FLORENCE SCHOOL OF REGULATION

ROBERT SCHUMAN CENTRE

# POLICY BRIEF

## EUROPEAN TRANSPORT REGULATION OBSERVER

## Revision of the railway state aid guidelines

Rail transport and inland waterways are crucial to achieve the objectives outlined in the Green Deal agenda. These aims include a 55% reduction in greenhouse gases by 2030 and attaining climate neutrality by 2050. The Railway Guidelines play a fundamental role in this context, enabling support for the transition to more sustainable transport modes. They aimed to endorse the Member State investments necessary for the completion of the single transport area, and the green and digital transitions (together with other state aid guidelines).

Since their adoption in 2008, around 75 measures have been found compatible with the Treaty based on the Railway Guidelines, particularly concerning state aid for the coordination of transport, with a total budget of over EUR 9 billion to encourage a modal shift from road to rail freight transport. The main objective of the Railway Guidelines was to accompany the sectoral policy on full liberalisation of the rail sector and completion of a single European rail market in which full interoperability is ensured. Furthermore, the Railway Guidelines aimed to facilitate the restructuring of a sector marked by significant indebtedness.

In 2020, however, a fitness check of these guidelines showed that they were outdated. EU policy priorities in the Green Deal put more

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emphasis on a modal shift to modes of transport which are less polluting than roads, such as rail and inland waterways. This modal shift should contribute to meeting the emissions reduction target set for 2050. In parallel with this, rail markets had now been fully liberalised following the adoption and implementation of the 4th Railway Package (which was not the case when the 2008 Railway Guidelines were adopted). Hence, the Commission launched a revision of the state aid rules applicable to rail transport to bring them into complete alignment with the Union's key priorities. The revision aims to support the shift towards more sustainable modes of transport and implement additional procedural facilitations for aid measures in the field of greener land and intermodal transport with block exemptions. The Commission also aims to protect the level playing field in the railway market. In pursuit of these aims and in line with Article 93 of the Treaty, the European Commission is also considering adopting block exemption regulations in the field of land transport.

Anticipating the publication of the State Aid Guidelines, the European Commission's DG COMP and the Florence School of Regulation Transport Area hosted a forum entitled 'Revision of The Railway State Aid Guidelines,' which took place on 16 April 2024. It tackled issues relating to operating aid, aid for investment in infrastructure and aid for investment in mobile equipment. Here, we summarise the main takeaways from the second workshop.

## A comment by Matthias Finger and Juan Montero, Florence School of Regulation – Transport Area

The current Railway State Aid Guidelines stem from a time (2008 and before) when pressure to decarbonise transport was much less acute and when the railway sector was less fragmented than it is today. Both these factors led to a more complex situation in terms of state aid and market distortion, which are two of the arguments for a much-needed revision of the State Aid Guidelines. In this opinion piece, we examine what state aid means in an age of a politically desired modal shift to rail, yet in the context of a much more complex railway industry.

For a start, the basic categories of railway aid remain valid. There is first the distinction between operating aid and investment aid. Operating aid is particularly prone to market distortion, but there is strong political pressure to accelerate a modal shift to rail, and that pressure easily translates into operating aid, especially start-up aid. There are of course already many public service obligations (PSOs) in the railway sector, especially in regional transport. PSO compensations are not considered state aid, yet they need to be factored into the overall distortion picture. There is also the so-far unsolved question as to whether single wagon load transport should be eligible for PSO compensation or for operating aid, and it may end up being both, making competition regulation even more complicated. There is also the question of track access charges (TACs), which in principle do not fall under the State Aid Guidelines for railways. However, there is aid for mitigating track access charges (TACs), which is a particularly tricky issue given that TACs differ so much from one country to another and have very different objectives, many of which are unrelated to the modal shift. Nevertheless, aid to mitigate TACs is particularly relevant for cross-border operations, be they in freight or in the newly emerging night trains.

Second, there is investment aid, which in principle is easier to deal with from a competition regulation perspective. Here, one has to distinguish between rolling stock aid and infrastructure aid. Infrastructure aid is easier to deal with from a market distortion point of view, as typical railway infrastructure (e.g. tracks and signals) is generally financed by a combination of public grants and track access charges and is not considered state aid (but then see the point above). Some is also financed by CEF as part of the TEN-T. Trickier are so-called 'superstructures,' namely service facilities (e.g. multimodal terminals), which may be supported financially by governments to facilitate market entry and the modal shift. However, here it is mostly the absence of investment in facilities that creates market distortion, i.e. that prevents market entry, something that does not really fall under the State Aid Guidelines. As for rolling stock aid, a distinction can be made between rolling stock per se, digitalisation (notably digital automatic coupling) and aid to accelerate the European Rail Traffic Management System (ERTMS), where there is a general consensus that aid is needed. But then, is aid for the deployment of the ERTMS rolling stock or infrastructure investment aid?

From the above, one can easily see how interrelated are all the different types of state aid in railways. Of course, this interrelatedness stems from the fact that railways have historically been a (vertically) integrated system, yet a system which has become increasingly, and sometimes artificially fragmented during the course of railway liberalisation since the 1990s. However, this systemic nature is only set to increase in the future owing to technological developments especially in the area of digitalisation, in which the different elements of the system (rolling stock and infrastructure) and the different activities that make this system work (from planning to maintenance to operations) are increasingly interdependent. This systemic approach is also increasingly required because of the modal shift (which is needed for decarbonisation purposes) and therefore modal competition, like the competitiveness of rail vis-à-vis the other transport modes, very much depends upon rail's ability to operate as an integrated system. For example, investors are certainly willing to contribute to the modal shift, but they will only invest if an effort in one part of the system benefits the competitiveness of the entire rail system so as to increase traffic and therefore their returns. And private investors are badly needed, especially in an industry like rail, which has long relied on state aid.

Sector-specific railway regulation has important loopholes in instruments to coordinate the rail system, and in general in harmonisation across the Member States. State funding is prevalent in all Member States, but the funding takes different forms. For instance, the amounts of track access charges are very divergent across Member States, and the current EU regulatory framework does not guarantee harmonisation. Similar shortcomings exist in state funding of infrastructure managers and service facility operators, PSOs, etc. Too often, state aid notifications are the result of such shortcomings in sector-specific regulation, as in the case of TAC compensation.

