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From:	General Secretariat of the Council
To:	Permanent Representatives Committee/Council
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Subject:	Coordinated position of the Union and its Member States in the Working Party on Rail Transport of the United Nations Economic Commission for Europe (UNECE) as regards the 'Unified Railway Law' initiative – Approval

This addendum contains the lines to take of the coordinated position of the Union and its member States at the 75th session of the UNECE Working Party on Rail Transport (17-19 November 2021), as regards the Unified Railway Law (URL) initiative. This topic will be discussed under item 4 'Towards unified railway law in the pan-European region and on Euro-Asian transport corridors'.

Background

The harmonisation and unification of rail transport law for international traffic in Eurasia is currently managed through two distinct legal regimes: (1) the Convention concerning International Carriage by Rail (COTIF), administered by OTIF, including its Appendix B "Uniform Rules Concerning the Contract of International Carriage of Goods by Rail (CIM UR)"; and (2) the Agreement on International Traffic by Rail (SMGS) administered by the Organisation for Cooperation between Railways (OSJD). The objective of the UNECE Unified Railway Law (URL) initiative is to develop an approach for the unification of rail transport law with the view to improving the efficiency and competitiveness of Euro-Asia rail freight transport services.

In its report to the UNECE Working Party on Rail Transport, the Group of Experts on URL deems that its mandate has been completed after it held two additional sessions in September 2020 and January 2021. According to the annotated agenda, the Working Party on Rail Transport should be “informed about the progress of meetings in 2020 and 2021 and discuss the next steps in preparing URL.”

Development in the Intergovernmental Organisation for International Carriage by Rail¹

At its General Assembly (28-29 September 2021), OTIF considered the report of the Secretary-General on the UNECE URL initiative and the conclusions of the OTIF Working Group of Legal Experts on the possible approaches to the unification of railway law. At its 4th session in April 2021, the Working Group of Legal Experts discussed the two approaches described above and concluded as follows:

“An interface law between COTIF/CIM² and SMGS would not contradict or overlap with COTIF, provided that its aim is to avoid any conflict with the CIM UR and SMGS and to fill a gap in the international regulations for international carriage when neither the CIM UR nor SMGS can be applied over the entire journey (traffic between Europe and Asia);

A single set of unified legal rules for any cross-border rail transport in the Euro-Asian area replacing the existing OTIF and OSJD legal systems will contradict and overlap with COTIF. Such a single regime could be developed only with the clear political commitment and participation of OSJD and OTIF and their members. This approach would also lead to the denunciation of the two tried and trusted legal regimes, COTIF/CIM and SMGS, and the dissolution of OTIF and OSJD.”

Following the proposal of the Secretary General of OTIF, the 15th General Assembly decided i.a. to:

- support the formation and adoption of an interface law between COTIF/CIM and SMGS to facilitate international rail freight transport between Europe and Asia, provided that this interface law must not conflict with the CIM UR;
- instruct the OTIF Secretary General to continue to participate in the UNECE work on the project to unify railway law and the ad hoc Committee on legal affairs and international cooperation to monitor the UNECE project concerning the unification of railway law.

¹ Note : The Union position in OTIF was prepared through Council Decision (EU) 2021/1744 of 28 September 2021, OJ L 351, 4.10.2021, p. 1.

² COTIF Appendix B - Uniform Rules Concerning the Contract of International Carriage of Goods by Rail

Those conclusions were aligned with the Union position.

Competence of the Union and of the Member States

In Council Decision (EU) 2021/1744 establishing the Union position at the 15th OTIF General Assembly, the Council determined that the UNECE URL initiative, in its current state-of-play, concerns both an area of competence that is shared with Member States and an area of exclusive Union competence.

As far as “Approach A” of URL is concerned (see *infra*, interface law), the legal area is strictly limited to the contract of carriage (equivalent to Appendix B of COTIF – CIM rules). This is an area where the EU has not adopted any rules yet. Therefore, the subject matter concerns a competence that is shared between the Union and its Member States.

