



## Supporting acceptance of automated VEHICLE

### **Deliverable 2.1. Comparison across countries of “right to access to transport”**

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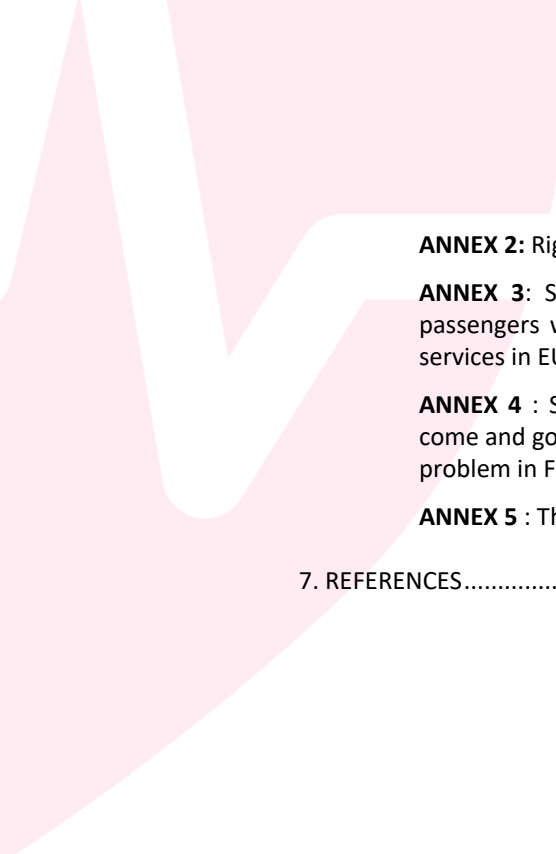
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## Terminology and Acronyms

ADS	Automated Driving System
AFDI	<i>Annuaire français de droit international</i>
AJDA	<i>Actualité juridique de droit administratif</i>
AOM	Autorité Régulatrice de la Mobilité – Mobility Regulatory Authority
Arr.	Order – Decree
ART	Autorité de Régulation des Transports – Transport Regulatory Authority
Art.	Article
<i>Bull. C. cass.</i>	<i>Court of Cassation judgment bulletin</i>
CAA	Administrative Court of Appeal
C. cass.	Court of Cassation (if Plenary Assembly: AP - Plenary Assembly)
CE	Conseil d'Etat – Council of State
CEDH - ECHR	European Court of Human Rights
CEE - EEC	European Economic Community
Conv. EDH	Convention for the Protection of Human Rights and Fundamental Freedoms
CGCT	General code of territorial authorities
CGPPP	General Code of the Property of Public Persons
Circ.	Circular
CJA	Code of Administrative Justice
ECJ (CJEU) - CJUE	European Court of Justice (Court of Justice of the European Communities / of the European Union)
CNIL	Commission nationale informatique et libertés (National Commission on Informatics and Liberty)
Cons. Const.	Constitutional Council
Const.	Constitution of the French Republic
HRE - CEDH	Convention for the Protection of Human Rights and Fundamental Freedoms
CRPA	Public-Administration Relations Code
C-ITS	Cooperative Intelligent Transport Systems
CSI	Internal Security Code
CSP	Public Health Code
C. Transp.	Transport Code
<i>D.</i>	<i>Dalloz Collection</i>
DC	Conformity Decisions
DDHC	(French) Declaration of Human and Civic Rights Of 26 August 1789
DDT	Dynamic Driving Task
D.A.	<i>Administrative Law</i>

<i>Doc. fr.</i>	<i>French Documentation</i>
EC	European Commission
EEC	European Economic Community
EDCE	<i>Council of State studies and documents</i>
EPCI	Établissement public de coopération intercommunale (Public Establishment for Intercommunal Cooperation)
EU	European Union
EUS	State of health emergency
GACA	<i>The major judgements in administrative litigation</i>
GACE	<i>The major opinions of the Council of State</i>
GAJA	<i>The major rulings of administrative case law</i>
<i>Gaz. Pal.</i>	<i>Gazette du Palais</i>
GDCC	<i>The major decisions of the Constitutional Council</i>
GDJ- droit administratif	<i>The major decisions of the administrative jurisprudence</i>
GDPR	General Data Protection Regulation
HMI	Human-Machine Interface
IT	Information Technologies
ITS	Intelligent Transport Systems
JCP A	<i>Juris- periodical binder ("La Semaine juridique"), Administrations and local authorities</i>
JCP G	<i>Juris- Periodical binder ("Law Week"), general edition</i>
JO - JORF	<i>Official Journal of the French Republic</i>
OJEC - JOCE	Official Journal of the European Communities
OJEU-JOUE	Official Journal of the European Union
L.	Law (Act)
LOM	(French) Mobility Orientation Law
LOTI	(French) Inland Transportation Policy Act
LGDJ	<i>General bookshop of law and jurisprudence</i>
LPA	<i>Les Petites Affiches</i>
ICCPR	International Covenant on Civil and Political Rights - Pacte international relatif aux droits civils et politiques
MaaS	Mobility as a Service
NHTSA	National Highway Traffic Safety Agency
NITC	New Information and Communications Technologies
ODD	Operational Design Domain
PSO	Public Service Obligations
PUAM	<i>Presses universitaires d'Aix- Marseille</i>
PUF	<i>Presses universitaires de France</i>

QPC	French application for a priority preliminary ruling on the issue of constitutionality
<i>R. or Rec. Leb.</i>	<i>Recueil des décisions du Conseil d'État et du Tribunal des conflits, des arrêts des cours administratives d'appel et des jugements des tribunaux administratifs (Lebon Report).</i>
RCC	<i>Compendium of Decisions of the Constitutional Council (annual)</i>
RA	<i>Administrative Review</i>
RDE	<i>European Law Review</i>
RDI	<i>Revue de droit international</i>
PRM	<i>People with reduced mobility</i>
SAE	<i>Society of Automotive Engineers</i>
SPA	Administrative Public Service
SPIC	Industrial and Commercial Service
UNECE	<i>United Nations European Economic Commission</i>
V2I	Vehicle-to-Infrastructure
V2P	Vehicle-to-Pedestrian
V2S	Vehicle to Sensor
V2V	Vehicle to Vehicle
V2X	Vehicle-to-Everything
C-V2X	Cellular-Vehicle to Everything

## EXECUTIVE SUMMARY

The purpose of this deliverable is to conduct a comparative law study on the right of access to transport with a focus on transport law in different legal systems. More precisely, for each step of the work, the report will distinguish between French laws and some other national laws. So, the work is focused on transport law in different legal systems. Indeed, the report includes a review of domestic, international and Community law that is aimed to answer the following questions:

*What's the definition of "the right to access to transport"?*

*How do the judges appreciate and interpret this right?*

A comparative study of the laws concerning the right of access to transport raises questions about the definition of the right of access to transport and the way in which it could be invoked before a judge.

The report is divided into two sections. The first step focuses on French case, which is mentioned as an example in the SUaAVE DoA because of its new Mobility Law. From the analysis of the French case as a starting point for the discussion, the second part of the study will be devoted to comparative law including the same legal issues in regard to other European countries, namely, Germany, Italy, and Spain, and the USA.

It is in this context, it will be useful to start by determining whether the right to access to transport is an omnipresent legal concept, and whether its meaning is common and shared. Then its enforceability, invocability and effectiveness must be questioned. Finally, it must be determined whether the introduction of CAV is likely to have an impact on the characteristics of this potential right, especially by investigating the legal issues related to the right to access to transport with the implementation of CAV in future transport systems provided by the different public policies of the countries studied.

The analysis shows that there is no general "right to transport" constituting a fundamental right as a "right-credential", which citizens may individually request to be implemented and whose disregard would be sanctioned.

There is no general (*i.e.* universal) right to transport guaranteed in Union or international laws for individuals, but consecration of different rights of the passenger for certain modes of transport (as, for example, the right to availability of tickets and reservations, the carrier's liability towards the passenger, rights in case of delay, cancellation...), with the notable and important exception of an effective "right to transport" for persons with reduced mobility or a disability, understood as a guarantee *a minima* of access to existing transport services or equivalent offers.

In addition, emphasis should be placed on the "right to information" component which is inherent in the right to transport in several legal regimes.

At the national level, the right to transport is raised to a legal matter of discussion in the different countries studied but is not enshrined in every system or protected at the same level. There is a disparity in its application depending on the legal regime to which it is subject to in each country. The effectiveness of a right to transport can be widely discussed. In some countries, it has not been established as a right but is invoked in public policies, while in others, even if it is expressly included in the law or indirectly promoted, it does not seem to be accompanied by the legal means to make it effective and applicable for every citizen. In each legal system, the right to transport is more like an objective recognised by legislation, a directive that needs to be implemented by public policies.

However, the legal effectiveness of a right of access to transport for people with reduced mobility and disabilities seems to be a common thread in the different legal regimes studied, including USA.

From this point of view, it is undeniable that the introduction of the CAV is unanimously apprehended as constituting a progress in the implementation of a right to transport.



Although no legal system expressly provides that the deployment of CAV must be such as to ensure the effectiveness of the right to transport on its own, they all point out that this new means of transport is likely to improve the effectiveness of this right. All texts reviewed highlight that CAV aims to provide solutions to the real mobility problems of citizens, especially of:

- elderly people
- people with reduced mobility and disabilities
- inhabitants of sparsely populated or landlocked territories

The various public policies emphasize the fact that accessibility will be improved, not only insofar as the transport offer will be more diversified ('on-demand' transport in particular is very often targeted), but also adapted to the person of the user and their possible physical, cultural, medical, social and intellectual constraints.

In this respect, it should be noted that the introduction of the CAV is legally disruptive in that it implies a rethinking of the organisation of transport systems, transcending traditional legal categories.

From this point of view, all the legal systems examined highlight the fact that there is a shift from a right to transport to a right to mobility, which would *de facto* guarantee not a "right for all" but "a right for everyone". This shift from the "transport" to the "mobility" strengthens real, not just formal, equality between individuals, in link with the enhancing of freedom of each individual.

To do so, however, the use of the CAV will involve the processing of personal data. Hence, the apparent reinforcement of one right may have the capacity to affect other rights which requires a balancing of interests. So the CAV implies the reconciliation of different rights which must be effectively carried out and requires compliance with other regulations protecting other rights, in particular with regard to the GDPR, that must be effective. Probably the most problematic legal issue is the use of data, especially personal data which can be very sensitive. It is therefore probably appropriate to consider that legal requirements should be integrated into the design process. This issue will be investigated as part of further work in the project.

# 1. INTRODUCTION AND OBJECTIVES

## 1.1. Method

1. The report has chosen to focus on two main issues of CAV implementation in new mobility by studying:

- **laws on right to access to transport (Deliverable 2.1)**
- **data protection framework and consumers rights (Deliverable 2.5)**

For each step of the work, the report will distinguish between French laws and some other laws (United States, Germany, Spain and Italy).

The objective of the first part is to investigate the legal issues related to the right to access to transport with the implementation of CAV in future transport systems and change in the notion of mobility.

This work will be particularly implemented through the prism of the *ALFRED* concept and its use cases<sup>1</sup>. *(Throughout the report, shaded boxes will illustrate the point using ALFRED).*

The legal research work first requires collection of useful legal and technical documents and need constantly updating, especially in an innovative field like CAV<sup>2</sup>. It is worth recalling that the COVID 19 health crisis imposed drastic changes that required a special focus on limitations to fundamental freedoms and rights due to covid-19 (This issue is discussed and detailed in **ANNEX 4**).

The next step of legal research is to study regulation, soft law, jurisprudence, administrative doctrine, legal doctrine and academic literature.

Following this methodology, the preliminary work was to tend to determine a legal definition of an automated and connected vehicle by analysis of international law (UNECE regulations, Union Law...) and laws of different states selected, using SAE technical standards (SAE levels

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<sup>1</sup> For memo, *ALFRED* Trip Use cases (Long scenarios, Deliverable 6.1 pages 32-34):

Use Case A:

Users: the main user of the first use case is an adult aged between 25 and 55 years old. The user does not have a driving licence. In addition, another user will be part of this use case, a passenger, unknown to the main user, will enter the vehicle in the middle of the journey. Before entering the car, the user had personal time at home. The user's emotional state is neutral. Context: the purpose of the journey is to travel to the airport. The occupant will have downtime time and possible inter-occupant interaction after the second user enter the vehicle. The journey will start at home, will have a pick-up stop and end up at the airport transport hub.

Use case B :

User: The user of the second use case is an adult (aged between 25 and 55) with a driving licence. Before entering the vehicle the user was working. The user has a neutral emotional state. Context: the user will go from the workplace to pick up the children at school. In between the start and final destination, the user will have to stop at a client office. The activity in the vehicle will concern work and media consumption.

Use case C:

User: the user of the third use case will be an elderly driver aged 65 years or older with or without a driving licence. The user activities before entering the vehicle will be normal activity at home and relaxing activities. The user has a neutral emotional state. Context: the journey purpose is day to day activities- the journey plan is from home to the doctor and finally to the shopping centre. The user activity in the vehicle will be reading.

<sup>2</sup> For example, standard SAE revised in April 2021 or new legal framework for deployment of CAV in France at the same period.

taxonomy) in order to make a comparison of the context in relation to the subject of the study (*Are we talking about the same thing?*).

Next, French Law was reviewed in order to define the traditional concept, the consistency and the legal value of a “*right to transport*” (*What is the right to transport in France?*).

Dealing with the right to transport requires prior consideration of its legal matrix and to look at the genesis and contours of the fundamental freedom to come and go, which would constitute the teleological basis of a possible right to transport. To highlight this essential link, whether the freedom to come and go is indeed guaranteed by means of a “*right to transport*” is effectively recognised in the French legal system needs to be verified by a review of constitutional Law and international Law as a potential source of « *right to transport* »).

So, this requires in fact to determine the scope of the freedom to come and go and its limits. This more detailed study on the link between the right to transport and the fundamental freedom to come and go is included in an annex to this report, to which the reader may refer for a more in-depth approach to the subject and its implications in terms of fundamental rights (**ANNEX 1**).

It is important to note that study on international Law is essential because the French legal system is monist, that is, international Law is directly integrated into the French legal order (Community and international Law in compliance with the provisions of Articles 88-1<sup>3</sup> and 55<sup>4</sup> of the French Constitution), unlike Italy or Germany, which operate under a dual system that requires the treaty to be transposed by law to give its effect in domestic law<sup>5</sup>.

Thus, this report opens directly on the right to transport in its traditional French sense and especially on the research for the existence of a right to transport in international and Community law (with a specific focus on rights granted to passengers detailed in **ANNEX 3** and **ANNEX 4**), on an attempt at some definition, in order to measure its effectiveness and justiciability<sup>6</sup>. The report investigates the impact of introduction of new devices (see active mobility, inclusive mobility, Maas, promotion of multimodality and intermodality discussed and detailed in **ANNEX 5**) with a special focus on the CAV (*Does CAV entail a change in the “right to transport”?*).

The objective of the second step of the report aims to answer the same questions by the study of each legal frameworks of public policies in other States, in the perspective of comparison between the different legal systems chosen (States belonging to the EU especially Italy, Germany and Spain, and the USA outside the European framework).

Each section includes a conclusion with key messages that will facilitate this comparison by synthesising the contribution of the research.

<sup>3</sup> “*The Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December, 2007*”.

<sup>4</sup> “*Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party*”.

<sup>5</sup> In dualist systems, the technique used is that of “*reception*”, a term used by the doctrine. It involves the adoption of internal enforcement measures.

<sup>6</sup> A detailed study and analysis of the French domestic legal framework implies to highlight the major role of the 1982 “LOTI” Act which introduced the notion of the right to transport (including research of parliamentary preparatory work), with a focus on definition and its components. The LOTI is “*the architecture*” of the French transport, which includes categories of transport existing in French law (use cases), qualification of public transport services and link between transport and French notion of « *public service* ». This is the basis of the French transport system, which had not seen any major changes until 2019 and the new LOM law introducing CAV for the first time into the system.

That is why the report will analyse the consecration of a « *right to mobility* » provided by the LOM.

NB: In this deliverable, scenarios provided are analysed from a legal point of view. Recommendations for CAV to be technologically in compliance with laws is out of the scope of the current deliverable.

## 1.2. Legal definition of an automated and connected vehicle

### 2. There is no "universal" legal definition of the automated and connected vehicle.

Moreover, the two concepts (automated/connected), while closely related - driving automation features equipped on vehicles usually meaning a connected vehicle - remain distinct insofar as the connected vehicle exists independently of the automation functions<sup>7</sup>.

An automated vehicle is not necessarily connected: radar, sonar, cameras and other lidars, whose information is processed by the computers and more generally by the on-board software that delegates some or all of the driving to the vehicle, should be sufficient to accomplish this. Nevertheless, the information produced by other vehicles, road infrastructure managers' networks or telecommunications operators should be able to make it more efficient, particularly from a safety point of view. Experts agree that there can be no real autonomy if vehicles cannot cooperate or collaborate with other entities. Indeed, even if vehicles are inclined to use more and more sensors in order to model their immediate environment, they will only be able to move, in a complex organisation such as the road traffic environment, by sharing information, (position, speed, direction etc...) . Many experts agree that the development of functions for the perception of critical situations for which needs or early warning exceed the capacity of the sensors is indispensable. The 'autonomous' vehicle is therefore likely to be a connected vehicle. In the long term, it is likely that it will even be connected to the infrastructure, which will also be 'intelligent' and capable of moving vehicles safely, thus generating a global automated system that presupposes connectivity between each stakeholder. More simply, the connected vehicle is equipped with devices enabling it to communicate with third parties. The adjective "communicating" may be preferred, which presupposes, in any case, that the vehicle is connected. As previously mentioned, relating to automated driving, there are 3 modes of operation depending on the actors involved in the communication. V2V (*vehicle to vehicle*) communication implies that vehicle data is collected and transmitted to vehicles, V2I (*vehicle to infrastructure*) communication performs the same operation but the data is centralised at an infrastructure management centre. I2V (*infrastructure to vehicle*) communication involves information being transmitted from the centre to the vehicles. In addition to these three main modes, there is also V2P (Vehicle to Pedestrian) communication, Vehicle to Sensor (V2S) communication, Vehicle to Everything (V2X) communication, and recently, the one that is distinguished by the network used, Cellular-Vehicle to Everything (C-V2X) communication.

Thus, vehicle connectivity, which is already marketed<sup>8</sup>, meets legal requirements that are distinct from those inherent in vehicle driving automation systems, as these two technologies

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<sup>7</sup> As the European Commission has made it clear, "Even though automated vehicles do not necessarily need to be connected and connected vehicles do not require automation, it is expected that in the medium term connectivity will be a major enabler for driverless vehicles". "Studies have quantitatively showed that automation without connectivity could lead to a potential deterioration of traffic conditions: <https://ec.europa.eu/jrc/en/publication/connected-and-automated-vehicles-freeway-scenario-effect-traffic-congestion-and-network-capacity>, in Communication of the Commission, "On the road to automated mobility: An EU strategy for mobility of the future", 17.05.18, COM/2018/283 final.

<sup>8</sup> Connectivity can refer to a wide range of new applications, from those dedicated to infotainment to those enabling automatic calls to emergency services (eCall), those related to automated driving will be focused on in this report.

generate different legal issues (e.g. protection of privacy in the use of personal data / civil or criminal liability of the driver).

3. **Relating to automated driving, based on the SAE's taxonomy** of driving automation systems which has just been revised in April 2021<sup>9</sup>, it is possible to define the common and shared characteristics of an automated vehicle toward a legal point of view.

Indeed, the SAE standard, a standard issued by the Society of Automobile Engineers (SAE) establishes a standard describing motor vehicle automation systems that perform part or all of the dynamic driving task (DDT) in a sustainable way. It provides a taxonomy with detailed definitions for six levels of driving automation, ranging from no driving automation (level 0) to high and full driving automation (levels 4 and 5).

**This technical standard has become an almost universal reference that has penetrated the legal sphere expressly, sometimes formally (as well as WP29<sup>10</sup> or EU<sup>11</sup>).**

This means that the CAV is a motor vehicle with part of automation, part of connection (allowing communication with the driver but also with other vehicles or infrastructure). In legal terms, this means that it must follow all legal rules that apply to a motor vehicle. For example, CAV must be insured because of the motor insurance directive that requires a third-party insurance for all motor vehicles in circulation in the EU.

But, beyond these common technical characteristics, the qualifications and legal regimes diverge.

**CAV are understood differently in different legal systems ( EU, UNECE...) and even in different countries. They have thus appeared in the legal order in various ways. First, and often, through non-binding standards, and then, progressively, in the context of regulatory texts.**

4. **Under the aegis of the UN, the WP29<sup>12</sup>** has adopted various non-binding texts<sup>13</sup> which content principles and many definitions of concepts for automated driving systems (ADS) as relevant for WP29 to date. These principles may be treated as guidelines for developing new regulations related to automated driving systems at WP29. As already said, it is important to note that these texts crystallise the SAE nomenclature. It is expressly referred to and annexed. However, the so-called "ALKS" regulation on automated lane keeping systems, adopted by the UNECE World Forum for Harmonisation of Vehicle Regulations on 24 June 2020 in Geneva, should be mentioned<sup>14</sup>. This is the first binding international standard on vehicle automation, known as "Level 3", which entered into force internationally in January 21. The European Commission, which has also contributed to its

<sup>9</sup> Taxonomy and Definitions for Terms Related to Driving Automation Systems for On-Road Motor Vehicles, J3016™, April 2021, [https://www.sae.org/standards/content/j3016\\_202104/](https://www.sae.org/standards/content/j3016_202104/)

<sup>10</sup> For example, Reference document with definitions of Automated Driving under WP.29 and the General Principles for developing a UN Regulation on automated vehicles, 23 April 2018, ECE/TRANS/WP.29/1140.

<sup>11</sup> Communication of the Commission, "On the road to automated mobility: An EU strategy for mobility of the future", 17.05.18, COM/2018/283 final.

<sup>12</sup> The UNECE World Forum for Harmonization of Vehicle Regulations (WP.29) is a unique worldwide regulatory forum within the institutional framework of the UNECE Inland Transport Committee.

<sup>13</sup> Economic Commission for Europe, Inland Transport Committee, World Forum for Harmonization of Vehicle Regulations, Reference document with definitions of Automated Driving under WP.29 and the General Principles for developing a UN Regulation on automated vehicles, 04.23.18, ECE/TRANS/WP.29/1140 ; Revised Framework document on automated/autonomous vehicles, 12.31.19, ECE/TRANS/WP.29/2019/34/Rev.2.

<sup>14</sup> UN Regulation on uniform provisions concerning the approval of vehicles with regards to Automated Lane Keeping System, <https://undocs.org/ECE/TRANS/WP.29/2020/81>

development, has announced that the regulation will apply in the European Union after its entry into force at a later date, yet to be specified. However there is currently no generic definition of CAV agreed by the WP29.

5. **The WP1**<sup>15</sup>, which presides over the work of the Vienna Convention on Road Traffic<sup>16</sup>, refers to "*automated driving systems*" in this communication strategy<sup>17</sup> since an amendment entered in force in 2016<sup>18</sup>. But, in reality, the text is aimed at «*Vehicle systems which influence the way vehicles are driven* » without more precision and does not remove the need for a driver<sup>19</sup>. Indeed, the convention does not define the term «*vehicle* »<sup>20</sup>. A divergence of interpretation then emerged between the signatory countries. A report by the French administration<sup>21</sup> summed up the situation as follows: "*The countries of the European Union are divided into three blocks as to the interpretation to be drawn from the two amendments to the Vienna Convention, which came into force at the end of a procedure that began in 2006:*

- *those who, like France, consider that the new text does not allow the deployment of truly autonomous vehicles;*
- *those who, like the United Kingdom and the Netherlands, consider that the amendments should be interpreted flexibly, and that they now allow the deployment of autonomous vehicles (at least of levels 3 and 4)*
- *those who, like Germany, want to allow the circulation of vehicles at level 5 without waiting for a new amendment.*<sup>22</sup> »

<sup>15</sup> The UNECE Working Party on Road Traffic Safety (WP.1) is the main coordinating body in the area of road safety;

<sup>16</sup> Vienna Convention on Road Traffic, 8 November 1968,

<sup>17</sup> <https://unece.org/press/unece-paves-way-automated-driving-updating-un-international-convention>

<sup>18</sup> Art. 8. 5bis. «*Vehicle systems which influence the way vehicles are driven shall be deemed to be in conformity with paragraph 5 of this Article and with paragraph 1 of Article 13, when they are in conformity with the conditions of construction, fitting and utilization according to international legal instruments concerning wheeled vehicles, equipment and parts which can be fitted and/or be used on wheeled vehicles\*Vehicle systems which influence the way vehicles are driven and are not in conformity with the aforementioned conditions of construction, fitting and utilization, shall be deemed to be in conformity with paragraph 5 of this Article and with paragraph 1 of Article 13, when such systems can be overridden or switched off by the driver* », C.N.569.2014.TREATIES-XI.B.19 (Depository Notification 09.23.14) and C.N.529.2015.TREATIES-XI.B.19 (Depository Notification 10.06.15). <https://unece.org/fileadmin/DAM/trans/doc/2014/wp1/ECE-TRANS-WP1-145e.pdf>

<sup>19</sup> Art.8-§5. "*Every driver shall at all times be able to control his vehicle...*". Art. 13§1 : "*Every driver of a vehicle shall in all circumstances have his vehicle under control so as to be able to exercise due and proper care and to be at all times in a position to perform all manoeuvres required of him*".

<sup>20</sup> Article 1 of the Convention is devoted to the glossary. This does not include a definition of the concept in the strict sense, but it is used on many occasions to define other concepts or generic terms used to organise subdivisions or sub-categories. However, it can be considered that this notion, however broad, excludes rail vehicles, even when they travel on a roadway. Thus, the term vehicle refers to any object that moves on the earth's surface and has one of its functions corresponding to such movement. It should be noted that the requirement of movement on wheels does not seem imperative.

<sup>21</sup> General Council for the Environment and Sustainable Development, General Inspectorate of Administration, *Vehicle automation* - February 2017, page 22.

<sup>22</sup> To illustrate this point, it is interesting to mention the position stated by the German Government in the presentation of the 2021 Act on autonomous Driving bill : "*The draft law is compatible with European Union law and international treaties concluded by the Federal Republic of Germany. The Act is in line with international regulations, in particular the Vienna Convention on Road Traffic (Vienna*



To illustrate this point, in France, we shall consider that this last amendment requires for sure a driver – a natural person in physical and physical capacity of the driving with a driving licence – in control of the vehicle. There is no precision neither in the Vienna convention nor in the French traffic law that could allow us to determine what the concept of “control” means: does the driver have their vehicle under control when the ADS is being activated? The Conseil d’Etat<sup>23</sup> explained: « *the Government cannot rely on any interpretation of these stipulations that would allow it not to make the experimental circulation of vehicles with driver delegation not declared to be in conformity with the United Nations technical regulations on vehicles, subject to the condition that the driver delegation system can be "neutralised or deactivated by the driver". It therefore proposes to amend the proposed provision to exclude experiments involving the "inattention" of the driver or the "absence of a driver" »<sup>24</sup>. For the Council of State, the driver is not released from any « *obligation of vigilance or attention* »<sup>25</sup>.*

However, WP1 adopted in 2018 a resolution on the deployment of highly and fully automated vehicles in road traffic that includes definitions<sup>26</sup>. **Then, an amendment to the convention introducing automated vehicles voted in September 2020 that finally addressed this major issue** <sup>27</sup> :

“Article 34bis

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*Convention on Road Traffic of 1968, BGBl. 1977 II pp. 809, 811). This also results from the recommendations of the Working Party "Global Forum for Road Traffic Safety" WP.1 of the United Nations Economic Commission for Europe (UNECE), which is responsible, inter alia, for the law of conduct, and which was promulgated in September 2018 (Verkehrsblatt vom 24/2018, vom 31.12.2018, pp. 866-870). According to this, autonomous motor vehicles are permissible in road traffic if there is at least one possibility of deactivation by a person - inside or also exclusively outside the vehicle (regardless of the spatial distance; e.g. by the technical supervisor)” (Drucksache 19/27439, p 17).*

<sup>23</sup> It is the administrative supreme court and apart from its jurisdiction, it has the responsibility for providing advice to the Government on the most important draft legislation (statutes, orders and decrees).

<sup>24</sup> Conseil d’Etat, Assemblée générale, séance du jeudi 14 juin 2018, Section de l’intérieur - Section des finances - Section des travaux publics Section sociale- Section de l’administration Nos° 394.599 et 395.021, avis sur un projet de loi relatif à la croissance et la transformation des entreprises, page 24§n°4.

<sup>25</sup> Conseil d’Etat, Assemblée générale, Séance du jeudi 14 juin 2018 , Section de l’intérieur Section des finances Section des travaux publics Section sociale Section de l’administration Nos° 394.599 et 395.021, avis sur un projet de loi relatif à la croissance et la transformation des entreprises, page 25.

<sup>26</sup> Economic Commission for Europe, Inland Transport Committee, Global Forum for Road Traffic Safety, Seventy-seventh session Geneva, 18-21 September 2018, Report of the Global Forum for Road Traffic Safety on its seventy-seventh session, resolution on the deployment of highly and fully automated vehicles in road traffic : art. 3 : « a) “Automated driving system” refers to a vehicle system that uses both hardware and software to exercise dynamic control of a vehicle on a sustained basis. (. (d) “Highly automated vehicle” refers to a vehicle equipped with an automated driving system. This automated driving system operates within a specific operational design domain for some or all of the journey, without the need for human intervention as a fall-back to ensure road safety. (e) “Fully automated vehicle” refers to a vehicle equipped with an automated driving system. This automated driving system operates without any operational design domain limitations for some or all of the journey, without the need for human intervention as a fall-back to ensure road safety », ECE/TRANS/WP.1/165.

<sup>27</sup> Economic Commission for Europe, Inland Transport Committee, Global Forum for Road Traffic Safety, Eighty-first session Geneva, 21-25 September 2020, Report of the Global Forum for Road Traffic Safety on its eighty-first session, « Addendum Amendments to Article 1 and new Article 34bis 1968 Convention on Road Traffic », ECE/TRANS/WP.1/173/Add.

*The requirement that every moving vehicle or combination of vehicles shall have a driver is deemed to be satisfied while the vehicle is using an automated driving system which:*

*(a) is in compliance with domestic legislation, and any applicable international legal instrument, concerning wheeled vehicles, equipment and parts which can be fitted and/or be used on wheeled vehicles, and*

*(b) is governed by domestic legislation for operation, which must be consistent with the principles of this Convention.”*

**The previous definition of the term « ADS » is included at article 1 : « (ab)“Automated driving system” refers to a vehicle system that uses both hardware and software to exercise dynamic control of a vehicle on a sustained basis». The amendment should come into force on 22 July 2022.**

6. **At the community level, the European Union adopted a definition too in 2019<sup>28</sup>.** The recast General Vehicle Safety Regulation of the European Parliament and of the Council of 27 November 2019 states that *"harmonised rules and technical requirements for automated vehicle systems, including those regarding verifiable safety assurance for decision-making by automated vehicles, should be adopted at Union level, while respecting the principle of technological neutrality, and promoted at international level in the framework of the UNECE's World Forum for Harmonization of Vehicle Regulations (WP.29) »* (recital 23). In this respect, the Regulation also recalls that the UN Regulations and their amendments which the Union has voted in favour of or which the Union applies, in accordance with Decision 97/836/EC, should be incorporated into the Union's type-approval legislation. Article 3, which is devoted in particular to definitions, enshrines the concept of *« automated vehicles »* and *« fully automated vehicles »<sup>29</sup>*. It also refers to various legal obligations specific

<sup>28</sup> Regulation (EU) 2019/2144 of the European Parliament and Of the Council of 27 November 2019 on type-approval requirements for motor vehicles and their trailers, and systems, components and separate technical units intended for such vehicles, as regards their general safety and the protection of vehicle occupants and vulnerable road users, amending Regulation (EU) 2018/858 of the European Parliament and of the Council and repealing Regulations (EC) No 78/2009, (EC) No 79/2009 and (EC) No 661/2009 of the European Parliament and of the Council and Commission Regulations (EC) No 631/2009, (EU) No 406/2010, (EU) No 672/2010, (EU) No 1003/2010, (EU) No 1005/2010, (EU) No 1008/2010, (EU) No 1009/2010, (EU) No 19/2011, (EU) No 109/2011, (EU) No 458/2011, (EU) No 65/2012, (EU) No 130/2012, (EU) No 347/2012, (EU) No 351/2012, (EU) No 1230/2012 and (EU) 2015/166, OJEU, L 325/1, 16.12.19.

<sup>29</sup> « (21)‘automated vehicle’ means a motor vehicle designed and constructed to move autonomously for certain periods of time without continuous driver supervision but in respect of which driver intervention is still expected or required ; (22)‘fully automated vehicle’ means a motor vehicle that has been designed and constructed to move autonomously without any driver supervision; »



to CAVs which will be in addition to the « traditional » vehicle obligations<sup>30</sup>. But most of the innovative technical provisions specific to CAVs are only applicable from 6 July 2022<sup>31</sup>.

Notwithstanding these international definitions, **many countries have adopted their own definitions.**

7. **For example, in France,** the legal regime for experimentation (« DPTC »<sup>32</sup>) has introduced the singular notion of « *vehicle with driving delegation* » in 2015<sup>33</sup>. This term was then enshrined in law in 2019 for the permanent circulation of CAV<sup>34</sup> (by the so-called “Mobility Orientation Law” (LOM) Act). Article 31 of the LOM intends to regulate the circulation of “*motorised land vehicles whose driving functions are, under predefined conditions of time, place and circulation, partially or totally delegated to an automated driving system*”. Then, with regard to automated driving systems, Order issued on the basis of legislative empowerment in April 2021 provides in particular for the definition of a vehicle with driving delegation and sets out the specific features of the automated driving systems with which it can be equipped<sup>35</sup> : «... *vehicle whose driving functions are delegated to an*

<sup>30</sup> Article 11 is specifically devoted to the requirements for automated and fully automated vehicles, which are thus added to the previous ones for this type of vehicle, and refers to future implementing regulations on various specific points concerning “ *systems to replace the driver’s control of the vehicle*” (sic), including signalling, steering, acceleration and braking (Art.11 .1.a); systems to provide the vehicle with real-time information on the status of the vehicle and the surrounding area (Art.11.1.b); driver availability monitoring systems (Art.11.1.c); event data recorders for automated vehicles (Art.11 .1.d); harmonised format for data exchange, e.g. for platooning of vehicles of different makes (Art.11.1.e) as well as systems for communicating safety information to other road users (Art.11.1.f). Pursuant to the provisions of Article 11 (2), the Commission will have to adopt, by means of implementing acts, provisions on uniform technical procedures and specifications for the systems and other components listed in paragraph 1(a) to (f) of this Article and for the type-approval of automated vehicles and fully automated vehicles with regard to those systems and other components in order to ensure the safe operation of automated vehicles and fully automated vehicles on public roads.

<sup>31</sup> So far, there is no sufficient legal framework at European level for motor vehicles with autonomous driving functions. The currently applicable Regulation (EU) 2018/858, according to the wording of its scope and the technical requirements (seat of the person driving, steering systems, protection of the person driving the vehicle in the event of an accident, field of vision, vehicles’ categories etc), always presupposes a person driving the vehicle and thus the comprehensive controllability of the vehicle (“*to be driven*”).

<sup>32</sup> As the 2018 decree and order setting out the regime for experiments are commonly known. Article 2 of the order defines the « *vehicles with partial or total driving delegation* » 1. “*Partially or fully delegated driving vehicle*” means a vehicle which belongs to the international category M, N, L, T or C or to a national type, equipped with one or more functionalities allowing the vehicle to delegate all or part of the driving tasks during all or part of the vehicle’s journey.

*Delegation is partial when the driver delegates part of the driving tasks to the vehicle’s electronic system but retains at least one physical driving action.*

*Full delegation is when the driver completely delegates all driving tasks to the vehicle’s electronic system.*

*This definition excludes driving aids, which do not relieve the driver of driving tasks. It also excludes legal safety devices, which are subject to approval and equipment requirements under current regulations. »*

<sup>33</sup> L. n° 2015-992 du 17 août 2015 JORF n°0189 du 18 août 2015, p. 14263.

<sup>34</sup> L. n° 2019-1428 du 24 décembre 2019 d’orientation des mobilités, JORF n°0299 du 26 décembre 2019.

texte n° 1.

<sup>35</sup> Order on the criminal liability rules applicable in the event of the use of a vehicle with driving delegation and their conditions of use, JORF du 15 avril 2021, texte n°36.

*automated driving system, when this system is exercising dynamic control of the vehicle... » (art. 121-3 of the Highway code). Then, the future application decree expected in May 2021 will define precisely the different types of vehicle with driving delegation that can be « partially, highly or fully automated »<sup>36</sup>.*

8. **In Germany**, the « AVF »<sup>37</sup> strategy was adopted by the Federal Government in 2015. Germany has succeeded in getting a vote to adapt the national legal framework, in particular the amendment of the Road Traffic Act, in order to allow the circulation of « *automated vehicles* ». On 12 May 2017, the German legislature indeed passed a law on the use of « *Motor vehicles with highly or fully automated driving function* », which was published on 20 June 2017 and entered into force the following day<sup>38</sup>. Unlike the French legislator, who initially dealt only with the delegation of driving and did not mention the technology used, the German Parliament immediately refers to "*automated driving*". From the very first lines of the law, it gives a very clear definition in that it focuses on the technical aspect, on the instrument constituted by the technology used. The CAV, for the purposes of this law, « *are those which have technical equipment* » and those that meets six criteria laid down by law (art. §1a)<sup>39</sup>. Now, the Federal Ministry of Transport and Digital Infrastructure has announced that Germany intends to enable « *autonomous, driverless driving in determined operational areas* ». The required legal framework is currently being prepared ("*Gesetzentwurf „zur Änderung des Straßenverkehrsgesetzes und des Pflichtversicherungsgesetzes - Gesetz zum autonomen Fahren*")<sup>40</sup>. The bill targets "*a motor vehicle with an autonomous driving*

<sup>36</sup> Article 1 of the decree project notified to the EU Commission provides: "*The vehicle with driving delegation can be partially, highly or fully automated;*

8.1. – '*partially automated vehicle*': *a vehicle fitted with an automated driving system exercising dynamic control of the vehicle in a particular functional design area, which has to issue a take-back request to respond to certain traffic hazards or certain failures during a manoeuvre performed in its functional design area;*

8.2. - '*highly automated vehicle*': *a vehicle fitted with an automated driving system exercising dynamic control of a vehicle in a particular functional design area, which is able to respond to any traffic hazard or failure without issuing a take-back request during a manoeuvre performed in its functional design area;*

8.3. - '*fully automated vehicle*': *a vehicle fitted with an automated driving system exercising dynamic control of a vehicle, which is able to respond to any traffic hazard or failure without issuing a take-back request during a manoeuvre.*"

Article 2 completes with other definitions including ADS "1. '*Automated driving system*': *a system combining hardware and software elements enabling it to exercise dynamic control of a vehicle for an extended period.*"

<sup>37</sup> « Strategie automatisiertes und vernetztes Fahren » (Strategy for automated and connected driving).

<sup>38</sup> Achtes Gesetz zur Änderung des Straßenverkehrsgesetzes vom 16. Juni 2017 Straßenverkehrsgesetz – StVG, Bundesgesetzblatt Jahrgang 2017 Teil I Nr. 38, ausgegeben am 20.06.2017, Seite 1648.

<sup>39</sup>« 1. *which can control the respective motor vehicle after activation (vehicle control) in order to cope with the driving task, including longitudinal and transverse guidance,*

2. *which, during the highly or fully automated vehicle control, is able to comply with the traffic regulations relating to vehicle control,*

3. *which can be manually overridden or deactivated at any time by the vehicle driver,*

4. *which can identify the necessity of the vehicle's manual control by the vehicle driver,*

5. *which is capable to optically, acoustically, tactically or otherwise perceptibly indicate to the vehicle driver with a sufficient time reserve before the vehicle control is handed over that it is necessary to manually control the vehicle and*

6. *which indicates any use contrary to the system description ».*

<sup>40</sup> On Thursday, 20 May 2021, the Bundestag passed a corresponding bill "to amend the Road Traffic Act and the Compulsory Insurance Act - Act on Autonomous Driving" (19/27439) of the Federal

function”<sup>41</sup>... which can perform the driving task independently in a defined operating area without a person driving the vehicle...”<sup>42</sup>. For the time being, autonomous vehicles in the sense of the German law are only defined as SAE level 4 vehicles. The definition again refers to technical equipment which must meet the legal requirements set out in Article §1e (2).

The illustrations of the French and German cases are interesting because they are at the opposite end of the spectrum. Germany focuses on the “technical equipment” while France initially ignored the technical reality to focus on a strictly legal understanding through the sole legal notion of “delegation”.

9. **The Italian regulation** also deals with automatic driving vehicle (“veicolo a guida automatica”<sup>43</sup>). The legislation specific to the testing of such vehicles provides a definition in Article 1. It means “a vehicle equipped with technologies capable of adopting and implementing driving behaviours without active intervention of the driver in certain road and external conditions”. From the outset, the legislation takes a techno-centric approach in terms of definition by defining the term of “automatic driving technologies”<sup>44</sup>.

10. **In Spain**, this is also a technical approach of the “vehículo autónomo” within an experimental legal framework since 2015 (or “vehículos de conducción automatizada” in the title)<sup>45</sup>. This text expressly targets “vehicles incorporating technology with functions associated with automation levels 3, 4 and 5”.

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Government. In order to adopt the new legal framework, the Länder must now also agree in the Bundesrat.

<sup>41</sup> “Ein Kraftfahrzeug mit autonomer Fahrfunktion”.

<sup>42</sup> It is interesting to note how the German government has justified the conformity of its bill with EU law: “However, the core of the type-approval regulations are the technical requirements for motor vehicles concentrated in Annex IV of the Framework Directive and Annex II of Regulation (EU) 2018/858. However, these do not contain any requirements for autonomous motor vehicles. In particular, Regulation (EU) 2018/858, according to the wording of its scope and the technical requirements (seat of the person driving, steering systems, protection of the person driving the vehicle in the event of an accident, field of vision, etc.), always presupposes a person driving the vehicle and thus the comprehensive controllability of the vehicle (“to be driven”). In contrast, autonomous driving functions are characterised precisely by the fact that they do not provide for human guidance. Examples of this are the so-called “people movers” or “goods movers”. Depending on the final stage of development, they are therefore more likely to be regarded as a legal aliud (robot) than as a motor vehicle within the meaning of Regulation (EU) 2018/858, so that a non-harmonised area is open to national legislation and a national authorisation with limited validity to Germany for the time being”, III. Vereinbarkeit mit dem Recht der Europäischen Union und völkerrechtlichen Verträgen, p. 17.

<sup>43</sup> Decreto 28 febbraio 2018, Modalità attuative e strumenti operativi della sperimentazione su strada delle soluzioni di Smart Road e di guida connessa e automatica. (18A02619) (GU Serie Generale n.90 del 18-04-2018).

<sup>44</sup> Art. 1 (g) : it “means innovative technologies for automatic driving based on sensors of various types, software for processing sensor data and interpreting traffic situations, learning software, software for making driving decisions and their implementation, components for integration with the conventional vehicle...”.

<sup>45</sup> DGT (Dirección General de Tráfico), Instrucción 15/V-113 - Autorización de pruebas o ensayos de investigación realizados con vehículos de conducción automatizada en vías abiertas al tráfico en general, 13. 11. 2015, The Royal Decree 2822/1998 of 23 December 1998, approving the General Vehicle Regulations (hereinafter RGV), granted the DGT, in Article 47, the power to grant special authorisations for the performance of extraordinary research tests or trials, carried out by manufacturers, second-stage manufacturers and official laboratories. Likewise, Instruction 10/TV-66 established the specific procedure for requesting and granting these authorisations. The definition of a “vehículo autónomo” is “any vehicle with motive power capability equipped with technology that allows it to be operated or driven without the need for active driver control or supervision, whether such autonomous technology is activated or deactivated, permanently or temporarily”.

In this respect, it should be noted that, even if the nomenclatures are sometimes similar, they do not cover the same definition (*comp.*, *e.g.*, EU regulation and French LOM decree project). An effort of harmonisation may be necessary.

**Law is also a marker of the cultural imprint. It is therefore useful to compare how the legal introduction of the automated vehicle may impact the conception of the right to transport.**

*ALFRED* is defined by the project as a concept to humanise the CAV actions based on the quality comfort, interaction and information. The concept will function in a defined operational domain, within which it will always be controlled autonomously during normal conditions. The parameters of vehicle use of *ALFRED* do not extend to a use outside of this domain and, as such, it will only be used by passengers, with no possibility of the vehicle being driven (*cf.* **WP6 - Deliverable 6.1. ALFRED Use cases**).

According to the abovementioned definitions, *ALFRED* falls at least within level 4 of the SAE standard. In legal terms, it is indeed a motor vehicle equipped with an ADS, and therefore falls into the category of highly (*e.g.* WP1) or fully (*e.g.* EU) automated vehicles, according aforementioned definitions. (In France, for example, it would already qualify as a vehicle with fully driving delegation (experimental framework) and probably in the near future, as a highly automated vehicle.)

*NB: In the current state of the law under construction, it is not possible to conclude on the adequacy of ALFRED to the different national legal frameworks (outside the framework of experiments).*

## 2. STUDY ON FRENCH LAW ON RIGHT TO ACCESS TO TRANSPORT: MOBILITY IN FRENCH LAW: FROM A FREEDOM TO A RIGHT?

### PARTICULAR CONTEXT

11. On 18 May 2018, the newspaper *Le Monde* published a column entitled "*Towards a 'right to mobility'*" in which ten leading figures called for the recognition of such a right in the framework of the future Mobility Orientation Act (LOM) then being prepared by the French Government. They demanded a "*right to mobility for all, integrating training and support, in order to enable everyone to be able to move*" (sic). The press article pointed out that in France, more than seven million people of working age, *i.e.* 20% of the working population, were experiencing difficulties in moving around and one person in two in the process of integration to the job market had already refused a job or training because of mobility problems. It also pointed out that the average French budget for mobility, around €5,000 per year on average, was increasing and placing a part of the population, particularly those dependent on private cars, in a vulnerable situation.

12. Mobility is not just a transport issue. It is also a matter of law, which must be taken all the more seriously as inability to move around or lack of means of transport tends to become a major factor in social exclusion. This is what various French and foreign academics have been trying to show for several years now, alongside elected representatives, integration professionals and company managers, at an international seminar organized by the chair of the Institute for the City on the Move (Institut pour la Ville en Mouvement, IVM-VEDECOM)<sup>46</sup>.

13. In an almost prophetic way, it should be recalled that it is, moreover, an issue related to mobility that has plunged the country into an unprecedented protest movement, called the "*Yellow Vests*" movement. In October 2018, the dissemination, mainly on social networks, of calls to demonstrate against the increase in the price of motor fuels resulting from the increase in the domestic consumption tax on energy products (TICPE) found an unprecedented echo in public opinion. Every Saturday, the protest was organized around roadblocks, roundabouts and demonstrations, before the protest movement gained momentum and the demands became broader and more political. It must then be considered that the question of mobility crystallizes issues that can shake a democracy.

14. This assertion was revealed in all its truth in March 2020 when France, like all European countries, entered a period of lockdown and the state of health emergency was declared for two months by an emergency law whose constitutionality was, thus, not controlled *a priori* by the Constitutional Council<sup>47</sup>. This state of emergency "*authorises*

<sup>46</sup> *Mobilité quotidienne et exclusion sociale, Quand les mobilités ne sont pas qu'une question de transports*, séminaire international, Jeudi 5 et vendredi 6 décembre 2002 à l'Université de Marne-la-Vallée.

<sup>47</sup> It was only when its prorogation was voted that the President of the Republic, the President of the Senate and the parliamentary opposition approached the Constitutional Council directly. When the law extending the state of health emergency was referred to it, the Constitutional Council validated several of its provisions but, concerning the processing of personal data of a medical nature for the purpose of "tracing", the Council decided on two partial censures and set out three reservations of interpretation, while, concerning the regime of quarantine and isolation measures, it pronounced one reservation of interpretation and one censure (Cons. const., 11 May 2020, dec. n°. 2020-800 DC, L.

