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**Convention on the Contract for the International Carriage of Goods by Road (CMR):****Additional Protocol to the CMR concerning the Electronic Consignment Note (e-CMR)****Guidance note on the legal aspects of e-CMR****Revision****Submitted by the Netherlands**

At the request of SC.1, the secretariat prepared a “without prejudice” guidance note on the legal aspects of e-CMR which took into account the legal questions provided by SC.1 members (ECE/TRANS/SC.1/2018/1). It focuses on the key articles in e-CMR and may be revised and expanded in the future to include further legal considerations as contracting parties begin to operationalize and implement e-CMR. The note does not cover technical aspects.

At its 113<sup>th</sup> session, SC.1 invited the Netherlands to prepare and submit ECE/TRANS/SC.1/2018/1/Rev.1 with appropriate text to reflect the usual scenario of the usage of electronic consignment notes for contracts of carriage of goods by road in vehicles for reward where both the place of origin and place of destination are situated in two different countries which are both contracting parties to the CMR. This change is reflected in a new paragraph 31 of this document. SC.1 will be invited to endorse the guidance note.

## I. Introduction

1. At the request of SC.1 at its 112th session, the secretariat organized a special SC.1 session on the Convention on the Contract for the International Carriage of Goods by Road (CMR) and its Additional Protocol to the Convention on the Contract for the International Carriage of Goods by Road (e-CMR) on 4 April 2018 to discuss issues related to e-CMR and to decide on a way forward.
2. To facilitate discussion at that meeting, the secretariat prepared a short background paper (ECE/TRANS/SC.1/S/2018/1). The secretariat also gave a presentation on the historical background in relation to the drafting of e-CMR, recent accessions, key articles and issues concerning the operationalization of e-CMR. In addition, SC.1 received presentations from a number of member States and international organizations.
3. SC.1 invited the secretariat and interested others to prepare a guidance note on the legal aspects of e-CMR for the present session of SC.1 (paragraph 18, ECE/TRANS/SC.1/S/398).
4. Therefore, the aim of this paper is to address the legal aspects of e-CMR. It does not cover technical matters, such as the choice of technological approaches (i.e. national registry, distributed ledger or something else) which contracting parties may wish to consider and recommend to senders, carriers and consignees in their countries for the issuance and exchange of electronic consignment notes.
5. By way of an observation on technical matters, it is noticeable that e-CMR and its explanatory memorandum are silent on specifications related to technology. Neither do they recommend a form or format for electronic consignment notes. In this regard, e-CMR is similar to CMR in providing for the mandatory and optional particulars (by referring to CMR), but it does not prescribe the form or format of the electronic consignment note.
6. On the matter of technology, no single opinion can be expressed, because the context and constraints for each contracting party is different, and what might be appropriate for one might not be for another. However, in foreseeing the possibility of multi-modal electronic transport documents in the future, the secretariat would encourage contracting parties to choose flexible technological approaches that may be easily adapted or incorporated into other approaches as needed.

## II. Background: CMR

7. CMR was drafted to provide a uniform legal framework to the international carriage of goods by road. As stipulated in article 1 paragraph 1 of CMR, the convention applies to every contract for the carriage of goods by road in vehicles for reward if origin and destination are situated in two different countries and at least one of them is a contracting party.
8. CMR concerns the contract conditions, the contract document (consignment note) as well as the carrier's liability limits in case of total or partial loss of the goods carried, or in case of delay of delivery of the goods. The convention also defines the content of the consignment note (also known as CMR consignment note), which confirms the contract of carriage which must contain eleven mandatory particulars. CMR is, therefore, a treaty that contains obligations which are not only for States but also for private parties.
9. Since 1956, paper consignment notes issued pursuant to CMR have been well accepted as proof of a carriage contract between a sender and a carrier. They are valid in a court of law to support claims relating to the total or partial loss, damage or delay in delivery of the goods. As CMR does not specify the form or format of a consignment note, a variety

of possible layouts have arisen, with the most popular being the one developed by the International Road Transport Union (IRU).

10. At the time CMR came into effect, it was not envisaged that consignment notes could be in or on any medium other than paper. Since then, technology has evolved rapidly, and the use of electronic communications in international transport and trade has become widespread. Electronic communications have the scope to provide significant benefits in terms of speed of exchange of information, global access, and reusability of data.

