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Subject: Response to the Draft Revised interpretative guidelines concerning regulation (EC) No 1370/2007 on public passenger transport services by rail.

The Federation of Mobility Companies Netherlands (hereinafter: FMN) is the interest group for the public transport companies Arriva, EBS, Keolis, Qbuzz, and Transdev, operating in the Netherlands. On behalf of its members and within the set period, the FMN would like to give react as follows, to the revised interpretative guidelines.

The FMN supports the draft interpretation, as drawn up by the Commission. The regulation resulting from the Fourth Railway Package further elaborated through the revision, is well in line with the ambitions that the Commission and the member states have formulated, with regard to the Green Deal, the modal shift to rail and the realization of Mobility as a Service. Conversely, these ambitions will not be realised without this regulation. For a country such as the Netherlands, where both road congestion and the number of passengers is increasing sharply, a more and better selection of rail transport is essential to keep the Netherlands on the move. But this increased and more suitable selection will only come about if the regulations set the right incentives for it to be realised. The FMN observes that proposals currently being elaborated by the Dutch government, for the direct awarding of the concession for the main railway network, are at odds in some respects with the objectives and obligations of the Fourth Railway Package and the objectives to be achieved. We also established that the interpretation of the Netherlands of these regulations fundamentally differs from their original intention. This results in an (unacceptable) protection of the position of the Dutch Railways and a sub-optimal offer for the traveller.

For this reason, the FMN explicitly supports the intended clarification through the revised interpretative guidelines and thus considers this further specification indispensable. The FMN would like to highlight a few focus points which, in their opinion, could be further clarified.

Clarification of the framework and conditions of SGEI/Altmark/SNCM

As the Commission additionally describes, public passenger transport is qualified as a Service of General and Economic Interest (SGEI). This means that the so-called Altmark criteria apply. In practice however, the criteria are frequently ignored. For example, the Dutch government has failed to carry out an ex-ante test of the question (i) which connections are susceptible to commercial operation, (ii) whether and to what extent there is sufficient commercial market interest in serving the rail routes the government wants to bring under the PSO, to operate on the basis of open access or after tendering, and therefore (iii) whether a PSO is necessary at all. The Netherlands have also failed to check whether the scope of the intended PSO is not broader than strictly necessary, as the Altmark criteria also require. Based on the combination of requirements from the SGEI and the Altmark judgment, the government, as grantor of concessions, could be asked to make a realistic assessment of whether the desired transport could not already be achieved by open access or by tendering, before any decision is made to engage in a PSO. In view of the Dutch Government's apparent lack of ambiguity on this point, the FMN proposes that, in the revised interpretative guidelines, the Commission should refer explicitly to the cumulative conditions resulting from the SGEI framework, the Altmark Judgment and the SNCM judgment.

In addition, the FMN argues that the ex-ante test that governments should conduct, should be founded on a quantitative analysis. It should be based on transparent, comprehensible, logical and verifiable criteria. Moreover, these criteria, the considerations based on them and the outcome of the test itself, should be fully transparent to third parties so that they can assess and challenge the results.

As FMN recently observed, the Dutch Ministry of Infrastructure (as the Dutch Railways) is of the opinion that the legal framework for SGEI, the Altmark criteria and the SNCM judgment, would not be relevant for public passenger transport by rail, because the PSO regulation would provide an exclusive framework. The FMN does not share this view: in their opinion, the PSO regulation is a further elaboration of the legal framework for Services of General Economic Interest and the Altmark criteria, just as the SNCM judgement, as an elaboration of the Altmark criteria on transport concessions, is indeed relevant for rail passenger transport. On this point, therefore, there is already a fundamental difference of opinion between the Ministry and the FMN. Therefore, we request you to clarify more explicitly on this point in which way the legal framework of the PSO regulation relates to the legal framework for SGEI, the Altmark criteria and the SNCM judgment.

Scope

The Commission clearly stipulates that the scope of the PSO should be proportionate to the size of the necessary service brought under the PSO. The FMN also supports the Commission's clarification that the merging of different services into one public service contract is only possible when such merging is necessary and proportionate. This is in line

with the EU Court of Justice's ruling in the SNCM case. According to the FMN, it is also important that this will prevent that the combination of separate train services in one concession is used as a strategy to limit competition and/or to favour the historical operator. This is the case in the Netherlands, for instance, where (almost) the entire main rail network was combined into one single concession, in violation of the proportionality principle. In that respect, the FMN points out the Dutch situation, in which all highly profitable IC connections are brought under the same concession, such as the occasionally loss-making regional connections. Without checking whether the combination is necessary at all, which alternative combinations (if any) are available and based on the simple reasoning that the whole package is a combination of profitable and loss-making lines and should therefore be moulded into a PSO as a single package. This is not in line with the requirements of the SNCM judgment, nor is this approach based on the idea that only the strictly necessary should be brought under a PSO (proportionality) and that the demonstrable existence of market failure should be the mandatory starting point. For this reason too, the FMN would like to suggest that the importance of proportionality be further elaborated in the final interpretative guidelines, in order to prevent more routes from being brought under a PSO than strictly necessary.

Separate accounting in accordance with IFRS 8

The FMN advocates that the holder of a national concession, such as the one for the Dutch main rail network, is obliged to maintain a separation of accounts and that the annual financial statement should include an explanation in accordance with IFR 8. This would provide insight in the results achieved by the various activities (IC connections, regional connections, services acquired in competition such as tenders, management and operation of stations, management of other properties, etc.). This will reduce the risk of both excessive profits and improper cross-subsidisation, while at the same time it can be tested whether the performance meets the requirements of efficiency in operations and financial management.

Open access

Whereas open access is the basis for the Fourth Railway Package, in practice open access is often dismissed as something where the public interest cannot be sufficiently safeguarded. Arguments for this include that transport operators can easily stop their services or that they are engaged in cherry-picking and only want to operate the profitable lines. This is inconsistent with the reality or with the experiences with open access gained elsewhere. Yet, these assumptions are so strong that – for example in the Netherlands – open access is minimised and a PSO is quickly seized upon as the way to prevent such risks. The FMN therefore pleads that, in the interpretative guidelines, the Commission will further comment on how governments can avert these risks and reap the benefits of open access.

Negotiated award for 24 December 2023

The Dutch government intends to award the new HRN concession by private treaty no later than 24 December 2023 and not to start the concession itself until the 1st of January 2025.

The FMN considers this to be a deliberate evasion of the purpose and letter of the Fourth Railway Package. It therefore calls on the Commission to keep a close eye on this and to preserve the integrity of the Union. Furthermore, the FMN believes that if the private awarding is chosen, at least the requirements for private awarding must be met, including the criteria already referred to in the Altmark and SNCM judgments. On this point, too, the FMN advocates making this more explicit in the interpretive guidelines.

The FMN thanks the Commission for the opportunity to respond to the draft interpretative guidelines. Naturally, the FMN would be pleased to provide further clarification.

Kind regards,

