

Position Paper

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2nd consultation on Targeted review of the GBER: extension to national funds combined with certain Union programmes

CER contribution to the 2nd consultation on Targeted review of the GBER: extension to national funds combined with certain Union programmes

1. Introduction

Community of European Railway and Infrastructure Companies (CER) would like to thank the European Commission for this opportunity to provide feedback on the [updated draft of the Commission Regulation amending the General Block Exemption Regulation](#) (hereinafter referred to as 'updated draft'). Overall, CER welcomes present targeted review of the General Block Exemption Regulation ('GBER') as it simplifies the procedures for receiving aid in the framework of the EU structural funds. At the same time, we believe that the updated draft grants the exemption from the notification requirement of Article 108(3) of the TFEU only to a fraction of rail transport and infrastructure projects under the support of the InvestEU Fund, unjustly excluding the rest of such projects from the scope of the GBER.

In particular, CER believes that updated draft should be aligned with the European Green Deal presented by the European Commission and should only cover aids for new rolling stock that is equipped with battery, hydrogen unit or hybrid technology. At the same time, the pre-notification exemption for such aid should not be limited to aid received by only one group of beneficiaries. Furthermore, the updated draft should re-include rail network infrastructure projects in the list of projects aids for which are exempted from the pre-notification requirement, as was the case in the [draft Commission Regulation opened for the first consultation](#) (hereinafter referred to as 'original draft'). Besides, combined transport projects under the support of the InvestEU Fund should also be covered by the GBER.

2. Proposed definition of new entrant is inadequate

CER regrets to see that the updated draft doesn't contain any adjustments to the definition of a 'new entrant' proposed already in the original draft, which is now contained in the proposed point (175) of Article 2 and reads as follows:

*"new entrant" means a railway undertaking as defined in Article 3(1) of Directive 2012/34/EU of the European Parliament and of the Council***, which fulfils the following conditions:*

- (a) it received a licence pursuant to Article 17(3) of Directive 2012/34/EU less than ten years before the aid is granted;*
- (b) it is not linked in the meaning of Article 3(3) of Annex I to this Regulation to a railway undertaking that received a license in any Member State prior to 1 January 2010;*

As already highlighted during the consultation on the original draft, in practice deciding whether a railway undertaking is a new entrant to the market solely based on the date of receiving a licence by this railway undertaking will often lead to unfounded conclusions,

as **such approach would result in exclusion of some of the actual new comers from the scope of this definition, while other well-established market players will be included** in the concept of 'new entrant'.

First of all, the fact of obtaining a licence is not equal to the actual start of operations, and in many cases several years pass between these two events. Obtaining a licence on itself is not sufficient to start operating rail transport services, and, usually, it takes few more years after a railway undertaking received a licence to obtain all the rest of the required paperwork to start the operations. Besides, after obtaining all the paperwork some railway undertakings do not start actual provision of rail transport services for a few more years due to absence of business. Sometimes even after finding business partners potential carriers are not able to start actual operations due to the lack of infrastructure capacities, i.e. unused slots in the timetable that are allocated for the existing rail carriers during tenders and are difficult for the new entrants to compete for; therefore, actual start of operations is further delayed. Hence, the moment of receiving a licence by a railway undertaking is not an adequate starting point and would result in unfair exclusion of railway undertakings that in fact commenced provision of the services only recently, even though their licences have been obtained a while ago.

Apart from that, it is important to note that a licence can also be suspended, revoked and repeatedly granted to a railway undertaking, as outlined in Chapter III of Directive 2012/34/EU. Following the approach of the proposed definition contained in point (175) of Article 2, a well-established market player, which has received a new licence following a revocation of an old one, will be considered to be a new entrant. This example clearly shows that the **date when railway undertaking obtained its licence is often of no relevance to the fact whether this railway undertaking is a newcomer to the market.**

As becomes apparent from the above clarifications, it is inadequate to define a new entrant railway undertaking based on the date when its licence was obtained, as the results of such delineation might in fact be quite random, i.e. **include the railway undertaking that are well established on the market but recently renewed their licence, and exclude new comers that didn't manage to start their operations soon enough after obtaining the licences.** Whether the railway undertaking is in fact a new entrant cannot be simply established by a reference to a fixed date as proposed in the point (175) of Article 2, but **should rather be determined on case by case basis**, based on careful assessment of all relevant facts.

Besides, as regards proposed point b), limiting new entrant definition only to companies that are not linked to any existing (licenced) railway undertakings in any Member States would also be inadequate. Having existing licence in one Member State would not give any actual advantage to enter a new market in another Member State, as it would require establishment of a completely new business. Barriers such as different width of tracks, different licencing, language and various other requirements constitute a situation, where existing licence in one Member State does not give any advantage for starting operations in another Member State.

It is furthermore important to note that, even though one of the main goals of the market pillar of the Fourth Railway Package is to boost competition in the railway markets and to ensure fair and non-discriminatory treatment of new entrants, the **European sectoral legislation in force doesn't contain a definition of 'new entrant'**. Such absence of the definition of the new entrant railway undertaking in the legislation may very well be explained by the wish of the European legislator to leave this concept sufficiently broad and flexible, in order to be able to account for the specificities of the rail services market, avoiding unjustified conclusions that inevitably will be reached unless the question whether the railway undertaking should be considered to be a new entrant is answered on the case

by case basis. Inclusion of the proposed inadequate definition of new entrant into the GBER will disturb the current balanced approach adopted by the sectoral EU legislation and will likely result in overall unfair treatment of many railway undertakings, going far beyond the proposed Article 56e of the GBER.

