CER
The Voice of European Railways

CER contribution to "Competition Policy supporting the Green Deal" call for contributions

Community of European Railway and Infrastructure Companies (CER) would like to thank the European Commission for this opportunity to provide our contribution to the "Competition Policy supporting the Green Deal" call for contributions. Our answers to the questions of the call can be found below.

Part 1: State aid control

1. **What are the main changes you would like to see in the current State aid rulebook to make sure it fully supports the Green Deal? Where possible, please provide examples where you consider that current State aid rules do not sufficiently support the greening of the economy and/or where current State aid rules enable support that runs counter to environmental objectives.**

Regrettably, today a fair competition between different transport modes is still not achieved. At the same time, presently there exists an urgent need to accelerate the modal shift from more polluting transport modes to rail, in order for the EU to reach the climate neutrality in 2050. Therefore, the future State aid rulebook should more than now take into account the positive impact of green economic activities of State aid beneficiaries. More specifically, in the transport sector the future State aid rulebook should pay close attention to the indirect harmful effect to the environment of the State aid provided to support more polluting modes of transport, which in turn is resulting in a reversed modal shift from rail to less environmentally friendly transport modes. Besides, in order for the EU to reach its climate objectives of 2030 and 2050, the future State aid rulebook should also ensure that support granted to undertakings in transport sector helps to reduce negative environmental externalities of transport.

In our view, modernized EU State aid control and State aid policy should have a consistent alignment with the EU environmental objectives. The **State aid rules in the transport sector** can substantially contribute to reaching the goals of the Green Deal. The Green Deal calls for a large reduction of greenhouse gas emissions by the transport sector and especially aims at a significant modal shift from road to environmentally friendly rail transport to foster its goals. Rail contributes directly to enhance decarbonisation, energy efficiency, sustainable mobility and the zero pollution ambition of the Green Deal.

It is fundamental to provide a policy framework that supports a modal shift towards sustainable transport modes as railways, and supports the reduction of external costs. As stated by the Commission in "Handbook on the external costs of transport" (2019) the average external costs of passenger rail transport are 2.8 times lower than the costs for the road sector (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 freight (including congestion - 3.2 times higher). In 2016 the total external costs in the EU27 for road transport amounted to 532 billion EUR, while for rail transport such total external costs amounted to 16,5 billion EUR (congestion based on deadweight loss costs).[1] This significant difference in the level of external costs should be taken into account by the Commission while considering a higher level of State aid measures supporting the railway sector.

Among the State aid rules in the transport sector the "Community guidelines on State aid for railway undertakings" (hereinafter "Railway Guidelines") **contribute the most to the promotion of the Green Deal goals**. In particular, Section 6 of the Railway Guidelines covers the "aid for the coordination of transport", comprising aid for rail infrastructure use, aid for reducing external costs and interoperability aid, all of which aim at encouraging a modal shift from more polluting transport modes to the environmentally friendly rail transport. The aid enables railway undertakings to lower their prices demanded from the passengers or from the shippers, and therefore reduces existing competitive disadvantages resulting from higher cost burden in contrast to more polluting modes of transport. In its ongoing Fitness check of State aid rules, the Commission already noted that "*Section 6 rules still correspond to the needs of the EU, all the more in consideration of the overarching priority of the Green Deal and the growing role played by rail transport in the EU strategy to accelerate the shift to sustainable mobility*"[2]. The Commission also noted in this regard that the rules of Section 6 "*contributed (…) to achieve the objectives of modal shift from road to rail as well as increased interoperability across Member States*".

However, the Railway Guidelines do not provide sufficient support for fostering the Green Deal goals. In our view, in the course of the upcoming revision of the Railway Guidelines the following changes should be made in order to further stimulate the railway sector, which will help achieving the Green Deal targets:

