CER comments on draft Revised Interpretative Guidelines concerning Regulation No 1370/2007

1. General remarks

The Community of European Railway and Infrastructure Companies (CER) would like to thank the Commission for this opportunity to comment on Revised interpretative guidelines concerning Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road (hereinafter "**Revised Guidelines**").

In principle, CER members welcome the efforts of the Commission to adapt the text of the Communication from the Commission on interpretative guidelines concerning Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road (hereinafter "**Guidelines 2014**") to the amended Regulation 1370/2007[1] (hereinafter "**PSO Regulation**") and the recent case law of the Court of Justice of the European Union (hereinafter – "**CJEU**"). Furthermore, it is welcomed that the text of the draft Revised Guidelines starts with the references to the Communication on a Sustainable and Smart Mobility Strategy and the European Green Deal, stressing the key role of the public transport services in this context.

However, overall CER members find the text of Revised Guidelines rather disappointing. Desirable and meaningful clarifications on the application of the PSO Regulation in the sense of a practical application aid for the competent authorities can only be found in the text in a few instances. As was already the case with the current text of the Guidelines 2014, on several occasions the text of Revised Guidelines goes beyond the wording of the provisions of the PSO Regulation and tries to re-introduce the parts of the original Commission's PSO Regulation Proposal that have not been included into the final compromise text of the PSO Regulation agreed with the European Parliament and the Council as the result of the legislative process.

In its introduction the draft Revised Guidelines states that the CJEU has interpreted certain provisions of the PSO Regulation and rules applicable to the services of general economic interest. However, most of the case law from which the Revised Guidelines draw conclusions does not interpret the provisions of the PSO Regulation, but instead interpret other Regulations (e.g. on maritime cabotage, footnote 19, 20, 22, 23 of the Revised Guidelines) and / or relate to other sectors (e.g. public service broadcasting, footnote 16 of the Revised Guidelines). The most relevant (recent) judgment of the CJEU which does explicitly concern the interpretation of the PSO Regulation is only discussed in the Revised Guidelines briefly, and moreover is quoted incorrectly (*Andersen* judgment, footnote 21 of the Revised Guidelines).

Furthermore, the draft Revised Guidelines attempt to limit the discretion of the Member States / public transport authorities[2] to provide, commission and organise public transport

[1] 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 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02007R1370-20171224

[2] Whereas the draft Revised Guidelines refers to the Member States, the situation differs per Member State, and in some Member States it is actually up to the regional public transport authorities to deal with the rail traffic.

services. This is contrary to Protocol (No 26) on services of general interest, which is annexed to the TEU and TFEU and has the same legal status as these Treaties, being 'integral part' of them.
While the importance of public transport is also emphasized by the recently published new EU Urban Mobility Framework[3], a number of provisions of the draft Revised Guidelines go against the objectives of the new Framework.

Moreover, the draft Revised Guidelines can only be qualified as a soft law instrument. Nevertheless, with the draft Revised Guidelines the Commission aims to create additional obligations that do not exist in the EU law and/or in the established judicial practice of the CJEU.

In its proposed wording the Revised Guidelines would, in our view, primarily lead to a higher degree of uncertainty on the part of the users of the law, i.e. the competent authorities in the Member States, while failing to achieve their goal of offering interpretative aids or support in the interpretation of the PSO Regulation. The presented draft Revised Guidelines does not serve the purpose of supporting healthy and sustainable competition, as it requires market participants to comply with additional requirements that go beyond the applicable provisions of the PSO Regulation, which appears counterproductive and contrary to the European Green Deal objectives, necessitating the creating of a favourable legislative framework for sustainable modes of transport.

Please find below our comments on specific points / sections of the draft Revised Guidelines.

2. Point 2.1.1. "Article 5(1) and Article 1(3). Relationship between Regulation (EC) No 1370/2007 and the public procurement and concession directives"

The second last paragraph of this point states that "*the award of public service contracts for public passenger transport services by railway and metro is governed solely by Regulation (EC) No 1370/2007 (and excluded from the scope of Directive 2014/24/EU, according to its recital 27 and Article 10(i), and from the scope of Directive 2014/25/EU, according to its recital 35 and Article 21(g))*". We would like to highlight that it is unclear which rules apply to services that exhibit both characteristics of a tram and a metro services, i.e. services that are performed underground and overground. Besides, it should be noted that there is a discrepancy between Directive 2014/24/EU and Directive 2004/18/EC (which Article 5(1) of the PSO Regulation explicitly refers to). While Directive 2014/24/EU excludes metro services (Article 10(i)), Directive 2004/18/EC did not exclude such metro services. Hence, as long as Directive 2004/18/EC applied, the PSO Regulation did not govern the award of public service contracts regarding metro services. According to the above interpretation, this situation changed with the adoption of Directive 2014/24/EU, meaning that Directive 2014/24/EU changed the scope of the PSO Regulation. It seems unlikely that this was intended. Rather, the scope of the PSO Regulation remained unchanged.

3. Point 2.1.3. "Article 1(2). Application of Regulation (EC) No 1370/2007 to international public transport services"

The last paragraph of this point states that "*if a competent authority does not give its agreement to the proposed international public service, the passenger transport services*

[3] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: The New EU Urban Mobility Framework https://transport.ec.europa.eu/system/files/2021-12/com_2021_811_the-new-eu-urban-mobility.pdf

shall be provided on a commercial basis on the territory under its jurisdiction." We find this provision to be rather unclear, as well as contradictory to the Commission's goal to boost long-distance and cross-border passenger rail[4]. In our view, the quoted sentence requires further clarification (e.g. by adding "*where there is a demand and costs do not exceed the revenue*") or should be deleted altogether.

4. 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 contracts"

This section has been extensively revised and expanded compared to the Guidelines 2014. In particular, a broad space is given to the description of an extensive obligation for competent authorities to survey demand for services of general economic interest (hereinafter – "**SGEI**") in detail. A precise "ex-ante assessment of demand" is required, along with an "analysis of market failure", i.e. why transport services in corresponding demand are not provided commercially. It appears from the draft text of Revised Guidelines that not only the strategy plans for public transport are to be subjected to the consultation, but also the specification under Article 2a itself. In accordance with the text, such is to be done by a public consultation of the operators with regard to the existing, as well as possible future commercial services.

