

## **Position Paper**

Brussels, 18 September 2024

# **LMT Guidelines and TBER public consultation – CER's reply**

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## **1. General remarks**

The Community of European Railway and Infrastructure Companies (CER) welcomes the publication of the draft Land and Multimodal Transport Guidelines and Transport Block Exemption Regulation (hereinafter "LMT Guidelines" and "TBER" respectively) and thanks the European Commission for the opportunity to share its Members' views.

The LMT Guidelines, with the new categories of aid introduced, consolidate the substantial Commission practice on the application of Article 93 TFEU and better reflect the reality and financing needs of an increasingly complex and digitalized railway sector which faces strong competition by road transport. On the other hand, the TBER is an important and long overdue instrument of simplification that will streamline the granting of aid while decreasing the administrative burden for Member States wishing to support rail.

CER especially welcomes the new categories of aid to launch new commercial connections, aid to rail service facilities and private sidings as well as the introduction of guidance on how to design freight PSOs. CER also welcomes the new rules set forward in regard to interoperability aid, especially the overall higher compatibility and exemption thresholds, specifically the higher aid intensities reserved to the key digitalisation technologies ERTMS and DAC. Such thresholds accurately address the specific market failures linked to these technologies and at the same time the huge societal benefits of their deployment and are an important signal of the Commission's commitment to them.

Although the drafts represent a very good starting point, there is still space for more ambition and for improvement on the specific points CER wishes to highlight below.

## **2. Aid to reduce the external costs of transport**

CER welcomes the high aid intensities proposed in the TBER and LMT Guidelines for aid exemption and compatibility respectively, especially the possibility for increased aid intensities for aid granted to combined transport operations under the TBER. As we know, rail is the mode of transport with the least cost to society in terms of externalities, but so far, the external costs were not being correctly allocated to rail and other, more polluting alternatives, namely road. From this point of view, the proposed higher aid intensities represent a step in the right direction of levelling the playing field between rail and the other modes. At the same time, we believe that a higher ambition is possible and that the TBER should exempt aid up to 75% of the eligible costs while the LMT Guidelines should consider aid to be proportional up to 100% of the eligible costs.

CER also wishes to express support for the elimination of the threshold relating to the total cost of rail transport.

While the developments recalled above set strong incentives for further shift from road to rail and reduce administrative burden for Member States, CER also wishes to highlight some points of concern raised by the draft LMT Guidelines and TBER.

A first important point for concern is the limitation of aid to reduce the external costs of transport to the maximum distances of 350 km and 800 km for unimodal rail transport and multimodal rail transport leg respectively (para. 96 of the draft Guidelines and Article 10 point 6 of the draft TBER). This limitation appears questionable from a State aid and transport policy perspective. CER would like to underline the following:

- There is no reliable market-based foundation for setting the specific limits proposed. In particular, the limits cannot be derived from the "Impact assessment

support study for the review of the Community Guidelines on State aid for railway undertakings” published by the Commission in 2023. On the contrary, the wide range of break-even distances mentioned in the literature and by stakeholder feedback in the study (see pages 125ff) rather indicates that distance is not the decisive criterion for competitiveness compared to road. From CER’s point of view such thresholds don’t take into account that there is strong competition between road and rail above the maximum distances proposed in the draft. Eurostat data for the year 2022 shows that in the EU even in the distance ranges above 1.000 km, over 300 billion tkm of transport are still provided by road<sup>1</sup>.

- Regarding the maximum distance of 800 km for the rail transport leg in multimodal transport to be within the scope of the TBER, intermodal transport cannot be assumed to be competitive compared to road transport without financial support. The proposal risks hindering the development of new intermodal links and ultimately leading to a reverse modal shift with the transfer of Intermodal Transport Units from rail to road, in marked contrast with the objectives of the European Green Deal.
- In light of these data and considerations, the need for Member States to demonstrate a competitive relationship above the maximum distances proposed (para. 97 of the draft LMT Guidelines), would result in a considerable and superfluous administrative burden. The 800 km breakeven distance would in particular place an unfair extra burden of proof on smaller Member States for whom intermodal traffic is automatically international, and for which the 800km limit is thus inappropriate.

