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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

We generally welcome 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). The reference to the communication of the European Commission (EC) on sustainable and intelligent mobility, to the European Green Deal and the importance of public transport in this context is also welcomed.
Unfortunately, the draft guidelines of 2/12/2021 contain some comments that hinder rather than promote the development of sustainable and intelligent mobility. Desirable and useful clarifications on the application of the PSO regulation with regard to a practical application guide for the competent authorities can only be found in a few places.
The importance of public transport and the combination of public transport with new mobility services is also emphasised in the Urban Mobility Framework recently published by the EC. However, some of the EC's statements in the draft guidelines run counter to these aspirations from the Urban Mobility Framework.

In general, it is noticeable that - as was already the case with the original interpretative guidelines from 2014 - in the revision the EC wants to use the guidelines to reintroduce "through the back door" contents of its original proposal for a regulation that fell victim to the compromise with the Council and the EP in the legislative process.
The EC regularly 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 interpretive guides or support for interpreting the PSO regulation.
The EC requiring market participants to comply with new requirements that go beyond the current provisions of the PSO Regulation (see, for instance, guidelines on Article 2a below) does not serve to support healthy and sustainable competition, but rather it slows down all associated processes due to the uncertainties this creates.
This appears counterproductive, 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 sustainable modes of transport.

Regarding point 2.2.3. Article 2 point (e) and Article 2a. Definition of the nature and extent of public service obligations and of the scope of public service contract

a. General principles and definition of public service obligations:

This section contains detailed definitions of when a PSO should exist. In our opinion, these are too restrictive and could be problematic in practice. The legitimacy of the commissioning possibilities according to the PSO regulation is reduced by this. A "weakening" of these provisions - insofar as this is possible in accordance with the cited CJEU case law - would therefore be desirable.

The sentence and the footnote 16 "*The specification of a public service obligation may only be called into question by the Commission in the event of a manifest error*" are positive in our opinion, as the EC may only call the specification of a PSO into question if there is a manifest error.

The removal of the sentence *"Thus, within the framework laid down by Regulation (EC) No 1370/2007, Member States have wide discretion to define public service obligations in line with the needs of end users"* and the amendment of footnote 18 should be revised. This considerably restricts the Member States' scope of application and PSOs would only be legitimate to a limited extent. Compliance with state aid rules already results from general Union law.

Remark on

"However, the Member State's power to define a SGEI is not unlimited and may not be exercised arbitrarily for the sole purpose of allowing a particular sector to circumvent the application of the competition rules[17]*."*

and the EC's conclusions in relation to the EGC's BUPA judgment (fn 17):

> The BUPA judgment concerned a risk equalisation mechanism for private (competing) health insurance providers (imposed by the state in Ireland). However, this judgment is based on Article 106 (2) TFEU, whereas the PSO regulation, the possibilities of direct allocation regulated therein, and also the compensation relating to this are based on Article 91 and Article 93, but not on 106/2.
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> The EC also misquotes the EGC in BUPA here; the paragraph of the BUPA judgment cited in footnote 17 reads as follows (referring to C 41/83):
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> *"In effect, that judgment [C-41/83] shows that the Member State's power to take action under Article 86(2) EC and, accordingly, its power to define SGEIs is not unlimited and cannot be exercised arbitrarily for the sole purpose* ***of removing a particular sector, such as telecommunications, from the application of the competition rules****."*
>
> The definition of SGEI in the transport/railway sector does not in any way exclude this sector from the competition rules; as is well known, competition in this sector can take place in different areas, specifically as competition in the market and as competition for the market. As already mentioned, member states have a wide margin of discretion in defining SGEIs - including land transport; this means that competition does not necessarily mean competition in the market, but also competition for the market.

b. consistency with objectives of Member State's public transport policy

The EC would like to anchor what must be included in these strategic papers of the member states in the guidelines (for example, the development of sustainable transport –

in particular, a quantitative assessment of the services offered per line is also required here). Furthermore, the member states should involve certain stakeholders in the preparation of these strategies. By involving all stakeholders at an early phase of such projects, the respective project could already be exposed to critical assessments at the initial stage, which could possibly jeopardise it. Of course, such preliminary studies – as are currently being carried out – are necessary to establish and confirm the demand for public passenger transport, which is why the current approach should be maintained.

According to the last sentence of Article 2a (1) of the PSO regulation, *The content and format of public transport policy documents and the procedures for consulting relevant stakeholders shall be determined in* ***accordance with national law***. The "*quantitative assessment of the services to be provided per route"* desired/demanded by the EC thus goes far beyond the text of the regulation.

