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European Commission  
DG MOVE, Brussels

Contact:



## Feedback on draft of Revised Guidelines PSO Regulation (1370/2007)

Amsterdam, 18 March 2022

Dear European Commission,

- (1) We would like to thank you for the opportunity to provide you our feedback on the draft of the Revised Guidelines for Regulation EU 1370/2007.

### About us

- (2) FlixBus B.V. is an operator based in Amsterdam, the Netherlands. We are providing national and international scheduled transport services in multiple Member States. The PSO Regulation is directly affecting the market environment in which we are operating.

### Strong support for the Commission's draft Revised Guidelines

- (3) First of all, we would like to express that we strongly support the Commission's draft on the Revised Guidelines. Although we have some minor remarks and critics, our overall assessment is that the draft Revised Guidelines are accurate, fair and balanced.
- (4) We welcome that the draft Revised Guidelines appear to provide clarity and significantly reduce the uncertainties by providing a clear guidance on the interpretation of the PSO Regulation. We would like to compliment the Commission with its approach to support healthy and sustainable competition and the creation of a fair and competitive European rail market, despite expected resistance of established parties with their own established interests.
- (5) These Revised Guidelines will, as long as the final version will stay close to this draft version, provide support for the development of the European rail market and achieving the European Green Deal objectives. There cannot be a favourable legislative legal framework for sustainable modes of transport without a fair and competitive unified European rail market.
- (6) It is essential for the functioning of the Common Market that the market for passenger transportation by road and rail does comply with the fundamental market principles, such as the criteria for State Aid and the condition that Services of General Economic Interests (SGEIs) are only legitimate when they are necessary and proportionate, when there is a real need for desired services in the public interest, and when these services could not be delivered under normal market circumstances. These criteria are fundamental for the European market and achieving the Union's economic policy's objectives.

## **Guidelines are reflecting current legislation**

- (7) We emphasize that the draft Revised Guidelines don't contain any new legislation or interpretation, but simply provide an overview of the applicable European legal framework and further clarifications by the Court of Justice of the EU, such as the *Altmark judgements* regarding State Aid and the SNCM judgement regarding the application of the Altmark criteria on transport concessions. We have observed in recent times that some Member States and incumbent operators were not aware of the applicable legal framework, or were at least not acting accordingly. We see the risk that these draft Revised Guidelines will be perceived by such actors as if it would impose new interpretations and would limit the options for national competent authorities – which is not the case. We would like to strongly encourage the Commission to stick to the rightful interpretation of the Union's legal framework and clarifications by the Court of Justice.
- (8) It is in the very interest of the development of the European rail market and European consumers that the Commission will continue on the track of a fair and competitive European rail market, and favour open access for all market players and offering choice to European consumers, over protectionism and national interests that dominated a divided Europe in the past. It is strategically important for the development of the unified European rail market that all Member States are bound to one uniform European legal framework that is based on the principles of the Common Market.

## **Cumulative relation between PSO Regulation and SGEI legal framework**

- (9) In the chapter "INTRODUCTION", the Commission refers to the legal framework of Services of General Economic Interest (SGEI). We have experienced recently that the national authority of a Member State and an incumbent operator advocated in a national court that this legal framework, including ECJ Judgements such as Altmark and SNCM, would not be applicable to PSOs as the PSO Regulation would provide an "exclusive legal framework" and would exclude the application of Altmark and SNCM. The SNCM Judgement was further dismissed because it "just concerned a maritime case". We strongly opposed that interpretation, as the opposite is true.
- (10) We therefore see an urgent need for this Revised Guidelines to explicitly state that the applicable European legal framework consists of "layers" that are cumulative. The State Aid provisions of the TFEU, protocol no. 26 and the Altmark judgement are providing fundamental principles, such as the principle of proportionality and the limitation of SGEIs to services that could not be provided under normal market circumstances. The PSO Regulation and SNCM judgement are an application of these principles on the public transport services and transport concessions.
- (11) We suggest the Commission to include in the introduction that the provisions of the PSO Regulation are "cumulative" to the general market principles on State Aid and SGEIs. We also suggest the Commission to explicitly state that the SNCM judgement is relevant for the interpretation of the PSO Regulation, despite the SNCM case was about a maritime PSO.

