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## TOWARDS A UNIFIED RAILWAY LAW: WHAT ARE THE ISSUES?

### Discussion paper prepared by the secretariat

#### I. INTRODUCTION

1. The UN Economic Commission for Europe (ECE) aims to improve international rail transport in the pan-European region, particularly in emerging markets and landlocked economies in Eastern and South-Eastern Europe, the Caucasus and Central Asia.<sup>1</sup> Transport accounts for a significant portion of the costs associated with international trade. A harmonization of rail transport infrastructure parameters (e.g. mass per axle, siding length), operational and performance procedures (e.g. customs clearance, length and speed of trains), and legal (contractual) provisions would contribute to economic development by increasing international trade, output and employment.

2. The question how to achieve rail interoperability at the pan-European level and beyond is by no means trivial. Already in 2005 and 2006, ECE government and industry experts, supported by the Inland Transport Committee, stressed that obstacles to rail interoperability need to be overcome and a level playing field, particularly between road and rail, needs to be established along East-West and Euro-Asian land transport corridors but preferably throughout the whole railway network. A unified system overcoming the present separation between the COTIF and SMGS regimes and allowing direct rail carriage under a single legal regime from the Atlantic to the Pacific is warranted. Thus negotiations should be initiated.<sup>2</sup>

3. A number of studies have revealed the importance of non-physical obstacles to the provision of efficient rail transport services and the growing need for a uniform legal framework for international transport of goods by rail, especially between Europe and Asia. Recent cooperative efforts to overcome such obstacles include joint activities of the OSJD with the CIT, ERA and OTIF, the Global Team of Experts (GTE) of the UIC, the UN SPECA Project Working Group on Transport and Border Crossing, Working Parties of the ECE,<sup>3</sup> the Expert Group on Euro-Asian Transport Links (EATL), and other initiatives.

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<sup>1</sup> The ECE region consists of 56 countries of Eastern Europe, the Caucasus and Central Asia, South-Eastern Europe, Western Europe and North America. The pan-European region includes all ECE sub-regions with the exception of North America.

<sup>2</sup> For details see TRANS/WP.24/109, paragraphs 4-20; ECE/TRANS/166, paragraphs 95-96.

<sup>3</sup> In particular the ECE Working Parties on Customs Questions Affecting Transport (<http://unece.org/trans/bcf/welcome.html?expandable=99>), Intermodal Transport and Logistics (<http://unece.org/trans/wp24/welcome.html?expandable=99>), and Rail Transport (<http://unece.org/trans/main/sc2/sc2.html?expandable=99>).

4. While all aspects of interoperability are important, this paper proceeds from the premise that they should be addressed in a stepwise manner, i.e. consecutively rather than all at once. The Working Party on Rail Transport (SC.2) has decided at its sixty-fourth session in Geneva in November 2009 to establish an informal group of experts that would produce a position paper on unified railway law for its sixty-fourth session in 2010. The group should also prepare a workshop on principal Euro-Asian rail transport issues that would take place during the sixty-fourth session.

5. The paper is organized as follows. Section 2 compares briefly international regulatory frameworks for various transport modes. Sections 3 and 4 consider some physical and operational interoperability issues. Section 5 addresses some legal interoperability issues. Section 6 discusses objectives of the informal expert group. Section 7 concludes.

## **II. LACK OF A HARMONIZED LEGAL AND REGULATORY FRAMEWORK FOR INTERNATIONAL RAIL TRANSPORT**

6. Efficient international transport requires a transparent, stable and harmonized international legal and regulatory framework that identifies minimum standards, conditions and targets for the operation of existing and planned railway lines and the quality of international rail services. Such framework conditions would allow governments, transport operators, logistics providers and shippers to invest in and organize efficient international transport networks in line with mobility needs of passengers and requirements of global supply chains.

7. Rail transport is the only transport mode that does not benefit from uniform or even harmonized infrastructure, operational and legal framework conditions at the global or pan-European level. Thus railways cannot compete even on international long-distance routes on a level playing field with other modes of transport in the pan-European context or between Europe and Asia or Middle East, even though the dense European rail network and its linkages to other regions via Central Asia, Eastern Europe and Turkey could provide viable, economic and sustainable transport complements if not alternatives to long-distance road and maritime transport on such routes.

8. Air transport and maritime transport are organized and regulated globally on the basis of uniform international standards. Similarly, road transport benefits from common pan-European infrastructure standards (E-Roads, etc.), standard operational rules and regulations (TIR, ADR, etc.), and common legal and contractual standards (e.g. CMR for road freight transport). Inland water freight transport in Europe has also a common contractual regime (CMNI).