From the sector's point of view, the whole of Point 2.2.3 should be comprehensively revised, for the following reasons. In our view, clarifications provided in this point effectively restrict the freedom of Member States to establish SGEIs and it would be problematic if the proposed approach is implemented in practice. First of all, Article 2a of the PSO Regulation exhaustively stipulates how the authority shall proceed when determining the SGEI specifications. Any further consideration of the primary EU law provisions would not be appropriate as, according to Article 91 TFEU, the formulation of the common transport policy (including, in particular, the freedom to provide services) is reserved for the secondary EU law, therefore, only the explicit stipulations contained in the PSO Regulation shall be applicable. Moreover, the reference to the 26th Additional Protocol to the TFEU provided in the Revised Guidelines is questionable, as it only contains an authentic interpretation or demonstrative enumeration of the "common values" mentioned in Article 14 TFEU in regard to SGEI. Besides, it could be noted that the 26th Protocol clearly states the "*essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organizing services of general economic interest as closely as possible to the needs of users*", along with "*a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights*." On other occasions the Commission has also stated that in defining SGEI in land transport, among others, Member States have to take into account the sector-specific legislation.[5] It should also be noted that during the revision of the PSO Regulation as a part of the 4th Railway Package, the points contained in the Point 2.2.3. of the draft Revised Guidelines have already been put forward by the Commission, but have not been included in the final text of the Regulation (EU) 2016/2338, which clearly indicates the absence of support of the EU legislator towards such provisions.

- **Section "General principles and definition of public service obligations"**

As outlined in preceding paragraphs, the changes introduced by the draft Revised

[4] See Action plan to boost long distance and cross-border passenger rail

[5] See, e.g. Communication from the A Quality Framework for Services of General Interest in Europe COM/2011/0900 final: "*Public service obligations in the transport sector are laid down in specific pieces of legislation for air services, inland transport and maritime transport[22]. This sector-specific legislation establishes the principles that Member States should follow when defining public service obligations in each transport mode.*"

Guidelines to this section go in the wrong direction by considerably restricting the powers of the Member States / public transport authorities to establish PSOs. In particular, the deletion of the existing 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*" cannot be supported.

In regard to the last sentence of the first paragraph of this section[6] we would like to note the following. The *BUPA* judgment that is being referenced in this sentence concerned a risk equalization 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 in this respect, are based on Articles 91 and 93 TFEU, but not on Article 106(2) TFEU. Besides, the quote provide in the text of Revised Guidelines is not exact, as the *BUPA* judgement paragraph cited in footnote 17 reads as follows: "*In effect, that judgment [C-41/83] shows that the Member State's power to take action under Article 86(2) Commission 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 SGEIs in the transport/railway sector in no way removes this sector from the application of the competition rules. Competition in this sector can, as is well known, take place in different areas, namely as *competition in the market* and as *competition for the market*. As mentioned above, Member States have a wide margin of discretion in defining SGEIs, including in land transport. This implies that competition does not necessarily mean competition in the market, but also competition for the market.

At the same time, we can support the specific statement provided in this section that the "*specification of a public service obligation may only be called into question by the Commission in the event of a manifest error*".

- **Section "Consistency with the objectives of Member States' public transport policy"**

We would also like to note the following in regard to the first paragraph of this section[7]. An extensive evaluation and verification process, including extensive consultation of public transport plans, can (only) be found back in the Commission's PSO Regulation Proposal of 2013, which, however, was amended in the course of the legislative process. In comparison, recital 10 of the Regulation (EU) 2016/2338 states that when "*preparing public transport policy documents, relevant stakeholders should be consulted in accordance with national law. Those stakeholders might include transport operators, infrastructure managers, employee organisations and representatives of users of public transport services*." At the same time, Article 2a para 1 of the PSO Regulation states that 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*" required by the draft

[6] "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]."

[7] "When applying Article 2a(1) of Regulation (EC) No 1370/2007, the competent authority must ensure that the public service specifications are consistent with the policy objectives stated in the Member State's public transport policy documents. Member States have a wide margin of manoeuvre in determining the content and format of such documents and the procedures for consulting relevant stakeholders. Such documents, to be adopted before the public service obligations are specified, should define the objectives of public transport policy, such as territorial connectivity and the development of sustainable transport, in sufficient detail (in particular a quantitative assessment of the services to be provided per route) and identify the means to attain them across the different transport modes. Stakeholders to be consulted may include transport operators actually or potentially present in the geographical area concerned, infrastructure managers and representative passenger organisations, employee organisations and environmental organisations."

text of Revised Guidelines therefore goes beyond the legal text of the PSO Regulation, which states that the content and format of the transport plans shall be determined in accordance with national legislation.

Moreover, a quantitative assessment of the services to be provided per route[8] is contrary to CJEU case law, and in our view would undermine the aim and goal of the PSO Regulation. There is no legal basis nor relevant case law which stipulates that a quantitative assessment of the services to be provided per route is mandatory – nor does the Revised Guidelines provide any substantiation or source. It is also not necessary to conduct a quantitative assessment per route as Article 2a of the PSO Regulation allows the combination of profitable and non-profitable lines in a public service contract. Further to this, this approach is contradictory to the decision-making practice of the Commission.[9] Additionally, this approach denies that policy-desired frequencies can deviate (strongly) from the frequencies that are logistically possible: the one-to-one link between policy and public service obligations is therefore not possible (apart from the fact that the precise interpretation is up to the Member State).

The additional specifications in regard to the Member State's / regions' public transport policy documents provided in this section go beyond the stipulations of the PSO Regulation and, instead of interpreting the existing legal provisions, establish additional requirements, and, therefore, should not be incorporated into the text of the draft Revised Guidelines. In accordance with the principle of subsidiarity, it is within the sole competence of the Member States to define the content of the public transport policy documents.

- **Section "Existence of a real need for public service obligations"**

In regard to the first paragraph of this part[10] we would like to note the following. The reference to the "least restrictive approach" and the "least harmful definition of PSO services" in relation to the internal market and fundamental freedoms is neither in line with the broad discretion in defining SGEI, nor with the text of Article 2a of the PSO Regulation.

Besides, we do not find the reference to the *SNCM* judgment appropriate (footnote 19), as the *SNCM* judgement is not relevant for land transport and the applicable PSO Regulation, as the *SNCM* judgment was issued for maritime transport with the legal basis of Article 106(2) TFEU. Public passenger transport, especially in cities, cannot be compared with shipping. On many occasions, such as in particular in the field of passenger rights, the EU law makes a clear distinction between the different modes of transport. In contrast to shipping, public transport offers a coordinated offer, covering various modes of transport, which is essential to address a customer's needs for an entire route, which is often challenging shall several various operators provide services on different lines.