## ***Wording of paragraph 2.1.1***

- (12) The current wording of paragraph 2.1.1, last paragraph on page 3, can be interpreted in a misguided way supporting the hypothesis that the general market principles are not applicable to the PSO Regulation, as the wording states that the award of public service contracts is "solely governed by Regulation 1370/2007". We assume the Commission did not intend to exclude the application of general market principles on the award of public service contracts, but the current draft of the Revised Guidelines could be read that way – and is apparently already being interpreted that way by at least one Member State and incumbent operator. We suggest the Commission to change or clarify in paragraph 2.1.1, last paragraph on page 3, that "the award of PSO contracts is solely governed by Regulation 1370/2007" does NOT mean that the general market principles and the legal framework for State Aid and SGEIs are no longer applicable to the award of PSO contracts. For the sake of clarity,

it could be considered to explicitly state that the general market principles on State Aid and SGEIs are always applicable and should be considered by any decision regarding the award of public service contracts.

## **International public transport services & “hybrid PSOs” (paragraph 2.1.3 & 2.5.1)**

- (13) We agree with the Commission on the clarification of article 1 (2), that states that the agreement of the competent authorities of the Member States on whose territory the international service is provided, is a pre-requisite for the establishment of an international public service.
  
- (14) However, we would like to kindly remind the Commission that the establishment of the European rail market, and the Common Market in general, means that international transportation services should be considered as international services when it comes to regulation. It is against the fundamental principles of the Common Market when a cross-border service would be regarded as two national (domestic) services, stuck together at the Member States’ borders. An international train service should be regarded as one (international) service. Any train service is either PSO, or commercial, but the same train service can never be both. This is regardless whether the train services crosses any administrative borders.
  
- (15) We strongly oppose the idea that so-called “hybrid PSOs” could be legitimate, as it is against the functioning of the Common Market to artificially split up services on the national borders. We would also stress that there won’t be a legitimization for a PSO service “until the border”, as such service won’t fulfil the conditions for SGEIs: there is no real demand to just the border. There is eventually a real demand across the border, but not just to the border. Furthermore, a hybrid PSO will not meet the first Altmark criterion, as the PSO won’t just describe the service until the border, but will also describe the destination(s) of the train service. In example, the Dutch PSO for the operation of the Nightjet to Vienna is officially just till the Dutch-German border, but the operator will only receive the compensation when the train continues to Vienna and Innsbruck. Providing a certain commercial service in Germany and Austria has become a part of the public service obligation in the Netherlands, which is logically impossible as a PSO can by definition never concern a commercial service.
  
- (16) A so-called “hybrid PSOs” would also be problematic from the perspective of the principle of transparency, as the business case of the commercial part of the route would not have to be disclosed as it is “commercially sensitive”. It is therefore impossible to have the required level of transparency on the PSO-part, as it is obscured what happens at the commercial part.
  
- (17) This is especially problematic when two or more (incumbent) operators are “cooperating” in an international train service. In example, we observed with the ÖBB Nightjet Amsterdam – Vienna that ÖBB and NS made an agreement on the provision of this international service, in which they agreed that NS would operate the train in the Netherlands as PSO. On this PSO-part, NS has to pay to ÖBB to use its rolling stock, making this part of the route unprofitable for NS but profitable for ÖBB. The deficit of NS is supplemented with subsidy from the Dutch Ministry, thus legitimizing the PSO. However, on the German side of the border, NS is being hired by ÖBB as subcontractor to operate the Nightjet from the Dutch-German border till Cologne. This makes this part of the route profitable for NS. The two operators are circulating money: from NS to ÖBB in the Netherlands (creating a deficit to trigger subsidy), and back from ÖBB to NS in Germany.
  
