Position Paper

The European Voice of Freight Logistics and Customs Representatives

Brussels, 18th January 2008

RE: Preliminary draft guidelines on State aid for railway undertakings

INTRODUCTION

CLECAT represents European freight forwarders, logistics service providers and Customs agents. Neutral towards transport modes, logistics service providers are large users of rail freight services and, hence, important customers of railway undertakings. Aware of the fact that rail could and should play a more substantial role in the supply chain, CLECAT has been promoting a liberalised European rail freight market where full and fair competition takes place throughout the European territory. Indeed, as it has been shown in other transport modes (e.g. road, short sea shipping), competition is the main natural driver of performance and results in an overall increase in service quality, an aspect which still is the weak point of rail freight transport. It is also probably fair to say that better service is a pre-condition for greater rail transport market share.

CLECAT welcomes the opportunity to comment on the draft guidelines on State aid for railway undertakings. Whilst it is understood that these guidelines address both passengers and freight services, CLECAT comments will be limited to freight-related aspects.

GENERAL COMMENTS

Setting a transparent financial framework is not only an important pillar of the EU rail transport policy but also essential for the consolidation of the other two pillars, liberalisation and technical interoperability. Indeed, since the most prominent railway undertakings are still predominantly state-owned, clear rules on State aid can prevent distortions of competition whereas a number of private railways have been successfully active and growing since the European rail freight market was opened in 2003. As far as technical interoperability is concerned, in view of the investments necessary, these guidelines may serve as a coordination tool for Member States. For the above reasons, CLECAT welcomes the Commission's initiative and supports the general idea of guidelines on state aid for railways.

Until a few years ago, national rail freight markets were national legal monopolies for both freight and passengers' transport. The liberalisation process, which aimed to create an EU continental market and started with the First Railway Package, has however been faster in freight than in passengers' transport. Although a lot remains to be achieved in terms of correct implementation and application of European legislation, rail freight has been legally open to competition since March 2003, whilst passengers will reach the same legal arrangement only in

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2010. Nevertheless, one can note that incumbent railway undertakings have not always reflected such differentiation in their organisational structure and many did not operationally separate their passengers and freight divisions. Whereas such separation is not legally mandatory, it has the enormous merit of lifting any doubt on possible cross-subsidisation, which is strictly prohibited. For these reasons, CLECAT considers of the utmost importance that any state aid to railway undertakings be also assessed with a freight perspective, even when it is directed to passengers' transport or to the undertaking as a whole. This condition is essential if fair competition is to be safeguarded on the rail freight market.

Finally, when assessing the effects of a State aid measure, CLECAT calls on the European Commission to consider not only the rail freight transport market but the entire European freight transport market. Indeed, the concept of co-modality, introduced by the midterm review of the 2001 Transport White Paper entails a fair and equal treatment of all transport modes in order for them to perform both on their own and in combination. CLECAT believes that such perspective is essential in order to avoid distortions of competition that would eventually be detrimental to the European freight transport sector in general.

SPECIFIC COMMENTS

Public financing of railway infrastructure

CLECAT agrees that substantial investments in rail infrastructure are required – as well as in other modes' infrastructure – and that infrastructure is usually financed by public funds. As the Commission rightfully points out, there is no problem with such investments as long as infrastructure use is open to all potential users in a fair and non-discriminatory manner and access to that infrastructure is charged for at an appropriate rate.

When these conditions are not fulfilled, the investment is considered as State aid but may still be authorised on the basis of Articles 73 ("*need for transport coordination*") or 87(3) of the EC Treaty. There, CLECAT would like to restate the importance of adopting a freight perspective when assessing such State aid. Indeed, at present rail infrastructure is used for both freight and passengers' transport but – except for a few countries - only freight is open to competition. Last year, the European Commission came forward with a much welcome Communication on a rail freight-oriented network. The practical implementation of the concept, however, is not likely to see the light before passengers' transport is fully open to competition. In the current situation, a restrictive effect may have little impact on passengers' transport, but it could affect freight transport in a more perceptible way. In CLECAT's opinion, as far as rail infrastructure is concerned, the "*common European interest*" referred to in Article 87(3) is not compatible with a restricted use of and access to the infrastructure.

Aid for the purchase and renewal of rolling stock

In principle, this section falls outside CLECAT's scope insofar as it deals with passengers' transport only. One may however observe that for passengers' transport, State aid for the purchase of rolling stock may be justified on regional/local markets because of their specificity and the public service obligation that is attached to them. On competitive markets, State aid may be accepted but only as and if it has an environmental purpose. This is for example the case with the most environmentally-friendly truck engines (EURO IV & V). The same logic should apply to rail.

In addition, rolling stock may consist of either carriages or locomotives. Whereas the former can only be used for passengers' transport, the latter can pull passengers' and freight trains indifferently. This may even be common practice, for instance in marshalling yards. Such characteristic casts a risk of distortion of competition on the rail freight market. Since it seems impossible to be entirely sure that the locomotive will be used for passengers' transport only, CLECAT would advocate the application of some kind of precautionary principle and remove locomotives from the scope of the section "aid for the purchase and renewal of rolling stock".

