**Study on EU Member States' national civil liability regimes in relation to rail accidents between Railway Undertakings and Infrastructure Managers in so far as they may present a barrier to the internal market**

**Final report**

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*The main report has been established by*
Carole Maczkovics
Pierre Van Ommeslaghe
Bob Martens
of DLA Piper UK LLP (Brussels)

*with the assistance of*
DLA Piper UK LLP (Cologne)
Horten (Copenhagen)
KGDI (Athens)
DLA Piper UK LLP (Madrid)
DLA Piper UK LLP (Paris)
DLA Piper UK LLP (London)
DLA Piper UK LLP (Budapest)
Mason Hayes + Curran Solicitors (Dublin)
Lideika, Petrauskas, Valiūnas ir partneriai LAWIN (Vilnius)
DLA Piper Wiater sp.k. (Warsaw)
DLA Piper UK LLP (Bucharest)

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Notice: the views expressed in this report are those of the authors, not necessarily those of the Commission.

*Preliminary note:*

*Following the entry into force of the Lisbon Treaty on 1 December 2009, the present report has chosen not to refer any longer to the European Community but only to the European Union, even when relating to past events, in order to simplify and unify the wording of the text.*

## Executive summary

### *Introduction*

The opening up of freight and, in 2010, international passengers' services in the railway sector has led to a restructuring of the sector. The restructuring of the sector relates to vertical unbundling which ranges from accountancy separation between railway transport services and infrastructure management (accompanied by the divesting of essential functions such as paths allocations and fee charging) to the complete separation between Railway Undertakings (RUs) and Infrastructure Managers (IMs). This has meant that the legal relationships between (the many more) parties have become more varied and complicated.

In this context, liability issues between on the one hand RUs and their clients or third parties and on the other hand between RUs and the separate IMs developed. Whereas civil liability issues between RUs and their clients or third parties have been addressed in International and EU law, those issues as they arise between RUs and IMs are not harmonised at a European level. The Convention concerning International Carriage by Rail does contain an appendix E setting out Uniform Rules concerning the Contract of Use of Infrastructure (CUI) in International Rail Traffic which addresses those issues, but it is disapplied by the EU Member States, for reasons of partial incompatibility with EU law on non-liability issues. The CUI was then revised as to comply with EU law and shall enter into force on 1 December 2010. Unless incompatibilities remain, CUI shall also be applied in the EU. In the absence of European harmonisation and of applicable international rules, civil liability pertaining to railway accidents, between RUs and IMs is addressed by national law.

These national liability regimes are largely unknown to the European Commission and some parts of the industry advised that they are not entirely suitable. Therefore, the European Commission commissioned this Study the objectives of which can be summarised as follows:

> (1) undertake a review of the national civil liability regimes in relation to rail accidents between RUs and IMs in the course of an international service, in a representative sample of EU Member States,
> (2) assess if any of the national regimes constitute a barrier to the internal market, and
> (3) recommend solutions.

### *Approach and methodology*

The Study examines the respective liability of RUs and IMs towards each other in the event of a railway accident happening during the provision of an international service. However,

national freight services being opened up to competition and some RUs considering that they enjoy a right of establishment for passenger services in other EU Member States, regimes as they apply to purely national transport services may also affect the internal market. Therefore, the Study is not limited to the international aspects of civil liability, but also the extent to which the national regimes may affect the internal market.

The EU Member States studied have been selected following four criteria:

- Difference / similarity between national legal regimes;
- Geographical spread;
- Duration of EU membership;
- Degree of separation between railway IMs and railway operators and their independence towards each other.

On the basis of these criteria, twelve EU Member States have been selected as a sample for the current Study: Belgium (BE), Denmark (DK), France (FR), Germany (DE), United Kingdom (UK), Hungary (HU), Ireland (IE), Greece (EL), Lithuania (LT), Poland (PL), Spain (ES) and Romania (RO).

The Study is based on several sources of information:

- on the consultation of national experts as to investigate the national legal regimes of civil liability.
- on a broad consultation of stakeholders as to poll the existing initiatives dealing with liability issues as they may appear between RUs and IMs as well as to collect their views. The response rate of Railway Undertakings and national ministries is relatively which led the consultant to extrapolate some conclusions and rely on technical findings.
- on desk top researches and on technical legal analysis.

***Status of civil liability between Railway Undertakings and Infrastructure Managers***

At international level, the Convention concerning International Carriage by Rail (COTIF) aims at setting out a uniform system of law. It is possible for COTIF Members to declare the disapplication of certain appendices to the Convention. On the basis of this possibility, the EU Member States have made such declaration with regard to Appendix E – CUI (Contract of Use of Infrastructure) to preserve the integrity of EU law since this appendix was considered as incompatible with EU law. Amongst its members are the EU Member States having railway infrastructure, but the European Union is not a member yet.

Certain COTIF Appendices provide for liability rules, often based on strict liability (without *culpa*), between RUs and their freight customers (CIV), passengers (CIM), vehicle keepers (CUV) as well as IMs (CUI). CUI contains liability provisions which are mandatory. The parties

may however agree to assume greater liability and obligations more burdensome than provided in CUI or to fix a maximum amount of compensation for loss of or damage to property. CUI sets out the principle of strict liability of both the IM and the RU towards each other. On the basis of such liability, it is not necessary to prove the fault of the other party but only the damage and the triggering event. However, the party found liable can escape its liability to the extent the other party was in fault, or, if the respondent can prove that the incident was caused by circumstances not connected with their activities or due to the behaviour of a third party, provided that these circumstances are unavoidable and their consequences impossible to prevent, in spite of having taken the care required in the particular circumstances. Damages cover bodily loss and damage (death and personal injury) to property and pecuniary loss resulting from damages payable by RUs on the basis of CIV or CIM. Indeed, on the basis of CIV and CIM, RUs are liable towards their clients and customers for their auxiliaries and also for the IM (through their assimilation *ex lege* to RU's auxiliaries) with a possible right of recourse against it if so provided under national laws. Hence, the provisions of CUI expressly organise the right of recourse of RUs against the IM when they have first paid damages to their customers under the CIM (Uniform Rules of COTIF concerning the Contract of International Carriage of Goods by Rail) or their passengers under CIV (Uniform Rules of COTIF concerning the Contract of International Carriage of Passengers by Rail) while the IM is to be held liable.

At the European level, it is clear that one of the objectives of the Common Transport Policy is the creation of an internal market for rail services. On the basis of this objective, the EU has already adopted several pieces of legislation. These laws have notably imposed the separation of the management of infrastructure and the operation of railway services, with a view to accompanying the opening up of the market. The vertical unbundling resulted in new legal relationships and new types of contracts, between RUs and IMs. Although the EU has adopted legislation to settle the liability regime between RUs and passengers, which renders RUs responsible also for the IM, the EU has not adopted any such legislation to settle the liability between RUs and IMs.

Indeed, EU law has already addressed liability issues in the railway sector in the remit of Regulation 1371/2007 on rail passengers' rights and obligations, but only as regards the relationships between RUs and their passengers in the operation of passenger services. This Regulation has been adopted in addition to the CIV Uniform Rules under the COTIF, in order to guarantee an extended scope for passengers' rights.

As regards liability issues between RUs and IMs, EU law merely imposes upon RUs to be "adequately" insured or to make equivalent arrangements for cover, in accordance with national and international law, of their liabilities in the event of accidents, in particular in respect of passengers, luggage, freight, mail and third parties. It is well required that RU enter

into a contractual relationship with IM, but the only harmonisation that occurred at EU level relates to the minimum compulsory content of the Network Statement, through which the IM communicates particular information on the use of its infrastructure, without dealing with civil liability issues.

At present, there are discussions in the industry to adopt European General Terms and Conditions (GTC) of use of railway infrastructure. Without prejudice to mandatory law, the proposal for GTC aims to simplify the contractual process and develop mutual understanding and solutions for all IMs and RUs on contract issues and best practices. The liability provisions contained in the proposal for GTC are largely drafted following the CUI. The GTC provide for strict liability (without *culpa*) of IMs and RUs when the origin of the damage is respectively in the infrastructure or in the goods and persons transported or in the means of transport. It provides several grounds of relief, whereby IMs / RUs are not liable to the extent the other party was at fault, or, if the respondent can prove that the damage was unavoidable and impossible to prevent despite the having taken the care required, where the damage is due to a circumstance not connected with the activity or to the behaviour of a third party.

The GTC of use of railway infrastructure adds value in comparison with the Appendix E – CUI of COTIF as revised in 2009 at least on three points:

- First, if an agreement can be reached, damage which is caused to a party by delay and disruption to the operation of the other party shall be settled.

- Second, an IM will be held liable for pecuniary loss resulting from damages payable by the RU under international and national law that he caused to the RU and not only pecuniary loss payable by the RU under CIV and CIM Uniform Rules of COTIF.

- Third, RU will be held liable for pecuniary loss payable by the IM under international and national law that he caused to the IM whereas CUI does not provide for a strict liability of RU for pecuniary loss caused to the IM.

At national level, civil liability regimes applicable between RUs and IMs are constituted of specific or general legal rules and sometimes of contractual clauses contained either in the contract of use of the railway infrastructure and/or the Network Statement.

The concepts of civil liability used vary from EU Member State to EU Member State, as do the applicable regimes. Therefore, data should be handled and compared with the greatest caution. For the purpose of comparison, the following general lines could be drawn.

Since IMs and RUs are obliged to adopt a contract for the use of the infrastructure, their liability towards each other is contractual. In some cases, the contracts provide for specific liability provisions. In these cases, following the principle of contractual freedom, these contractual provisions will prevail on possible suppletive, non-mandatory national rules. When these contracts, containing liability provisions, exist, they appear to be non-negotiable contracts, unilaterally issued by the IM for the sake of non-discrimination.

The contract used by Network Rail (the IM in Great Britain) retains a liability based on fault. In FR, HU and DE, the contracts provide for liability based on both objective grounds (without *culpa*) and on fault. The contracts in use in BE and RO foresee a strict liability. When strict liability is provided, this also generally includes liability for the defect of respectively the rolling stock and the infrastructure. In all cases, grounds of relief are also foreseen. However, in the contract currently in use in RO, the IM can be relieved on various grounds whereas RUs can only escape their liability in the event of force majeure, putting the RUs in an unfair position. The contracts generally describe the damage covered and sometimes also set some financial cap or minimum thresholds out. As regards delays and disruptions, these issues are dealt with in the performance schemes adopted on the basis of Directive 2001/14 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure.

Even if a contract contains specific liability provisions, these provisions will remain dependent on the interpretation given by the national judge and in particular on the causation theory in force in the Member State in question.

Three main categories of causation theories can be made with variation within each category:

(1) causation based on the equivalence of the conditions whereby to establish liability it suffices to show that the damage would not have occurred in the absence of the triggering event (e.g. in Belgium and in Hungary);

(2) adequate / relevant causation whereby to invoke liability an adequate link between the triggering event and the damage has to be proven (e.g. in Denmark, Greece, Romania, Spain and possibly also in France / the remoteness limit used in the United Kingdom, in Ireland and in Lithuania could be considered as pertaining to this category) and

(3) causation based on a triple test consisting of determining whether the link between the triggering event and the damage constitutes the "*conditio sine qua non*", if so, whether the link can be considered as adequate and finally whether the damage is within the scope of protection of the norm which has been infringed (e.g. in Germany).

In almost all the EU Member States studied, apart from France and Lithuania, non-contractual liability grounds may also be invoked under certain conditions.

Unless otherwise provided in the contracts, the majority of EU Member States retain liability based on "fault" (subject to various definitions). Some grounds of strict liability (liability without *culpa* or without fault) also exist in DE, HU, LT and PL. Where strict liability applies, possible exonerations are also foreseen. This is explainable because, whereas liability for "fault" can, by definition, be avoided (by not making fault), strict liability is automatically triggered when the conditions for its application are fulfilled.

In general, the burden of proof is borne by the claimant. However, in EL, under a contract, it is the respondent who has to prove that he acted diligently. In addition, in some circumstances, there is a shift in the burden of proof in many EU Member States. In EL, HU, IE, LT, ES and UK, such burden of proof exists where negligence is presumed on the respondent since the object causing injury was in their control. In some other jurisdictions, as in BE and FR, such reversal of the burden of proof would exist when the respondent is considered to bear obligations of result ("*obligations de résultat*").

As to the damage covered, the causation theory helps to determine the scope of the liability.

The quantum of damage obtainable is often unlimited (the whole damage, but not more than the damage). Such quantum is limited in France where only the contract and contract law apply and in Germany where RUs and IMs are subject to strict liability. In some EU Member States, the fact that the injured party is at fault and contributed to the damage can lead the quantum of damage due being reduced or in certain EU Member States, sometimes even excluded.

These regimes are complex and not yet settled as regards the relationship between RUs and IMs, because of the recent phenomenon of separation between railway operations and infrastructure management, involving some legal uncertainties as to the applicable regime. However, it appears that all regimes follow their own pattern. It is the combination of their features which gives them coherence.

It is worth noticing that in Great Britain, a particular system has been put in place to deal with liability issues in the railway sector, based on a Claims Allocation and Handling Agreement (CAHA). The analysis of CAHA consists of two regimes:

(1) under a certain threshold, liability is allocated according to the terms of the agreement and (2) above these thresholds, the agreement designates a lead party to handle the case and the allocation of liabilities is agreed among the CAHA members involved.

The agreement is an agreement approved by the Regulatory Body and to which the industry must subscribe. It appears that the agreement leads to a rapid identification of the liable party while providing for a one-stop-shop to the claimant. Disputes are referred to a specific committee, the Railway Industry Dispute Resolution (RIDR) Committee, to arbitration or to the courts as determined by the agreement and the nature of the dispute. The objective is to reduce the costs of inter-industry disputes by use of a pre-determined allocation regime for small claims, to avoid court actions and time spent in resolving disputes within the industry, and provide a unified face to passengers. The principles are to avoid the risk of a claimant who has, for instance been injured in an accident, having to pursue more than one industry party, and minimise the industry parties' costs incurred in defending such claims.

***Analysis and assessment***

A. The question to be answered by this Study is whether the current situation is liable to impede or render less attractive the provision of railway services in the EU.

1) The views expressed by the stakeholders helped in assessing the current state of play of civil liability regimes as they apply between Railway Undertakings and Infrastructure Managers.

In general, RUs underlined the difficulties they encounter with the application of the civil liability regimes and in particular their weaker position in comparison to IMs, who seem to have more freedom to manoeuvre and contractual dominance. From their contributions, it appears that liability issues with IMs are settled out of Court. RUs have provided only very few examples of accidents. They did not provide information neither on their risk coverage. Only one indicated its level of satisfaction of the current situation to being very low.

The International Rail Transport Committee (CIT) mainly underlined the necessity for a unified civil liability regime and denounced the multiplicity of the different international bodies of rules which they found to be in many aspects incompatible. The CIT considers that the current situation "*hinder[s] rapid and formality-free crossing of frontiers based on standard and certain legal principles and make[s] claims for compensation more difficult as the non-application of the CUI Appendix to COTIF in most EU states shows*". However, concrete example could not be provided by CIT or by RUs. CIT advocates the adoption of legal regimes which would complement each other instead of being contradictory. CIT also advocates for an extension of the scope of CUI as to apply to domestic services and to ensure a broader right of recourse for RUs who have been the first liable party paying damages. CIT considers that such extension could happen through a EU Regulation.

On the other hand, referring to the General Terms and Conditions for the use of railway infrastructure that the Industry is currently discussing, the organisation of the European Rail Infrastructure Managers (EIM) "*considers that the contractual process based on access contracts between IMs and RUs may be sufficient. There is no need for a legislative route*".

It would then appear that none of the RU that participated in the survey has been directly impeded in providing services abroad because of the existing national regimes, in so far as they had even contemplated the issue. Indeed there was no evidence that they actively thought about this, perhaps assigning such low priority over other considerations.

2) There are many grounds of liability upon RUs which apply even if the fault rests elsewhere. Hence, where damage occurs, the Railway Undertakings will often (if not always) be the first party to pay damages to the victims. If these regimes still apply without international or EU harmonisation, liability borne by RUs are largely dealt with in EU and international law. This is the case of the CIV and CIM Uniform Rules of COTIF, according to which RUs bear strict liability (i.e. liability without *culpa*) towards their clients for damage occurred to the passengers and their belongings or occurred to the goods transported. RUs are liable towards their clients and customers for their auxiliary and also for the IM (through its assimilation *ex lege* to RU's auxiliaries) with a possible right of recourse against it if so provided under national laws. This is also the case of Regulation 1371/2007 on rail passengers' rights and obligations which repeat the liability provisions contained in the COTIF Uniform Rules CIV. To a lesser extent, CUV Uniform Rules of COTIF (Contract of Use of Vehicles) provides for a presumption of fault of RU for any loss or damage to the vehicles which can be rebutted. Another ground for RU's strict liability is the Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage. This Directive also retains a strict liability of RUs for environmental damage in the transport of dangerous goods.

To deal with the issue raised by the RUs bearing liabilities even for the actions of IMs, national civil liability regimes apply. These regimes are complex and not yet settled as regards the relationship between RUs and IMs, because of the recent phenomenon of separation between railway operations and infrastructure management, involving some legal uncertainties as to the applicable regime. However, all regimes follow their own pattern and it is difficult to ascertain which one serves the internal market the best or the worst.

Looking at international dimension, the co-existence of different national regimes renders cross-border services more difficult and triggers additional information costs. The international dimension also implies that it is difficult to know beforehand the competent courts and laws which will be of application even for a RU which operates only domestic services, since events can occur on a network and have effects abroad.

The contracts entered into by RUs and IMs are often without any choice or room for leeway for Railway Undertakings. In general, those contracts often fail to remedy the numerous grounds of liability borne by RUs by an appropriate right of recourse and create sometimes additional grounds of liability with consequences for RUs.

3) The additional costs generated by the current legal uncertainties and lack of information could have an impact on the cost structure of the RUs and on their risk coverage. RUs did not provide information as to the impact of the current situation on their costs. Insurance premiums are not only influenced by the existing civil liability regime but also by other factors. Hence, even if there were available data on insurance premiums, the correlation between the existing civil liability regime as such and the level of insurance premiums is difficult to determine, although some stakeholders highlighted the link. According to the Study on rail insurance in the railway market, rail insurance does not in itself constitute an immediate barrier to increased competition and subsequent further integration of the European rail market.

B. The other question which remains to be answered is whether the available instruments are able to adequately address the problems highlighted in the Study.

1) COTIF's CUI appendix is generally deemed as useful and adequate to address liability issues between RUs and IMs. However, at current, it is not applied and on the basis of a technical analysis, CUI presents various gaps which, if not filled, might lead to difficulties:

- CUI only provides for a regime based on "strict liability" (as referred to in the explanatory report on CUI and which means liability without *culpa*). Hence, there will be no liability engaged in cases where the conditions of strict liability are not fulfilled, unless the parties agree to assume liability greater than in CUI.

- The CUI leaves to the parties to the contract to agree whether and to what extent the IM or the RU will be liable for the loss or damage caused to the other by delays or disruptions.

- The CUI guarantees a right of recourse of the RU against the liable IM only when it has paid damages under CIV and CIM, and does not guarantee such right in the event such payments have been made on the basis of other grounds (CUV, Regulation 1371/2007, environmental liability, contracts, etc.).

- The CUI only applies for international railway services. Hence if it were applied, it is possible that contracts of use of infrastructure would contain different clauses for

- CUI does not contain definitions of the terms used. This might lead to a difficulty in understanding and applying the CUI regarding the very different understanding of similar terms throughout the EU.

- The CUI does not address liability issues raised from an accident occurred in a Member State and causing damage in another Member State, since it only addresses the contractual relationship between the RU and the IM on which the first operates.

2) Similarly, the General Terms and Conditions of use of railway infrastructure (the GTC) would provide a standardised contract. However, this contract presents various gaps which, if not filled, might lead to difficulties:

- Similarly to the CUI, GTC of use of railway infrastructure only provides for a regime based on strict liability. This might be construed as a regime which excludes any other grounds of liability and hence, which would provide for a general exclusion of liability where the conditions of strict liability are not fulfilled. This principle applies without prejudice to mandatory law. Hence, it would be possible to fall back on the national regime, with all the difficulties above mentioned.

- The GTC of use of railway infrastructure does not provide for the same limitation regarding competing actions between the parties. Hence, if the GTC of use of railway infrastructure does not apply in combination with CUI, the complex interplay between contract and non-contractual liability law remains.

- The GTC does not (yet) settle the issue relating to the loss or damage caused to the other party by delays or disruptions.

- The GTC guarantees a right of recourse of the RU against the liable IM only when it has paid damages towards its customers under national or international law, and does not guarantee such right in the event such payments have been made on the basis of other grounds (i.e. contracts going beyond the law) or to third parties.

- The GTC does not address liability issues raised by an accident that has occurred in a Member State and causing damage in another Member State, since it only addresses the contractual relationship between the RU and the IM on which the first operates.

***Recommendations***

Regarding the findings of the study, the question to be asked is whether there is room for EU action. Indeed, national civil liability regimes seem not to be an important driver for the choice of RUs to enter a particular market.

To answer the question, one could think to show the link between the favourable / unfavourable character of national civil liability regimes with the market opening degree in the EU Member States. To show such a link, the exercise would consist of assessing the quality of a country's civil liability regime based on the quantification of the quality of several features of such regime. This would require to select the features according to their presumed impact on the protection of RUs in the specific remit of civil liability.

It appeared very difficult if not nearly impossible to determine which type of regime best supports the internal market. If it is possible to conclude that the ease in invoking liability and hence recovering damage sustained is influenced by the causation theory in force in the EU Member States, what was discernible however, was that, all these regimes follow their own patterns, and have their own defining and ultimately differing characteristics. As regards contracts, while it is possible to determine whether contracts are fair or not, it would appear again difficult to determine on this mere basis which regime is most supportive of the internal market. Such measurements would be difficult to make since the coherence of civil liability regimes resides in the combination of their particular features so that their quantification would always entail the risk of arbitrary.

Not only the methodology consisting of ranking national civil liability regimes would be objectionable, but further the correlation between such ranking and the degree of railway market opening would not be conclusive. It is indeed something to assess the quality of national regimes and concluding that such regimes are more or less protective of RUs, and hence positively / negatively participate to the competitive process, and it is something else to ascertain that competition / lack of competition is due to favourable / unfavourable character of national civil liability regimes. Indeed, it appears that civil liability regime is only one of the many aspects which RUs take into consideration when deciding on entering the railway market of an EU Member State, and apparently not the most important one.

The strongest evidence for EU action is the existence of international and EU law imposing liability upon RUs, also for the action of IMs. As highlighted in the study, several EU and international legislations impose on RUs to pay damages even if the IMs are to be held liable. They have a right of recourse which depends on the applicable national law or on the contract provision concluded with the IM. RUs exposure may even be amplified with the new

Regulation on rail passengers rights and obligations in comparison with a situation where only CIV was applied. Hence, it appears that there is room for EU action.

Possible EU action could achieve the following objectives:

1) Further enhancement of the internal market for railway services and their competitiveness (in particular in comparison with other means of transport less environmental friendly), including administrative simplification aiming at reducing unnecessary burdens on transport companies;
2) Guarantee RUs an effective right of recourse against IMs in circumstances where they pay the initial damages when IMs have actually caused the damage;
3) Equalise the bargaining relationship between IMs and RUs;
4) Clarify and unify the applicable rules of civil liability between RUs and IMs on international as well as on national routes (since some domestic services are also opened up to competition) and the enforcement of these rules.

EU action could either proceed of soft or hard law. Several policy options, not exclusive from each other, could be envisaged:

1) It is possible for the EU not to act. In this case, there are two possible situations: either CUI will eventually apply in the EU Member States which have ratified COTIF or not. In both situations, the GTC of use of railway infrastructure could provide a standardised contract between RUs and IMs. Under this scenario, some issues would remain unaddressed and the policy objectives would not be entirely achieved.

2) Among soft law measures, the EU could adopt a recommendation to encourage the industry to finalise and adopt a standardised contract of use of railway infrastructure (the GTC). Such recommendation would provide some guidance as to the results that the standardised contract should achieve and the manner to do so. This would help in enhancing the internal market and secure effective right of recourse where the RUs have paid damages whereas the damage could be attributed to the IMs. This would clarify the applicable regimes. However, such a standardised contract would remain subject to interpretation and application by national courts.

3) Another soft law measure could consist of encouraging all EU Member States to publish information on their civil liability regimes and the IMs to publish their models of contracts. This would provide RUs a first overview of the existing civil liability regimes. This policy option could reduce to a certain extent information costs and possibly clarify the applicable rules. However, such policy option is not as such able to guarantee the right of recourse of RUs which paid damages where the IM was

actually responsible. Nor could this option unify the applicable rules and equalise the relationship between IMs and RUs. That being said, enhanced transparency might have induced effect leading to spontaneous improvement.

4) Among hard law measures the EU could adopt a EU Regulation aiming at harmonising the contractual civil liability regimes between RUs and IMs. This option would be adopted if the CUI does not find to apply. This policy option is able to achieve the policy objectives laid down in this Study and enable the gaps to be filled.

5) The EU also could accede to the COTIF and render CUI applicable. In such a case, however, in order to fulfil the gaps left by CUI, this option could be adopted together with the previous option, namely the adoption of a EU Regulation. This Regulation would only address the issues which stem from gaps in the CUI. It would then constitute a complement to the CUI. This policy options, combined with the previous, is able to achieve the policy objectives set out in this Study.

6) The EU could also take inspiration in the British CAHA system, at least as regards small claims below a certain thresholds, for which liability could be pre-allocated through Regulation. This policy option could help the first objective of enhancing the internal market by reducing burdens, but would not be able alone to achieve the other objectives set out in this Study.

**List of the main abbreviations**

EU Member States

| | |
|---|---|
| AT | Austria |
| BE | Belgium |
| BG | Bulgaria |
| CY | Cyprus |
| CZ | Czech Republic |
| DE | Germany |
| DK | Denmark |
| EE | Estonia |
| EL | Greece |
| ES | Spain |
| FI | Finland |
| FR | France |
| HU | Hungary |
| IE | Ireland |
| IT | Italy |
| LT | Lithuania |
| LU | Luxembourg |
| LV | Latvia |
| MT | Malta |
| NL | Netherlands |
| PL | Poland |
| PT | Portugal |
| RO | Romania |
| SE | Sweden |
| SI | Slovenia |
| SK | Slovakia |
| UK | United Kingdom |

Other acronyms used

| | |
|---|---|
| CAHA | Claims Allocation and Handling Agreement |
| CER | Community of European Railway and Infrastructure Companies |
| CIT | International Rail Transport Committee |
| EIM | European Rail Infrastructure Managers |
| EU | The European Union |
| GTC | General Terms and Conditions |

| | |
|---|---|
| IM | Infrastructure Manager(s) |
| MS | Member State |
| RB | Regulatory body |
| RNE | RailNetEurope |
| UIC | International Union of Railways |
| CUI | Appendix E Uniform Rules concerning the Contract of Use of Infrastructure in International Rail Traffic |
| CIV | Appendix A Uniform Rules concerning the Contract of International Carriage of Passengers by Rail |
| CIM | Appendix B Uniform Rules concerning the Contract of International Carriage of Goods by Rail |
| CUV | Appendix D Uniform Rules concerning Contracts of Use of Vehicles in International Rail Traffic |
| OTIF | Intergovernmental Organisation for International Carriage by Rail |
| COTIF | Convention concerning International Carriage by Rail |
| RU | Railway Undertaking |
| TFEU | Treaty on the Functioning of the European Union |

This Study was prepared in response to a request for services on an evaluation of EU Member States' National Civil Liability Regimes in relation to rail accidents between Railway Undertakings (RUs) and Infrastructure Managers (IMs) in so far as they may present a barrier to the internal market (TREN/2009/E2/542/S12.546186) under an EU Commission DG TREN Framework Contract (TREN/R1/350-2008 lot 1) on the provision to the Commission of services of legal assistance in the field of energy and transport policy.

This Study aims to outline the context of the present situation, the problem analysis, its approach and its objectives. This Study also seeks to provide conclusions and recommendations for action to the European Commission and intermediate milestones.

This Study is structured as follows: (1) in a first chapter, an introduction is given, describing the context of the Study, its objectives and the methodology. (2) Chapter 2 describes the current state of play regarding civil liability between RUs and IMs . (3) The third chapter provides the findings of the Study And their assessment. (4) Chapter 4 provides recommendations to address the problems raised by the current state of play.

Summary conclusions are provided in a box at the end of each the section.

# 1. Introduction

This chapter describes the context in which the current Study has been commissioned as well as the objectives pursued and the methodology followed.

## 1.1. Context

The opening up of freight and, more recently, international passengers' services in the railway sector has led to a restructuring of the sector. The restructuring of the sector relates to vertical unbundling which ranges from accountancy separation between railway transport services and infrastructure management (accompanied by the divesting of essential functions such as paths allocations and fee charging) to the complete separation between Railway Undertakings (RUs) and Infrastructure Managers (IMs). This has meant that the legal relationships between (the many more) parties have become more varied and complicated. This situation requires a deeper understanding of the respective liability of RUs and IMs towards each other in the event of a railway accident happening during the provision of an international service.

Such civil liability issues are not harmonised at a European level, except in so far as COTIF applies. In the absence of European harmonisation, civil liability pertaining to railway accidents, between RUs and IMs is addressed by national law.

Some studies[1] have highlighted the unclear division of liability between different stakeholders, such as between RUs and IMs, in the wake of the vertical disintegration. Such a lack of clarity may result, as highlighted in these studies, in the pushing around of claims between potentially liable organisations to the detriment of all parties, as well as in unnecessary inconsistencies in the way a number of third party claims are dealt with, and also in higher insurance premiums for RUs. These negative effects might present barriers to the internal market.