*restrictions on freedoms on an unprecedented scale"»<sup>48</sup>. On 16 March 2020, the President of the Republic addressed the French for the second time on the subject of the Covid-19 epidemic. On this occasion, he announced both the postponement of the second round of municipal elections, initially scheduled for 22 March, and the implementation of measures resembling generalized containment throughout the country from 12 noon the next day. Under the latter law, a new chapter was instituted in the Public Health Code, creating a permanent emergency regime called a "state of health emergency", which was immediately and concomitantly implemented by decree<sup>49</sup>. This state of health emergency placed decision-making power in the hands of the Prime Minister and, incidentally, the Minister of Health, while the State representative in the department were to intervene only upon authorization from one or the other (CSP, art. L. 3131-17), these authorities being subject to judicial review by the administrative judge. N. Molfessis, who even sees in it the "risk of a Wild West", recalls that "For the rest, as the Minister of Justice has indicated, the courts are now "closed"<sup>50</sup>. The word, one measures it at once, does not only refer to a physical state of the courts, closed doors; it also expresses a decision of the State justice: one "closes" justice, as one would say of a shop which ceases its activity". As the Minister of Justice herself recalled, justice is reduced to its strictest necessity, which, as far as the administrative order is concerned, covers only summary proceedings. The country was indeed facing the situation described by Michel Troper as a state of exception, namely "a situation in which, by invoking the existence of particularly dramatic exceptional circumstances and the need to deal with them - one thinks, for example, of a natural disaster, a war, an insurrection. In the event of a terrorist act or epidemic, the application of the rules that normally govern the organization and functioning of public authorities is temporarily suspended and other rules, obviously less liberal, are applied, leading to a greater concentration of power and restrictions on fundamental rights"<sup>51</sup>.*

15. In this respect, the impossibility of travelling<sup>52</sup> in order to limit contacts between persons outside the cases strictly defined by the authorities, in which the citizens have found themselves, posed a difficulty and was the subject of debate. Indeed, the main measure adopted under the state of emergency consisted of a restriction on the freedom to come and go. However, without being exhaustive, the question arises as to how one can exercise one's other rights when it is no longer possible to travel to the headquarters of one's association, to visit friends and relatives, to settle in one's secondary residence, to attend a wedding, to

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n°2020-546, May 11 2020 extending the state of health emergency and supplementing its provisions, *JORF* n°0116 12 mai 2020.

<sup>48</sup> L. n° 2020-290, March 23 2020 : *JCP G* 2020, act. 369, Libres propos A. Levade.

<sup>49</sup> The state of health emergency was declared for a period of two months from the entry into force of the law of 23 March 2020, *i.e.* from 24 March 2020 throughout the national territory. It was then extended by the law of 11 May 2020 until 10 July 2020 inclusive. The law of 9 July 2020 extended the state of health emergency only on the territories of French Guyana and Mayotte until 30 October 2020. The state of public health emergency was again declared by decree from 17 October 2020 at 00:00 hours throughout the Republic and was extended until 16 February 2021 inclusive by law of 14 November 2020. In view of the worsening spread of the Covid-19 epidemic, the state of health emergency in place since 17 October 2020 has been extended until 1 June 2021 inclusive. (L. n° 2021-160 of 15 February 2021 extending the state of health emergency, *JORF* n°0040, February 16 2021).

<sup>50</sup> « Coronavirus - Le risque du Far West - Libres propos par Nicolas Molfessis », *JCP G*, n° 15, 13 Avril 2020, 44.

<sup>51</sup> M. Troper, *Le droit et la nécessité* : PUF, coll. Leviathan, 2011.

<sup>52</sup> The topical example is the decision of the French National Railway Company (SNCF), at the request of the government, to reduce the supply of high-speed trains to 7% and regional express transport to 15%, in order to accompany the containment measures.



go to a place of worship, for example (respect for private and family life, the right to a normal family life, freedom of assembly and association, religious freedom, etc.)?

16. Even though the Transport Code implicitly refers to the extent to which the possibility of travelling is a condition and guarantee for the effectiveness of many other rights by recalling that disruptions to public transport services may constitute *"a disproportionate interference with the freedom to come and go, freedom of access to public services, freedom of work, freedom of trade and industry and the organization of school transport. It corresponds to the coverage of the essential needs of the population"* (C. transp. Art. L 1222-3), the question of mobility is thus raised in a significant way as a material basis for the exercise of other rights and freedoms. The limitation on human interaction imposed by the state of health emergency has in fact reassessed our need to travel and gave rise to the question of the *"right to transport"*, which alone would guarantee the effectiveness of the freedom to come and go.

### ISSUES

17. Indeed, it is essential to remember that *"the freedom to come and go ... is inherent in the human person: parking and staying are an integral part of its vital functions"*<sup>53</sup>. It is therefore appropriate to look at the genesis and contours of this fundamental freedom, which would constitute the teleological basis of a possible right to transport (see **ANNEX 1**). The obvious observation is that the freedom to come and go only implies the freedom to choose the mode of transport. The choice of means of transport is inherent in the exercise of the freedom to come and go. As such, the link between the freedom to come and go and the choice of mode of transport must be highlighted, as the freedom of use of public space. The first legal translation of the concept of *"mobility"* in French law means a freedom, or a *"right-freedom"*. It is now commonplace to oppose the *"rights-freedoms"*, from the first generation (civil and political rights) anchored in the *DDHC*, to the *"rights-credentials"*, prerogatives that individuals can assert with the public authorities (*"rights to"*)<sup>54</sup>. The Preamble of the 1946 Constitution, which has been part of the block of constitutionality since its consecration as such in 1975<sup>55</sup>, contains this latter notion, even if it does not refer directly to it. Whereas the rights recognized in 1789 are based on a logic of defending the individual against the power of the public authorities and of fighting against possible encroachments, the rights proclaimed in 1946 are based on the opposite logic: it is no longer just a question of protecting freedoms but of demanding positive intervention by the State to guarantee the effectiveness of the rights thus recognized. This series of rights, which has been called *"second generation rights"*, is based on the attribution of economic and social rights. Paragraphs 3 to 18 of the Preamble set out principles that are *"particularly necessary for our times"* and they constitute the affirmation of new principles. They correspond to a new

<sup>53</sup> X. Philippe, in *Libertés et droits fondamentaux*, Rémy Cabrillac, Hors collection Dalloz, mai 2019, p 456.

<sup>54</sup> Rivero (J.), *Les libertés publiques*, t1. P 115, « Les droits de l'homme », *P.U.F.*, 2 éd., 1978, ; BURDEAU (G.), *Les libertés publiques*, 3 éd., 1966, p.19 ; FERRY (L.), RENAUT (A.), *Philosophie politique*, t.3, « Des droits de l'homme à l'idée républicaine », *P.U.F.*, 1985, pp.26s.; "Droits-libertés et droits-créances", *Droits* n°2, 1985, pp.75-84.

<sup>55</sup> Cons. const., décision n° 74-54 DC, Loi relative à l'interruption volontaire de grossesse, *Rec. Cons. const.*, p. 19 : considérant 15 *"Considering that none of the derogations provided for by this law is, as it stands, contrary to one of the fundamental principles recognized by the laws of the Republic, nor does it disregard the principle set forth in the Preamble of the Constitution of October 27, 1946, according to which the nation guarantees to the child the protection of health, nor any of the other provisions having constitutional value enacted by the same text"*.

philosophy of human rights inspired by a social conception of society. They deal - exhaustively, as a closed list - with the family, the right to protection of health, to material security, to rest and leisure guaranteed to children, mothers and older workers, and the organization of public, free and secular education at all levels. They also define the status of the worker in the enterprise by proclaiming the right to employment and non-discrimination in work, freedom of association and the right to strike. Finally, they proclaim the participation of the worker in the collective determination of working conditions and the obligation to nationalize any enterprise or property that has the character of a national public service or a *de facto* monopoly. They can be considered as "*rights-claims*" on society or on the nation, implying positive benefits from the State. D. Roman recalled that "*a doctrinal conceptualization<sup>56</sup> has established social rights as a specific category, with a certain normative vulnerability (social rights would be more programmes, objectives and guides for action by the public authorities than rights of individuals) and a contentious one (weakly determined and without precise holders, social rights could not benefit from judicial protection)*"<sup>57</sup>. The latter thus reported the remarks of Pierre Mazeaud, former President of the Constitutional Council, who had been able to indicate that "*the Council's case law has served to temper the scope of social rights [...] which must be considered as not having an absolute character, not being directly applicable and addressed not to individuals but to the legislator for whom they constitute obligations of means and not of result. In particular, they are not subjective rights, with direct justiciability [...] the level of benefits provided by the welfare state being conditioned by the economic situation, it would not be reasonable to fix it rigidly at the constitutional level*". It is true that if, in constitutional jurisprudence, all the "*principles necessary for our times*" are just as applicable as the freedoms of the *DDHC*, this same value does not imply an identity of binding force. Indeed, the said principles have been essentially established as "*objectives of constitutional value*" taken from certain written provisions of the 1946 Preamble. **They do not constitute rights that may be invoked before the ordinary courts by individuals in view of their programmatic or incantatory wording.** The Constitutional Council leaves the legislature a fairly large degree of freedom to implement these principles, some of which thus have a fairly limited practical scope. The latter cannot compel the legislature to take the legislative measures necessary to give concrete expression to these principles, since article 61 of the Constitution, according to the known formula, "*does not confer on the Council the same power of appreciation and decision-making as on Parliament*" and confines itself to a review of the manifest error of compatibility between the law submitted and the objective in question. Similarly, the administrative judge considered that some of the principles set out in the Preamble were too abstract to serve as a basis for litigation in the absence of a legislative provision ensuring their application<sup>58</sup>. **In this respect, it should be noted that, as current case law stands, both constitutional and administrative, there is no "right to transport" constituting a fundamental right.** However, the concept is not unknown in French law and D. Roman even wrote in 2012 that "*it now seems impossible to separate the human rights that require protection from those that*

<sup>56</sup> B.Mathieu et M.Verpeaux, *Contentieux constitutionnel des droits fondamentaux*, LGDJ, 2002, p. 428 : "*social rights known as "rights- claims" are essentially not subject to the legal regime of classic rights and freedoms. They are not subjective rights, but objectives that the State must take into account and which play a kind of corrective role with regard to principles of a liberal nature. They are, in essence, guiding principles that must guide the legislator*".

<sup>57</sup> D.Roman, « La justiciabilité des droits sociaux ou les enjeux de l'édification d'un Etat de droit social », mis en ligne à la *Rev. dr. homme* le 30 juin 2012, [<http://revdh.revues.org/635>]

<sup>58</sup> This is the case of the principle of national solidarity enshrined in paragraph 12. (CE 10 déc. 1962, Sté indochinoise de constructions électriques et mécaniques, *Lebon* 676. – CE 29 nov. 1968, Tallagrand, *Lebon* 607 ; CE 22 janv. 1997, req. n° 175215, Sté hôtelière de l'Anse heureuse , *JurisData* n° 1997-050022.



require distribution", that "the freedom to come and go presupposes a public road domain and is the basis for the recognition of a right to transport"<sup>59</sup> without supporting this assertion, which should therefore be verified. This assertion is not unfounded. The parliamentary work on the Inland Transportation Policy Act (*Loi d'orientation des transports intérieurs*, LOTI) highlights this filiation link: "For C. Fiterman, the right to transport, a right of an economic and social nature, is "in line with the rights that have already been asserted up to now - the right to health, the right to housing -". It gives concrete expression to and makes it possible to ensure the effectiveness of the liberal right to come and go by responding "to the needs of our time"<sup>60</sup>. This presentation of the right to transport takes up a classic conception of the function of the so-called "second generation" social rights, compared to the so-called "first generation" liberal rights. According to this conception, social rights are intended to provide individuals with a certain number of benefits from the State that liberal rights, formal rights based on the idea of State abstention, cannot guarantee<sup>61</sup>. **In any case, in accordance with what has just been recalled, its dimension in the hierarchy of norms, is still modest, as will be shown below**<sup>62</sup>.

### **LINES OF ENQUIRY**

18. This research involves verifying whether the freedom to come and go is indeed guaranteed by means of a "right to transport" effectively recognised in the French legal system. To this end, it is necessary to determine the sources that have enabled it to be established and to measure its effectiveness and justiciability (**Part 3.1.**). Finally, it is clear that the COVID-19 health crisis has rekindled the urgency of having to rethink our modes of transport, and more broadly, our travel needs, and has incidentally legitimised the need to develop new means of locomotion, such as the automated and connected vehicle used in the *SUaaVE Project*, for example. Indeed, technologies linked to the deployment of so-called autonomous vehicles, which allow the circulation of vehicles without a driver on board, are likely to ensure, in an individualized manner, the routing of goods and the transport of people by neutralizing human interactions, and thus limiting the spread of epidemics. France initiated the debate during the National Mobility Conference organised over several months in 2017 and then adopted, at the end of 2019, an orientation law intended to "revolutionise" the field of transport and, more broadly, that of mobility, by allowing, among other measures, the circulation of this new type of vehicle<sup>63</sup>. In this context, a new concept has emerged, "the right to mobility", replacing the "right to transport", the meaning of which will have to be understood in order to check whether the measures underlying it are likely to improve its effectiveness (**Part 3.2.**).

<sup>59</sup> D. Roman, « La justiciabilité des droits sociaux ou les enjeux de l'édification d'un État de droit social », *op. cit.*.

<sup>60</sup> C. Fiterman, travaux parlementaires LOTI, 1ère séance du 12 octobre 1982, Assemblée Nationale J. O. . p. 5640.

<sup>61</sup> Institut International de Paris La Défense, Joëlle AFFICHARD - Véronique CHAMPEIL-DESPLATS, Antoine Lyon-Caen, *Définir le service public, réguler un secteur concurrentiel : genèse de la loi d'orientation des transports intérieurs*, rapport de recherche, 20 avril 1997.

<sup>62</sup> Cf part 2.1.2.

<sup>63</sup> Loi n° 2019-1428 du 24 décembre 2019 d'orientation des mobilités, *JORF* n°0299 du 26 décembre 2019, texte n° 1.

## 2.1. Emergence of a right to transport

19. The existence of right to transport should be questioned in terms of international standards which could have thus incorporated the French legal system pursuant to Article 55<sup>64</sup> of the Constitution (3.1.2.2), and in particular pursuant to Article 88-1<sup>65</sup> in the case of Community law (3.1.2.3), but also at domestic level (3.1.2.4). Beforehand, in order to determine the scope of application of this law, it is necessary to define what is meant by "transport", as well as all the ancillary concepts that revolve around this concept (3.1.2.1).

### 2.1.1. Preliminary search for definitions

#### 2.1.1.1. Legal typology of transport at Community level

20. **Regulation from the Road Package 2009**<sup>66</sup>. The transport market is still divided into three segments: occasional transport, specialised regular transport and regular transport. The first is carried out under the condition of a journey form, the second under the condition of a contract between the carrier and the organiser of the latter, the third is subject to the authorisation system. The latter is issued by the State of departure in agreement with the Member States on whose territories the passengers are picked up or set down<sup>67</sup>. Regular services are available to everyone, for the carriage of passengers at specified frequencies and on specified routes; passengers may be picked up and set down at predetermined stops Art. 2). Special regular services are operated under the same conditions, but only for specific categories of passengers, *i.e.* for the carriage of workers to and from work, the carriage of schoolchildren and students to and from school, and the carriage of military personnel and their families from their home country to their barracks (Art. 5.2). It follows that "*special regular services*" constitute a specific category of "*regular services*". Being an "*own-account*" carrier implies in the reading of Regulation (EC) No 1073/2009 "[...] *transport operations carried out for non-commercial and non-profit-making purposes, provided, on the one hand, that the transport activity is only an ancillary activity for the natural or legal person providing it. On the other hand, the said definition provides that the vehicles must be the property of*

<sup>64</sup> "Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party".

<sup>65</sup> "The Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December, 2007".

<sup>66</sup> Regulation (EC) No 1072/09 on common rules for access to the international road haulage market (OJ L 300, 14.11.2009, p. 72) and Regulation (EC) No 1073/09 on common rules for access to the international market for coach and bus services (OJ L 300, 14.11.2009, p. 88). This is complemented by Commission Regulation (EU) No 361/2014 of 9 April 2014 laying down detailed rules for the implementation of Regulation (EC) No 1073/2009 of the EP and of the Council as regards documents for the international carriage of passengers by coach and bus and repealing Commission Regulation (EC) No 2121/98 (OJEU No L 107, 10 Apr 2014, pp. 39-55). Regulations (EEC) No 881/92, (EEC) No 3118/93 and (EEC) No 684/92, 12/98 as well as Directives 2006/94/EC and 96/26/EC disappear to be merged.

<sup>67</sup> The power of refusal is not discretionary. It is governed by a list of grounds set out in Regulation (EEC) No 684/92. Own-account transport is exempt from licensing and authorisation, but requires a certificate issued by the Member State in which the vehicle is registered.

that person, must have been purchased on instalment terms or have been the subject of a long-term leasing contract, and must be driven by a member of the staff of that natural or legal person or by the person himself, or by staff employed by the undertaking or made available to it by virtue of a contractual obligation"<sup>68</sup>. The latter definition diverges somewhat from the French definition.

### 2.1.1.2. French categorisation of passenger transport

21. **Transport, a well-defined concept.** Within the meaning of the Transport Code, as initially established by the LOTI<sup>69</sup>, the notion of "right to transport" would mean access to the transport covered by the said Code. This guiding law concerned the following modes of transport: rail, road, river and air. In addition, it covered the transport of goods by pipeline and maritime transport under reserved navigation. This scope of application is purely and simply taken over by the Transport Code. The preamble to the first part of the new Transport Code contains three definitions. The first is that of land transport, which is understood to mean transport between a point of origin and a point of destination situated on national territory (C. transp., art. L. 1000-1). Public transport means any transport of persons or goods, with the exception of transport organized for its own account by a person, public or private, and transport subject to other regulations. Finally, transport operations carried out in the context of a removal are considered to be transport of goods (C. transp., art. L. 1000-3). **From this point of view, it is common ground that the "right to transport" is mainly crystallized around access to public transport**, as expressly stated in Article L. 1111-2 of the Transport Code in its version prior to the Mobility Orientation Act, which provided: *"The progressive implementation of the right to transport enables users to travel under reasonable conditions of access, quality, price and cost to the community, in particular by using a means of transport open to the public"*<sup>70</sup>. "Public transport" is opposed to "private transport". Article L. 1000-3 of the said code specifies that *"public transport is considered to be any transport of persons or goods, with the exception of transport organized on its own account by a person, public or private, and transport covered by other regulations"*. It is therefore appropriate to question the content of these various notions.

22. **Private transport.** Also known as "own account transport" or "private services", the latter covers in particular passenger transport organized by public or private persons for the needs of their operation: *"Public persons, undertakings and associations may organize private road passenger transport services for the normal needs of their operation, in particular for the transport of their staff or members."* (C. transp., art. L. 3131-1)<sup>71</sup>. Also, "The

<sup>68</sup> CJEU, 10th Ch, 2 March 2017, Case C-245/15, SC Casa Noastră SA v Ministerul Transporturilor - Inspectoratul de Stat pentru Controlul în Transportul Rutier (ISCTR): JurisData no. 2017-008081).

<sup>69</sup> Loi n° 82-1153 d'orientation des transports intérieurs du 30 déc. 1982, *JORF* du 31 décembre 1982, page 4004.

<sup>70</sup> underlined by the author.

<sup>71</sup> R. 3131-2 : *"In application of the provisions of article R 3131-2 :*

*"Are also considered as private services when they meet their usual needs of operation:*

*1° Transport organized by local authorities or their groupings for particular categories of citizens, within the framework of activities falling within their own competence, to the exclusion of all travel of a tourist nature;*

*2° Transport organized by departmental or municipal public establishments for the elderly, special education establishments, accommodation establishments for disabled adults and the elderly, and sheltered employment institutions for the people who are accommodated there, excluding any travel of a tourist nature;*

transport of their staff organized for their normal operating needs by public authorities, by companies and by associations is considered as private services" (C. transp., art. L. 3131-1). Since they may be carried out for the benefit of members or clients of associations and companies, their distinction from public transport is sometimes delicate. The operators of "discount cars" (VTC, passenger cars with drivers) have contested the private nature of certain types of transport<sup>72</sup>. It should be noted that the code classifies "transport services of social utility" organized by associations under the 1901 Law as private road passenger transport<sup>73</sup>.

**23. Public transport (for hire or reward): distinction between private public transport and collective public transport.** A distinction must also be made upstream between public passenger transport (C. transp., art. L. 1421-1)<sup>74</sup> and public goods transport (C. transp., art. L. 1422-1). A distinction must then be made between public collective transport and private public transport, which only concerns vehicles with less than 10 seats, for a fee, e.g. taxis, VTC, etc. (C. transp., art. L. 3120-1<sup>75</sup>). Private public transport services are public road passenger transport services which are neither public collective transport nor private road passenger transport. These services may be offered to as many persons as there are seats available in the vehicle. They are provided for a fee by taxis, chauffeured transport vehicles and two- or three-wheeled motor vehicles (C. transp., art. R. 3120-1). With regard to collective public transport, it includes "regular service" which corresponds to a "collective public passenger transport service by road, rail, sea or river, carried out at a specified frequency and on a specified route, passengers being picked up and set down at

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3° Subject to Articles L. 3111-7 to L. 3111-16, transportation organized by educational institutions in connection with education, provided that such transportation is reserved for students, staff of the institutions and, where applicable, parents of students participating in the supervision of students, is considered as private non-urban road transportation services for persons ;

4° Transport organized by companies for their customers

5° Transports organized by associations for their members, provided that these trips are directly related to the statutory object of the association and that it is not an association whose main object is the transport of its members or the organization of tourist trips.

These services are performed free of charge for the passengers".

<sup>72</sup> Cass. 1re civ., 30 oct. 2007, n° 05-16.880, Assoc. française de tennis : *JurisData* n° 2007-041104 ; *Rev. dr. transp.* 2007, comm. 230, note Ch. Paulin ; *Resp. civ. et assur.* 2008, comm. 2 ; *RTD com.* 2007, p. 175, obs. B. Bouloc. The judge qualified as public, the transport of an association whose beneficiaries were not all subscribers and whose drivers were remunerated (Cass. crim., 17 nov. 2015, n° 14-82.224 : *JurisData* n° 2015-025740).

<sup>73</sup> C. transp., art. L 3133-1, R 3133-1 s., chapitre III du titre III « Le transport privé routier de personnes » with carpooling in particular (chapitre II du livre I de la partie III).

<sup>74</sup> Definition of "public road transport of persons" (collective) (R 3111-6): "For the purposes of this book [cf. road transport of persons], the expression : "undertaking for the public road transport of persons", and by assimilation "the undertaking" applies to any natural person, any legal person with or without profit-making aim, any association or group of persons without legal personality, with or without profit-making aim, as well as to any body subject to public authority, whether it has legal personality or is dependent on an authority having such personality, carrying out or wishing to carry out, as a principal or accessory, road transport of persons by means of motor vehicles with at least four wheels, including those with a maximum authorised speed not exceeding 40 km/ h, with a minimum capacity of four seats, including the driver, offered to the public or to certain categories of users against remuneration paid by the person transported or by the organiser of the transport. »

<sup>75</sup> cf Article L3120-1 : « This Title [TITLE II: PUBLIC PARTICULAR TRANSPORT] shall apply to road passenger transport services carried out for consideration in vehicles with less than 10 seats, excluding the public collective transport mentioned in Title I of this Part and the private road passenger transport mentioned in Title III". »

*predetermined stops*" (C. transp, art. R. 3111-37.4°), *"freely organised services"* which are regular interurban services providing a link with two stops 100 kilometres or less apart and *"on-demand services"* for the carriage of passengers by road which are collective services offered instead, determined in part according to user demand, for which the general rules of charging are established in advance and which are carried out with vehicles having a minimum capacity of four seats, including the driver's seat (C. transp., art. R. 3111-2). *"Occasional services"* must also be added. Conversely, according to the definition set out in Article R. 3112-1 of the same Code, occasional public road passenger transport services are services which do not meet the definition of regular services, meant by 4° of Article R. 3111-37 and whose main characteristic is to carry groups formed on the initiative of a principal or the carrier himself (commercial public transport). They can only be carried out by companies entered in the register mentioned in article R. 3113-4 of the Transport Code (cf: national electronic register of transport companies). A group defined by Article R. 3112-1, is made up of at least two persons. The conditions for the performance of the said services are set out in Articles L. 3112-1 to 2 of the said Code<sup>76</sup>.

*Focus on "transport on demand" services and collectives with mobility restrictions targeted in SUaVE project :*

According to the French law, on-demand transport service is a public service that usually complements regular public passenger transport. It generally operates as a complementary service to public transport in order to serve areas with lower population densities, in particular peri-urban or rural areas, and to meet specific needs such as people with reduced mobility, shared journeys or serving areas that are not easily accessible by public transport. It is placed under the responsibility of a mobility organising authority.

Running a public road passenger service without having concluded an agreement with the competent organising authority is, as for regular services, also a 5th class offence<sup>77</sup>.

These are public transport services sold "by the seat". Their pricing rules are established in advance, and the services are carried out with vehicles whose minimum capacity is set at four seats, including the driver's seat<sup>78</sup>.

They can provide services for the transport of people or pupils with disabilities and students or elderly people, and more generally those who are considered vulnerable and have very limited access to conventional transport services.

This can therefore be provided by private car type vehicles (or by shuttles). This transport service could usefully be operated by autonomous vehicles, especially like ALFRED.

24. **The notions of public service / public transport.** In the Transport Code, the notion of *"public service"* is expressly referred to in Article L 1211-4<sup>79</sup>. It is common ground that this

<sup>76</sup> Occasional services, when performed with motor vehicles having, in addition to the driver's seat, a maximum of eight seats, are then subject to the requirements of private public transport and, if they are organized within the sole jurisdiction of a Mobility Organizing Authority (AOM), they must contain more than eight seats.

<sup>77</sup> R. 3116-30 of Transport Code

<sup>78</sup> R 3111-2 of Transport Code

<sup>79</sup> "Constitute public service missions whose execution is ensured by the State, the local authorities and their public institutions in liaison with private or public companies:

1° The construction and management of infrastructures and equipment for transport and their provision to users under normal conditions of maintenance, operation and safety;

2° The organization of public transport;



enumeration, although it does enshrine the organization of public transport as constituting a public service mission, does not include the performance of the said service. However, the Code does cover the performance of certain public transport services as constituting a public service mission. With regard to public passenger transport, the law only covers "regular public transport services"<sup>80</sup> or "on demand" under the terms of the provisions of Articles L. 1221-1<sup>81</sup> and L. 1221-3<sup>82</sup> of the same code. The said service may be performed "directly" by the public entity, by means of a SPIC<sup>83</sup> on the one hand or by means of a public service concession or a public contract concluded with another person, in particular a private person ("company" as defined in the Transport Code) on the other hand.

25. **The special case of "freely organized services"**<sup>84</sup>. The *summa divisio* relating to public transport, in addition to the regular service vs. occasional service opposition mentioned above, concerns "freely organised services" and "public services". The philosophy behind the liberalisation of the sector stems from the so-called "PSO" regulation<sup>85</sup>: "the introduction of regulated competition between operators makes services more attractive, more innovative and cheaper, without hindering public service operators in the pursuit of the specific missions assigned to them". The provisions of Article R. 3111-38 of the Transport Code expressly state that "Freely organised road services provide, in the form of regular interurban road services which are not public services, domestic road links subject or not subject to regulation". The "freely organised" services are :

- regular long-distance services
- which are services that are not entirely within the territorial jurisdiction of a mobility organizing authority, within the meaning of Article L. 1231-1 or carried out over a distance of more than 40 km in the Ile-de-France region
- provided by public road passenger transport undertakings established on national territory which must be complementary to public services

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3° The regulation of transport activities and the control of its application as well as the organization of transport for defense;

4° The development of information on the transport system;

5° the development of research, studies and statistics likely to facilitate the achievement of the objectives assigned to the transport system"

<sup>80</sup> Supplemented by the accessory services that are the temporary and parallel services of Article R. 3111-4: "Temporary services are services intended for the same clientele as the regular services mentioned in Article R. 3111-1 and whose services consist in the putting into service of reinforcement vehicles or increased frequencies during a defined period. Parallel services are temporary services that do not serve certain intermediate stops or, on the contrary, involve serving additional stops".

<sup>81</sup> "The institution and organization of regular and on-demand public transport services are entrusted, within the limits of their powers, to the State, regional and local authorities and their groupings as organizing authorities...».

<sup>82</sup> "The operation of regular and on-demand public passenger transport services shall be provided for a limited period under the conditions laid down in 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 [the so-called "PSO Regulation" - Public Service Obligations] and repealing Council Regulations (EEC) Nos. 1191/69 and 1107/70 for the services covered by it, either under the control of a public person in the form of an industrial and commercial public service, or by an enterprise having concluded an agreement with the organizing authority for this purpose".

<sup>83</sup> Service Public Industriel ou Commercial - Industrial or commercial public service, in the form of a public service corporation with financial autonomy or as a separate industrial and commercial establishment.

<sup>84</sup> trivially called "cars Macron".

<sup>85</sup> Regulation (Ec) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 OJEU L 315/1, 3 déc. 2007, consid. 7.

- subject to a declaration to the Transport Regulatory Authority ("ART"<sup>86</sup>, ex ARAFER), prior to their opening for any service providing a link with two stops 100 kilometres or less apart ("*regulation*"). Regular interurban services of this nature are subject to regulation, so as not to create competition detrimental to public transport services, thanks to the right of opposition of the transport organizing authorities.

Passenger transport over a distance of more than 100 kilometres may be freely organized and carried out by the transport undertaking, provided that it is a regular service.

ART shall guarantee the proper functioning of the market and, in particular, of the public service, for the benefit of users and customers of road and rail transport services.

The law provides for a possible prohibition or limitation of the said services by a transport organizing authority, after receiving the assent of ART, under the conditions defined in Article L. 3111-19 of the Transport Code, when they are carried out between stops whose connection is provided without connection by a regular transport service that it organizes and when they cause, alone or as a whole, substantial damage to the economic equilibrium of the public transport service line or lines likely to be in competition or to the economic equilibrium of the public transport service contract concerned (C. transp., art. L. 3111-18).

26. **Passenger transport public services.** These should also be shared between urban, non-urban and school transport services. Where they are urban, these services concern road, inland waterway and maritime transport and, on networks falling within the competence of the mobility organizing authorities, rail or guided transport. In terms of regular road or guided public passenger transport, the urban transport service, as defined in Article L. 1231-2 of the Transport Code, is a passenger transport service carried out on a non-seasonal basis within the territorial jurisdiction of a mobility organizing authority as defined in Article L. 1231-1, either by means of guided transport vehicles as defined in Article L. 2000-1 or by means of any motorized land vehicle, with the exception of coaches, and whose average stop spacing and variation in the frequency of passage satisfy criteria defined by decree, *i.e.* an average stop spacing of less than or equal to 500 meters and a ratio between peak and off-peak frequency of less than or equal to 2.5. School transport is a regular public service as determined by law (C. transp., art. L. 3111-7). A distinction must also be made between regular and on-demand services. Regular public road passenger transport services are collective services offered instead, whose route or routes, stopping points, frequencies, timetables and fares are fixed and published in advance (C. transp., art. R. 3111-1). Demand-responsive public services for the road transport of passengers are collective services offered instead, determined in part according to user demand, for which the general tariff rules are established in advance and which are carried out with vehicles having a minimum capacity of four seats, including the driver's seat (C. transp., art. R. 3111-2).

27. **The qualification of transport public services.** The public service nature of road public transport has long been uncertain and "*virtual*"<sup>87</sup>. Today, the public service character is no longer discussed since this notion appears at the very heart of the law, in accordance with what was previously recalled. However, not all public transport is a public service. But when it is recognized as such, is it an administrative (SPA<sup>88</sup>) or industrial and commercial public service (SPIC)? Under the terms of Article L. 1221-3 of the Transport Code, regular and on-demand services carried out on a public authority basis are industrial and commercial. A *fortiori*, therefore, are services granted to private operators. It should be noted that the Tribunal des Conflits has classified school transport as a public transport service (SPA). Prior

<sup>86</sup> *Autorité de Régulation des Transports*, in French.

<sup>87</sup> Cf L. Sigouir *JurisClasseur Transport* Fasc. 715 : « Transports routiers collectifs de Personnes. – Réglementations administrative, commerciale, européenne » n°26 s. - CE, 6 févr. 1948, Cie carcassonnaise transport en commun : RDP 1948, p. 248.

<sup>88</sup> Service public administratif – Administrative public service.

to the LOTI, as accessories to the mainly tax-financed education service, they had been qualified as public administrative services, even if they were delegated to private actors<sup>89</sup>. The Tribunal des Conflits<sup>90</sup> upheld its earlier case law and classified school transport as a public administrative service<sup>91</sup>. It is unusual to see the Tribunal des Conflits maintaining school transport in the centre of SPA even though they are, by determination of the Act, regular services under the provisions of Article L. 3111-7: "*School transport is a regular public service*". In terms of Community law, Regulations (EEC) No. 1191-69 of 26 June 1969, then (EC) No. 1370/2007 of 23 October 2007 on public passenger services by rail and by road (known as PSOs) confirmed the traditional definition given by the jurisprudence of the Council of State with regard to "*a public passenger transport service*" constituting a "*service of general economic interest*".

28. **Link between transport and public service.** The concept of "*public transport*" is not to be confused with that of "*public service*". It relates to the "*open*" nature of transport and the fact that it is, broadly speaking, a transport service offered to third parties. Some public transport services do not have this public service character (occasional transport, freely organized sector). A comparison with "*establishment receiving the public*" is relevant. **Thus, not all public transport fulfils a public service mission.** Public transport operators cannot offer public transport services other than by submitting a tender to a public service delegation or a public contract for regular or on-demand public transport.

However, they are free to do so to:

- provide occasional services
- positioned within the strict framework of the sector of "*freely organised services*", i.e. regular interurban public road passenger transport services, under the conditions mentioned above

The decree of 13 October 2015<sup>92</sup>, which came into force on 15 October 2015, opened up regular interurban public road passenger transport services to private initiative, in application of the Macron law of 6 August 2015<sup>93</sup>. However, this is a sector that remains subject to regulation, for the purpose of preserving the public service agreement lines. On the other hand, the transport of goods is largely subject to freedom of organization, with some exceptions, such as the provisions concerning the transport of dangerous goods (cf. C. transp., art. L. 1252-1 to L. 1252-12). **However, the notion of public transport, like that of public service, tends to "dissolve" in the new concepts linked to the new forms of mobility (cf. *infra*, Part 3.1.3)** Until now, public transport of persons and public service were intimately linked, the latter being understood only in relation to the former, in accordance with what has been seen above.

<sup>89</sup> TC 5 juill. 1982, n° 2231, *Rec. CE* 1982, p. 459

<sup>90</sup> A special tribunal established to settle conflicts of jurisdiction between the two types of French judges: ordinary courts / administrative courts.

<sup>91</sup> TC, 23 juin 2003, n° 3360, Sté GAN Eurocourtage : *JurisData* n° 2003-217008 ; *Dr. adm.* 2003, comm. 220, note R. Schwartz.

<sup>92</sup> D. n° 2015-1266 du 13 octobre 2015, *JORF* n°0238 du 14 octobre 2015 page 19013.

<sup>93</sup> L. n° 2015-590, 6 août : *JORF* 7 août 2015, p. 13537.



The concept of transport is based on a well-defined legal architecture. Will the transport system and its existing legal regime be impacted or even revolutionised by the introduction of CAV?

In any case, it is difficult to see how the planned use cases for *ALFRED* (A, B and C) will work and what category it may fall into:

It can operate:

- on a fixed route, with a precise route and fixed stops,
- on a fixed route, with a precise route and fixed stops on demand,
- on a flexible route according to mobility needs, with fixed stops on demand.
- on a fixed route, but without official and determined stops
- on a perimeter service, without a fixed route and fixed stops, as a zonal demand- transport service
- as a private car with the possibility of car-pooling
- as a robot taxi... (the operation of a taxi robot is closer to that of a VTC-type service than to that of a taxi-type service, marauding being, for example, an aspect that should disappear with this service...).

Will *ALFRED* use cases fit into the existing legal framework? The services provided by *ALFRED* offer flexibility and adaptability of supply to demand which can meet several criteria.

For this, it is necessary to look at the way in which the law provides for the introduction of CAVs (see LOM, **Part 3.2.**)

29. Having defined the concept of "*transport*" and its various ancillary legal concepts, it is now necessary to look at the existence and content of this right to transport in order, in particular, to determine whether it has an international or European basis or whether it is a purely domestic concept.

### 2.1.2. From the point of view of international law

30. **No right to transport.** There is *a priori* no international text to which France is a party and which enshrines a "*right to transport*", apart from a few scattered legal instruments conferring some indirect but effective rights, such as the right to be driven safely to destination by the rail carrier<sup>94</sup>, *i.e.* through the establishment of an obligation of result in respect of safety during the performance of a contract of international carriage by rail and imposing liability on the carrier in case of cancellation, train delay or missed connection, or air transport conventions such as the Convention for the Unification of Certain Rules for International Carriage by Air, signed in Montreal on 28 May 1999, known as the "*Montreal Convention*" or the Convention for the Unification of Certain Rules for International Carriage by Air, signed in Warsaw on 12 October 1929, known as the "*Warsaw Convention*", which organize civil liability regimes.

<sup>94</sup> Articles 6 and 26 § 1 of the Convention concerning International Carriage by Rail, signed at Berne on 9 May 1980 and as amended by the Vilnius Protocol of 3 June 1999, known as "COTIF", published by Decree No. 87-722 of 25 August 1987 publishing the Convention concerning International Carriage by Rail (together a Protocol and two Appendices), signed at Berne on 9 May 1980, and a Protocol concerning the implementation of the said Convention, done at Berne on 17 February 1984, O.J. of 03/09/1987 Pages: 10154/10180.

### 2.1.3. At the EU level

31. **Objective of liberalizing transport markets vs. public service obligations.** European transport policy developed rather late, with the establishment of the single market in 1992. The advent of the internal market - the *Single Act* and the *Maastricht Treaty* - marked a turning point by completing the removal of physical frontiers and definitively launching the liberalization of all modes of transport. The establishment of a European transport area was then seen as essential for the free movement of persons and goods. All types of transport, road, rail, air, inland waterway and maritime transport are concerned by the European transport policy. The philosophy behind the regulation implies that competition must necessarily lead to increased competitiveness of transport companies, improved service and lower prices for users. Moreover, the implementation of a trans-European transport network must make it possible to increase investment in infrastructure, help to open up peripheral regions and improve safety and environmental standards. This is the objective. The legal basis is provided by Article 4(2)(g) and Title VI of the *Treaty on the Functioning of the European Union* (TFEU). Already in the *Treaty of Rome*, Member States stressed the importance of a common transport policy by devoting a special title to it. Transport was therefore one of the first common areas of Community action. The priority was to create a common transport market, to achieve freedom to provide services and to open up transport markets. This objective has largely been achieved, as even national rail markets have gradually been opened up to competition. In opening up the transport markets, it had thus become essential to create a level playing field for the different modes of transport, both individually and in their interrelationships. The construction of trans-European networks was also an important element for economic growth and job creation. The European Union, through its action, thus aims to promote the interconnection and interoperability of national networks and access to these networks (Articles 170 to 172 TFEU). As the development of the European networks (TEN-T) is one of its priority strategic actions to promote the competitiveness and cohesion of the Member States, the European Union decided in 2013 to set up a complete and structured multimodal transport network at Union level, with specific regional variations<sup>95</sup>. The main objectives of European public transport policy are to provide safe, efficient and high-quality passenger transport services through regulated competition. This involves taking into account the social, environmental and regional development factors to ensure their transparency and performance. However, many public passenger transport services that society needs in the general interest cannot be managed commercially, so the competent national, regional or local authorities in the EU must be able to ensure that they are provided. There are several ways of doing this:

- by granting exclusive rights to those who run public services;
- by compensating them financially;
- by defining the operating rules for public transport.

In this respect, Article 14 TFEU and Protocol No 26 on services of general interest annexed to the TFEU<sup>96</sup> set out the general principles for the way in which Member States define and provide these *services of general economic interest* (SGEI). The European Union has developed legislation to avoid disparities between Member States in the procedures and conditions they apply to the fulfilment of public service obligations. This legislation differs

<sup>95</sup> Regulation (EU) No 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU.

<sup>96</sup> Protocol (No 26) On Services Of General Interest *OJEU* C 326, 26.10.2012, p. 308–308.

slightly between the different forms of transport - in particular with regard to competition - and takes into account the specificities of each mode of transport, including its operational characteristics. Under Article 106(2) TFEU, companies providing services of general economic interest are subject to the rules of the Treaties, in particular the rules on competition. However, unlike other economic sectors, this Article does not apply when compensation is paid for public service obligations (PSOs<sup>97</sup>) in inland transport. Instead, this type of compensation is covered by Article 93 TFEU as "*lex specialis*" and is applied in accordance with the rules of Regulation 1370/2007 on public passenger transport services by rail and by road<sup>98</sup>. Unlike land transport, the maritime and air transport sectors are subject to Article 106(2) of the Treaty. Certain rules applicable to public service compensation in these two sectors are contained in Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community<sup>99</sup> and in Regulation (EEC) No 3577/92<sup>100</sup> which applies the principle of freedom to provide services to maritime transport within Member States (maritime cabotage). In this respect, it must be considered that no effective right to transport is enshrined in Community texts, although the question of transport appears, in the construction of Europe, to be consubstantial, *ab initio*, with the concept of "public service" and is underpinned, in accordance with Protocol No 26, by a value implying "*a high level of quality, safety and affordability, equal treatment and the promotion of universal access and users' rights*". Moreover, Community law refers, in this respect, to the principle of subsidiarity, which implies that it is the national authorities that establish "*social and quality criteria in order to maintain and raise quality standards for public service obligations, for example [...] passengers' rights, the needs of persons with reduced mobility or environmental protection, passenger safety [...]*"<sup>101</sup>. The Charter of Fundamental Rights of the European Union also states in this respect that "*The Union recognizes and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union*".

**32. No right to transport, but consecration of the rights of the passenger.** As regards to coach and bus transport, the Regulation of 16 February 2011<sup>102</sup> establishes rights similar to those already benefited by passengers in other transport modes (in particular air, rail, sea and inland waterway transport, see details in **ANNEX 2**) but also imposes a number of obligations on bus and coach transport companies and bus station managers concerning their

<sup>97</sup> The Declaration of Public Service Obligations (PSO) is the mechanism available to the public authorities to ensure a collective public transport system that reaches all citizens, in those cases in which an operator, if it were considering its own commercial interests, would not provide the service or its offer would be insufficient or would not meet the necessary conditions of frequency, quality or price, without receiving compensation and/or the right of exclusivity in the provision of the service in return.

<sup>98</sup> Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, *OJ L 315*, 3.12.2007, p. 1–13.

<sup>99</sup> Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast) (Text with EEA relevance), *OJ L 293*, 31.10.2008, p. 3–20.

<sup>100</sup> Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), *OJ L 364*, 12.12.1992, p. 7–10.

<sup>101</sup> Regulation (EC) No. 1370/2007, known as the "PSO" referred to above.

<sup>102</sup> Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 Text with EEA relevance, *OJ L 55*, 28.2.2011, p. 1–12.

liability towards passengers (compensation and assistance in the event of accidents, delays or cancellations).

33. **A "right to transport", a guarantee of transport for persons with reduced mobility or a disability.** It is worth recalling that on 23 December 2010, the European Union formally acceded to the *United Nations Convention on the Rights of Persons with Disabilities* of 13 December 2006<sup>103</sup>, thus becoming the first inter-State organization to participate in a human rights treaty and to assume its binding obligations. Only 16 Member States had already ratified this Convention, including France on 18 June 2010. Under its article 9, States Parties shall take appropriate measures to ensure access to transport. Obstacles and barriers to accessibility must be identified and removed, and these principles also apply to automated and connected vehicles. The EU guarantees the rights of passengers with disabilities and passengers with reduced mobility, regardless of the mode of transport chosen. Numerous technical regulations have thus been adopted, particularly in rail transport<sup>104</sup> but also by bus<sup>105</sup> to provide effective access. But the most significant regulatory effort concerns the rights granted to passengers with disabilities and passengers with reduced mobility for different types of transport service (rail transport, air transport, inland or maritime navigation, transport by bus and coach, see details in **ANNEX 3**).

*"ALFRED concept for new potential drivers"*

ALFRED will undoubtedly promote access to citizens with currently limited autonomy by allowing the transport of people who are legally, physically, or mentally unable to drive. The target population mentioned by the project corresponds perfectly to the issues and regulatory expectations relating to the right to transport insofar as it concerns the supply of autonomous vehicles. However, it is still necessary for the use of the said vehicle to be effectively permitted (adaptation of the vehicle to handicaps, deficiencies, or necessities). But beyond that, thanks to its intelligent cognitive assistant, it is likely to promote the effective use of transport by vulnerable people by adapting to the individual needs and by creating a safe, comfortable, and reassuring space (for children, elderly people with disabilities or people suffering from mental pathologies or autistic disorders...). It is precisely

<sup>103</sup> Résolution adoptée par la soixante et unième session de l'Assemblée générale de l'Organisation des Nations Unies, à New-York, le 13 décembre 2006, Décret n° 2010-356 du 1er avril 2010 portant publication de la convention relative aux droits des personnes handicapées (ensemble un protocole facultatif), signée à New York le 30 mars 2007, *JORF* n°0079 du 3 avril 2010 page 6501, texte n° 16.

<sup>104</sup> Commission Regulation (EU) No 454/2011 of 5 May 2011 concerning the technical specification for interoperability relating to the subsystem "telematics applications for passengers" of the trans-European rail system, known as "TSI TAP" - which has been amended on several occasions - specifies the technical modalities used for passenger information on assistance to PRMs, *OJ L* 123, 12.5.2011, p. 11–67; Commission Regulation (EU) No 1300/2014 of 18 November 2014 on technical specifications for interoperability relating to the accessibility of the rail system of the Union for disabled persons and persons with reduced mobility, known as the "PRM TSI", which amends the 2008 TSI and has been amended several times since then, and was drawn up by the European Union Railway Agency (ERA), *OJ L* 356, 12.12.2014, p. 110–178.

<sup>105</sup> Directive 2001/85/EC of the European Parliament and of the Council of 20 November 2001 relating to special provisions for vehicles used for the carriage of passengers comprising more than eight seats in addition to the driver's seat has become Regulation No. 107 of the United Nations Economic Commission for Europe (UNECE), which brings together all the uniform provisions relating to the approval of vehicles in categories M2 and M3 with regard to their general construction characteristics. Its Annex 8 concerns the prescriptions applicable to technical devices facilitating access for passengers with reduced mobility, Regulation 107 (Schedule 8) on the Construction of Road Passenger Vehicles of 2001, p 100, E/ECE/324/Rev.2/Add.106/Rev.3 E/ECE/TRANS/505/Rev.2/Add.106/Rev.3.

the contribution of the project to consider the concrete use of the CAV for users with mobility restrictions by its design process.

34. **Transport users' right to information and Intelligent Transport Systems (ITS) : a « step » towards improving the effectiveness of the right to transport.** Directive of 7 July 2010<sup>106</sup> defined a European framework for the coordinated and coherent deployment and use of Intelligent Transport Systems (ITS<sup>107</sup>) in the field of road transport and interfaces with other modes of transport, and specified the general conditions necessary for this purpose. ITS are advanced applications which without embodying intelligence as such aim to provide innovative services relating to different modes of transport and traffic management and enable various users to be better informed and make safer, more coordinated and 'smarter' use of transport networks. Thanks to these systems, users can benefit from information services and transport network managers have information on the state of disruptions, enabling them to manage traffic in real time, inform users of disruptions and guide them to the most efficient routes or modes of transport. Different Priority actions are defined by Directive (art.3) :

- multimodal travel information services ;
- real-time traffic information services;
- universal minimum traffic information related to road safety free of charge for users;
- interoperable EU-wide eCall service;
- information services on safe and secure parking areas for trucks and commercial vehicles;
- reservation services for safe and secure parking areas for trucks and commercial vehicles.

