Comments on the EC Non-Paper concerning the Interpretative Guidelines of the PSO Regulation

The mobility providers of the Wiener Stadtwerke Group essentially welcome the efforts to revise the guidelines to recast PSO Regulation and the current judgements of the ECJ. The reference to the Communication of the EC on more sustainable and smart mobility, to the European Green Deal and the significance of public transport (PT) in this context is also explicitly supported.

However, it should be noted that the non-paper on the interpretative guidelines in part – in particular Chapter 2.2.3 relating to the definition of public service obligations – **goes beyond the text of the Regulation and contains a restriction on the application area of the PSOs and their related public service contracting options**, which should be regarded as inadmissible.

Furthermore, there are several statements in this non-paper which hamper the development of sustainable and smart mobility in general and PT in particular. PT in combination with new forms of mobility however is essential in order to achieve the goals of the European Green Deal. The importance of PT and the combination of the PT with new forms of mobility services have also recently been highlighted in the Urban Mobility Framework published by the EC. There is even mention that these shared services should form part of PT in certain areas. Several statements made by EC in the non-paper of the new interpretative guidelines, such as the **very narrow definition of a public service obligation under Point 2.2** for example, would be contrary to this objective of the UMF.

Point 2.2: Definition of public service obligations and general rules:

ad. 2.2.3. Definition of the nature and extent of public service obligations and of the scope of public service contracts

- **General principles and definition of public service obligations:**

This section contains detailed definitions of when a PSO can apply. We consider these to be excessively restrictive and potentially problematic in practice. The admissibility of granting public service contracts in accordance with the PSO Regulation would be reduced as a result. It would therefore be desirable to ‘dilute’ these rules in as far as this is consistent with the ECJ judgements cited.

It is our considered opinion that the sentence and the related footnote (16) “The specification of a public service obligation may only be called into question by the Commission in the event of a manifest error.” is to be viewed positively given that European Commission may only cast doubt on the specification of a PSO in cases relating to an obvious error.

The deletion of the sentence “Thus, within the framework laid down by Regulation (EC) No 1370/2007, Member States have wide discretion to define public service obligations in line with the needs of end users” and the supplement to Footnote 18 should be revised. This would significantly limit the scope of application by Member States and the permissibility of PSOs in future would be restricted. Compliance with financial aid rules already exists based on general Union Law.

- **Consistency with objectives of Member State’s public transport policy:**

The EC aims to embed rules in the guidelines which must be contained in the strategic papers of the Member States (e.g. the development of sustainable transport, also with demands for a quantitative assessment of the services offered on each line in particular). Furthermore, the Member States should also involve certain stakeholders in the formulation of these strategies. Pursuant to Article 2a, para. 1 (last sentence) of the PSO Regulation, *The content and format of public transport policy documents and the procedures for consulting relevant stakeholders* ***shall be determined in accordance with national law****.*

Given that these previously mentioned rules **contradict the text of the PSO Regulation**, this is no longer a permissible interpretation and must therefore again be deleted in this detailed form. In the interests of subsidiarity, the Member States are permitted, particularly with regard to urban public transport, to decide themselves how and with which contents these strategies are prepared.

- **Existence of a real need for public service obligations:**

In its non-paper on the guidelines, the EC proposes a **completely new procedure for establishing the need for or the necessity of a public service obligation**. However, given that the guidelines are legally non-binding in nature and only intended to aid interpretations of the Regulation, this procedure cannot be legally binding in nature and must permit alternatives. This new procedure leads to **considerable legal uncertainty** for the entire sector and should therefore definitely be diluted or again deleted.

In detail, the EC proposes:

Initially, according to the EC, the competent public authority should assess whether **customer demand exists which cannot entirely or partially be satisfied by a market actor without a public service obligation**. According to the EC, such a requirement would only exist if demand cannot be entirely satisfied by ‘*market forces*’.