However, the current State Aid Guidelines, and more generally ex-post competition regulation, as regulatory policy instruments are ill equipped and ill prepared for such a systemic approach. For example, how can a competition regulator assess market failure if the failure is not necessarily due to one segment in the value chain, but it is of a systemic nature? In other words, what should be done if market failure is not vis-à-vis other train operating companies but vis-à-vis the road or the aviation industry?

While competition regulatory instruments and practices will certainly have to evolve in the light of these new and much more systemic challenges resulting from both technological dynamism and the pressure to decarbonise, one is forced to admit that many of the challenges that now State Aid Guidelines and rail competition regulation more generally face have other roots. In fact, it is as if the State Aid Guidelines and ex-post competition regulation are simply a sticking plaster to compensate for the growing complexity of the railway sector, which itself is the result of fragmentation resulting from its liberalisation and loopholes and shortcomings in sector-specific regulations.

## Main takeaways from the discussion

### By Anouk van der Veer, Ph.D. Candidate at the European University Institute

The 24th Florence Rail Forum took place in anticipation of the forthcoming revised Railway State Aid Guidelines (revised Railway Guidelines or revised Guidelines). At the time of the Forum, the Commission was in the process of fine-tuning the draft version of the Railway Guidelines, which was expected to be published in May for public consultation. The objective is to get the rules right, not just for today but for the foreseeable future.

Europe has developed a multimodal transport system, encompassing railways, motorways and inland waterways, to meet the transport demands of EU citizens. At the time of adoption of the Railway State Aid Guidelines (Railway Guidelines or Guidelines) in 2008, the aim was to support the development and modernisation of railway infrastructure and services while ensuring fair competition and compliance with EU regulations. Key objectives included promoting the modal shift from road to rail freight transport, enhancing interoperability, improving service quality and fostering sustainability in the railway industry. These Guidelines have proven effective, with 75 state aid measures having been approved totalling over €9 billion, aimed at encouraging a modal shift from road to rail freight transport.

However, a Commission fitness check of the Guidelines in 2020 revealed that they were outdated and inadequate to meet upcoming challenges. For example, to meet the conditions outlined in the Green Deal, a modal shift in transport needs to take place to modes that are less polluting than roads, such as rail and inland waterways. In the past, road transport benefitted from construction and improvements and regulatory and tax advantages, and it proved to be a highly cost-effective and flexible industry. This trend challenges rail and inland waterways, which have not benefitted from the same competitive advantages, resulting in losses of market shares. Hence, the Commission initiated the revision of the Railway Guidelines to bring them into complete alignment with the Union's key priorities.

The revision aims to restore the balance between modes of transport. In doing so, the revised Guidelines will support the transition to more sustainable modes of transport and streamline aid measures for greener land and intermodal transport. Policy choices will be informed by a comparative assessment of the positive and negative externalities on society. The revised Guidelines are built on the enforcement experience of the 2008 Guidelines but aim to simplify assessments, particularly through land transport block exemption regulations. Moreover, the revised Guidelines will reflect the increasingly integrated character of the industry, involving a broader array of stakeholders, such as inland waterway operators, independent facilities owners, operators and end customers.

Furthermore, the revision aims to ensure fair intermodal competition. This is a particular concern in the railway sector, where incumbent operators still maintain strong market positions. The distinction between the freight and passenger markets is no longer needed as the markets are now liberalised. Instead, the Guidelines will focus on the specific assets used for land and multimodal transport services, and aim to address market failures. In the fully liberalised passenger services market, open access has become the primary method for introducing new services. This necessitates a re-evaluation of existing regulations to accommodate commercial asset use while upholding regulatory frameworks. Challenges may arise from the interaction between public service obligations and open access in both passenger and freight markets. In the freight sector, particular attention will be given to the financial strain faced by operators, especially in segments such as wagonload. Support schemes and public service compensation could be considered to address market failures.

The subsequent three sections cover the specific topics discussed. For each topic, an introduction to the forthcoming revised Guidelines is provided to set the stage, after which the key points in the presentations and roundtable are summarised.

### Operating aid: supporting modal shifts

The question debated was how the Railway Guidelines can support modal shifts in passenger and freight, new services, new connections and innovation in transport organisations.

The discussion was initiated by focusing on the context of operating aid. There is a general aversion to operating aid due to its potential to distort competition. Hence, many guidelines do not foresee its use. The reality is, however, that there is a structural imbalance between modes of transport, which justifies an exception to allow operating aid for land transport. This is in the light of political initiatives such as the Green Deal, the Sustainable Mobility Strategy and policy developments adopted on the basis of these political initiatives such as the 2021 Action Plan on Cross-border Services and the 2023 Combined Transport Directive proposal. Some market developments in need of support were highlighted, such as the relaunch of night train services, emerging alliances in freight services and competition in high-speed rail networks. Recent aid has supported a reduction in track access charges (TACs) and single wagon load (SWL). Despite these efforts, challenges persist. These were particularly exacerbated by the impacts of the COVID-19 pandemic on some operators.

Delving into specific operating aid practices, past guideline practice was discussed and how the revised Guidelines will change it. The Guidelines foresaw two specific types of operating aid: i) railway infrastructure use (track access charges); and ii) a reduction of the external costs of transport, both of which are subject to the additional cap on the total cost of transport. There is a large case practice in the latter category, as it has been applied to other beneficiaries such as inland waterways, intermodal transport with a green leg and start-up aid for new multimodal services. Given the desire of Member States to support the launch of new services, the revised Railway Guidelines will codify such practices. Applying the Guidelines to second category cases is not without difficulties, especially regarding the two thresholds. Accordingly, the revised Guidelines will foresee these difficulties. Moreover, the revised Guidelines will strive to balance aid in the interest of rail users with aid in the interest of operators. The aid will not prioritise road-only options over green transport solutions like rail, and overall it will incentivise a modal shift to keep traffic off the road.