The Commission has thus adopted several delegated regulations<sup>108</sup>. By a Decision adopted Dec. 12 of 2017, the European Parliament and the Council extended by 5 years the duration of the delegation given to the Commission to continue the definition of common rules<sup>109</sup>. The delegated Regulation n°2017/1926 harmonises the modalities of access to transport service data and lays down the rules to be respected by transport information services using these data. The categories of data that must be made available are defined in the annex to the delegated regulation. These are data concerning regular collective services, on-demand services, including car-sharing, car-pooling and bike-sharing, and personal modes of travel. In particular, the delegated regulation requires the implementation of a single digital interface corresponding to the national access point whose creation it requires (art. 3). It specifies that the data are reused "*in a neutral manner, without discrimination or bias*" (art. 8) and that the prioritisation criteria used must be transparent. The list of data to be reported

<sup>106</sup> Directive 2010/40/EU of the European Parliament and of the Council of 7 July 2010 on the framework for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport, *OJ L 207*, 6.8.2010, p. 1–13.

<sup>107</sup> For the purposes of this Directive, 'Intelligent Transport Systems' or 'ITS' means systems in which information and communication technologies are applied in the field of road transport, including infra-structure, vehicles and users, and in traffic management and mobility management, as well as for interfaces with other modes of transport' (art.4).

<sup>108</sup> No 2013/885 on the provision of information services concerning safe and secure parking areas for trucks and commercial vehicles, *OJ L 247*, 18.9.2013, p. 1–5; no 2013/886 on data and procedures for the provision, as far as possible, of universal minimum traffic information related to road safety free of charge to users, *OJ L 247*, 18.9.2013, p. 6–10; n°2015/962 on the provision of EU-wide real-time traffic information services, *OJ L 157*, 23.6.2015, p. 21–31; n° 2017/1926 on the provision of multimodal travel information services throughout the Union, *OJ L 272/1* 21.10.2017;

<sup>109</sup> Decision (EU) 2017/2380 of the European Parliament and of the Council of 12 December 2017 amending Directive 2010/40/EU as regards the period for adopting delegated acts, *OJ L 340*, 20.12.2017, p. 1–3.



and re-used is set out in the annex to the Regulation. The directive was transposed in France by an Order of 13 June 2012 on intelligent transport systems<sup>110</sup>. Article 4 of the Act of 6 August 2015 on growth, activity and equal economic opportunities<sup>111</sup> also provided for free and immediate access to transport service data for the purpose of informing users, but the implementing decree referred to in Article L. 1115-1 of the Transport Code has not been published, a situation which, as it stands, limited the scope of the principle. The LOM<sup>112</sup> makes a very voluntarist transposition by recasting the transport code in this respect by including the dynamic data of transport services beyond the perimeter set by the delegated regulation. On 13 March 2019, the Commission adopted a Delegated Regulation on specifications for the provision of C-ITS, supported by an impact assessment. Its objective was to develop minimum legal requirements for the interoperability of C-ITS and to enable the widespread deployment of C-ITS systems and services from 2019 onwards, in particular by focusing on the "Day1" services, *i.e.* the C-ITS services that are expected to be deployed in the short term. It describes how vehicle-to-vehicle, vehicle-to-infrastructure and infrastructure-to-infrastructure communications are to be provided by means of C-ITS stations and how C-ITS stations are to be marketed and commissioned to enable the provision of C-ITS services to ITS users. The delegated regulation did not enter into force following an objection by the Council of the European Union<sup>113</sup>.

It is clear that *ALFRED* and its intelligent assistant concept ("*informing and reassuring the "driver", passengers or even other road user of the intentions of the automated vehicle and its ability to handle what is happening on and around the road*") goes far beyond the legal and regulatory requirements regarding the "right to information" component of the "right to transport". Nonetheless, *ALFRED* will have to comply with the expected future regulations in the area of C-ITS.

35. In France, the concept of "*right to transport*" appeared well before the beginning of the 1980s, a period which saw the arrival in power of a socialist government under the presidency of François Mitterrand. Major works were initiated and in terms of infrastructure, the Lyon-Paris TGV line were inaugurated. Numerous social achievements were enshrined in law. At Community level, the French impetus gave rise to the *Community Charter of Fundamental Social Rights of Workers*, which was signed at the Strasbourg European Council of 8 and 9 December 1989<sup>114</sup>. The Charter is presented as a declaration of principle on labour law within the Community area. However, from the French point of view, this text gave concrete expression to a political program announced by François Mitterrand as soon as he won the presidential elections in May 1981: the French President wanted to build a

<sup>110</sup> Ord. n° 2012-809 du 13 juin 2012 relative aux systèmes de transport intelligents, *JORF* n°0137 du 14 juin 2012.

<sup>111</sup> L. n° 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques, *JORF* n°0181 du 7 août 2015, known as "Loi Macron".

<sup>112</sup> L. n° 2019-1428 du 24 décembre 2019 d'orientation des mobilités, *JORF* n°0299 du 26 décembre 2019, texte n° 1.

<sup>113</sup> UE Council, 5 juillet 2019, 10471/19, TRANS 389, DELACT 131, <https://data.consilium.europa.eu/doc/document/ST-10471-2019-INIT/fr/pdf>

<sup>114</sup> The Community Charter of the Fundamental Social Rights of Workers, adopted on 9 December 1989 by a declaration of all Member States, with the exception of the United Kingdom, established the major principles on which the European labour law model is based and shaped the development of the European social model in the following decade. The fundamental social rights declared in the Community Charter are further developed in the Charter of Fundamental Rights of the European Union that became legally binding with the ratification of the Treaty of Lisbon on 1 December 2009.

"European social area" to match the common market. In this spirit, which was to permeate the whole of the Community, the Loi d'Orientation des Transports Intérieurs (LOTI<sup>115</sup>) was adopted, constituting a genuine "fundamental law for the organization of public transport services in France"<sup>116</sup>.

#### 2.1.4. Internally

36. **Emergence of the concept in the Act.** In French domestic law, the concept appeared fairly recently with the *Inland Transport Policy Act* of 30 December 1982 (known as the "LOTI"<sup>117</sup>), which for the first time set out the existence of a right to transport by referring in Article 1 to *"the right of every user to travel and the freedom to choose the means of transport and the right to carry out the transport of his goods himself or to entrust it to the body or undertaking of his choice"*. Article 2 announced *"the progressive implementation of the right to transport [which] allows users to travel under reasonable conditions of access, quality and price and at a reasonable cost to the community, in particular by using a means of transport open to the public. In this spirit, special measures may be taken in favour of persons with reduced mobility. Disadvantaged social categories, in particular those on islands and in remote regions or regions with difficult access to the national territory, may be the subject of provisions adapted to their situation."* These provisions were then codified in Articles L. 1111-1 *et seq.* of the Transport Code. The right to transport, long regarded as a constitutional right in a number of countries, was expressed in earlier texts under the heading of "satisfaction of transport needs". It will thus become a reference for almost forty years, until the entry into force of the *Loi d'orientation des mobilités* at the end of 2019 (known as the "LOM"<sup>118</sup>). *"By stating in the second paragraph of article 1 that the needs of users will be "satisfied by the implementation of provisions to give effect to the right of every user to travel and the freedom to choose the means of doing so (...)", the Act transforms the needs of users into rights. These rights are binding on the State, which must guarantee their effectiveness. This provision is fully in line with a promotional vision of the law, because it is not just a question of formally proclaiming subjective rights, but of ensuring that action is taken to give them a substantial content"*<sup>119</sup>. Moreover, the second paragraph of Article 1 of the Act does not directly state a "right to transport" but the "right to travel", the "right to transport" only appearing in Article 2 of the Act. However, the two are now assimilated without distinction. Thus, as A. Lyon-Caen, V. Champeil-Desplats And J. Affichard rightly pointed out in their analysis of the genesis of the LOTI, *"It should be noted that this link between the proclamation of the "right of every user to travel" and the requirement to make it effective results in a progressive assimilation of the right to travel with the notion of the "right to transport". In the course of parliamentary debates, the right to travel has emerged as the foundation, if not the very expression, of the right to transport"*.

<sup>115</sup> Inland Transport Policy Act.

<sup>116</sup> Designation used by the decentralized services of the State, *i.e.* : <http://www.centre-val-de-loire.developpement-durable.gouv.fr/loi-d-orientation-sur-les-transports-interieurs-a2672.html>.

<sup>117</sup> JORF du 31 décembre 1982 page 4004.

<sup>118</sup> *Mobility orientation law on transport (LOM)* Loi n° 2019-1428 du 24 décembre 2019 d'orientation des mobilités, JORF n°0299 du 26 décembre 2019, texte n° 1. This law is a vast document setting out France's legal strategy on the future of its transport sector. It has four objectives: 1) Get out of car addiction, 2) Accelerate the growth of new transport modes, 3) achieve the ecological transition, and 4) Schedule investments in transport infrastructure.

<sup>119</sup> Institut International de Paris La Défense, Joëlle Affichard - Véronique Champeil-Desplats, Antoine Lyon-Caen, *Définir le service public, réguler un secteur concurrentiel : genèse de la loi d'orientation des transports intérieurs*, rapport de recherche, 20 avril 1997.

## Right to information component

37. The definition given makes it possible to understand that this right also includes a right to information for the user: *"The right to transport includes the right of users to be informed about the means available to them and the way in which they are used"*. Moreover, the *"right to transport"* included a *"right to information"* component which was then codified in Article L. 1111-4 of the Transport Code. It specified that *"the right to transport includes the right for the user to be informed about the means offered to the user and the modalities of their use"*, information set out in Article L. 1115-1 of the same code with regard to digital data of regular transport services which must be communicated *"freely, free of charge and immediately"*. Beyond the principle of a right to information, the right to transport has in reality only received three series of concrete applications: in favour of persons with reduced mobility or in a situation of disability, socially or economically disadvantaged persons or within the framework of the principle of territorial continuity.

## Measures in favour of persons with reduced mobility or a disability

38. Amended and then codified<sup>120</sup>, the provisions of article L 1111-1 of the Transport Code state that *"the transport system must meet the needs of users and give effect to the right of all persons, including those with reduced mobility or disabilities, to move around and the freedom to choose the means of doing so ..."*. According to article L. 1112-1 *"(...) public transport services shall be made accessible to disabled persons<sup>121</sup> or persons with reduced mobility, in accordance with the provisions of the first paragraph of article L. 114-4 of the Code of Social Action and Families, before 13 February 2015."* This provision echoes the Act of 11 February 2005<sup>122</sup> on equal rights and opportunities, participation and citizenship for people with reduced mobility, which initially gave public transport ten years to comply with its accessibility requirements. The code and the implementing decree of 9 February 2006<sup>123</sup> not only required that *"all rolling stock acquired when renewing equipment or extending networks must be accessible"*, they also required that all equipment in all their services must be accessible in less than ten years (*i.e.* by 13 February 2015). They prohibited the organizing authorities from giving longer priority to the replacement of specific vehicles and services adapted to these users (but provided at ordinary rates), on the basis of Article 27 of the Decree of 16 August 1985<sup>124</sup>. The local authorities could only claim *"proven technical impossibility"*, but not the cost of the investment<sup>125</sup>. It was not until the ten years allowed for the implementation of these measures had expired that the failure was established. The ordinance of 26 September 2014 on the accessibility of establishments receiving the public,

<sup>120</sup> Ord. n° 2010-1307 du 28 octobre 2010 relative à la partie législative du Code des transports, *JORF* n°0255 du 3 novembre 2010 page 19645;

<sup>121</sup> While the current widely accepted terminology is "people with disabilities" or "people with reduced mobility", the exact terminology is kept when referring to or citing specific a law or a legal article in order not to change its content or understanding unintentionally.

<sup>122</sup> L. n° 2005-102 du 11 février 2005 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées, *JORF* n°36 du 12 février 2005 page 2353.

<sup>123</sup> Décr. n°2006-138 du 9 février 2006 relatif à l'accessibilité du matériel roulant affecté aux services de transport public terrestre de voyageurs., *JORF* 10 févr. 2006.

<sup>124</sup> Décr. n°85-891 du 16 août 1985 relatif aux transports urbains de personnes et aux transports routiers non urbains de personnes, *JORF* du 23 août 1985 page 9744 : art. 27 : *"Regular public services and on-demand public services for the transport of passengers by road may be organized for the benefit of particular categories of users"*.

<sup>125</sup> CAA Lyon, 1er juill. 2010, n° 09LY00079, Bouret : *JurisData* n° 2010-013562 ; *AJDA* 2010, p. 2015, tribune Y. Jegouzo. – CE, 22 juin 2012, n° 343364, Communauté d'agglomération du pays voironnais : *JurisData* n° 2012-013501 ; *AJDA* 2012 p. 1253, obs. M-Ch. Monteclerc.



public transport, residential buildings and roads for disabled persons<sup>126</sup> provides that accessibility to the service is reduced at priority stopping points<sup>127</sup> and that, in the event of technical impossibility "*due to an obstacle that cannot be overcome unless adjustments are made at a manifestly disproportionate cost*", alternative transport at an equivalent cost is to be offered (C. transp., art. L. 1112-4). For the future, Law No. 2015-990 of 6 August 2015<sup>128</sup> requires transport organizing authorities to draw up a master plan setting out the programming and procedures for the accessibility of services (C. transp., art. L. 1112-2). The decree of 27 April 2016<sup>129</sup> determines the controls and penalties. The first concrete application of the right to transport therefore only concerns access to transport for people with reduced mobility or in a handicap situation.

### Measures in favour of the socially disadvantaged

39. The second practical application concerns access to transport for socially disadvantaged persons, since Article 123 of the SRU Law<sup>130</sup> entitled "*Implementing the right to transport*", now Article L. 1113-1 of the Transport Code, provides that "*persons whose resources are equal to or below the ceiling set pursuant to Article L. 861-1 of the Social Security Code, shall benefit from tickets allowing access to transport with a fare reduction of at least 50 per cent or in any other form of equivalent aid. This reduction applies regardless of the user's place of residence*".

### Measures in favour of territorial continuity

40. The third practical application concerns, to some extent, the requirement of "*territorial continuity*" between mainland France and Corsica and the overseas departments, regions and communities on the other hand. The so-called "*territorial continuity*" mechanism was introduced in 1976 and is designed to reduce the consequences of insularity in the field of transport. The Constitutional Council has specified that "*the principle of 'territorial continuity' has no constitutional value either in itself or as a corollary of the principle of indivisibility of the Republic*"<sup>131</sup>. The legislator therefore has considerable legal leeway to organize territorial continuity. This makes it possible, for services between Corsica and the mainland, to allocate to maritime and air transport companies an annual financial envelope in return for a service commitment. According to the decentralisation laws, the State retains the responsibility for granting a territorial continuity allocation intended to reduce costs. It is collected, under an agreement, by the Corsican regional authorities, which pay it to the Corsican Transport Office, which then redistributes it to the concessionary companies. In the overseas departments, regions and communities, the national territorial continuity policy implemented for the benefit of the overseas departments, regions and communities is defined in Article L. 1803-1 of the Transport Code. A territorial continuity fund and financial aid to individuals is set up to facilitate the purchase of a territorial continuity transport ticket and to open up the prospects for training and professional integration through mobility for

<sup>126</sup> Ord. n° 2014-1090 du 26 septembre 2014 relative à la mise en accessibilité des établissements recevant du public, des transports publics, des bâtiments d'habitation et de la voirie pour les personnes handicapées, *JORF* 27 sept. 2014.

<sup>127</sup> C. transp., art. L. 1112-1 modifié. – D. n° 2014-1323, 4 nov. 2014 : *JO* 6 nov. 2014.

<sup>128</sup> L. n° 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques, *JORF* n°0181 du 7 août 2015 page 13537.

<sup>129</sup> Décret n° 2016-529 du 27 avril 2016 relatif aux contrôles et aux sanctions applicables aux schémas directeurs d'accessibilité - agendas d'accessibilité programmée pour la mise en accessibilité des transports publics de voyageurs, *JORF* 30 avr. 2016.

<sup>130</sup> L. n° 2000-1208 du 13 décembre 2000 relative à la solidarité et au renouvellement urbains, *JORF* n°289 du 14 décembre 2000 page 19777.

<sup>131</sup> Cons. const., 17 juill. 2003, n° 2003-474 DC : *JO* 22 juill. 2003, p. 12336.

overseas residents. This mechanism provides in particular an implementation of a national policy of territorial continuity at overseas for the benefit of all persons who are regularly established there. This policy is based on the principles of equal rights, national solidarity and unity of the Republic and should aim to bring the conditions of access of the population to public transport, training, health and communication services closer to those in the metropolitan France, taking into account the particular geographical, economic and social situation of each overseas territorial community. With this in mind, the territorial continuity fund finances aid for territorial continuity as well as aid for higher education students and upper secondary school pupils. It also finances aid linked to travel justified by mobile vocational training.

41. **A right conceived as an "objective".** Apart from these three cases of concrete application, it has to be said that the right to transport is in no way a subjective right; moreover, it now appears only as an "objective" following the codification effected by the Order of 28 October 2010 on the legislative part of the Transport Code<sup>132</sup>, its only positive dimension prohibiting the creation or continuation of discrimination to the detriment of certain categories of the population, persons with reduced mobility or in a handicapped situation and socially disadvantaged persons. Moreover, it is worth recalling that during the preparatory work on the LOTI, the Ministry of Transport had indicated that *"the right to transport is not a right that can be claimed in court"*<sup>133</sup>. From this point of view, the administrative judge therefore confined himself to reviewing the manifest error of assessment with regard to this objective, under the "LOTI"<sup>134</sup>, as he would have done, previously, for any decision modifying the organization of a public service in application of

<sup>132</sup> Ord. n° 2010-1307 du 28 octobre 2010 relative à la partie législative du Code des transports, *JORF* n°0255 du 3 novembre 2010 page 19645 texte n° 2.

<sup>133</sup> Minutes of the interdepartmental meeting, May 18, 1982, p. 4.

<sup>134</sup> CE 13 Nov. 2006, n°287665 "Pays de la Loire Region": control of the manifest error of assessment (EMA) on the removal of lines, invoking the LOTI: *"Considering, finally, that under the terms of Article 1 of the law of 30 December 1982 on the orientation of inland transport, 'the inland transport system must satisfy the needs of users under the economic, social and environmental conditions most advantageous to the community'; that under the terms of Article 3 of this same law 'the overall policy for the transport of persons and goods (...) shall be based on the principle of the principle of the 'sustainable development of the region'. ...) takes into account the real economic costs of creating, maintaining, and using transport infrastructure, equipment, and materials and the social and environmental costs, both monetary and non-monetary, borne by users and third parties. 'that, given the size of the deficit borne by SNCF as a result of the operation of the inter-regional links in question, on the one hand, and the reduced number of passengers on these links, on the other hand, SNCF's decision, which reorganizes the consistency of services on these lines without eliminating them and adapting them to ridership, is not vitiated by a manifest error of assessment';* CE 6 Nov. 2000, n°180496 Comité Somport d'opposition totale à l'autoroute Caen-Rennes, on the downgrading of sections of RFF lines (French Railway Network), EMA control : *"Considering that the law of December 30, 1982 defines the general principles of transport policy, in particular the implementation of a right to transport under reasonable conditions of access, quality and price as well as cost to the community, and the harmonious development of the various modes of individual and collective transport, taking into account their advantages and disadvantages, in regional development, urban planning, environmental protection, defense, rational use of energy, security, as well as costs related to the creation, maintenance and use of infrastructure, equipment and transport materials; that the contested decree, which declassifies the national rail network of lines or sections of lines whose operation has been closed, when the intensity of traffic on these lines no longer allowed operation under reasonable cost conditions, is not vitiated by a manifest error of assessment with regard to the above-mentioned objectives".*

the "Rolland Laws"<sup>135</sup>. In the same way, he considered that this right was in fact implemented by the other provisions of the law and its implementing texts and that it was only a "principle" which could not be directly invoked before the judge, independently of the said provisions<sup>136</sup>.

42. **A right "built" on the transport public service: serving territories, a public service obligation.** In the Transport Code, the notion of "public service" is expressly referred to in Article L 1211-4<sup>137</sup>. It is common ground that this enumeration, although it does enshrine the organization of public transport as constituting a public service mission, does not include the performance of the said service. However, the Code does aim at the performance of certain public transport services as constituting a public service mission. In this respect, it should be noted that Article L. 1111-3 of the same code, in its version prior to the Mobility Orientation Act, provided that *"In the planning of infrastructures, account shall be taken of the issues of opening up, development and competitiveness of territories, including cross-border issues. This programming allows, from the major transport networks, to serve areas with low population density by at least one transport service fulfilling a public service mission"*. Also, according to the said code, low population density areas should be served by a transport service, which thus fulfils a public service mission. With regard to public passenger transport, the law refers only to *"regular or on-demand public transport services"*<sup>138</sup>. Article L. 1231-1 provided that transport organizing authorities *"shall organize regular public passenger transport services and may organize transport services on demand"*. Regular public passenger transport services were therefore a mandatory competence exercised, *i.e.* a mandatory public service as determined by law. The said service may be performed either *"directly"* by the public entity or granted in compliance with the European regulation of 23 October 2007 on public passenger services by rail and by road, known as the PSO, which lays down the operating conditions<sup>139</sup>. Also, it is common ground that under the terms of the LOTI, only regular or on-demand services contribute to the performance of this mission to serve the entire territory.

<sup>135</sup> There are three laws governing public service as conceived by Louis Rolland in the 1930s: firstly, the principle of continuity of public service, secondly, the mutability of public service, and thirdly, equality of public service.

<sup>136</sup> CE, 21 juin 1996, n°127155, « Association Aquitaine alternatives ».

<sup>137</sup> *"Constitute public service missions whose execution is ensured by the State, the local authorities and their public institutions in liaison with private or public companies:*

*1° The construction and management of infrastructures and equipment for transport and their provision to users under normal conditions of maintenance, operation and safety;*

*2° The organization of public transport;*

*3° The regulation of transport activities and the control of its application as well as the organization of transport for defense;*

*4° The development of information on the transport system;*

*5° The development of research, studies and statistics likely to facilitate the achievement of the objectives assigned to the transport system."*

<sup>138</sup> Article L 1221-1: *"The institution and organization of regular and on-demand public transport services are entrusted, within the limits of their powers, to the State, local authorities and their groupings as organizing authorities..."*.

Article L1221-3 : *"The performance of regular and on-demand public passenger transport services is provided for a limited period of time under the conditions laid down in 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 [Regulation known as the "PSO" Regulation] and repealing Council Regulations (EEC) Nos. 1191/69 and 1107/70 for the services which fall within its scope, either under the control of a public person in the form of an industrial and commercial public service, or by an enterprise having concluded an agreement with the organizing authority for this purpose"*.

<sup>139</sup> Article L 1221-3 Transport Code which refers to the said regulation, published in OJEU No. L. 315, Dec. 3, 2007.

43. **Lack of "minimum service".** Under the provisions of the Preamble to the 1946 Constitution, the legislature intervened in 2007 to ensure the continuity of the public service and, in particular, to regulate the exercise of the right to strike in respect of land passenger transport <sup>140</sup>(C. transp., arts. L. 1324-1 to L. 1324-5). Then, the *Diard Act* of 19 March 2012<sup>141</sup> transposed certain provisions of the 2007 text relating to the land transport sector to the air sector, which covers only a few public service activities (C. transp., art. L. 1114-1 to L. 1114-7). The code has instituted a Chapter II entitled "*Continuity of service in the event of foreseeable traffic disruption*", which covers "*regular public land passenger transport services for non-touristic purposes, excluding river transport*" and which requires the transport organizing authority to define priority services in the event of a foreseeable traffic disruption, after consultation with users. The text specifies that the concept of "*foreseeable disruption*" covers five situations (strikes; maintenance work plans; technical incidents, where a period of thirty-six hours has elapsed since their occurrence; climatic contingencies, where a period of thirty-six hours has elapsed since a weather warning was issued; and any event whose existence has been brought to the attention of the transport undertaking by the representative of the State, the transport organizing authority or the infrastructure manager within thirty-six hours). Article L. 1222-3 stipulates that the level of service on priority services "*must make it possible to avoid disproportionate interference with the freedom to come and go, freedom of access to public services, freedom of work, freedom of trade and industry and the organisation of school transport. It corresponds to the coverage of the basic needs of the population. It must also guarantee access to the public education service on national examination days. It takes into account the special needs of persons with reduced mobility. Service priorities and the different levels of service shall be made public*". In the light of these elements, companies must draw up a transport plan adapted to the service priorities and levels of service and a user information plan, which are drawn up by the State representative in the event of failure to do so (C. transp., art. L. 1226-2). In transport undertakings, the employer and the representative trade union organisations shall conclude a collective agreement on the foreseeability of the service applicable in the event of foreseeable traffic disruption. The collective agreement on the foreseeability of the service shall list, by occupation, function and level of competence or qualification, the categories of staff and their numbers, as well as the material resources essential for the performance, in accordance with the safety rules in force applicable to the undertaking, of each of the levels of service provided for in the adapted transport plan. It shall lay down the conditions under which, in the event of foreseeable disruption, the organisation of work shall be revised and available staff will be reassigned to enable the implementation of the modified transport plan. In the event of a strike, the staff available are the company's non-striking personnel. In the absence of an applicable agreement, a predictability plan is defined by the employer. In the event of traffic disruption, all users have the right to free, accurate and reliable information on the service provided, under the conditions set out in the user information plan. In the event of foreseeable disruption, information to users must be provided by the transport undertaking at least 24 hours before the start of the disruption (C.transp., art. L. 1222-7). In the event of failure by the undertaking to implement the adapted transport plan or the user information plan, a principle of reimbursement of tickets by the undertaking to users is provided for (C.transp., art. L. 1222-11). A user who has not been able to use the means of transport for which he has taken out a season ticket or purchased a ticket is entitled

<sup>140</sup> Loi n° 2007-1224 du 21 août 2007 sur le dialogue social et la continuité du service public dans les transports terrestres réguliers de voyageurs, *JORF* n°193 du 22 août 2007 page 13956, texte n° 2.

<sup>141</sup> Loi n° 2012-375 du 19 mars 2012 relative à l'organisation du service et à l'information des passagers dans les entreprises de transport aérien de passagers et à diverses dispositions dans le domaine des transports, *JORF* n°0068 du 20 mars 2012 page 5026, texte n° 2.

to an extension of the validity of this season ticket for a period equivalent to the period of use of which he has been deprived, or to the exchange or refund of the unused ticket or season ticket (C.transp. , art. L. 1222-12). In reality, these legislative interventions do not establish any minimum service. With regard more specifically to the right to strike, there is no legislation imposing a reduced service capable of operating in the event of a strike, implying a ban on the right to strike for staff deemed essential to it. The measures introduced have further regulated the procedure for recourse to strike action in enterprises, by generalising a system of social dialogue and conflict prevention; at the same time, they have increased predictability and improved the organisation of the public service in the event of traffic disruption. The Court of Cassation points out that the legal obligation imposed on the employer, the company responsible for a public land passenger transport service, to draw up a transport and user information plan and to guarantee a minimum service cannot limit the exercise of the right to strike in the absence of a legal provision prohibiting it and failure to comply with the obligation to negotiate<sup>142</sup>. With regard to land passenger transport, the scope referred to in Article L 1324-1 of the Transport Code covers "*public regular land passenger transport services and freely organised rail passenger transport services mentioned in Article L. 2121-12 with the exception of international passenger transport services*", in the version resulting from the Ordinance of 3 June 2019 containing various provisions relating to the SNCF group<sup>143</sup>. The provisions of the law require negotiation prior to the filing of the notice period, under penalty of irregularity of the latter, within the framework of a framework agreement or a branch agreement, or failing this, in compliance with the terms and conditions laid down by the provisions of Articles R. 1324-1 to 6 of the same code. As soon as notice of a strike has been given, it is incumbent on employees belonging to the categories of staff indispensable to the execution of the agreement or the foresight plan and who nevertheless intend to join the movement to inform the head of the undertaking of their intention to join it, and this forty-eight hours before taking part in it, under penalty of disciplinary action (C.transp., art. L. 1324-7 to L. 1324-11). **The question of a "minimum service" and the effectiveness of a right to transport was also an important issue during the health crisis. Transport has been considered as an essential activity by the case law**, without imposing minimum service obligations for public transport as a general rule (for further information, see details in **ANNEX 4**).

44. **State of play of the "right to transport" on the eve of the LOM (out of context of exceptional regime, see ANNEX 4).** It is the local authorities, the transport organising authorities, who are, then, responsible for the organisation and management of the networks. The implementation of the "*right to transport*" has progressed rather unevenly under the responsibility of the local authorities, who have the power and the authority to organise passenger transport at the various levels and often with the help of the State through multi-year modernisation contracts concluded with these authorities. Important shortcomings have persisted, and in some cases have even become more pronounced. In sparsely populated areas, particularly in rural areas, there has been a withdrawal of rail services and regular lines, sometimes leaving only school transport services, although open to the public, but with timetables and journey times that are ill-suited to other users. It has been observed that a number of communities have been able to set up transport on demand services to provide these populations with a minimum quality service at a reasonable price thanks to appropriate subsidies. But the fact remains that many authorities have not had the means to set up a regular service and that the only possibility open to citizens is the use of

<sup>142</sup> Cass. soc., 30 juin 2015, n° 14-10.764, M. c/ S. : *JurisData* n° 2015-016107.

<sup>143</sup> Ord. n° 2019-552 du 3 juin 2019 portant diverses dispositions relatives au groupe SNCF, *JORF* n°0128 du 4 juin 2019, texte n° 30



the car to get out of their isolation. The use cases developed by the project are part of this dynamic. Certain peripheral neighbourhoods are home to many workers forced to use saturated and/or degraded public transport to access their workplace or certain services. State transport policy has focused on the development of major infrastructure. The right to information on the services offered has itself made great progress. However, care must still be taken to ensure that the complexity of certain information or ticketing systems does not leave out many users (illiterate, foreigners, the elderly or people with reduced mobility or disabilities, etc.). While the principle of a "right to transport" seems a laudable objective, it should be noted that its implementation has hitherto been entirely dependent on the way in which the public service is organised. The mobility Orientation Law<sup>144</sup> is intended to change this state of affairs.

45. **Paradigm shift.** In the context of the new wording of the aforementioned Article L. 1111-3, which stems from the Mobility Orientation Act, the notion of *"at least one transport service fulfilling a public service mission"* has disappeared from the said article in favour of a formula encompassing public transport or the organisation of *"mobility solutions"*: (*"... by at least one public transport service or by the organisation of mobility solutions meeting the population's travel needs"*). This point seems to be confirmed by reading the new paragraph of the aforementioned Article L. 1211-4, which conveniently states that *"Within the framework of their public service missions mentioned in this article, the State and local authorities shall take into account both the plurality of mobility needs and the diversity of territories in order to provide them with appropriate, sustainable and equitable responses"*. Under the terms of the LOM, *"mobility solutions"* must, therefore be an alternative to transport services fulfilling a public service mission in certain territories. It is therefore necessary to understand the scope of this "paradigm shift" assumed and claimed.

46. **Conclusion:** In France, the performance of certain passenger transport services constitutes a public service mission. The freedom to come and go justifies special measures in favour of, in particular, people with disabilities or disadvantaged persons so that they can exercise their prerogatives. These measures will apply in the same way to automated and connected vehicles. The right to transport has been conceived as an objective and the implementation of the means to achieve it will also apply to automated and connected vehicles. In this sense, the use cases developed by the project can perfectly well contribute to the implementation of this right throughout the territory. As a result, the automated and connected vehicle is perfectly integrated into the legal system under analysis since it is free of any "technical" and/or "technological" concept that could limit its application from a service point of view. **However, it must be taken into account that the deployment of CAV in the transport system will eventually disrupt the existing categories and will probably require a rethinking of the system's architecture.**

## 2.2. Consecration of a right to mobility

47. **Mobility Orientation Law. Genesis.** The orientation law on mobility, known as the "LOM", was adopted on 24 December 2019 and published in the *Official Journal* on 26 December 2019, after a veritable legislative marathon of almost two years which resulted in the implementation of Article 45 paragraph 4 of the Constitution, the Senate having rejected the text, on a new reading, on 5 November 2019. The Constitutional Council, seized by 60 deputies and 60 senators, has invalidated, very marginally, the said text<sup>145</sup>. However, over

<sup>144</sup> LOI n° 2019-1428 du 24 décembre 2019 d'orientation des mobilités, *JORF* n°0299 du 26 décembre 2019, texte n° 1.

<sup>145</sup> Décision n° 2019-794 DC du 20 décembre 2019, *JORF* n°0299 du 26 décembre 2019



and above the aspects relating to the ecological transition, which occupy an important place in the law, it would appear that the law, with its 189 articles, which impact not only on the Transport Code but also on many other codes (including the General Code of Local Authorities, the Highway Code and the Road Code), is making a radical change in public transport policy. **The Mobility Orientation Act heralds the advent of a new era and is in fact, with a slow pace, the beginning of a revolution - some would say a "disruption" - in that it dissociates "mobility" and "public service", whereas, as mentioned above, the architecture of land passenger transport policy was hitherto essentially based on the notion of "public service".**

48. At the outset, the legal understanding of the "right to mobility" (3.2.1) should be questioned. Noting the absence of a definition, the services covered by the LOM will then be analysed in order to determine what this new concept covers with the focus on the introduction of CAV with the view to deployment (3.2.2). Emphasis will then be placed on the reduction of public service obligations in the implementation of this new right (3.1.3.), which tends to bring the right to mobility closer to a simple freedom and to move it away from a right to receive payment, the translation being legitimised by the effect of social innovation (2.1.4).

### 2.2.1. Lack of definition of the right to mobility

49. **Lack of definition of new concepts relating to mobility.** While the explanatory memorandum of the Mobility Orientation Act explains that "*Article 1 transforms the right to transport into a right to mobility, in order to cover all the issues of access to mobility, which are neither limited to access to public transport nor to a vision centred on infrastructure. This should in particular make it possible to take better account of new forms of mobility as well as the problems of advice and support for the most vulnerable people, with a major focus on access to employment and training*", no concrete definition is provided in the text. The impact study is not more dissenting as to the contours of the notion, the latter being limited to specifying that "*being able to move is synonymous with access to goods, services and social relations, and therefore with access to rights*" and that "*an adaptation of the legislation therefore appears necessary to clarify the notion of the right to mobility, for all and everywhere*". The jurist is therefore faced with a new concept in this area<sup>146</sup> with undefined contours, whereas the notion of transport and its various categories, echoing the very title of the code, is well defined by the code itself, particularly in its introductory articles. A draft definition seems to be provided in point 2.2 of the impact study, which states that "*the right to transport is not limited to access to public transport, with a vision centred on infrastructure, but is also understood as access by the most vulnerable people to local services and functions, but also to support them when necessary*". Beyond the social dimension of the right to mobility, the territorial dimension of this right must be enshrined in law, so that the development of mobility solutions adapted to the needs of the population can really be considered by a public authority at any point in the territory". Nothing is really new and it is still a "negative" definition, consisting of the implementation of specific measures to promote access for so-called vulnerable populations, in a concern for real equality and non-

<sup>146</sup> Notion that is now found instead of the notion of "migration" also and in the EU space, to speak of freedom of movement and settlement. Whereas in reality, it only appears expressly in civil service law: the affirmation of a right to mobility by Law No. 2009-972 of 3 August 2009 relating to mobility and career paths in the civil service (cf. L. No. 83-634 of 13 July 1983, art. 14 bis).

discrimination. In this sense, use case C experiments with the hypothesis of a transport service for a person aged 65 or over. The notion of "*organisation of mobility solutions*" is not better circumscribed. It is therefore necessary to analyse the text in order to determine in concrete terms whether the legal arsenal deployed is such as to enable these "*elusive*" notions to be grasped and the benefits to be measured, whereas, as has been pointed out, the removal of the notion of "*transport service fulfilling a public service mission*" - which only concerns regular and on-demand public transport - rather materialises a retreat of public authority in the assistance of fragile or weakened citizens.

50. **The right to transport is dead. Long live the right to mobility.** It should be borne in mind that the notion of "*public service*" is not the only notion that disappears somewhat in the Loi d'orientation des mobilités (LOM – Mobility Orientation Law). In fact, most of the references to the term "*transport*" are replaced by the term "*mobility*" and, first and foremost, the title of Book I of Part I "*the right to transport*" which becomes "*the right to mobility*"<sup>147</sup>. **At first sight, it is curious to think that the networking of low population density areas can be achieved by "at least one public transport service or by the organisation of mobility solutions", insofar as public transport is not synonymous with "public service" and is a matter of both public and private initiative, whereas the organisation of mobility solutions is an indefinite notion.**

51. **Variable geometry offer.** Thus, the Legislator disqualifies the existence of a single solution involving the provision of at least one public transport service in favour of a differentiated solution according to the nature of the territory to be served, in accordance with the provisions of Article L. 1211-4 of the Transport Code, which opportunely recalls that "*Within the framework of their public service missions mentioned in this article, the State and local authorities shall take into account both the plurality of needs in terms of mobility and the diversity of territories in order to provide them with appropriate, sustainable and equitable responses*". The disappearance of the public service as a means of providing a minimum service appears to be a real risk because nothing, as it stands, guarantees the existence of an equivalent offer, whereas the new paragraph of Article L. 1211-4, mentioned above, confirms the possibility of a mobility offer with variable geometry according to the territories - "*An adaptation and clarification of the competence to organise mobility is thus necessary, so as to leave communities the choice of mobility service, public transport or other, the most suitable in an "à la carte" organisation "according to local characteristics"*" will state the impact study - whereas the philosophy of the previous text had at least the merit of establishing a minimum standard. Moreover, the impact study explicitly states that "*the offer of mobility services must be understood even within territories far from large networks, without systematic links with them*" and completes the argument in a clear manner: "*The exercise of the mobility competence today targets the implementation of a public transport network. This is a hindrance for many municipalities and communities of municipalities located in sparsely populated areas, which do not take up the competence even though mobility issues are high in these areas and mobility solutions other than public transport could be provided in a much more relevant way, given the needs of the population and the specific characteristics of the area*"<sup>148</sup>. Essentially, it is a question of basing the architecture of

<sup>147</sup> In article L. 1111-1 of the Transportation Code, the "*transportation system*", which must "*satisfy the needs of users...*" becomes, for example, the "*organization of mobility*".

<sup>148</sup> At the same time, the provisions of Article L 2333-68 of the General Code of Local Authorities (CGCT) now prohibit an AOM from levying a mobility payment if it does not organize a regular passenger transport service, which many AOMs will not be able to afford. Many local authorities will now be deprived of all resources to organize the financing of active or shared mobility, which appears to be an irreducible contradiction.

mobility on another pillar than public transport, which is still the most accessible means of transport for sensitive populations, given the costs of acquiring or renting private means of transport. What then is proposed in terms of the place and place of the "right to transport"?

### 2.2.2. Mobility solutions promoted by the LOM : focus on the CAV

52. **New devices or just new names?** What is the consistency of these alternative "mobility solutions" with public transport? As a matter of fact, some are already known. They are promoted further by LOM and are subject to a new legal framework (promotion of multimodality and intermodality). Others are given a new name ("*active mobility*", "*inclusive mobility*",) including new legal frameworks. Some, on the other hand, are new in the transport landscape (*MaaS* with the inclusion of the transposition into national law of the European regulation on the opening up of mobility offer data<sup>149</sup>). Others are called "*new mobilities*" and needed to be regulated (*shared mobility*, free-floating, digital freight platform, co-transportation of parcels...). (for further information and to see details of "*mobility solutions*" described by the LOM, cf **ANNEX 5**). The LOM includes a Title III "*Making a success of the new mobility revolution*" which emphasizes and deals with both innovations and new forms of mobility, in addition to the themes present already. In terms of innovations, the aim is to provide a legal framework for the deployment of automated and connected vehicles.

53. **Genesis of the legal introduction of CAV.** Article 31 empowers the Government to take, by ordinance, all measures allowing the circulation of such vehicles on the public roads and to devise an appropriate legal regime for criminal liability. It is also envisaged to impose the provision of appropriate information or training prior to the provision of vehicles with driving delegation when such vehicles are sold or rented. It should be recalled, however, that this authorisation - which seems to constitute a "*showcase*" for the Government, which has no hesitation in announcing that "*the circulation of autonomous shuttles will be authorised from 2020*"<sup>150</sup> - appeared premature insofar as the experimental framework for the circulation of vehicles with partial or total delegation of driving was not even completed when the LOM was adopted<sup>151</sup>. It is the law of 17 August 2015 on the energy transition for green growth<sup>152</sup>, which constitutes the legal basis for the experimentation of delegated driving vehicles. Article 37 IX provided that "*the Government is authorized to take by ordinance any measure falling within the scope of the law in order to allow the circulation on the public highway of vehicles with partial or total delegation of driving powers, whether passenger cars, vehicles for the transport of goods or vehicles for the transport of persons, for experimental purposes, under conditions ensuring the safety of all users and providing, if necessary, for an appropriate liability regime*". Thus, the Ordinance of 3 August 2016 on the experimentation of vehicles with delegated driving on public roads<sup>153</sup> was adopted, which

<sup>149</sup> Commission Delegated Regulation (EU) 2017/1926 of 31 May 2017 supplementing Directive 2010/40/EU of the European Parliament and of the Council with regard to the provision of EU-wide multimodal travel information services (Text with EEA relevance) C/2017/3574, OJ L 272, 21.10.2017, p. 1–13.

<sup>150</sup> Website « *vie publique* », 26 dec. 2019, <https://www.vie-publique.fr/loi/20809-loi-du-24-decembre-2019-dorientation-des-mobilites-lom>

<sup>151</sup> Some of the texts implementing the automated vehicle experimentation regime needed to be revised to comply with the new legal framework specific to experimentation with delegated driving vehicles.

<sup>152</sup> L. n° 2015-992 du 17 août 2015, *JORF* n°0189 du 18 août 2015, p. 14263 (Loi relative à la transition énergétique pour la croissance verte).

<sup>153</sup> Ord. n° 2016-1057 du 3 août 2016 relative à l'expérimentation de véhicules à délégation de conduite sur les voies publiques, *JORF* n°0181 du 5 août 2016.

created a system of authorisation to drive on "roads open to public traffic" specific to the experimentation of vehicles with partial or total delegation of driving. The latter provides that this authorisation is issued by the Ministry of Transport after obtaining the opinion of the Minister of the Interior and, if necessary, the opinions of the road managers, the competent traffic police authorities and the transport organising authorities concerned. The Ordinance was supplemented by a decree of 28 March 2018 relating to the experimentation of vehicles with driving delegation on public roads<sup>154</sup> (known as "DPTC decree") and by an order of 17 April 2018 relating to the experimentation of vehicles with driving delegation on public roads<sup>155</sup>, which sets out the composition of the application file for authorisation to drive a vehicle with driving delegation for experimental purposes and the content of the register created to list the authorisations granted. However, article 37 of the 2015 Act was amended by the provisions of article 125 of the *PACTE Act*<sup>156</sup>, which also amended the Order of 3 August 2016. Since then, the implementing decree n°2018-211 was in the process of being recast following the amendment of order n°2016-1057 in its consolidated version "PACTE" and it was not until December 2020 that the Government adopted the new amended version of the said decree<sup>157</sup>. The amended version of the order of 17 April 2018 is still awaited. Even though the draft amendments to the texts on experimentation had not yet been finalised, the Government asked Parliament to consider the deployment of automated and connected vehicles by means of an ordinance within the framework of the LOM. Similarly, through article 38 of the Constitution, which allows the Parliament to empower the Government to "legislate", article 32 authorizes the Government to take measures to ensure "the provision of data from 'connected' vehicles and driver's assistants to law enforcement agencies and fire and rescue services". *The authorisation also aims to create a non-discriminatory framework for access to certain vehicle data for the private sector, allowing the development of new services*, according to the explanatory memorandum. However, it is worth noting that the legislative authorisation is much broader, since it will be up to the Government to supervise the collection and processing of the data, which will indeed be excessive. Thus, six main lines of data processing are planned. The first concerns the issue of road and public safety and should enable the police authorities, rescue services and road infrastructure managers to prevent or remedy accidents or incidents. The second envisages allowing the investigation services to access data for the purposes of accident investigation. The third, which will deserve the greatest attention, should enable insurance companies and the Fonds de Garantie des Assurances Obligatoires de dommages<sup>158</sup> to determine compensation. The fourth will allow for the maintenance and correction of faults in driving systems ("telecorrection") as well as the prevention of cyber-attacks. The sixth axis is based on the need to enable the ancillary services of land motor vehicles to offer an adapted and relevant service. The last axis will enable mobility organising authorities and road infrastructure managers to access the data produced by digital travel assistance services for the needs of their mission. It is already planned that the draft text will be submitted,

<sup>154</sup> Décr. n°2018-211 du 28 mars 2018 relatif à l'expérimentation de véhicules à délégation de conduite sur les voies publiques, *JORF* n°0075 du 30 mars 2018 known as "DPTC".

<sup>155</sup> Arr. 17 avril 2018 relatif à l'expérimentation de véhicules à délégation de conduite sur les voies publiques, *JORF* n°0103 du 4 mai 2018.

<sup>156</sup> L. n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises, *JORF* n°0119 du 23 mai 2019,

<sup>157</sup> Décr. n° 2020-1495 du 2 décembre 2020 modifiant le décret n° 2018-211 du 28 mars 2018 relatif à l'expérimentation de véhicules à délégation de conduite sur les voies publiques, *JORF* n°0292 du 3 décembre 2020.

<sup>158</sup> FGAO: if person liable for a damage remain unknown or not insured, the Fund of Guarantees for Cars created in 1951, provides compensation for the damage.

among others, to the Commission Nationale de l'Informatique et des Libertés (CNIL)<sup>159</sup>. The two Orders issued on the basis of the LOM were published in the *Official Journal* on 14 April 2021<sup>160</sup>. The publication of the implementing decree is now awaited.

54. **Order on the criminal liability rules applicable in the event of the use of a vehicle with driving delegation and its conditions of use of 14 April 2021.** A quick reading of the ordinances will show that the legislator intends to perpetuate the penal regime resulting from the experimentation. The holder of the experiment, who is designated as criminally liable, will simply be replaced by the manufacturer (new Article L 123-2 of the Highway Code) or, in the case of an automated road transport system, the organiser of the service or the operator (new Article L 3151-4 of the Transport Code). Despite the introduction of the notion of ADS, the law perpetuates the term “*vehicles with driving delegation*”. This formula is significant in that it implies the permanence of a driver, even when the ADS is activated, as provided by Article L319-3<sup>161</sup>. Indeed, according to the Article L 123-3 of the Highway Code, “*The driver must be in a constant state of readiness and position to respond to a request to intervene of the ADS*”. The Ordinance does, however, envisage laying down the framework for the operation of automated road transport systems, which is incorporated into the Transport Code. These systems, which will be defined in the expected decree<sup>162</sup>, no longer require a driver but a “*remote intervention*”, i.e. “*a person who is authorised to carry out a remote intervention on a vehicle with driving delegation operated as part of an automated road transport system*”<sup>163</sup>. In any case, those systems, which can only be SAE level 4 vehicles will only be deployed on “*predefined traffic routes or zones*”. For this reason, Article 7 of the Ordinance provides that “*The provisions specific to these systems shall enter into force the day after the publication in the Official Journal of the decree publishing the amendments to the Convention on Road Traffic of 8 November 1968 and by 1 September 2022 at the latest*”.

In accordance with what has been said above, *ALFRED* will only be used by passengers, with no possibility of the vehicle being driven. Within this operational domain the vehicle will

<sup>159</sup> Public agency created to protect personal data, support innovation, preserve individual liberties. Created in 1978, the CNIL is an independent administrative authority that exercises its functions with accordance to the French Data Protection Act of the 6<sup>th</sup> of January 1978, amended the 6<sup>th</sup> of August 2004.

<sup>160</sup> Order n° 2021-442 of 14 April 2021 on access to vehicle data, *JORF* du 15 avril 2021; Order on the criminal liability rules applicable in the event of the use of a vehicle with driving delegation and its conditions of use of 14 April 2021, *JORF* du 15 avril 2021.