9. Even though a lot has been achieved at the sub-regional level, particularly within the 27 countries of the European Union, little has been done to reach the potential of long-distance international railway transport at the pan-European level and beyond and to provide for a regulatory level playing field with other modes. For instance, out of the 57 UN transport facilitation agreements administered by the ECE, only 5 offer solutions for rail transport and have been ratified by only 90 Contracting Parties (3 of these Agreements date back to the 1950s

and are today of only marginal interest).<sup>4</sup> In comparison, the 36 pan-European and global treaties with 1273 Contracting Parties address problems in international road transport and cover road infrastructure, road transport operations and border-crossing facilitation as well as contractual rules.<sup>5</sup>

10. The cumbersome dual legal system as well as incomplete market reforms in many European and Asian countries prevent railway enterprises from offering competitive long-distance transport solutions at the Euro-Asian and global level. Uniform framework conditions could improve significantly the performance of international rail transport. However, such conditions need to be negotiated and approved by all countries with rail networks in the pan-European region and preferably in neighboring countries (e.g. China, Iran, Mongolia) in order to address physical (infrastructure), operational and legal standards and interoperability issues.

11. With the progressively improving physical connections of the railway networks in Europe and Asia, the common framework will be even more warranted. The existing policy and legal instruments, such as COTIF and SMGS, or operational arrangements, such as the common CIM/SMGS consignment note,<sup>6</sup> could become the cornerstones of a unified legal framework for international rail transport that would enhance the competitiveness of rail freight networks across the Euro-Asian land bridge.

### **III. TECHNICAL INTEROPERABILITY IN INTERNATIONAL RAIL TRANSPORT**

12. UN agreements define minimum infrastructure standards and some operational parameters in the pan-European region (AGC, AGTC)<sup>7</sup> and Asian region (TAR).<sup>8</sup> There are 27 Contracting Parties to AGC, 32 to AGTC and 8 to TAR. While not identical, the AGC-AGTC and TAR parameters are interoperable to a large extent. There is no specific schedule for the implementation of the AGC, AGTC or TAR standards although Contracting Parties are encouraged to include them in their national development programmes.

13. Some physical parameters such as the loading gauge or gauge width are unlikely to be harmonized, given the considerable length of existing networks that were built according to specific national norms. Technical solutions exist for coping with such problems at a reasonable cost. Moreover, the OSJD/ERA contact group has started recently to harmonize technical specifications for interoperability of the 1,435 mm and 1,520 mm railway systems in the EU and East European CIS countries.<sup>9</sup>

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<sup>4</sup> The AGC and AGTC Agreements of 1985 and 1991 respectively, the 1952 and 1958 Conventions on the Facilitation of Crossing of Frontiers of Goods Carried by Rail and the 1958 Customs Convention on Repairing EUROP Wagons.

<sup>5</sup> Details are available at [http://unece.org/trans/conventn/agreem\\_cp.html](http://unece.org/trans/conventn/agreem_cp.html)

<sup>6</sup> CIM = Uniform Rules concerning the Contract of International Carriage of Goods by Rail (Appendix B to COTIF); SMGS = Agreement on International Transport of Goods by Rail.

<sup>7</sup> AGC = European Agreement on Main International Railway Lines; AGTC = European Agreement on Important International Combined Transport Lines and Related Installations.

<sup>8</sup> The Intergovernmental Agreement on the Trans-Asian Railway Network (TAR) came into force on 11 June 2009 when China became the eighth country that ratified it.

<sup>9</sup> For details see <http://unece.org/trans/doc/2009/sc2/ECE-TRANS-SC2-63-inf05e.pdf>.

14. A number of projects have been launched to improve the physical rail infrastructure in Central, South-Eastern and Eastern Europe, the Caucasus and Central Asia (e.g. CAREC, EATL, TER).<sup>10</sup> Major investments are typically financed with the aid of international financial institutions. Such investments can reduce transport costs considerably and thus stimulate trade and economic development of the countries concerned.

#### **IV. OPERATIONAL INTEROPERABILITY IN INTERNATIONAL RAIL TRANSPORT**

15. Non-physical obstacles to cross-border operations have been addressed mainly at bilateral and sub-regional levels. In principle, trade in rail transport services could be fully liberalized in line with the freedom of transit and other WTO rules for land transport services. This is however unlikely to happen in the foreseeable future, given the complex nature of ongoing negotiations on the liberalization of trade in services and the fact that a number of ECE member states with transition economies have not yet acceded to the WTO.<sup>11</sup>

16. The liberalization and privatization of railway systems in many ECE countries imply the need for efficient customs transit provisions for rail transport. In the ECE region, such provisions include the European Community transit procedure, European Convention on common transit procedure (EU and EFTA countries),<sup>12</sup> NAFTA transportation provisions, TIR and other UN legal instruments relevant to customs transit, including the Harmonization Convention. The recently adopted customs-related security obligations of the European Union pose new challenges for the Euro-Asian rail transport.