The pressing need for the revised Guidelines to better support a modal shift in transport was underlined in the debate. Despite the ambitious aims of the Green Deal, the expected growth in the rail modal share has not yet materialised. To further achieve the desired modal shift and reduce CO2 emissions, significant investments are required together with supportive Railway Guidelines. An additional problem is that the existing infrastructure is used in an inefficient manner, so investments are needed in innovative technologies to make the railway system much more efficient. A number of other challenges remain such as low interoperability due to highly fragmented rail systems in Europe, investment backlogs in infrastructure and rolling stock, and the need for a level playing field between road and rail. Moreover, economic developments starting with COVID and the geopolitical situation causing rising electricity and production prices pose challenges.

Inland waterway transport plays a vital role in achieving a modal shift. This shift would benefit from an expansion of the scope of the Railway Guidelines to include inland waterways, while noting that the sector operates differently from railway transport. Inland waterways are characterised by small and medium-sized enterprises (SMEs) that have huge investment needs in terms of cleaning their fleet. It is desirable for the revised Railway Guidelines to tailor aid to the needs of SMEs. The Guidelines could then facilitate fleet modernisation, infrastructure development and energy transitions. Overall, the presentation called for targeted measures to accelerate innovation and facilitate the widespread adoption of clean technologies and digitalisation in the inland waterway transport sector.

The aid should, however, not go so far as to undermine market competitiveness. The revised Guidelines should strike the right balance between aid and competition, so that state aid only captures market or regulatory failures. Some argued that operational aid should be limited to cases i) of crisis where the costs cannot be expected to be carried by the user, so compensation is needed, and ii) in which all options have been exhausted to make the service viable under open access conditions, thus removing any barrier. Some specifically pointed to the need for energy subsidies, against the background of the current energy crisis. Moreover, for aid to be appropriate it has to be transparent, non-discriminatory and open to all actors. Two examples were used to show the difference between applying state aid in more and less competitive markets. Combined transport operates in a competitive market with transparent aid distribution often benefiting multimodal operators. However, the market for single wagon traffic is less competitive, so aid should be granted in a targeted manner while guaranteeing transparency and non-discrimination. Moreover, aid should avoid unintended consequences like market distortion and cross-subsidisation with other freight types like block train traffic. The revised Guidelines should include criteria to evaluate aid suitability, ensuring that resources support the entire rail freight market rather than favouring specific segments, and ultimately aiming for effective and equitable aid distribution. It was commented that a true level playing field should treat all sustainable modes of transport equally, so the same conditions apply and the market and competition are not distorted.

The revised Guidelines should improve clarity in a few areas. First and foremost, the process should be simplified. Moreover, clarity as to what is possible and a clear framework for what is state aid, for example in the case of track surcharges, would be beneficial. The revised Guidelines should furthermore reflect the diversification of market players in the new reality of the market today. Railway transport is no longer only provided by national incumbents but also by new entrants. These entrants encounter significant hurdles, such as a regulatory burden that dates back to incumbent times. These entrants also benefit from competition rather than aid. A suggestion was made to enable entry by investing in the interoperability of the network, which would make it easier to operate.

Finally, the revised Guidelines should embrace new technologies. The outdated Guidelines hinder innovation, as a result of which railway transport is lagging behind in adopting new technologies. Instead of operational aid supporting infrastructure, the modal shift could be supported by aid driving innovation and future transformation, such as autonomous driving, remote control and battery operated wagons. Moreover, data sharing should be supported. Some argued, however, that a line has to be drawn between operating aid and aid to innovation. Some took the position that operating aid should only be used to reduce operating costs and modernisation of transport could be achieved with instruments other than the Guidelines.

### Investment aid: new infrastructure

The question debated was how the Railway Guidelines can support new infrastructure, in particular service facilities like multimodal terminals, terminals in ports and maintenance facilities.

Both private and public investments in infrastructure are crucial to better equip the network. The revised Guidelines aim to clarify the concept of infrastructure, differentiating between pure infrastructure and service facilities. Pure infrastructure is something that cannot be duplicated, like bridges. There is a natural monopoly in those cases in which financing does not constitute state aid. The other type of infrastructure is service facilities that can be duplicated, like private sidings, and it falls within the rules of state aid. Furthermore, the revised Guidelines will provide more clarity on which assets can receive financing. Remaining questions revolve around the usefulness of a catchment area or whether a more useful concept exists, the proportionality of the aid and the effect on competition to avoid, for example, overcompensating or unnecessarily duplicating infrastructure.

The discussion underlined the importance of concepts like the catchment areas and the density factor, but these are complex to define. The measurement of demand and the ability of existing infrastructure to respond quantitatively and qualitatively to that demand remain impending challenges, suggesting a need for clearer guidance on aid distribution. Furthermore, concerns about the shareability or substitutability of infrastructure should be considered when establishing aid schemes, especially about ensuring equitable access for facility owners. A final comment regarding catchment areas was that potential areas should be considered rather than historical ones. Proportionality can be managed by imposing strict criteria and conducting post-assessment controls on funding gaps. Finally, concerning competition, infrastructure and service facilities need to be open to all operators. In border areas the Commission has to be especially wary to not distort competition and cause prices increases.

The existing Guidelines are perceived to be burdensome. The process of obtaining state aid for developing new infrastructure and service facilities is arduous and lengthy, involving extensive back-andforths with the Commission. This is also the case for relatively small amounts. This leads insurmountably to significant delays in critical projects. Simplification of the process is desired, with suggestions including potential exemptions, streamlining smaller projects and percentages of total project costs in block exemptions. Two potential conditions for such aid could be that there is no existing non-saturated facility in the defined zone and that the facility must be open to all operators in a non-discriminatory manner. In addition to a simplification, it would be helpful if transparency at the European level increased regarding support measures by Member States, especially in the area of track access charges.

The industry also faces issues regarding the existing infrastructure and service facilities that need modernisation to meet the new standards. Securing funding for modernisation is challenging, for example when the ownership of the infrastructure is not in the hands of those that need the modernisation, or when recognition of the need and justification for the financing amounts are not easy. For example, the improvement of port networks and terminal access lines could benefit from state aid. The hurdle, however, lies in substantiating the necessity and the amount needed, especially when it is likely that there is a single applicant, i.e. the port of Antwerp is the only one able to work on its port. Integrating aid with mainline reconstruction projects and ensuring that single applicants align with national objectives through negotiated awards can address this issue. Alternatively, the usage costs could be increased so as to shift the burden of financing to private terminals. This, however, comes with a problem of separating public and private tracks and the impact on operational profitability for private operators.

