The Voice of European Railways

Position Paper

Brussels, 18 September 2023

Revision of Railway State Aid Guidelines - Update

CER aisbl – **COMMUNITY OF EUROPEAN RAILWAY AND INFRASTRUCTURE COMPANIES**
Avenue des Arts 53 – 1000 Bruxelles | T: +32 (0)2 213 08 70 | F: +32 (0)2 512 52 31 | @CER_railways | E: contact@cer.be | www.cer.be

Revision of Railway State Aid Guidelines

1. Introduction

The Community of European Railway and Infrastructure Companies (CER) would like to share its members' views in regard to the content of the updated text of the "Community guidelines on State aid for railway undertakings" (hereinafter "Railway Guidelines", "Guidelines"), which is currently being developed by DG Competition, and would like to thank the Commission for taking the points outlined in this position paper into account.

In its Communication on "The European Green Deal"[1], the Commission noted that "as a matter of priority, a substantial part of the 75% of inland freight carried today by road should shift onto rail and inland waterways". Similarly, in its Communication on a "Sustainable and Smart Mobility Strategy – putting European transport on track for the future"[2], the Commission noted the need for "decisive action to shift more activity towards more sustainable transport modes (notably […] shifting a substantial amount of freight onto rail", indicating that transport by rail should double by 2050. In line with these policy objectives and considering that their attainment depends on major investments by Member States, the updated text of the Railway Guidelines should make it easier for Member States to support rail transport, thus providing strong incentives for modal shift to rail. The following paragraphs outline CER's vision in regard to which stipulations of the updated text of the Guidelines would be most appropriate to reach these objectives.

2. General remarks

In our view, it is important to note in which political, social, and economic context the current revision of the Railway Guidelines is taking place, and to take these circumstances into account during the drafting process.

Rail fulfils a critical socio-economic function of providing sustainable, energy efficient, socially inclusive, and environmentally friendly transportation. For the EU to reach its climate neutrality goal in 2050, the modal shift from more polluting transport modes to rail has to be urgently accelerated. This should be reflected in the European Commission's approach to State aid.

In the two years of COVID-19 pandemic (March 2020 – March 2022), railway was one of the sectors that suffered the highest losses, accumulating more than 54 billion EUR of revenue losses in EU27, which have been only partially compensated. Thus, the updated text of the Guidelines could provide a specific basis for compensation of the COVID19-related losses of the railway companies, reflecting the specificities of the railway sector.

When revising the Guidelines, the Commission should also, in our view, consider the recent significant rise in energy prices, that has caused the overall costs of rail transport to increase. First with the Temporary Crisis Framework (TCF) and then with the Temporary Crisis and Transition Framework (TCTF)[3] the Commission has introduced an effective but

[1] COM (2019) 640 final of 11.12.2019. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2019%3A640%3AFIN .
[2] COM (2020) 789 final of 9.12.2020. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0789 .
[3] The TCF and TCTF comprise under their Section 2.4 a specific 'Aid for additional costs due to exceptionally severe increase in natural gas and electricity prices'. Several Member States have taken measures to support affected undertakings including RUs under the TCF and TCTF, see for instance the following decisions: SA.104588 as amended by SA.106390, SA.105513, SA.103096 as amended by SA.105084, SA.105458, SA.105405,

temporary instrument to face the crisis, which has, however, revealed a structural vulnerability of the sector that calls for more permanent solutions and a stable and predictable framework to tackle future challenges. Furthermore, these instruments are designed more for small and medium-sized enterprises, setting very low aid ceilings and restrictive requirements which make them less effective for railway undertakings. Therefore, we also suggest to the Commission to consider that the updated text of the Guidelines provides better guidance to Member States on what kind of support could be given to railway undertakings to mitigate the effects of the increase of traction electricity costs, taking into account the specific features of the sector.

Apart from that, railway undertakings will inevitably suffer additional losses in terms of traffic and revenues due to the on-going conflict in Ukraine, which will have a negative impact on the development of EU-Asia rail transport and the international rail transport in general.

Finally, when revising the Guidelines, the Commission should consider the increased importance, in the context of the energy crisis, of energy saving and thus energy efficiency, namely of the 'energy efficiency first' principle. This should be reflected in new Guidelines that enable Member States to easily invest in railways, the most energy efficient mode[4].