- As previously mentioned, these very strict rules **contravene the principle of subsidiarity**, particularly in the case of urban public transport. Competent local authorities are best able to estimate which measures need to be implemented in the course of such an assessment. A uniform EU-wide rule is not expedient in this case. It is evident that such demand exists. There would therefore be an unnecessary administrative burden were the competent public authorities required to undertake surveys in this regard. It should not be ignored that PT services represent essential public services which must be accessible to every individual under the same terms. It is often challenging or impossible to provide these services on a profit-oriented basis.
- What is extremely problematic is the statement that partial fulfilment by commercial operators would be sufficient. It is unclear here what the consequences of this would be. Would this lead to a splitting of services offered? This would culminate in **cherry picking by private operators** who would only operate lucrative routes. Public sector operators would therefore only continue to operate non-profitable lines, which would lead to a form of discrimination. The reference to the decision of the ECJ in the case of SNCM is not appropriate in this context given that public transport, particularly in cities, is not comparable with passenger shipping services. In many other areas of Union Law, such as that relating to passenger rights, a clear differentiation is also made between the various modes of transport. In the case of PT in cities, it is essential to offer a range of services coordinated between the various transport providers (coordinated schedules in order to ensure good connections) so as to effectively take into account customer requirements along the entire route. This would not be possible in the case of several operators (particularly public sector and private sector operators) on various routes. It must also be permissible to consider several transport modes on a macroeconomic basis. An optimally integrated overall range of transport services as attractive alternatives to individual private transport is ensured in Vienna by Wiener Linien acting as an internal operator for the City of Vienna. Besides the advantages from a passenger perspective, the transaction costs (contracting, monitoring, interfaces, etc.) of this model are also considerably lower than those in the case of splitting the services offered. The same applies in the case of the EC rule that operators should be asked by means of a consultation process for every route whether they wish to operate these routes (refer here to the subpoint “Analysis of the market failure“ on page 9 of the non-paper on the Interpretative Guidelines).
- It is also unclear how to interpret “*market forces*”. It is mentioned in this context that there is only a need for public service obligations if market forces alone are insufficient. From our point of view, this contradicts the previously mentioned formulation which seems to refer to a splitting of service offerings.

- It is important in the interests of offering services tailored to the needs of customers, on the one hand, and from a commercial perspective, on the other, that the entire range of PT services offered in a city is considered and not simply individual lines when public authorities make their assessments. For this reason, the formulation *"even partly*[1]*"* must therefore be deleted. The interaction between public transport and new mobility services should also be taken into account. Rather than competing, these services complement each other. This is also a clear statement on the part of the EC in its recently published Urban Mobility Framework.

  - Ex ante assessment of the demand for public transport services

The ex-ante assessment of the actual demand for public transport services prior to initiating the contracting of a PSO in this form is not legally prescribed in Austria and could lead to **extensive delays in the case of such contracting procedures**. The involvement of all stakeholders – including affected residents, neighbours, etc. – during the early stages of such projects could endanger the relevant project at the outset due to the critical assessments it would be exposed to.

Additional criteria formulated by the EC relating to the ex-ante assessment of this demand are further, safer, premium quality and more environmentally friendly services. This should entail **surveying customers**. This relates however to planning aspects in addition to an overall view of the service. In this context, we advise against only allowing customers to decide since this is often a very subjective perspective on the basis of which no decisions with major consequences can be reached. Wiener Linien regularly performs customer surveys in Vienna in order to continuously improve the services it provides. This is an important and helpful tool but should not be relied upon to decide whether demand can be satisfied by a public service obligation or not.

  - Analysis of the market failure:

On the grounds of the subsidiarity principle, the Member States have to decide not only which aspects surveys should cover but also how they establish that the imposition of a public service obligation is necessary. The requirement to perform surveys with certain operators is also too far-reaching in this context.