- **Higher intensity thresholds**: Section 6 of the Railway Guidelines sets the aid intensity threshold for aid for the coordination of transport for reducing external costs and interoperability aid to 50% of the eligible costs. Greater flexibility on these thresholds, namely the presumption of compatibility of all types of aid for coordination of transport up to 100% of the eligible costs, would promote a level playing field in the transport sector and foster a modal shift towards lower emission transport modes. Besides, railway undertakings do no profit directly from interoperability measures such as vehicle ETCS equipment, while the society as a whole does. Higher aid intensities up to 100% would trigger strong incentives for such retrofitting, while currently the undertakings are not sufficiently incentivized by only 50% aid intensity. Such ETCS interoperability measures specifically promote the Green Deal goals as they raise railway infrastructure capacity and therefore make room for further modal shift. The recommendation of the railway sector to raise the intensity thresholds for aid for the coordination of transport has already been reflected in the Commission's conclusions in the ongoing Fitness check of State aid rules.
- **Covering investment-related additional costs**: Currently the Railway Guidelines only allow for funding the genuine investment costs of interoperability measures as, for example, noise reduction measures. Covering not only the investment cost, but also the consequential costs resulting from the conversion (i.e. investment-related additional costs), at least for a transitional period, would significantly increase the incentives for such measures and therefore promote the Green Deal goals. Such an

[1] Handbook on the external costs of transport, Version 2019. European Commission, publication number 18 (2019): K83, pages 311-312 https://op.europa.eu/en/publication-detail/-/publication/e021854b-a451-11e9-9d01-01aa75ed71a1

[2] Commission Staff Working Document Fitness Check of the 2012 State aid modernisation package, railways guidelines and short-term export credit insurance, SEC(2020) 372 final, SWD(2020) 258 final, Part 3/4, p. 142.

approach was already a part of the former 2008 Community guidelines on State aid for environmental protection.

- **Stimulating stronger modal shift**: In transport sector important disparities exist as to the level of internalisation of the transport modes' external costs. Due to the fact that the negative effects of the transport mode are unequally reflected in the costs of each mode, there is a price distortion and an unequal competition to the disadvantage of rail transport services.[3] These existing cost differences should be vigorously compensated through State aid in order to stimulate market players to use the less polluting rail transport mode. Currently, the Railway Guidelines allow aid for reducing external costs to be granted to the railway undertakings only to level the playing field with other modes of transport, but not to stimulate the railway sector compared to more polluting modes of transport. Allowing for higher aid would further foster the Green Deal goals.
- **Establishing a block exemption**: Currently, any scheme qualified as State aid and falling within the scope of the Railway Guidelines must be notified to the European Commission services. Exempting such aid from the notification requirement would reduce administrative burden for the Member States and therefore promote the Green Deals goals. In its ongoing Fitness check of State aid rules, the Commission has already noted with regard to the rules of the Section 6 on aid for the coordination of transport that "*public authorities do understand the rules and consequently design their schemes in compliance with the rules*", from which the Commissions concludes that it "*appears that there may be room for a block exemption*."[4] In our view, taking into account the fact that railway transport is much greener than other transport modes, and that it allows to reduce CO^2 emissions significantly, further exemptions or simplifications, namely for the aid supporting purchase and renewal of rolling stock, could also be introduced in addition to the above-mentioned exemption for aids for the coordination of transport.
- Besides, costs of acquisition of rolling stock for exclusive use in freight transport should become admissible.

Apart from the above points on the Railway Guidelines, more generally in regard to State aid we would suggest the following:

- The compatibility with the internal market of any rescue or restructuring aid should be examined in light of the positive or negative environmental impact of the activities of the recipients of such aid.[5]
- Undertakings whose activities help achieving the goals of the Green Deal should be allowed to deviate from the general rules and to be able to use several subsidies simultaneously in a coordinated manner, if it can be proven that a greater environmental benefit can be achieved by means of such combined investments.
- The railway sector is contributing to the UN Sustainable Development Goals, namely the goal no. 7 (affordable and clean energy), no. 9 (build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation), no. 11 (sustainable cities and communities), and no. 13 (climate action). A significant example and the most recent sustainability endeavour is the Eco-Scoring project, aimed at implementing an innovative and reliable standard of measurement of the degree of sustainability of the entire railway sector.