3. Presumption of compatibility of interoperability aid and aid for reducing external costs with intensities of up to 100% of the eligible costs

The current text of the Railway Guidelines provides that the necessity and proportionality of the aid for reducing external costs or the interoperability aid will be presumed if such aids do not exceed 50% of the eligible costs; while for such types of aid with aid intensities above 50% threshold the Member States must demonstrate the need and proportionality of the measures in question. This requirement imposes an unnecessary burden of proof upon Member States, having the effect of unnecessarily limiting their interventions to the set limit. For example, out of fifteen decisions issued by DG Competition in 2019-2022 that approved aid schemes for reducing external costs after analysing the aid intensities based on the stipulations of the Railway Guidelines, in every single case the respective Member State has notified the scheme with maximum aid intensities defined at or below 50% of the eligible costs[5]. Presumption of compatibility of the aid for reducing external costs and the interoperability aid up to 100% of the eligible costs would relieve the Member States from the administrative burden of proving the need and proportionality of such aids and, therefore, would promote higher amounts of support to be granted to railways, supporting the EU modal shift objectives.

Regarding the aid for reducing external costs, it should be noted that currently the external costs are not being correctly allocated to the modes of transport in accordance with their level of pollution. As stated by the Commission in its "Handbook on the external costs of transport" (2019), the average external costs of passenger rail transport are 2.8 times

SA.104116 and SA.102841. The TCTF can be found at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2023.101.01.0003.01.ENG&toc=OJ%3AC%3A2023%3A101%3ATOC .

[4] Rail is seven times more energy efficient than road. See CER's factsheet 'Railway to a green future', available at: https://www.cer.be/cer-facts-figures/railway-to-a-green-future?highlight=WyJyYWlsd2F5IiwidG8iLCJhIiwiZ3JlZW4iLCJmdXR1cmUiXQ== .

[5] See the following decisions on State aid: SA.100486, SA.62208, SA.62018, SA.59448, SA.60383, SA.58046, SA.55507, SA.55025, SA.54990, SA.51559, SA.51714, SA.62800, SA.57886, SA.53615, SA.55912.

lower than for road (without congestion), and 3 times lower than for aviation. For freight transport, the average external costs for road freight transport are 2.6 times higher than for rail (including congestion - 3.2 times higher). Member States should be incentivised to compensate this imbalance in full. Therefore, the compatibility of the aid for reducing external costs with aid intensities of up to 100% of the avoided externalities should be presumed, and this would encourage Member States to provide such level of funding. Only the aid schemes covering up to 100% of the difference in external costs would create a level playing field between different modes of transport, as well as they would adequately support the necessary shift to rail, in accordance with the above-mentioned ambitious targets set out in the Communication on a "Sustainable and Smart Mobility Strategy". Research conducted in the framework of an external study commissioned by the Commission's DG COMP to support the review process[6], found that, when it comes to rail freight, the differential of external costs between road and rail for the majority of EU countries is not effectively addressed by the current 50% threshold[7] and thus not enough to make rail competitive vis-à-vis road and to incentivize modal shift.

Data proving the lower external costs of rail abound, making the current need for Member States to provide a reasoned and quantified comparative cost analysis a pointless duplication. Recent and up-coming developments in EU legislation offer arguments to support this[8].

Finally, in regard to the interoperability aid, the need for higher aid intensities has been recognised in the established Commission's decision-making practice. In several cases[9] the Commission has approved the interoperability aids related to ETCS/ERTMS with aid intensities of 85%-100% of eligible costs. In these decisions the Commission concluded that such aid intensities should be regarded as necessary and proportionate due to the exceptionally high investment costs necessary to deploy ETCS/ERTMS. Besides, it could be noted that the funding of the ETCS/ERTMS benefits the society as a whole, and in a much lesser extent the rail transport services operators as such. Presumption of compatibility of the interoperability aid with aid intensities of up to 100% of the eligible costs would allow Member States to provide adequate public funding for deployment of ETCS/ERTMS easier and faster, by eliminating the redundant step of demonstrating the need and proportionality of higher aid intensity in every single case.

