

STUDY OF COMPLIANCE

REGARDING

EU-RAILWAY LAW

AND

OSJD-RAILWAY LAW

FOR

EUROPEAN COMMISSION

DIRECTORATE-GENERAL FOR ENERGY AND TRANSPORT
DIRECTORATE

Dated

12 March 2007

Dr. Mansur Pour Rafsendjani and Christian-Thomas Stempfle

NÖRR STIEFENHOFER LUTZ • Partnerschaft

Brienner Straße 28

80333 München

CONTENT

EXECUTIVE SUMMARY.....	25
I. THE DEVELOPMENT AND UNIFICATION OF RAIL TRANSPORT LAW IN EUROPE	25
1. The Development of European Railway Transport Law	25
2. The Unification of EC Rail Transport Law	25
II. The Organisation for co-operation of railways in Eastern Europe and Asia (OSJD)	26
1. The legal personality of the OSJD.....	26
2. The Bodies of the OSJD	26
3. Resolutions of the OSJD.....	27
4. Jurisdiction of the OSJD	27
5. Common Railway Policy of the OSJD.....	27
6. Strategic Objectives of the OSJD	28
7. Implementation of Transport Policy of the Member States of the OSJD	28
8. Railway corridors	29
9. Consideration of EC Directives.....	29
10. The Influence of EC Transport Policy on the OSJD	29
11. Targets	30
12. Membership	30
III. The relevant EC legislation	30
IV. The OTIF.....	30
V. The OSJD agreements	31
1. Convention of the OSJD (OSJD Statute 2002).....	31
2. Agreement on International Passenger Transport (SMPS).....	31
3. Agreement on International Railway Goods Transport (SMGS).....	31
4. Rules on the Use of Wagons (PPW with its Annex 1).....	32
5. International Passenger Tariff (MPT).....	32
6. Uniform Transit Tariff (ETT).....	32
7. International Transit Tariff (MTT)	32
8. Convention on the Use of uniform Containers (Container Agreement)	32
9. Agreement on Organisational and Operational Aspects of Combined Transport in the Communication between Europe and Asia (Agreement on Combined Transport).....	32
VI. COMPARATIVE ANALYSIS.....	33
1. Independence of the Railway Undertakings	33

1.1.	Independence from the State.....	33
1.2.	Separation of the Railway Undertakings from the Infrastructure Managers	33
2.	Restriction on State Aid and Guarantees	34
3.	Interoperability.....	34
4.	Access to the Railway Infrastructure for Independent Carriers.....	37
5.	Wagon usage in international Railway Transport.....	37
6.	The Use of uniform Containers	37
7.	Combined Transport	38
8.	Relations between Railways and Users.....	39
8.1.	The Transport of Passengers.....	39
8.1.1.	Concordant Basis: International transport.....	39
8.1.2.	Exceptions from scope of application.....	39
8.1.3.	Areas regulated	39
8.1.4.	Obligation to transport.....	39
8.1.5.	Contract of carriage.....	39
8.1.6.	Transport of Passengers and Luggage/ Express Goods.....	39
8.1.7.	Further specifics.....	40
8.1.8.	Transport of Luggage	40
8.1.9.	Transport of Express Goods.....	40
8.1.10.	Transport Charges/Costs.....	40
8.1.11.	Liability for Loss, Damage and Delay of Luggage.....	41
8.1.12.	Liability of the Carrier for Personal Injury and Damage to Hand Luggage	42
8.1.13.	The Passenger's Rights and Obligations in Case of Delay, Cancellation, Missing Connection.....	42
8.1.14.	Joint Liability of Carriers	42
8.1.15.	Liability of Agents	43
8.1.16.	Liability of Passengers	43
8.1.17.	Extinction of Claims under the Conventions	43
8.1.18.	Limitation of Claims	43
8.1.19.	The Making of Claims	44
8.1.20.	Court Jurisdiction.....	45
8.1.21.	Accounting between the Railways/Carriers	45
8.1.22.	Recourse between the Railways/Carriers.....	45
8.1.23.	Information Obligation	45
8.2.	The Transport of Goods	46

8.2.1.	Contract of Carriage and Obligation to Transport	46
8.2.2.	Freight	46
8.2.3.	Payment of Costs.....	46
8.2.4.	Conclusion of the Contract of Carriage	46
8.2.5.	Acceptance of Goods for Transport.....	46
8.2.6.	Packaging, Marking, Sealing and Loading	47
8.2.7.	Value and Interests in the Consignment	47
8.2.8.	Accompanying Documents / Common Consignment Note	47
8.2.9.	Charging of Costs and Additional Charges.....	48
8.2.10.	Transit Periods	48
8.2.11.	Delivery of the Goods, Tracing	48
8.2.12.	Investigation	49
8.2.13.	Lien of the Railways.....	49
8.2.14.	Amendment to the Contract of Carriage under the SMGS	50
8.2.15.	Impediments to Transport and Delivery	50
8.2.16.	Liability of the Railways	51
8.2.17.	Relief from Liability.....	51
8.2.18.	Burden of Proof.....	52
8.2.19.	Amount of Compensation	53
8.2.20.	Interest on Compensation	53
8.2.21.	Complaints, Limitation of Claims	53
	(1) Complaints	54
	(2) Limitation.....	54
8.2.22.	Accounting and Regress between the Railways	54
9.	The Fixing of Tariffs	55
	REPORT.....	56
A.	TASK, PURPOSE AND SCOPE OF THE REPORT.....	56
I.	Introduction	56
II.	Task Specifications According to Annex A of the Contract TREN/CC/01-2005 Lot 1 Legal Assistance Activities	58
III.	Scope of the Study	59
B.	THE DEVELOPMENT AND UNIFICATION OF RAIL TRANSPORT LAW IN EUROPE	59
I.	The Development of European Railway Transport Law	59
II.	The Unification of EC Rail Transport Law	63

C.	THE ORGANIZATION FOR CO-OPERATION OF RAILWAYS IN EASTERN EUROPE AND ASIA (OSJD).....	64
I.	General Overview	64
II.	The Bodies of the OSJD.....	66
	1. Governing Bodies.....	67
	1.1. The Ministerial Board	67
	1.2. Conference of General Directors	68
	2. Executive Body: the Committee.....	68
	3. Working Bodies.....	69
	3.1. Commissions	69
	3.2. Joint Working Groups	69
	3.3. Working Groups.....	70
III.	Jurisdiction of the OSJD	70
	1. The Continuous Development of International Rail Transport	71
	2. Continuous Development of International Transport Law	71
	3. Co-operation in Economic, Informational, Technical and Ecological Matters.....	71
	4. Improvement of Competitiveness of Railways.....	71
	5. Technical Development	71
	6. Co-operation with Other International Organizations.....	72
IV.	Membership.....	72
	1. Members	72
	2. Member States.....	73
	3. Observers and Associate Companies	73
	4. The Admission of New Members	73
	5. Termination of Membership.....	74
V.	Resolutions of the OSJD	74
VI.	Common Railway Policy of the OSJD	75
	1. Initial Situation in the Member States	76
	1.1. Co-operation between Member States and Railways	77
	1.1.1. Railway Infrastructure	77
	1.1.2. Member States and Railway Passenger Transport.....	77
	1.1.3. Member States and Railway Goods Transport	78
	1.1.4. Promotion of Key Elements of a Modern Railway Network... 78	
	(1) Telecommunication and Information	78
	(2) Environmental Protection.....	79
	(3) Logistic Centres.....	80

1.2.	International Passenger Transport.....	80
2.	Strategic Objectives of the OSJD	80
2.1.	Reduction of Delivery Times.....	82
2.2.	Acceleration of Goods Transport.....	82
3.	Implementation of Transport Policy in the Member States of the OSJD	82
4.	Railway Corridors	83
5.	Consideration of EU Directives.....	83
6.	Influence of EU Transport Policy on the OSJD	84
6.1.	Guarantee of Independence of Management of Railway Companies and Separation of Management of Railway Infrastructure from Operations	84
6.2.	Financial Independence of Railway Companies	85
7.	Targets	85
VII.	The Legal Value of OSJD Rules and Agreements	86
1.	Legal Status of the OSJD	86
2.	Comparison in Relation to OTIF	88
3.	Rule of Precedence in the Event of Conflict of Laws	88
4.	The Legal Nature of the OSJD rules.....	88
5.	The Legal Nature of the Individual OSJD Agreements and Potential Conflicts with EC-Legislation.....	90
5.1.	The Statute of the OSJD.....	90
5.2.	SMPS	91
5.3.	SMGS.....	92
5.4.	The Tariffs (MPT, MTT, ETT).....	94
5.5.	Convention on the Use of Uniform Containers.....	96
5.6.	Agreement on Organisational and Operational Aspects of Combined Transport	97
5.7.	Conclusion.....	97
6.	Legal Status.....	97
7.	Working Languages.....	97
8.	Headquarter of the Committee	98
D.	IMPORTANT DIRECTIVES AND TREATIES.....	98
I.	Directives and Regulations of the EC	98
1.	Regulation 1017/68/EEC on Competition in Railway Transport.....	98
2.	Directives 91/440/EEC, 2001/12/EC and 2004/51/EC on the Development of an Open Market.....	99

2.1.	Directive 91/440/EEC	99
2.2.	Directive 2001/12/EC.....	100
2.3.	Directive 2004/51/EC.....	101
3.	Directives 95/18/EC, 2001/13/EC (and 2004/49/EC) on the Licensing of Railway Undertakings.....	101
3.1.	Directive 95/18/EC	101
3.2.	Directive 2001/13/EC.....	102
3.3.	Directive 2004/49/EC.....	102
4.	Directives 95/19/EC, 2001/14/EC (and 2004/49/EC) on the Allocation of Railway Infrastructure Capacity and Charges for the Use of Railway Infrastructure and Safety Certification	103
4.1.	Directive 95/19/EC	103
4.2.	Directive 2001/14/EC.....	103
4.3.	Directive 2004/49/EC.....	104
5.	Directive 96/48/EC, 2001/16/EC and 2004/50/EC on interoperability	105
5.1.	Directive 96/48/EC	105
5.2.	Directive 2001/16/EC.....	105
5.3.	Directive 2004/50/EC.....	106
6.	Directive 92/106/EEC on the establishment of common rules for certain types of combined transport of goods.....	107
7.	Regulation 881/2004/EC on Establishing a European Railway Agency (Agency Regulation).....	108
II.	OTIF	109
1.	COTIF.....	109
2.	According to the CIV.....	109
3.	According to the CIM	110
4.	RID	110
5.	CUV.....	110
6.	RICo	110
7.	CUI.....	111
8.	APTU and ATMF	111
III.	OSJD.....	111
1.	Convention of the OSJD (2002)	111
2.	Agreement on International Passenger Transport (SMPS).....	111
3.	Agreement on International Railway Goods Transport (SMGS).....	112
4.	Rules on the Use of Wagons (PPW with its Annex 1).....	112
5.	International Passenger Tariff (MPT).....	112

6.	International Transit Tariffs for Goods Transport	113
6.1.	Uniform Transit Tariff (ETT)	113
6.2.	International Transit Tariff (MTT).....	113
7.	Convention on the Use of Uniform Containers	113
8.	Agreement on Organisational and Operational Aspects of Combined Transport in the Communication between Europe and Asia	113
E.	COMPARATIVE ANALYSIS.....	114
I.	Independence of the Railway Companies.....	114
1.	Independence from the Member State	114
1.1.	Legal Situation in the EU	114
1.1.1.	Competition in the Railway Sector.....	114
1.1.2.	Opening of the Market.....	116
	(1) Directive 91/440/EEC	116
	(2) Directive 2001/12/EC.....	118
1.2.	Legal Situation under OSJD Law.....	119
2.	Independence of the Railway Undertakings from Infrastructure Managers	120
2.1.	Legal Situation in the EU	120
2.2.	Legal Situation under OSJD Law.....	122
3.	Interim Conclusion	122
II.	Restriction on State Aid and Guarantees	124
1.	State Aid within the EU	124
1.1.	Community Aid	124
1.1.1.	General	124
1.1.2.	Cohesion Policy of the Community.....	124
1.2.	Aid Granted by Member States.....	124
1.2.1.	General	124
1.2.2.	The Special Provisions of Article 73 seq. EC Relating to Transport.....	125
1.2.3.	Particular Cases.....	126
1.3.	Aid to Promote Trans-European Infrastructure Networks	126
2.	Aid and Guaranties in the OSJD.....	128
3.	Interim Conclusion	128
III.	Interoperability	129
1.	Legal Situation in the EU.....	129
1.1.	Directive 96/48/EC	129
1.2.	Directive 2001/16/EC.....	130

2.	Legal Situation on the Territory of the OSJD	130
3.	Potential Legal Conflicts regarding Interoperability	131
3.1.	Technical specifications	132
3.1.1.	EC	132
3.1.2.	COTIF	132
3.1.3.	OSJD	133
	(1) Rules on Wagon Usage	133
	(2) Convention on the Use of Uniform Containers (Container Agreement).....	134
	(3) OSJD Convention on Combined Transport	135
	(4) Bulletins “O 920 -1 to -15”, “O+P 582-1” and “O+P 582-2”.....	136
3.1.4.	Result.....	136
3.2.	Technical standards.....	137
3.3.	Authorisation for rolling stock in international traffic	137
3.3.1.	EC law	137
3.3.2.	COTIF	138
3.3.3.	OSJD	138
3.3.4.	Result.....	139
3.4.	Mutual recognition of technical admission.....	140
3.5.	Vehicle registration and management of the registers.....	140
3.5.1.	EC law	140
3.5.2.	COTIF	141
3.5.3.	OSJD	141
3.5.4.	Result.....	141
3.6.	Vehicle numbering and marking	141
3.6.1.	COTIF	142
3.6.2.	OSJD	142
3.6.3.	Result.....	142
3.7.	Maintenance rules	142
3.7.1.	EC law	142
3.7.2.	COTIF	144
3.7.3.	OSJD	144
3.7.4.	Result.....	145
3.8.	Accident investigation.....	145
3.8.1.	EC law	145
3.8.2.	COTIF	146

3.8.3.	OSJD	146
3.8.4.	Result.....	146
3.9.	Conclusion.....	146
IV.	Access to the Railway Infrastructure for Independent Carriers	149
1.	Provisions of the EU.....	149
1.1.	Rights of Access	149
1.1.1.	Transport License.....	151
(1)	Reliability, Article 6 of Directive 95/18/EC.....	152
(2)	Financial Capacity, Article 7 Directive 95/18/EC	152
(3)	Professional Competence, Article 8 Directive 95/18/EC.....	152
(4)	Insurance Cover, Article 9 Directive 95/18/EC	153
1.1.2.	Safety Certificate.....	153
1.1.3.	Allocation of Infrastructure Capacity	154
(1)	Participants in the Allocation Procedure	154
(2)	Procedure	154
(3)	Legal Consequences of Allocation.....	156
1.1.4.	Access Agreements	156
(1)	National Law	157
(2)	CUI	157
(a)	Scope of Application	158
(b)	Content and Form of the Agreement.....	158
(c)	Liability	158
(d)	Limitation	160
(e)	Court Jurisdiction	160
1.2.	Fees for Use of Infrastructure	160
1.3.	Regulatory Body	161
2.	Regulations of the OSJD.....	161
3.	Interim Conclusion	162
V.	Wagon Usage in International Railway Transport	162
1.	Comparison between CUV and PPW.....	162
2.	Topics of Regulation	164
2.1.	Requirements for Wagons in Use.....	164
2.1.1.	According to the CUV	164
2.1.2.	Requirements on Wagons in Use according to the RWU (Annex 1 to the PPW).....	164
2.2.	Renting of Wagons/Handing-over of Wagons	165
2.2.1.	According to the CUV	165

2.2.2.	According to the RWU (Annex 1 to the PPW).....	165
(1)	Procedure for Renting Wagons.....	165
(2)	Handing-over of Wagons	165
2.3.	Use of Wagons.....	166
2.3.1.	According to the CUV	166
2.3.2.	According to the RWU	166
(1)	Conditions for the Use of Goods Wagons	166
(2)	Charging for the Use of Wagons.....	167
(3)	Use of Means of Transport	167
2.4.	Liability.....	167
2.4.1.	Liability in Case of Loss.....	167
(1)	According to the CUV.....	168
(2)	According to the RWU.....	168
2.4.2.	Liability for Damage	170
(1)	Liability According to the CUV	170
(2)	Maintenance and Repair of Wagons according to the RWU	170
2.5.	Treatment of Private Goods Wagons According to RUW	171
2.6.	Damage Caused by Wagons	173
2.6.1.	According to the CUV	173
2.6.2.	According to the RWU	173
2.7.	Subrogation	173
2.7.1.	According to the CUV	173
2.7.2.	According to the RWU	174
2.8.	Return of Wagons	174
2.8.1.	According to the CUV	174
2.8.2.	According to the RWU	174
2.9.	Liability for Agents.....	175
2.9.1.	According to CUV.....	175
2.9.2.	According to RUW	175
2.10.	Miscellaneous	175
2.10.1.	According to the CUV	175
2.10.2.	According to the RWU	176
3.	Interim Conclusion	176
3.1.	Provisions Which are Very Similar.....	176
3.2.	Areas with Minor Differences	177
3.3.	Areas with Major Differences.....	177

VI.	The Use of Uniform Containers.....	178
1.	Comparison.....	178
2.	Scope of Application of the CIM	178
3.	Topics of Regulation	179
3.1.	Technical Requirements	179
3.1.1.	According to CIM	179
3.1.2.	According to the Container Agreement	179
3.2.	Containers Owned by the Railways	179
3.2.1.	According to CIM	179
3.2.2.	According to the Container Agreement	180
3.2.3.	Handing-over of Containers.....	180
	(1) According to CIM.....	180
	(2) According to the Container Agreement.....	181
3.2.4.	Charges.....	181
	(1) According to CIM.....	181
	(2) According to the Container Agreement.....	182
3.2.5.	Use of Containers.....	182
	(1) According to CIM.....	182
	(2) According to the Container Agreement.....	182
3.2.6.	Return of Containers	183
	(1) According to CIM.....	183
	(2) According to the Container Agreement.....	183
3.2.7.	Container Transport.....	183
	(1) According to CIM.....	183
	(2) According to the Container Agreement.....	183
3.2.8.	Care and Repair of Containers	184
	(1) According to CIM.....	184
	(2) According to the Container Agreement.....	184
3.2.9.	Loss and Damage	185
	(1) According to CIM.....	185
	(2) According to the Container Agreement.....	185
3.3.	Private Containers.....	186
	(1) According to CIM.....	186
	(2) According to the Container Agreement.....	186
3.4.	Admission.....	186
	(1) According to CIM.....	186
	(2) According to the Container Agreement.....	186

3.4.1.	Data in Consignment Note.....	186
(1)	According to the CIM	186
(2)	According to the Container Agreement.....	187
3.4.2.	Return and Re-use	187
(1)	According to the CIM	187
(2)	According to the Container Agreement.....	187
3.4.3.	Loss and Damage	187
(1)	According to the CIM	187
(2)	According to the Container Agreement.....	187
4.	Interim Conclusion	188
4.1.	Most concordance	188
4.2.	Minor Differences.....	189
VII.	Combined Transport.....	189
1.	The OSJD Convention on Organisational and Operational Aspects of Combined Europe-Asian Transport	190
1.1.	General Provisions	190
1.2.	Concluding Provisions	191
2.	Directive 92/106/EEC.....	191
VIII.	Relations between Railways and Users	192
1.	Transport of Passengers	192
1.1.	Subject for Comparison.....	192
1.2.	Participants	193
1.2.1.	Of the CIV	193
1.2.2.	Of the SMPS	193
1.3.	Scope of Application.....	194
1.3.1.	Concordant Basis: International transport.....	194
1.3.2.	Combined Transport	194
(1)	According to the CIV	194
(2)	According to the SMPS	194
1.3.3.	Exceptions from Scope of application	194
(1)	According to the CIV	194
(2)	According to the SMPS	195
1.3.4.	Areas Regulated	195
(1)	Concordant Regulation.....	195
(2)	Regulations in the CIV	195
(3)	Regulations in the SMPS.....	195
1.4.	Topics of Regulation	195

1.4.1.	Obligation to Transport	195
	(1) According to the CIV	196
	(2) According to the SMPS	196
	(3) Interim Conclusion	196
1.4.2.	Contract of Carriage	197
	(1) According to the CIV	197
	(2) According to the SMPS	197
	(3) Interim Conclusion	197
1.4.3.	Transport of Passengers and Luggage/ Express Goods.....	198
	(1) Persons	198
	(a) Concordant Regulations.....	198
	(b) Regulations of the CIV	198
	(c) Regulations of the SMPS	198
	(2) Admitted Objects	199
	(a) Hand Luggage	199
	(aa) According to the CIV	199
	(bb) According to the SMPS	199
	(cc) Luggage.....	200
	(dd) According to the CIV	200
	(ee) According to the SMPS	200
	(b) Special Objects.....	200
	(aa) According to the CIV	200
	(bb) According to the SMPS	201
	(cc) Interim Conclusion.....	201
	(c) Express Goods.....	201
	(aa) According to the CIV	201
	(bb) According to the SMPS	201
	(3) Supervision of Compliance with the Provisions on Permitted Objects.....	201
	(a) According to the CIV.....	201
	(b) According to the SMPS	202
	(c) Interim Conclusion	202
1.4.4.	Transport of passengers	203
	(1) Ticket	203
	(a) According to the CIV.....	203
	(b) According to the SMPS	203
	(c) Interim Conclusion	204

	(2) Allocation of Seats.....	204
	(a) According to the CIV.....	204
	(b) According to the SMPS	204
1.4.5.	Transport of Luggage	205
	(1) Concordant Regulations	205
	(2) According to the CIV	205
	(3) According to the SMPS.....	206
	(4) Interim Conclusion	206
1.4.6.	Transport of Express Goods.....	207
	(1) According to the CIV	207
	(2) According to the SMPS.....	207
1.4.7.	Transport Charges/Costs.....	208
	(1) Time of Performance/Charging	208
	(a) According to the CIV.....	208
	(b) According to the SMPS	209
	(aa) Time of Performance.....	209
	(bb) Calculation of Charges	209
	(c) Interim Conclusion.....	210
	(2) Consequences of Non-Payment	211
	(a) According to the CIV.....	211
	(b) According to the SMPS	211
	(c) Interim Conclusion.....	211
	(3) Refund of Carriage Charges	212
	(a) According to the CIV.....	212
	(b) According to the SMPS	212
1.4.8.	Liability of the Carrier for Personal Injury and Damage to Hand Luggage	212
	(1) General.....	213
	(2) Liability of the Carrier for Personal Injury According to CIV	213
	(a) Liability Grounds, Article 26 § 1 CIV	213
	(b) Release from Liability, Article 26 § 2 CIV	214
	(c) Legal Consequences, Article 27 to 30 CIV	214
	(3) Liability of the Carrier for Personal Injury according to SMPS	215
	(4) Liability for Loss or Damage to Hand Luggage According to CIV.....	215

	(a) Liability Grounds, Article 33 CIV	216
	(b) Release from Liability	216
	(c) Legal Consequences	216
	(5) Liability for Loss or Damage to Hand Luggage According to SMPS	216
	(6) Interim Conclusion	217
1.4.9.	Liability for Loss, Damage and Delay of Luggage.....	217
	(1) Ground of Liability	217
	(a) According to the CIV.....	217
	(b) According to the SMPS	217
	(c) Interim Conclusion	217
	(2) Relief from Liability	217
	(a) According to Article 36 § 2 and § 3 CIV	218
	(b) According to Article 32 SMPS.....	218
	(c) Interim Conclusion.....	219
	(3) Legal Consequences.....	219
	(a) Loss	219
	(aa) Concordant Regulations	219
	(bb) According to the CIV	219
	(cc) According to the SMPS	219
	(dd) Interim Conclusion.....	220
	(b) Damaged Goods	220
	(c) Delay	220
	(aa) According to the CIV	220
	(bb) According to the SMPS	221
	(cc) Interim Conclusion.....	222
1.4.10.	The Passenger's Rights in Case of Delay, Cancellation, Missing Connection.....	222
	(1) According to the CIV	222
	(a) Repeat Performance.....	222
	(b) Compensation.....	222
	(2) According to the SMPS.....	223
	(3) Interim Conclusion	223
1.4.11.	Joint Liability of Carriers	223
	(1) Concordant Regulation.....	223
	(2) Exceptions in the CIV	224
1.4.12.	Liability of Agents	224

(1) Concordant Regulation.....	224
(2) According to the CIV	224
(3) According to the SMPS	224
1.4.13. Liability of Passengers	224
(1) According to the CIV	225
(2) According to the SMPS	225
(3) Interim Conclusion	225
1.4.14. Extinction of Claims under the Conventions	225
(1) According to the CIV	225
(2) According to the SMPS	226
1.4.15. Limitation of Claims	226
(1) According to the CIV	226
(2) According to the SMPS	227
(3) Interim Conclusion	227
1.4.16. The Making of Claims	227
(1) Reclamation/Complaints	228
(a) According to the CIV.....	228
(b) According to the SMPS	228
(2) Legal Proceedings.....	228
(a) According to the CIV.....	228
(b) According to the SMPS	229
1.4.17. Court Jurisdiction.....	229
(1) According to the CIV	229
(2) According to the SMPS	229
1.4.18. Accounting between the Railways/Carriers	230
(1) Concordant Regulations	230
(2) Special Features of the CIV	231
(3) Special Features of the SMPS.....	231
(4) Interim Conclusion	231
1.4.19. Recourse Between the Railways/Carriers	231
(1) Recourse Rights	231
(a) According to the CIV.....	231
(b) According to the SMPS	232
(c) Interim Conclusion	233
(2) Recourse Procedure	233
(a) Concordant Regulations.....	233
(b) According to the CIV.....	234

	(c) According to the SMPS	234
1.4.20.	Information Obligation	235
	(1) According to the CIV	235
	(2) According to the Commission Draft Regulation on the Rights and Duties of Passengers in Cross-border Rail Transport	235
	(3) According to the SMPS	235
1.5.	Interim Conclusion.....	236
1.5.1.	Areas of Most concordance.....	237
1.5.2.	Areas of Minor Differences	237
1.5.3.	Areas of Major Differences.....	237
	(1) Obligation to Transport and Compulsory Tariff	237
	(2) Executed Contract/Consensual Contract	238
	(3) Liability for Material Damage	239
	(4) Liability for Personal Injury	239
	(5) Rights of Passengers in Case of Delay, Cancellation or Missed Connections	239
	(6) Liability for Agents.....	240
2.	The Transport of Goods	240
2.1.	Subject for Comparison.....	240
2.2.	Participants	241
2.3.	Areas of Application	241
2.3.1.	According to the CIM.....	241
2.3.2.	According to the SMGS.....	241
2.4.	Topics of Regulation	242
2.4.1.	Contract of Carriage and Obligation to Transport	242
	(1) According to the CIM	242
	(2) According to the SMGS	243
2.4.2.	Freight to be Transported.....	243
	(1) According to the CIM	243
	(2) According to the SMGS	243
2.4.3.	Payment of Costs.....	244
	(1) According to the CIM	244
	(2) According to the SMGS	244
2.4.4.	Conclusion of the Contract of Carriage	245
	(1) According to the CIM	245
	(2) According to the SMGS	245

2.4.5.	Acceptance of Goods for Transport.....	246
	(1) According to the CIM	246
	(2) According to the SMGS	246
2.4.6.	Packaging, Marking, Sealing and Loading	246
	(1) According to the CIM	247
	(2) According to the SMGS	247
2.4.7.	Value and Interests in the Consignment	248
	(1) According to the CIM	248
	(2) According to the SMGS	248
2.4.8.	Accompanying Documents	248
	(1) According to the CIM	249
	(2) According to the SMGS	249
2.4.9.	Common Consignment Note	250
	(1) According to the CIM	251
	(2) According to the SMGS	251
2.4.10.	Charging of Costs and Additional Charges.....	252
	(1) Charging According to the CIM	252
	(2) Charging According to the SMGS	254
2.4.11.	Transit Periods	258
	(1) According to the CIM	258
	(2) According to the SMGS	258
2.4.12.	Delivery of the Goods, Tracing.....	261
	(1) According to the CIM	261
	(2) According to the SMGS	262
2.4.13.	Investigation	263
	(1) According to the CIM	263
	(2) According to the SMGS	264
2.4.14.	Lien of the Railways.....	266
	(1) According to the CIM	266
	(2) According to the SMGS	266
2.4.15.	Amendment to the Contract of Carriage Under the SMGS ...	266
	(1) According to the CIM	267
	(2) According to the SMGS	268
2.4.16.	Impediments to Transport and Delivery	270
	(1) According to the CIM	270
	(2) According to the SMGS	272
2.4.17.	Liability of the Railways	274

(1)	Basis of Liability	274
(a)	According to the CIM.....	274
(b)	According to the SMGS.....	275
(2)	Relief from Liability	275
(a)	According to the CIM.....	275
(b)	According to the SMGS.....	277
(3)	Burden of Proof	278
(a)	According to the CIM.....	278
(b)	According to the SMGS.....	278
(4)	Amount of Compensation.....	279
(a)	According to the CIM.....	279
(b)	According to the SMGS.....	282
(5)	Interest on Compensation.....	283
(a)	According to the CIM.....	283
(b)	According to the SMGS.....	283
2.4.18.	Complaints, Limitation of Claims	284
(1)	Complaints	284
(a)	According to the CIM.....	284
(b)	According to the SMGS.....	286
(2)	Limitation.....	288
(a)	According to the CIM.....	288
(b)	According to the SMGS.....	289
2.4.19.	Accounting and Regress between the Railways	289
(1)	According to the CIM	289
(2)	SMGS.....	290
2.4.20.	General Provisions	291
(1)	According to the CIM	291
(2)	According to the SMGS	292
2.5.	Interim Conclusion.....	293
2.5.1.	Regulations which Display the Greatest Correspondence.....	294
2.5.2.	Areas Where Regulations Differ but Without Particular Potential for Conflict.....	294
2.5.3.	Areas Where Harmonisation is Required.....	295
3.	Interaction of SMPS and SMGS with Directive 91/440 EC.....	297
4.	The Fixing of Tariffs	298
4.1.	Applicable Regulations	298
4.1.1.	In the Territory of the EU	298

4.1.2.	In the Territory of the OSJD	299
4.2.	Scope of Application of the OSJD Tariffs.....	299
4.2.1.	Area of Application of the International Railway Transit Tariff (MTT)	300
4.2.2.	Application of the Uniform Transit Tariff (ETT).....	301
4.2.3.	Scope of Application of the Agreement on International Public Transport Tariffs (MPT)	301
4.3.	Topics of Regulation	303
4.3.1.	The Contract on International Railway Tariffs	303
(1)	General.....	303
(2)	Organs of the MTT	303
(3)	The Committee of Representatives	304
(4)	Concluding Provisions	304
4.3.2.	The International Railway Transit Term (MTT)	305
(1)	Members.....	305
(2)	Language of the Tariff	306
(3)	Currency of the Tariff	306
(4)	Calculation of the Transport Charges.....	306
(5)	Charging for the Transport	308
(a)	Charges for High Speed Transport	308
(b)	Calculation of the Transport Charge for Transport at Lower Speed.....	309
(aa)	Wagon Transport	309
(bb)	Transport in HABBINS-Wagons	309
(cc)	Small Transport	310
(c)	Special Tariffs Regulations	310
(aa)	Large Dimension Goods.....	310
(bb)	Goods of Excess Length.....	310
(cc)	Dangerous Goods.....	311
(dd)	Private Wagons	311
(d)	Transport Regulations for Containers.....	311
(e)	Transport Regulations for Piggyback Transport..	311
(6)	Transport Procedure.....	312
(a)	Transport East/West	312
(aa)	Transport to the First Boarder Station.....	312
(bb)	Transport from the First Boarder Station ...	312
(b)	Transport West to East.....	313

4.3.3.	Uniform Transit Tariff (ETT)	313
(1)	Calculation of Freight	314
(2)	Issue of the Transport Documents.....	315
(a)	Issue of the Transport Documents for Transport between ETT- and/or SMGS-Estates	315
(b)	Issue of Transport Documents in Transport between ETT-States and Non-SMGS-States	315
(aa)	Transports of Goods in States in Which the SMGS is not Applied	315
(bb)	Transport of Goods from States in Which the SMGS is not Applied.....	316
4.3.4.	The Agreement on the International Public Transport Tariffs (MPT Agreement)	316
(1)	General.....	316
(2)	Interpretation of and Amendments to the MPT Agreement	318
(3)	Proportion of Votes, Representation of Other Railway Companies	319
(4)	Accession to the MPT Agreement	319
(5)	Withdrawal from the MPT Agreement.....	319
4.3.5.	The International Public Railway Transport Tariff (MPT) ...	320
(1)	General Provisions.....	320
(2)	Remuneration for the Transport of Passengers, Luggage and Goods	320
(3)	Excess Fares	321
(4)	Rounding Up Weight and Fares.....	321
(5)	Terms and Conditions of Use for Special Trains, Railcars and Wagons.....	322
(a)	Scope of Application of Part IV of the MPT Agreement.....	322
(b)	Special Trains.....	322
(c)	Special Railcars.....	323
(d)	Special Wagons	323
4.3.6.	Interim Conclusion	323
4.4.	Consideration under European Antitrust Law.....	324
4.4.1.	General Remark	324

4.4.2.	Applicability of European Antitrust Law in the Railway Transport Sector	324
4.4.3.	Article 81 EC	325
(1)	Agreements between Undertakings.....	325
(2)	Appreciable Restriction of Competition.....	326
(3)	Appreciable Impairment of Trade between Countries..	327
(4)	Exemptions from the Ban on Cartels in the Railway Transport Sector	327
(a)	Art. 5 para. 3 Directive 91/440.....	327
(b)	Art. 3 EC Regulation No. 1017/68/EEC	328
(aa)	ETT	329
(bb)	MPT and Contract on the MPT	330
4.4.4.	Interim Conclusion on Antitrust Aspects of the Tariffs.....	331
4.5.	Interim Conclusion for the Determination of Tariffs	331
F.	FINAL CONCLUSIONS	332
I.	Different Role of EC and OSJD.....	332
II.	Results Regarding the Areas Examined	333
1.	Independence of Railways from the State.....	333
2.	Independence of Railway Undertakings and Infrastructure Managers.....	334
3.	Access to the Infrastructure	334
4.	Use of Wagons	334
5.	The Use of Uniform Containers	335
6.	Handing over of Containers	336
7.	Handling of loss and damage	337
8.	Passenger Transport.....	337
9.	Goods Transport.....	341
10.	Fixing of Tariffs	344
G.	ANNEXES	346
I.	Annex I: Structure of the OSJD	346
II.	Annex II: List of Member States	347
III.	Annex III: Members of the OSJD	349
IV.	Annex IV: Wagon Usage.....	350
	Annex V: Uniform Containers.....	352
VI.	Annex VI: Comparison table of passenger rights	354
VII.	Annex VII: Transport of Goods	361
VIII.	Annex VIII: Railway Geography	366

H.	ABBREVIATIONS.....	368
I.	BIBLIOGRAPHY.....	372
I.	Monographs.....	372
II.	Legal Articles	372
III.	Commentaries.....	376
IV.	Publications of the European Commission.....	376

EXECUTIVE SUMMARY

I. THE DEVELOPMENT AND UNIFICATION OF RAIL TRANSPORT LAW IN EUROPE

1. The Development of European Railway Transport Law

After first steps from the late 19th century on, the development of European railway transport law was affected by the changed political and economic conditions after the Second World War.

Two different systems were established in Eastern- and Western-Europe. The OSJD, starting with the Treaty on International Rail Goods Transport (SMGS) in 1951, was founded as an international organisation in 1957. For Western Europe, the Convention on International Railway Transport (COTIF) was concluded in Bern 1980.

Both systems were designed for a state railway system and already experienced fundamental changes due to the liberalisation process promoted by the European Union.

2. The Unification of EC Rail Transport Law

The course of a beginning harmonisation of railway transport law started in the 1990s in the Directives 91/440/EEC, 95/18/EC and 95/19 EC. Key elements of these directives were the preparation of the railway companies for a competitive market. This process continued step by step with three consecutive “Railway Packages”.

The First Railway Package concerned the development of railway companies, the issue of licenses to railway companies and the allocation of infrastructure capacity for the purpose of opening rail transport.

In the Second Railway Package, this opening of the rail transport sector was continued by further measures on the opening of markets and on security and interoperability. In addition, the European Railway Agency was established.

A third Railway Package is not issued but intended to be devoted to the expansion of access to infrastructure for passenger transport, the improvement of passengers' rights, further harmonization of conductor training and the introduction of minimum quality standards in goods transport by rail.

II. The Organisation for co-operation of railways in Eastern Europe and Asia (OSJD)

The Organisation for Co-operation of Railways in Eastern Europe and Asia (OSJD) is a governmentally influenced non-governmental organisation of Eastern European and Asian railway undertakings founded in 1956 and based in Warsaw. The OSJD has currently 25 members plus some western European railway undertakings having observer status.

1. The legal personality of the OSJD

The members of the OSJD are the respective railway undertakings and not the states, although the railway undertakings are represented in the Ministerial Board, the topmost body of the OSJD, by the respective ministers of transport of the relevant states. The OSJD has therefore not the status of an intergovernmental organisation under international public law, but is mere a non-governmental organisation under private international law.

2. The Bodies of the OSJD

The bodies of the OSJD have to be subdivided into governing bodies and working bodies.

The governing bodies of the OSJD are the Ministerial Board and the Conference of the General Directors of the contracting railway undertakings (hereinafter the "**Conference**").

The Ministerial Board is the highest executive body of the OSJD, where the railway undertakings are presented by their respective ministers of transport.

The Conference organises the work and decides on the questions relating to the OSJD tasks.

The executive body of the OSJD is the Committee. It ensures the ongoing work of the OSJD in the periods between the meetings of the Ministerial board and the Conference.