Also, the paragraph of the *SNCM* judgment quoted in the text of Revised Guidelines concerns the admissibility of an alternative test for the first *Altmark* judgement criterion[11]. However, the PSO Regulation is also to be understood explicitly as a "response" of the EU

[8] A further complicating factor is that there is no definition of "the route" in the legal text.

[9] Commission Decision of 24 February 2010 concerning public transport service contracts between the Danish Ministry of Transport and Danske Statsbaner (Case C 41/08 (ex NN 35/08)), par. 263

[10] "The Union courts have made it clear that before laying down specifications for public service obligations, the competent authority should assess whether there is a genuine need for the planned public transport services and to that end, whether there is a genuine demand from users that cannot be addressed, even partly, by market operators in the absence of public service obligations. A need for public service can occur only where there is a user demand and that demand is not capable of being met by the interplay of market forces alone. To meet the need thus identified, the competent authority should give priority to the approach that is least restrictive for the fundamental freedoms and least harmful for the proper functioning of the internal market[19]."

[11] "First, the beneficiary undertaking must actually be entrusted with the discharge of public service obligations and those obligations must be clearly defined"

legislator to the *Altmark* judgment (see, for instance, recitals 33-37 of the PSO Regulation), therefore making the direct recourse back to the *Altmark* judgment and the criteria mentioned therein (let alone their application in other transport sectors) is not appropriate when interpreting provisions of the PSO Regulation.

On the second paragraph of this part[12] we would like to share the following comment. In this case the text of Revised Guidelines once again cites a CJEU decision that is not relevant, as it was issued more than 20 years ago, on maritime transport, on a different TFEU legal basis, as well as on a different Regulation (Council Regulation (EEC) No 3577/92 of 7 December 1992). The PSO Regulation may have some relevance for maritime transport if the Member State decides to apply the PSO Regulation to maritime transport "*without prejudice to Regulation 3577/92*"[13], however, this does not change the fact that Regulation 3577/92 has no relevance for land or rail transport. Therefore, the quoted CJEU decision does not provide any relevant findings for the interpretation of the PSO Regulation for land transport.

Strict requirements introduced by this sub-section of the draft Revised Guidelines violate the principle of subsidiarity and restrict the powers of Member States in regard to establishing public transport services. Competent authorities are best placed to estimate what actions are required to be taken to assess which public transport services should be organised in the interest of the users, and a detailed uniform EU-wide methodology is not expedient.

- **Sub-section "Ex ante assessment of the demand for public transport services"**

We believe that the approach outlined in this sub-section should be adjusted for the following reasons.

First of all, a reference to a comprehensive evaluation and verification including extensive consultation of the public transport plans can (only) be found in the original Commission's PSO Regulation Proposal of 2013, which, however, has not been included into the final text of the PSO Regulation, clearly showing that the EU legislator was not in favour of such approach. As already quoted above, recital 10 of the Regulation 2016/2338 takes a different view, while Article 2a para 1 of the PSO Regulation clearly states that the "*content and format of public transport policy documents and the procedures for consulting relevant stakeholders shall be determined in accordance with national law*."

Moreover, we believe that the provision that requires Member States to prove the existence of a "real" demand for public transport services is in contradiction with the wide discretion Member States enjoy in defining SGEI. Furthermore, the draft text of Revised Guidelines also seems to demand that the public transport plans would in any case also have to fully cover the period of the intended award of the contract, while Article 2a of the PSO Regulation does not provide any legal basis for such, as it states that the content and format of the public transport plans and the procedures for the consultation of the relevant stakeholders should be determined in accordance with national legislation. The same applies to the question of the periods to be covered and intervals for the evaluation/updating of the public transport plans in line with demand, i.e. this shall also be determined in accordance with the national legislation.

[12] "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]."

[13] See Article 1(2) of the PSO Regulation and Communication from the Commission on the interpretation of Council Regulation (EEC) No 3577/92.

Besides, the references to *ex ante* evaluation of demand for public passenger transport services provided in the Revised Guidelines are based on a case law on maritime transport and respective compensation granted under Article 106(2) TFEU, while the PSO Regulation and related compensation are based on Articles 91 and 93 TFEU.

With the reference to the CJEU judgment in *Andersen v. Commission* case, the second paragraph of this section states that a "*Member State can justify the demand for public transport by the pursuit of a legitimate objective in the public interest such as the provision of more numerous, safer, of a higher quality services or environment-friendlier services.*[21]" However, the draft Revised Guidelines omits to include a very relevant part of the same paragraph of *Andersen v. Commission* judgement, which reads as follows: "*Moreover, according to the case-law, while evidence of market failure may be a relevant factor for declaring State aid compatible with the internal market (…), such evidence is not an essential condition, for, in any case, a State may justify aid by the pursuit of a legitimate objective in the public interest (…)*.[14]" As follows from the quoted paragraph, the CJEU considered in the *Andersen* judgment – contrary to the interpretation provided in the present section of the draft Revised Guidelines – that evidence of market failure is not an essential condition for declaring State aid compatible with the internal market in a case which is about public transport.

In the same paragraph, the draft Revised Guidelines refers to the *SNCM* judgment and states that a Member State must demonstrate the existence of a real demand for the public transport services contemplated by the public authorities. However, the *SNCM* judgment is only applicable to additional maritime cabotage services and not to rail transport services: "… *for a maritime cabotage service to be classifiable as an SGEI, it must meet a real public service need, demonstrated by the insufficient regular transport services in a situation of free competition, and that the scope of the SGEI is necessary and proportionate to that need."* The *SNCM* judgment concerns the additional services provided, and not the basic services. If any relation is to be taken into account, it is that the rail sector is comparable to the basic services, and not the additional services.

The *SNCM* case – just as the *Analir* case referenced by the draft Revised Guidelines (footnote 20) – deals precisely with the maritime cabotage sector and makes it explicit that its solution is based on existing EU regulation applicable to maritime cabotage sector. This consideration of the CJEU cannot be extrapolated to every other sector or Regulation, e.g. the PSO Regulation, especially because rail transport is of a totally different order than ferry routes.

Furthermore, it should be noted that the reliance of the draft Revised Guidelines on user demand in the qualification of the necessity of a public service obligation is too limited. To base the decisions about public transport services solely upon users' demand would not be prudent, as users' demand represent subjective views, whereas there are many urban and traffic planning aspects that also have to be taken into account. Transport companies already conduct customer surveys on the regular basis in order to continually improve their services. This is an important and useful tool, but it should not be used as the sole or main basis to decide whether to establish a public service obligation. The Member States / public transport authorities must also have the possibility to factor into account, for instance, punctuality, quality, regularity, sustainability of the service (which may not be directly related to an existing user demand). The modal shift is an example of a legitimate objective of a Member State, without an explicit user demand.