In view of all the above, CER proposes that the Commission eliminate the proposed thresholds altogether.

CER would also like to invite a further reflection on the provision concerning the consequence of potential capacity constraints on the transport infrastructure (para. 98 of the draft LMT Guidelines). This provision is not necessary as Directive 2012/34/EU already provides for a detailed set of rules dealing with congested infrastructure aiming at enhancing capacity where congestion has been detected. Namely, in such case the infrastructure manager carries out capacity analyses and develops capacity enhancement plans. The proposed provision would also be counterproductive in terms of incentivising modal shift from road to rail. This is because in practice capacity constraints of railway infrastructure only concern specific hubs or routes and oblige railway undertakings to take detours, which makes state funding even more relevant due to higher infrastructure costs. Only in the rather theoretical case where the infrastructure capacity of the railway network as a whole is at its limits, state funding would not set any incentives for further shift to rail.

A notable difference between the 2008 Railway Guidelines and the draft LMT Guidelines and a point for concern from CER’s point of view is that the latter do not include a section on aid for infrastructure use (see point 98 (a) of the 2008 Guidelines, that foresaw an intensity threshold of 100% of eligible costs i.e. the difference in infrastructure costs between road and rail). Both the LMT Guidelines and the TBER only mention aid for infrastructure use under the “Aid to reduce the external costs of transport” section (Point 24 and 103 of the LMT Guidelines and Article 10 (3) of the TBER respectively), clarifying that Member States can use aid to reduce the external costs of transport, based on the

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<sup>1</sup> See data available at [https://ec.europa.eu/eurostat/databrowser/view/road\\_go\\_ta\\_dctg/default/table?lang=en](https://ec.europa.eu/eurostat/databrowser/view/road_go_ta_dctg/default/table?lang=en)

external cost methodology, to continue to cover the costs linked to the use of infrastructure. This is however not enough, considering that railway undertakings pay higher charges to use rail network infrastructure compared to the charges road operators pay to use road infrastructure and the difficulty of taking into account externalities in the pricing systems for access to transport infrastructure. This would be especially the case for combined transport operations, where, due to high transshipment costs, the difference in infrastructure use costs is very significant and an aid scheme based on the new LMT Guidelines would result in a lower maximum aid amount than what the current Guidelines allow under infrastructure use aid.

CER proposes reintroducing a dedicated section on aid for infrastructure in both the LMT Guidelines and the TBER. This section should also clearly outline the proportionality criteria for such aid, reflecting the well-established decisional practices developed by the Commission in this regard.

Moreover, the draft LMT Guidelines stipulate that the Commission will only approve operating aid schemes for a maximum duration of 5 years (as opposed to a maximum duration of 10 years for investment aid schemes) to limit any negative effects on competition and trade. CER would like to encourage the Commission to increase the maximum duration of external costs reduction aid schemes. For this kind of aid, a maximum duration of 10 years appears justified by the substantial experience the Commission has with such aid and by a reduction of the administrative burden for the Commission and the Member States. Furthermore, a 10-year duration would provide the beneficiaries with legal and economic certainty for an adequate time necessary considering the high investments needed in railway transport. On the other hand, negative effects on competition seem unlikely. In its 2008 Guidelines the Commission justified the maximum duration of 5 years on the grounds of the "rapid development of the transport sector" (para 97 of the 2008 Guidelines). While such a rationale was valid at the time in the context of the European railway liberalisation, it is no longer applicable to the same extent today in light of the widely implemented liberalisation.

Lastly, with regard to the calculation method used to reduce external costs, the current proposals for the exemption regulation and the Guidelines refer to the 2019 Handbook, that is currently under revision. In order to ensure legal certainty, it would be necessary to make it clearer that once this revision is completed the values used will be those from the most updated version of the Handbook.

