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PSO Guidelines legal analysis

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On June 22, 2023, the European Commission published revised Interpretative Guidelines on Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road ("the PSO Regulation"), a non-binding instrument aimed at providing guidance to Member States on the Commission's interpretation of its provisions.

CER welcomes this initiative, which is important to ensure a correct and consistent application of the PSO Regulation and that was especially needed following its amendment by Regulation (EU) 2016/2338 in the context of the 4th Railway Package. However, in CER's view, the new Guidelines go beyond their desirable stated objective, by instead setting forth new requirements to the point of being an amendment of the Regulation itself. This constitutes a disproportionate limitation of Member States' discretion and results in problems of legal certainty.

As mentioned, the revised PSO Guidelines are considerably more far reaching than the previous, adding new general and systematic obligations that are not inherent in the PSO Regulation and, in doing so, attempting to introduce **updates and a legal amendment of the Regulation itself**. Such an amendment is inadmissible through a soft law instrument and the Commission exceeded its prerogatives by unilaterally modifying the requirements as agreed by the co-legislators. In fact, in some instances the new requirements were already present in the proposal that led to 2016 revision of the PSO Regulation and were not retained in its amendment, showing that the EU co-legislators were not in favor of them.

The most relevant examples of the above are the procedure introduced in Section 2.2.3 of the new Guidelines for classification as public service obligations and the requirement of extensive ex-post overcompensation controls even in the case of competitively tendered contracts, introduced in Section 2.6.3. About the first point (classification as public service obligations), competent authorities must, according to the interpretation brought forward by the Commission, engage in a detailed, small-scale three-step procedure that involves surveying demand and market offer. Article 2a of the PSO Regulation, however, exhaustively explains how public authorities should proceed when determining SGEIs and does not prescribe such a detailed test. Furthermore, the new obligation bears the risk of competent authorities making broad errors when carrying out the newly defined three-stage test. The new Guidelines also introduce ex post overcompensation controls in case of competitive tenders (Section 2.6.3 of the new Guidelines), even though Regulation 1370/2007 itself does not prescribe them and competitive tendering should rule out any overcompensation as it already leads to the best market price and quality of service available. Both these new requirements also lead to additional administrative work by the competent authorities when implementing the PSO Regulation.

Other examples of instances where the new Guidelines go beyond the requirements of the PSO Regulation include the subjection of the extension of a running public service contract to stricter conditions, the requirement of a strong justification for subcontracting more than 1/3 of services, the requirement of comparison with an hypothetical competitively tendered contract instead of the use of the previously directly awarded contract as a benchmark in case of a direct award pursuant to Article 5(4a) and the demonstration that the award based on other provisions has not been materially possible in case of direct emergency award.

It is also worth mentioning that these requirements are sometimes justified by reference to case law¹ based on Article 106(2) TFEU, which is, however, not applicable to land transport. Article 93 TFEU, in fact, sets specific rules that prevail on the general rules foreseen by Article 106(2) TFEU and it is the legal basis of the PSO Regulation that the Guidelines seek to interpret. Additionally, some of the decisions mentioned relate to maritime transport, that cannot be compared to rail transport.

The attempt to introduce new obligations through the revised PSO Guidelines risks **unduly restricting Member States' wide discretion** in providing, commissioning and organizing services of general economic interest, in this case public transport passenger services, foreseen by Protocol 26 to the TFEU and by consolidated case law of the Court of Justice². It is true that in the presence of specific Union rules defining the scope for the existence of an SGEI such discretion is limited and Member States will have to follow the principles set for the specific transport mode³. However, within the framework set by the sector relevant rules, this discretion continues to exist and the Commission's role is limited to checking whether the State made a manifest error and to assess any State aid involved in the compensation⁴. This limitation of the Commission's powers is specifically referenced by the SGEI Communication to the Commission's assessment of whether a service can be provided by the market⁵. Thus, in the case at hand, the PSO Regulation, specifically its article 2a for what concerns the definition of the service scope, sets the bounds of the Member States' discretion that cannot be further restricted.

The new Guidelines also create a problem of **legal certainty**. This principle, as formulated in the jurisprudence of the Court of Justice, requires that rules of law be clear, precise, certain and predictable namely as regards their effects, and their application to be foreseeable by those subject to them⁶. In particular, the principle imposes that Union rules should enable those concerned to know precisely the extent of the obligations which are imposed on them⁷. On the contrary, by introducing new requirements that are not to be found in the PSO Regulation, which is the actual piece of legislation that competent authorities have to comply with, the new Guidelines increase uncertainty.

Legal certainty also requires that the binding nature of any act intended to have legal effects be derived from a provision of Union law which prescribes the legal form to be taken by that act and which must be expressly indicated therein as its legal basis⁸. This is not the case in the Guidelines, that fulfil the condition of being considered as an act

¹ See footnotes 16, 18 and 19 of Section 2.2.3 of the new Guidelines.

² Article 1 of Protocol 26 to the TFEU and cases C-706/17, *Achema et al v Lithuania Energy Regulator* paragraph 104, *Comunidad Autónoma del País Vasco and Others v Commission*, C-66/16 P to C-69/16 P, paragraphs 69 and 70, *ENEL*, C-242/10, paragraph 50, case C-67/96 *Albany*, paragraph 104, and case C-265/08, *Federutility and Others*, paragraph 29.

³ Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (SGEI communication), paragraph 46 and Communication from the Commission 'A Quality Framework for Services of General Interest in Europe', COM/2011/0900 final, page 10.

⁴ SGEI communication, paragraph 46.

⁵ *Ibid.*, paragraph 48.

⁶ Case C-72/10, *Criminal proceedings against Costa*, paragraph 74 and case C-201/08, *Plantanol GmbH & Co KG Hauptzollamt Darmstadt*, paragraph 46.

⁷ Case C-345/06, *Proceedings brought by Heinrich*, paragraph 44.

⁸ Case C-325/91, *France v. Commission*, paragraphs 23, 26 and 30.

intended to have legal effects in their own right as they add new obligations to those provided for by the provisions they ostensibly interpret.

The result of the issues highlighted above is that while the aim of the Guidelines is to give guidance and a practical application aid for competent authorities, the recipients of the PSO Regulation, they might actually prove detrimental to these goals. In fact, for the reasons mentioned, the Guidelines are susceptible of creating a higher degree of uncertainty for competent authorities and a **risk of errors** on their part and to the ultimate detriment of railway undertakings, as an improper classification might lead to no compensation or the compensation wrongly attributed to be recovered.

Taking all the above into consideration, it can be argued that with the new Interpretative Guidelines the Commission has gone beyond its prerogatives and stated aim of providing guidance in the interpretation of the PSO Regulation by laying down requirements that are **disproportionate** to the goal pursued and result in an amendment of the PSO Regulation. This in turn restricts the competences and discretion of transport authorities with a related risk of undermining the principle of subsidiarity and creating legal uncertainty. This is ultimately not in line with the necessity to create a favorable legislative framework for rail in the context of the Green Deal.

About CER

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