[14] Judgment of the General Court of 18 January 2017 in the Case T-92/11 RENV *Andersen v Commission* (para 69 and 70).

- **Sub-section "Analysis of the market failure"**

We believe that the wording of this sub-section of the Revised Guidelines goes beyond the stipulations of the binding legal text of the PSO Regulation, as neither a quantitative *ex ante* assessment, nor a separate market failure test is prescribed in its Article 2a. The approach presented in this sub-section of the Revised Guidelines furthermore results in more confusion rather than clarity. From the draft wording it appears that after the consultation on the public transport plans, further market consultations must also take place before (i) defining the public service obligation specification under Article 2a, and then again before (ii) awarding a public service contract. However, the PSO Regulation does not require the competent authorities to carry out further consultations in these phases.

The first paragraph of this sub-section of the draft Revised Guidelines states that "*Member States must assess whether the identified demand for public transport services cannot be met by operators on open access in the absence of a public service obligation*". This statement is, however, contrary to what the CJEU considered in the *Andersen* judgment, which states that "*while evidence of market failure may be a relevant factor …, such evidence is not an essential condition*". Rather than the *SNCM* judgment on maritime cabotage, the *Andersen* judgment is of higher relevance as it actually interprets the PSO Regulation.

It is furthermore important to stress that the 26th Additional Protocol concerning SGEIs, which is repeatedly quoted by the Revised Guidelines, emphasizes that the common EU values in this context include "*a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights*." The COVID-19 pandemic has shown that purely commercially operated passenger rail services can be significantly reduced or eliminated altogether in a very short period of time. In contrast, ensuring secure, stable and affordable public mobility is a core responsibility of each Member State towards its people, and this is also one of the reasons for the wide discretion in the definition of SGEI that Member States enjoy. This discretion is not limited by the PSO Regulation and should also not be limited by the present non-binding Interpretative Guidelines.

Further to this, open access has no priority over public service contracts, which, in particular, is reflected in the recital 25 of Directive 2016/2370[15]: "*The right of railway undertakings to be granted access to the infrastructure does not affect the possibility for a competent authority to grant exclusive rights in accordance with Article 3 of Regulation (EC) No 1370/2007 of the European Parliament and of the Council or to award a public service contract directly under the conditions established in Article 5 of that Regulation. The existence of such a public service contract should not entitle a Member State to limit the right of access of other railway undertakings to the railway infrastructure concerned for the provision of rail passenger services, unless such services would compromise the economic equilibrium of the public service contract*."

In addition, it could be noted that above clarifications provided in the draft Revised Guidelines do not seem to consider the fact that the PSO Regulation covers all modes of land public transport (i.e. train, bus, metro and tram), whereas the scope of the Directive 2012/34/EU[16], which contains provisions on open access, is limited only to rail transport. Therefore, when applying the PSO Regulation, no obligation to reduce public service contracts in favour of open access can be assumed, as the regulatory framework

[15] Directive (EU) 2016/2370 of the European Parliament and of the Council of 14 December 2016 amending Directive 2012/34/EU as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure OJ L 352, 23.12.2016, p. 1–17

[16] Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area OJ L 343 14.12.2012, p. 32

set forth in the PSO Regulation is identical for all modes of land transport in this respect, while the notion of open access is not established for the land transport other than rail.

- **Sub-section "Selection of the least harmful approach to the functioning of the internal market"**

The draft text of this sub-section suggests that the least harmful approach to the functioning of the internal market should be taken. This, however, is neither a criterion of the PSO Regulation, nor does it follow from the European law perspective. The PSO Regulation stipulates the conditions under which a Member State may act in the field of public passenger transport. As long as the Member State handles in accordance with the PSO Regulation, it may choose which approach it takes.

Besides, the draft text of this sub-section of the Revised Guidelines makes a reference to an incorrect legal basis. According to Article 91 TFEU, the development of the common transport policy (including, in particular, the freedom to provide services) is reserved for the secondary EU legislation. Any further consideration of the fundamental freedoms set force in the primary EU legislation is therefore not in line with TFEU. Apart from that, the principle of proportionality is also explicitly recognized in the Article 2a(1)(2) of the PSO Regulation. It is therefore not appropriate to "rewrite" the concepts laid down in the PSO Regulation by referring to the stipulations of the primary EU law.

Besides, the hierarchy between PSO contracts and general rules presented in the last sentence of the text of this sub-section[17] is not provided for in the PSO Regulation, is not in line with the binding legal text, and therefore should be deleted. This sentence leads to confusion as it suggests that general rules in the sense of Article 3(2) of the PSO Regulation have to be considered before awarding a public service contract. However, such approach cannot be expected to be adopted by competent authorities since this would lead to a comparison of two different concepts. General rules in the sense of Article 3(2) of the PSO Regulation only impose maximum tariffs and not the performance of a transport service as a whole. Public service contracts, on the contrary, rarely only impose a maximum tariff on a provider. Maximum tariffs are usually applied by all undertakings in a certain area. Therefore, a public service contract containing a maximum tariff for only one or only few undertakings would be futile. Rather, public service contracts impose the performance of a service as a whole under certain qualities on an undertaking. Therefore, public service contracts and general rules in the sense of Article 3(2) of the PSO Regulation can rarely be compared.

- **Section "Possibility to group cost-covering and non-cost-covering services in the public service contract"**

The second paragraph of this section[18] suggesting that "*including cost-covering services in the scope of the PSOs should mainly be justified by the objective of ensuring a coherent transport system…*" is not based on the requirements of the PSO Regulation, goes beyond what is prescribed in the binding legal text and therefore should be deleted from the text of Revised Guidelines.

Article 2(a)(1) of the PSO Regulation clearly states that the competent authority shall lay down specifications for PSOs in the provision of public passenger transport services and

[17] "the competent authority may consider imposing general rules instead of awarding a public service contract to a single operator, subject to compliance with State aid rules."

[18] "However, the Commission considers that including cost-covering services in the scope of the public service obligations should mainly be justified by the objective of ensuring a coherent transport system, notably at a geographical level, and of reaping the benefits of positive network effects, rather than only limiting the amount of the compensation. If so, such grouping may help ensuring that the specifications of the public service obligations achieve the public policy objectives in a cost-effective manner, as required under Article 2(a)(2) of Regulation (EC) No 1370/2007."

the scope of their application, which "*includes the possibility to group cost-covering services with non-cost-covering services*." The PSO Regulation does not mention that grouping cost-covering services with non-cost covering services should mainly be justified by the objective of ensuring a coherent system, rather than only limiting the amount of the compensation.