The working bodies of the OSJD are the Commissions, the Joint Working Groups with other international organisations, the international working groups, the Committee of representatives of the member states of the OSJD and other bodies created.

3. Resolutions of the OSJD

For resolutions of the OSJD, every member has one vote. At the level of the Ministerial Board, the decisions are made unanimously. The Conference is in principle deciding with a 2/3-majority. There are some exceptions in case of decisions having financial consequences, decisions affecting the Statute or membership issues.

Distinction has to be made between the OSJD agreements which provide for rules regarding the transport of passengers and goods by railway undertakings and the resolutions passed by the different OSJD bodies which concern the organisational matters of the OSJD itself. The OSJD agreements are only binding for the railway undertakings having concluded them on a voluntary basis.

4. Jurisdiction of the OSJD

The main tasks of the OSJD are the continuous development of international rail transport, a coordinated transport policy, the continuous development of international transport law, the co-operation in economic, informational, technical and ecological questions, the improvement of the competitiveness of railways, the technical development and the co-operation with other international organisations.

5. Common Railway Policy of the OSJD

The Common Railway Policy was established by the Conference in 1997 in Tashkent and later amended within the first Commission of the OSJD between 1998 and 2000. It contains the programmatic guidelines for the common policy of the OSJD. The Common Railway Policy contains a self-critical

analysis of the status and development perspective of the OSJD and the respective contracting railway undertakings in their states, has no legal value and is comparable the EU White Book. The OSJD remarks however the role of railways as a crucial investment multiplier.

The OSJD wants to enforce the co-operation between the contracting railway undertakings and their respective member states and sees the railway infrastructure as a natural monopoly, which should stay under state control.

The OSJD furthermore points out the special role of passenger transport because of its prominence in public mind. With regard to railway goods transport the OSJD wants to reduce transport times, promote and increase combined transport.

Due to the lack of investments, the OSJD promotes investments in the key elements of a modern railway network, which are, according to the OSJD, telecommunication and information, environmental protection and logistic centres.

Regarding the links between Europe and Asia the speed of passenger transport should be rather increased, than the amount of passengers.

6. Strategic Objectives of the OSJD

The strategic objectives of the OSJD are the formation of transport systems and the structural reform of transport aimed at better competition between transport enterprises, in particular the reduction of delivery times and acceleration of goods transport.

These objectives seem however difficult to reach, as of today, not all OSJD agreements provide for the respective opening clauses for the application of other agreements and more contractual freedom. The OSJD furthermore aims to reduce delivery times and to accelerate goods transport.

7. Implementation of Transport Policy of the Member States of the OSJD

According to the Common Railway Policy, the principle objective of the respective national policy should be the economic orientation of railway undertakings and the creation of a competitive railway system under market

economy conditions, the harmonisation of the OSJD standards with the standards of other international organisations.

8. Railway corridors

The OSJD recommends determining certain railway corridors through the territory of various states in main directions, in particular east/west and north/south. Further, the OSJD recommends to build up / to improve the infrastructure around these corridors and provides for suggestions for corridors.

9. Consideration of EC Directives

The OSJD recommends the respective states, whose railway undertakings are members of the OSJD, in particular the non-EU Member States, to apply the relevant EC directives, at least adjusted as the case may be to their national conditions for the purpose of achieving harmonisation of railway transport law in Europe.

10. The Influence of EC Transport Policy on the OSJD

Due to the overlaps with regard to the members or their respective states and due to the observer status of further railway undertakings from Member States, the OSJD and its policy is today under a remarkable influence of the European Union. According to the Common Policy the independence of the management of the railway undertakings from the state and the independence of the principle of separation between management of the railway undertaking and management of the infrastructure are acknowledged as fruitful principles. However, the OSJD emphasizes that access of third parties to infrastructure shall be carefully given which shows a certain reluctance to the opening of the market. However, it is clearly stated in the Common Policy that the member states (by the term “member states” it is not taken into account that the railway undertakings and the relevant states are member to the OSJD) shall arrange for the establishing the political and economical climate in order to achieve above mentioned independence principles. Thereby, the role of the OSJD shall be similar to the role of the COTIF as organisation which acts as platform for bundling and exchanging the various interests of the relevant “member states”.

11. Targets

The targets resumed in the Common Policy are the harmonisation of the legal basis for transport, the creation of a transport territory with connections to the major Eurasian economic centres, the improvement of co-operation with neighbouring states, a strengthening of Combined Transport, a structural alteration of railway transport to increase competitiveness, a coordinated investment policy, the establishment of logistic centres for the intermodal transport, the improvement of the contacts with carrier organizations, the expansion of coordinated competitive tariff policy for transport within international railway transport corridors and the improvement of the railway infrastructure.

12. Membership

The members of the OSJD are the railway undertakings and not the respective states. However, the railway undertakings can be represented in the OSJD either by their respective executive body or by the respective minister of transport. The OSJD now also provides for observing railway undertakings and associate enterprises. New members can join the OSJD by a unanimous decision of the members. The procedure of the admission of new members corresponds to that of the OTIF. Withdrawal is possible at the end of the year, taking into account a notice period of usually six months.

III. The relevant EC legislation

In the study, all relevant Directives and Regulations applicable and in force, in particular the Directives 91/440/EEC, 95/18/EC and 95/19 EC with their amendments and the first and the second Railway Package are included.

IV. The OTIF

As nearly all Member States¹ are also OTIF members, the OTIF, the intergovernmental organisation for international carriage by rail, and its respective agreements were taken into consideration in this study of compliance, as far as the European Union itself has not made any provisions, yet.

¹ With exception of Estonia (currently acceding), Malta and Cyprus.

Due to the differing geographical scope and differing approaches with regard to procedural aspects and the binding effect of COTIF provisions, the application of COTIF provisions in the EU is not always free of conflict. Some Member States have therefore declared the non-application of the COTIF appendices in contrast, ATMF and APTU.

V. The OSJD agreements

1. Convention of the OSJD (OSJD Statute 2002)

The OSJD Statute is the founding document of the OSJD. It deals mainly with organisational questions, while setting out certain political objectives presented in the range of the OSJD Common Railway Policy.

2. Agreement on International Passenger Transport (SMPS)

The Agreement on International Passenger Transport (SMPS) deals with questions of international passenger transport by rail and was signed by the ministries being competent in the various OSJD countries for railway acting thereby as representatives of the relevant state-owned or state-controlled railway undertakings with the exception of these of Hungary and Romania. The SMPS is at present undergoing review. According to our information received from the OSJD, greater precision and convergence, to the EU is intended.

3. Agreement on International Railway Goods Transport (SMGS)

The Agreement on International Railway Goods Transport (SMGS) provides for aspects of international transport of goods; it has not been ratified by the Czech Republic, Slovakia, Hungary and Romania. It is the goods transport agreement for the OSJD and regulates the transport of goods between the states the railways of which are members of the OSJD. The SMGS is at present undergoing review. Greater precision and convergence to the EU is intended.

4. Rules on the Use of Wagons (PPW with its Annex 1)

The Rules on the Use of Wagons (PPW), with its Annex 1 (RWU), provides for mutual use of passenger wagons, goods wagons, and the cleaning and maintenance of private goods wagons.

5. International Passenger Tariff (MPT)

The Agreement on direct International Transport of Passengers and Goods by Rail (MPT) is the tariff agreement of the OSJD for passenger transport. It deals with the conclusion and performance of international passenger transport and luggage.

6. Uniform Transit Tariff (ETT)

The Uniform Transit Tariff (ETT) is an OSJD tariff agreement for goods transport, directed, in particular, at shorter routes. It applies a linear method for the calculation of charges and applies mainly between Russia and the CIS.

7. International Transit Tariff (MTT)

The Reformed International Railway Tariff (MTT) is the second goods tariff agreement, applied mainly to longer routes. It is based on a decreasing method of calculating transport charges.

8. Convention on the Use of uniform Containers (Container Agreement)

The OSJD convention on the use of uniform containers (Container Agreement) sets out the conditions for the employment of containers in goods transport by rail and the international exchange of these containers.

9. Agreement on Organisational and Operational Aspects of Combined Transport in the Communication between Europe and Asia (Agreement on Combined Transport)

The Agreement on Combined Transport is, as a relatively short agreement, directed at the promotion of Combined Transport involving rail, road and ship.

VI. COMPARATIVE ANALYSIS

The Comparative Analysis deals with the following:

- independence of railway undertakings on the one hand from the respective state and on the other hand from the infrastructure manager.
- the restriction on State Aid and Guarantees,
- the interoperability,
- the access to the Railway Infrastructure for Independent Carriers,
- the Wagon usage in international Railway Transport,
- the Use of uniform Containers,
- Combined Transport,
- the relations between Railways and Users and
- the Transport of Passengers is analysed.

1. Independence of the Railway Undertakings

1.1. Independence from the State

Concerning the independence of the railway undertaking from the state on the territory of the OSJD, there are no regulations on the question of the independence of railways from the state and the infrastructure managers at supranational level, as the OSJD has no jurisdiction on this issue. However, the OSJD recommends to the states, whose railway undertakings are members to the OSJD, but which are non-EU Member States, that they apply the EC directives, adjusted as the case may be.

1.2. Separation of the Railway Undertakings from the Infrastructure Managers

The OSJD has not issued any provisions on the independence of railways and infrastructure managers. This is therefore to be provided for in the respective

national law. For the OSJD, only the absence of supranational regulations can therefore be ascertained.

2. Restriction on State Aid and Guarantees

Within the European Community there are both, Community Aid and Member State Aid. On the other hand, the aid system of the European Community is not reflected at all in the OSJD, so that no substantial comparison at the supranational level is possible. At the national level, no binding statements can be made with regard to the OSJD states, whose railways operate under very different financial and legal conditions.

3. Interoperability

The OSJD does lay down provisions with regard to interoperability and technical harmonisation in the area of technical specifications and technical standards, the authorisation of rolling stock for international transport, mutual recognition of technical admission, vehicle numbering and marking and maintenance rules.

In the area of technical specifications and technical standards, the existing provisions in the OSJD documents O 920 -1 to -15 are not of a binding nature. Insofar as these provisions are not consistent with the respective EC legislation they could be amended.

In the area of authorisation of rolling stock for international transport, there are technical requirements in annex 1 to the RWU. The provisions in the annex 1 to the RWU, however, are not binding, as they foresee that the parties to the RWU can conclude diverging bi- or multilateral agreements (§ 1.1 para. 2 Annex 1 to the RWU).

In the area of mutual recognition of technical admission, the criteria of § 4.2 RWU in conjunction with Annex 1 of the RWU have to be met. As explained above, the provisions in the annex 1 to the RWU are binding according to § 1.1 RWU, but they foresee that the parties to the RWU can conclude diverging bi- or multilateral agreements (§ 1.8 RWU).

The area of vehicle numbering and marking is addressed in the documents “O+P 582-1” and “O+P 582-2”. These bulletins describe the indications to be

used for passenger wagons (O+P 582-1) and freight wagons (O+P 582-2). According to the said documents, the wagons designated for both national and international routes are to be indicated according to the bulletins, applicable legislation and agreements. The provisions on such indications are however flexible and might be adjusted to international agreements. As the bulletins do not state which international agreements are meant, this might also apply to EC legislation. The bulletins have to be regarded as non-binding and therefore are not in conflict with EC legislation.

In the area of maintenance rules, the OSJD provides for detailed provisions in §§ 11, 12, 18, 23 of the RWU. The rules deal with the cleaning and disinfection of wagons (§ 11 RWU), the maintenance and repair of wagons (§ 12 RWU), the maintenance and repair of damaged wagons (§ 18 RWU) and the maintenance of private wagons (§ 23 RWU). In comparison to EC legislation, in particular, the relevant technical specifications of interoperability, the RWU addresses cleaning and maintenance in a more general manner. In this respect the RWU is not consistent with the respective EC legislation. However, the RWU does not contain binding provisions, as the parties to the RWU can conclude diverging bi- or multilateral agreements (§ 1.1 para. 2 Annex 1 to the RWU).

The issues of vehicle registration and accident investigation are not addressed in any of the OSJD agreements. They are therefore subject to the respective national law, which must not conflict with EC legislation in those Member States which are at the same time involved in OSJD agreements by virtue of their respective railway undertakings.

The situation between the European Union and the OSJD differs from the situation between the European Union and the OTIF. The OSJD does on the one hand stipulate detailed provisions, but on the other hand, the provisions are either non-binding or can be contracted out by way of diverging bi- or multilateral agreements.

Despite the obvious common interest in a uniform implementation of technical specifications and standards and measures for a working interoperability within the OSJD, the approach is completely different to the approach under the OTIF.

The OTIF sets up binding and detailed criteria in ATMF and APTU, as well with regard to the content and in particular with regard to the procedures, which differ remarkably from those of the EU.

In view of the fact that the agreements of the OSJD, regardless of their content, are agreements of a non-governmental organization, the provisions are not binding on the states concerned whose railway undertakings are member to the OSJD. Insofar as OSJD rules are not in compliance with EC law, the Member States whose railway undertakings are members to the OSJD have, according to the *effet utile* principle, to ensure that conflicting OSJD rules are not applied by the respective railway undertakings.

The major difference between OTIF regulations and OSJD regulations is that the OTIF is a governmental organization, while the OSJD is a non-governmental one.

The regulations set up by the OTIF have legal power as international law. This means that the relevant COTIF rules constitute part of international law, which causes conflicts between the COTIF and EC Law in case of diverging provisions.

The provisions of the OSJD agreements, to the contrary, are not part of international law but mere private agreements. Consequently, only the contracting parties, meaning the railway undertakings, are bound by the OSJD agreements. If OSJD provisions do conflict with EC law, the latter prevails. The respective provisions are simply contrary to EC law. It remains the obligation of the individual Member State concerned whose railway undertaking is OSJD member, to ensure enforcement of the relevant EC law.

With regard to the OSJD and the pictured lack of conflict potential in the field of interoperability and technical harmonisation, there is consequently no urgent need for action.

With respect to the COTIF and its conflicts with EC law, the European Union has consequently not awaited potential conflicts but has recommended to the Member States to declare their reservations and not to apply the relevant appendices of the COTIF which conflict with EC law.

4. Access to the Railway Infrastructure for Independent Carriers

With regard to the access to the railway infrastructure, only the absence of supra-national regulations can be ascertained as far as the territory of the OSJD is concerned. It remains therefore for each state to decide whether and how it enables independent domestic and foreign carriers to access the railway infrastructure.

5. Wagon usage in international Railway Transport

Regarding the wagon usage in international railway transport, the CUV, being the OTIF agreement on wagon usage, has been compared to the OSJD Rules on the Use of Wagons and the PPW, which is an appendix to the PPW. The RWU and the PPW contain more detailed provisions than the CUV.

Significant differences arise in the area of contracts on wagons usage as regards the scope of regulations and the intensity of regulations. They are however mostly of a structural nature, as the respective issues are left to the contractual regulation of the parties under CUV.

With respect to liability for loss of or damage to the wagons similar concepts exist. Liability is at least restricted to the damage sustained and at maximum the value of the wagons.

With regard to types of wagons, the CUV does not distinguish between passenger wagons, goods wagons and private goods wagons. In the area of the RWU, the distinction between passenger wagons, goods wagons and private goods wagons is always made, even though this does not lead to fundamental difference in their handling.

Major differences exist in the areas of wagon types, damage caused by wagons and subrogation. The RWU contains no provisions with regard to damage caused by wagons and regarding limitation. These issues remain therefore subject to national law.

6. The Use of uniform Containers

The provisions on the use of containers in international railway goods transport is an area of the most concordance due not only to international but

also to multimodal technical connections and standards. There is also widest accordance on charges and the use of containers, because this is left to tariffs or contracts of the parties.

There are slight differences in the area of handing over the wagons which is subject to the parties' agreement in the OTIF-area, while there are provisions specifying the conditions of handing over of wagons in the Container Agreement of the OSJD.

The compensation for loss and damages is both in the CIM (as part of the COTIF) and in the Container Agreement (as part of the OSJD) limited on the actual value of the lost or damaged container.

A degree of harmonisation is required in the areas of handing over and return of containers of the railway undertakings themselves and in the area of container transport.

With regard to the handover and return of containers owned by the railway undertakings themselves, the CIM (COTIF) leaves space for contractual agreements, while the Container Agreement (OSJD) prescribes a record of takeover and of the condition of the wagon.

Provisions on the conduct of container transport and the obligations of the user are not made in CIM (COTIF). The Container Agreement (OSJD) contains, however, provisions on care and repair. The need for harmonisation in this respect is limited because in the OTIF-area such obligations can be assigned to the user by separate contract, and this appears also to be appropriate.

7. Combined Transport

Combined transport as intermodal transport of several differing types of transportation units is provided for in the CIM (COTIF), the OSJD Convention on Organisational and Operational Aspects of Combined Europe-Asian Transport and the EC Directive on Combined Transport of Goods.

All agreements want to promote combined transport and try to set up rules to facilitate intermodal co-operation.

8. Relations between Railways and Users

8.1. The Transport of Passengers

8.1.1. Concordant Basis: International transport

The transport of persons is subject to the SMPS of the OSJD and the respective COTIF Annex CIV. Both agreements deal with the international transport of persons by rail or in combined transport with regard to the relationship of the railway undertaking and the passenger.

8.1.2. Exceptions from scope of application

Both agreements exclude their application on transports between neighbouring states, while under CIV (COTIF), this does only apply if the infrastructure is under the same infrastructure manager.

8.1.3. Areas regulated

Due to the intensity of the regulations of the SMPS (OSJD) in all areas, e.g. on the validity and possibility of changing tickets, the freedom of movement and commercial freedom of the railways is restricted. In the CIV (COTIF), reference is often made to general conditions of transport.

8.1.4. Obligation to transport

The SMPS (OSJD) still imposes an obligation to transport on the railway, while this is not deemed necessary in the CIV (COTIF) any more. The obligation to transport in the meaning of an obligation to conclude a contract, imposed by the SMPS (OSJD) is limiting the privity of contract vis-à-vis other means of transport.

8.1.5. Contract of carriage

A further fundamental difference is the classification of the contract of carriage. The CIV (COTIF) provides for a consensual contract. The classification of the contract of carriage under SMPS (OSJD) as an executed contract, conflicts with this.

8.1.6. Transport of Passengers and Luggage/ Express Goods

According to the SMPS (OSJD) and the CIV (COTIF), in principle, all persons have to be transported. Exemptions under both are foreseen for passengers who constitute a danger either due to their behaviour or due to their state of health.

Under both, hand luggage is allowed to an amount and weight that can be easily carried. Small domestic animals are also allowed under both agreements. Both agreements, as well, provide for regulations on special objects, although not always in a concordant manner.

8.1.7. Further specifics

With regard to the transportation of passengers, both the CIV (COTIF) and the SMPS (OSJD) provide for detailed provisions on the design and content of the ticket. Concerning the allocation of seats, the CIV (COTIF) does not contain any provisions and leaves this subject to the national law respectively the general conditions of transport. The allocation of seats is, instead, precisely provided for in the SMPS (OSJD).

8.1.8. Transport of Luggage

With respect to the transport of luggage the SMPS (OSJD) provides for detailed provisions on the calculation of transport periods, the handing out of the luggage and the formal requirements for transportation and the handing out of the luggage, while the CIV (COTIF) leaves this, in general, to the general terms of transport of the relevant railway undertaking.

8.1.9. Transport of Express Goods

In the CIV there are no provisions with respect to the transport of express goods. The transport of luggage independently of a passenger transport contract can, however, be permitted under general conditions of transport.

In the OSJD, provisions on permitted express goods make reference to provisions on luggage positively admitted. The catalogue of permitted goods is however extended.

8.1.10. Transport Charges/Costs

Both the CIV (COTIF) and the SMPS (OSJD) provide for transport charges and the conditions of the payment.

According to the CIV (COTIF) and the SMPS (OSJD), the performance of the payment of the charges has to be effected in advance.

The calculation of charges is subject to detailed provisions in the SMPS (OSJD), although reference is made to the applicable tariff agreements. Under the CIV (COTIF), there are no rules provided for the calculation of charges.

Both, the CIV (COTIF) and the SMPS (OSJD) provide for consequences of a non-payment. The CIV (COTIF), however, simply states, that the passenger must obtain a valid ticket prior to the commencement of the journey, while the possible consequences of a non-payment are subject to the general conditions of transport. Under the SMPS (OSJD), in absence of a valid ticket, the passenger is obliged to pay the fare both for the distance travelled as for the distance ahead.

If a passenger has the right of refund of carriage charges, the procedure must be provided for in the general conditions of transport under the CIV (COTIF), while the SMPS (OSJD) provides for own detailed provisions on the circumstances of surcharge, use and refund in such a case.

8.1.11. Liability for Loss, Damage and Delay of Luggage

With respect to the liability for loss, damage and delay of luggage, the grounds providing relief from liability with regard to damages for loss and damage are provided similarly in both conventions.

There is a difference in both set of rules regarding the burden of proof that damage has been caused by the luggage. According to the SMPS (OSJD), the railway undertaking must prove that the damage was caused by the quality of the luggage in order to be relieved of liability, while under the CIV it is presumed that the damage was caused by the quality of the luggage, if this is established by the carrier, until the passenger rebuts this presumption.

Under both set of rules, compensation for loss covers the transport costs and other costs arising in connection with the transport of the lost baggage.

However, large differences could arise with regard to the compensation of loss; depending under which agreement the transport was executed.

In case of damaged goods both, the SMPS (OSJD) and the CIM (COTIF) provide for a limitation of the compensation to the goods' value. With respect to the compensation for delay, the SMPS (OSJD) calculates the compensation on the basis of the delay and the freight, while the CIV (COTIF) calculates the respective amount on the basis of the weight of the luggage, irrespective of the period of the delay.

8.1.12. Liability of the Carrier for Personal Injury and Damage to Hand Luggage

With respect to liability of the carrier for personal injury and damage to hand luggage a strict liability is provided for in the CIV (COTIF). In the SMPS (OSJD), there is no provision to be found with regard to the liability of the carrier for personal injury and damage to hand luggage.

With regard to liability for personal injury and damage to hand luggage, there is potential for conflict with EC legislation. But as the SMPS (OSJD) refers to national law, no further conflict arises in the Member States being involved in the SMPS by their respective railway undertakings, as soon as the third railway package is implemented and thereby adequate protection for passengers provided.

8.1.13. The Passenger's Rights and Obligations in Case of Delay, Cancellation, Missing Connection

On the topic of passenger's rights in case of delay, cancellation of the journey or missing connections, the SMPS (OSJD) provides for a repeated performance, but gives no right for compensation. The CIV (COTIF), to the contrary, provides only for compensation, but refers to the general conditions of transport or national law.

The proposal of the Commission goes much further in this area than the CIV. The SMPS, as well, is in conflict with EC Law, because the passenger can only claim repeat performance.

8.1.14. Joint Liability of Carriers

Both the CIV (COTIF) and the SMPS (OSJD) provide for joint liability of carriers in international passenger transport. The railway undertakings are also, under both agreements, responsible for the provision of transport on the entire route until delivery. The CIV however provides for exceptions to the joint liability in the field of loss arising due to death and injury. In this case, only the executing carrier is liable.

8.1.15. Liability of Agents

Both the CIV and the SMPS provide for a liability of the railway undertakings for their employees and persons who serve them in the contract of carriage. The CIV furthermore assumes that the infrastructure operators are agents of the carriers and under the SMPS, the railway undertakings are liable for their employees irrespective of whether the employees are engaged on their own or another railway.

8.1.16. Liability of Passengers

The provisions on the liability of passengers in the event of an accident are similar both in the CIV and the SMPS. However, in the SMPS, there is no relief from liability for passengers.

8.1.17. Extinction of Claims under the Conventions

According to the CIV, the rights lapse if they are not invoked within the periods for notification. The CIV distinguishes in this respect between claims in the event of death and injury and claims regarding the transport of luggage. Claims for personal injuries lapse if they are not notified to the relevant carriers within 12 months after awareness of the injury. Claims for the transport of luggage generally lapse on acceptance of the luggage.

The SMPS only provides for the right to compensation for exceeding the delivery period in the case of express goods to be lapsing if the express goods are not collected within 24 hours after notification by the railway undertaking.

8.1.18. Limitation of Claims

With regard to the limitation of claim, the limitation periods of the SMPS are in any event shorter than the limitation periods provided for in the CIV. The general limitation period for the liability in case of death or injury is three (3) years. In cases of all other actions arising from the contract, the limitation period is one (1) year. In case of material damage through intent or gross negligence of the carrier the limitation period of the CIV is two (2) years.

On the other hand, the SMPS does not differ between the various grades of culpability and the limitation period is always and only nine (9) months.

The limitation periods for claims due to late delivery or exceeding the delivery period also differ considerably (CIV: 1 year; SMPS: 30 days). The claim for delay in the case of express goods under SMPS lapses earlier, if the goods are not collected within 24 hours after notification.

8.1.19. The Making of Claims

With regard to complaints, according to the CIV, complaints based on personal injury are in principle to be made to the carrier against to whom claims for personal injury can be made in court. Complaints because of other claims are to be directed to the carrier which may be sued.

According to the SMPS, complaints for luggage/express goods are to be made either to the dispatching railway undertaking or to the destination railway undertaking. Complaints about fares are to be submitted to the office where the ticket in dispute was issued.

With regard to legal proceedings, claims against carriers under the CIV may be made against the first, the last or the carrier providing the part of the transport in the course of which the fact giving rise to the claim occurred. Claims for personal injury can only be made against the carrier obliged according to the contract of carriage to provide the transport in which the accident occurred.

A claim under the SMPS can only be made after a formal complaint. A claim can be made by the entitled person only against the railway undertaking or the issuing office at which the complaint was made and then only if the railway undertaking or issuing office has rejected the complaint.

8.1.20. Court Jurisdiction

Under the CIV, the courts having jurisdiction are the courts of the member states at which the defendant has its residence or normal place of abode or its main or branch office or office which concluded the contract. Under the SMPS, the courts of the state to which the railway undertaking or the issuing office belongs have exclusive jurisdiction for claims against the undertaking.

8.1.21. Accounting between the Railways/Carriers

The accounting between the railways for transport under the SMPS is based on detailed provisions on the conditions of accounting and the interest in costs and charges. Under the CIV, the railways can agree on the manner and nature of the accounting and can also make other agreements which deviate from the CIV. This takes account of their commercial freedom to a larger extent than the SMPS.

8.1.22. Recourse between the Railways/Carriers

Both under CIV and SMPS, each railway undertaking is liable for the damage which it causes. In the event, that it is not possible to prove which railway undertaking has caused the damage, under the SMPS the damage will be divided between all railway undertakings, while under the CIV this is to be calculated according to the proportion of the fare to which each carrier is entitled.

8.1.23. Information Obligation

There are no information obligations incumbent on, the railways under the CIV.

According to the Commission Draft Regulation on the Rights and Duties of Passengers in Cross-border Rail Transport, information obligations of railway enterprises are mentioned with a list of minimum information which should be provided by, during and after the journey, as well as minimum information to be stated on the ticket. The Member States are obliged to set penalties for breaches of the regulation.

According to the SMPS, the railway undertakings have to organise information to enable passengers to inform themselves on the trains and wagons travelling on their routes and lines. A special information obligation exists in the SMPS and in the tariffs applicable to international transport. However, no penalty is provided in the SMPS for a breach of this obligation.

8.2. The Transport of Goods

8.2.1. Contract of Carriage and Obligation to Transport

The SMGS (OSJD) still imposes an obligation to transport on the railway, while this is not deemed necessary in the CIM (COTIF) any more. The obligation to transport in the meaning of an obligation to conclude a contract, imposed by the SMPS (OSJD) is limiting the privity of contract vis-à-vis other means of transport.

8.2.2. Freight

Both the CIM and the SMGS demarcate the freight to be transported negatively. In principle each good may be transported if not excluded by the relevant Convention. The CIM refers in this respect to the RID (analogously to the provisions on luggage in the CIV) with respect to dangerous goods.

8.2.3. Payment of Costs

Unless otherwise agreed between the parties, the transport costs are payable according to CIM by the consignor. The SMGS contains a different provision on the obligation to bear the costs. The consignor is, in principle, obliged to pay the costs only on the routes of the first carrying railway.

8.2.4. Conclusion of the Contract of Carriage

There are no specific provisions regarding the conclusion of a carriage contract in the CIM. Pursuant to the SMGS, the carriage contract is concluded by completing the consignment note.

8.2.5. Acceptance of Goods for Transport

In this regard, there are no regulations to be found in the CIM. The SMGS, in contrast, distinguishes between wagonload, package freight, large container consignment, and contrailer consignment.

8.2.6. Packaging, Marking, Sealing and Loading

With regard, to packaging, marking and sealing, the CIM (COTIF) provides that the consignor is responsible for the packaging. Loading and unloading are subject to agreement between consignor and carrier. In the CIM, no provision exists regarding the sealing of the wagon

The SMGS contains detailed provisions on packaging, marking, loading, ascertainment of volume and quantity of the goods and the sealing of the wagon. The provision can be seen as a parallel to the respective CIM provisions, but in considerably more detail, which presents a limitation of the privity of contract.

8.2.7. Value and Interests in the Consignment

With respect to the value and interest in the consignment, the CIM does not provide for any regulation regarding statement of value.

According to the SMGS the value of the goods and the interests in the consignment has to be stated in the consignment note for certain precious goods and can be stated for any others, as well. The stated value is not only relevant for compensation but also for any additional charges.

8.2.8. Accompanying Documents / Common Consignment Note

Both the CIM and the SMGS provide that certain documents accompany the transport. This refers to the common CIM/SMGS consignment note and other documents necessary for the transport or for customs purposes. The CIM/SMGS consignment note serves in both systems in principle as a customs document. Both systems also stipulate that the consignor is liable for the completeness of the documents.

A common CIM/SMGS consignment note will be used both on the territory of the CIM and that of the SMGS. The common consignment note is not, however, based on a legal harmonization of the relevant provisions but is at

present only the aggregate of the provisions in the CIM or the SMGS contained on one single form.

8.2.9. Charging of Costs and Additional Charges

The CIM itself contains no provisions on the charging of costs and additional charges. However, in the general conditions of transport, the GTC-CIM No. 8, corresponding statements are contained, but the parties under a contract governed by the CIM are entitled to derogate from the.

The charges to be paid by the customer under the GTC-CIM include carriage charges, the ancillary charges, customs duties, other charges mentioned in GTC-CIM. An entry in the consignment note in accordance with the GLV-CIM can indicate who is responsible for which charges.

The SMGS defines the costs as freights, fares and ancillary fees. The amounts depend on the relevant national tariffs of the relevant dispatch, destination and transit railway undertakings. The SMGS also contains provisions of additional freight in the event of incorrect or incomplete entries in the consignment.

8.2.10. Transit Periods

According to the CIM, the period for transit is prior subject to an agreement between the parties. If the parties do not have an agreement on this issue, the respective provisions of the CIM are applicable.

The transit period is calculated from the taking over of the goods on and is extended by the duration of a stay caused without any fault of the carrier.

According to the SMGS, the period for transit is prior subject to an agreement between the parties. If the parties do not have an agreement on this issue, the respective provisions of the SMGS are applicable.

The SMGS specifies delivery periods, according to the nature of the goods and the distance to be travelled. According to the SMGS, there is, in addition, a distinction between express and normal freight.

8.2.11. Delivery of the Goods, Tracing

The performance of the contract of carriage is similar under the CIM and SMGS. The delivery of the goods takes place against payment of the costs stated in the consignment note or additional costs to be paid by the recipient. The goods are then delivered to the recipient against receipt.

8.2.12. Investigation

According to the CIM, when partial loss or damage is discovered or presumed by the carrier he must draw up a report stating the loss or damage, the condition of the goods, their weight and the extent of the loss or the damage, its cause and the time of its occurrence.

In the event of disagreement, the incident might be ascertained by an expert. The procedure to be followed shall be governed by the laws and prescriptions of the State in which such ascertainment takes place.

The SMGS provides for a similar procedure. The railway undertaking is obliged to produce a report if the inspection is insufficient with respect to its condition or content or that the consignment note or parts of it are lost or the means of transportation are partially or completely missing.

According to the SMGS, the obligation of investigation exists only if the irregularity could only have appeared in the time period between acceptance and delivery of the consignment. Under the SMGS the destination railway station may be entitled to refuse a deferred investigation under certain conditions laid down in the SMGS. An investigation will only take place if the loss is of reasonable importance. If the consignee does not agree with the findings of the report, he is entitled to note this in the report. An expert may be entrusted with the ascertainment of causes and scope of the incident.

8.2.13. Lien of the Railways

The CIM does not contain a specific provision regarding means of security. A lien in favour of the carrier can be required as means of security.

According to the SMGS the railway undertaking is granted a lien on the goods transported as means of security for all costs arising out of the contract for carriage.

8.2.14. Amendment to the Contract of Carriage under the SMGS

Under the CIM, the consignor is entitled to dispose of the goods and to modify the contract of carriage by giving subsequent orders.

The consignor's right to modify the contract of carriage shall be extinguished in cases where the consignee has taken possession of the consignment note, accepted the goods, asserted his rights or is entitled to give orders. The consignee's right to modify the contract of carriage shall lapse in cases where he has taken possession of the consignment note or accepted the goods or asserted his rights. Subsequent modifications must not have the effect of splitting the consignment.

According to the SMGS, both the consignor and the consignee are entitled to amend the contract of carriage even after the beginning of its performance.

The consignor can amend the contract of carriage to the effect that the goods are to be returned to the original railway station, or the destination railway station can be changed. The consignee can require that the goods be delivered to a different destination or a different consignee. Amendments with the effect of dividing a consignment are, however, not admissible. The separation or division of the train or of wagons is therefore not permissible.

The consignor and the recipient can each amend the contract of carriage only once. This is a considerable restriction on contractual freedom. There is no reasonable ground for this even in the absence of technology which would simplify the implementation of changes.

8.2.15. Impediments to Transport and Delivery

According to the CIM, when circumstances prevent the carriage of goods, the carrier shall decide whether it is preferable to carry the goods as a matter of course by modifying the route or whether it is advisable, in the interest of the person entitled, to ask him for instructions while giving him any relevant information available to the carrier. If the consignee refuses the goods, the consignor shall be entitled to give instructions even if he is unable to produce the duplicate of the consignment note.

According to the CIM, the carrier is entitled to recover the costs occasioned by his request for instructions, the carrying out of instructions received, the fact that instructions requested do not reach him or do not reach him in time, the fact that he has taken a decision without having asked for instructions, unless such costs were caused by his fault. The carrier may in particular recover the carriage charge applicable to the route taken and shall be allowed the transit periods applicable to such route.

According to the SMGS in the event of impediments, the railway carrier may decide whether it is necessary to obtain instructions from the consignor. The railway carrier, as well, is entitled to demand additional freight for any changes to the transit route and may extend the agreed the delivery period unless the railway carrier is at fault.

8.2.16. Liability of the Railways

With respect to the liability of the railway undertakings, most concordance has been ascertained between the two systems.

According to the CIM in principle the carrier shall be liable for loss or damage. Specific provisions exist for vehicle transport. In case of carriage of railway vehicles running on their own wheels and consigned as goods, the carrier in principle shall be liable for the between the time of taking over for carriage and the time of delivery.

According to the SMGS the railway undertaking, having taken over the goods accompanied by an SMGS consignment note, shall be liable for execution of the contract of carriage until the delivery of the goods at the destination station. The railway undertaking shall be liable for loss of and damage to the goods for and delays in delivery.

8.2.17. Relief from Liability

According to the CIM the carrier shall be relieved of this liability to the extent that the incident was caused other than as a result of the fault of the carrier or by circumstances which the carrier could not avoid and the consequences of which it was unable to prevent.

The carrier shall also be relieved of this liability to the extent that the loss or damage arises from the special risks such as carriage in open wagons, absence or inadequacy of packaging, loading of the goods by the consignor or unloading by the consignee, the nature of certain goods, irregular, incorrect or incomplete description or numbering of packages, carriage of live animals, carriage which must be accompanied by an attendant and for vehicle transport the carrier shall not be liable for loss or damage resulting from the loss of accessories which are not mentioned on both sides of the vehicle or in the inventory list which accompanies it.

The limits of liability shall not apply, if it is proved that the loss or damage results from an act or omission which the carrier has committed either with intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result.

According to the SMGS, many exclusions of liability are provided for. Railway undertakings are not responsible for damage, which the railway could not have avoided, caused by the defective quality of the goods or packaging or inappropriate transport equipment, caused by the consignor or recipient, due to non-compliance with customs regulations, due to transport in open wagons, due to the infringement of regulations not caused by the accompanying person appointed by the carrier, due to objects excluded from transport or only admitted on conditions, and which have been transported under incorrect, imprecise or incomplete description, due to reduction (spoilage) within the degree of tolerance, due to loss of volume if no external impact on packaging or sealing is ascertainable or this has occurred for customs reasons, due to loading or unloading if this is carried out by the consignor or recipient or in the case of the transport of live animals.

8.2.18. Burden of Proof

On the question of the burden of proof, both agreements are in concordance. According to the CIM, the carrier bears the burden of proof that the delay in delivery or the loss or damage to the goods was caused by the entitled person. According to the SMGS, there is also a presumption that the railway company is liable if the railway measures or confirms the volume or quantity in the consignment note.

8.2.19. Amount of Compensation

According to the CIM, the amount of compensation is calculated according to the commodity exchange quotation or, if there is no such quotation, according to the current market price, or if there is neither such quotation nor such price, according to the usual value of goods of the same kind and quality on the day and at the place where the goods were taken over. However, compensation shall not exceed 17 units of account per kilogramme of gross mass short. In respect of goods which, by reason of their nature, are generally subject to wastage in transit by the sole fact of carriage, the carrier shall only be liable to the extent that the wastage exceeds the certain allowances. In case of a total loss of goods or in case of loss of a package, no deduction for wastage in transit shall be made in calculating the compensation.

