



**ETF Contribution to the targeted consultation on  
Revised interpretative guidelines concerning Regulation (EC) No  
1370/2007 on public passenger transport services by rail and by road**

*10 February 2022*

***Introduction***

The ETF, our affiliates, and the legal experts we have consulted consider that the revised interpretative guidelines exceed by far their purpose. The role of European Commission guidelines is to serve as clarification only, of the provisions set out in EU legal acts, in this case in Regulation 1370/2007. To this extent, guidelines must respect the spirit of the EU law and refrain from adding further limitations or requirements to the legal text.

The current draft guidelines regrettably reveal that the European Commission aims at a biased interpretation of the PSO Regulation, which is in contradiction to the intention and the wording of the Regulation, in as much as this interpretation favours competitive tendering over direct awarding, although no such prevalence stems from the Regulation itself. This follows the general approach of the European Commission that blindly promotes the liberalisation of the European sector, even though this has not been proven to lead to better services, safety or efficiency.

Without a doubt, the Commission seems to assume that increased competition and Europe-wide competitive tendering is the right way to go in increasing the rail share in passenger transport in Europe. It is to be noted however that many of the European Commission's proposals in this regard were removed from the original draft proposal or toned down, by Council and the European Parliament, in the course of the complicated co-decision process surrounding the adopted version of the PSO Regulation. One example is the choice between competitive tendering and direct award in passenger rail transport. Another aspect is the priority given to private transport over public transport. We also draw attention to this specific part of the recitals of the Regulation: *"In order to ensure transparent and comparable terms of*

*competition between operators and to avert the risk of social dumping, competent authorities should be free to impose specific social and service quality standards,”* giving national authorities the discretion to set certain standards to avert social dumping.

Thus, any attempt by the European Commission to make changes to existing EU legislation, in this case through the use of guidelines, without the proper legislative process and without the involvement of the co-legislators is regrettably deeply undemocratic, especially considering the small margin with which the Regulation was originally adopted. We therefore strongly oppose the revision of these guidelines that goes beyond the mere clarification of existing legislation.

Please find below our comments on specific articles of the text that concern both rail and road.

***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***

The Guidelines underline the need for Member States to consult a wide range of stakeholders when preparing public transport strategy documents. The list of stakeholders to be involved is wide and open, the list includes transport service providers currently or potentially affected in the region, infrastructure managers, passenger associations, workers' organisations (such as trade unions and chambers of labour) and environmental organisations. The emphasis on the need to consult stakeholders is positive and is expressly welcomed by us.

Furthermore, the EC formulates many aspects and demands here that do not correspond to the text of the PSO Regulation. For the ecological and climate-friendly mobility transition, nationwide and affordable public transport is necessary, which is why we reject counterproductive restrictions and hurdles in the design and expansion of public transport. There must be a high degree of discretion for the local authorities; a prior review of whether a PSO is necessary at all makes little sense, since, as in the rest of the economy, supply determines demand in public transport as well.

The EC's claim that liberalisation in particular would have a direct positive influence on passenger satisfaction and the number of connections is simply wrong. In Austria, for example, schoolchildren with their schoolchildren's tickets or commuters with their commuter tickets cannot travel with the "new" providers.

The pandemic has shown that purely commercially operated rail passenger services can be considerably reduced or completely discontinued within a very short time. During the timetable change 2021/22 in Austria, private providers did not start their announced services at short notice, which is why the publicly owned railway company had to step in in the interest of the customers. This was the only way to continue to serve the regular-interval nodes. In general, it can be said that "open access" services and interval timetables are not compatible.

However, ensuring the security of supply of affordable public mobility is a core responsibility of each Member State towards its population, which is why Member States have wide discretion in defining SGEI. This discretion is not restricted by the PSO Regulation, nor can the EC restrict it through non-binding guidelines. The definition of SGEI in the transport/railway sector does not in any way remove this sector from the application of the competition rules; competition can take place in different areas, namely as competition in the market and as competition for the market.

Excessive consideration for private transport would lead to the famous "cherry-picking": Private operators would only run the lucrative lines, leaving the less profitable lines for public operators, which would weaken the overall public transport system and make it less attractive for passengers.