Besides, this new requirement stated in the Revised Guidelines neither stems follow from the case law of the CJEU, nor from the decision-making practice of the Commission. For example, the Commission's decision concerning public transport service contracts between the Danish Ministry of Transport and Danske Statsbaner states the following: *"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. Finally, that possibility is, furthermore, not limited by the existence or otherwise of comparable transport services,..."*[19] This entirely new line of argument of the Revised Guidelines – contrary to Commission's previous decisions – is not based on new case-law either. The case-law with regard to other sectors is not relevant in this case as the PSO Regulation – different from, for example, the Maritime Cabotage Regulation in the *SNCM* judgment – explicitly specifies the possibility to group cost-covering services with non-cost-covering services.

5. 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"

In our view, provisions of the fourth paragraph of this draft point in relation to the duration of the mobilisation period are not in line with the text of the PSO Regulation, which does not make any stipulations in regard to the duration of the mobilisation period. We therefore believe that such an interpretation goes beyond the provisions of the legal text.

In particular, the draft Revised Guidelines state that the "*timing of the award in relation to the start of operations should not result in circumvention of the provisions of Regulation (EC) No 1370/2007 … enshrined in Article 8(2)(iii)*". However, when a contract is awarded in line with Article 8(2)(iii) of the PSO Regulation, there is by definition no circumvention of the provisions of the PSO Regulation. Under the transitional provisions of Article 8(2) of the PSO Regulation, a PSO can, without any further justification required under the PSO Regulation, be granted by direct award for a maximum of ten years (unless prohibited by national law).

It is furthermore unclear why the Revised Guidelines take the position that, in the event of a direct award, only a few weeks can be required between the moment when the contractual obligations come into being and the start of transport operations. No substantiation or source is given for such requirement. In addition, the text transpires that it is assumed that direct awards do not require "significant preparations". However, in fact direct awards may require significant preparations, for example due to the fact that the requirements of the new direct award differ substantially from the previous contract. Furthermore, considerably more than a few weeks' time is required for railway capacity requests. A few weeks is not enough to prepare for the new award and, as said, such limit is also not imposed by the PSO Regulation.

[19] Commission Decision of 24 February 2010 concerning public transport service contracts between the Danish Ministry of Transport and Danske Statsbaner (Case C41/08 (exNN35/08)), par.263.

It may further be noted that the following two questions arise in relation to the "mobilisation phase". First, it is not clear whether the competent authority may directly award a contract relating to the "mobilisation phase" to an operator other than the public service operator that will eventually provide the services covered by the contract. And second, it is also not clear whether the "mobilisation phase" is initiated before the contract is concluded, and even before the information referred to in Article 7(2) of the PSO Regulation is published, or before the one-year period laid down in the respective provision has expired.

Moreover, the 3rd last paragraph of the point states, inter alia, that the possibility of extending the duration of the contract *"by up to 50% should be applied restrictively"*, and the "*competent authority must assess whether an extension is necessary to enable the operator to amortise its assets at a typical or legally prescribed depreciation rate and whether the additional duration is proportionate to this objective*". In this regard, we would like to highlight that it is not clear what would happen in the case when the public service contract contains different services, and only for part of the services the amortization calls for an additional duration. For example, a contract contains bus and tram services, and the investment in trams calls for a longer duration. Would it also possible to extend the contract with regard to the bus services?

Besides, the draft text of the second last paragraph of this point states that an extension of the duration of the contract while the contract is running is only possible subject to certain (stricter) conditions. However, according to the wording of Article 4(4) of the PSO Regulation, the extension of the term can also be decided during the running of the contract, with the same substantive conditions (and not stricter) than those set for an extension of the term of the contract before the award. Therefore, the proposed interpretation of Article 4 goes beyond the stipulations of the binding legal text.

Furthermore, it is important to note that the acquisition of large rail assets with long-term depreciation (worth more than EUR 100 million at times) has in itself provided a significant guarantee for the extension of the contract. However, the draft Revised Guidelines does not specify in relation to the overall assets whether the number or the value of new investments (leading to the extension of the contract) and procurements has to be significant. Thus, it leaves a considerable flexibility for the interpretation. Therefore, a further explanation of the term "overall assets" would be helpful. We would suggest an interpretation or a definition that provides an alternative for companies having a significant proportion of less modern assets, which purchase new assets (especially EMU, DMU, locomotives, train cars etc.) of significant value, rather than the quantity.

In addition, it would be beneficial if the text of the Revised Guidelines includes as a specific and exceptional case for extension a 'substantial reduction of traffic due to unforeseeable circumstances', such as a pandemic or limitations imposed by the competent authority, so that the extension of the duration of the public service contract, in proportion to the duration of the unforeseeable cause that has led to the substantial reduction of traffic, allows to amortise operator's assets. Inclusion of such clarification in the text of the Revised Guidelines can be further supported by the flexibility provided by Article 5.5 of the PSO Regulation for emergency situations.

6. Point 2.2.6. "Article 4(7) and Article 5(2)(e). Conditions of subcontracting"

The 3rd paragraph of this point states that "*subcontracting more than one third of the public transport services would require a strong justification*". This interpretation goes beyond the provisions of the binding legal text, as according to the PSO Regulation it is sufficient that the operator performs "*the major part of the public passenger transport*

service itself", i.e. more than 50%. The limit of 1/3 of the services introduced in this point of the Revised Guidelines is not in line with the legislative text and should therefore be adjusted.

7. Point 2.3.1. "Article 5a. Access to rail rolling stock"

The draft text of this point of the Revised Guidelines suggests that "*assessment report must be made publicly available sufficiently in advance to allow all stakeholders to react, so that an effective review can be completed before a competitive tendering procedure is launched*". We would like to stress that Article 5a of the PSO Regulation does not specify any time limit between the publication of the report and the initiation of an award procedure. Besides, it is unclear what is meant by the "effective review", since the audit report as such is not subject to the review mechanism provided for in Article 5(7) of the PSO Regulation. It can also be noted that by using the phrase "*sufficiently in advance*" the Commission appears to be trying to assume competence to specify such a time limit with binding effect.