11. In order to legally facilitate the use of electronic consignment notes, e-CMR was introduced. It came into effect in 2008. As an additional protocol, e-CMR does not aim at changing the substantive provisions of CMR, rather it provides a supplementary legal framework for the digitalization of consignment notes.

12. The explanatory memorandum to e-CMR<sup>1</sup> sheds light on the objectives of e-CMR. It states that “it is essential that in legally contractual relations the best conditions for the protection and security of documents are offered to operators” and lists the following three conditions:

- (a) the inalterability of the message, without the agreement of the parties, but also the possibility to change if there is agreement;
- (b) understanding and acceptance of the message by the consignee;
- (c) identification of the parties and security of the authentication of their signatures.

13. These conditions are reflected in articles 3 (authentication of the electronic consignment note) and 4 (conditions for the establishment of the electronic consignment note) of e-CMR which are explained in detail together with the other key articles of e-CMR in section IV below.

14. As at the date of writing, there were 55 contracting parties to CMR<sup>2</sup>, and 17 contracting parties to e-CMR<sup>3</sup>. Only contracting parties to CMR may become a party to e-CMR.

15. The key point of difference between CMR and e-CMR is that while CMR requires a paper form with mandatory particulars<sup>4</sup> and optional particulars<sup>5</sup> (if applicable), e-CMR requires also an agreement on the procedures for its operation and on the implementation of these procedures (per article 5 of e-CMR).

16. In recent times, e-CMR has attracted the interest of contracting parties and of commercial operators, and contracting parties are seeking clarity on the legal and technical aspects of its implementation. This note aims to address the legal aspects.

### III. Interpretation of “Parties” and “parties” in e-CMR

17. In e-CMR, there are references to “Parties” (i.e. the preamble and articles 7, 9, 10, 11, 12, 13, 14 and 15), “party or parties interested in the performance of a contract of carriage”

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1 ECE/TRANS/SC.1/2007/2.

2 Mostly in Europe, Central Asia and North Africa.

3 Bulgaria, Czech Republic, Denmark, Estonia, France, Iran (Islamic Republic of), Latvia, Lithuania, Luxembourg, Netherlands, Republic of Moldova, Russian Federation, Slovakia, Slovenia, Spain, Switzerland and Turkey.

4 See article 6 paragraph 1 of CMR for the eleven mandatory particulars of a consignment note.

5 See article 6 paragraph 2 of CMR for the seven optional particulars of a consignment note.

(i.e. articles 1 and 5), “parties to the contract of carriage” (i.e. article 3) and “parties” (i.e. article 6).

18. Article 31 of the Vienna Convention on the Law of Treaties stipulates that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. Accordingly, an appropriate interpretation of “Parties” seems to be the countries which are contracting parties to e-CMR.

19. In relation to “the parties to the contract of carriage”, it seems that they refer to the sender, carrier, consignee and successive road carriers (if applicable). Generally speaking, the parties to a contract are usually understood to be the entities who have concluded a contract and who are named in the contract. Uniquely, for CMR (and hence e-CMR), any successive road carriers “becom[e] a party to the contract of carriage, under the terms of the consignment note, by reason of his acceptance of the goods and the consignment note” based on article 34 of CMR.

20. In relation to “the parties interested in the performance of a contract”, it may be interpreted in two ways:

(a) The first possibility is that this wording reflects the nature of the relationship between the various private party entities (i.e. sender, carrier, consignee and successive road carriers (if applicable)) before they formally conclude the contract of carriage. At that stage, a contract does not yet exist, and the “parties” are usually not bound by any contractual obligations to each other, but merely have an interest in the conclusion of a contract. In the case of e-CMR, if these parties are unable to agree on the requirements in paragraph 1, a contract of carriage that fulfills the requirements of e-CMR will not come into existence; or

(b) The second possibility is that this wording is intended to cover all parties who may have an interest in the performance, rather than conclusion, of a contract. This could potentially include public authorities such as customs administrations.

21. In relation to “parties” in article 6 paragraph 2, in the context of this article, it seems clear that the reference is to the sender and the carrier.

22. Finally, it is worth noting that public entities may also have a right of access based on grounds of national security or trade policy, and some may additionally derive a right of access from the national laws which establish their governance functions.