### ***2.3.2. Article 4(4a), (4b), (5) and (6). Staff protection in the case of a change of operator***

It is regrettable that the draft guidelines do not include more detailed guidelines on staff transfer and social criteria: Article 4 regulates, among others, the possibility of transferring all affected personnel in the event of a change of operator, as well as the application of social and other quality criteria. In order to create legal certainty, more detailed clarification by the EC would have been desirable here.

Instead, only the possibilities for the competent authority are: (a) not apply the regulation, (b) require transfer of personnel, (c) define social criteria, or (d) a combination of (b) and (c). Here the draft guidelines do not create more certainty for the national authority nor for the personnel whose job might be on the line.

In any case, in the event of a change of operator, the regulation enables member states to apply the Transfer of Undertakings Directive (2001/23/EC). The revised EC guidelines have to include reference to this provision and encourage member states to pursue this approach. See in annex, the letter addressed by the European Commission to the EPP rapporteur, highlighting the absolute need for a high-level protection of staff in the context of the award of public service. This is fully supported by the Regulation, by recitals 13 and 14. The selected operators of a public service have to take over the employees of the previous operator under the same or better conditions granted to them by the previous operator. To prevent wage dumping, competing companies must calculate with the same personnel conditions and personnel costs. It goes without saying that the above-mentioned provision has to apply to all personnel affected by the transfer, rather than being limited to just a few job categories and staff should also have the right to refuse a transfer.

In the area of defining social criteria (c), we specifically insist the following points: sufficient availability of social and sanitary facilities, regular and continuous training of staff (e.g., de-escalation training) and of junior staff (apprentices) in particular, promotion plans for women, for older employees and for people with disabilities, company reintegration measures. We equally insist on compliance with workplace health and safety obligations and prevention programs, as well as on compliance with worker participation rules, in making company decisions that have a direct or indirect impact on staff, to name but a few.

We also point out that mechanisms must be found that favour those companies that succeed in retaining their staff for a long time and have low staff turnover. In purely competitive procedures with an exclusive price component, this economically desirable goal becomes a disadvantage for the companies. We expect the EC to provide clear positioning and guidance via the guidelines.

**2.4.1. Article 5(2)(b). Conditions under which a public service contract may be directly awarded to an internal operator**

The PSO Regulation states that internal operators and any entity over which the operator exercises influence may not participate in competitive award procedures outside their own area of responsibility. However, the draft guidelines seek to extend this so that (apart from outgoing lines) no passenger transport services, even as subcontractors, may be provided outside the operator's own area of responsibility, irrespective of the type of award, nor may they participate in competitive tendering. This clearly contradicts the text of the regulation. The ETF therefore considers that the EC draft guidelines depart from the spirit of the PSO regulation and so we are in total disagreement with this approach.

According to Article 5(2)(b), internal operators may operate "outgoing lines or other ancillary components of this activity which enter the territory of adjacent competent local authorities". The draft guidelines explain that "Internal operators may therefore operate services beyond the territory of their competent local authority to a certain extent." To clarify whether these are permissible additions, the draft guidelines apparently prescribe a case-by-case assessment: *"To assess whether the services under public service contract are compliant with this provision, the following criteria should be applied: whether those services connect the territory of the competent authority in question to a neighbouring territory, and whether they are ancillary rather than the main purpose of the public transport activities under public service contract."* In this case-by-case assessment, the draft guidelines deviate strongly from the text of the regulation. Once again, the ETF therefore considers that the EC draft guidelines depart from the spirit of the PSO regulation, and we are in total disagreement with this approach of the draft revised guidelines.

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

Article 5(3) refers to the cases of direct award provided for in paragraphs 3a, 4, 4a, 4b, 5 and 6. It is clear from the wording of this article that these are not exceptions that can be restricted, but cases for which direct award is explicitly provided. The

introduction part of article 2.4.2. of the draft guidelines is thus incomplete and must be re-worded to reflect the meaning of the regulation.

***2.4.3. Article 5(3a). Conditions under which competent authorities may directly award a public service contract for rail under exceptional circumstances***

The list of exceptional circumstances in the regulation is open ended, but in the revised EC interpretative guidelines, the EC wants to see it interpreted restrictively. The authority should thus only be allowed to choose the most cost-efficient type of award. The regulation itself explicitly refers to the competent authority's assessment of whether a temporary direct award is justified. Thus, a restrictive interpretation to be provided according to the EC draft guidelines cannot be derived from the regulation itself. The pandemic in particular has shown that such cases can occur more spontaneously than can be foreseen and that the necessities cannot always be anticipated in advance. The ETF therefore considers that the EC draft guidelines depart from the spirit of the PSO regulation, and is in total disagreement with this approach of the draft revised guidelines

***2.4.4. Article 5(4). Conditions under which a competent authority may directly award a public service contract in case of a small contract volume***

The PSO Regulation allows the thresholds to be doubled for awards to small and medium-sized enterprises, i.e., to EUR 2,000,000 and 600,000 km, respectively. The upper limit for small or medium-sized enterprises is 23 road vehicles.