The draft text of this point 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)*". In our view this "warning" of the Revised Guidelines to the competent authorities is not appropriate for the following reasons. First of all, the authorities have to apply the relevant legal provisions conscientiously in an official manner. Moreover, the interpretation provided in this section of the Revised Guidelines is not the only possible one. It is important to note that the text of the original PSO Regulation Proposal of the Commission stipulating that access to rolling stock has *to be guaranteed by the Member States* was rejected by the Council with the reference to negative effects on the public budgets of the Member States[20]. Article 5a(2) of the PSO Regulation should also be read against this background, according to which the Member States should be allowed to take appropriate measures if necessary, but are not obliged to do so[21]. Besides, the wording of the Article 5a(2) itself states that "*competent authorities may decide*" and not the "*competent authorities shall decide*". In any case, the inspection obligations of the competent authority pursuant to Article 5a(1) must not be overstretched.

8. Point 2.3.3. "Article 4(8). Access to information essential for the award of public service contract"

In regard to the content of this point we would like to stress that the draft Revised Guidelines does not provide any concrete support for the competent authorities on how to deal specifically with the protection of business secrets of the current operator in a tender situation. It is clear that the knowledge of the current cost and revenue picture of the contract held by the current operator represents a competitive advantage for potential bidders, as on this basis 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 such bid in commercial terms (e.g. price). In such an arrangement, previous operators have a clear starting disadvantage in tenders for the follow-up contract, which may adversely affect the fairness of the tender proceedings. We believe that the Revised Guidelines should

[20] Communication from the Commission to the European Parliament concerning the position of the Council on the adoption of a Regulation amending Regulation (EC) No 1370/2007 COM (2016) 689 final
[21] Statement of the Council's reasons: Position (EU) No 19/2016 of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1370/2007 concerning the opening of the market for domestic passenger transport services by rail

provide the competent authorities with a clear set of instruments on how to adequately protect trade secrets, e.g., by obliging them to provide only historical, aggregated, and approximate data to the interested parties. Among the set of instruments on how to protect trade secrets, the Revised Guidelines could state that, in any case, competent authorities may not disclose information that selected operators have designated as confidential, e.g., technical or commercial secrets and confidential aspects of tenders, in terms similar to those set out in Article 21 of Directive 2014/24/EU and Article 31 of Directive 2014/25/EU.

9. Point 2.4.2. "Article 5(3). Procedural requirements for the competitive tendering of public service contracts"

We would like to note that the draft Revised Guidelines do not contain any comments on the application of Article 5(3b) of the PSO Regulation and the criteria mentioned therein. This is regrettable, as competent authorities have not yet been able to gather any, or only marginal empirical data, on this new provision of the PSO Regulation, and an interpretation by the Commission would therefore be useful.

10. 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"

We find debatable the comment provided in this point stating that that the provision of Article 5(4a) of the PSO Regulation should be interpreted restrictively. It can be presumed that the EU legislator has intended this provision to have a corresponding scope of application - provided that the relevant requirements are met - which should not however be subsequently nullified by a restrictive interpretation. In particular restrictive interpretation does not fit in the situation referred to in letter (a) of the Article 5(4a) of the PSO Regulation, where the assessment is left to the competent authorities. Therefore, it seems to be more appropriate to use the wording "*this provision should not be interpreted extensively*" instead.

Besides, when reproducing the individual requirements of Article 5(4a)[22], the second paragraph of this point is not fully in line with the exact wording of the provision of the PSO Regulation. The provision of Article 5(4a) only requires that the direct award is justified from the competent authority's point of view ("*where it considers that*"), i.e. that assessment of the market and network characteristics includes subjective elements, to the discretion of the competent authority. Article 5(4a) makes a clear distinction between the justification under the letter (a) ("*where it considers that*") and the justification under the letter (b) ("*where such a contract would result*"). The justification under the letter (a) is therefore dependent on the assessment of the competent authority, whereas the justification under the letter (b) should indeed be essentially objective (although also here the competent authority would have a margin of discretion). If the EU legislator had indeed intended that the requirement under the letter (a) should have been understood purely objectively, it would surely have worded the article in that way. The wording of Article 5(4a) therefore clearly speaks in favor of (i) not overstretching the review obligations of the competent authority in this area, and (ii) focusing on or recognizing the subjective

[22] "The first condition is that the direct award is justified by the relevant structural and geographical characteristics of the market and network concerned, and in particular size, demand characteristics, network complexity, technical and geographical isolation and the services covered by the contract."

view / the broad discretion of the authority, which should be properly reflected in the text of the Revised Guidelines.

We agree with the Commission that the list of specific characteristics of Article 5(4a) of the PSO Regulation is not exhaustive, and the competent authority can therefore consider the need for direct award also with reference to other specific characteristics (sub-criteria) than the ones explicitly mentioned in Article 5(4a). However, while the list of specific characteristics (sub-criteria) is not exhaustive (and competent authorities therefore can justify a direct award with reference to other specific characteristics than the ones explicitly mentioned), such additional specific characteristics should still be linked to the criterion "*relevant structural and geographical characteristics of the market and network concerned*".

Moreover, the interpretation provided in the fourth paragraph of this point[23] goes beyond the stipulations of Article 5(4a) of the PSO Regulation. Article 5(4a) does not refer to any kind of "performance based-exception", which would require that a direct award should be "justified" in that it better meets the quality and cost objectives which the Revised Guidelines presumes to be achieved by competitive tendering. A hypothetical comparison between the results of a hypothetical tender and the direct award considered by the competent authority is therefore not required by Article 5(4a). In regard to the letter (a), it is only required that the direct award of the contract is 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, while with regard to the efficiency or quality considerations, only the letter (b) is relevant, and in the letter (b) the "old" contract is the relevant benchmark. If the criteria under Article 5(4a) are met, a competent authority can proceed with a direct award and there is neither a need nor a requirement for a comparison to be made with competitive tendering.

Besides, the interpretation provided in the fourth paragraph of this point openly neglects the importance of "*number and nature of the market and network characteristics*", which plays the key role for assessment of the first condition referred to in Article 5(4a) of the PSO Regulation, subsequently depriving the competent authorities their prerogatives in terms of assessment of those characteristics. It imposes on the competent authorities a new obligation to "*demonstrate that in the specific case at hand, direct award is justified*", thus shifting their competence of considering whether the direct award is justified to the Commission.

Furthermore, the comment provided in the sixth paragraph of this point in relation to the margin of improvement, i.e. that the improvement of services should be "meaningful", is not based on the provisions of the PSO Regulation and therefore cannot be supported. The Article itself only stipulates that there should be an "*improvement in quality of services or cost-efficiency, or both, compared to the previously awarded public service contract*". Again, if the EU legislator would have intended that the improvement should be "meaningful" or "significant", the wording of this article would have been different. Given that the EU legislator has stipulated that an improvement in quality of services or cost-efficiency, or both, is sufficient, there is no basis in the binding legal text to require for these improvements to be "meaningful".