[6] Impact assessment support study for the review of the Community guidelines on State aid for railway undertakings (from now on 'the support study'), available at: https://competition-policy.ec.europa.eu/system/files/2023-03/KD0423349enn_railway_guidelines_final_report.pdf .
[7] See pp. 154-155 of the support study, especially Figure 42 on p. 154.
[8] The on-going negotiations of the new Energy Taxation Directive (ETD) might be mentioned as proof of what is being argued. In one of the latest compromise texts, in fact, a limited exemption for the price of electricity (=0€ until 31/12/2027) for rail transport of goods and passenger is foreseen following an amendment by the Council Presidency. Considering that one of the explicit objectives of the ETD revision is to ensure that the taxation of different energy sources reflects the externalities they produce, it can be argued that the proposed exemption is itself a recognition of the lower external costs or rail and that no further proof should be requested of Member States. Another example is the green Taxonomy the EU is gradually putting into place and that covers most rail activities. From January 2023 reporting obligations started applying to RUs, that already have experience reporting under voluntary green bonds schemes and the Non-Financial Reporting Directive, on the Taxonomy alignment of their activities for the two environmental objectives of climate change adaptation and mitigation. This is another reason why asking Member States to provide an analysis is redundant. When the activities subsidized, as is the case for rail, are Taxonomy eligible and reporting Taxonomy alignment, the reported alignment should be the base of a simplified state aid assessment: alignment beyond set thresholds could justify a presumption of compatibility of the aid or at least dispense Member States from the need to provide a cost analysis.
[9] See in particular the following decisions on State aid: SA.100432 approving aid with intensity of up to 100% of the eligible costs, SA.44621 approving aid with intensity of up to 85% of eligible costs, SA.55451 approving aid with intensity of up to 90% of eligible costs, SA.58908.

4. At least twice higher threshold for presumption of compatibility of aid for rail infrastructure use and aid for reducing external costs in relation to total cost of rail transport

In the present text of the Railway Guidelines the threshold for presumption of compatibility of the aid for rail infrastructure use and the aid for reducing external costs is set at 30% of the total cost of rail transport. We believe that this threshold needs to be raised to at least 60%, also in line with the increasing proposed above of the compatibility thresholds concerning eligible costs. In regard to the aid for reducing external costs, the threshold of 30% of the total cost of rail transport doesn't allow for sufficient compensation of external costs savings achieved by the RUs, and, hence, doesn't encourage further external costs savings in transport sector, and, therefore, such threshold limits the possible benefits to society. The inadequacy of the 30% threshold to incentivize modal shift from road to rail has also been pointed out by replies to the Commission's public consultation on the revision of the Guidelines that was open from 22 December 2021 until 16 March 2022[10].

Besides, the aid that amounts to only 30% of the total cost of rail transport is insufficient to compensate for the imminent extensive cost burden that the rail freight sector faces. Rail transport is characterised by extremely high fixed costs, which account for over 80% of its total costs. This means that the traffic volumes that are necessary to break-even are far greater for rail transport (than for road transport). Yet, rail transport has much lower externalities: rail represented only 0,4% of the CO2 emissions from all transport modes in the EU27, while road transport accounts for 71,7% of the CO2 emissions from all transport modes in the EU27[11].

In accordance with the current text of the Guidelines, for aids for rail infrastructure use and aids for reducing external costs with intensities above 30% of the total cost of rail transport the Member States must demonstrate the need and proportionality of such measures. This requirement creates a very high administrative burden for the Member States and likely results in Member States strictly limiting the amounts of funding to this set threshold. For example, out of fifteen decisions issued by DG Competition in 2019-2022 that approved aid for reducing external costs after analysing the aid intensities based on the stipulations of the Railway Guidelines[12], only in two cases, which both related to the same aid scheme[13], have the respective Member States notified the scheme with higher aid intensities than the set threshold (namely, intensity of 40-50% of the total cost of transport).