- (18) The aforementioned example shows why it is dangerous territory to artificially split up train services at the border – which is in our sincere analysis in breach with the legal framework anyway. An international train service that would be commercially viable when considered the full international route, could be artificially made loss-making on the territory of one competent authority by allocating costs to the PSO-part of the route, which are compensated on the commercial part of the route. It can also allow Member States to provide illegitimate support to their own incumbent operator on the

liberalized market for international passenger services by adding the part of the route in their home country to a domestic PSO, giving the incumbent an advantage over foreign or non-incumbent operators. The PSO-part of an international service is furthermore blocking other operators from starting a comparable commercial service. It is in example impossible to start an Amsterdam – Berlin intercity service comparable to the offer of the incumbents NS and DB, as the Dutch part is a directly awarded PSO with very significant domestic passenger revenues and preferential access to the infrastructure capacity for the incumbents' international train service. It is impossible for any other market player to compete with such train service, despite both the German market and international train market are in theory liberalized and "level playing field".

- (19) We want to suggest the Commission to get away and stay away of the idea of "hybrid PSOs", as this is illegitimate and a combination of the worst of two worlds. However, we see the possibility to operationally link a PSO train service and commercial train service (i.e. a regional train continuing to a touristic destination outside the regular PSO route), but then both train services should be clearly distinguishable and should be able to exist standalone. We are then not speaking about an "hybrid PSO", but "two operationally linked independent services". Artificially splitting up a train service at an administrative border is simply not compliant with the Common Market.

*Wording of last paragraph of 2.1.3*

- (20) The current wording of the last paragraph of paragraph 2.1.3 is simply incorrect from a legal perspective, as splitting up international passenger services at the border into two national services is against the fundamental principles of the Common Market, in breach with the legal framework for SGEIs and not consistent with judgements of the Court of Justice on the provision of cross-border services. In case a Member State does not give its agreement to a proposed international public service, the consequence is that the international service can only be provided on a commercial basis. The current wording should be changed by removing the part "on the territory under its jurisdiction".

*Wording of paragraph 2.5.1*

- (21) Given our assessment of the incompliance of hybrid PSOs with the EU legal framework, the last two paragraphs of paragraph 2.5.1 can no longer sustain. We hope the Commission understands our point of view that the promotion of "hybrid PSOs" in paragraph 2.5.1 of the draft of the Revised Guidelines is totally inappropriate and misguided, as such hybrid PSOs should be deemed in breach with the fundamental principles of the Common Market. As explained earlier, a hybrid PSO will by definition distort the level playing field on the commercial part of the route, and will allow to manipulate the business case on which the compensation is determined by allocating costs to the PSO-part and have them compensated on the commercial part of which the business case will be kept confidential.
- (22) We would like to strongly oppose the idea that a hybrid PSO is a middle way between PSO and commercial services, or an intermediate step towards further market opening. Contrary, it is uncontrolled market distortion and is jeopardizing potential development of real commercial services by accommodating unfair competition and expanding the distortion of a PSO to the area of the commercial service. Hybrid PSOs are not compliant with fundamental market principles of the Union and the Commission should refrain from promoting such illegitimate schemes. We urgently suggest to remove the last two paragraphs of paragraph 2.5.1.

**Nature and extend of PSOs and scope of PSCs (paragraph 2.2.3)**

- (23) We want to strongly support the Commission regarding the analysis and clarifications in paragraph 2.2.3. The Commission did an outstanding job. The current wording of paragraph 2.2.3 is accurate and legally correct and we would suggest the Commission to leave this paragraph unchanged, as this matter is fundamental for the understanding of the legal framework.

## *General principles*

- (24) We highly appreciate that the Commission explicitly states that “*the Member State’s power to define SGEIs is not unlimited*”, as we observed that this wasn’t clear to some competent authorities and incumbent operators so far. It is expected that these parties see paragraph 2.2.3 as new limitations imposed on the power of Member States, but we would like to emphasize that paragraph 2.2.3 is simply reflecting standing regulations and interpretations that we recognize and share.
- (25) For the sake of clarity, we suggest the Commission to add in this paragraph a reference to article 2 point a) of Regulation 1370/2007, which states that public transport services are by definition SGEIs. This makes clear why compliance with the legal framework of SGEIs is a pre-requisite to the establishment of PSOs and PSCs.
- (26) We also suggest the Commission to further elaborate why the SNCM Judgement is relevant for the PSO Regulation, as we experienced that some Member States and incumbent operators dismissed the SNCM Judgement because it was about a maritime PSO. We believe that the SNCM Judgement is relevant because the maritime PSO is closely related and very well comparable with the PSO in Regulation 1370/2007. Furthermore, the SNCM Judgement is the application of the Altmark criteria on a public transport concession, which should equally apply to PSCs under the PSO Regulation. The Commission might consider to more prominently underline the relevance of the SNCM Judgement.