According to the SMGS, the amount of compensation under the SMGS depends on the price stated in the certified invoice extract of the foreign supplier. If a price cannot be ascertained, it will be fixed by a state-recognized expert commission.

8.2.20. Interest on Compensation

Within the CIM, interest on compensation is very briefly regulated. The entitled party has a right to 5% interest per annum from the day of complaint or, if no complaint is made, from the day of the filing of the claim.

According to the SMGS, the payment of compensation is more extensively dealt with and deviates considerable from the CIM provision. E.g., in the event that compensation or an overpayment is paid out after the expiry of more than 180 days after filing of the application, the amount might be subject to interest.

Under the SMGS regime the interest rate is 4% and under the CIM 5%. However, the right to interest under the SMGS arises only if the compensation claim is paid more than 180 days after having been made. In addition, under the SMGS there is no claim for minor losses.

8.2.21. Complaints, Limitation of Claims

(1) Complaints

In case of loss of or damage to the goods, the railway undertaking must draw up a report stating the condition of the goods and the extent of the loss or damage, which may be ascertained either by an expert. Claims may be brought against the railway carrier by the consignor until the consignee has either taken possession of the consignment note or accepted the goods.

According to the SMGS, consignor and consignee are entitled to establish claims under the contract of carriage. The consignor has to file such claims with the dispatching railway undertaking and the consignee with the destination railway undertaking. Claims against the railway undertaking can be made, in case of a total or partial loss of goods, in case of late delivery and in case of overpaid costs.

(2) Limitation

According to the CIM, claims arising out of contracts of carriage are statute-barred in principle after one year. After two years, claims for payment of receipts or proceeds from the sale by the carrier are statute-barred, also in case of deliberate or grossly negligent causation of damage. In addition, claims out of prior contracts of carriage are only statute-barred after two years if it is assumed that the damage was caused during these transports.

Under the SMGS, the limitation periods are considerably shorter. For payment of compensation claims these are only nine months. As regards delays in delivery, the shorter limitation periods of two months apply.

8.2.22. Accounting and Regress between the Railways

According to the CIM, any carrier who has or ought to have charges under the contract of carriage must pay to the other carriers concerned their respective shares. A carrier who has paid compensation has a right of recourse against the other carriers who have taken part in the carriage.

If the loss or damage has been caused by several carriers, each carrier shall be liable accordingly. If it cannot be proved which of the carriers has caused the damage, the compensation shall in principle be apportioned among all carriers according to the shares of the carriage charge.

According to the SMGS, a payment made by the carrier exercising the right of recourse cannot be disputed by the carrier against whom the right of recourse is exercised if the compensation has been determined by a court or tribunal and if the latter carrier has been given the possibility to intervene in the proceedings. The courts of the state on the territory of which one of the carriers participating in the carriage has its principal place of business shall be competent for the recourse claim.

9. The Fixing of Tariffs

In the area of the OSJD, there is a total of three tariff agreements: The “International Railway Tariff (MTT)”, the “Uniform Transit Tariff (ETT)” and “Agreement on the Transport of Persons and Luggage by Rail in international direct transport (MPT)”.² The agreements MTT and ETT are both applied to the transport of goods by rail. The MPT is the tariff agreement for the transport of passengers by rail.

The MTT generally applies to longer routes. A reducing increase of the transport charge takes place.

The uniform transit tariff (ETT), on the other hand, is applied to shorter routes, mainly in international transport of goods by rail between Russia and the CIS. In this case, the increase in the transport charge is linear.

The ETT applies to the transport of goods in transit on routes of the participating railways, between ETT railways and railways which participate in the SMGS or which apply the SMGS or the CIM and also between ETT railways and other railways which do not participate or apply in the SMGS.

The MPT agreement, applies to the transport of passengers, luggage and goods in the international railway traffic between the participating railway undertakings.

² Abbreviation used by the OSJD; the abbreviation MPS also appears but is also used for the Russian ministry of transportation.

REPORT

A. Task, Purpose and Scope of the Report

I. Introduction

The European Community's current transport policy aims at strengthening the position of railways and integrating national rail markets into one European railway market. For this purpose, the European Community defines principles concerning the structure and the functioning of railway undertakings so as to ensure their management independence and efficiency. Furthermore, it issues legal acts ensuring non-discriminatory access for EU-based rail operators to rail infrastructure in all EU Member States as well as improving the interoperability and the safety of the railways.

There exist two other relevant bodies laying claim to regulating rail traffic at the international level: the Intergovernmental Organization for International Carriage by Rail (OTIF) and the Organization for the Co-operation of Railways (OSJD). The OTIF gathers 42 countries, including EU Member States (except for Estonia which is currently acceding) and some countries of the Middle East and North Africa as well. The members of the OSJD are the incumbent railway companies of 25 countries, mostly the states of the former Soviet Block as well as China, Vietnam, etc.

The key task of the OTIF is to bring the Convention Concerning International Carriage by Rail (COTIF) and its Appendices into force and to prepare their practical application. The OSJD performs a mixture of functions which go beyond those carried out by the OTIF. Besides managing the transport conventions, it accomplishes some tasks similar to those of the International Union of Railways (UIC) (i.e. technical co-operation, seat reservations) and of the International Railway Vehicle Agreement RIV (e.g. setting loading gauges and rules for the use of vehicles in international traffic). Furthermore, it sets technical standards for its members and deals with transport tariff coordination.

Some EU Member States and EU accession countries are also members of the OSJD. This is the case as regards Poland, the Czech Republic, the Slovak Republic, Hungary, Estonia, Latvia, Lithuania, Bulgaria and Romania. As the

OSJD freight and passenger traffic conventions (SMGS and SMPS) lay claim to regulate all rail traffic between their Member States, the incompatibility of the SMGS/SMPS provisions with those of the European legislation may lead to the violation of the latter. It has to be noted, however, that some of the countries mentioned above, although being OSJD members, do not participate in the SMGS (Czech Republic, Hungary, Slovak Republic and Romania) or the SMPS (Hungary, Romania).

The incompatibility between EU legislation (in particular: transport and competition legislation) and OSJD railway law results e.g. from the fact that the SMGS and SMPS conventions prescribe procedures in great detail which best fit the tasks of state railways but not other railway companies offering distinctive railway services (e.g. specific transport as JKEA-Transports). Furthermore, SMGS/SMPS agreements neither consider market forces having an impact on rail traffic volumes nor do these OSJD agreements provide freedom of contract. They presume railways are integrated and make no distinction between rail services and rail infrastructure. In the case of passenger transport, SMPS does not guarantee regress in case of death or injury. In particular, the OSJD deals with tariff coordination between its members (including agreements on prices) which raises questions under European competition law. The OSJD also does not foresee membership of organizations other than the bodies of executive authorities responsible for railway transport or, alternatively, of central bodies of railway transport authorized by their governments. Because of this, the incumbent railway companies and the new independent railway undertakings in the OSJD Member States face two sets of less than consistent legal provisions. Finally, some incompatibilities may arise from the diverging interoperability standards caused by the different track and loading gauges between the two regions concerned.

Some initiatives have already been taken in order to deal with the legal differences between the two railway systems. A first joint conference EU - OTIF - OSJD was held in Kiev in October 2003.³ An agreement was reached that the participating organizations should strengthen co-operation. A concrete first objective consisted in drawing up a common CIM/SMGS consignment note for the carriage of goods. According to the conclusions of

³ The “joint declaration” of this conference is available under www.otif.org.

the last conference on the common consignment note, held in Bern on 25 April 2006, this note will be introduced as from September 2006 as a pilot project on a number of pan-European corridors. Moreover, the OSJD is going to establish a joint working group together with the European Commission/ERA with the goal of further developing interoperability of the 1435/1520-mm-systems. A meeting on the establishment of this group was scheduled for 19 October 2006 in Warsaw.

II. Task Specifications According to Annex A of the Contract TREN/CC/01-2005 Lot 1 Legal Assistance Activities

The objective of this Study of Compliance (the “**Study**”) is to identify legal conflicting areas between EU legislation and the OSJD railway law. The concrete tasks to be carried out include:

a) identifying conflicts between EU legislation (i.e. the EU legal acts in the field of railway transport and, where necessary, in the field of competition) and the law regulating rail traffic for OSJD Member States (in particular: regulations concerning the internal structure of the OSJD, its competences and way of functioning, the agreement on rules in wagon usage in international transport, the rules for use of wagons in international traffic (PPW), the SMGS, the SMPS as well as regulations on the process of setting tariffs and infrastructure fees) with special attention devoted to provisions concerning the following issues:

- the right of independent carriers to have access to rail infrastructure and to offer rail services,
- the independence of railway companies from the state and from infrastructure managers,
- the process of setting transport service tariffs and infrastructure fees,
- the right of independent carriers to be subject to the respective railway law (membership issues),
- passengers’ rights

b) presenting the outcome of the research undertaken under point "a" in the form of a report. The interim report is to be submitted four weeks and the draft final report six weeks after the entry into force of the contract on conducting this study. The latter has to contain an executive summary. Both reports are to be written in English.

III. Scope of the Study

The scope of the study is limited firstly to a comparison of the regulations of the OSJD with the entire relevant and already implemented legislative acts of the EU.

In some relevant areas, there is either no EU law at all which corresponds to the OSJD convention, or EU regulations are still in the legislative or implementation process.

In these areas the regulations of the OTIF will be applied to the EU territory as all EU Member States are also members of the OTIF. Therefore, the regulations of the OSJD are compared with the corresponding rules of the OTIF, in particular with the relevant annexes to the COTIF. The comparison is limited to the area of rail traffic including competition law issues. Technical issues have not been taken into account.

B. The Development and Unification of Rail Transport Law in Europe

I. The Development of European Railway Transport Law

The first draft of an international treaty on railways is found in the year 1874.⁴ It was the basis for the International Treaty on Railway Goods Transport which came into force in 1893 as the so-called Bern Convention. The treaty was signed by Belgium, Germany, France, Italy, Luxembourg, The Netherlands, Austria-Hungary, Russia and Switzerland. This first comprehensive legal provision for international goods transport applied therefore to the most significant European rail links.

Also a connection to Asia was established by the participation of Russia. An important amendment of the system took place after the First World War in

⁴ For the history railway law also see: Allégret, ZIntEisenb 1994, p. 3-20.

1923. At the amendment conference 1923, a treaty for the international rail carriage of persons was developed. The predecessors of the Uniform Legal Provisions for the Treaty on the International Transport of Goods by Rail (CIM) and the Uniform Legal Provisions for the Treaty on the International Transport of Persons and Baggage by Rail (CIV) were created. They both came into force on 1 October 1928 and applied to all European states with the exception of Great Britain, Turkey, Lithuania and the Soviet Union, which no longer participated in these treaties.

Also the changed political and economic conditions after the Second World War affected the law on railway transport. In 1951, the Treaty on the International Rail Goods Transport (SMGS) came into effect, and was mainly applied in the socialist states. A considerable proportion of the world railway network thereby came within the area of application of this treaty. In 1956, the Organization for Railway Co-operation (OSJD) was established as the association of East European and Asian railway companies, which commenced work on 1 January 1957. The main areas of the work of the OSJD are the improvement of international railway transport, in particular, between the Member States of the OSJD in Europe and Asia.

In the Western European states, the Convention on International Railway Transport (COTIF) was concluded in Bern in 1980. This international treaty provides in its schedules the conditions for the transport of persons and goods. Initially 25 states participated in the COTIF, coordinated in the Interstate Organization for the International Railway Transport (OTIF). The OTIF sees its task in the adjustment of legal provisions to the current developments in the transport sector.

The COTIF, as concluded in 1980, came into effect in 1985 and was subject to a fundamental revision in 1999 by the Protocol of Vilnius. The institutional provisions of the COTIF constitute the framework conditions for transport. The actual transport legal regulations are, however, prescribed in the schedules CIV and CIM. The convention is applicable in many European states, including meanwhile all EU Member States except Estonia (which has not yet completed the ratification procedure), Malta and Cyprus.⁵ Even in

⁵ Malta and Cyprus both do not dispose of a relevant railway network

some states of Northern Africa and the Near East, the COTIF and its schedules are the basis for cross-border transport.

The present applicable law of the WTIF was, also in Western Europe, designed for a state railway system. The rail line system, the transport obligation, the transport and common liability of railways and a compulsory form, by type of contract – formal or executed contract – were prescribed.

But with the liberalization of railway transport by the European Union, also a comprehensive revision of the legal framework of the COTIF became necessary.⁶ The crucial basis for the liberalization of railway transport is constituted by Directive 91/440/EEC of the Council of the European Community of 29 July 1991. Pursuant to this Directive, the core of the future development was the separation of the operation of the railway infrastructure from the provision of transport services. In addition, competition was intended to be developed within the railway sector.

The new COTIF took into account, apart from the ideas of the EU, other conditions for liberalized railway goods transport such as the cancellation of transport and tariff obligations, greater freedom in the drafting of transport agreements, an expansion of the scope of application of the CIM or the possibility of agreements on the application of the CIM.

On the other hand, the Treaty on the International Railway Goods Transport (SMGS) as parallel treaty to the CIM and the Treaty on the International Transport of Persons (SMPS) as parallel treaty to the CIV are still today mainly based on the treaties concluded by the former socialist states. The provisions are based on the special requirements of a planned economy and the co-operation of states. A distinction from the COTIF is that the SMGS and the SMPS were concluded between the state railways which were represented by the relevant transport ministries which form the Organization for Railway Co-operation (OSJD).⁷

Based on the idea that harmonization and augmentation of railway transport is in the interests of all states, the OTIF and the OSJD have repeatedly

⁶ Kunz, *Transportrecht* 2005, p. 329-345, 332.

⁷ Kunz, *Transportrecht* 2005, p. 329-345, 344.

attempted in the past to harmonize the legal system COTIF/CIM and OSJD/SMGS, as well as their schedules and supplements. The OSJD also promotes harmonization to the legal system of COTIF/CIV in the area of passenger transport insofar as a discussion on the acceptance of liability for injury to persons is currently being discussed.

However, several attempts at harmonization in the area of goods transport made in the past failed in spite of the common interest. The joint working group of the OSJD and the OTIF, established in 1982, was dissolved in 1987. The attempt to negotiate common rules in the context of the Eurasian Convention also ended in 1994 after four years. The joint task force of the OTIF and the OSJD, established in 1995, ceased its work in the following year. All attempts failed to achieve any significant advances on a joint concept of goods transport.

In recent years, the problems were again discussed at the Conference on International Rail Transport Law (Kiev 2003) and the Conference on Optimization of the Transport Law of CIM/SMGS (Paris 2004). Still, despite considerable differences, there are various possibilities to overcome the different approaches to transport law.

The situation is different, however, with respect to EU railway law, where a supra-national legal framework for a harmonized railway law in the Member States of the EU has been established.

The principle objectives of the legal concept of the EU are "a smoothly functioning internal market and the strengthening of economic and social cohesion" (Decision No 1692/96/EC of the European Parliament and of the Council of 23 July 1996 on Community Guidelines for the development of the trans-European transport network). An efficient transport system with cross-border capacity is necessary for the achievement of these objectives. Transport and, therefore, also the transport corridors, is of great significance for European economic development.

These transport corridors mainly extend through Central and Eastern European states, thus enabling connections to Asia. Today, goods transport by rail has a relatively high market share in Eastern Europe. In Russia and China it reaches even approximately 80%. In the Member States of the EU,

the market share is, however, stagnant. Nonetheless there is potential for growth. The removal of impediments to goods transport by rail is a priority in European transport policy⁸ because of its value for the European economy and for a proper environment.

Because of the development of the Asian economy, above all China, rail transport could become more significant again, provided that an improvement in its efficiency is possible. The quality of cross-border transport and, above all, speed must significantly be improved and this again depends crucially on the legal conditions for transportation.

II. The Unification of EC Rail Transport Law

The current transport policy of the EU aims at promoting rail transport and integrating national railways into a European railway network. In spite of a general increase in cross-border transport, the railways have suffered significant losses compared to other means of transport.⁹

If the railways are to keep up with other means of transportation, concepts must be developed to meet the requirements of a modern market and the competitive demands of service, quality and speed. The transport policy of the Commission as stated in the White Book of European Transport Policy for 2010 has highlighted as its special task the increased promotion of the railway sector. Capacity and competition are to be increased.

In the course of a beginning harmonization of railway transport law in the EU, the Directives 91/440/EEC and 95/18/EC and 95/19/EC were issued in the 1990s as first steps. Key elements of these Directives were the preparation of the railway companies for a competitive market. Later, the EU has continued this process by the initiation of so far three “Railway Packages”.

The First Railway Package concerned the development of railway companies (Directive 2001/12/EC), the issue of licenses to railway companies (Directive 2001/13/EC) and the allocation of infrastructure capacity (Directive

⁸ Paper No. 44 of the European Parliament, page 11 seq.

⁹ Ebeling, Japan Railway & Transport Review, December 1997, p. 18-26, 19.

2001/14/EC) for the purpose of opening rail transport which had previously been monopolized in most aspects.

In the Second Railway Package, this opening of the rail transport sector was continued by further measures on the opening of markets (Directive 2004/51/EC) and on security (Directive 2004/49/EC) and interoperability (Directive 2004/50/EC). In addition, the European Railway Agency was established by Regulation 2004/881/EC.

A third Railway Package is now intended to be devoted to the expansion of access to infrastructure for passenger transport and the improvement of passengers' rights. In addition, further harmonization of conductor training and the introduction of minimum quality standards in goods transport by rail are intended. The third Railway Package is not yet issued and still in discussion within the various institutions of the EU.

C. The Organization for Co-operation of Railways in Eastern Europe and Asia (OSJD¹⁰)

I. General Overview

The Organization for Co-operation of Railways (OSJD)¹¹ is an association of Eastern European and Asian railway companies based in Warsaw. It was founded in 1956 and commenced work on 1 January 1957. The members are the railway companies of the participating states represented by their transport ministries or the responsible central authority for railways.

The main activity of the OSJD is the improvement of international rail transport, in particular between Europe and Asia, including Combined Transport,¹² the co-ordination of an international rail transport policy, the improvement of interoperability between standard gauge (1435 mm) and the Russian broad-gauge (1520 mm), the co-operation with other international organizations and the improvement of international transport law.¹³

¹⁰ ОРГАНИЗАЦИЯ СОТРУДНИЧЕСТВА ЖЕЛЕЗНЫХ ДОРОГ (ОСЖД).

¹¹ Also abbreviated to OSShD or SSZhD.

¹² For definitions and further aspects please see the section on Combined Transport

¹³ Presentation on the 50th Anniversary of the OSJD, 11. 04. 2006 (provided by the OSJD).

At the present time, the organization has 25 members. After the German reunification, the German Democratic Republic ceased to exist as a Member State. The railway companies of France, Germany, Hungary, Serbia, Finland and Greece have observer status.

The aggregate rail network of all members of the OSJD almost is 300,000 km and therefore approximately a third of the world's rail network.

In the years 1990 to 1992, the OSJD carried out reforms to increase its efficiency. Four main points, which were recognized by the OSJD as particularly important, are the expansion of the Western European railway connections to the East Asian coast and the introduction of modern technologies, the exchange of experience between the railways of Central and Eastern Europe and those of Asia and the harmonization of international transport law and coordination between transport and environment policy.¹⁴

The OSJD reforms in the early 1990s were devoted to a fundamental reform of the regulations on membership. The original restriction to the railways of the Member States and the related transport ministries representing them seemed no longer appropriate after the fall of the Iron Curtain. The expanded rules for membership now provide associate memberships, an observer status and the possibility of association for companies. This was very welcomed. As stated, the railways of several EU Member States now have an observer status.

A focus of the work of the OSJD is programs to improve railway connections between Europe and Asia and to increase the volume of goods carried, achievable both by direct investment in technical equipment and also by rationalization and improvement of existing processes and services.

In the area of railway transport law, the area of application of the international treaties was determined and co-ordination with other international treaties on the Eurasian continent was aimed for. The counterparts of the OSJD are the expanded OTIF and the EU.

¹⁴ Andrzej Golaszewski „OSShD-Organisation for the Collaboration of Railways“, Japan Railway & Transport Review, 1997, p. 27 seq.

The OSJD, the OTIF and the EU can be compared only to a rather limited extent. The OTIF, as an international organisation founded by states, has its main purpose in the legal and technical harmonization of international rail transport, which overlaps to some extent with EU law. The OTIF has a wider geographical scope and is purely limited on railway aspects and consequently rather focusing on technical issues, in comparison to the EU. The EU, primarily an economic community focuses on economic influences of international rail transport. The OTIF and the EU have much more overlaps among each other, as both have with the OSJD. The OSJD as an association of Central and Eastern European railway undertakings and not of their respective states is structurally in contrast to OTIF and EU. The OSJD saw and sees its task in a considerably more comprehensive scope. The core tasks contain issues like interoperability and legal harmonisation, but also the field of tariff agreements.

The OSJD and the OTIF are endeavouring within the framework of their respective organizations and the further development of their treaties, to achieve harmonization, which is urgently necessary not only in the area of freight transport but also in the interest of all participants.

By the most recent COTIF reform of 1999, this objective has not yet been achieved. The reform in fact can rather be seen as regressive from the point of view of harmonization. The long-term necessity of harmonization is, however, undisputed, especially as the overlap of both systems has increased considerably with the eastward enlargement of the EU. For this reason, both organizations have concluded an agreement called the Common Position of OTIF/OSJD, which has been confirmed by the committees of both organizations.

II. The Bodies of the OSJD

The bodies of the OSJD are subdivided, into governing bodies, according to Article 4 of the OSJD Statute, the committee of the OSJD as executive body, according to Article 5 of the OSJD Statute, and the working bodies according to Article 6 OSJD Statute.¹⁵

¹⁵ The structure of the OSJD is shown in Annex I.

1. Governing Bodies

The governing bodies of the OSJD are the Ministerial Board and, at the level of the railway companies, the Conference of the General Directors, Article 4 OSJD Statute (hereinafter the “Conference”).

1.1. The Ministerial Board

The highest executive body of the OSJD is, according to Article 4 No. 1 OSJD Statute, the Ministerial Board. The Ministerial Board deals with, issues and makes decisions on matters relating to the tasks of the OSJD while taking into account the proposals of the Conference. The members of the Ministerial Board are delegates of the various national railway companies, Article 5 Nr. 4 of the OSJD Ministerial Board’s rules of internal procedure.

According to Article 4 No. 3 of the OSJD Statute, emphasis is laid on the tasks No. 1 (further development of international rail transport), No. 2 (common transport policy), No. 3 (further development of international rail transport law), No. 4 (co-operation on commercial, informational, technical and ecological questions) and No. 7 (co-operation with other international organizations) of Article 2 of the OSJD Statute.

The Ministerial Board, however, also has internal managerial functions and reports on the activity of the OSJD (Article 4 No. 3 first indent) and the Audit Committee of the OSJD (Article 4 No. 3 third indent).

In addition, the Ministerial Board also decides on its budget and its numbers of staff (Article 4 No. 3 second indent).

The decision on the admission of new members, the grant of status as observer of the OSJD (Article 4 No. 3 fourth indent) and the amendment or addition to the Statutes of the OSJD are also made by the Ministerial Board (Article 4 No. 3 fifth indent).

The members of the Ministerial Board implement their decisions within their authority under the national law of their states. If the decisions exceed this authority, confirmation by the relevant governments is required according to Article 4 No. 4 of the OSJD Statute.

Meetings of the Ministerial Board usually take place once annually (Article 4 No. 5 OSJD Statute).

1.2. Conference of General Directors

The governing body at the level of the railway companies is the Conference of General Directors of the various state railway companies, Article 4 Nr. 2 of the OSJD Statute.

The Conference organizes the work and makes decisions on questions relating to the tasks of the OSJD within the area of competence of railways (railway companies) according to No. 4 (co-operation in economic, informational, technical and ecological questions), No. 5 (improvement of competitiveness), No. 6 (technical development) and No. 7 (co-operation with other international organizations) of Article 2 of the OSJD Statute and the grant of the status of associated companies.

Insofar as the Conference is responsible for areas on which the Ministerial Board decides (co-operation in economic, informational, technical and ecological questions and co-operation with other international organizations), the Ministerial Board has to take account of the decisions of the Conference according to Article 4 No. 3 of the OSJD Statute.

The meetings of the Conference also take place usually once annually according to Article 4 No. 7 sent. 1 of the OSJD Statute.

The Conference can assign individual questions for individual decisions to the established commissions and standing working groups of the OSJD and the Committee according to Article 4 No. 7 of the OSJD Statute, which fall within their competence.

2. Executive Body: the Committee

The executive body of the OSJD is, according to Article 5 of the OSJD - Statute, the committee of the OSJD (hereinafter the "Committee").

The Committee ensures the ongoing work of the OSJD in the periods between meetings of the Ministerial Board and the meetings of the Conference according to the rules of procedure of the Committee of the

OSJD, together with the head of the Committee, the organizational commission of the OSJD and the standing working groups, Article 5 No. 2 of the OSJD Statute.

It upholds the OSJD Statute and also other contracts and conventions concluded by the OSJD unless otherwise provided in those documents, Article 5 No. 3 of the OSJD Statute.

Each member of the OSJD is obliged, according to Article 5 No. 4 of the OSJD Statute, to delegate a representative to the Committee.

3. Working Bodies

The working bodies of the OSJD are, according to Article 6 OSJD Statute, the Commissions, the joint working groups with other international organizations, the international working groups, the Committee of Representatives of Member States of the OSJD and other bodies created by decisions of the Ministerial Board or the Conference.

3.1. Commissions

Five Commissions have been established. The Commission for Transport Policy and Strategic Development and the Commission for Transport Law were established by the Ministerial Board. The Commissions for Goods Transport, Passenger Transport and for Infrastructure and Equipment were established by the Conference.¹⁶

3.2. Joint Working Groups

There are joint working groups with other international organizations. These are the Joint Working Group on the OSJD/ UNESCAP project for development of Asian-European rail goods transport with rail associations, the Joint Working Group of the OSJD and the UIC on codifying¹⁷ and information technology and the Joint working group of the OSJD and UIC on border crossing.

¹⁶ See Organigram available at www.osjd.org (also see Annex I).

¹⁷ The working group deals with the use of uniform signs and symbols.

If representatives of other international organizations participate in Joint Working Groups, the rules of internal procedure of the standing Working Groups of the OSJD (GO AG OSJD) are not applicable to these (Article 9 OSJD Statute). In these cases Joint Working Groups will establish their respective own rules.

According to Article 12 No. 1 o, Russian and Chinese are the working languages for meetings of the standing working groups. If other languages are provided in the relevant co-operation agreements, these are applicable.

3.3. Working Groups

The OSJD has at present two standing working groups. These are the Standing Working Group for Codification and Information, Technology and the Standing Working Group on Financial and Charging Issues. Other ad hoc working groups are established. These are the expert ad hoc working group of the Commission on large container transport between Asia and Europe, the expert ad hoc working group of the Commission on further development of the convention on the Use of Wagons for amending the PPW, the expert ad hoc working group of the Commission on revising the international convention on tariffs for passenger transport (harmonization with the OSJD Commission provisions), the expert ad hoc working group of the Commission on transport law (SMGS Schedule 2) and the expert ad hoc working group of the Commission on updating the OSJD – leaflets R 305-2 on main line operating indices.

III. Jurisdiction of the OSJD

The main tasks of the OSJD are defined in Article 2 of the OSJD Statute. These are the continuous development of international rail transport, coordinated transport policy, continuous development of international rail transport law, co-operation in economic, informational, technical and ecological questions, the improvement of the competitiveness of railways, technical development and the co-operation with other international organizations.

1. The Continuous Development of International Rail Transport

In the context of the development and completion of international rail transport, the OSJD relies mainly on the connections between Europe and Asia and expressly also on the strengthening of Combined Transport.

2. Continuous Development of International Transport Law

For completion of international transport law, the OSJD in the recent past has relied strongly on the harmonization of OSJD rules with the rules of the OTIF and the EU.

The OSJD has major influence on the harmonization and uniform development of railway transport law in the Eurasian area through its direction of matters under the SMPS (passenger transport), the SMGS (freight transport) and the other agreements of the OSJD relating to international railway transport.

3. Co-operation in Economic, Informational, Technical and Ecological Matters

The co-operation in the matters mentioned above connected to rail transport also belongs, according to Article 2 No. 4 of the OSJD Statute, to the core tasks of the OSJD. Included, in particular, is the development of uniform contracts to simplify international transport and of technical standards to improve interoperability (e.g. wagons and containers for the use in combined transport). Please note that lots of these forms need to be completed in Russia or China.

4. Improvement of Competitiveness of Railways

The objective of improving the competitiveness of railways in comparison to other means of transport which is stated as an objective in Article 2 No. 5 of the OSJD Statute renders harmonization on the technical and legal level necessary according to the understanding of the OSJD.

5. Technical Development

The co-operation on the use of railways and associated technical issues connected to the further development of international rail transport is of

course a focus of the increase in competitiveness and the improvement of international, technical and ecological standards, therefore going hand in hand with the measures taken to improve competitiveness.

6. Co-operation with Other International Organizations

Co-operation with international organizations which deal with rail transport issues including Combined Transport, is expressed in recent years mainly in intensified co-operation between the OTIF and the OSJD because of the interconnection of OTIF, EU and OSJD in the areas, for example, of joint working groups, but also in the recommendation that EU Directives are to be taken into account by the OSJD members other than those in the EU, as contained in the Common Railway Policy of the OSJD.¹⁸

IV. Membership

1. Members

Members of the OSJD are the railways of Member States which are represented by the executive body responsible for rail transport or the central body of the railways which have the government competences. Every member of the OSJD can specify such a body to represent it in the OSJD.¹⁹

The fact that not the states but the railways are members of the OSJD should not be overvalued for historical reasons, because the OSJD is based in principle on state railways, as the membership rights show.

The OSJD, according to Article 3 No. 2 of the OSJD Statute, now provides for observers and associate enterprises, the rights and duties of which will be specified in agreements. The observer status is granted by the Ministerial Board of the OSJD on the proposal of the OSJD Committee while taking account of the proposals of the Conference of the General Directors of the railways of the OSJD.

¹⁸ Common Railway Policy, 4.1.3, para 10.

¹⁹ Article 3, No. 1 Statute of the OSJD; A list of the Member States of the OSJD is shown in Annex II and their participation in the various agreements and treaties/organisations is shown in Annex VIII .

The grant of status of associated enterprise is a matter according to Article 3 No. 4 of the OSJD Statute for the Conference on a proposal made by the Committee.

The agreements and the status of observer or associate enterprise providing for the relevant rights and duties are concluded by the Committee, which, in the case of an observer, acts on behalf of the Ministerial Board and, in the case of an associate enterprise, on behalf of the Conference.

2. Member States

The Convention was concluded by the executive bodies or central bodies of railways of Member States responsible for rail transport. Outside the EU, these are Azerbaijan, Byelorussia, Vietnam, Georgia, Iran, Kazakhstan, China, The Peoples Republic of Korea, Kyrgyz, Moldavia, Mongolia, the Russian Federation, Tadjikistan, Turkmenistan, Uzbekistan and the Ukraine. However, Bulgaria, Hungary, Poland, Latvia, Lithuania, Romania, Slovakia and the Czech Republic, which are also members of the EU and of the OTIF, also belong to the OSJD.

3. Observers and Associate Companies

Six railway enterprises belong to the OSJD as observers. These are Deutsche Bahn (DB), Greek Railways (OSE), French Railways (SNCF), Finnish Railways (VR), Hungarian Railways (MAV) and Serbian Railways (JIS).²⁰

Private Companies having their principal business in the EU (e.g. Siemens AG) act as associate enterprises in the context of their work with the OSJD. According to amendments to the OSJD Statute, international organizations as such can now be members of the OSJD.

4. The Admission of New Members

The admission of new members is provided for in the OSJD Statute in Article 11 No. 1 and 3.

²⁰ <http://www.osjd.org/r-index.htm>; section „Наблюдатели ОСЖД“; (02.03.2007).

The admission of a new member to the OSJD is decided on by the Ministerial Board on the application of the Committee, taking account of the proposal made by the Conference.

The resolution of the Conference according to Article 5 No. 2 of the rules of procedure of the Conference of the General Directors needs to be unanimous.

The admission of a new member to the OSJD is possible with the written agreement of all members, if no member objects within two months.

This method corresponds to that for the admission of new members to the OTIF.

5. Termination of Membership

It is possible to withdraw from the OSJD. A withdrawal application must be made to the chairman of the Committee. Withdrawal is possible at the end of a calendar year. The notice period for withdrawal is six months, and membership will therefore end on 1 January of the following year (Article 11, No. 2 Statute of the OSJD).

V. Resolutions of the OSJD

Every member of the OSJD has one vote, Article 7 No. 7 of the OSJD Statute.

At the level of the Ministerial Board, decisions are made unanimously by the members of the Ministerial Board present, Article 7 No. 2 sentence 1 of the OSJD Statute.

Decisions on the imposition of penalties for non-payment of membership subscriptions are made with the exclusion of the relevant member, Article 7 No. 2 sentence 2 of the OSJD Statute.

At the level of the Conference, decisions are made in principle with a 2/3-majority of the attending members of the Conference, Article 7 No. 3 of the OSJD Statute.

There are, however, the following exceptions in which resolutions must be made unanimously:

- In questions which have financial consequences, those which arise from agreements and contracts concluded under the OSJD, insofar as they provide for a resolution (Article 7 No. 3 first indent of the OSJD Statute)
- Issues which affect amendments or additions to the Statutes of the OSJD (Article 7 No. 3 second indent of the OSJD Statute)
- The application of membership subscriptions (Article 7 No. 3 third indent of the OSJD Statute)
- The budget of the Committee and the admission of new members to the OSJD (Article 7 No. 3 fourth indent OSJD Statute).

Dealing with questions connected to international agreements and contracts of the OSJD, the parties to these agreements and contracts have voting rights, Article 7 No. 4 of the OSJD Statute. The Convention on International Passenger Transport (SMPS) and the Convention on International Goods Transport by Rail (SMGS) show that the members of the OSJD are not always identical with the subscribers to the relevant treaties. For example, Cuba which is a member of the OSJD, may not decide on issues regarding SMPS since it is not a party to the SMPS.

The resolution process of the relevant bodies provided for in agreements and treaties must correspond to the procedure contained in the rules of procedure of the relevant body of the OSJD, Article 7 No. 5 of the OSJD Statute, which is assigned in the agreement to pass the relevant resolution.

VI. Common Railway Policy of the OSJD

The OSJD has undertaken the preparation and ongoing development of strategic targets for international rail transport and a strategy of the OSJD in the course of the common transport policy for international rail transports.

According to the decision of the XXV Conference of the Ministerial Conference of the OSJD in 1997 in Tashkent, a coordinated railway and transport policy of the OSJD was prepared within the first commission of the OSJD between 1998 and 2000 headed by the representatives of Hungary, the

Czech Republic, France (as an observer), Kazakhstan, Russia, Poland and the Ukraine.

The result is the Common Railway and Transportation Policy of the OSJD (hereinafter “Common Railway Policy”) which constitutes a self-critical analysis of the status and development perspective of railway policy the Member States while taking into account the economic transformation process in Central and Eastern Europe.

This Common Railway Policy has no legal force in the Member States of the OSJD comparable to that of EU legislation. The Common Railway Policy consists of program points, comparable to the EU White Book, which constitute only rough objectives and political intentions.²¹

1. Initial Situation in the Member States

The OSJD itself paints a critical picture of the situation of railways in the OSJD Member States. The principal deficits in the course of reform to economically functioning railway companies are the low technical standard, the reduced maintenance and expansion of the infrastructure and the lack of investment in rolling stock and technology.

The condition of the rolling stock has in many places reached a critical point and the deficits and the condition have already led to the closure of routes or at least to a reduction in the frequency of services.

Increased costs in the transport of persons and goods and a decline in demand have led to an ongoing worsening of the financial situation of the railway companies. Railways are at present either low profit or loss making. Irrespective of ownership, railway companies are in a general investment crisis.

The OSJD, however, also sees potential and perspectives for rail transport in the Eurasian territory.

²¹ This report is based upon the official compendious edition of the Common Railway Policy of the OSJD (2002).

The Common Railway Policy emphasizes that transport is crucial as an investment multiplier because every amount invested in transport has 2.5 to 3 times that influence on the procurement of private investment.²²

1.1. Co-operation between Member States and Railways

According to the Common Railway Policy of the OSJD, the main task of the states is the establishment and improvement of a legal basis for railways.

It is ascertained by the OSJD that considerable differences exist with regard to the economic situation of railways and the support they receive as between the various Member States of the OSJD. While some railways receive budgetary funds regularly and adequately, others must survive practically completely without financial subvention by the state. The same applies also to indirect state support through loans or guarantees and state influence on tariff policies.²³

1.1.1. Railway Infrastructure

The OSJD regards the railway infrastructure as a kind of natural monopoly for the care and financial support of which the state is responsible, without a clear position being taken in the Common Railway Policy on what the concept of natural monopoly actually involves.

Various models are visible in individual OSJD Member States in the course of implementation of this policy. The European Union's model of the privatization and separation of the railway infrastructure from the state and railway operators is not applied outside the EU according to the position and proposals in the Common Railway Policy.

1.1.2. Member States and Railway Passenger Transport

In relation to railway passenger transport, the OSJD sees a special obligation of the state because passenger transport by rail has a considerable influence

²² Common Railway Policy, section I, "Past, present and economical tasks for the transport policy of the OSJD Member States", No.3.

²³ Common Railway Policy, section II, "cooperation of state and railways", No. 2, table I.

on the attitude of the population to railways because of its prominence in the public mind.²⁴

1.1.3. Member States and Railway Goods Transport

With regard to the transport of goods by rail in the OSJD states, the Common Railway Policy of the OSJD provides several measures.²⁵

Firstly, transport times should be reduced by simplifying of processing at borders. A reorganization of the methods and simplification of procedures should take place. The OSJD also, however, sees obligations on the part of the railways which could and must contribute to a reduction of transport times by modernizing rolling stock and introducing new transport systems.