### **3. Aid schemes for the acquisition of vehicles for rail transport**

While compared to the 2008 Railway Guidelines the proposed LMT Guidelines and TBER set forth more comprehensive rules on aid for purchasing rolling stock, including freight rolling stock, CER wishes to express concern regarding the limitation of such aid to beneficiaries that qualify as SMEs or fall within the definition of 'new entrants', irrespective of the fact that they qualify as SMEs in the case of the LMT Guidelines. It is also worth mentioning that the concept of 'new entrants' proposed in the draft LMT Guidelines and TBER appears vague and to some extent arbitrary.

The limitation to SMEs and 'new entrants' is discriminatory in so far as it does not take into account that low profitability, and long amortization while operating in a very resource-intensive market is something that concerns all railway undertakings irrespective of their dimension and that companies other than SMEs and new entrants do also experience difficulty accessing finance.

CER believes that for freight rolling stock a wider possibility to access aid for the acquisition of vehicles is necessary. As shown by data collected in the framework of the Impact assessment support study for the review of the Community guidelines on State aid for railway undertakings (European Commission, 2023), that of an ageing fleet and inadequate renewal rate is an issue that concerns disproportionately freight wagons compared to other rolling stock. Another important reason for allowing a wider access to aid for freight rolling stock, is the necessity to make fully effective the proposed new interoperability aid rules regarding the deployment of interoperability technologies, chiefly ERTMS and DAC. In CER's view, the other aids provided for in the LMT Guidelines and TBER and the other Guidelines referred to do not provide adequate options to address these needs.

CER also wishes to point out that the proposed limitation to SMES and new entrants is not in line with recent decisional practice (SA. 64726) which authorised aid up to 30% of the purchase cost of new wagons and up to 20% of new locomotives and freight wagons. The measure was intended for both railway undertakings and leasing companies without limitation to new entrants and to SMEs.

For passenger transport, CER would like to underline its support for aid schemes in favour of acquisition of rolling stock for PSO activities.

Finally, aid is only foreseen in the form of guarantee and CER suggests that more flexibility is given to Member States in the choice of instrument and that it is made possible for aid to also be granted in the form of direct contribution/grants covering the 20 or 30 % of the eligible costs. This will allow the most effective selection of the form of assistance appropriate to the situation.

#### **4. Aid to launch new commercial connections**

Regarding the newly introduced category of aid to launch new commercial connections, CER wishes first and foremost to welcome its introduction. CER also wishes to remark that limiting support only to newly launched commercial passenger rail services over 400 kilometres (art. 11 2 b TBER and point 107 b LMTG) is not appropriate because it discourages the operation of shorter routes, which in smaller countries have a significant share of passenger services.

This will have a negative impact on:

- the development of rail connections, which are more environmentally friendly than road connections, thereby making it more difficult to achieve the goal of reducing CO<sub>2</sub>. There is no doubt that car transport in such sections is competitive with rail connections (commercially viable alternative to transport by rail). This is acknowledged by the Commission itself.
- construction of new rail connections, the need for which is unquestionable in view of the underdeveloped rail network and is a prerequisite for the elimination of the communication exclusion as well as the cutting off of smaller towns from rail connections, which has a hampering effect on economic development in these areas.

Furthermore, CER would like to underline the importance of including in this section of the Guidelines a reminder of the principle of territoriality, which prevents a Member State from financing part of a journey that takes place in a territory other than its own. The Guidelines should specify at the very least that for international journeys, the aid scheme must be

supported by the bordering Member States simultaneously if the aid covers the entire journey.

A scenario that the Guidelines do not address is that in which a new passenger transport service includes a section already served. It is CER's belief that in these instances the best solution is excluding from the aid programme the whole of the existing first part and including only the new portion of the route served.

Finally, the aid should be accompanied by a commitment to maintain the newly established link (for example for a period of 2 to 5 years beyond the launch phase benefiting from the aid): rail transport is based on network effects, including between services, operators, distances and on medium-term projections. The continuation of the aid schemes should be made conditional upon the fulfilment of this condition.