➔ Since these requirements contradict the text of the PSO regulation, this is no longer a permissible interpretation and must be removed in this detailed form. From the point of view of subsidiarity, the member states are entitled to decide for themselves how these strategies are drawn up and what they contain.

c. Proof of an actual need for a public service obligation

In the draft guidelines, the EC proposes a completely new procedure for this proof. However, as the guidelines are not legally binding but merely serve to interpret the regulation, this procedure cannot be legally binding and alternatives must be permitted. This new procedure leads to considerable legal uncertainty for the entire sector and should in any case be weakened or removed again.

✓ **Existence of a real need for public service obligations**

First, according to the EC, the competent authority should assess 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. According to the EC, such a demand would only exist if the demand cannot be met by market forces alone.
These very strict requirements, as mentioned before, violate the principle of subsidiarity, especially in public transport. Competent local authorities are in the best position to assess which measures need to be taken for such an assessment. In this case, an EU-wide uniform regulation is not expedient. It must not be ignored that public transport services are services of general interest that must be available to everyone under the same conditions. It is often difficult or even impossible to provide these services on an economic basis.

The statement that partial fulfilment by commercial operators would be sufficient is extremely problematic. It is unclear what consequences this would have. Would this lead to a splitting of the offer? 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.**

The reference to the CJEU's decision in the SNCM case is not appropriate here, as public passenger transport, especially in cities, cannot be compared to shipping. In many other areas of EU law, such as passenger rights, a clear distinction is made between the different modes of transport. For public transport, in contrast to shipping, a coordinated offer between the different modes (coordinated timetables to ensure good interchanges) is

essential to effectively take customer needs into account for the whole route. This would not be possible with multiple operators (especially public service and private service) for different lines.
The paragraph of the SNCM judgment cited by the EC also dealt with the admissibility of an alternative test for the first **Altmark Trans criterion**: "First, the beneficiary undertaking must actually be entrusted with the discharge of public service obligations and those obligations must be clearly defined". However, the PSO regulation should be understood explicitly as a "response" of the Union legislator to the Altmark Trans ruling (cf. recitals 33-37 of Regulation 1370/2007), so that direct recourse to the Altmark Trans ruling and the criterion mentioned there (not to mention their application in other transport sectors) is not appropriate when interpreting the provisions of the PSO regulation.

Remark on
"*The Commission considers that it would not be appropriate to attach specific public service obligations to an activity, which is already provided or can be provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State, by undertakings operating under normal market conditions*[20]*.*":

> Once again, to support its conclusions, the EC cites a decision that is not relevant because it was issued more than 20 years ago on maritime transport and therefore on a different legal basis of the TFEU and a different regulation (Regulation 3577/92).
> The PSO regulation may have some relevance for maritime transport if the member states decide to apply the PSO regulation to maritime transport "irrespective of Regulation 3577/92" (see Article 1(2) PSO regulation and the guidelines issued on this COM/2014/0232 final); however, this does not change the fact that Regulation 3577/92 has no relevance to land or rail transport.
> This decision does not offer any relevant insights for the interpretation of the PSO regulation for land transport.

A macroeconomic consideration of several modes of transport must also be permissible. For example, an optimally integrated overall transport offer is ensured as an attractive alternative to motorised individual transport in Vienna with the WL as an internal operator of the City of Vienna. In addition to the advantages from the customer's point of view, the transaction costs (awarding, monitoring, interfaces, etc.) are significantly lower in this model than in the case of a split offer. The same applies to the EC's requirement that operators be asked by way of consultation for each route whether they would operate it. (see sub-heading "Analysis of the market failure" P. 9 of the draft guidelines).

Furthermore, it is unclear what exactly is meant by market forces. It is mentioned that there is only a need for public service obligations if market forces alone cannot manage. In our view, this contradicts the previously mentioned wording, which would indicate a splitting of the offer.

- ➔ 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, 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. This is also a clear statement by the EC in its recently published Urban Mobility Framework.

✓ **Ex ante assessment of the demand for public transport services**

Additional criteria set by the EC in the ex ante assessment of this demand are, for example, more, safer, higher quality, and more environmentally friendly services. Customers should be consulted on this. However, these are planning aspects and an overall view of the service. It is not advisable to let only the customers decide, as these are often very subjective views, and numerous urban and transport planning aspects have to be taken into account. Transport companies conduct customer surveys on an ongoing basis in order to continuously improve their services. This is an important and helpful tool, but should not be used alone to decide whether or not to fulfil the need with a public service obligation.

An extensive evaluation and verification, including extensive consultation of the strategy papers for public transport, can (only) be found in the Commission proposal of 2013, which was, however, massively amended and greatly simplified in the course of the legislative process:
Refer to recital 10 of the 2016/2338 Regulation "(10) When preparing public transport policy strategy papers, relevant stakeholders should be consulted in accordance with national legislation. These stakeholders could include transport undertakings, infrastructure managers, workers' organisations, and representatives of users of public transport services."