[3] See Study Sustainable Transport Infrastructure Charging and Internalisation of Transport Externalities (June 2019) https://ec.europa.eu/transport/themes/sustainable/internalisation-transport-external-costs_en
[4] Commission Staff Working Document Fitness Check of the 2012 State aid modernisation package, railways guidelines and short-term export credit insurance, SEC(2020) 372 final, SWD(2020) 258 final, Part 3/4, p. 139.
[5] Community guidelines on State aid for rescuing and restructuring firms in difficulty

- In case of investments for environmental protection, it would furthermore be important to have the possibility to be able to deviate from the examination of returns procedure.
- It would further help to achieve the goals of the Green Deal if a simplified approval of the latest energy tools and solutions in case of building reconstructions and real estate investments would be introduced.
- It is of high importance that the various EU guidelines on State aid are consistent and do not contradict with each other.

2. If you consider that lower levels of State aid, or fewer State aid measures, should be approved for activities with a negative environmental impact, what are your ideas for how that should be done?

As a principle, activities with an overall negative environmental impact should not receive State aid when it concerns support for highly polluting production methods and technologies that need phasing out in order to reach the Green Deal objectives. One could rely on compensation but this should be allowed for only a limited period of time. When deciding on the eligibility of State aid, this should be set against the long term vision of the Green Deal. When negative effects are mostly not avoidable, but the overall balance is positive, then one should make their mitigation compulsory and an integral part of the approval criteria for the State aid. Furthermore, any existing exemptions or simplifications should no longer be applicable for activities that have significantly higher negative environmental impact in comparison with existing competing activities (for example, in transport sector road transport produces significantly higher level of emissions than railway transport on the same route).

a. For projects that have a negative environmental impact, what ways are there for Member States or the beneficiary to mitigate the negative effects? (For instance: if a broadband/railway investment could impact biodiversity, how could it be ensured that such biodiversity is preserved during the works; or if a hydro power plant would put fish populations at risk, how could fish be protected?)

In such cases, it is important to take into account national legislations which already apply for projects with negative environmental impact. Regarding the State aid, it would be more efficient to have additional obligations to prevent such negative effects.

We would also like to emphasized that rail is a track-based mode and does not have considerable negative impacts on biodiversity. During the performance of transport activity, the footprint of railway undertakings, especially in comparison with other modes of transport, cannot be considered as significant.

3. If you consider that more State aid to support environmental objectives should be allowed, what are your ideas on how that should be done?

a. Should this take the form of allowing more aid (or aid on easier terms) for environmentally beneficial projects than for comparable projects which do not bring the same benefits ("green bonus")? If so, how should this green bonus be defined?

In our view, such green bonus could take the form of higher intensity thresholds for environmentally beneficial projects such as railways projects. As outlined above, in our view the Railway Guidelines should provide a greater flexibility on the intensity thresholds, covering up to 100% of the eligible costs, which could constitute a green bonus.

Besides, the EU has been working on the taxonomy that should provide transparency on environmental sustainability to investors, financial institutions, companies and issuers, thereby enabling informed decision-making in order to foster investments in environmentally sustainable activities. This taxonomy could also serve as a basis to define the green bonus.

b. Which criteria should inform the assessment of a green bonus? Could you give concrete examples where, in your view, a green bonus would be justified, compared to examples where it would not be justified? Please provide reasons explaining your choice.

In the transport sector, the green bonus would be justified if investments are made to promote the modal shift to greener modes of transport such as rail, or, to support the reduction of emissions. For instance, a green bonus would be justified for an investment to buy new rolling stock with better energy consumption, better transport capacity, etc. Replacing rolling stock requires considerable amounts of investments, while such replacement provides a benefit for the environment (e.g. replacement of diesel freight locomotives).

4. How should we define positive environmental benefits?

a. Should it be by reference to the EU taxonomy[3] and, if yes, should it be by reference to all sustainability criteria of the EU taxonomy? Or would any kind of environmental benefit be sufficient?

We would be in favour of defining positive environmental benefits by referencing to (some of) the sustainability criteria of the EU taxonomy. At the same time we would like to stress that if State aid requirements and EU taxonomy are merged, and beneficiaries of State aid would have to be assessed also in the light of sustainable development criteria, there is a risk that such additional criteria and assessments would further complicate and delay the investment process. As far as infrastructure managers and infrastructure investments are concerned, environmental rules and criteria are already very tight and assessment processes are already rather complex.