Combined Transport should also be increasingly promoted. This corresponds to the national priorities in most OSJD Member States.²⁶

In order to exploit the advantages of Combined Transport, the OSJD proposes in its Common Railway Policy that joint regional projects for various applications of Combined Transport be prepared and implemented, in particular those which offer advantages for all means of transport, as well as the modernization of the infrastructure and the terminal facilities, increasing the speed of transport and supporting the development of international transport corridors.²⁷

1.1.4. Promotion of Key Elements of a Modern Railway Network

The OSJD in the Common Railway Policy favours targeted promotion in key areas of railway policy. This includes telecommunication and information, environmental protection, logistic centres and the coordination of associated railway transport systems.

(1) Telecommunication and Information

²⁴ Common Railway Policy, section II, “cooperation of state and railways”, No. 3, lit. b.

²⁵ Common Railway Policy, section IV, “transport policy concerning the transport of persons between Europe and Asia”.

²⁶ Common Railway Policy, para 4.1.2.

²⁷ Common Railway Policy, para 4.1.2.

According to the OSJD, the effectiveness and competitiveness of rail transport is determined increasingly by the status of information and technology. In the opinion of the OSJD, the introduction of intelligent transport systems is proposed in order to increase the effectiveness, quality and competitiveness of the transport network. These systems permit the use of constantly developing new information and telecommunication technology so as to improve the quality of rail transport.²⁸

Only the consistent introduction and application of this system in the area of rail transport will help the railways to overcome the deficits vis-à-vis competing methods of transport - primarily road and high seas transport. In addition, the introduction of telematic application oriented programs for optimizing network density of the individual means of transport is necessary. Uniform standards should thereby be created, which simplify co-operation and ultimately increase the quality of services.

(2) Environmental Protection

The Common Railway Policy states that environmental protection requires the preparation and implementation of an effective and long-term strategy and policy for railways.

The OSJA estimates that railway transport, while being a means of transport which is relatively environmentally friendly, presents many ecological questions in connection with railway transport and environmental protection.

Further, it is stated that in comparing means of transport, the very different treatment of taxation and costs of environmental damage caused, creates a problem.

But even relieved from interdisciplinary comparison between methods of transport, the OSJD relies on the environmental friendliness of railways owing to the reduction of transports which damage the environment, the reduction of emissions by the employment of modern rolling stock. Damaging emissions, use of resources and noise can thereby be reduced. An

²⁸ Here and hereinafter Common Railway Policy, section II, "cooperation of state and railways", No. 5a.

active information policy in favour of environmentally friendly railways should be aimed at.

(3) Logistic Centres

The significance of rational procedures is growing in international transport. The requirements on carriers are increasing. For effective use of the advantages of railway transport, according to the Common Railway Policy it has become indispensable to ensure the logistic standard of transport. In the present time of intermodality, the significance of well organized coordination between the various methods of transports both in goods and passenger transport has increased.²⁹

1.2. International Passenger Transport

The Common Railway Policy of the OSJD in the area of passenger transport sees good perspectives for links between the European and Asian territories. Because of the characteristically long distances, emphasis must be placed on high-speed trains and functioning traffic corridors. The OSJD regards rail transport as competitive in principle in comparison to other means of transport. Because of the condition of the infrastructure and the inadequate finance, emphasis shall, according to the OSJD, firstly be placed on the expansion of comfort and speed in selected areas.³⁰

The railways should place particular value on their specific strength in the area of comfort and generally on better coordination including with other means of transport. The time for border checks should according to the OSJD be reduced as much as possible.³¹

2. Strategic Objectives of the OSJD

The strategic objectives of state transport policy in the Member States of the OSJD as set down in the Common Railway Policy of the OSJD are the

²⁹ Common Railway Policy, section II, “cooperation of state and railways”, No. 5c.

³⁰ Common Railway Policy, Section VI “examination of the international passenger transport”, Conclusions.

³¹ Common Railway Policy, Section IV, “transport policy concerning the transport of persons between Europe and Asia”

formation of transport systems and the structural reform of transport aimed at better competition between transport enterprises.

This strategic objective seems, in our opinion, difficult to achieve as long as not all agreements of the OSJD contain the respective opening clauses in favour of possible competitors providing access to the infrastructure. Further objectives are the disconnection of infrastructure management and independent railway undertakings and the establishment of railway services independently from the state.

The strategy of cautious change laid down in the Common Railway Policy is not emphasized as being a supranational concern.³² The latest changes in OSJD-agreements are aligned cautiously to an opening e.g. for the application of other agreements and additional contractual freedom for the Parties.³³

In order to ensure stable and profitable railway transport operations, the OSJD defined as its primary tasks the optimization of the administrative systems and the modernization of rolling stock, the closing or privatization of underused railway lines, the introduction of qualitative high-value transport technologies, the implementation of a flexible tariff policy and the promotion of Combined Transport.

In considering the relationship between the Member States and the railways, the OSJD recommends 0.6% of GDP or up to 0.9% of GDP at least for necessary expansion as the investment in the railway infrastructure.³⁴

Taking account of the fact that the public assesses the work of railways mainly according to the quality of passenger transport, the OSJD considers the expansion of services for passengers to be necessary. This means, in particular, that delays in border-crossing should be reduced.

It is also aimed to expand Combined Transport and the infrastructure. This is to be achieved, in particular, by establishing of logistic centres and by employing of modern information technologies.

³³ See the analysis of the MPT in this report.

³⁴ Common Railway Policy, para 4.1.2, subpara 3.

2.1. Reduction of Delivery Times

A reduction of delivery times through increased speed of transport is aimed at, in particular by reducing and simplifying border stops. This is to be achieved by deploying improved technology on the basis of clear priorities. The employment of modern technology could, according to the OSJD, lead to considerable time-savings in the area of advance announcement of trains especially, because the processing can be better prepared and completed.³⁵

2.2. Acceleration of Goods Transport

Another important point in the Common Railway Policy is the acceleration of goods transport. The OSJD opts in particular for accelerated processing of trains at border stations by expanding of the necessary infrastructure and through technical improvements to the railway network and the rolling stock.

At border controls, the main reason for delays is the lack of information, for example on the times of arrival of goods transports or their freight.³⁶

3. Implementation of Transport Policy in the Member States of the OSJD

According to the Common Railway Policy, the principle objective of the national transport policy in the OSJD Member States is the economic orientation of railway enterprises and the creation of a competitive railway system by structural alterations and institutional reform integrating national systems in the international transport corridors.

To achieve these aims, market economy conditions should be created for the functioning of the transport system, with subventions in the case of a non-market economy viewpoint. The administrative structures of railway enterprises should also be improved. Harmonization within the OSJD and with standards of other international organizations should be aimed at in the course of legal reforms. In particular, European standards to improve the

³⁵ Common Railway Policy, para 4.1.7.

³⁶ Common Railway Policy, section VII, para. 14.

connections with the overall European transport network should be aimed at.³⁷

4. Railway Corridors

The OSJD recommends determining certain railway corridors through the territory of various states in main directions, in particular east/west and north/south. Further, the OSJD recommends to build up / improve the infrastructure around these corridors and provides for suggestions for corridors.

The Eurasian railway corridors are intended to be connected to the existing system of Western-Central European railway corridors. On the basis of an analysis of the anticipated volume of traffic, projects should be coordinated in a cross-border manner.³⁸

In the area of international passenger transport, there should be concentration on the existing routes, in order to achieve better times and quality there because in the short term an increase in passenger traffic cannot be expected.

5. Consideration of EU Directives

In its Common Railway Policy the OSJD recommends its Member States (in particular non-EU Member States) to apply EU Directives adjusted if necessary to their national conditions, for the purpose of achieving harmonization of railway transport law in Europe.³⁹

The starting point for a discussion on the application of EU Directives in the OSJD territory is the fact that the problems for railways in Central and Eastern Europe differ quite considerably from those of western railways. Nevertheless, the OSJD is of the opinion that the Directives are applicable with adjustments and should therefore be considered by the non-EU Member States.

³⁷ Common Railway Policy, section I, “Substantial adjustments and means for the realization of the traffic policy of the member countries of the OSJD” ,No. 3, Para 4.

³⁸ Here and hereinafter: Common Railway Policy, section I, para 4.2.1.

³⁹ Here and hereinafter: Common Railway Policy, section III, D, para 9.

The attitude of the OSJD is distinctive in the area of legal harmonization because the OSJD in its Common Railway Policy prefers in principle pragmatic solutions over protectionist policies.

The application of Directives to the non-EU States will probably increase in significance due to the EU eastern expansion, because the EU now within its own borders deals with the eastern European view of matters so that the implementation for eastern European States which are not EU members should thereby be facilitated.

6. Influence of EU Transport Policy on the OSJD

Already today there are numerous overlaps between OSJD and the European Union within the range of the members. Further more, since France, Finland and Germany have observer status in the OSJD, European ideas obviously influence the development of the transport policy of the OSJD.

In reviewing the extent to which separation of railway operations and infrastructure has taken place, whether the railway companies are financially independent, and to what extent access to the network is ensured for independent operators, it must therefore firstly be remembered that the Common Railway Policy was issued in February 2002, when some of the OSJD Member States were candidates for the EU, and secondly that outside the EU only few states have applied the ideas of the EC-Directive.⁴⁰

6.1. Guarantee of Independence of Management of Railway Companies and Separation of Management of Railway Infrastructure from Operations

According to the Common Policy the independence of the management of the railway undertakings from the state and the independence of the principle of separation between management of the railway undertaking and management of the infrastructure are acknowledged as fruitful principles. However, the OSJD emphasizes that access of third parties to infrastructure shall be carefully given which shows a certain reluctance to the opening of the market. However, it is clearly stated in the Common Policy that the member states (by the term “member states” it is not taken into account that the railway undertakings and the relevant states are member to the OSJD) shall

⁴⁰ Common Railway Policy, section III, C, 1, see table.

arrange for the establishing the political and economical climate in order to achieve above mentioned independence principles. Thereby, the role of the OSJD shall be similar to the role of the COTIF as organisation which acts as platform for bundling and exchanging the various interests of the relevant “member states”.

6.2. Financial Independence of Railway Companies

The OSJD states that the poor financial situation of many of the railway undertakings is OSJD countries. It therefore requires not only political but also financial assistance in order to advance the railway system and requires an effective administration of the state properties used for railway undertakings. The OSJD requests in particular to provide state aids to railway undertakings and that a minimum percentage of the BIP shall be invested into the railway infrastructure. The Common Policy requires further an independent tariff policy in order to help the railway undertakings being profitable.⁴¹

7. Targets

The OSJD states the following targets in its Common Railway Policy:⁴²

- Harmonization of the legal basis for transport in all Member States
- Creation of a common transport territory with connections to the major Eurasian economic centres
- Improvement of co-operation with neighbouring states
- Strengthening of Combined Transport
- Structural alteration of railway transport to increase competitiveness
- Preparation and implementation of a coordinated investment policy of the Member States

⁴¹ Common Railway Policy, section III, D

⁴² Common Railway Policy, section IX.

- The establishment of logistic centres for the organization of intermodal transport in international railway transport corridors
- Improvement of the contacts of the railway routes of the OSJD with carrier organizations
- Expansion of coordinated competitive tariff policy for transport within international railway transport corridors
- Improvement of the railway infrastructure with the objective of achieving international technical standards

The OSJD therefore presents itself in co-operation with other international organizations as a whole as a critical and open partner. The emphasis of its work corresponds overwhelmingly to that of the international railway organizations OTIF and CIT. The economic targets also aim in the same direction as the work of the EU. There are therefore, in our opinion, good chances for the future of further links and harmonization.

VII. The Legal Value of OSJD Rules and Agreements

1. Legal Status of the OSJD

To evaluate the legal value of the OSJD rules and agreements it has to be analyzed due to the legal form, which might be either a non-governmental organisation (NGO) or an international governmental organisation (IGO).

An intergovernmental organisation (IGO) is an organization, whose members are either sovereign states or other IGOs. Other organisations or associations of international character, having other members than (only) sovereign states or other IGOs, are classified as non-governmental organisations (NGOs). The crucial criteria to determine, whether an international organisation is an IGO or a NGO, is to elaborate, whether there are members other than states or IGOs.

Although the OSJD Statute itself mentions in Article 1 of the OSJD Statute, that the OSJD Statute was agreed upon by the executive bodies or alternatively by the central organs of the railway undertakings of the respective states, the OSJD Statute declares under Article 1 as well, that the

OSJD has international legal personality (Art. 1, Nr. 4 OSJD Statute) and that privileges and immunity are granted to the organisation and its representatives in all Member States. This is mere typical for international governmental organisations but however not an exclusion criteria and therefore no striking criteria here.

In Article 1 Nr. 3 of the OSJD Statute, the OSJD refers to herself as an international organization – a term, which is, despite its lack of notional clearness, usually used only for non-governmental organizations, which is a further indication for the OSJD being a non-governmental organisation and therefore not founded or governed by the respective states of origin of the railway undertakings.

Furthermore, the topmost management body of the OSJD is the ministerial board (Art. 4 Nr. 1 OSJD Statute), which consists of state representatives. The OSJD thus presumes that there is a relation and dependence of railway undertakings and their state and that the railway undertakings represent their state and as well the other way round. This becomes apparent in Article 4 OSJD Statute.

It also has to be considered, that, at least in the OSJD's founding period, railway undertakings were incumbent and the question of the organization's character did not arise. The OSJD was however founded by railway undertakings, which cannot at all be contractors of a contract under international public law.

Given all this, the OSJD clearly appears to be a non-governmental organization and consequently holds no international legal personality. This at the same time means that contracts concluded by the OSJD and/or its members are not subject to public international law so that these contracts as well as the OSJD regulations themselves cannot conflict with the provisions of the EC Treaty or European Secondary Law as they are mere international private law being inferior. Thus, Art. 307 EC is not applicable as there is no conflict of European Law with treaties under public international law. Regulations which are not in accordance with European Law are therefore superseded by European Law and the Member States whose railway undertakings are affected have to ensure that European Law is enforced sufficiently.

2. Comparison in Relation to OTIF

The OTIF, on the other hand, is a typical intergovernmental organization. It was founded by the states, being the OTIF members.

The different classification of the two organizations leads of course to a differing legal value of their respective agreements. While the OTIF agreements being concluded by states are international treaties, the agreements of NGOs are of a mere private nature and as such governed by international private law.

With regard to the impact of this classification, it has to be clarified, that the number of Member States being at the same time members of the OTIF and involved in the OSJD by the membership of their respective railway undertaking is limited on the new Member States Czech Republic, Hungary, Slovakia, Poland, Slovenia, Lithuania, Latvia, Romania, Bulgaria and soon Estonia, which is currently acceding to the OTIF (see Annexes II, III and VIII).

The impact of their involvement even differs within this group, as they are not applying all OSJD agreements.

3. Rule of Precedence in the Event of Conflict of Laws

As far as conflicting law in this area exists, the OTIF agreements have the prior status, as they are binding international law and the OSJD rules are agreements of a non-governmental organization and therefore private law.

If there is a conflict between OSJD and OTIF agreements, the states concerned should act appropriately in the Ministerial Board of the OSJD and the General assembly of the OTIF to either harmonize the concerned provision or to terminate the concerned agreements or organizations.

4. The Legal Nature of the OSJD rules

To clarify the legal nature of the OSJD rules and their relationship towards potentially conflicting European provisions, in particular those of European competition law, it is necessary to determine what consequences the fact has that the parties to the OSJD rules are state-run/-owned railway undertakings.

Regarding the qualification of the OSJD rules, distinction has to be made between international treaties and private agreements such as the articles of an association.

International treaties, such as the European Treaty or the various Hague Conventions, can only be validly concluded by states, according to Art. 6 of the Vienna Convention on the Law of Treaties. The States can be represented by Heads of State, Heads of Government, Ministers for Foreign Affairs and Heads of diplomatic missions, but also by representatives accredited by States to an international conference or to an international organization or one of its organs (Art. 7, para. 2, lit. c of the Vienna Convention on the Law of Treaties).

As far as ministers acted during the founding of the OSJD, they did not act as state representatives but merely as representatives of the respective railway undertakings and did, therefore, not give binding declarations on behalf of the respective states, but only on behalf of the respective railway undertakings.

Since the signatories of the OSJD rules are no states but state-run/-owned railway undertakings, which, as described above, cannot conclude international treaties, the OSJD rules cannot be qualified as international treaties.

Consequently, the OSJD rules and the organisation itself is governed by the applicable international private law.

As a mere private agreement, binding on the members of the OSJD, the OSJD rules are, therefore, inferior to EC Law, if applicable, according to Article 10 of the EC Treaty, regardless of the legal personality of the OSJD itself.

Art. 307 EC, which provides for the relationship between the EC Treaty and international treaties concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, is not applicable.

Art. 307 EC only applies in the case of a collision of European law with certain treaties of Member States with non-Member States or inter-se-treaties of Member States which are subject to public international law. Since the OSJD agreements are of a mere private nature, they do not fall under the scope of Art. 307 of the EC Treaty.

Even if the OSJD rules would be deemed part of an intergovernmental agreement, this would not change the position. Accessing states to the European Community have to ensure, that rights and obligations arising from prior intergovernmental agreements are compatible or are made compatible with the EC Treaty.

The respective Member States are required by Art. 3, 10 of the EC Treaty to ensure the *effet utile* of the EC Treaty. Insofar as the OSJD rules are in conflict with the EC Treaty or any EC directives, Member States whose railway undertakings are signatories to the OSJD rules are consequently obliged to exert their influence on their respective railway undertaking, that the railway undertaking either does not apply the respective rules or terminates the respective agreements which are in conflict with EC Law.

5. The Legal Nature of the Individual OSJD Agreements and Potential Conflicts with EC-Legislation

Hereinafter, it is described what legal nature the various OSJD agreements have and, in case these agreements are in conflict with EC law, what possibilities the respective Accessing States have to avoid such conflict.

5.1. The Statute of the OSJD

The Statute of the OSJD, concluded between the executive bodies responsible for railway respectively the central bodies of the railway undertakings, does not present any conflict to EC Law, as it is limited to the structure and functioning of the OSJD and its organs and does not have any further effect on EC Law. In particular, the Statute of the OSJD does not fulfil the criteria for an intergovernmental agreement, since no states but representatives of state-owned or state-controlled railway undertakings have signed the Statute of the OSJD; the Statute has therefore to be regarded as a statute of a non-governmental organisation and cannot be deemed a regulation of an intergovernmental organisation.

5.2. SMPS

The Agreement on International Passenger Transport (SMPS), concluded as well between the executive bodies responsible for railway respectively the central bodies of the railway undertakings, contains detailed provisions on the transportation of passengers and their luggage. According to Article 2 § 1 SMPS the provisions of the SMPS have binding character.

The provisions of the SMPS, e.g. on the obligation of carriage (Article 2 SMPS), the design of tickets (Article 4 and 5 SMPS), the validity of tickets (Article 6 SMPS), the conditions of transport for children (Article 8 SMPS), the provisions on the exclusion of certain passengers and goods from transportation (Article 11 and 13 SMPS), the delivery periods for the luggage (Article 20 and 21 SMPS) and the liability of railway undertakings (section VI SMPS) do clearly harm the commercial freedom granted by several provisions of the EC Treaty such as the freedom of movement of goods (Article 23, 25, 28 EC) and persons (Article 18, 39, 43 EC). As the SMPS is, insofar, in breach of EC Law, the Accessing States, because of the *effet utile* principle, have to ensure that their railway undertakings which are members of the SMPS, do not apply these conflicting rules.

Article 2 § 3 SMPS provides for a clause, which allows the SMPS contracting parties, to conclude bilateral or multilateral agreements on the international transport of persons, if these agreements do not affect the interest of other contracting parties of the SMPS. However, this clause does not waive the applicability of the SMPS in the European Union.

But: it has to be emphasized that the members to the OSJD are state owned or state controlled railway undertakings. Therefore, it can be said that the OSJD is a governmentally controlled private organisation. Consequently, the Accessing States whose railway undertakings are signatories to the SMPS have the possibility to intervene that the SMPS is terminated according to Article 50 SMPS, which refers to Article 11, Nr. 2 of the OSJD Statutes.

The SMPS deals with the termination in that sense, that any member can resign from the SMPS after having notified the president of the Committee of the resigning six months before the end of the year. In that case the resigning becomes effective by January, 1st of the following year.

5.3. SMGS

The Agreement on International Railway Goods Transport (SMGS), concluded between the railway undertakings of the states mentioned in Article 1 SMGS, deals with the international transportation of goods on railway.

The agreement is partly in breach of EC Law, as e.g. the provisions on the obligation of transport (Article 2, § 1 SMGS), the transportation of certain goods only under certain conditions (Article 5 SMGS), the fixing of delivery periods (Article 14 SMGS), the right to change the conditions of the freight contract (Article 20 SMGS) and the liability of the railway undertakings (Article 22 to 28 SMGS) are not compatible with fundamental freedoms provided for in the EC Treaty, such as the freedom of contract, hereby affecting especially the free movement of goods (Article 23 EC).

The Member States being at the same time involved in the OSJD by the membership of their respective railway undertakings, have, therefore, to take care that the conflicting provisions of the SMGS are not applied by the relevant railway undertakings.

According to Article 2 § 1 para. 2 SMGS the SMGS is binding on the participating railway undertakings as well as for sender and recipient regardless of the nationality of the freight contract's partners. However, according to Article 2 § 4 SMGS, the railway undertakings of states, being at the same time participants of another international agreement can execute the transportations according to this other agreement.

This provision can be seen as an opening clause, enabling the railway undertakings of states being Accessing Members, to safeguard the compliance of EC provisions on transport without completely terminating their participation in the SMGS.

The concerned states might, however, decide to terminate their participation in the SMGS according to Article 41 SMGS, which refers to the appropriate provisions in the Statute of the OSJD (Article 11, Nr. 2 of the OSJD Statutes).

The Rules on the Use of Waggon (PPW)

The Rules on the Use of Waggon (PPW) with its Annex 1 (RWU), provide for mutual use of passenger waggon, goods waggon, and the cleaning and maintenance of private goods waggon.

The RWU contains detailed provisions on the requirements for waggon in use. For example, in § 14.1 RWU it is provided that only such goods waggon are admitted to international railway transport which comply with the technical requirements of Annex 5 to the RWU.

According to § 16.1 RWU, liability for waggon taken over and the obligations connected with the takeover of liability begins with the signing of the list of waggon by the taking over railway undertaking.

Also, the charging for the use of waggon is provided for in § 20 RWU, in accordance with the tariffs stated at points 7 and 8 of Annex 46 to the RWU. That means a serious limitation of the privity of contract as the charging prices are fixed.

The same applies for the amounts for damages: § 13 RWU makes provision for compensation in case of the loss of waggon in that way, that the handing over railway is obliged to reimburse the railway owner for the value of the waggon in accordance with the value stated on the agreed tariff lists (§ 13.3 RWU).

The PPW is, therefore, in conflict to EC Law, as the commercial freedom and the privity of contract, being parts of the fundamental freedoms provided for in the EC Treaty, are affected.

Although the PPW has an opening clause, regarding agreements concluded prior to the accession to the PPW (Article 1, Nr. 2 PPW) and agreements between contracting and third parties (Art. 1 Nr. 3 PPW), the Member States being at the same time involved in the PPW by their respective railway undertakings being contracting party of the PPW must apply the PPW, since the opening clause is not applicable here. The reason is that the conclusion of agreements between contracting and third parties is inadmissible if affects PPW railway undertakings not participating to the other agreement. The EC Treaty could be deemed such other agreement with third parties, but it is

affecting other PPW railway undertakings because the provisions of the EC Law being in conflict with the PPW precede. Therefore, the PPW opening clause is not applicable.

Consequently, the concerned states have to intervene on their respective railway undertakings to terminate their participation in the PPW according to Article 6 PPW by declaring their withdrawal to the Committee (Art. 6, Nr. 1 PPW).

5.4. The Tariffs (MPT, MTT, ETT)

The International Passenger Tariff (MPT), the International Transit Tariff (MTT) and the Uniform Transport Tariff (ETT) are the three tariff agreements of the OSJD.

The International Passenger Tariff (MPT) consists of a contract on the MPT and the MPT itself. The contract on the MPT has in general a binding character Article 1 Nr. 2.

Notwithstanding the latter, according to Article 2 Nr. 1 contract on the MPT, the contracting railway undertakings are free to agree on diverging tariffs with third countries. Further, the contract on the MPT also provides for a clause in Article 2, Nr. 2 permitting the conclusion of bi- or multilateral agreements on differing international tariffs.

Any party to the contract on the MPT has the right to agree on differing tariffs regarding the transport of passengers, luggage, freight and the charge for reservations in sleeping cars according to Article 6 Nr. 2 contract on the MPT.

This means, that the contract on the MPT provides for opening clauses in all relevant areas and does not present a serious conflict to EC Law.

Furthermore, every contracting railway undertaking can terminate its participation in the agreement according to Article 7 Nr. 3 sentence 1 contract on the MPT. In such a case the contracting railway undertaking shall send a notice of cancellation to the committee of OSJD and to all members of contract on the MPT six months prior to the envisaged cancellation date. The

committee of OSJD then informs immediately all concerned railway undertakings about such a cancellation.

The International Passenger Tariff (MPT) itself is integral part of the contract on the MPT and is therefore also generally binding. Issues, which are not covered by the MPT have to be dealt with according to the SMPS (section I, § 3 MPT). Despite its detailed provisions, the contract on the MPT and the MPT do not present any conflict potential, as the provisions can be waived – as provided for in the contract on the MPT.

The International Transit Tariff (MTT) contains a vast amount of detailed provisions on various kinds of goods and wagons (§§ 19 to 30 MTT). The fixing of tariffs is not compatible with the privity of contract and seriously affects the free movement of goods within the European Union. The Member States, whose respective railway undertakings apply the MTT are therefore in breach of fundamental freedoms of the EC Treaty and the Member States are obliged to ensure the *effet utile* of the EC Treaty by impacting on their respective railway undertakings to either not apply the concerned provisions or to terminate the agreement.

The contract on the MTT has an opening clause: According to Article 1, Nr. 7 of the contract on the MTT other tariffs can be applied, but only insofar as they are not in conflict with the MTT. This, however, cannot be deemed a remedy regarding the clear conflict between the MTT on the one side and the fundamental freedoms provided for in the EC Treaty on the other side.

The Member States, whose respective railway undertakings are applying the MTT therefore have to intervene on their railway undertakings to terminate their participation in the MTT according to Article 4, Nr. 3 of the Contract on the MTT. The provision deals with the termination in the same way as for the MPT. Any contracting railway undertaking can resign from the agreement after having notified the president of the Committee of the resigning. The delay is with respect to this agreement only three months before the end of the year, to make the resigning effective by January, 1st of the following year.

The Uniform Transport Tariff (ETT) was concluded between railway undertakings and concerns the transport of goods between the contracting parties (§ 1, lit. a ETT) and the application on third parties, not being

signatory to the said agreement (§ 1, lit. b ETT). The Uniform Transit Tariff (ETT) is according to its § 1, lit. a und b, only applicable on the routes mentioned in section VIII of the ETT and provides for the application of fixed tariffs on these routes. As far as these routes lie within the European Union or are affecting the Common Market, the ETT is in conflict with the EC Treaty since such fixing of tariffs is in breach with Directive 91/440/EEC. . The ETT does not contain any opening clause or exemption from the application of the fixed tariff.

The Member States, whose respective railway undertakings are applying the ETT, therefore have to intervene on their railway undertakings to terminate their participation in the ETT according to Article 11, Nr. 2 of the OSJD Statutes which has to be applied accordingly to the ETT termination. The OSJD Statutes provide for a declaration of notice 6 months in advance. The termination becomes effective with the beginning of the following year.

5.5. Convention on the Use of Uniform Containers

The Convention on the Use of Uniform Containers contains provisions on the conditions of usage and the standards of the containers.

As far as the standards of the used containers is concerned, the agreement refers in its § 1.1 to international standards and is therefore not in conflict with EC Law. But as far as the usage of the containers is concerned, the agreement provides for detailed provisions on the handing over (§ 2), the transportation (§ 3), the usage and return of the containers (§ 4) and the compensation in case of damages (§ 6). These provisions provide for an unacceptable limitation of the privity of contract and are therefore in breach of EC Law.

The Convention on the Use of Uniform Containers does not provide for an opening clause or a termination clause. According to § 7 of the Convention on the Use of Uniform Containers, any changes or amendments are subject to general OSJD proceedings.

The Member States, whose respective railway undertakings are applying the Convention on the Use of Uniform Containers, therefore have to intervene on their railway undertakings to terminate their participation in the Convention on the Use of Uniform Containers according to § 7.2 of the Container

Agreement in conjunction with the Article 11, Nr. 2 of the OSJD Statutes, which provide for a declaration of notice 6 months in advance. The termination becomes effective with the beginning of the following year.

5.6. Agreement on Organisational and Operational Aspects of Combined Transport

The Agreement on Organisational and Operational Aspects of Combined Transport in the communication between Europe and Asia is a rather political agreement formulating the willingness to cooperate to enforce and improve combined transport between Europe and Asia. As the agreement has no binding character, there is no breach of EC Law.

5.7. Conclusion

Concluding it can be said, that the EC Law is not in conflict with OSJD agreements due to the superior standing of EC Law. However, the EU Member States have to ensure the effectiveness of the EC Treaty according to the *effet utile* principle and have if necessary to terminate the OSJD agreements in contrast to EC Law.

6. Legal Status

The OSJD is according to Article 1 of its Statute an international organization which acts strictly on the basis of its Statute. The OSJD is a subject of international law and possesses the legal personality necessary for the exercise of its activities.⁴³ The OSJD Statute came into force on 1 January 1957. In its present version with changes and additions, it is in force since 1 July 2002. According to Article 8 OSJD Statute, its work is financed by the members of the OSJD.

7. Working Languages

The working languages of the OSJD are, according to Article 12 No. 1 OSJD, Statute, Chinese and Russian. According to Article 12 No. 2 OSJD Statute, however, every member of the OSJD has the right to use other languages, although in this case a translation into one of the two working languages

⁴³ A list of the OSJD Members is shown in Annex III to this study

must be provided. In Article 12 No. 3 OSJD Statute, it is also stated that in international affairs, English and German can be used.

The Statutes of the OSJD were issued in Chinese and Russian. While the working and contract languages are equal in principle, in the case of different interpretations the Russian text is binding.

8. Headquarter of the Committee

The headquarters of the Committee which should, according to Article 10 OSJD Statute, be in a Member State, is determined by the Committee of Ministers every five years taking account of the proposal of the Conference of the General Directors. The present headquarters of the committee is Warsaw.

D. Important Directives and Treaties

I. Directives and Regulations of the EC

In the study, the Directives and Regulations of the EC issued in connection with rail transport were taken into account. Included were the Directives 91/440/EEC, 95/18/EC, 96/48/EC and Directives of the first and second railway package and Regulation 881/2004/EC as well as Regulations 141/62/EEC and 1017/68/EEC on Competition in Railway Transport

1. Regulation 1017/68/EEC on Competition in Railway Transport

The Regulation 1017/68 (amended in the year 2003) provides for an exemption of the application of Art. 81 EC Treaty for certain agreements in the railway sector. The most important of these is the exemption for technical agreements according to Article 3 of Regulation 1017/68, which provides an exception on the basis of the determination of certain functions, permits technical co-operation and logically does not regard such co-operation as a breach of competition rules. However, amendments are intended.

2. Directives 91/440/EEC, 2001/12/EC and 2004/51/EC on the Development of an Open Market

2.1. Directive 91/440/EEC

Directive 91/440/EEC on the development of the community's railways applies to the management of railway infrastructure and to rail transport activities of the railway undertakings established or to be established in a Member State of the EU. Railway undertakings, the activity of which is limited to the provision of solely urban, suburban or regional services, are excluded.

The aim of the Directive is to facilitate the adaptation of the community railways to the needs of the single Market and to increase their efficiency.

The Directive provides that Member States shall take the measures necessary to ensure that as regards management, administration and internal control over administrative, economic and accounting matters, railway undertakings have independent status in accordance with which they will hold in particular assets, budgets and accounts which are separate from those of the state and that railway undertakings shall be managed according to the principles which apply to commercial companies.

Furthermore the management of railway infrastructure and the provision of transport services shall be separated. The separation of the accounts for these two areas is obligatory; the organizational and institutional separation is dispositive.

In conjunction with the existing publicly owned or controlled railway undertakings, Member States shall set up appropriate mechanisms to help reduce the indebtedness of such undertakings down to a level which does not impede sound financial management and to improve their financial situation.

The Directive specifies that railway undertakings shall have the right of access to the railway infrastructure in other Member States. This, however, was limited to the international groups of railway undertakings and to companies in cross-border combined goods transport services. An international grouping in the meaning of Article 3 Directive 91/440/EEC is any association of at least two railway undertakings established in different

Member States for the purpose of providing international transport services between Member States.

The user fee for use of the railway infrastructure and the technical legal and financial conditions agreed between the infrastructure operators and the authorized users of the infrastructure may not be discriminatory. Directive 95/19/EC was issued in order to create uniform principles for the above.

2.2. Directive 2001/12/EC

Directive 2001/12/EC amended and extended Directive 91/440/EEC. The dispositive separation between railway undertaking and infrastructure manager was made obligatory with regard to the organisational independence. Accordingly, railway undertakings and infrastructure managers shall prepare and publish separate profit and loss accounts and balance sheets. Public funds paid to one of these two areas of activity may not be transferred to the other. A formal institutional separation between the activities of infrastructure managers and railway undertakings is not required according to Article 6 of Directive 2001/12/EC or Article 14 of Directive 2001/14/EC and Article 4 of Directive 91/440/EEC. The organisational separation can be managed by means of separation of certain essential functions and/or the creation of a rail regulator.

From 15 March 2003, all railway undertakings to which Article 2 of Directive 91/440/EEC, amended by Directive 2004/51/EC with regard to market opening, applies, i.e. all existing or future railway undertakings based in the EU, and which are not expressly excluded from application, may offer their goods transport services on the Trans European Rail Freight Network which is more precisely defined in Article 10a of Directive 2001/12/EC and its Annex I (approx. 50,000 km). From 15 March 2008, the entire rail network of the EU will be opened for international freight services.

The Trans-European Rail Freight Network (TERFN) consists of the major lines in each Member State shown on the map incorporated into the Directive, plus feeder lines and access to track in ports and multi-user

terminals; and by 2008 open access to the entire European rail network for all international freight.⁴⁴

The functions (according to Schedule 2 of the Directive, e.g. decisions on allocation of rail tracks lines and charges for using them), crucial for equitable and discrimination-free access to the infrastructure, are to be assigned to authorities or companies which themselves do not provide transport services.

2.3. Directive 2004/51/EC

The purpose of Directive 2004/51/EC amending Directives 91/440/EEC and 2001/12/EC, is to develop cross-border rail transport and improve the efficiency of the railway in comparison to other means of transport.

Directive 2004/51/EC provides that access shall be granted to the Trans European Rail Freight Network and, at the latest by 1 January 2006, to the entire rail network for the purpose of operating international freight services. Furthermore, access to the infrastructure in all Member States for the purpose of operating all types of rail freight services shall be granted to railway undertakings at the latest by 1 January 2007.

3. Directives 95/18/EC, 2001/13/EC (and 2004/49/EC) on the Licensing of Railway Undertakings

3.1. Directive 95/18/EC

This Directive supplements Directive 91/440/EEC. Its objective is to ensure, by the introduction of a license for railway undertakings that access rights to railway infrastructure are applied throughout the European Community on a uniform and non-discriminatory basis and that dependable and adequate services are provided for the protection of customers and third parties and the maintenance of high standards of safety.

Directive 95/18/EC concerns the criteria applicable to the grant, renewal or amendment of licenses by a Member State intended for railway undertakings established in the community.

⁴⁴ <http://www.rail-reg.gov.uk> Website of the UK Office of Rail Regulation.

This Directive is applicable to railway undertakings which provide transport services as stated in Article 10 of Directive 91/440/EEC. Those, the activities of which are limited to the operation of urban, suburban or regional services, are excluded.

A railway undertaking shall be entitled to apply for a license to the designated responsible body in the Member State in which it is established and the license must be issued if the requirements as to financial capacity, professional competence and cover for its civil liability or equivalent arrangements for cover in accordance with national and international law, of its liabilities in the event of accidents, in particular, in respect of passengers, luggage, freight, mail and third parties, are met. A railway undertaking shall also comply with national law provisions, in particular, specific technical and operational requirements for rail services, safety requirements applying to staff, rolling stock and the internal organization of the undertaking, provisions on health, safety, social conditions and the rights of workers and consumers.

A license granted is valid throughout the European Community.

3.2. Directive 2001/13/EC

Directive 2001/13/EC amending Directive 95/18/EC removes from the application of Directive 95/18/EC railway undertakings the activities of which are limited exclusively to the transport of shuttle services for road vehicles through the channel tunnel and permits Member States to exclude additional railway undertakings from its application.

It also provides that the licensing authority of a Member State may not itself provide railway services and must be independent of offices or undertakings which do so.

3.3. Directive 2004/49/EC

Directive 2004/49/EC amending Directives 95/18/EC and 2001/14/EC, amends Article 8 of Directive 95/18/EC only to the effect that it specifies that professional competence is established if the applicant railway undertaking has or will have an internal organization and has the necessary

knowledge and/or experience for a safe and reliable control and supervision of its business. For further provisions D.I.4.3. below are referred to.

4. Directives 95/19/EC, 2001/14/EC (and 2004/49/EC) on the Allocation of Railway Infrastructure Capacity and Charges for the Use of Railway Infrastructure and Safety Certification

4.1. Directive 95/19/EC

This Directive will not be dealt with because it was superseded by Directive 2001/14/EC as of 26 February 2001.