According to the EC, an analysis of market failure should also take into account comparable transport services which are provided by other forms of transport. It is however unclear which modes of transport are meant here. Public transport services by rail or road have been proven

[1] *"The Union courts have made it clear that before laying down specifications for public service obligations, the competent authority should assess whether there is a genuine need for the planned public transport services and to that end, whether there is a genuine demand from users that cannot be addressed,* ***even partly****, by market operators in the absence of public service obligations" (p8)*

to be the most environmentally friendly form of mobility. As such, a comparison in this context is not expedient.

- Selection of the least harmful approach to functioning of the internal market

This section defines a general rule as having less impact on the market than a public sector obligation in the form of a contract. However, this permits the public authority less flexibility in terms of changing circumstances then is the case with a bilateral contract. These general rules are also often extremely vaguely formulated. Such a ranking is also missing in the text of the Regulation. General rules and bilateral contracts must be regarded as equivalent since this would otherwise constitute a breach of the text set out in the Regulation.

- **Possibility to group cost-covering services and non-cost covering services in the public service contract**

The EC also applies very strict criteria here which go beyond those defined in the text of the Regulation. The competent public authorities need to be very precise with regard to this definition. Should the public authority make an error here, this could result in the entire compensation being considered to be unlawful aid and this would have to be repaid.

With regard to the network effects, it is essential in terms of reducing the overall costs of public transport services and the continuity of these that the option of granting a public service contract is not restricted to non-profitable PT services.

Since they are best able to assess this, the competent public authorities must have a certain degree of discretion here in order to decide which services are covered by a PSO and which are not.

Point 2.2.5 Article 4 and Article 8. Duration of public service contracts and conditions under which a 50% extension up to 50% of the duration of the public service contract can be granted:

Paragraph 3 proposes a mobilisation phase of 3 to 4 years in the case of major investments. It should be noted here that vehicle procurement processes can currently take significantly longer than 3 to 4 years until sufficient vehicles are available for operational purposes.

Point 2.4.1 Conditions under which a public service contract may be directly awarded to an internal operator:

Subpoint (vi) mentions that Article 5, para. 2, of the PSO Regulation is not applicable to public service contracts relating to buses. It only applies if bus services are provided in the form of service concessions. It would appear that reference to tram services has been overlooked here.

Point 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:

In 2.4.6. of the draft guidelines the EC states that the provision on performance-related direct awards should be interpreted restrictively. We see this very critically:

First of all, one can assume that the European legislator, who explicitly allows direct award under certain conditions, intended to have a corresponding scope of application, which should not be nullified by a restrictive interpretation. Recital 25 of the amending Regulation (EU) 2016/2338 also clearly speaks in favor of a coexistence of equal rank between competitive award and performance-based direct award if the corresponding requirements are met.

Furthermore, the Commission seems to ignore the exact wording of the provision with regard to the individual direct award requirements: The provision only requires that the direct award is justified in the opinion of the competent authority ("in its opinion" or "where it considers") – which clearly speaks in favor of (i) focusing on or recognizing the subjective view/the broad discretion of the authority and (ii) not overstretching the review obligations of the competent authority in this area. This should be clarified accordingly, the sentence „should be based on objective grounds“ should therefore be deleted in the draft.

In application of Article 5 (4a) the EC apparently requires a justification of the direct award by means of a comparison that in certain cases the improvement cannot be achieved by competitive tendering. Apart from the fact that such a comparison is unlikely to be feasible in practice, the EC also clearly departs from the wording of the provision here. A comparison to a hypothetical tender is not required by Article 5(4a). Subparagraph (a) merely requires that the direct award of the contract is justified in the opinion of the competent authority on the basis of the respective structural and geographic characteristics of the market and the network concerned. With regard to efficiency and quality considerations, subparagraph (b) is decisive, and here the "old contract" is the relevant benchmark (i.e., likewise not the results of a hypothetical tender). The parts „cannot be achieved by competitive tendering“ and „which the Regulation presumes to be achieved more effectively, in principle, by competitive tendering“ should therefore be deleted in the draft.