## *Consistency with public transport policy*

- (27) Although we agree with the Commission’s analysis, we observe that many Member States have the opinion that they have no other option than award PSOs, as they think that commercial services won’t allow to safeguard the public interest. We therefore suggest the Commission to add some guidance regarding commercially viable services whose provision are in the public interest. The concept of “Services of General Economic Interest” seems to suggest that only loss-making services can be of *general economic interest*, which is not true. We believe that the Member States’ transport policy is the right place to develop a strategy to safeguard the public interest regarding commercially viable services, in example via general rules or an “operator of last resort” or the award of emergency-PSOs on article 5 (5) in case an important commercial service would cease operations. The Commission might use the opportunity of these Revised Guidelines to support and inspire the Member States with developing mechanisms to safeguard the public interest in absence of PSOs.

## *Existence of a real need*

- (28) We totally agree with the Commission on pre-requisite of the existence of a real need. We would like to add that this condition is not just derived from the SNCM Judgement, but is also a logical consequence of the legal framework for SGEIs.
- (29) The Commission correctly states that the Member States’ “wide discretion” to establish public services is subject to the demonstration of a real demand for those services. For clarity, we would suggest to immediately add the other conditions, such as the necessity and proportionality and demonstration of market failure.
- (30) The ex-ante assessment is very important for transparency and legitimacy of public services. We suggest the Commission to refrain from exceptions. It is unclear when competent authorities are “*not in a position to quantify the need for public transport services*” and we see the risk that this exception will effectively jeopardize the obligation for the ex-ante assessment.

## *Analysis of market failure*

- (31) We can totally agree with the rightful explanation of the Commission on the “analysis of market failure”. This aspect is very important, as it is a fundamental pre-requisite for Services of General Economic Interest. We suggest the Commission to address that the analysis of market failure has to be done ex ante, as it determines whether a PSO could be legitimate at all.
- (32) We furthermore want to suggest the Commission to elaborate that the pre-requisite of market failure implies that public services and commercial services are not likely to co-exist for the very same services, as the existence of the commercial service suggest the absence of a market failure. This is important, as we believe some Member States are planning to award PSOs for a “minimum offer”, with additional commercial services on top of it. Such scheme would not meet the “market failure requirement” and the condition that the PSO should be “necessary”. As some Member States are looking into such scheme, we suggest the Commission to clarify that this is not the right approach.
- (33) Direct competition between PSO and commercial services is problematic anyway, as commercial services are by definition on the condition of level playing field, while the PSO is protected from substantial competition by the Economic Equilibrium Test. PSOs and commercial services may be overlapping, but may not be aimed at the same demand for a service. This is consistent with Regulation EU 2018/1795 on the Economic Equilibrium Test and the relation between PSO and commercial services, in recital (2):

*On the other hand, such [commercial] services, depending on their specific features, such as quality characteristics, timing, destinations served and prospective customers targeted, may not be in head-on competition with public services, and thus cause only limited impact on the economic equilibrium of a public service contract.*

- (34) We suggest the Commission to clarify that public services and commercial services may not be in head-on competition, as explicitly stated in Regulation EU 2018/1795. This means that Member States should seek different methods to safeguard a certain minimum offer (in the public interest), in example via General Rules or the option to instate an Emergency PSOs in case the desired minimum offer would no longer be delivered by commercial services.
- (35) It might appear as an open door, but the Commission could consider to clarify that the existence of commercial services imply the absence of market failure, but the absence of commercial services does NOT imply that the service could not be delivered under normal market circumstances.