Specialised infrastructure, like shunting yards, storage tracks and bypass tracks, also needs modernisation. Funding for this depends on the technical challenge and relate to the availability of land, infrastructure management support and technical complexities. Instead of relying on state aid, these components could benefit from private investment. However, this is not allowed as the infrastructure is built on the public network. A suggestion to overcome this regulatory barrier is to make these commodities investable propositions. Overall, state aid is important for niche components of the rail network, and a national freight transport development plan could streamline the allocation of funding.

Independent and innovate newcomers invest in developing efficient and competitive maintenance facilities. These projects are generally not supported by state aid due to access limitations. Some argued that state aid is also not the most effective to help these newcomers. More stringent barriers that entrants face relate to the structure of the market, including reliance on OEMs for maintenance contracts and competition for depot and maintenance contracts. The procurement cycle, which often prioritises the acquisition of rolling stock over the development of depot infrastructure, sidelines independent maintenance providers in the bidding process. This misalignment in bid timing limits their contract opportunities. In addition, the practice of bundling rolling stock and maintenance contracts further exacerbates this issue, as it excludes independent maintenance providers not affiliated with major OEMs or established operators. Structural changes are needed to remove these barriers and support fair competition and infrastructure development, such as mandating OEMs to provide transparent access to materials and data, and decoupling rolling stock procurement from maintenance procurement. More generally speaking, challenges regarding access to infrastructure and facilities, and transparency in land ownership and usage, were raised.

### Investment aid: mobile equipment

The final question debated was how to support access to modernisation and greening of mobile equipment, and improve interoperability while ensuring a level playing field.

Investment aid for mobile equipment encompasses a broad range of equipment, including rolling stock, inland waterway vessels and terminal equipment used for loading or unloading. The existing Guidelines primarily address rolling stock with only a few measures for other types of equipment. Regarding access to state aid for acquiring such equipment, concerns arise about the limited supply capacity and the potential distortion of demand caused by state aid. It is important to ensure that state aid contributes to fleet expansion and the modal shift rather than facilitating early scrapping. The need for state aid was questioned in the case that the leasing market for equipment is functioning effectively, so focusing on interoperability may be a more viable solution. Interoperability under the existing Guidelines was examined in terms of technical adaptation and modernisation. In addition to targeting technical barriers, the revised Guidelines will expand to cover broader measures and also encompass modernisation efforts. The remaining questions relate to whether the existing provisions are sufficient and whether intensity levels should be adjusted based on market conditions, such as varying market needs and the potential for preferential treatment based on market failures. The revised Guidelines will be informed by past case practices, with an emphasis on addressing market failures hindering the modal shift and coordination of transport. The focus will be on addressing these market failures to promote the modal shift effectively.

A general remark was made that state aid must be transparent and non-discriminatory between operators. Uncertainties in time, duration and approval must be avoided as much as possible. The system would benefit from quicker procedures, a true understanding of market needs and longer-term aid with a clear strategy and stable vision of the future. Moreover, aid for mobile equipment cannot be completely separated from aid for infrastructure, as that risks market failure. Both infrastructure and mobile equipment should develop at the same speed, so aid in both instances should be provided in a synchronised manner. In addition to consolidating case practice, the discussion expressed a wish for flexibility in the revised Guidelines to overcome new challenges, such as the digital and green transitions, which are not covered by existing practices.

There was disagreement on whether there is a market failure in purchasing rolling stock which justifies the need for state aid. Those in favour argued that the existing rolling stock fleets are in need of renewal. Much of Europe's rolling stock is at least 30 years old, so there is a pressing need for renewal and therefore public support. Despite recent attempts to provide direct funding for rolling stock purchases, like Italy's Next Generation EU programme, challenges persist, including scarcity in the rolling stock market and lengthy delivery times for new locomotives. Therefore, a new framework is needed. In the existing framework, the definition of eligible costs is restrictive, only allowing financing of a part of the extra costs. Second, the opportunity for public support is even lower when the aid is granted outside of a competitive bidding process because aid intensity will not exceed 20% to 30%. Since purchase and maintenance of rolling stock require significant costs, access to rolling stock constitutes an important barrier to expansion in railway markets. The revised Guidelines should clarify the rules for financing rail rolling stock in liberalised markets, and provide more flexible provisions and higher aid intensities. Regarding the beneficiary category, some argued that aid should be granted directly to railway undertakings. Leasing companies could only be beneficiaries of aid provided that they reduce tariffs accordingly to ensure the railway sector benefits from the measures to the detriment of the modal shift.

Instead of purchasing new rolling stock, some argued that existing equipment in both railway and inland waterways needs modernisation. In this regard, prior to granting support it is important for the sector to be clearly ready to retrofit older equipment with modern technologies to avoid funds remaining unused. A transition phase to facilitate the shift to new technologies is needed in which the market readiness and feasibility of planning should be reviewed. Modernisation is complex and involves high costs requiring substantial public support. Under the existing Guidelines, only 10% to 15% of modernisation costs are covered. There is agreement on the need for public aid but not on how far the support should reach. Whereas some argued that 100% of the costs should be covered, others argued that the focus should be on the least distortive forms of aid or on improving the overall efficiency of the railway system. Least distortive forms of aid include reducing rail operation costs, such as infrastructure track access charges, driver and land staff training costs, and taxes applied to energy. Aid to improve the efficiency of the railway system should benefit all operators in a fair and non-discriminatory manner, such as aid supporting investment in the European Rail Traffic Management System (ERTMS), digital automatic coupling (DAC) and the transition from fossil fuel to green energies.

Similarly, the inland waterway sector faces challenges in greening vessels. There is much willingness to switch to low-emission vessels with fuel changes, such as to hydrogen, but the sector cannot carry the full burden and faces uncertainties, particularly concerning the future of fuels and long-term commitments. This weighs heavily, considering the sector is dominated by SMEs which want to know whether their investments for 15 to 20 years will pay off. Supportive Guidelines, higher thresholds and extended catalogues of eligible costs need to bridge the financial gap in transitioning to low-emission or zero-emission vessels. A combination of national and EU funding schemes can support engine renewals and innovative vessel design that reduces energy consumption, can increase fleet resilience to climate change and retrofitting existing vessels with electric drive or propulsion. In this regard, the revised Guidelines need to take a technological neutral approach and support measures for the energy transition. Although greening is not an issue under the Guidelines, under environmental Guidelines inland waterways need support as they are important in the modal shift for sustainability and traffic reduction reasons, underscoring the need for reliable infrastructure and awareness of intermodal shift possibilities.