<sup>161</sup> “*The driver shall be responsible for choosing to activate an automated driving system, having been informed by the system that it is able to exercise dynamic control of the vehicle, in accordance with its conditions of use*”.

<sup>162</sup> The draft notified to the European Commission on March 2021 provides that it would be : “*an automated road transport technical system deployed on predefined traffic routes or zones and supplemented by operating, servicing and maintenance rules, for the purpose of providing a collective or individual public passenger transport service by road, or a private passenger transport service, to the exclusion of means of transport subject to Decree No 2017-440 of 30 March 2017 on the safety of guided public transport*”.

<sup>163</sup> Called “*intervenant à distance*”. Article 6 of the Decree draft defines it : « *Remote intervention*: an action performed by an authorised person located outside an automated road transport system, for the purposes of:

- a) activating or deactivating the system, giving an instruction to perform, modify or interrupt a manoeuvre, or confirming manoeuvres proposed by the system;
- b) instructing the navigation system operating on the transport system to choose or modify the planning of a route or stopping points for users.”



therefore function as a fully autonomous vehicle, needing to manage all normal scenarios without relying on a human user.

Despite the recent LOM Act, the French legal framework for the deployment of automated vehicles, *ALFRED* is not yet able to drive on public roads. The disappearance of the driver is only announced for automated road transport systems, but not before the entry into force of the amendment to the Vienna Convention, at the earliest, and by 1 September 2022 at the latest.

**55. The future impact of the introduction of CAV on the architecture of the transport system.** With the future automated road transport systems as provided in the draft of French decree notified to the UE, in reality, all passenger transport is included, whether public (for hire or reward) or private ("for own account"), including non-collective transport, known as "*public private*" transport (which concerns vehicles with fewer than ten passengers), which is a new feature compared to the previous version. We are no longer dealing exclusively with public transport since private transport is included. It is curious that all transport is included in the scope of automated transport. The dividing line between the categories of transport disappears. The essential criterion becomes that of the "*predefined traffic routes or zones (and supplemented by operating, servicing and maintenance rules)*", which could be a very extensive scope. However, the concordance and compatibility of the decree with the other articles of the Transport Code that regulate transport by category should be checked, which is likely to cause problems as we will see below. The legal framework currently applicable to road passenger transport activities is complex and has not been created to incorporate CAV, both from the point of view of the conditions of access to the profession authorised to provide these services and from the point of view of the conditions of practice. As seen above, the transport categories as provided in the Transport Code are often based on the category of vehicles used, which is itself defined, among other things, according to the number of seats "*in addition to that of the driver*". The notion of "driver", in the legal sense of the term, is central to the definition of many categories and the CAV transcends these distinctions (VTC and taxis, car-sharing, car-rental<sup>164</sup>, car-pooling...). The difficulties posed by the inclusion of fully automated, *i.e.* driverless, CAV make it possible to understand that, over and above the safety issues relating to the lack of maturity of the technologies put forward, there is a legal problem relating to the need to overhaul, in the long term, the legal regime for transport in the light of the uses of CAV assigned to passenger transport services.

The three trip Use Cases as part of *ALFRED* development (A, B and C) are not clearly defined because the category of vehicle (*e.g.* number of seats, fixed stops; fixed routes, marauding *etc.*) is inherent in the organisation of the transport system and there is not enough information on the context. With the exception of purely private transport<sup>165</sup>, it is tricky to know the different kinds of services that could be available to classify the Use Cases accordingly. Each category will have to be rethought because none of them, as they stand, is capable of absorbing the autonomous, *i.e.* driverless (fully automated), vehicle<sup>166</sup>.

<sup>164</sup> This activity is not legally analysed as a transport activity, but as an activity of hiring out things, governed by the provisions of the Civil Code.

<sup>165</sup> However, it should be noted that the definition of carpooling refers to the driver (Art. L. 3132-1 of Transport Code).

<sup>166</sup> For the A, it couldn't be a regular service (eight seats at least, no predefined route *i.e.* "*the journey will start at home*") neither a transport on-demand because the destination is likely to be well served (airport). It seems to be a public private transport but the definition needs to evolve (VTC, taxis) to include the taxi-robot. The same observation can be made for use case B. The use case C could possibly be a transport on-demand depending on the context (sociological profile of the elderly person, low density area, poorly served ...)



### 2.2.3. Fear of a decline in transport public service under the guise of "mobility"

56. Apart from issues related to "green mobility" which are not directly linked to the issue of public services and the reorganisation of "governance"<sup>167</sup> in terms of mobility, which is characterised by renewed complexity<sup>168</sup>, given the thick mosaic of competences (C. transp., art. L. 1231-1 s. to 5, L 3111-5)<sup>169</sup>, the LOM does not "revolutionise" the issue of mobility as such, but limits itself to supporting, supervising and even encouraging certain newly emerging practices. Sometimes, it is even a question of semantic changes that some would describe as "marketing"<sup>170</sup>. The LOM impact study does not fail to point out that the LOTI organised a "right to transport [which] has above all resulted in the search for equal territorial coverage of public transport networks... In the end, the assertion of the right to transport will above all have significantly improved the supply and networking of the various public

<sup>167</sup> The vie-publique.fr website ( URL: <https://www.vie-publique.fr/loi/20809-loi-du-24-decembre-2019-dorientation-des-mobilites-lom>, 26.12.19) states: "The law on mobility guidelines aims to eliminate mobility white zones (areas not covered by a mobility organizing authority) by granting new powers to local authorities to organize services such as car sharing, car pooling, transportation on demand.... ». However, in its opinion on the bill, the Conseil d'Etat already denounced "an erroneous observation [...] based on the fact that many parts of the territory would not be "covered by any mobility organizing authority" and would constitute as many "white zones" where no authority would "exercise this competence". Now, on the one hand, by making municipalities mobility organizing authorities, transport law makes such an institutional gap impossible by construction and, on the other hand, a distinction must be made between the fact that a local authority may freely exercise its competence and the fact that it implements specific actions falling within this competence", General Assembly, Public Works Section, Social Section, Session of 15 November 2018, No. 395539. Nevertheless, the Government persisted in its error, arguing that it had put an end to the existence of "white zones".

<sup>168</sup> Stella Flocco, Aloïs Ramel, "La loi d'orientation des mobilités: la révolution du déplacement? "AJDA 2020, p.661: "Moreover, due to the desire for a strong territorial network in terms of mobility, as reflected in the new articles L. 1231-1 and L. 1231-3, the risk of a tangle of competences within the same territory, leading to practical difficulties between local authorities and a lack of legibility for the user, has been identified".

<sup>169</sup> In any event, as of July 1, 2021, the municipalities will no longer be the organizing authorities for mobility. More than 900 of the 1,000 existing communities of municipalities, which were not AOMs before the bill was adopted, will have to deliberate by December 31, 2020 to decide whether or not to take over the authority (see Olivier Crépin, Simon Mauroux, Raphaël Meyer, "Transfert et modalités d'exercice de la compétence d'organisation de la mobilité dans les communautés de communes" AdCF Direct January 2020).

<sup>170</sup> Philippe Delebecque- Jean-Baptiste Charles, Loi d'orientation des mobilités: l'occasion ratée d'une LOTI du XXI<sup>e</sup> siècle, EEI, 01/03/2020: "Lawyers had placed serious hopes in the "loi d'orientation des mobilités", known as the "LOM". If not a Transport Code finally completed, they hoped for a real program law on the organization of transport based on the model of the remarkable LOTI on the organization of inland transport. They will be as disappointed as the philologists, and no doubt with them. The title of the law is already confusing: why speak of "orientation" when the word refers to a location and not to a policy? Why also speak of "mobility" and not of transport? And what about the subtitles that propose, to the sound of trumpets, to "improve governance in terms of mobility" or to strengthen "the coordination of mobility organizing authorities in the service of intermodality"! In any case, the terminology is in unison: neologisms are flourishing ("ticketing", "cotransportation", "bicycle route") and adjectives are disappearing as mobility is asked to be "inclusive", "supportive", "cleaner and more active".

transport networks in France, including accessibility for people with disabilities or reduced mobility".

The decline in public transport services, particularly when envisaged as a minimum service, appears to be a real risk, particularly with regard to the effectiveness of the right to transport because, as things stand, there is nothing to guarantee the existence of an equivalent offer, whereas the philosophy of the previous text at least had the merit of imposing on the public authorities an objective relating to the establishment of a minimum public transport service<sup>171</sup>. Thus, the LOM refers to the "organisation of mobility solutions [...] à la carte" while the disappearance of a "standard" raises questions, as the alternative offer has yet to be created. It is now left to the free appreciation of the AOM<sup>172</sup> which, while they may, however, organise services relating to active mobility and services relating to the shared use of motorised land vehicles, may also, and only, limit themselves to "contributing" to the development of this mobility (C. transp., art. L. 1231-1-1, I. 4° and 5°)<sup>173</sup>. As S. Flocco and A. Ramel point out, **"no competence appears to be obligatorily exercised by an AOM. In fact, the law merely provides for a list of the powers vested in them, from which they can draw"** whereas the former Article L. 1231-1 of the Transport Code required that the power to organise regular public passenger transport services be exercised on a mandatory basis<sup>174</sup>. Although in the explanatory memorandum to the law the Government implicitly but indisputably refers to the concept of "de-mobility"<sup>175</sup>, many commentators question the guarantees offered by the LOM in this respect.

57. From the point of view of the right to mobility, the LOM may appear, from this point of view, to be built on a vision that some would describe as "fantasy" of the near future, following the example of the problem of the deployment of the automated and connected vehicle<sup>176</sup>. Indeed, the "service-based" vehicle, as opposed to the "owned" vehicle, is still awaited, not without circumspection and at least not without curiosity, particularly on an ethical, legal and social level. Moreover, the vehicle with total delegation of driving, without any person in control of it - neither inside nor outside it - is not yet technically or "legally"<sup>177</sup>

<sup>171</sup> Stella Flocco, Aloïs Ramel, "La loi d'orientation des mobilités: la révolution du déplacement?" *AJDA* 2020 p.661 "In short, the institutional solutions provided by the LOM in favor of the development of mobility in the ZPDs may seem far removed from the concrete needs of the populations, or at the very least insufficient."

<sup>172</sup> Mobility organising authorities (local public authorities responsible for the organisation and management of mobility solutions).

<sup>173</sup> "The LOM thus appears to be a source of clarification in that it expressly confers organizational competence on the AOM in these areas. It remains that these provisions must be implemented in the light of the more precise provisions of articles L. 1231-14 and following, which largely subordinate the intervention of the AOM to a lack of private initiative", *ibid*.

<sup>174</sup> "... they organize regular public passenger transport services and may organize transportation services on demand".

<sup>175</sup> Julien Damon, "Démobilité : travailler, vivre autrement", *Innovation politique* 2014, pages 247 to 275: "Having the choice of mobility means moving from a mobility offer that is imposed to a mobility offer that is chosen".

<sup>176</sup> Autonomous shuttle buses will be allowed to operate as of 2020, according to the service-public website. (URL <https://www.vie-publique.fr/loi/20809-loi-du-24-decembre-2019-dorientation-des-mobilites-lom>). However, even beyond scientific and technical contingencies, the international regulations to which France is subject (Vienna Convention) will have to be effectively changed beforehand to allow traffic without the limits due to the necessary presence of a "natural person driver" in control of vehicles with partial or total driving delegation, as said above. See *supra* part 2.2.

<sup>177</sup> In its opinion on the draft text of the LOM, the Conseil d'Etat recalled that "the rules relating to the circulation on public roads of autonomous vehicles, which this article empowers the Government to make by ordinance, cannot enter into force until after the revision of the Convention on Road Traffic

ready to circulate, even though the experiments resulting from the energy transition law of 17 August 2015<sup>178</sup>, which establishes the principle of experimental authorisations for vehicles with delegation of driving, are still in progress. Other examples may also be mentioned, but these are not exhaustive. For example, although new aid and support measures are planned for vulnerable people under the heading of "solidarity mobility", the question remains as to how eligible people will be able to access this service. For example, even if the article L. 1215-3 of the Transport Code provides that *"the action plan defines the conditions under which these people benefit from individualised advice and support for mobility. It provides, in particular, for measures enabling the public employment service to provide these services to any job-seeker, any person far from work or young people on an apprenticeship contract"*, the question will always arise as to how the target population will be able to physically access the public employment service, particularly in regions with a low public transport offer? The same is true for multimodal digital services ("MaaS"), which from the outset require enlightened and efficient access to the Internet. However, the massive development of new information and communication technologies (NICTs), while real, has not been able to resolve the issue of social and territorial inequalities. **The obstacles linked to the "digital divide", recently detailed by the Defender of Rights in their report on dematerialisation<sup>179</sup>, are perfectly transposable to the "right to mobility"**. However, the use cases developed by the present project require the use of technological tools and attention must be paid to the accessibility of new means of mobility, and in particular the automated and connected vehicle. From this point of view, the impact study of the LOM only considers the costs inherent to the investments linked to the services themselves, without taking into account the indirect expenses linked to the equipment or even to the training and education of public in the use of these new services. Paradoxically, the impact study points out in particular that in terms of "MaaS", the mechanism *"encouraging private initiatives, private services can in fact provide this service without additional cost to the public authorities"*. However, it is foreseeable that commercial players will not invest in the areas with low population density and low yields, thus placing the burden of these new services entirely on the departments concerned. This is, moreover, the whole point of the Senate's rejection vote, which pointed to the lack of funding for inter-municipalities that do not benefit from specific dedicated funding for the implementation of "mobility solutions" as an alternative to the regular public transport service under Article L. 1111-3 of the Transport Code<sup>180</sup>. In the report of the Commission for Land Use Planning and Sustainable Development submitted on 23 October 2019, it is stated that *"Article 1 of the bill therefore provides that the municipalities shall deliberate before 31 December 2020 to transfer the competence for organising mobility to the communities of municipalities of which they are members. This transfer raises the question of the resources that these inter-municipalities will have at their disposal to develop a mobility offer, given that most of them will not set up regular transport services, given the cost that such services represent, and that they will therefore not benefit from the revenue*

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*opened for signature in Vienna on 8 November 1968, signed and ratified by France, which alone will be able to allow the circulation of highly automated vehicles on public roads, whereas in its present wording it allows the circulation on the roads only of vehicles with delegated driving authority which comply with the United Nations regulations on vehicles or which can be "neutralised or deactivated by the driver" (see Article 8 of the Convention)",* CE, Assemblée générale, Section des travaux publics Section sociale, Séance du 15 novembre 2018, n° 395539 avis sur un projet de loi d'orientation des mobilités.

<sup>178</sup> L. n° 2015-992 du 17 août 2015 relative à la transition énergétique pour la croissance verte, JORF n° 0189 du 18 août 2015, p. 14263.

<sup>179</sup> Défenseur des Droits, « Dématérialisation et inégalités d'accès aux services publics », rapport 2019

<sup>180</sup> Rapport n° 85 (2019-2020) de M. Didier MANDELLI, fait au nom de la commission de l'aménagement du territoire et du développement durable, déposé le 23 octobre 2019.

from the mobility payment. The question of financing the "mobility" competence of the communities of communes was identified as a red line by the Senate from the beginning of the examination of the bill. Without resources dedicated to the financing of this competence, the intermunicipalities will indeed not be able to develop a mobility offer on the territories which are today deprived of it. Under these conditions, the Commission for Spatial Planning and Sustainable Development considers that the intermunicipalities will not be encouraged to take up the "mobility" competence, because they will not have the means to develop alternatives to the individual car, and that, consequently, the Government's promise to put an end to the "white zones of mobility" is likely to remain a dead letter, to the detriment of the inhabitants of these territories. The committee regrets that the problem of financing the competence to organise mobility, which has been identified since the beginning of the examination of this bill as central to the fight against inequalities in access to mobility, has not found an answer".

#### 2.2.4. A "right to mobility", in line with the freedom to come and go

58. "While the text of the law will not prevent legitimate disappointments on certain important aspects of the organisation of mobility (such as complex institutional solutions that seem far removed from practical considerations, renunciations on financing and ecology) and is probably not the great law likely to bring about a mobility revolution"<sup>181</sup>, **the key question is whether the legitimisation of the weakening of public service obligations disguised by social and technological innovation will not constitute a risk for the "right to mobility", by weakening its effectiveness.** It is difficult to predict whether mobility solutions will take over from public service obligations, without any real constraints, simply as a result of market forces. **While many ancillary rights are strengthened, first and foremost the obligation to inform the "mobile" citizen about the mobility offer, this information must still be accessible and, above all, the offer thus proposed must be capable of providing more solutions.** Identifying solutions does not necessarily imply the creation of new solutions. In reality, under the terms of the LOM, it is indeed the freedom of choice of the citizen with regard to the mobility offer that is strengthened, whereas in the current state, the effectiveness of the right to move rests on a legal basis that appears more fragile. However, it should be recalled that although, under Article L. 1111-1 of the Transport Code, the right to mobility does indeed refer to the freedom to choose the means of travel, it also implies that the right to travel must be made effective. These are the objectives to be pursued by the "organisation of mobility throughout the territory", which is supposed to "satisfy the needs of users". Also, the scope of the change, which is not only semantic, like a pendulum swing, tends to bring the right to mobility closer to a simple freedom and to move away from a right to claim, the translation being, paradoxically, legitimised by the effect of innovation.

### 2.3. Conclusion – Key messages

59. The analysis of the French legal system regarding the right to transport can be summarised and criticised as follows:

- The choice of means of transport whose use is authorized is inherent in the exercise of the freedom to come and go, which is an established fundamental right. So, this choice must also be protected as a fundamental freedom.

<sup>181</sup> Stella Flocco, Aloïs Ramel, *op.cit.*.

- There is no "right to transport" constituting a fundamental right as a "right-credential", a right to claim before the judges.
- The 1982 LOTI Act enshrines a right to transport, but it is only protected as an "objective" assigned to public authorities by the Law and cannot be directly invoked before the judge by individuals.
- The "right to transport" includes a "right to information" component. The Law (LOTI) specifies that "the right to transport includes the right for the user to be informed about the means offered to the user and the modalities of their use".
- Beyond the principle of a right to information, the right to transport has in reality only received three series of concrete applications, the disregard of which can be sanctioned : in favour of persons with reduced mobility or in a situation of disability, socially or economically disadvantaged persons or within the framework of the principle of territorial continuity (between mainland France and Corsica and the overseas departments, regions and communities).
- The architecture of the transport system initiated by the LOTI law (public/private transport - collective public transport/private public transport - regular collective public transport/on-demand collective public transport/occasional - public transport services/freely organised services/occasional...for the most part) is based on various categorisations of passenger transport depending on several criteria including, among others the notion of "driver" (e.g. number of seats "in addition to that of the driver", occupying domain public, marauding, fixed routes, or stops....) which come under different legal regimes.
- In France, the "right to transport" is indeed "built" on the transport "public service" because serving territories is enshrined as a "public service obligation". In application of the LOTI Act, Transport organizing authorities (AOT) shall organize regular public passenger transport services and may organize transport services on demand.
- The Mobility Orientation Act (2019 LOM) heralds the advent of a new era and is in fact, with a slow pace, the beginning of a "disruption" - in that it dissociates "mobility" and "public service", whereas, the architecture of land passenger transport policy was hitherto essentially based on the notion of "public service".
- The transport categories as provided for in the Transport Code are based on several well-defined criteria that will eventually become obsolete for some of them. The CAV will transcend these distinctions. The notion of "driver" is central to the definition of many categories and legal regimes.
- Despite the recent LOM Act, the French legal framework for the deployment of autonomous vehicles, driverless CAV is not yet able to drive on public roads. The disappearance of the driver is only announced for automated road transport



systems, but not before the entry into force of the amendment to the Vienna Convention, at the earliest, and by 1 September 2022 at the latest.

- The difficulties posed by the inclusion of fully automated CAV make it possible to understand that, over and above the safety issues relating to the lack of maturity of the technologies put forward, there is a legal problem relating to the need to overhaul, in the long term, the legal regime for transport in the light of the uses of CAV assigned to passenger transport services.
- The key question is whether the legitimisation of the weakening of public service obligations disguised by social and technological innovation will not constitute a risk for the "right to mobility", by weakening its effectiveness.

60. Mobility in France is not legally linked to a mode of transport, although the legal transportation system has in fact been conceived by the LOTI Act on the basis of transport "public service" which aimed to guarantee effectiveness of right to transport. Thus, the automated and connected vehicle, like any "*conventional*" vehicle, will participate fully in the effectiveness of a "right to transport" as it constitutes a new innovative solution promoted by the LOM supposed to enhance mobility of individuals, provided of course that it complies with the requirements laid down in particular by the Vienna Convention on Road Traffic, technical regulations and also national traffic codes. Nonetheless, the legal transportation system will eventually require rethinking of its architecture to make room for 'autonomous' vehicles - conceived as a new "mobility solution"- as a transport service status. While the conditions for its deployment are envisaged in terms of liability, security and conditions of use of automated road transport<sup>182</sup>, its place as a transport service and the related legal regime have not yet been decided. Its legal status, from this point of view, is still to be invented. As part of the exercise of the freedom to come and go, new applications could emerge thanks to the connectivity built into the vehicle. As with any mode of transport, the automated and connected vehicle will have to adapt to any restrictions that may be imposed (e.g. attacks, Covid-19 crisis). The Covid-19 has indeed shown the need to develop new means of locomotion to limit the spread of the pandemic. Although the automated and connected vehicle tested in the project can perfectly fit into the framework of the "renewal of the transport offer", it is nonetheless subject to the health requirements imposed by the legislator. For instance, these could facilitate cross-border exchanges, in particular by reading passports or taking passengers' temperatures, subject to compliance with the specific provisions on the protection of personal data. This issue seems to be a source of legal problematic of CAV deployment and especially with *SUaaVE project* which involves the use and processing of biometric and health data in real time<sup>183</sup>. The automated and connected vehicle is addressed by the new regulation even in the absence of technical regulations harmonising and authorising, in particular, driving delegation functions for all levels. The services experimented within the framework of the project fully participate in the legislative

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<sup>182</sup> As mentioned above, the implementing regulations for the LOM Act are currently being adopted. Two ordinances have already been published. The decree draft defines the notion: "*an automated road transport technical system deployed on predefined traffic routes or zones and supplemented by operating, servicing and maintenance rules, for the purpose of providing a collective or individual public passenger transport service by road, or a private passenger transport service, to the exclusion of means of transport subject to Decree No 2017-440 of 30 March 2017 on the safety of guided public transport*"(Art.1-2).

<sup>183</sup> Subtask on personal data, on going deliverable.



will to promote "*new mobilities*" both from a technical point of view - vehicle aspect - and from a service point of view - transport on demand, car-pooling, *etc*, as a "*mobility solution*" promoted by the LOM Act. But this latest issue still needs to be legally framed. It is worth considering whether the other countries concerned have adopted the same approach to the right to transport, especially with the implementation of CAV in future transport systems. Is there also a change in the notion of mobility?



### 3. STUDY ON COMPARATIVE LAW ON RIGHT TO ACCESS TO TRANSPORT

61. CAV, and especially fully automated vehicles, are attractive because they can offer environmental benefits by contributing to traffic fluency and could improve people's mobility by giving them greater access to transport through this automated mode of driving. As such, the deployment of CAV should indeed be part of public policies promoting, and even guaranteeing, a right to transport. It is therefore interesting to check whether there is a common core, *i.e.* a common framework of legal rights to guarantee mobility of individuals. A comparative study of the laws concerning the right of access to transport raises firstly questions about the definition of the right of access to transport (**part 3.1**) and the way in which it could be invoked before a judge (**part 3.3.**). This study is carried out by comparing the rights protected mainly by the federal transport policy in the United States or the planning policy specific to Germany, but also by comparing them with French, Spanish and Italian law, which also protects this right, in accordance with regulations imposed by Community law (**part 3.2.**).

#### 3.1. Right to transport definition

##### 3.1.1. Notion

62. *'Mobility can be defined as the social relationship to change of place, i.e. the set of actions that contribute to the movement of people and material objects'*<sup>184</sup>. The term mobility refers to two aspects, one social and the other technical. The ability to move is unequal from a physical, social and geographical point of view. A person living in a rural area does not have the same ability to move as a person living in an urban area. Access to transport provides access to basic services (*e.g.* supermarket), public services and especially health care services. It also conditions access to the labour market and to leisure activities. Consequently, social life depends on the ability to move around. In legal terms, this could be translated into freedom of movement, which is a condition for the exercise of other rights and several other freedoms, and which would thus be guaranteed by the effectiveness of a right to transport<sup>185</sup> (see **ANNEX 1** for the link between the two concepts). Travel can be carried out individually or collectively. Public transport must correct these inequalities and combat the segregation that results from the lack of access to an adequate transport solution. Consequently, the right to transport should require the implementation of a transport policy that offers technical solutions to meet a social need for mobility. It is a tool for opening up access. As seen above in French analysis, the right to transport shall imply equal territorial coverage of public transport networks. The principle of territorial equity then complements social equity (see **Part 2.1**). A right to transport, which became a right to mobility with the French LOM Act (see **Part 2.2.**) is explicitly enshrined in the French Transport Code. It refers to the user's right to move around *"under reasonable conditions of access, quality, price and cost for the*

<sup>184</sup>Jacques Levy, « Transports - Mobilité et société », *Encyclopædia Universalis* [en ligne], URL : <http://www.universalis.fr/encyclopedie/transports-mobilite-et-societe/>

<sup>185</sup> UN-Habitat 2018 report, "Tracking Progress Towards Inclusive, Safe, Resilient and Sustainable Cities and Human Settlements, SDG 11 Synthesis Report High Level Political Forum 2018 : *"A good transport system is synonymous with the growth of many urban economies and the quality of life found in cities. Sustainable transport is a key ingredient for the achievement of most SDGs, particularly those related to education, food security, health, energy, infrastructure, and environment."*, p 45.

community, in particular by using a means of transport open to the public". Access to transport raises a variety of issues. The law on mobility guidelines introduced the term right to mobility, which refers to a broader concept than the right to transport. The right to transport refers more to access to a public transport network, whereas the right to mobility envisages the possibility for the individual to travel alone, thanks in particular to new modes of transport. The right to mobility is intended to meet the specific travel needs of each individual. The right to mobility also implies an adaptation of infrastructure to enable users to make optimal multi-modal use of the means of transport they dispose and to provide users with relevant and timely information on the transport offer adapted to them (right to information component) in order to provide the best service (Mobility as a service). Equity, accessibility, and inclusivity of the system therefore underpin this new concept. The question must be asked whether different, stronger, or weaker requirements are included in the visions of this right to transport in the other countries studied. For example, respect for everyone's right to transport (choice of means of transport) could impose a free choice including environmentally friendly transport offers or transport that is in line with one's cultural, ethical and moral standards. Indeed, the 2018 UN-Habitat report stresses the need to integrate this aspect into the transport policy : *"Given that the transport system is a space where people spend significant amounts of time every day, governments and city decision makers need to consider comfort and safety issues as well as conditions of dignity for users. Leaving no-one behind in the context of sustainable transport means that in the coming decades, transport systems that are inclusive, integrated, gender-sensitive and those that match people's wishes should be built"*<sup>186</sup>. Given that the countries covered by the study are all members of the European Union (with the exception of the United States), it is useful to look first at the understanding of this concept within the European Union.

### 3.1.2. European transport policy and recognition of rights

63. **The establishment of a European transport area was seen as essential for the free movement of persons and goods, which implies liberalization of all modes of transport.** All types of transport, road, rail, air, inland waterway and maritime transport are concerned by the European transport policy. As mentioned above in **part 2.1.3** and detailed in **part 2.1.1.1**, from the point of view of the legal regime of passenger transport (see **ANNEX 2**), with the exception of PMR legislation<sup>187</sup> (see **ANNEX 3**), it must be considered that **no general and effective right to transport is enshrined in Community texts, although the question of transport appears, in the construction of Europe, to be consubstantial, *ab initio*, with the concept of "public service"** and is underpinned, in accordance with Protocol No 26<sup>188</sup>, by a value implying *"a high level of quality, safety and affordability, equal treatment and the promotion of universal access and users' rights"*. It should be pointed out that transport system is a particularly sensitive area of sovereignty for the Member States, affecting the dynamism of their economies and the development of their territories, in accordance with the principle of subsidiarity. Conflicts in this area can be particularly paralyzing (transport strikes), which explains why there was for a long time an implicit consensus in the Council to take little or no action in the field of transport, and why transport negotiations are still

<sup>186</sup> *Op. cit.* p 49.

<sup>187</sup> European Union Persons with Reduced Mobility (PRM) legislation.

<sup>188</sup> Protocol No 26 on services of general interest annexed to the TFEU, Protocol (No 26) On Services of General Interest *OJEU* C 326, 26.10.2012, p. 308–308.

particularly difficult. Despite this, there has been significant recent progress in the implementation of very voluntary public policies.

### 3.1.2.1. Objectives

64. **Provide equitable access to transportation.** Efforts are underway to reverse the current inequitable access to transportation through the development of well-planned transit arteries to connect marginalized areas to central commercial points (transit-oriented development). Indeed, the Senate (fr) in an information report drawn up in 2001<sup>189</sup> noted that the European Union has one of the most extensive transport infrastructure networks in the world, but that despite the completion of the single market and the increasing integration of national economies, the European transport area remained highly fragmented. Indeed, when two cities or two regions are separated by a border, traffic between them is divided by a considerable factor, of the order of 5 to 10 in 2000 compared with two cities located in the same country. Thus, from a transport point of view, unlike the United States, the European Union is not a continent but looks like an "archipelago". The report stressed the need for *'an operation to harmonize the conditions of competition, better integration of environmental and safety considerations and the urgent construction of new infrastructure which need to meet a demand that is developing so vigorously that it is leading to unacceptable congestion and saturation'*.

65. **The inclusive transport strategy.** On December 2, 1992, the Commission adopted a White Paper on the future development of the common transport policy [COM (1992) 0494]<sup>190</sup>. It advocated the opening up of transport markets, the development of the trans-European network, the strengthening of safety and social harmonization.

Then, the 2011 White Paper<sup>191</sup> envisioned to create the single European transport area as a cornerstone of European transport policy. Fostering cohesion, reducing regional disparities as well as improving connectivity and access to the internal market for all regions, are of strategic importance for the EU.

In Resolution on a European strategy for low-emission mobility, adopted in December 2017, Parliament stressed that transport sector must make a greater contribution to climate objectives. In this context, it insisted, inter alia, on the following

- the need to invest in multimodality and public transport;
- the need to send clearer price signals for all modes of transport, better reflecting the polluter pays and user pays principles; and
- on the role of digitization in sustainable mobility.

<sup>189</sup> *La politique commune des transports*, Rapport d'information n° 300 (2000-2001) de M. Jacques Oudin, le 3 mai 2001, [https://www.senat.fr/rap/r00-300/r00-300\\_mono.html#toc39](https://www.senat.fr/rap/r00-300/r00-300_mono.html#toc39)

<sup>190</sup> COM (1992) 494: Communication from the commission - the future development of the common transport policy - A global to the construction of a Community framework for sustainable mobility.

<sup>191</sup> COM (2011) 144 final, "White Paper – Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system".

### 3.1.2.2. Means

66. Community policy on access to transport was initiated following an action for failure to act by the European Parliament against the Council. The Court of Justice of the European Communities, in its judgment of May 22th 1985 (in Case 13/83) on the action for failure to act, urged the Council to act. This way it gave a real boost to the common transport policy. European transport policy is governed by Article 4(2) and Title VI of the TFEU (Articles 90 to 100). It aims to promote the free, efficient and safe movement of goods and persons throughout Europe by means of integrated networks combining all modes of transport (road, rail, water and air). It imposes minimum requirements for clean fuels as part of the policy to combat climate change. Since the Treaty of Lisbon, the entire common transport policy has been governed by the ordinary legislative procedure (formerly known as co-decision). The Treaty abolished the exceptions that previously existed. Transport infrastructure is financed by the **European Interconnection Mechanism**, which has a budget of €50 billion for the period 2014-2020 to support the launch of high-performance, sustainable and unified trans-European networks in the fields of transport and energy, as well as broadband and digital services. On 11 March 2021, the European Parliament and the Council reached a provisional agreement on the 2021-2027 edition of the European Interconnection Mechanism. This facility is intended to support projects deemed to be of general interest in the transport, telecommunications and energy sectors in the EU. It is part of the European Union's (EU) Trans-European Transport Network (TEN-T) strategy for a comprehensive network by 2030. The aim is to strengthen the interconnection of transport systems between member countries by ensuring common standards of safety, security and quality. Furthermore, in July 2016, the Commission published a European strategy for low-emission mobility, and then detailed its objectives in a communication entitled *'Europe on the move – An agenda for a socially fair transition towards clean, competitive and connected mobility for all?'*<sup>192</sup> before presenting, in November 2017 and May 2018, a three-part "Mobility Package" which reviews the rules for transport in Europe, focusing on the road, and more specifically implements a strategy for automated mobility ('autonomous' vehicle). In this area, different stages can be identified.

67. **The first step was the promotion and rise of intelligent transport systems**<sup>193</sup>, and later on, C-ITS. So, the 2010 Communication on the European Road Safety Area included automated and connected vehicles<sup>194</sup>. The Communication also refers to *"the vehicles of the future"* and in this respect states that *"the development of so-called 'cooperative systems', which allow vehicles to exchange data and interact with infrastructure and other vehicles in their vicinity, thus ensuring that drivers are optimally informed, should contribute significantly to improving road safety by reducing the risk of accidents and improving overall traffic flow"*. The Communication then recalls that in the context of the implementation of the action plan for the deployment of intelligent transport systems in Europe and the proposal for a directive

<sup>192</sup> 31.5.2017, COM(2017) 283 final.

<sup>193</sup> 2000/53/EC: Commission Recommendation of 21 December 1999 on safe and efficient in-vehicle information and communication systems: A European statement of principles on human machine interface (notified under document number C(1999) 4786) (Text with EEA relevance), *Official Journal L* 019 , 25/01/2000 P. 0064 – 0068 ; Communication on Information and Communication Technologies for Safe and Intelligent Vehicles on 15 September 2003, ; Communication On the Intelligent Car Initiative "Raising Awareness of ICT for Smarter, Safer and Cleaner Vehicles" COM(2003) 542 final 15.02.06.

<sup>194</sup> Communication from the Commission, Towards a European road safety area: policy orientations on road safety 2011-2020, 20.07.10, COM/2010/0389 final.

laying down the framework for the deployment of intelligent transport systems in the field of road transport and for interfaces with other transport modes, the plan provides that the Commission shall propose, *inter alia*, the specifications necessary for the exchange of data and information between vehicles (V2V), between vehicles and infrastructures (V2I) and between infrastructures (I2I). An important step was indeed the prior adoption of the ITS Action Plan<sup>195</sup>, the ITS Directive<sup>196</sup> and its complementary delegated regulations including automated and connected vehicles<sup>197</sup>. This Action Plan aims to accelerate and coordinate the deployment of Intelligent Transport Systems (ITS) in road transport, including interfaces with other transport modes. It aims “*Europe’s transport system to play its full role in satisfying the mobility needs of the European economy and society*”. Especially, one of the goals is to “*Improving transport efficiency and “facilitate mobility”, by “Real-time Traffic and Travel Information (RTTI) services, more and more combined with satellite navigation, are now being offered from both public and private sources*”. The work programme had to be updated in line with the technological developments and material contingencies. Various decisions were taken to update the initial work programme set out in the ITS Directive. In parallel with the priority actions, a special effort was made in the area of C-ITS. The commission adopted a new “*European strategy on Cooperative Intelligent Transport Systems, a milestone towards cooperative, connected and automated mobility*”(CCAM)<sup>198</sup> that refers to the new technologies that “*can spur social innovation and ensure mobility for all, with the emergence of new players and new forms of value creation such as the collaborative economy*”. However, on 13 March 2019, the Commission adopted a Delegated Regulation on specifications for the provision of C-ITS<sup>199</sup>, supported by an impact assessment. Its objective was to develop minimum legal requirements for the interoperability of C-ITS and to allow for the large-scale deployment of C-ITS systems and services from 2019 onwards, in particular by focusing on the “*Day1*” services, *i.e.* the C-ITS services that are expected to be deployed in the short term. It describes how vehicle-to-vehicle, vehicle-to-infrastructure and infrastructure-to-infrastructure communications are to be provided by means of C-ITS stations and how C-ITS stations are to be marketed and commissioned to enable the provision of C-ITS services to ITS users. The delegated regulation did not enter into force following an objection from the Council of the European Union. The draft recalled that “*this enables a wide range of*

<sup>195</sup> Communication from the Commission - Action plan for the deployment of Intelligent Transport Systems in Europe, 16.12.08, COM/2008/0886 final.

<sup>196</sup> Directive 2010/40/EU of the European Parliament and of the Council of 7 July 2010 on the framework for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport Text with EEA relevance, JO L 207 du 6.8.2010, p. 1–13.

<sup>197</sup> In 2013, a regulation on data and procedures for the provision, as far as possible, of universal minimum traffic information related to road safety free of charge for users and the provision of multi-modal travel information services was adopted. In 2014, a regulation was adopted on the specifications for the provision of real-time traffic information services. In 2017, this text was complemented by the regulation on the specifications needed to ensure that multimodal travel information services made available throughout the Union are accurate and available across borders for ITS users. Finally, it was on this legal basis that the European “*ecall*” was adopted, which was one of the priority actions of the Commission's action plan.

<sup>198</sup> Communication “A European strategy on Cooperative Intelligent Transport Systems, a milestone towards cooperative, connected and automated mobility”, 30.11.16, COM/2016/0766 final.

<sup>199</sup> Commission Delegated Regulation (EU) .../... supplementing Directive 2010/40/EU of the European Parliament and of the Council with regard to the deployment and operational use of cooperative intelligent transport systems, 13.03.19, C/2019/1789 final.



information and cooperation services". It is worth mentioning that the text recalls both the benefits but also warns of the risks of increased supply and over-information<sup>200</sup>.

68. **The 'accelerator' on automated and connected mobility.** After the founding political act of the Amsterdam Declaration of 14 and 15 April 2016 on cooperation in the field of connected and automated driving, EU has a priority action in the financial support of R&D and a plethora of "consulting" production. In 2018, European Parliament adopted a non legislative resolution on a European strategy on Cooperative Intelligent Transport Systems<sup>201</sup> that calls Member States' authorities and the industrial sector to *"respond to the pressing need to make transport safer, cleaner, more efficient, sustainable, multimodal and accessible for all road users, including the most vulnerable and those with reduced mobility"*. The resolution *"underlines the need to provide road users with more choices, more user-friendly, affordable and customised products, and more information"* (§19). In May 2018, the Commission published a communication that is supposed to be about the "EU strategy on future mobility"<sup>202</sup> and focuses on automated but also connected mobility. For the first time, the Communication makes explicit reference to artificial intelligence. The Communication insists, right from the start, on the fact that *"driverless vehicles" "could pave the way for new services and offer new ways to respond to the ever-increasing demand for mobility of people and goods".... "Driverless vehicles could bring mobility to those who cannot drive themselves (e.g. elderly or disabled people) or are under-served by public transport". They could encourage car-sharing schemes and 'mobility as a service' (i.e. selling rides, not cars)"*. The exchange between institutions did not falter as the Parliament adopted on January 19<sup>th</sup> of 2019 a *"resolution on autonomous driving in European transport"*<sup>203</sup>. Despite in its point 6, the resolution *"underlines the need for the development of autonomous vehicles that are accessible for persons with disabilities and reduced mobility (PRM)"*, this text focuses more on the legal aspects in terms of liability and regulation. Then, in the context of the meeting of the 27 leaders of the post-Brexit Union in Sibiu, Romania, on 9 May 2019<sup>204</sup>, the European Commission made recommendations on the future configuration of Europe in an increasingly multipolar and uncertain world. This communication, which is intended to be synthetic and educational, includes a paragraph dedicated to automated and connected mobility. President Juncker recalls the urgency of establishing *"a modern and flexible regulatory framework for mobility and transport, in particular for connected and automated mobility"*. To this end, the contribution stresses the need to improve connectivity across Europe by completing the single European transport Area and calls on Europe to *"lead the way in developing new international standards for safe, smart, sustainable and resilient mobility"*. The communication specifically targets the fight against cyber-attacks and urges the promotion of *"a truly circular economic approach and to address the social impact of the shift*

<sup>200</sup> *"The benefits of C-ITS span a range of areas and include better road safety, less congestion, greater transport efficiency, mobility and service reliability, reduced energy use, fewer negative environmental impacts, and support for economic development. At the same time, care must be taken to avoid potential negative effects, e.g. increased traffic demand because of these improvements, drivers experiencing information overload, or the additional data sharing leading to greater cybersecurity or privacy risks"*.

<sup>201</sup> European Parliament resolution of 13 March 2018 on a European strategy on Cooperative Intelligent Transport Systems (2017/2067(INI)),

<sup>202</sup> Communication, "On the road to automated mobility: An EU strategy for mobility of the future", 17.05.18, COM/2018/283 final.

<sup>203</sup> European Parliament resolution of 15 January 2019 on autonomous driving in European transport (2018/2089(INI)).

<sup>204</sup> Communication, "Europe in May 2019: Preparing for a more united, stronger and more democratic Union in an increasingly uncertain world The European Commission's contribution to the informal EU27 leaders' meeting in Sibiu (Romania) on 9 May 2019", COM/2019/218 final.

to cleaner and more automated modes of transport". It should be noted, however, that the paragraph on automated and connected mobility is part of a "*competitive Europe*" program and not part of a "*fair Europe*" in terms of promotion of Social Rights and to address inequalities and social challenges. At the end of 2020, the Commission presented its new strategy "*Sustainable and Smart Mobility Strategy –putting European transport on track for the future*"<sup>205</sup> based on the greening of transportation system ("zero emission mobility"). However, it is interesting to note that, for the first time, the Commission refers in this document to the notion of "*comfort*" in relation to the notion of automation, alongside that of traditional safety, security and reliability, as a goal, ""in order to maintaining the EU's leadership in transport equipment manufacturing and services and improving our global competitiveness".

The new 2020 EU transport strategy places comfort among the objectives to be achieved in automated transport, alongside safety, security and reliability.

ALFRED, with its "Adaptive, Cognitive and Emotional" (ACE) Interface, formulated as the control strategies for the management of CAV behaviour to enhance trip user experience on-board (Acting and communicating), including the communication with the passenger via HMI and vehicular dynamic response (ride comfort, ambient and postural comfort), will help to achieve this goal.

Most importantly, the issue of equal access is addressed directly in point 8<sup>206</sup>. It is clear that this issue has been brought to the fore by the effect of the pandemic, as the Commission itself points out. Indeed, this issue is thus developed and is the subject of the "*flagship initiative*" n°9 called "*Making mobility fair and just for all*". The action plan would thus target various beneficiaries:

- people with low disposable income,
- people with disabilities or reduced mobility,
- people with low IT-literacy
- people living in peripheral and remote areas, including the outermost regions and islands

In order to achieve this goal, the Commission will consider options to bring about a multimodal PSOs system<sup>207</sup>, notably with a view to allowing all transport modes to compete on an equal footing to fulfil relevant transport needs. This could be an interesting way to promote and insert the CAV into the public transport network.

<sup>205</sup> Communication, "Sustainable and Smart Mobility Strategy –putting European transport on track for the future", 9.12.2020, COM(2020) 789 final.

<sup>206</sup> "This evolution should leave nobody behind: it is crucial that mobility is available and affordable for all, that rural and remote regions are better connected, accessible for persons with reduced mobility and persons with disabilities, and that the sector offers good social conditions, reskilling opportunities, and provides attractive jobs. The European Pillar of Social Rights is the European compass to make sure that the green and digital transitions are socially fair and just".

<sup>207</sup> The Declaration of Public Service Obligations (PSO) is the mechanism available to the public authorities to ensure a collective public transport system that reaches all citizens, in those cases in which an operator, if it were considering its own commercial interests, would not provide the service or its offer would be insufficient or would not meet the necessary conditions of frequency, quality or price, without receiving compensation and/or the right of exclusivity in the provision of the service in return. See **part 2.1.3** for more details about the concept.

In parallel, and as seen above, the EU has laid the foundations for future strictly technical regulation of CAV, which are only applicable from 6 July 2022<sup>208</sup>.

At the state level, do we find the same level of guarantees for mobility ?

There is no general right to transport guaranteed in the Union or international laws, but consecration of different rights of the passenger for certain modes of transport (as, for example, the right to availability of tickets and reservations, the carrier's liability towards the passenger, rights in case of delay, cancellation..., cf **ANNEX 2**), with the exception of an effective "right to transport" for persons with reduced mobility or a disability, understood as a real guarantee of access to existing transport services (**ANNEX 3**)

EU ITS and C-ITS: while the right to transport is not expressly targeted, the efficiency of the transport system, its interoperability, and the improvement of the information offered to the road user are expressly objectives. The EU legal framework for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport, without enacting a general right for the transport user to be informed, is a real "step" towards improving the effectiveness of the right to transport<sup>209</sup>.

They comply with the "right to information", essential component of effectiveness of a right to transport.

Although the texts on connected and automated mobility recall the need to make transport more accessible, especially to PRMs, they are rather oriented towards the search for competitiveness and not accessibility.

ALFRED, by "concept for new potential drivers" and, in general, with its new concept of HMI "cognitive smart assistant" will empower the "right to transport" by generating new mobility solutions on the one hand and reinforce its component "right to information" by providing and adapting dynamically relevant information to the "driver" for better understanding about the state of the vehicle within the cooperative traffic flow on the other hand.

The promotion of a multi-modal PSOs system by the latest EU strategy envisaged by the Commission may be an interesting avenue to promote the use of CAVs, especially like ALFRED, to meet relevant transport needs of certain less mobile populations.

But that is important to note that the EU regulations applicable to date<sup>210</sup> always presupposes a person in command of the vehicle and thus the comprehensive controllability of the vehicle according to its scope and technical specifications. So far, there is no sufficient legal framework at European level for motor vehicles with automated driving functions.

## 3.2. The implementation of public policies adapted by the States

### 3.2.1. The right to transport in sparsely populated or landlocked territories

69. The capacity for mobility has consequences on social life, so that social exclusion and geographical exclusion are intimately linked. In fact, it is more difficult to benefit from alternative transport solutions to the private vehicle in sparsely populated, remote or landlocked areas. However, the policy conducted to promote the right of access to transport takes account of the geographical particularities of these areas which are poorly or even not served by public transport. Taking into account the spatial dimension of social inequalities

<sup>208</sup> See **part 1.1.** for more precisions.

<sup>209</sup> For further details, see **part 2.1.3.** for developments and references.

<sup>210</sup> Regulation (EU) 2018/858 of the European Parliament and of the Council of 30 May 2018 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC.

leads the public authorities to question the levers for reducing them, starting with access to transport.

### 3.2.1.1. In Germany

70. **German transport access policy faces permanent challenges in managing the massive flows it has to cope with due to its central location on the European continent.** Indeed, it has to cope with congestion in its road system and saturation of its rail paths. Public policies in the transport sector are therefore very active and innovative in Germany. It was Germany itself that launched the major reform for the liberalization of the intercity coach market in 2013, which France followed in 2015<sup>211</sup>.

71. **Transport, a multi-level competence.** The German Basic Law sets an objective for public transport policies, namely, a certain homogenization of living conditions on the federal territory ("*Gleichwertige Lebensverhältnisse*"<sup>212</sup>). This therefore has an impact on financing and infrastructure choices. Due to the principle of subsidiarity, the Federation does not have all the powers of action but sets a strategic framework, with the Länder implementing on the ground the infrastructure decisions decided by the Federal Transport Infrastructure Plan ("*Bundesverkehrswegeplan*") which is passed as a law. Decisions concerning transport are therefore made by a multi-level structure: the Bund (BVWP), the Länder, which also present a transport investment plan and 'transport' public policy guidelines linked to citizens' mobility, and the municipalities with urban travel and development plans. The objectives of sustainable development are also clearly stated in the amendment to the Spatial Planning Act drawn up in 1998. German public authorities at all levels also emphasize the importance of establishing a network of 'European metropolitan regions' well endowed with transport infrastructure, according to the decisions of the MKRO (the Conference of Ministers for Spatial Planning, which brings together the Bund and the 16 Länder). Although a Federal Spatial Planning Act (ROG) sets a federal framework for spatial planning issues and lays down the strategic axes, the application of the principle of subsidiarity remains in Germany. Thus, the free autonomy of the municipalities and the priority given to feedback from all levels of government strongly influence the orientation of transport policy in Germany.

