recognize the delegator's need for information.
61. The local authority needs to know:
 - as regards fixed assets:

- whether the delegatee is in a position to hand back the assets in good operating condition;
 - whether the delegatee has the capacity for renewal of the renewable assets for which it is contractually responsible;
 - whether the long-term renewal plan relating to the delegation arrangement is being complied with; and
- as regards operation, whether all commitments under the delegation arrangement are covered by an adequate agreement, insofar as the delegator local authority may be required subsequently to take over these commitments.
62. Dependent on the contracts and types of activity involved, the annual report must:
- describe, in technical terms, changes to essential assets at the disposal of the delegatee (giving a list of material assets requiring particularly close surveillance), on the basis of characteristic physical quantities for the activity (precise, checkable material data);
 - specify dates for making investments, the renewable or non-renewable character of fixed assets and their origin (contributed by the delegator or delegatee, with cash flow data or not) and details of subsidies;
 - provide the means to monitor the condition of assets to be handed back on termination of the contract, namely returnable and reversionary assets (more than simple inventory);
 - provide additional information above and beyond the requirements of common law, concerning the methods used for the calculation of provisions;
 - establish the base and calculation method for costs relating to renewal and major repairs;
 - indicate financial commitments associated with the delegation arrangement; and
 - provide information about any new element emerging during the period of the contract, which could impair the freedom of choice as assessed on termination of the contract.
63. It is appropriate firstly to provide information on the way in which renewal costs have been quantified and the plan — where this exists — followed, and secondly to report on operation of the public service in terms of revenue and costs.
64. The cost of a service comprises both direct and indirect costs. Breakdown into direct and indirect costs depends on the form of organization adopted by the delegatee (for example, centralized or decentralized).
65. Obviously, the organization of the delegatee entity is the sole responsibility of its management. The rules for the allocation of headquarters or regional centre costs depend on this organization, but their application must not cause users to bear unjustified charges.
66. This means that the delegator local authority is entitled to receive detailed information on the nature of the costs so allocated and the method of allocation applied, together with all necessary explanations. The annual report must describe the choice of methods adopted for the allocation of indirect costs, and provide for their ongoing monitoring.
67. It is necessary at this point to highlight the two most important specific accounting issues associated with the delegation of a public service:

- the first relates to the status of the assets (concession and lease contract); and
- the second concerns the effect of subsidies.

Specific issues linked to the status of the assets (concession and lease contract)

68. Concession companies have a number of specific economic and accounting characteristics of direct interest to the local authority granting the concession. These characteristics are related to the status of the assets involved in the concession.
69. The concession company must identify its renewal obligations and the policy adopted for distinguishing between maintenance and renewal expenditure. The company must be able to present a “renewal assessment” to the local authority covering the assets required for provision of the public service.
70. As regards the economic and legal aspects of the contract, it is necessary to distinguish between two possible approaches:
- the contract makes the delegatee entirely responsible for renewal, and defines the technical objectives of this renewal policy (condition of the facilities, reliability of the service, etc.). The delegatee then bears the financial and contractual risk in full. The delegatee may be obliged to commit expenditure which is greater or less than the amount initially specified. Provided the delegatee has complied with the objectives defined in the contract, the delegatee is not liable for payment of any compensation to the local authority on termination of the contract; or
 - the delegator has requested the delegatee to create a suspense account for the renewal obligations defined in the contract, this account being established from the remuneration to the delegatee. The amount of the delegatee’s expenditure is limited to the amount in this account. In the event of a deficit or surplus, the parties meet to decide the measures to be taken to balance the account, including termination of the contract if necessary.
71. In the event of a deficit in the suspense account, it is the responsibility of the delegating local authority (the delegator) to decide whether to defer the investment or increase the rates charged by the delegatee.
72. This approach requires the preparation of a “statement of the use of funds”, in order to justify utilisation of amounts in the suspense account. Where this approach is followed, it is essential to make a clear distinction between renewal and maintenance expenditure (maintenance remaining in all cases the responsibility of the delegatee, without limitation of amount), and to specify this distinction clearly in the contract.
73. It is in the interests of the local authority to have a clear idea of the amount of the requisite provision (the amount necessary to provide for the renewal of the asset) when drafting the contract. A number of old contracts, as well as some signed more recently, fail to identify clearly the logic adopted, and can therefore contain measures liable to be qualified as de facto management. In these cases, it is essential to correct any such measures by the inclusion of additional clauses.
74. The need to maintain productive potential derives from the requirement for continuity of public service. Accounting principles stipulate that maintenance of productive potential at the level required for the public service must be sought through recognising the effect of depreciation or possibly through adequate provisions (for renewal costs in particular).
75. Insofar as the value in use of a facility can be preserved by appropriate maintenance, the facility is not the subject of charges to depreciation as part of the operating costs of the delegatee.