However, Article 2a(1)(4) is especially relevant:
"The content and format of public transport strategy papers and the procedures for consulting relevant stakeholders shall be determined in accordance with national law."

The references to ex ante evaluation of demand for public passenger transport services are based on non-relevant case law on maritime transport and compensation granted there under Article 106(2) TFEU; however, the PSO Regulation and related compensation are not based on Article 106 TFEU but on Article 91/93 TFEU.

The EC is also wrong when it says that member states must prove the existence of a "real" demand for public transport services – this is completely at odds with the wide discretion member states have in defining SGEI.

The EC also seems to demand that the public transport strategy papers must also fully cover the period during which the contract is to be awarded; Article 2a of the PSO regulation does not provide any legal basis for this either, because the content and format of the public transport strategy papers and the procedures for consulting the relevant stakeholders are determined in accordance with national legislation => nothing else will apply to the question of the periods to be covered and intervals for evaluating/updating the public transport strategy papers in line with demand: This is also determined according to national legislation.

✓ **Analysis of the market failure**

The SNCM ruling cited by the EC in footnote 23 was only about finding an alternative test for the first Altmark Trans criterion (clear definition of and entrustment with public

service obligation) => However, Article 2a already serves to clearly define/specify public service obligations with the corresponding consultation.

Neither a “quantitative ex-ante assessment nor a separate market (failure) test is prescribed in Article 2a; the Commission thus goes far beyond the wording of Article 2a with these comments.

The EC’s approach here also confuses more than it clarifies; evidently the EC takes the view that after the consultation on the public transport strategy papers, there will also be additional market consultations prior to
(i) definition of the public service specification under Article 2a and again prior to
(ii) awarding a public service contract. However, it fails to recognise that the PSO regulation does not require the competent authorities to consult further in these downstream phases.

When the EC highlights certain aspects of the 26th Additional Protocol concerning SGEIs, it should also be emphasised that the common values of the EU in this context include:
“a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights."
"a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights."

The pandemic has shown that purely commercially operated rail passenger services can be significantly reduced or completely discontinued within a very short time. In contrast, guaranteeing the security of supply with affordable public mobility is a core task of every member state vis-à-vis its population, and this is also the reason for the broad discretion in the definition of SGEI that the member states continue to enjoy. This discretion is not restricted by the PSO regulation, nor can the EC restrict it through the non-binding guidelines in question.

Due to the subsidiarity principle, member states must not only be able to decide on the content of the surveys, but also how they prove that the imposition of a public service obligation is necessary. In any case, the requirement to conduct surveys with certain operators goes too far here.

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. Moreover, there are many other advantages of public transport besides these environmental aspects (such as social aspects, jobs, accessibility, etc.). In this respect, a comparison is not expedient.

- ✓ **Selection of the least harmful approach to functioning of the internal market**

The EC fails to recognise the relevant legal foundations of the Union: According to Article 91 TFEU, the formulation of the common transport policy (including, in particular, the freedom to provide services) is reserved for secondary law. Any further consideration of the fundamental freedoms is therefore wrong.

Apart from that, the principle of proportionality is anchored in the PSO regulation at the appropriate place anyway; see Article 2a(1)(2) of the PSO regulation.

The hierarchy propagated by the EC between the PSO contract and the general provision, on the other hand, does not exist in the PSO regulation (with good reason).
In this case, a general provision is qualified as having less influence on the market than a public service obligation under a contract. However, this leaves the authority less flexibility to respond to changing conditions than in a bilateral contract. Furthermore, these general regulations are often very vague. There is no such sequence in the text of the regulation either. The EC's comments are misguided and should be rejected.

- ➔ General provisions and bilateral contracts must be regarded as equivalent, otherwise this would also constitute a violation of the text of the regulation.

d. Possibility to group cost-covering services and non-cost covering services in the public service contract

When the PSO regulation was originally enacted (in addition to modernising the predecessor Regulation 1161/69), the main goal was to implement the CJEU's "Altmark Trans" ruling for land transport in a practicable manner and not to overstretch the obligations of the competent authority.

The text of the regulation is clear here: the contents and formats of the strategy papers for public transport and the procedures for consulting the relevant stakeholders are determined in accordance with national legislation. The PSO regulation does not regulate how often and at what intervals this consultation is to take place. According to the regulation, it is not necessary for all data/surveys to cover the entire multi-year period of a contract to be awarded.

A renewed analysis of the market failure, including a renewed consultation of the operators of any transport services, is also not the subject of the text of the regulation and can therefore not be subsequently interpreted into it.