As far as “Approach B” of URL is concerned (see *infra*, global convention), there is an element of Union (exclusive) competence because the scope of this approach affects COTIF and its Appendixes as well as significant part of the EU rail acquis (e.g. rules on safety and interoperability). The two approaches are fundamentally different and incompatible with each other.

Support for “Approach A” should be accompanied with opposition to the development of URL according to the principles of “Approach B”.

Therefore, at the meeting, the Union and the Member States should support the coordinated position.

Proposed line to take on behalf of the EU and its Member States

Completion of task (c)

Reference is made to points 1 to 13 of the meeting document ECE/TRANS/SC.2/2021/1.

The Group of Experts agreed to present one particular output document titled “Convention on the contract for international carriage of goods by rail as a first Convention of a system of Unified Railway Law Convention”³. This document provides provisions from preamble through substantive provisions to final provisions, which together form a draft interface “URL Contract of Carriage’s Convention”. Yet,

³ ECE/TRANS/SC.2/GEURL/2021/3 – consolidated draft text of a “Convention on the contract for international carriage of goods by rail as a first Convention of a system of Unified Railway Law Convention” (interface law)

“the Group of Experts was not able to overcome a difference in approaches to URL, as described below:

Approach A - creation of unified rules for rail transport on Euro-Asian corridors in areas where they are urgently needed by the industry – i.e. the contract of carriage – while leaving unaffected the two existing rail organisations and the legal rules (in particular CIM and SMGS) applicable for transports of goods within their respective territories (interface law);

ECE/TRANS/SC.2/GEURL/2021/3 contains a legal regime for the contract for international carriage of goods by rail that is considered to serve its purpose of interface law. It could be formally adopted as a convention rapidly and would then facilitate carriage of goods on Euro-Asian corridors responding to the needs of both the rail carriers and the relevant industry; and

Approach B – creation of a single set of unified legal rules for any cross-border rail transport in the Euro-Asian area replacing the existing systems of CIM and SMGS and only being put in force after all annexes (e.g. infrastructure, rolling stock, wagon law, transport of dangerous goods, etc.) have been negotiated and adopted. The industry does not have an urgent demand in the third legal regime, as CIM/SMGS consignment note provides seamless railway deliveries.

ECE/TRANS/SC.2/GEURL/2021/3 does not correspond to this approach. (...).

If approach A was followed, URLCoC Convention would have been produced based on ECE/TRANS/SC.2/GEURL/2021/3 to serve as an interface international law for immediate application on an opt-in basis for carriage of goods by rail on the Euro-Asian transport corridors by its Contracting Parties, leaving the COTIF/CIM Convention and the SMGS Agreement unaffected. If approach B was followed, URL as a single set of legal rules for Euro-Asian rail transport operations could be developed which would replace CIM and SMGS upon their adoption. However, that would have been outside the Terms of Reference of the Group of Experts which, apart from finalizing a Contract of Carriage convention, requests the Group only to identify other issues relevant to international rail freight traffic.

In view of the above, the Group of Experts invites the Working Party on Rail Transport (SC.2) to take stock of the two approaches.”

Position:

- *Support the development of URL along the lines set under “Approach A” as reflected in document ECE/TRANS/SC.2/GEURL/2021/3 that is the formation of an interface law for contract for international carriage of goods by rail between COTIF/CIM and SMGS, as an opt-in solution, and to fill a gap in the international regulations for international carriage when neither the COTIF/CIM nor SMGS apply over the entire journey (traffic between Europe and Asia);*
- *Oppose the endorsement of “Approach B”, which does not follow the step-by-step approach and the interface law principle. Also, while “Approach B” suggests the development of a framework convention covering the very broad scope, the URL Group of Experts could not agree on the opportunity or feasibility to extend the scope of URL beyond the area of the contract to carriage.*

Completion of task (d)

Reference is made to points 14 to 18 of the meeting document ECE/TRANS/SC.2/2021/1.

