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From:	General Secretariat of the Council
To:	Permanent Representatives Committee/Council
No. prev. doc.:	ST 12791/21
Subject:	Position of the Union in the ad hoc Committee on Legal Affairs and International Cooperation of the Intergovernmental Organisation for International Carriage by Rail (OTIF) as regards the issue of the “ECM certificates” – Approval

This addendum contains the lines to take on behalf of the EU¹ at the forthcoming session of the above *ad hoc* Committee regarding the issue of ‘ECM certificates’.

In line with the argumentation developed in its contribution LAW-21077-GTEJ 4/3, the EU should take the following lines during the discussion on this item:

- (1) The EU notes that WGTECH did not formulate any precise question in its request for legal assistance. Nevertheless, the WGLE decided to update its work programme, in order to:

“Examine legal aspects involved in the request formulated by the WG TECH as set out in TECH-20019-GTEJ (27.02.2020), in particular the interaction between COTIF ATMF and EU law and the application of the disconnection clause set out in Article 2 of the EU-OTIF accession agreement”

¹ Note : the lines to take are identical to those set out in document ST 13198/21.

- (2) The EU considers that the WGLE/ad hoc Committee should only clarify the “legal aspects”, and leave it to the WGTECH and the CTE, its parent body, to elaborate further on the issue in accordance with their attributions and prerogatives. This should include reflection and discussion on the implications of the (possible) advisory opinion, as well as analysis of potential options to further improve and facilitate international railway traffic.
- (3) With regard to the possibility that WGLE/ad hoc Committee provides an advisory legal opinion, the EU notes that only the Contracting Parties to the COTIF could agree to give an interpretation of the Convention that will be legally binding. The mandate of the WGLE (or of its successor, the ad hoc Committee on Legal Affairs and International Cooperation) does not include the interpretation of the COTIF or of the EUOTIF Accession Agreement. Therefore, the " advisory legal opinion" that may be adopted by the WGLE/ad hoc Committee on the issue of the "mutual recognition of ECM certificates", even under the new mandate of the ad hoc Committee on Legal Affairs and International Cooperation, cannot be binding on the Contracting Parties to the Convention and should only fulfil the purpose of providing an advisory opinion to the WGTECH.
- (4) The EU underlines that the subject matter – the technical admission of railway material in international traffic and the certification of the Entities in Charge of Maintenance (ECM) – is fully regulated at EU level and therefore pertains to the exclusive competence of the EU:
- Directive (EU) 2016/798 of the European Parliament and of the Council of 11 May 2016 on railway safety²
 - Commission Implementing Regulation (EU) 2019/779 of 16 May 2019 laying down detailed provisions on a system of certification of entities in charge of maintenance of vehicles pursuant to Directive (EU) 2016/798³
 - There also exists specific EU procedures and processes managed at central level by the European Union Agency for Railways (ERA), including:
 - a. Guide for the application of Article 14 of Directive (EU) 2016/798 and Commission Implementing Regulation (EU) No 2019/779⁴

² <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L0798>

³ https://eur-lex.europa.eu/eli/reg_impl/2019/779/oj

⁴ https://www.era.europa.eu/sites/default/files/activities/docs/guidance-ecm-certification-process_en.pdf

- b. ERA's Certification scheme for ECM and outsourced maintenance functions under Regulation (EU) 2019/779⁵
- c. ERA's Sectorial scheme for accreditation and recognition of ECM certification bodies under Regulation (EU) 2019/779⁶
- d. European Railway Agency Database of Interoperability and Safety (ERADIS)⁷

(5) The EU disagrees with the legal analysis set out in the meeting Document LAW-21012-GTEJ 4/3 prepared by the OTIF Secretariat. In particular, the EU disagrees with the opinion of the OTIF Secretariat that the EU would not adhere to COTIF Appendix G on its right, that the disconnection clause set out in Article 2 of the EU-OTIF Accession Agreement would not apply, and that ECM certificates issued in accordance with COTIF rules should be recognised for any type of international railway traffic between OTIF States, including within the EU, between two or more EU Member States. This analysis is based on misconception of the relevant international law instruments and distorts the EU-OTIF Accession Agreement.