It is known that liability relationships between RUs and IMs are dealt with through Appendix E - CUI (Contract of Use of the Infrastructure) of COTIF, as amended by the Vilnius Protocol of 1999, but what is sought through this Study is an analysis of what national regimes offer, since it is possible for OTIF Member State to declare the non-application of the CUI's standard contract conditions for the use of infrastructure for international carriage.

[1] European Commission, DG TREN, Insurance of Railway Undertakings, Final report, September 2006, p. 45.

And indeed, since Appendix E - CUI of COTIF was partially in conflict with EU law, the EU Member States made declarations not to apply this Appendix following a formal suggestion of the European Commission.[2]

In the meanwhile, Appendix E - CUI has been revised so as to comply with EU law[3] and will enter into force on 1 December 2010.[4] The CIT announced that it will ask to the European Commission and to the Member States of the EU to for a general withdrawal of reservations regarding the application of CUI.[5]

The liberalisation of railway services and the consequential restructuring of the sector resulted to new legal relationships and new types of contracts within the industry. In these circumstances, civil liability issues between Railway Undertakings and Infrastructure Managers are addressed by COTIF, Appendix E – CUI but since this international instrument is not applied in the EU Member States, these issues remain solely governed by national law.

### 1.2. Objectives of the study

In the context described above, the European Commission sought the commissioning of a study on EU Member States' national civil liability regimes in relation to rail accidents occurring in the course of an international service between RUs and IMs in so far as they may present a barrier to the internal market.

#### 1.2.1. Purposes

The purpose of the Study according to the tender specifications is:

- to assess the current situation with regard to liability regimes applicable to accidents between RUs and IMs in a selection of European Union Member States;
- to identify any problems, complications and related costs faced by trying to access national regimes and

[2] See proposal for a Council decision on the conclusion by the European Community of the Agreement on the Accession of the European Community to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999, COM(2009) 441 final, para 6 of the explanatory memorandum.
[3] OTIF, CR 24/NOT/Add. 2 of 21 December 2009, Partial revision of Appendix E (CUI) to the Convention (Text as modified and Explanatory Report), text available at: <http://www.otif.org/fileadmin/user_upload/otif_verlinkte_files/04_recht/03_CR/03_CR_24_NOT/CR_24_NOT_ad2_e.pdf>.
[4] OTIF A 55-24/508.2009 of 21 December 2009 available at: <http://www.otif.org/fileadmin/user_upload/otif_verlinkte_files/04_recht/03_CR/03_CR_24_NOT/A_55-24_508_2009_21_12_2009_e.pdf>. Pursuant to Article 35(2) and (3) of COTIF, the entry into force of the revised CUI would have been impeded if one quarter of the Member States would have formulated an objection by 20 April 2010.
[5] CIT-Info 3/2010.

- to gather and analyse data, in order to illustrate findings, on the currently applicable legislation in the field, national commercial customs and practices, relevant case law including outcomes and results, and related costs for accessing justice.

### 1.2.2. Tasks

The purpose of the study is to be achieved according to the tender specifications through the following principal tasks:

(1) To review a selection of European Member States' – to be chosen by a methodology that ensures a comprehensive and characteristic sample – liability regimes, applicable to international railway services in relation to accidents caused by either (national or foreign) RUs or an IM to another RUs or IM in the course of operating / facilitating such services.

(2) To identify the characteristics of each of the selected EU Member State's liability regime, including at least the following:

- Existing civil liability provisions (and identify if there are any related / independent criminal sanctions) in as far as they relate to accidents between RUs and IMs engaged in the provision of international services.
- The scope of such liability in each Member State studied (is there any statute limitation, are there any other time limits for claims, remoteness limits, nature of *locus standi*, burden of proof and standard of proof or any major limitation etc).
- The quantum of damages that is obtainable (detailing whether limited / unlimited, existence of contributory negligence, etc).
- How far national liability regimes – in the absence of COTIF 1999 appendix E CUI – satisfy the needs of international rail operators.

(3) To analyse how far, and in what manner, these liability regimes constitute a barrier to the internal market. Particular attention should be paid to any cost or burdens attributable to divergences of national liability regimes, both for incumbent and new entry RUs when accessing judicial systems. A quantitative assessment should be made and reported on as regards costs of accessing justice.

(4) To identify any common (and diverging) features between Member States.

(5) To assess whether there are any problems related to the application of COTIF 1999 Appendix – CUI in the selected Member States (assuming CUI is in force).

(6) To propose a methodology and timetable for the study.

(7) To propose an appropriate approach at EU level, by making initial recommendations as to whether the Commission should undertake legislative action which would have the ultimate effect of helping to achieve the aim of the internal market.

### 1.2.3. The scope

#### a) National civil liability regimes

The scope of the Study is focussed on national legal regimes dealing with liability issues. The aim is to investigate the liability issues and their remedies in the event of a railway accident occurring during an international service where no international law is applicable.

The Study relates to "liability". Liability arises when a natural / legal person is considered responsible for a loss, damage or an injury.[6]

The Study provides an overview of the existing national civil liability regimes. This includes contractual and non-contractual law as well as specific national railway legislation. In addition, contractual provisions between the RUs and the IMs are analysed as they might constitute the only national provisions dealing specifically with civil liability in relation to accidents.

Insurance issues within the EU Member States are not examined, since liability and insurances are conceptually two very distinct matters.[7] Indeed, insurance coverage requirement is the monetary amount which the liable part must be able to pay out in case of an accident / incident for which it is liable in accordance with contract and/or national provisions.[8] Insurance issues were only addressed to investigate how far insurance premiums impact on RU's costs and therefore their decision whether to contract or not.

#### b) Railway Undertakings and Infrastructure Managers

The purpose of the Study is limited to the relationship between RUs and IMs. RU refers to any public or private Undertaking, licensed according to applicable EU legislation, the principal business of which is to provide services for the transport of goods and/or passengers by rail with a requirement that the Undertaking must ensure traction; this also includes Undertakings

[6] European Commission, DG TREN, Insurance of Railway Undertakings, Final report, September 2006, p. 14.
[7] Study commissioned by the European Commission on the details and added value of establishing a (optional) single transport (electronic) document for all carriage of goods, irrespective of mode, as well as a standard liability clause (voluntary liability regime), with regard to their ability to facilitate multimodal freight transport and enhance the framework offered by multimodal waybills and or multimodal manifests, final report.
[8] European Commission, DG TREN, Insurance of Railway Undertakings, Final report, September 2006, p. 14.

which provide traction only.[9] IM refers to any body or Undertaking that is responsible in particular for establishing and maintaining railway infrastructure. This may also include the management of infrastructure control and safety systems. The functions of the IM on a network or part of a network may be allocated to different bodies or Undertakings.[10]

Existing legislation on obligations (contractual or *ex delicto* or *quasi ex delicto*) between RUs and their clients / customers or third parties were only examined to the extent that it is relevant for the study. In consequence, the current Study sketches out the existing remedies available to third parties (passengers / freight customers / other third parties) against RUs.

### c) Rail accidents

Regarding the objective of the study, it is necessary to comprise a large definition of accident.

The EU legislation on safety contains a definition of rail accidents. Article 3, k) of Directive 2004/49/EC defines an accident as "*an unwanted or unintended sudden event or a specific chain of such events which have harmful consequences; accidents are divided into the following categories: collisions, derailments, level-crossing accidents, accidents to persons caused by rolling stock in motion, fires and others*".[11] This definition is relatively broad, so that it is used to delineate the scope of the present Study.

### d) International rail services

Directive 91/440/EEC on the development of the Community's railways defines international rail services as follows:[12]

- "international freight service" shall mean transport services where the train crosses at least one border of a Member State; the train may be joined and/or split and the different sections may have different origins and destinations, provided that all wagons cross at least one border;
- "international passenger service" shall mean a passenger service where the train crosses at least one border of a Member State and where the principal purpose of the

[9] See Article 3, first indent of Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways, [1991] OJ L 237/25 ("Directive 91/440") and Article 2, k) of Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure, OJ [2001] L 75/29 ("Directive 2001/14").
[10] See Article 3, second indent of Directive 91/440/EEC and Article 2, h) of Directive 2001/14/EC.
[11] Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 on safety on the Community's railways and amending Council Directive 95/18/EC on the licensing of railway undertakings and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (Railway Safety Directive), [2004] OJ L 164/44 and [2004] OJ L 220/16, as lastly amended by Directive 2008/110/EC [2008] OJ L 345/62.
[12] Council Directive 91/440/EEC of 29 July on the development of the Community's railways [1991] OJ L237/25 ("Directive 91/440"), Article 3, fourth and fifth indents.

service is to carry passengers between stations located in different Member States; the train may be joined and/or split, and the different sections may have different origins and destinations, provided that all carriages cross at least one border.

The study examines the respective liability of RUs and IMs towards each other in the event of a railway accident happening during the provision of an international service as defined above.

However, national freight services being opened up to competition, regimes as they apply to purely national transport services may also affect the internal market. In addition, although national passenger services are not opened up to competition, some RUs consider that there is no material barrier in most of EU Member State to set up a subsidiary in another Member State, on the basis of the right of establishment, as prescribed under Article 49 Treaty on the Functioning of the European Union (TFEU). Therefore, the internal market may be affected not only by specific rules applicable to international services but also by the regime applicable to purely national services.

That being said, the distinction between national and international transport services with respect to civil liability issues appears in any case immaterial. There is in general no difference of regimes regarding the national or international nature of services. Hence, the conclusion of this Study is applicable to national railway services as well.

The objectives of the study can be summarised as follows:
(1) undertake a review of the national civil liability regimes in relation to rail accidents between Railway Undertakings and Infrastructure Managers occurred in the course of an international service, in a representative sample of EU Member States,
(2) assess if any of the national regimes constitute a barrier to the internal market, and
(3) recommend solutions.

## 1.3. Approach and methodology

### 1.3.1. Selection of EU Member States

The present Study aims to review the civil liability regimes of a selection of European Member States, applicable to the relationship between RUs on the one hand and IMs on the other, in the event of a railway accident.

The selection of European Union Member States (EU MS) is based on criteria aiming at a representative sample:

(1) Difference / similarity between national legal regimes. The scope of this Study embraces civil liability regimes as set out by the Member States by law. These regimes might be found in specific railway legislations, but also in general civil liability provisions, which are applicable as an additional / statutory body of rules and which have an influence on the (application of the) specific railway provisions on civil liability, if any. The following systems constitute a representative sample: common law (UK, IE), codification of German inspiration (e.g. DE, IT) and codification of French inspiration (e.g. FR, BE).

(2) Geographical spread. The objective of the study is to have a comprehensive overview of the civil liability regimes applicable to the relationships between RUs and IMs in the event of a railway accident, therefore, EU Member States located in the Northern, Southern, Central, Eastern and Western EU are included as representing a suitable geographic spread.

(3) Duration of EU membership. In some of the EU Member States, EU law constitutes a relatively new legal dimension to take into account in their legal traditions. Therefore, a good mix of both old and some of the most recent EU Member States are included.

(4) Degree of separation between IMs and RUs and their independence towards each other. The scope of the Study includes possible contractual provisions existing between RUs and IMs. In this respect, it is investigated whether the corporate structure of the IMs has an impact on the content of contracts entered into by IMs with RUs. The fact that IMs are often public entities, or publicly funded, involves an obligation to treat all operators on an equal base. However, there may be valid justification to treat operators differently so that it is possible that some IMs conclude contracts for the use of infrastructure, the content of which might vary according to the nature of their client. Therefore, it is proposed to select a sample of EU Member States representing each of the four possible categories of corporate structure of IMs as identified in annex 5 of the Report from the Commission to the Council and the European Parliament – Second report on monitoring development of the rail market:[13]

> (i) Fully legally, organisationally and institutionally independent IM responsible for capacity allocation (Great Britain, FI, DK, NL, NO, ES, SE, PT, SK, LT, RO, CZ, EL);[14]
>
> (ii) Independent IM allocating capacity, having delegated certain infrastructure management functions (e.g. traffic management, maintenance) to one of the train

[13] COM(2009) 676.
[14] It is to be noted that in reality Lithuania's IM is integrated with the RU.

operating companies / Integrated IM working alongside with an independent body in charge of capacity allocation (EE, FR, HU, SI, LU, LV);

(iii) Legally (but not institutionally) independent IM undertaking capacity allocation owned by a holding company which also owns one of the operators (AT, BE, DE, IT, PL);

(iv) IM in charge of allocating capacity and RU still integrated (IE *and Northern Ireland*).

On the basis of these criteria, the following 12 EU Member States have been selected, with the approval of the European Commission: Belgium (BE), Denmark (DK), France (FR), Germany (DE), United Kingdom (UK), Hungary (HU), Ireland (IE), Greece (EL), Lithuania (LT), Poland (PL), Spain (ES) and Romania (RO).

### 1.3.2. Data collection and results

#### a) The process of collecting data

Data collection was one of the main challenges of the present Study. This data collection occurred through contacts with relevant stakeholders. These contacts took the form of questionnaires. The stakeholders consulted for the study were identified as follows:

- National experts;
- National transport ministries;
- Regulatory bodies;
- Organisations of IMs (e.g. RailNetwork Europe and European IMs);
- IMs (1 per country, including Eurotunnel and Translink) ;
- RUs
    - incumbents of the countries covered by the study,
    - other RUs of the countries covered by the study,
    - incumbent established in the EU Member States not covered by the study but which are active or willing to be active in the countries covered by the study,
    - other RUs established in the EU Member States not covered by the study but which are active or willing to be active in the countries covered by the study.

Opinions and positions were collected directly from involved stakeholders, but also from their lobby or interested groups. Lobby groups have been contacted mainly in order to help the consultant to identify the RUs to be consulted (as well as the relevant persons to be addressed within these undertakings).

Regarding the relatively short timeline to conduct such a broad survey, the identification of the stakeholders occurred in parallel with the sending around of the questionnaires.

The identification of the relevant RUs, providing international services, has faced difficulties for the following main reasons.

- First, the scope of the study is limited to international transport services.[15] It appears that only a few RUs provide genuine international services:
    - International services are often provided through an international grouping in the sense of Article 3, fourth indent of Directive 91/440 before and despite its amendment by Directive 2007/58. An international grouping means any association of at least two RUs established in different MS for the purpose of providing international transport services between MS. With an international grouping, the journey realised in a Member State is provided under the responsibility of the RU established in this country, so that the international journey can be legally divided in as many **domestic** services as there are countries crossed by the international grouping.
    - Some major RUs have developed their activities abroad through subsidiaries. This phenomenon has led the consultant to seek contributions from the subsidiaries of the mother company deemed relevant for the Study. One of these major RUs has directly provided the contact details of its subsidiaries. Another has integrated the inputs of its subsidiaries in its own answers. These subsidiaries often provide only **domestic** services.

- Second, the scope of the Study meant that there was a need to consult not only RUs providing international services but also any RUs proposing to put on such services in these Member States. Apart from a few examples rendered public,[16] ascertaining the intention of a prospecting RU was difficult and none of the RUs approached revealed any such intention.

- Third, several RUs which were created with the opening up of the railway sector have been acquired by incumbent RUs. Such consolidation of the railway market has, as a consequence, that the consultant has received contributions from different RUs which are part of the same group.

[15] This point has been discussed in the section relating to the scope of the study (see section 1.2.3).
[16] "Rivals in challenge to SNCF on TGV routes", Financial Times of 23 December 2009.

### b) The objectives of the data collection

The questionnaires were specifically drafted for each group according to the information expected from each of them.

- The review of legal liability regimes is based on the information provided by our network of national experts. Such review covers (i) specific railway legislation, (ii) case law, and (iii) general rules on civil liability, which is – as far as certain Member States are concerned – the only legislation applicable, or which is complementary to the specific railway legislation.

  A questionnaire was sent to the national experts of our network which was designed to elicit a detailed description of the civil liability system by which the relationships between RUs and IMs in the event of an accident are governed in the selected EU Member States.

- A questionnaire was also sent to Regulatory bodies (RB). The questionnaire (see Annexe VIII) had as its objective to poll the RBs in particular since they are competent to monitor arrangements for access (Article 30(2) f of Directive 2001/14/EC)[17] as well as the competition in the rail services markets and any discrimination towards RUs (Article 10(7) of Directive 91/440/EEC).

- A questionnaire was sent to IMs. The questionnaire (see Annex VIII) aimed to obtain a view of the contract practice developed by the IMs and in particular, whether and to what extent the IMs have foreseen in their access arrangements liability clauses. This questionnaire also aimed at gathering relevant examples from the IMs of accidents occurred on their infrastructure and the way the liability issues have been settled in these cases.

- A questionnaire was sent to the representative organisations for IMs (see Annex VIII): RNE (RailNetwork Europe) and EIM (European Infrastructure Managers). The objective of this questionnaire was to investigate whether and to what extent the industry addresses the liability issues through self regulation.

- The questionnaire addressed to the RUs contained both descriptive and evaluative questions (see Annex VIII). Descriptive questions aimed at determining the impact of the national liability regimes on the organisation and financial situation of RUs.

[17] Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure, [2001] OJ L75/29 ("Directive 2001/14").

Evaluative questions aimed at collecting the RUs views with respect to these regimes.

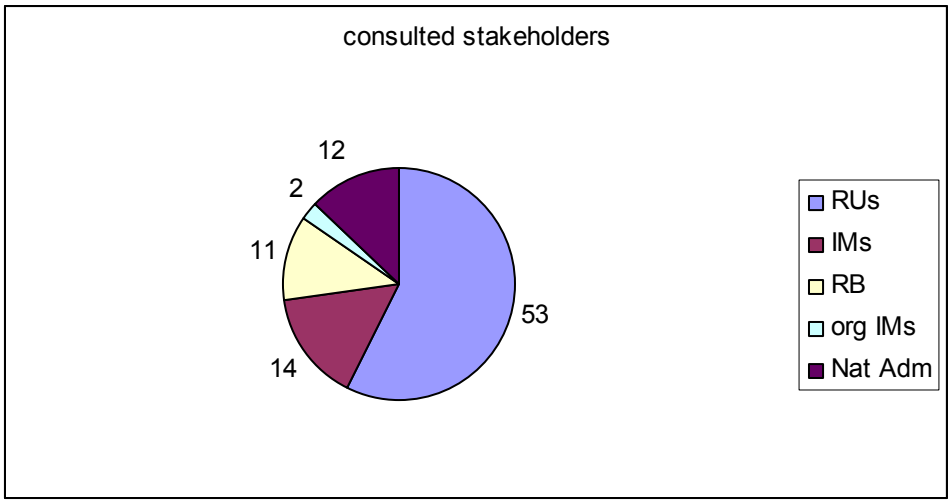
### c) Results of the data collection

National experts of the twelve EU countries covered by the study were consulted.

**Stakeholders**

Questionnaires were distributed as follows:

- RUs: 53
- IMs: 14 (1 per country – in a country 3)
- Regulatory bodies (RB):[18] 11 (there is no Regulatory body identified in Ireland)
- Organisations of IMs (Org IMs): 2
- National ministries (Nat Min):[19] 12

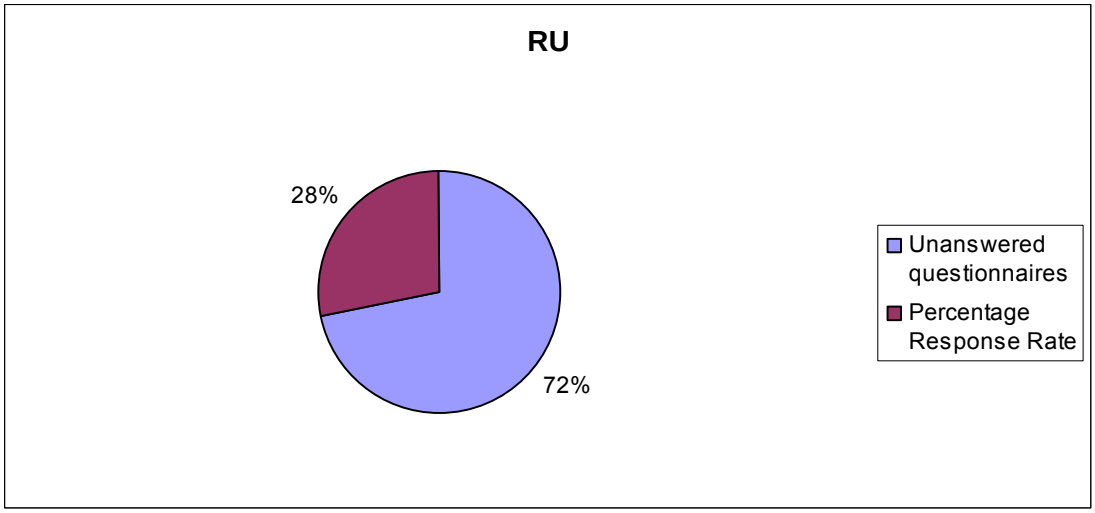



[18] Even where Regulatory bodies were created within the public entity in charge of railway transport, a distinction between both has been made in the current study.

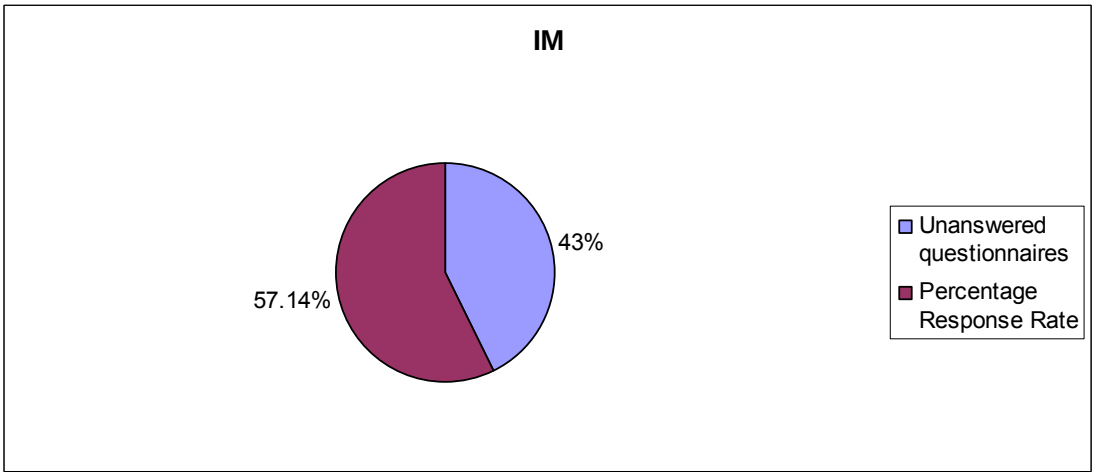
[19] The current study shall use the expression “national ministry” to refer in general to the public entity in charge of railway transport in the EU Member States. In some countries, this may cover the term of “department”, in others of “service public” or “administration”, etc.

**Response rate:**

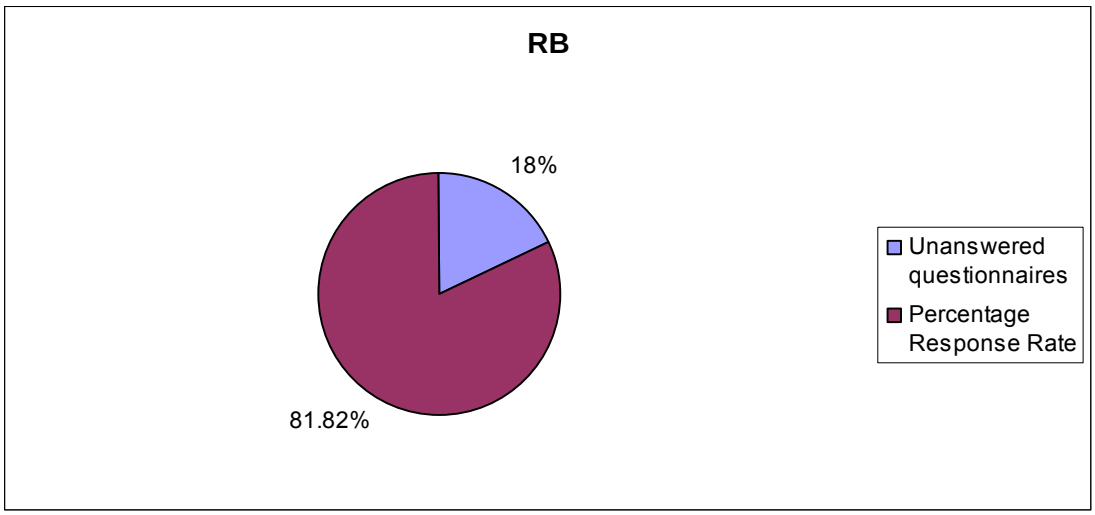
- RUs: 15/53



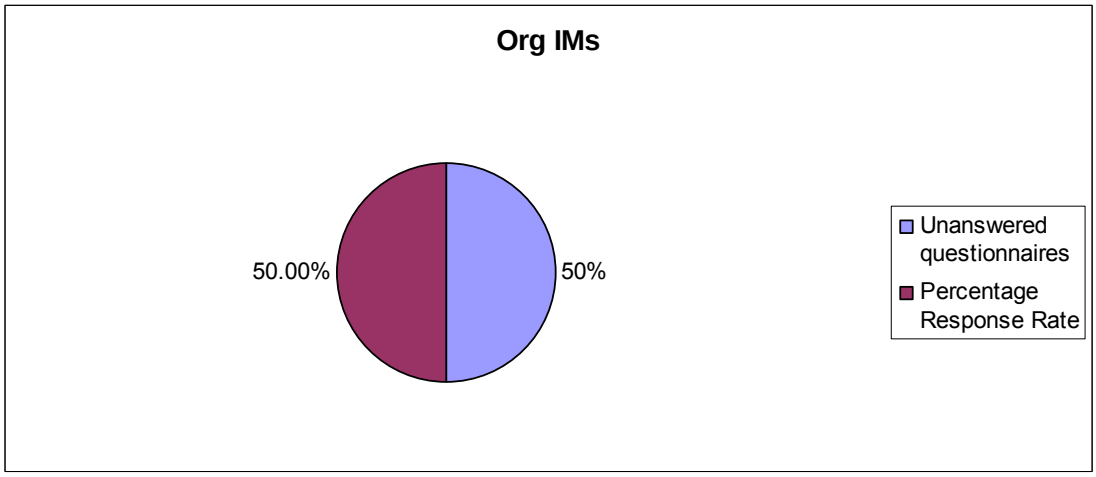

- IMs: 8/14



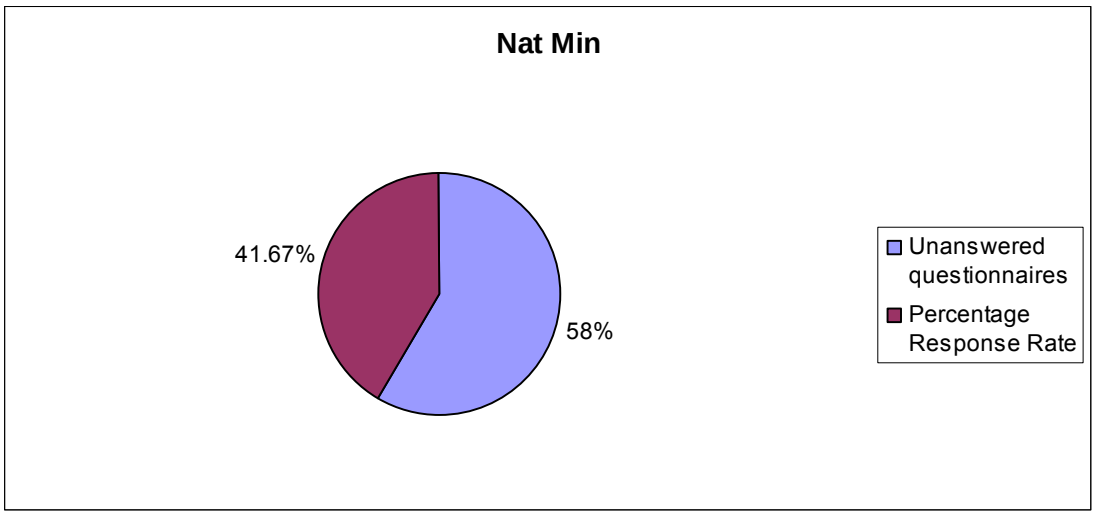
- Regulatory bodies: 9/11




- Organisations of IMs: 1/2



- National ministries: 5/12




**Representation of stakeholders and accuracy of the information**

In general, the response rate of RUs and national ministries is rather low. In addition, the answers received were not always complete. Therefore, further consultation has been pursued for the final report in order to ensure representation and sufficient information. However, the answers received in the second phase of consultation, when any received, were rather incomplete. Therefore, the study is limited to the contributions received and the assessment has necessarily been either extrapolated from those contributions or based on technical findings. The consultant considers that despite this fact, the findings of the study are plausible and reliable since the contributions received from RUs and national ministries have been roughly comparable.

The EU Member States studied have been selected following four criteria:

- Difference / similarity between national legal regimes;
- Geographical spread;
- Duration of EU membership;
- Degree of separation between IMs and RUs and their independence towards each other.

On the basis of these criteria, twelve EU Member States have been selected as a sample for the current study: Belgium (BE), Denmark (DK), France (FR), Germany (DE), United Kingdom (UK), Hungary (HU), Ireland (IE), Greece (EL), Lithuania (LT), Poland (PL), Spain (ES) and Romania (RO).

The present Study is based on several sources of information:

- on the consultation of national experts as to investigate the national legal regimes of civil liability;
- on a broad consultation of stakeholders as to poll the existing initiatives dealing with liability issues as they may appear between RUs and IMs as well as to collect their views. The response rate of RUs and national ministries being relatively low, the consultant had to extrapolate some conclusions and rely on technical findings;
- on desk top researches and on technical legal analysis.