Part 2: Antitrust rules

1. Please provide actual or theoretical examples of desirable cooperation between firms to support Green Deal objectives that could not be implemented due to EU antitrust risks. In particular, please explain the circumstances in which cooperation rather than competition between firms leads to greener outcomes (e.g. greener products or production processes).

As a theoretical example could serve a cooperation agreement between competitors to start jointly providing a new service, which ensures reduction of the level of emissions as well as significantly lowers the climate impact, in comparison with the situation without such agreement. However, such new service would not be cheaper than the ordinary services, and therefore it is uncertain whether there would be a sufficient demand for such new environmentally friendly service. In order to use this new service, the clients would furthermore need to make certain changes in their technological chain. If we take into account antitrust considerations, it would be possible to say that each company, theoretically, could start providing such new environmentally friendly service on its own, and companies could compete with each other. However, from the economical point of view, starting such new environmentally friendly service would be too risky for each individual company, considering potential loses linked to the price of the service and the need of clients to change their technological chain. In order to comply with the antitrust rules companies do not start such cooperation and do not launch such new environmentally friendly service together. To foster achievement of the objectives of the Green Deal the Commission could consider introducing an exemption from Article 101 TFEU for cooperation agreements that support the Green Deal objectives.

Besides, in regard to the freight transport it could be noted that in order to better support and accommodate the Green Deal objectives, antitrust rules should take into account that all players in the logistical process of the freight transport sector should be able to:

- cooperate and exchange operational data more freely, to better match supply and demand of transport capacity, and to offer synchro-modality solutions, leading to pro-competitive effects on both supply as demand side;
- to share assets more freely as to optimise their utilisation rates and load factors.

2. Should further clarifications and comfort be given on the characteristics of agreements that serve the objectives of the Green Deal without restricting competition? If so, in which form should such clarifications be given (general policy guidelines, case-by-case assessment, communication on enforcement priorities…)?

Further clarifications on the characteristics of agreements that serve the objectives of the Green Deal without restricting competition would be very helpful and would ensure higher degree of legal certainty and predictability. In our view, the best form for such clarifications would probably be Commission Guidelines defining criteria under which agreements that serve the objectives of the Green Deal would be qualified as not restricting competition.

Besides, in our view the scope of Article 2 of the Council Regulation 169/2009[6], which already authorizes to derogate from Article 101 TFEU within the framework of technical improvements or technical cooperation, could be further broadened to environmental aspects.

3. Are there circumstances in which the pursuit of Green Deal objectives would justify restrictive agreements beyond the current enforcement practice? If so, please explain how the current enforcement practice could be developed to accommodate such agreements (i.e. which Green Deal objectives would warrant a specific treatment of restrictive agreements? How can the pursuit of Green Deal objectives be differentiated from other important policy objectives such as job creation or other social objectives?).

Above-mentioned situation with cooperation agreement could serve as such example. From the antitrust point of view each of the parties of such agreement could, theoretically, launch a new more environmentally friendly service on their own, and the companies could compete with each other. Therefore, such cooperation agreement to launch a new service that helps to significantly reduce emissions could be qualified as an agreement restricting competition. However, taking into account the fact that due to economic considerations none of the companies would actually launch this new service on their own due to high uncertainty and risks, such cooperation agreement could be justified taking into account the objectives of the Green Deal. To accommodate such agreements current enforcement practice could be further developed by setting clear exemptions from the Article 101 TFEU for cooperation agreements that support the Green Deal objectives.

[6] Council Regulation (EC) No 169/2009 of 26 February 2009 applying rules of competition to transport by rail, road and inland waterway.

Part 3: Merger control

1. **Do you see any situations when a merger between firms could be harmful to consumers by reducing their choice of environmentally friendly products and/or technologies?**

2. **Do you consider that merger enforcement could better contribute to protecting the environment and the sustainability objectives of the Green Deal? If so, please explain how?**

In our view, mergers and acquisitions generally do not have a direct effect on environmental protection. We would suggest that the merger control rules should not be unnecessarily further complicated by adding the environmental aspect to them, as the latter is not part of the concentration policies' objectives.