High investments are needed to ensure cross-border interoperability, such as in the European Rail Traffic Management System (ERTMS), the European Train Control System (ETCS) and digital automatic coupling (DAC). The need for higher aid intensity in this regard has been established in the Commission's decisional practice, in which it approved interoperability aids related to the ERTMS and the ETCS with aid intensities of 85-100% of the eligible costs. In the case of compatibility of the aid for interoperability, the revised Guidelines should foresee aid up to 100% of the eligible costs or 100% of the investment in projects that contribute to environmental aims and technological development. This will relieve Member States of the administrative burden of proving the need for and proportionality of such aid, and therefore promote higher amounts of support being granted to railways, supporting the EU modal shift objectives. The funding should be balanced between infrastructure operators and train operators. Moreover, an exemption from notification requirements in a specific provision in the block exemption for investments in the ERMTS and DAC is needed, due to their high costs. In addition to funding, operators need to take responsibility for adjusting their governance strategy to meet the European deadlines by 2050. A final remark on interoperability delved into a nuanced definition of interoperability so as to draw the line between interoperability and technical modernisation. While specific technical specifications for interoperability are well-defined, there is a need for consistency in supporting digitalisation and automation.

## Conclusion

The forthcoming revision of the Railway State Aid Guidelines will constitute a step forward in adapting to the evolving landscape of the transport sector. Since the inception of the existing Guidelines in 2008, the sector has undergone profound changes driven by factors such as liberalisation, market dynamics and climate change. The revision of the Guidelines aims to restore balance among transport modes and prioritise sustainability and address market failures hindering the modal shift. Key objectives include facilitating fair intermodal competition, streamlining aid processes and embracing technological innovation. By promoting transparency, non-discrimination and fairness, the revised Guidelines should seek to create a level playing field conducive to sustainable growth and innovation in the railway sector.

The 24th Florence Railway Forum provided a platform to delve into key areas of the revised Guidelines: operational aid, infrastructure aid and mobile equipment aid. The discussion in the forum underscored the pressing need for the revised Guidelines to better support the modal shift. Challenges such as outdated infrastructure, low interoperability and economic uncertainties were identified as significant barriers. Inland waterway transport emerged as a vital component in achieving modal shift aims, necessitating an expansion of the scope of the Guidelines to include this sector. Targeted measures to support innovation, modernisation and the energy transition in inland waterways were highlighted as essential to drive sustainable growth. The debate also addressed investment aid for new infrastructure and mobile equipment, and emphasised the need for clarity, flexibility and transparency in aid allocation. Streamlining aid processes, ensuring fair competition and promoting the adoption of new technologies were identified as key priorities for the revised Guidelines.

The following four takeaways result from the forum. First and foremost, state aid should be limited to cases in which it addresses market failures. State aid serves as a buffer, bridging gaps between divergent regulatory frameworks and providing a mechanism for aligning market needs with broader EU objectives, such as the modal shift and the Green Deal. At the same time, there is a call for coherence and consistency in the application of state aid rules to ensure fairness and transparency.

A second point is the systemic nature of the transport sector. The sector has an increasingly integrated character involving a broader array of stakeholders. The modal shift affects the different components and stakeholders in railway transport, and other transport modes like inland waterways. Railway transport should therefore not merely be seen as an isolated component but as an interconnected element in a broader system. A unified framework should therefore accommodate diverse components and needs. By fostering an environment where market players can choose the most efficient means of transport, the revised Guidelines should aim to promote sectoral growth and sustainability.

A third point is to ensure that the revised Guidelines are future-proof in the face of rapid technological advances. With the technological environment rapidly evolving, with digitalisation, automatisation and artificial intelligence, the industry landscape may soon change, so the revised Guidelines must be flexible to meet these changes to remain relevant and effective.

The final point is a simplification of the process in the revised Guidelines. A clear call was expressed for a less complicated application process, and clearer rules and definitions to navigate the complexities inherent in the transport industry. In this regard, the thresholds and land transport block exemption regulations are very important.

Overall, the forum provided valuable insights into the challenges and opportunities facing the transport sector, setting the stage for the forthcoming revised Guidelines to play a pivotal role in shaping its future. As the draft Guidelines prepare for public consultation in May, stakeholders are encouraged to provide feedback on key areas of interest. The aim is to strike a balance between meeting market needs and upholding regulatory requirements, to ensure that the Guidelines effectively promote investment in transport infrastructure and services.

## To be aid, or not be aid, that is the question

A Comment by Udo Woll, Head of Public Commercial Law, State Aid Law and Public Transport Contract Law at Deutsche Bahn

### The context of the railway guidelines

The transport sector is and will be a key element in achieving the ambitious aims of the European Green Deal. To quote the Commission it in its '*Sustainable and Smart Mobility Strategy*,' "*The success of the European Green Deal depends on our ability to make the transport system as a whole sustainable.*"

At the same time, financing transport infrastructure (here, rail and intermodal transport infrastructure) and providing public transport services (for passengers, and to a growing extent also with regard to freight) rely to a large extent on public support. According to the European Commission's state aid scoreboard, EU Member States in 2020 spent more than 58 billion EUR of subsidies on railways.[1]

Such intervention is to be seen against the background of a further liberalised railway sector. The second railway package of 2004 completely liberalised rail freight transport in 2007,[2] resulting in rising market shares of competitors compared to incumbents from 34% to 46% between 2015 and 2018.[3] The 2016 fourth railway package aimed to also complete the single market for rail passenger services.

### The revision of the railway guidelines – an ongoing process for more than 5 years

In 2008 the above-described circumstances led the Commission to introduce Guidelines that accommodate these particularities of the railway sector. They specified the requirement of Art. 93 TFEU to stimulate the development of rail transport. The necessary revision of these Guidelines – due to further liberalisation of the sector and its importance to the Green Deal initiative – started more than five years ago in 2019 as part of a Commission 'fitness check' with regard to rules adopted in the state aid modernisation process.[4] In the fitness check, it became clear that a fundamental revision was necessary. Already on 1 October 2021 the Commission published an inception impact assessment[5] and a support study[6].

