

1st Advisory Committee meeting on the Transport Block Exemption Regulation (TBER) – Tuesday 10/09/2024 from 09:00 to 17:30 – Webex

Belgian Position – Speaking Point

General remarks regarding the LMT Guidelines

BE welcomes the European Commission's current proposal for new guidelines and welcomes the existence of two separate legal tools concerning the implementation of PSOs in both the field of rail passenger transport and the goods. Such coexistence of Regulation 1370/2017 on public services in rail and road transport and these new guidelines on state aid for land and multimodal transport allows to take into account the specificities of these organisations of rail transport.

General remarks regarding TBER

BE appreciates the exercise conducted by the European Commission. This is in line with a request from several Member States, including BE, to simplify and facilitate the granting of aid to the rail sector, which is at a competitive disadvantage compared to other more polluting modes of transport.

Belgium has adopted in 2021 an aid scheme consisting of a reduction of track access charges in favour of railway undertakings active in rail freight transport. This aid scheme covers the period 2022-2025 and was approved by the European Commission (file SA.102429). However, regarding the current discussed proposal, for aid granted for rail freight transport operations, a limit is set in terms of kilometres, which suggests that the Belgian system would not benefit from the application of the future regulation.

We want to highlight, however, that the reduction of track access charges was recommended by the European Commission themselves during the covid-19 crisis (see regulation 2020/1429). We therefore question the reasons for suggesting that a fee reduction system could not benefit from an exemption from notification. This type of system is in fact fair because it benefits all operators in a transparent way and presents a net advantage in the context of the objective of modal shift towards rail. In view of these factors, we feel it is necessary to allow an exception to the maximum distance covered rule.

However, some comments and questions remain.

Recital 15

We would like to precise that competitiveness between modes of transport depends on many factors, the distance of which is one. In addition, many other factors play a role, such as legal provisions, nature, size and frequency of the load, quality and availability of the transport offer, etc.

Recital 22

We would like to know what exactly is meant by “distortions of competition and trade are limited and subject to well-defined conditions”? How and where is this described in more detail?

Without a clear description, these concepts are open to interpretation and discussion.

Article 1 – Scope

- **(f)** : It is indicated that this Regulation applies to investment aid schemes for the acquisition of intermodal loading units (UCI) and cranes on board vessels. What about multimodal land-based platforms? Does the Commission plan to cover them and if not, why?
- **§ 2, h)** According to BE, the wording is not very clear.
Nothing prevents to put different bullet points for each of the 2 hypotheses to have more legibility. Moreover, as regards the first option, is it therefore to be considered that only those aids which are dealt with by the Commission on the basis of Article 107, paragraph 3, (c) of the TFEU and which are not exempted by the GBER do not fall within the scope of application of the regulation?

Article 2 – Definitions

BE calls for new precise definitions to be added that are consistent with all European legislation on rail. At a minimum, the terms “renovation”, “upgrade” and “modernization” should be defined.

- **Point (a):** What does fall within the definition of access infrastructure?
For example, on a site along the waterway where there is only one dock + one dock slab without port superstructure, which allows only loading/unloading, goods on/boat on trucks and trucks to be able to sail along the boat and manoeuvre safely. Most of the time, it is a mixed installation (transshipment area +). In BE, we have inland navigation facilities which are under the responsibility of autonomous ports and for which a concession is granted to private operators, or which remain open to all.

Point (k): Can the EC confirm that the terms service facilities correspond or are equivalent to the concept of port superstructure as defined in the GBER?

Article 4 – Notification thresholds

There is a need to clarify the articulation of article 4 with the rest of the text.

- For example, for aid related to external costs, no thresholds are specified (same for other types of aid). If there are, it is necessary to specify. What about the indexation of these amounts?
- **Points (b), (c) and (d):** Maximum amounts are expressed per project. This is not clearly defined even if the term is already used in the GBER for example. In particular, recital (29) states that “*it must not be possible to circumvent the thresholds set out in this Regulation by artificially splitting projects into several projects with similar characteristics, objectives or beneficiaries*”. If this is logically applicable to avoid abuse,
 - ⇒ Can the Commission confirm that renovation/modernization work spaced over several years may each constitute a single project and benefit from the threshold provided? Indeed, for large investments, many factors come into play (subsidies, calls for projects, economic conditions,...). It is therefore not easy to plan a project in its entirety and, for budgetary and technical reasons, several phases/projects must be considered in the medium/long term.

Commented [MM1]: We think that «thresholds» is the better term. It is the term used in the TBER (EN version).

Article 6 – Incentive effect

There is a need to clarify certain elements of Article 6 concerning incentive effects.

- ⇒ As this is an aid program and not an ad hoc aid, can an application for the support scheme be made after the creation of the mechanism and before the start of activities?
- ⇒ What about a company that applies for aid for an activity not limited in time?
- ⇒ What is the impact on the incentive condition?