Debt cancellation

Directive 91/440 provided for the possibility of "*financial rearrangement*" in order for Member States to ensure that "*publicly owned or controlled railway transport undertakings* (be) *given a sound financial structure*". Despite Member States' measures to this end, the Commission is still concerned with the level of indebtedness of many railway undertakings.

Since the opening-up of the international rail freight market in 2003 (Directive 2001/12), these measures however have much more substantial effects in terms of competition. CLECAT understands the Commission's temptation to authorise debt cancellation when the debt was incurred before the entry into force of Directive 2001/12 (15th March 2001). It should however be pointed out that Member States had some 10 years between Directives 91/440 and 2001/12 to take measures in order to reduce the indebtedness of their railway undertakings. Extending the possibilities to wipe out old debts seems rather unfair now that the international rail freight market has been open. Measures intended to protect from the rigours of the market are seldom fruitful and must be corroborated by a sound and superior strategic interest. CLECAT fails to see any superior strategic interest in defending debts often emerging form national protectionism and extending its scope into the EU, where market rules should play their role in full span.

The only exception CLECAT would make is when debt cancellation occurs within a restructuring process. Paragraph 52 of the present guidelines specifies that "*aid of this kind must generally be examined on the basis of the Community guidelines on State aid for rescuing and restructuring firms in difficulty ('restructuring guidelines')*". CLECAT would be in favour of restricting the possibility of debt cancellation to this restructuring process provided the restructuration business plan shows reasonable chances of future success.

Aid for restructuring railway undertakings – restructuring a "freight" division

Before going into the specifics of this section, CLECAT would like to react to a sentence contained in the guidelines. Referring to the different competitive situation between the passengers' and freight rail transport markets, paragraph 66 states that "*this situation has a financial impact in so far as freight is in principle governed solely by the business relations between shippers and carriers*". Such statement seems to ignore the substantial difference in the role of forwarders, logistics service providers and consolidators in rail freight. Indeed, as explained in the introduction, forwarders handle a sizeable part of rail freight and are therefore important customers of rail carriers. In so doing, they can be identified as shippers vis-à-vis RU's. However, by consolidating a large number of smaller consignments, they make the railway market accessible to a number of shippers who find themselves under the access barrier of rail transport. Either by putting together block trains or by consolidating cargoes into single wagons, they play a vital part to make rail transport accessible and appealing. Therefore, we believe that the guidelines ought to mention forwarders, together with shippers, as business partner of carriers. This would deter an over-simplified perception of rail transport commercial arrangements, which created a number of misconceptions in the past.

According to the European Commission's reasoning, based on the *common interest*, the freight division of a railway undertaking may still benefit from restructuring aid although the restructuring guidelines do not strictly apply, as and if the freight division is not yet legally separated from the passengers' transport section. The Commission however requires, amongst other conditions, that the restructuring plan includes the legal separation of the freight division from the rest.

This possibility would be open until 1st January 2010 only, when international rail passengers' transport is also open to competition. Whilst not being entirely sure of the positive effect of such a move, CLECAT can live with it considering it would only apply for 2 years, whilst compelling the requesting undertaking to legally separate its passengers' and freight transport activities - an action of good business practice that may contribute to transparency in the accounts.

As regards the other conditions required:

- ***Return to long-term viability***: considering the current inadequacy of rail freight service quality, CLECAT very much supports the Commission's request that the restructuring plan must "*make it possible to ensure a standard of quality, reliability and service which meets customers' requirements*". For the Commission's guidance, CLECAT suggests taking into account the performance of road transport, which shows the best standard in terms of quality, reliability and service. It is clear that RU's who wish successfully compete in future markets must put quality upfront in their business plan, by **mandating the introduction of quality agreements** in their dealings with customers.
- ***Prevention of any excessive distortion of competition***: CLECAT has no problem for the Commission to base its analysis on the economic models of other transport modes, as well as on the competitive situation on the (rail) market. Taking into account the "*Community objective of shifting the balance between modes of transport*" when assessing possible distortion of competition is however debatable. Indeed, if one looks at the entire European freight transport market, allowing a distortion of competition to the benefit of one mode (rail) would be certainly counterproductive. Rail must win market share by increasing its efficiency, not by counting on a less than neutral approach to competition by the institutions. Since the 2001 Transport White Paper, the European Commission itself has drawn the – albeit counterproductive – conclusions of a unilateral approach. In the 2006 midterm review, the modal shift objective was accommodated within the better-balanced concept of co-modality. These guidelines should therefore reflect the change by replacing the unsuccessful modal shift paradigm with the co-modality approach.
- ***Aid limited to a minimum***: the guidelines allow the European Commission to accept "*lower* (firm's) *own contributions than those provided for in the 2004 guidelines provided that the freight division's own contribution is as high as possible without jeopardising the viability of the operation*". CLECAT finds the idea of a "contribution as high as possible" too vague. Considering this article is potentially posing questions on its compatibility with a truthful market approach, CLECAT recommends its scope be limited to SME's.
- ***"One time, last time" principle***: CLECAT fully agrees with this principle.