#### **V. LEGAL INTEROPERABILITY**

17. In the area of rail transport, two basic legal systems (COTIF, SMGS/SMPS) continue to exist side by side. The COTIF and SMGS/SMPS regimes are administered by the international railway organizations based respectively in Berne and Warsaw, i.e. OTIF (46 member states) and OSJD (27 member states). International freight traffic by rail between Europe and Asia uses the SMGS consignment note on the routes within the SMGS area. The traffic between the COTIF and SMGS countries has traditionally involved time-consuming border procedures, including the alignment and translation of relevant documents. The interoperability of the two legal regimes has been improved in recent years with the aid of a common CIM/SMGS consignment note developed jointly by the CIT and OSJD. This document is currently used on over 50 traffic axes in the trans-European rail corridors connecting the EU with Eastern Europe (Belarus, Russian Federation and Ukraine). It could also facilitate freight transport by rail between Europe and East Asia, providing that the CIM/SMGS consignment note were to be accepted in countries of Central Asia and China.<sup>13</sup>

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<sup>10</sup> These projects are described at <http://www.adb.org/carec/>, <http://unece.org/trans/main/eatl/intro.html>, and <http://unece.org/trans/main/ter/ter.html>.

<sup>11</sup> E.g. 7 CIS countries have so far not acceded to the WTO (Azerbaijan, Belarus, Kazakhstan, Russian Federation, Tajikistan, Turkmenistan and Uzbekistan).

<sup>12</sup> The transit procedure enables customs authorities to identify and monitor the transit of imported goods so that they can be processed at final destination rather than at the border.

<sup>13</sup> So far only Kyrgyzstan has agreed to accept the CIM/SMGS consignment note while its use on a trial basis is to start soon in Mongolia.

18. The legal duality mentioned above as well as complex transit rules have imposed considerable extra costs on international rail transport of goods in comparison to competing transport modes with uniform legal regimes. Although the use of the common CIM/SMGS consignment note has been increasing, most international freight trains between the COTIF and SMGS areas are still subjected to time-consuming and expensive documentation procedures at border stations.

19. In addition to the common consignment note, a CIM/SMGS claims handling procedure and corresponding rules for compensation payments have been developed recently by the CIT and OSJD. The common liability regime can be viewed as another important step towards a unified rail transport law in the Euro-Asian region.

## **VI. OBJECTIVES OF THE INFORMAL EXPERT GROUP ON UNIFIED RAILWAY LAW**

20. The main objective of the new expert group will be to assess the feasibility of developing a (partly legislative) strategy for cooperation between the established railway law systems administered by various organizations (in particular EU-OTIF, OSJD and UN). If feasible, the necessary actions and their sequencing ought to be identified by the group. Where there is a clear interest between railway law areas to cooperate, one should look at relevant options. E.g. rail freight contracts for international shipments to/from Russia and further East seem to be a logical point to look at with a view to exploring possibilities for systematic cooperation and harmonization.

21. The relevance of the EU railway law and its harmonization with other systems in the Euro-Asian region as well as current initiatives of international railway organizations ought to be considered from the outset and reflected in the terms of reference for a formal expert group on unified railway law that could be prepared by the informal group, if appropriate. Such terms of reference would have to be approved by the Working Party on Rail Transport and subsequently by the Inland Transport Committee in order to ensure administrative support of the ECE (including secretarial, interpretation and translation services) for an initial period of 2 years (2011-13) that could be extended by another 2 years (2014-15), if necessary.

22. The issues to be addressed in the position paper to be prepared for the Working Party on Rail Transport by the expert group could include:

- Key actions for establishing uniform railway law in the pan-European region;
- Merger of COTIF and SMGS in a new regime with transitory provisions;
- Extension of the new regime to the whole region and beyond;
- Legal interoperability of the Euro-Asian (global) and EU railway law;
- Relevant harmonized transport documents in the new legal regime;
- Responsibility for the drafting of relevant documents;
- Agency to administer the new legal regime;
- Elaboration of terms of reference for a formal ECE expert group on unified railway law.

23. The secondary objective of the group is to prepare a workshop on key Euro-Asian rail transport issues that should take place during the sixty-fourth session of SC.2 on 18-19 November 2010. The session is to be hosted by the Austrian government and OSCE in Vienna and coordinated with a session of the Steering Committee of the Trans-European Railway (TER) project on 17 November 2010.

24. The Vienna workshop could consider *inter alia* outcomes of the 2<sup>nd</sup> Global Rail Freight Conference in St. Petersburg on 6-7 July 2010. This high-level event, hosted by the Russian Railways and UIC, is expected to end with the adoption of a declaration aiming to support the harmonization and streamlining of the legal regime for Euro-Asian rail transport. The St. Petersburg declaration could be reflected in a policy statement to be adopted at the end of the Vienna workshop.

## VII. CONCLUSIONS

25. This paper has discussed a number of obstacles that reduce the competitiveness of rail-based solutions on Euro-Asian transport corridors. It has also discussed the principal and secondary objectives of the new informal expert group of the Working Party on Rail Transport.

26. The first conclusion is that the new expert group should focus on selected interoperability issues with a view to developing a strategy for a unified legal framework for international rail transport. Activities of the new expert group should be coordinated with existing initiatives of the CIT, EU, OSJD, OTIF and UIC that aim to develop harmonized legal regimes for the pan-European and Euro-Asian rail transport. This would ensure that the work of the expert group is both additional and effective.

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