

**REVISED INTERPRETATIVE GUIDELINES CONCERNING REGULATION (EC) NO 1370/2007 ON PUBLIC
PASSENGER TRANSPORT SERVICES BY RAIL AND BY ROAD**

ITALO – NUOVO TRASPORTO VIAGGIATORI S.P.A FEEDBACKS

Boosting sustainable public transport is a key component of the Sustainable and Smart Mobility Strategy and, in this context, Italo believes that, as proven by the incredible positive effects on the demand driven by the competition in Italy in the last 10 years, the market approach should always be the preferable approach. Only where this cannot be applied, the OSP can be the alternative option, but always with a tender based assignment. In this regard, the Regulation (EC) No 1370 has an extraordinary importance and it is considered absolutely necessary to revise its guidelines so that they will be not only more responsive to the new regulatory framework dictated by the 4th Railway package but able to solve various issues that do not allow the correct unfolding of competitive dynamics in the railway sector (a market characterized by the presence of vertically integrated historical operators who, in a hybrid way, jointly provide market and PSO services, with the latter entrusted directly for long term intervals).

Main feedbacks

- As for the costs recognized for PSO services, it is necessary to pay close attention to their relevance and their calculation methodology. It is worth noting the PSO service's cost per train-km is often higher than the cost per train-km of a "market service" (in some cases also comparing a standard PSO intercity service with a high speed service). It is necessary to introduce criteria for which the costing at the basis of PSO contracts takes into account the efficiencies that the "commercial railway segment" has achieved. Therefore, in addition to taking care not to overcompensate the PSO operator, it would be necessary to introduce specific criteria and market references aimed at making its costs more efficient.
- With reference to point 2.1.3 of the Draft, concerning the application of Regulation (EC) No 1370/2007 to international public transport services, we consider the possibility of providing a cross-border service partly with public contribution (PSO) and partly on commercial basis, particularly dangerous. Indeed, if a cross-border service were provided in two Member States and one of these, on the territory under its jurisdiction, did not consider it a PSO (but a service on "commercial basis"), while the other Member State considered it a PSO, the cross-border service itself would be considered, at the same time, partly a PSO service and partly a market service. This possibility would allow the operator providing the cross-border service to compensate, with public funds deriving from the "PSO section", any losses or costs deriving from the "commercial section" of the cross-border service. This eventuality would undermine the competitive dynamics in the market railway segment, and for this reason the guidelines should not allow the same service to be considered partially at PSO and partially a market service.
- With reference to point 2.2.4 of the Draft, we believe that the protection of public service contracts, which grant exclusive rights, should not be "absolute" and based on the economic equilibrium test, pursuant to Articles 11 and 11 bis of Directive 2012/34 / EU, but should also include fair mechanism aimed at foreseeing a revision of the public service contract (instead of a protection of it) should a market operator wanted to operate a service in potential competition with the PSO. As a matter of fact, we believe it is necessary to provide for further mechanisms that allow for the gradual reduction of these PSO contract's exclusive rights in the presence of operators who want to provide, also partially, the same railway service on commercial basis, even more efficiently. For this reason, new regulatory mechanisms could annually evaluate whether or not to reduce these PSO exclusive rights or modify the PSO contract providing for its cancellation within a certain period, and, therefore, allow "market operators" to provide rail services in that same area.

- With reference to point 2.3.1 of the Draft, the new guidelines could provide clearer indications in order to facilitate the regulatory choices of the competent national authorities. In particular, the process leading to the classification as an “indispensable asset” of the PSO outgoing operator’s rolling stock should be made more transparent and non-discriminatory. The assigning public entity, in most cases the full shareholder of the incumbent PSO operator, should, in favor of the incoming entrant, allow a transparent and easy takeover of the outgoing operator’s rolling stock. In fact, the availability of rolling stock for incoming operators who would like to participate in public tenders represents the main barriers to entry into the market. Classifying rolling stock as “indispensable asset” more easily would allow the participation of many operators in tenders for the award of public transport services. For this reason we welcome the possibility, endorsed by the new guidelines, of introducing in the public service contract, an obligation to transfer the rolling stock at the end of the contract to the incoming operator at the market price, net of any public funds received by the outgoing operator for purchase of the rolling stock. Moreover, given the fact that the rolling stock represents the main investment of an operator, this obligation would also avoid direct award of PSO and/or extension of the related duration justified by such kind of investments.

- With reference to point 2.4 and the following paragraphs, we believe that the direct awarding of public service contracts should no longer be considered as a residual alternative to public tenders for the award of public transport services. In particular, we believe that the list of situations provided in Regulation (EC) No 1370/2007 that constitute “exceptional circumstances” is an open one, as pointed out in the draft. It is necessary to foresee in advance specific economic reasons that justify the direct assignment and not to leave margins of discretion to the entrusted public bodies. In addition: (i) the awarding public bodies must fully justify this choice in detail; (ii) such direct assignments must be subject to careful control by European institutions or by national competition authorities.

Moreover, another dangerous (for the market) condition that justifies the direct assignment is that the public service contract guarantees an improvement in the quality of the service or in cost efficiency in relation to the previous public service contract. In this regard, we believe that the term of comparison cannot be solely the previous service contract and/or the costs of the PSO operator providing that service, because that could include a high level of inefficiencies, easy to be overtaken. It is consequently always necessary to introduce a term of comparison represented by the “market costs” and the quality results reached by market operators, that would be more objective references to be compared with.

- With reference to point 2.5.1 of the Draft, which takes into account the operators that provide the so-called “hybrid” passenger transport services (with which they offer, at the same time, PSO and commercial services), despite the fact that the EC remembers that for the aforementioned operators there are obligations of non-cross-subsidiation (and therefore obligations not to unduly supply the railway market segment with public resources), we believe that foreseeing a hypothetical remodeling of the public compensation, as a “corrective” to the (numerous and mentioned) network effects deriving from the mixing of the two services (PSO and commercial routes), is absolutely not sufficient since the same positive externalities (enjoyed exclusively by the “hybrid” operator) determine an alteration of the competitive dynamics in the railway commercial segment since “non-hybrid” railway undertakings are completely excluded from the enjoyment of those effects. The mere fact of recognizing (we’ll finally dare to say) the existence of positive externalities (aka network effects such as sharing of rolling stocks, employees, interconnection of PSO and market routes increasing client base) generated by hybrid operators, should push the E.Commission to foresee not only solutions aimed at reducing public compensation (as advanced in the draft) but, with a view to creating a level playing field and opening up the railway sector more to competition, to allow “non-hybrid” third parties to access the necessary information (held by the operator providing the PSO service) in order to resell integrated travel solutions, benefiting themselves from the mentioned network effects.

On this occasion it is necessary to reiterate how the mere “accounting separation” within hybrid operators is one of the causes of the phenomenon of cross subsidisation. Indeed, there should be a clearer separation (corporate separation) within companies that jointly offer PSO services and commercial services.

It should be remembered that these indirect network effects, deriving from the possibility of jointly providing market and PSO services (without any corporate separation into the operator) also lead to an alteration of the competitive dynamics in the allocation and use of railway station spaces. Indeed, the hybrid operator promiscuously uses the largest number of automatic vending machines (AVM) or traditional ticket offices, for the sale of PSO services, also to sell market ones. By operating in this way, other railway companies cannot effectively compete with the hybrid operator, which takes advantage of its hybrid nature.

It is necessary to foresee mechanisms aimed at preventing these phenomena and/or, should it not be avoided, to compensate, directly or creating a level playing field, the other market operators.