## 2. Status of civil liability between RUs and IMs

This Chapter describes the current state of play regarding civil liability between RUs and IMs. Civil liability is derived from a number of sources. This Chapter examines first civil liability derived from international law by providing the context of this law (2.1). In a second section, the current situation at the European level is described (2.2). Finally, the third section reviews the national regimes (2.3).

### 2.1. The international level

#### 2.1.1. The Convention concerning International Carriage by Rail (COTIF)

The Intergovernmental Organisation for International Carriage by Rail (OTIF) was set up on 1 May 1985 with the entry into force of the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980. A significant modification to the COTIF was brought about on 1 July 2006 with the entry into force of the Vilnius Protocol signed on 3 June 1999.[20] The modification aimed to translate into international rail transport law, the developments of EU law and, in particular, to take into account the separation of RUs from the State administration and their independence as well as the separation of infrastructure management from the transport of passengers and goods.

The aim of the Organisation is to promote, improve and facilitate international traffic by rail,[21] in particular by

> "*a) establishing systems of uniform law in the following fields of law:*
> *1. contract of international carriage of passengers and goods in international through traffic by rail, including complementary carriage by other modes of transport subject to a single contract;*
> *2. contract of use of wagons as means of transport in international rail traffic;*
> *3. contract of use of infrastructure in international rail traffic;*
> *4. carriage of dangerous goods in international rail traffic;*
> *b) contributing to the removal, in the shortest time possible, of obstacles to the crossing of frontiers in international rail traffic, while taking into account special public interests, to the extent that the causes of these obstacles are within the responsibility of States;*

[20] The text of COTIF in its latest version is available on the website of the OTIF at the following address: <http://www.otif.org/fileadmin/user_upload/otif_verlinkte_files/07_veroeff/02_COTIF_99/COTIF-1999-e.PDF>.
[21] Article 2 COTIF.

*c) contributing to interoperability and technical harmonisation in the railway field by the validation of technical standards and the adoption of uniform technical prescriptions;*

*d) establishing a uniform procedure for the technical admission of railway material intended for use in international traffic;*

*e) keeping a watch on the application of all the rules and recommendations established within the Organisation;*

*f) developing the systems of uniform law, rules and procedures referred to in letters a) to e) taking account of legal, economic and technical developments*".

### 2.1.2. The accession of the European Union to the COTIF

OTIF has 45 Member States,[22] including all the EU Member States that have railway infrastructures on their territory (all EU Member States but Cyprus and Malta). Although EU Member States who have railway infrastructures are part of the OTIF, the European Union is not yet itself a Member of the Organisation.[23]

The Vilnius Protocol inserted a new Article 38, allowing regional economic integration organisations to adhere to the Convention. In 2003, the European Council authorised the European Commission to enter into negotiations with the Contracting Parties to COTIF in order to reach agreement on the European Union's accession to that Convention.[24] Despite this authorisation, the accession of the EU to the COTIF could not take place until the Vilnius Protocol of 1999 had come into force. The entry into force of the Protocol occurred in July 2006. For a number of reasons the EU accession to COTIF has not occurred yet, and in order to preserve the integrity of EU law (after the entry into force of COTIF) for Member States that were both members of the EU and OTIF, certain appendices of COTIF (E, F and G) were disapplied in the EU Member States. This situation will prevail until the incompatibility issues are resolved.

In contemplation of the accession of the EU to COTIF, and to deal with the immediate problems of incompatibility between certain aspects of EU and COTIF law, some revisions have been made to the COTIF, which will enter into force 1 December 2010.

[22] Albania, Algeria, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iran, Iraq, Ireland, Italy, Latvia, Lebanon, Liechtenstein, Lithuania, Luxembourg, the former Yugoslav Republic of Macedonia, Monaco, Montenegro, Morocco, Netherlands, Norway, Poland, Portugal, Romania, Russia (since 1 February 2010), Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Syria, Tunisia, Turkey, Ukraine and United Kingdom.

[23] On the EU's accession to the COTIF, see OTIF leaflet on the International Organisation for International Carriage by Rail (OTIF) of February 2010, pp. 8 and 9.

[24] 2499th Council meeting, Transport, telecommunications and energy, 7685/03 (Presse 90).

### 2.1.3. The application of the COTIF and of its Uniform Rules

International rail traffic and admission of railway material to use in international traffic is to be governed by the Uniform Rules in the appendices to the COTIF (Article 6). However, any Member State may declare, at any time that it will not apply certain Appendices to the COTIF (Article 42).[25] Such declaration must relate to the entirety of the Appendix, unless partial application is expressly allowed by the Appendix itself.

### 2.1.4. The dispute resolution under COTIF

As regards dispute resolution under the Convention, disputes between Member States or between Member States and the OTIF arising from the interpretation or the application of the COTIF may be referred to an Arbitration Tribunal at the request of one of the parties (Article 28). Other disputes arising from the interpretation or application of the COTIF, if not settled amicably or brought before the ordinary courts or tribunals may also be referred to an Arbitration Tribunal by agreement between the parties (Article 28). This allows private parties (such as RUs) to have recourse to Arbitration. The advantage is that arbitration Tribunal's decisions are final (Article 31), enforceable after completion of the formalities required in the State where enforcement is to take place (e.g. exequatur/enforcement, etc.) and their merits cannot be subject to review (Article 32). The commencement of such procedure has the same effect as a procedure before an ordinary tribunal or court in terms of interruption of limitation periods (Article 32).

### 2.1.5. The liability regimes under the COTIF Uniform Rules

For a table comparing the liability regimes under COTIF, see Annex III.

#### a) CIV and CIM Uniform Rules

The civil liability regime as applicable to the relationship of the RUs with their passengers and freight customers are governed by the CIV (Appendix A Uniform Rules concerning the Contract of International Carriage of Passengers by Rail) and CIM (Appendix B Uniform Rules concerning the Contract of International Carriage of Goods by Rail) Uniform rules of COTIF. On the basis of these rules, the RUs bear a strict liability (i.e. liability without *culpa*) towards their clients for damage occurred to the passengers and their belongings as well as to the goods transported during an international railway service. Under Article 51 of the CIV and Article 40 of the CIM, the RUs are liable to their clients for the actions of their auxiliary which

[25] Hence, in the COTIF system, there is a difference between the entry into force of an appendix and its application in a particular Member State.

also includes the IMs (through their assimilation *ex lege* to RU's auxiliaries) with a possible right of recourse against them if so provided under national laws.

In some Member States, such recourse has been expressly organised through specific railway legislation. This is the case of DK. Most of EU Member States have not organised such recourse, though the general rules (or specific contractual clauses, if any) would allow the RUs to claim reimbursement from the IM.

For an examination of the CIM Uniform Rules, please refer to Annex VI. Much of the text of the CIV Uniform Rules have been repeated at the European level by Regulation 1371/2007 (see Annex V).[26]

### b) CUI Uniform Rules

#### *Introduction*

The Uniform Rules concerning the Contract of Use of Infrastructure in International Rail Traffic (CUI – Appendix E to the Convention) have been adopted in the context of corporate restructuring of RUs and IMs, described above.[27]

Regarding the strict liability (i.e. liability without *culpa*) borne by the RUs under CIV and CIM, it was considered useful and desirable to regulate at international level the relationships between the IMs and the RUs, as regards liability, in a uniform and mandatory manner (CUI).[28]

However, since Appendix E - CUI of COTIF is partially in conflict with EU law, the EU Member States have made declarations not to apply this Appendix following a formal suggestion of the European Commission.[29]

Appendix E (CUI) has been revised so as to comply with EU law[30] and will enter into force on 1 December 2010 (revised CUI).[31]

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[26] Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations [2007] OJ L 315/14.

[27] The text of the Uniform Rules concerning the Contract of Use of Infrastructure in International Rail Traffic (CUI - Appendix E to the Convention) is available on the website of OTIF at the following address: <http://www.otif.org/fileadmin/user_upload/otif_verlinkte_files/07_veroeff/02_COTIF_99/RU-CUI-1999-e.PDF>.

[28] Explanatory report to the CUI, available at <http://www.otif.org/fileadmin/user_upload/otif_verlinkte_files/07_veroeff/03_erlaeut/rpex99-ru-cui-e.pdf>, para 7 of the general points.

[29] See proposal for a Council decision on the conclusion by the European Community of the Agreement on the Accession of the European Community to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999, COM(2009) 441 final, para 6 of the explanatory memorandum.

***Scope***

Where CUI is applicable, it applies to any contract of use of railway infrastructure for the purposes of international carriage within the meaning of CIV or CIM (Article 1), although Member State are free to provide the same legal system for internal traffic.[32]

Member States have the possibility to declare that the liability rules contained in CUI in case of bodily loss or damage are not applicable when the victims are nationals of, or have their usual place of residence in, that State (Article 2).[33]

Unless CUI expressly allows it, any stipulation in the contract which, directly or indirectly, would derogate from CUI, will be null and void (Article 4). This does though not impede RU and IM which are parties to the contract to assume liabilities greater and/or obligations more burdensome than those provided for in the CUI or to fix a maximum amount of compensation for loss of or damage to property (Article 4).

***Liability provisions***

- **Basis of liability**

Title III of Appendix E - CUI deals with contractual liability issues between the RUs and the IMs. As analysed in the explanatory report to CUI, Articles 8 and 9 stipulate the principle of strict (objective) liability (liability without *culpa*) of respectively the IM / RU where the origin of a given damage lies at respectively the infrastructure / the means of transport used or by the persons or goods carried, provided that the damage was caused during the use of the infrastructure. According to the explanatory report on CUI, liability will be triggered if the person having suffered the damage has proved the origin of the damage (the triggering event) and, in addition, that the damage was caused during the period of use of the infrastructure.[34] The other party to the contract which has sustained the damage has a burden of proof limited to the evidence of the origin of the damage and to the evidence of the occurrence of the damage during the use of the infrastructure.

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[30] OTIF, CR 24/NOT/Add. 2 of 21 December 2009, Partial revision of Appendix E (CUI) to the Convention (Text as modified and Explanatory Report), text available at: <http://www.otif.org/fileadmin/user_upload/otif_verlinkte_files/04_recht/03_CR/03_CR_24_NOT/CR_24_NOT_ad2_e.pdf>.

[31] OTIF A 55-24/508.2009 of 21 December 2009 available at: <http://www.otif.org/fileadmin/user_upload/otif_verlinkte_files/04_recht/03_CR/03_CR_24_NOT/A_55-24_508_2009_21_12_2009_e.pdf>.

[32] Explanatory report on CUI, available at <http://www.otif.org/fileadmin/user_upload/otif_verlinkte_files/07_veroeff/03_erlaeut/rpex99-ru-cui-e.pdf>, para 2 of the comments to Article 1.

[33] Bodily loss and damage is the wording used by the CUI and the GTC but it can also be understood as death or personal injury.

[34] Ibid., para 1 of the comments to Article 8.

- The IM is liable for bodily loss or damage (injury as well as death), for loss of or damage to property and for pecuniary loss resulting from damages payable by the carrier under the CIV Uniform Rules and the CIM Uniform Rules, caused to the RU or its auxiliaries. According to Article 23, the validity of payment made by the carrier on the basis of CIV or CIM may not be disputed when compensation has been determined by a court or a tribunal and when the IM has been offered the opportunity to intervene in the proceeding.
- The RU is liable for bodily loss or damage and for loss of or damage to property caused to the IM or to its auxiliaries.

- **Relief**

The party which is liable on the basis of the strict liability principle can be exonerated on several grounds, depending on the type of circumstances.

In case of bodily loss or damage and, where liability is invoked against an IM, of pecuniary loss resulting from damages payable by the RU under the CIV Uniform Rules, the liable parties will be discharged in the following circumstances:

- If the incident has been caused by circumstances not connected with their activities (respectively, the management of the infrastructure and the operations of the RU). These circumstances are to be unavoidable and their consequences impossible to prevent, in spite of having taken the care required in the particular circumstances.

- To the extent that the incident is due to the fault of the other party suffering the loss or damage.

- If the incident is due to the behaviour of a third party. The circumstances relating to the behaviour of the third party are to be unavoidable and their consequences impossible to prevent, in spite of having taken the care required in the particular circumstances.

According to the explanatory report on CUI, the fact that it is required for successfully invoking the grounds of relief that the care required has been taken emphasises the objective character of the liability.[35]

In case of loss or damage to property and, where liability is claimed against an IM, for pecuniary loss resulting from damage payable by the RU under the CIM Uniform Rules, the

[35] Ibid., para 6 of the comments to Article 8.

liable parties will be discharged when the loss or damage was caused by the fault of the other party to the contract.

When the incident is due to the behaviour of a third party but the IM or RU cannot be discharged under the grounds of the exoneration provided in the CUI, the IM or RU will be liable in full up to the limits laid down in CUI but without prejudice to any right of recourse against this third party.

- **Delays and disruptions**

The parties may agree whether and to what extent the IM or the RU will be liable for the loss or damage caused to the other by delays or disruptions.[36] In the revision of CUI, it was made clear in the new Article 5bis that EU law would remain unaffected in this respect, and in particular, Article 11(1) of Directive 2001/14 which imposes performance schemes aiming at encouraging RUs and IM to minimise disruption and improve the performance of the railway network and which can include penalties and bonuses.[37]

Indeed, under EU law, the issue of delays or disruptions is settled through the performance scheme aiming at improving the use of the infrastructure (objective of competitiveness). This performance scheme is part of the general charging scheme determined.[38] The charging scheme is enshrined in the Network Statement and hence is subject to the same adoption procedure as that document. RUs may intervene in the shaping of the performance scheme *ex ante*, when commenting on the Network Statement and *ex post*, through complaints before the Regulatory Body (Article 30(2) d of Directive 2001/14).

The clarification made in the revision of CUI is deemed more than necessary since in EU law, under Directive 2001/14, performance schemes are to be part of the general infrastructure charging scheme which does not proceed from the contractual freedom between RUs and IMs, but from either the MS (setting out the charging framework) or the IM (implementing the framework by setting out the charging scheme). Hence, the remaining margin of manoeuvre of IMs and RUs to negotiate compensation in the event of delays or disruptions is unclear, and would depend on the rules set out in the performance scheme.

It has to be noted that this point can be both within and outside the remit of the present Study. This point can be within the remit of this Study if an accident causes delays or disruptions to

[36] Please see footnote 51.
[37] Revision Committee, 24th Session of 21 December 2009, Partial revision of Appendix E (CUI) to the Convention.
[38] It appears from the Directive that the "charging framework" is the competence of the MS whereas the "charging scheme" is of the competence of IMs. It is to be noted that the Directive does not define "charging framework" and "charging scheme". Hence, the extent to which MS and IM intervenes with respect to charging principles is unclear. Therefore, the role of the IM in determining the performance scheme will probably differ from Ms to MS following the transposition of the Directive.

the railway operations. This point will be outside the remit of this Study when the delays and disruptions are not caused by an accident.

- **Concomitant causes**

Article 10 of the CUI governs the cases where causes are attributable to both parties, by providing that their liability will be engaged only to the extent that the causes are attributable to them.

- **Limitations of liability**

Article 14 refers to national law for the limitation of the amount of damages to be awarded in the event of death and personal injury and provides an upper limit to such an amount.

Limits of liability provided in CUI or by national law, which limit the compensation to a certain amount, cannot be invoked where the loss or damage has been committed with the intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result (Article 15).

- **Other actions**

Article 19 deals with possible competing actions (identified in the explanatory report as being *ex delicto* or *quasi ex delicto*). These actions are subject to the conditions and limitations drawn in the CUI.

- **Agreements to settle**

Following Article 20 of CUI, the parties may agree conditions in which they assert or renounce their rights to compensate from the other party to the contract.

- **Notice of claim**

The period to file a claim on the basis of CUI is limited to three years.

At the international level, the Convention concerning International Carriage by Rail (COTIF) aims to set a uniform system of law. Amongst its members are the EU Member States having railway infrastructure, but not the European Union, yet. It is possible for a COTIF Member to declare the disapplication of certain appendices to the Convention. On the basis of this possibility, the EU Member States have declared the non-application of Appendix E – CUI (Contract of Use of Infrastructure) to preserve the integrity of EU law since this appendix was considered as incompatible with EU law.

Certain COTIF Appendices provide for liability rules, often based on strict liability (without *culpa*), between RUs and their freight customers (CIV), passengers (CIM), vehicle keepers (CUV) as well as IMs (CUI). CUI sets out the principle of strict liability (liability without *culpa*) of both the IM and the RU towards each other. On the basis of such liability, it is not necessary to prove the fault of the other party but only the damage and the triggering event. However, the party found liable can escape its liability to the extent the other party was at fault, or, if the respondent can prove that the damage was unavoidable and impossible to prevent despite the having taken the care required, or where the damage is due to a circumstance not connected with the activity or to the behaviour of a third party. The provisions of CUI expressly organise the right of recourse of RUs against the IM when they have first paid damages to their customers under CIM or their passengers under CIV while the IM is to be held liable.

## 2.2. The European level

### 2.2.1. The objective to create an internal market for rail services

Where the common transport policy was initially considered as sustaining the objectives of the internal market, since the adoption of a programme for the establishment of the internal European market, the creation of an internal market for transport services has become an objective in itself of the European Union.[39] This objective received growing support with the necessity to make mobility more sustainable across the EU.[40] The establishment of an internal market for transport services as such is not pursued under the general provisions of the TFEU on the free movement of services (Article 58(1) TFEU), but on the basis of Article 91 TFEU on the EU competence in transport. Therefore, the European Union initiated a series of legislative acts to liberalise the railways.[41]

As for other network industries, the liberalisation process has been accompanied by regulatory measures, *ex ante* mechanisms, to progressively create the conditions of market economy, in contrast with a pure application of competition law that intervenes *ex post*.[42] Additionally, considerations related to the quality and the safety of these services, were also created.

Through these legislative initiatives, freight services have been entirely (international as well as national) opened up to competition by 1 January 2007. Recently, international passengers' services have also been opened up to competition. However, the internal market of railway freight and international passengers' services is not fully harmonised and it is noted that the European Commission appears to receive complaints on the operation of the market.[43]

### 2.2.2. The absence of EU harmonisation of civil liability between IMs and RUs

Article 1, second indent and section II (Articles 6 to 8) of Directive 91/440/EEC in its original version require the separation of infrastructure management from railway transport services

[39] R. Greaves, *EC Transport Law,* (European Law Series, Longman, Harlow 2000), 3.
[40] See, for instance, White Paper: A strategy for revitalising the Community's railways, COM(1996) 421 and The White Paper: European transport policy in 2010: time to decide, COM(2001) 370 final.
[41] Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways, [1991] OJ L 237/25 and the three railway packages.
[42] L. Idot, "L'intérêt général : limite ou pierre angulaire du droit de la concurrence?" [2007] JTDE, 225, 230.
[43] Report from the Commission to the Council and the European Parliament, Second report on monitoring development of the rail market, COM(2009) 676 final of 18 December 2009.

(vertical unbundling), separation of accounts being compulsory and organisational or institutional separation being optional. This resulted in new legal relationships and new types of contracts. The RUs are clients and contractual partners of the IMs, whereas the passengers, freight consignors and keepers of private wagons are not in a direct contractual relationship with the IMs. Therefore passengers or consignors of goods must seek redress from either the RU or other parties responsible.

In the wake of vertical unbundling, Article 10(5) of Directive 91/440/EEC, introduced by Directive 2001/12/EC,[44] imposes on any RU engaged in rail transport services to conclude the necessary agreements with the IMs of the railway infrastructure used. However, EU law does not impose any specific content upon this contract, hence leaving to Member States discretion on how to regulate these relationships. It has to be noted that EU law regulates to some extent the relationships between IMs and RUs, by imposing a certain content to the network statement (an information document of the IMs to the attention of the RUs).[45] It is required that the network statement contains information on the nature of the infrastructure, on charging principles and tariffs and on the principles governing capacity allocation.

The restructuring and the opening up of the railway sector have not been accompanied by specific regulations on the civil liability between IMs and RUs. EU law merely imposes upon RUs to be "adequately" insured or to make equivalent arrangements for cover, in accordance with national and international law, of their liabilities in the event of accidents, in particular in respect of passengers, luggage, freight, mail and third parties.[46] To date, there has been no harmonisation of liability issues between RUs and IMs at an EU level.

EU law has already addressed liability issues in the railway sector in the remit of Regulation 1371/2007 on rail passengers' rights and obligations, which is of direct application in the EU Member States.[47] The liability issues in this Regulation are, however, purely limited to the relationships between RUs and their passengers in the operation of passenger services. This Regulation has been adopted in addition to the CIV Uniform Rules under the COTIF, in order to guarantee an extended scope for passengers' rights.[48] Similarly to the CIV Uniform Rules under the COTIF, the Regulation imposes to the RUs a strict liability (liability without *culpa*) towards their passengers, even where damage has been caused by a third party, such as the IM. For a description of the content of Regulation 1371/2007, see Annex V.

[44] Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community's railways [2001] OJ L75/1.
[45] Article 3 of Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification [2001] OJ L75/29.
[46] Article 9 of Council Directive 95/18/EC of 19 June 1995 on the licensing of railway undertakings, [1995] OJ L 143/70.
[47] Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations [2007] OJ L 315/14 ("Regulation 1371/2007").
[48] See recital 6 of Regulation 1371/2007.

The European Commission proposed in 2004 the adoption of a Regulation to address liability issues between RUs and rail freight customers.[49] The Regulation laid down the obligations of RUs and rail freight customers in order to define quality requirements for rail freight services, and subsequently, compensations in case of non-compliance with the quality requirements by the parties to the transport contract. The proposal was built upon the CIM Uniform Rules under the COTIF but tried to better reflect the realities of the current rail freight transport markets. Similarly to the CIM Uniform Rules under the COTIF, the proposed Regulation imposed to the RUs a strict liability (without *culpa*) towards their customers, even when the damage was caused by the IM. However, the triggering conditions of liability were expanded in comparison to the CIM Uniform Rules. In the absence of a consensus in the Council, the European Commission withdrew the proposal.

### 2.2.3. Industry initiatives - the European GTC of use of railway infrastructure

#### a) Introduction

This section is limited to the only industry initiative regarding liabilities between RUs and IMs known to us, the European General Terms and Conditions of use of railway infrastructure (GTC of use of railway infrastructure).

In the absence of EU harmonisation of the civil liability in relation to accidents between RUs and IMs, organisations such as the CIT (International Rail Transport Committee), UIC (International Union of Railways) – bringing together RUs – and RNE (RailNetEurope), supported by EIM (European Rail Infrastructure Managers) – bringing together IMs and allocation bodies all over Europe – as well as CER (Community of European Railway and Infrastructure Companies) – bringing together both stakeholders – are currently developing GTC of use of railway infrastructure. The GTC of use of railway infrastructure was almost completed in 2008.[50] However, issues relating to financial consequences of cancellations of allocated paths (see GTC Article 2.3.8), and of financial consequences of delays and disruptions remained in dispute and were not able to be agreed upon by the parties (see Chapter 4 of GTC).[51]

[49] Proposal for a Regulation of the European Parliament and the Council on compensation in cases of non-compliance with contractual quality requirements for rail freight services, COM(2004) 144 final.
[50] See 3rd RNE Regulatory Bodies Meeting in Vienna held on 6 November 2009.
[51] It is interesting to observe that the points that remain open correspond partly to the points for which Articles 8(4) and 9(4) of Appendix E - CUI of COTIF give to the parties the freedom to negotiate.

In June 2009, the RNE proposed to limit the maximum amount of compensation for consequential damages to the amount of the access charges of the path concerned by the litigating case.[52] However no final agreement could be reached by the parties.[53]

With the revised CUI entering into force on 1 December 2010, CIT wants to resume the negotiations with RNE and hopes to finalise the draft of GTC of the use of infrastructure by that date.[54]

Since all national civil liability regimes recognise the principle of contractual freedom, the European GTC of the use of infrastructure has the potential, if adopted, to harmonise rules, or at least a minimum set of rules of civil liability between the parties. Therefore, a short description of the proposal is provided. The description provided puts also the text of the proposal in perspective with the existing international legally binding provisions, but which are not currently in force, i.e. the Appendix E – CUI of COTIF.

**b) Objectives**

The objective of the European GTC of the use of infrastructure is "*to simplify the contractual process and develop mutual understanding and solutions for all European IMs and RUs on contract issues and best practices*".[55] It is established without prejudice to mandatory international or national law. Precedence would be given to the contract of use of the infrastructure itself (Article 1.1) which would be negotiated on an individual basis by the RUs and the IMs.

Therefore the aims of the European GTC are the following:[56]
- Minimum standards in order to protect RUs
- Same rules for international and domestic traffic
- Legal certainty through standardisation
- Legal efficiency through standardisation

**c) Liability provisions**

Chapter 6 of the proposal of GTC of use of railway infrastructure deals with the liabilities of both the IMs and the RUs in the event of accidents and other incidents. Consequences of delays and disruptions of the use of infrastructure caused to the other party are not covered

[52] Presentation of T. Leimgruber, CIT, "European GTC of Use of Railway Infrastructure, at Berner Tage, 4 & 5 February 2010.
[53] 3rd RNE Regulatory Bodies Meeting in Vienna held on 6 November 2009.
[54] CIT-Info 3/2010.
[55] Ibid.
[56] Presentation of T. Leimgruber, CIT, "European GTC of Use of Railway Infrastructure, at Berner Tage, 4 & 5 February 2010.

by Chapter 6 but by section 2.3.8 and Chapter 4 which are still to be determined. However, it is to be noted that regarding Article 11(1) of Directive 2001/14 (providing for the adoption of a performance scheme to minimise disruption and improve the performance of the railway network) the remaining margin of manoeuvre of IMs and RUs to negotiate compensation in the event of delays or disruptions is unclear, and would depend on the rules set out in the performance scheme (see section 2.1.5).

Article 6.2 and 6.3 stipulate, similarly to articles 8 and 9 of Title III of Appendix E – CUI of COTIF, the principle of "strict" (objective) liability (liability without *culpa*) of respectively the IM / RU where the origin of a given damage lies with the infrastructure / the means of transport used or by the persons or goods carried respectively, provided that the damage was caused during the use of the infrastructure. This is reflected in the grounds of relief aswell as the burden of proof for the party that has sustained the damage in the sense that the party only has to prove the origin of the damage (triggering event) and that the damage occurred during the time that the party used the infrastructure.

On the basis of that principle, the proposal for GTC of use of railway infrastructure provides that the IM will be liable for bodily loss or damage, for loss of or damage to property irrespective of ownership,[57] and for pecuniary loss resulting from damages that the RU, as being carrier, is obliged to pay by international or national law (but not by contract going beyond the law, unless otherwise agreed) to its customers (but not to third parties, for which liability is governed by national or international law), this when the damage is caused to the RU or its auxiliaries. By contrast with the CUI, the IM is liable for pecuniary loss not only payable by the carrier under the CIV Uniform Rules and the CIM Uniform Rules but payable by the RU under any international or national law (e.g. CIV, CIM, CUV, Regulation 1371/2007, etc.). The GTC of use of railway infrastructure organises a wider right of recourse than the CUI for RUs against IMs which have actually caused damage (see Annex IV).

Regarding the qualification given to "pecuniary loss" being the one "resulting from damages payable by the RU/IM to its customers pursuant to international or national law", it has to be noted that the consequences of cancellation of paths, delays and disruptions of the use of infrastructure are already covered to a large extent under Article 6.2 and 6.3.

The RU, on its turn, will be liable for bodily loss or damage, for loss of or damage to property irrespective of ownership[58] and for pecuniary loss resulting from damages payable by the IM to its customers (but not to third parties, for which liability is governed by national or international law) in accordance with the applicable national and international law (but not

[57] Article 8, §1, b) of Title III of Appendix E – CUI of COTIF does not contain the phrase *"irrespective of ownership"*.
[58] Article 9, §1, b) of Title III of Appendix E – CUI of COTIF does not contain the phrase *"irrespective of ownership"*.

following a contract going beyond the law unless otherwise agreed), this when the damage is caused to the IM or its auxiliaries. This would for instance cover national legal obligations to reimburse or compensate RUs or authorised applicants in the event of cancelled or re-scheduled paths. Title III of Appendix E – CUI of COTIF does not hold the RU liable for pecuniary loss resulting from damages payable by the IM to its customers, which means that the proposal of GTC of use of railway infrastructure contains a more extensive liability for the RUs than CUI.

Nevertheless the principle of strict liability, articles 6.2.2 and 6.3.2 contain circumstances in which the IM or the RU will be relieved from their liability. This will be the case when the loss or damage has been caused by:

- The fault of the RU / IM or by an order given by the RU / IM which is not attributable to the IM / RU;
- Circumstances such as force majeure or the behaviour of a third party provided that the IM / RU has taken the care required in the particular circumstances, could not avoid the damage and was unable to prevent the consequences.

Unlike in Title III of Appendix E – CUI of COTIF, Chapter 6 of the GTC of use of railway infrastructure does not mention the right that the IM or the RU has recourse against the third party when they were not exonerated from their liability, even though the third parties' behaviour caused the loss or damage. Chapter 6 does not explicitly mention, in contrast to Title III of Appendix E – CUI of COTIF, that the parties will be discharged from their liability when the damage is caused by circumstances not connected with their activities.

Furthermore, Chapter 6 states that the same strict liability applies for the additional and ancillary services provided by either the IM or the RU, unless agreed otherwise by the parties.