A new element accompanying the revision is an initiative to introduce a block exemption regulation for railways, inland waterways and intermodal transport. The enabling regulation was adopted and published in late 2022.[7] It aims to simplify administration in cases in which distortion of competition is limited to a minimum.

### A reflection on the discussion: when do the guidelines apply – when is it aid?

Unfortunately, the original idea of the 24th Florence Rail Forum to 'market-test' the draft Guidelines and the draft Transport Block Exemption Regulation (TBER) with participants in different sectors, Member States and stakeholders could not be realised. In late April 2024 the draft was still in the process of internal consultation within the European Commis-

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1 Dropping to 46 billion EUR in 2021 due to the less strict COVID containment measures. See European Commission, State Aid Scoreboard 2022, p.11 and 67.

2 Directive 2004/51/EC of the European Parliament and of the Council of 29 April 2004 amending Council Directive 91/440/EEC on the development of the Community's railways.

3 See the "Eighth monitoring report on the development of the rail market" of 13 September 2023, COM(/2023) 510 final, page 12.

4 See the Commission´s press release of 7 January 2019, "*State aid: Commission to prolong EU State aid rules and launch evaluation,*" IP/19/182.

5 Ref. Ares(2021)5975184 - 01/10/2021.

6 "*Impact assessment support study for the review of the Community guidelines on State aid for railway undertakings,*" published online in March 2023 at https://competition-policy.ec.europa.eu/system/files/2023-03/KD0423349enn_railway_guidelines_final_report.pdf.

7 Council Regulation (EU) 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, OJ L338/35 of 30 December 2022.

sion. Hence, whether the new text will reflect the manifold perspectives of different Member States, multiple sectors and varied stakeholders, including public institutions and private companies, incumbents and new entrants that have contributed to the revision process in the past five years and that in Florence have again pointed out the relevant issues that the revised rules should ideally address, remained a secret that only the representatives of DG COMP were able to assess. Nevertheless, important points of overarching interest to the diverse stakeholders were taken from the lively discussions.

An important discussion from the legal perspective concerned the issue of which measures fall under the Railway Guidelines and the TBER – and which actually remain outside these rules as they do not constitute State aid.

The question of compatibility with Art. 93 TFEU or any other basis arises only if the measure constitutes state aid, in particular with regard to support for railway infrastructure and the use of it. Does the financing really represent aid as defined in Art. 107 (1) TFEU? There was a view that this may and should be further questioned also in the process of the upcoming consultation.

Even if it provides an economic advantage to the beneficiary, the financing of railway infrastructure may not qualify as state aid as it does not distort competition, and hence it does not meet one of the cumulative criteria to qualify a measure as state aid. Accordingly, already in the 2008 Railway Guidelines the Commission established that when infrastructure use is open to all potential users in a fair and non-discriminatory manner, it would normally consider that public financing of the infrastructure does not constitute state aid to railway transport companies.[8] With regard to the owners and managers of railway infrastructure, already in its 'Network Rail' decision of 2002 the Commission underlined that the financing of railway infrastructure would not constitute state aid.[9] It applied the same reasoning in its further decision practice.[10] This approach is also reflected in the European Commission's Analytical grids[11] and its Guidance on the Notion of Aid Notice.[12]

Against this background, this question was raised: Why do support measures that (partially) fund track access charges for railway undertakings constitute state aid? The above-mentioned arguments in the existing Guidelines and the Commission´s reasoning on the financing of railway infrastructure seem to imply otherwise. As general schemes to fund track access charges are usually open to all users in a fair and non-discriminatory manner in the highly regulated field of railway infrastructure pricing, there should be no distortion of competition involved. However, despite its approach with regard to the financing of railway infrastructure, in its decisional practice concerning selectivity and distortion of competition the Commission also seems to argue in terms of intermodal competition. Measures to support track access charges would provide an advantage for railway undertakings compared to undertakings providing other modes of transport – such as road transport and air transport – which do not receive aid for using infrastructure.[13] Operating costs of supported undertakings would be reduced compared to non-aided undertakings. However, in consistency with the approach to financing railway infrastructure, in cases concerning support for track access charges the European Commission might also take a purely intramodal perspective. This is particularly true as state aid is effects-based. If

8 Community Guidelines on State aid for railway undertakings, 2008/C 184/07. OJ C 184/13 of 22 July 2008.

9 Commission Decision No. 356/2002 of 17.07.2002 – *United Kingdom Network Rail*, para 75.

10 See, for example, Commission Decision SA.35948 (2012/N) of 02.05.2013 – *Czech Republic – Prolongation of the interoperability scheme in railway transport* (ex No. 469/2008), para 18. Commission Decision SA.36558 (2014/NN) and SA.38371 (2014/NN) – Denmark, SA.36662 (2014/NN) of 15.10.2014 – *Sweden – Aid granted to Øresundsbro Konsortiet*, para. 80.; Commission Decision SA.39078 (2014/N) of 23.07.2015 – *Denmark – Financing of the Fehmarn Belt Fixed Link project*, para 55.

11 Infrastructure Analytical Grid for Railway, Metro and Local Transport Infrastructure, para (10) et seq.

12 Communication from the Commission, Notice on the notion of State aid as referred to in Article 107(1) TFEU.

13 See, for example, with regard to a German scheme for rail freight transport, Commission Decision SA.51956 (2018/N) of 10.12.2018 – Germany – Aid scheme for the promotion of rail freight transport, paras 44 et seq. With regard to rail passenger transport, see for example Commission Decision SA.63635 of 30.07.2021 – Germany – Support for long-distance rail passenger transport providers, para 42.

funding of a railway infrastructure operator that results in allowing IT to lower track access charges does not constitute state aid, the same should be true for funding schemes that have the same effect of mitigating track access charges directly for providers of railway transport services.

If the TBER in the (hopefully near) future makes such measures exempt, one might question whether the issue of no aid versus block-exempted compatibility will play a major role. However – as was discussed in Florence – considering, for example, the implications for the accumulation of aid (point 8 in the current Guidelines), the fundamental question of whether the measure is considered to constitute aid may play an important role.