Under this task, the Group of Experts was to discuss other relevant issues related to international rail freight transport, which may be included in the scope of a legally binding document on URL, namely: provisions on dangerous goods; on the use of freight wagons; on rail infrastructure; and on rolling stock. The report presented by the Secretariat summarises the outcome of the activities of the Group of Experts regarding task (d) of its terms of reference:

“The Group of Experts was not able to identify in a unanimous way any specific issue on which additional provisions would need to be added to the provisions developed under Task (c). This is also due to the fact that the question depends on the approach followed: The interface law approach as reflected in ECE/TRANS/SC.2/GEURL/2021/3 provides for a legal regime that remains subject to the existing provisions of public law (such as e.g. infrastructure law).

As a consequence, there would be no need to harmonise those additional issues (Article 4 of URLCoC). Following the approach of the Russian Federation, that suggests a complete replacement of CIM and SMGS, the question of harmonisation of additional provisions could become relevant.

(...) the Group of Experts invites SC.2 to analyse those inputs and examine if any specific work aimed at preparation of specific legal provisions, or any specific research should be undertaken. If such work or research appears desirable, SC.2 should consider establishing a new expert group.”

The possible extension of the scope of application of the URL instrument to other areas, such as dangerous goods, use of freight wagons, rail infrastructure and rolling stock, would create a conflict with the EU acquis on rail transport as well as with the rules of OTIF. Such conflict should particularly be avoided in the areas of public regulations, which ensure the safety of international transport, such as the transport of dangerous goods or use of vehicles. Also, unlike the regulation of the contract of carriage of freight, which can be ensured by “light provisions”, the legal framework for the use of rolling stock, carriage of dangerous goods etc. requires well developed and detailed regulations.

It should be mentioned that legal provisions on the carriage of dangerous goods are subject to a multimodal harmonization process at global level; the UNECE administers the agreements for road, rail and inland waterways transport of dangerous goods, notably through the Joint Meeting of the RID Committee of Experts and the Working Party on the Transport of Dangerous Goods.

One single international legal regime covering all areas of rail transport may have clear benefits in comparison to the current situation. However, such a single global regime could be developed only with the clear political commitment of all interested parties and with a proper negotiating mandate adopted at EU level. Such undertaking would be very time-consuming and require a substantial amount of resources; it should only be envisaged if the costs and benefits of such approach have been clearly established and the necessary political support ensured.

Position:

- ***Take note that the Group of Experts was not able to identify any specific issue on which additional legal provisions would need to be added to the provisions on contract of carriage developed under Task (c); at this juncture, it appears that none of the “other relevant issues related to international rail freight transport” mentioned under task (d) could realistically be considered for inclusion in the legally binding instrument on URL.***

Next steps and future activities under the URL initiative

In the likely scenario, where no consensus will be found in the meeting of the Working Party on Rail Transport in November 2021 to move forward with the “interface law” approach on URL, the following lines to take may be followed:

Position:

- *Note that the Group of Experts on URL deems that its mandate has been completed after it held two additional sessions in September 2020 and January 2021.*
- *Note the fundamental differences (scope, purpose) between the interface law approach commanded supported by the majority of experts in the Group of Experts on URL, and the approach promoted by Russia for a global framework convention replacing OTIF and OSJD rules;*
- *Acknowledge that the Group of Experts succeeded to produce significant material that needs to be assessed by, and discussed between, relevant rail organisations, in particular OTIF and OSJD;*
- *Comment that OTIF carried out such internal consultation during the year and took a formal position on this issue during the 15th General Assembly that took place in September 2021;*
- *Comment that it would be most useful to know also OSJD position on this issue, also in relation to the on-going negotiation on the draft OSJD Convention;*
- *Consider that there is no justification to renew again the Group of Experts’ mandate on the basis of the same terms of reference;*
- *Suggest that the Working Party on Rail Transport continue to discuss and elaborate proposals for future activities under the URL initiative.*