Article 7 – Aid intensity and eligible costs

BE would ask the Commission to clarify Article 7, and mainly the following extract (**§1**): *“all figures used shall be taken before any deduction of tax or other charges. However, value added tax charged on eligible costs or expenses that is refundable under the applicable national tax law shall not be taken into account for calculating aid intensity and eligible costs”*.

Article 8 – Cumulation

BE would ask the Commission to clarify article 8.

- ⇒ Does **§1** cover cumulation with any other type of state aid?
- ⇒ With regard to **§3**, can an aid exempted under this Regulation be cumulated with other aid without calling into question the exemption (subject to proper compliance with the conditions set out in Article 8)?
- ⇒ How does the Commission consider that cumulation should be calculated (in terms of activity? project? enterprise?)? Who should evaluate this cumul?
- ⇒ The amounts to be considered should be determined.

General remarks regarding the 2 documents (TBER and LMGT):

A general finding is the fact that the 2 documents do not always show coherence, even if both of which have the same focus and are complementary. This is at the expense of the legibility and application of both documents. It can also lead to confusion and misuses / interpretation of certain concepts and rules.

In particular, we can remark that there is a lack of a coherent conceptual framework, which is detrimental to an understanding of regulation, as well as its reading and application. It is noted that, under the title ‘ definitions ’, there is no coherence in both documents in the numbering. Some concepts are appointed differently or some concepts are given two meanings. Furthermore, some concepts are only defined in one of the documents where they are also used in the other document, but there without definition.

The EU aims to ensure that all laws and regulations are drafted in clear and understandable language so that it is accessible to a wide audience. We therefore think that both documents should be re-examined and coordinated in this area in order to arrive at one clear reading and usable whole. Indeed, there is quite some differences in the translation. (NDLS and FR)

Presentation Part I: Operating Aid - Aid to reduce the external costs of transport and aid to launch new commercial connections

TBER (article 10 and 11)

Article 10 – Operating aid to reduce the external costs of transport

BE would ask the Commission to clarify article 10.

- ⇒ How to consider the kilometres mentioned in this article? Per route? Per year? Only in a specific territory (country) or for the entire journey?
- ⇒ §5 is unclear. Can the supportive government provide 5% or 10% more support?
- ⇒ §6 imposes a maximum distance. This seems low for rail traffic.

Article 11 – Aid to launch new commercial connections

BE would ask the Commission to clarify article 11.

- ⇒ Is there a common method of verification? If not, how does the Commission intend to ensure consistency in all methods used?
- ⇒ The §3 states that *“the aid may take the form of grants paid out on a periodical basis for periods not exceeding one year”*.
The §4 specifies that the maximum period is 5 years.
Therefore, would it be permissible to make 5 one-off payments over 5 years, that is 1 per year, if all thresholds are met?

LMT Guidelines

BE would ask the Commission to clarify points 96 and 97 of part 4.2.1.1. on aid for reducing external transport costs.

- ⇒ How to consider the kilometres at these points? Per route? Per year? Only in a specific territory (country) or for the entire journey?
- ⇒ How does the Commission intend to determine what an alternative competitive mode is?
- ⇒ What definition does the Commission propose to define a viable economic alternative?

Presentation Part II: Aid that represents reimbursement for the discharge of certain obligations inherent in the concept of a public service in the rail freight sector and transparency of financial flows in vertically integrated railway undertakings

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Presentation Part III: Investment Aid - Facilities, private sidings, acquisition of vehicles, acquisition of intermodal loading units (ILUs) and cranes on board of vessels, interoperability aid, technical adaptation and modernisation (article 12-13-14-15-16-17)

TBER (recitals 12 and 28 + article 12-13-14-15-17)

The implementation of interoperability aids such as ERTMS (European Rail traffic Management system)/ETCS (European train control system) supports is essential for the consolidation and harmonisation of the single European railway area and its objectives. Similarly, support for ERTMS/ETCS strengthens the competitiveness and performance of rail transport. BE would like to ask

the Commission to clarify certain points which could block, if unaltered, the effectiveness of implementing support for this type of technology.

- It is stated in **recital 12** that aid for activities which the beneficiary would undertake in any event, even in the absence of aid, should be excluded from the scope of the EBRs. BE requests that these elements do not apply to the obligations related to **ERTMS/ETCS**, as the adoption of this technology, including updates, by the sector is very expensive. Because of this, the competitiveness of rail transport is impacted compared to more polluting modes.
- **Recital 28** states that no aid should be granted where investments are used to bring undertakings into compliance with Union standards which have already been adopted. BE requests that investments related to ERTMS should not be excluded from the scope of investment aid, despite the fact that the ETCS specifications have been approved for the reasons mentioned above.