Chapter 6 does not deal with the liability for pecuniary loss resulting from damage caused by the IM / RU and payable by the RU / IM to third parties. It is explicitly stated that the liability for damages to third parties will be governed by the applicable national and international law. "Third party" refers to "*any person other than the IM, the RU and their auxiliaries*". However, it is reasonable to consider that this provision should be construed as applying without prejudice to the strict liability for pecuniary loss resulting from damages payable by the IM / RU to its customers in accordance with the applicable national and international law.

With regard to the loss or damage caused to the other party by delays or disruptions, Chapter 6 refers to article 2.8.3 and Chapter 4 of the present GTC. In its current version, the proposal does not yet contain the rules regarding the consequences of delays and disruptions. However as stated above, the pecuniary losses already cover some consequences of delays, such as the reimbursement of tickets and the compensations paid to its passengers for delays

and cancellations of trains under Regulation 1371/2007 and the possible reimbursement of cancelled paths if national or international law provides so. In addition, Directive 2001/14 addresses at EU level the issue of delays and disruption through the imposition of performance schemes. Performance schemes are to be part of the general infrastructure charging scheme which does not proceed from the contractual freedom between RUs and IMs, but from either the MS (setting out the charging framework) or the IM (implementing the framework by setting out the charging scheme). Hence, the remaining margin of manoeuvre of IMs and RUs to negotiate compensation in the event of delays or disruptions is unclear, and would depend on the rules set out in the performance scheme.

Liability for the loss of use (i.e. damages resulting from the loss of income such as track charges for the IM or the impossibility to use the rolling stock for the RU) is left to an agreement between the parties. This point is not yet closed in the negotiations of the GTC of use of railway infrastructure.

Chapter 6, similarly to Title III of Appendix E – CUI of COTIF, states that in the case of concomitant causes, this being the causes attributable to the IM and the RU, each of the party to the contract will only be liable to the extent that the causes attributable to him contributed to the loss or the damage. Chapter 6 does not state, in contrast to article 10 of Title III of Appendix E – CUI of COTIF, how to deal with the impossibility of assessing to what extent the respective causes contributed to the loss or damage or how to deal with the fact that the causes are attributable to the IM and several RUs (or only to several RUs) using the same Railway Infrastructure.

Chapter 6 neither states in which form (lump sum or annuity) the damages must be awarded and does not provide an upper limit to the amount of such damages, nor does it refer to the applicable national law to determine the amount of the payable damages. Article 6.5 mentions the fact that the parties will have to agree to the limits of their liability and states that they will lose their right to invoke such limits if it is proven that the damage results from an act or omission performed with the intention to cause the loss or damage or performed recklessly while knowing that the loss or damage would probably occur. Article 15 of Title III of Appendix E – CUI of COTIF contains the same loss of the right to invoke the limits of liability.

Unlike Title III of Appendix E – CUI of COTIF, Chapter 6 does not contain articles dealing with the following aspects: damages in case of death, damages in case of personal injury, compensation for bodily harm, form and amount of damages in case of death and personal injury, conversion and interest, liability in case of nuclear accidents, possible competing actions and agreements to settle any disputes.

In consequence, the proposal of GTC of use of railway infrastructure seems to be constructed as a complementary tool to possible international or national law. The GTC of use of railway infrastructure adds value in comparison with the Appendix E – CUI of COTIF as revised in 2009 at least on three points. First, if an agreement can be reached, damage which is caused to a party by delay and disruption to the operation of the other party will be settled. Second, an IM will be held liable for pecuniary loss payable by the RU under international and national law that he caused to the RU and not only pecuniary loss payable by the RU under CIV and CIM Uniform Rules of COTIF. Third, RU will be held liable for pecuniary loss payable by the IM under international and national law that he caused to the IM whereas CUI does not provide for a strict liability of RU for pecuniary loss caused to the IM.

One of the objectives of the Common Transport Policy is the creation of an internal market for rail services. On the basis of this objective, the EU has already adopted several pieces of legislation. These laws have notably imposed the separation of the management of infrastructures and the operation of railway services, with a view to supporting the opening up of the market. The vertical unbundling resulted in new legal relationships and new types of contracts, between RUs and IMs. Although the EU has adopted legislation to settle the liability regime between RUs and the passengers, which renders RUs responsible also for the IM, the EU has not adopted any such legislation to settle the liability between RUs and IMs. At present, the only discussion on this issue is being conducted within the industry to adopt European General Terms and Conditions of use of railway infrastructure.

## 2.3. The national level

### 2.3.1. National civil liability regimes

For a comparative table of the existing legal regimes in the EU MS studied, see Annex I.

#### a) Introduction

As a preliminary remark, MS use different legal terms and concepts in the field of liability which are not, despite the efforts of UNIDROIT,[59] harmonised at international level.

Therefore, for the purpose of this Study and for the sake of the consistency, an explanation of the main concepts used is proposed. This explanation remains high level and is given for the

[59] Unidroit is the International Institute for the Unification of Private Law. It is an intergovernmental Organisation the purpose of which is to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States.

purpose of understanding the national regimes applicable between RUs and IMs in the event of a railway accident. However, this explanation does not constitute a precise or exhaustive exercise, since the understanding of concepts may vary from country to country.

Such preliminary explanation of the concepts will enable easier comparison between national situations and terms that do not have the same name but that might refer to the same legal mechanism (such as for instance "*novus actus interveniens*"), or to clarify the use of certain legal terms.

### b) Explanation of the concepts used

#### *Non-contractual and contractual liability*

Non-contractual liability covers the area of law also known in French as "*responsabilité extra-contractuelle*", "*responsabilité délictuelle*" (in France) or "*responsabilité aquilienne*" (in Belgium), "*delict*" in Scotland, or in England as "*tort liability*".[60] As defined in the "Study on Property Law and Non-contractual Liability Law as they relate to Contract Law", in all EU Member States, this type of liability is the area of the law in which it is decided whether one who has suffered damage can on that account demand reparation from another with whom there may be no other connection in law than the incident of damage itself.[61] It has to be noted that sometimes the connection referred to between the claimant and the respondent may be organised by law but what is hereby excluded is a contractual relationship. In the following analysis, the concepts of tort or non-contractual liability will be used to refer to this type of liability.

Contractual liability is governed in the EU Member States by Contract law. This type of liability is the area of law which governs whether one party to the contract who has suffered damage can seek reparation or remedy from the other party under the terms of their contract.

#### *Liability based on fault and strict liability*

Liability can be based on "fault" or not. The concept of fault varies from country to country and sometimes according to the field of law, non-contractual or contractual liability. Such variation has consequences on the way liability is invoked and proved. "Fault" is defined through various concepts:

- intention (for instance, DE, although not mentioned for other MS, intention would always constitute a fault);

[60] Study on Property Law and Non-contractual Liability Law as they relate to Contract Law, Submitted to the European Commission - Health and Consumer Protection Directorate-General – SANCO B5-1000/02/000574, p. 51.
[61] Ibid.

- negligence (for instance, DE, DK, ES);
- breach of the contract (for instance, in BE, EL, UK, FR, LT, RO);
- breach of a legal rule (for instance, under non-contractual liability law, in BE, RO) that is intended to protect another person (for instance, under non-contractual liability law in DE) or without such purpose of protection of the injured person (for instance under non-contractual liability law in BE, FR…);
- breach of the general duty of care (for instance, under non-contractual liability law in BE, IE, UK, FR);
- wrongful act, being a mere act resulting in a damage – presumption of fault (for instance, in HU)

Under this category of "fault" based liability, a person is held liable for damage only if he or she is proven to be at fault.

The term or concept of strict liability is used in the explanatory report to the CUI to qualify the liability of IM / RU where a damage has been caused to the other party, during the use of the infrastructure, having its origin in the infrastructure / the means of transport used or by the persons or goods carried. In the absence of international / European contract law, the CUI and its explanatory report present themselves as the natural starting point of reference for comparing liability regimes in the railway sector. Therefore, where liability is not based on fault, this study uses the concept of “strict liability” or “objective liability”.

However, strict liability, if it does not rely on a "fault" as described above, is however only triggered where certain conditions are fulfilled. The claimant will not have to prove the fault but will still have to prove the triggering event of liability as well as the damage and the causal link. In the CUI, these conditions are that the damage must have its origin in the infrastructure / the means of transport used or by the persons or goods carried and that the damage occurred during an international transport service.

In some cases, although there is no "fault" of either party required, liability might be triggered for a damage caused by the defect of the infrastructure / rolling stock. To understand what could be meant by defect, we could here refer to Article 6 of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products:[62]

“*A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:*
*(a) the presentation of the product;*
*(b) the use to which it could reasonably be expected that the product would be put;*
*(c) the time when the product was put into circulation.*

[62] [1985] OJ L210/29.

*2. A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation*".

Where liability is triggered for defect in the rolling stock or the infrastructure, the present Study will also use the concept of strict liability, but the reader has to bear in mind that the conditions to be proven may be different from other strict liability cases. Indeed, this type of liability is triggered by the IM or the RU permitting or suffering a defect to arise. Hence, strict liability is not a universal term and the conditions to be fulfilled to successfully invoke such liability may vary.

As an additional remark, where strict liability regimes have been put in place, exonerations to liability have in general also been incorporated. This is explainable because, whereas a liability for "fault" can, by definition, be avoided (by not making fault), strict liability is automatically triggered when the conditions for its application are fulfilled.

***Remoteness limits or causation***

The questionnaire sent to the national experts asked whether their liability regimes were limited by "remoteness". This concept is linked to causation. It is known under English law as a set of rules in both tort and contract law, which limits liability, and consequently the amount of compensatory damages, when the imposition of liability becomes too tenuous, or remote. It appears that most of the EU MS studied have some notion of remoteness, although the concept used is not necessarily "remoteness". The concepts used may refer to the adequacy / relevancy of the causal link (e.g. in DE, DK, EL, RO, ES) and in Germany, to additional "rule theory", whereby a damage can be recovered only within the scope of protection of the norm which has been infringed. By contrast, other countries rely on the equivalence of the conditions (*conditio sine qua non*) whereby sufficient causal link exists where the damage would not occurred without the triggering event even if the event is remote from the damage (e.g. BE, HU, FR subject to controversies).

***Force majeure***

Another concept often used is the one of "force majeure". This concept seems to mean the same in the different EU MS, but interpretation given by national courts may include in these concepts various situations. In general, "force majeure" refers to an outside event, beyond control (unforeseeable) and unavoidable. There are, however, degrees of unavoidability across the sample MS. For instance, for force majeure to be applicable in DE there is need only to take reasonable care to avoid some harm occurring, whereas in ES there must be much more than the use of due or reasonable care.

In the UK, “force majeure” is used in practice. This concept is however not a legal concept. The basic concept which governs situations of “force majeure” as depicted above is the one of “frustration”.

***Novus actus interveniens***

The questionnaire sent to the national experts also asked whether their liability regimes were limited with “*novus actus interveniens*” (from Latin: “*a new intervening act*”). This expression refers to an act of a third party that intervenes between the original act / omission and the damage that is produced as a result and therefore is capable of breaking the liability.

This expression is thus also linked to the system of causation applicable. The stronger the causal link required, the lesser the impact of such intervention on the liability. For instance, in DE, under the general law, a misconduct of a third person does not, in principle, break the causal connection, unless there is a gross misconduct. However, such would not be the case where strict liability applies as between IM and RU which is excluded for when the following interventions occurred: the object accepted for safekeeping is damaged or the object being transported is damaged unless a passenger is wearing or carrying it with him.

***Res ipsa loquitur***

The questionnaire sent to the national experts also investigated whether "*res ipsa loquitur*" exists. This expression meaning in Latin, "*the thing speaks for itself*", is used in common law under tort law to refer to situations where negligence is presumed on the respondent since the object causing injury was in their control. This expression refers thus to a presumption of “blameworthiness”, that can be rebutted by the respondent. Essentially, for example in UK the burden of proof is reversed, whereby the claimant does not need to prove negligence occurred but the respondent must prove that negligence did not occur because of his actions.

Such concept exists to a certain extent in some other Member States (EL, HU, IE, LT and ES). However, in EL, the presumption only exists for widely known facts or findings of common experience. In ES, under non-contractual liability law only, the Supreme Court has reversed the burden of proof of the breach of duty in cases of activities that pose somewhat increased risks of harmful consequences to others. In IE and UK, *res ipsa loquitur* operates to shift the burden of proof to the respondent in circumstances where a conclusion can be drawn that the respondent’s negligent conduct caused the injury. Such conclusion can be drawn in common law where the object causing the injury was under the respondent’s control and accidents such as occurred do not normally happen if those in control exercise due care. In LT, *Res ipsa loquitur* is accepted but does not reverse the burden of proof. A similar consequence may occur in other laws in the light of the distinction between "*obligation de*

*moyen*" and "*obligation de résultat*" (FR, BE). In case of a breach of an "*obligation de résultat*" the claimant has only to prove that the result was not achieved and the respondent has the possibility to prove that this was the consequence of "force majeure". For the "*obligation de moyen*", the claimant has to prove the fault resulting from the behaviour of the respondent.

***Pecuniary damage/loss***

Another concept used is “pecuniary damage/loss”. This expression is used in the COTIF Appendix E – CUI, but has not been defined. However, Article 8 gives greater precision on the pecuniary loss covered: pecuniary loss resulting from damages payable by the carrier under the CIV Uniform Rules and the CIM Uniform Rules. This concept seems to correspond under French law to the concept of immaterial damage (as against “material damage” which appears to cover the concept of “property damage/loss” or loss incurred by a natural person). Hence, in this Study, it is understood under the concept of pecuniary damage/loss, any damage/loss which is not occurred directly to persons or to properties, but which is economic and can be evaluated in money, such as the reimbursement / compensations of tickets or fees for the use of infrastructure, the loss of revenue from the selling of tickets or train paths, etc. due to the accident.

***Limited / unlimited obtainable damage***

The quantum of damage was also investigated through the questionnaire sent to the national experts. One particular question aimed to determine whether the quantum of damage was limited or unlimited. For the purpose of this study, “unlimited obtainable damage” refers to an amount of damage that was not limited previously to the damage as such (e.g. by a financial cap) even if the compensation that the liable party has to assure the entire reparation, that is, the rehabilitation of the situation which the victim would have been in if the “harm” had not occurred. This principle is often known as “*restitutio in integrum*” and implies that the amount of compensation awarded should put the successful claimant in the position he or she would have been had the “fault” / triggering event not occurred.

By contrast, for the purpose of this Study, “limited obtainable damage” refers to a quantity of damage that was limited previously to the damage as such. Where the obtainable damage is limited, it is possible that the victim who sustains the damage would not be put in the same situation he would have been if the “fault”/triggering event would not have occurred. This will be the case when the whole reparation exceeds the limits set out previously to the damage.

Some Member States have answered that the damage obtainable is limited to the damage that can be proved or to the entire economic loss, but not more, and hence the quantum of damage is limited (i.e limited to 100% of the loss – whatever quantum that might be).

However, regarding the definition above, these answers will be treated in the comparison of the national regimes as referring to an unlimited quantum of damage because the limitation is not set out previously to the damage but with the damage.

Still in the investigation of the quantum of damage, it was asked whether contributory negligence would influence the quantum of obtainable damage. “Contributory negligence”, for the purpose of this study, refers to cases where a claimant has, through his own negligence, contributed to the damage he sustains. This contributory negligence can reduce the amount of or, under certain regimes, even exclude the compensation. .

In the EU, of those Member States studied, where the concept of contributory negligence exists, it is possible for the party suffering the damage to have a degree of blameworthiness too (and so it is possible to be 100% contributorily negligent).

***Standard of proof***

The standard of proof (i.e. a duty placed upon a respondent to prove or disprove a disputed fact) was also investigated.

In common law jurisdictions such UK and IE, the civil standard of proof is known as the “balance of probabilities” or “preponderance of the evidence”. This standard is met if the proposition is more likely to be true than not true and is sometimes described as being satisfied if there is greater than 50 percent chance that the proposition is true. Such standard of proof does not exist on the continent (apart from LT which also recognises the balance of probabilities).

In civil law jurisdictions, in continental Europe, the standard of proof means a free assessment of the evidence provided to determine whether the conditions of liability are fulfilled, in accordance to the procedural rules. In Belgium and Hungary, where the theory of the equivalence of the conditions applies, it must be shown that the fault/triggering event was the condition *sine qua none* for the occurrence of the damage. In the other countries, with various nuances, the principle of the “adequate” (or relevant) causation applies. The principles applied on the continent do not rely on what has probably caused the damage but on what has definitely caused the damage.

This should not be confused with the burden of proof. The burden of proof describes on whom the duty rests to prove the case.

***Moral damage***

In this study, moral damage refers to pain, suffering and damage caused to reputation and other similar non pecuniary situations.

***Foreseeability / unforeseeability***

Another concept identified is that of foreseeability / unforeseeability of the damage. Unforeseeability is understood in this Study as qualifying a damage incapable of being anticipated at the moment of the conclusion of the contract or before the tortious event took place.

***Direct / indirect***

The concepts of direct and indirect damage appear to have very different definitions from MS to MS. In some MS, the distinction is even immaterial regarding the general principles stating that the whole damage has to be repaired (e.g. BE, DE). For the purposes of this Study the terms of indirect damage refer to consequential damage in contrast with direct damage which refers to the damage which is directly sustained from the event either by the victim himself or by persons depending on the victim (in FR, BE : "*dommage par répercussion*"). But even this definition leaves open various interpretations. Therefore, one should bear in mind when considering what can be qualified as a direct / indirect damage the theory which applies to causation in the considered country.

***Pacta sunt servanda***

This expression meaning in Latin, "*agreements must be kept*", is used to stress that contractual clauses are law between the parties, and implies that non-fulfilment of respective obligations is a breach of the pact.

### c) Description of the national liability regimes

The following description only analyses the national liability regimes as they apply between RUs and IM. Liability between RUs and third parties has been largely dealt with in international and EU law and will be examined in Chapter 3. In this section possible liability towards third parties, like passengers or freight customers and other third parties is only taken into consideration inasmuch as it stems from national law and may have an influence on the relationship between RUs and IMs.

***General overview of the national civil liability regimes***

The liability between RUs and IMs arises, in the majority of Member States, from the general rules of civil liability (either contractual or non-contractual).

Only DK, DE and RO have also specific rules governing civil liability between RUs and IMs. The specific rules in DK foresee a right of recourse of the RU which has paid damages for an event caused by the IM.

The nature of the liability is mainly both non-contractual and contractual, except for FR and LT where it is only contractual. However, JSC LIetuvos Gelezinkeliai (the IM in LT) is vertically integrated with the RU and no competition exists on the Lithuanian network. Therefore, even if a legal provision transposes Article 10(5) of Directive 91/440 imposing the conclusion of all necessary arrangements for the access to the infrastructure, there is no possibility of adopting a contract between the parties because there are no separate parties. The same is true of Ireland where the IM and the RU are integrated and no competition exists.

Concerning the rules that govern civil liability, there is a distinction to make between Common Law MS and Continental Law MS. In most of the EU MS, the rules are provided in the Civil Code, even if the case law can be very important in the interpretation of the concepts. In Belgium and in France, for instance, it is recognised that the Civil Code (Napoleon Code of 1804) only contains very short provisions and no definitions. Therefore, the case law and the literature create a superstructure necessary to apply the general rules set out in the Civil Code, but contrary to Common law, the rule of precedent does not exist. In some cases, specific national legislation (DE, RO and DK) provides the rules.

However, for UK and IE, being Common law countries, the Law develops mainly by way of case law.

In UK, along with the common law aspects, there is the CAHA system. As explained in the contribution of the UK (national regime), "*any RU based in a member state other than the UK and holding a European Passenger Licence or European Freight Licence issued by a licensing body in another member state will need a Statement of National Regulatory Provisions ("SNRP") from the UK Office of Rail Regulation ("ORR").*

*Before the SNRP can come into effect, a RU must sign up to approved arrangements governing the allocation amongst RUs and IMs of liabilities and the handling of claims. The only approved arrangements are those contained in the industry Claims Allocation and Handling Agreement ("CAHA"). (…) Liability between a RU and Network Rail in respect of a*

*railway accident will be governed by CAHA, the track access agreement and the Network Code.*

*In addition to these contractual liability provisions, there may also be a claim in tort (delict in Scotland), depending on the circumstances*".

The rail industry has created this arrangement, called the Claims Allocation and Handling Agreement (CAHA)[63], in the words of ORR "to deal with third party claims, to which all companies must belong if they wish to run train services as part of licence conditions. This was a condition imposed by the rail regulator after privatisation. Under the agreement, compensation for damage below a minimum threshold is dealt with by operators according to a CAHA schedule. Claims above the threshold or not in the schedule are handled by a lead party and the allocation of liabilities is agreed among the CAHA members involved. Disputes can be referred to the Railway Industry Dispute Resolution (RIDR) Committee (or to mediation), to arbitration or the courts as determined by the CAHA rules and the nature of the dispute.

All licensed operators (RUs) and IMs are party to CAHA through their licences. RIDR, a central agency dealing with claims handling, makes the rules (which ORR approves) and determines cases within the industry. It deals with low value claims particularly (e.g. for trips and falls) through its rules and allocates liability according to a set schedule. It has mediation/arbitration for other disputes brought to it. This means claims can be kept out of the courts and potentially expensive intra-industry disputes can be avoided. RIDR handles all claims against parties to CAHA below £7,500. Claims above that threshold are handled by a lead party or its insurer. The lead party can either be the party which is likely to bear the largest share of liability for the claim or, if that cannot be agreed, it is picked by the potentially liable parties on a without prejudice basis.

The UK dispute resolution regime is intended to minimise the cost of claims handling to the rail industry, to reduce the costs of inter-industry disputes by use of a pre-determined allocation regime for small claims, to avoid court actions and time spent in resolving disputes within the industry, and provide a unified face to passengers. The principles are to avoid the risk of a claimant who has, for instance been injured in an accident, having to pursue more than one industry party, and minimise the industry parties' costs incurred in defending such claims.

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<http://www.networkrail.co.uk/browse%20documents/Restricted/Documents/StandardSuiteOfContracts/CAHA1.pdf>.

The conclusion to be drawn is that this is a unique system among the Member States studied. Indeed, following CAHA, IMs can be identified quickly as the liable parties and be required to pay the damages claimed by the third party.

The use of this specific railway system may be explained by the fact that, as pointed out in the UK national ministry contribution, the Great Britain rail network is occupied mainly by domestic traffic. The volume of international traffic is very small. However, the CUI covers liability for international traffic only.

In the majority of MS, non-contractual and contractual liabilities are based on “fault”, meaning all acts or omissions breaching the contract or a tortious obligation (for example, the general duty of care) as described above should be looked at. In the UK, in terms of discussing rail accidents, the tort of negligence seems most relevant rather than the other categories of tort (such as nuisance, trespass or defamation for example). This type of tort can also be understood as being based on "fault".

However, some grounds of strict liability exist in DE, HU, PL, and LT.

In DE, besides the contractual liability, non-contractual liability law may apply. Within non-contractual liability law, several grounds of liabilities are possible. Under the general rules, fault has to be shown. In some cases, presumptions of fault are set out by the general rules. In specific legislation, strict liability applies to RUs and IMs, and in their relationship, as recognised by the German Federal Court of Justice. The respondent will be relieved of liability if it can be shown that:

- the damage was due to force majeure,
- that an object accepted for safekeeping was damaged beforehand,
- that an object being transported was damaged beforehand, unless a passenger is wearing or carrying it with him.

In HU and PL, strict liability is triggered by the risky nature of the activity. In HU, the respondent may be relieved from strict liability if he shows that the damage was unavoidable and the triggering fact was outside its risky activity. In PL, the respondent can be relieved if the damage was due to force majeure, the damage was solely caused by the fault of the person who suffered the damage or the damage was solely caused by the fault of a third party for whom he is not responsible.

In LT, strict liability exists in contractual relations whereby the claimant does not have to prove the fault of the respondent. The respondent may be relieved only if he proves force majeure or that the damage was due to the action of the claimant.

Non-contractual and contractual liabilities interplay in different ways in MS:

- A combination of causes of action are possible under specific conditions in BE, DE, EL, HU, IE and PL but only in ES and UK to the extent the contract has not addressed the issue.

- Liabilities may be complementary: non-contractual liability law applies only to the extent the contract has not addressed the issue in DK and RO.

- Liabilities may be mutually exclusive: competing liabilities are not possible in FR or LT.

***Specific features***

***Liability for other persons***

In almost all the Member States, RUs and IMs are liable for the actions of their auxiliaries, subcontractors and personnel (contractual and tort).

***Limitation of liability***

Unless it is provided in the contract, a limitation to the liability by a financial cap is not a common rule in the EU MS.

In DE, where strict liabilities apply, limitations of liability are also set out. Limitations provided for in German law are much higher than under CIV (as absorbed by Regulation 1371/2007) and CIM. Hence, in Germany, these limitations do not impede RUs to recover from the DB Netz (IM) the entire amount that they paid under CIV and CIM to their clients when DB Netz will be held liable.

Where strict liability is triggered by the risky nature of an activity, no such cap is foreseen (HU and PL). In LT, strict liability exists in contract law and hence, the parties may limit their liabilities except (i) when damage arises due to wilful acts or gross negligence of the respondent, and (ii) in case contractual provisions restrict civil liability for damages to health, loss of life and moral damage. In any case, according to the principle of contractual freedom, limitation of liabilities seems possible within contractual law.

Some kind of “remoteness” limits exists in DK, DE, EL, IE, RO, ES, UK, FR. HU, LT and PL. Limitation of liability is best described through the concept of causation which is able to determine the scope of liability, and hence the level of difficulty to recover the damage sustained.

- In UK, IE and LT, liability is limited when imposition of liability becomes too remote. The claimant has to establish that the respondent is liable for the claimant's loss or damage. He must provide sufficient evidence to enable the court to make a finding of fault on the part of the respondent (that is, that there is a duty of care which he owes towards the claimant, and that his conduct has breached that duty), and there must be a causal link between the respondent's conduct and the loss or damage suffered by the claimant. Simply establishing that the respondent has been at fault and that his conduct caused the claimant's loss is not on its own sufficient to find him liable in non-contractual liability law – a claimant will further need to establish that it is reasonable that the respondent should be held liable or responsible for that loss; for example, if the loss is too remote a consequence of the respondent's conduct (even if that conduct indeed caused the loss), then the respondent will not be liable in non-contractual liability law.[64]

- In DE, it has to be differentiated between the respondent's conduct and the infringement of the law and, furthermore, between the infringement of law and the damage suffered. The first causal link is called "*haftungsbegründender Tatbestand*" and helps to establish the basic liability of the respondent; the second causal link is denominated "*haftungsausfüllender Tatbestand*". Only if the two mentioned links are established, the claimant can successfully claim damages.

  In order to establish the necessary causal connection ("Zurechnungszusammenhang"), German law provides for three different elements:

  - The first element for determination of whether a conduct is a condition for the damage is known as the so called equivalence theory ("*Äquivalenztheorie*"), also referred to as "*conditio sine qua non*". According to this theory, causation only exists if the damage suffered by a party would not have occurred in the absence of the respondent's conduct.
  - The core of the second element, the theory of adequate causation ("*Adäquanztheorie*"), is that for a party to be held liable for damage a mere causal link between the conduct of this party and the damage is not sufficient. The damage needs to be an adequate link between the conduct and the effects brought about. More precisely, adequacy means that the general behaviour of a party objectively increased the probability of the occurrence of an event. The function of this theory is to limit the scope of responsibility for damage. Consequences of a behaviour that cannot be adequately taken into consideration have no implication for liability.
  - Finally, according to the scope of the "rule theory" ("*Lehre vom Schutzzweck der Norm*"), a damage can be recovered only if this is within the scope of protection of the norm which has been infringed. Again, this element has

[64] This description is reproduced from a note provided by ORR.

been developed to limit the scope of liability with regard to unexpected consequences.

- In DK, EL, RO, ES, (and possibly FR since the jurisprudence has a tendency to recognise this theory) there is a need for an adequate/relevant causal link between the triggering event and the damage, following the theory of adequate causation. Such a result of causation theory is comparable to result achieved with the concept of remoteness.
- In BE and HU, in application of the theory of the "*équivalence des conditions*", the causal link exists as soon as the damage suffered by a party would not have occurred in the absence of the respondent's conduct (which is the condition *sine qua non* of the damage), irrespective of the proximity of the link.

The liabilities can also be limited / excluded in cases of:

- force majeure, and other similar causes of justification ("*causes d'exonération*") (BE, DE, FR, LT, RO, and probably, the other EU Member States, although not expressly mentioned);
- if so provided in the contract (FR, IE, BE and probably, the other EU Member States, although not expressly mentioned, on the basis of *pacta sunt servanda*);
- *novus actus interveniens* or similar mechanism (UK, EL, IE, PL, RO, DK, ES).

***Criminal sanctions***

There are independent criminal sanctions in BE, DK, FR, EL, PL, ES usually provided in the Criminal Code. However, criminal sanctions related to railway accidents or transportation also exist and are provided sometimes directly in the Criminal Code (DE, EL, HU, LT, RO) or in specific legislation (BE, IE).

In UK, criminal sanctions are provided in specific legislation concerning railway transportation and in general Statutes, as there is no Criminal Code.

It has to be noted here that when a national regime provides for an exclusive application of contract law for breaches to contracts (even if they also constitute a criminal offence), there is no possibility for the victim to rely on other grounds of liability, which is restrictive of the victims' rights.

