Position Paper

SGI EUROPE FEEDBACK TO THE EUROPEAN COMMISSION'S NON-PAPER REVISED INTERPRETATIVE GUIDELINES CONCERNING REGULATION (EC) NO 1370/2007 ON PUBLIC PASSENGER TRANSPORT SERVICES BY RAIL AND BY ROAD

10 February 2022

SGI EUROPE GENERAL SECRETARIAT Rue des Deux Eglises, 26 bt 5, BE – 1000 Brussels
T: + 32 (0) 2 219 27 98 | F: + 32 (0) 2 218 12 13 | E: SGIeurope@SGIeurope.org | **www.SGIeurope.org** | Registered stakeholder ID Nr 59513031434-92

Brussels, 10 February 2022

Executive Summary

- SGI Europe welcomes the opportunity to provide feedback on the revision of the European Commission's non-paper on the PSO Regulation. The organisation and financing of public transport services is critical for European recovery from the pandemic and for the achievement of net-zero carbon goals.
- However, the draft guidelines in some areas go beyond the text of the regulation and/or contain new and questionable interpretations of the Treaty and case law. This is likely to lead to constraints on public authorities designing and providing public services. Accordingly, SGI Europe cannot support the Commission's draft.
- The very narrow definition of a public service obligation in point 2.2 counteracts the efforts of the Urban Mobility Framework that underlined the importance of public transport and its combination with mobility as a service and should therefore be revised.
- The ex-ante assessment of the existence of demand for public passenger transport is unnecessary and potentially damaging. It could cause significant delays and provide opportunities for unjustified legal challenges. Such ex-ante assessments would not take into account parameters such as environmental compliance or quality of the services.
- SGI Europe calls for clarification of which modes of transport are meant to be comparable when analysing the existence of market failure.
- Member States should retain discretion to define services that fall within the public service obligation, meaning that the possibility of awarding a public service contract should not be limited to non-profitable public transport services.
- SGI Europe points out that the maximum duration of the mobilisation phase that is set by the Commission is not appropriate, since it takes more than 3 or 4 years for enough vehicles to be fully operational in some cases.
- SGI Europe calls for the use of a more inclusive definition of small and medium enterprises. Since the providers of public service obligations are often local public service enterprises (LPSEs), SGI Europe considers that non-discrimination towards their privately owned competitors is essential.

- SGI Europe disagrees with the intention of the non-paper concerning the provision that public service specifications have to be consistent with the "Member State's public transport policy documents" since this seems to refer to the national level only. Public transport strategies are often devolved to the regional or local level, in which case it is for the relevant competent authorities at these levels to take the appropriate decisions. The principle of subsidiarity ensures that Member States retain freedom in designing their policies, and thus decision about the content of the national strategies should remain in their full remit. Given that the Member States have wide discretion in providing, commissioning and organising services of general economic interest, provision of public transport services should not be subject to the demonstration of a demand for those services. Other overriding reasons of public policy, such as protecting the environment, are equally important.

SGI Europe welcomes the opportunity to provide feedback to the revision of the European Commission's non-paper on the interpretative guidelines of the Public Service Obligation (PSO)-Regulation. With the dual challenges to aim for a fully digitalised and decarbonised economic development, SGI Europe, as representative of providers and operators of services of general economic interest in the mobility sector, strongly recommends that the draft guidelines are revised to ensure clarity and fairness.

SGI Europe supports the intention of the Commission to ensure close alignment between the PSO Regulation, the EU Green Deal and the Sustainable and Smart Mobility strategy, which recognise the important roles of services of general economic interest.

However, it should be noted that the draft guidelines in some areas - especially in Chapter 2.2.3 regarding the definition of public service obligations - go beyond the text of the regulation and contain a restriction of the scope of application of the PSO or its awarding options, which is inappropriate.

Furthermore, some statements in this draft seriously prevent the development of sustainable and intelligent mobility in general and of public transport in particular. However, public transport in combination with new forms of mobility is essential for achieving the goals of the European Green Deal. The Urban Mobility Framework (UMF) recently published by the Commission also emphasises the importance of public transport and encourages the combination of public transport with new mobility services. Some statements in the draft of the new guidelines, such as the very narrow definition of a public service obligation in point 2.2. would in any case run counter to the UMF's effort.

In order to provide a stable legal framework for PSOs, clarifications on several provisions in the guidelines of the PSO Regulation are necessary.

2.2. Definition of public service obligation (PSO) and general rules:

On point 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 provides key characteristics and guidance on how Member States define public service obligation (PSO). In SGI Europe's opinion, these are too restrictive and could be problematic in practice. This reduces the admissibility of the awarding of public contracts options in accordance with the PSO Regulation. Given the challenges faced by public authorities in recovering from the pandemic and meeting other public policy challenges, not least achieving climate targets, they need maximum flexibility in the organisation and provision of public services.