## **IV. Key provisions in e-CMR**

23. In this section, unless specified otherwise (in relation to CMR), the article references are to e-CMR.

### **A. Accession to e-CMR: article 7**

24. According to article 7 paragraph 1, there are two prerequisites to acceding to e-CMR: a State should be a signatory to or contracting party to CMR, and it should be either a member of the United Nations Economic Commission for Europe (UNECE) or have a consultative status with UNECE.

25. At the time of accession, a potential contracting party may also decide to include in its instrument of accession the only reservation permitted by article 12 which relates to the dispute resolution mechanism in article 11.

26. Article 11 provides that in the case of a dispute between two or more contracting parties relating to the interpretation or application of e-CMR which these parties are unable to settle by negotiation or other means may, at the request of any of these parties, the dispute may be referred for settlement to the International Court of Justice. Such a reservation may be withdrawn at any time by a notification addressed to the Secretary-General of the United Nations.

## **B. Scope and effect of the electronic consignment note: article 2**

27. As mentioned above, the drafters of e-CMR did not intend to modify CMR on any substantive legal point but to supplement CMR in order to facilitate the optional making out of the consignment note by means of procedures used for the electronic recording and handling of data.

28. Therefore, contracting parties to e-CMR wishing to understand the potential application of e-CMR should in the first instance, refer to article 1 paragraph 1 of CMR which addresses the scope of application of CMR.

29. Article 1 paragraph 1 of CMR provides that CMR applies to every contract for the carriage of goods by road in vehicles for reward, if the origin and the destination are situated in two different countries, and at least one of the countries is a contracting party to CMR. Accordingly, in order for CMR to be potentially applicable, it is sufficient if only one of the origin or the destination countries is a contracting party to CMR.

30. That is, it is not necessary for both origin and destination countries to be contracting parties to CMR. Neither is it necessary for the sender's and/or the consignee's countries to be contracting parties to CMR, though in many instances, this is usually the case.

31. National legislation in many CMR contracting parties requires the use of CMR or e-CMR for contracts of carriage of goods by road in vehicles for reward where both the place of origin and place of destination are situated in two different countries. In countries that haven't ratified or accessed the e-CMR protocol, e-CMR can be used under the condition that a printed version is available on board.

32. Article 6 paragraph 1 of CMR is also important in determining if a consignment note can be said to be a consignment note under CMR. It lists eleven mandatory particulars that CMR consignment notes must contain. This includes "a statement that the contract is subject, notwithstanding any clause to the contrary, to the provisions of [CMR]" (article 6 paragraph 1(k) of CMR).

33. Taking into account the linkage between CMR and e-CMR, the requirement of an explicit statement to opt in CMR arguably also applies to opting in e-CMR. That is, there should be a statement in the electronic consignment note to the effect that that contract is subject to CMR and e-CMR.

34. In contrast, with respect to opting out, there is no need for an explicit statement to that effect as the use of electronic means is voluntary. Article 2 paragraph 1 (of e-CMR) states that "the consignment note referred to in [CMR], as well as any demand, declaration, instruction, request, reservation or other communication relating to the performance of a contract of carriage to which [CMR] applies, may [emphasis added] be made out by electronic communication".

35. In summary, for e-CMR to be potentially applicable, one of the origin or the destination countries must be a contracting party to e-CMR, and the electronic consignment note must contain a statement to the effect that that contract is subject to CMR and e-CMR. Additionally, the electronic consignment note must refer to the procedures listed in article 5

paragraph 1 as agreed between the “parties interested in the performance of the contract of carriage”. This is explained in further detail below.

36. Further, the use of electronic consignment notes in e-CMR contracting parties is voluntary. That is, it is not obligatory following accession, though it is certainly hoped that contracting parties will begin a process of transitioning from paper to electronic consignment notes.

37. There are practical reasons behind the slow uptake of electronic consignment notes to date. These include the relatively small number of contracting parties to e-CMR, and an absence of contracting parties that are geographically situated next to each other, thereby forming a transport corridor. Until recently, France and Spain were the only contracting parties to be situated next to each other. At present, there are a number of pilots trialing the use of electronic consignment notes, including France and Spain, and in the Benelux region<sup>6</sup>.