***Conditions to access justice***

The conditions to have access to Justice (or requirements of *locus standi*) are as follows in the EU MS studied:

- quality / legal capacity (DE, EL, HU, RO, ES, PL)
- sufficient / legitimate interest (DK, FR, IE, LT)
- both (BE, FR)
- a right, a title and an interest (UK)

The other conditions to access justice with a view to seeking redress for a damage sustained, including the lawyers' fees, the courts fees and the length of legal proceedings, are not standard in the EU MS studied. Indeed, such costs and length of legal proceedings would always depend on various factors (e.g. importance of the claim, necessity to proceed to expertise, load of the competent court, etc.) so that precise information in this respect would require a separate study, as pointed out in the extensive "Study on Property Law and Non-contractual Liability Law as they relate to Contract Law". In addition, such conditions are dependent on the national rules governing civil proceedings which may evolve in time. For instance, in BE, it is only recently that lawyers' fees can be recovered as part of a damage ("*répétibilité*"). Finally, it appeared from the contributions of RUs that they barely go before Court to settle their civil liability issues with IM, preferring an out of Court solution. Therefore, no concrete information on these other conditions to access justice has been provided in this respect in what could be considered as a 'typical liability case'. RUs have not highlighted that costs for accessing justice would be so high as to determine their preference for out of court settlement. Hence the reasons for out of court settlement may be various.

***Notice of claim***

To invoke the civil liability regime(s), the time limitation varies from one MS to another.

In the majority of MS, the notice of claim is 3 years starting with the awareness of the damage and the identification of the liable person: DK, FR, LT, PL, RO, HU (for strict liability) and DE (up to 30 years from the event if injury to life, body or liberty).

In BE, it is, unless otherwise provided by the contract or the Law, 10 years for contractual liability and 5 years for non-contractual liability.

In EL, the general notice of claim period is 20 years. However, in non-contractual liability law, the limitation period is 5 years from the moment the damaged party becomes aware of the damage and of the person liable for compensation.

In IE, the time limitation is 6 years but only 2 years for personal or fatal injuries.

In UK, the notice of claim is also 6 years in case of a breach of contract or in tort law (12 years if breach of deed), 3 years if personal injury, or within 365 days of first becoming aware of the injury.

In ES, the action to claim non-contractual liability has a legal term of one year to be calculated from the moment in which the victim could bring a suit. In cases of personal injury, this typically implies complete recovery from the injuries and repercussions. This period will re-open if the victim presents even an informal claim against the injurer. The Catalan Civil Code contains though a provision establishing a materially divergent limitation period of 3 years. It is to be noticed that a Court in Lleida raised in 2008 a constitutional challenge against this provision, for lack of legislative competences of the Catalan Parliament over this matter, and a decision is pending from the Spanish Constitutional Court. There is another region, Navarre, which has also legislate in that matter but the term is the same as in the Spanish Civil Code, that is, one year. The action to claim contractual liability has a legal term of 15 years, according to article 1964 CC (which sets the term of limitation for personal obligations). In Catalonia, this term is of ten years.

***Burden and standard of proof***

In all MS covered by this study, but EL, the claimant bears the burden of proof. However, in EL, under contract law only, the burden of proof lies with the person who caused the damage, who must prove that he acted diligently. However, in some EU MS, there will often be a shift of burden of proof when the conditions for claims are relatively easy to demonstrate by the claimant (BE, DK). Under certain laws, parties have to collaborate in bringing the evidence before the court (e.g. BE, FR).

The principle "*res ipsa loquitur*" or a comparable mechanism is applied in EL, HU, IE, LT, ES and UK. As mentioned here above the reversal of the burden of proof may vary under certain laws depending on the nature of the breached rule of contract (distinction between "*obligation de moyen*" and "*obligation de résultat*" whereby the obligation of result, "*obligation de résultat*" would call for a shift in the burden of proof (BE, FR)

As detailed in the explanation of the concepts, there are two tendencies in the standard of proof:

- In BE, DK, FR, DE, EL, HU, PL, RO and ES: the principle is free assessment of evidence according to the rules governing civil proceedings.
- In IE, UK and LT: balance of probabilities prevails (also known as preponderance of the evidence, whereby the proposition is more likely to be true than not true). Whereas the link between the triggering event and the damage should not be too

*Damage*

The damage repaired or compensated in each MS is the following:

1. Foreseeable:
BE and FR (contractual except in case of intentional breach of contract), DK, DE, EL, HU, IE, LT, PL, RO, ES, UK

2. Unforeseeable:
BE (non-contractual liability), DE, HU, IE, PL, RO, ES

3. Direct:
BE, DK, FR, DE, EL, HU, IE, PL, RO, ES and UK
In LT this includes the recourse of the party which incurs liability towards third parties as a consequence of an accident due to the fault of the other party,

4. Indirect:
DE, DK, EL, HU, IE, LT, PL and ES
In BE this includes the recourse of the party which incurs liability towards third parties as a consequence of an accident due to the fault of the other party,
In FR (sometimes),

5. Death or personal injury:
All EU Member States studied (BE, DK, FR, DE, EL, HU, IE, LT, PL, RO, ES, UK)

6. Damage to property:
All EU Member States studied (BE, DK, FR, DE, EL, HU, IE, LT, PL, RO, ES, UK)

7. Pecuniary:
All EU Member States studied: BE, DK, DE, EL, HU, IE, LT, PL, RO, ES, UK, FR (but called immaterial damage)

This includes, in HU and PL, the recourse of the party which incurs liability towards third parties as a consequence of an accident due to the fault of the other party.

8. Moral:
All EU Member States studied (BE, DK, DE, EL, HU, IE, LT, PL, PL, RO, ES, UK)

9. Mere compensation (which is not punitive):

All EU Member States studied (BE, DK, FR, DE, EL, HU, IE, LT, PL, RO, ES, UK)

10. Punitive:

IE

In DK only if in the contract, and in PL in the form of a contractual penalty.

Although damages are generally intended to compensate the claimant rather than punish the respondent, in English law, the concept of "exemplary damages" does exist in respect of certain limited types of claims in tort (but note that none of those is likely in a railway accident).[65] In any case, exemplary damages are never awarded in respect of claims in contract.

11. Acts of terrorism:

In general, acts of terrorism are a damage which can be covered if liability is not excluded because of force majeure.

In ES and EL, damage resulting from an act of terrorism would be compensated by the State.

12. Train delays, infrastructure disruptions, infrastructure rehabilitation, train immobilisation :

All EU Member States studied (BE, DK, FR, DE, EL, HU, IE, LT, PL, RO, ES, UK)

13. Soil pollution:

All EU Member States studied (BE, DK, FR, DE, EL, HU, IE, LT, PL, RO, ES, UK)

*Reparation*

Two different rules coexist in the MS concerning the way the damage is repaired.

1) The principle of repairing damage *in natura* and only if it is not possible or without utility for the victim, is it a financial compensation:

BE, DE, RO.

[65] Indeed, exemplary damages may be awarded only in three categories of cases: (1) The first category is oppressive, arbitrary or unconstitutional action by servants of the government. This category is not confined to Crown servants but includes persons who are exercising functions of a governmental character, like the police. This category does not, however, ordinarily extend to oppressive action by private corporations or individuals. (2) The second category is cases in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the claimant. This category is not confined to money-making in the strict sense but extends to cases (for example, libel or trespass) where the defendant is seeking to gain some object at the claimant's expense. However, the mere fact that a tort, particularly a libel, is committed in the course of a business carried on for profit is not sufficient to bring a case within this category (3) The third category is cases where exemplary damages are expressly authorised by statute.

2) In most of the MS, the rule is to repair the damage by financial compensation. The reparation *in natura* is then excluded or has to be justified:
FR, HU, IE, LT. But in DK *in natura*, if in the contract, in ES, UK and EL, it can be repaired *in natura* if it is feasible, but it is more common to repair the damage by financial compensation.

PL is the only MS where the victim can choose between *in natura* or by financial compensation.

*Quantum of damage*

As regards the quantum of damage which is obtainable:

1) The quantum of obtainable damage is limited:
- If so provided by the contract:
  - BE (except in case of intentional breach of contract, where such clause is invalid),
  - FR,
  - LT,
  - and possibly other EU MS regarding the principle of contractual freedom.
- By law by the use of financial caps in DE and HU. In UK (some caps are provided by CAHA : £5 million in respect of claims for damage to property, annual Liability Cap to be determined by the parties or by ORR, caps in the Track Access Agreements).

2) The quantum of obtainable damage is unlimited:
ES, RO, BE, DK, EL, HU, IE, LT, PL, UK (tort law and in contract law if death or personal injury caused by negligence)

3) Contributory negligence or a similar mechanism exists in DK, DE, HU, IE, EL, LT, PL, RO, ES and UK.

The consequence is that the compensation is then reduced, divided between the parties or excluded. This concept does not exist as such in FR and BE. However, FR and BE accept the concept of simultaneous faults of the victim and the author which leads to a shared liability whereby the damage obtainable is limited to the proportion of liability.

It has to be noted that the concept of contributory negligence is always based on fault or some sense of blameworthiness of the injured party:

DE: fault of injured party

PL: contributory negligence of an injured party based on fault (e.g. travelling in a car when he is aware that the driver is drunk).
LT: negligence of the injured party
UK: fault of injured party
HU: interaction of injured party based on fault
IE: contributory of injured party based on fault
DK: contributory of injured party based on gross negligence or wilful
EL: contributory of injured party based on fault
RO: action of the claimant which contributes to the damage
ES: “comparative negligence” or “comparative fault”

### 2.3.2. Contractual liability provisions in the EU Member States

For a comparison of the contractual provisions existing between RUs and IMs, see Annex II.

#### a) Introduction

This section analyses the provisions relating to civil liability between RU and IM as set out in their contractual documents. Indeed, a RU which uses a particular railway infrastructure must adopt all the necessary arrangements with the IM of the infrastructure used pursuant to Article 10(5) of Directive 91/440/EEC. This provision should have been transposed in all EU Member States. In consequence, and in so far as it is possible to understand this requirement under all national regimes as imposing a contractual relationship, the respective civil liability of IMs and RUs towards each other are governed by national law on contractual civil liability. In addition, all EU Member States studied recognise contractual freedom.

Although the contractual clauses constitute the most important part of the national regimes (since, on the basis of *pacta sunt servanda*, they prevail on suppletive / non-mandatory legal provisions), this section is separate from the previous dealing with the national legal regime for two reasons. First, as discussions at EU level between RUs and IMs reveal (as well as the content of CUI), it is possible that contracts, which are currently in force, would be modified with the entry into force of CUI and/or the European GTC of use of the railway infrastructure. Second, under most of the national regimes, non-contractual liability law constitute either a complementary body of rules or an additional ground for action. This distinction is less relevant in countries where contractual law applies exclusively (FR and LT).

**b) Preliminary remark**

Eight IMs answered the questionnaire (RO, IE, UK (Network Rail), BE, DE, HU, FR, LT). Therefore, for the IMs who did not answer the questionnaire, the present study describes the contractual clauses only to the extent of the information available on Internet.

In addition, some contributions were not always complete. Regarding the UK system, a questionnaire was also sent to RIDR which is the institution dealing with liability issues under the CAHA regime used by RUs and IMs, but no answer was received.

**c) Description of the contractual clauses**

***Documents and margin of negotiation***

Amongst the IMs that have answered the questionnaire (eight), six IMs in BE, DE, FR, HU, RO and UK have foreseen liability provisions directly in their contractual documents (see Annex II).

Irishrail (IM of IE) and JSC Lietuvos gelezinkeliai (IM of Lithuania) do not have any contract of use of infrastructure since there is no other company operating railway services on their infrastructure than the national RU to which they are vertically integrated.

Infrabel (IM of BE), RFF (IM of FR), MÀV (IM in HU), Network Rail (IM of UK), CFR (IM of RO) and DB Netz (IM of DE) have set out liability clauses in either general terms and conditions or in the Network Statement. These clauses are not subject to negotiation with the RUs. According to RFF and CFR, the reason given as to why these clauses are not negotiable is because of the concern to be compliant with the obligation to set out contract of use of infrastructure / access arrangement which are transparent and non-discriminatory. As pointed out by RFF, RUs are consulted when the Network statements are being established, so that RUs have a possibility to express their views with regard to the model of contract of use of infrastructure / access arrangement at the time they are put into the Network Statement.

The contract model of Infrabel is identical to the content of CUI. The contract which is signed by the parties may be submitted at the initiative of either party to the Regulatory Body for its conformity check with the law, and hence with the non-discriminatory principle as well.

Network Rail (IM of UK) has also set out liability provisions in the Access agreements (for passenger services and for freight services) which are subject to the approval of the Office of Rail Regulation (the Regulatory Body of UK).

***Basis of liability***

The basis of contractual liability is strict/objective (without *culpa*) (Infrabel, CFR).

In these cases, it is required that the origin of the damage lies respectively with the RU or the IM.

The triggering events for such liability include the defect of the rolling stock / infrastructure.

CFR's contract also retains a strict liability of both parties. However, RUs can be relieved only if they can prove the existence of force majeure. Whereas the CFR can be relieved not only in the case of force majeure but also, as regards bodily loss and pecuniary loss, where the damage occurred in circumstances not connected to CFR, through the fault of the victim or by third parties, and as regards material damage and pecuniary loss, where the damage occurred by the fault of the RU.

Some documents base liability on fault (UK).

Network Rail's contracts contain liability provisions based on fault and refer to the Claims Allocation and Handling Agreement ("CAHA") system. Indeed, as explained in the questionnaire concerning the UK (national regime), in respect of the liability between an RU and an IM relating to a rail accident when the claims are brought by a third party (e.g. a passenger injured in an accident or the owner of freight damaged in an accident), CAHA applies. Under CAHA, save for small claims (up to a threshold of £7,500) to which a specific regime applies, liability will be borne by the CAHA Party or Parties which would be liable for the loss at law. In this case, there is a procedure for a Lead Party to be appointed to have conduct of the defence of the claim vis-à-vis the third party claimant. If that third party claimant is successful in its claim, there is then a procedure under CAHA for the relevant RU and IM to meet to seek to agree the allocation of liability for the claim between them. If the parties are unable to agree that allocation then, under the Railway Industry Dispute Resolution Rules (RIDR), the allocation may be determined by the RIDR Committee (if the parties agree to them carrying out that role) or the issue may be referred to arbitration or the courts.

Some contracts base liability on both objective grounds and fault (RFF, MÁV and DB Netz).

In FR, defect of infrastructure is the only ground of "strict liability" for IM, whereas RU can also be held strictly liable when the damage has its origin in the transported persons or merchandises. Both the IM and RUs can be held liable for their fault. The party held liable can

be relieved if he can prove force majeure (that is, an unavoidable external cause), that the damage is due to the fault or an order from the other party or is due to the fact of a third party.

MÁV's contract contains both liabilities based on fault for breaches of the law and strict liability for the risky activity (of operating a railway infrastructure and of operating transport services). Liability based on fault would not be triggered in the event of force majeure. The party held liable without *culpa*, can be relieved if he can prove that the damage rose from events beyond the risky activity, from the fault of the victim or from an abnormality in the sphere of the activities of the other party.

In DE, reference is made to statutory provisions described in the national legal regimes (see section 2.3.1).

***Damage covered***

The contract used by Infrabel uses the uniform rules as detailed in the COTIF CUI Appendix, without alteration. In Infrabel's contract, the same damage as in the CUI are covered by the strict liability (that is, for IM's liability, bodily loss or damage, loss or damage to property and pecuniary loss resulting from damages payable by the carrier under CIV or CIM; and for RU's liability, bodily loss or damage and loss or damage to property).

The RFF's contract covers bodily loss, material damage (as might be understood as damage to property) and some immaterial damage (as might be understood as pecuniary damage) independent of this ground. The immaterial damage that can be obtained is not limited to damages disbursed by a party on the basis of legal provisions (national or international as foreseen in the proposal of European GTC of use of railway infrastructure or CIV and CIM as foreseen in the CUI). It is not required that the immaterial damage has been disbursed on specific provisions. Immaterial damage is not pre-defined towards RFF and includes the amount of infrastructure charges which could not be perceived. All direct costs of measures taken by RFF following an accident or a risk for the environment due to an RU are also borne by the latter. While the immaterial damage obtainable by RUs is defined as covering the immobilisation of the rolling stock and possible indemnities that the RU had to pay to third parties on the basis of national and international law and of judicial or arbitral decisions. These indemnities exclude amounts paid by the RU to third parties on a commercial basis, where RFF could not agree on such commercial arrangements beforehand.

In the contract of CFR, CFR's liability covers bodily loss, damage to property and pecuniary losses resulting from the damage owed by RUs under national and international "conventions". This provision resembles the one in the proposal of European GTC of use of railway infrastructure in the sense that pecuniary damage also covers losses resulting from

the damage owed by RUs under national and international law. The damage covered as regards the RU's liability is not defined and reference is made to the law in force in RO (hence, any direct damage).

Network Rail's contract covers "relevant losses" (i.e. all costs, losses, including loss of profit and loss of revenue, expenses, payments, damages, liabilities, interest).

MÁV's Network of Statement does not limit the obtainable damage.

***Limitations of liability***

Infrabel's contract provides that any damage of less than 2.500 € would not trigger any liability. Hence, the parties bear the costs of such damage. The same is provided under the contract DB Netz and RFF but for a damage of less than 10.000 €.

According to the German Regulatory Body (RB), this liability threshold does not impede network access in principle. However, still according to the German RB, if such incidents add up for one RU, its profitability suffers.

RFF's contract only limits the immaterial damage. Immobilisation of rolling stock and loss of revenues from infrastructure charges are limited to an amount of 1000 times the amount of the infrastructure charges concerned by the immaterial damage.

***Concomitant causes***

The contract of Infrabel uses the uniform rules as detailed in the COTIF CUI Appendix, without alteration.

The contract of RFF provides that the parties should determine by common agreement their respective part in the damage.

The contract of MÁV and CFR provide that the liabilities are attributed to the extent of the attributable causes.

The contract of MÁV further foresees the possible contributory negligence for bodily injury which can reduce the amount of or even exclude the compensation.

In DE reference is made to statutory provisions.

***Delays and disruptions***

Concerning the compensation in cases where a train path is cancelled or rescheduled, each Member State's IM has its own way of dealing with the problem.

In general, it seems that the IM faces no penalty if it cancels / reschedules a train path. However, RFF's contract provides for a compensation in the event of a cancellation of train paths when the RU can prove that he sustains a damage which is direct, real in its existence and certain in its substance.

RUs have to pay a charge if they do not use the train paths allocated. This appears to correspond to what is provided in Article 12 of Directive 2001/14: "*that Infrastructure Managers may levy an appropriate charge for capacity that is requested but not used. This charge shall provide incentives for efficient use of capacity*". This is the case confirmed in the Network Statements and the Use of Infrastructure Agreements of Infrabel (BE), Rail Net Denmark (DK), MÁV/GYSEV (HU), PKP PLK (PL), Network Rail (UK).

Also, in some cases, the IM and RU are not entitled by the terms of their contracts to demand any compensation or damages, and therefore, have to bear their own costs: DB Netz (DE), Adif (ES).

Sometimes, no information concerning compensation is provided: JSC Lietuvos Gelezinkeliai (LT), Irish Rail (IE) and CFR (RO).

In the event of delays in the scheduled train services, Infrabel (BE) and RFF (FR) provide in their contracts that neither the RU nor the IM can request compensation towards each other following delays.

Some IMs do not provide any compensation in case of delays: for example Rail Net Denmark (DK), EDISY S.A.(EL), Adif (ES), MÁV/GYSEV (HU), JSC Lietuvos Gelezinkeliai (LT), Irish Rail (IE), PKP PLK (PL), Eurotunnel (FR-UK) and Translink (Northern IE). However, there might be penalties applicable for breach of the contract (PL).

In RO, CFR has provided a system where the delay minutes are registered to the parties' account and are mutually analysed and approved each month. The difference determined in favour of any party will be then paid, against an invoice, by the other party.

Also, in DE, DB Netz (DE) provides that depending on the cause of the delay, delay minutes are attributed to either DB Netz AG or the RU or to neither party and offset.

Network Rail (UK) organises a system where RUs pay directly for delays they cause to their own trains. They do not pay directly for the impact of one RU's performance on others. This is attributed to Network Rail, but payments by RUs are established at levels such that, over time and on a national basis, Network Rail can expect to be compensated for the effect of those impacts.

It is noted that IMs are often state-owned and financed by public funds. As an hypothesis, it is possible that in some Member States questions may arise about the payment of commercial damages payable to private commercial interests by publicly funded bodies. In relation to this, note for instance, that in Belgium, although there is no damage to be paid by Infrabel for delays caused by him to RUs, the management contract with the State anticipates that a portion of the granted subsidy to Infrabel will vary in accordance with the delays that it causes.

On the other hand, with the opening up of the railway market, there was a concern that reserved train paths would artificially block the use of the infrastructure. There was a need to avoid the situation that incumbent RUs would reserve train paths even beyond their needs as not to allow new entrants as well as international services to also have capacities. This concern has been inscribed in Article 12 of Directive 2001/14 and translated in some Member States by the imposition of compensations in the event paths were reserved but not used.

This situation may explain why, in some Member States, the performance scheme and other provisions of the Network Statement might appear unbalanced to the detriment of the RU.

#### 2.3.3. Control of the contractual liability provisions by the Regulatory Bodies (RBs)

It is to be noted that there is no RB identified in Ireland.[66] In Denmark, the tasks of the RB are currently fulfilled by the Transport Ministry. However, a RB is being set up. In France, the RB is the current Transport Ministry but a proper RB is being set up (ARAF - Autorité de Régulation des Activités Ferroviaires).

On the basis of the European Directives, Regulatory bodies should be rendered competent to monitor arrangements for access (Article 30(2) f of Directive 2001/14/EC) as well as the competition in the rail services markets and any discrimination towards RUs (Article 10(7) of Directive 91/440/EEC).

[66] Ireland has probably made use of Article 33(3) of Directive 2001/14 (extension of the derogation).

Amongst the nine RB having answered, the following RB have not rendered any decisions relating to possible restrictions to access to infrastructure or to any discriminatory treatment due to liability regimes between RUs and IMs in the event of a rail accident: BE, DK, ES, EL, HU, LT, RO, UK.

A RB explains that the "*administrative court of […] decided […] that complete exclusion of liability by the IM is capable of undermining the right to non-discriminatory access. According to the court, it thus infringes legal provisions on non-discriminatory access*". This therefore shows that in some EU Member States complete exclusion of IM liability under a contract is not legal.

An RB has been confronted with a particular clause relating to specific insurance requirements in the contract of an IM connecting industrial and chemical plants to the network of the main railway infrastructure manager which would have imposed considerable additional costs upon RUs. This requirement was capable to limit the right of access of RU especially because not all RUs already had such insurance. The particular requirement has been changed and linked to the hazardousness of the materials transported. Hence the requirement has been differentiated in function of the potential risks of the RU, which was found to be acceptable by the RB.

Access to the settlement procedures of RB in ES, RO, DE, DK, UK, EL, LT is free of charge. However, when the RB is set up in DK, administrative costs will be requested and charged for. The amount of such administrative costs is not known, but should be comparable to other institutions (such as the “Jernbaneklagenævn”, which charges a fee of 4000 DKK for handling a complaint approx. 537 €).

The UK RB (ORR) does not charge for receiving appeals. However, the costs of the appeals vary substantially depending on the nature of the case. ORR is funded through a combination of licence fees and a railway safety levy and its economic regulation activities (including appeals) are funded through the licence fee. A standard condition in most operator licences requires the licence holder to pay an annual fee to ORR, but currently only Network Rail pays this fee.

In Germany, the charges are calculated in accordance to the time spent on files and are borne by DB Netz which is the "respondent".

In Hungary, where there is a dispute regarding the obligations laid down in the Network Statement or in the access agreement, the RUs and the IMs may appeal to the rail regulatory body, which is able to make binding decisions. The costs of the administration of such a dispute range from 227 000 HUF (840 €) to 454 000 HUF (1680 €).

National civil liability regimes applicable between RUs and IMs are constituted of specific or general legal rules and sometimes of contractual clauses contained either in the contract of use of the railway infrastructure and/or the Network Statement. The concepts of civil liability used vary from EU Member State to EU Member State, as do the applicable regimes.

## 3. Analysis and assessment

This Chapter provides the findings and the conclusions of the Study. In particular, this Chapter examines whether the existing civil liability regimes present a barrier to the internal market and whether the available instrument are able to address the difficulties encountered by RUs regarding their liability.

The first section describes the opinions of RUs as to the applicable civil liability regimes (3.1). The second section relates to the opinion the CIT (3.2). In section 3.3, the opinion of EIM is given. Section 3.4. depicts the liability issues of RUs towards their clients or third parties. Section 3.5 analyses the regimes of liability between RUs and IMs which at present exist in the EU Member States. This section covers the national legal regimes seen individually and together as forming a patchwork, as well as the contractual provisions addressing the issue. Horizontal issues relating to insurance are also dealt with in this section. In section 3.6 advantages and drawbacks of the available instruments such as CUI and GTC of use of railway infrastructure are listed.

### 3.1. Opinions of RUs

Amongst the answers received:

- 12 RUs provide only domestic services and 3 also international services
- 10 RUs are incumbent
- 2 are associations of private RUs
- 1 is currently prospecting to enter a new market
- 1 is a new private RU but is part of the group of an incumbent
- 1 is an "institutionalised" international grouping especially created to run a specific international line.

Some RUs have repeated CIT's comment by advocating the application of CUI amended as to extend the right of recourse of RUs which had to pay damages in the event IM is responsible for damage. The extension of the right of recourse relates to the grounds of damages paid by RUs to third parties. In addition, another RU calls for an extension of the CUI to domestic services (as does CIT) and for a standardisation through the European GTC of use of railway infrastructure. A third one also informed us, following the entry into force of Regulation 1371/2007 that amendments to the CAHA system are under discussion. Indeed, as pointed out in the UK national ministry contribution, the Great Britain rail network is occupied mainly by domestic traffic. The volume of international traffic is very small. Since the CUI covers liability for international traffic only, the COTIF liability regimes are applied to an as small extent as the volume of international traffic.

None of the RUs who have answered the questionnaire have indicated having been directly influenced in their decision to operate railway services by civil liability regimes, not even the private RUs. An RU explained that barriers rather exist within the financial conditions to run trains (charging conditions and height of the infrastructure charges, investments in rolling stock, etc.). Some private RUs consider that civil liability is an issue but the impact is not too grave. Their answers do not mean that civil liability regimes do not have any negative impact on the internal market. Indeed, the good functioning of the internal market can be compromised if a measure renders the exercise of the freedom of movements not only impossible but also more difficult.[67] This has been confirmed in one answer received, by a RU that highlighted the necessity to have a solid financial background to deal with existing liability gaps.

Almost all the RUs that answered have declared being in a weaker position in the negotiation of the contract of use of the infrastructure than IM, which benefits from a monopoly position. Therefore, some RUs advocate for a clear and secure legal framework for negotiations with IM. Some RUs active in PL and in FR underlined the iniquity of the contracts, and that the IM excludes its liability or retains less liability than RUs.

In RO, it was argued that the corporate structure of the IM has an impact on RU's bargaining position. An operator active in FR and BE, also underlined that when a RU and an IM belong to the same group, contractual clauses tend to be more favourable to the IM since financial consequences for the RU are minimised by financial transfers within the group. Otherwise, it is considered that if the general principles (non-discrimination, for some, Network Statement, for others) are respected, the corporate structure does not impact on the bargaining position of the parties to the contract of use of the infrastructure (in FR, DE, PL). One RU considers that effective regulatory oversight is required. But it is noted that in the UK, the contract of use is approved by ORR and that in BE, the draft contract might be submitted to the Regulatory Body for advice.

It was highlighted that in DE, there is no bargaining power between the parties at all since the contract is considered as non negotiable.

Therefore, it is surprising that other RUs have not raised the same concerns or formulated comparable arguments since, as can be seen above, most of the contracts of use of the infrastructure are non-negotiable, at least as regards their liability clauses.

[67] See for instance, case C-55/94 *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, para 37.

Regarding coverage of civil liability and the insurance premiums (or other coverage measures), none of the RUs which answered have given an indication of the impact on their costs structure or any difficulties related thereto. Such information appears to be very sensitive. One RU has provided information on the compulsory minimum coverage foreseen under their national law. One RU has underlined that premiums would be lower if possible recourse against IM could be organised by law and was easy to enforce.

Consultees only sent two examples of accidents, those that occurred in HU and PL.

It was reported that on 2 August 2008 there was a railway accident in HU, which was caused by the poor condition of the railway infrastructure. A train with four carriages was derailed and the last carriage turned over. The train was transporting about 90 passengers but only 12 persons were injured, one of them seriously and eight of them had light injuries.

The cost of the damage caused for the RUs was around HUF 140,000,000 (approx. EUR 518,518). The tracks and the overhead cables were damaged, two pylons that supported the overhead cables were overturned and the four carriages were seriously damaged. The IM admitted its liability, so there was no need for the matter to go to court.

The RU active in PL that responded to the questionnaire, explained that in 2009, there were 26 railway accidents in PL that were attributable to causes within its control and 38 railway accidents, involving the rolling stock, attributable to causes within the control of the IM (PKP PLK S.A.) and on the infrastructure managed by PKP PLK S.A. Their respective financial claims resulting from incurred costs of the accidents were settled according to accounting notes. These notes were made out upon the completion of explanatory procedures conducted by railway committees and of the Report on Final Findings. The representatives of the interested parties met and defined the proportions (percentages) of costs incurred by each of the parties in total costs.

According to most of the RUs active in the Member States here studied, cases are settled out of court. It appears indeed that arrangements are found between IMs and RUs, once an accident has occurred.

