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Statement on the Draft of the European Commission on the Amendment of the Interpretative Guidelines on Regulation (EC) No. 1370/2007 | Summary

Generally speaking, the efforts of the European Commission (EC) to adjust the guidelines to the adapted PSO regulation and to the recent case law of the Court of Justice of the European Union (CJEU) are to be welcomed. Unfortunately, the draft guidelines from 2/12/2021 contain some comments that hinder rather than promote the development of sustainable and intelligent mobility. Useful clarifications and practical aids on the application of the PSO regulation for the competent authorities can only be found in a few places.

It is noticeable that the EC - as was already the case with the original interpretative guidelines from 2014 - obviously wants to use their revision to reintroduce certain contents of its original proposal for a regulation that fell victim to the compromise with the Council and the EP in the legislative process "*through the back door*". As a rule, the draft clearly strays far from the wording of the PSO regulation. In several passages of the draft, conclusions are also drawn from non-relevant rulings of the European General Court (EGC) and the CJEU, for example on maritime transport.

In this form, the interpretive guidelines primarily lead to uncertainty on the part of those applying the law and fail to achieve their goal of offering support for interpreting the PSO regulation; rather, they slow down all market processes in this regard. Especially with regard to the European Green Deal and compliance with the agreed climate targets, the underlying pressing timeline, and the associated need to maintain and expand public passenger rail transport as a sustainable mode of transport, this clearly harms the objectives of European transport policy. Likewise, some of the statements contained in the draft guidelines run counter to the Urban Mobility Framework recently published by the European Commission.

1. With regard to the EC's statements in Point 2.4.6. (Article 5 Para. 4a of the PSO Regulation; performance-based direct award):

- The EC's comment that this provision for performance-based direct awarding should be interpreted restrictively is unacceptable: It can be assumed that the Union legislator intended this provision - if the relevant requirements are met - to have a

corresponding scope of application, which should therefore not be subsequently nullified by a restrictive interpretation. Recital 25 of the [amending Regulation \(EU\) 2016/2338](#) also clearly speaks in favour of a coexistence of equal rank between competitive award and performance-based direct award if the corresponding conditions are met.

- In reproducing the individual requirements, the EC overlooks the exact wording of the provision: The provision merely requires that the direct award be justified in the opinion of the competent authority (“*in its opinion*” or “*where it considers*”). This therefore clearly militates in favour of (i) focusing on or recognising the subjective view/the broad discretion of the authority and (ii) not overstressing the review obligations of the competent authority in this area => this should be clarified accordingly.
- In application of Article 5 Para. 4a, the EC apparently requires a justification of the direct award by means of a hypothetical comparison with hypothetical results of a hypothetical tender => Apart from the fact that this hypothetical comparison is hardly likely to be feasible in practice, the EC also clearly departs from the wording of the provision here. A hypothetical comparison between the results of a hypothetical tender and the direct award considered by the competent authority is not required by Article 5 Para. 4a. In subparagraph a, it is only required that the direct award of the contract be justified in the opinion of the competent authority on the basis of the respective structural and geographical characteristics of the market and the network in question; subparagraph b is decisive with regard to efficiency and quality considerations, and here the “previous contract” is the relevant benchmark(i.e. also not the results of a hypothetical tender).

2. With regard to the EC’s comments in point 2.2.3 (Article 2a of the PSO Regulation - specification of public service obligations):

This section has been extensively revised and expanded compared to the 2014 guidelines.

- In particular, considerable space is given to the description of a comprehensive obligation of the competent authorities to survey the demand for SGEIs in detail.
- The EC demands a precise “*ex-ante assessment of demand*” as well as an “*analysis of market failure*”, i.e. a description of why transport services that are in demand are not provided commercially. Here, apparently, not only are the strategic plans for public transport to be subjected to consultation, but also the specification according to Article 2a itself.
- This is to be done through a public consultation of the operators with regard to the existing and possible future commercial services.
- This approach of the EC is supplemented by the reference that the competent authority should take the least restrictive path with regard to fundamental freedoms and the least harmful path with regard to the functioning of the internal market.

In our view, the entirety of Point 2.2.3 should be comprehensively revised for the following reasons:

- The most critical point here is the procedure for proof of an actual need for a public service obligation The EC proposes a completely new procedure for this proof. These very strict requirements violate the principle of subsidiarity, especially in public transport in cities.

The EC is demanding an assessment by the competent authority as to whether there is a demand from customers that cannot be met in part or in full by an operator in the market without a public service obligation:

The statement here that partial fulfilment by commercial operators would be sufficient is extremely problematic. This would result in cherry picking by private operators, who would then only operate the lucrative routes. Public operators could then only operate the non-economic lines, which would lead to discrimination.

It is important both for an offer that is tailored to the needs of the customers and from an economic point of view that the entire public transport offer in a city/region, and not only individual lines, is taken into account in the authority's assessment. For this reason, the wording "even partly" should be removed in any case. Furthermore, the interaction of public transport with new mobility services should be taken into account. These are not in competition with each other but complement each other. The assessment of whether such a demand exists cannot be based solely on the results of surveys of customers and commercial operators.

