

POSITION PAPER

Consultation - State Aid - Draft Communication on State Aid to Promote Important Projects of Common European Interest (IPCEI)

10 March 2014

COMMUNITY OF EUROPEAN RAILWAY AND INFRASTRUCTURE COMPANIES - COMMUNAUTÉ EUROPÉENNE DU RAIL ET DES COMPAGNIES D'INFRASTRUCTURE - GEMEINSCHAFT DER EUROPÄISCHEN BAHNEN UND INFRASTRUKTURGESELLSCHAFTEN



INTRODUCTION

The European Commission has opened on 28 January 2014 a consultation related to a *Draft Communication on State aid to promote Important Projects of Common European Interest (IPCEI)*. The IPCEI will modernise state aid control in order to foster smart, sustainable and inclusive growth.

CER welcomes this initiative and would like to contribute to this consultation in order to address some concerns and needs for clarifications relating to the content of the draft guidelines.

CER has two major concerns in relation with this draft communication: first of all, it is important that this communication comforts other EU initiatives like TEN-T or rail freight corridors and allows for a swift and coherent application of competition law.

Secondly, CER believes that this draft communication will play an important role in the railway sector and therefore it is important that the design of the rules is thought with EU transport policy and economics challenges in mind.

CER brings together 81 members: railway undertakings and their national associations, infrastructure companies and vehicle leasing companies from the European Union, the Western Balkan countries, Turkey, Norway, and Switzerland. CER members represent about 75% of the rail network length, more than 85% of the rail freight business and over 90% of rail passenger operations in EU, EFTA and EU accession countries.

You will find below detailed information about these two points.

I. EVALUATION OF THE DRAFT COMMUNICATION

Regarding other EU Initiatives, CER would like to point out that there is a risk of legal uncertainty to develop in cases involving EU funded projects. These projects could be jointly financed by either the Member States, the European Commission or the European Bank of Investment making them clear State aid cases. We in concrete refer to the trans-European transport network projects (TEN-T) which comprises transport infrastructure and telematics applications as well as measures promoting the efficient management and use of such infrastructure and permitting the establishment and operation of sustainable and efficient transport services¹.

¹ Article 2, *TEN-T Guidelines*

The TEN-T transport network is aimed to strength the social, economic and territorial cohesion of the Union, also contributing to the creation of a single European Transport Area which would be efficient and sustainable, increasing the benefits for its users and supports inclusive growth.

The fact that these projects are co-financed by the European Commission and/or the European Bank of Investment must trigger different consequences than for those financed by one or several Member States alone. The draft guidelines have to make these different consequences clear in order to do not jeopardise the added-value of the TEN-T policy at EU level.

For example, the fact that projects are compliant with TEN-T and other EU initiative has to “*de jure*” imply that these projects meet the Common European Interest criteria set in the draft guidelines. The same applies when applying the balancing test. EU policy initiatives are aimed to improve both the intramodal and intermodal competitive situation of the EU transport modes and certainly in the Railway aspects.

The proposal must also ensure that projects which are co-financed by the EU Institutions in the EU transport policy framework are compatible with the internal market. This should be a “*ius tatum*” presumption allowing the European Commission to prove, in case of misconduct of the parties involved in the execution of the project the need to carry out State aid control. The burden of proof for the European Commission should be increased not putting this kind of projects, which are supervised by a European Institution, at the same level than any other which could be considered as a State aid.

Moreover TEN-T should also comply with European Competition rules as we can see below:
“Member States shall take all necessary measures to ensure that the projects are carried out in compliance with relevant Union and national law, in particular with Union legal acts on the environment, climate protection, safety, security, competition, state aid, public procurement, public health and accessibility.”²

Furthermore CER would like to express its concerns regarding the orientation of the proposal. It is clear that the design of this regulation has been done for R&D projects. However, we share the views of the European Commission that this draft communication will be applied in many other sectors and is of key importance for European companies.

We consider that the proposal needs to address in a clearer way some specificities of other sectors like the transport sector.

² Article 7.4, *TEN-T Guidelines*

II. CER SUGGESTIONS OF MODIFICATIONS

You will find below some concrete examples illustrating our concerns and a few drafting suggestions aimed at improving the legal certainty.