Before the occurrence of an accident, there might be some precautions taken to create a system that handles what happens after an accident. When the contractual clauses stem from the principles set out in the Network Statement, RUs should have, on the basis of the transposition of Article 3 of Directive 2001/14, been consulted, and will have been able to influence to some extent the terms and conditions of the contractual arrangements between them. In addition, in some countries, there might be an intervention of the Regulatory Body. In the UK, contracts are subject to approval of ORR. This is compulsory and the RUs having

answered for UK are aware of this remedy. In BE, the contract may be submitted to the advice of the RB on the conformity of the prospected contract with the Act on the use of the infrastructure. However, none of the RUs active in Belgium that answered the questionnaire used this possibility.

Only one RU gave an indication of its satisfaction of the civil liability regime, this being a very high level of dissatisfaction. Two RUs in FR were critical of the study in that it was limited to the relationship between RUs and IMs and did not relate to the other relationships with RUs.

The "Study on Property Law and Non-contractual Liability Law as they relate to Contract Law" concluded that the problem of interference between contractual law and non-contractual liability law was for most companies not addressed and companies rather left the matter to chance, hoping that everything will work out for the best.[68] Although that Study focused on the issue of the inter-relationship between contractual law and non-contractual liability law, a similar finding can be extrapolated from the larger question of civil liability and risk assessment. This has been confirmed by a RU which admitted that since it was very difficult to gain knowledge of the applicable regimes, it simply did not address or contemplate the issue beforehand.

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| In general, RUs have underlined the difficulties they encounter with the application of the contractual civil liability regimes and in particular the weaker position they consider themselves to be in compared to IMs. |

### 3.2. Opinions of CIT

The CIT members have asserted that through traffic by rail which is not to be held up at frontiers, requires continuous and standardised law.[69] They denounce the fact that international rail transportation is subject to "*up to three systems of international law are applied to international traffic by rail and in many respects these three systems are not compatible*".[70] CIT members considered that: *"[b]y contrast, international freight traffic by road, as the main competitor of the railway, has a single standard legal structure in the form of the Convention on the Contract for the International Carriage of Goods by Road (CMR) and the CMR extends right through into Asia"*. This situation "*hinder[s] rapid and formality-free crossing of frontiers based on standard and certain legal principles and make[s] claims for*

[68] Study on Property Law and Non-contractual Liability Law as they relate to Contract Law, Submitted to the European Commission - Health and Consumer Protection Directorate-General – SANCO B5-1000/02/000574, pp. 436 and 442.
[69] "Appeal from Bern" by RUs, CIT document of the conference "Bern days" of 5 February 2010 hold in Bern.
[70] The CIT refer to the following body of rules: "European law in the form of European Union Directives and Regulations (for those twenty-five states of the European Union with railways); international transport law under the aegis of OTIF (itself composed of forty-four states); for much Eurasian traffic, the SMPS and SMGS Conventions in addition".

*compensation more difficult as the non-application of the CUI Appendix to COTIF in most EU states shows*".[71] However, RUs could not provide examples to support this conclusion.

CIT members made a plea with regard to the subject of the current study: that legal regimes that overlay each other must not compete with each other or block each other; rather they should be coordinated so that they complement rather than contradict each other. The railways they said, require simple, comprehensible law which can be easily applied both by them and by their customers, even where several legal regimes complement each other. Therefore in the interests of legal certainty, once legislation and statutes have been passed, the law must remain unchanged for a certain period of time and in the preparatory phases of EU legislation the EU Commission should provide a maximum of transparency.

Regarding COTIF/CUI, the CIT finds that it covers adequately civil liability issues in international rail traffic. However, it advocates that the scope of CUI should be extended to domestic traffic so as to make the internal market function in the simplest and clearest way possible.

CIT also takes the view that as IMs are regarded by law (especially in COTIF/CIV and CIM) as “auxiliaries” of carriers (the same as RUs) in the relationship carrier-customer, carriers need to secure their right of recourse against IMs when they cause accidents or other incidents. This right of recourse must be regulated when extending the scope of CUI to domestic traffic.

The CIT proposes that, through the accession agreement of the EU to the COTIF or through a specific Regulation of the type of EC Regulation No 889/2002 (extending and complementing the Montreal Convention), the mechanism of recourse provided for in Article 8(1)(c) CUI of COTIF be extended to pecuniary loss resulting from compensation paid to passengers on the basis of EC Regulation 1371/2007 or service contracts with public authorities, as well as to the compensation paid to wagon keepers on the basis of the General Contract of Use (GCU).

CIT and RNE developed European general terms and conditions for the use of infrastructure. According to CIT, this document aims to create a standard liability regime in all Europe to cover all types of damage (loss of or damage to property, bodily loss and pecuniary loss). It also covers other aspects of the contractual relationship IM-RU and will therefore remain a valuable tool even if CUI were applicable for both international and domestic traffic.

Finally, CIT observes that the position of the IM is that of a natural monopoly. In the words of CIT, this means that the carrier is the weaker party in its contractual relationship with the IM.

[71] Ibid.

The carrier would certainly benefit from a clear and secure legal framework when negotiating with the IM and asserting its legitimate rights.

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| CIT mainly underlines the necessity for a unified civil liability regime and denounces the multiplication of the different international bodies of rules which are in many respects incompatible. CIT mainly advocates for the adoption of legal regimes which would complement each other. CIT also advocates for an amendment of CUI as to extend the scope to domestic services and to ensure a broader right of recourse to RUs which have paid in first instance damages. |

### 3.3. Opinions of EIM

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| EIM has declared in answering the questionnaire the following "*EIM considers that the contractual process based on access contracts between IMs and RUs may be sufficient. There is no need for a legislative route*". |

### 3.4. Liability of RUs towards their clients or third parties

Although civil liability regimes as applicable to the relationships between RUs and IMs are not harmonised, several EU or international rules address the liability of RUs towards their clients and/or third parties. In this section, a brief description of the most relevant rules is provided.

***Liability towards passengers on the basis of Regulation 1371/2007***

For a description of Regulation 1371/2007 on rail passengers' rights and obligations, see Annex V.

Regulation 1371/2007 is of direct application in all EU Member States. This Regulation reproduces within it certain terms and provisions of the CIV Uniform Rules of COTIF (the Regulation only incorporates the following provisions from CIV: Articles 6 – 56 and Articles 58 - 64). On the basis of these rules, the RUs bear a strict liability (i.e. liability without *culpa*) towards their clients for damage occurred to the passengers and their belongings. RUs are liable towards their clients for their auxiliary but also for the IM (through their assimilation *ex lege* to RU's auxiliaries) with a possible right of recourse against it if so provided under national laws. As seen in Chapter 2, all national liability regimes would allow RUs to have recourse against the IM if the latter has caused the damage. Some national regimes provide for a specific right of recourse. Although the possibility exists to revert to the IM under national law, such recourse would generally require the RU to prove the fault of the IM.

CIV also still exists independently and the parts that the Regulation does not incorporate are independently applicable in those EU MS that have ratified COTIF (all EU Member States but IE, IT and SE).[72]

***Liability towards freight customers on the basis of CIM***

For a description of the relevant provisions of CIM, see Annex VI.

The CIM Uniform Rules of COTIF address liability questions regarding freight customers and operations. No EU MS has made any declaration of non-application, so that these Uniform Rules are applicable in the European Union, in those EU MS that have ratified COTIF (all EU Member States but IE, IT and SE).[73] Indeed, in the so-called monistic states, COTIF (and its appendices) comes into force through simple ratification (this is the case for instance of BE, RO or LT in which COTIF and its appendices were of application by ratification). However in dualistic states, additional legislation is necessary for COTIF (and its appendices) to pass into national law (this is the case of DK, where the Ministerial order n° 1 of 1 February 2007 has incorporated COTIF in Danish law, and of UK by Regulations 2005 (SI 2005/2092)).

However received in the national legal order (by mere ratification or by a specific legislation), the provisions of CIM can be considered as being self-executive (or in other words having direct application) in the OTIF Member States.[74] Indeed, the rules contained in CIM are sufficiently precise and unconditional to allow their direct application.[75]

It is clear on analysis that under Article 40 of the CIM, the RUs bear a strict liability towards their clients for their auxiliaries but also for the IM (through their assimilation *ex lege* to RU's auxiliaries) with a possible right of recourse against it if so provided under national laws.

***Liability towards vehicle keepers under CUV***

Appendix D – CUV to COTIF contains the Uniform Rules concerning Contracts of Use of Vehicle in International Rail Traffic. This appendix applies to contracts concerning the use of

[72] For the status of ratification at 25 May 2010, see: <http://www.otif.org/fileadmin/user_upload/otif_verlinkte_files/07_veroeff/02_COTIF_99/Prot-1999-ratifications_25_05_2010_fde.pdf>.
[73] For the status of ratification at 25 May 2010, see: <http://www.otif.org/fileadmin/user_upload/otif_verlinkte_files/07_veroeff/02_COTIF_99/Prot-1999-ratifications_25_05_2010_fde.pdf>.
[74] P. Daillier and A. Peller, Droit International Public (5th edn, LGDJ, 2001 Paris) 230.
[75] CIT, "COTIF law and EC law relating to international carriage by rail: areas of conflict and options for solutions" 2006, p. 16.

railway vehicles as means of transport for carriage in accordance with the CIV Uniform Rules and in accordance with the CIM Uniform Rules.

The CUV Uniform Rules of COTIF (Contract of Use of Vehicles) are applicable in the EU Member States that have ratified the Convention.

Liability of the RU for any loss or damage to the vehicles is conceived of as liability for presumed fault, leaving the possibility of contrary proof (Article 4) in other words evidence that rebuts. This regime entails a heavy burden of proof on the RUs but is not as stringent as the CIV and CIM Uniform Rules, which provide for a strict liability with limited grounds of relief.

***Public Service Contracts***

CIT has proposed to include in Article 8 (1) c) of CUI reimbursement of RUs which are exposed in the frame of a public service contract concluded with an authority competent to organise public transport services. Indeed, it might be that some competent authorities impose (upon RUs in charge of public service obligations) levels of punctuality subject to penalties.

As highlighted in the scope of the present Study, liability arises when a natural / legal person is considered responsible for a loss, damage or an injury. The question is whether it is possible for civil liability to exist where Service Level Agreements determining levels of quality are used (and subject to penalties if not reached). Such discussion appears to be linked to the broader issue of possible recourse against the other party in the event of delays and disruptions.

It has to be noted that public service contracts are contracts. Hence, damages paid on their basis would not constitute a damage covered by the IM's strict liability under the proposal of European GTC of use of railway infrastructure, which is limited to the cases where liability is triggered by law (international or national), unless the contract does not go beyond the law. However, a right of recourse exists under national law, but then the RU must have to prove the "fault" of the IM which has caused the damage.

Finally, public service obligations that respect levels of punctuality might also be enshrined in public service contracts concluded with IMs. This is for instance the case in BE, where the public service contract between the Belgian State and Infrabel provides that a portion of the exploitation subsidy granted to Infrabel varies in accordance with the delays that it has caused.

***Liability for environmental damage***

EU law provides for a specific non contractual liability regime for environmental damage through Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.[76] This Directive applies to rail transport of dangerous goods. On the basis of this Directive, a RU transporting dangerous goods bears a strict liability when an environmental damage occurs irrespective of who has made a fault. The RU may however prove the contrary and be exonerated of this strict liability. For a description of the relevant provisions of this Directive, see Annex VII.

There are many grounds of liability upon RUs which apply even if the fault lies on other persons. Many grounds of such liability are set out in international or EU law. Hence, where damage occurs, the RUs will often (if not always) be the first to pay damages to the victims.

## 3.5. Existing regimes of liability between RUs and IMs

This section analyses whether and to what extent the existing civil liability regimes constituted by the national laws and contractual provisions in force may have a negative impact on the internal market.

### 3.5.1. National civil liability regimes

The question whether national civil liability regimes might have a negative impact on the internal market is not new. As already highlighted in the "Study on Property Law and Non-contractual Liability Law as they relate to Contract Law" commissioned by the European Commission, civil liability regimes are not easily decipherable, even by specialised experts.[77] This Study's findings are that companies "*have hardly a chance of reliably informing themselves of appropriate costs and in an appropriate time-scale*".[78] As a consequence, doing business under different laws remains difficult.[79] The "Study on Property Law and Non-contractual Liability Law as they relate to Contract Law", underlined notably the extraordinarily complicated and multi-faceted picture of contractual and non-contractual liability law. Therefore any prospective RU wanting to put on services in places other than their own jurisdictions will be faced with different obligations.

As Chapter 2 shows, it is not easy to summarise the content of national civil liability regimes because of their complexity and diversity both internally and globally. National regimes are

[76] [2004] OJ L 143/56.
[77] Study on Property Law and Non-contractual Liability Law as they relate to Contract Law, Submitted to the European Commission - Health and Consumer Protection Directorate-General – SANCO B5-1000/02/000574, p.434.
[78] Ibid.
[79] Ibid.

not clear-cut nor settled yet and they are nuanced so as to provide for all possible situations. In addition, liability under contract and non-contractual liability law across the Member States of this study refers to different concepts and rules, which, do not lend themselves to very easy summary or comparison.

According to the "Study on Property Law and Non-contractual Liability Law as they relate to Contract Law", this situation is able to generate special information costs.[80] These costs relate to the obtainment of specialist legal advice which were probably not anticipated or appreciated at the time of deciding to do business in a foreign country. In some countries, in the absence of specific railway provisions, the applicable rules to the relationship between RUs and IMs are not entirely clear. For instance, in HU, before being able to determine the applicable rule, there is a necessity to first determine whether the activities of IMs are considered a risky activity. Once the management of a Railway Infrastructure is deemed to be a risky activity, different rules based on the one hand on fault and on the other hand on strict liability are applicable.

In addition, since the restructuring of the railway sector which has led to separate railway transport services and infrastructure management (ranges from account separation to complete unbundling) is a relatively new phenomenon, there is almost no case law explaining the application of the general liability principles to the relationship RU / IM (apart from UK). This raises legal uncertainty as to the applicable regime. The aspect of legal uncertainty can have an impact not only on cross-border services but also on domestic ones. It is then difficult to determine the applicable rule under national law.

According to the "Study on Property Law and Non-contractual Liability Law as they relate to Contract Law", a lack of clarity in the applicable regime may also result in the pushing around of claims between potentially liable organisations, to the detriment of all parties, as well as in unnecessary inconsistencies in the ways a number of third party claims are dealt with.[81]

However, on the basis of the information received from the RUs, this appears not to be the case with the relationship between RUs and IMs. On the contrary, despite (or because) of the complexity of national civil liability regimes, RUs and IMs often settle their conflict out of court, through mutual arrangement.

This might be interpreted in several ways. On the one hand, the fact that judicial remedies are not pursued may be due to various factors (e.g. costs of judicial proceedings, length of the proceedings, contentious relationship with a contractual partner, etc.). Regarding these various factors though, RUs have not underlined particular difficulties in accessing justice

[80] Ibid., p. 438.
[81] Ibid.

(see also above, section 2.3.1, conditions for accessing justice). On the other hand, it could be that out of court dispute resolution stands for a clear and well understood civil liability system under which easy, quick and cheap resolution can be found.

The interplay between non-contractual liability and contract law constitutes an additional complicating factor to the civil liability regimes the analysis of which cannot be reduced to the existing contracts between IMs and RUs. In most of the countries, parties cannot escape the complex interplay between non-contractual liability and contract law by contracting out apart from Lithuania and France where there is mutual exclusivity.[82] However, this difficulty is immediately compensated by the fact that on the basis of the principle of contractual freedom, the parties may limit, contractually, their tortious liability between them for instance to the same extent as their contractual liability (this is the case of the contract concluded by Infrabel with RUs),

In some countries, such as in IE and LT, the RU is vertically integrated with the IM and there is no competition. Hence, in these countries, liability issues as the object of the present study have not arisen yet even theoretically. In the course of the study, there was no information whatsoever relating to potential RUs willing to enter the Irish and the Lithuanian markets.

Looking at the substance of national civil liability regimes, it would appear impossible to determine which type of regime supports best / worst the internal market. It was shown in Chapter 2 that the applicable causation theory is the fulcrum around which civil liability regimes are balanced. Chapter 2 has identified 3 main categories of causation: (1) causation based on a triple test consisting of determining whether the link between the triggering event and the damage constitutes the "*conditio sine qua non*", if so, whether the link can be considered as adequate and finally whether the damage is within the scope of protection of the norm which has been infringed; (2) adequate causation or remoteness limitation and (3) *conditio sine qua non*. Under regimes using the first category (the German model), three cumulative conditions have to be fulfilled for a damage to trigger liability. This category is the most restrictive category of liability. The second category is the most used across EU Member States, but what is meant by the "adequacy" required from the link between the triggering event and the damage may vary from Member State to Member State. The third category appears to be the category under which liability is the most broadly recognised. It suffices indeed to show that the damage sustained by a party would not have occurred in the absence of the respondent's conduct.

The causation theory is deeply rooted into the national legal systems. However, in some countries, there are some discussions on the applicable causation theory (e.g. in FR) and some evolution cannot be excluded.

[82] Ibid, p. 434.

In addition, national civil liability regimes follow their own patterns. It is the combination of the features which makes the regime coherent in itself. These features can make that in a particular situation the obtainable damage would be limited to a certain extent or that it would be easier for the claimant to invoke the liability of the respondent. Isolating these features may lead to a distorted picture of the reality.

For instance, civil liability regimes which do not allow any interplay between non-contractual liability and contract law appear at first to be the easiest regime to know and to understand since it suffices to read the existing contract (provided the contract contains detailed clauses and is in conformity with national contract law). However, these regimes might then present less attractive features. For instance, in regimes where contract law applies exclusively from other grounds of liability, it is not possible for a claimant to become a part of a criminal proceeding and to ask for damages. The only possibility the claimant has is to conduct an independent proceeding based on contract law.

Another example is in the limitation of liability on remoteness grounds, meaning that if damage appears to be too remote from the cause of the damage, then liability may not be causally linked. This might appear to be a restriction to the reparation of a damage sustained in comparison with countries where it is possible that the whole damage (even remote) is compensated. However, this restriction also appears counter-balanced in the countries where remoteness applies, by a much easier way to prove liability thanks to the balance of probabilities.

Therefore, it appears difficult if not nearly impossible to determine which particular regime best supports the internal market for railway services. Indeed, quantifying quality aspects which depend so much from situation to situation would entail arbitrary considerations and would be a difficult approach to justify. It would appear to be a fruitless attempt to correlate civil liability regimes with the degree of railway market opening in the EU Member States studied.

National civil liability regimes are complex and not yet settled as regards the relationship between RUs and IMs, involving some legal uncertainties as to the applicable regime. However, all regimes follow their own pattern and it is difficult to ascertain which one serves the internal market the best or the worst.

### 3.5.2. The co-existence of different regimes

The present Study also highlights that national civil liability regimes differ immensely from EU Member State to EU Member State. Aside from the potential difficulty of understanding the

different national liability regimes, the fact that no EU secondary legislation has been adopted to regulate civil liability in relation to an accident between RUs and IMs, implies that even if EU Member States have clarified their civil liability regime in this case, there are still as many different regimes as they are Member States.

The existence of many different civil liability regimes throughout the European Union renders cross-border services more difficult, since a RU would have to be acquainted with all the national regimes of the countries in which it wanted to provide services to. Indeed, if a railway accident happens on the Railway Infrastructure of a country, the law which will be applicable would be the law of that country. The existence of various civil liability regimes constitutes in itself a burden upon RUs to enquire about the applicable regimes in every EU Member State in which they are active.

This will also be reflected in RUs' costs structures. The international dimension is further complicated by possible (consequential) damage occurring on another Railway Infrastructure than the one where a railway accident happened. In such a case, Private International Law (the law which sets out the conflict-of-law rules) would determine which country's law will be applicable to this damage.

For example, a RU sustains a damage on the infrastructure of IM1 with whom he has a contract and whose service is disrupted by the actions of IM2 further up the line. The question is against whom will the RU be able to claim the reparation of the damage that he sustains, given that the only contract that exists is the one between RU and IM1, but where the fault rests with IM2 or an RU active on his infrastructure.

It would appear that the RU may need to recover damages essentially from IM2 or from another RU on the IM2’s infrastructure.

In this case, two different situations can be foreseen:

- If the contract between RU and IM1 provides a strict liability: IM1 will pay the damages of RU, and then, IM1 will claim the reimbursement from IM2.

- If the fault has to be proven, considering that IM1 did not cause the damage and the fault, RU will only be able to file a claim against IM2 (or the RU which has caused the disruption on its infrastructure), on the grounds of non-contractual liability law, as there is no contractual link between RU and IM2 (or the RU which has caused the disruption).

If the person, the organisation or the company which is claiming damages, in this case, RU, intends to pursue a case against the party thought to be liable, it will have initially to

determine the court which will be qualified to settle the case and then the law which will govern the case: these are the classic first two steps of private international law (the third being the recognition and enforcement of foreign judgments).

There is a "special" jurisdictional rule for non contractual liability under Article 5 of the so-called Brussels I Regulation,[83] which grants jurisdiction – over and above the domicile of the respondent[84] – to the courts of the place where the harmful event occurred or may occur. Given that neither the Regulation nor the *Jenard*[85] report specify how this proviso needs to be understood, the ECJ ruled on this in *Mines de Potasse*:[86] the ECJ held that the "*place where the harmful event occurred or may occur*" includes both the place where the damage occurred, and the place of the event giving rise to such damage. Although if the claimant chooses a court purely on the basis of the former, the court of that Member State may only rule on that part of the damage which has occurred in that Member State as stated in the *Shevill* Case.[87]-[88]

In terms of applicable law, Regulation 864/2007,[89] the "Rome II" Regulation, includes in Article 4(1) the general rule for choice of law and determines that the law of the country where the damage occurs (*lex loci damni*) should apply. The connecting factor also means that different laws will apply in the case of different places of damages [the so-called "Mosaic" principle, even if, e.g. by virtue of Article 2 of Brussels I (domicile of the respondent), the case is pending in one court only]. This may be remedied in certain cases by virtue of the exception and escape clause in 4(2)[90] and (3),[91] Article 14 confirms that parties may, subject to conditions, agree to submit non-contractual obligations to the law of their choice.

Consequently compensation of an RU may very well depend on the law of non-contractual liability. This might be detrimental to RUs, where the required link between the damage and event is difficult to establish or where the remote consequences of an event are not taken into consideration. It is to be noted however that on the basis of the principle of *lex loci damni*, the applicable law will generally be the one of the country in which the RU is active and has sustained the damage. In addition, no RU that answered the questionnaire raised this point.

[83] Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters , OJ [2001] L12/1.
[84] This is included in Article 2 of the Regulation and remains valid for torts.
[85] Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed at Brussels, 27 September 1968, [1979] OJ C59.
[86] Case 21/76, *Mines de Potasse d'Alsace*, [1976] ECR 1735.
[87] Case C-68/93, *Shevill* v. *Presse Alliance*, [1995] ECR I-415.
[88] Lest of course another rule gives it more all-encompassing jurisdiction: in particular: where that court is also the State of the defendant's domicile.
[89] OJ [2007] L199/40.
[90] Article 4(2) provides that where both parties are habitually resident in the same country when the damage occurs, the law of that country shall apply.
[91] when it is clear from the circumstances of the case that it is '*manifestly*' more closely connected with a country other than the one indicated by 4(1) or 4 (2), the law of that country shall apply instead. Evidently contractual relations between parties prior to the occurrence of the tort may indicate such manifest closer connection.

It also appears that IMs have not specifically established a cooperation system in case an accident occurs that implies damages in different Members States. However, most of them make reference to the international cooperation that exists through the establishment of the RailNetEurope organisation that supports and promotes the European rail business Industry. Such cooperation stems from Article 4(3) of Directive 2001/14. This cooperation is, however, more oriented on the commercial interests of the IMs than on the liability issues.

The co-existence of different regimes renders cross-border services more difficult and may trigger additional costs. The international dimension also means that it becomes very difficult beforehand to know which Court and which law will be applicable and how it is to be determined on the basis of international private law.

### 3.5.3. The contractual clauses

On the basis of Article 10(5) of Directive 91/440, there must be a contract between RUs and IMs to govern their relationship and in particular the conditions of access by the RUs to the infrastructure.

Chapter 2 shows that amongst the IMs for which the relevant documents were available, six IMs foresee liability provisions in their contracts. For most of them, these provisions are not negotiable. Some IMs have explained the impossibility to negotiate these provisions notably by the obligation imposed upon them to treat all RUs in a transparent and non-discriminatory manner. Some RUs complained about the difficulty to obtain modifications of the contract. The contracts are then contracts of adhesion where RUs have no leverage to amend the terms and conditions in accordance to the risk presented by the respective parties, their financial situation, etc. These contracts are therefore basically take it or leave it.

The liability provisions rely either on strict liability and/or fault. The contracts of Network Rail and MÁV appear to contain symmetric clauses for IM and RUs' liability. In FR, RUs bear strict liability and liability for fault whereas RFF only bears liability if it is at fault or if the infrastructure is defective. Some RUs consider that the contract of Infrabel is more favourable to RUs than the one of RFF, which is generally deemed by some RU as unfair. In PL, a RU stated that the IM excludes its liability for consequences caused by third parties whereas this is not the case for the RU. In RO, RUs bear a strict liability for which they may be relieved only in case of force majeure whereas the liability borne by CFR may be exempted on numerous grounds. This creates an important disadvantage for RUs, since it was also reported by a RU that in its view, most accidents in RO are due to the poor state of infrastructure.

As regards the damage covered, and in particular the right of recourse for RUs in cases where they have had to pay first party damages, this is more largely covered in the contract of RFF which ensures a right of recourse not only where payments have been made on the basis of CIV and CIM as in the contract of Infrabel but also where payments are made on other bases.

Most of the contracts contain thresholds below which no liability / damages can be claimed. The German Regulatory Body has highlighted that, in practice, a significant part of railway accidents cause damages below this liability threshold. Examples include such common incidents where damage is caused by the IM's insufficient pruning back of track side vegetation. Branches reaching into the loading gauge often damage varnish or windows of trains. In the answers received, the RU have not highlighted that such thresholds constitute a difficulty for them although some damage would remain uncompensated. However, in the words of the German RB "*if such incidents add up for one RU, its profitability suffers*".

RFF applies a financial cap for liabilities, which is considered by some RUs too low to cover the damage sustained. In addition, it has to be noted that in FR there is no possibility to rely on grounds of liability other than under the contract because of the principle of exclusivity. Hence this financial cap which is considered as too restrictive for the liability cannot be remedied through non-contractual liability law.

As regards concomitant causes, in countries such as FR, the contract provides that the parties will agree on their respective liability. However, such discussions between RUs and IMs might be difficult regarding the stronger bargaining position of the IM.

Delays and disruptions are also addressed in the contracts or the Network Statements. In general, IMs face no penalty if they cancel / reschedule a train path whereas in most of the EU Member States studied RUs have to pay a charge if they do not use the train paths allocated. This reflects the content of Directive 2001/14. As regards delays, several types of provisions exist. In BE and FR the parties bear the costs of delays caused by the other and no compensation is foreseen. In DK, EL, HU, LT, IE, PL, UK (Eurotunnel) and Northern IE, the issue is not addressed. In DE and RO there is a global system offsetting the respective delays and the delay is subject to compensation. Network Rail (UK) organises a system where RUs pay directly for delays they cause to their own trains. They do not pay directly for the impact of one RU's performance on others. This is attributed to Network Rail, but payments by RUs are established at levels such that, over time and on a national basis, Network Rail can expect to be compensated for the effect of those impacts. This mechanism amounts to an offsetting of the delays caused to the benefit of Network Rail which acts as a one-stop-shop for possible delays and consequential damage caused on its infrastructure.

As underlined above, Directive 2001/14, on the basis of which the performance schemes are adopted, follows objectives of optimal performance and use of the infrastructure. These performance schemes escape the contractual freedom and appear in some cases to be more stringent towards RUs with a view to securing the optimal use of the infrastructure. This can therefore explain why provisions on delays and disruptions are rather drafted in a way to secure the optimal use of the infrastructure and not necessarily in a way to ensure the equality between IMs and RUs.

All those contractual provisions are or might, in certain countries (e.g. BE and UK) be subject to review by the RB. As stated by one RU, effective regulatory oversight is required.

As analysed here, it is possible to determine whether contracts are fair or not, whether their specific features help RUs recovering the damage they sustained. However, as explained above, It is the combination of the features which makes the regime coherent in itself. In addition, these contracts inscribe themselves in the national tradition of each country with possible interplay with non-contractual liability law and with the determination of the scope of liability depending on the causation theory in force. In consequence, the existing contracts appear not to be sufficient to determine which civil liability regime supports best / worst the internal market.

The contracts that have been analysed are often of the non-negotiable type. In general, these contracts often fail to remedy the numerous grounds of liability borne by RUs by an appropriate right of recourse and sometimes create additional grounds of liability with consequences for RUs.

According to the CIT, it would be possible to negotiate the contracts without discriminating between the RUs. Negotiation is even advisable. The CIT considers that IMs are also service providers and that the situations differ from RUs to RUs. The RUs do not all use infrastructures in the same manner and to the same extent as others. Similarly, the services provided by the IMs are not the same for important clients than for smaller ones. Therefore, according to CIT it would make economic sense for RUs to negotiate some provisions on liability where they relate to particular situations such as financial caps, financial thresholds, etc. Mechanisms such as those existing in the UK (that is, compulsory approval of contractual arrangements by ORR) and BE (possible advice of RB) adequately resolve the risk posed by possible discrimination.

Regarding the content of the contract, the responses to the consultation revealed that there is no specific feature of IMs leading to fairness or unfairness:

- Although a RU has pointed out that where the RU and IM are of the same group, contractual clauses tend to be more favourable to IM, this is not verified in the analysis of the 6 contracts available, and in particular of the contracts involving RFF, DB Netz and Infrabel all of whom belong to the same group as the incumbent.