- The reference to the 26th Additional Protocol to the TFEU is also misguided because this merely contains an authentic interpretation or demonstrative list of the "shared values" mentioned in Article 14 of the TFEU concerning SGEL; moreover, it also once again emphasises

"the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users" as well as *"high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights."*

- Even the EC has acknowledged elsewhere that Member States have to take into account sector-specific legislation when defining SGEL (including inland transport), refer to EC, A Quality Framework for Services of General Interest in Europe [COM\(2011\) 900 final](#), page 10: *"Public service obligations in the transport sector are laid down in specific pieces of legislation for air services, inland transport and maritime transport. This sector-specific legislation establishes the principles that Member States should follow when defining public service obligations in each transport mode"*.

Article 2a of the PSO Regulation thus conclusively stipulates how the authority must proceed when determining the GWL specifications. Any further consideration of primary law provisions is already inappropriate because, according to Art 91 TFEU, the formulation of the common transport policy (including, in particular, the freedom to provide services) is reserved for secondary law - therefore, only that which is explicitly regulated by the PSO "applies".

- The precise *"ex-ante assessment of demand"* and an *"analysis of market failure"* demanded by the EC in the draft guidelines are not the subject matter of Article 2a of the PSO Regulation, but go far beyond it.
- Proportionality considerations in the GWL specification are already directly laid down in Article 2a - refer to Article 2a Para. 1 and Para. 2: *"When laying down those specifications and the scope of their application, the competent authority shall duly respect the principle of proportionality, in accordance with Union law."* The EC therefore clearly departs from the binding text of the Regulation when it demands that competent authorities pay particular attention to the *"least restrictive approach"* and the *"least harmful definition of PSO services"* in relation to the internal market and fundamental freedoms => This misses the point in view of the broad discretion in the definition of SGEL. Once again, the EC negates the massive weakening of Article 2a in the legislative process.

- According to the EC, comparable transport services provided by other transport modes should also be taken into account for the analysis of market failure. It is unclear which modes are meant by this. Public passenger transport by rail and road is demonstrably the most environmentally friendly form of mobility. In this respect, a comparison is not expedient.
- The hierarchy propagated by the EC between the PSO contract and the general provision does not exist in the PSO regulation (with good reason). General provisions and bilateral contracts must be regarded as equivalent, otherwise this would constitute a violation of the text of the regulation.
- The alleged barriers to the combination of cost-covering with non-cost-covering services cited by the EC in the draft are also not covered by the text of the PSO Regulation; rather, it was the EC itself that stated the following in its [Danske Statsbaner decision](#) with regard to the (unchanged) Article 2(e) of the PSO Regulation and the combination of several lines/routes into one transport service contract, see there Para. 263: *“The Commission thus points out that the specific legislation in force in no way limits the possibility of entrusting service missions covering a set of lines in order to establish a coherent transport system, particularly with the concern of allowing a certain continuity of transport. No criteria are laid down concerning the profitability or otherwise of the individual lines concerned.”*

3. With regard to the EC’s statements in point 2.3.3 (Article 4(8) of the PSO Regulation; provision and protection of company information):

- The draft guideline does not currently offer any concrete support to the competent authorities on how to deal with the protection of business secrets of the current operator in a tender situation.
- What is clear is that knowledge of the current cost and revenue picture of the contract held by the current operator represents a competitive advantage for potential bidders, because on the basis of this knowledge they could make a good estimate of how this operator’s bid for the new contract will turn out in order to position themselves only slightly below it in terms of price. In these kinds of situations, previous operators thus have a clear starting disadvantage in tenders for the subsequent contract.
- The EC must provide the competent authorities with a clear set of instruments on how to adequately protect business secrets, for example by obliging them to provide only historical, aggregated, and approximate data to the interested party or parties.

4. Regarding the EC’s comments in Point 2.3.1 (Article 5a of the PSO Regulation; railway rolling stock):

We consider the “warning” addressed by the EC to the competent authorities that they risk the annulment of the award decision in the event of rolling stock measures not being set in the subsequent tender to be unwarranted for the following reasons:

1. The authorities still have to apply the relevant provisions conscientiously and officially.
2. Moreover, the EC’s interpretation is by no means the only possible one, especially since the original proposal of the EC for access to rolling stock to be guaranteed by the member states was rejected by the Council with a reference to negative effects on the public budget of the member states; refer to [COM \(2016\) 689 final](#). Article

5a Para. 2, according to which the member states “may” take appropriate measures, but are not obliged to do so, should also be read in this context (refer also to [Council position from 17/10/2016](#)).

In any case, the inspection obligations of the competent authority according to Article 5a Para. 1 must not be overstretched.

5. The EC’s comments in Point 2.5 (especially the PSO Annex - compensation and avoidance of overcompensation):

- The passages in this chapter are also in need of revision; in particular, the EC should recognise that the detailed regulations of the PSO Annex (in particular on the calculation/review of the compensation, on cost allocation, on the assessment of network effects and on the avoidance of overcompensation) do not apply to competitively awarded contracts.
- In the case of competitively awarded contracts, overcompensation or “excessive compensation” in Article 4 Para. 1 (b) only plays a role in connection with “*the nature and extent of any exclusive rights granted*”. If no exclusive rights are granted, the overcompensation considerations made by the EC are also superfluous.
- The separation calculation considerations also have no legal basis in the PSO regulation in the case of competitively awarded service contracts.

Kind regards