Besides, the desired increase of the threshold for presumption of aid compatibility to up to 100% of eligible costs, which is described in the previous paragraph, should go hand in hand with the increase of the threshold for presumption of aid compatibility in relation to the total cost of rail transport. If the threshold for presumption of aid compatibility in

[10] 80% of the respondents (56 out of 70) deemed this threshold too low. One notable example mentioned by the Commission's support study is that of a respondent pointing out that, in some countries, track access charges alone represent 30% of total costs of railway transport. The consultation and its summary report are available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13154-Rail-transport-revision-of-State-aid-guidelines/public-consultation_en .

[11] Commission Staff Working Document Accompanying the document report from the Commission to the European Parliament and the Council Seventh monitoring report on the development of the rail market under Article 15(4) of Directive 2012/34/EU of the European Parliament and of the Council, SWD/2021/1 final, p. 17: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021SC0001&from=EN .

[12] See the following decisions on State aid: SA.100486, SA.62208, SA.62018, SA.59448, SA.60383, SA.58046, SA.55507, SA.55025, SA.54990, SA.51559, SA.51714, SA.62800, SA.57886, SA.53615, SA.55912.

[13] SA.51559, SA.51714.

relation to the total cost of rail transport is not increased to at least 60%, the mere increase of the threshold for presumption of aid compatibility to up to 100% of eligible costs would be ineffective and would only have a very limited effect. For external cost reduction aid for rail freight, this correlation has been substantiated by quantitative analysis conducted by the Consortium responsible for the above-mentioned support study[14].

Against this background, we believe that the current threshold for presumption of aid compatibility in relation to the total cost of rail transport should be at least doubled, i.e., increased to at least 60% of the total cost of rail transport.

5. Simplifications: cutting red tape

In order to support rail transport as the greenest land transport mode, it should be made easier for Member States to provide funding for railways. In particular, it should be avoided that the Member States are required time and time again to provide substantiated lengthy analyses in regard to the points that have already been sufficiently proven on a number of occasions.

For example, eligibility of aid schemes providing support for rail should not be conditioned on showing reduction of external costs by a certain percentage compared to a road only alternative. Estimation of the reduction of external costs by using rail by a certain percentage compared to road is already widely reported by the various Commission's studies and reports. There is sufficient data demonstrating that railway transport has significantly lower external cost than the road transport. All studies confirm that the external cost gap between road and rail transport is persistent. Therefore, the obligation to prove this fact in the context of a specific aid scheme constitutes unnecessary administrative hurdle, which at the least delays the moment when the funding is actually made available for the undertaking.

The same can be said about the aid eligibility criteria requiring a proof that the rail transport services are not fully competitive vis-à-vis alternative road transport services. It is a well-established fact that the railway undertakings in the freight sector are struggling with competitive disadvantages due to higher costs compared to road transport. There is enough data already confirming that road transport has lower operational costs (but higher external costs), and hence can offer lower prices and delivery terms to the clients, giving it a competition distortive advantage compared to railway transport. Demanding proof of lacking competitiveness on the side of rail transport leads to unnecessary administrative burden. In our view, the ongoing revision of the Guidelines should encourage and therefore make it as easy as possible for Member States to provide the necessary funding for railways. Hence, such redundant compatibility conditions for aid should not be upheld in the updated text of the Guidelines.

6. Specific guidance on State aid to rail service facilities

In our view, the revised text of the Railway Guidelines should also include specific provisions in regard to State aid to passenger and freight service facilities. Passenger service facilities (for example, ticket offices, waiting rooms, commercial points inside the railway station buildings) should be supported through public financing as it wouldn't be possible to provide comfortable, full-fledged travel services without them. In cases where

[14] See support study, p. 152 especially Figure 41 on page 152.

such financing involves State aid, this should therefore at least be compatible aid. Evidence on freight facilities collected by the already mentioned support study suggests that their number and capacity is insufficient to support modal shift and subsidies might be needed[15]. Presently, however, the funding of service facilities is not addressed in a clear and transparent way by the EU rules, which may introduce uncertainty in case of financing infrastructural projects with public money, where service facility objects are part of their scope.