4.2. Directive 2001/14/EC

This Directive has as its objective increasing transparency and non-discriminatory access to railway infrastructure for all railway undertakings, and to create incentives for the optimal use of the railway infrastructure.

Safety certification will not be dealt with here, cf. infra under D.I.4.3.

This Directive concerns the use of the railway infrastructure for inland and cross-border railway transport. Shuttle services for road vehicles through the channel tunnel are excluded from its scope. Member States are enabled to exclude certain other networks.

This Directive establishes the principles and procedures to be applied with regard to the setting and charging of railway infrastructure charges and the allocation of railway infrastructure capacities.

In principle, track capacity is allotted by the infrastructure manager which is legally, organizationally and, in its decision-making, independent of railway undertakings. It conducts the allocation proceedings. The Member States can adapt framework regulations for the allocation of track capacity. The procedure for the allocation of track capacity will be determined by the infrastructure managers for their network within the framework of this Directive, ensuring thereby that the track capacity is allocated in an equitable and non-discriminatory manner in compliance with community law. The infrastructure manager must develop and publish a network statement

specifying the conditions for access to the relevant railway infrastructure, the procedure, the nature of the track and the charging rules and tariffs.

Track capacity can be allocated on the basis of framework agreements (with duration, in principle, of five years), the allocation of a working timetable period (one year) or an ad hoc allocation (allocation of train paths).

After the allocation, the applicant is entitled to use a train path within the limits allocated in return for charges. Once allocated Infrastructure capacity is not transferable, and trading in infrastructure capacity is prohibited (the use of capacity by a railway undertaking when carrying out the business of an applicant which is not a railway undertaking, shall not be considered a transfer).

The levying of charges for the use of railway infrastructure must be in accordance with the following principles:

Member States shall establish a charging framework. They shall also establish specific charging rules or delegate such powers to the infrastructure manager provided that the latter is legally, organizationally and, in its decision-making functions, independent of any railway undertakings.

The determination of the charge for the use of infrastructure and the collection of this charge shall be performed by the infrastructure manager, which shall ensure that the charging scheme results in equivalent and non-discriminatory charges for different railway undertakings that perform services of equivalent nature.

4.3. Directive 2004/49/EC

Directive 2004/49/EC removes the provisions on safety certification from Directive 2001/14/EC and re-imposes them.

Firstly, it is provided that in order to be granted access to the railway infrastructure, a railway undertaking must hold a safety certificate, which consists of evidence that the railway undertaking has established its safety management system and can meet requirements on controlling risks and operating safely on the network. The safety authorities of the Member States are responsible for issuing of the certificate.

Member States shall ensure that railway undertakings applying for a safety certificate have fair and non-discriminatory access to training facilities whenever such training is necessary for the fulfilment of requirements to obtain the safety certificate.

Safety authorization is also issued to infrastructure managers and also consists of two parts, namely the authorization confirming acceptance of the infrastructure manager's safety management system and authorization confirming acceptance of the provisions of the infrastructure manager to meet specific requirements necessary for the safe design, maintenance and operation of the railway infrastructure.

Each Member State shall establish a safety authority which may be the ministry responsible for transport matters but must be independent of railway enterprises and infrastructure managers etc.

5. Directive 96/48/EC, 2001/16/EC and 2004/50/EC on interoperability

5.1. Directive 96/48/EC

Directive 96/48/EC on the interoperability of the Trans European High Speed Rail System aims at improving the coherence of infrastructure and rolling stock, for example, performance capacity, highest speed or acceleration.

National technical standards and consequent close associations to national railways and national railway industries are in conflict with interoperability. Firstly, therefore, insofar as possible and necessary, European technical standards for interoperability (TSI) should be developed by the European Standards Institutes CEN, CENELEC and ETSI.

5.2. Directive 2001/16/EC

Directive 2001/16/EC on the interoperability of the Trans European Conventional Rail System is intended to improve the interoperability of the Trans European Conventional Rail System in accordance with the provisions of Directive 98/48/EC, which regulates interoperability in the area of high speed trains.

National technical standards also operate against interoperability in the area of conventional railway systems as they do in the high speed sector. The European Standards Institutions should also therefore develop European standards for conventional railway transport, the technical standards for interoperability (TSI).

Interoperability means that in railway transport, vehicles can travel between various rail networks, in particular, between the networks of various states.

5.3. Directive 2004/50/EC

Directive 2004/50/EC amended and corrected Directives 96/48/EC and 2001/16/EC. The main reason for this was the establishment of the European Railway Agency by Regulation 881/2004/EC and the assignment of jurisdiction resulting there from and the intended unification of both Directives on high speed trains and conventional trains. Other changes related to the clarification and improvement of the technical, organizational regulations resulting from the knowledge gained in the practical application of both Directives.

The European Railway Agency (ERA) is one of the agencies of the European Union. Its mandate is the creation of a competitive European railway area, by increasing cross-border compatibility of national systems, and in parallel ensuring the required level of safety.

As the Community has adopted legislation in its Common Railway Policy to pave the way for the gradual establishment of an integrated European railway area not only in a legal manner but also technically, this does necessarily include the development and implementation of Technical Specifications for Interoperability (TSI) and a common approach to questions concerning railway safety. The main task of the European Railway Agency (ERA) is to manage the preparation of these measures, in particular reinforcing safety and interoperability of railways throughout Europe by providing a strong new momentum towards the shared vision of a truly integrated, competitive European railway area.

The structure of the ERA, as well as its main tasks and working methods are outlined in EC Regulation No 881/2004. The Agency is governed by an Administrative Board composed of one representative of each Member State, four representatives of the Commission, and six representatives of the

Railway sector. The Executive Director is appointed by the Administrative Board. The Agency is operational, with about 90 members of staff, mostly professionals from the European railway sector.⁴⁵

6. Directive 92/106/EEC on the establishment of common rules for certain types of combined transport of goods

Council Directive 92/106/EEC regulates the establishment of common rules for certain types of Combined Transport of goods between Member States.

Goods transport between Member States in which only feeder and delivery routes are dealt with by trucks and such equipment, while the remaining parts are travelled by rail or inland waterways or by sea, if this amounts to more than 100 km linear distance, is defined as “Combined Transport” in the meaning of Directive 92/106/EEC Article 1 (2).

The feeder and delivery road transport is therefore – for the feeder section – between the place at which the goods are loaded and the nearest loading station or – in the case of the delivery section – between the nearest loading station and the place at which the goods will be unloaded or within a maximum radius of 150 km linear distance around the inland waterway or sea harbour of the loading station.

According to Article 4 Directive 92/106/EEC, all transport companies based in a Member State which fulfil the conditions for access to the market for goods transport between Member States may conduct national or cross-border delivery or collection transport on the roads as a part of Combined Transport.

The Member States should, according to Article 6 Directive 92/106/EEC, take the necessary measures to reduce or refund tax for road vehicles engaged in Combined Transport, at a fixed rate or proportionately.

⁴⁵ <http://www.era.europa.eu/> Website of the European Railway Agency.

7. Regulation 881/2004/EC on Establishing a European Railway Agency (Agency Regulation)

The European Parliament and Council of the European Union issued Regulation No. 881/2004 establishing a European Railway Agency for technical regulation of the railway sector on the international level.

The main task of this agency is, according to Article 1 of the Regulation, the improvement of safety and interoperability within the European Union by technical support of the Commission and the Member States in relation to improving interoperability and safety of the European railway transport system.

Its tasks also include the issuing of common safety standards and monitoring of these standards and further technical specification for interoperability (TSI).

This agency is also intended to provide the necessary support for the implementation of Directive 2004/49/EC on railway safety by preparing common safety procedures and objectives in consultation with its subordinate expert groups and ensuring continuous monitoring of the safety standards.

The agency is also responsible for further preparation and revision of technical specifications on the basis of the preparatory work of the AEIF. It maintains, according to Article 11 of the Regulation, a databank on railway safety, which should be available to the public like the RAILINC⁴⁶ in the US, and ensures the networking and co-operation between the railway safety authorities of the individual states and other investigation agencies, in particular, by promoting exchanges of experience and developing a common safety culture in the area of railways.

According to Article 16 of the Regulation, the European Railway Agency also certifies maintenance workshops for rolling stock and makes recommendations, according to Article 17 of the regulation, for professional competence and the assessment of operational and maintenance staff.

⁴⁶ Communication from the Commission to the Council and the European Parliament: "Towards an integrated European railway area" [COM (2002) 18 final - not published in the Official Journal].

II. OTIF

As agreed with the European Commission, a comparison between the OSJD rules and the OTIF rules is made in the areas in which the EU itself has made no provisions.

The OTIF – the intergovernmental organization for international carriage by rail – was established in 1985 by the OTIF Convention. It has 42 Member States, including all Member States of the European Union with the exception of Estonia (ratification procedure is continuing), Cyprus and Malta. Some countries of the Middle East and North Africa are also members.⁴⁷

Due to the differing geographical scope of EC and OTIF rules, the application of OTIF rules in the EU is not always free of conflicts. Regarding CIV, problems might occur after implementation of the third railway package.

1. COTIF

The OTIF is based on the OTIF-Convention, the COTIF, which was modernized by the protocol of Vilnius in 1999 and entered into force on 01. 07. 2006. It contains several schedules on international rail transport.

An extension of the area of application of the COTIF is intended, in order to facilitate for the long term railway transport from the Atlantic to the Pacific under a uniform legal regime. Impediments to cross-border international transport are intended to be removed. The OTIF also intends to cooperate in the preparation of another international convention on rail transport within the framework of the ECE/UNO and the Unidroit.

2. According to the CIV

Appendix A to the COTIF contains the Uniform Rules concerning the Contract for International Carriage of Passengers by Rail (CIV)⁴⁸ and

⁴⁷ A list of all Member States can be found in the Annex II

⁴⁸ The abbreviation CIV is based on the French title (convention internationale concernant le transport des voyageurs par chemin de fer).

provides regulations for the conclusion and performance of contracts for the carriage of passengers and luggage and on the liability of railways providing international passenger transport.

3. According to the CIM

The Uniform Rules concerning the Contract for International Carriage of Goods by Rail (CIM)⁴⁹ Appendix B, provide regulations for the conclusion and performance of contracts for the carriage of goods, calculation of the freight and the use of the CIM consignment note or the uniform CIM/SMGS consignment note.

4. RID

The Regulation concerning the International Carriage of Dangerous Goods by Rail (RID) Appendix C, contains regulations on dangerous goods and the conditions for their transport. The RID has been discussed only to the extent necessary because of its limited legal content.

5. CUV

The use of wagons is dealt with in the Uniform Rules concerning the Contract for the Use of Wagons in International Rail Transport, Appendix D to the COTIF. The CUV contains regulations for bi- or multi-lateral contracts for the use of railway wagons in international rail transport under the CIV and CIM.

6. RICo

The former RICo contained regulations for the use of uniform containers in international transport. The Regulations concerning the International Carriage of Containers by Rail (RICo) was annex III to the CIM in its former version of 1980. With the entry into force of COTIF 1999, RICo has been repealed and replaced by Article 3d, Article 7, par. 1, Article 23, para. 3a, Article 30, para. 3 ad Article 32, para. 3 in the CIM 1999.

⁴⁹ The abbreviation CIM is based on the French title (convention internationale concernant le transport des marchandises par chemin de fer).

7. CUI

Appendix E which contains the Uniform Rules concerning the Contract for the Use of the Infrastructure in International Rail Transport (CUI) has been discussed for completeness although in some cases it has been stated not to apply.⁵⁰

8. APTU and ATMF

Appendix F The validation of technical standards and prescriptions applicable to railway material intended to be used in international traffic (APTU) and Appendix G The technical admission of railway material used in international traffic (ATMF) have not been taken into account in this report.

This is due, firstly, to the fact that these appendices provide for mere technical requirements and have therefore no significance for the questions dealt with here, and, secondly, because of the reservation of application declared by some EU Member States according to Article 42 COTIF.

III. OSJD

Established railway companies of 25 countries belong to the OSJD, mostly those of the former Soviet Union, China and Vietnam. Some EU Member States namely the Czech Republic, Slovakia, Hungary, Poland, the Baltic States, Bulgaria and Romania are also members of the OSJD.

1. Convention of the OSJD (2002)

The OSJD Statute is the founding document of the OSJD. It deals mainly with organisational questions, while setting out certain political objectives presented in the range of the OSJD Common Railway Policy - as described above.

2. Agreement on International Passenger Transport (SMPS)

The SMPS deals with questions of international passenger transport by rail and was signed by the ministries competent for railway in the various OSJD

⁵⁰ Certain Member States have made use of the right by COTIF not to apply the CUI following the recommendation of the Commission to do so.

countries acting thereby as representatives of state owned or state controlled railway undertakings with the exception of Hungary and Romania.

Apart from the regulations for the international transport of passengers by rail and the formation and performance of the contracts for the carriage of passengers, the transport of luggage and the liability of the railways are dealt with.

The SMPS is at present undergoing review. According to our information received from the OSJD, greater precision and convergence, to the EU is intended.

3. Agreement on International Railway Goods Transport (SMGS)

The SMGS regulates aspects of international transport of goods; it has not been ratified by the Czech Republic, Slovakia, Hungary and Romania.

It is the goods transport agreement for the OSJD and regulates the transport of goods between the states the railways of which are members of the OSJD.

The SMGS is at present undergoing review. Greater precision and convergence to the EU is intended.

Both the SMPS and SMGS are still, to some extent, oriented to the special requirements of a planned economy and co-operation between states. A distinction from the COTIF is that these conventions were concluded between the railways, although the latter were represented by the relevant transport ministries. Both conventions are, at present, in the course of revision with the aim of increasing precision and harmonisation to EU law.

4. Rules on the Use of Wagons (PPW with its Annex 1)

The Rules on the Use of Wagons (PPW), with its Annex 1 (RWU), provides for mutual use of passenger wagons, goods wagons, and the cleaning and maintenance of private goods wagons.

5. International Passenger Tariff (MPT)

The Agreement on direct International Transport of Passengers and Goods by Rail (MPT) is the tariff agreement of the OSJD for passenger transport. It

deals with the conclusion and performance of international passenger transport and luggage.

6. International Transit Tariffs for Goods Transport

On the territory of the OSJD there are two conventions on tariffs in international goods transport; the Uniform Transit Tariff (ETT) and the International Transit Tariff (MTT), both dealing with the calculation of tariffs and charges and the procedure for issuing tickets for international travel between states which apply the SMGS and those which apply the CIM.

6.1. Uniform Transit Tariff (ETT)

The Uniform Transit Tariff (ETT) is an OSJD tariff agreement for goods transport, directed, in particular, at shorter routes. It applies a linear method for the calculation of charges and applies mainly between Russia and the CIS.

6.2. International Transit Tariff (MTT)

The Reformed International Railway Tariff (MTT) is the second goods tariff agreement, applied mainly to longer routes. It is based on a decreasing method of calculating transport charges.

7. Convention on the Use of Uniform Containers

The OSJD convention on the use of uniform containers sets out the conditions for the employment of containers in goods transport by rail and the international exchange of these containers.

8. Agreement on Organisational and Operational Aspects of Combined Transport in the Communication between Europe and Asia

The agreement on Combined Transport is, as a relatively short agreement, directed at the promotion of Combined Transport involving rail, road and ship.

E. Comparative Analysis

I. Independence of the Railway Companies

1. Independence from the Member State

1.1. Legal Situation in the EU

1.1.1. Competition in the Railway Sector

Regulation 1017/68 provided for the first time the application of European competition rules to railway, road and inland waterway transport.

For railways, roads and inland waterway transport, the provisions of Regulation 141/62 were from the outset limited until 31 December 1965. In 1968, Regulation 1017/68 provided specific rules for the application of European competition provisions to the railway transport sector.

The Regulation in principle provided a cartel prohibition for the railway transport sector, in order to exclude coordinated conduct in the meaning of the former Article 85 of the EC Treaty and the abusive exploitation of a market-dominant position in the meaning of the former Article 86 of the EC Treaty.

The prohibition of agreements is contained in Article 2 of the Regulation. It covers all agreements between enterprises, decisions of groups of enterprises and coordinated conduct likely to adversely affect trade between the Member States and effecting or even intending a restriction or hindrance of competition. Provisions for the purpose of maintaining the status quo in the transport sector are also covered by the cartel prohibition.

Article 2 a) to e) of the regulation prohibits the fixing of prices or transport conditions, the exercise of influence on the transport market, the division of the transport market, discrimination between equal trading partners by the application of different conditions and certain linked transactions without reference to transport services.

According to Article 3 of the regulation, agreements on technical co-operation are excluded from the cartel prohibition because a stronger link of the over-fragmented transport sector was to be promoted.

Exceptions to the application of the cartel prohibition were further possible agreements and coordinated conduct would contribute to improving of the quality of transport services or on the markets on which supply and demand is subject to strong periodic fluctuations, to increase the continuity and stability of satisfying the demand for transport or to increase the productivity of enterprises or to promote technical or financial progress, provided that the interests of the transport user are adequately protected.

Article 8 of the regulation provides a prohibition on the abuse of a dominant market position. Accordingly, the abusive exploitation of a dominant position on a market or a significant part thereof is explicitly forbidden, if this adversely affects trade between the Member States. The exploitation of a dominant market position is assumed in particular according to Article 8 a) to d) of the regulation if agreements in the meaning of Article 2 a, b, d, e, of the Regulation exist, i.e., if fares or fare conditions or other conditions are set directly or indirectly, the control of transport offers, sales, technical development or investment is restricted, markets allocation, different conditions for services of the same value apply to different customers, who are thereby placed at a competitive disadvantage, or the conclusion of contracts subject to the condition that the partner takes additional services which are neither materially nor customarily associated with transport services.

The most important Article on the promotion of the independence of railway undertakings from the State is Article 9 of Regulation 1017/68, which concerns the treatment of public enterprises in competition.

According to Article 9 of the Regulation, public enterprises are state railway companies but also such private undertakings to which the state grants special or exclusive rights.

Measures which conflict with the objectives of the Regulation to apply the EU competition rules to the transport sector in the widest possible manner are prohibited to the Member States according to Article 9 (1) of Regulation 1017/68/EEC expressly.

In principle, thereby all State interference in competition is forbidden. An exception from this prohibition applies only if the enterprise is engaged in services of general financial interest.

This exception is, however, subject to a restriction because measures limiting competition even in the area of services of general financial interest are in turn only admissible if thereby a consistent application of directives on the relevant area of activity would make the services to be provided in the public interest legally or actually impossible (Article 9 (2) sent. 1 of Regulation 1017/68). Finally, every exceptionally admissible restriction of competition applies subject to the reservation that no exception is in conflict with the development of trade. (Article 9 para. 2, sent. 2 of Regulation 1017/68).

Railway undertakings were enabled and obliged to conduct their activities now independently of direct state influence.

1.1.2. Opening of the Market

(1) Directive 91/440/EEC

The first step in opening the market in railway transport was taken with Directive 91/440/EEC in 1991 prior to the passing of the first railway package. The basic condition of the intended step-by-step opening of the railway transport sector for private railway undertakings initiated with Directive 91/440/EEC was of course the organization of existing state railway companies on the basis of market economy principles.

The objective pursued with the Directive was to enable railway undertakings to adjust to the requirements of the common internal market and at the same time to increase their capacity in order to make them competitive with other means of transport.

Directive 91/440/EEC on the development of railway undertakings of the community applies to all existing, future and private and public railway undertakings registered in the EU. Only such railway undertakings which operate exclusively in urban, suburban or regional transport are excluded.

The independence of the management of railway undertakings is provided for in Article 4 of Directive 91/440/EEC.

According thereto, the railway sector should be developed in accordance with the principle of the European Community. This requires the creation of a common internal market with a liberalized market economy with the principle of competition as its driving element.⁵¹

The Commission and the Council initially saw themselves as facing the difficulty of directing state monopolies with territorial borders away from a certain sovereignty frame of mind⁵² so as to promote stronger international co-operation.

In Part II of the Directive the Member States are instructed to take the necessary measures in order to guarantee the independence of railway undertakings.

This independence is to be ensured as regards management, administration and internal control over administrative, economic and accounting matters (Article 4 Directive 91/440).

The railway undertakings should therefore hold, in particular, assets, budgets and accounts which are separate from those of the State.

In Article 14 Directive 91/440, the Commission is obliged to submit to the Council a report on the implementation of this Directive. In this report, the Commission, while acknowledging considerable progress, criticized mainly that owing to political control some railway undertakings are not in a position to work in a service-oriented manner and, in addition, that a great proportion of revenue comes from state grants or subventions.⁵³

Article 5 of Directive 91/440/EEC deals with the management of railway undertakings.

Adjustment of the activities of railway undertakings to the market is aimed at. Railway undertakings are, according to Article 5 (1) of Directive 91/440/EEC, to be managed according to the principles which apply to commercial companies and this is to apply also to their public service

⁵¹ Kunz, Eisenbahnrecht, Short explanations C 2.2.p.9.

⁵² Kunz, Eisenbahnrecht, Short explanations, Introduction C 2.2.p.9.

⁵³ Kunz, Eisenbahnrecht, Short explanations, Introduction C 2.2.p.9.

obligations imposed by the State. Thus, not only were the railways thereby obliged to operate on commercial principles, in the interest of financial independence, the railway undertakings are entitled to reasonable remuneration for their services and one able to establish new activities in fields associated with railway business. Commercial freedom and independence is restricted only by the prescribed separation of railway operations from railway infrastructure.

A further significant aspect for achieving the independence of railway undertakings from the state is the establishment of independent solid financing of railway undertakings. For this purpose the previously state controlled railway undertakings must be the subject of financial restructuring according to Article 9 of Directive 91/440/EEC. Falling market share is accompanied by a dangerously increasing level of debts of railway undertakings.

In accordance with Article 9 (1) Directive 91/440/EEC, Member States shall set up, in conjunction with existing publicly owned or controlled railway undertakings, appropriate mechanisms to help reduce the indebtedness of such undertakings. In Article 9 (2) Directive 91/440, the setting up of a separate debt amortization unit is proposed.

All loans raised by the undertaking both to finance investment and to cover excess operating expenditure resulting from the business of rail transport or from rail infrastructure management may be charged to the balance sheet. On the other side, the assets and Aid accorded by Member States to the railway undertaking may be shown.

(2) Directive 2001/12/EC

Directive 2001/12/EC of the European Parliament and the Council of 26 February 2001 amending Directive 91/440/EEC, amends and extends Directive 91/440/EEC. The experience gained from implementing that Directive and certain developments in the meantime were intended to be taken into account.⁵⁴

⁵⁴ Aspects to Directive 01/12/EC.

The Directive also represents a further step from the point of view of competition in the railway sector, because the hitherto optional principle of separation between railway business and infrastructure operations is now made obligatory.

According to Article 1 No. 6 and 7 of Directive 2001/12/EC, it is now obligatory that separate profit and loss accounts and balance sheets be kept and published for the provision of transport services by railway undertakings on the one hand, and for the management of railway infrastructure on the other. Because the expansion of access to the infrastructure was mainly limited to goods transport on the Trans-European Network, the separate accounting for passenger transport services and rail freight transport services is made obligatory by Article 1 No. 10 of Directive 2001/12/EC.

Public funds paid to one of these two areas of activity may not be transferred to the other according to Article 1 No. 7 of Directive 2001/12/EC amending Article 6 (2) of Directive 91/440/EEC. Complete organizational separation, however, continues to be optional.

According to Article 1 No. 12 Directive 2001/12/EC, the right of access is expanded. All railway undertakings covered by Article 2 Directive 91/440/EEC, i.e. all existing and future railway undertakings established in the EU not explicitly excluded from the scope of application, may therefore offer their freight transport services on the Trans-European Rail Freight Network. From 15 March 2008, the entire EU rail network is to be open for international freight transport services.

In Article 1 No. 13 Directive 2001/12/EC, the establishment of a railway regulatory body is prescribed, unless such a body already exists. The functions crucial for proper and non-discriminatory access to the infrastructure are to be assigned to this body which, according to Article 1 No. 7 of the Directive 2001/12/EC, may not itself provide transport services and should be independent of the state.

1.2. Legal Situation under OSJD Law

The OSJD has no provision on cartel law, competition or market opening, because it has no jurisdiction in these areas, which are therefore left to national law. The Common Railway Policy of the OSJD, however, provides

as a programmatic issue that each Member State of the OSJD has to create and increase competitiveness. It is, however, not described how such a competitive environment is to be created. Questions of competition and cartel law are therefore to be answered for each Member State of the OSJD separately under its applicable national law but not on the level of supranational law of the OSJD.

2. Independence of the Railway Undertakings from Infrastructure Managers

2.1. Legal Situation in the EU

The Commission, in 1984, already recognized the necessity for the independence of the commercial operation of railway transport from the operation of the infrastructure.⁵⁵ A corresponding proposal has not yet, however, non the support of the Council.

Directive 91/440/EEC is also relevant to the independence of railway undertakings, as providers of railway transport services, from operators of the railway infrastructure.

The separation between infrastructure management and transport operations in Directive 91/440/EEC is also seen as the “central item of transport policy conception of the EU”.⁵⁶

In Article 6 of this directive, the separation of accountancy for infrastructure and railway services is regulated.

In Article 6 (1) Directive 91/440/EEC, the Member States are obliged to take the measures necessary to ensure that the accounts for business relating to the provision of transport services and those for business relating to the management of railway infrastructure are kept separate.

Profit made by one of these two areas of activity may not be transferred to the other. The European Commission therefore clearly opted for a concept of separation.

⁵⁵ KOM (83) 764 final, 9.1.1984.

⁵⁶ Kunz, Eisenbahnrecht, Short explanations to Article 6 C 2.2. p. 15.

In the conflict between the concept of separation and that of integration, which is regarded by some as being beneficial or even necessary for technical and commercial reasons, the European Commission saw the concept of separation as a condition for at least the perspective of ending national routes monopolies.⁵⁷

According to Article 6 (2) Directive 91/440, Member States may also provide that this separation require the organization of distinct divisions within a single undertaking or that the infrastructure be managed obligatory by a separate entity. The separation of the accountancy as such is, however, contrary to the imprecise wording in the explanatory⁵⁸ memorandum.

Article 10 Directive 91/440/EEC provides the basis for the right of access to railway infrastructure and the terms thereof. The provision is essential for the independence of railway undertakings because only free access enables community-wide liberalized railway operations by independent railway undertakings.

According to Article 10 (1) Directive 91/440/EEC international groupings shall be granted access and transit rights in the Member States of establishment of their constituent railway undertakings, as well as transit rights in other Member States for international services between the states where the undertakings constituting the said groupings are established. According to the present valid wording, only international groupings obtain access and transit rights in the Member States in which their constituent railway undertakings are established and transit rights in those states through which they must travel.

While groupings were acknowledged in the discussion on the Directive as adversely affecting the railways vis-à-vis other means of transport, but assessed nevertheless as a first step on the way towards full liberalization and approved as such⁵⁹ from the point of view of the independence of railways and infrastructure managers, no objection can be taken to a step by step opening of the internal market with general possibilities of access.

⁵⁷ Kunz, Eisenbahnrecht, Short explanations to Article 6 C 2.2., p. 16.

⁵⁸ Kunz, Eisenbahnrecht, Short explanations to Article 6 C 2.2., p. 16.

⁵⁹ Kunz, Eisenbahnrecht, Short explanations to Article 10, C 2.2., p. 20.

2.2. Legal Situation under OSJD Law

The OSJD has issued no provisions on the separation of railway transport operators from infrastructure managers. The OSJD has no jurisdiction on the issue. In the document we have received, there is no express statement of the OSJD as to whether or not the separation of railway transport operation from the infrastructure is aimed at.

3. Interim Conclusion

On the territory of the OSJD, which as such overlaps that of the European Union and also of the OTIF, there are no regulations on the question of the independence of railways from the state and the infrastructure managers.

It is therefore to be stated that the OSJD has no competence in this respect and that this problem in the territory of the OSJD is simply reserved to national cartel law.

The OSJD refers to questions of the separation of railway undertakings and the state or railway undertakings and railway infrastructure only in its Common Railway Policy to the extent that an analysis of the mutual relations between the state and railways and the applicability or adoption of EU Directives to the OSJD States which themselves are not members of the European Union, takes place.

The legal structure of railways on the territory of the OSJD extends “from purely state undertakings and organizations to companies with a variety of state participations and partially privatized areas”.⁶⁰

In the “Common Railway Policy” 4.1.2. “Analysis of the mutual relations between state and railways,” it is merely stated that all railway routes of the OSJD are in the ownership of the State concerned.⁶¹

In Part II, 2 a of the Common Railway Policy, it is stated further on the question of financing the railway infrastructure that the state is obliged to

⁶⁰ Common Railway Policy , official summarized edition, p. 25

⁶¹ Common Railway Policy , official summarized edition, p. 3.

ensure effective financing of the infrastructure of the railways.⁶² However, in practice “regulated and adequate subvention from the budget in the form of certain amounts or a percentage of gross national product for the needs of the railway infrastructure cannot be referred to”.⁶³

It is remarkable that the OSJD in the Common Railway Policy at 4.1.3. also deals with the development of EU Directives on rail transport and their influence on the existing and future railway situation, and makes recommendations accordingly to those OSJD states which are not themselves members of the EU.

The OSJD thereby emphasizes that the causes for the present difficulties of railways of the OSJD are considerably different from the problems existing in Western Europe.

While the Directives of the EU could be applied to the development of railway and transport policies of the Member States of the OSJD, they would have to be adjusted to the existing political and economic situation of each state, or the states themselves should develop new principles. It is also to be remembered that the Directives of the EU are constantly modernized.⁶⁴

In conclusion it is therefore to be stated that the OSJD has not expressly considered the separation of state and railway companies or railway operations and railway infrastructure.

Among the Member States of the OSJD, completely different standards of development and interests are, of course, to be observed. While the OSJD states which are meanwhile members of the EU, have implemented the relevant EU Directives and Regulations as “*acquis communautaire*”, in the other states⁶⁵ different policies are in operation in national cartel law depending on the interests and state of development.

⁶² Common Railway Policy , official summarized edition, p. 25

⁶³ Common Railway Policy , official summarized edition, p. 26

⁶⁴ Common Railway Policy, section III, D, para 9.

⁶⁵ Detailed presentation of the status of development of the OSJD railways is not the subject matter of this report. The membership of individual states and railways is shown in Annex II.

Consideration of individual national provisions was expressly not the subject of the present report.⁶⁶

II. Restriction on State Aid and Guarantees

1. State Aid within the EU

Within the European Community there are both, Community Aid and Member State Aid.

1.1. Community Aid

1.1.1. General

Community Aid is not subject to the principal prohibition of State Aid in Article 87 subsection 1 EC, which applies only to Aid granted by Member States.⁶⁷ Community Aid is, however, subject to the fundamental principles of the EC Treaty which arise in particular from the principles in Article 2, 3 and 4 EC.

1.1.2. Cohesion Policy of the Community

In Article 158 EC, the Community has set its certain objective of reducing disparities within the Community by means of structural funds. For the development of rail transporters, however, Article 161 subsection 2 EC is significant since it provides for the creation of a special Cohesion Fund with the purpose of a financial contribution to projects in the field of Trans-European Networks with regards to traffic infrastructure. Through the Cohesion Fund development measures in Member States with a GNP per head of less than 90 % of the Community average are facilitated.

1.2. Aid Granted by Member States

1.2.1. General

⁶⁶ See Task Specifications according to Section A, I.

⁶⁷ Cremer, in: Callies/Ruffert,; Das Verfassungsrecht der Europäischen Union, Article 87, para. 62; Koenig/Scholz, EWS 5/2003, p. 225; Müller-Graff, ZHR 152 (1988), p. 410.

In principle, Article 87 subsection 1 EC comprehensively forbids State Aid. However, certain exceptions are permissible. Regarding Trans-European railway transport, an exemption is made under Article 154 seq. EC in connection with Article 87 subsection 3 b Alt. 1 EC. A further exemption is made under Article 73 EC, which provides that State Aid is permitted as compensation for certain structural disadvantages resulting from the railway companies (formerly) being state-owned or from the railway companies undertaking obligations for the common good, especially local public passenger transport. A third exemption is provided for opening not yet fully liberalized transport markets.

1.2.2. The Special Provisions of Article 73 seq. EC Relating to Transport

Article 73 and Article 76 EC both refer to the admissibility and limits of State Aid to the transport sector, including therefore railway transport. Article 76 EC prohibits State Aid for the area of transport which, by the artificial reduction of transport tariffs, leads to subsidizing of industries in other branches.

Article 76 EC applies only to goods transport, not to passenger transport. The purpose of Article 76 EC is the protection of the free movement of goods and interstate competition within the European internal market from impediments by any state interference in transport prices.⁶⁸ The prohibition of Article 76 EC covers only such tariffs which are usually based on state initiative, imposed or approved.⁶⁹

The comprehensive prohibition of State Aid under the EC Treaty is, however, exempted by Article 73 EC for the area of transport as it declares certain State Aids for the transport sector admissible. It is, however, to be noted that pursuant to now clear decisions of the ECJ, the legal basis for State Aid permissible according to Article 73 EC is not only Article 73 EC itself, but

⁶⁸ Boeing, in: Grabitz/Hilf, EU, Article 76, para. 1; Rossi/Jung, in: Callies/Ruffert, Das Verfassungsrecht der Europäischen Union, Article 76, para 2; Rossi/Jung, in: Callies/Ruffert, Das Verfassungsrecht der Europäischen Union, Article 73, para. 1.

⁶⁹ Rossi/Jung, in: Callies/Ruffert, Das Verfassungsrecht der Europäischen Union, Article 76, para. 3; Rossi/Jung, in: Callies/Ruffert, Das Verfassungsrecht der Europäischen Union, Article 73, para. 1; Boeing, in: Grabitz/Hilf, EU, Article 76, para. 4 with further references.

also Regulation 1107/70/EEC for the field of the assumption of common economic obligations, for example in local public passenger transport.⁷⁰

1.2.3. Particular Cases

There are, however, further exemptions which facilitate State Aid, e.g. on the basis of Regulation 1191/69/EEC which is basically used for local public passenger transport services. These further exemptions, however, are not the subject of this study.

1.3. Aid to Promote Trans-European Infrastructure Networks

For the free movement of goods and services, but also for the supply of raw materials to the Community, the development of Trans-European networks in the meaning of Article 154 EC is indispensable.

According to Article 154 subsection 1 EC, the Community shall contribute to the establishment and development of the network infrastructure. The primary responsibility for the planning, construction and operation of the network and its financing remains however with the Member States.⁷¹ This also means that Member State Aid for the establishment and development of the network may be admissible if certain requirements are fulfilled.

Competition within the Single Market may not be affected adversely by the relevant State Aid. With regard to State Aid in the course of privatization, a tendency is recognizable in the practice of the Commission not to regard payments of Member States as State Aid if the undertaking works according to a low profit concept.⁷² That means that the railway undertaking, in an open and non-discriminatory manner, must make the infrastructure accessible to all interested parties without the aim of profit, or must at least reinvest profits achieved.

⁷⁰ Rossi/Jung, in: Callies/Ruffert: Das Verfassungsrecht der Europäischen Union, Article 73, para. 1, 6 and 10; CFI, Case T157/01, Rec. 2004, p. II-917, para. 100, 101, 114 (Danske Busvognmænd/Commission).

⁷¹ Koenig/Scholz, EWS 5/2003, p. 224.

⁷² Koenig/Scholz, EWS 5/2003, p. 225.

In the absence of exemptions as described above, State Aid, however, may be admissible on the ground of the principles laid down in Article 87 subsection 2 and 3 EC. Article 87 subsection 3 EC provides that the Commission may consider Aid to be compatible with the Common Market if it is aid to promote the execution of an important project of common European interest, and is thereby excepted from the prohibition of Article 87 subsection 1 EC. It is however not yet adequately clarified what projects fulfil this criterion, namely important projects of common European interest in the meaning of the provision, and the Commission therefore continues to have wide discretion.

With regard to the constitutive common European interest, it is discussed whether a separation between a qualitative and a quantitative element appears to be appropriate. The ECG and the Commission require in this connection the participation of several Member States. However, the opinion is expressed that the wording of Article 87 subsection 3 b Alt. 1 EC alone refers to the common element of the interest and not to that of the project. A project could then precisely be of common interest if it is implemented by only one Member State, for example the closing of a gap in the European real network, which would usually benefit not only one Member State.

Qualitatively, the project must, according to Article 87 subsection 3 b EC, serve a common European interest, forming part of the objectives of the community.⁷³ It is, however, not finally determined of which quality such an interest has to be.

Even projects outside the Community could fall within the scope of application of Article 87 subsection 3 b EC, if they are projects in which the Community has a strong interest, for example to strengthen the Community in world competition.⁷⁴ In the practice of the Commission, such references are found in the approval of research and development aid or aid to insure energy supplies to all the Community.⁷⁵

⁷³ Koenig/Scholz, EWS 5/2003, p. 227.

⁷⁴ Koenig/Scholz, EWS 5/2003, p. 227; also see advocate general Lenz' opinion, Case 62/87, Rec. 1988, p. 1573 (1588) (Exècutif Réginal Wallon).

⁷⁵ Koenig/Scholz, EWS 5/2003, p. 228; also see the Commission's 19th Report on Competition Policy 1989, p. 144.

Trans-European Networks such as the railway and infrastructure network in Europe are of major significance economically for the implementation of the free movement of goods and services. The integration of individual railway undertakings in a uniform Trans-European Network, the provision of the necessary pre-conditions therefore with regard to a complete rail network and interoperability, can therefore be classified as an important project of common European interest, in particular if the Community itself supports individual projects in this area. Then, Member State Aid may in principle be eligible for approval according to Article 87 subsection 3 b Alt. 1 EC, such as for example the closure of a gap within the European railway network.

2. Aid and Guaranties in the OSJD

In the area of the OSJD, no Aid or guaranties exist at the supra-national level.