72. **Accessibility and local mobility are indispensable for equal living conditions.** Based on the proposals of the commission for "Equal Living Conditions" established in 2018, the Federal Cabinet adopted on 10 July 2019 federal government measures to implement the commission's findings. The fourth measure is called "*Improve mobility and transport infrastructure in the area*" and it is currently being implemented. The Commission's report

<sup>211</sup> L. Guihéry « L'essor des nouveaux services des autocars interurbains : le casse tête des politiques publiques en Allemagne », *L'Allemagne d'aujourd'hui*, 2015/2 n°212.

<sup>212</sup> There are considerable differences within Germany in regional income and employment opportunities, in securing mobility and in access to basic services and services of general interest. These trends are reinforced by demographic developments, but also by economic effects of the modern division of labour. As the BMI (Minister of the Interior, for Building and Home Affairs) said, "*Structurally weaker regions have difficulties in keeping younger, often well-educated people in the area. Structurally stronger regions, on the other hand, benefit to a greater extent from the influx of qualified people from Germany and abroad*". Equal living conditions (*Gleichwertige Lebensverhältnisse*) are of central importance for social cohesion in Germany. The Federal Government has therefore made it a cross-departmental task to create equal living conditions everywhere in Germany. The Federal Government set up the Equal Living Conditions Commission by cabinet decision on 18 July 2018. It held its inaugural meeting on 26 September 2018. On the basis of these proposals, the Federal Cabinet decided on 10 July 2019 on measures to be taken by the Federal Government to implement the Commission's findings.

remains that *“Accessibility and local mobility are indispensable for equal living conditions... Today, mobility policy is much more than transport policy; today, settlement structure, supply and mobility, environmental and climate protection must be thought together.”* In reality, however, public mobility services in rural areas are often sparse and not sufficiently geared to people's needs. Therefore, an environmentally friendly, comprehensive, efficient, affordable and user-oriented mobility offer should be created. This is another reason why the federal government has increased its investments in local public transport. It announces that through the amendment of Article 125c of the Basic Law, the Municipal Transport Financing Act can already be amended before 1 January 2025. This should mean that federal investment aid for improving transport conditions in the municipalities can increase as early as 2020 and then reach 1 billion euros as of 2021. The report provides measures to create nationwide connections and *“opening up the legal framework for new services that strengthen and complement regular transport”*. The commission concludes that *“in future, the development plans of the federal government and the federal states should take much greater account of regional mobility concepts with locally adapted, flexible and needs-based solutions”*. Connections between growth centers and their surrounding areas, which are also more sparsely populated, as well as in and between more sparsely populated regions, should be strengthened and opportunities created at the federal, state and local levels to ensure that measures can be implemented for structural policy reasons. The Federal Government's report on the interim assessment of the implementation of the measures of the Equal Living conditions policy during the 19th legislature was published on 28 April 2021<sup>213</sup>. In addition to investments in traditional infrastructure (especially rail), the report points out that the Federal Government is also driving forward the development of new and, in particular, flexible forms of mobility that are attractive for rural areas with the amendment of the Passenger Transport Act, which, among other things, creates a legal framework for a new form of scheduled transport within public transport (scheduled on-demand transport) as well as for a new form of occasional transport outside public transport (bundled on-demand transport). The important areas of work remains to be, in particular, the expansion of cycling, walking and public transport in urban and rural areas as well as their digitalisation and networking and the expansion of infrastructures for alternative mobility. While the report does not target the CAV especially, it does target the autonomous minibuses *“for the combined transport of people and goods in rural areas”*. The report highlights the implementation of innovative technologies and solutions in Germany in the long term. **The above-mentioned bill, “Draft Act of the Federal Government Draft Act amending the Road Traffic Act and the Compulsory Insurance Act - Autonomous Driving Act”<sup>214</sup> passed by the Bundestag on 20 May 2021, envisages the circulation of autonomous vehicles in predefined operational areas (SAE 4 only)<sup>215</sup>.** So the impact assessment of the bill states that *“citizens will not be owners of motor vehicles with autonomous driving functions in defined operating areas in the foreseeable future”*. Indeed, the government's presentation of the bill recalls

<sup>213</sup> Politik Für Gleichwertige Lebensverhältnisse, Zwischenbilanz Der 19. Legislaturperiode, Bericht der Bundesregierung zur Zwischenbilanz zur Umsetzung der Maßnahmen der Politik für gleichwertige Lebensverhältnisse in der 19. Legislaturperiode, 28.04.21.

<sup>214</sup> *“Gesetzesentwurf der Bundesregierung Entwurf eines Gesetzes zur Änderung des Straßenverkehrsgesetzes und des Pflichtversicherungsgesetzes – Gesetz zum autonomen Fahren”*, <https://dip21.bundestag.de/dip21/btd/19/274/1927439.pdf>

<sup>215</sup> *“Enabling the operation of motor vehicles with autonomous driving functions in defined operational areas represents the next step towards introducing automated, autonomous and connected vehicles into regular operation on public roads”.... “This law on autonomous driving opens up opportunities for use in various mobility areas. Various uses in public transport within municipalities are conceivable. Smaller and larger vehicles can be used to cover various passenger transport needs. In the municipal sector, there are also opportunities for service and supply trips”.*



that “the use of automated, autonomous, i.e. driverless and networked motor vehicles in public road transport will be an essential component of future mobility”. However, it also recalls that, generally speaking “In addition, they enable new mobility concepts that offer not only conventional transport solutions (e.g. regular transport) but also individual options for picking people up from their front door and taking them to their destination. The presentation highlights the fact that “this can also strengthen social inclusion, because the use of driverless vehicles helps people with limited mobility - like all other citizens - to participate in social life. This is particularly true in structurally weak and rural regions.” (p15) and adds “Autonomous driving will make a decisive contribution to maintaining and improving mobility, especially in sparsely populated, rural areas. By supplementing or replacing regular public transport services, a contribution is made to creating equal living conditions between urban and rural areas.” (draft, p 21).

ALFRED, as an alternative mobility form, could easily fit in with the German concept of equal living conditions “*Gleichwertige Lebensverhältnisse*”, recently highlighted in terms of mobility needs adapted to the diversity of people and territories.

### 73. Focus on CAV ethical aspect in the 2021 German Act on Autonomous Driving Draft.

On the basis of the results of the independent Ethics Commission on Automated and Connected Driving from the previous parliamentary term, the Federal Government has adopted an action plan for the creation of ethical rules for self-driving computers. The Commission published its report in June 2017, without the legislator being aware of its recommendations at the time for the first 2017 Law on Automated Driving. It drew up a report containing 20 principles that it considers to be ethical rules prior to the circulation of automated and connected vehicles<sup>216</sup>, while reserving a certain number of issues that it expressly details and considers should be the subject of additional work prior to the deployment of the various technologies implemented in this area. The Government indicates that the measures contained in this report are being implemented and specifies that these issues can only be the subject of cross-cutting discussions at EU level in order to develop a harmonized framework at European level. However, while the remaining issues have not been the subject of further recommendations, Germany has already announced a new “autonomous driving law” in mid-2021, which it considers to be a transitional solution pending the introduction of harmonised regulations at international level, recalling that the German State, with a view to harmonising markets and standards, has a major interest in the creation of higher-level rules, a future legal framework at EU and UNECE level. Pending future legislation, the Government announced that it was implementing the Commission's recommendations, bearing in mind that the Commission had worked on Level 4 and 5 vehicles, which the Government did not fail to mention were not yet commercially mature. For the first time, the BMVI takes a step forward and considers the need to arbitrate upstream the ethical issues raised by the deployment of automated and connected vehicles. It states that “*In a few years’ time, the public will be using automated vehicles, encountering them in traffic and thus also handing over “decision-making powers” to algorithms. They must be able to rely on absolutely clear ethical principles being observed in the development and design of the technology*”. In doing so, he recognises that driving is likely to move out of the realm of human activity and rely on the decision of a non-human intelligence. The Federal Government announced that “*it will expedite the development of an appropriate regulatory framework for the programming of self-driving computers that will mandate the principles*

<sup>216</sup> It is important to note that the Commission’s report contains, among others, recommendations to strike an appropriate balance between collecting and using data and ensuring informational self-determination.



*governing unavoidable accident situations set out in the ethical guidelines. The principles here are: these situations are to be prevented wherever possible; the prevention of personal injury must always take precedence over the prevention of damage to property; and any distinction between individuals based on personal features is impermissible*<sup>217</sup>. Germany is thus taking a first step towards resolving the dilemmas by incorporating some of the recommendations into its draft law (art. §1e (2), <sup>218</sup>. The legal integration of these ethical principles at the design stage is likely to contribute the necessary societal acceptance according to the German BMVI (*“necessary to transfer the general principles governing our social relations to the new technologies”*). But these principles are somewhat unclear and the concepts should probably be better defined to be effectively implemented.

The German new legal framework *ALFRED*, including “Ethic by design” could be a basis for the development of *ALFRED* by guiding the definition of action controls of the decision-making processes of the vehicle with acceptance criteria.

*ALFRED*, thanks to its smart cognitive assistant that will keep situational awareness to the use (*“the model will be focused on cognitive control, emotional state, risk acceptance, anticipation for error prevention, self-confidence and confidence in automation”*), will enhance the trust in the decisions made and executed by the vehicle.

### 3.2.1.2. In Italy

**74. Italy observed a significant development of the road network.** These infrastructures has been entrusted to concession companies and financed by tolls. In the 1980s, the network was 6 000 km long, making it the second largest network in Europe (only West Germany was larger). Commercial road transport has developed strongly and Italy has one of the five largest truck fleets in Europe<sup>219</sup>. However, the streets of Italian cities have long faced congestion problems. Many city centers are based on medieval street plans and are unable to cope with the levels of traffic and pollution generated by a population with one of the highest motorisation rates in Western Europe. For this reason, several cities, including Rome

<sup>217</sup> Federal Government’s action plan on the report by the Ethics Commission on Automated and Connected Driving (Ethical rules for self-driving computers), p7.

<sup>218</sup> NB : Informal and non official translation : *“Motor vehicles with an autonomous driving function must have technical equipment which is capable of independently complying with the traffic regulations addressed to the vehicle driver and which has an accident avoidance system that is, (a) is designed to avoid and reduce damage, (b) in the event of unavoidable alternative damage to different legal interests, takes into account the importance of the legal interests, with the protection of human life having the highest priority; and (c) in the event of an unavoidable alternative risk to human life, does not provide for any further weighting on the basis of personal characteristics,...”*

( 2) Kraftfahrzeuge mit autonomer Fahrfunktion müssen über eine technische Ausrüstung verfügen, die in der Lage ist, [...] 2. selbständig die an die Fahrzeugführung gerichteten Verkehrsvorschriften einzuhalten und die über ein System der Unfallvermeidung verfügt, das a) auf Schadensvermeidung und Schadensreduzierung ausgelegt ist, b) bei einer unvermeidbaren alternativen Schädigung unterschiedlicher Rechtsgüter die Bedeutung der Rechts-güter berücksichtigt, wobei der Schutz menschlichen Lebens die höchste Priorität besitzt, und c) für den Fall einer unvermeidbaren alternativen Gefährdung von Menschenleben keine weitere Gewichtung anhand persönlicher Merkmale vorsieht,...”.)

<sup>219</sup> <https://www.britannica.com/place/Italy/Transportation-and-telecommunications>

and Milan, have introduced measures to reduce the number of cars entering city centers at peak times and have encouraged other modes of transport. In the 21<sup>st</sup> century, some cities have taken these measures even further, adopting the trend known as the "slow city", completely banning cars from historic city centers and encouraging the use of local means of transport. Dozens of cities have adhered to the "Slow City" philosophy with a view to preserving their traditional character. The Italian road network is subdivided into four administrative categories: express motorways (*autostrade*) and national, provincial and municipal roads (*strade statali*, *strade provinciali* and *strade comunali*, respectively). Road construction in Italy flourished during the 20<sup>th</sup> century. Automobile sales grew faster than in any other Western European economy during this period. Much of this growth is due to the mass production of cheap models by Fiat. Road construction in the south has particularly benefited from funds made available by the Southern Development Fund.

75. **Transport policy in Italy is organised on a regional level.** As such, the Veneto region in Italy has just adopted its new regional transport plan 2020-2030, the result of planning work carried out by the Veneto Regional Council. The Plan is intended to focus on "sustainability", it is divided into 8 fundamental points and provides for investments, by 2030, of more than 20 billion euros, more than half of which is already available, 62% of the investments are dedicated to mobility and rail transport and 35% to road adaptation and maintenance. Its aim is to connect the Veneto to national and international markets by promoting the sustainable growth of the regional economy, which is strongly oriented towards international relations. With this in mind, it gives priority to completing the design of infrastructure to connect with the main European capitals and European markets. Among other things, it is intended to strengthen regional mobility, overcome congestion problems and the limits of coordination between the different modes of transport and reduce territorial disparities in order to counter the depopulation of peripheral centers, promote mobility based on the development of tourism supply, extend the infrastructure network and improve intermodal connections between public, private and low mobility (pedestrian routes, cycle tourism, hiking) and airport development. It aims to develop a transport system focused on environmental and territorial protection by providing for the reduction of harmful emissions into the air, with greater traffic fluidity, a shift towards more sustainable modes and the revival of public transport, as well as the development of green fuels and hybrid and electric vehicles. It is also intended to increase the functionality and safety of transport infrastructure and services, further protecting low mobility and ensuring the monitoring and scheduled maintenance of networks and routes. It promotes the Veneto region as a laboratory for new technologies and mobility paradigms, in particular for user access to public transport services. The objective and to make public transport expenditure more efficient and to promote forms of financing capable of attracting private capital, to develop a new integrated governance of regional mobility. In addition, the Region of Lombardy has just granted 60 million for sustainable mobility and road safety, the Region of Piedmont has recently drawn up a Phase 3 Mobility and imposed fully loaded journeys on trains and buses, as has Sicily, which is also restoring 100% capacity on local public transport<sup>220</sup>.

76. **With regard to the right of access to transport,**<sup>221</sup> the freedom of movement regulated by Article 16 of the Constitution has been enshrined, particularly from the point of

<sup>220</sup><https://www.trasporti-italia.com/citta/veneto-approvato-il-nuovo-piano-regionale-dei-trasporti/43215>

<sup>221</sup> Refer to the analysis developed by Rosalba Catizone, in *Diritto alla mobilità ed effettività della libertà di trasporto alla luce delle nuove normative europee e nazionali. Attualità del servizio pubblico dei trasporti*, [Dissertation thesis], Alma Mater Studiorum Università di Bologna. Dottorato di ricerca in Stato, persona e servizi nell'ordinamento europeo e internazionale, 28 Ciclo, 2017, p 170 s.

view of guaranteeing freedom of movement against the limitations of public power<sup>222</sup>. R.Catizone recalls that there is a favourable interpretation according to which the content of the constitutional Law is the presupposition of the affirmation of the social right to mobility, the affirmation of which is the way to the realisation of the personalistic principle, guaranteed by articles 2<sup>223</sup> and 16<sup>224</sup> of the Constitution<sup>225</sup>. She explains that in addition to the protection of the individual, freedom of movement is also linked to the economic freedoms that represent the historical foundation of the right and the means of its realisation. It is clear that transport is an increasingly important means of affirming and developing the individual, as recognised by the legislator. Among the forms of transport, scheduled services have the nature of a public service, regardless of traffic conditions, as they aim to ensure the regular and continuous enjoyment of the fundamental right of citizens to mobility. With regard to the role of the state in the economy, it is necessary that it ensures both the needs of planning and development and the realisation of fundamental human rights in a manner compatible with their expansion. Within this framework, the “essential public services” provided for in Art. 43 of the Constitution<sup>226</sup> are the instrument that links economic relations to fundamental rights, which must be calibrated not only to guarantee individual interests, but also those of a collective nature. Italian legislation transposed this principle in Law n°146 of 1990 containing rules on the exercise of the right to strike in

<sup>222</sup> Indeed, the exercise of freedom of movement through the use of a vehicle has the capacity to affect other rights, such as the right to safe movement and the integrity of others, which require a balancing of interests only possible by the State. For example with regard to the regulation of driving licences. the Italian constitutional Court ruled on the identification of penalties that can be imposed on licence holders, considering that they do not affect the freedom of movement - understood as the possibility and opportunity to move from one place to another - but the right to drive a motor vehicle, which 'is not guaranteed indiscriminately to all citizens by a constitutional provision, but only to those who have certain requirements laid down by ordinary law'. Sent. 14 febbraio 1962, n. 6 (Giur. Cost., 1962, 59) :*“E se si volesse esaminare il problema in riferimento allo stesso art. 16 della Costituzione, inteso quale proiezione del citato art. 13, il discorso non assumerebbe una piega diversa. Infatti, non la libertà di circolare, cioè di portarsi da un luogo ad un altro con un qualunque mezzo di trasporto, apparisce colpita dalle norme denunciate, ma più semplicemente il diritto di guidare un autoveicolo; e poiché nessuna norma costituzionale assicura indistintamente a tutti i cittadini il diritto di guidare veicoli a motore, non viola la Costituzione la legge ordinaria che consente l'esercizio del diritto solo a chi abbia certi requisiti: di modo che la patente, come è concessa caso per caso in applicazione d'una norma di legge ordinaria, così può essere tolta, in virtù di un'altra norma di legge ordinaria, senza che ne soffra la libertà di circolazione costituzionalmente garantita ».*

<sup>223</sup> “Art. 2 “The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled”.

<sup>224</sup> “Art. 16 “Every citizen has the right to reside and travel freely in any part of the country, except for such general limitations as may be established by law for reasons of health or security. No restriction may be imposed for political reasons. Every citizen is free to leave the territory of the republic and return to it, notwithstanding any legal obligations”.

<sup>225</sup> The author refers to P. Ciarlo, “La mobilità delle persone tra libertà e diritti costituzionalmente garantiti”, in L. Tullio, M. Deiana, cur, *Continuity territoriale e servizio di trasporto marittimo*, atti del convegno di Cagliari, 30 giugno 1 luglio 2000 Cagliari ISDIT, 2001 31

<sup>226</sup> As amended by Law No 83 of 11 April 2000, in which Article 1 states that “ For the purposes of the common good, the law may establish that an enterprise or a category thereof be, through a pre-emptive decision or compulsory purchase authority with provision of compensation, reserved to the Government, a public agency, a workers' or users' association, provided that such enterprise operates in the field of essential public services, energy sources or monopolies and are of general public interest.”.

essential public services. Indeed, Italy adopted two laws on 12 June 1990 and 11 April 2000<sup>227</sup> which impose a minimum service in public transport services, particularly during strikes. These laws define essential public services as those *"whose purpose is to guarantee the enjoyment of human rights protected by the Constitution: the rights to life, health, freedom and security, freedom of movement, social assistance and welfare, education and freedom of communication"*. Urban and extra-urban public transport networks as well as railways are thus among the services necessary to safeguard freedom of movement. Consequently, Italian law requires a minimum service to ensure that the population's essential transport needs are met and that users are given accurate prior information. Several binding provisions have been enacted by the Italian legislator. For example, during each strike day, local transport guarantees a full service for six hours, divided into two time slots corresponding to peak hours. Strikes are also prohibited during school holidays, in both private and public transport undertakings, even taxis are subject to strike action. Transport undertakings must give at least ten days' notice, determine in advance the duration of the strike (prohibition of strikes of unlimited duration), and inform users at least five days before the start of the strike of the main features of the minimum service (arrangements and timetables) and the measures for the normal resumption of the service as soon as the work stoppage is over. These laws therefore provide a framework for the right to strike in order to ensure a certain continuity of public service in Italy, unlike in Germany, where the right to strike is relatively rare, as civil servants do not have the right to strike in accordance with Article 33 of the German Constitution<sup>228</sup>. However, the freedom of movement of Italians may also be limited by strikes by foreign transport companies serving the peninsula. Rome has therefore attempted to extend its legislation to European regulations attempts which have come up against the importance of the right to strike in many countries<sup>229</sup>. Moreover, as R. Catizone synthesises in her aforementioned thesis work, *"The statute of the travelling citizen is established directly by the legislator in providing rules that ensure the refund and compensation of the passenger for the violation of transport regulations and for the damage that the passenger has suffered due to this inefficiency, such as in the case of delays, loss of luggage, et similia. The doctrine has indicated a number of reference principles: the principle of adequacy of supply, for which conditions of quality and cost-effectiveness of services must be guaranteed; continuity of transport, especially for island areas and for services instrumental to reaching the workplace; safety and information for users; and the need to ensure that all passengers have access to all services"*. Indeed, it must especially be remembered that the need for effective recognition of the right to travel has had to take into account an entirely Italian peculiarity characterised by a territory that is not too extensive, with a peninsular structure and several islands, two of which are particularly large. So the need to ensure the principle of territorial continuity is real in Italy and is enshrined in the Law<sup>230</sup>.

<sup>227</sup> L 12 giugno 1990, n. 146, Norme sull'esercizio del diritto di sciopero nei servizi pubblici essenziali e sulla salvaguardia dei diritti della persona costituzionalmente tutelati. Istituzione della Commissione di garanzia dell'attuazione della legge (GU n.137 del 14-6-1990 ).

Legge 11 aprile 2000, n. 83, (in GU 11 aprile 2000, n. 85), Diritto di sciopero nei servizi pubblici essenziali.

<sup>228</sup> <https://www.senat.fr/rap/I06-385/I06-3855.html> : annexe au Projet de loi sur le dialogue social et la continuité du service public dans les transports terrestres réguliers de voyageur (Rapport du Sénat n°385 déposé le 12 juillet 2007).

<sup>229</sup> [https://www.lepoint.fr/monde/la-greve-a-l-italienne-20-07-2011-1354518\\_24.php#](https://www.lepoint.fr/monde/la-greve-a-l-italienne-20-07-2011-1354518_24.php#)

<sup>230</sup> As mentioned by R. Catizone, *"An express reference to the principle of territorial continuity is also to be found in the regional legislation, where Regional Law No 8 of 10 July 2000, Article 1 of which states that the Sardinian Region "in order to ensure the social and economic conditions of territorial continuity between Sardinia and its minor islands, which are the seats of municipal centres or peri-feric residential agglomerations, is authorised to guarantee, by means of appropriate tariff concessions, the exercise*

77. **Mobility and Italian “smart road”.** In Italy, the Ministry of Sustainable Infrastructure and Mobility (MIMS)<sup>231</sup> has been interested in these developments for a long time and took an important step with DM70 of 28 February 2018 (Decree on the smart road<sup>232</sup>). The experimentation and deployment of automated and connected vehicles as well as the deployment of C-ITS services are part of the “Connecting Italy” plan<sup>233</sup>, which places the emphasis, “for the first time in Italy’s infrastructure policy, on accessibility and connections to the country’s driving forces: cities, production and tourism centres”. The Minister highlighted “the aim of guaranteeing full mobility (of people and goods) and accessibility to Europe for all areas of the national territory, while making Italian cities liveable for citizens and welcoming for visitors, and the country competitive on international markets”. The third section identifies four objectives and their targets including “Accessibility to the territories, to Europe and to the Mediterranean: Sustainable and safe mobility”. In this respect, the decree recalls that road infrastructure and C-ITS services will interact increasingly in the future with the highly automated and connected vehicles. In order to meet this objective, the latest report of the Italian Smart Road Technical Observatory drafted in early 2021<sup>234</sup> states that, in addition to strengthening experimentation, one of the priority is to lay the foundations for the launch, at national level, of services based on the connectivity of vehicles and infrastructures (“C-ITS services”), but that the pandemic has interrupted this process. In February 2020, a Memorandum of Understanding was signed between the Minister for Infrastructure and Transport and the Minister for Technological Innovation and Digitalisation (MID). Specifically, the main objectives of the protocol are “to promote the development of alternative modes of mobility and transport and, with it, the ecosystem of the autonomous, connected, ecological and shared vehicle, as well as to set up a centre for the technological development and production of innovative vehicles, in order to increase the skills needed to create a new supply chain for autonomous and connected vehicles and means of transport”.

In line with this “servant” conception of the Italian transportation infrastructure, ALFRED could comply with the Italian mobility concept in process of legal development, based on “utility”.

### 3.2.1.3. In Spain

78. **Mobility a cross-cutting objective, shared competences.** The Spanish Constitution (CE) has established a framework of shared competences between the State and the Autonomous Communities in the field of transport, in which the State, in addition to the exclusive competence on “Bases and coordination of the general planning of economic

*of the constitutional right of citizens to mobility on the maritime routes between these islands and the prospective Sardinian”, op.cit. p 131.*

<sup>231</sup> formerly the Ministry of Infrastructure and Transport, whose name was changed by Legislative Decree No. 22 of 1 March 2021, published in G.U. No. 51 of 1 March 2021.

<sup>232</sup> Modalita' attuative e strumenti operativi della sperimentazione su strada delle soluzioni di Smart Road e di guida connessa e automatica. (18A02619) (GU Serie Generale n.90 del 18-04-2018). The decree is being recast to establish a specific new scheme of regulation, replacing DM70/2018, which would introduce, among other things, the experimentation of “innovative means of transport on public roads”, not only with vehicles (but more generally with innovative means of road transport with automatic driving, which have not been type-approved, nor can be type-approved according to the current Community and national regulations on the subject).

<sup>233</sup> Ministero delle Infrastrutture e dei Trasporti, « Connettere l’Italia, Strategie per le infrastrutture di trasporto e logistica », 2016.

<sup>234</sup> Osservatorio tecnodi supporto per le smart road e per il veicolo connesso e a guida automatica (art.20 DM 70/2018), Relazioneannuale 2020 (ai sensi dell’art.4 comma 2del decreto 9/2018).



activity" (art. 149.1. 13ª), among others ( e.g. traffic and circulation of motor vehicles..." (art. 149.1. 21ª), while Art. 148.1.5 CE attributes to the Autonomous Communities a range of exclusive competence. For its part, the legislation on local government attributes to the municipalities as their own competences, under the terms of the legislation of the State and the Autonomous Communities, those of mobility and urban public transport (art. 25.2.g) of Law 7/1985, of 2 April, Regulating the Bases of Local Government (LBRL)<sup>235</sup>. To date, this Ministry has promoted the approval of various infrastructure and transport plans, the latest of which is the Infrastructure, Transport and Housing Plan (PITVI) with a 2024 horizon, and strategies, such as the Spanish Sustainable Mobility Strategy of 2009, with the participation of the Ministry of the Environment and Rural and Marine Affairs. The Spanish Urban Agenda, presented to the Council of Ministers on 22 February 2019, recognises mobility as a key element of urban policies through its Strategic Objective 5, which seeks to favour proximity and sustainable mobility and which, in turn, is divided into two specific objectives: *"favouring the city of proximity"* and *"promoting sustainable modes of transport"*. For their part, the Autonomous Communities, within the framework of regional laws, have regulated different planning instruments for their respective territorial areas (such as the Mobility Strategy of the Principality of Asturias). As for the municipal level, in 2010 the Spanish Federation of Municipalities and Provinces (FEMP) drafted the document "The Spanish Strategy for Sustainable Mobility and Local Governments", which was intended to be a practical guide for the application at local level of the Strategy approved by the Council of Ministers in 2009. So, the MITMA<sup>236</sup> announced in 2020 that, *"faced with this reality of the distribution of powers and the profusion of sectoral and/or territorial regulations and planning instruments and debate forums, the Ministry aims to contribute to organising and giving coherence to all mobility-related initiatives that are being promoted by the different ministerial departments and public administrations, in order to optimise resources and take advantage of synergies, assuming the leadership in this area that the main agents in the transport sector are demanding of it"*.

79. **Right to transport and regulations.** In terms of current regulations, it is important to mention the Royal Legislative Decree 7/2015, of 30 October, approving the revised text of the Law on Land and Urban Rehabilitation<sup>237</sup>, establishes in its art. 3.3. f) that public authorities .... *"Guarantee mobility at a reasonable cost and time, based on an appropriate balance between all transport systems, which, however, gives preference to public and collective transport and encourages pedestrian and bicycle travel"*. For its part, Art. 20, among the basic criteria for land use, includes that of complying *"...with the principles of universal accessibility, ....mobility ...."*.

80. **Improving passengers' right to information and transparency.** In 2013, Spain reformed the 1987 Land Transport Planning Act. The aim of this reform was to improve the competitiveness and efficiency of undertakings in the transport sector, while at the same time optimising the public service of road passenger transport. Several measures were taken during this reform, such as the possibility of carrying out all types of transport activities with a single authorisation. Administrative formalities are reduced for companies. Companies can deal with the competent transport authority (Ministry of Development or Autonomous Communities) via the Internet, without the need to visit the different institutions. This reduces costs and saves time in the application process. Likewise, the text aims to extend

<sup>235</sup> Ley 7/1985, de 2 de abril, Reguladora de las Bases del Régimen Local, «BOE» núm. 80, de 03/04/1985.

<sup>236</sup> Ministry of Transport, Mobility and Urban Agenda (MITMA).

<sup>237</sup> Real Decreto Legislativo 7/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley de Suelo y Rehabilitación Urbana, « BOE » n°261, 31.10.15.



jurisdictional competence to arbitration assemblies for the resolution of disputes, a mechanism that has proven its usefulness as an alternative to the judicial route. All the measures set out affect both freight and passenger transport. The reform has had a significant impact on the regular passenger bus transport sector, with concessions granted by the Ministry of Development or by the Autonomous Communities. The new law makes it compulsory to register the management contracts for the regular public passenger transport service in a register, which tends to increase market transparency for passengers or users of regular bus lines, since they will be able to obtain information via the Internet, at any time, on the conditions and fares of the regular service they are going to use. The reform also aims to limit the authorisations for hiring cars with drivers in proportion to those for taxis (one authorisation granted for 30 taxi licences). Transparency in management has also been improved, the number of mandatory data that the company will have to register is increased and this information will be available to the public. As such, those who want to contact a carrier will be able to know in advance whether the company actually has the authorisation in question, while users of regular bus services will be able to find out about the conditions and fares of the service they wish to use.

81. **The Spanish Safe, Sustainable and Connected Mobility Strategy 2030<sup>238</sup>**. This strategy has been created in order to *“to respond to the mobility and transport challenges posed by the 21st century”* and presented in September 2020. The MITMA explained that *“The Mobility Strategy aims to address these new challenges. Understanding mobility as a right, an element of social cohesion and economic growth, it aims to provide solutions to the real mobility problems of citizens, as well as to ensure an efficient, sustainable and resilient transport and logistics system, the importance of which has been particularly highlighted during the COVID-19 pandemic”*. It is developed through 9 strategic axes, which are made up of more than 40 lines of action with more than 150 specific measures. The participatory process lasted from September to December 2020. The Spanish Mobility Strategy is based on three basic pillars or principles: Safety and Security, Social, economic and environmental sustainability *“Prioritising everyday mobility, economic and social equity”*) and connectivity (digitalisation and technological progress, connectivity with Europe and the world, and multimodal connectivity). The draft targets abandonment of the private car in urban mobility, promotes intermodality and multimodality in urban environments, micromobility, active mobility, shared mobility. With regard to mobility in rural and low-density areas, by means of mobility solutions adjusted to the demands of their inhabitants and reasonable in cost *“mobility for all”*.) A document with the conclusions of the Open Dialogue on Mobility will be published soon. The fifth axis of line actions and measures is dedicated to *“Intelligent Mobility”* (Enabling Mobility as a Service, Open Data and New Technologies for Mobility Analysis and Optimisation; Intelligent Management of Infrastructures; Automation of transport and logistics; boosting connected and autonomous vehicles (cars, rail, ships) and the use of Galileo in mobility; boosting the Use of Drones). In the specific field of the Ministry of Transport, Mobility and Urban Agenda's own competences, a key part is to ensure the correct regulation governing the use of autonomous vehicles, a task that MITMA will have to carry out together with other Ministries involved and other administrations. In addition, MITMA recalls the automation of mobility can lead to disruptive changes in mobility patterns and stresses the need to *“guaranteeing users' rights, including accessibility”*.

**ALFRED**, with its offer of a flexible and personalised mobility, will fit in with the Spanish strategy under development.

<sup>238</sup> Data from the site *“es.movilidad”*, website of the Ministry of Transport, Mobility and Urban Agenda (MITMA).

#### 3.2.1.4. In United States of America

82. **Context.** In the United States, the private car accounts for 90% of trips and public transport only 5%<sup>239</sup>. For an American living in the suburbs, less than 20% of jobs will be accessible in less than 90 minutes by public transport, so every American aspires to own a car, because without it is almost impossible to go to work. This is why carpooling or driver-on-demand systems have been introduced. In 1991, the US Congress passed the Intermodal Surface Transportation Efficiency Act (ISTEA), which redefined the role of the federal government in transport policy. Since 1991, the states played a greater role in subsidizing federal transport. More funding has been available for alternative forms of transport such as cycling and walking, but the majority of the funds were still intended to support motorized transportation or roadways. Transport policies in the United States are consistent with the idea that, in order to stimulate economic growth, national authorities must invest in road construction and renovation, especially in rural areas. These investments should be integrated into plans, which involve rural communities in cooperation with the various actors in education, health and agriculture to maximize the social and economic benefits of these investments<sup>240</sup>. On December 4, 2015, President Obama signed the Fixing America's Surface Transportation (FAST) Act (Pub. L. No. 114-94), the first federal law to secure long-term funding for transportation infrastructure planning and investment. The FAST Act allocated \$305 billion over the fiscal years 2016 to 2020 for road infrastructure development and maintenance, highways and motors vehicles safety, public transportation, motor carrier safety, hazardous materials safety, rail safety, and research, technology and statistics programs. The FAST Act thus maintained the focus on road development, but also, for the first time, provided a source of federal funds dedicated to freight projects in the states. Roads account for about 20-25% of the surface area of European cities and about 35% of cities in the United States. In fact, the road construction sector is a major source of job creation in the United States. However, an analysis carried out in the United States<sup>241</sup> showed that investment in public transport is likely to generate 31% more jobs than the construction of new roads or bridges, and that public transport reduces the impact on air pollution, which is why a discussion was launched in 2017 with the American authorities to encourage investment in the development of public transport<sup>242</sup>. There is no "general" right to public transportation (see further **part 4.2.3**), even if a Former Secretary of Transportation said in 2011 that "*Access to transportation is one of the most fundamental of American rights*" by explaining that the DOT has stepped up enforcement to ensure every American's right to access transportation<sup>243</sup>. "*The freedom of citizens to move around and go where they want is*

<sup>239</sup> S. Qadiri, *Futur de la mobilité : une comparaison Etats-Unis – France*.

<sup>240</sup> Paul Starkey, John Hine, *Poverty and sustainable transport, how transport affects poor people with policy implications for poverty reduction, A literature review*, Octobre 2014.

<sup>241</sup> Smart Growth America, 2011.

<sup>242</sup> 2017, public transportation industry talking points, legislative issue brief, March 2017.

<sup>243</sup> <https://obamawhitehouse.archives.gov/blog/2011/06/01/equal-access-transportation-right-all-americans>

a right<sup>244</sup>, but the method by which they do it is not”<sup>245</sup>. President Biden recalls that the current federal transportation law expires in September 2021. He said that “the next reauthorization should prioritize the projects that do the most to improve access to jobs and services. USDOT should be required to collect data on how well the transportation system connects people to what they need and create a national assessment of access to jobs and services”<sup>246</sup>.

**83. Link between CAV and right to transport.** In the U.S there is not yet a harmonized regulatory framework for CAV in public road through all the States<sup>247</sup>. There are some States through the governor have issued executive orders related to autonomous vehicles. The Federal Department of Transportation (DOT) and its National Highway Traffic Safety Agency (NHTSA) published a document in September 2016, entitled “Accelerating the Next Revolution in Roadway Safety”<sup>248</sup>, which outlines federal policy for autonomous vehicles. The report highlights that “The benefits don’t stop with safety. Innovations have the potential to transform personal mobility and open doors to people and communities—people with disabilities, aging populations, communities where car ownership is prohibitively expensive, or those who prefer not to drive or own a car—that today have limited or impractical options”. The latest USDOT’s Automated Vehicles Comprehensive Plan<sup>249</sup> establishes U.S. Government automated vehicle technology principles and the first of them is to “Protect Users and Communities”. To this end, Goal 4 is to “Enhance Mobility and Accessibility”. The U.S. Government embraces the freedom of the open road, which includes the freedom for Americans to drive their own vehicles. The U.S. Government envisions an environment in which AVs operate alongside conventional, manually driven vehicles and other road users; therefore, the U.S. Government will protect the ability of consumers to make the mobility choices that best suit their needs. The U.S. Government will support AV technologies that enhance freedom by providing additional options for consumers to access goods and services, allowing individuals to live and work in places that fit their families’ needs and expanding access to safe, affordable, accessible, and independent mobility options to all people,

<sup>244</sup> One of the freedoms based in the Constitution is our freedom of movement and subsequent right to travel. Especially, in US, with “the doctrine of the “right to travel” actually encompasses three separate rights, of which two have been notable for the uncertainty of their textual support. The first is the right of a citizen to move freely between states, a right venerable for its longevity, but still lacking a clear doctrinal basis. The second, expressly addressed by the first sentence of Article IV, provides a citizen of one state who is temporarily visiting another state the “Privileges and Immunities” of a citizen of the latter state. The third is the right of a new arrival to a state, who establishes citizenship in that state, to enjoy the same rights and benefits as other state citizens. This right is most often invoked in challenges to durational residency requirements, which require that persons reside in a state for a specified period of time before taking advantage of the benefits of that state’s citizenship”. Cornell Law School, Legal Information Institute, <https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/the-right-to-travel>

<sup>245</sup> M. Harmsworth, “Public transportation is not a human right,” Apr. 2, 2012. <https://www.washingtonpolicy.org/publications/detail/public-transportation-is-not-a-human-right>

<sup>246</sup> <https://t4america.org/reauthorization/>

<sup>247</sup> On 7 September 2017, the Self Drive Act was unanimously passed by the House of Representatives. It is a bill to ensure the sustainability of deployments and research in the evolution of vehicles. The measure, known as the SELF DRIVE Act, has been dormant since 2017, when it was passed unanimously by the House and later died in the Senate amid objections from Democrats and trial lawyers concerned about the right to sue if someone is hurt or killed in a self-driving car. It was reintroduced in House in 2020.

<sup>248</sup> Federal Automated Vehicles Policy, Accelerating the Next Revolution In Roadway Safety, sept. 2016.

<sup>249</sup> Automated Vehicles Comprehensive Plan, January 11, 2021, <https://www.transportation.gov/av/avcp/5>

including those with disabilities and older Americans. It aims also to prepare the Transportation System in order to “improve its accessibility” (“expand access to safe, affordable, accessible, and independent mobility options for all people, including people with disabilities and older Americans”).

The USA seems to be culturally very attached to the personally owned car<sup>250</sup> and public policies relating to CAVs are a constant reminder of this. Also, *ALFRED*, being a vehicle that adapts to its occupant, insofar as it is “customisable” (“*ALFRED is the first attempt in Europe of real time adjusting and modulating CAV behaviour to passenger needs, preferences and state*”), adapted to different user profiles and contexts, being personalized by interpreting the emotional state of the “driver”) could perfectly coincide with the philosophy that would drive the American regulations, still making room for the personal car.

### 3.2.2. Transport Cost

84. The implementation of the right to transport necessarily implies limiting its cost; this can be made possible by free access to public transport.

#### 3.2.2.1. Free access to public transportation

85. In Germany, several ministers proposed by letter to the European Commission on February 11, 2019 to introduce free public transport in city centers as an incentive to limit the use of private cars. Germany is one of nine countries which were asked at the end of January to explain why they regularly exceed the emission limits designed to protect the health of Europeans for two key pollutants: fine particulate matter (PM10) and nitrogen dioxide (NO2).

86. In the United States, Seattle experimented with free public transport before reversing the measure.

87. The region of Emilia Romagna has just imposed free local public transport for children under 14 from September 2021 onwards. From September 2021, children under 14 will be able to travel free of charge on local public transport in Emilia Romagna. The administration plans to extend the benefit, from September 2021, also to students aged between 14 and 19.

88. In France, the CRCE group (Communist Republican Citizen and Ecologist Group) decided to question the Senate on the possibility to introduce free transport. Free transport is currently being implemented by a growing number of local authorities in France. Free transport is, according to this group, the corollary of the recognition of the right to mobility as a special right, since its existence conditions access to other rights such as work, leisure, culture<sup>251</sup>, etc.

<sup>250</sup>“The preference for road building and motor vehicles dominates the American psyche and receives support at the highest levels of U.S. government.... The dominance of the automobile as a policy choice of federal and state governments is undeniable”, in T. Baldwin, The Constitutional Right to Travel: Are Some Forms of Transportation More Equal Than Others?, 1 *Nw.J. L. & Soc.Pol'y.*213 (2006).

<sup>251</sup> « La gratuité totale des transports collectifs : fausse bonne idée ou révolution écologique et sociale des mobilités ? », Rapport d’information, n° 744 (2018-2019) de M. Guillaume GONTARD, fait au nom de la MI Gratuité des transports collectifs, 25 septembre 2019,.

### 3.2.2.2. Poverty and sustainable transport

89. The public transportation fare framework allows the United States to require carriers which met "*reasonable conditions*", including price. The common carrier may charge a reasonable price to offset its costs, but it is not allowed to charge more than what is reasonable.

90. In Spain, as aforementioned, the law requires public authorities to guarantee "*mobility at a reasonable cost.*" In passenger transport services, the contracting authority subrogates itself in professional relations with employees. In the event of non-payment, the carrier will be able to claim the amount from both the agency and the shipper.

91. In Germany, the travel allowance ("home-work package") is one of the main levers activated to facilitate access to transport. It is also mobilized in France and includes new modes of transport within its scope, such as the bicycle. Since February 13, 2016, private sector companies have been able to cover all or part of the expenses incurred by employees for travel by bicycle or electrically-assisted bicycle between their usual residence and their place of work, in the form of a 'bicycle mileage allowance'.

### 3.2.3. The right to transport for vulnerable people

92. **US persons with disabilities - persons with reduced mobility.** The Americans with disabilities Act (ADA), passed by the U.S. Congress in 1990, is a civil rights law designed to protect the people of the United States from discrimination on the basis of disability<sup>252</sup>. For example, the ADA obliges all employers to provide reasonable accommodation to employees with disabilities and imposes accessibility requirements for public housing. Title II prohibits discrimination on the basis of disability by all public entities at the local level, for example at the school district, municipal, city or county level, and at the state level. Public entities must comply with Title II regulations of the United States Department of Justice. Access includes physical access as described in the ADA standards and access to programs that may be impeded by discriminatory entity policies or procedures. Title II applies to public transportation provided by public entities through U.S. Department of Transportation regulations. It includes the National Railroad Passenger Corporation (Amtrak), as well as all other suburban transit authorities. It requires the provision of paratransit services by public entities that offer fixed-route services. The ADA also establishes minimum requirements for space planning to facilitate the stowage of wheelchairs on public transport. These standards are based on the Board's original ADA Accessibility Guidelines for Transportation Vehicles (1991). Regulations issued by DOT under the ADA apply these standards and indicate which vehicles are required to comply. DOT's ADA regulations also address transportation service and facilities. The Access Board has updated its accessibility guidelines for buses and vans in 2016. These updated provisions are not yet part of DOT's enforceable vehicle standards. It is important to remind that USDOT insists on the fact that "*Automation presents enormous potential for improving the mobility of travellers with disabilities*"<sup>253</sup>. This goal is addressed

<sup>252</sup> 36 CFR 1192, Americans With Disabilities Act (ADA) Accessibility Guidelines for Transportation Vehicles, <http://www.access-board.gov/guidelines-and-standards/transportation/facilities/about-the-ada-standards-for-transportation-facilities/ada-standards-for-transportation-facilities-single-file?highlight=WzM2LCJjZnliLDExOTIsIjM2IGNmciIsIjM2IGNmciAxMTkyliwiY2ZyIDExOTIiXQ==>

<sup>253</sup> USDOT, "Preparing for the Future of Transportation, Automated Vehicles 3.0", Sept. 28, 2018.



through the Accessible Transportation Technologies Research Initiative (ATTRI), which focuses on emerging research, prototyping, and integrated demonstrations with the goal of enabling people to travel independently and conveniently, regardless of their individual abilities. The aim is to improve mobility for those unable or unwilling to drive and enhance independent and spontaneous travel capabilities for travellers with disabilities. One area of particular interest among public transit agencies is exploring the use of vehicle automation to solve first mile/last mile mobility issues, possibly providing connections for all travellers to existing public<sup>254</sup>.

93. Like in USA, in Spain, the future « *Estrategia de movilidad* » recalls that “*the autonomous car can contribute to more inclusive mobility, enabling people who cannot drive (some elderly or people with disabilities, minors or people without a driving licence) to access flexible and personalised mobility*”.

94. In Italia<sup>255</sup>, the Decree of 30 January 1971<sup>256</sup> introduced for the first time the principle of “the obligatory removal of architectural barriers” from all public buildings, although it postponed the necessary implementation regulations to subsequent provisions, which were then adopted with great delay compared to the annual deadline. It also introduced the principle of accessibility of mobility services, with the provision that ‘*public transport services, and in particular trams and metros, shall be accessible to persons with disabilities who cannot walk*’. Other deepening provisions have followed which have made Italy a forerunner in this field<sup>257</sup>. Lastly, a detailed analysis is also carried out by the Presidential Decree of 24 July 1996<sup>258</sup> on special services of public utility and, more precisely, on tramway, trolleybus, automobile and underground railway services (art. 24); on trains, stations and railways (art. 25); on maritime navigation services and national ships (art. 26); on inland navigation services (art. 27); on air terminals (art. 28); on passenger services (art. 29); on public telephone systems (art. 31). The need to buy a car for persons with disabilities allows access to various tax benefits through the regulations set out in Law 104.

95. The above-mentioned German bill, “Draft Act of the Federal Government Draft Act amending the Road Traffic Act and the Compulsory Insurance Act - Autonomous Driving Act

<sup>254</sup> “In addition, machine vision, artificial intelligence (AI), assistive robots, and facial recognition software solving a variety of travel-related issues for persons with disabilities in vehicles, devices, and terminals, are also included to create virtual caregivers/concierge services and other such applications to guide travelers and assist in decision making”.

<sup>255</sup> Vincenzo Amato, “L’eliminazione delle barriere architettoniche, ambientali e sociali all’integrazione delle persone. Elementi per un approfondimento e considerazioni minime”, from the website *Questione Justizia*, [https://www.questionegiustizia.it/rivista/articolo/l-eliminazione-delle-barriere-architettoniche-ambi\\_557.php](https://www.questionegiustizia.it/rivista/articolo/l-eliminazione-delle-barriere-architettoniche-ambi_557.php)

<sup>256</sup> DECRETO-LEGGE 30 gennaio 1971, n. 5, Provvidenze in favore dei mutilati ed invalidi civili, GU n.26 del 01-02-1971, converted into law by law no. 118 of 30 March 1971 (Conversion into law of decree no. 5 of 30 January 1971, and new regulations in favour of civilians with disabilities and invalid civilians).

<sup>257</sup> Among others, Law No 104 of 5 February 1992, better known as Law 104/92, is the legislative reference “for assistance, social integration and the rights of people with disabilities”. Legge 5 febbraio 1992, n. 104. Legge-quadro per l’assistenza, l’integrazione sociale e i diritti delle persone handicappate, (GU Serie Generale n.39 del 17-02-1992 - Suppl. Ordinario n. 30).

<sup>258</sup> Decreto del Presidente della Repubblica 24 luglio 1996, n. 503, Regolamento recante norme per l’eliminazione delle barriere architettoniche negli edifici, spazi e servizi pubblici. (GU Serie Generale n.227 del 27-09-1996 - Suppl. Ordinario n. 160).