We believe that State aid for rail service facilities should be allowed up to 100% of the funding gap, ideally with presumption of compatibility of such aids with aid intensities of up to 100% of the eligible costs. Such approach would be in line with the established decision-making practice of the Commission. In a number of decisions, the Commission has approved aid schemes that finance construction or upgrade of rail service facilities with aid intensities of up to 75%-100% of the eligible costs[16]. In these cases, the Commission found such high aid intensities necessary and proportionate due to the fact that, while such projects require high investments, there is a risk that the required construction/upgrade of respective service facilities would not take place with lower aid intensities, due to the lack of willingness to invest on the part of private investors.

7. Clearer and more flexible provisions on funding for the purchase and renewal of rolling stock

It is our view that the revised Guidelines should make it easier to subsidize purchase and retrofitting of rolling stock, provided that at the same time competition distortions are avoided. In fact, evidence shows that at the current rate of renewal there will be a net reduction in the size of the rolling stock fleet (freight wagons, passenger and tractive rolling stock)[17], that the modernization rate is also unsatisfactory and that constraints both to access to new rolling stock and to the adoption of new technologies are mainly financial[18]. Against this backdrop, CER welcomes the recent amendment of the General Block Exemption Regulation (GBER)[19] that exempts form notification investment aid for the acquisition of 'bimode' (dual power) and zero direct tailpipe CO_2 emissions rolling stock and the retrofitting of rolling stock to make it so[20]. However, it does not seem sufficient to provide adequate support since it establishes a restrictive definition of eligible costs and a very low aid intensity outside of a competitive bidding process.

The current provisions of the Railway Guidelines on aid for purchasing or renewal of rolling stock lack clarity, in particular in regard to their scope. In our view, going forward this ambiguity should be corrected, and the updated text of the Railway Guidelines should explicitly cover the aid for purchase, renewal and retrofitting of freight rolling stock as well. More than 50% of the freight wagon fleet in Europe in 2019 was more than 30 years

[15] See pp. 27-28 of the support study. The study suggests subsidies might especially be needed to keep non-profitable service facilities in operation and avoid a negative feedback loop.
[16] See in particular the following decisions on State aid: SA.64546 approving aid with intensity of 99.6% of the eligible costs, SA.64434 approving aid with intensity of approximately 74% of the costs, SA.52716 approving aid with intensity of 83.89% of the eligible costs, SA.46341 approving aid with intensity of 80% of the eligible costs.
[17] Support study p. 56 specifically Table 11.
[18] Support study pp. 58 to 60. Subsidies for first movers with high aid intensities covering the transition period are suggested as a possible solution to incentivize the retrofitting of innovative and clean technologies.
[19] Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02014R0651-20210801 .
[20] See the new Article 36b, 'Investment aid for the acquisition of clean vehicles or zero emission vehicles and for the retrofitting of vehicles', introduced in the GBER by the recent amendment.

old[21] and thus close to the end of its useful life and, as mentioned above, the current renewal rate is sub-optimal, which is not compatible with the EU's goal to double rail freight traffic by 2050. While freight rolling stock is generally available, measured against high costs and low profitability in the rail freight transport sector it remains to be too expensive. This results in the railway undertakings focusing only on the most profitable services and leaving a substantial part of transport demand to road. Funding schemes for purchase and renewal of freight rolling stock would help mitigating this market failure.

The explicit inclusion of freight rolling stock in the revised Guidelines is especially needed for the deployment of Digital Automatic Coupling (DAC), an innovative technology that will increase safety and efficiency, increase capacity and boost the digitalisation of rail freight, thus making rail transport more attractive and overall contributing to the shift to rail. DAC is a major investment and as foreseen in the European DAC Investment Plan[22], support at different levels, including national support through State aid, is needed for its successful deployment. Namely, rolling stock aid for first movers could be used to balance the possible competitive disadvantage they would find themselves in and reduce the risk implicit in deploying this new technology. As significant investments in new rolling stock are needed in the near future, it is of the utmost importance to put in place through the Guidelines an enabling framework that will offer predictability to investors and be in force when DAC deployment begins.

Besides, while in our view it could be justified to subsidise the purchase of rolling stock by leasing companies, it would be important to have it alongside the possibility to provide such aid to railway undertakings directly. In the rail freight sector, the demand for affordable rolling stock is best served if the railway undertakings can choose between purchasing and leasing rolling stock, so it should be possible for Member States to support each of both models. For example, leasing of the rolling stock addresses potential transitory necessities for rolling stock by railway companies, e.g., for ETCS or DAC refurbishments and downtimes of owned rolling stock due to refurbishments.