(6) On the contrary, the EU analysed and clarified in its contribution that:

- a. The EU acceded to COTIF on its own right as the legal person "European Union".
- b. The condition of accession are set out in the EU-OTIF Accession Agreement, which states that: *"provisions in the Convention shall be so interpreted as also to include the Union, within the framework of its competence, and the various terms used to designate the Parties to the Convention and their representatives are to be understood accordingly."*
- c. Therefore, for matters of EU exclusive competence the EU is to be considered as "Contracting Party" to COTIF and a "Contracting State" to the relevant rules (ATMF), so that the international traffic as defined in Article 2 1) of ATMF, is the traffic that enters or leaves EU territory from/to an OTIF Member State which is not an EU Member State.

⁵https://www.era.europa.eu/sites/default/files/activities/docs/era-1172-003_ecm_certification_scheme_en.pdf

⁶https://www.era.europa.eu/sites/default/files/activities/docs/sectorial_scheme_for_accreditation-era_1172-002_en.pdf

⁷<https://eradis.era.europa.eu/default.aspx>

- d. Also, given that the matter at hand is regulated at EU level, the disconnection clause set out in Article 2 of the EU-OTIF Accession Agreement applies and EU Member States shall apply EU rules in carriages within their national territories or between them and “*shall therefore not apply the rules arising from that Convention*”; the application of the disconnection clause leads to the same conclusion that, as far as the EU is concerned, ATMF applies only to the international traffic that enters or leaves the EU territory.
- e. Article 3a of ATMF “Interaction with other international agreements” does not constitute a *lex specialis* vis-à-vis the disconnection clause and, in any case, it is not in conflict with the disconnection clause. It clarifies the application of ATMF between contracting Parties taking into account the existence of rules applicable within a group of States, members of a regional economic integration organization; i.e. the Member States of the EU.

- i. This article takes into account the disconnection clause of the EU-OTIF Accession Agreement: Point 8 of the ATMF Explanatory Report (Article 3a) states: “*Article 3a § 3 is derived from Article 2 of the ”Agreement between the European Union and the Intergovernmental Organisation for International Carriage by Rail (...)*”.
- ii. In line with the legal analysis presented by the European Union, Point 11 of the ATMF Explanatory Report (Article 3a) clarifies the different types of traffic and the application of COTIF or EU rules:

“The following three points illustrate the interaction between COTIF rules and EU rules:

For traffic between Member States of the EU, EU rules take precedence.

For traffic between EU and non-EU OTIF Contracting States: For the part of such traffic which takes place on the territory of the EU Member States, EU rules apply, except insofar as there are equivalent rules arising from COTIF on the particular subject concerned. For the part of such traffic which takes place outside the territory of the EU Member States, COTIF rules apply. The COTIF rules should be complemented by national rules, insofar as there is no COTIF rule governing the subject.

For traffic between two or more non-EU OTIF Contracting States, COTIF rules apply. The COTIF rules may be complemented by national rules, insofar as there is no COTIF rule governing the subject”