The EC sets very strict criteria here, which go beyond the text of the regulation. The competent authorities must be very precise in their definition. Should the authority make a mistake this should lead to the entire compensation payment being qualified as contrary to state aid law and having to be repaid.
With regard to the network effects, it is essential for a reduction of the total costs of public transport services and the continuity of the service that the possibility of awarding a public service contract is not only limited to non-profitable public transport services.

- ➔ The competent authorities must have some discretion here to decide which services fall under a PSO and which do not, as they are also in the best position to judge this.

Regarding point 2.2.5. Article 4 and Article 8 Duration of public service contracts and conditions under which a 50% extension up to 50% of the duration of the public service contract can be granted

For good reason, the PSO regulation does not specify any (maximum) periods that may not be exceeded between the award of the contract and the start of operations. The EC's statements are therefore not covered by the text of the regulation.

Paragraph 3 provides for a *mobilisation phase* of 3 to 4 years in the case of large investments. It should be noted here that it can currently take longer than 3 to 4 years for the procurement of vehicles until a sufficient number of vehicles are ready for operation.

With regard to paragraphs 7 and 8, the EC also departs from the text of the regulation here. According to the wording of Article 4 (4), the extension of the term can also be decided while the contract is in force; the substantive requirements are the same and no stricter than those in which an extension of the term of the contract is intended from the outset.

Regarding point 2.3.1. Article 5a. Access to rail rolling stock
Article 5a does not specify a time limit between the publication of the report and the initiation of an award procedure. It is also unclear what the EC actually means by "effective review", as the assessment report as such is not subject to the review mechanism provided for in Article 5(7).

Regarding*:* "*When the assessment report concludes that measures are necessary to ensure effective and non-discriminatory access to suitable rolling stock, competent authorities are not legally required under Article 5a(2) to take such measures. However, the Commission underlines that by not adopting appropriate measures, a competent authority runs the risk of having the award of the public service contract reviewed under Article 5(7), on the grounds that the award procedure was not fair and did not observe the principles of transparency and non-discrimination, in line with Article 5(3).*"

We consider this "warning" by the EC to competent authorities to be misplaced for the following reasons: The authorities have to apply the relevant provisions conscientiously and officially.

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(2) should also be read in this context, according to which the member states "may" take appropriate measures, but are not obliged to do so (refer also to Council position of 17/10/2016.

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

Regarding point 2.3.3. Article 4(8). Access to information essential for the award of public service contract
The draft 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 can 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 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.

Regarding point 2.4.1 Conditions for direct award to an internal operator
In sub-item (iv) it is mentioned that Article 5(2) of the PSO regulation is not applicable to public service contracts involving buses. It only applies when bus services are provided in the form of service concessions. The reference to trams was probably forgotten here due to an editorial oversight.

Regarding point 2.4.2. Article 5(3). Procedural requirements for the competitive tendering of public service contracts
In this context, we note that the draft guidelines do not contain any comments on the application of Article 5(3b) and the criteria mentioned therein. This is disappointing, as competent authorities have not yet been able to gather any or only limited experience with this new provision; an interpretation by the EC would therefore be useful.

Regarding point 2.4.6. Article 5(4a). Conditions under which competent authorities may directly award a public service contract for rail in case of certain structural and geographic characteristics of the market and network and of performance improvements
The EC's comment that this provision 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.

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 ("*where it considers*".
This therefore clearly speaks in favour of (i) not overstretching the review obligations of the competent authority in this area and (ii) focusing on or recognising the subjective view / broad discretion of the authority => this should be clarified accordingly.

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(4a). This view clearly deviates from the wording of the provision.
In the area of 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.

Regarding point 2.5 Compensation for public services
With this surprising conclusion, the EC deviates from the previous PSO guidelines, its own decision-making practice, and the decision-making practice of the CJEU. It is also completely *unclear which specific provisions* of the PSO regulation the EC wants to see applied to compensation that already meets the 4 Altmark Trans criteria. As a result, these comments should be rejected and omitted.

Regarding point 2.5.1. Contracts awarded on the basis of a competitive tender
Here, too, the EC deviates from the text of the regulation, which clearly states that the annex does not apply to service contracts awarded on the basis of a competitive tender. The EC must also recognise that overcompensation is only mentioned in Article 4(1)(b) 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.

The last paragraph in point 2.5.1. should be omitted, as the remarks have no basis in the text of the regulation.
"The operation of public services may benefit operators that also provide commercial services through positive network effects. .... Where such network effects are quantifiable, they should be taken into account in the compensation."

Regarding point 2.5.3. Overcompensation - ex post checks
Even if competent authorities often design overcompensation checks as ex post checks, the PSO regulation does not necessarily require such a mechanism - an ex ante check is also in conformity with the regulation and the annex.

The avoidance of overcompensation in competitively awarded contracts is only an issue when exclusive rights are granted.

Kind regards