The OSJD has no jurisdiction in this regard and only makes statements on financial questions in the context of its Common Railway Policy to the extent that it complains of the generally bad financial situation of the railways and demands higher investment in the infrastructure.⁷⁶

Contrary to EC law, there is no general prohibition of State Aid by OSJD rules. Resulting from this, State Aids are subject to the various national legal systems of the OSJD Member States which is, however, not the subject of this report.

3. Interim Conclusion

The Aid system of the European Community is not reflected at all in the OSJD, so that no substantial comparison at the supranational level is possible. At the national level, no binding statements can be made with regard to the OSJD states, whose railways operate under very different financial and legal conditions.

⁷⁶ Common Railway Policy, section II, 2 „state and financial infrastructure of the railways“.

III. Interoperability

It is a significant condition for the independence of railway undertakings and intra-modal competition - meaning competition between several providers of the same means of transport -, within the EU that, from a technical point of view, unhindered access over the borders of the individual Member States be provided. This can be achieved only by clear regulations of the European Community on the achievement of interoperability. Interoperability means the ability of various systems, technologies or organizations to cooperate.

1. Legal Situation in the EU

1.1. Directive 96/48/EC

Interoperability in the sense of Directive 96/48/EC Article 2 b means the ability of the Trans European High Speed Rail System to allow the safe and uninterrupted movement of high-speed trains which accomplish the specified levels of performance. This ability rests on all the regulatory, technical and operational conditions which must be met in order to satisfy essential requirements.

High-speed transport requires excellent coherence between infrastructure and vehicle standards. Performance, safety and quality standards are essential for this coherence.⁷⁷

Directive 96/48/EC of the Council of 23 July 1996 on the interoperability of the Trans European High Speed Rail System was intended to improve the coherence of infrastructure and vehicles. National technical specifications and the close links between the national railway industries and the national railways run counter to this. These technical standards were often developed over the years in agreement between the competent national authorities and the national railways. This created both a dependence of nationally operating railways on the regulations of their states, and a restriction of the extent of the area compatible with the technical requirements, namely mostly to that of the Member States.

⁷⁷ Annex I, No. 3 to Council Directive 96/48/EC of 23 July 1996 on the interoperability of the trans-European high-speed rail system, OJ L 235, 17.9.1996, p. 6–24.

Insofar as possible and necessary, European standards are to be drawn up by the European standardization bodies CEN, CENELEC and ETSI for interoperability (TSI)

1.2. Directive 2001/16/EC

By Directive 2001/16/EC of 19 March 2001 on the interoperability of the Trans European Conventional Rail System, technical standards were intended to be harmonized, and an improvement in competitiveness of the railways achieved. From the point of view of the environment, a strengthening of the share of railways in the overall volume of transport was intended. In addition, the coherence of infrastructure and vehicles and the efficient linking of information and communications systems were to be improved.

The objective of the Directive is the facilitating, improvement and development of cross-border railway transport services in the EU and third countries as well as a contribution to the step-by-step achievement of the internal market for equipment and services for the design, construction, renewal, operation and maintenance of the conventional Trans-European Railway System as well as the interoperability of that System.

2. Legal Situation on the Territory of the OSJD

The problem of interoperability is recognized by the OSJD. However, interoperability in the OSJD is not provided in a separate agreement. The 59 annexes and 10 graphics contained in Annex 1 to the PPW (RWU), however, deal with issues of technical interoperability, but mostly providing rules for the uniform design of forms and takeover records, setting tariffs for internal accounting between railways, for example, for the cost of cleaning or repairing the wagons of other railway companies or assessing the value of the lost wagons.

The annexes provide also, however, for certain design characteristics of wagons, for example, the distribution of smoking and non-smoking places, the numbering of seats and the marking of wagons. The appendices also deal with technical requirements for wagons.

From the reviewed documents, it can be ascertained that the OSJD is aware of the problem of differing gauges, but has not taken measures to achieve a solution in the near future.

3. Potential Legal Conflicts regarding Interoperability

Access to a foreign railway infrastructure inevitably depends on the fulfilment of the relevant technical requirements - as the example of the different gauges shows. Rolling stock which does not fit with the gauges, simply will not move, no matter what access might be granted.

Therefore, co-operation in technical matters in order to achieve international technical standards on interoperability, belongs, according to Article 2 No. 4 of the OSJD Statute, to the core tasks of the OSJD. The problem of interoperability is recognized by the OSJD as well, but without having resulted in a separate agreement.

For a general comparison of the nature of technical issues regulated in various EC-directives, the OTIF and the OSJD agreements, it has to be pointed out, that these sets of technical regulations cover a wide range of technical issues. Thereby, it is pointed out that the OSJD agreements – contrary to the OTIF and the relevant EC directives - are not a “set of law” but mere private agreements concluded by and between the various railway undertakings.

The EC provides for extensive legislation in the field of interoperability, infrastructure and other technical issues. The provisions concern technical requirements and measures for harmonisation and interoperability as well as provisions implementing a common European structure for rail transport.

The OSJD also deals with most of the relevant issues on technical harmonisation and interoperability either in the Rules on Wagon Usage (RWU), which are an appendix to the Contract on the Rules on Wagon Usage (PPW), or in several documents, such as the documents O 920 1 to 15.

The OTIF deals with technical harmonization in the appendices F and G to the Convention Concerning International Carriage by Rail (COTIF). The two appendices are the “Uniform Rules concerning the Validation of Technical Standards and the Adoption of Uniform Technical Prescriptions applicable to

Railway Material intended to be used in International Traffic (APTU - Appendix F to the Convention)” and the “Uniform Rules concerning the Technical Admission of Railway Material used in International Traffic (ATMF - Appendix G to the Convention)”.

These three sets of technical regulations to be compared here contain rules on technical specification and standards, authorisation of the rolling stock in international traffic, mutual recognition of technical admission, vehicle registration, vehicle numbering and marking, maintenance rules and accident investigation.

3.1. Technical specifications

3.1.1. EC

In the area of technical specifications, the EC provides for procedural rules for the adoption of technical standards for interoperability in Directive 2004/50/EC amending Directive 96/48/EC on the interoperability of the trans-European high-speed rail system, and Directive 2001/16/EC on the interoperability of the trans-European conventional rail system. The adoption of these Technical Standards for Interoperability (TSI) should be lead-managed by the European Railway Agency. Detailed aspects are laid down in numerous TSI, such as e.g. TSI Noise, TSI maintenance, or TSI operation.

3.1.2. COTIF

In COTIF, the aspects of technical specification are regulated in the “Uniform Rules concerning the Validation of Technical Standards and the Adoption of Uniform Technical Prescriptions applicable to Railway Material intended to be used in International Traffic (APTU- Appendix F to the COTIF)” with a procedure for the adoption of technical prescriptions in Article 6 APTU.

The APTU lays down binding provisions in the area of railway material and the adoption of uniform technical prescriptions applicable to the railway material, which should be validated (Article 3 § 1 APTU).

According to Article 1 of the APTU, the respective provisions lay down the procedure for the validation of technical standards and the adoption of

uniform technical prescriptions for railway material intended to be used in international traffic.

The validation procedure is described in Article 5 APTU. As the list of technical appendices according to Article 8 APTU shows, technical standards and adopted uniform technical prescriptions are foreseen by the APTU in a comprehensive amount: Railway vehicles (Article 8 § 1, lit. a APTU), traction units (Article 8 § 1, lit. b APTU), wagons (Article 8 § 1, lit. c APTU), carriages (Article 8 § 1, lit. d APTU), infrastructure installations (Article 8 § 1, lit. e and f APTU), safety and operational control systems (Article 8 § 1, lit. g APTU) and systems of information technology and any other railway material (Article 8 § 1, lit. h APTU) should be validated in order to achieve uniform technical standards and uniform technical prescriptions.

According to Article 6 § 1 APTU, any of the contracting states (Article 6 § 1 lit. a APTU), but also any regional economic integration organisation to which its Member States have transferred competence to legislate in the field of technical prescriptions concerning railway material (Article 6 § 1 lit. b APTU), and any representative international association for whose members the existence of uniform technical prescriptions relating to railway material is indispensable for reasons of safety and economy in the exercise of their activity (Article 6 § 1 lit. c APTU), may apply for the adoption of a uniform technical prescription.

With regard to the wording, also the European Union, as a regional economic integration association and the OSJD as a representative international association may apply for adoptions.

3.1.3. OSJD

The OSJD deals with technical specifications in the Rules on Wagon Usage (PPW), the Container Agreement, OSJD Convention on Combined Transport, the bulletins “O 920 -1 until -15” and the Bulletins “O 920 -1 until -15”, “O+P 582-1” and “O+P 582-2”.

(1) Rules on Wagon Usage

The Rules on Wagon Usage (PPW) provide for 59 annexes and 10 graphics in Annex 1 to the PPW (RWU). These appendices deal with issues of technical interoperability by means of binding provisions.

Article 4, Nr. 8 of the PPW provides that the implementation of the PPW is effected by each member state in accordance with its national law – thereby not taking into account that the parties to the OSJD are not states but, rather, state-owned or state-controlled railway undertakings. This provision does not deal with the case of conflicting national law which might occur through the implementation of EC Law.

Therefore, this provision does not present an effective opening clause to ensure the compliance of the enactment of the PPW in the relevant states with the EC Treaty. The Member States are consequently obliged to use their influence on their respective railway undertakings, either not to apply the PPW provisions as far as they are in conflict with the EC Treaty or particular EC directives, or to terminate the PPW agreement.

The contracting railway undertakings to the PPW can terminate the PPW according to Article 6 PPW by notification to the OSJD Committee. The termination has to be declared at least three months in advance before the end of the year; as such a termination becomes effective on January 1st of the following year.

Termination of the PPW does not lead to automatic termination of the other OSJD agreements or other agreements concluded on the basis of the PPW. These could be e.g. bi- or multilateral agreements between the OSJD contracting railway undertakings, and agreements concluded in addition to the PPW.

(2) Convention on the Use of Uniform Containers (Container Agreement)

Technical provisions can be found in the Container Agreement. The Container Agreement prescribes in § 1.1 that for the transport of goods, in international transport multi-purpose containers should be used in accordance with international standard of the series ISO Type IC, ICC, IA and IAA, and that these containers must comply with the requirements of international standards such as the Convention on Safe Containers (CSC) and the

Container Customs Convention of 1972 (CCO), according to § 1.2 Container Agreement.

Certain markings and codes, like the owner code, the container number, state code, the identification of the gross and the empty weight of the container, a CSC and a CCO table and the date of the next regular test are prescribed in § 1.3 of Container Agreement.

These international standards are not part of the OSJD agreements but international accepted standards which are applied within the EU as well. Therefore, we do not see a conflict of the Container Agreement with EC Law.

(3) OSJD Convention on Combined Transport

In Article 3 of the OSJD-Convention on Combined Transport, the parties agreed that the technical data for railways in their respective states should comply with the requirements stated in Annex III to the OSJD-Convention on Combined Transport (requirements for rolling stock), and if necessary are to be adjusted in the course of national endeavours.

The possibility of an adjustment of requirements stated in Annex III to the OSJD-Convention on Combined Transport means that, if a wagon does not fulfil these technical requirements of Annex III to the OSJD Convention on Combined Transport, but is admitted due to the national provisions of its state of origin, the other state can agree on the transit of this wagon although it does not fulfil the criteria provided for in Annex III to the OSJD-Convention on Combined Transport.

Article 4 of the OSJD-Convention on Combined Transport sets out the requirements on the infrastructure in connection with Annex IV to the OSJD-Convention on Combined Transport.

The criteria provided for in Annex IV to the OSJD-Convention on Combined Transport are, however, mere declarations of intent and not binding provisions, e.g. on how to improve the relevant factors of an effective combined transport, such as the delivery time, the length of the freight trains or the overall loading.

Since the technical requirements stated in Annex III to the OSJD-Convention on Combined Transport (requirements for rolling stock) can be adjusted according to national endeavours, we do not see a conflict with EC law.

(4) Bulletins “O 920 -1 to -15”, “O+P 582-1” and “O+P 582-2”

The documents O 920 -1 to -15 deal with the digital encoding of freight devices and transport packaging. However, these bulletins contain mere recommendations. They have therefore no binding effect on the contracting railway undertakings of the OSJD and do not present a potential conflict with EC law.

3.1.4. Result

With respect to the content, the three sets of technical regulations (EC law, COTIF, OSJD agreements), with the exception of the PPW in which does conflict with EC law, do not reveal essential differences on the issue of technical specification. This is due to the fact that working interoperability is in the common interest of all parties concerned. The differences are merely to be found in the divergent procedures, obligation of application and in the depth of the provisions.

With respect to possible future discrepancies, both the OSJD and the OTIF seem rather to converge with the EU provisions and therefore do not present any conflict potential as of today.

The OTIF generally adopts an EU-friendly approach. E.g. the OTIF is about to implement the EU TSIs so as to achieve harmonisation with EU technical specifications throughout all the OTIF Member States.⁷⁸ However, with regard to the current regulations, the OTIF contains binding and detailed provisions, partly in contrast to EC legislation.

The several OSJD agreements do not have any binding provisions in the field of technical specifications and do not therefore present any particular problem with regard to the consistency of the provisions. Furthermore, the OSJD adopts an EU-friendly approach in particular with regard to

⁷⁸ “Explanatory remarks to the proposals concerning APTU Annexes” of the CTE; available at http://www.otif.org/otif/_epdf/dir_tech_adm_2006/07_2006_A_94-00_1_2006_e.pdf.

harmonisation in technical and interoperability issues. E.g. the OSJD has advised its contracting railways respectively their countries outside the EU to apply or at least adopt EU provisions in order to achieve harmonisation (OSJD Common Policy, chapter 4.1.3).

3.2. Technical standards

In the area of technical standards, the EU does not provide for any binding rules, as the standards set up by the CEN are not legally binding and validation is not foreseen.

The COTIF does not distinguish between technical prescriptions and technical standards with respect to their adoption. Both are regulated in the APTU with a procedure for the validation of technical norms in Article 6 APTU.

The OSJD deals with technical standards in the RWU (Annex 1 to the PPW) and in bulletins “O 920 -1 to -15”. However, these bulletins contain, as explained regarding the technical specifications, mere recommendations and therefore have no binding effect on the contracting railway undertakings of the OSJD.

As the OSJD does not contain any binding provisions in the field of technical standards, there is no particular problem with regard to the compliance of the provisions.

3.3. Authorisation for rolling stock in international traffic

The provisions of the European Community on the authorisation of rolling stock in international traffic depend on whether new or in-use rolling stock is to be authorised.

3.3.1. EC law

Within the EU, the authorisation of placing in service of new rolling stock, to be used in international traffic, is dealt with in Article 14 of the Interoperability Directive (Directive 2004/50/EC).

Article 14 Nr. 1 of the Directive 2004/50/EC provides for “subsystems constituting the trans-European high-speed rail system”, which also includes the rolling stock as one of these subsystems (TSI wagons).

Each Member State shall authorise the placing in service (Article 14 Nr. 1 and 4 of the Directive 2004/50/EC) and ensure the compatibility, e.g. by checks at regular intervals or when renewals or upgrades are implemented (Article 14 Nr. 3 of the Directive 2004/50/EC).

Furthermore, a declaration of verification by a contracting entity and a technical file, to be delivered by the Notified Body, are required for the authorisation of in-use rolling stock for the international market (Article 18 of the Directive 96/48/EC and Directive 2001/16/EC as amended by Directive 2004/50/EC).

3.3.2. COTIF

The COTIF regulates the admission of new railway material in Article 4 of the ATMF, which is an Appendix to the COTIF. According to Article 4 ATMF, the admission can be effected either in one single step or in two successive steps, whereas first a type of construction to a given type of railway vehicle is admitted and afterwards the individual vehicles corresponding to that type.

According to Article 5 § 1 ATMF, the technical admission of railway vehicles to circulation and of other railway material to use in international traffic is the task of the national or international authority competent in the matter in accordance with the laws and prescriptions in force in each contracting state. Such a competent international authority might also be the ERA. Such competent authority, however, would be obliged to carry out the admission according to the uniform technical standards and uniform technical prescriptions laid down in the APTU and the relevant appendices.

3.3.3. OSJD

For the OSJD contracting railways no distinction is made between new and in-use rolling stock with regard to the authorisation for international transport.

The RWU provides for the authorisation of rolling stock for use in international transport in § 2.1 RWU in conjunction with annex 1 (technical requirements), annex 47 (description of smoking/non-smoking compartments) and annex 44 (marking and numbering of seats). The wagons should comply with national provisions on the maximum axle load (§§ 2.2, 4.3 RWU) and the wagons used should provide for bogies (§ 2.3 RWU).

The appendices do not contain binding provisions, as the provisions foresee that the parties to the RWU can conclude divergent bi- or multilateral agreements (§ 1.1 para. 2 Annex 1 to the RWU).

3.3.4. Result

Within the European Union, with regard to placing in service of in-use rolling stock, to be used in international traffic, the Safety Directive (Directive 2004/49/EC) is applicable.

Article 14 of the Safety Directive, dealing with the placing in service of in-use rolling stock, provides that the respective safety authority can decide to request a specific authorisation, if the authorisation granted before was not fully covered by the TSI (Article 14 Nr. 1 Directive 2004/49/EC). As far as the respective rolling-stock is already fully authorised in one Member State, other Member States are obliged to authorise it as well, if a technical file according to Article 14, Nr. 2 Directive 2004/49/EC is provided for.

For the area of the COTIF, Article 4 of the ATMF as described above is applicable. As with new rolling stock, the admission can be effected in one or two steps.

As the OSJD does not have any binding provisions in the field of authorisation for rolling stock in international traffic, there is no particular problem with regard to the compliance of these provisions with EC law or the COTIF.

3.4. Mutual recognition of technical admission

The mutual recognition of technical admissions in the respective states of origin is a practical option for interoperability.

In the European Union, Article 14 of the Safety Directive and also Article 14 of the Interoperability Directive, discussed above, are applicable. However, automatic recognition does not exist, nor is it foreseen in the EU yet. The applicant, according to Article 14 of the Safety Directive and also Article 14 of the Interoperability Directive, having fulfilled the criteria in another Member State, has to provide the relevant documents in order to receive an additional permit. The safety authority can request test runs and may not adopt its decision later than four months after submission of all relevant documents, including the test run.

For the COTIF, Article 6 of the ATMF provides for automatic mutual recognition of the technical admissions granted by another OTIF contracting state. This means that, as far as certificates exist, another examination or technical admission should not be effected.

In the scope of the OSJD no mutual recognition of technical issues is provided for, which might be due to the technical obstacles, notably the differing gauges within the OSJD. However, the RWU provides for a technical standard in § 4.2 RWU in conjunction with Annex 1 of the RWU to be fulfilled for the handing over in international transport. Said Annex 1 to the RWU provides a vast number of detailed technical provisions which can be amended by diverging bi- or multilateral agreements.

As the OSJD does not provide for any binding provisions in the field of mutual recognition of technical admission, there is no particular problem with regard to compliance of the provisions with EC law and COTIF.

3.5. Vehicle registration and management of the registers

3.5.1. EC law

With regard to the registration of vehicles and the management of the respective registers in the EU, the Member States apply the Interoperability Directive (Directive 2004/50/EC). According to Article 14 Nr. 4 of the

Interoperability Directive, National Vehicle Registers are managed by the safety authorities, currently under development by the ERA.

The vehicle registration and management of the respective registers are therefore currently subject to national authorities. The national vehicle register has however to fulfil the criteria of Article 14 Nr. 4 of the Interoperability Directive, which specifies the data the register shall contain (alphanumeric code on each vehicle, identification of the owner or lessee, restrictions on how the vehicle may be used, safety-critical data relating to the maintenance schedule).

3.5.2. COTIF

The OTIF applies the ATMF, which provides for a central data bank to be established and updated by the OTIF itself according to Article 13 ATMF.

3.5.3. OSJD

The OSJD agreements do not provide for the registration of vehicles in a supranational manner. The registration is subject to the respective national law.

3.5.4. Result

As the OSJD does not provide for vehicle registration and management of the registers, there is no particular problem with regard to the compatibility of the provisions on a supra-national level. However, this will not affect any requirement by national law of the relevant states of railways being member of the OSJD.

3.6. Vehicle numbering and marking

Within the EU, the aspect of vehicle numbering and marking is subject to the TSI relating to the rolling stock subsystem of the Trans-European High Speed Rail System referred to in Article 6, para. 1 of Directive 96/48/EC, annex L⁷⁹.

⁷⁹ Commission Decision of 30 May 2002 concerning the technical specification for interoperability relating to the rolling stock subsystem of the trans-European high-speed rail system referred to in Article 6(1) of Directive 96/48/EC

3.6.1. COTIF

The OTIF declares the Committee of Technical Experts (CTE) to be competent according to Article 14 § 2 of the ATMF to lay down the signs and the respective procedures, e.g. the transitional periods.

3.6.2. OSJD

In the scope of the OSJD agreements, the numbering and marking of vehicles for use in international transport is subject to the documents “O+P 582-1” and “O+P 582-2”.

Bulletin „O+P 582-1“ is a description of indications used for passenger wagons, which is applicable to the OSJD and UIC members. Bulletin „O+P 582-2“ is a description of indications used for freight wagons. The said documents do not specify the indications and signs which define the specification of the interoperability, as well as the procedure of registration and authorisation of wagons, which is subject to national law in accordance with international legislation and international agreements. Wagons designated for both national and international routes, are to be indicated according to the bulletins, applicable legislation and agreements. The rules of indication are flexible and might be changed after the coming into effect of the specifications for interoperability and might be adjusted to international agreements. As the bulletins do not state which international agreements are meant by that, this might also apply to EC legislation.

3.6.3. Result

As the OSJD does not provide for any binding provisions in the field of mutual recognition of technical admission, there is no particular problem with regard to the compatibility of the provisions. However, compatibility issues can arise with respect to national law of the respective states of the railways being members of the OSJD.

3.7. Maintenance rules

3.7.1. EC law

In the European Union, the “Commission Decision of 30 May 2002 concerning the technical specification for interoperability relating to the maintenance subsystem of the Trans European High Speed Rail System referred to in Article 6(1) of Directive 96/48/EC” (TSI maintenance) provides for the maintenance of wagons. Other prospective technical standards of interoperability (TSIs) in the field of maintenance might be implemented.

The TSI maintenance provides for safety, health, reliability and availability, environmental protection and technical compatibility.

With respect to reliability and availability, the monitoring and maintenance of fixed or movable components that are involved in train movements must be organised, carried out and quantified in such a manner as to maintain their operation under the intended conditions (Essential requirement 1.2 of TSI maintenance).

Concerning environmental protection, it is provided in the TSI maintenance that the repercussions on the environment of the establishment and operation of the trans-European High Speed Rail System must be assessed and taken into account at the design stage of the system in accordance with the Community provisions in force (Essential requirement 1.4.1 of TSI maintenance), that the materials used in the trains and infrastructures must prevent the emission of environmentally harmful or dangerous fumes or gas, particularly in the event of fire (Essential requirement 1.4.2 of TSI maintenance), that the rolling stock and energy-supply systems must be designed and manufactured in such way as to be electromagnetically compatible with the installations, equipment and public or private networks with which they might interfere (Essential requirement 1.4.3 of TSI maintenance) and that the technical installations and the procedures used in the maintenance centres must not exceed the permissible levels of nuisance with regard to the surrounding environment (Essential requirement 2.5.2 of TSI maintenance).

The technical characteristics of the infrastructures and fixed installations must be compatible with each other and with those of the trains to be used on the trans-European high-speed rail system (Essential requirement 1.5).

In order to achieve the aim of protecting health, as regards materials likely, by virtue of the way they are used, to constitute a health hazard to those having access to them, it is stipulated that such materials must not be used in trains and railway infrastructures (Essential requirements 1.3.1 TSI maintenance). All other materials have to be selected, deployed and used in such a way as to restrict the emission of harmful and dangerous fumes or gases, particularly in the event of fire (Essential requirements 1.3.2 TSI maintenance). Furthermore, the technical installations and the procedures used in the maintenance centres must not constitute a danger to human health (Essential requirements 2.5.1 TSI maintenance).

To maintain and improve safety, the parameters involved in the wheel/rail contact must meet the stability requirements in order to guarantee safe movement at the maximum authorised speed (Essential requirement 1.1.2 of TSI maintenance). All the components used must withstand any normal or exceptional stresses that have been specified during their period in service (Essential requirement 1.1.3 of TSI maintenance). The design of fixed installations and rolling stock and the choice of the materials used must be aimed at limiting the generation, propagation and effects of fire and smoke in the event of fire (Essential requirement 1.1.4 of TSI maintenance). Furthermore, any devices intended to be handled by users must be designed so as not to impair the users' safety if they are foreseeably used in a manner which is not consistent with the posted instructions (Essential requirement 1.1.5 of TSI maintenance).

3.7.2. COTIF

The OTIF will adopt the maintenance rules provided for in the APTU and RID Appendices according to Article 15 ATMF. The relevant appendices are currently about to be set up.

3.7.3. OSJD

The OSJD includes rules for the maintenance of wagons in §§ 11, 12, 18, 23 RWU which are not binding according to § 1.1 para. 2 Annex 1 to the RWU.

§ 11 RWU addresses the cleaning and disinfection of wagons by prescribing a general obligation to clean at the destination and departure stations. Further

obligations are imposed e.g. after the transport of animals or passengers with infectious diseases or the transit of a quarantine area.

§ 12 RWU provides for the maintenance and repair of wagons and § 18 RWU provides for the maintenance and repair of damaged wagons. In both cases, the regular maintenance and repairs are to be effected by the owner, while the continuous maintenance lies in the field of responsibility of the railway undertaking on whose track the wagon is in the respective moment.

§ 23 RWU provides for the maintenance of private wagons. The maintenance should be effected according to the corresponding general rules in §§ 12, 18 RWU as well as the rules provided for the handing-over of wagons in § 15 RWU. According to § 23.2 RWU, there is furthermore no obligation to clean tank wagons and other special wagons, and § 23.3 RWU provides for the treatment of top frames. § 23.4 RWU lays down the treatment of damaged private wagons. They have to be restored to service after being damaged.

3.7.4. Result

As the OSJD does not have any binding provisions in the field of maintenance rules, there is no particular problem with regard to compliance with the provisions with EC law or the COTIF.

3.8. Accident investigation

3.8.1. EC law

The topic of accident investigation is governed by the Safety Directive (Directive 2004/49/EC). The Safety Directive sets out precise rules for an independent safety investigation according to chapter V of the said directive.

According to Article 19 Nr. 1 of the Directive 2004/49/EC the Member States are obliged to investigate in case of a respective accident or incident.

The investigators have rights which guarantee an effective investigation, such as access to the site of the accident and the rolling stock involved (Article 20 Nr. 2, lit. a of the Directive 2004/49/EC), access to the results of examination (Article 20, Nr. 2 lit. d and e of the Directive 2004/49/EC), the opportunity to question witnesses (Article 20, Nr. 2 lit. f of the Directive 2004/49/EC) and

access to any other relevant information or records held by the infrastructure manager, the railway undertakings involved or the safety authority (Article 20 Nr. 2, lit. g of the Directive 2004/49/EC).

The investigation shall be accomplished independently of any judicial inquiry (Article 20, Nr. 3 of the Directive 2004/49/EC), by an independent permanent body for investigations of accidents and incidents (Article 21, Nr. 1 of the Directive 2004/49/EC).

3.8.2. COTIF

The OTIF has set up principles of investigation in Article 16 §§ 1 lit. a and 4 of the ATMF. The infrastructure managers and if appropriate the keepers and the transport undertakings concerned shall establish the causes of the accident or the severe damage. Any contracting state can also demand an examination by the CTE.

3.8.3. OSJD

The OSJD does not contain its own rules on investigations in case of an accident. The investigation is therefore subject to national legislation.

3.8.4. Result

As the OSJD does not set out any binding provisions in the field of accident investigation, there is no particular problem with regard to compliance of the provisions with EC law or the COTIF.

3.9. Conclusion

The OSJD does lay down certain provisions with regard to interoperability and technical harmonisation in the area of technical specifications and technical standards, the authorisation of rolling stock for international transport, mutual recognition of technical admission, vehicle numbering and marking and maintenance rules.

However, the OSJD does not contain any provisions on vehicle registration in international transport or accident investigation.

In the area of technical specifications and technical standards, the existing provisions in the documents O 920 -1 to -15 are not of a binding nature. Insofar as these provisions are not consistent with the respective EC legislation, they are not in conflict, as they can be amended.

In the area of authorisation of rolling stock for international transport, there are technical requirements in annex 1 to the RWU. The provisions in the annex 1 to the RWU, however, are not binding, as they foresee that the parties to the RWU can conclude diverging bi- or multilateral agreements (§ 1.1 para. 2 Annex 1 to the RWU).

In the area of mutual recognition of technical admission, the criteria of § 4.2 RWU in conjunction with Annex 1 of the RWU have to be met. As explained above, the provisions in the annex 1 to the RWU are binding according to § 1.1 RWU, but they foresee that the parties to the RWU can conclude diverging bi- or multilateral agreements (§ 1.8 RWU).

The area of vehicle numbering and marking is addressed in the documents “O+P 582-1” and “O+P 582-2”. These bulletins describe the indications to be used for passenger wagons (O+P 582-1) and freight wagons (O+P 582-2). According to the said documents, the wagons designated for both national and international routes are to be indicated according to the bulletins, applicable legislation and agreements. The provisions on such indications are however flexible and might be adjusted to international agreements. As the bulletins do not state which international agreements are meant, this might also apply to EC legislation. The bulletins have to be regarded as non-binding and therefore do not conflict with EC legislation.

In the area of maintenance rules, the OSJD provides for detailed provisions in §§ 11, 12, 18, 23 of the RWU. The rules deal with the cleaning and disinfection of wagons (§ 11 RWU), the maintenance and repair of wagons (§ 12 RWU), the maintenance and repair of damaged wagons (§ 18 RWU) and the maintenance of private wagons (§ 23 RWU). In comparison to EC legislation, in particular, the relevant technical specifications of interoperability, the RWU addresses cleaning and maintenance in a more general manner. In this respect the RWU is not consistent with the respective EC legislation. However, the RWU does not contain binding provisions, as

the parties to the RWU can conclude diverging bi- or multilateral agreements (§ 1.1 para. 2 Annex 1 to the RWU).

The issues of vehicle registration and accident investigation are not addressed in any of the OSJD agreements. They are therefore subject to the respective national law, which must not conflict with EC legislation in those Member States which are at the same time involved in OSJD agreements by virtue of their respective railway undertakings.

The situation between the European Union and the OSJD differs from the situation between the European Union and the OTIF. The OSJD does on the one hand stipulate detailed provisions, but on the other hand, the provisions are either non-binding or can be contracted out by way of diverging bi- or multilateral agreements.

Despite the obvious common interest in a uniform implementation of technical specifications and standards and measures for a working interoperability within the OSJD, the approach is completely different to the approach under the OTIF.

The OTIF sets up binding and detailed criteria in ATMF and APTU, as well with regard to the content and in particular with regard to the procedures, which differ remarkably from those of the EU.

In view of the fact that the agreements of the OSJD, regardless of their content, are agreements of a non-governmental organization, the provisions are not binding on the states concerned whose railway undertakings are member to the OSJD. Insofar as OSJD rules are not in compliance with EC law, the Member States whose railway undertakings are members to the OSJD have, according to the *effet utile* principle, to ensure that conflicting OSJD rules are not applied by the respective railway undertakings.

The major difference between OTIF regulations and OSJD regulations is that the OTIF is a governmental organization, while the OSJD is a non-governmental one.

The regulations set up by the OTIF have legal power as international law. This means that the relevant OTIF rules constitute part of international law,

which causes conflicts between the COTIF and EC Law in case of diverging provisions.

The provisions of the OSJD agreements, to the contrary, are not part of international law but mere private agreements. Consequently, only the contracting parties, meaning the railway undertakings, are bound by the OSJD agreements. If OSJD provisions do conflict with EC law, the latter prevails. The respective provisions are simply contrary to EC law. It remains the obligation of the individual Member State concerned whose railway undertaking is OSJD member, to ensure enforcement of the relevant EC law.

With regard to the OSJD and the pictured lack of conflict potential in the field of interoperability and technical harmonisation, there is consequently no urgent need for action.

With respect to the COTIF and its conflicts with EC law, the European Union has consequently not awaited potential conflicts but has recommended to the Member States to declare their reservations and not to apply the relevant appendices of the COTIF which conflict with EC law.

IV. Access to the Railway Infrastructure for Independent Carriers

1. Provisions of the EU

1.1. Rights of Access

Provisions which affect access to railway infrastructure are found in Directives 91/441 EEC together with 2001/12/EC and 2004/51/EC, in Directives 95/18 EC in connection with 2001/13 EC and 2004/49/EC, in 2001/14 EC in connection with 2004/49 EC and in 2004/49 EC Chapter III.

On the territory of the EU, the right of access to the railway infrastructure has been and is being expanded step by step. Initially, in Article 10 of Directive 91/440/EEC a limited right of access was introduced for international groups and providers of combined goods transport.

Directive 2001/12/EC amending Directive 91/449/EEC extended the right of access within the first railway package. According to Article 1 Nos. 11, 12 of Directive 2001/12/EC, all railway enterprises registered in an EU Member

State received the right of access as of 15.03.2003 for the purpose of providing cross-border goods transport on certain routes which are defined in the maps annexed to Directive 2001/12/EC and which cover approximately 50,000 km, as well as harbours and marshalling yards.

In the second railway package, an extension of the right of access was provided in Article 1 No. 2 of Directive 2004/51/EC, on the basis of which the entire network of the EU Member States is opened from 01.01.2006 for cross-border goods traffic for railway enterprises established in the EU. From 01.01.2007 there is a right of access for all kinds of railway freight services, now including cabotage journeys. Cabotage is the right of a foreign company to provide transportation services in another state.

The third railway package, which has not yet been passed, will provide for the complete opening of the market in international passenger transport from 2010 (initially without cabotage).

In order to ensure that the right of access does not remain only a right on paper, but will actually be put into practice, the creation of a transparent and non-discriminatory framework was necessary. Directive 95/18/EC, which refers to the approval of railway enterprises by the Member States and the conditions for approval, and Directive 95/19/EC which deals with the allocation of line capacity and the calculation of fees, were adopted. These Directives were also supplemented or amended by the first and second railway packages. Directive 95/19/EC was repealed and replaced in the course of the first railway package by Directive 2001/14/EC.

A right of access to the railway infrastructure applies meanwhile in the EU for rail goods transport to all railway enterprises established in the Member States for all networks of Member States. The right of access to the railway infrastructure includes all kinds of rail freight services, including cabotage, cf. Article 10 Directive 91/440/EEC, Article 1 Nos. 11, 12 Directive 2001/12 EC, Article 1 No. 2 Directive 2004/51/EC.

Insofar as the Directives have not yet been implemented in the Member States, the question whether these provisions have direct effect, so that in the absence of national implementation they can still be invoked by railway

enterprises directly, can be considered, because the provisions on the granting of the right of access are precise and adequate.⁸⁰

In order that a railway enterprise can use the railway infrastructure in accordance with the right of access under Directive 91/440, the following conditions must be fulfilled:

1. Transport license according to Directive 95/18/EC (2004/49/EC) must be obtained
2. Safety Certificate according to Article 10 Directive 2004/49/EC must be obtained
3. Allocation of line capacity for the relevant infrastructure according to Directive 2001/14/EC
4. Access Agreement according to Article 10 Directive 91/440/EEC must be concluded

1.1.1. Transport License

A transport license is granted to an enterprise by the Member State in which the enterprise is based, in compliance with Directive 95/18/EC as amended by Directive 2001/13/EC with regard to Article 6 of the Directive 1995/18/EC and amended by Directive 2004/49/EC with regard to Article 8 of the Directive 1995/18/EC (hereinafter referred to together as Directive 95/18). By issuing the license, the state recognises the enterprise as a railway enterprise (Article 2, Directive 95/18).

If a license is granted by a Member State, it applies in the entire territory of the Community, Article 4, subsection of 5 Directive 95/18. If it is not restricted in time, it applies as long as the railway undertaking complies with the obligations under Directive 95/18. The railway undertaking may provide transport services which fall under Directive 95/18 in the territory of the Community; the license alone does not however provide a right of access to the railway infrastructure.

⁸⁰ Silla Olivier, *Der Aufbau des Binnenmarktes im Schienengüterverkehr*, 2002, www.ec.europa.eu/transport/rail/overview/articles_de.html (as at 14.02.2006).

The license is issued by the licensing authority which is to be nominated by each Member State but which itself may not provide any railway transport services and must be independent of any undertakings which do so. (Article 3 Directive 95/18).

The license is issued on application. If the enterprise fulfils the conditions of Directive 95/18, there is a right to the license; otherwise a license may not be issued (Article 4 Directive 95/18).

Prior to taking up operations, the enterprise must be able to prove to the licensing authority that it satisfies the requirements of Directive 18/95/18 as to reliability, financial capacity, professional competence and insurance cover.

(1) Reliability, Article 6 of Directive 95/18/EC

The Member States define conditions to ensure that an applicant railway undertaking or the persons in charge of its management have not been convicted of serious criminal offences including offences of a commercial nature, have not been declared bankrupt, have not been convicted of serious offences against specific legislation applicable to transport, or serious or repeated failure to fulfil social or labour law obligations including obligations under occupational safety and health legislation, or if the activity of the undertaking is cross-border transport, of customs offences.

(2) Financial Capacity, Article 7 Directive 95/18/EC

An applicant railway undertaking must demonstrate that it will be able to meet its actual and potential obligations established under realistic assumptions for a period of twelve months. In order to satisfy the licensing authority, the railway undertaking shall provide its annual accounts or annual balance sheet to such authority, providing the particulars listed in Sec. I of the annex to the Directive.