SGI Europe sees the following wording "*Member States' power to define a SGEI is not unlimited and may not be exercised arbitrarily for the sole purpose of allowing a particular sector to circumvent the application of the competition rules*", as completely misplaced in these guidelines. Given that public transport services are often highly subsidised in order to provide acceptable quality or price structures, or to meet other public policy objectives, there is no question of PSOs being used to prevent the application of competition rules in the public transport sector. It is noticeable that here the Commission has chosen to delete the reference in the guidelines to the third indent of Article 1 of Protocol 26 "It is a shared value of the Union that SGEIs strive for a high level of quality, safety, affordability, equal treatment and the promotion of universal access and the rights of users." This is consistent with the rest of the new draft which seeks to promote a purely commercial approach without taking into account broader general interest objectives.

SGEIs are not a tool to give a competitive advantage to any sector, on the contrary, with an adequate public support, SGEIs facilitate other businesses, ensure resilience and help alleviate inequalities. Especially after the outbreak of the pandemic, the SGEIs played a major role in ensuring the business continuity through the provision not only of public transport, but also other SGEIs such as energy and water supply, waste management, healthcare, broadband, broadcasting, education. The Commission should acknowledge this and should be looking for ways to support SGEIs rather than trying to undermine them.

- *Consistency with objectives of Member State's public transport policies:*

In the guidelines, the Commission would like to set out specifications, that would have to be indicated in the Member States' strategic papers (e.g., in particular a quantitative evaluation of the services offered per route). Furthermore, the Member States should involve certain stakeholders in the creation of these strategies. However, pursuant to Article 2a (1), last sentence of the PSO Regulation, the content and format of the public transport policy papers and the procedures for the consultation of relevant stakeholders are determined in accordance with national legislation. In

addition, responsibilities for transport strategy and planning are often devolved to regional or local level, where transport strategies are very common.
Since these previously mentioned specifications go beyond the text of the PSO Regulation, SGI Europe does not regard them as acceptable interpretation. In line with the principle of subsidiarity, the Member States are entitled to decide for themselves how and with what content these strategies are created, especially in urban public transport. Therefore, the two sentences: "Such documents … modes. Stakeholders … organisations" should be deleted.

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

SGI Europe is extremely concerned by the Commission's assertion that a Member State's wide discretion to establish public transport services is subject to the demonstration of a demand for those services. This is not consistent with the Treaty nor the PSO Regulation. One of the key objectives of transport policy, particularly in urban areas, is to foster modal shift away from car use to public transport, walking and cycling. This is explicitly supported in the Commission's Smart & Sustainable Mobility Strategy and its Urban Mobility Framework. Therefore, the aim is precisely to create demand for alternatives to the car which does not currently exist.
In addition, the Commission proposes a formal procedure for an ex-ante assessment of user demand. As there should be no need for any justification, such a process is also unnecessary. But in any case, as already mentioned, local or regional transport plans and/or SUMPs will often already be in place, setting out the objectives for transport service provision in the context of wider mobility and sustainability policy. Such a new procedure, including any requirement for a "re-evaluation during the lifetime of the contract" simply increases opportunities for legal challenges and thus leads to considerable legal uncertainty for the entire sector.
In detail, the Commission proposes the following:
According to the Commission, the competent authority should first assess whether there is a demand that cannot be met in part or in full by an operator operating on the market without a public intervention. According to the Commission, such a need would only exist if the demand cannot be covered by "market forces" alone.

- As already mentioned, these very strict requirements violate the principle of subsidiarity, especially in the case of public transport in cities. Competent local authorities are the most suitable actors to estimate what actions need to be taken for such an assessment. In this case, an EU-wide uniform regulation is not appropriate. Therefore, it would be an unnecessary additional administrative burden if the competent authorities would always have to carry out surveys every time a service is introduced or changed. It must not be forgotten that public transport services are services of general interest that must be universally available to everyone at the same conditions and as part of an integrated approach. To accomplish this, public intervention is needed.

- The statement that partial compliance by commercial operators would be sufficient is extremely problematic and its consequences could be very detrimental to the transport providers that are entrusted with the public service obligations. SGI Europe is concerned that this would result in cherry picking by commercial companies, who would then only operate the lucrative routes. The non-profitable lines, on the other hand, would be left to public operators, which would lead to discrimination. The reference to the decision of the ECJ in the Société nationale maritime Corse Méditerranée (SNCM) case is not appropriate since public passenger transport, especially in cities, cannot be compared with ship transport. In many other areas of EU law, such as passenger rights, there is also a clear distinction between the different modes of transport. When it comes to public transport in cities, an offer that is coordinated between the various modes of transport (coordinated timetables to ensure good transfer hubs) is essential in order to be able to effectively take customer needs into account for the entire route. This, however, would not be possible with several operators (particularly public and private) for different routes. An overall economic review of several modes of transport must also be allowed. In addition to the advantages from the customer's point of view, the transaction costs (awards, monitoring, interfaces...) are also significantly lower in this model than with a split offer. The same applies to the Commission's specification that operators should be asked in a consultation for each route whether they would operate it. (See sub-item "*Analysis of the market failure*" p. 9 of the draft guidelines).