Railway undertakings also still face difficulties in having access to passenger rolling stock, despite the possibilities provided by Regulation 1370/2007/EC. In particular, it could be highlighted that, there is a need of state funding for the long-distance passenger transport equipment, i.e. new or existing rolling stock for international cross-border services with multisystem technology. The supplier market in regard to such rolling stock is very limited and the Member States' standards vary greatly all-over Europe. The latter leads to high investments when providing cross-border services, which hinders railway undertakings from providing such services. Therefore, it is important that the updated text of the Railway Guidelines outlines a straightforward and clear framework for the Members States on how to design compatible support schemes to finance purchase or lease of passenger rolling stock.

Lastly, in the current context the clarification of the rules on aid for the purchase and the renewal of rolling stock and the expansion of their scope as detailed above, is also necessary to give legal certainty to MSs and ensure that they can most effectively implement the REPowerEU chapters of their National Recovery and Resilience Plans (NRRPs)[23].

---

[21] Support study pp. 55-56, see specifically Figure 15 on page 55.

[22] Available at: https://rail-research.europa.eu/publications/european-dac-investment-plan/#:~:text=This%20report%20provides%20an%20investment,overall%20sustainable%20and%20digital%20strategy .

[23] The March 2023 Commission Guidance (COM 2023/C 80/01) on the drawing of such chapters explicitly includes, when listing examples of measures aimed at supporting zero emission transport, investments or reforms for the

8. Block exemption for aid for coordination of transport and PSO compensation for rail freight

CER welcomes the adoption by the Council of the European Union of Regulation 2022/2586 of 19 December 2022 on the application of Articles 93, 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of State aid in the rail, inland waterway and multimodal transport sector[24]. This Regulation allows the Commission to block exempt aid for coordination of transport and compensation of public services in the freight sector. The exemption from notification of aid for coordination of transport will reduce the administrative burden for the Member States and make it easier for them to provide support for the rail sector. This will in turn promote further modal shift from road to rail.

Furthermore, the exemption from the notification requirement should include aid for service facilities' operators, especially when they concern service facilities falling within the scope of Directive 2012/34/EU, without notification threshold or with higher notification thresholds in order to be suitable for investments in service facilities.

CER especially welcomes the bridging of the gap between passenger and freight PSO services. In our view, there should be a clear legislative framework in place outlining how to establish public service obligations in rail freight transport and to provide respective compensation, for instance to support single wagon rail freight transport, combined transport or freight transport in geographical areas characterised by market failure (e.g. where the cost for rail infrastructure use is particularly higher than the cost for road). Single wagon load transport is especially in need of support as recent analysis found that, with few exceptions, its costs generally exceed revenues, making it unprofitable and uncompetitive against road and intermodal transport[25]. Therefore, we believe that to ensure full transparency and predictability, the new legal framework should contain a clear guidance for the Member States on how to design the PSO compensation for rail freight services in accordance with the State aid rules.

Against this background, CER would like to urge the Commission, as the Council Regulation empowers it to do, to swiftly adopt the block exemption regulation that will make the exemption effective in the rail sector. CER stands ready to cooperate with its input and knowledge to the process.

9. Specific rescue and restructuring rules for railways

deployment of, among others, 'zero-emission rolling stock for rail as well as rail infrastructure and related subsystems for zero-emission rolling stock'. In other words, the acquisition and retrofitting of rail rolling stock is an important measure that Member States are called on to deploy to successfully implement the REPowerEU chapters of their NRRPs. This, coupled with the fact that, as per recital 8 of the Recovery and Resilience Regulation, state aid rules and procedures fully apply to the measures funded by the Recovery and Resilience Facility, makes the clarification of the rules on rolling stock aid especially poignant and urgent to provide the necessary legal certainty and guidance to Member States when implementing their NRRPs.

[24] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R2586 .

[25] Support study pp.106-108.