76. In light of the above considerations, we can distinguish, in accounting terms, between two categories of asset to which the delegating authority has title — returnable assets (returnable assets in the strict sense of the term, and former reversionary assets) and reversionary assets.

Returnable assets

77. These are assets which are returned automatically to the delegator on termination of the contract, because they:

- were contributed by the delegator; or
- were contributed by the delegatee company in accordance with the specifications; or
- are necessary for the continued provision of the public service on expiry of the contract.

78. Any such assets belong ab initio to the delegator authority, unless otherwise stipulated in the contract.

79. From the contractual point of view, where the delegatee has funded an asset, the delegator can be required to pay compensation to the delegatee on return of the asset, or agree to take over outstanding loan repayments. Deferred transfer of ownership is always possible, subject to compliance with constraints relating to public ownership and the public service context.

80. Returnable assets may have been contributed by the delegator authority:

- free of charge;
- free of charge with a specific clause covering their return on expiry of the contract. This contractual clause obliges the delegatee to pay certain calculated charges on termination of the contract (charges for depreciation or provisions for renewal made on behalf of the authority);
- in return for payment; or
- with a combination of these possibilities.

Reversionary assets

81. These are assets assigned to the concession, and which can revert to the delegator on termination of the contract. They belong to the delegatee, but only remain in its hands on termination if the delegator does not claim them. In fact the delegating authority holds a reversion option, subject to payment of compensation to the delegatee company.

82. Belonging as they do to the delegatee, reversionary assets are no different in accounting terms from other fixed assets, and are normally governed by common law accounting rules.

83. Other assets can belong to the delegatee, and are not included in either of the two categories analysed above.

Specific accounting issues relating to the effect of (investment or equipment) subsidies

84. Where a public service delegatee company funds the investments involved itself, it frequently requires investment subsidies for this purpose.

85. These comprise any contribution of funds for which the delegatee's only obligation is to apply the funds for acquiring specific fixed assets.

86. If assets provided by the delegator are, at the end of the contract, to be transferred free of charge to the delegator, a depreciation charge can provide for the return of the capital invested. If the initial value of the asset on which depreciation is based has subsidies deducted, the depreciation will be based on this lower amount.

OPERATING OR DEFICIT SUBSIDIES

87. Insofar as these are permitted by law:
- operating subsidies are those received by the delegatee to offset deficits in relation to certain income items, or to cover certain operating costs; and
 - deficit subsidies are used to offset, in part or in full, the global loss which would be incurred by the delegatee in their absence.
88. In practice, it is difficult to distinguish between the two types of subsidy.
89. The law of 5 January 1988 (Galland law) permits local authorities to subsidize delegatee companies in certain cases, particularly when such action is designed to ensure that services required to meet the needs of the population are maintained, and where private supply is deficient or non-existent.
90. Operating subsidies are reported in the same way as if the concession company were not a public service delegatee.

QUALITY OF SERVICE

91. An analysis of the quality of service provided forms an integral part of the annual report submitted by the public service delegatee, and must contain a series of quality evaluation indicators.
92. The emergence of this concept within the framework of a general report which must provide an objective description, raises a number of questions. Assessment of the quality aspect is ultimately based on the users' perception of the service provided, in terms of satisfaction of the users' perceived needs. There can be no doubt that different users will judge the same level of quality in different ways.
93. Nevertheless, indicators that are based on verifiable, physical data must be used, in order to assess the intrinsic characteristics of the delegated service in a more neutral manner.
94. The assessment of quality indicators must thus take into account, not only the perceptions of the users in terms of the adequacy of service compared with their needs, but also a description of the technical and human resources applied (if necessary with respect to the service provided).
95. The main quality indicators are as follows:
- Technical and physical data:
 - facilities;
 - networks;
 - capacities;
 - output and productivity;
 - equipment construction or commissioning date.

- User services:
 - charge setting, with breakdown of the scale(s) of charges between direct and final users;
 - volume of services;
 - satisfaction of peak demand;
 - replacement services;
 - continuity of service.
- Safety, hygiene and accidents:
 - response to compliance with legal or contractual standards;
 - accident analysis.
- Pollution and impact on the environment:
 - noise;
 - discharge to the atmosphere;
 - recycling of waste and other materials;
 - eco-products;
 - treatment of contaminated sites.
- Productivity objectives (adapted according to delegation arrangement risks):
 - performance enhancement;
 - equipment enhancement;
 - savings achieved.
- Personnel arrangements:
 - composition and qualification of staff;
 - organization of staff, working hours;
 - training.
- User participation:
 - customer service for users;
 - information;
 - processing of complaints;
 - consultation.