## **5. Aid for the construction, upgrade and renewal of unimodal and multimodal rail and inland waterways transport facilities and private sidings**

As mentioned under point 1, CER very much welcomes the introduction of investment aid for the construction, upgrade and renewal of unimodal and multimodal rail transport facilities and private sidings in the draft LMT Guidelines and TBER.

The only CER suggestion on these points is that the thresholds foreseen in the TBER be increased to cover 100% of the funding gap. This both for interventions where the amount of aid is lower than 3 million euros and for those where it is higher in case of aid to rail service facilities and both for interventions where the amount of aid is lower and those where it is higher than 0.5 million euros in case of aid to private sidings.

## **6. Interoperability aid**

CER welcomes the increased aid intensities proposed in the TBER and LMT Guidelines for interoperability aid for crucial interoperability technologies such as ETCS, FRMCS, ATO, ERTMS and DAC. CER especially supports the possibility for State aid for interoperability investments in case of new rolling stock acquisition, with eligible costs covering the net extra cost of interoperability intended as the difference between the total cost of purchasing the vehicle equipped with such investments, and, on the other hand, the total cost of purchasing the same vehicle or a similar one without interoperability investments.

In order to further incentivise investments in these technologies, CER suggests that the LMT Guidelines additionally allow for covering not only the investment costs, but also the consequential investment-related additional costs of interoperability measures, at least for a transitional period. This would significantly increase the incentives for interoperability measures as the investment-related costs represent a significant part of the overall cost burden, an example being the higher maintenance costs after retrofitting trainsets for ETCS or wagons with low noise brakes. The former 2008 Community Guidelines on State aid for environmental protection provide a precedent for such an approach.

## **7. Aid for technical adaptation and modernisation**

CER welcomes the possibility for funding for technical adaption and modernisation in the rail sector. However, limiting funding to 20% of the eligible costs would significantly

compromise incentives for such measures. This is especially the case where they do not specifically benefit the railway undertaking itself.

CER therefore encourages the Commission to increase the aid intensity up to 50%.

## **8. Transparency of financial flows within vertically integrated companies**

From CER's point of view there is no need for the LMT guidelines to reference or recall existing provisions of EU law on financial transparency. The LMT Guidelines by nature aim at specifying the conditions under which State aid in the transport sector is compatible with the Treaties by way of exception. Compliance with the provisions on transparency of financial flows is already required by EU law in force (Directive 2012/34/EU, Directive 2016/2370 and Regulation 1370/2007).

## **9. Applicability**

In CER's view, the LMT Guidelines should refrain from requesting the amendment of existing aid schemes to bring them into line with the provisions of the new Guidelines (para. 259 of the draft).

Amending schemes causes significant administrative burden for the Member States and the Commission. It also causes uncertainty for the railway undertakings having relied on (and potentially also done investments based on) the legitimate expectation of the unchanged continuation of approved funding schemes. Moreover, it is unlikely that aid schemes which were approved under the current Guidelines might negatively contradict the new provisions. Finally, it is worth underlining that as the current Guidelines only allow for approval of aid schemes for a maximum of 5 years, there is only a very limited temporal overlap of such schemes with the applicability of the new Guidelines.

A possible alternative option could be not to require the amendment of existing aid schemes ending within 12 or 18 months from the date of publication of the LMT Guidelines.

## **10. Conclusion**

The draft LMT Guidelines and TBER represent a first step in the good direction towards putting in place an enabling regulatory framework for railways to get on track to achieving the Green Deal Goals. However, they would benefit from some adjustments and a greater ambition as outlined in CER's contribution.

CER thanks the Commission for taking the points outlined in this position paper into account and stands ready to continue contributing to the process going forward.

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#### **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 78% of the rail network length, 81% of the rail freight business and about 94% 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](http://www.cer.be) or follow us on Twitter [@CER\\_railways](https://twitter.com/CER_railways) or [LinkedIn](https://www.linkedin.com/company/cer).

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