Aid for the needs of transport coordination

Paragraph 90 of the guidelines rightfully recognises that in a liberalised sector, the need for coordination is reduced since coordination can in principle result from the action of market forces. In CLECAT's opinion, two important conclusions should be drawn from this observation:

- Rail freight transport has been liberalised for almost 5 years. The need for coordination should therefore be very small and Article 73 should only be used in exceptional cases;
- International passengers' transport will be liberalised as from 1st January 2010. Past that date, the use of Article 73 should therefore become exceptional for ALL rail transport activities.

With this preliminary observation in mind, whereas Article 73 may be used in exceptional cases to justify State aid for interoperability, CLECAT is opposed to using 'transport coordination' to justify either aid for infrastructure use or aid for reducing external costs.

Aid for infrastructure use is described as the "*aid granted to railway undertakings which have to pay charges for the infrastructure they use, while other undertakings providing such transport services based on other modes of transport do not have to pay such charges*". Such statement is wrong and seems to ignore the structure and functioning of freight transport. There is no free access to infrastructure in Europe at all, be is in the form of direct charges, tolls, service fees, excise on fuels, property tax, circulation taxes, poll taxes, etc. All these charges are substantiated by governments' need to build and maintain infrastructure, as well merely transferring enormous resources form the transport sector to other public use. All transport is paying to use general or specific infrastructure: shipping lines pay to use port facilities; road hauliers pay to use most of the road transport network (vignette or pay-by-use systems) and to access more and more European cities, in addition they absorb heavy excise rates on fuels and a number different property or circulation taxes and charges; barges operators pay to use inland ports; airlines pay to use airports. None of these modes, however, receive any aid to compensate these costs. The latter are just one of the many components of their commercial offers.

Rail has been often an exception in this landscape, infrastructure was developed with public money and its use remained in the public domain within a social arrangement where the role of the state in the economy was much more important than it is today. There is no justification - be it commercial or political - to grant rail a preferential treatment now. On the contrary, allowing aid to compensate for rail infrastructure use would be distorting competition with other modes of transport and be eventually counter-productive and detrimental to the overall perception of rail efficiency.

Aid for reducing external costs is "*designed to encourage a modal shift to rail because it generates lower external costs than other modes such as road transport*". CLECAT finds this statement not only arguable but – and this is more serious – premature. First, it is yet untested whether rail is the best performing mode in terms of external costs. When one looks at CO2 emissions, for instance, rail performances are far from uniform, if the source of energy production is taken into account (electricity is often produced by burning fossil fuels). Second, road transport is already paying for a number of its external costs whereas rail is not. Third, it is not sure that all direct costs are covered by infrastructure charges in rail. Beyond these arguments, it is more than surprising to read such a statement, whilst the Commission is preparing a methodology for the calculation and the internalisation of external costs in all transport modes. The results of this work will be made public by June 2008, and possibly include a legislative proposal. Before then, it is impossible not to consider this statement other than being pre-emptive vis-à-vis the Commission's own conclusions and any serious investigation on the issue of internalisation of external costs. The guidelines' statement banks on allegations to jump to conclusions for rail transport only, as though there were reasons to be afraid of the conclusions which will be reach for all modes of transport.

One could add that, if **all transport modes eventually have to pay for their externalities, there will be no need for state aid at all.** Indeed, the charge being proportional to the externalities, the most environmentally-friendly modes will *de facto* enjoy a competitive advantage. Moreover, there will be no need for financial assistance if revenues from charges are earmarked to the mode that generated them (a solution promoted by CLECAT[1]), thus making funds available for technology upgrading and further reduction of externalities.

[1] For more information on CLECAT opinion on internalisation of external costs, please see http://www.clecat.org/dmdocuments/pp020osecr071218intextcosts.pdf

➔ For the above reasons, CLECAT strongly requests aid for infrastructure use and aid for reducing external costs to be taken out of these guidelines completely and altogether. Their inclusion would not only result in substantial distortions of competition but also have no impact on the objective pursued (i.e. a shift towards rail transport).

Allowing such instruments may in the long run simply contribute to RU's receiving a placebo instead of the cure that will make them sound and more efficient.

Aid in the form of service compensation

CLECAT has no specific comment on this section since it is not related to freight transport.

State guarantees for railway undertakings

According to this section, railway undertakings, which are operating on both competitive and non-competitive markets, and enjoy unlimited state guarantees, are in breach of the EC Treaty. These guarantees should indeed be removed.

As for the date by which the guarantees should be removed (the guidelines propose 1st January 2010), CLECAT believes that a differentiation should be introduced:

- *1st January 2010* for railway undertakings that have legally separated their passengers' and freight transport activities;
- *Within 3 months after the publication of the guidelines* for railway undertakings that have not undertaken such separation. Indeed, on the rail freight market, these undertakings have been enjoying an unfair competitive advantage over their competitors for some 5 years. This uncompetitive advantage must therefore disappear as soon as possible. The sooner the better.

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