- Current disputes:
 - with users;
 - other.

DELIVERY OF THE SERVICE

96. The conditions for delivery of the public service relate principally to the contractual relations between the delegatee and delegator authority, and the manner in which the former meets its commitments in this respect.
97. The task is to analyse objectively whether the legal and contractual measures and principles governing the delegation arrangement are complied with.
98. It is customary to define public service on the basis of a set of principles, namely equality, continuity, adaptation and contractual equilibrium. The principle of neutrality, together with a number of action-related principles, namely transparency, responsibility, confidence and fidelity (Council of State 1994 annual report) were added to the basic set by the Public Service Charter of 18 March 1992, referred to in the Council of State 1994 public report. Other principles have since appeared, and are examined below.

Principle of equality

99. Users of the service of general interest are to be treated equally in common situations. This means that different treatments for different user categories are therefore possible, provided this is justified in the interests of the service, and that the effects of these differences are proportionate to the (objective) differences in the situations involved.

Principle of continuity

100. This principle is applied for user and delegatee alike, in event-related terms, on the occasion of failures, interruptions of service for the execution of work, social problems (for example, strikes), etc.
101. French tradition privileges de facto the right to strike over the principle of continuity, and the notion of minimum service has still to be defined. The examination of technical incidents (failures, interruptions of service for work, etc.) which adversely affect continuity of service, is consequently more operationally oriented than the number of incidents.
102. The principle of continuity reflects the normal condition for delivery of the contract. It applies both to the service and the contract itself, through the adaptability which enables the administration to modify the clauses of the contract on a unilateral basis, to take account of changes in the needs of the service within the limits of the interest of the service itself, and the very notion of a contract (compliance with the purpose of the mutual agreement and financial equilibrium).

Principle of adaptability (including modernisation)

103. The delegatee must adapt the service to technical changes and maintain the service in a situation such that user needs are met in a modern manner.

Principle of contractual equilibrium

104. The state of balance between the interests of the parties must be safeguarded, short of reviewing the initial agreement and its additional clauses. The theory of improvidence enables the delegatee to negotiate more favourable financial conditions in circumstances where unforeseen events have aggravated its financial situation to a material extent.

105. It is less clear whether the delegator local authority can also benefit from this same theory in a case where unforeseen events occur. There have been cases of renegotiation of contracts in order to enable users or the delegator local authority to benefit from such changes, where these changes were not foreseen at the time of signing the original contract.

Safeguarding the freedom of the delegator on termination of the contract

106. This is not a principle relating to operation of the public service, but one that concerns the actual delegation of the service. It must be regarded as essential to preserve the freedom of the authority, on termination of the contract:

- to be able to select another delegatee under conditions of open competition; or
- to continue the existing delegation arrangement with the same delegatee, by reason of the strength of the latter's candidature, relative to others, for the new delegation period.

107. It should also be considered that anything that gives the outgoing delegatee an advantage, other than the recognized quality of its candidature, could distort fair competition. Under no circumstances should the authority have the renewal of an existing delegation arrangement imposed against its will, and the authority should be in a position to assess all actions which could impair or preserve its freedom in this context. Procedures for handling returnable and reversionary assets, and taking over outstanding loan repayments in particular are essential aspects.

FEE ISSUES

108. The following paragraphs discuss economic, financial and legal aspects relating to setting fees for provision of the public services.

Economic and financial aspects of setting fees

109. Article 4 of the law of 8 February 1995 makes it obligatory to specify the fees to be charged to users in the text of the agreement concluded between delegator and delegatee. The agreement must also define the impact on these fees of the parameters or indices that determine their evolution. It is desirable for the agreement to set out the information to be reported on this subject in the mandatory annual report.
110. In all cases, it appears clear that the delegatee should do more, in the appendix to its report on conditions for delivery of the public service, than merely provide technical information and operating financial statements. The delegatee should examine all financial aspects. Furthermore, certain types of public service are governed by specific legal requirements, in particular water supply, drainage systems and waste.

Legal aspects of setting fees

111. The component elements of the charges made must be assessed according to the scope of the service provided, the prospects for changes in the fees, and eventually an increase in the cost of the public service and the risks borne by the delegatee in a multi-year management context. Although production of an annual report on the delegation arrangement may not be designed for reappraisal of charges each year, it should make it possible to monitor changes which will trigger reappraisal of charges under the conditions specified in the contract.
112. The price which users are required to pay is initially calculated on the basis of forecast costs for the service, which include remuneration to the delegatee.
113. As noted earlier in this paper, the financial management of delegated services is based on two principles. The first stems from the regional authority basic texts, and stipulates that the budgets for these services

must be balanced in terms of revenue and expenditure: “budgets for public services of an industrial or commercial nature and operated under direct control, lease contract or concession arrangement by local authorities, must be balanced in terms of revenue and costs”. It should be noted that it is not the delegatee budget which is targeted, but the secondary budget of the delegator which describes its financial relations with the delegatee.