Article 12 - Aid for the construction, upgrade and renewal of unimodal and multimodal rail and inland waterways transport facilities

- **§ 2:** There is a need to clarify the words “*any undertaking that constructs, upgrades and/or renews rail facilities, (...)*” . Those are not particularly appropriate as it implies that construction/renovation companies could be awarded aid. However, this is either the owner or either the operator of the undertakings which are active in the transport or management of the infrastructures concerned (**same remark for article 13**).
- **§ 2:** having to determine that, in the medium term, potential demand exceeds the current capacity of the installation to be built and that of other existing installations nearby could be very complicated because it also depends on many factors, both economic, practices, etc. Therefore, this should be done, as for the operating margin, on a reasonable ex ante basis.

⇒ Should there not be a distance between the installations concerned?
- **§ 3:** In relation to surface installations, are all works concerning them, including foundations, sub-foundations, eligible? Can these eligible costs be considered to correspond to the concept of port superstructure, which are ineligible costs under Article 56c of the GBER?
- **§ 5:** How can we calculate the economic life span? Can European texts allow for this duration? For FEDER projects in particular, there are indications regarding this theme, can we refer to it? (**same question for article 13**)
- **§5 (a):** This proposal contains too much discretion. In addition, it is not clear who should determine these criteria.
- **§ 8:** While the award of a concession for the construction of a new installation under conditions of transparency, competition, etc... is quite legitimate; certain practical difficulties arise as regards the award of exploitation. We have some situation as example in BE.

(Explanation of the Walloon region:

Indeed, in many cases in the files analyzed by the Region (SPW MI), renovation or modernization concerns a facility for which an operation has already been allocated. Concessions can be contracted for a long term, 25 or 30 years. However, according to the provisions of this proposed

regulation, for each project of work, a call for tenders is necessary and mandatory. This would mean that, for each project, agreements which have been in force for many years on installations, where the operator himself has been making investments in port or railway superstructures, would have to be broken, to develop the site according to its exploitation. The systematic re-entry of competition could result in lost investment and loss of occupancy of facilities as a result of changes by the new operator).

The Belgian question is:

- ⇒ Can an initial operating/leasing concession, made in accordance with the provisions of §8, be valid for several renovations/modernizations or is a re-run in competition really systematic?

Article 13 - Aid for the construction, upgrade and renewal of private sidings

Same remarks that for §52 and 5 of article 12 regarding “...any undertaking that constructs, upgrade, (...)” as for the economic lifetime. This proposal contains too much discretion. In addition, it is not clear who should determine these criteria.

Article 14 - Aid for the acquisition of vehicles for rail or inland waterways transport

- §3: The (a) “only to newcomers or SMEs” seems very restrictive for rail traffic consisting of relatively large companies.
- §4: Only in the form of warranty provision seems very restrictive.
- §7: There is need to remove “or” from “and/or”, the “and” does not exclude “or”, which is clearer and easier to interpret and read.

Article 15 - Aid for the acquisition of intermodal loading units and cranes on board of vessels

- §3: Do points (a) and ,especially, (b) bring the replacement of the propulsion mode to a more sustainable mode in eligible investments? *For example, for a ship, the change from diesel to electric or hydrogen engines, which may not guarantee improved hydrodynamics or efficiency.* If not, it would be wise to allow such assistance.
- §5: Given that there is no maximum threshold per company, can a company be allowed to apply for adaptation/modernisation of 1 or 2 vehicles each year and finance 20% of the eligible costs each time?

Article 17 - Aid for the technical adaptation and modernisation of vehicles for rail or inland waterways transport and equipment for sustainable multimodal transport

BE would ask the Commission to clarify article 17 regarding the exclusion of equipment that is obsolete after 5 years.

- ⇒ How does the Commission envisage a situation where the beneficiary receives aid in the last year of application of the aid scheme?

Closing remarks

TBER Final provision

Article 20 – Evaluation

BE would ask the Commission to clarify article 20 on the *ex post* evaluation.

This evaluation must be delivered within 9 months before the end of the aid scheme. However, if the scheme is less than 5 years, there is a real risk of lack of samples to produce a relevant *ex post* analysis within 9 months before the end of the aid. → What about the requirement to use an external entity to carry out this analysis?

Article 22 – Transitional provisions

Is retroactivity, in §1, without limit of time?

Appendix to TBER

Taking into account 80/20 distribution of our customers (inland shipping) and the SME definition included in appendix 1 to the (draft) Regulation (TBER), BE believes that not only SMEs, but also larger companies can make good use of state aid, as the inland waterway sector as a whole is subject to major challenges and difficulties. It is also very difficult, if not impossible, for the larger companies to green the fleet.