[23] "Taking into account the rationale for the so-called "performance based-exception", i.e. that in certain cases, the improvement of the service and / or its cost-efficiency cannot be achieved by competitive tendering, due to certain market and network characteristics, what is essential is not so much the number and nature of the characteristics invoked by the Member State but the demonstration that in the specific case at hand, direct award is "justified", as point (a) of Article 5(4a) first subparagraph puts it, in that it better meets the quality and cost objectives which the Regulation presumes to be achieved more effectively, in principle, by competitive tendering."

Besides, Article 5(4a) PSO Regulation does also not require – as the draft Revised Guidelines state – that the competent authority must bring sufficient evidence proving that the conditions specified in that provision of the PSO Regulation are fulfilled. The only requirement stipulated in the PSO Regulation is that the competent authority shall publish a substantiated decision and shall inform the Commission thereof within one month of its publication (Article 5(4a)). A restrictive interpretation of this provision as suggested by the Revised Guidelines, therefore, also does not find support in the PSO Regulation.

Lastly, the second last paragraph of this point states that the operator should not be able to seek damages for the suspension or termination of the contract if it was done in line with the provisions of the PSO Regulation. This is essentially a civil law question of the individual case, which cannot be resolved by the Commission Interpretive Guidelines. An operator is and should always be entitled to consider legal remedies if it believes that the competent authority was not entitled to suspend or terminate the contract.

11. Point 2.4.7. "Article 5(5). Emergency awards"

In our view, the draft text of this point is missing guidance on several important points. First of all, from the wording of the Article it is unclear whether the "*disruption of services*" only refers to an already initiated performance of services on the basis of a concluded public service contract, or rather it covers, more broadly, any disruption of a transport service. Regarding the latter, authorities could direct award contracts for new services. Moreover, a clarification of the scope of the "*disruption of services*" would be welcome, in particular on whether it covers the instances when the previous public service contract expires, while a new one is not concluded in due time. These situations carry a high potential for circumventions: if an authority can direct award a contract that expires simply because the authority did not take the necessary steps for a competitive tender procedure, the authority can easily provoke emergency situations.

12. Point 2.4.9. "Art. 5(7). Review of award decisions"

Article 5(7) of the PSO Regulation stipulates that Member States shall take the necessary measures to ensure that decisions taken in accordance with paragraphs 2 to 6 may be reviewed effectively and rapidly, and that such review bodies may be of a judicial character. In its second subparagraph, Article 5(7) PSO Regulation further specifies that for cases covered by paragraphs 4a and 4b, such measures shall include the possibility to request an assessment of the substantiated decision taken by the competent authority by an independent body designated by the Member State concerned.

In the draft text of this point the Revised Guidelines take the position that "*rail regulatory bodies within the meaning set out in Article 55 of Directive 2012/34/EU are better placed to provide this function*." It is however unclear why a rail regulatory body, which has by nature and definition less experience and knowledge in the field of reviewing decisions than a court, should be better placed to provide the function of reviewing award decisions. In any event, Commission's Interpretive Guidelines are not the right place to establish which independent body would be best placed to perform the assessment, as the PSO Regulation explicitly leaves the designation to the discretion of the Member State.

13. Point 2.5. "Compensation for public services"

The fourth paragraph of this point states that public service compensation fulfilling the conditions laid down in the *Altmark* judgment does not constitute State aid, but, nevertheless, to be compliant with Union law, such public service compensation would still need to fulfil the other requirements of the PSO Regulation. We find this stipulation of the

draft Revised Guidelines rather surprising, as it equally departs from the text of the current Guidelines 2014, the Commission's own decision-making practice, as well as from the jurisprudence of the CJEU. Besides, it is unclear which *specific* provisions of the PSO Regulation are meant by the draft Revised Guidelines to be applied to compensation that already meets all four *Altmark* judgment criteria. We therefore suggest that this interpretation is removed from the text of the Revised Guidelines.

14. Point 2.5.1. "Contracts awarded on the basis of a competitive tender"

The fourth paragraph of this point, which set force the need to perform an overcompensation test within a competitive tender procedure is neither in line with the legal provisions of the PSO Regulation, nor with the common market practice. **We strongly believe that such interpretation should not be included in the text of the Revised Guidelines**. An additional overcompensation test within a competitive tender procedure is unnecessary and takes away any market incentives to improve the services. If competent authorities would have to comply with these demands, efforts and expenses for contract controlling would (unnecessarily) increase significantly. For each contract, a report by an auditor firm would have to be prepared. Thousands of contracts on the European Union would have to be checked in hindsight. Competent authorities as well as undertaking would have legal conflicts (presumably in court) about the price which has been contractually agreed upon, since undertakings calculated and relied upon the remuneration.

An overcompensation test within a competitive tender procedure is unnecessary for the following reasons. Within a competitive tender procedure, undertakings calculate the best price for the services they can offer. That means, all positive effects as well as all costs are taken into consideration. There is no possibility for cross-subsidisation since undertakings calculate such positive effects in their bids as well. If undertakings would neglect such positive effects (for example for other services), they would miss out on a better bid and could lose the tender. Therefore, there is no need for an additional overcompensation test similar to the one performed in the context of a direct award. The best price in a competitive tender is already a market price.

Besides, an overcompensation test within a competitive tender procedure would be counterproductive for a successful tender due to the following:

- As rightfully stated in the text of the Revised Guidelines itself, namely in the point 2.5.8. "*for competitively awarded contracts, an excessively low compensation would discourage prospective bidders from participating in tender procedures*".
- If the price of the winning tender cannot be relied upon by an undertaking, the undertaking takes additional risks. Such risks would have to be calculated as well.
- Such a test leads to a legal uncertainty. The price is the most important aspect for a provider. If the calculated price is uncertain, an undertaking might not participate in the tender at all. In the rail sector high investments are necessary. If profits are kept to a minimum in competitive tenders, there is no incentive for newcomers.
- Taking away chances from undertakings hinders competition. An undertaking would only be faced with the risks (for example not enough passengers, damages, negative modal shift, accidents etc.). All chances (of higher passenger numbers and higher incentives, for example) are essentially removed if an undertaking is kept under a certain margin.
- Reasonable profits are artificially kept low since the benchmark for a reasonable profit are the existing profits in the market. If profits in competitive tenders are

also capped though this standard, there is no room for market margins to increase in future. Future margins will only be lowered.