We believe that specific rules on rescue and restructuring of railway undertakings in difficulty should be included into the updated text of the Railway Guidelines in order to cater for the specificity of the rail sector, such as, in particular, the long-term investments as well as the competition with the more polluting transport modes that don't internalize their negative externalities. The need for such specific Guidelines has all but increased following recent developments that have exacerbated the difficult situation some undertakings versed in: first the COVID-19 pandemic, that, as mentioned in paragraph 2, caused more than 54 billion EUR of revenue losses in EU27 for the rail sector, and then the rise in energy prices, that over the last year has dramatically increased RUs 'operating costs.

The horizontal Rescue and Restructuring Guidelines[26] ("R&R Guidelines") are difficult to be applied to railway undertakings and require some special derogations. Due to the distinctive features of the rail transport, such as long lead times, significant investments, high fixed-costs and inflexible labour market, the restructuring of railway undertakings in difficulty should be determined according to sector-specific criteria.

The horizontal R&R Guidelines do not sufficiently take into account that the rail transport market is in some parts still characterized by market failures, which need to be addressed differently. Applying the R&R Guidelines to the railway undertakings could even result in the discontinuation of vital transport services. Namely, the R&R Guidelines contain the condition to withdraw from loss-making activities, which, applied to a railway undertaking, could result in a termination of certain services which are not cost-covering due to particularly higher cost burden compared to road transport (e.g., Single Wagon load services).

Besides, the significant own contribution of at least 50% of the restructuring costs from the own resources of the aid beneficiary imposed in the R&R Guidelines also constitutes a bad fit for the railway undertakings, as it does not take into account the financial challenges of the rail transport market with its particularly high-cost burden. To appropriately reflect the specificities of the sector, the minimum required contribution of a railway undertaking in question should be limited to the maximum of 10% of the total restructuring costs.

Furthermore, such conditions for restructuring outlined in the horizontal R&R Guidelines as the "one-time, last time principle" and the necessary structural measures (divestments of assets and reduction of business activities) are poorly-matched for the railway sector. The "one-time, last time principle" doesn't account for the fact that some railway undertakings struggle with a legacy of unfinished restructuring, along with a backlog of important system innovations. Further opportunities to restructure and/or innovate may be justified to ensure the long-term viability of the railway undertakings, as well as to make them better prepared to compete on the market on their own. Moreover, demanding structural measures in a restructuring scenario in the transport market could easily jeopardize the outcome of the restructuring. In contrast to other sectors, the successful train operations depend on the networks, which require a minimum scope of assets and business activities.

[26] Communication from the Commission — Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty; available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014XC0731%2801%29 .

10. Provisions on governing the financial flows within vertically integrated companies already exist

The Commission's public consultation on the revision of the Railway Guidelines contained, among others, a section on the financial transactions concerning railway undertakings. In particular, the questionnaire inquired whether there are any difficulties in application of the Commission Notice on the notion of State aid[27] to the vertically integrated railway companies, as well as whether there are any risks of cross-subsidisation between commercial and non-commercial activities of such companies.

The sector recognizes the possible benefits of providing further guidelines to the Member States on which of the two sets of rules should be applicable in each case, - the general legislation on transparency of financial relations between the Member States and public undertakings or the rail sector-specific financial transparency requirements. As the current version of the Guidelines was published before the adoption of the Directive 2012/34 establishing a Single European Railway Area, the Guidelines would benefit from alignment with the provisions on independence of railway undertakings set out in Articles 4-6 Directive 2012/34/EU, including a proper separation of accounts. It should, however, be noted that the Commission Guidelines are of a non-binding nature and therefore the updated text of the Guidelines may not establish any new legal obligations in addition to the existing comprehensive set of rules on transparency of financial flows already provided for by the EU law. Directive 2012/34/EU and Regulation 1370/2007 already pursue the absence of any cross-subsidisation between the commercial activities of the railway undertakings and those subject to public service obligations. This is especially the case with regard to the existing transparency obligations of Directive 2016/2370 for vertically integrated companies. The risk of cross-subsidisation between commercial and non-commercial activities of vertically integrated railway companies might exist in the situation when Member States do not correctly transpose and/or apply the existing comprehensive set of rules. Therefore, the strict compliance with the formal and accounting separation obligations imposed by the existing regulation is a key.

[27] Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XC0719(05) .