Draft Communication from the Commission - Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest

DRAFT COMMUNICATION	CER SUGGESTIONS
<p>I. INTRODUCTION</p> <p>This Communication gives guidance for the assessment under the State aid rules, of public financing of important projects of common European interest (IPCEIs).</p> <p>[...]</p> <p>Rules on public financing of IPCEIs are already laid down in the Framework for State aid for Research and Development and Innovation² and in the Guidelines on State aid for environmental protection³ which give guidance on the application of Article 107(3)(b) of the Treaty of Functioning of the European Union. The SAM constitutes a good opportunity to update and consolidate the existing guidance in one single document so as to bring it into line with the Europe 2020 objectives and the SAM goals and to extend it to other fields where such a notion could be of application. <u>This Communication therefore replaces any existing provisions on the IPCEI. In this way, this Communication provides Member States with dedicated and transversal guidance aimed at encouraging the development of important collaborative projects that promote the common European interest.</u></p>	<p>I. INTRODUCTION</p> <p>For the sake of clarity, CER suggest to be very precise on the rules which are derogated either by making them more easy to find out or by setting an annex with those rules. Avoidance of any misunderstanding is here an essential requirement of this communication.</p>

<p>Article 107(3)(b) of the Treaty provides that "<i>aid to promote the execution of an important project of common European interest may be considered to be compatible with the internal market</i>". Accordingly, this Communication sets out guidance as to the criteria the Commission will apply for the assessment of State aid to promote the execution of IPCEIs.</p> <p>[...]</p>	
<p>II. SCOPE OF APPLICATION</p> <p>[...]</p> <p>III. ELIGIBILITY CRITERIA</p> <p>[...]</p> <p>ii. Common European interest <i>General criteria</i></p> <p>1) The project must contribute in a concrete, clear and identifiable manner to one or more Union objectives and must have a significant impact on EU competitiveness, sustainable growth, addressing societal challenges or value creation across the Union.</p> <p>2) [...]</p> <p>3) The project must involve more than one Member State and its benefits must not be confined to the financing Member States, but extend to <u>a substantial part of the Union</u>. The benefits of the project must be clearly defined in a concrete and identifiable manner.</p>	<p>II. SCOPE OF APPLICATION</p> <p>[...]</p> <p>III. ELIGIBILITY CRITERIA</p> <p>[...]</p> <p>ii. Common European interest <i>General criteria</i></p> <p>1. We believe this criteria should not be on a stand-alone base sufficient to deny to a project compliance to the common European interest requirement</p> <p>2. [...]</p> <p>3. The appreciation of the substantial part of the Union positively affected by the project could not be easy to determine. CER suggest for transport related project like a bridge or a tunnel, to replace this criterion by a criterion based upon the fact that this infrastructure project will have a</p>

<p>4) [...]</p> <p>5) In addition to the above-mentioned cumulative criteria, the following elements will be considered as positive indicators:</p> <ul style="list-style-type: none"> – the project has been designed so as to make it possible for all interested Member States to participate, having regard to the type of project, the objective pursued and its financing needs; – <u>the design of the project involves the Commission or any legal body to which the Commission has delegated its powers, like for example the European Investment Bank;</u> – <u>the selection of the project involves the Commission or any legal body to which the Commission has delegated its power, providing this body is only acting in that purpose as an implementing structure;</u> – <u>the governance structure of the project involves the Commission – or any legal body to which the Commission has delegated its powers – and several Member States;</u> – the project involves important collaborative interactions (number of partners/ organisations of different sectors involved/ enterprises of different sizes); – <u>the project requires significant co-financing by Union funds.</u> <p>Specific criteria</p> <p>1) [...]</p> <p>2) [...]</p> <p>3) Environmental or energy projects must be of great importance for either the environmental or energy strategy of the European Union or to contribute significantly to the internal market.</p>	<p>positive impact on cross-border traffic.</p> <p>4. [...]</p> <p>5. CER believes the below listed points when met (any of them) are enough (de jure) to meet the common European interest criterion and therefore this section has to be modify to reflect this in a clearer manner.</p> <p>Specific criteria</p> <p>1) [...]</p> <p>2) [...]</p> <p>3) it is important to allow that such kind of project have also effects in other sectors like energy projects positively affecting the EU transport sector. The opposite is also important. This is why we suggest amending the text as</p>
---	---