## *Selection of the least harmful approach*

- (36) We strongly support the principle of the least harmful approach, which is in line with the general principles of the Union. We suggest the Commission to explain that this implies that commercial services (“open access”) should be preferred over public services (PSOs) and that competitive tendered PSOs should be preferred over directly awarded PSOs.
- (37) We would like to ask the Commission to consider that the principle of the least harmful approach should also limit the option to directly award public services on article 5 (6) before December 25<sup>th</sup> 2023. We observed that the direct award on article 5 (6) might be used by some Member States in violation with the general market principles (such as the criteria for SGEIs and the Altmark criteria), as some Member States believe this is their last chance to give another direct award to their incumbent operator for another 10 years and postpone the introduction of new market forces till the year 2033. However, there seems to be no valid reason why these Member States could not pursue a less harmful approach than a direct award just before the cut-off date. The existence of that cut-off date should not be considered as a valid reason for a direct award before that date. We suggest to add this remark to paragraph 2.2.3 and/or 2.4.8.

## **Possibility to group cost-covering and non-cost-covering services**

- (38) We agree with the Commission on the analysis that the possibility to group cost-covering and non-cost-covering services is bound by the principle of proportionality, which is explicitly stated in the PSO Regulation, but clearly not respected in some public service contracts. We therefore welcome that the Commission elaborates that this principle means that the grouping should be necessary and proportional.
- (39) However, we are missing a reference to the SNCM Judgement, in which the Court of Justice provided further guidance for criteria on the grouping of multiple services in one public service contract. It would be a missed opportunity not to address these criteria, in example whether there is “technical complementarity” (paragraph 178 of the SNCM Judgement) between the services, whether they “are subject to different obligations, in particular in terms of timetable and frequencies” (paragraph 179) and whether the vessels -or trains or buses- that are used are of “different types and having different purposes” (paragraph 179):

*As regards the second set of arguments, it must first be noted that the Commission was correct in pointing out in recital 141 of the contested decision that no technical complementarity between the basic service and the additional service had been demonstrated.*

*It must be borne in mind in that regard that, apart from the fact that those services are subject to different obligations, in particular in terms of timetables and frequency of crossings (see paragraph 151 above), they are also provided using vessels of different types and having different purposes (see paragraphs 152, 160 and 161 above).*

- (40) The Court has furthermore explained that the existence of “many common technical characteristics” and significant synergies are not sufficient argumentation to group services:

*Those findings are not called into question by SNCM’s claim that the two types of service have ‘many common technical characteristics, inter alia in terms of quality of service’ and that there are significant synergies between them since they share the same port infrastructure, the same network of agencies and the same telephone and telecommunications resources for booking tickets, as well as the same dock staff and can use the same procedures for certification, hygiene control and food security. As rightly pointed out by the Commission, the synergies thus invoked are of only a relatively marginal nature, since the main sources of costs for the services concerned relate to the shipping resources and the crews, and the sharing of common administrative and commercial structures cannot constitute a valid complementarity for the purposes of resolving the issues in the present case, since it could in any event apply to all SNCM activities*

- (41) The very same argumentation should be applied to public service contracts regarding road or rail that contain clearly distinguishable services. We would like to encourage the Commission to expand the paragraph on the grouping of cost-covering and non-cost-covering services with the aforementioned findings of the SNCM Judgement, as this would help Member States and incumbents to get a better understanding of the criteria to be taken into consideration.

## **Duration and extension of public service contracts (2.2.5)**

- (42) We totally agree with the Commission that the “mobilization phase” should not be abused by taking an early direct award decision for re-awarding a public service contract to an incumbent operator just before the cut-off date in 2023, while operations start considerably later. As the draft of the Revised Guidelines didn’t inspire the Dutch competent authority to reconsider this approach, we suggest the Commission to add that such direct award should also be justified on the general market principles,

such as the principles for SGEIs, the Altmark Criteria and the principle of proportionality and that the Member State is obliged to choose the least harmful approach, which is usually not a direct award.

## **Direct award to internal operators (2.4.1)**

- (43) We see uncertainty regarding whether internal operators should be allowed to undertake commercial activities, even within the geographic area of the local authority. We believe that the special protected market position of an internal operator should ban such operator from competing with commercial operators, in example by operating commercial services outside the scope of the PSO. For such services, the internal operators would act as a normal market player, but enjoys a preferred and protected position as affiliate of the competent authority. This would also pose a conflict of interest for the competent authority, that should be considered “neutral” but is at the same time directly involved in commercial operations, as the internal operator is closely linked to the competent authority. We suggest to add to point (iii) that the confinement to a geographical area does not mean that potential unfair competition and distorted level playing field by commercial operations of the internal operator within the geographical area should be accepted. An internal operator that is protected from market forces should not use market forces to compete with other operators, regardless whether this is within or outside the geographic territory of the authority.