- Similarly, the corporate structure of the IM cannot explain the fairness of the contractual clauses. To take as an example, CFR and Network Rail who belong to the first category of fully separated and independent IMs,[92] one can see that the contract of CFR is asymmetrical and considered as unfair whereas the contract of Network Rail appears symmetrical and is considered as fair. Thus one sees that these organisational models are characterised by wide variation and difference. The only similarity found is where the IM is vertically integrated with the incumbent RU, meaning that no model of contract exists and the provisions in the Network Statement are either non-existent or relatively high level. In these cases, there is no competition on the network either.

- The type of ownership of the IM by either the public or the private sector cannot explain the fairness of the contract either. Amongst the examples of symmetrical contracts, one can review and compare the contract provided by Network Rail, which is a private company, with the contracts of other IMs that are by publicly owned companies.

- The fact that IMs are in former post-communist countries – who have witnessed a revolution in their transport policies - does not provide a good indicator neither of fairness / unfairness of the contracts. Instead one sees that these contracts are characterised by variation too. Therefore one observes that the contracts of CFR and PLK appear to be unfair while the same does not apply to the contract of MÁV in HU, which appears fair.

- The only conclusion which may be drawn on the basis of the analysis of the available contractual provisions on liability is that IMs seem in general to enjoy large margins of manoeuvre and their actions appear not to be constrained by any regulation (except maybe in DE and ES where reference is made to the statutory provisions).

The contracts are often of the take it or leave type. In general, those contracts often fail to remedy satisfactorily the numerous grounds of liability borne by RUs by an appropriate right of recourse and create sometimes additional grounds of liability with consequences for RUs.

[92] as identified in the Report from the Commission to the Council and the European Parliament – Second report on monitoring development of the rail COM(2009) 676.

### 3.5.4. Horizontal issues

Regarding the difficulty to know and understand each of the civil liability regimes and even more several civil liability regimes, if the extent of the risks is unknown or known but imprecisely, there might be a tendency to adopt a risk coverage which is as large as possible, and which covers far more than the actual risk incurred. However, this finding is based on a logical reasoning but has not been confirmed by the inputs of RUs which apparently considered the data relating to their risk coverage as being sensitive.

In addition, an analysis of the findings of the study on insurance in the railway market shows that liability is not the only factor influencing the level of premiums paid by RUs and that rail insurance does not in itself constitute an immediate barrier to increased competition and subsequent further integration of the European rail market.

Indeed, EU law imposes upon RUs the requirement to be “adequately” insured or to make equivalent arrangements for cover, in accordance with national and international law, of their liabilities in the event of accidents, in particular in respect of passengers, luggage, freight, mail and third parties.[93]

EU law leaves it to the Member States to define what is meant by “adequate” liability coverage. The study on Insurance of RUs highlights that the term “adequate cover” relates to various concepts. In some Member States, it means sufficient coverage to cover claims in the case of basic or considerable accidents. In others, it means sufficient coverage to cover the worst case scenarios. As regards the obligation of liability coverage towards passengers, Regulation 1371/2007 on rail passengers' rights and obligations refers to a subsequent decision of the European Commission (Article 12).

Insurance coverage requirements might have an impact on the amount of premiums paid. However, insurance coverage requirements are only one parameter determining the level of premiums paid by RUs, the other parameters being, liability, risk and the probability of occurrence of an accident.[94] Some of these parameters are in the control of the authorities or IMs and others in the hands of RUs. Indeed, insurance coverage requirements are either determined by law or in the contract between RUs and IMs. The liability regime is similarly determined by law and/or in the contract between RUs and IMs. Risk is inherent in the activity carried out and is therefore generic, whereas risk exposure may be influenced by RU through effective risk management systems.[95] Risk exposure is also determined on the basis of the safety history of a RU. Therefore, it appeared in the study on Insurance of RUs that large (incumbent) RUs have easier access to insurance and pay less for the same coverage than

[93] Article 9 of Council Directive 95/18/EC of 19 June 1995 on the licensing of RUs, [1995] OJ L 143/70.
[94] European Commission, DG TREN, Insurance of RUs, Final report, September 2006, p. 15.
[95] Ibid., p. 38.

smaller ones since the former are well known and have a long safety track record.[96] In addition, large (incumbent) RUs have a financial standing that often enables them to accept higher risk exposure than the smaller RUs, which reduces insurance premiums. Finally, the study reveals that few insurance companies hold sufficient knowledge about railway operations and their associated risks. Hence these insurance companies are often not interested in selling cover to RUs and have in many cases difficulties in assessing the actual risks of operations undertaken by the RU demanding cover. According to the study this is likely to lead to unnecessary high premiums.[97]

As highlighted in the Study on Insurance of RUs, rail insurance does not in itself constitute an immediate barrier to increased competition and subsequent further integration of the European rail market.[98]

Our current study did not find any examples of RU who intended to provide railway services but have decided not to because of high insurance premiums. However, it is to be noted that the response rate to our questionnaires was quite limited.

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| Insurance premiums are not only influenced by the existing civil liability regime but also by other factors. Hence the correlation between the existing civil liability regime as such and the level of insurance premiums is difficult to determine, although some stakeholders highlighted the link. According to the Study on rail insurance in the railway market, rail insurance does not in itself constitute an immediate barrier to increased competition and subsequent further integration of the European rail market. |

### 3.6. Available instruments

#### 3.6.1. Appendix E - CUI

As shown in Chapter 2, CUI is able to provide a harmonised liability regime for international transport services. According to CIT, continuous and standardised law is necessary to guarantee through rail traffic[99] is a coherent system established by private law specialists and is therefore in their opinion adequate. A uniform regime may indeed avoid the negative effects of the existing regimes.

This regime presents the following main advantages:

[96] Ibid., p. 47.
[97] Ibid. p. 50.
[98] European Commission, DG TREN, Insurance of RUs, Final report, September 2006, pp. 12 and 27.
[99] "Appeal from Bern" by RUs, CIT document of the conference "Bern days" of 5 February 2010 hold in Bern.

- The CUI, once applied, is legally binding. According to Article 4, unless CUI expressly allows so, any stipulation which, directly or indirectly, would derogate from CUI, will be null and void (Article 4). The explanatory report on CUI states that CUI Uniform Rules are mandatory in nature and prevail over national law.[100] This does though not impede RU and IM which are parties to the contract to assume a liability greater and obligations more burdensome than those provided for in the CUI or to fix a maximum amount of compensation for loss of or damage to property (Article 4).

- The CUI provides for a simple liability regime based on objective grounds but balanced by several grounds of relief, which are formulated in a descriptive way as to avoid relying on non-univocal concept.

- The CUI guarantees the right of recourse of RUs which have paid initial first party damages where the damage actually rests with the IM.

- The CUI restricts the possible actions between the parties to the contract under non-contractual liability law to the same extent as provided in the contract. This provision simplifies the complex interplay between contract and non-contractual liability law under the national laws.

However, the CUI has some gaps:

- CUI only provides for a regime based on strict liability. Hence, if the parties do not agree to assume liability greater than in CUI, there will be no liability engaged in cases where the conditions of strict liability are not fulfilled. Since CUI is mandatory and other actions (based on non-contractual liability) are limited to the same extent as CUI, there is no possibility to pursue under national law the compensation of other damage than the one provided in CUI, unless the parties agree to bear greater liability than in CUI. A judge would not be entitled to consider that the exclusion of liabilities go beyond what could be lawful under national contract law since CUI is mandatory. As an example, the “loss of use” (e.g. fees for the use of the infrastructure or loss of income following the impossibility to use the rolling stock), although might constitute an important damage for the parties, could be considered as excluded from the CUI. As seen above, most of the national civil liability regimes would also provide compensation for the loss of use. With the adoption of CUI and if the parties do not agree to assume greater liability, this could become impossible, even on the basis of non-contractual liability law.

[100] Ibid., para 1 of the comments to Article 4.

- The CUI leaves to the parties to the contract to agree whether and to what extent the IM or the RU will be liable for the loss or damage caused to the other by delays or disruptions.[101] However, it is unclear to what extent IMs and RUs could negotiate on their liability for loss or damage caused to the other party by delays or disruptions. Indeed as highlighted in section 2.1.5, Article 11(1) of Directive 2001/14 imposes the adoption of a performance scheme. This performance scheme has to deal with disruptions on the infrastructure, the non usage of train paths, etc. and does not proceed from the contractual freedom between RUs and IMs. This leaves an unclear margin of negotiation between RUs and IMs in this respect.

- The CUI guarantees a right of recourse of the RU against the liable IM only when it has paid damages under CIV and CIM, and does not guarantee such right in the event such payments have been made on the basis of other grounds (CUV, Regulation 1371/2007, environmental liability, contracts, etc.). Hence, if the parties do not agree to assume greater liability than in CUI, such damage paid by the RU would remain uncompensated.

- The CUI only applies for international railway services. Hence if it were applied, it is possible that contracts of use of infrastructure would contain different clauses for national and for international services, because compulsory upon international services and not upon national services. Hence, instead of simplifying, through harmonisation, the civil liability regime applicable in a EU Member State, there is a potential application in a single Member State of different regimes, one for international services and one for national services. This is so despite the fact that internal market for railway services is not only made of international services, but also, of national services, since domestic freight services have been opened up to competition (see section 1.2.3). The application of CUI only to international services would have as a consequence to partially harmonise the RU's protection within the internal market, the part not being harmonised depending on the national regime.

  That being said, such a risk seems to be remote because, in general, the contracts of use of the infrastructure are the same for national and international services, in order to comply with the non-discriminatory obligation. This is even more so when liability clauses are enshrined into the network statement. It is submitted that if the IM have to modify their model of contracts to comply with CUI, they would do so not only for the contracts covering international services but also for contracts covering national services.

[101] Please see footnote 51.

- CUI does not contain an exhaustive list of definitions of the terms used. This might lead to a difficulty in understanding and applying the CUI regarding the very different understanding of similar terms throughout the EU. Disputes on the interpretation of the terms of CUI, are either subject to arbitration or to national courts, depending on the nature of the claimant (Article 28 COTIF, see section 2.1.4). Hence, the harmonisation pursued under CUI, in the absence of clear and precise definitions of all the concepts used, might amount to a various understanding of the liability clauses. In addition, despite the harmonising power of the CUI, its application remains subject to national courts. Hence, it might be that depending on the causation theory in force in a Member State, similar cases would not be dealt with in the same manner. It is to be noted that in the opinion of CIT, the liability regimes under COTIF (CIV, CIM, CUV, etc.) are well known and their application have been fully tried and tested. Hence, CIT considers that the system would not lead to any interpretation problems.

- The CUI does not address liability issues raised from an accident occurred in a Member State and causing damage in another Member State, since it only addresses the contractual relationship between the RU and the IM on which the first operates.

When the revised CUI will enter into force, the question arises whether such “uniform” liability regime would not be undermined by the possibility conferred upon Member States to declare CUI non-applicable. It is indeed theoretically possible that CUI would apply in some EU Member States and not in others, which have made such declaration. However, it appears from the contributions received that EU Member States would expect to withdraw their reservations once COTIF compatibility with EU law is assured and EU obligations are not affected.

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| CUI is generally deemed as useful and adequate to address liability issues between RUs and IMs. However, on the basis of a technical analysis, CUI presents various gaps which, if not dealt with, might lead to difficulties. |

### 3.6.2. GTC of use of railway infrastructure

As shown in section 2.2.3, the GTC of use of railway infrastructure would provide a European standard contract between IMs and RUs. According to the CIT, even if the CUI is applied, the GTC of use of railway infrastructure would still be useful regarding the general principles set out and not only on liability issues.

The liability regime provided in the GTC of use of railway infrastructure presents the main following advantages:

- The GTC of use of railway infrastructure provides for a simple liability regime based on objective grounds but balanced by several grounds of relief, which are formulated in a descriptive way as to avoid relying on non-univocal concept.

- The GTC of use of railway infrastructure guarantees the right of recourse of RUs which have paid liable first party damages to their customers on the basis of larger grounds than the CUI, where the damage actually lies on the IM.

- As opposed to the CUI, the GTC of use of railway infrastructure intends to address the consequences caused to the other party of delays or disruptions of the use of the infrastructure.

- The GTC of use of railway infrastructure intends to address the liability issues in the event of loss of use.

- If applicable in addition to CUI, the GTC of use of railway infrastructure would imply that the parties agree to assume greater liability without necessitating individual negotiations to include liability for pecuniary damage paid by RUs on the basis of other grounds than CIV and CIM and liability for the loss of use. This would settle two issues raised in Chapter 2. First, the question of the bargaining power of RUs in comparison to IMs would be solved by the commitment of IMs to bear greater liability than under CUI without necessitating individual, and possibly difficult, negotiations. Second, the concern of non-discrimination between RUs would be solved by the standardisation of the contracts.

However, the GTC of use of railway infrastructure contains some gaps:

- Similarly to the CUI, GTC of use of railway infrastructure only provides for a regime based on strict liability. This might be construed as a regime which excludes any other grounds of liability and hence, which would provide for a general exclusion of liability where the conditions of strict liability are not fulfilled. If such standard contract is not interpreted in this way, because the judge would consider that such exclusion would go beyond what is legally allowed, than the judge might fall back on his national regime. This would then fail to settle the problem of complexity and of information relating to the existence of the various national civil liability regimes.

- The GTC of use of railway infrastructure does not provide for the same limitation regarding competing actions between the parties. Hence, if the GTC of use of railway

- The GTC does not (yet) settle the issue relating to the loss or damage caused to the other party by delays or disruptions.[102] As highlighted in section 2.1.5, Article 11(1) of Directive 2001/14 imposes the adoption of a performance scheme which would leave an unclear margin of negotiation between RUs and IMs in this respect, if any.

- The GTC guarantees a right of recourse of the RU against the liable IM only when it has paid damages towards its customers under national or international law, and does not guarantee such right in the event such payments have been made on the basis of other grounds (i.e. contracts going beyond the law) or to third parties.

- The GTC does not address liability issues raised by an accident that has occurred in a Member State and causing damage in another Member State, since it only addresses the contractual relationship between the RU and the IM on which the first operates.

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| GTC of use of railway infrastructure would provide a standardised contract and would usefully complement CUI. However, this contract presents various gaps which, if not fulfilled, might lead to difficulties. |

[102] Please see footnote 51.

# 4. Recommendations

This chapter provides recommendations to the European Commission aimed at resolving the problems highlighted in this Study. In a first section, an analysis of the right for the EU to act in the field studied is given (5.1). Second, policy objectives for EU action are set out (5.2). In a third section, several possible policy options are proposed, analysed and assessed as to determine whether they are able to efficiently and adequately address the problems listed out in the Study (5.3). These policy options are not necessarily exclusive and might be combined. However, for the sake of clarity, they are analysed separately.

## 4.1. Room for EU action?

National civil liability regimes seem not to be an important driver for the choice of RUs to enter a particular market. The RUs which have answered the questionnaire have highlighted the difficulties linked with the current state of play, but none of them have evidenced the impact of those difficulties on their cost structures or their decision to develop their business. Hence it is necessary to verify whether there is ever room for EU action.

### a) The standard for EU action

A possible assumption for this Study was that the national civil liability regimes are a major factor in explaining the development of the internal market for railway services. Hence, if these national civil liability regimes were to impede the development of railway markets, that would constitute an evidence of the need for EU action. The way to determine the validity of such assumption could rely on methodologies such as that used for instance by the International Finance Corporation (IFC-World Bank Group) in their reports on *Doing Business*. Such methodology consists of assessing the quality of a country's legal system based on the quantification of the quality of several legal procedures.[103] Transposed to the subject matter, the methodology would consist of assessing the quality of a country's civil liability regime based on the quantification of the quality of several features of such regime. This would require to select the features according to their presumed impact on the protection of RUs in the specific remit of civil liability. To make the link between such protection of RUs under national civil liability regimes, the ranking obtained on the basis of such methodology would be correlated to the level of market opening in the EU Member States studied.

As shown in section 3.2.1, it appeared very difficult if not nearly impossible to determine which type of regime best supports the internal market. If it is possible to conclude that the

[103] C. Ménard and B. du Marais "Can We Rank Legal Systems According to Their Economic Efficiency?" (2008) 26 Journal of Law & Policy, 55-80.

ease in invoking liability and hence recovering damage sustained is influenced by the causation theory in force in the EU Member States, what was discernible however, was that, all these regimes follow their own patterns, and have their own defining and ultimately differing characteristics. As regards contracts, while it is possible to determine whether contracts are fair or not, it would appear again difficult to determine on this mere basis which regime is most supportive of the internal market.

Some scholars encourage researches aiming at measuring the economic impact of legal systems but they put the current available methodologies into question, since they lead to superficial ranking rather than actually measuring the real impact of specific legal instruments.[104] It is submitted that as regards the specific issue of civil liability between RUs and IMs, such measurement would be even more difficult since the coherence of civil liability regimes reside in the combination of their particular features so that their quantification would always entail the risk of arbitrary.

Not only the methodology consisting of ranking national civil liability regimes would be objectionable, but further the correlation between such ranking and the degree of railway market opening would not be conclusive. It is indeed something to assess the quality of national regimes and concluding that such regimes are more or less protective of RUs, and hence positively / negatively participate to the competitive process, and it is something else to ascertain that competition / lack of competition is due to favourable / unfavourable character of national civil liability regimes.

Regarding the degree of market opening, the report from the Commission to the Council and the European Parliament – second report on monitoring development of the rail market and in particular annex 13 gives a rail market opening score to the EU Member States having railway infrastructures. This annex provides the market shares of non incumbent in the EU Member States as well as the Herfindahl-Hirschman Index (HHI) which estimates the concentration ratio in the industry and serves as an indicator of the amount of competition in the market (1 being a monopoly and 0 full competition).

To give some examples of the lack of robustness of the correlation between the national civil liability and market opening, one could look at the features which might possibly be considered as such as being more or less favourable to RUs (subject to the preliminary caution). The study revealed in Romania the unfair character of the contract of use of the infrastructure for the RUs, which bear a strict liability in various cases with as possible ground of relief solely for “force majeure” whereas various grounds of relief are available to the IM found liable. However, the total market share of non-incumbent in rail freight services is 41% and the HHI is 0,35 which is almost the same HHI as in the UK where there is no incumbent.

[104] Ibid. 80.

Hence, it would appear that there is little conclusive evidence to be found on the basis of such methodology of a strong link between openness and the favourable character of civil liability regimes and it would appear to be difficult to base the need for EU action on these findings.

It should be concluded that the civil liability regime is only one of the many aspects which RUs take into consideration when deciding on entering the railway market of an EU Member State, and apparently not the most important one. The most obvious driver is the commercial objective and strategy. International rail service implies transiting other Member States irrespective of the regime applicable in that State.

If the civil liability regime does not appear to have much impact on the decision to provide services and hence, on market opening, it might however have an impact on the costs of the RUs (e.g. information costs, damages to be paid to third parties, etc.). But the strongest evidence for EU action is the existence of international and EU law imposing liability upon RUs, also for the action / inaction of IMs.

Indeed, the objectives of the Treaty are the removal of measures liable to impede or render less attractive the provision of services, if they have an effect on inter-State trade.

As the ECJ stated, in the "Transport" case between the European Parliament and the Council, the Council has the obligation to adopt a common transport policy and, as regards the free movement of services, to pursue the liberalisation of the sector.[105] On that occasion, the ECJ considered that Article 91 TFEU on the implementation of the common transport policy must be read in combination with Articles 56 and 57 TFEU on the free movement of services. In other words, although Article 58 TFEU relating to transport provides for derogation to those rules, the result of the common transport policy concerning the movement of transport services must be similar to the one of the general Treaty rules. According to the Court, only the "*means employed to obtain that result, bearing in mind (…) those features which are special to transport*" and the priorities of harmonisation are left to the discretion of the Council.[106]

To determine the result which should be achieved under the general Treaty rules, the Court referred to the case 279/80 *WEBB* which states that the objectives of the Treaty are "*the removal of any discrimination against the person providing services based on his nationality or the fact that he is established in a Member State other than that where the services are to be provided*".[107] This result pursued under the general Treaty rules has evolved with the years. At present the relevant case law seem to adopt a market-access approach whereby measures liable to impede or render less attractive the provision of services are to be

[105] Case 13/83 *European Parliament v Council of the European Communities* [1985] ECR 1513.
[106] Paras 50 and 65.
[107] [1981] ECR 3305 para 64.

removed by contrast with the former discriminatory approach adopted by the Court in the *WEBB* case.[108]

However, this tendency has limits. In *Viacom and in Weigel*, the Court came back to a non-discrimination approach in a case where the effect on inter-state free movement was too remote.[109] Where the effect on inter-State trade is remote, then the objective of those general rules of the Treaty are less ambitious and aim to remove only the discriminations between nationals and foreigners.

In *Weigel*, a case on the free movement of workers, the claimants were German workers, having bought their cars in Germany and moved to Austria where they worked and where the Authority applied a tax on vehicles, based on the energy consumption. They deemed that the taxation measure in question constituted a discriminatory measure because when they bought their cars, they did not have the incentive to choose cars consuming less. The Court held that, given the disparities in the legislation of the Member States in this area, a transfer of activities may be to the worker's advantage, according to the circumstances. Hence, the effect of these taxes on inter-state movement of workers being too remote, the measure was not deemed as contrary to the internal market in the absence of discrimination.

In *Viacom*, a case on the freedom to provide services, a French seller of real property bought services from Viacom to advertise in Italy, where the municipality imposed a tax on outdoor advertisement. The contract between the French seller and Viacom did not stipulate which of the two parties would have to pay the tax. Their dispute on this point led to a preliminary ruling. The Court of Justice judged that such an indistinctly applicable taxation measure on outdoor advertising activities involving the use of public space administered by local authorities and the level of which was rather modest, is not on any view liable to prohibit, impede or otherwise make less attractive the provision of advertising services to be carried out in the territory of those authorities, including the case in which the provision of services is of a cross-border nature on account of the place of establishment of either the provider or the recipient of the services.

On the basis of this case law, the question may arise whether the mere existence of different national civil liability regimes has an effect on inter-State trade.

However, as per the liabilities and costs borne by RUs on the basis of EU and international law, the inter-State effect is obvious, since the measures are not national. The Study has

[108] C. Barnard, *The Substantive Law of the EU, the Four Freedoms* (2nd edn, Oxford University Press, 2007), 19, See for instance, case C-55/94 *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, para 37.
[109] Case C-134/03 *Viacom outdoor SRL v. Giotto Immobilier SARL* [2005] ECR I-1167, paras 54-55 and 60 and Case C-387/01 *Weigel v. Finanzlandes diresction für Voratlberg* [2004] ECR I-4981 paras 37 and 38.

shown that international, EU legislations, access contracts and public service contracts, etc. have imposed upon Railway Undertakings several obligations to be the first party to pay damages to customers or third parties. The impositions made under international law are counter-balanced by CUI which provides for a (limited) right of recourse but which is currently disapplied in the EU Member States, leading to an incomplete regulatory framework. The impositions made under European law (environmental liability, Regulation 1371/2007) are not counter-balanced by any specific right of recourse organised at EU level. Regulation 1371/2007 provides that such right of recourse exists if so provided under national law and will not be affected. We have seen that such recourse is possible under every national law but with all the uncertainties relating to the application of the general civil liability rules, or even limited in the contracts between IMs and RUs.

In summary, the measures at stake here are not only internal, national measures such as the taxes put into question in the *Weigel* and *Viacom* cases which reverted to the discriminatory approach, but also measures adopted at International and European level, which have *per se* an effect on inter-state trade. Hence, arguably, there is room for EU action.

**b) The legal basis for EU action**

Article 4 TFEU lists the matter of transport amongst the competencies shared between the EU and the Member States. Article 2(2) TFEU provides that "*[w]hen the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence*".

In the field here studied, the EU has the right to act on the basis of Article 91 and 216 (conferral principle) of the TFEU.

- Article 91 TFEU (ex Article 71 TEC) reads as follows:
  "*1. For the purpose of implementing Article 90, and taking into account the distinctive features of transport, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, lay down:*
  *(a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States;*
  *(b) the conditions under which non-resident carriers may operate transport services within a Member State;*
  *(c) measures to improve transport safety;*

*(d) any other appropriate provisions.*

*2. When the measures referred to in paragraph 1 are adopted, account shall be taken of cases where their application might seriously affect the standard of living and level of employment in certain regions, and the operation of transport facilities*".

This provision expressly confers a competence to the European Institutions to pursue harmonisation in land transport.

- Article 216 TFEU governs the possibility for the EU to conclude an agreement with international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope. Article 218 TFEU provides for the procedure to adopt an international agreement.

**c) The subsidiarity and proportionality principles**

For all policy options the following questions would be raised:[110]

(1) Why can the objectives of the proposed action not be achieved sufficiently by MS or at international level? (the necessity test)

(2) As a result of this, can objectives be better achieved by action by the EU (the EU Value Added test)?

| |
|---|
| Regarding the existing EU and International legislations creating liabilities of RUs towards third parties or clients while no EU or applicable international legislation deals with the possibility for RUs to seek redress for the damages paid in first instance, there is room for EU action. |

### 4.2. Policy objectives

On the basis of the assessment of the current state of play, the policy objectives for possible EU action could be defined as follows:

[110] European Commission, Impact Assessment Guidelines, 15 January 2009, SEC(2009) 92, p. 22.

1) Further enhancement of the internal market for railway services and their competitiveness (in particular in comparison with other means of transport less environmental friendly), including administrative simplification aiming at reducing unnecessary burdens on transport companies;[111]
2) Guarantee RUs an effective right of recourse against IMs in circumstances where they pay the initial damages when IMs have actually caused the damage;
3) Equalise the bargaining relationship between IMs and RUs;
4) Clarify and unify the applicable rules of civil liability between RUs and IMs on international as well as on national routes (since some domestic services are also opened up to competition) and the enforcement of these rules.

These policy objectives are based on the aim of the study which relates to the enhancement of the internal market for railway services. However, other considerations could interfere with these policy objectives such as limitation of IMs' liability because of their public financing, etc..

## 4.3. Policy options

### 4.3.1. Policy option 1: Status quo / no EU action

This policy option means that the European Union would not intervene on liability issues. Under this baseline scenario, two possibilities exist:

(1) Aside from the national civil liability regimes, there will be application of CUI in all EU Member States or
(2) CUI will remain disapplied because of incompatibilities raised by the EU.

Under both of these possibilities, a standardised contract, the GTC of use of the railway infrastructure may become of application, meaning that the industry voluntary use of the GTC would be taken up.

(1) if CUI applies

In the event CUI applies in the EU Member States, there would be the application of a compulsory harmonised civil liability regime across the EU for international services. This would settle numerous problems highlighted in the Study. The application of CUI would help to further enhance the internal market for railway services. It would also equalise the relationship between IMs and RUs and guarantee an effective right of recourse for RUs who pay the first party damages. However, such right of recourse would be limited to cases where

[111] This objective is one of the basic objectives described in the Communication "A sustainable future for transport: Towards an integrated, technology-led and user friendly system" has been adopted by the Commission on 17 June 2009 [COM(2009) 279].

RUs would have paid damages under CIV and CIM, but not under other grounds of liability, unless the parties agree to assume greater liability. The CUI would partially clarify and unify the applicable rules of civil liability between RUs and IMs on international routes. However, some damage may remain uncompensated in the cases where the conditions for the liability provided under CUI are not fulfilled, unless the parties agree to assume greater liability. There would be some uncertainties as regards the margin of manoeuvre for delays and disruptions caused to the other party. The harmonisation also only relates to international routes, which may lead to the application of different rules determined by the national / international character of the service, although domestic freight services are opened up to competition. Finally, the enforcement of civil liability rules partially harmonised for international services through CUI would depend on the national courts and their national causation theory which might lead to differences in the interpretation and application of those rules.

(2) if CUI does not apply

This reflects the current situation. This would mean the application of the national civil liability regimes and of the contracts of use of the railway infrastructure, with possible interplay between the contract and non-contractual liability law. As underlined in this Study, the current state of play is complex and, since the phenomenon of separation between RUs and IMs is relatively recent, it contains lots of legal uncertainties. This difficulty is even more significant when looking at the very diverse national regimes.

The main problem highlighted in this Study is the absence of a specific right of redress organised by law (with some exceptions) when the RU is the first or only party to pay damages although the damage was caused by the IM.

The negative effects are expected to amplify with the application of Regulation 1371/2007 which entered into force on 3 December 2009 and which contains larger grounds of payments by RUs to passengers than does the CIV. This might lead to a higher financial exposure of RUs than was the case before the entry into force of the Regulation.

#### 4.3.2. Policy option 2: EU encouragement and guidance to RUs and IMs for the finalisation of the European GTC of use of infrastructure

**a) Choice of the instrument**

The question to ask here is whether and how the Commission can influence the civil liability regimes as applicable between RUs and IMs without establishing binding legislation. More specifically, it needs to be determined which instruments of "soft law" the Commission can

use to achieve its policy goals with regard to drafting process of the standard contract as it relates to civil liability issues.

Soft law is the term applied to EU measures, such as guidelines, declarations and opinions, which, in contrast to directives, regulations and decisions, are not binding for those to whom they are addressed.

Article 17(1) TFEU gives the European Commission a general power to promote matters dealt with in the Treaty, either where it is expressly provided for or where the Commission believes that it is necessary to do so, provided that the measures taken are in the general interest of the Union. A neat checklist of legislative and non-legislative measures that the Commission intended to take in order to attain the single market is to be found in its 2000 Review of the Internal Market Strategy:[112] recommendations, communications, the publication of guides, establishment of a dialogue, etc. It is clear that the Commission uses a broad range of policy instruments to achieve its policy goals. However, these instruments should not be used to avoid the democratic legislative process and they should then be considered carefully.[113]

Therefore hereunder, only mainly steering instruments are considered. Merely preparatory or informative instruments and interpretative and decision-making instruments do not seem to be of any use. Preparatory or informative instruments (such as Green Papers, White Papers, action programmes, informative communications) are linked to the legislative procedure or the preparation of European law. Interpretative and decision-making instruments provide guidance for the interpretation and application of existing European law.