(3) Professional Competence, Article 8 Directive 95/18/EC

The railway undertaking meets the requirements relating to professional competence if it has or will have a management or organisation which possesses the knowledge and/or experience necessary to exercise safe and

reliable operational control and supervision of the type of operation specified in the license (or in the application for the license).

(4) Insurance Cover, Article 9 Directive 95/18/EC

The railway undertaking must be adequately insured or make equivalent arrangements for cover of its liabilities in the event of accidents especially in respect of passengers, luggage, freight, mail and third parties, in accordance with national and international law.

1.1.2. Safety Certificate

The safety certificate will be issued by a national safety authority of the Member States, which will be established by the Member States and which must be independent in its organisation, legal structure and decision-making from any railway undertaking, infrastructure manager, applicant and procurement entity, Article 16 Directive 2004/49.

The safety certificate under chapter III of Directive 2004/49 EC is a condition for use of the railway infrastructure by the railway undertaking. A safety certificate can be issued to a railway undertaking for the entire network of a Member State or for a certain part only, Article 10, subsection 1 of Directive 2004/49. It is not valid throughout the Community.

The purpose of the safety certificate is to provide evidence that the railway undertaking has established its safety system management and can meet requirements laid down in TSI and other relevant Community legislation under national safety rules in order to control risks and operate safely on the network, Article 10, subsection 1 of Directive 2004/49.

The safety certificate consists of two certificates:

Certification confirming acceptance of the railway undertaking safety management as described in Article 9 of Directive 2004/49. This certificate is issued by the Member State in which the railway undertaking commences operations, Article 10 subsection 3 of Directive 2004/49. The objective is that the Member States recognise the certificates issued by other Member States, secondly a certification of the approval of the measures taken by the railway undertaking to fulfil the special requirements for safe transport on

the relevant network is necessary. This certificate is therefore related to routes and is issued by the Member State in which the railway undertaking intends to take up additional transport services. Article 10 subsection 4 of Directive 2004/49.

1.1.3. Allocation of Infrastructure Capacity

(1) Participants in the Allocation Procedure

Every railway undertaking recognised by a Member State by the issue of a transport license and their international groupings can be allotted line capacity, Article 16, subsection 1 of Directive 2001/14/EC.

The Member States can, in their own relevant jurisdictions, expand the group and allow other natural/legal persons with a financial interest in acquiring line capacity for the conduct of railway transport services (in particular loaders, carriers, undertakings in Combined Transport, authorities in the context of regulation No. 1191/69 – transport services based on community obligations suburban/regional transport) to apply for allotment of line capacity, Article 16 subsection 1 of Directive 2001/14/EC as amended by Directive 2004/49/EC (hereinafter Directive 2001/14).

The infrastructure manager may set requirements for applicants. These requirements must be limited to the provision of a financial guarantee in a reasonable amount and must be reasonable, transparent and non-discriminatory, Article 16 subsection 2, 3 of Directive 2001/14.

The allotment of infrastructural capacity is made by the infrastructure manager, which also conducts the procedure for allotting infrastructural capacity if it is legally, organisationally and in its decision-making independent of railway undertakings, Article 13 of Directive 2001/14. Otherwise the procedure will be conducted by an allocation body which is legally, organisationally and its decision-making independent railway undertakings, Article 14 of Directive 2001/14.

(2) Procedure

The Member States may draw up framework regulations for the allotment of infrastructure capacity, Article 14, subsection 1 of Directive 2001/14.

The procedure for the allocation of infrastructure capacity will be determined by the infrastructure manager for its network within the terms of the Directive. In particular, infrastructure managers must ensure that the infrastructure capacity is allocated on a fair and non-discriminatory basis and in accordance with Community law, Article 14 subsection 1 of Directive 2001/14.

The infrastructure managers shall, after consultation with the interested parties, develop and publish a network statement (cf. Article 3 and Annex 1, Directive 2001/14) setting out the nature of the infrastructure which is available to railway undertakings, the conditions for access, charges and tariffs and the principles and criteria for the allocation of infrastructure capacity. This includes data on the general characteristics of the infrastructure, restrictions on use and processing, and periods for the allocation procedures. The material data for the procedure must contain specific criteria for the making of allocation applications, the requirements governing applicants, the schedule for the application and allocation process, the principles governing the coordination process etc.

The allocation of infrastructure capacity can be provided by the allocation for one working timetable of one year (Article 19, subsection 1 and 2 of Directive 2001/14) by framework agreements with a basic period of five years (Article 17, Directive 2001/14) or by ad hoc allocation (Article 23, Directive 2001/14).

The Member States can demand approval of framework agreements by the regulatory authorities. Framework agreements do not apply to rail routes individually but should provide for legitimate commercial requirements of the applicant. A framework agreement must be capable of being amended or restricted, subject as the case may be to a contractual penalty. A framework agreement may not exclude the use of the relevant rail network by other applicants or transport services.

In the case of allocation for a working timetable period, the infrastructure managers should cooperate in the interests of the efficient creation and

allocation of infrastructure capacity. The applicants may apply on the basis of public or private law to the infrastructure manager for the right to use railway infrastructure. Applicants may request infrastructure capacity crossing more than one network by applying to one infrastructure manager. That infrastructure manager shall then be permitted to act on behalf of the applicant to seek capacity with the other relevant infrastructure managers. The infrastructure manager must endeavour as far as possible to facilitate all applications. If applications are irreconcilable, a coordination process for the best possible fulfilment of all requirements is to be conducted. A working timetable shall be prepared by the infrastructure manager once in the calendar year (in principle, last Saturday in May). The period for filing applications may not expire more than 12 months prior to the timetable coming into force.

Decisions on ad hoc applications are to be made as quickly as possible, at the latest, however, within five working days. Information on available reserves of capacity will be provided to applicants in the case of interest. The infrastructure manager shall also examine whether it is necessary to make reserves for ad hoc capacity applications in the timetable prepared.

(3) Legal Consequences of Allocation

An applicant is entitled to use a rail track at the terms allocated to it in return for a charge.

Transfer or trading in infrastructure capacity is prohibited. The use of capacity by a railway undertaking and conducting out the business of an applicant which is not a railway undertaking shall not be considered a transfer, Article 13 of Directive 2001/14/EC.

The respective rights and obligations between infrastructure managers and applicants in respect of allocation of capacity shall be laid down in contracts or in legislation.

1.1.4. Access Agreements

Railway undertakings and managers of the railway infrastructure shall, in accordance with Article 10, Directive 91/440/EEC, amended by Directive 2004/51/EC conclude the necessary administrative, technical and financial

agreements. The conditions governing such agreements shall be non-discriminatory.

(1) National Law

EU law provides for the frame conditions of access agreements in Article 10 Directive 91/440/EEC, amended by Directive 2004/51/EC. As this Article provides for a granted access and transit rights on equitable conditions, without determining in detail, how this access should be formed and which conditions are supposed to be equitable. Therefore, the provisions of Article 10, Directive 91/440/EEC, amended by Directive 2004/51/EC have to be implemented accordingly by the respective national provisions on access to the railway infrastructure.

(2) CUI

There is, however a more detailed supranational codification in the Member States being at the same time members of the OTIF, where the CUI applies, unless the relevant states have declared their reservations.⁸¹

The CUI, as well, does not contain provisions on the conditions of access but provisions on the structure of the CUI user agreements (agreement between the infrastructure management and the carrier). Apart from regulations on the content, form and duration of user agreements, it contains provisions on mutual liability of the parties and the making of claims.

The EU Commission called upon the Member States to declare non-application according to Article 42 § 1 COTIF 1999 (as well as the APTU, ATMF), which Denmark, Germany, Finland, France, Luxembourg, the Netherlands, Norway, Portugal, Spain, Slovenia, Hungary and the UK did.⁸²

⁸¹ The following have declared their reservations: Denmark, Germany, Finland, France, Luxembourg, Netherlands, Norway, Portugal, Spain, Slovenia, Hungary and the UK; http://www.otif.org/otif/_epdf/dir_pub_2007/web_COTIF99_Erklaerungen_und_Vorbehalte_26.02.2007_e.pdf (02.03.2007).

⁸² The following have declared their reserves: Denmark, Germany, Finland, France, Luxembourg, Netherlands, Norway, Portugal, Spain, Slovenia, Hungary and the UK; http://www.otif.org/otif/_epdf/dir_pub_2007/web_COTIF99_Erklaerungen_und_Vorbehalte_26.02.2007_e.pdf (02.03.2007).

Non-application means that the OTIF states are free, according to Article 42 § 1 COTIF 1999, to exclude the application of individual COTIF appendices to their national territory.

The reservations of the EU Commission as to the compatibility between Directive 2001/14/EC and the CUI refer mainly to the definition of carrier, the insurance obligation of the carrier, the duration of the contract and court jurisdiction.

(a) Scope of Application

The CUI is applicable to every contract on the use of railway infrastructure for the conduct of international railway transport in the meaning of the CIV and CIM, Article 1 CUI. It is in principle not dispositive, conflicting agreements between infrastructure managers and carriers are void, Article 4 CUI. This affects in particular the liability provisions.

(b) Content and Form of the Agreement.

The user agreement according to the CUI is to be recorded in writing or equivalent form with the following minimum particulars: the infrastructure to be used, the scope of use, the performance of the infrastructure operator, the performance of the carrier, personnel to be engaged, vehicles to be used, financial conditions (the absence of such conditions does not affect the existence of the agreement or the application of the CUI), Article 5 CUI.

The contract can be for a limited or unlimited period, Article 7 CUI

(c) Liability

The carrier is liable to the customer for damage caused by defects in the infrastructure because, under the CIM and CIV (Article 40 CIM, Article 51 CIV); the infrastructure manager is deemed to be the agent of the carrier.

The infrastructure manager is liable to the carrier for personal injury and material damage which the carrier suffers during use of the infrastructure, and is also liable for financial damage arising because the carrier is obliged to pay compensation under the CIV or CIM, as far as the cause of the damage lies in the infrastructure (Article 8 CUI).

For personal injury and financial damage incurred by the carrier on the basis of the CIV, the infrastructure manager is not liable for force majeure, fault of the injured party, the conduct of a third party which the operator cannot avoid and the consequences of which it cannot prevent.

In the case of material damage and financial damage which the operator incurs on the basis of the CIM, the operator is not liable if the damage is caused by the fault of the carrier, on instruction of the carrier not the fault of the operator or force majeure.

No release from liability can be claimed if gross fault is proved, Article 15, CUI.

The carrier is liable to the operator for personal injuries and material damage incurred by the operator or its agent due to means of transport used by the carrier or persons or goods carried by it in the course of the use of the infrastructure, Article 9, CUI.

In the case of personal injury, the carrier is not liable if the damaging event is caused by force majeure, fault of the injured party or the conduct of a third party which the carrier cannot avoid and the consequences of which it cannot prevent.

In the case of material damage, the carrier is not liable if the damage is due to the fault of the operator, an instruction of the operator not due to the fault of the carrier or in the case of force majeure.

No release from liability can be claimed if gross fault is proved, Article 15 CUI.

If causes within the responsibility of the operator and causes within the responsibility of the carrier combine, each party is liable only to the extent of its contribution to causation of the damage. If the contribution of each to the damage cannot be proved, each party shall bear the damage which it suffers itself.

If several carriers use the same infrastructure and if several of them contribute to damage suffered by the operator, they are responsible for the damage analogously to the above-mentioned principle.

The amount and scope of compensation are set out in Article 12 to 14 CUI which correspond to the rules of the CIV. In the case of gross fault unlimited liability applies, Article 15 CUI.

(d) Limitation

Claims under the CUI are in principle subject to a limitation period of three years, Article 25 CUI.

(e) Court Jurisdiction

The courts of the Member States of the COTIF have jurisdiction in claims based on the CUI. If the parties to the agreement have not agreed on a court of jurisdiction, the courts of the Member State in which the operator is established have jurisdiction, Article 24 CUI.

1.2. Fees for Use of Infrastructure

The basis for the calculation of the fees for use of the infrastructure is provided in Directive 2001/14 EC as amended by Directive 2004/49/EC (hereinafter referred to as Directive 2001/14).

The Member States shall establish a charging framework and specific charging rules or shall delegate such powers to the infrastructure manager provided that it is in its legal form, organisation or decision-making functions independent of any railway undertaking. Article 4 of Directive 2001/14.

The regulations for charges and tariffs are to be set down and published in a network statement. Article 3 of Directive 2001/14.

Charges are to be paid to the infrastructure manager and used to fund its business, Article 7 of Directive 2001/14. The infrastructure manager shall calculate and invoice the charges.

The infrastructure managers shall ensure that the charging scheme in use is based on the same principles over the whole of their network and that the application of the charging scheme results in equivalent and non-discriminatory charges for different railway undertakings that perform services of an equivalent nature. Article 4 of Directive 2001/14.

1.3. Regulatory Body

Member States shall establish a regulatory body according to Article 30 Directive 2001/14 which shall be independent in its organisation, funding decisions, legal structure and decision-making from any infrastructure manager, charging body, allocation body or applicant.

An applicant shall have the right to appeal to the regulatory body if it believes that it has been unfairly treated, discriminated against or is in any other way aggrieved. The regulatory body shall ensure that the charges set by the infrastructure manager comply with the Directive and are non-discriminatory.

2. Regulations of the OSJD

The OSJD itself has made no regulations with regard to the right of access to the railway network for independent carriers on its territory. The OSJD system, originally intended to regulate co-operation between state railways, never catered for the possibility of access by independent carriers. It is therefore a matter for the railways or national legislation to provide for regulation of access to the railway infrastructure in each case. The results can therefore differ from state to state.

At the supranational level there are no regulations relating to access rights of carriers. Whether and how on the territory of the OSJD, which is not within the sovereign territory of an EU Member State, independent carriers are granted access to the infrastructure is therefore a matter for these states. The investigation of national law with regard to access is not a subject dealt with here.

In its Common Railway Policy of 2002, the OSJD favours cautious dealing⁸³ with the principle of Directive 91/440/EEC, the access of third parties to the infrastructure, because this principle involves the creation of a very reliable legislative mechanism, which would be provided too soon for most Member States. "The application of this principle can awake the idea of competition within the various means of transport in the states which so far have only

⁸³ Common Railway Policy, section D.

very limited means of coping with such competition. In such a case, the application of the principle could be dangerous".

3. Interim Conclusion

Since the OSJD itself has made no regulations with regard to the right of access to the railway network for independent carriers, this subject is governed by national law. Consideration of individual national provisions was not, however, the subject of the present report.

V. Wagon Usage in International Railway Transport

1. Comparison between CUV and PPW

The EU itself has not made any provisions on the use of passenger or goods wagons in international rail transport.

To compare the provisions of the OSJD contained in the PPW and in its Annex 1 (RWU), the provisions of the OTIF set out in the CUV are therefore to be used.

The regulations of the OTIF and the OSJD do not provide any fundamental differences with regard to the subject matter regulated and the scope of application. There is, however, a significant difference in relation to the intensity of the regulations. The scope of the PPW and the RWU exceeds that of the CUV by more than 10 times.⁸⁴

The provisions in the uniform regulations for contracts on the use of wagons in international rail transport (CUV) contain, according to § 1 CUV, provisions for bilateral or multilateral contracts on the use of railway wagons for transport according to the CIV and CIM.

The Annex 1 to the PPW (hereinafter RWU) provides in § 1 for the use of passenger and goods wagons, private goods wagons and the relevant means of transport, for example, containers or pallets.

⁸⁴ The CUV manages with 12 articles on 5 pages.

Structurally, a distinction is made in the PPW between passenger wagons, goods wagons and private goods wagons, although hardly any differences arise.⁸⁵

The CUV provisions do not differentiate between wagons of the railways themselves, private wagons and other wagons or between the various kinds of user agreements. The parties have considerable freedom to contract including in the area of liability. Only the limitation provisions are mandatory. An overview on both legal systems is given in Annex IV to this study.

The PPW Agreement (which is a framework agreement entered into between various OSJD members) does not intend to exclude the conclusion of bi- or multilateral agreements between railways participating in the PPW on questions which relate to the common use of wagons and the possibility of reductions or discounts according to Article 1, No. 3 of the PPW Agreement.

In order to provide the PPW with its independent legal status, the participating railway undertakings have concluded a separate agreement. The actual regulations on the use of wagons in international transport (PPW) are contained in Annex 1 to the PPW and apply, according to Article 1 No. 1 of the PPW Agreement, as an inseparable element of the contract.

According to Article 1 No. 4 of the PPW Agreement, the currency of account between the railway undertakings is Swiss Franks or another free convertible currency on the basis of bilateral agreement between the PPW railways as signatories to the PPW Agreement.

The PPW Agreement provides in Article 5 in principle, the possibility of accession of other members. Other railways can therefore apply for membership. The application for membership of the PPW is deemed, according to Article 5 No. 1 (2) of the PPW Agreement, as accepted if, after the expiry of two months from the date of sending confirmation of receipt of the application for membership by the Committee of the OSJD, no objection is received from a railway undertaking of the PPW.

⁸⁵ Section I on passenger waggons, section II on goods waggons and section III on private goods waggons.

The Committee of the OSJD informs all railway undertakings of the PPW of the new membership according to Article 5 No. 2 of the PPW Agreement. The acceding railways will be added to Annex A to the PPW with a note of the date of accession.

The PPW Agreement is concluded for an indefinite period and drafted in Russian and Chinese, because these languages are the official languages of the OSJD. Both versions are equal, although in the case of differing interpretation possibilities the Russian text takes precedence (Article 7 of the PPW Agreement).

2. Topics of Regulation

2.1. Requirements for Wagons in Use

2.1.1. According to the CUV

The CUV contains only provisions on the marking and description of wagons in service, Article 3 CUV.

Subject to the technical conditions for approval, a wagon must, for service in international transport, show the name of the owner if appropriate, the railway undertaking to the fleet of which the wagon belongs, and the home railway station and the other markings and descriptions agreed in the CUV. Article 3 § 2 stipulates that means of electronic identification can also be provided.

2.1.2. Requirements on Wagons in Use according to the RWU (Annex 1 to the PPW)

According to § 2.1 RWU, only wagons are which are in operating condition and comply with the technical requirements of Annex 1 to the RWU admitted to service in international rail transport..

In § 14.1 of the RWU it is provided that only such goods wagons are admitted to international railway transport which comply with the technical requirements of Annex 5 to the RWU. This applies irrespective of whether the goods wagons belong to the member railways or are private goods wagons.

2.2. Renting of Wagons/Handing-over of Wagons

2.2.1. According to the CUV

The handover of wagons is not regulated in the CUV. Agreements on the issue are therefore left, without any pre-requirements, to the railway undertakings concerned either by agreement or by general conditions of transport.

2.2.2. According to the RWU (Annex 1 to the PPW)

(1) Procedure for Renting Wagons

The procedure for providing passenger wagons is set down according to § 3 RWU by the contracting parties to the SMPS in the course of OSJD meetings or bilateral agreements.

(2) Handing-over of Wagons

The manner and method of handing over wagons is provided in § 4 RWU differentiated as between direct transport and transport with changes. The handover for direct transport should accordingly take place at the border station specified and in the case of transport with changes at the border station of the party taking over.

As the wagons are only handed over when they comply with the technical requirements according to Annex 1 to the RWU, in the event that the technical requirements are not met, a record of the condition of the wagons has to be prepared according to Annex 1 to the RWU.

In relation to the provisions on the handover of goods wagons, a distinction is made in § 15 RWU between transport which is subject to reloading and transport which is not subject to reloading. In transport which is not subject to reloading, the handover takes place according to § 15.1.1 RWU at the border station specified by the parties. In the case of transport with reloading, the handover takes place, according to § 15.1.2 RWU, at the border station of the railway taking over.

As in the case of passenger wagons, goods wagons must, on handing over, comply with the technical standards and, are, if these standards are not

complied with or the wagons is damaged, have to be repaired. In the case of handing over of goods wagons not in compliance with the technical standard, a record according to the requirements of Annex 5 to the RWU is to be made.

In the case of reloading wagons, cleaning, disinfection or the like is to be carried out by the railway handing over but at the costs of the railway taking over (§ 15, 15.1 (13) RWU).

2.3. Use of Wagons

2.3.1. According to the CUV

The issue of providing wagons is not regulated in the CUV. Such agreements are therefore again without any pre-requirements left to the railways by contract or under general conditions of transport.

2.3.2. According to the RWU

(1) Conditions for the Use of Goods Wagons

§ 16 RWU contains conditions for the use of goods wagons. According to § 16.1 RWU, liability for wagons taken over and the obligations connected with the takeover of liability commence upon the signing of the list of wagons by the railway taking over.

As also explained in the case of passenger wagons, the parties to the RWU are obliged to treat the wagons with care and in accordance with regulations. They are obliged to keep the goods wagons in operational condition (§ 16.2 et seq. RWU).

Special wagons and empty tank wagons are to be inspected and loaded in a technically appropriate manner. The return of empty tank wagons to the railway owner takes place with the accompanying documents according to Annex 19 to the RWU (§ 16.4 (6) RWU).

The RWU railway undertakings can lease wagons to one another. The provisions of the lease are to be made by the railways concerned. The leased wagons are, however, to be marked according to Annex 19 to the RWU (§ 16, 16.7 RWU).

(2) Charging for the Use of Wagons

The charging for the use of wagons is provided for in § 20 RWU, according to which a railway which takes over wagons of another railway undertaking pays for the use of the wagons in accordance with the tariffs stated at points 7 and 8 of Annex 46 to the RWU.

For the use of bogeys of another railway a charge of 15% of the tariff for the use of wagons is payable (§ 20, 20.1 (3) RWU).

Charges are calculated, according to § 20.2 RWU, on the basis of full days or hours. In the case of 24 hour time recording, the day of acceptance and the day of return are each deemed to be a full day.

The using railway undertaking is relieved of the duty to pay a charge inter alia if, because of a natural disaster, there is an interruption in the transport of at most 10 days, if a delay is due to the handing over or the taking over railway, if empty wagons are added or for the duration of repair of wagons including the time of waiting for spare parts (§ 20.3 et seq. RWU).

(3) Use of Means of Transport

Chapter IV of the RWU provides for the use of means of transport.

§ 24 RWU firstly contains general provisions and regulations on the use of tarpaulin covers and their marking. § 25 RWU contains provisions on the dimensions and technical qualities of containers to be used and the accompanying documents to be prepared according to Annexes 7 and 13 to the RWU.

In § 26 RWU provisions on the pallets to be used are contained. The condition of pallets must correspond to the regulations in Annex 45 to the RWU. The return of pallets is recorded in a takeover list according to Annex 7 to the RWU. The basis for the monthly accounting in balance lists takes place according to Annex 8 to the RWU. If return in natura does not take place, compensation is payable according to Annex 6 to the RWU.

2.4. Liability

2.4.1. Liability in Case of Loss

(1) According to the CUV

According to Article 6 § 1 CUV, a wagon is deemed to be lost if the entitled party has requested the railway to which the wagon was passed for use to trace the wagon and the wagon is not made available within three months after receipt of the request and no indication of its location has been obtained. This period is reduced in the case of a wagon taken out of service, for example, for repair, by the period out of service.

The loss of a wagon gives rise to compensation. According to Article 4 § 3 CUV, compensation is limited to the value of the wagon. Agreements deviating from this limitation of liability are admissible according to Article 4 § 5 CUV.

According to Article 5 CUV, the limitations on liability granted in Article 4 §§ 3 and 4 CUV do not apply if it is proved that the damage incurred was caused by intent or deliberate negligence on the part of the railway undertaking.

If the wagon deemed to be lost is discovered after payment of compensation, the entitled party can, within six months after corresponding notification, demand that the wagon be provided to it against return of the compensation at the home railway station free of charge.

If the wagon is found more than one year after payment or if no a request for the return of a wagon is made, the railway can dispose the wagon in accordance with Article 6 § 3 CUV in accordance with the law applicable at the place where it is discovered. Alternative agreements are admissible.

(2) According to the RWU

The liability of the taking over railway for the wagons taken over begins with the signing of the wagon list by the railway taking over (§ 5.1 RWU).

It is also prescribed that the railway taking over is obliged to treat the wagons taken over with care and in accordance with the regulations. In addition, the parties to the PPW and the RWU are obliged to ensure the observance of agreed timetables (§ 5, 5.4 RWU). In case of delays, the delayed wagons are to be returned in accordance with the provisions in the

RWU. As an interim measure, appropriate replacement wagons should be employed if necessary.

§ 13 RWU makes provision for compensation in case of the loss of wagons.

According to § 13.1 RWU, wagon is deemed to be lost if it is written off as a total loss or not returned to the railway owner for other reasons within three months. The beginning of this delay is not expressly regulated due to its range of application on differing situations. In comparison to other RWU rules on loss, this should be the day on which the owner can or does demand the return of the wagon.⁸⁶

A private goods wagon is deemed to be lost if it cannot be provided to the recipient within three months after expiry of the delivery period (§ 23.6.1 RWU). The railway to which the private goods wagon is attributed in international rail transport shall participate in the tracing (§ 23.6.1 (2) RWU).

The railway where the wagon has been lost informs the railway owner of the wagon accordingly.

The handing over railway is obliged to reimburse the railway owner for the value of the wagon in accordance with the value stated on the agreed tariff lists (§ 13.3 RWU). The value to be reimbursed is 85% of the new value (§ 13.3 RWU). For every year of operation, however, 3% will be deducted, at most, however, 75%. If a severely damaged wagon is returned, appropriate deductions are to be made from the compensation payable.

Further, § 19 RWU makes provision for compensation in case of the loss of a goods wagon.

If there is a total loss or a wagon not returned to its owner for other reasons within six months, compensation has to be paid. The beginning of the 6-months delay is not expressly regulated but should be the day on which the owner can or does demand the return of the wagon.⁸⁷ The railway where the wagon has been lost informs the owner thereof stating the wagon number and the reason for the loss.

⁸⁶ e.g. see 23.6.1 and 23.6.2 on the loss of private wagons, 25.11 on the loss of containers.

⁸⁷ e.g. see 23.6.1 and 23.6.2 on the loss of private wagons, 25.11 on the loss of containers.

According to § 19.3 RWU, the handing over railway is obliged to reimburse the owner for the value of the lost wagon in accordance with the value stated in the agreed tariff lists (§ 19.3 RWU). The value to be reimbursed is according to table 2 Annex 16b to the RWU 85% of the new value (§ 19.3 (3) RWU). For every year of service 4% of the new value is deducted, to a maximum, however, of 80%.

If a severely damaged wagon is returned, a compensation has to be paid according to the provisions under 23.8 and 23.9 in accordance with § 19.7 (2) RWU, which defines the amount in connection with appendix 16 b to the RWU.

2.4.2. Liability for Damage

(1) Liability According to the CUV

According to Article 4 § 1 CUV, the railway to which the wagon was provided as a means of transport is liable for all damage due to the loss of or damage to the wagon or any of its components.

In Article 4 § 1 CUV, at the end, a presumption of fault on the part of the railway is provided.

In Article 4 § 2 CUV, the liability of the railway is, however, limited. The railway is not liable for the loss of loose components unless they are listed on the long side of the wagon or on a list attached to the wagon.

The compensation claim for damage is, according to Article 4 § 4 sent. 1 CUV, limited to the cost of repair which according to Article 4 § 4 sent. 2 CUV may not exceed the amount necessary for the purchase of a new wagon. Agreements deviating from the limitation of liability are admissible according to Article 4 § 5 CUV.

According to Article 5 CUV, the limitations on liability provided in Article 4 § 3 and 4 CUV do not apply if it is proved that the damage was caused with intent to cause such damage or recklessly and with knowledge on the part of the railway undertaking that such damage or loss will probably occur.

(2) Maintenance and Repair of Wagons according to the RWU

It is provided in § 12.1 RWU that the owner is responsible in principle for the repair and maintenance of wagons. The railway handing over is responsible only for the care of the wagon, i.e. technical inspection, ongoing repairs and lubrication. The care of the wagon is therefore at the cost of the railway company handing over (§ 12.2 RWU).

The repair of damaged wagons takes place according to § 12.3 RWU by the handing over railway at the cost of the owner in accordance with the tariffs in Annex 15a to the RWU. The decision on repair or write off will be made in consultation with the owner.

§ 23 RWU provides specific regulations on the servicing of private goods wagons and liability for these. According to § 23.1.2 RWU, private goods wagons shall in principle be treated during the transport as goods wagons of the railway undertaking on the territory of which the private goods wagon is admitted.

According to § 23.2.2. RWU, the cleaning of tank wagons and other special wagons is not conducted under the RWU. This is, therefore, subject to the relevant contract between the parties (owner and user of the wagons).

According to § 23.4 RWU, damaged private wagons are to be repaired by the railway undertaking handing over, at the cost of the owner. If the repair costs exceed 500 Swiss Franks, the consent of the owner is required.

In the case of severe damage, it is a matter for the owner alone to decide whether the wagon can be repaired. The owner must justify its decision (§ 23.4.2.3 RWU).

A repaired wagon to be returned will be transported free of cost with despatch note if the damage has been caused by the railway undertaking. If the owner is responsible for the damage or if the responsibility is not ascertained, the transport with despatch note will be charged for.

2.5. Treatment of Private Goods Wagons According to RUW

The third section of the RWU is dedicated to the handling of private goods wagons in international railway transport. In § 21.1 RWU it is provided that private goods wagons, i.e. wagons belonging to a natural or legal person and

attributed to a party to the RWU, or leased by such a railway to a third person, must comply with the requirements of Annex 5 to the RWU and the OSJD notice “O+P 401”. Notice “O+P 401” provides for technical requirements to the relevant wagon, e.g. that the wagons should be marked with a “P”.

The railway undertaking to which the wagon is attributed in international goods transport decides on the admission of a private goods wagon (§ 21.3 RWU), which means that the railway undertaking decides a private wagon may be used in the relevant infrastructure or not. It is not has regulated, nether a private wagon fulfilling the required conditions to be admitted.

If the private goods wagon to be admitted originates from the stock of a railway undertaking other than that which decides on the admission in international goods transport by rail, agreement with the relevant railway undertaking must be reached.

Questions in connection with the damage, repair and loss of private goods wagons or parts thereof will be dealt with between the owner of the wagon and the railway undertaking to which the private goods wagon is attributed in international rail transport (§ 21.6 RWU), with no further provisions as to how the owner and the railway undertaking have to regulate this.

Issues concerning the handover, takeover and refusal of private goods wagons are decided according to § 15 RWU. Private goods wagons are thereby, in principle, treated analogously way according to the rules on goods wagons of railway companies.

The cost of repairs or cleaning private goods wagons will be invoiced by the railway company carrying out the same to the railway company to which the goods wagons are attributed in international goods transport by rail (§ 23.7.1 RWU).

If the cost of repair exceeds the amount to be assumed in case of the loss of the wagon, the lesser amount is to be charged in accordance with § 23.8.1.1 (2) RWU.

For the write-off of a private goods wagon, § 23.8.2.2 RWU provides that the same value is to be applied as for a goods wagon of a railway undertaking participating in the agreement.

Compensation claims for damage to a private goods wagon will, according to § 23.9 RWU, be accounted for through the railway undertaking to which the goods wagon is attributed in international transport of goods by rail. The respective railway undertaking is thereby acting as a kind of agent for the owner according to § 23.9.1 RWU.

2.6. Damage Caused by Wagons

2.6.1. According to the CUV

The question of liability for damage caused by wagons is dealt with in Article 7 CUV, according to which whoever provided a wagon as a means of transport is liable for the damage caused by that wagon. This applies, of course, only if and to the extent fault arises.

2.6.2. According to the RWU

In spite of the very comprehensive regulations in the RWU, there is no provision for the case of damage caused by a wagon. The question is therefore to be dealt with at the level of the relevant national law.

2.7. Subrogation

2.7.1. According to the CUV

Subrogation is expressly dealt with in the CUV in Article 8. According to this Article, the railway undertaking providing the use of a wagon as a means of transport to another railway undertaking may agree on a subrogation, assuming that the owner of the wagon approves it. Subrogation means in this context that claims of the owner of the wagon for loss of or damage to the wagon shall be addressed to the railway undertaking providing the use of the wagon to the other railway undertaking. However, the railway undertaking has the right of recourse for the use of the wagon by the other railway undertaking.

In addition, the railway undertaking providing for the use of the wagon can agree with the other railway undertaking, subject to the approval of the owner of the wagon, that only the owner shall be liable to the other rail transport undertaking for loss or damage caused by the wagon, but that only the railway undertaking which is the contractual partner of the owner (the one providing for the use of the wagon) shall be authorized to assert the rights of the other railway undertaking.

2.7.2. According to the RWU

Subrogation is regulated in the RWU separately in the section on various wagon types, but with provisions which are to a great extent similar to the provisions of the CUV.

Subrogation is regulated under Article 8 CUV. When the contract of wagon usage provides that the railway undertaking may provide the wagon to other railway undertakings for use as a means of transport, the railway undertaking may, with the agreement of the owner, agree with the other railway undertakings that, subject to its right of recourse, it shall be subrogated to them in respect of their liability to the owner for loss of or damage to the wagon or its accessories. Furthermore it is stated under Article 8 lit b) CUV, that only the owner shall be liable to the other railway undertakings for loss or damage caused by the wagon, but that only the railway undertaking which is the contractual partner of the owner shall be authorised to assert the rights of the other railway undertakings.

2.8. Return of Wagons

2.8.1. According to the CUV

There is no provision in the CUV as to how wagons should be returned. This is therefore to be dealt with at the level of the relevant national law.

2.8.2. According to the RWU

The return of wagons to the railway owner is provided for in § 17 RWU. According to § 17.1 RWU, it is provided that wagons should be returned after unloading, but loaded again with goods if possible. As regards transport

wagons, they should be reloaded only with the agreement of the owner. Tank wagons are to be returned empty (§ 17.1.3 (7) RWU).

If goods wagons are loaded on the return journey or on parts thereof, a deduction will be made from the cost of the empty journey accordingly. If, due to diversions in the course of the return journey, additional costs for the empty journey arise, they are to be reimbursed to the relevant railway undertaking to the extent that it has not been compensated by the charge for the load-carrying part of the journey (§ 17, 3 RWU).

According to § 17.3, the railway owner of wagons must, in case of urgent need, demand the return of the wagons. If the necessity for urgent return is relieved, the participating railway undertakings are to be notified accordingly (§ 17.4 (3) RWU).

2.9. Liability for Agents

2.9.1. According to CUV

In Article 9 CUV, the liability for agents of the parties to the contract of carriage is regulated. The parties to the contract of carriage (which are carrier and customer) are obliged to accept liability for their employees and other persons who they engage in the performance of the contract.

In Article 9 § 2 CUV it is provided that the infrastructure manager on whose routes railway services are provided, is also deemed to be an agent of the railway undertaking as the relevant carrier.

2.9.2. According to RUW

The RWU has no express provision on the liability of agents. This is therefore to be dealt with at the level of the relevant national law.

2.10. Miscellaneous

2.10.1. According to the CUV

According to Article 10 CUV, claims made in the scope of application of the CUV exclude other claims or other conditions.

Article 11 § 1 CUV provides the parties with the possibility of agreeing on court jurisdiction. The freedom to agree on a court of jurisdiction means that the parties can conclude such an agreement in accordance with the relevant national law. The CUV does not contain more detailed provisions in this respect.

In addition, the courts where the railway undertakings are established are stated to have jurisdiction. Only if the relevant railway undertaking is not established in the area of application of the CUV, will courts of Member States where the damage occurs have jurisdiction.

Claims under Article 4 and 7 CUV are statute-barred after three years according to Article 12 § 1 CUV.

The beginning of the period of limitation is calculated from the day on which the loss or damage is ascertained by the damaged party or the wagon is deemed to be lost or, in the case of claims under Article 7 CUV, from the day on which the damage occurs.

2.10.2. According to the RWU

The RWU has no provisions on the limitation of any claims. This issue is therefore to be dealt with at the level of the relevant national law.

3. Interim Conclusion

The need for harmonization in relation to contracts for the provision of wagons can be described as rather minor. The differences in the scope of regulations and the intensity of regulation is mostly of a structural nature, because many areas expressly regulated in the PPW or the RWU have been left to general transport conditions and contractual provisions rather than the CUV itself.

3.1. Provisions Which are Very Similar

In the areas of liability, the provisions are very similar. Liability in both conventions is limited to the damage or the value of the wagon.

In both systems a wagon is deemed to be lost after three months following the agreed day of return, although in the case of the RWU this period is six months for goods wagons. This difference is however not significant.

3.2. Areas with Minor Differences

While there are differences in many parts of the CUV and the RWU, they are, as already stated, mostly of a structural nature and therefore require only a lesser degree of harmonization.

With regard to the requirements on wagons in service, the RWU in Annex 1 specifies the technical conditions for admission, while the CUV is restricted to description and marking. This, however, does not result in substantial differences because, of course, technical standards of interoperability are provided in the territories of the EU and the OTIF. These are not, however, contained in conventions on the use of wagons such as CUV but in other agreements, e.g. the APTU and the ATMF.

This applies to the same extent to the provisions on wagon use and the maintenance and service of wagons. In this respect, the CUV does not contain any provisions of its own and therefore leaves the matter to contractual agreements between the parties to the contract of carriage or their general conditions of transport.

On the other hand, while the liability for agents of the parties to the contract of carriage is expressly regulated in the CUV, there is no such provision in the PPW or the RWU.

3.3. Areas with Major Differences

Concerning the types of wagons, damage caused by wagons and the possibility of subrogation, there are significant differences which have a material impact on to international railway law.

As regards types of wagons, the CUV does not distinguish between passenger wagons, goods wagons or private goods wagons. In the territory of the RWU, however, this distinction is always made. The CUV provisions are clearer and more accessible and provide a greater degree of legal certainty.

With regard to damage caused by wagons, the RWU contains no provisions. However, while there should be claims under the applicable national law in such cases, the system of cross-border provision of wagons and derogation lead to unnecessary additional complications in making claims for damage caused by wagons provided.