## **Direct award for small volumes (2.4.4)**

- (44) The provision of article 5 (4) could in our opinion also be used to procure “missing trips” on routes that are served with commercial services, in example early morning and late night departures. It could be in line with the *principle of the least harmful approach* that competent authorities procure just the missing trips via a small PSO instead of procuring the full train service as PSO. These missing trips could be procured from the operator that operates the commercial service via a direct award on article 5 (4), in case the volume doesn’t exceed the threshold. We suggest the Commission to use paragraph 2.4.4 to make authorities aware of this option.
- (45) We also see a risk that article 5 (4) could be used in a way in which just the part of the route on the territory of the competent authority is being considered for the assessment whether the threshold has been exceeded, in example concerning international train services. A competent authority could even artificially cut services in multiple contracts to stay under the threshold. The solution to this risk is to make sure that transport services are always considered for the full service, for the full route. As advocated earlier, we believe it is against fundamental market principles and the functioning of the Common Market to artificially split up services on administrative borders of competent authorities. Any service should either be a public service for the full route, or should be operated commercially.

## **Direct award on article 5 (6) (2.4.8)**

- (46) We have observed that some Member States interpretate the possibility to directly award on article 5 (6) as a “carte blanche” or even a “waiver” to fulfil the general market principles. We would therefore ask the Commission to state more explicitly that a direct award on article 5 (6) should also meet the criteria for SGEIs and the Altmark Criteria. This means that such direct award must be necessary and proportional, should answer to a real demand and market failure should be demonstrated. We would also ask to highlight that the obligation of the Member State to choose the approach that is the least harmful to the functioning of the market, is also applicable and limits the Member States in the use article 5 (6).
- (47) The absence of sufficient knowhow and experience regarding tendering and open access at the competent authority or a perceived lack of time to investigate alternatives should never be considered as a valid reason to opt for a direct award based on article 5 (6). As we observe these arguments are being used, we ask the Commission to address their invalidity.

## Review of decisions (2.4.9)

- (48) We would like to ask the Commission to elaborate which *decisions* are subject to article 5 (7). We observe that some Member States (i.e. Belgium and The Netherlands) took the position that only the award decision itself (= the signing of the decision) is subject to article 5 (7). As such award decision for direct awards are usually just shortly before the start of operations under the new public service contract, it means that any judicial review of the award decision will take place years after the public service contract has commenced. This implies that article 5 (7) is useless, as the judicial review will take place when the award is already a *fait accompli*. We would therefore suggest the Commission to interpretate “decisions” in such a broad way that any explicit intention for an award, in example a notification in the Official Journal based on article 7 (2), should be eligible for a review.