<sup>259</sup> stresses that *“the use of automated, autonomous, i.e. driverless and networked motor vehicles “can also strengthen social inclusion, because the use of driverless vehicles helps people with limited mobility - like all other citizens - to participate in social life”.*

96. **Elderly people.** Mobility, the key to maintaining independence. The same approach can be applied to older people who have specific mobility needs and are sometimes limited in their ability to travel. The “transport on demand” is often very suitable for older people, and some local authorities offer such services on an age-related basis<sup>260</sup>. For example, the above-mentioned German bill, “Draft Act of the Federal Government Draft Act amending the Road Traffic Act and the Compulsory Insurance Act - Autonomous Driving Act “ stresses that *“demographic change means that more and more older people are taking part in road traffic in order to remain mobile. They often face challenges in using the various means of transport, for example in finding suitable mobility offers in local public transport (low-floor vehicles, accessibility of stops). Motor vehicles with autonomous driving functions can increase road safety due to the more responsive technology”*, in addition to promoting social inclusion.

The guarantee of a right of access to transport for people with reduced mobility and disabilities seems to be a common thread in the different legal regimes studied.

ALFRED uses to be an appropriate mobility solution for vulnerable people, notably by its “transport on demand” convenient use case.

### 3.3. The Judge’s application

#### 3.3.1. Examination of the right to transport by the European Institutions

##### 3.3.1.1. The right of access to transport versus other rights and freedoms protected by the Treaties

97. The European Affairs Committee already had the opportunity, on four occasions in 2018, to examine the conformity of the provisions of the draft law on mobility guidelines (fr) with European texts in order to identify possible over-transpositions that would place constraints on French companies that are not justified by imperatives of general interest and that are likely to generate distortions of competition. The Commission monitors the application by the Member States of European texts in their national legal systems, as is the case with the designation of the authorities or services responsible for monitoring CO<sub>2</sub> and particulate emissions from vehicles, and the definition of protective measures and penalties in the event of failure to comply with European rules. Generally speaking, checks are also carried out on the protection of personal data recorded by vehicles, concerning their potential use, which is conditionally possible, in most cases, for safety reasons only. Although certain technologies may seem to favour the right to transport, they may notably conflict with respect for privacy, medical secrecy and, more generally, the issue of personal data processing. Indeed, the European texts applied by the Commission recall the need to ensure compliance with the General Data Protection Regulation (GDPR) and the Directive concerning the processing of personal data and the protection of privacy (**see the further Deliverable Study on data protection and consumer rights (information & consent)**).

ALFRED with this empathic module concept (EmY, ACE, covering from the inputs from user - biometrics, behaviour- and context to the outputs with the emotional and cognitive state of

<sup>259</sup> “Gesetzesentwurf der Bundesregierung Entwurf eines Gesetzes zur Änderung des Straßenverkehrsgesetzes und des Pflichtversicherungsgesetzes – Gesetz zum autonomen Fahren”, <https://dip21.bundestag.de/dip21/btd/19/274/1927439.pdf>

<sup>260</sup> transport on demand service for people over 70 years of age like in the city of Cergy, France.

the users, and its relation with trip services such as ride comfort, ambient control and HMI feedback) could improve the right to transport by

- promoting passenger information,
- their freedom of choice (the cognitive smart assistant of ALFRED will also increase the vehicle performance by sharing 'decision making' events and providing data to the "drivers" about a critical predicted situation)
- and their comfort (e.g. motion sickness) on the one hand, but above all by allowing access to certain users who would otherwise be immobile (senior population - those over age 65), non-drivers (e.g. children who are too young to drive) and people with disabilities.

But the *SUaAVE* human centred approach including users in the design process implies however to process their sensitive personal data.

The reconciliation of different rights must be effectively carried out and compliance with regulations, in particular with regard to the GDPR, must be effective.

Legal requirements need to be included in the design process.

98. The CJEU had the opportunity to rule on the validity of licenses for regular coach services in Germany under Community law, namely their conformity with Article 95 of the Treaty on the Functioning of the European Union (ex-Article 75). The latter prohibits *'discrimination consisting in the application by a carrier of different rates and conditions of carriage on the same market on the same transport links on grounds of the country of origin or destination of the products carried'*. The CJEU also ruled on its compliance with the Council Regulation of 20 June 1991, as amended by Council Regulation No. 569-2008 of 12 June 2008, which concerns the elimination of discrimination in transport rates and conditions and prohibits the use of tariffs or the fixing, in any form whatsoever, of discriminatory transport rates and conditions.

99. On July 24, 2003, in the *'ALTMARK'*<sup>261</sup> judgment, the European Court of Justice ruled that *'compensation paid by a public person to a private operator must be limited to covering the costs incurred in discharging public service obligations, taking into account the operator's revenue and a reasonable profit on the basis of an analysis of the costs incurred by a well-managed and adequately equipped undertaking'*.

100. However, on June 13, 2016, the Court of Appeal of Marseille (fr) had occasion to rule that the criteria thus formulated for assessing the legality of State aid under European Union law do not, in any event, concern the setting of charges payable by users of public transport services<sup>262</sup>.

101. Generally speaking, State aid, i.e. aid granted directly or indirectly to undertakings by States, is prohibited as incompatible with European competition rules (article 107 TFEU, ex article 87 TEC). However, a number of derogations are provided for in article 107 TFEU and article 93 states that *'aid which meets the needs of coordination of transport or which corresponds to reimbursement for the discharge of certain obligations inherent in the concept of a public service shall be compatible with the Treaties'*<sup>263</sup>. It was in the absence of such supporting facts that the Greek State was condemned by the CJEU on June 7, 2009 for the numerous illegal aids it had granted to the airline Olympic Airways<sup>264</sup>.

<sup>261</sup> CJEU C-280/00 July 24, 2003.

<sup>262</sup> CAA Marseille, n°15MA00808, June 13, 2016.

<sup>263</sup> See *supra* part 3.1.3. for further details.

<sup>264</sup> CJEC C-369/07 July 7, 2009, Commission/Greece.

### 3.3.2. The application of the right of access to transport by the judge in each country

#### 3.3.2.1. In Germany

102. The BMVI -Federal Ministry of Transport and Digital Infrastructure<sup>265</sup> is the Ministry of the German Federal Government responsible for spatial planning, transport and digital infrastructure. It does not have full responsibility for this policy area. Its task is to set the strategic directions of transport policy, with the Länder implementing the infrastructure decisions taken by the Federal Transport Infrastructure Plan, which is passed in the form of a law, on the ground. The German judge, at the federal level, therefore rules on the cases presented to him on the basis of this law in terms of the right of access to transport.

In addition, the cantonal court has jurisdiction in civil matters for disputes between passengers and hoteliers, carriers and shippers in ports if these disputes concern the payment of the hotel bill, the payment of transport wages, the transport of a passenger, without taking into account the value of the dispute.

#### 3.3.2.2. In the United States

103. In the United States, the judge applies the texts drawn up by the United States Department of Transportation, which is the department of the United States federal executive responsible for transport, created by an act of the United States Congress on October 15, 1966. Its mission is *'to serve the United States by ensuring a fast, safe, efficient, accessible, and convenient transportation system that meets our vital national interests and enhances the quality of life of the American people, today and in the future'*.

Thus, the American judge had the opportunity to point out that although the car remained the preferred mode of transport with regard to the political choices made at both federal and state level, he did not recognize the individual right to drive a car<sup>266</sup>. American courts guarantee freedom of movement<sup>267</sup> but do not recognize the right of each individual to choose a method of transport.

While US courts have not been inclined to create a constitutional right of 'right to drive a car', the Supreme Court seems to defend the freedom of movement that protects the individual right to travel as a pedestrian<sup>268</sup>.

In *Oregon v. Mitchell*, the Supreme Court<sup>269</sup> noted that the right to interstate travel is a nebulous legal construct that cannot be grounded in any particular section of the Constitution. However, many Supreme Court decisions refer to the right of everyone to travel between states, referring to structures that involve different modes of transport, tailored to the economic circumstances of the traveler.

Furthermore, the Philadelphia Court of Appeals recently rejected the appeal by taxi companies in a case against a platform for connecting with chauffeured transport vehicles<sup>270</sup>.

<sup>265</sup> Bundesministerium für Verkehr und digitale Infrastruktur - BMVI

<sup>266</sup> *Ducan v. Cone*, No. 00-5705, 2000

<sup>267</sup> *Paul v. Virginia*, 75 U.S. 168, 1869

<sup>268</sup> The constitutional Right to Travel: Are some Forms of Transportation More Equal than Others? Timothy Baldwin, 2006.

<sup>269</sup> *Oregon v. Mitchell*, 400 U.S. 112 (1970)

<sup>270</sup> 3rd US Circuit Court of Appeals, 27 mars 2018, 17-1871 Philadelphia Taxi Association Inc et al versus Uber Technologies Inc..

### 3.3.2.3. In Italy

104. The Italian judicial system is based mainly on civil law. Jurisdiction in administrative matters lies with the Regional Administrative Courts (*Tribunali Amministrativi Regionali* or TAR) and the Council of State (*Consiglio di Stato*) and jurisdiction in ordinary civil and criminal matters lies with magistrates belonging to the judicial system.

It was in this context that, following a complaint by taxi drivers in Italy, Uber was ordered to cease its activities by a court decision dated 7 April 2017 from the Court of Rome. Indeed, the Court had found that Uber drivers were not, unlike taxis, subject to fares "*fixed by the competent administrative authorities*" and had noted the practice of drivers of "*electronic marauding*" (picking up passengers on the public highway without prior reservation). This privilege is reserved for taxi drivers. The court also noted the possibility for Uber drivers to operate in geographical areas other than those for which they had obtained a licence in violation of the principle of territoriality enshrined in national legislation.

A complaint of unfair competition had been filed at the end of 2016 by associations of Italian taxi drivers. This decision was intended to apply to the vast majority of company of private passenger transport services by car ("Black", "Lux" or "SUV") and to prohibit all advertising in this sector by virtue of another decision handed down by the Court of Turin. Only the UberEats service (orders and deliveries of meals on wheels) available in several Italian cities was spared. This decision to ban the activity had been taken under a penalty payment of 10,000 euros per day for each offence found and 100 euros for "partner drivers" who would not comply with this decision. Uber has appealed against this decision. In 2015, a court in Milan had already banned the operation of UberPop, a variant for transport between private individuals (similar suspensions have been taken in France and Germany).

However, after an appeal was lodged, the High Court of Rome overturned its decision of 7 April, because although at the time of the first decision the legislation was intended to evolve towards a stricter framework for reservation platforms for chauffeured transport vehicles, an amendment was adopted in the Decree-Law Milleproroghe on 27 February 2017 which postponed the application of these measures<sup>271</sup>. The amendment introduced postponed the entry into force of the provision on which the appeal lodged by the taxi drivers' associations was based its adoption had triggered almost a week of demonstrations in Milan, Rome and Turin.

After this second decision, only the Uber Black service was able to function again. The other versions, such as Lux, XL, SUV and VAN, are still prohibited in view of the judgment handed down on 22 March in Turin<sup>272</sup>.

### 3.3.2.4. In Spain

105. The judiciary and the Spanish government have had the opportunity to take several decisions in order to comply with European transport regulations. Indeed, Spain was called to order in April 2016 by the institutions of the European Union which had denounced before the Court of Justice of Luxembourg the Spanish exception of the "*three lorries*" in force since 2007. The European rule clearly enounce that "*any undertaking which has at least one vehicle must be able to obtain a transport authorisation, without the Member States being able to*

<sup>271</sup> Used since 2005, the *Milleproroghe* (literally, "*one thousand extensions*") is used to extend time limits provided for by urgent legislative or financial provisions.

<sup>272</sup> <https://www.itespresso.fr/uber-reprendre-route-italie-pression-taxis-159888.html>

*establish a minimum number of vehicles as an additional condition"* (Article 5b of Regulation 1071/2009). As a result, the Spanish government has abolished by decree the requirement of having at least three trucks to set up a company of transport. From now on, only one heavy goods vehicle is sufficient to become a haulier. The only condition is that the lorry must be less than five years old.

In addition, the main judicial body of the Spanish Basque Country has ruled in favour of the transporters' federations, which had requested the cancellation of the tolls installed in 2018 on the roads of Guipuzcoa. The High Court of Justice of the Basque Country annulled the eco-tax implemented in the province of Guipuzcoa, by a decision suspending the tolls on the three gantries installed at the beginning of the year on the A15 and the National 1 (N1). The decision was taken following complaints lodged by the Spanish transporters' federations. The Court of First Instance held that *"the criterion for the use of the A-15 and N1 lanes implemented for heavy goods vehicles infringes the principle of non-discrimination laid down in Article 7(3) of European Directive 2011/76/EU"*. It stated that the installation of the gantry cranes generated *"indirect discrimination between the transport of goods to or from Guipuzcoa and transport within the province"*, since the latter was practically exempt from the new ecotax, given the location of the gantry cranes<sup>273</sup>.

### 3.4. Conclusion – Key messages

The comparative analysis of the different domestic legal system targeted regarding the right to transport can be summarised and criticised as follows:

- There is no “general” (*i.e.* universal) right to transport guaranteed in Union or international laws, but consecration of different rights of the passenger for certain modes of transport (as, for example, the right to availability of tickets and reservations, the carrier's liability towards the passenger, rights in case of delay, cancellation...), with the exception of an effective “right to transport” for persons with reduced mobility or a disability, only understood as a guarantee of access to existing transport services (or the existence of alternative offers)
- The EU legal framework for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport, without enacting a right for the transport user to be informed, is a real « step » towards improving the effectiveness of the right to transport
- EU ITS or C-ITS policies: while the right to transport is not expressly targeted, the efficiency of the transport system, its interoperability, and the improvement of the information offered to the user are expressly targeted.
- The latest 2020 EU mobility strategy has a clear objective of fair and just mobility for all, which would benefit not only people with disabilities or reduced mobility but also people with low disposable income, people with low IT-literacy and people who live in rural or peripheral and remote areas, including the outermost regions and islands.

<sup>273</sup> <https://www.transportinfo.fr/espagne-justice-suspend-lecotaxe/>

- The promotion of a multi-modal PSOs system by the latest EU strategy envisaged by the European Commission may be an interesting avenue to promote the use of CAV to meet relevant transport needs of certain less mobile populations.
- At the German level, the Basic Law sets as a public policy objective a certain homogenisation of living conditions on the federal territory (“Gleichwertige Lebensverhältnisse<sup>274</sup>”), which has a certain impact on financing (equalisation) and infrastructure choices. Due to the principle of subsidiarity, the Federation does not have all the powers of action but sets a strategic framework, with the Länder implementing on the ground the infrastructure decisions decided by the Federal Transport Infrastructure Plan (“Bundesverkehrswegeplan”) which is passed as a law. Decisions concerning transport are therefore taken by a multi-level structure: The Bund (BVWP), the Länder, which also present a transport investment plan and 'transport' public policy guidelines linked to citizens' mobility, and the municipalities with urban travel and development plans. Based on the notion of 'equal living conditions', mobility has recently become a central issue. Through the recent public policies including automated vehicles (among digitalisation, alternative mobilities, modification of the legal regime of passenger transport, Multi-Modal Mobility Services, improving local transport governance ...) accessibility and local mobility are now seen as indispensable for equal living conditions. The 2021 draft law on autonomous driving<sup>275</sup> includes for the first time in national legislation ethical principles for the operation of CAV (Ethical rules for self-driving computers).
- In Italy, Transport policy is organised on a regional level. The right of access to transport is guaranteed by law in the context of strikes through the obligation to implement a minimum service, which respects the fundamental freedom to come and go. The MIT's new approach to infrastructure policy places the needs of citizens and businesses at the centre of government action, and promotes infrastructure as a means of satisfying the demand for mobility of passengers and goods and connecting areas of the country (particularly cities, industrial centres and places of major tourist interest are specially targeted) through measures that are useful for economic development and proportionate to needs. CAV are part of this new strategy under legal development, based on the concept of “utility”.
- In Spain, the 2013 reform of the Land Transport Act improves users' right to information and transparency (public data). In 2015, a regulation enshrines that public authorities guarantee mobility at a reasonable cost and time, with a preference to public and collective transport and encourages pedestrian and bicycle travel. And the text establishes the basic criteria for land use, includes that of complying "...with the principles of universal accessibility, .... mobility ....". A “Safe, Sustainable and Connected Mobility Strategy 2030” participatory process lasted from September to December 2020. A document with the conclusions of the Open Dialogue on Mobility will be published soon. The work of building the correct

<sup>274</sup> 'Equal living conditions'.

<sup>275</sup> “Draft Act of the Federal Government Draft Act amending the Road Traffic Act and the Compulsory Insurance Act - Autonomous Driving Act “ passed by the Bundestag on 20 May 2021, envisages the circulation of autonomous vehicles in predefined operational areas.



regulation governing the use of autonomous vehicles is in process. However the link between improving people's mobility, especially people who cannot drive (some elderly or people with disabilities, minors or people without a driving licence) to access flexible and personalised mobility and CAV is already done.

- In USA, there is no universal right to public transportation at federal level, but some specific rights guaranteed for persons with disabilities - persons with reduced mobility. The USA seems to be culturally very attached to the personally owned car and public policies relating to CAVs are a constant reminder of this, still making expressly room for the personal car in the recent doctrine. It seems to be a specificity compared to the other national law and policy frameworks studied.
- The effectiveness of a right to transport can be widely discussed. In some countries, it has not been established as a right but is invoked in public policy, while in others, even if it is enshrined, it does not appear to be accompanied by the means to make it effective and enforceable. However, the legal effectiveness of a right of access to transport for people with reduced mobility and disabilities seems to be a common thread in the different legal regimes studied. They all provide specific legal provisions in order to guarantee its effectiveness.



## 4. GENERAL CONCLUSION

The examination of the legal issues related to the right of access to transport with the implementation of CAV in future transport systems and its impact on the notion of mobility is, on the principle, unquestionably very favourable.

There is no doubt that the deployment of the CAV, insofar as it will offer a new, alternative, and complementary transport service, is likely to strengthen the effectiveness of a right to transport which is not, in general and except for PRM<sup>276</sup>, a universally guaranteed and enforceable right, unlike the freedom to come and go, which is enshrined as a fundamental freedom in all the legal systems studied.

Its polymorphic nature from a service point of view, its potential to adapt to the user through artificial intelligence implemented in the framework of HMI, is undoubtedly an advantage for people excluded from conventional transport systems. From this point of view, all the public policies studied consider PRM and rural and sparsely populated areas as being a privileged target for the deployment of CAV.

In this respect, the notion of "mobility", which now frequently appears alongside the notion of transport or in its place, is significant. It seems to imply that it does not only cover access to public transport, with a vision focused solely on transport infrastructure. But it should also be understood as access for people, especially the most vulnerable, through support if necessary, to local services and functions on the one hand, and to information on how to access them on the other.

Beyond the social dimension of the right to mobility, it seems to be part of a territorial dimension of this right, adapted to the needs of the population at any point in the territory of the States studied. The most salient aspect therefore seems to be the refocusing on the level of the individual and no longer from a collective point of view to ensure equity, inclusiveness and accessibility of the transport offer.

In this sense, the right to transport, conceived as a means of ensuring the mobility of citizens, seems to be renewed insofar as it would constitute an effective support for the freedom of movement for each individual, in all their diversity.

However, this positive approach still faces multiple obstacles, including legal ones, which affect the current legal framework of CAV.

For the time being, the regulation is essentially geared towards establishing a technical framework which is not even harmonised yet.

Though the very definition of CAV is still discordant in the various legal systems and even at European level.

Law is also a marker of the cultural imprint. It is therefore useful to compare how the legal introduction of CAV may impact *in concreto* on the conception of the right to transport. Beyond the rhetoric of the public authorities announcing new regulations related to CAV, it is necessary to look at the positive and substantive law alone, and from this point of view, the deviation from what is expected is still significant.

There is no "universal" legal definition of the automated and connected vehicle. If the SAE technical standard has become an almost universal reference that has penetrated the legal sphere expressly, sometimes formally (as well as WP29 or EU), beyond these common technical characteristics, the qualifications and legal regimes diverge. CAV are understood

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<sup>276</sup> "Persons with reduced mobility"

differently in different legal systems ( EU, UNECE...) and even in different countries. They have thus appeared in the legal order in various ways. First, and often, through non-binding standards, and then, little by little, in the context of regulatory texts.

The UNECE WP1, which presides over the work of the Vienna Convention on Road Traffic, refers to "*automated driving systems*" in this communication strategy since an amendment entered in force in 2016 . But, in reality, the text is aimed at «*Vehicle systems which influence the way vehicles are driven* ». There is no precision in the Vienna convention that could allow us to determine what the concept of "a driver", which is still currently legally required, means: does the driver have their vehicle under control when the ADS is being activated? A divergence of interpretation then emerged between the signatory countries, even within the member states of the European Union. Finally, an amendment to the convention introducing in fact highly and fully automated vehicles voted in September 2020 that finally addressed this major issue by removing the requirement for a driver for any vehicle under certain conditions. The previous definition of the term « ADS » is included at article 1: « (ab) "*Automated driving system*" refers to a vehicle system that uses both hardware and software to exercise dynamic control of a vehicle on a sustained basis». The amendment should come into force on 22 July 2022.

At the community level, European Union adopted in 2019 its own definition too. But most of the innovative technical provisions specific to CAV are only applicable from 6 July 2022. Notwithstanding this international framework in which the USA is not otherwise locked in, many countries have adopted their own definitions. In this respect, it should be noted that, even if the names are sometimes similar, they do not cover the same definition. An effort at harmonisation would be not only welcome but necessary.

The same view can be taken with regard to the legal frameworks governing the circulation of CAV at a domestic level. The legal frameworks are, for some, at the stage of experimentation and not of deployment (USA United States Congress seems to fail to agree on federal regulations, Spain emerges from a wide and interesting public consultation phase and Italy seems to be focused on reviewing its legal framework for experimentation and developing connectivity). France has adopted a legal framework that does not yet allow for the removal of the driver, which is only planned for September 2022 at least, through "Automated road transport systems" needing remote intervention and "deployed on predefined traffic routes" "for the purpose of providing a collective or individual public passenger transport service by road, or a private passenger transport service". After a first legal framework adopted in 2017 but rather symbolic, which in fact imposed the presence of a driver, Germany is in the process of adapting legislation that will allow the deployment of driverless CAV needing a remote intervention too. Unlike France, Germany provides for immediate application of the law. It should be noted that in both cases, the role of the supervisor is still more than essential in the decision making process.

The first obstacle is of course a technical one: although the legal frameworks currently in place for the deployment phase are limited to well-defined ODD, they are conceived in the abstract. However, the presentation of the German draft law itself points out that some areas will be *de facto* excluded (e.g. "*level crossings without barriers or adjacent paths of fields and forests*"<sup>277</sup>) as they are too complex areas where human interaction is still indispensable. Indeed, some areas could be excluded, especially in rural areas.

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<sup>277</sup> Deutscher Bundestag, Drucksache 19/27439, p. 22.

Above all, the aforementioned legislation focuses on the functional obligations of the “vehicle” and other stakeholders (supervisor, manufacturer, etc.) as well as their liability and insurance issues, and seems to neglect to rethink the integration of the CAV into the transport system and to consider its place as a “transport service”. In particular, the person of the “CAV passenger” should be better understood from a legal point of view, especially from the point of view of information on his or her rights and obligations.

However the concept of transport is based on a well-defined legal architecture - giving an important place to the notion of the driver among others - which is undermined by the introduction of the CAV.

For the time being, the regulations studied seem to neglect the legal overhaul of the transport system from the service point of view, which may constitute an obstacle to the implementation of the CAV, and therefore to its deployment, which is supposed to promote the effectiveness of the right to transport. The CAV use cases that are often referred to in order to make up for the inadequacies or gaps of the current transport offer could be explicitly included in the law texts in order to acquire legal recognition that would facilitate their implementation. In view of the state of the aforementioned current legal arrangements in France and Germany, the risk that could be identified is that of simply replacing regular public transport lines, without any emphasis on the deployment of a complementary or alternative offer that CAV could provide.

In this respect, it is important to note that, although the PRM mobility is specifically targeted in the discourse of all public authorities, no legally binding link seems to be established between the mobility of this category of population and the use of CAV. However, the CAV accessibility should not only be understood in terms of its physical and material design, as any motorised land vehicle, but also should impose the accessibility of the HMI. Furthermore, while it seems that the CAV could, in absolute terms, be an appropriate solution for people excluded from the current transportation system, with its adapted architecture and its adaptable HMI, it is also necessary to think about the service upstream of “entry into the vehicle” in order to ensure, particularly in the context of the MaaS currently being promoted, that people with low technology literacy or low-skills do not come up against an obstacle from the point of view of “the digital divide”. While the CAV itself seems to be adaptable to the user, the service provider offering it (commercial, public, etc.), which is its essential accessory, must be able to offer a service that is just as adapted.

Generally speaking, in order to encourage the CAV deployment, consideration should be given to imposing information or even training adapted to all user profiles for this new transport offer, not only at the time of the sale or rental of a CAV but for all types of use. This could appropriately be a condition of the safety assessment.

Finally, the right to mobility may be hampered by citizens' fears about the CAV movement in public space. Safety is an inherent issue in the right to transport in that it can be an obstacle to mobility if it is not provided, whether the lack of safety is imagined or real. However, if the technical aspect of the traditional vehicle (manufacturing, maintenance) is well regulated and well integrated into society, the ADS that will henceforth perform the driving task should not put road users at risk.

It might therefore be necessary to regulate situations described as “dilemmatic” so that the citizen would have the assurance or, at least would be aware, of the legal framework underlying the parameters of CAV programming that must comply the constitutive values of rule of law. Following the example of Germany, which has taken a first, albeit timid, step towards democratic arbitration by lawmakers.

Finally, and to link to further work on **data protection and consumer rights in the project**, it is worth recalling that the data processing issue is inherent in the CAV use, and connectivity more generally. The latter French and German laws have begun to legislate on this issue. While the data processing related to CAV, particularly personal data, may improve the right to transport by allowing it to function optimally, the question of reconciliation with other rights and freedoms - which infringement's risk is virtually contained in the very concept of personal data (respect for private and family life, medical secrecy, etc.) - and its consubstantial issue of consent, arises in a significant manner.



## 5. APPENDICES

### ANNEX 1: The freedom to come and go, recognition of a freedom attached to the human person

In the context of the development of human rights (A), it is necessary to look at the sources of the freedom to come and go in order to understand its genesis (B). It will be seen that the freedom to come and go is, first and foremost, a freedom that claims to be universal, yet is exercised solely through the prism of the sovereign State (C) and which in reality implies freedom of choice among the ways in which it is exercised (D).

#### A. The Context of Human Rights Development

**Rights of the individual.** Mobility is first and foremost a human freedom that passes through the body, as opposed to an intellectual freedom (e.g. freedom of belief). It is therefore attached to the physical person and is understood as a "*freedom*" of movement, movement or displacement guaranteeing the possibility of going from one place to another. In France, the term "*freedom to come and go*" is used. It thus comes under people's power of self-determination, their ability to act autonomously and to choose their own behaviour. It is a notion that has not always been attached to the human person. Indeed, the slaves of antiquity were by definition deprived of this freedom of movement. In the Middle Ages, serfs who were attached to a piece of land could not leave it. The numerous tolls, maintained or institutionalized under the Ancien Régime (Old Regime), and which hindered the exercise of this freedom, were abolished during the French Revolution. Benjamin Constant, questioning what is meant by the word freedom, explains that "*It is the right for everyone ... to come and go, without obtaining permission, and without giving an account of their motives or actions*"<sup>278</sup>. This freedom would thus be part of the fundamental rights "*by nature*"<sup>279</sup> because it is part of the essential rights in that they condition the reality of other rights. These are rights predating any organized society, universal because they are attached to the human person. This question has very early animated the philosophers, and therefore the jurists who are in charge of transposing this issue into law.

**Human Rights.** Human rights thus emerge thanks to an important historical movement and the drafting of texts considered fundamental that will link "*law*" and "*human person*". This is the case of the *Magna Carta*, written in 1215, which proclaims in England for the first time rights such as the right to property, the freedom to come and go in peacetime or even certain guarantees of the criminal trial (impartiality of judges, intervention of a jury, legality, necessity and proportionality of sentences...). Later, the *Bill of Rights* of 1689 set forth the superiority of essential rights, and the *Habeas Corpus Act* of 1679 laid the foundations for individual liberty. The Declaration of Independence of the United States signed in July 1776 proclaimed that "*all men are created equal, that they are endowed by their Creator with certain inalienable rights, and that these rights include life, liberty and the pursuit of happiness*". The U.S. Constitution of 1787 will include amendments that will contain as many essential rights. In France, the *Declaration of the Rights of Man and of the Citizen* of 1789 emphasized the abstract and universalist characteristics that are the fundamental characteristics of these rights. International law thus generally refers to human rights or more precisely to "*Human Rights*". This was followed by the internationalisation of these rights, a manifestation of the international protection that was to be accorded to these rights.

<sup>278</sup> in *De la liberté des Anciens comparée à celle des modernes*, discours prononcé en 1819.

<sup>279</sup> rights relating to the body, to personal freedom ...



In the twentieth century, the United Nations made a major contribution to this movement, in accordance with the spirit of the *San Francisco Charter* of 1945. It is precisely the *Universal Declaration of Human Rights* adopted by the United Nations General Assembly in Paris on 10 December 1948 that constitutes the reference text at the international level. On a regional level, the Council of Europe created in 1949 the most developed and effective regional system for the protection of rights and freedoms, that of the *European Convention on Human Rights*. This is how a genuine international human rights standard will emerge, which nevertheless remains the hallmark of a very Western conception of rights, without regard for cultural relativism.

**Human rights and civil liberties.** As J. Rivero stated, human rights constitute a "*general, permanent, a-legal category*". They are then "*essential attributes of the person, existing independently of their consecration in positive law*"<sup>280</sup>. They would impose themselves both horizontally, in the relations between individuals, but also, in a more classical sense, vertically. Civil liberties would thus be the legal translation, by a given political system, of human rights which "... correspond to human rights that their recognition and development by the State have inserted into positive law ...". ». They would be a set of rights enforceable against the State and public persons. This is, moreover, the full meaning of the reference to the concept of "*civil liberty*" in article 34 of the 1958 Constitution, which states that the law lays down the rules concerning the "*fundamental guarantees granted to citizens for the exercise of civil liberties*", with a view to protecting the legislature from the administration. From this point of view, the law is the first guarantee of liberties, with regard to the regulatory power. This notion is the fruit of a vision and an era when the law was not controlled, that of the "*Legal State*". It has now been overtaken by the notion of fundamental rights and freedoms and by the notion of the "*rule of law*" which is consubstantial with it.

**Human rights, civil liberties and fundamental rights.** A third category of qualification of these rights and freedoms has emerged, under the heading of "*fundamental*". Affirmed by positive law, this category is characterized, according to some authors, by a strengthening the guarantees both in terms of standards of recognition and modalities of protection<sup>281</sup>. There would thus be a hierarchy between the various civil liberties and some would be better protected than others, in order to benefit from protection at the constitutional or supranational level. Thus, the Constitutional Council has enshrined several freedoms as "*fundamental*". Transposed from the German concept of the "*rule of law*", this notion implies that certain rights and freedoms enjoy a more solid legal basis, due to the existence of a higher norm in the hierarchy of norms, supra-legal, whether enshrined in the Constitution or in a treaty, which is binding on the executive power but also on the legislature. In France, it is the Constitutional Council which has therefore endeavoured to confer a constitutional value on certain freedoms, thus becoming the guarantor of fundamental freedoms. However, not all of them have been enshrined as such.

**First generation rights.** Historically, freedom and its various corollaries, including the freedom to come and go, is part of what the authors have been able to describe as "*first generation rights*", rights and freedoms that would have appeared in the first phase of the theory's construction, which was then built in reaction to the State.

First generation rights	Second generation rights – « <i>economic and social rights</i> »	Third generation rights known as " <i>solidarity rights</i> »
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<sup>280</sup> Jean Rivero, *Libertés publiques*, vol. 1 : *Les droit de l'homme*, Paris, PUF, coll. « Thémis Droit », juillet 2003, 9e éd. (1re éd. 1973).

<sup>281</sup> *Droit des libertés fondamentales*, sous la direction de Louis Favoreu, Dalloz, Précis, 7<sup>ème</sup> édition, 2015.

Liberty Equality Security property	Right to education Right of asylum Right to work Equality between Men and Women Right to strike Right to determine working conditions Protection of family and health	Right to a healthy environment Precautionary Principle Right to peace
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These are rights implying a freedom to do rather than rights to claim. Marked by a liberal state of mind, these rights establish the freedoms relating to physical conditions of existence and those relating to intellectual conditions of existence, the latter necessarily deriving from the former from the point of view of their effectiveness. *"The rights of 1789 impose on society only one negative obligation: not to do anything that would paralyze their play"* (Rivero<sup>282</sup>). It is in this context that the freedom to come and go is consecrated.

## B. The genesis of a freedom: the sources

**Internal sources.** The freedom to come and go appears, philosophically and historically, as an illustration of the general principle of freedom enshrined in the *Declaration of the Rights of Man and of the Citizen* of 26 August 1789<sup>283</sup>. The Constitutional Judges very quickly dissociated it from it to make it a value per se. Moreover, the Constitutional Council did not - curiously enough - immediately establish a link between this text and the freedom of movement. It invoked it in a decision of 1 July 1979, *"Law relating to certain works linking national or departmental roads"*, known as the *"Toll Bridges"* decision<sup>284</sup>, establishing it as a principle of constitutional value. In other decisions<sup>285</sup>, it referred to *"constitutionally guaranteed public freedoms, including the freedom to come and go"*. Later, the Judges of the Constitutional Court will clearly classify it among the *"fundamental rights and freedoms"* in their decision of 22 April 1997<sup>286</sup>. Finally, the Constitutional Judge considered *"that among the freedoms constitutionally guaranteed are the freedom to come and go ... protected by articles 2 and 4 of the Declaration of the Rights of Man and of the Citizen of 1789"*<sup>287</sup>. The

<sup>282</sup> Jean Rivero, *Libertés publiques*, vol. 1 : Les droit de l'homme, Paris, PUF, coll. « Thémis Droit », juillet 2003, 9e éd. (1re éd. 1973).

<sup>283</sup> Article 2 : « *The goal of any political association is the conservation of the natural and imprescriptible rights of man. These rights are liberty, property, safety and resistance against oppression* » ; article 4 : « *Liberty consists of doing anything which does not harm others: thus, the exercise of the natural rights of each man has only those borders which assure other members of the society the fruition of these same rights. These borders can be determined only by the law* ».

<sup>284</sup> Décision n° 79-107 DC du 12 juillet 1979, Loi relative à certains ouvrages reliant les voies nationales ou départementales JO du 13 juillet 1979 : *"Considering, on the one hand, that if the freedom to come and go is a principle of constitutional value..."*; RDP 1979, p. 1693, note L. Favoreu.

<sup>285</sup> par exemple, Cons. const., 18 janv. 1995, n° 94-352 DC, Loi d'orientation et de programmation relative à la sécurité : JO 21 janv. 1995, p. 1154.

<sup>286</sup> Décision n° 97-389 DC du 22 avril 1997, Loi portant diverses dispositions relatives à l'immigration, JO 25 avr. 1997, p. 6271.

<sup>287</sup> Décision n° 2003-467 DC du 13 mars 2003, Loi pour la sécurité intérieure, JO 19 mars 2003, p. 4789), ou ultérieurement décision n° 2005-532 DC du 19 janvier 2006, Loi relative à la lutte contre le terrorisme, JO 24 janv. 2006, p. 1138.

Tribunal of Conflicts had in fact previously paved the way in a decision of 9 June 1986<sup>288</sup>, followed by the Council of State in a decision of the Council of State assembly of 8 April 1987<sup>289</sup>, thus giving priority to national sources to which more recent international sources necessarily referred. As early as 1984, the Court of Cassation had qualified the said freedom as "*fundamental*" without, however, referring expressly to it<sup>290</sup>.

**Freedom to come and go and individual freedom.** The natural filiation between these two concepts has not been clearly understood from a legal point of view. Initially, the freedom to come and go may have appeared to be part of individual freedom. Thus, in his decision of 13 August 1993<sup>291</sup> relating to the *Act on immigration control and the conditions of entry, reception and residence of foreigners in France*, the constitutional judge stated that "*among these rights and freedoms are individual freedom and security, in particular the freedom to come and go*". It was as if the freedom to come and go was a corollary of individual freedom. However, the Constitutional Council was going to dissociate them definitively to make them two distinct values, individual freedom thus coming closer to what some would call "*security*". "*Divorce*" will be pronounced by the Constitutional Council in its aforementioned decision of 13 March 2003, in which it distinguishes, "*among the constitutionally guaranteed freedoms*", between "*the freedom to come and go and respect for privacy*" on the one hand and "*individual freedom*" on the other. In accordance with what has already been said, individual freedom is then refocused on the notion of security. In French law, the right to security<sup>292</sup> is the subject of particularly strong specific protection, since it is protected under the heading of individual freedom referred to in article 66 of the Constitution<sup>293</sup>. This dissociation is not without explanation insofar as it makes it possible to establish the legitimacy of the office of the administrative judge in the protection of this right. Indeed, article 66 of the Constitution relating to individual freedom - which was established as a "*Fundamental Principle Recognized by the Laws of the Republic*" (PFRLR) by the Constitutional Council in its decision of 12 January 1977 on the "*search of vehicles*"<sup>294</sup> - reaffirms this principle and entrusts custody of it to the judicial authority, under the terms of the same decision. Thus, the administrative judge is fully empowered to exercise control over the freedom to come and go<sup>295</sup>. Thus, the Act of 30 June 2000 on summary proceedings before the administrative courts<sup>296</sup> allows the latter to act in order to safeguard a

<sup>288</sup> T. confl., 9 juin 1986, n° 02434 « Eucat c/ Trésorier payeur général du Bas-Rhin » *Rec. CE* 1986, p. 301: "*that this right is recognized by the Declaration of the Rights of Man and of the Citizen of 1789*".

<sup>289</sup> CE, 8 avr. 1987, n° 55895, *Ministre de l'Intérieur et de la Décentralisation c/ Peltier* ; *Rec. CE* 1987, p. 128.

<sup>290</sup> Cass. 1re civ., 28 nov. 1984, [3 arrêts], n° 83-16.552, n° 83-14.046, Bonnet, Buisson, Lisztman : *Bull. civ.* 1984, I, n° 321.

<sup>291</sup> Décision n° 93-325 DC du 13 août 1993, *Loi relative à la maîtrise de l'immigration et aux conditions d'entrée, d'accueil et de séjour des étrangers en France*, *JO* 18 août 1993.

<sup>292</sup> Right to freedom from arbitrary arrest and detention.

<sup>293</sup> "*No one shall be arbitrarily detained.*"

*The Judicial Authority, guardian of the freedom of the individual, shall ensure compliance with this principle in the conditions laid down by statute.*

<sup>294</sup> Décision n° 76-75 DC du 12 janvier 1977, *Loi autorisant la visite des véhicules en vue de la recherche et de la prévention des infractions pénales*, *JO* du 13 janvier 1976, page 344.

<sup>295</sup> Recently again, see T. confl., 12 févr. 2018, n° 4110 : "*by withholding the identity documents of a foreigner suspected of document fraud when he is admitted to France beyond the time strictly necessary for identity control and the regularity of his situation, the border police infringe on the freedom of movement of the person concerned by placing him in a waiting zone. However, this freedom does not fall within the scope of "individual liberty" within the meaning of article 66 of the Constitution, so that such an infringement is not likely to characterize an assault. The conclusions of compensation therefore fall within the jurisdiction of the administrative court*".

<sup>296</sup> Loi n°2000-597 du 30 juin 2000 relative au référé devant les juridictions administratives *JO* 1er juill. 2000, p. 9948.

fundamental freedom under the provisions of article L. 521-2 CJA<sup>297</sup>. Moreover, one of the first decisions taken in this area concerns the freedom to come and go, in the case of a refusal to renew a passport<sup>298</sup>. That said, there is sometimes a fine line between the two concepts. In reality, reference must be made to security when the freedom to come and go is totally suppressed in order to check whether the conditions of arrest and detention are not arbitrary, since article 2 of the *Declaration of Human Rights* allows the freedom to come and go without being arbitrarily arrested or detained.

**Freedom to come and go and personal freedom.** The relay will be taken by a concept, which disappeared for a while, then reactivated, which is "*personal freedom*", which will henceforth be considered as the matrix of multiple freedoms protecting the rights of the individual within it<sup>299</sup>. The Constitutional Council clearly revived this concept in two decisions of 18 December 2003<sup>300</sup>, the last of which affirmed that freedom of marriage is a component of personal freedom, the latter being based explicitly on articles 2 and 4 of the Declaration of 1789. Then, the Constitutional Council emphasized that the freedom to come and go is "*a component of personal freedom protected by articles 2 and 4 of the Declaration of 1789*"<sup>301</sup>. The freedom to come and go is now clearly dissociated from individual freedom to be better linked to personal freedom. Thus the Council of State has followed in the footsteps of the Constitutional Council and has taken up the notion of personal freedom in matters of summary proceedings.

**European sources.** With regard to the concept enshrined in Community law, freedom of movement is at the heart of European construction: "*the free movement of [...] persons [...] shall be ensured*" (Article 26 § 2 TFEU). Initially specific to Community nationals exercising an employed or self-employed activity, this right implies "*to move freely within the territory of the Member States for this purpose*" (Article 45 §3b), and this independently of the issue of a residence permit, the CJEC will even say<sup>302</sup>. The Maastricht Treaty of 1992 will enshrine the extension of this freedom to all European citizens. According to Article 21 § 1 TFEU "*every citizen of the Union has the right to move and reside freely within the territory of the Member States...*". » In the judgment of 17 September 2002, "*Baumbast and R*"<sup>303</sup>, the Court of Justice of the European Communities accepted to give direct effect to this article. The Court of Justice of the European Union now routinely qualifies freedom of movement as "*fundamental*"<sup>304</sup>. The *Charter of Fundamental Rights of the European Union* proclaimed in Nice in December 2000 - to which the *Treaty of Lisbon* conferred the same legal value as the Treaties - confirms the fundamental right nature of this freedom<sup>305</sup>. Its Article 15.2 states that

<sup>297</sup> "When dealing with an application of this type that is justified by the urgent nature of the case, the urgent applications judge may order all measures required to safeguard a fundamental freedom that has been seriously infringed by a legal person governed by public law or an organisation governed by private law with responsibility for the management of a public service, in the exercise of its powers, in a manner that is clearly illegal. The urgent applications judge will make a ruling within 48 hours".

<sup>298</sup> CE, ord., 9 janv. 2001 Desperthes, n° 228928, Rec. CE 2001, p. 1.

<sup>299</sup> Décision n° 88-244 DC du 20 juillet 1988, Loi portant amnistie, JO 21 juill. 1988, p. 9448.

<sup>300</sup> Décision n° 2003-487 DC –Loi portant décentralisation en matière de revenu minimum d'insertion et créant un revenu minimum d'activité– (Cons. 27) *Journal officiel* du 19 décembre 2003, page 21686 et décision du 20 novembre 2003 n° 2003-484 DC –Loi relative à la maîtrise de l'immigration, au séjour des étrangers en France et à la nationalité, JO du 27 novembre 2003, page 20154.

<sup>301</sup> Cons. const., 9 juill. 2010, n° 2010-13 QPC, Orient O. et a. : JO 10 juill. 2010, p. 12841. – Cons. const., 7 juin 2013, n° 2013-318 QPC, consid. 12 : JO 9 juin 2013, p. 9630.

<sup>302</sup> CJCE, 8 avr. 1976, « Royer » aff. 48/75 : Rec. CJCE 1976, p. 497.

<sup>303</sup> CJCE, 17 sept. 2002, aff. C-413/99 : Rec. CJCE 2002, I, p. 7091.

<sup>304</sup> CJCE, 11 juill. 2002, aff. C-224/98, D'hoop : Rec. CJCE 2002, I, p. 6191. – CJCE, 2 oct. 2003, aff. C-148/02, Carlos Garcia Avello : Rec. CJCE 2003, I, p. 11613.

<sup>305</sup> Charter of Fundamental Rights of the European Union, JOCE C 364, 18.12.2000, p1.

"Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State". Citizenship and freedom of movement are now undeniably linked. Third-country nationals are, however, from this point of view, subject to the beginnings of a Community status under the new Title IV "Visas, asylum, immigration and other policies related to the free movement of persons" inserted into the *Treaty of Rome* by the *Treaty of Amsterdam*. The Charter of Fundamental Rights also contains an Article 45<sup>306</sup> which takes up this distinction between Community nationals and third-country nationals residing legally in the territory of a Member State. *The Schengen Agreements*<sup>307</sup>, which are binding on all the continental countries, organize the free movement of persons and therefore of foreigners who have lawfully entered the area they create, namely the Schengen area. This area is extended to the territories of all States bound by the Schengen acquis, which has now been integrated into the European Union since the *Treaty of Amsterdam*<sup>308</sup>. These agreements are based on the abolition of controls at internal borders, *i.e.* those common to the Member States, together with the strengthening of controls at external borders, *i.e.* those with third countries<sup>309</sup>.

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<sup>306</sup> "Article 45 - Freedom of movement and of residence

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States. 2. Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State".

<sup>307</sup> Schengen Agreements, June 14 1985, JOCE n° L 239, 22 sept. 2000, p. 19.

<sup>308</sup> The Schengen area, composed of 26 countries, should not be confused with the European Union, which today has 26 Member States. While all but six EU Member States are part of Schengen, non-EU countries such as Iceland, Norway, Switzerland and Lichtenstein bring the number of Schengen countries to 26. Ireland and the United Kingdom (members until Dec. 2020) maintain certain derogations and manage their own travel area, while with Bulgaria, Croatia, Cyprus and Romania border controls remain with the Schengen area.

<sup>309</sup> There are, of course, limitations provided for in the texts. Article 45§3 of the TFEU refers to a public health ground in addition to public policy and public security to justify national limitations on free movement. Article 52§1 TFEU, on the other hand, authorises a special regime for foreign nationals, justified on grounds of public health again, in addition to public policy and public security as regards establishment and, in combination with Article 62 TFEU, as regards the freedom to provide services. These limitations provided for by the Treaty are made explicit in the Directive of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Dir. no. 2004/38 of the Parl. EU Parl. and Cons. EU, 29 Apr. 2004, OJ L 158, 30 Apr., Art. 27). Due to COVID-19, a number of Member States have unilaterally taken measures restricting freedom of movement, on the basis of Articles 25 and/or, as the case may be, 28 of the Schengen Borders Code on the grounds of a serious threat to public policy or internal security of a Member State in the Schengen area (*cf* Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77, 23.3.2016, p. 1–52.). On 16 March, the European Commission published guidelines on, among other things, mobility at the external and internal borders of the 27 Member States (Information from european union institutions, bodies, offices and agencies, European Commission, 2020/C 86 I/01, Covid-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services, OJEU C1 86/1 16.03.20).

To explore the issue further, read the very complete article by C. Bories : "Quand l'Union européenne reconsidère la question de ses frontières par temps de coronavirus - État des lieux par pays", *Revue de l'Union européenne* 15 2020 p.296 : "In response to the Covid-19 pandemic, Europe is compartmentalizing itself without necessarily coordinating. From Rome to Nicosia, via Warsaw, Amsterdam, Paris, Madrid, Prague or Ljubljana, the decisions to close the national borders are multiplying, while the external borders of the Union and the Schengen area will remain closed for a period of 30 days from March 17, 2020. As unprecedented as it may be, the reintroduction of borders in Europe in times of coronavirus today calls for a certain number of questions with regard in particular to the principles of Union law and of its conception of the border. Nationalist withdrawal or truly protective barrier capable of stemming the spread of the virus? Attempted response".