## A comment by Germano Guglielmi, Ferrovie dello Stato Italiane

The Community Guidelines on State Aid for railway undertakings were adopted in 2008, following the liberalisation of the rail freight sector (2007) and the phasing out of the freight Public Service Obligations (PSOs). However, since 2008 rail freight transport has not significantly increased its market share compared to less sustainable modes of transport. It is also widely recognised that today rail transport is characterised by lower externalities than road, it faces high fixed costs and requires substantial investment in interoperability projects such as ERTMS/ETCS and digital automatic coupling (DAC).

To achieve the aim of doubling rail freight traffic by 2050 and fostering the green and digital transitions, a new legal framework should be introduced at the European level. In 2021, the European Commission initiated a revision of the Railway Guidelines to adapt to evolving market trends and support these transitions, aiming to ease public funding of the rail sector and incentivise the modal shift from road to rail.

In the context of revising the 2008 Guidelines, the railway sector proposed key changes. These mainly include adjusting aid intensity thresholds, providing specific guidance on state aid to rail service facilities and rolling stock, and introducing a new Transport Block Exemption Regulation (TBER) and a new framework for rail freight PSOs.

First, in our view, increasing the intensity thresholds for presumption of compatibility of aid for the coordination of transport, together with exempting them from the notification requirements, would relieve Member States from the administrative burden of proving aid compatibility, especially in cases already extensively evaluated in the Commission's decision-making practice.

We believe that the intensity threshold for aid to reduce external costs and interoperability aid should be set at 100% of the eligible costs, whereas the accumulated intensity of both aids for reducing external costs and aid for rail infrastructure use in relation to the total cost of rail transport should be doubled to at least 60%.

Regarding state aid to rail service facilities (i.e. intermodal terminals, sidings, last-mile infrastructure), there is currently not a clear legal framework enabling adequate funding. The lack of rail service facilities in the EU is also attributed to a reluctance of operators to invest without public support, given the considerable costs and limited returns. Several recent Commission decisions approving funding for the construction or upgrading of rail service facilities, such as the Italian scheme for electrification and technical upgrading of railway sidings (SA.102422), highlight the need for greater aid intensities. Consistent with the Commission's practice, in our opinion, state aid for rail service facilities should cover both construction and upgrading of infrastructure with aid intensity up to 100% of the funding gap and it should be exempted from notification requirements.

Furthermore, new guidance with higher aid intensities and more flexible provisions should be introduced for purchasing, renewing and retrofitting rolling stock in line with the Commission decisions. The existing regulation falls short of providing sufficient support in this field. Indeed, in its article 36 (b) the General Block Exemption Regulation (GBER) provides a restrictive definition of eligible costs with low aid intensity outside a competitive bidding process and the current Guidelines lack clarity and require stringent conditions. Moreover, high costs and low profitability hinder access to new rolling stock and adopting new technologies, leading to an outdated rolling stock fleet in the EU that requires renewal. In response, the Commission recently endorsed Italian state aid schemes to incentivise the purchase and renewal of freight rolling stock (SA. 101273 and SA. 64726).

It is proposed that aid for rolling stock should be granted to all potential beneficiaries, primarily to railway undertakings, with leasing companies benefiting only if they lower tariffs to promote the modal shift.

Last, PSOs in the rail freight sector are regulated solely by the conditions outlined in the Altmark judgment, as Regulation (EC) No 1370/2007 does not cover freight transport services. In the case of PSOs, public authorities entrust an operator to run a service which would not be provided by the market satisfactorily and under the same conditions in the absence of public compensation. Compensation for PSOs covers the net extra costs of the public service obligation, plus a reasonable profit. We advocate that a new legal framework should guide Member States in establishing PSO compensation for rail freight services in compliance with state aid rules and that PSO compensation should be exempted from notification requirements, especially in geographical areas with market failure, such as peripheric regions and islands (e.g. where the cost of rail infrastructure use is markedly higher than the cost for road).

In conclusion, the proposed revision of the 2008 Railway Guidelines should allow Member States to provide railway undertakings with public funding more easily and faster, thus supporting the EU modal shift objectives and ensuring a fair level playing field between road and rail for the benefit of society as a whole.

## Creating a sound legal framework for operational aid

### A comment by Conor Feighan, ERFA

The current Guidelines on State Aid for Railway Undertakings were published in 2008. The Guidelines are now in need of revision given the changes in market structure which have occurred in the European rail freight market since then. In 2008, when the Guidelines were published, 81% of European rail freight markets were made up of national incumbents whereas only 19% were composed of challengers. In 2022, it was now the challengers who made up most of the market, accounting for 52%.

This fundamentally changes how we discuss state aid. In 2008, most of the market was made up of vertically integrated companies which were present in all segments of the rail freight market. In 2022, most companies were only active in certain segments such as block train traffic. Aid targeted at individual market players is therefore a non-starter as it will significantly distort competition and, crucially, undermine important private investment in the sector.

### What type of support is appropriate?

Given the fragmented nature of the rail freight market, any support measures need to be transparent, non-discriminatory and open to all actors. The best mechanisms are therefore those that decrease the cost of providing rail freight services as a whole, thereby supporting all rail freight undertakings equally. The most appropriate type of such support is reduced track access charges.

Fundamental questions remain over whether all types of support measures constitute state aid. Track access charge reductions are not an advantage conferred by national public authorities on undertakings on a selective basis but are instead a general measure open to all enterprises. Questions must therefore be raised on whether support for track access charges constitutes state aid.

This is important because if track access charge reductions are not state aid there is no notification requirement, and this significantly lowers the administrative burden for any Member State looking to reduce infrastructure charges. In the event that support for track access charges are deemed to constitute state aid, it is essential that as much bureaucracy as possible is removed. Such support measures are encouraged as a first priority if a Member State decides to support rail freight.

### Is operational aid possible in a fragmented market?

During the drafting of the 2008 Guidelines one of the main discussions was on restructuring railway undertakings and, more specifically, the potential unintended consequences of competition distortion. The issue of restructuring should now be considered closed as all railway undertakings have had the opportunity to restructure under the existing Guidelines at this stage and normal restructuring rules should apply. The question remains, however, of whether operational aid, although well intended, could lead to competition distortion in a similar manner.