The draft guidelines emphasize that Article 5(4) is an exception and should therefore be interpreted restrictively. It only applies to bus transports, but not to trams, metros and trains. The threshold value of 23 road vehicles is also to be interpreted restrictively, i.e., it is to be applied to the entire company and not only to the contract mentioned.

The regulation provides for the possibility of direct award for smaller contracts under the appropriate conditions. We reject a subsequent restriction as an exception to be interpreted restrictively.

In view of the planned push for more climate-friendly public transport, it would make sense to extend the definition to include rail vehicles as well - it is not

comprehensible why a higher km performance for bus transports should be permissible for a direct award under this article than for small rail transport companies (600,000 km for small bus transports compared to 500,000 km for rail transports). In addition, the respective contract volume should be taken into account and not the entire company. The effort required for a Europe-wide competitive procedure is enormous and endangers regional jobs. This is not a desirable effect for municipalities either.

***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***

Already in the last amendment of the PSO Regulation (2016/2338), this option was restricted with regard to direct award. The current PSO Regulation has been in force since 24.12.2017, with the main transition period ending on 25.12.2023. According to Article 5(4a), direct award is possible for rail transport if:

- (a) in the opinion of the competent authorities, direct award is justified by the respective...characteristics of the market and the network concerned; and
- (b) such a contract would lead to an improvement in the quality of services or cost efficiency, or both, compared to the previously awarded public service contract.

The present draft guidelines are quite clearly steering towards the path of restricting the use of direct award. The ETF is led to believe that the real intention of the revised guidelines is for direct awarding to no longer be maintained as an equivalent form of awarding, but rather that tendering procedures are to be favoured. the following sentence in the draft guidelines stands as a proof: "*As an exception to the principle of the competitive tendering procedure for the award of public service contracts, this provision should be interpreted restrictively.*"

Direct awarding is thus to be presented in the draft guidelines as an exception that should be interpreted restrictively. However, this does not follow from the text of the regulation and does not reflect the political agreement process at the time. The regulation provides for the possibility of direct award - under appropriate conditions. We therefore strongly disagree with this retrospective restriction.

The same understanding is shared in the legal opinion prepared by two lawyers and procurement experts Rudolf Lessiak and Josef Aicher on behalf of the Chamber of Labour of Vienna. They state that: *"A priority of competitive award or subordination of direct award cannot be derived from the PSO. If all elements of the facts of permissible direct award are fulfilled, then no additional justification is required as to why direct and not competitive award should be used. Notwithstanding the equal priority of the award methods, the need for objective justification of the chosen procedure remains (in both cases)."*

Regarding condition (a) - i.e., specific characteristics of the market and the network - the draft guidelines state that this list of characteristics may be increased by competent authorities if objectively justified. We consider this discretion for national authorities to be necessary and appropriate.

The draft guidelines also stipulate that the competent authority must provide "sufficient evidence" that the conditions are met. However, the wording of the provision in the Regulation itself only requires that the direct award is justified in the opinion of the competent authority ("in its opinion" or "where it considers"). This therefore clearly argues for (i) not overstressing the review obligations of the competent authority here and (ii) recognizing the subjective view/wide discretion of the authority - this should be clarified accordingly. We firmly reject the introduction of a verification requirement that goes beyond the regulation in the PSO itself.

Regarding condition (b) - quality improvement or cost efficiency - the draft guidelines specify that there must be a "significant" improvement over the previous award. Again, competent authorities may determine the "meaningful" criteria themselves, but it goes on to state: *"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."* The restriction to "significant" improvement cannot be derived from the regulation, it is also unspecific and therefore not suitable as a decision criterion. We therefore reject this restriction.