- It is also unclear what exactly is meant by "*market forces*". It is mentioned that there is only a need for public service obligations if market forces alone cannot do it. From our point of view, this contradicts the wording mentioned above, which would indicate a split of the offer.

- On the one hand, it is important for the customer to develop a tailor-made offer, however, on the other hand, from an economic point of view, it is very important that the entire PTOs offers are available in one city rather than taking individual lines into account in the assessment by the authorities. Therefore, the formulation "e*ven partly*" should be deleted. In addition, the interaction of public transport with new mobility services should be taken into account. These are not in competition with each other but complement each other. This is also a clear statement by the Commission in the urban mobility framework that has recently been published.

- *Ex ante assessment of the demand for public transport services*

The ex-ante check of the existence of the actual demand for public passenger transport before initiating the entrustment with public service obligation is not legally prescribed in this form in all Member States and imposing mandatory assessment of the demand could lead to considerable delays. Any new provision of services will normally be set out in local or regional transport plans, with appropriate evidence and explanations, and further investigations may be necessary in order to determine or confirm the precise scope and shape of services. In addition, transport providers conduct customer surveys in order to continually improve their services. But as there is no general legal obligation for such an assessment in the PSO Regulation, it cannot be introduced through non-binding guidelines.

- *Analysis of market failure:*

In line with the principle of subsidiarity, Member States must be able to decide not only what the content of the surveys is, but also how to demonstrate the necessity of a public service obligation. In any case, the requirement to carry out surveys with certain operators is too far-reaching.
According to the Commission, comparable transport services provided by other modes of transport should also be taken into account for the analysis of market failure. It is unclear which modes are meant by this. Public transport by rail and road is demonstrably the most environmentally friendly form of mobility. In this respect, a comparison is not useful here.

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

The Commission argues that public service obligations laid down in a public service contract must imply the least harmful approach for the proper functioning of the internal market. This appears to be another concept lifted from the specific circumstances of the SNCM case on maritime cabotage and turned into a general principle applying to the whole transport sector. As an example of less distortive measures, imposing general rules instead of awarding a public service contract to a single operator is given. However, this allows the authority less flexibility to respond to changed conditions than in a bilateral contract. In addition, these general rules are often very vague in design. There is no such ranking of measures in the text of the Regulation either. On the contrary, Art 3 (1) of the regulation sets public service contracts as the standard instrument and Art. 3 (2) states that general rules are possible “By way of derogation from paragraph 1.”

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

Equally on this point, the Commission applies very strict criteria that go beyond the text of the regulation. The competent authorities have to be very precise with the definition. If the authority makes a mistake, this should result in the entire compensation payment being classified as illegal and having to be paid back.

With regard to the network effects, it is essential for a reduction in the overall costs of public transport services and the continuity of the service that the possibility of awarding a public service contract is not limited to non-profitable public transport services.
The competent authorities must have some discretion here to decide which services fall under a PSO and which do not, as they are also the best judges of this.

On 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 provides for a mobilisation phase of 3 to 4 years in the case of large investments. It should be noted here that it can currently take longer than 3 to 4 years for vehicle procurement until a sufficient number of vehicles are ready for operation.

Point 2.4.1 Requirements for direct award to an internal operator

Sub-item (vi) mentions that Article 5(2) of the PSO Regulation does not apply to public service contracts involving buses. It only applies when bus services are provided in the form of service concessions. The reference to the trams was probably forgotten here due to an editorial error.

Point 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 and 2.4.5. Article 5(4) Conditions under which a competent authority may directly award a public service contract in case of a small contract volume or a SME

Section 2.4.5 of the non-paper interprets the possibility of Member States to lower thresholds in case of direct award either of a contract of small value or to small and medium-sized enterprises. We regret that the paper refers to the SME definition as it is included in the Commission Recommendation 2003/361/EC, which due to the "ownership criterion" excludes enterprises that are owned over 25% by public entities (so called LPSEs – local public service enterprises). Due to the essential nature of the services that they provide (amongst others also public transport), public authorities retain some control over them to ensure continuity and equal access for all citizens. At the same time, LPSEs very often continue to operate in a competitive market environment. Therefore, SGI Europe calls for rethinking the referral to the Recommendation 2003/361/EC and invites the Commission to use a different definition of SMEs, in particular one that would not exclude LPSEs. For illustration, in 2020, 6% of LPSEs in France were active in transport sector.

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-GL the EC states that the provision on performance-related direct awards should be interpreted restrictively. We see this very critically:
Firstly, 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 favour 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 favour of (i) focusing on or recognising 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 showing 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 with 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.