Therefore, the **definition of a 'new entrant' contained in Article 2 (175) should be removed from the updated draft.**

3. Exempted aid for rolling stock should be consistent with the European Green Deal

New Section 16 added to the GBER by this targeted revision defines when the aid involved in financial products supported by the InvestEU Fund shall be considered to be compatible with the internal market within the meaning of Article 107(3) of TFEU and hence shall be exempted from the notification requirement of Article 108(3) of TFEU. Conditions that are ought to be fulfilled by the aid in order to fall under the scope of the Section 16 are laid down in proposed Article 56e and Article 56f. Thus, Article 56e in its point 5 (point 7 of the original draft) sets the requirements to be complied with by the aid for transport and transport infrastructures, with its point (a) listing the compatible infrastructure projects.

Point (iii) of proposed Article 56e.5(a) of the updated draft states:

(a) aid for infrastructure, except ports, shall be provided only to the following projects:

...

*(iii) rolling stock only for the provision of rail transport services not covered by a public service contract within the meaning of Regulation (EC) No 1370/2007***, provided the beneficiary is a new entrant;*

CER believes that the wording of the paragraph should be limited to the aid received by a railway undertaking for new rolling stock that helps to boost railway sector in a green way and contributes to deployment of an alternative fuels in rail sector. In our view, the GBER should be aligned with the European Green Deal by covering those projects that positively contribute to the environment and climate change. Hence, CER Members believe that the **scope of the pre-notification exemption should be limited to aid for new rolling stock equipped with battery, hydrogen unit or hybrid technology.**

At the same time, CER members believe that the **scope of such exemption should be broadened to all railway undertakings.** This would ensure that all railway undertakings that receive public support for new rolling stock equipped with battery, hydrogen unit or hybrid technology via the EU structural funds will obtain such aid in a timely and speedy manner, which means that further greening of the railway sector will not be slowed down by the necessity to go through Commission pre-notification process.

4. Exemption of aid for rail network infrastructure project should be re-included

In the original draft, the point (a) of Article 56e(7) contained, among others, the sub-point (iv) 'rail network infrastructure', which, however, was deleted from the text in the updated draft. In this regard, the [Explanatory note](#) accompanying the updated draft states that the Commission has taken out from the list projects that are 'in most circumstances non-economic in nature' (such as investment in rail infrastructure).

Whereas the financing of general rail infrastructure that is constructed by public authorities and the access to which is open to all potential users on equal and non-discriminatory

basis indeed does not constitute State aid as non-economic activity, there are also instances when rail infrastructure financing can amount to State aid which is compatible with the internal market (e.g. construction of a terminal by a private company or an extension of a railway line to a terminal). We believe that financing of the latter rail infrastructure projects supported by the InvestEU Fund should be covered by the General Block Exemption and therefore the **rail network infrastructure projects should be re-included** into the list of projects supported by the InvestEU Fund that are exempted from aid pre-notification requirement.

5. Aid to combined transport projects should be exempted as well

Furthermore, CER believes that the list of eligible projects set in Article 56e.5(a) shall be supplemented by combined transport projects. Road-rail combined transport services play a major role in the rail freight business and in the wider freight transport sector. To further increase the competitiveness of combined transport compared to long-distance freight services and therefore strengthen the shift from road freight to cleaner modes of transport, CER proposes to make public support to combined transport projects provided under financial products supported by the InvestEU Fund automatically compatible with the internal market within the meaning of Article 107(3) of the Treaty and, hence, exempted from the notification requirement of Article 108(3) of the Treaty, as long as such aid does not exceed 35% of the total expenditure incurred. This threshold is appropriate as it would compensate the current regulatory discrepancies suffered by rail freight vis-à-vis other transport modes without a distortive effect on competition, and is fully in line with the existing practices of the European Commission in regard to the environmental performance of the freight transport system and modal shift to transport modes with less negative externalities.

Therefore, CER proposes to **add aid for combined transport that does not exceed 35% of the total expenditure incurred to the list of the eligible transport and transport infrastructure projects contained in Article 56e.5(a)**. CER would also like to underline that in our view, based on all above considerations, a general exemption for the aid for combined transport that does not exceed 35% of the total expenditure incurred should be introduced in the GBER.

6. CER Proposals

Based on the foregoing CER proposes to amend the text of the updated draft as follows:

1. To delete point (175) of Article 2.
2. To amend Article 56e.5(a)(iii) as follows:

(a) aid for infrastructure, except ports, shall be provided only to the following projects:

...

*(iii) new rolling stock equipped with battery, hydrogen unit or hybrid technology only for the provision of rail transport services not covered by a public service contract within the meaning of Regulation (EC) No 1370/2007**, ~~provided the beneficiary is a new entrant;~~*

3. To reintroduce deleted point (iv) to Article 56e.5(a):

(a) aid for infrastructure, except ports, shall be provided only to the following projects:

...
(iv) rail network infrastructure;

...
4. To add new point (vii) to Article 56e.5(a):

(a) aid for infrastructure, except ports, shall be provided only to the following projects:

...
(vii) combined transport, provided that the aid does not exceed 35% of the total expenditure incurred.

About CER

The Community of European Railway and Infrastructure Companies (CER) brings together railway undertakings, their national associations as well as infrastructure managers and vehicle leasing companies. The membership is made up of long-established bodies, new entrants and both private and public enterprises, representing 71% of the rail network length, 76% of the rail freight business and about 92% of rail passenger operations in EU, EFTA and EU accession countries. CER represents the interests of its members towards EU policy makers and transport stakeholders, advocating rail as the backbone of a competitive and sustainable transport system in Europe. For more information, visit www.cer.be or follow [@CER_railways](https://twitter.com/CER_railways) on Twitter.

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