- Incentives for improvements are being removed for undertakings since all positive effects over the lifetime of a contract (for example, more passengers) are taken away from the undertaking. Such incentives could only be set if the competent authority anticipates all possible improvements and deliberately sets financial incentives for reaching them. Improvements which the authority did not anticipate would not be of any interest for an undertaking (since positive effects from such improvements would eventually be taken away). Since improvements bear costs for an undertaking and there are no guarantees for success, such measures might be not taken at all.

Last but not least, an overcompensation test within a competitive tender procedure is not in line with the legal text of the PSO Regulation:

- Requirements of *Altmark* judgement (specifically the 3rd criterion) and Article 4 of the PSO Regulation are not the same. The PSO Regulation demands less strict requirements than the *Altmark* judgement and does so deliberately. If the requirements would be the same, any compensation (fulfilling also the *Altmark* criteria) would not constitute State aid. Thus, such a measure would not fall into the scope of the PSO Regulation. Consequently, the requirements cannot be the same.
- For a competitively tendered contract Article 4 of the PSO Regulation does not require an overcompensation test regarding costs and revenues. Article 4(1)(b) explicitly solely requires such a test for "*public service contracts awarded in accordance with Article 5(2), (4), (5) and (6)*". Also, the Annex of the PSO Regulation is not applicable to competitively tendered contracts (there an undertaking does not have separate accounts to keep).
- An overcompensation within a competitive tender procedure is already prevented if the authorities pay the market price for the services and do not pay advances or installment rates which exceed that market price. A market price is established through the competition for the services.

Furthermore, in the fifth paragraph of this point the draft Revised Guidelines state that where the undertaking holds several public service contracts, the common costs should be allocated to each individual contract, as well as suggests possible benchmarks. This interpretation contradicts ECJ judgment of 28 June 2017 in the Case C-482/14 *Commission v Germany* (para 118 et seqq). Besides, in this paragraph the Revised Guidelines again depart from the text of the PSO Regulation, which clearly states that the Annex is not applicable to competitively awarded PSO contracts. It should be acknowledged that overcompensation is mentioned in Article 4(1)(b) of the PSO Regulation only in connection with "*the nature and extent of any exclusivity granted*". Therefore, if no exclusive rights are granted, the overcompensation considerations made in the draft Revised Guidelines are superfluous. Besides, the separate calculation considerations also have no legal basis in the PSO Regulation in the case of competitively awarded service contracts. It is possible according to the PSO Regulation to combine the overcompensation check for several contracts, which can be seen from the wording of its Annex: "*compensation connected with public service contracts*" (plural). Also, Article 4(1)(b) states that in "*the case of public service contracts awarded in accordance with Article 5(2), (4), (5) and (6), these parameters shall be determined in such a way that no compensation payment may exceed the amount required to cover the net financial effect on costs incurred and revenues generated in discharging the public service obligations*" (plural).

Moreover, the two last paragraphs of this section, which suggest that public service compensation must be adapted accordingly in cases when the operation of public services may benefit operators that also provide commercial services through positive network effects, also have no basis in the text of the PSO Regulation. These effects are already calculated and considered by the undertaking in its bid. In a serious tender an undertaking would not ignore any positive effects which would enable to submit a better bid, which means that there is no practical need for an additional consideration.

Based on the above-listed considerations we would like to **strongly suggest that the last four paragraphs of this point are deleted from the text of the Revised Guidelines** (i.e. starting with "*Notwithstanding this principle*,…" and ending with "*Where such network effects are quantifiable, they should be taken into account in the compensation*.").

15. Point 2.5.3. "Overcompensation – ex post checks"

In regard to clarifications provided in this point of the draft Revised Guidelines we would like to underline that even if competent authorities often design overcompensation checks as *ex post* checks, the PSO Regulation does not impose *ex post* checks, leaving the timing for the overcompensation checks entirely open, and, therefore, an *ex ante* check is also fully compliant with the PSO Regulation and its Annex. The interpretation provided in this point, therefore, exceeds the requirements of the legal framework.

Additionally, the PSO Regulation does not impose more than one overcompensation check. Therefore, the part of this point of the draft Revised Guidelines that states that "*competent authorities will need to carry out regular ex post checks*" should be adapted accordingly. In accordance with the text of the PSO Regulation competent authorities neither have to carry out checks regularly, nor have to make more than one assessment.

Besides, as stated above, avoiding overcompensation in competitively awarded contracts is limited by the PSO Regulation to the situations when exclusive rights are granted. Thus, the second paragraph of this point[24] should be deleted from the text of the Revised Guidelines.

16. Point 2.5.4. "The notion of 'reasonable profit'"

For the reasons outlined above, the sentence "*This provision applies, whether the contracts are directly awarded or competitively tendered*" should be removed from the text of the Revised Guidelines.

17. Point 2.5.5. "Article 4(1) and (2) and the Annex. Preventing the cross-subsidisation of commercial activities"

The last paragraph of this point states that each public service contract should give rise to specific accounting entries. This interpretation contradicts ECJ judgment of 28 June 2017 in the Case C-482/14 *Commission v Germany* (para 118 et seqq). Please see our comment on the Point 2.5.1. above.

[24] "This principle applies to competitively tendered and directly awarded contracts, as the prohibition of overcompensation laid down in Article 4(1) applies to all contracts."

18. Point 2.6. "Article 7(2), (3) and (4). Publication and transparency"

The third paragraph of this point states that a failure to publish the information pursuant to Article 7(2) will "*deprive Member States from the exemption of notification pursuant to Article 108(3) TFEU*[54]." However, not all provisions of the PSO Regulation do have a State aid relevance. For example, if authorities do not comply with Article 7(1) of the PSO Regulation (aggregated report) this cannot result in inadmissible aid regarding all compensation the authorities awarded. Article 7(1) solely fulfils the purpose of information for the public and does not have an effect on overcompensation or any other State aid relevant subject. Consequently, the judgment *Dilly's Wellnesshotel* (footnote 54) cannot be applied nonreflective on the PSO Regulation. The same accounts for Article 7(2) of the PSO Regulation in case of competitively awarded contracts. Through the (transparent) competitive procedure the market had the possibility to participate in a tender. The result is a market price. In this case Article 7(2) does not fulfil a further State aid relevant purpose. It has solely a purpose within public procurement law. A failure to comply with Article 7(2) of the PSO Regulation in the framework of a competitive tender procedure should therefore *not* deprive of the exemption from prior notification.