

EPTO Position Paper

on the proposal by the European Commission for a revision of the PSO interpretative guidelines

EPTO welcomes the opportunity to comment on the European Commission's revised draft interpretative guidelines concerning Regulation (EC) 1370/2007 on public passenger transport services by rail and road (the "PSO Regulation") and its intent to provide clarity over the application of the regulation.

EPTO is committed to the principles of both fair, transparent and non-discriminatory competition for contracts to operate public transport services, and of deregulated markets with open access and commercial opportunities. Each of these systems needs to have clearly defined rules governing its operation.

The PSO Regulation has been in operation for several years and the interpretative guidelines were first published in 2014. EPTO notes that whilst the PSO Regulation itself remains unchanged, significant alterations are proposed to the interpretative guidelines. Whilst EPTO supports some of the proposed changes, we cannot support the draft guidelines as they currently stand. Details are set out below.

The text of the revised guidelines **goes beyond the wording of the provisions of the PSO Regulation** and tries to introduce provisions which are not included in the final compromise text of the PSO Regulation.

In particular the revised guidelines introduce the concept of a market review which competent authorities are required to undertake prior to deciding to commence a process of competitive tendering. The revised guidelines suggest that only services which would not be operated on a commercial/open access basis should be regarded as PSO services and able to be tendered, with the market generally left to commercial operations. The general presumption is that PSO contracts are to be avoided; commercial services should be the default option and have priority over public service contracts, **which is not stipulated by the PSO Regulation**.

This process appears to overturn the principle of subsidiarity where competent authorities determine the way in which PSO services should be provided. The opportunity to review the market and identify the scope of a PSO contract already exists and how this is undertaken should remain a choice open to such authorities. The PSO Regulation does not mandate the process to be followed therefore neither should the interpretative guidelines.

Commercial/Open Access services certainly have a role to play in Europe's public transport markets; **these need to work alongside the PSO process** and not lead to the potential break-up of established, stable networks. **The Commission must recognise the need to balance the opportunities for Commercial/Open Access services and the need for, and vital role of PSOs to create well-functioning, efficient and affordable public transport networks.**

Furthermore, the suggestion that a competent authority or member state's wide discretion to establish public transport services is subject to the demonstration of demand ('ex-ante assessment') does not reflect the PSO Regulation or the case for stimulating public transport demand to deliver Europe's environmental and social objectives. **EPTO therefore questions the legality of such provisions which are not included in the final compromise text of the PSO Regulation.**

The revised guidelines are further based on case law which does not interpret the PSO Regulation, but instead interprets other regulations, such as on maritime cabotage or other sectors (e.g. public service broadcasting).

EPTO welcomes some of the new concepts in the guidelines, such as access to essential information in order to compete in a tender that follows the principles of fair, transparent and non-discriminatory competition.

EPTO also supports the development of guidelines to ensure that all operators have access to rolling stock. Access to rolling stock can be a significant barrier to entry for new operators. Although it is not an obligation or a legal requirement under the PSO Regulations for competent authorities to take appropriate measures, ensuring that competent authorities understand that measures may be implemented to ensure there is no discrimination between new operators and incumbents is essential. **However, EPTO recommends the current draft guidelines are amended to make that clear.**

Overall, EPTO would welcome more clarity in the revised guidelines that ensures a balance between establishing open access services and competitive tendering, and does not prioritise one over the other. EPTO would caution against the introduction of provisions in the guidelines which are not included in the PSO Regulation.

As they currently stand, the draft guidelines attempt to limit the discretion of EU member states and competent authorities to commission and organise public transport services. On this basis, EPTO cannot support the draft revised guidelines. New legal concepts should not be provided in a non-binding interpretative document, and, in some instances, the guidelines are contrary to the principles laid down in the PSO Regulation. As currently drafted, the guidelines would create legal uncertainty for the public transport sector at a time when the sector needs to focus on the recovery from the pandemic.

About EPTO

EPTO, the association of European Passenger Transport Operators, represents major private sector public transport operators in Europe who have the majority of their business awarded by open tendering and contracts.

EPTO is committed to the development of the transport market through liberalisation of bus, rail and other similar transport modes. It helps to shape the framework for delivering real benefits to the economic growth and social wellbeing of communities through quality of services at a price that also represents value for money for taxpayers, government bodies and PTAs.