114. The second principle, based on administrative jurisprudence, states that the fees charged for a delegated public service must be proportionate to the cost of the service concerned.
115. In principle, the delegator cannot force the delegatee to apply charges that do not enable the latter to cover its expenses (except in special cases such as subsidized school meals or urban transport). On the other hand, the remuneration of the delegatee must not exceed a “normal” level.

Fees paid to the delegatee

116. Fees paid to the delegatee must correspond to the services provided, on an exclusive basis under the terms of its contract. In the majority of cases, these fees are paid solely by the users, and must be directly related to the cost of the service provided, in the absence of any subsidy. The delegator can pay a deficit subsidy in a case where special charges which do not cover all costs are levied.

Fees paid to the delegator

117. The contract can provide for payment of a fee by the delegatee to the delegator (this is frequently the case with a lease contract), and the amount of this fee can be subject to revision.
118. An authority delegating a public service must set out and verify the payment amounts and times in relation to the delegation arrangement. This also applies to the conditions for delivery of the public service, which should be appended to the annual report of the public service delegatee.
119. These verification procedures, where they result in expenditures, are necessarily paid for by the delegator.
120. The authority’s budget used to fund these costs could be serviced, following procedures defined in the contract, by a verification fee paid by the delegatee. This is frequently for the approach in the case of water supply and drainage systems, for example. This specific expense is then taken into account when setting the charges which the delegatee is authorized to collect from users.

ADDITIONAL CLAUSES AND THEIR IMPACT

121. Like any other contract, a public service delegation agreement can undergo modifications during its course, by agreement between the parties. These modifications may take the form of one or more additional clauses. These additional clauses are not subject, in principle, to any particular form or forms (apart from approval by the deliberative assembly), except in two cases:
 - If an additional clause has the effect of extending the period of the delegation contract, it must comply with the provisions of the law which states that: *“a service delegation arrangement can only be extended:*
 - a) *For reasons of general interest, in which case extension of the period may not exceed one year.*
 - b) *Where the delegatee is obliged, for the proper delivery of the public service or extension of the geographical area served, and at the request of the delegator, to undertake material investments not provided for in the initial contract, which are of a nature to modify the general economics of the delegation arrangement, and which could not be depreciated during*

the outstanding period of the delegation contract other than by a manifestly excessive increase in user charges.”

- If the additional clause results in a global increase in the amount of the contract exceeding 5%, the additional clause must be submitted for examination by the tender review board. The deliberative assembly of the local authority concerned must be informed of the board’s conclusion prior to giving its statutory ruling on the proposed additional clause.

RENEWAL WORK AND MAINTENANCE

122. One of the fundamental aspects of the public service delegation contract (concession, lease or intermediate contract) is the inclusion of the renewal of fixed assets in the obligations of the delegatee. This aspect is frequently difficult to implement in cases where reliable renewal plans were not established at the time of signature of the contract, or where the assets were handed over in global form (networks for example).
123. The relevant information to be obtained should make it possible to demonstrate that the delegatee has met its renewal obligations:
- contractual description of assets handed over and related renewal obligations;
 - execution of renewal obligations;
 - precise description of renewal plans; and
 - effective state of progress with renewal in relation to the specified plan.
124. A description of the state of maintenance of the equipment, fixed assets and maintenance conditions could be included in this part of the report.

USER FRAUD, INFRINGEMENTS AND UNPAID BILLS

125. User compliance with the regulations governing the service should be analyzed. Essential information also includes the nature and evolution of cases of fraud and disputes (by type of infringement), fines collected, penalties imposed and damages obtained. Details of settlements out of court, initiation of court proceedings, sanction periods and any eventual rescheduling of outstanding payments, must also be included in the annual report of the public service delegatee.
126. The level of unpaid bills is a key variable. The local authority may take the place of users unable to pay outstanding fees for welfare-related reasons.

CHAPTER 5: SUMMARY

127. Authorities have the choice between two management modes for the provision of public services, namely direct or delegated management. This enables the authority to take a management decision in the same way as the governing body of a company. In fact, the question is not really whether to provide a public service on a direct basis, or sub-contract its provision, but how to achieve optimum economic and social management of the particular public service. As we have seen, although the notion of delegation may appear straightforward, in practice it is less so due to the various administrative constraints to which this approach is subject. Nevertheless, it ensures that transparency and accountability principles are obeyed while facilitating synergy between the private and the public sector.

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