An obligation to prove that in a specific case direct award produces better quality and cost efficiency than competitive award cannot be derived from the PSO Regulation - the criterion for comparison in each case is the "old contract", not a hypothetical competitive award. It is also not objectively justified, as there is no evidence-based evidence to date that, in the rail sector, competitive awards better implement the EU's objectives than direct awards do. On the contrary, Austria for example has the best functioning railways system in the EU thanks to the successful implementation of direct awarding.

These restrictive provisions in the draft guidelines do not respect the wording and spirit of the Regulation and are therefore strictly rejected by us.

#### **2.4.8. Article 5(6). Rail services that qualify for the direct award procedure**

In Article 5(6), the draft guidelines again attempt to present direct award as an exception to the basic rule of competitive award. As explained before, we disagree with this approach. According to the already cited expert opinion of Rudolf Lessiak and Josef Aicher, the two basic types of awarding, competitive and direct, are on an equal footing; a priority of competitive award cannot be derived from the PSO Regulation:

*"A priority of competitive award or subordination of direct award cannot be derived from the PSO. If all elements of the facts of permissible direct award are fulfilled, then no additional justification is required as to why direct and not competitive award should be made. Notwithstanding the equal priority of the award methods, the need for objective justification of the chosen procedure remains (in both cases)."*

Other railway systems - such as metros and trams - are excluded from the option of direct award under Article 5(6), which is why the draft guidelines make a clarification with regard to heavy rail and tram-train systems. Decisions are to be made on a case-by-case basis on the basis of "suitable criteria", whereby interoperability and/or the use of heavy rail infrastructure are mentioned as suitable criteria. Although the use of heavy rail infrastructure is mentioned as a criterion, this is again restricted in the next sentence: *"Although tram-train services do use heavy rail infrastructure, their*

*special characteristics mean they should nonetheless be regarded as 'other track-based modes'.*"

In our view, the exclusion of trams and metros from the application of Article 5(6) cannot be explained by technical criteria, but by the fact that operators on these infrastructures usually fall within the scope of Article 5(2), i.e., direct award to internal operators, or Article 5(4), i.e., "small" awards. Tram-train systems, on the other hand, are usually not operated by internal operators, but by local railway undertakings, and thus cannot usually comply with the rules for internal operators. As a result, tram-train systems would fall under "other track-based modes" and the freedom of choice in award type would be severely limited.

We do not consider the attempt to allow award types based on technical criteria to be appropriate. The more recent parts of the PSO Regulation itself also depart from this idea, for example Article 5(4a) and (4b) use the overarching term "rail passenger services". We therefore consider the approach of the draft guidelines to exclude tram-train systems from the application of Article 5(6) to be incorrect and we vehemently reject it. Suburban rail transport systems such as for example S-Bahn like in Austria, Germany and Denmark and the RER are also railways and therefore covered by Art.5(6).

#### **2.4.9. Art. 5(7). Review of award decisions**

Here PSO Regulation 2016/2338 states that *"for cases of direct award covered by its paragraphs 4a and 4b, such measures must include the possibility for interested parties to request an assessment of the substantiated decision taken by the competent authority by an independent body designated by the Member State concerned. The outcome of this assessment shall be made publicly available in accordance with national law."*

The draft guidelines consider rail regulatory bodies to be the best suited for this. If a Member State designates another independent body, the degree of independence should be sufficient to ensure legal and operational independence from the interests of the competent authorities and railway undertakings, and at least equivalent to the degree of independence of the rail regulator.

The railway regulatory authority shall supervise the competition of the existing railway undertakings and shall also serve as a conciliation body between them. If the same authority is then also to evaluate the type of award, conflicts of interest may arise. In our view, the recommendation is therefore not practically feasible. In principle, we see the emphasis on the option for member states to entrust this task to another independent body as positive.

#### ***2.5.1. Contracts awarded on the basis of a competitive tender***

Here, the draft guidelines deal with overcompensation and possible cross-financing when a railway undertaking performs both private and public service transport. The problem of cross-financing or overcompensation can be eliminated by internal company regulations. The same issue however can arise in competitive tendering, as the contracting authorities face similar challenges there in order to prevent cross-subsidization with other contracts. In addition, the regulation makes no provision for this. We therefore consider the comments to be an improper deviation from the text of the regulation.

To conclude, the ETF believes that the draft guidelines impose measures that are basically against the spirit of the PSO regulation, which come against the decisions made by the EU co-legislators, and thus this approach cannot be pursued by the European Commission.