Soft law, as steering instruments, covers instruments that aim to establish or give further effect to EU objectives and policy or related policy areas, often with a view to establishing closer cooperation or harmonisation between Member States in a non-binding way.

Recommendations and opinions are to be considered first, as formal steering instruments.

According to article 288 TFEU, to exercise the Union's competences, the institutions will adopt regulations, directives, decisions, recommendations and opinions. The most evident form of "soft law", i.e. non binding measures taken by the Commission, to be found are "recommendations and opinions". Recommendations and opinions constitute the principal way in which a policy can be developed within the Community. Recommendations will have

[112] COM (2000)257, final.
[113] Indeed, the European Parliament stated in its resolution of 4 September 2007 on institutional and legal implications of the use of "soft law" instruments that where the Community has legislative competence however, but there seems to be a lack of political will to introduce legislation, the use of soft law is liable to circumvent the properly competent legislative bodies, may flout the principles of democracy and the rule of law under article 6 TFEU and also those of subsidiarity and proportionality under article 5 TFEU.

no binding force and could therefore be used to influence the development of the negotiated contractual framework.

A recommendation or an opinion is an instrument that invites or proposes the addressee to adopt or to follow a certain line of action. Apart from the statement of "no binding force", Article 288 TFEU merely indicates that recommendations and opinions may be adopted by both the Commission and the Council, thus leaving the nature, objective, function and other characteristics of this EU instrument largely an open question. On the basis of the actual wording and contents of recommendations adopted hitherto, it can be concluded, however, that both Council and Commission recommendations aim at laying down general rules of conduct and are directed at influencing the behaviour of outside parties. They are thus of a general, normative and an "external" nature. Furthermore, the aim is usually to lay down new rules, which are not necessarily linked to existing legislation or Treaty provisions and cannot be said to be inherent to the existing legal framework. In the majority of cases, recommendations are addressed to Member States. Yet, it is possible to also address recommendations to other actors or individuals (e.g. 84/646/EEC: Council Recommendation of 19 December 1984 on strengthening the cooperation of the national railway companies of the Member States in international passenger and goods transport). Opinions differ from recommendations as they express a view on a given question. As such, opinions aim at prescribing certain behaviour for certain addressees. Opinions are used when Member States, or by expansion other actors, are considering the adoption of measures on which the Commission can express its view. By its nature, an opinion is less an alternative to legislation than recommendations.

The great advantage of recommendation and opinions is that, although not legally binding, recommendations are not devoid of all legal effect. Recommendations enjoy a greater visibility as they are formally recognised in the Treaty than other informal soft law measures. National judges are obliged to take them into consideration for the interpretation of EU law.[114]

Recommendations and opinions are not the only way in which the Commission can develop policy. The Commission can also make other, so called "non-formal steering", instruments. These instruments are not formally mentioned under article 288 TFEU or the Treaty in general. The Commission can, for example, adopt a code of conduct. Yet, the use of different kinds of soft law is often listed under the general heading of recommendations or opinions.

[114] See for instance case C-322/88, *Grimaldi.*

**b) Development of the policy option**

Under this policy option, the EU would, through a legally non binding recommendation, encourage the adoption by the industry of the GTC of use of railway infrastructure with a view to ensuring a standardised contract across Europe.

This recommendation would be based on the general objective of the common transport policy to enhance the internal market.

This Study also examined Directive 2001/14 which addresses at EU level the issue of delays and disruption through the imposition of performance schemes (Article 11(1)). Performance schemes are to be part of the general infrastructure charging scheme which does not proceed from the contractual freedom between RUs and IMs, but from either the MS (setting out the charging framework) or the IM (implementing the framework by setting out the charging scheme). Hence, the remaining margin of manoeuvre of IMs and RUs to negotiate compensation in the event of delays or disruptions is unclear, and would depend on the rules set out in the performance scheme. This recommendation would then usefully provide some guidance to the industry as to the interpretation of Directive 2001/14 and, in particular, the possible margin of manoeuvre in settling the question of delays and disruptions caused to the other party to the contract of use of railway infrastructure.

The recommendation could also recommend further development of the existing clauses with a view to having very precise clauses. Indeed, as the GTC stands, the pursuit of the objective of standardising practices has limits since the concepts used are not defined and would be interpreted by national courts. The national courts would interpret these concepts in the frame of their national law.

In order to ensure an effective right of recourse, the recommendation would advocate for the extension of the currently foreseen right of recourse to damages paid by RUs not only to their customers, but in general (third parties, the environment, etc.) and on the basis of not only international, national law and contracts which do not go beyond the law, as provided in the current version of GTC, but also of other contracts. This extension of the right of recourse for damages paid by RUs also for contracts might however be limited to contracts which are reasonable and this to avoid that RUs' exorbitant engagement in a contract bind third parties to that contract.

This policy option would help to enhance the internal market and secure an effective right of recourse in most cases where RUs have been the first party to pay damages for which they were not actually responsible. Such standardised contract would equalise the relationship between RUs and IMs. This would also clarify the applicable regimes. However, these

contracts would be subject to interpretation by the national courts, which could lead to various interpretations and concrete applications, and hence to a lack of unification. This drawback could be limited if the industry were to give very precise definitions of all the concepts used in the GTC so as to cover all the possible meanings.

#### 4.3.3. Policy option 3: EU obligation upon MS to publish information on the national liability regime

This policy option would encourage the EU Member States to provide full information on the existing civil liability regime.

This information should include the explanation of the interplay between contract and non-contractual liability law as to fully understand the extent to which RUs are exposed to risk.

This information should also include the rules which cannot be derogated through contractual provisions and which ones would apply (mandatory rules).

However, as highlighted throughout this Study, the civil liability regimes in the EU Member States are complex and, regarding the relatively new phenomenon of separation between IMs and RUs, the legal situation is not yet settled, and may mean that not all the various nuances can be covered by the information to be published. Therefore, the objective of such information would be to provide a short overview to RUs willing to enter a railway market rather than a comprehensive description of the applicable regime. Such information should then be accompanied by a disclaimer stating that the information cannot replace specialised legal advice.

As examined in section 2.3, national civil liability regimes are not only constituted of legal provisions but also possibly of contractual arrangements between RUs and IMs. Therefore, to complete the available information on the existing civil liability regime, this policy option would also encourage the IMs to publish their model of contract which is to be concluded on the basis of the transposition of Article 10(5) of Directive 91/440, and containing the civil liability principles, if any. The model of contract could be attached to IMs' Network Statement. Indeed, pursuant to Directive 2001/14, the Network Statement is a document developed and published by the IMs and which sets out in detail the general rules, deadlines, procedures and criteria concerning the charging and capacity allocation schemes, as well as such other information as is required to enable application for infrastructure capacity.

Such requirement of publicity would not be formulated as to impede IMs and RUs to negotiate their contracts, provided such negotiation complies with the general principles of equal treatment and non-discrimination between RUs.

This policy option could be adopted through a recommendation as explained under section 4.3.2. The advantage of a recommendation is that it is not devoid of any legal effect but it is also a flexible instrument. Such policy option would provide the prospective RU a first overview of the applicable regime and the associated risk level. This policy option would be able to satisfy the first objective set out in section 4.2, namely further enhance the internal market for railway services and their competitiveness.

However, such policy option would not be able as such to guarantee RUs an effective right of recourse against IMs in circumstances where they pay the initial damage when IMs have actually caused the damage. Such guarantee depends on possible restriction in the contract and on the legal regimes. It might be that the information provided by the EU Member State could clarify the actions available to RUs to seek redress against IMs, and hence would in fact contribute to render the existing right of recourse effective. As for the two other policy objectives determined under section 4.2, the equalisation of bargaining relationships between RUs and IMs and the clarification and unification of the applicable rules, this policy option is not as such able to meet these objectives. That being said, publicity may clarify the applicable rules and induce IMs to equalise their contracts. This would depend on the way the recommendation adopted on the basis of this policy option would be implemented in the EU Member States.

#### 4.3.4. Policy option 4: EU harmonised civil liability regime between RUs and IMs

This policy option may be applicable where CUI would not be applied, or in the case where it might be combined as a complement to policy option 5.

The way to proceed to harmonisation could be minimal, maximal or complete harmonisation. Complete or exhaustive harmonisation is the best way of helping to achieve a level playing field.[115] Minimum harmonisation through minimum standards directives has the advantage to reconcile the need for a level playing field for competition with room to accommodate national diversity.[116]

This Study has highlighted that civil liability regimes are construed of specific and/or general rules and of contract law and often also non-contractual liability law, as well as of possible contractual clauses. The difficulty being the application of the civil liability regimes exists (when looking at international services) in their differences, and (when looking at national

[115] C. Barnard, The Substantive Law of the EU, the Four Freedoms (2nd edn, Oxford University Press, 2007), p. 596.
[116] Ibid., p. 600.

services) in legal uncertainties and the possible interplay between non-contractual liability and contract law.

Therefore, this policy option proposes the complete harmonisation of civil liability issues in the event of a railway accident between RUs and IMs so as to avoid unmanageable differences and grey areas. In consequence, it is also proposed to use the EU instrument of Regulation rather than a Directive. Indeed, a Directive only provides the result to attain, but not the means, whereas a Regulation does not require transposing measures and is directly applicable in the Member States. The legal basis of the proposed Regulation is Article 91 TFEU on the common transport policy.

(1) In the case where CUI would not be disapplied (because of incompatibilities with EU law), the proposed Regulation would make the CUI applicable in the EU in a similar fashion as Regulation (EC) No 889/2002 on air carrier liability in the event of an accident.[117] That Regulation implements the Montreal Convention in the EU, lays down certain supplementary provisions and extends the application of these provisions to carriage by air within a single Member State.In a similar manner, the EU Regulation adopted under this policy option would, in addition to the CUI provisions, provide provisions which would fill the gaps of CUI (e.g. additional ground of liability based on fault, extended right of recourse, etc.) and extend the scope of application of civil liability rules also to national railway services.

(2) Even in the case where CUI would not apply in the EU, this policy option should take due account of these Uniform Rules in order to avoid the creation of different systems where EU RUs are liable to apply CUI with IMs located outside the EU. Indeed, it has to be noted that in some EU Member States there is will to have a common regime to establish a more competitive market for rail transport to and from new markets (in the South and Southeast of Asia which is expected to grow) and reduce administrative barriers.

This option should be designed as to provide the same regime as under CUI but in a refined fashion. A difficult question might be the interplay between CUI (and in general COTIF) and the proposed Regulation. Indeed, the European Court of Justice recognises the prevalence of International law on EU law.[118] In *Poulsen*, the ECJ ruled that the EU must respect international law in the exercise of its powers.[119] However, since Article 3 COTIF provides for a disconnection clause according to which obligations under the COTIF shall not prevail on EU Member States obligations under EU law, this difficulty should not raise.

[117] Regulation No 889/2002 of the European Parliament and the of the Council of 13 May 2002 amending Council Regulation (EC No 2027/97 on air carrier liability in the event of accidents, [2002] OJ L 140/2.
[118] P. Daillier and A. Peller, Droit International Public (5th edn, LGDJ, 2001 Paris), p. 275.
[119] Case C-286/90, *Anklagemyndigheden v Poulsen* [1992] ECR I-6019.

The Regulation would thus aim to harmonise contractual liability between RUs and IMs. It would proceed from Article 10(5) of Directive 91/440 which imposes upon RUs the conclusions of the necessary arrangements with an IM for the access to an infrastructure.

The scope of the Regulation would be both international and national railway services since domestic railway services are not any longer out of the scope of action of the EU. Indeed, freight services have been opened up totally, including for domestic markets, since 1st January 2007.

In order to avoid that some damage remain uncompensated, the regulation would first confirm the preference for the general principle of liability based on fault. The Regulation would provide a precise definition of fault so that this concept will be understandable despite the disparities which might exist throughout the EU.

Aside from the general principle, the Regulation would set out a strict liability framed in the same manner as the CUI. The difference will reside in the fact that when the conditions for strict liability under the Regulation are not met, liabilities would not be excluded. Liability for fault would apply. This might have the effect to extend RUs' liability in some cases, where they are indeed at fault, but would also ensure that all the damage caused (except the proposed exceptions) can be effectively compensated. Grounds of relief would be provided.

In a similar fashion to CUI, liability for employees, subcontractors and auxiliaries would also be covered.

The Regulation would also describe the causation theory applicable in the scope of the Regulation. This would in consequence also define the damage covered. In defining the causation, one should bear in mind the specific features of rail transport services in which consequences of an accident having a potentially important effect on the RUs comprise the immobilisation of the rolling stock, damages paid in first instance to customers, passengers, or third parties, the loss of revenue due to the cancellation/reschedule of a service, etc. Therefore, the causal link would be defined in a way to ensure that RUs which sustain damage caused by an IM can recover all damages. The obtainable damage would put the person which has sustained the damage in a similar position as if there were no damage. However, with a view to avoid claims going too far, concepts such as foreseeability could be applied. Such concept would again be precisely defined and refer to the consequences which could have been expected when signing the contract (before the occurrence of the damage). The damage covered would guarantee an appropriate right of redress against IMs which have actually caused the damage when the RU was the first party to pay damages. Such right of recourse would be guaranteed to a larger extent than CUI or the proposal for European GTC

of use of railway infrastructure. This would comprise cases in which the RUs have paid damages on the basis of national, European and international law, but also on the basis of contracts. However, in the latter case, the contracts concluded by RUs should be reasonable, on the basis of objective criteria defined in the Regulation.

The provisions of CUI on other actions could be copied in the Regulation. This would allow limiting to the same extent as in the Regulation possible non-contractual liability claims against RUs and IMs. However, this would not be enough to harmonise all possible issues of liability between IMs and RUs since any accident having a cross-border effect, there is no contractual link between the liable RU or IM and the RU or IM having sustained the damage. For such cases, the Regulation would provide a stand-alone clause governing International Private Law issues and the solution applied in the EU Member States' non-contractual liability law as applicable to these cases.

To ensure the effectiveness of the Regulation, there would not be any possibility to exclude its liability in the contract. However, some margin of negotiation would be left to the parties as regards possible thresholds, financial caps, etc.

The Regulation would be subject to the interpretation of the European Court of Justice, as any other Regulation, which would guarantee a uniform interpretation of the concepts used across the EU.

This harmonisation Regulation would allow the application of a coherent system of EU law, building up on the existing international law of COTIF, through complementing it usefully for the RUs and IMs active in the EU, with a view to enhancing the internal market.

Such a proposal for Regulation would be usefully discussed with the stakeholders and would need to conform to the communication of the Commission on better regulation. [120]

As regards delays and disruptions caused to the other party, there might be a reminder of the application of Directive 2001/14 and in particular of the provisions regarding the adoption of a performance scheme. Some clarification on the margin of negotiation in this respect could also be provided. This issue might be dealt with in the remit of the recast of the first railway package in order to avoid the interference of the objectives of optimal use of the infrastructure pursued under Directive 2001/14 with the objective of fair contractual relationships between RUs and IMs hereby followed.

[120] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Third strategic review of Better Regulation in the European Union, COM(2009) 16 final and COM(2009) 17 final, p. 7.

As regards the subsidiarity principle, the study has shown that the existence of very different civil liability regimes are liable to render the provision of international railway services less attractive. Therefore, the objectives set out in section 4.2 are not able to be achieved by the EU Member States individually. The question arises whether International law would be able to attain the policy objectives. As highlighted above, CUI is able to harmonise the civil liability regimes. However, CUI as it stands, even in its revised form, still presents gaps which if not filled can have important consequences on RUs. This is even more so since Regulation 1371/2007 which has extended the scope of CIV to domestic services and has provided for more detailed compensation provisions, entered into force on 3 December 2009. In any case, EU harmonisation has the advantage to provide for a unified interpretation through the European Court of Justice. The fact that the harmonisation will remain limited to the issues of liability between RUs and IMs, as a mirror of what already exist between RUs and their passengers under Regulation 1371/2007, leaves the national civil liability regimes as they apply in general intact and does not go beyond what is necessary to achieve the policy objectives.

This policy option would further enhance the internal market for railway services and their competitiveness, including administrative simplification aiming at reducing unnecessary burdens on transport companies. The RUs would have to know a single liability regime in the event of an accident, even if the damage sustained was caused in another Member State by an IM or RU with whom there is no contractual link. This would simplify the understanding of the regime applicable. This would allow the RUs to effectively recover expenses that they should not have paid and without necessitating out of court settlement with IMs which are in a monopoly position, hence in a stronger position (although, it might be that IMs make no use of such stronger position, but at least the risk is hereby reduced).[121]
By imposing the harmonisation of the contractual liability clauses, the Regulation would *de facto* equalise the relationship between RUs and IMs.

This policy option would fulfil all the policy objectives set out under section 4.2.

#### 4.3.5. Policy option 5: EU accession to COTIF and application of CUI

This policy option would build upon the European Council decision of 2003 to authorise the European Commission to enter into negotiations with the Contracting Parties to COTIF in

[121] It is to be noted that, regarding publicly owned RU, this policy option would be coherent with Article 9 of Directive 91/440 on the financial soundness of public RUs. Indeed, this provision imposes upon EU Member States to help reduce the indebtedness of publicly owned RU to a level which does not impede sound financial management and to improve their financial situation. A harmonised civil liability regime would also contribute to that objective.

order to reach agreement on the European Union's accession to that Convention[122] and the Commission's proposal for such agreement.[123] Such accession became possible with the entry into force of the Vilnius Protocol to of 3 June 1999 amending the COTIF and which introduced a clause allowing the accession of regional economic integration organisations such as the European Union.

In contemplation of the accession of the EU to COTIF, and to deal with the immediate problems of incompatibility between certain aspects of EU and COTIF law, some revisions have been made to the COTIF, which will enter into force 1 December 2010. This should facilitate the accession of the European Union to the COTIF.

According to Article 216 TFEU, the EU may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States (Article 216(2) TFEU). The Court has consistently held since the *Haegeman* ruling that once an agreement to which the EU is a party enters into force, its provisions form an "integral part" of EU law.[124]

Rules that derive from international agreements that bind the EU, enjoy priority over EU acts.[125] The Court held that it was bound to *"examine whether their validity may be affected by reasons of the fact that they are contrary to a rule of international law*". However, by virtue of Article 3 of the COTIF, the obligations arising out of the Convention with regard to international cooperation do not take precedence, for the EU Member or States party to the Agreement on the European Economic Area, which are also party to COTIF, over their obligations as Members of the European Union or as States party to the Agreement on the European Economic Area.[126]

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[122] 2499th Council meeting, Transport, telecommunications and energy, 7685/03 (Presse 90).

[123] Proposal for a Council Decision on the conclusion by the European Community of the Agreement on the Accession of the European Community to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999, COM(2003) 696 final and revised proposal for a Council Decision on the conclusion by the European Community of the Agreement on the Accession of the European Community to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999, COM(2009) 441.

[124] Case C-181/73 *Haegeman v Etat belge* [1974] ECR 449.

[125] Case C-21-24/72, *International Fruit Company e.a. v Produktschap voor Groenten en Fruit* [1972] ECR 1219; case C-38/75, *Douaneagent der Nederlandse Spoorwegen v Inspecteur der Invoerrechten en Accijnzen* [1975] ECR 1439.

[126] See preamble of the draft Agreement annexed to the proposal for a Council Decision on the conclusion by the European Community of the Agreement on the Accession of the European Community to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999, COM(2003) 696 final.

The accession of the EU to the COTIF would mean that the CUI would apply in the EU Member States and in addition would enjoy a common interpretation through the legal assimilation of the international Convention to EU law. As highlighted above, CUI is able to harmonise civil liability regimes between RUs and IMs for international transport services. However, CUI presents some gaps which, if not filled, might lead to problems. This policy option, by providing a common interpretation of the CUI by the European Court of Justice would fulfil the gap of the possible various interpretations.

The CIT advocates the extension of the scope of the CUI to national services either through a Regulation (see policy option 4.3.4) or through the accession agreement of the EU to COTIF. That would fill one of the gaps identified in the Study, namely the partial harmonisation of civil liability rules for international services only. However, it is unclear how the European Union could legislate without complying with the ordinary legislative procedure set out in Article 294 TFEU through the procedure adopted to conclude agreements on the basis of Article 218(6) TFEU.

This policy option constitutes thus an added value to the baseline scenario, variant 1. However, regarding the gaps underlined in this study, the policy objectives would not be entirely fulfilled.

To address the issues set out in this Study, this policy option could be combined with policy option 4 which would be adopted as a complement to the EU accession to COTIF and would not repeat the provisions already contained in CUI. In such a case, both options could be combined as to keep two sets of legislations: on the one hand, CUI and on the other hand, the necessary complementary Regulation. This Regulation may make reference to CUI and its possible evolutions in time. This would avoid settling a piece of legislation in another piece of legislation without taking into account its possible evolutions in time. This method would also avoid creating conflicts between the two sets of rules since the one is being complemented by the other. This method would finally respect and reconcile the two bodies of rules constituted by CUI and EU law.

This policy option, combined with policy option 4 to the extent necessary to complement the accession of the EU to COTIF would help with the enhancement of the internal market and the assurance of an effective right of recourse of RUs against IMs for damages paid in the first instance when the IMs have actually caused the damage. By harmonising the contractual provisions, the relationship between IMs and RUs would be equalised. Finally, the applicable rules would be clarified and unified across the EU, in a fashion which is respectful of the possibly applicable law to RUs when operating outside the EU.

#### 4.3.6. Policy option 6: the adoption of a European CAHA system

Regarding the apparent positive effect of the Claims Allocation and Handling Agreement in place in Great Britain, a policy option could be inspired by this agreement.

The analysis of CAHA consists of two regimes:
(1) under a certain threshold, liability is allocated according to the terms of the agreement and
(2) above these thresholds, the agreement designates a lead party to handle the case and the allocation of liabilities is agreed among the CAHA members involved.

The agreement is an agreement approved by the Regulatory Body and to which the industry must subscribe. It appears that the agreement leads to the rapid identification of the liable party while providing for a one-stop-shop to the claimant. Disputes are referred to a specific committee, the Railway Industry Dispute Resolution (RIDR) Committee), to arbitration or the courts as determined by the agreement and the nature of the dispute. The objective is to reduce the costs of inter-industry disputes by use of a pre-determined allocation regime for small claims, to avoid court actions and time spent in resolving disputes within the industry, and to provide a unified face to passengers. The principles are to avoid the risk of a claimant who has, for instance been injured in an accident, having to pursue more than one industry party, and minimise the industry parties' costs incurred in defending such claims.

The inspiration found in the CAHA could lead to sub-options:
(1) the encouragement of the adoption of such system in every EU Member States or
(2) the adoption of such system at EU level.

(1) the encouragement of the adoption of a CAHA system in every EU Member States

As stated above, CAHA is an industry agreement, approved by the ORR, and to which all licensed RUs must subscribe.

This policy option would lead the European Commission to adopt a recommendation as explained above (see section 4.3.2), encouraging directly RUs and IMs to adopt an agreement allocating their respective liabilities below a certain thresholds and designating a lead party which would handle the case above the threshold.

If the parties agree, approval from the national Regulatory Body would confer legitimacy on the agreement which would have to be signed up by all new RUs entering the market. At the moment, even if a RB could be conferred with such a competence, not all EU Member States have conferred upon RB such specific powers. It might be that in some Member States, such powers could be implicitly foreseen, but this is not the case in every EU Member States. On

the basis of such policy option, it would appear necessary to adopt legislative measures at EU level to extend RBs' powers as to make these bodies competent for supervising the organisation of the handling of liability cases in the railway industry. This could be through the revision of Article 30 of Directive 2001/14 on Regulatory Bodies.

This would be accompanied by a recommendation made to the EU Member States to set up an "alternative dispute resolution" system. which would constitute an alternative to litigation, offering a quicker, cheaper and confidential way of sorting out disputes between companies within the railway industry and, by agreement, with companies outside it. Such a system would include, mediation, where the parties to a dispute want to reach an agreement but need some help in doing so fairly, expert determination, where an independent expert accepted by both parties reaches a decision taking account both of his own knowledge and of arguments presented to him, and arbitration, a judicial process where the award is final and binding and can be registered as a judgement on application to the court and enforced in the same way. These alternatives may already exist in various EU Member States, but are not institutionalised specifically for railways as is the case in the UK.

However, this policy option is based on a system which was set up as a condition to the privatisation of the sector in the UK. The situation in the UK is not comparable to the situation in the other EU Member States where there are incumbent RUs. Indeed, regarding the findings of the current Study it is doubtful that all the RUs active in a Member State could negotiate at equal footing with incumbents and IMs to determine the way liabilities should be allocated. In addition, regarding the nature and content of such agreement, prior delegation from the political power appears to be required, at least in some EU Member States. Finally, the possible strengthening of the role of RB at European level, if necessary, should be envisaged in a broader perspective than only regarding liability issues.

Therefore, although this policy option could achieve the policy objectives of enhancing the internal market for railway services through simplification and reduction of burdens, such as costs, such policy option would probably reveal difficult to implement and to achieve the other policy objectives.

(2) the adoption of a CAHA system at EU level

This policy option would lead the European Commission to adopt a recommendation as explained above (section 4.3.2), encouraging directly RUs, possibly represented by CIT and UIC, and IMs, possibly represented by RNE, to adopt an agreement allocating their respective liabilities below a certain thresholds and to designate a lead party which would handle the case above the threshold. The Commission could encourage the industry to do so for instance through the GTC of use of railway infrastructure, currently under negotiation.

However, such EU agreement would have to take into consideration all the national civil liability regimes and guarantee their preservation.

In addition, such agreement could not as such be rendered binding upon all RUs and IMs and would depend on the good will of the stakeholders to apply it. If, as is the case for the CAHA system, such agreement is to be rendered compulsory upon all RUs and IMs, some kind of approval should be sought at EU level. There is currently no EU Regulatory Body therefore another body would have to be specifically empowered to do it. In any case, regarding the nature and content of such agreement, prior delegation from the political power appears to be required, so that there would be a need for a legislative act to impose upon RUs and IMs to be bound by such possible agreement.

As the first variant of a CAHA system, analysed above, although this policy option could achieve the policy objectives of enhance the internal market for railway services through simplification and reduction of burdens, such as costs, such policy option would probably be difficult to implement and hence to achieve the other policy objectives.

Another possibility based on the British CAHA would be the integration of supplementary provisions to CUI in the Regulation as described under policy option 4 whereby liabilities would be pre-allocated under a certain threshold. This would further simplify the applicable regime and possibly reduce costs, while guaranteeing reparation even for small claims. Indeed, at present, contracts in some EU Member States retain no liability under a certain threshold with a view to avoiding costs to be exposed for damages considered as relatively small. However, if several accidents occur with damage remaining under the threshold, RUs may be disadvantaged by the system. This policy option would help solve smaller claims in a quick, easy and cheap fashion.

EU action could either proceed through soft or hard law. Several policy options, not exclusive from each other, can be proposed.

1) It is possible for the EU not to act. In this case, there are two possible situations: either CUI will find to apply in the EU Member States which have ratified COTIF or not. In both situation, the GTC of use of railway infrastructure could provide a standardised contract between RUs and IMs. Under this scenario, some issues would remain unaddressed and the policy objectives would not be entirely achieved.

2) Among soft law measures, the EU could adopt a recommendation to encourage the industry to finalise and adopt a standardised contract of use of railway infrastructure. Such recommendation would provide some guidance as to the results that the standardised contract should achieve and the manner to do so. This would help enhancing the internal market and secure effective right of recourse where the RUs have paid damages whereas the damage could be attributed to the IMs. This would clarify the applicable regimes. However, such standardised contract would remain subject to interpretation and application by national courts.

3) Another soft law measure could consist of encouraging all EU Member States to publish information on their civil liability regimes and the IMs to publish their models of contracts, would provide RUs a first overview of the existing civil liability regimes. This policy option could reduce to a certain extent information costs and possibly clarify the applicable rules. However, such policy option is not as such able to guarantee the right of recourse of RUs which paid damages where the IM was actually responsible. Nor could this option unify the applicable rules and equalise the relationship between IMs and RUs. That being said, enhanced transparency might have induced effect leading to spontaneous improvement.

4) Among hard law measures the EU could adopt a EU Regulation aimed at harmonising the contractual civil liability regimes between RUs and IMs. This option could be adopted if the CUI were not to apply. This policy option is able to achieve the policy objectives laid down in this Study.

5) The EU also could accede to the COTIF and render CUI applicable. In such a case, however, in order to fill the gaps left by CUI, this option could be adopted together with the previous option, namely the adoption of a EU Regulation. This Regulation would only address the issues which stem from gaps in the CUI. It would then constitute a complement to the CUI. This policy option, combined with the previous, is able to achieve the policy objectives set out in this Study.

6) The EU could also take inspiration in the British CAHA system, at least as regards small claims below a certain thresholds, for which liability could pre-allocated through Regulation. This policy option could help the first objective of enhancing the internal market by reducing burdens, but would not alone be able to achieve the other objectives set out in this Study.

## Annexes

## I. Table comparing national legal regimes

## II. Table comparing the contractual clauses

## III. Table comparing the COTIF liability regimes

## IV. Table comparing CUI and GTC

## V. Description of Regulation 1371/2007 on rail passengers' rights and obligations

## VI. Description of the liability regime of the CIM – Appendix B to COTIF

## VII. Analysis of non-contractual liability for RU under EU law

## VIII. Questionnaires sent to the stakeholders

## IX. Summary of replies of RUs