### **C. Authentication of the electronic consignment note: article 3**

38. Article 3 lists the methods to authenticate electronic consignment notes.

39. Paragraph 1 specifies that “[t]he electronic consignment note shall be authenticated by the parties to the contract of carriage by means of a reliable electronic signature that ensures its link with the electronic consignment note. The reliability of an electronic signature method is presumed, unless otherwise proved, if the electronic signature:

- (a) is uniquely linked to the signatory;
- (b) is capable of identifying the signatory;
- (c) is created using means that the signatory can maintain under his sole control;

and

(d) is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable.”

40. Paragraph 2 gives the contracting parties the option to authenticate an electronic consignment note “by any other electronic authentication method permitted by the law of the country in which the electronic consignment note has been made out”. In this regard, regional legislation on electronic identification and electronic transactions<sup>7</sup> may be applicable and should be considered.

41. Paragraph 3 specifies that “[t]he particulars contained in the electronic consignment note shall be accessible to any party entitled thereto”.

### **D. Conditions for the establishment of the electronic consignment note: article 4**

42. Article 4 paragraph 1 specifies that “[t]he electronic consignment note shall contain the same particulars as the consignment note referred to in [CMR]”.

43. Paragraphs 2 and 3 relate to the integrity of the original particulars and any subsequent amendments to the electronic consignment note.

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<sup>6</sup> Belgium, the Netherlands and Luxembourg.

<sup>7</sup> This includes the European Union’s eIDAS Regulation and the Eurasian Economic Union’s Protocol on Information and Communication Technologies and Information Interaction, among others.

44. Per paragraph 2, “[t]he procedure used to issue the electronic consignment note shall ensure the integrity of the particulars contained therein from the time when it was first generated in its final form. There is integrity when the particulars have remained complete and unaltered, apart from any addition or change which arises in the normal course of communication, storage, and display.”

45. Paragraph 3 specifies that “[t]he procedure used for supplementing or amending the electronic consignment note shall make it possible to detect as such any supplement or amendment to the electronic consignment note and shall preserve the particulars originally contained therein.”

## **E. Implementation of the electronic consignment note: article 5**

46. Article 5 paragraph 1 lists six procedures and the methods of their implementation which “parties interested in the performance of the contract of carriage shall agree on... in order to comply with the requirements of e-CMR and CMR”. These are:

- (a) The method for the issuance and the delivery of the electronic consignment note to the entitled party;
- (b) An assurance that the electronic consignment note retains its integrity;
- (c) The manner in which the party entitled to the rights arising out of the electronic consignment note is able to demonstrate that entitlement;
- (d) The way in which confirmation is given that delivery to the consignee has been effected;
- (e) The procedures for supplementing or amending the electronic consignment note; and
- (f) The procedures for the possible replacement of the electronic consignment note by a consignment note issued by different means.

47. Paragraph 2 requires that “[t]he procedures in paragraph 1 must be referred to in the electronic consignment note and shall be readily ascertainable.” Accordingly, the agreed procedures and their implementation per paragraph 1 must be referred to in the electronic consignment note.

48. As mentioned in the introduction, e-CMR is silent on specifications related to technology and technical matters, as well as in relation to a recommended form and format of the electronic consignment note. Given this, the parties have the flexibility to choose appropriate procedures and methods of implementation so long as they comply with the requirements of paragraph 1.

49. However, this flexibility in relation to technology and technical matters should be distinguished from stipulations which are not permitted by CMR (per article 41 of CMR).

## **F. Documents supplementing the electronic consignment note: article 6**

50. Article 6 paragraph 1 states that “[t]he carrier shall hand over to the sender, at the latter’s request, a receipt for the goods and all information necessary for identifying the shipment and for access to the electronic consignment note to which this Protocol refers.”

51. Paragraph 2 provides that the sender may furnish the carrier with “[t]he documents referred to in Article 6, paragraph 2(g) and Article 11 of [CMR]... in the form of an electronic communication if the documents exist in this form and if the parties have agreed to

procedures enabling a link to be established between these documents and the electronic consignment note to which this Protocol refers in a manner that assures their integrity”.

52. Article 6, paragraph 2(g) of CMR refers to “a list of the documents handed to the carrier” while article 11 of CMR refers to documents “[f]or the purposes of the customs or other formalities which have to be completed before delivery of the goods”.

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