- f. This means that: for traffic between an OTIF member that is also an EU Member State (e.g. Germany) and an OTIF member that is not an EU Member State (e.g. the UK), COTIF ATFM rules on ECM may apply to the entire traffic, including to that part of the traffic that takes place on EU territory, where normally EU rules apply, provided that there are equivalent rules arising from COTIF on the particular subject concerned.
- g. Concerning ECM, Article 3a § 5 ATMF provides that: *“An entity in charge of maintenance (ECM) for a freight wagon, certified according to Article 15 § 2 [of COTIF ATMF], shall be deemed as certified according to applicable European Union and corresponding national legislation and vice versa in the case of full equivalence between the certification system adopted under Article 14a (5) of the EU Railway Safety Directive 2004/49/EC and rules adopted by the Committee of Technical Experts according to Article 15 § 2. These adopted rules are set out in Annex A to these Uniform Rules.”* This is correct but it must be stressed again that the equal value provided for in ATMF, of ECM certificates issued under its provisions and of ECM certificates issued under EU law, is only applicable within the scope of ATMF, as stated in Article 1 of the introductory provisions of ATMF Annex A: *“The equivalence between ECM certificates issued in accordance with these rules and in accordance with EU law shall be limited to the purpose and scope of ATMF”*.
- h. Also, Article 3a ATMF cannot be assimilated to, or construed as, a general Mutual Recognition Agreement. Even when both EU and ATMF provisions are equivalent, and the ATMF provides for equal value of ECM certificates, ECM certificates issued under the ATMF do not give the same rights in the EU as ECM certificates issued under EU law:
- i. ECM certificates issued under EU law can be used for national traffic in an EU Member State and in cross-border traffic within the EU, while the ECM certificates issued under ATMF cannot;

- ii. ECM certificates issued under ATMF, in their turn, can be used for international traffic when entering or leaving an EU Member State, from or to a Party to the COTIF that is not an EU Member State (nor a country which applies EU law as a result of an international agreement).

(7) In conclusion, the EU suggests that the WGLE/ad hoc Committee issues the following advisory legal opinion:

- a. The EU acceded to COTIF on its own rights.
- b. In accordance with the terms of the EU-OTIF Accession Agreement, for subject matters falling under its exclusive competence, the EU is to be considered a “Contracting Party” to COTIF and a “Contracting State” to COTIF Appendix G (ATMF).
- c. As far as the EU is concerned as “Contracting State” to COTIF ATMF, the international railway traffic defined in Article 2 1) of ATMF is the railway traffic that enters or leaves the EU territory from/to an OTIF Member State, which is not an EU Member State.
- d. There are EU rules governing the technical admission of railway material in international traffic (Directive (EU) 2016/798 on railway safety; Commission Implementing Regulation (EU) 2019/779 of maintenance of vehicles); thus, in application of the disconnection clause set out in Article 2 of the EU-OTIF Accession Agreement, COTIF ATMF does not apply within the EU as regards railway traffic between two or more EU Member States.
- e. Article 3a of COTIF ATMF (Interaction with other international agreements) deals with the “interaction” between ATMF and the EU legislation, reflecting the application of the disconnection clause, i.e. clarifying the application of ATMF UR between the Contracting Parties of ATMF with regard to the existence of other rules applicable within a group of OTIF Member States, i.e. the Member States of the European Union.
- f. For international traffic between an OTIF member that is also an EU Member State and an OTIF member that is not an EU Member State, COTIF ATFM rules on ECM may apply to the entire traffic, i.e. also to that part of the traffic that takes place on EU territory, where normally EU rules apply, only where there is full equivalence between the EU rules and the rules arising from COTIF on the particular subject concerned.

- g. There does not exist any system of mutual recognition of ECM certificates set out in COTIF ATMF, whereby ECM certificates issued under COTIF ATMF would be usable for international traffic within the EU; the principle of equal value between ECM certificates issued in accordance with COTIF ATMF Annex A and ECM certificates issued in accordance with EU law is limited to the purpose, and within the scope, of COTIF ATMF; in this framework, as a Contracting Party to COTIF on its own right, the EU adheres to the COTIF ATFM with regard to the international railway traffic that enters or leaves the single European rail area, so that, subject to the detailed rules set out in COTIF ATMF (including its Annex A):
- i. An ECM certified in accordance with EU law is to be deemed certified for the maintenance of a railway vehicle used for any type of traffic within the EU and for traffic between the EU and an OTIF State, which is not a member of the EU;
 - ii. An ECM certified in accordance with the ATMF is to be deemed certified for the maintenance of a railway vehicle used only for traffic between the EU and an OTIF State, which is not a member of the EU and does not apply EU law pursuant to a separate treaty or agreement.