## Overcompensation and nett positive effect

- (49) Although the Commission is addressing overcompensation, we would like to address that we are missing further clarification on the calculation of the nett positive effect, as described in the Annex of the PSO Regulation. The annex of the PSO Regulation states “*any positive effects generated within the network operated under the public services obligation(s) in question*” should be considered. We believe that for a fair assessment of the nett financial effect, such “positive effects within the network” should be considered in a broad definition.
- (50) In example, when an incumbent is directly awarded the operations of a considerable part of the national railway network (such as in Belgium and The Netherlands), the incumbent operator is also given a dominant market position that allows the incumbent to make additional profits on adjacent markets. In example the Dutch main rail network PSC that provided Dutch incumbent NS a near-monopoly on the railway market, allowed NS to sell other products and services to the passengers using its PSO services. In example shared bicycles (“OV Fiets”), parking at NS-property around train stations (together with Q-park), car rental (“Greenwheels”) but also Mobility as a Service products such as the “NS Business Card” for business travellers and the “NS Flex” card for consumers. Other companies willing to provide the comparable services don’t have any chance as NS has such a dominant market position and virtually every citizen already has a NS card for travelling. The market dominance of NS is even more precure because of the nationwide monopoly of NS on the commercial operations of train stations, putting NS in the position to solely decide which services can be offered in train stations, even in train stations just served by other operators.
- (51) Although this is all officially outside the scope of the PSO Regulation, there is a direct link by NS getting a directly awarded nationwide public service contract to operate the vast majority of all trains, and the commercial potential for NS on adjacent markets. Furthermore, we observe a bundling of the sale of train tickets for PSO services and other commercial activities on liberalized markets. We would like to argue that the assessment of “positive effects” for the *nett financial effect* should also take into consideration whether the possession of the PSC does also lead to other financial revenues for the operator, other than directly for operating the PSO services.
- (52) Furthermore, we observed a case with an international train service of which the Dutch part was added to a PSO, while the German part was operated commercially. Such “hybrid PSO” is in our sincere analysis of the EU legal framework illegitimate, as we have explained earlier. However, we observed that the two incumbents operating the train were circulating money across the border, in which the Dutch PSO part of the route was made artificially loss-making, which was compensated with revenues on the commercial German part of the route. The business case for the calculation of the subsidy was just limited to the Dutch part of the international services, therefore missing that the train service “cooperation” was designed in such way that the losses incurred on the Dutch PSO part were compensated with revenues on the commercial part in Germany. We would therefore ask the Commission to clarify that for the calculation of the *nett financial effect*, ALL positive financial effects that are, as a “*conditio sine qua non*”, caused by the operation of the concerned service, should be taken into consideration.

## Procedure towards final Revised Guidelines

- (53) Regarding the further procedure towards the adoption of the Revised Guidelines, we would like to ask the Commission to just consider the received feedback on their merits and legal validity, not on the quantity of the given feedback. We would like to emphasize that the draft Revised Guidelines reflect the current state of European regulations and does not impose any new restrictions or legislation. It is an established objective of the Union's legislator and the Union's courts to establish, develop and stimulate a fair and competitive European market for public transport by road and rail. This is the best way to achieve the objectives of the Green Deal and stimulate sustainable modes of transport.

## Closing remarks

- (54) We would like to thank again the European Commission for providing us the opportunity to share our feedback. We hope that the Commission will stick to the interpretations and guidance as displayed in the draft of the Revised Guidelines.
- (55) Only exception is the very serious issue we have with so-called “hybrid PSOs”, that are according to our sincere analysis and understanding of the European legal framework in breach with fundamental principles of the Common Market. Artificially dividing an (international) transportation service into two (national) services in order to circumvent the lack of an agreement between competent authorities is not the right way forward. It is furthermore fundamentally in breach of the conditions for Services of General Economic Interest and the Altmark Criteria. There is also no way to objectively separate the PSO and commercial part financially and the PSO operations will by definition also give a competitive advance to the operator on the commercial part of the route, therefore distorting the level playing field and preventing the emerge of real commercial services. A “hybrid PSO” is effectively a PSO imposed by one Member State on the territory of another Member State, despite there being misclassified as “commercial service”.
- (56) We would like to invite the Commission to re-assess the legitimacy of so-called “hybrid PSOs”, considering the legal arguments we've provided. For all other topics, we would like to endorse the Commission for their interpretations and clarifications expressed in the draft of the Revised Guidelines and ask the Commission to be determined and persistent.
- (57) To stimulate the European rail market, structural and non-discriminatory measures should be favoured over institutionalizing market distortion with subsidized unnecessary PSOs. As the ancient saying tells: *“give a man a fish and you feed him for a day, teach a man to fish and you feed him for a lifetime”*. Although giving a man a fish might be advocated by that man as the most effective way for the supply of fish, the structural approach of setting the conditions to enable men to provide fish themselves is the best way forward – as it does not rely on the indefinite supply of fish to man. The same applies for the bus and rail markets. We believe that the long distance bus and rail markets don't need PSOs (“giving fish”), but could provide train services without compensation when the conditions are set right, in example by lowering the operating costs by reducing taxes and lowering track access charges, in example funded by imposing charges on less environmentally-friendly modes of transport. It is crucial that PSOs are only used when they are necessary and proportionate to meet the real demand for the service and the market is unable to deliver – even after non-discriminatory measures. And even then, the least harmful approach should be chosen.

Yours sincerely,