<p>iii. Importance of the project [...]</p>	<p>follows: <i>Environmental, transport or energy projects must be of great importance for either the environmental, the transport or energy strategy and policy of the European Union or to contribute significantly to the internal market inclusive in these specific sectors.</i></p> <p>iii. Importance of the project [...]</p>
<p>IV. COMPATIBILITY CRITERIA</p> <p>[...]</p> <p>In view of the nature of the projects, the Commission may consider that the presence of a market failure or other important systemic failures, as well as the contribution to a common European interest, is presumed where the project fulfils the indicated eligibility criteria.</p> <p>i. Necessity and proportionality of the aid [...]</p> <p>ii. Prevention of undue distortions of competition and balancing test</p> <p>1) The Member State should provide evidence that the proposed aid measure constitutes the appropriate policy instrument to address the objective of the project. An aid measure will not be considered appropriate if other less distortive policy instruments or other less distortive types of aid instruments make it possible to achieve the same result.</p> <p>2) For the aid to be compatible, the negative effects of the aid measure in terms of distortions of competition and impact on trade between Member States must be limited and outweighed by the positive effects in terms of contribution to the objective of the common European interest.</p> <p>3) In assessing the negative effects of the aid measure, the Commission will focus its analysis of the distortions of competition on the foreseeable impact the aid has on competition</p>	<p>IV. COMPATIBILITY CRITERIA</p> <p>[...]</p> <p>CER strongly disagrees with this provision. In the case of projects framed by an EU initiative or funded by the EU, this presumption has to be applied directly and in all circumstances.</p> <p>i. Necessity and proportionality of the aid [...]</p> <p>ii. Prevention of undue distortions of competition and balancing test</p> <p>Here again we believe that projects within the framework of EU policies like TEN-T or/and having EU financial support have to be exempted from any application of these two criteria</p>

<p>between undertakings in the product markets concerned and on the risk of overcapacity.</p> <p>4) The Commission will assess the risk of market foreclosure and dominance, in particular in case of absence of, or limited dissemination of research results. Projects involving the construction of infrastructure must ensure open and non-discriminatory access to the infrastructure.</p> <p>5) The Commission will assess the potential negative effects on trade including the risk of a subsidy race between Member States that may arise in particular with respect to the choice of a location. Aid for a project that merely leads to a change in the location of the project within the Union without changing the nature, size or scope of the project will not be considered compatible.</p> <p>iii. Transparency [...]</p>	<p>iii. Transparency [...]</p>
<p>V. FINAL PROVISIONS [...]</p>	<p>V. FINAL PROVISIONS [...]</p>
<p>ANNEX I - ELIGIBLE COSTS</p> <p>a) [...]; b) [...]; c) [...]; d) [...]; e) [...];</p> <p>f) Personnel and administrative costs (including overheads) directly incurred for the R&D&I activities, including those R&D&I activities related to first industrial deployment.</p>	<p>ANNEX I - ELIGIBLE COSTS</p> <p>a) [...]; b) [...]; c) [...]; d) [...]; e) [...];</p> <p>f) CER believes this criterion can be applied to cases where less or no R&D&I is involved like in the establishment of a transport infrastructure or a multi-modal transport switch.</p> <p>CER suggest amending this provision as follows: <i>Personnel and administrative costs (including overheads) directly incurred for the R&D&I activities, including those R&D&I or for activities related to first industrial deployment in</i></p>

<p>g) In case of aid to a project of first industrial deployment the capital and operating expenditures (CAPEX and OPEX), as long as the industrial deployment follows on from R&D&I activity of which constitutes an integral and necessary element for its successful implementation and contains itself a very important R&D&I component. The operating expenditures shall be related to such component.</p> <p>¹ First industrial deployment refers to the up scaling of pilot facilities, or to the first-in-kind equipment and facilities which cover the steps subsequent to the pilot line but neither mass production nor commercial sales.</p>	<p><i>case of infrastructure transport projects.</i></p> <p>g) in this case again, some specificities of the transport sector have to be taken into consideration.</p> <p>CER suggest amending this provision as follows: <i>In case of aid to a project of first industrial deployment the capital and operating expenditures (CAPEX and OPEX), as long as the industrial deployment follows on from R&D&I activity of which constitutes an integral and necessary element for its successful implementation and contains itself a very important R&D&I component. The operating expenditures shall be related to such component.</i> <i>in the case of transport project, the R&D&I component is not compulsory for EU funded projects or in case these projects has positive cross-border effects.</i></p>
---	--

Disclaimer

Community of European Railway and Infrastructure Companies (CER) AISBL

Avenue des Arts 53
B-1000 Brussels
Belgium

Tel +32 2 213 08 70
Fax +32 2 512 52 31
contact@cer.be

This CER document is for public information.

Although every effort is made to ensure the accuracy of the information in this document, CER cannot be held responsible for any information from external sources, technical inaccuracies, typographical errors or other errors herein. Information and links may have changed without notice.