

From: [REDACTED] <[REDACTED]@akwien.at>
Sent: Thursday, July 7, 2022 3:56 PM
To: GOETZ Walter (CAB-VALEAN) <[REDACTED]@ec.europa.eu>
Subject: Legal opinion about the "Revised interpretative guidelines" regarding PSO-regulation (1370/2007 & 2016/2338)

Dear Sir,

Good quality public transport often does not cover its costs. It has to be subsidized by public money. Regulation (EC) No 1370/2007 lays down the conditions under which competent authorities, when imposing or contracting for public service obligations, compensate public service operators for costs incurred and/or grant exclusive rights in return for the discharge of public service obligations. The so-called PSO-regulation rules on EU-level how public transport has to be organised and financed.

The railway systems in Switzerland and Austria are widely regarded as the best in Europe. This can be measured by a wide range of parameters, f.e. passenger kilometres per inhabitant, punctuality, passenger satisfaction etc. In both countries, most of the railway services are awarded directly. This model has proven to be successful. It would be counter-productive to be forced to change to the "experiment" of competitive tendering. Article 5 (4a) of new PSO-regulation (EU) 2016/2338 states that....

..... the competent authority may decide to award public service contracts for public passenger transport services by rail directly:

(a) where it considers 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, and

(b) where such a contract would result in an improvement in quality of services or cost-efficiency, or both, compared to the previously awarded public service contract.

So, Article 5 (4a) says that – if certain conditions are met – direct awarding is still possible. A study written by the two well-known Austrian legal experts Lessiak and Aicher concludes that authorities are still equally entitled to choose between direct awarding and competitive tendering.

In December 2021, the European Commission has sent out a draft (=Non-Paper) of guidelines to consult with a very limited group of stakeholders. As Regulations are often the result of a compromise, their wording is often fuzzy, ambiguous, and imprecise. Therefore, the aim of guidelines is to explain how to implement and deal with legal texts.

Unfortunately, the Commission fails to fulfil these expectations. On several occasions, the draft of the “Revised interpretative guidelines” gives the impression that the Commission wants to use these guidelines to re-introduce its original demands and ideas (part of the fourth railway package), which were written down in the proposal of the PSO-Regulation. The Commission’s draft was subsequently strongly altered by the democratic law-making process of the European Parliament and the Council. Therefore, we strongly disagree to the Commission’s efforts to restore its “old ideas” via the “backdoor” of the guidelines. In many cases, these guidelines do not reflect the wording and spirit of the Regulation. These actions by the European Commission can be seen as undemocratic.

Therefore we oppose the Commission’s view that direct awards are “exceptions” that should be “interpreted restrictively”. [REDACTED] states in a new and more detailed legal opinion that no priority of competitive tendering and inferiority of the direct award procedure can be derived from the PSO Regulation. If all conditions to allow direct awards are met, then no additional justification about the type of awarding is required. Regardless of this equality of both awarding types, there remains the need for the objective justification of the chosen procedure (for both cases). Please find more details regarding this argumentation attached (in German and English).

Please do not hesitate to contact me for further information

Best regards

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