**International sources.** At the European regional level, the provisions of Article 2(2) of *Protocol No 4 to the European Convention on Human Rights*<sup>310</sup>, recognize certain rights and freedoms other than those already included in the Convention and guarantee freedom of movement for persons lawfully residing on the territory of a Member State. This right is generally understood to be subject to such restrictions as are necessary in a democratic society to various aspects of public order as are enumerated in the text or for the protection of the rights and freedoms of others. Such restrictions must have a legal basis<sup>311</sup> and the Court shall review whether they are justified and proportionate. In international law, essentially<sup>312</sup>, the *Universal Declaration of Human Rights*, which is not binding<sup>313</sup>, contains an Article 13 recognizing that "everyone has the right to liberty of movement ... within the borders of a State". Article 12 of the *International Covenant on Civil and Political Rights* (ICCPR)<sup>314</sup>, adopted in 1966 and which entered into force on 16 December 1976, contains a § 1 which reads: "*Everyone lawfully within the territory of a State shall have the right to liberty of movement ...*", which will make it a genuine tool of protection of international scope<sup>315</sup>.

### C. A universal freedom exercised through the prism of the State

**Universality.** It is constant that all men must enjoy the freedom to come and go. Thus, the Constitutional Council, in its decision of 13 August 1993<sup>316</sup>, lists the freedom to come and go among the rights and freedoms enjoyed by all those, including foreigners, residing in the

<sup>310</sup> "Article 2 – Freedom of movement

1Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2Everyone shall be free to leave any country, including his own.

3No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society."

<sup>311</sup> CEDH, 23 mai 2001, *Deniczci*, § 405. –CEDH, 1er juill. 2004, *Santoro c/ Italie*, § 45.

<sup>312</sup>This freedom of movement will also be recognized in other international instruments, such as the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (Conv., 21 Dec. 1965, art. 5/d) i and ii), or article 26 of the 1951 Convention relating to the Status of Refugees.

<sup>313</sup>Before ruling on the plea alleging a violation of the Universal Declaration, the French administrative judge dismisses it classically for inoperability with regard to the legal nature of this text, in the absence of ratification. When responding to this plea, the administrative judge frequently emphasizes that the Declaration does not constitute a treaty of international law, that it does not appear among the diplomatic texts that have been ratified under the conditions set by article 55 of the Constitution of October 4, 1958, or that the mere publication of the text in the Official Journal is not sufficient to give it a higher value than those of the laws.

<sup>314</sup> Opened for signature in New York on December 19, 1966, entered into force for France on February 4, 1981. - Published by Decree No. 81-76 of January 29, 1981, *JO* Feb. 1, 1981.

<sup>315</sup>Direct invocability before the administrative judge of some of its provisions: v. par ex., CE, 21 oct. 2005, n° 285577, *Association Aides, Lebon* p. 438 ; CE, 22 oct. 2010, n° 301572, *Mme Bleitrach, Lebon* p. 399.

<sup>316</sup> Décision n° 93-325 DC du 13 août 1993, *Loi relative à la maîtrise de l'immigration et aux conditions d'entrée, d'accueil et de séjour des étrangers en France, JO* 18 août 1993, p. 11722.



territory of the Republic. The movement of sex workers<sup>317</sup> or sick persons<sup>318</sup> cannot be arbitrarily restricted. From this freedom derives the freedom to determine one's residence freely, which constitutes its corollary, albeit an autonomous one.

**The prism of the State.** International texts will recognize, in terms which are not always identical, the right to freedom of movement of nationals and foreigners. Thus, the right to move freely is recognized to foreigners only if they are in a regular situation (Conv. EDH, Protocol No. 4, Art. 2 § 1), or are lawfully on the territory of a State (ICCPR, Art. 12 § 1). And there is a consensus that the principle of equality is not violated because these two categories of persons are not placed in an identical situation<sup>319</sup>. Indeed, the freedom to come and go has been constructed in mirror image of the construction of the State, with regard to its territorial space. This freedom will therefore primarily concern the crossing of state borders, whether it concerns entry into or exit from a state. However, the freedom to come and go is not limited to freedom of movement within the French State; it also includes freedom of movement between States. It implies the right to enter French soil for French nationals or European citizens<sup>320</sup>. This right of entry for nationals is therefore generally guaranteed by international texts. Thus, according to § 2 of Article 3 of *Protocol No. 4 to the European Convention on Human Rights*, "*no one shall be deprived of the right to enter the territory of the State of which he is a national*". It should be noted that this right of entry is not explicitly guaranteed by the French Constitution. On the other hand, control over the entry of a foreigner into the territory of a State is a sovereign prerogative of each State, within the limits of compliance with international instruments imposing respect for other rights<sup>321</sup>. Consequently, the use of the automated and connected vehicle in cross-border trade could potentially contribute to the implementation of the exercise of this sovereign right. According to the Constitutional Council, "*no principle or rule of constitutional value guarantees foreigners general and absolute rights of access and residence on national territory*". However, the second § of Article 2 of *Protocol No. 4 to the European Convention on Human Rights*, as well as Article 12 of the ICCPR, enshrine in the same terms the freedom of any person to "*leave any country, including his own*"; no one may be illegally detained against his will in a country. The right to leave a State is therefore recognized in the same way for citizens of a State and for aliens; there is no difference between the two on this point. The right not to be prevented from leaving the national territory also implies that persons have the possibility of travelling to the country of their choice, as long as that country agrees to receive them. The Court of Cassation reiterated this principle for the first time<sup>322</sup>, followed

<sup>317</sup> Cass. crim., 1er févr. 1956, n° 56-03.636, Flavien : *D.* 1956, jurispr. p. 365.

<sup>318</sup> CE, 17 oct. 1952, n° 3868, Synd. climatique Briançon : *Rec. CE* 1952, p. 445.

<sup>319</sup> Décision n° 89-266 DC du 9 janvier 1990, Loi modifiant l'ordonnance n° 45-2658 du 2 novembre 1945 relative aux conditions d'entrée et de séjour des étrangers en France, *JO* 11 janv. 1990, p. 464 : "*legal framework in which foreigners are placed in a different situation from that of nationals*".

<sup>320</sup> Selon l'article 5 § 1 de la directive 2004/38/CE du 29 avril 2004, "*1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport*"..

<sup>321</sup> States must respect international obligations such as those existing, for example, in relation to refugees. A refugee may not be returned "to the frontiers of territories where his life or freedom would be threatened", according to article 33 of the Geneva Convention relating to the Status of Refugees, adopted on 28 July 1951. In addition, a constitutional right to admission is recognized for the benefit of asylum seekers, particularly in France. According to the fourth paragraph of the Preamble of the 1946 Constitution, "Every man persecuted because of his action in favor of liberty has the right to asylum in the territories of the Republic. We can also cite the reconciliation of the necessary respect for the right to lead a normal family life (Article 8 *Conv. EDH*).

<sup>322</sup> Cass. 1re civ., 28 nov. 1984, [3 arrêts], n° 83-16.552, n° 83-14.046, Bonnet, Buisson, Lisztman : *Bull. civ.* 1984, I, n° 321.

by the Constitutional Council in its 1993 decision<sup>323</sup>, which requires the State not to arbitrarily hold a person's travel documents, including his or her passport<sup>324</sup>. Conversely, according to Article 3 § 1 of *Protocol No. 4 to the European Convention on Human Rights*, "No one may be expelled, by means of an individual or collective measure, from the territory of the State of which he is a national". Thus, a national of a State enjoys full protection against any expulsion order by his or her own State, while aliens are always liable to be subject to expulsion orders.

**Freedom within the limits of the state's control.** There can thus be no prior authorization regime in this area<sup>325</sup>. It is in this context that certain provisions of Act No. 69-3 of 3 January 1969<sup>326</sup>, which required "Travellers" to hold a travel document to be stamped every three months, were invalidated, on pain of imprisonment. By its decision of 5 October 2012<sup>327</sup>, the Constitutional Council declared the requirement of a special circulation booklet for these categories of unconstitutional persons. In a decision of 19 November 2014, Peilleix<sup>328</sup>, the Council of State recognised that the criminal penalties provided for failure to present a special circulation booklet were contrary to Article 2 of the Fourth Additional Protocol to the European Convention on Human Rights.

**Limitations.** The Council of State, in an order of the interim relief judge of 29 June 2006, "Moon"<sup>329</sup>, recalled that "*the freedom to come and go is not general and absolute*". Thus, some of its elements may be subject to several kinds of limitations by the French authorities.

<sup>323</sup> Décision n° 93-325 DC du 13 août 1993, Loi relative à la maîtrise de l'immigration et aux conditions d'entrée, d'accueil et de séjour des étrangers en France, JO 18 août 1993, p. 11722.

<sup>324</sup> Décision n° 97-389 DC du 22 avril 1997, Loi portant diverses dispositions relatives à l'immigration, JO 25 avr. 1997, p. 6271.

<sup>325</sup> See the examples cited by F.FINES dans *JurisClasseur Administratif*, Fasc. 204 : « liberté d'aller et venir » : the judge cancelled the decree taken by the mayor of a mountain commune, anxious to prevent accidents, and which intended to oblige all tourists wishing to walk to inform the town hall beforehand. (CE, 13 mai 1927, Carrier et a. : *Rec. CE* 1927, p. 538). Several deliberations of territorial assemblies of TOM have been annulled, in that they intended to subordinate the exit from these territories to the production of documents attesting to the regularity of the tax situation (CE, 18 mars 1983, n° 41520 et n° 41682, Faure : *Rec. CE* 1983, p. 121), or the payment of taxes (CE, 9 nov. 1992, n° 107469, prés. gouv. territoire Polynésie française, prés. Ass. territoriale Polynésie française : *RFDA* 1993, p. 570, concl. S. Lasvignes). Let us also mention the decision of the Conseil d'État Assembly « Vedel et Jannot » (CE, ass., 20 déc. 1995, n° 132183 et n° 142913 : *AJDA* 1996, p. 165, chron. J.-H. Stahl et D. Chauvaux, p. 124) in which will be censured the refusal to repeal a 1935 decree which required any French person going to French Polynesia to produce a list of documents, and to deposit a guarantee of repatriation in that they "*bring to the freedom of movement of citizens on the territory of the Republic restrictions which are not ... justified by necessities peculiar to this overseas territory*".

<sup>326</sup> *JORF* 5 janv. 1969, p. 195.

<sup>327</sup> Décision n° 2012-279 QPC du 5 octobre 2012, M. Jean-Claude P. [Régime de circulation des gens du voyage] JO 6 oct. 2012, p. 15655 : "*Considering that administrative police measures that may affect the exercise of constitutionally guaranteed freedoms, including the freedom to come and go, which is a component of the personal freedom protected by Articles 2 and 4 of the Declaration of 1789 and the respect for privacy implied by the freedom proclaimed by Article 2 of the said Declaration, must be justified by the need to safeguard public order and proportionate to that objective. Considering that, according to the petitioner and the intervening association, the requirement of travel documents imposed only on persons who have been in France without domicile or fixed residence for more than six months institutes a difference in treatment that violates the principle of equality before the law; that, moreover, the regime of these travel documents would also institute differences in treatment contrary to the principle of equality and would disproportionately infringe the freedom to come and go*".

<sup>328</sup> CE, 19 nov. 2014, n° 359223, mentioned in the *tables du recueil Lebon*.

<sup>329</sup> CE, juge réf., 29 juin 2006, n° 294649 : *JurisData* n° 2006-070373.

The first reason is the need to reconcile this freedom with the constitutional objective of maintaining public order<sup>330</sup>, the proportionality of which is controlled by the administrative judge in the case of police powers<sup>331</sup>. The fight against terrorism has very recently justified the implementation of new measures introduced by the legislature limiting the freedom to come and go<sup>332</sup>. The second limitation concerns the special case of situations of a temporary and exceptional nature, such as a state of emergency<sup>333</sup> or the theory of exceptional circumstances<sup>334</sup>. Following the attacks of 13 November 2015 in Paris, a state of emergency was introduced in France to combat terrorist acts<sup>335</sup>. On this basis, hundreds of people were placed under house arrest by administrative decisions, the legality of which was challenged before the administrative judge<sup>336</sup>. The Constitutional Council, acting through a QPC, declared the new procedures for house arrest resulting from the Act of 20 November 2015<sup>337</sup> constitutional. These various provisions echo the reservations contained in international instruments. According to § 3 of *Article 2 of Protocol No. 4 to the European Convention on Human Rights*, the exercise of freedom of movement "may not be subject to restrictions other than those which, in a democratic society, are necessary in the interests of national security or public safety, for the maintenance of public order, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". Similarly, Article 12 § 3 of the ICCPR contains such a public policy reservation. It is interesting to try to understand the impact of the health crisis in this respect (see **ANNEX 4**).

#### D. Freedom of choice in terms and conditions of exercise

**Choice of mode of transport.** The freedom to come and go implies having a choice of means of travel. The choice of means of transport is inherent in the exercise of the freedom to come and go. As such, the link between the freedom to come and go and the choice of mode of transport must be highlighted. It is in the name of this freedom that the legislator regulated

<sup>330</sup> Cons. const., 8 juin 2012, n° 2012-253 QPC, Mickaël D. : *JO* 9 juin 2012, p. 9796 : "the infringements on the exercise of these freedoms must be adapted, necessary and proportionate to the objectives pursued", with regard to placement in a drunk tank following public drunkenness, based on article L. 3341-1 of the Public Health Code (CSP, art. L. 3341-1).

<sup>331</sup> CE, 9 juill. 2003, n° 229618, mentionné in *tables du recueil Lebon* : for an anti-mendicancy decree.

<sup>332</sup> Loi n° 2017-1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme, *JO* 31 oct. 2017, texte n° 1 (CSI, articles L 228-1 s.)

<sup>333</sup> Article 5 of Law No. 55-385 of April 3, 1955 (*JO* 7 avr. 1955, p. 3479) related to the state of emergency: this could only be declared "in the event of imminent danger resulting from serious breaches of public order" or "in the event of events presenting, by their nature and gravity, the character of a public calamity". Pursuant to this law, the prefect had the power to prohibit the movement of persons or vehicles in the places and at the times set by order, to establish protection or security zones where the stay of persons is regulated, and to prohibit the stay in all or part of the department of any person seeking to hinder, in any way whatsoever, the action of the public authorities. The Constitutional Council considered that the law of April 3, 1955 did not ensure a balanced reconciliation between, on the one hand, the constitutionally valid objective of safeguarding public order and, on the other hand, the freedom to come and go and the right to lead a normal family life, the repeal was postponed until July 15, 2017. (Cons. const. 9 juin 2017, n° 2016-635 QPC : *JO* 11 juin 2017, texte n° 28).

<sup>334</sup> CE, 18 mai 1983, Rodes, n° 25308 : *JurisData* n° 1983-607223 : temporary traffic ban due to volcanic eruptions.

<sup>335</sup> L. n° 2015-1501 20 nov. 2015 : *JO* 21 nov. 2015, p. 21665.

<sup>336</sup> For issues related to the COVID pandemic-19, cf § n°23, 24 et 54 et 55.

<sup>337</sup> Cons. const., 22 déc. 2015, n° 2015-527 QPC, M. Cédric D. [Assignations à résidence dans le cadre de l'état d'urgence], *JORF* n°0299 du 26 décembre 2015 page 24084 texte n° 210.

the use of the right to strike by the law of 21 August 2007<sup>338</sup> on regular public land transport services, now inserted in the Transport Code. The legislator thus felt it necessary to specify that the said services were essential because they allow the implementation of the said freedom. Recently, the Council of state, which was seized under the Act on the state of emergency with a request for summary proceedings, explicitly recalled that this aspect of the freedom to come and go must be protected as a fundamental freedom: *"the ability to move around using a means of locomotion whose use is authorized constitutes, in the context of the freedom to come and go and the right of each person to respect for his or her personal freedom, a fundamental freedom within the meaning of the provisions of article L.521-2 of the Code of Administrative Justice"*<sup>339</sup>. "Authorised use" may also be inferred from international stipulations. It should thus be recalled that in its decision of 25 and 26 June 1986<sup>340</sup>, the Constitutional Council recalled that *"orders may not be contrary, in disregard of Article 55, to France's international obligations"*. Subsequently, in the same spirit, reference was made to compliance with *"applicable international and European standards"*. For example, with regard to automated and connected vehicles, the Vienna Convention on Road Traffic of 8 November 1968<sup>341</sup> constitutes a major obstacle as it requires a natural person to be in control of the vehicle at all times. Consequently, the Council of State, in its advisory capacity, has constantly recalled that it was necessary to obtain a revision of the Vienna Convention before any amendment to the Highway Code, which is merely a servile transposition (in particular in Article R. 412-6). The Council thus reiterated its position in the context of the draft law on the orientation of mobility<sup>342</sup> by recalling that *"the rules relating to the circulation on public roads of autonomous vehicles, which this article empowers the Government to make by ordinance, can only enter into force after the revision of the Convention on Road Traffic opened for signature in Vienna on 8 November 1968, signed and ratified by France, which alone will be able to allow the circulation of highly automated vehicles on public roads, whereas in its present wording it allows the circulation on the roads only of delegated driving vehicles which comply with the United Nations regulations on vehicles or which can be "neutralized or deactivated by the driver" (see Article 8 of the Convention)*<sup>343</sup>. This position is constant since, in the context of its referral on the PACTE bill in terms of experimentation<sup>344</sup>, the judges of the Constitutional Council had detailed the reasons for their doctrine on the subject, recalling that *"under the Convention on Road Traffic*

<sup>338</sup> Loi n° 2007-1224 du 21 août 2007 sur le dialogue social et la continuité du service public dans les transports terrestres réguliers de voyageurs, *JORF* n°193 du 22 août 2007 page 13956 : *"This law is applicable to public scheduled non-tourist ground transportation services. These services are essential to the population because they allow the implementation of the following constitutional principles:- the freedom to come and go...."* ».

<sup>339</sup> CE, Ord. du 30 avril 2020, n°440179, « Federation Francaise des Usagers de la Bicyclette », with regard to the use of the bicycle.

<sup>340</sup> Décision n° 86-207 DC du 26 juin 1986, Loi autorisant le Gouvernement à prendre diverses mesures d'ordre économique et social, *JO* du 27 juin 1986, page 7978.

<sup>341</sup> Nations Unies, *Recueil des Traités*, vol. 1042, p. 17; et notifications dépositaires C.N.19.1992.TREATIES-1 du 3 mars 1992 amendements); C.N.120.1993.TREATIES-2 of 6 août 1993 (acceptation des amendements); C.N.924.2004.TREATIES-4 du 28 septembre 2004 (proposition d'amendements) et C.N.998.2005.TREATIES-3 du 29 septembre 2005 (acceptation des amendements); C.N.569.2014.TREATIES-XI-B-19 du 23 septembre 2014 (proposition d'amendements aux articles 8 et 39 de la Convention) et CN.529.2015.Reissued.06102015-Frn.TREATIES-XI-B-19 (rediffusée) du 6 octobre 2015 (acceptation des amendements aux articles 8 et 39 de la Convention)1; C.N.162.2015.TREATIES-XI-B-19 du 19 mars 2015 (proposition d'amendement au paragraphe 1 de l'annexe 2 de la Convention)2 et C.N.155.2016.TTREATIES-XI.B.19 du 8 avril 2016 (Acceptation).

<sup>342</sup> Loi n° 2019-1428 du 24 décembre 2019 d'orientation des mobilités, *JORF* n°0299 du 26 décembre 2019, texte n° 1.

<sup>343</sup> Conseil d'Etat, Assemblée générale, Section des travaux publics Section sociale, Séance du 15 novembre 2018, n° 395539 avis sur un projet de loi d'orientation des mobilités

<sup>344</sup> L. n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises, *JORF* n°0119 du 23 mai 2019.

opened for signature in Vienna on 8 November 1968, signed and ratified by France, only vehicles with delegated driving authority that comply with the United Nations regulations on vehicles or that can be 'neutralized or deactivated by the driver' may be authorized to circulate on the roads. The argument of the Council of State seemed implacable in view of its detailed analysis of the conventional stipulations<sup>345</sup>. The Council of State warned the Government that it could not "rely on any interpretation of these stipulations which would not allow experimental circulation of delegated driving vehicles not declared to conform the United Nations technical regulations on vehicles, on condition that the system of delegated driving could be "neutralized or deactivated by the driver". Thus, formulas such as "driver inattention" or "driver absence", which implied the possibility of authorizing experiments during which the driver would not be subject to an obligation of vigilance or attention, as well as experiments conducted without a driver, will be neutralized<sup>346</sup>. Similarly, since "rolling stock intended for the delivery of packages" were vehicles within the meaning of the Highway Code and the Vienna Convention, and as such subject to the same regime, the Council of State advised excluding them from the scope of the experiment. However, the recent amendment<sup>347</sup> adopted at the end of 2020 of the decree of the Council of State of 28 March 2018 relating to the experimentation of delegated driving vehicles on public roads<sup>348</sup> authorised, under the terms of its Article 17-1, "on an experimental basis and for a period of ten years, in order to allow experimentation with certain particular categories of vehicles" to derogate from the provisions of the highway code "in order to authorise the circulation of rolling stock intended for the delivery of goods on certain pavements, pavements and shoulders". As the opinion of the Council of State has not been made public, it is not possible to know the reasons for this "turnaround" or to know whether the government has ignored it<sup>349</sup>. It should be recalled that the opinion of the Council of State, even in its advisory capacity, is not to be neglected in so far as it may be seized, before ratification of the order

<sup>345</sup> CE, Assemblée générale, Séance du jeudi 14 juin 2018, Section de l'intérieur, Section des finances Section des travaux publics, Section sociale, Section de l'administration, n° 394.599 et 395.021, avis sur un projet de loi relatif à la croissance et la transformation des entreprises :

"Article 8, paragraph 1, of the same article states that every vehicle in motion must have a driver, paragraph 5 of the same article states that every driver must at all times be in control of his vehicle, and paragraph 6 of the same article states that the driver of a vehicle must avoid any activity other than driving;

- in article 13, paragraph 1, that every driver of a vehicle must remain in control of his vehicle under all circumstances;

- and in paragraph 5 bis of article 8, which entered into force on 23 March 2016, that "On-board systems affecting the driving of the vehicle shall be deemed to comply with paragraph 5 of this article and with the first paragraph of article 13 if they comply with the construction, installation and use requirements set out in international legal instruments relating to wheeled vehicles and equipment and parts which can be fitted and/or used on wheeled vehicles.

On-board systems affecting the operation of a vehicle which do not comply with the above-mentioned construction, assembly and use requirements shall be deemed to comply with paragraph 5 of this article and the first paragraph of Article 13 provided that they can be disabled or deactivated by the driver".

<sup>346</sup> It is with astonishment that we read on page 130 of the impact study of the draft law on mobility orientation that "The revision of the Vienna Convention is thus necessary to allow the circulation of highly automated vehicles on public roads outside the framework of the experiments" because nothing allows us to derogate from it at the experimental stage.... Impact study of the Mobility Orientation Law of 28 Nov. 2018.

<sup>347</sup> Décr. n° 2020-1495 du 2 décembre 2020 modifiant le décret n° 2018-211 du 28 mars 2018 relatif à l'expérimentation de véhicules à délégation de conduite sur les voies publiques, *JORF* n°0292 du 3 décembre 2020

<sup>348</sup> Décr. n°2018-211 du 28 mars 2018 relatif à l'expérimentation de véhicules à délégation de conduite sur les voies publiques, *JORF* n°0075 du 30 mars 2018 known as "DPTC".

<sup>349</sup> It should be noted, however, that III of the aforementioned article does indeed provide for a "driver"...



made on the basis of Article 38, as well as of any text of a regulatory nature, whether autonomous or of an implementing nature, which would fall within the scope of the treaty. However, since the "GISTI" reversal decision<sup>350</sup>, its office includes the interpretation of international treaties, the administrative judge being in no way bound by the interpretation formulated by the Ministry of Foreign Affairs<sup>351</sup>.

**Freedom of use of public space - parking.** The freedom to use public land is the expression of fundamental rights and freedoms enshrined in the Constitution or recognized by the Constitutional Council as principles of constitutional value. The freedom to use public domain dependencies for public use does not mean that users may act as they see fit. Indeed, freedom does not imply the absence of regulation, be it police or oriented towards the preservation of the public domain<sup>352</sup>. From this principle flows freedom of movement, which exists only on roads open to public traffic. Indeed, the respect for privacy, guaranteed by Article 2 DDHC, imposes a limitation on the freedom to come and go with regard to private property. The Besançon Court of Appeal recalled that the freedom to come and go does not confer the right to pass without authorization on the property of others, whereas such a right could only result from an easement of conventional or legal origin<sup>353</sup>. Moreover, freedom of movement does not operate in the same way according to the beneficiary in question, whether pedestrian or vehicle. The doctrine is hesitant as to whether parking itself would be a fundamental freedom in so far as it constitutes an application of the freedom to come and go. With reference to the case law of the Council of State and the Court of Cassation, both based on the "freedom to park"<sup>354</sup>, P. Bon could thus conclude: *"This is why it seems, with the majority of the doctrine (J.-M. Auby, La réglementation administrative du stationnement des véhicules automobiles sur les routes publiques, D., 1962, Chr., pp. 83. - J. Dufau, Le régime juridique du stationnement des automobiles dans les agglomérations, A.J.D.A., 1976, pp. 494-495. - F. Moderne, article cited above, pp. 168-171), that it is preferable to see parking as a public freedom; a public freedom which is the natural extension of the freedom of movement to which it is indissolubly linked, a freedom on the content of which it is advisable, however, not to have many illusions, since the content can sometimes prove to be very limited"*<sup>355</sup>.

<sup>350</sup> CE, Ass., 29 juin 1990, *Rec. CE*, p. 171.

<sup>351</sup> CE 21 déc. 1994, Serra Garriga, *Rec. CE*, p. 569, *Rev. crit. DIP* 1995. 291, note P. Lagarde.

<sup>352</sup> Dimitri Georges Lavroff- *Encyclopédie des collectivités locales* Chapitre 3 (folio n°5040) - Domaine des collectivités locales : régime du domaine public — Février 2008 cites a few judgments expressing this jurisprudence : CE 20 mars 1991, Association La truite de Moutier Haute-Pierre : *Lebon* p. 95 (freedom of use of waterways may be restricted for reasons of public interest, with a prohibition on the use of watercraft such as rafts, makeshift boats, inner tubes, etc.). – 5 septembre 1990, Delaby : *Lebon* T. p. 895 (recognizes the legality of the act of the police authority which prohibits that fairground shows or individual exhibitions take place on the public highway, except in front of the Centre Georges Pompidou and on the Place Saint-Germain-des-Prés, because they hinder the circulation of pedestrians and local residents). – Cass. crim. 8 avril 1992, Baudoux : *Gaz. Pal.* 15-16 janvier 1993, p. 6, note J.-P. Doucet (allows users to load and unload their vehicles but not to park for long periods of time without paying the parking fee that is mandatory in the zone concerned).

<sup>353</sup> CA Besançon, 1re ch. civ., 8 nov. 2006 : *Bull. inf.*, n° 663, 15 juin 2007.

<sup>354</sup> Thus, the Conseil d'État, in connection with a municipal police order reserving a half-day per week of parking spaces in front of the city hall for wedding processions, stated that the mayor had not "interfered with the freedom of other motorists to park their vehicles in a manner not imposed by the demands of traffic" (CE, February 26, 1969, *Sieur Chabrot and Syndicat national des automobilistes*, req. 72405: *Rec. Leb.*, p. 120). Similarly, the Court of Cassation, in relation to a municipal police order of which a defendant had allegedly disregarded the provisions, noted that it "contains no provision restricting freedom of parking in places where the defendant is accused of having let her car park" (Cass. crim., 27 May 1972, *Fayolle*: *Bull. crim.*, no. 175, p. 446).

<sup>355</sup> In *Encyclopédie des collectivités locales*, Chapitre 1 (folio n°2255) - Police municipale : voies ouvertes ou non ouvertes à la circulation publique, sept. 2018.



**Lack of constitutional value of the principle of free use of public space.** The principle of free use of the public domain assigned for the use of the public does not have constitutional value, as the Constitutional Council recalled in its 1979 decision "*Toll Bridges*" : "*Considering, on the one hand, that while the freedom to come and go is a principle of constitutional value, it cannot prevent the use of certain works from giving rise to the payment of a toll; [...] it cannot be inferred from this that the principle of free circulation on these roads must be regarded, within the meaning of the preamble to the 1958 Constitution, as a fundamental principle recognized by the laws of the Republic*"<sup>356</sup>. This principle of free collective use must be regarded as a general principle of law of legislative value. It follows that it is for the legislator alone to restrict its scope or to make derogations from it.

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<sup>356</sup> Décision 79-107 DC, 12 juillet 1979, Loi sur les ponts à péage : L. Favoreu, *RJC*, 1959-1993, p. 73 ; *RDP* 1979. 1691.

## ANNEX 2: Rights panel of the passenger in the EU Law

**In rail matters**, Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations<sup>357</sup> is, from its entry into force, applicable in its entirety to international rail passenger services (within the European Union). With the exception of certain mandatory provisions<sup>358</sup>, Member States may derogate from the application of the Regulation with regards to urban, suburban and regional rail passenger services (Article 2(5)). Subject to the same reservation, they may also derogate from it, for a period not exceeding five years, renewable twice for maximum periods of five years, in respect of domestic rail passenger services (Article 2(4)). With regard to urban, departmental or regional public rail transport services on the national rail network, France has chosen to make them subject to the mandatory articles of the regulation only, without prohibiting the authority organizing the service from applying all or part of the non-mandatory provisions (cf. Transposition Code, Article L. 2151-2<sup>359</sup>). With regard to other domestic rail passenger services, France has chosen to defer application of the provisions of the Regulation other than those of immediate mandatory application for a period of five years, renewable twice for a maximum period of five years if necessary. Only certain provisions of the Regulation cannot be subject to derogations. Certain minimum rights are indeed mandatory. This is the case for the right to availability of tickets and reservations (Article 9), the carrier's liability towards the passenger (Article 11), the right to transport of persons with disabilities or with reduced mobility (Articles 19 and 20(1)), and measures relating to the personal safety of passengers (Article 26).

**In aviation**, the Regulation of the European Parliament and of the Council of 13 May 2002 on air carrier liability in the event of accidents<sup>360</sup> aims to ensure alignment between the international rules provided in the Montreal Convention and the Community regime on air carrier liability in the event of accidents, for all air transport operations carried out by European carriers, regardless of the route (domestic, The Regulation of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights<sup>361</sup> complements the provisions of the *Montreal Convention* by improving the protection of air passengers in the event of denied boarding

<sup>357</sup> Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, *OJ L 315*, 3.12.2007, p. 14–4.

<sup>358</sup> "On the entry into force of this Regulation, Articles 9, 11, 12, 19, 20(1) and 26 shall apply to all rail passenger services throughout the Community" (Art.1 (3)).

<sup>359</sup> "Public urban, departmental or regional rail passenger transport services carried out on the rail network as defined in Article L. 2122-1 are subject only to the application of Articles 9, 11, 12, 19, 26 and I of Article 20 of the aforementioned regulation.

The other domestic rail passenger transport services are subject to the application of articles 9, 11, 12, 19, 26 and I of article 20 of the same regulation for a period of five years. This period may be renewed, by decree, twice for a maximum period of five years. At the end of this period, all the provisions of the same regulation are applicable to these services.

The present article does not prevent the competent authority for the organization of a public rail passenger transport service from deciding to apply all or part of the non-binding provisions of this regulation".

<sup>360</sup> Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents (Text with EEA relevance), *OJ L 140*, 30.5.2002, p. 2–5.

<sup>361</sup> Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (Text with EEA relevance) - Commission Statement, *OJ L 46*, 17.2.2004, p. 1–8.

against their will (overbooking) and cancellation or long delay of flights. These rules have been supplemented by Community case law<sup>362</sup>.

**With regards to the inland waterway and maritime transport**, the Regulation of 11 October 2010<sup>363</sup> imposes an obligation to provide passengers with adequate information in the event of cancellation or delay of a passenger transport service or cruise (Article 16<sup>364</sup>), assistance in the event of delays of more than 90 minutes (Article 17), and re-routing and reimbursement in the event of cancelled or delayed departures (Article 18), as well as rules on compensation for the price of the ticket in the event of late arrival (Article 19).

**As regards coach and bus transport**, the Regulation of 16 February 2011<sup>365</sup> establishes rights similar to those already enjoyed by passengers in other transport modes (in particular air, rail, sea and inland waterway transport) but also imposes a number of obligations on bus and coach transport companies and bus station managers concerning their liability towards passengers (compensation and assistance in the event of accidents, delays or cancellations).

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<sup>362</sup> *E.g.* : Judgment of the Court (Fourth Chamber), 19 November 2009, Christopher Sturgeon, Gabriel Sturgeon, Alana Sturgeon v Condor Flugdienst GmbH (C-402/07), and Stefan Böck, Cornelia Lepuschitz v Air France SA (C-432/07) : By this ruling, the European Court of Justice (CJEU) requires airlines - for a flight departing from a European Union Member State, regardless of the nationality of the airline, or when the flight lands in the European Union with an airline that is a national of a European Union State - to systematically compensate passengers (without the latter having to prove their loss) who suffer a delay of more than three hours ("*a loss of time equal to or greater than three hours, i.e. when they reach their final destination three hours or more after the arrival time initially scheduled by the air carrier*"), up to €250 to €600 depending on the flight concerned.

<sup>363</sup> Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 Text with EEA relevance, *OJ L 334*, 17.12.2010, p. 1–16.

<sup>364</sup> Article 16 (1) : "*...as soon as possible and in any event no later than 30 minutes after the scheduled time of departure, and of the estimated departure time and estimated arrival time as soon as that information is available*".

<sup>365</sup> Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 Text with EEA relevance, *OJ L 55*, 28.2.2011, p. 1–12.

### ANNEX 3: Specific rights granted to passengers with disabilities and passengers with reduced mobility for different types of transportation services in EU Law

**Rail transport.** Thus, with regard to rail transport, the above-mentioned Regulation No 1371/2007 recalls in its grounds that *"rail passenger services should benefit citizens in general. Consequently, disabled persons and persons with reduced mobility, whether due to disability, age or any other factor, should have access to rail transport under conditions comparable to those of other citizens. Disabled persons and persons with reduced mobility have the same right as all other citizens to free movement, freedom of choice and non-discrimination"*. This Regulation has a Chapter V, Article 19 of which is expressly entitled *"right to transport"*. It states that persons with disabilities and persons with reduced mobility have the right to non-discriminatory access to transport, both from the point of view of infrastructure and transport (1), and it is therefore prohibited to charge extra for their reservations and tickets (2). For the purposes of Community law, the *'right to transport'* therefore means non-discriminatory access to transport for persons with reduced mobility or a disability. This right to transport in the strict sense is coupled with an obligation to provide information. Indeed, the railway undertaking must, on request, provide information on the accessibility of rail services and on the conditions of access to the rolling stock, as well as on the equipment on board (Article 20§1). Under the provisions subject to derogation, the railway undertaking and the station manager must ensure, through compliance with the technical specifications for interoperability (TSI) for persons with reduced mobility, that stations, platforms, rolling stock and other equipment are accessible to persons with disabilities and persons with reduced mobility (Article 21§1). The TSIs bring together the technical prescriptions, adopted by Commission Decision, which must be met by the various components of the rail system (rolling stock, infrastructure, etc.) in order to meet the essential safety requirements and ensure the interoperability of the European rail systems. By Decision of 21 December 2007<sup>366</sup>, the Commission adopted, in accordance with Directives 96/48/EC and 2001/16/EC, a TSI relating to persons with reduced mobility in the trans-European conventional and high-speed rail system. On the occasion of the recasting of the regime of interoperability of the rail system within the Community by Directive 2008/57/EC<sup>367</sup> having repealed the two above-mentioned directives and according to which accessibility is an essential requirement of the rail system within the Union, the above-mentioned decision was repealed by Regulation No 1300/2014 on technical specifications for interoperability relating to the accessibility of the rail system of the Union for disabled persons and persons with reduced mobility<sup>368</sup>. The railway undertaking and the station manager shall cooperate in order to provide, free of charge and within reason, assistance on board trains and in staffed stations, provided that the passenger has notified his need for assistance 48 hours before departure (Articles 22 to 24).

**Air transport.** The Regulation of 5 July 2006<sup>369</sup> recalls the same principle that *"the single market for air transport services should benefit all citizens. Consequently, disabled persons and persons with reduced mobility, whether caused by disability, age or any other factor,*

<sup>366</sup> Decision of 21 December 2007 concerning the technical specification of interoperability relating to persons with reduced mobility in the trans-European conventional and high-speed rail system (notified under document C(2007) 6633) (2008/164/EC), *JOUE* L 64 du 7 mars 2008 p 72.

<sup>367</sup> Directive 2008/57/EC of the European Parliament and of the Council of 17 June 2008 on the interoperability of the rail system within the Community, *JOUE* L 191, 18.7.2008, p. 1–45

<sup>368</sup> Commission Regulation (EU) No 1300/2014 of 18 November 2014 on the technical specifications for interoperability relating to accessibility of the Union's rail system for persons with disabilities and persons with reduced mobility, *JOUE* L 356, 12.12.2014, p. 110–178

<sup>369</sup> Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air (Text with EEA relevance), *OJ* L 204, 26.7.2006, p. 1–9

*should have access to air transport comparable to that available to other citizens. Disabled persons and persons with reduced mobility have the same rights as all other citizens to free movement, freedom of choice and non-discrimination". A genuine right of access to transport is therefore affirmed, but this must be reconciled with security imperatives in the following terms: "Disabled persons and persons with reduced mobility should, therefore, have access to transport and should not be refused transport on the grounds of their disability or lack of mobility, except on safety grounds which are justified and imposed by law". The Regulation prohibits the refusal of a reservation or the embarkation of a person with reduced mobility or a disability, subject to various exemptions on grounds of manifest material impossibility or safety issues and provided that an alternative offer or refund or re-routing is offered. An obligation to be accompanied by "an accompanying person" may still be imposed (Articles 3 and 4). A right to assistance at the airport is also provided for (Article 7). Finally, appropriate information must be made available to the person concerned (Article 5).*

**As regards inland or maritime navigation**, the Regulation of 24 November 2010<sup>370</sup> recalls the same formula, which has now become sacramental<sup>371</sup>. Thus, Article 7 enshrines a "*right to transport*" prohibiting the refusal of a reservation, ticket or boarding solely on the grounds of an individual's disability and prohibiting additional costs in terms of fares, subject to various derogations due to obvious material impossibility or safety issues and on condition that an alternative offer or a refund or re-routing is proposed. An obligation to be accompanied (assistant) may still be imposed (Article 8). A right to assistance in ports and on board ships is also provided for (Article 10). Finally, appropriate information must be made available to the data subject (Article 9).

**As regards transport by bus and coach**, the regulation of 16 February 2011<sup>372</sup> also adopts the sacramental formula<sup>373</sup>. Article 9 thus enshrines a "*right to transport*" according to which

<sup>370</sup> Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 Text with EEA relevance, *OJ L 334*, 17.12.2010, p. 1–16

<sup>371</sup> *"The internal market for maritime and inland waterway passenger services should benefit citizens in general. Consequently, disabled persons and persons with reduced mobility, whether caused by disability, age or any other factor, should have opportunities for using passenger services and cruises that are comparable to those of other citizens. Disabled persons and persons with reduced mobility have the same rights as all other citizens with regard to free movement, freedom of choice and non-discrimination" [...] "In the light of Article 9 of the United Nations Convention on the Rights of Persons with Disabilities and in order to give disabled persons and persons with reduced mobility opportunities for maritime and inland waterway travel comparable to those of other citizens, rules for non-discrimination and assistance during their journey should be established. Those persons should therefore be accepted for carriage and not refused transport, except for reasons which are justified on the grounds of safety and established by the competent authorities. They should enjoy the right to assistance in ports and onboard passenger ships. In the interests of social inclusion, the persons concerned should receive this assistance free of charge. Carriers should establish access conditions, preferably using the European standardisation system deciding on the design of new ports and terminals, and as part of major refurbishments, the bodies responsible for those facilities should take into account the needs of disabled persons and persons with reduced mobility, in particular with regard to accessibility, paying particular consideration to 'design for all' requirements. Carriers should take such needs into account when deciding on the design of new and newly refurbished passenger ships in accordance with..."*

<sup>372</sup> Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 Text with EEA relevance, *OJ L 55*, 28.2.2011, p. 1–12.

<sup>373</sup> *"Bus and coach passenger services should benefit citizens in general. Consequently, disabled persons and persons with reduced mobility, whether caused by disability, age or any other*

carriers, travel agents and tour operators may not refuse to accept a reservation, issue or provide a ticket or to take a person on board on the grounds of disability or reduced mobility, while no supplement is charged to persons with disabilities and persons with reduced mobility for their reservations and tickets, subject to various derogations on the grounds of manifest material impossibility or for security reasons and provided that an alternative offer or a refund or re-routing is offered. An obligation to be accompanied (assistant) may still be imposed (Articles 9 and 10). A right to assistance at stations and on board buses and coaches is also provided for (Articles 13 and 14). Finally, appropriate information must be made available to the data subject (Article 9).

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*factor, should have opportunities for using bus and coach services that are comparable to those of other citizens. Disabled persons and persons with reduced mobility have the same rights as all other citizens with regard to free movement, freedom of choice and non-discrimination [...] In the light of Article 9 of the United Nations Convention on the Rights of Persons with Disabilities and in order to give disabled persons and persons with reduced mobility opportunities for bus and coach travel comparable to those of other citizens, rules for non- discrimination and assistance during their journey should be established. Those persons should therefore be accepted for carriage and not refused transport on the grounds of their disability or reduced mobility, except for reasons which are justified on the grounds of safety or of the design of vehicles or infrastructure. Within the framework of relevant legislation for the protection of workers, disabled persons and persons with reduced mobility should enjoy the right to assistance at terminals and on board vehicles. In the interest of social inclusion, the persons concerned should receive the assistance free of charge. Carriers should establish access conditions, preferably using the European standardisation system. »*



## ANNEX 4 : State of health emergency related to covid19, freedom to come and go and right to transport : the example of the treatment of the problem in France

### A. Freedom to come and go and COVID19

#### Freedom to come and go and Covid-19. Containment phase [17 March - 11 May 2020].

Many commentators have expressed concerns about the infringements of rights and freedoms, including the freedom to come and go, as a result of the lockdown imposed in France in March 2020. At the international level, the Secretary General of the Council of Europe had invited member states to make use of Article 15 of the Council of Europe Convention on Human Rights and Fundamental Freedoms on derogations in cases of urgency, which substitutes an exceptional form of conventionality for normal conventionality, allowing the temporary suspension of the enjoyment of certain guaranteed rights. According to Article 15 § 3 of the European Convention on Human Rights, *"any High Contracting Party exercising this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures taken and the reasons therefor"*. Failure to notify, or withdrawal of, such measures shall prevent the State from availing itself of the derogation provided for in Article 15. Only 10 States had declared the use of Article 15 by 20 April 2020. However, France did not believe she had to make use of this article, contrary to previous declarations of a state of emergency in 1985 (New Caledonia), 2005 (situation of urban violence) and 2015 (terrorist attacks in Paris), which leaves one perplexed by the attacks on, *inter alia*, the freedom of movement. Yet France has declared a *"state of health emergency"* (EUS<sup>374</sup>) and has put in place a permanent arsenal of exceptional measures restricting rights and freedoms, creating an exceptional regime that can be mobilized in the event of a state of health emergency. Article 2, paragraph 3 of the Emergency Act of 23 March 2020 to deal with the Covid-19 epidemic inserted into the Public Health Code an article L. 3131-12, according to which *"A state of public health emergency may be declared in all or part of metropolitan France (...) in the event of a public health disaster which, by its nature and seriousness, endangers the health of the population"*, as well as an article 3131-15 according to which *"In the territorial districts where a state of health emergency is declared, the Prime Minister may, by regulatory decree issued on the report of the Minister responsible for health, for the sole purpose of guaranteeing public health: / 1° Restrict or prohibit the movement of persons and vehicles in the places and at the times laid down by decree; / 2° Prohibit persons from leaving their homes, subject to travel that is strictly essential for family or health needs; (...). ... / The measures prescribed in application of 1° to 10° of this Article shall be strictly proportionate to the health risks incurred and appropriate to the circumstances of time and place. They shall be terminated without delay when they are no longer necessary"*. The text also created an offence in case of repetition of the violations provided for more than three times within thirty days, and punishes it with six months' imprisonment and a fine of €3,750. As F. Sudre<sup>375</sup>, points out, *"France has de facto derogated from the ECHR. The measures*

<sup>374</sup>Law n° 2020-290 of March 23, 2020 of emergency to face the epidemic of Covid-19 (Rect. JO of 25/03/2020. - Modification of the Public Health Code) - Decree n° 2020-293 of March 23, 2020 prescribing the general measures necessary to deal with the Covid-19 epidemic within the framework of the state of health emergency, modified eight times and most recently by Decree n° 2020-400 of April 5, 2020 (Repeal and replacement of Decree n° 2020-197 of March 5, 2020, Decree no. 2020-247 of March 13, 2020 and Decree no. 2020-260 of March 16, 2020) - Order of March 14, 2020 on various measures relating to the fight against the spread of the Covid-19 virus, six times amended by orders of March 15 to 21, 2020 and then repealed by the order of March 23, 2020 prescribing the organizational and operational measures of the health system necessary to deal with the covid-19 epidemic within the framework of the state of health emergency.

<sup>375</sup> « *La mise en quarantaine de la Convention européenne des droits de l'homme* », par Frédéric Sudre, professeur émérite, Université de Montpellier, <https://www.leclubdesjuristes.com/blog-du->

restricting rights and freedoms adopted under the state of public health emergency - under the generic name of lockdown - clearly go beyond, by their unprecedented scale and generality (the entire population, the entire territory), the ordinary conventional regime of restrictions on rights and fall, in our view, within the regime of derogations, particularly if they extend over time. The non-exhaustive list of rights protected by the Convention whose exercise is limited or suspended is impressive: ... freedom of movement (Prot.4, art. 2) ...". However, according to this author, by refraining from indicating her intention use article 15, France was not respecting the international legal order to which she had nevertheless submitted, while she was supposed to respect the treaty norms. Mr. Sudre, like many others, therefore considered that certain provisions ran counter to the Convention from the outset. The absence of appeal to Article 15 did not mean that no limitation on treaty rights was possible, since normal treaty law provided for the possibility of restricting certain rights. Where restrictions are allowed, the text of the Convention itself most often makes express reference to *"the preservation of health"* as a reason for adopting such measures, which is the case of Article 2 of Protocol No. 4, which guarantees freedom of movement. In this case, the measures will be advantageously subject to ordinary proportionality control and must be *"necessary in a democratic society"*. The extent of the margin of appreciation granted to states depends *"on factors such as the nature and importance of the interests at stake and the seriousness of the interference"*. From this point of view, notwithstanding the drastic restrictions imposed by the lockdown, none of the decisions handed down by the Council of State acting as an interim relief judge during this period considered that a disproportionate interference was being made<sup>376</sup>, leading F. Sudre to say that the Supreme Judge ruled *"according to a stereotypical motivation, the requests for summary proceedings in connection with covid-19 'in the absence of a serious and manifestly unlawful infringement of a fundamental freedom', which 'clearly shows that the review of conventionality is purely formal'".* It should also be noted that the interim relief judge refused to refer back to the Constitutional Council the provisions of the Emergency Act of 23 March 2020 which define in the Public Health Code the prohibitions - and the penalties incurred by offenders - that may be enacted by the Prime Minister for the purpose of guaranteeing public health in the context of a state of health emergency. The Supreme Judge considers that the provisions of article L. 3131-15 of the Public Health Code, derived from the Emergency Act of 23 March 2020 to deal with the covid-19 epidemic, define with sufficient precision the prohibitions that may be issued by the Prime Minister for the purpose of guaranteeing public health, in the context of a state of health emergency. The provisions in question do not disregard the principle of legality of offences and penalties and do not provide for penalties which are manifestly disproportionate to the seriousness and nature of the offences punished under the state of public health emergency. As for the decree of 23 March 2020 adopted on the basis of the said law, the judges of the Council of State considered that *"the prohibition on leaving one's home, and the exceptions to which it is subject, provided for in article 3 of the decree of 23 March 2020, which are defined in sufficiently clear and precise terms, are not manifestly contrary to the principle, set out in article L. 3131-15 of the Public Health Code, according to which the measures prescribed must be proportionate to the health risks involved and appropriate to the circumstances [...]"* Consequently, *if the provisions described in point 11 have the effect of limiting the freedom of movement and their implementation may, as it is claimed, entail restrictions on the right to privacy and the right to lead a normal family life, The Prime Minister, in adopting these measures, did not seriously and manifestly illegally infringe a fundamental freedom, given the circumstances that led to the declaration of a state of health emergency by Article 4 of the Emergency Law of 23 March 2020 to deal with the covid epidemic*<sup>377</sup>. Even before the adoption of the law declaring a state of health emergency, the Minister of Solidarity and Health had taken measures, by several decrees from 4 March 2020, on the basis of the provisions of article L. 3131-1 of the Public Health

coronavirus/que-dit-le-droit/la-mise-en-quarantaine-de-la-convention-europeenne-des-droits-de-l'homme/

<sup>376</sup> See, however, *infra* on the choice of mode of transport.