There are risks of competition distortion purely because rail freight is made up of different operation types which have very different market characteristics. For instance, the block train and intermodal markets are usually composed of many international and local market players, whereas the single wagon traffic market is primarily made up of one operator, the historical national incumbent.

The risks of competition distortion arising from support measures for block train and intermodal transport, especially when the support measures are not directed at railway undertakings but instead the organiser of the transport service, are therefore limited. It is essential, though, that such operational aid is designed in such a way that it is transparent, non-discriminatory and open to all.

Single wagon traffic operational aid is more complex as the market usually only consists of one railway undertaking, namely the national incumbent, which is also usually active in all other rail freight markets.

### Is support for single wagon traffic possible?

This is not to say support for single wagon traffic is not possible, but certain conditions need to be met. First, conditions must be attached to ensure that the undertaking in receipt of aid is organisationally and financially separated from other rail freight activities. This is to guarantee that state aid intended to support single wagon traffic does not lead to cross-subsidisation of other rail freight activities such as block train or intermodal trains.

Second, any State Aid must have a clear scope. Otherwise, there is a potential for unintended consequences such as single wagon traffic competing with non-subsidised rail freight activities. For instance, a support system which subsidises single wagon traffic 'per movement' incentivises a product that focuses on last mile connections and avoids competition with longer distance traffic such as block trains.

Finally, if a company is in receipt of state aid, and when the above services are used as an auxiliary service for the general good, such as last mile connections, it is essential for this service to be offered to all customers at the same rate per movement.

## Conclusion

The European rail freight market today is unrecognisable compared to 2008. For this reason, the State Aid Guidelines for Railway Undertakings need to be revised. The focus must be on how best to support rail freight while avoiding unintended consequences of competition distortion and creating an unfriendly investment environment.

## A comment by Theresia Hacksteiner, Secretary General, EBU

Inland waterway transport (IWT) plays an important role in the European Green Deal and the Sustainable and Smart Mobility Strategy (SSMS) and is considered a sustainable mode that should take much higher volumes of freight shifted from road. For this purpose, the SSMS seeks to increase the share of inland waterway transport (IWT) by 25% by 2030 and by 50% by 2050.

In line with this strategy, the European Commission recently released its NAIADES III Action Programme, putting forward an ambitious 'Inland Waterway Transport Action Plan 2021-2027.' NAIADES III focuses on two core objectives: shifting more freight transport to inland waterways; and setting the sector on an irreversible path to zero-emissions accompanied by a paradigm shift to further digitalisation, together with accompanying measures to support the current and future workforce. IWT is an enabler to absorb much higher volumes and to deliver the ambitions of the EU Green Deal.

In this context, the European Commission recognised that the realisation of its ambitions as laid down in the European Green Deal and subsequent strategies requires huge investments, both public and private. Therefore, revisions of the current Rail State Aid Guidelines and the General Block Exemption Regulation are pivotal to support the role of IWT in the EU policy and transport frame.

### Revision of rail state aid guidelines (RSAG) and the general block exemption regulation (GBER)

The revisions of the Rail State Aid Guidelines (RSAG) and the General Block Exemption Regulation (GBER) are important to cope with the current market failures and market challenges in the inland waterway transport sector, which so far have hampered an increase in its modal share and broad deployment of innovation in the sector due to a lack of a business case. Obviously, the investments involved cannot be borne by the sector alone due to a lack of a business case.

### Revision of the RSAG should lead to multi modal state aid guidelines

In the context of the revision of the current guidelines we emphasised the difference between the inland waterway transport market and the rail transport market. From this perspective it would not make sense to simply replicate the criteria applicable to rail transport for IWT but instead to design specific criteria tailored to the concrete needs of the IWT sector.

As a condition sine qua non, the revision in any case should create a level playing field between the sustainable modes addressed in the SSMS. In its multimodal approach it should extend the scope of eligibility criteria to compensate the multimodal legs for the additional trans-shipment costs which by their nature are involved in these kinds of services. In the attempt to increase the modal shift to sustainable modes, it should also cover grants for the renewal and retrofitting of the existing inland fleet. In addition, it should include fiscal tools that have a positive impact on operational costs contributing to making a business case. Support should also include measures for new traffic flows including new services, infrastructure and superstructure.

### Revision of the GBER into a transport BER

The envisaged revision of the GBER leading to TBER is considered an important tool to support the energy transition of the IWT sector leading to a low or zero-emission fleet. Section 7 of the current GBER allows aid for environmental protection aligned with the Guidelines on State Aid for climate, energy and environmental CEEAG 2022.

The new TBER should take into account the specific needs of the IWT sector to cope with the high investment costs to meet the above challenges. This would in particular require a substantial increase in the aid intensity covering both CAPEX and OPEX. The aid intensity under art. 36b of the current GBER should be increased to 100 % for the SME-dominated IWT sector. Moreover, the new article 36b introduces a competitive bidding system, which in our view hampers access to state aid for our mainly SME dominated sector. It imposes additional administrative burdens and barriers and leads –

unlike the intended improvement in legal certainty – to legal uncertainty when applying for funding.

As the criteria for public funding for investment aid for the acquisition of clean or zero-emission vehicles and for the retrofitting of vehicles are linked to the CEEAG, it is pivotal to set the right criteria for this aid. Therefore, we provided input to the consultation in preparation of the new CEEAG 2022. While we welcome the fact that this led to a new definition of clean vehicles, and included transitional technologies, the calculation of the emissions is based on a complicated methodology, raising obstacles to the release and accessibility of new state aid programmes. This should be repaired together with the revision of the TBER to support the IWT sector in its energy transition pathway.

In conclusion, the envisaged revision of the Rail State Aid Guidelines into Multimodal State Aid Guidelines and the GBER into a Transport Block Exemption Regulation are understood as a chance to cope with the current market failures and to provide the right support for the IWT sector. They should establish an appropriate framework allowing Member States to provide the SME-dominated IWT sector with flexible state aid programmes with higher funding thresholds. Finally, any new guidelines and regulations should level the playing field and cut administrative burdens to ease access to state aid and funding for SMEs.

## FSR Transport

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