<sup>377</sup> Conseil d'Etat, ord., 4 avr. 2020, n° 439888.

Code. In particular, by an order of 14 March 2020, a large number of establishments receiving the public were closed to the public, gatherings of more than 100 people were banned and the reception of children in establishments receiving them and in schools and universities was suspended. Then, by a decree of 16 March 2020 motivated by the "*exceptional circumstances*" arising from the covid-19 epidemic, amended by a decree of 19 March, the Prime Minister prohibited the movement of any person from his or her home, subject to exceptions that were restrictively listed and had to be duly justified, without prejudice to more stringent measures that could be ordered by the State representative in the department. In the event of trip, the persons had to be in possession of a certificate proving that the trip corresponded to one of these exceptions. In addition, the decree authorized the departmental prefects to take additional restrictive measures if local circumstances so required. While in the past, population containment measures had already been taken by the administrative authorities, this was the first time that such a system had been deployed throughout the national territory and concerned persons potentially not infected by the virus. The Minister of Solidarity and Health then took additional measures by orders of 17, 19, 20 and 21 March 2020<sup>378</sup>. Here again, many authorized opinions pointed to the unorthodox nature of the measures enacted. The foremost among them was Nils Symchowicz, who noted that "*this succession of imperfect, approximate acts with uncertain legal foundations is obviously regrettable, both for the minimal respect due to the exercise of our fundamental freedoms and for the legal security of bleeding economic operators. And the emergency situation cannot be an excuse. The scale and seriousness of the measures taken are all the more reasons to justify the enactment of irreproachable acts*"<sup>379</sup>.

**Freedom to come and go and Covid-19. "Post-lockdown period" [11 May 2020 - 10 July 2020].** The French Government seemed to become aware of the problem since the President of the Republic decided to address the Constitutional Council under the provisions of Article 61 paragraph 2 of the Constitution, in parallel with the parliamentarians, the constitutionality of the law extending the state of health emergency and supplementing its provisions, which was finally promulgated on 12 May 2020<sup>380</sup>. The key measure consisted in easing the restrictions on freedom of movement, since any movement of persons within a perimeter defined by a radius of 100 kilometers from their place of residence and within the department in which the latter is located was now authorized, although exceptional reasons make it possible to go beyond that<sup>381</sup>. In support of this measure affecting freedom of

<sup>378</sup> Décret n° 2020-260 du 16 mars 2020 portant réglementation des déplacements dans le cadre de la lutte contre la propagation du virus covid-19, *JORF* du 17 mars 2020 - Arrêté du 16 mars 2020 complétant l'arrêté du 14 mars 2020 portant diverses mesures relatives à la lutte contre la propagation du virus covid-19.

<sup>379</sup> Urgence sanitaire et police administrative : point d'étape, *Le droit en débats*, par Nils Symchowicz le 31 mars 2020, *Dalloz Actualités*.

<sup>380</sup> Loi n° 2020-546 du 11 mai 2020 prorogeant l'état d'urgence sanitaire et complétant ses dispositions, *JORF* n°0116 du 12 mai 2020.

<sup>381</sup> Cf art. 3 lists the motifs : "1° Journeys between the place of residence and the place(s) where the professional activity is carried out, and professional journeys that cannot be postponed; 2° Journeys between the place of residence and the educational establishment carried out by a person who is educated there or who accompanies a person who is educated there, and journeys necessary to go to exams or competitions; 3° Journeys for health consultations and specialized care that cannot be carried out at a distance or near the home; 4° Journeys for urgent family reasons, for the assistance of vulnerable persons, for respite and accompaniment of disabled persons and for childcare; 5° Journeys resulting from an obligation to report to the national police or gendarmerie services or to any other service or professional, imposed by the administrative police authority or the judicial authority; 6° Travel resulting from a summons issued by an administrative court or judicial authority; 7° Travel for the sole purpose of participating in missions of general interest at the request of the administrative authority and under the conditions specified by it", Décret n° 2020-548 du 11 mai 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire, *JORF* n°0116 du 12 mai 2020.

movement, the legislative arsenal of the state of public health emergency provided for in article L. 3131-15 I. of the Public Health Code has been supplemented by a first paragraph entitled *"Regulating or prohibiting the movement of persons and vehicles and regulating access to means of transport and the conditions of their use"*, which allows the Prime Minister, in the territorial districts where a state of public health emergency has been declared, to take measures in the area of transport by decree for the sole purpose of guaranteeing public health. In its decision of 11 May 2020<sup>382</sup>, the Constitutional Council again recalled that *"the Constitution does not exclude the possibility for the legislator to provide for a state of health emergency. It is incumbent upon it, in this context, to ensure that the constitutionally-valued objective of health protection is reconciled with respect for the rights and freedoms recognized for all those residing on the territory of the Republic. These rights and freedoms include the freedom to come and go, a component of personal freedom, protected by articles 2 and 4 of the Declaration of 1789"* when the President of the Senate argued that the freedom to come and go was being infringed. If the Wise Men acknowledge that *"Paragraph I, 1° of Article L. 3131-15 of the Public Health Code allows the Prime Minister to regulate or prohibit the movement of persons and vehicles and to regulate access to means of transport and the conditions of their use. These provisions infringe the freedom to come and go"*, they conclude that *"the legislature has struck a balanced balance between the above-mentioned constitutional requirements"*, recalling the guarantees surrounding the pronouncement of a state of emergency (recourse to the law at the end of a month, public health purpose, measures strictly proportionate to the health risks incurred and appropriate to the circumstances of time and place, judicial review). With regard to placement and maintenance in quarantine or isolation<sup>383</sup>, for which the legal regime has been considerably fleshed out and detailed, the parliamentarians thus criticized the infringement of individual liberty and the disregard of article 66 of the Constitution, which provides that the judicial authority is the guardian of individual liberty, under the conditions referred to above<sup>384</sup>. In this connection, the Constitutional Council points out that deprivation of exit (being deprived from going out) is indeed equivalent to deprivation of liberty and that *"individual liberty can only be considered to be safeguarded if the judge intervenes as soon as possible"*. The provisions criticized are therefore censured in that they did not provide for the intervention of the liberty and custody judge in any measure allowing the extension of quarantine or placement in isolation requiring the person concerned to remain in his or her home or place of accommodation for a period of more than 12 hours a day. Under these conditions and subject to this provision, quarantine or solitary lockdown measures do not affect the freedom to come and go, according to the Constitutional Council. Now in accordance with what P. Wachsmann<sup>385</sup> recalled, *"it is not enough to invoke proportionality in hollow and quickly dispatched formulas, as the Constitutional Council likes to do: it is advisable to carry out the verifications that it implied in its three elements of adequacy, proportionality stricto sensu"*

<sup>382</sup> Décision n° 2020-800 DC du 11 mai 2020, Loi prorogeant l'état d'urgence sanitaire et complétant ses dispositions, *JORF* n°0116 du 12 mai 2020.

<sup>383</sup> Under Article L 3131-15, I CSP, 3°, it is permitted to *"3° Order measures to quarantine, within the meaning of Article 1 of the International Health Regulations of 2005, persons likely to be affected; 4° Order measures to place and maintain in isolation, within the meaning of the same Article 1, in their homes or any other suitable accommodation, persons affected [...]"*. In this respect, the prefect, pursuant to the provisions of Article L3131-17, II of the same code, is empowered to take the said measures: *"Individual measures involving quarantine and measures for placement and maintenance in isolation shall be pronounced by reasoned individual decision of the representative of the State in the department on the proposal of the director general of the regional health agency. This decision mentions the channels and deadlines for appeal as well as the procedures for referral to the liberty and detention judge. Placement and maintenance in isolation are subject to medical confirmation of the infection of the person concerned. They are pronounced by the State representative in the department on the basis of a medical certificate [...]"*.

<sup>384</sup> cf § n°15.

<sup>385</sup> Patrick Wachsmann, « Les libertés et les mesures prises pour lutter contre la propagation du covid-19 », *JCP G*, n° 20-21, 18 Mai 2020, 621.



and necessity, being recalled that the criticized measure must successfully undergo the examination on these three aspects successively". Some may have considered that the constitutionality review appeared somewhat stereotypical in this last decision, but it should be recalled that it had to be handed down as a matter of extreme urgency. As Xavier Dupré de Boulois presupposes, *"the decision of the Constitutional Council is probably only one stage in the construction of the state of health emergency regime. It is intended to be enriched in the future with new paragraphs that could usefully strengthen the framework for public authorities' action in times of health disasters. The "narrow doors" submitted to the Constitutional Council by several associations on the occasion of its decision No. 2020-800 DC suggest developments through the claims of unconstitutionality that they have put forward in vain. The process of "co-construction" of the law inherent in the functioning of a democratic regime is therefore bound to continue"*<sup>386</sup>. Moreover, it should be noted that the Council of State has significantly strengthened its control by issuing, during this period, various decisions censuring an infringement of a fundamental freedom<sup>387</sup>.

**Freedom to come and go and Covid-19. Temporary exit from the state of emergency, new declaration, curfew [10 July 2020 - 1 June 2021].** The law of 9 July 2020 extended the state of health emergency only on the territories of French Guyana and Mayotte until 30 October 2020. As already explained, in a state of health emergency, Article L. 3131-15 of the Public Health Code (CSP) allows the Prime Minister to take police measures that significantly affect fundamental freedoms. But this power was extended by Article 1 of Act of 9 July 2020 organising the end of the state of public health emergency, for a period expiring on 30 October 2020<sup>388</sup>. However, once the state of emergency has been lifted and in the territories where it has been lifted, the legislature may authorise the Prime Minister to take measures by decree, on the report of the minister responsible for health, in the interests of public health and for the sole purpose of combating the spread of the covid-19 epidemic, to organise the exit from the state of public health emergency<sup>389</sup>. The law organising the exit from the state of health emergency mainly includes measures of restriction or prohibition<sup>390</sup>. This text provides for an *ad hoc* regime for exiting a state of health emergency. It enables the Prime Minister to take measures by decree relating to the movement of persons and vehicles and access to public transport (air and sea transport only); the opening of establishments open to the public and meeting places, with the exception of premises used for residential purposes; gatherings and meetings on the public highway and in public places ; the obligation to carry out a virological test for persons travelling by air to or from metropolitan France or overseas<sup>391</sup>. Prefects may be empowered by the Prime Minister to take measures to implement these provisions. When these measures are to be applied in a geographical area that does not exceed the territory of a department, the prefect of the department may be

<sup>386</sup> Xavier Dupré de Boulois, Éloge d'un état d'urgence sanitaire en « co-construction » - . - CSP, art. L. 3131-12 et s. *JCP G*, n° 20-21, 18 Mai 2020, 622.

<sup>387</sup> CE, Ord. n°s 440442, 440445, 18 mai 2020, Association la quadrature du net ; Ligue des droits de l'Homme : for a lack of awareness of the right to privacy – CE, Ord. n° 440366, 440380, 440410, 440531, 440550, 440562, 440563, 440590, 18 mai 2020, M. W...et autres : for a misunderstanding of the freedom of worship.

<sup>388</sup> Loi n° 2020-856 du 9 juillet 2020 organisant la sortie de l'état d'urgence sanitaire, *JORF* n°0169 du 10 juillet 2020.

<sup>389</sup> Cons. const. 9 juill. 2020, no 2020-803 DC, *JORF* n°0169 du 10 juillet 2020.

<sup>390</sup> As analysed by M. Verpeaux "Le déconfinement partiel devant le Conseil constitutionnel", *AJDA* 2020. 2274.

<sup>391</sup> Décret n° 2020-860 du 10 juillet 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans les territoires sortis de l'état d'urgence sanitaire et dans ceux où il a été prorogé, *JORF* n°0170 du 11 juillet 2020. Then, successive decrees have gradually expanded the list of "zones of active virus circulation" in which the Prime Minister's police powers inherent in a state of public health emergency have been reinforced (CSP, art. L. 3131-15; measures restricting the movement of persons and vehicles, closure of establishments open to the public, etc.).

empowered to decide himself. But widespread lockdown of the population can no longer be ordered. Two provisions of Article 1 were challenged by the referral. The first is set out in the first point of paragraph I authorising the Prime Minister to regulate or prohibit the movement of persons and vehicles as well as that of means of public transport. The direct consequence of this power is to infringe the freedom of movement. Everything then depends on the reasons likely to justify this restriction, or at least to reconcile with it. As for the referral considered that these powers could lead to a ban on all circulation when the conditions of the state of public health emergency are no longer met, since the law is, in principle, intended to organize the exit from the state of public health emergency. Predictably, given the context of this Act and the decisions handed down on comparable laws, the Council uses, in order to establish this reconciliation with the freedom to come and go, the constitutionally valid objective of health protection taken from paragraph 11 of the Preamble to the 1946 Constitution, according to which the Nation "*guarantees to all, in particular to children, mothers and elderly workers, the protection of health, material security, rest and leisure*"<sup>392</sup>. Four reasons justify, in the aforementioned Council's Decision, that the conciliation is deemed to be balanced between these two necessarily contradictory constitutional norms in the context of the epidemic and that the objective of health protection should be pursued. The first is a factual observation of the link between the movement of persons and vehicles and the spread of the virus. « *The more mobile people are, the more the epidemic develops* »<sup>393</sup>. The second reason is to be found in the limitation in time of the exceptional powers granted to the Prime Minister, *i.e.* during the period from 11 July to 30 October 2020, because it is during this period that a "*significant risk of propagation of the epidemic persisted*" (according to the legislator's analysis at the time the law was passed, relatively over-optimistic forecasts in retrospect). The third reason is drawn from the contested provision itself, which provides, in paragraph III, that "*the measures prescribed pursuant to this Article shall be strictly proportionate to the health risks incurred and appropriate to the circumstances of time and place. They shall be terminated without delay when they are no longer necessary*". In the Council's view, their sole reason must be "*in the interests of public health and for the sole purpose of combating the spread of the covid epidemic*"<sup>19</sup> (§ 14), which brings us back to the definition of the constitutionally valid objective of health protection. In addition, these measures may be the subject of "*a summary suspensory application or a summary release application before the administrative court*", according to paragraph 4 of the same Article 1, provided for in Articles L. 521-1 and L. 521-2 CJA, which in particular enabled the judge to recall that he ensures that French nationals are guaranteed the right to enter the territory even in the event of a pandemic<sup>394</sup>. The administrative court will then be able, on a case-by-case basis, to assess the adequacy of the content of the measures with the objectives sought in the law, through a control which, in order to be effective, must be a normal control. Finally, and this is the fourth reason, conciliation is not unbalanced because the prohibition or restriction measures are limited to "*territories where an active circulation of the virus has been observed*" (referred law, 1° of art. 1). In a manner that is not really reassuring, the Council observes, according to parliamentary proceedings, since this precaution is not formulated in the law, that the prohibition cannot lead to preventing persons "*from leaving their homes or their surroundings*" (§ 15). Similarly, and again according to the Council's interpretation, which is akin to a reservation, these measures

<sup>392</sup> In the French text : "*Elle garantit à tous, notamment à l'enfant, à la mère et aux vieux travailleurs, la protection de la santé, la sécurité matérielle, le repos et les loisirs. Tout être humain qui, en raison de son âge, de son état physique ou mental, de la situation économique, se trouve dans l'incapacité de travailler a le droit d'obtenir de la collectivité des moyens convenables d'existence*".

<sup>393</sup> M. Verpeaux, *ibid.*.

<sup>394</sup> For example, in an order of 18 August 2020, the Council of State recalled that "the right to enter French territory constitutes, for a French national, a fundamental freedom within the meaning of Article L. 521-2 of the Code of Administrative Justice". This principle was established following requests for suspension of the provisions of Article 11 of amended Decree No. 2020-860 of 10 July 2020 requiring persons abroad who wish to travel by public air transport to metropolitan France to present negative results of a virological screening test when boarding (CE, ord. 18.08.20, n° 442628).



may not apply to "travel that is strictly indispensable for family, professional and health needs". As the conciliation is balanced in the Council's view, Article 1(I)(1) is in line with the Constitution because the freedom to come and go is not excessively disregarded. But the state of public health emergency was again declared by decree<sup>395</sup> of 14 October 2020 from 17 October 2020<sup>396</sup> at 00:00 hours throughout the Republic and was extended until 16 February 2021 inclusive by law of 14 November 2020<sup>397</sup>. The most important measure of this second act of the state of health emergency is the establishment of a curfew. A curfew from 9 p.m. to 6 a.m. applied to the Ile-de-France region and eight metropolitan areas (Grenoble, Lille, Lyon, Aix-Marseille, Montpellier, Rouen, Saint-Etienne and Toulouse)<sup>398</sup>, then extended in time and finally applied to the entire territory in January 2021<sup>399</sup>. From Sunday 31 January, all entry into France and all exit from the French territory to or from a country outside the European Union are prohibited, except for compelling reasons. Entry into France, including from the European Union countries, is subject to the presentation of a negative PCR test. Overseas travel is only authorised for compelling reasons. More recently, the fifth law after Law of 23 March 2020, which created the notion of a state of public health emergency within the Public Health Code, on 15 February 2021, extended the state of public health emergency until 1 June 2021<sup>400</sup>.

## B. Right to transport and COVID19

**"Right to transport" and state of health emergency - Covid 19. "Containment" phase<sup>401</sup> : transport, an "indispensable" activity.** It is surprising to note that, initially, no particular measures regarding the offer of transport were adopted, apart from strictly health obligations<sup>402</sup>. It should be remembered that when a doctors' union asked for a total halt to public transport, the Conseil d'Etat recalled that : *"While a total confinement of the population in certain areas may be envisaged, the measures requested at national level cannot, in the first instance with regard to the provision of food to the population at home, be adopted and organised throughout the national territory, taking into account the means available to the administration, unless there is a risk of serious disruptions of supply which*

<sup>395</sup> Decr. no. 2020-1257 of 14 November 2020, *JORF* n°0251 du 15 octobre 2020.

<sup>396</sup> Décr. n° 2020-1257 du 14 octobre 2020 déclarant l'état d'urgence sanitaire, *JORF* n°0251 du 15 octobre 2020

<sup>397</sup> Loi n° 2020-1379 du 14 novembre 2020 autorisant la prorogation de l'état d'urgence sanitaire et portant diverses mesures de gestion de la crise sanitaire, *JORF* n°0277 du 15 novembre 2020.

<sup>398</sup> Décr. n° 2020-1262 du 16 octobre 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire, *JORF* n°0253 du 17 octobre 2020. The appeal against the curfew was rejected by the Council of State, which considered it necessary (CE, ord. 23.1°.20, n° 445430, M. CASSIA et autres).

<sup>399</sup> Decree no. 2021-31 of 15 January 2021 amends decrees no. 2020-1262 of 16 October 2020 and no. 2020-1310 of 29 October 2020 prescribing the general measures necessary to deal with the covid-19 epidemic in the context of the state of health emergency (D. n° 2021-31, 15 janv. 2021, *JORF* 16 janv. 2021). More specifically, the decree provides for the generalisation of curfew from 6pm throughout the territory and modifies the list of possible derogations; adds new restrictions for travel overseas. In addition to a negative test carried out less than 72 hours before departure, people wishing to travel to the overseas collectivities will have to sign a certificate in which they undertake to isolate themselves for seven days, and to take a new test at the end of this period.

<sup>400</sup> L. n° 2021-160, 15 févr. 2021 : *JORF* 16 févr. 2021.

<sup>401</sup> Containment decided by Décret n° 2020-260 du 16 mars 2020 portant réglementation des déplacements dans le cadre de la lutte contre la propagation du virus covid-19, *JORF* n°0066 du 17 mars 2020.

<sup>402</sup> For more information on the safety obligations of road transport operators in the context of the covid pandemic, please refer to the article by N. Rodriguez in *Bulletin d'Aix*, "Les limites de l'obligation de sécurité de résultat du transporteur face au virus COVID-19", 2020-3.

would themselves be dangerous for the protection of life and delay the delivery of the materials essential for this protection. In addition, the essential activity of health personnel or carers, network operation security services, or people involved in the production and distribution of food makes it necessary to keep public transport running at appropriate speeds, the use of which is restricted to the events listed in the decree of 16 March 2020. Moreover, the continuation of these various vital activities in optimal operating conditions is itself dependent on the activity of other sectors or professionals who are directly or indirectly indispensable to them, which it is therefore not possible to interrupt completely"<sup>403</sup>. Going further, C. Testard reminds us that in reality", *de jure*, the reference to public service is absent; the idea of necessity for the population and for the fight against the epidemic is the only criterion and not the public or private nature of the service. The Council of State also expressly recognised that certain activities were indispensable - those of health, safety, networks, transport, food production and distribution - without, however, falling within the scope of the public service, on the sole basis of their interdependence"<sup>404</sup>. As Mr. Testard concludes, "to believe that the crisis has highlighted only public service activities as essential would therefore be an erroneous shortcut". Prior to the promulgation of the law on the state of health emergency<sup>405</sup>, it was the order of 14 March 2020, as supplemented by the order of 19 March<sup>406</sup>, which established some measures<sup>407</sup>. Under its article 7<sup>ter</sup>, various obligations were imposed on operators of collective road, guided or rail public passenger transport and on operators of goods transport. For the former, the company had to disinfect each public transport vehicle or rolling stock at least once a day. Unless proven to be technically impossible, the undertaking had to take all appropriate measures to separate the driver from the passengers by a distance of at least one meter and to inform the passengers accordingly. In road vehicles with more than one door, the undertaking should prohibit passengers from using the front door and allow them to board and alight through any other door. However, the use of the front door was permitted when arrangements were made to separate the driver from the passengers by a distance of at least one meter. The undertaking had to communicate to passengers, in particular by means of a display on board each vehicle or rolling stock, the hygiene and social distancing measures, known as "*barriers*", defined at national level, including in particular the obligation for passengers to keep at least one meter from other passengers. The sale on board of tickets by an agent of the company was suspended. The company had to inform passengers of the means by which they could obtain a ticket. Failure to comply with the above provisions could result in a ban on transport services on all the routes concerned. For the carriage of goods, drivers had to be equipped with a supply of water and soap and disposable towels or hydro-alcoholic gel and to avoid physical contact with the consignees. These various obligations will be purely and simply included in the framework of article 6 of the decree of 23 March 2020, based on the new provisions of article L. 3131-15 CSP of the law proclaiming the state of health emergency<sup>408</sup>. Restrictions on access to metropolitan France and the overseas collectivities were then put in place during the containment period, with Article 5 of the same decree prohibiting the movement of persons by commercial air transport from French territory to Reunion, Mayotte, Guadeloupe, Martinique, French Guiana, Saint Pierre and Miquelon, Saint Martin, Saint Barthélemy, New Caledonia, French Polynesia and Wallis and Futuna; from one of these

<sup>403</sup> CE Ord. n° 439674, 22-03-2020, *Rec. Leb.* 2020.

<sup>404</sup> C.TESTARD in "Service public et lutte contre la covid-19 : physique d'une confrontation" *AJDA* 2020. 1710.

<sup>405</sup> L. n° 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de Covid-19 (*Rect. JO* du 25/03/2020).- *cf-supra*, 2.1.1." § n°23, 24.

<sup>406</sup> Arr. du 19 mars 2020 complétant l'arrêté du 14 mars 2020 portant diverses mesures relatives à la lutte contre la propagation du virus covid-19, *JORF* n°0069 du 20 mars 2020, texte n° 19.

<sup>407</sup> Arr. du 14 mars 2020 portant diverses mesures relatives à la lutte contre la propagation du virus covid-19, *JORF* n°0064 du 15 mars 2020, texte n° 16.

<sup>408</sup> Décret n° 2020-293 du 23 mars 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire, *JORF* n°0072 du 24 mars 2020, texte n° 7.

collectivities to the French territory and between these collectivities, except in the case of derogations (compelling personal and family reasons, emergency medical or professional reasons that cannot be deferred).

**"Right to transport" and state of health emergency - Covid 19. Deconfinement" phase.** The extension of the state of emergency, which coincided with the lifting of containment, has largely completed and refined the issue of the right to transport in a health emergency without imposing minimum service obligations for public transport as a general rule<sup>409</sup>. The law extending the state of health emergency and completing its provisions was definitively adopted by the Senate and then the National Assembly in the late afternoon of Saturday 9 May. It was then submitted to the Constitutional Council before being promulgated on 12 May 2020<sup>410</sup>. The law completed the permanent arsenal created under Article L. 3131-15 I. of the Public Health Code by a 1° entitled *"Regulating or prohibiting the movement of persons and vehicles and regulating access to means of transport and the conditions of their use"* which allows, in territorial districts where a state of health emergency is declared, the Prime Minister to take measures in terms of transport, by regulatory decree taken on the report of the Minister in charge of health, for the sole purpose of guaranteeing public health. Thus, the decree of 11 May 2020<sup>411</sup>, whose chapter is devoted to *"Provisions concerning travel and transport"* has in fact - and paradoxically - reinforced restrictions on access to transport. In river and maritime matters (Article 4), in addition to the ban on cruise ships calling in France, the movement of ships with accommodation is prohibited. Any *"vessel carrying passengers"* arriving in a French port may have its number limited by the Prefect with the exception of freight drivers. Any person aged eleven or over who enters or remains on board a ship or passenger boat must wear a protective mask. This obligation applies in the areas accessible to the public of maritime stations and waiting areas, for which the carrier or the operator of the installations organises the arrangements for the movement of persons present or wishing to access these areas. The maritime or inland waterway passenger carrier will have to inform passengers by means of on-board displays and sound announcements of hygiene and social distancing measures, known as *"barriers"*. The maritime or river passenger carrier must allow access to a water point and soap or a hydro-alcoholic gel dispenser for passengers. The sea or inland waterway carrier may require the passenger to present, before boarding, a sworn declaration that he/she does not show any symptoms of Covid-19 infection. Failing this, access may be refused and the passenger may be escorted out of the spaces concerned. With regard to air travel (Article 5), the same obligations regarding the wearing of masks, declaration on honor, information on barrier gestures and access to a water point and soap and hydro-alcoholic gel apply. The air carrier may also deny boarding to passengers who have refused to submit to a temperature check. It should be noted that air transport remains in principle prohibited except for compelling reasons of a personal or family nature, for health reasons of an emergency nature or for professional reasons that cannot be postponed. The most drastic measures are applied to public transport by land (Article 6). Naturally, the now classic obligations also apply (masks, hydro-alcoholic gel, information obligations, etc.). It is the competent mobility organising authority, or *Ile-de-France Mobilités* for Ile-de-France, which must organise, in consultation with the local authorities concerned, employers, users' associations and transport service operators, the levels of service and arrangements for the movement of people present in the areas and vehicles assigned to public passenger transport, as well as the adaptation of equipment, in such a way as to enable social distancing to be respected. Otherwise, any undertaking which offers rail or road passenger transport

<sup>409</sup> *"There can be no public service without a service and without an audience. This statement would be self-evident if the crisis had not largely removed these two components from the equation, with the result that the "French-style" service public which contributes to the "material or spiritual well-being of the members of the community" (B. Plessix) has been largely tarnished. Indeed, many public services - not to say the essential ones - have found themselves de jure "suspended" said C.TESTARD, op. cit..*

<sup>410</sup> Loi n° 2020-546 du 11 mai 2020 prorogeant l'état d'urgence sanitaire et complétant ses dispositions, *JORF* n°0116 du 12 mai 2020.

<sup>411</sup> Décret n° 2020-548 du 11 mai 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire, *JORF* n°0116 du 12 mai 2020

services extending beyond the perimeter of a region must make it compulsory, unless technically impossible, to make reservations in trains and coaches used for transport beyond that perimeter. Reservations are limited to 60 % of the maximum capacity of vehicles (Article 6, VII). However, it should be noted that the Prefect is authorised to reserve access to public collective passenger transport spaces and vehicles at certain times, in view of observed or foreseeable conditions of affluence, as well as to tramway platforms and areas near stops served by collective road passenger transport vehicles only to persons making a journey for strictly limited reasons (professional, school, compelling family reasons, health reasons, administrative or judicial summons, etc.), thus making it possible to exclude journeys of pure convenience at the time of deconfinement (Article 6, III). For private public passenger transport services and private or public collective transport services using vehicles with less than nine seats, excluding the driver, a display for information purposes must be installed inside the vehicle and a mask must be worn. No passenger is allowed to sit next to the driver. Only one passenger is allowed. By way of derogation, when the driver is separated from the passengers by a fixed or removable transparent wall, several passengers are allowed if they belong to the same household or, in the case of transporting a pupil with disabilities, mentioned in article L. 242-1 of the Social Action and Family Code. These same obligations apply in the case of car-pooling and for social utility transport services (Article 6, IX). It should also be noted that the provisions of Article L. 3136-1 of the Public Health Code now allow the agents mentioned in 4° and 5° of I of Article L. 2241-1 of the Transport Code<sup>412</sup> to record by means of official reports violations of the prohibitions or obligations laid down in application of 1° of I of Article L. 3131-15 of the aforementioned Public Health Code with regard to the use of rail or guided transport services and public road passenger transport services, when they are committed in the vehicles and property rights-of-way of these services.

**"Right to Transport" and State of Health Emergency - Covid 19. Temporary exit. New declaration and curfew.** From the transitional phase of the exit from the state of emergency, the decree of July 2020<sup>413</sup> lightens the restrictions on maritime matters (cruise ships) in the territories that have left the state of health emergency and will be applied again following the new declaration of the state of emergency. For the rest and for the most part, in broad terms, the measures previously mentioned will continue to apply to the use of the various means of transport until now. For international air, sea and now even land<sup>414</sup> transport, the requirement of a virological screening test or examination less than 72 hours before the departure that does not conclude to covid-19 contamination will be required for 11 year olds and the commitment to respect a prophylactic isolation of seven days after arrival in France<sup>415</sup>. Flights to overseas countries may also be restricted only for compelling personal or family reasons, for health reasons of an emergency nature or for professional reasons that cannot be postponed. In the latest state of the law, it is decree of 17 February 2021<sup>416</sup> which laid down the obligations in terms of transport. It stipulates, for Overseas France travel, that the document justifying the reason for travel for compelling reasons as well as the declaration on honour must be sent to the Préfet no later than six days before the date of

<sup>412</sup> Namely the sworn agents of the operator of the transport service or the sworn agents of a transport company acting on behalf of the operator and the sworn agents appointed by the internal security services of the SNCF and the RATP (Régie Autonome des Transports Parisiens).

<sup>413</sup> Décr. n° 2020-860 du 10 juillet 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans les territoires sortis de l'état d'urgence sanitaire et dans ceux où il a été prorogé, *JORF* n°0170 du 11 juillet 2020.

<sup>414</sup> Décr. n° 2021-99 du 30 janvier 2021 modifiant les décrets n° 2020-1262 du 16 octobre 2020 et n° 2020-1310 du 29 octobre 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire, Art. 2 (Décr. 29 oct. 20, art. 14-1).

<sup>415</sup> Décr. n° 2020-1262 du 16 octobre 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire, *JORF* n°0253 du 17 octobre 2020 - Décret n° 2020-1310 du 29 octobre 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire, *JORF* n°0264 du 30 octobre 2020.

<sup>416</sup> Décr. n° 2021-173, 17 févr. 2021, *JORF* 18 févr. 2021.

the journey. It thus amends Decrees of 16 October 2020 and of 29 October 2020 prescribing the general measures required to deal with the covid-19 epidemic in the context of a state of health emergency. It is worth recalling that since 17 October, the Prefect has been authorised to reserve, at certain times, in view of observed or foreseeable traffic conditions, access to public collective passenger transport spaces and vehicles, as well as to tramway platforms and spaces located near stops served by public road passenger transport vehicles, to persons travelling for strictly limited reasons only<sup>417</sup>.

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<sup>417</sup> Décr., 16.10.20, art. 17 :

« 1° Journeys between the place of residence and the place(s) where the professional activity is carried out, and professional journeys that cannot be postponed;  
 2° journeys between the place of residence and the school carried out by a person who is attending school or who accompanies a person attending school and journeys necessary to go to examinations or competitions;  
 3° Journeys for health consultations and specialised care that cannot be provided at a distance or close to home;  
 4° Travel for urgent family reasons, for assistance to vulnerable persons, for respite and support for disabled persons and for childcare;  
 5° Travel resulting from an obligation to report to the national police or gendarmerie services or to any other service or professional, imposed by the administrative police authority or the judicial authority;  
 6° Travel resulting from a summons issued by an administrative court or judicial authority;  
 7° Travel for the sole purpose of participating in missions of general interest at the request of the administrative authority and under the conditions it specifies;  
 8° Displacements related to a move resulting from a change of residence and displacements essential to the acquisition or rental of a property, which cannot be postponed ».



## ANNEX 5 : The “mobility solutions” covered by the LOM

**“Active mobility”**<sup>418</sup>, formerly known as “non-motorised land-based modes of travel”, is valued as one of the modes of travel that public authorities must make effective. There is therefore a right to so-called active mobility, which should be promoted with a view to “combating sedentary lifestyles”. The “new” mobility plans take this requirement into account and must henceforth include “a component relating to the continuity and safety of cycle and pedestrian routes”. This section also defines the principles for locating bicycle parking areas near stations, multimodal transport hubs and city entrances located within the territorial jurisdiction. This section also defines the tools for increasing information for pedestrians and cyclists, in particular the implementation of signs to encourage walking” (C. transp. art. L 1214-2 s.). The amendment of article L 1111-1 of the Transport Code also appears clumsy in its wording, which directly juxtaposes “persons with reduced mobility or in a situation of disability” and “freedom and choice to use active mobility”, except that it implies the possibility for such persons to obtain the accessibility of public spaces, an objective which is already codified elsewhere. For the rest, it seems unlikely that users of public space had “tasted”, on the day the law was promulgated, when France was marked by an unprecedented transport strike that forced some users to walk several dozen kilometres a day, the objective of “fighting sedentary lifestyles”. Moreover, if such an objective can be linked to public health policy - which is struggling to find its place in the Transport Code - it would have been more judicious to put it in perspective with the “fight against climate change and air and noise pollution as well as the protection of biodiversity” now referred to as an issue to be taken into consideration in the programming of infrastructures in the new 1st paragraph of Article L 1111-3 of the Transport Code.

**Inclusive mobility.** It should be noted, however, that there is a novelty in the inclusion of people with reduced mobility or in a situation of disability and socially disadvantaged people in a chapter dedicated to “inclusive mobility”. The aim is to create a “common action plan for inclusive mobility”, at the initiative of interested public and private persons, which defines the conditions under which these persons benefit from individualised mobility advice and support. It provides, in particular, for measures enabling the public employment service to provide these services to any job-seeker, any person far from work or young people on an apprenticeship contract (C. transp., art. L. 1215-3). This objective thus “goes beyond” the obligations specific to mobility plans, which follow on from urban travel plans, and which were intended to ensure “access to public transport networks for disabled persons or persons with reduced mobility, as well as the elderly” under the former version of article L. 1214-2, 2°, and is added to the accessibility master plans or accessibility master plan-scheduled accessibility agenda of articles L. 1112-1 et seq. of the Transport Code. The aim is therefore to offer services (advice, support, assistance) to people with reduced mobility or suffering from a disability or to people who are economically or socially disadvantaged in their mobility related endeavours. It is planned to improve the information provided to interested parties through the compulsory collection of data on the accessibility of regular public transport services to persons with disabilities or persons with reduced mobility (C. transp., art. L. 1115-6<sup>419</sup>). Article 27 provides for a double obligation: to create the accessibility data in

<sup>418</sup> New Art. L. 1271-1. - Active mobility, in particular walking and cycling, are all modes of transport for which human motive force is required, with or without motorized assistance. They contribute to the implementation of the objective assigned to the organisation of mobility defined in Article L. 1111-1 of the same code and to the preservation of public health.

<sup>419</sup> In accordance with the provisions of Article V of Article 27 of Law No. 2019-1428 of 24 December 2019, the collection and provision of the data mentioned in Article L. 1115-6 of the French Transport Code shall be carried out no later than 1 December 2021 for the overall TEN-T network within the meaning of Regulation (EU) No 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the European Interconnection Mechanism, amending Regulation (EU) No



transport<sup>420</sup> and also to create them on the roads within 200 metres of priority stop points<sup>421</sup>. It is in fact essential to provide information on the accessibility of routes leading to transport networks in order to ensure the continuity of the transport chain from one point to another. The LOM has also planned to add data from radio-frequency transmitting systems (digital beacons). These are devices commonly found in the transport sector, but also at the front of many ERPs (establishments receiving the public), including those of local authorities, to provide information to users via smartphone applications. This opening up of data will enable the development of guidance and digital signage applications and even improve the location of pedestrian GPS. Article L. 1115-7 of the Transport Code also provides, "*for actors deploying digital beacon systems emitting a Bluetooth signal to digital receivers (tablets, smartphones, for example), to enter the identifiers and location of the beacons into an open database in order to enable the development of digital guidance and signalling systems for blind and partially sighted persons*", as specified in the impact study. Also to be noted is the obligation, instead of a mere possibility, to take special measures for persons with reduced mobility or disability and their carers. The specific tariff measures may even go as far as to make such persons free of charge. As for the implementation of alternative services within the meaning of Article L. 1112-4 of the Transport Code, which is required when the accessibility of a stop identified as a priority stop under Article L. 1112-1 of the same Code proves to be technically impossible due to an obstacle to be overcome, this may be abandoned in favour of the accessibility of two additional stops considered as non-priority. It thus seems curious that it should be possible to simply dispense with a journey by a person with reduced mobility or a disability, who is thus prevented from travelling for lack of adapted transport or alternative services (C. transp., art. L. 1112-4, last two paragraphs). Moreover, alternative services do not necessarily mean alternative transport but "*measures of a human, organisational or technical nature enabling the journey to be made under conditions of duration similar to those of the journey initially desired*". While the notion of "duration" is important, the frequency and mode of completion of the journey should not be neglected... The notion of "*alternative measures*" is thus "*obscure*" and worrying. At the very least, there is a dynamic of decline in the provision of public transport accessibility which does not seem to be in line with the "*inclusive*" term chosen, and it should be remembered that the philosophy behind it does not imply that an alternative solution is offered but that the same service is offered in an adapted manner. Inclusion means a community of life among all, without exception, without stigmatization.

**"MaaS" - Transposition into national law of the European regulation on the opening up of mobility offer data<sup>422</sup>** -. Chapter V, articles L. 1115-1 et seq. of the French Transport Code, becomes "*digital services designed to facilitate travel*", which encompasses both the case of the service presenting the offer of the various operators via a single channel, with or without

913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010, and no later than 1 December 2023 for the other networks.

<sup>420</sup> "The persons mentioned in 1° of article L. 1115-1, transport operators and infrastructure managers within the meaning of Article 2 of the delegated (EU) Regulation 2017/1926 of the Commission of 31 May 2017 supplementing Directive 2010/40/EU of the European Parliament and of the Council with regard to making available, throughout the Union, of multimodal travel information services collect, each as far as it is concerned, data on the accessibility of regular public transport services to disabled persons or persons with reduced mobility, according to the division of competences defined in 3° to 5° of Article L. 1115-1 of the present code.

This data is made accessible and reusable under the conditions provided for by the delegated regulation mentioned in the first paragraph of this article and in articles L. 1115-1 to L. 1115-3".

<sup>421</sup> CVR, Art. L141-13 (code of roadway network, which is separate of Highway Code).

<sup>422</sup> Commission Delegated Regulation (EU) 2017/1926 of 31 May 2017 supplementing Directive 2010/40/EU of the European Parliament and of the Council with regard to the provision of EU-wide multimodal travel information services (Text with EEA relevance) C/2017/3574, OJ L 272, 21.10.2017, p. 1–13.

payment, and the distribution of a complete and multimodal mobility service, based on the principle of "MaaS", for "Mobility-as-a-Service". Prior to this, in order to enable the implementation of multimodal information services, the law sets out, in domestic law, the European regulation on the opening up of mobility supply data and entrusts the regions and metropolises with the role of leading the process of opening up and transmitting this data to the single digital interface (national access point) which will record all mobility data concerning all types of transport, under the control of a regulator which will be the Transport Regulatory Authority (ART, formerly ARAFER). The AOMs will have to *"ensure"* the existence of a multimodal information service within their territorial jurisdiction, an obligation which will have to be effective by 1 December 2021. The law was not to require the organising authorities to create their own service, but simply to oblige them to ensure that it exists, *"without restricting private initiative"*, according to the very terms of the impact study. The law also creates a legal and regulatory framework for any multimodal digital sales or reservation service<sup>423</sup> that will have to present the various travel solutions transparently to users. Any person, public or private, will therefore be able to offer a multimodal service for the sale of transport or parking services contracted or organized by the public authorities according to technical and financial terms and conditions defined by a contract concluded between the supplier of the multimodal digital service and the manager of each of the services. Its conditions must be *"reasonable, equitable, transparent and proportionate"* (C. transp., art. L. 1115-10, III). There is a good chance that private initiative, better equipped in investment capacity, will quickly take over, favouring their own offer and the more profitable dense areas to the detriment of less populated areas, contrary to the aim stated by the legislator<sup>424</sup>. More generally, it is regrettable that user information, which is still one of the components of the right to mobility under Article L. 1111-4 of the Transport Code, is not considered a public service mission by law and is therefore not listed as such under the provisions of Article L. 1211-4 of the same code<sup>425</sup>, even though the explanatory memorandum of the law proclaims that the right to mobility means *"having a choice of mobility [...] It also means being well informed of all the mobility solutions existing in the territory"*.

**Promotion of multimodality and intermodality.** In addition to the multimodal digital service, multimodal interchange hubs are promoted since their creation becomes one of the objectives of the overall transport policy under the new 1bis of Article L. 1211-3 of the Transport Code<sup>426</sup>. In this respect, the law requires better coordination of the authorities organising mobility *"in the service of intermodality"* under Chapter II of Title II of the law. The Region becomes the *"leader"* in this area. The provisions of Article L. 1215-1<sup>427</sup> of the said

<sup>423</sup> Article L 1115-10 I: *"A multimodal digital service is a digital service that enables the sale of mobility, parking or central reservation services"*.

<sup>424</sup> See the analysis by M. Guesnier and G. Gach, respectively head of transport planning studies and mobility and digital consultant at SYSTRA, *"Les défis du MaaS pour les AOM"*, <https://www.systra.com/fr/newsroom/regards-d-experts/article/les-defis-du-maas-pour-l-aom#marque>

<sup>425</sup> Which aims exclusively, at 4°, *"the development of information on the transport system"*.

<sup>426</sup> *"The creation or development of multimodal transport hubs tailored to passenger flows and accommodating different modes of land transport"*.

<sup>427</sup> Indeed, the new article L. 1215-1 provides that *"Under the conditions set out in articles L. 1111-9 and L. 1111-9-1 of the General Code of Local Authorities, and for the exercise of the missions defined in II of article L. 1111-9 of the same code, the region is responsible for organizing, as leader, the terms and conditions of the joint action of the authorities organizing mobility, in particular with regard to : "1° The different forms of mobility and intermodality, in terms of services, timetables, pricing, information and reception of all types of public, as well as the territorial distribution of physical sales outlets; " 2° The creation, development and operation of multimodal exchange hubs and mobility areas, particularly in rural areas, as well as the transport system to and from these hubs or areas; "3° The methods of managing deteriorated situations in order to ensure the continuity of the service"*

code echo those of Article L. 1111-9 of the General Code of Local and Regional Authorities as amended by Article 10 of the Law of 28 February 2017<sup>428</sup> which stipulates that *"the Region is responsible for organising, as leader, the arrangements for joint action by local and regional authorities and their public establishments for the exercise of relative competences : 7° Intermodality and complementarity between modes of transport, in particular the development of stations"*. Indeed, the new Article L. 1215-1 provides that *"Under the conditions set out in Articles L. 1111-9 and L. 1111-9-1 of the General Code of Local and Regional Authorities, and for the exercise of the tasks defined in II of Article L. 1111-9 of the same code, the region is responsible for organising, as leader, the terms and conditions of the joint action of the authorities organising mobility"*, it being specified that these actions must be carried out within a *"mobility pool"* that the region determines in consultation with the persons concerned (AOM, etc.) and with whom an *"operational mobility contract"* must be concluded. Moreover, these basins can sometimes be interregional. Finally, it should be noted that the provisions of Article L. 1221-4 of the Transport Code have been amended to determine the conditions under which a public transport service contract may be executed. In addition to the general consistency as well as the operating and financing conditions of the service, it must now define *"the actions to be undertaken by either party in order to favour the effective exercise of the right to mobility, to promote public passenger transport and to encourage the development of innovative mobility solutions in order to favour multimodality and intermodality"*, which is not directly under the responsibility of its office since the public transport service is understood to mean only regular and on-demand public passenger transport.

**Regulation of "new mobilities".** The LOM intends to emphasise and provide a more secure legal framework for what it describes as *"new mobilities"*, which it intends to regulate, without however providing a definition of this formula. Carpooling and car-sharing, described as *"shared mobility"*, are encouraged through the payment of an allowance, the creation of lanes and reserved parking. The co-transportation of parcels is covered by Article L. 3232-21 of the Transport Code. Article 40 of the Act empowers the Government to legislate on the basis of Article 38 of the Constitution in order to regulate the activity of digital intermediation platforms between customers requesting a transport service and companies carrying out public road haulage, for the transport of goods, or public road passenger transport companies, for occasional passenger transport services or groups of passengers (digital freight platform). Free-floating is also supervised under Articles L. 1231-17 and L. 1231-18 of the same code by the issue of a permit issued to operators of vehicle, cycle and vehicle sharing services for the movement of persons or the transport of goods, made available to users on the public highway and accessible on a self-service basis, without a docking station, which is established under the conditions defined in Title II of Book I of Part II of the General Code of Public Property, after consultation with the AOM. Title IV entitled *"Developing cleaner and more active mobility"* proposes, according to Chapter I, to *"put active mobility at the heart of daily mobility"*. The main interest of this chapter consists in the introduction, for the Mayor, of the power to lay down, by means of a reasoned decree, rules derogating from those provided for in the Highway Code for the circulation of personal transport vehicles on all or part of the roads on which he exercises his police power as well as on their dependencies, under conditions laid down by decree (CGCT, art. L. 2213-1-1). Passenger stations, multimodal interchange hubs and bus stations must contain a secure parking area for bicycles before 2024. It is also stipulated that new rail and bus equipment must be able to accommodate a space dedicated to bicycle parking (excluding urban transport) (C. transp., art. L. 1272-5 and 6)<sup>429</sup>.

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*provided to users on a daily basis; " 4° The inventory and dissemination of mobility practices and actions implemented in particular to improve social and territorial cohesion; " 5° Assistance in the design and implementation of transport infrastructure or mobility services by the mobility organizing authorities."*

<sup>428</sup> L. n° 2017-256 du 28 février 2017 de programmation relative à l'égalité réelle outre-mer et portant autres dispositions en matière sociale et économique, *JORF* n°0051 du 1 mars 2017, texte n° 1.

<sup>429</sup> For example, it is provided that, as from 1 July 2021, new coaches used for regular public road passenger transport services, with the exception of urban services, shall be equipped, when they are

put into service, with a system for carrying at least five undismantled bicycles (C. transp., art. L. 1272-6 ). Decree no. 2021-190 of 20 February 2021 defines the conditions of application of this provision to the freely organised services mentioned in Article L. 3111-17 of the Transport Code. For the purposes of its codification in Chapter II "Intermodality" of Title VII of Book II of Part I of the first regulatory part of the Transport Code, the decree creates a third section to incorporate the provisions relating to the transport of bicycles in coaches. The decree comes into force on 1 July 2021, *JORF* 21 févr. 2021.

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