There is also a difference with respect to the possibility of subrogation. A subrogation according to which claims because of damage to or loss of wagons may be addressed to the railway undertaking providing use of the wagon to another railway undertaking (which caused the damage), is provided for in the CUV but not in the RWU.

Finally, the absence of limitation periods in the PPW and the RWU leads to considerable legal uncertainty, because the limitation periods are therefore subject to the relevant national law.

VI. The Use of Uniform Containers

1. Comparison

The EU itself has not made any regulations on the use of uniform containers. A comparison is therefore necessary between the OTIF regulations in the CIM, and the "Agreement on the use of uniform containers" (Container Agreement) of the OSJD. An overview of the different legal provisions with respect to the use of containers is provided in Annex V of this study.

2. Scope of Application of the CIM

In the area of the OTIF, the use of containers is regulated in Article 3 lit. d, Article 7 para 1, Article 23 para 3 lit. a, Article 30 para 3 and Article 32, para. 3 in the CIM of COTIF 1999.

The regulations on the use of multipurpose containers of owners from the OSJD Member States in international rail transport (Container Agreement), also deal with the use and requirements for multi-purpose containers of owners from the Member States of the OSJD in international rail transport in relation to the railway undertakings of the OSJD. The Container Agreement is not, however, applicable to the railway undertakings of the Czech

Republic, Slovakia and Poland, as they are not signatories of that Container Agreement.

3. Topics of Regulation

3.1. Technical Requirements

3.1.1. According to CIM

Article 7 § 1, lit l CIM provides for the containers, to be identified in the consignment note by kind, number and other characteristics necessary for an identification.

The relevant container conventions are not named in the CIM. However, the relevant international standard is determined in the international Convention on Safe Containers (CSC) and the Container Customs Convention of 1972 (CCO) and is therefore applicable for the container, deemed to be intermodal transport units according to Article 3, lit d CIM .

3.1.2. According to the Container Agreement

The Container-Agreement prescribes in § 1.1 that multi-purpose containers in accordance with international standard of the series ISO of Type IC, ICC, IA and IAA be used for the transport of goods in international transport, and that these containers must comply, according to § 1.2 Container Agreement, with the requirements of the international Convention on Safe Containers (CSC) and the Container Customs Convention of 1972 (CCO).

Certain markings and codes are prescribed for the containers by § 1.3 of Container Agreement. The containers should accordingly show an owner code and the container number and the state code, the gross and the empty weight of the container, a CSC table, a table according to the Container Customs Convention CCO and the date of the next regular test.

3.2. Containers Owned by the Railways

3.2.1. According to CIM

The CIM, in contrast to the former RICO, does not distinguish between containers owned by the railway undertaking and private containers.

3.2.2. According to the Container Agreement

The Container Agreement does not distinguish between containers owned by the railways and private containers, but apparently assumes that only containers of the railway undertakings are used.

3.2.3. Handing-over of Containers

(1) According to CIM

With regard to the handover and return of containers owned by the railway undertakings themselves, the CIM provides for the carrier to hand over the consignment note and deliver the goods to the consignee at the place designated for delivery against receipt and payment of the amounts due according to the contract of carriage (Article 17 § 1 CIM).

It shall be equivalent to delivery to the consignee if, in accordance with the prescriptions in force at the place of destination, if the goods have been handed over to customs or the respective authorities at their premises or warehouses, when these are not subject to the carrier's supervision, or if the goods have been deposited for storage with the carrier, with a forwarding agent or in a public warehouse (Article 17 § 2 CIM).

After the arrival of the goods at the place of destination, the consignee may ask the carrier to hand over the consignment note and deliver the goods to him. If the loss of the goods is established or if the goods have not arrived on the expiry of the period provided for in Article 29 § 1 CIM, the consignee may assert, in his own name, his rights against the carrier under the contract of carriage (Article 17 § 3 CIM).

The person entitled may refuse to accept the goods, even when he has received the consignment note and paid the charges resulting from the contract of carriage, so long as an examination which he has demanded in order to establish alleged loss or damage has not been carried out (Article 17 § 4 CIM).

In other respects, delivery of the goods shall be carried out in accordance with the prescriptions in force at the place of destination (Article 17 § 5 CIM).

If the goods have been delivered without prior collection of a cash on delivery charge, the carrier shall be obliged to compensate the consignor up to the amount of the cash on delivery charge without prejudice to his right of recourse against the consignee (Article 17 § 6 CIM).

(2) According to the Container Agreement

For the area of the OSJD, the handover of containers in international railway transport is provided for in § 2 Container Agreement. The handover of containers between the railways of the OSJD should take place, according to § 2.2 Container Agreement, subject to a record of the numbers according to the container handover list (Annex I Container Agreement), by the transferring railway at the transfer points stated in Annex II Container GO. The containers are, according to § 2.3 Container Agreement, deemed to have been handed over and accepted from the time of the signing and stamping of the handover lists by both parties.

Containers are, according to § 2.4 Container Agreement, to be handed over ready for service. Empty containers are to be cleaned for this purpose. The exact procedure on handing over of containers between railways is to be specified, according to § 2.4 Container Agreement, by the railway management in each case taking account of applicable agreements and contracts.

Damaged containers which pose a risk to the integrity of goods, transport safety or handling of containers as stated in Annex 3 Container Agreement, may not, according to § 2.5 Container Agreement, be handed over unless a return of empty containers for the conduct of the scheduled test and repair is concerned (§ 2.7 Container Agreement).

The handover and transport of large containers the owners of which are either not members of the OSJD or in the case of the Polish, Slovakian and Czech railways, which do not apply Container Agreement, takes place according to § 2.7 Container Agreement on the basis of the relevant applicable national law.

3.2.4. Charges

(1) According to CIM

Regarding charges, the CIM only provides in Article 7, § 1, lit. o CIM, that charges can be mentioned in the freight bill for freight, tariffs, customs and also other costs. This can include the costs imposed for the use of containers. In Article 10 § 1 CIM it is provided for, that in the absence of any agreements on costs, the sender is deemed to be bear them. This includes additional costs for the use of containers.

(2) According to the Container Agreement

Container Agreement also only refers to the possibility of contractual regulations. In § 4.5 Container Agreement it is stated that the charging and payment for container use between the container owners and the carriers or the railway acting as carrier shall take place in the scope of Container Agreement on the basis of the contracts concluded between them.

3.2.5. Use of Containers

(1) According to CIM

With regard to the use of containers, it is provided for in Article 7 § 1, lit. 1 CIM that the owner, the number of the container and the other characteristics of the container are to be stated in the consignment note.

(2) According to the Container Agreement

The use of containers, their transport, inventory, supervision and return is, according to § 4.1 Container Agreement, a matter for contractual agreement between the parties in bi- or multilateral agreements.

If containers of railway undertakings from three or more OSJD Member States are transported, multilateral agreements can be concluded including with the involvement of carriers of third states. The parties must inform all participants in the transport of the contracts concluded and of the provisions to ensure unhindered handing over of containers between the railway undertakings of the participating Member States of the OSJD.

According to § 4.1 subsection 4 Container Agreement, the railway undertakings of transit states are also liable for the transport of containers in accordance with the provisions of SGMS, CIM and other regulations.

3.2.6. Return of Containers

(1) According to CIM

With regard to the return of containers, there are no provisions to be found in the CIM. This is, therefore, governed by stipulations in the relevant tariffs or the private agreements of the respective parties.

(2) According to the Container Agreement

According to § 4.1 subsection 5 of the Container Agreement, applicable in the OSJD-area, in principle the container is to be returned after unloading to the railway undertaking which owns the container. Containers which cannot be returned loaded, will be returned empty to the railway to which the owner of the container has handed the relevant container or, at the instructions of the container owner, to another railway undertaking or other transport organization for further use on a contractual basis (§ 4.2 Container Agreement).

If no provision has been made, containers to be returned to the owner will be transported, according to § 4, 4.4 Container Agreement, at the expense of the transport organization on the basis of existing agreements to the railway undertaking to which the owner of the container has handed over the relevant container, and damaged containers will be transported at the expense of the carrier or the railway undertaking which is responsible for the damage.

3.2.7. Container Transport

(1) According to CIM

The CIM contains no provision as to how container transport is to be undertaken and dealt with. This is, therefore, governed by the applicable national law or the respective private agreements of the parties concerned.

(2) According to the Container Agreement

According to § 3, 3.1 the Container Agreement, the transport of empty or loaded containers takes place with an accompanying document according to the applicable legal provisions. However, the Container Agreement does not regulate which legal provisions are applicable.

The carriage of containers at stations not open for container operations (access routes for consignor or consignee) is only executed upon acceptance of the railway administration of the country of destination, which is, according to Article 3.2 of the Container Agreement, to be noted in the relevant documents of carriage.

Pursuant to Article 3.3., all changes and amendments of the Container Agreement (Appendix 4 to the Container Agreement) have to be notified to all Member States among each other and to the OSJD Committee.

3.2.8. Care and Repair of Containers

(1) According to CIM

With regard to the care and repair of containers, the CIM contains no provisions. It is therefore left to the parties to agree upon contractual provisions.

(2) According to the Container Agreement

The Container Agreement of the OSJD does contain provisions as between the participating railways undertakings for care and repair.

The necessary preparation of containers for loading and repairs to containers damaged by the fault of the user (railways, carrier etc.) is, according to § 5.1 Container Agreement, to take place irrespective of the ownership, at the expense of the railway undertaking company where it is located at that time.

According to § 5.2 Container Agreement, the design of containers is to be maintained in the course of the repair of damaged containers and the markings are to be restored according to § 1 Container Agreement.

If an examination is necessary in the course of container repairs, this will be conducted according to § 5.2 subsection 2 Container Agreement, with the consent of the owner of the container at the expense of the user.

Regular examination and the necessary repairs are to be ensured in the periods according to international regulations according to § 5.3 Container Agreement, by the owner of the container.

3.2.9. Loss and Damage

(1) According to CIM

The consequences loss or damage to containers in international rail transport provided for in Article 30 § 3 and Article 32 § 3 CIM.

Article 30 § 3 CIM provides for a limitation of the compensation for a loss of a container or parts of it to the amount of the worth on the day of loss.

Article 32 § 3 CIM provides for a limitation of the compensation in case of the damage of a container or parts of it to the amount of the overhauling costs.

(2) According to the Container Agreement

On the area of the OSJD on the other hand, compensation for containers which are lost or severely damaged is dealt with in accordance with § 6 Container Agreement.

According to § 6.1 Container Agreement, a container is deemed to be lost if it cannot be returned to the owner within six months after the handover to the user.

§ 6.1 subsection 2 Container Agreement states that the owner of the container is to cause enquiries to be made after expiry of the set period. This enquiry is to be addressed to the participants in the transport, who are obliged on receipt of the request to conduct searches and to inform the container owner of the result within 20 days.

The user due to whose fault a container is lost or damaged, is obliged according to § 6.2 Container Agreement to inform the container owner 10 days after the loss or damage has been ascertained.

Severely damaged containers which must be removed from stock, and lost containers will be replaced for the owner, according to § 6.3 Container Agreement, by the user through whose fault the container was lost or damaged.

Compensation can, according to § 6, 6.3 Container Agreement, be in the form of an exchange by a container of equal value that is fit for use or by payment of the value determined by bi- or multilateral agreements while taking account of the world standard of container prices. This should be dealt with within 30 days after the sending of the notification to the container owner.

3.3. Private Containers

(1) According to CIM

The CIM does not distinguish between the use of private or railway-owned containers in international rail transport and does therefore not provide for any particular provisions on the use of private containers.

(2) According to the Container Agreement

In the Container Agreement, private containers are not provided for. Stipulations are, therefore, subject to the parties' agreements.

3.4. Admission

(1) According to CIM

The CIM does not distinguish between the use of private or railway-owned containers in international rail transport and does therefore not provide for any particular provisions on the use of private containers.

(2) According to the Container Agreement

The Container Agreement does not provide for regulations with respect to the use of private containers. Stipulations are, therefore, subject to the parties' agreements.

3.4.1. Data in Consignment Note

(1) According to the CIM

The CIM provides for the necessary data on any containers to be entered in the consignment note according to Article 7 § 1, lit. 1. The kind, number and

other characteristics necessary for the identification of the container have to be entered in the consignment note.

(2) According to the Container Agreement

The Container Agreement does not provide for regulations with respect to the use of private containers. Stipulations are, therefore, subject to the parties' agreements.

3.4.2. Return and Re-use

(1) According to the CIM

The CIM does not provide for any provisions on the return and re-use of containers. Respecting the privity of contract, this issue is left to the parties' agreement.

(2) According to the Container Agreement

The Container Agreement does not contain for regulations with respect to the use of private containers. Stipulations are, therefore, subject to the parties' agreements.

3.4.3. Loss and Damage

(1) According to the CIM

The CIM does not distinguish between the use of private or railway-owned containers in international rail transport and does therefore not provide for any particular provisions on the loss and damage of private containers.

(2) According to the Container Agreement

The Container Agreement does not provide for regulations with respect to the use of private containers. Stipulations are, therefore, subject to the parties' agreements.

4. Interim Conclusion

4.1. Most concordance

The provisions on the use of containers in international railway transport are due to the international but also multi-modal technical connections essentially set upon a common international technical base and are therefore more practical. In technical matters, both conventions – the CIM and the Container Agreement – are based on the international conventions CSC and CCO and the ISO container standards.

With respect to charges the CIM and the Container Agreement basically refer to contractual provision to be made. The CIM provides for an obligation of the sender to bear the cost, if no contractual provision is made on the charges, but this does not present a crucial difference between the CIM and the Container Agreement.

For the use of containers, both the CIM and the Container Agreement refer to contractual agreement and are therefore in most concordance.

As the EU has no own provisions on the use of uniform containers, the Container Agreement of the OSJD is compared to the CIM. The use of uniform containers and their measures are subject to international and multimodal agreements like the CCO and the ISO-container standards.

There are slight differences in the area of handing over the wagons, as this is subject to the parties' agreement in the OTIF-area, while there are corresponding provisions in the Container Agreement.

With respect to the handling of loss and damages both the CIM and the Container Agreement provide for a limitation of the compensation on the actual value of the lost or damaged container. The CIM provides for a limitation on the actual value in Article 30 § 3 CIM in case of loss and Article 32 § 3 CIM in case of a damage. The Container Agreement provides for a replacement of the container or the payment of the compensation in the amount of the actual value in § 6.3 of the Container Agreement.

4.2. Minor Differences

A degree of harmonisation is required in the areas of handing over and return of containers of the railway undertakings themselves and in the area of container transport.

With regard to the handover and return of containers owned by the railway undertakings themselves, the CIM leaves space for contractual agreements, while the Container Agreement in § 2 prescribes a record of takeover and of the condition of the wagon.

Harmonisation appears to be possible as in the case of the consignment note, for example by the development of a uniform record of takeover.

Provisions on the conduct of container transport and the obligations of the user are not made in CIM. The Container Agreement contains, however, provisions on care and repair. The need for harmonisation in this respect is limited because in the OTIF-area such obligations can be assigned to the user by separate contract, and this appears also to be appropriate.

VII. Combined Transport

In accordance with the definition in the ABB CIM, combined traffic is intermodal traffic of intermodal transportation units, with the predominant part the distance carried out by railway, inland water traffic or sea traffic and which is accomplished before or after by another carrier.

The OSJD briefly defines combined traffic in accordance with Article 1 of the OSJD agreement on combined traffic as the carriage of goods with the same unit load device (container, swap-container, half trailer, and transporters) by using several kinds of traffic.

Combined Transport has been emphasised both by the EU and the OSJD as being the main objective of present railway transport policy.⁸⁸

The European Union deals with combined traffic in Directive 92/106/EEC.

⁸⁸ Comparisons for the EU: „White book - European Transport Policy for 2010: time to decide“, p 23; for the OSJD: „Common Railway and Transport Policy of the OSJD“, p. 4.

1. The OSJD Convention on Organisational and Operational Aspects of Combined Europe-Asian Transport

The OSJD Convention on Organisational and Operational Aspects of Combined Europe-Asian Transport (hereinafter the "OSJD-Convention") consists of two sections. The first contains the general provisions such as definitions and references to Annexes and the second the concluding provisions. The important provisions on routes and technical conditions are found in the Annexes, which, according to Article 5 of the OSJD-Convention, constitute an integral part thereof

1.1. General Provisions

The term "Combined Transport" is, according to Article 1a of the OSJD-Convention, the transport of goods with the same load unit (container, interchangeable container, half trailer, transporters) by the use of more than one means of transport.

The term "relevant objects" according to Article 1c of the OSJD-Convention, is intended to cover terminals, border-stations, reloading stations for wagon groups, stations for the exchange of wheel sets and railway bogeys and harbours significant for international Combined Transport, which are used for Combined Transport.

Apart from the definitions, the parties (being the OSJD Member States) agreed in Article 2 of the OSJD-Convention that they accept, on the basis of the OSJD-Convention and the recommendations in Annex I (most important network lines of international Combined Transport) and Annex II (relevant objects significant for international Combined Transport) to the OSJD-Convention, recommendations of the stated railways and objects for international development and operation planning.

In Article 3 of the OSJD-Convention, the parties have agreed that the technical data for railways in the Member States should comply with the requirements stated in Annex III to the OSJD-Convention and if necessary are to be adjusted in the course of national endeavours.

In Article 4 of the OSJD-Convention, requirements on the infrastructure are stated. These should be adjusted in the relevant states to the values and standards stated in Annex IV to the OSJD-Convention.

1.2. Concluding Provisions

In the concluding provisions the possibility of accession is provided in Article 8 of the OSJD-Convention. However, this is limited to members of the OSJD. Article 8 No. 1, Article 9 of the OSJD-Convention contains an arbitration clause which inter alia prescribes that the decision of an arbitrator is binding.

According to Article 9, No. 2 of the OSJD-Convention, all disputes between the parties as to the interpretation or application of the OSJD-Convention, which cannot be resolved by the parties by negotiation or other means, are to be submitted to one or more arbitrators.

The arbitrators are to be selected by the parties. If the parties have not agreed on an arbitrator within three months from the submission of the request, each party can request the Ministerial Board of the OSJD to nominate an arbitrator. The decision of the arbitrator or arbitrators is binding on the parties.

The Convention is silent as to the conduct of the arbitration and the possible subject matter in dispute.

According to Article 10 and 11, an addition to the Convention of routes and values and standards to be specified is possible.

2. Directive 92/106/EEC

This is Council Directive 92/106/EEC of 7 December 1992 on the establishment of common rules for certain types of Combined Transport of goods between Member States

In view of the increasing problems in connection with the burdens on the road network and the consequent problems of safety in road transport and also for reasons of environmental protection, it was necessary in the view of the Council to increasingly expand Combined Transport as a genuine alternative to road transport and to promote same. Goods transport between

Member States in which only feeder and delivery routes are dealt with by trucks and such equipment, while the remaining parts are travelled by rail or inland waterways or by sea, if this amounts to more than 100 km linear distance, is defined as “Combined Transport” in the meaning of Article 1 (2) Directive 92/106/EEC Article

The feeder and delivery road transport is therefore – for the feeder section – between the place at which the goods are loaded and the nearest loading station or – in the case of the delivery section – between the nearest loading station and the place at which the goods will be unloaded or in a maximum radius of 150 km linear distance around the inland waterway or sea harbour of the loading station.

According to Article 4 Directive 92/106/EEC, all transport companies based in a Member State which fulfil the conditions for access to the market for goods transport between Member States may conduct national or cross-border delivery or collection transport on the roads as a part of Combined Transport.

The Member States should, according to Article 6 Directive 92/106/EEC, take the necessary measures to reduce or refund tax at a fixed rate or proportionately for road vehicles engaged in Combined Transport.

VIII. Relations between Railways and Users

1. Transport of Passengers

1.1. Subject for Comparison

So far, the EU has not issued any regulations which – comparable with the regulations of the OTIF and the OSJD – lay down the rights and duties of passengers. The Commission however has proposed a regulation on the rights and duties of passengers in cross-border rail transport. Both the Council and the Parliament have made amendments in many areas, precisely in the area of liability of the railway undertakings in order to harmonise with the CIV. The legislative process is ongoing. On 22.01.2007 the EU Parliament accepted the draft for a second reading with many amendments so that mediation

proceedings between the EU Parliament and the Council are unavoidable.⁸⁹ Since the legislative process is still ongoing, the following comparison will be made between the Regulations of the OTIF and the OSJD.

The rules on international passenger transport within the OTIF are set down in the "uniform rules concerning the contract for international carriage of passengers and luggage by rail" (CIV) Appendix A to the COTIF. The CIV /COTIF as amended by the protocol of Vilnius 1999 is in force since 01.07.2006.

On the territory of the OSJD, international passenger transport is regulated in the Convention on International Passenger Transport (SMPS). Formally, the SMPS is an independent treaty but it has not been ratified by all Member States of the OSJD. Hungary and Romania are not parties to the SMPS. The SMPS came into effect on 01 November 1951, the last amendment and additions came into effect on 30.05.1999.

The SMPS is at present undergoing review. Greater precision and convergence to the EU is intended.

1.2. Participants

1.2.1. Of the CIV

The CIV applies in all Member States of the OTIF and therefore beyond the borders of the EU. Apart from EU Member States, the following countries are members of the OTIF: Albania, Algeria, Bosnia and Herzegovina, Iran, Croatia, Liechtenstein, Monaco, Morocco, Macedonia, Norway, Switzerland, Serbia, Syria, Tunisia, Turkey and Ukraine. The membership of Iraq and Lebanon is currently suspended.

1.2.2. Of the SMPS

The railways represented by the relevant ministries, of the following countries concluded the SMPS: Azerbaijan, Albania, Bulgaria, China, Estonia, Georgia, Iran, Kazakhstan, Kyrgyz, Cuba, Latvia, Lithuania,

⁸⁹ press service of the European Parliament in: www.europarl.europa.eu/news/expert/briefing_page/1927-015-01-03-20070112 (as at 31. 01. 2007).

Moldavia, Mongolia, North Korea, Poland, The Russian Federation, Slovakia, Tajikistan, The Czech Republic, Turkmenistan, The Ukraine, Uzbekistan, Vietnam, Byelorussia.

1.3. Scope of Application

1.3.1. Concordant Basis: International transport

It is common to both conventions that they apply to the international transport of persons by rail which takes place on the basis of a contract of carriage, if the departure and arrival stations are in different Member States of the relevant convention, Article 1 § 1 CIV, Article 2 § 1 SMPS.

1.3.2. Combined Transport

Both conventions are also applicable to Combined Transport.

(1) According to the CIV

According to Article 1 §§ 3, 2 CIV, the CIV is applicable both to combined rail/road transport and combined rail/shipping transport, if the transport takes place made under a contract of carriage and the rail transport is cross-border, the road or ship transport is only inland. Cross-border shipping transport which takes place on shipping lines which are listed in Article 24 § 1, does not prevent the application of the CIV.

(2) According to the SMPS

The SMPS is applicable to international combined rail/shipping transport, if, according to the agreement with the relevant shipping company, certain provisions accordingly are accepted and have come into effect as a schedule to the SMPS, Article 2 § 1 SMPS.

1.3.3. Exceptions from Scope of application

(1) According to the CIV

The CIV excludes transports between stations which are on the territory of neighbouring states, if the infrastructure is under the care of the same infrastructure manager (e.g. Basel Badischer Bahnhof), Article 1 § 5 CIV.

(2) According to the SMPS

The SMPS is not applicable to transport between railway stations of two states on the territory of a third state which is not a member of the SMPS, which takes place in trains or wagons of the railway of the destination or consigning state, Article 2 § 2 SMPS.

1.3.4. Areas Regulated

(1) Concordant Regulation

The area regulated in both conventions is the relationship between the railway and the traveller (consignor/recipient of express goods).

(2) Regulations in the CIV

The CIV applies expressly both to transport for and without reward, although in the case of transport without reward it is a condition that it takes place on the basis of a contract of carriage, Article 1 § 1 CIV.

The CIV is not applicable to the persons accompanying CIM-consignments in principle, as the transport of such persons is ancillary to the contract on which the CIM is based. The provisions of the CIM on the liability of the carrier in case of death and injury of passengers is also applicable to these persons under Article 1 § 4 CIV.

(3) Regulations in the SMPS

The SMPS refers only to the transport of persons so that transport both for and without reward is subject to its application.

The SMPS also applies to the transport of express goods (1 day for loading and one day for each commenced 300 km). The person accompanying the express goods will be dealt with as a passenger with ordinary transport papers, Article 22 § 1 SMPS. The rules of the SMPS also apply to him.

1.4. Topics of Regulation

1.4.1. Obligation to Transport

(1) According to the CIV

In the new version of the CIV, an obligation to transport is excluded for international passenger transport. It remained until the CIV 1999 came into force in order to prevent abuse of the monopoly position of the railways. With the liberalization on the railways sector, such a duty to transport is no longer required, now free competition is intended to take the place of regulations.⁹⁰ In the area of application of the CIV, the carrier is therefore in principle obliged to transport only after the conclusion of the contract of carriage, Article 6 CIV.

In the CIV, the opportunity is provided by Article 4 § 3 CIV that two or more Member States are free to agree an obligation to transport for their bilateral traffic, unless this conflicts with other international law provisions. This provision is intended to make it clear that it does not conflict with the rules of the CIV if an obligation to transport is agreed between states and the carriers in the territory of these states are made subject thereto.

(2) According to the SMPS

In the area of the SMPS, the railways are obliged by the convention to transport persons, luggage, and express goods provided the passenger, the consignor/recipient of the express goods observes the provisions of the convention and the transport is not prevented by circumstances which the railways cannot avoid or cannot ameliorate and provided there is sufficient space for the transport of the express goods in goods wagons, Article 3 § 3 SMPS.

(3) Interim Conclusion

Because the SMPS subjects the railways to an obligation to transport in the sense of an obligation to conclude a contract, the contractual freedom of railways compared to other means of transport is restricted.

If one considers the purpose of the obligation to transport, it can be assumed that the SMPS still proceeds on the basis of a monopoly position of railways,

⁹⁰ Explanatory report of the Central Office of the OTIF on the CIV, General, No. 5 and Article 4, No. 3, Explanatory report of the Central Office of the OTIF on the CIM, General No. 25, 26

although the obligation to transport does not prevent the liberalisation of the railways sector.

1.4.2. Contract of Carriage

(1) According to the CIV

In the CIV, the contract of carriage is a consensual contract, for the conclusion of which corresponding declarations of will of the parties are adequate. The conclusion and the content of the contract are proved – until the contrary is proved – by one or more tickets.

The lack, insufficiency or loss of the ticket does not affect the contract of transportation (Article 6 §§ 2, 3 CIV). Consequently, the ticket is merely evidence. The lack of a valid ticket can, however, have consequences, according to Article 9 CIV; in the general conditions of transport it can be provided that persons without a valid ticket must pay an additional fare and if they refuse immediate payment of the fare or the additional fare they can be excluded from transport.

(2) According to the SMPS

In the area of application of the SMPS, the contract of carriage is structured as an executed contract, two corresponding declarations of wills of the parties are not therefore adequate to give the contract of carriage legal effect, but actual performance is also necessary. Just the ticket entitles the passenger to travel in the indicated direction within its validity, Article 4 § 2 SMPS. Consequently, the passenger can demand the transportation only after receipt of the ticket and only according to the conditions indicated in the ticket, Article 4 § 2 SMPS.

(3) Interim Conclusion

According to Article 4 § 2 SMPS, the ticket entitles the passenger to travel. In accordance with Article 9 § 1 CIV the traveller must also hold his travelling documents before departure. Article 6 § 2 CIV states clearly, that the lack, loss or insufficiency of the ticket does not affect the contract of carriage. Such a regulation is missing in the SMPS. It can therefore be concluded that a ticket pursuant to SMPS is not only evidence as under CIV.

It embodies a requirement, which cannot be made valid without presentation of the ticket.

1.4.3. Transport of Passengers and Luggage/ Express Goods

(1) Persons

(a) Concordant Regulations

In principle, all persons are to be transported according to both conventions. In the area of application of the CIV, naturally only persons with whom a contract of carriage has been concluded.

(b) Regulations of the CIV

The CIV contains only a reference as to the persons who can be excluded from transport by the general conditions of transport, in order to ensure the necessary flexibility and the freedom to contract, Article 9 §§ 1, 2 CIV, namely persons who constitute a danger to the safety and order of the operation or to the safety of fellow travellers or who unreasonably disturb fellow travellers. In the general conditions of transport, it can also be provided that these persons have no right to reimbursement of the fare and luggage charge. It can also be provided that persons without a valid ticket and who refuse immediate payment of the fare or the additional fare can be excluded from transport, Article 9 § 1 lit. b CIV. In the course of the discussions on the amendment of the CIV, the inclusion of provisions on the transport of passengers becoming ill on the journey and of persons who suffer from an infectious illness was considered but not implemented and therefore national law applies in each case.⁹¹

(c) Regulations of the SMPS

Article 11 SMPS specifies persons who are not admitted to carriage or who can be excluded in the course of the journey. These are persons in respect of whom internal laws and regulations valid for travellers have not been observed or who infringe propriety. If a person is not admitted or is excluded on these grounds, the fare need not be returned. Persons who would endanger

⁹¹ Explanatory report of the Central Office of the OTIF on the CIV, Article 9 Nr. 6.

fellow travellers because of illness cannot be admitted or may be excluded unless a separate compartment has been ordered for them in advance or if such a compartment cannot be assigned to them.

Persons who become ill on the journey are to be transported to the next station where they can obtain medical assistance. In these cases, the fare and luggage charge will be reimbursed less the fare and luggage charge for the distance travelled.

(2) Admitted Objects

(a) Hand Luggage

(aa) According to the CIV

The CIV permits easily carried objects and live animals in accordance with the general conditions of transport and bulky objects in accordance with special provisions in the general conditions of transport. Objects which would obstruct or be a nuisance to other travellers or which could cause damage are excluded, Article 12 § 1 CIV. The transport of dangerous goods as hand luggage is admitted only in accordance with the provisions of the RID.

The supervision of hand luggage and animals is the responsibility of the traveller, according to Article 15 CIV.

(bb) According to the SMPS

According to Article 12 SMPS, objects which can easily be carried are permitted as hand luggage but may not exceed 35 kilos in the case of an adult and 15 kilos in the case of children. Heavy luggage is to be handed in as travel luggage. Small domestic animals (dog, cat, bird, etc.) are also allowed. Objects which could damage the wagon, fellow travellers or other objects and objects which may be infectious or malodorous or such the transport of which is forbidden by customs and other provisions, may not be carried in passenger wagons, specifically loaded guns, explosives, radioactive, irritating, poisonous, and easily inflammable substances, as well as bulky items measuring over 200 cms.

The supervision of hand luggage and animals is the responsibility of the traveller, according Article 12 § 5 SMPS.

(cc) Luggage

(dd) According to the CIV

The CIV, in Article 12 § 2 CIV, again refers here to the General Conditions of Transport. The transport of dangerous goods as luggage is admitted only in accordance with the RID.

(ee) According to the SMPS

Article 15 SMPS specifies that objects in closed containers or in well-bound baskets, bails, sacks, bundles may be transported as luggage. The permitted weight of each item of luggage is between 5 and 75 kg, the entire weight may not usually exceed 100 kg per passenger. In addition, certain bulky objects are specified. Easily spoiled goods, dangerous (e.g. easily inflammable, explosive, irritant, poisonous, infectious) objects and valuable objects (gold, silver, platinum, securities, cash, pearls, precious stones, art items) are not permitted as luggage. Also excluded are objects for which even in only one of the states the railways of which participate in the transport, the Post has sole right of transport, Article 15 § 3 SMPS.

Luggage must be handed in for transport in sturdy and undamaged packaging. The traveller may, on handing in luggage, state its value, Article 17, 18 SMPS.

(b) Special Objects

(aa) According to the CIV

According to Article 12 § 3 CIV, vehicles can, in the general conditions, also be admitted to transport in conjunction with the transport of passengers. According to Article 23, 24 CIV, regulations are then to be made in the general conditions for acceptance, loading, checking, transport, unloading and delivery and for ticketing. Subject to the provisions in Article 23, 24 CIV, the provisions on luggage in Article 25 CIV apply.

(bb) According to the SMPS

In Article 16 § 6 SMPS, the carriage of human remains in coffins by certain specified railways is provided for in special regulations.

(cc) Interim Conclusion

Transport of vehicles in the area of the SMPS is limited to two-wheeled vehicles and then only permitted if all fuel containers are emptied, Article 15 § 2 SMPS. Car trains are not possible under the SMPS. This should perhaps be assessed under the SMGS, appendix 7 to SMGS (motor vehicles and tractors)

The carriage of human remains is not regulated in the CIV.

(c) Express Goods

(aa) According to the CIV

The CIV contains no regulations on the carriage of express goods.

(bb) According to the SMPS

Provisions on permitted express goods are found in Article 22 SMPS, where reference is made mainly to the luggage positively admitted, with the catalogue being extended by domestic household machines, furniture, art objects, radioactive material (in accordance with transport conditions), other small items and food which does not require refrigeration. Objects not admitted as luggage are likewise admissible as express goods, unless positively mentioned in Article 22 SMPS.

(3) Supervision of Compliance with the Provisions on Permitted Objects

(a) According to the CIV

Under the CIV the carrier is entitled, in case of a justified suspicion of non-compliance with transport conditions, to carry out an examination as to whether the transported objects comply with the transport conditions, unless this is forbidden by the laws and regulations of the state in which the examination is intended to take place. The passenger must be invited to be

present at the examination, if he does not attend or cannot be reached, the carrier must involve two independent witnesses, Article 13 Sec. 1 CIV.

If the examination confirms the carrier's suspicion, the carrier can demand payment of the costs of the examination from the passenger, Article 13 § 2 CIV. Additional liability of the passenger for losses incurred is provided in Article 53 CIV.

(b) According to the SMPS

According to the SMPS, the railway, if it suspects a breach of the provisions on admitted objects, may check the hand baggage in the presence of the passenger, Article 13 SPMS. Likewise, it can, according to Article 19 § 2 SMPS, check luggage handed in, although here also the passenger must be present. However, the examination can take place without the passenger if he does not attend, but in this case the railway station supervisor or his representative must be present. There is a similar provision for express goods in Article 26 § 2 SMPS.

If the examination of the hand luggage confirms a breach of the regulations, the passenger is liable in accordance with the regulations and laws applicable to the railway on which the breach has been established, and for the damage suffered by the railway, Article 13 § 3 SMPS.

If the examination confirms that the passenger has not observed the regulations on luggage or express goods, the passenger is liable for the costs of the examination and for any damage caused, together with a charge of 5 times the freight for the entire distance travelled with the railway on which the breach has been ascertained. This charge is credited to that railway, Article 19, § 3 SMPS (together with Article 26 § 3 SMPS – express goods). In the case of express goods, the cost, charges and compensation will be imposed after examination at the dispatching railway station of the consignor, in the case of examination en route or at the destination station by the recipient.

(c) Interim Conclusion

The SMPS at first sight protects the interests of the passenger in case of an examination of hand luggage to a greater extent than the CIV, because the

passenger must be present at the examination according to the SMPS and his presence cannot be replaced. However, for an examination a mere assumption suffices, under the CIV a justified assumption on the part of the carrier is necessary. This restriction is intended to meet the needs of the passenger for protection against his baggage being checked at any time without good reason.

According to the SMPS, the railway which ascertains a breach in the case of luggage/express goods, can impose a charge of 5 times the freight for the entire route covered by the railway on which the breach has been ascertained. No such penalty is provided for either in the CIV or in the CIM.

1.4.4. Transport of passengers

(1) Ticket

(a) According to the CIV

According to Article 7 CIV, the form and content of the ticket and the language and script signs to be used when printing or filling out, fixed by the general conditions of transport, must contain the following data:

The carrier, a statement that the transport is subject to the mutual agreement of the CIV (this may be by the abbreviation CIV), all data necessary to prove the conclusion and content of the contract and which enable the passenger to claim the rights granted in the contract.

The ticket can also consist of electronic data records converted into legible script; the data must be of equal value in the evidentiary quality as a physical ticket.

On receipt of the ticket the passenger must check that these data are properly filled in.

(b) According to the SMPS

The SMPS contains very comprehensive provisions on the content and format of tickets which may be issued manually or electronically. Tickets are to be marked "MC" and must show the following data (see Article 4 § 1 SMPS): the stations of embarkation and destination, the number of the ticket, the

route, class of wagon, price, period of validity, date of issue, name of the issuing railway.

The passenger must check the content of the ticket when it is issued, Article 4 § 8 SMPS.

According to Article 6 § 1 SMPS, the ticket entitles the passenger to travel within the period stated thereon. In the other paragraphs of Article 6, the period of validity, its calculation and the possibility of change or extending the duration are dealt with.

(c) Interim Conclusion

The SMPS contains comprehensive provisions on the duration of validity and possibilities of changing the ticket, which is not the case in CIV. By the provisions of the SMPS, the discretion of carrier is very restricted; the freedom to contract is severely curtailed.

(2) Allocation of Seats

(a) According to the CIV

The CIV contains no provisions and therefore leaves this area national law or general conditions of transport.

(b) According to the SMPS

The allocation of seats and the consequence that no seat or only a different seat can be allocated is dealt with in Article 7 SMPS.

The allocation of seats takes place under the internal regulations of each railway and on the basis of the passenger's ticket, in the case of journeys in sleeping wagons or couchettes, a bed ticket.

If, because of the fault of the railway, no seat corresponding to the class or category of his ticket can be allocated to the passenger, he can either cancel the journey or take a seat in a lower class or category. The passenger then has the right to have the cause of the non-use of the ticket in the relevant class/category certified. This certificate is necessary in order to be able to claim a refund of the amount overcharged subsequently.

1.4.5. Transport of Luggage

(1) Concordant Regulations

Subject to deviant provisions in the General Terms and Conditions of a railway undertaking, the acceptance of luggage takes place under both conventions only upon presentation of a ticket, Article 16 § 1 SMPS or Article 18 CIV. The transport of luggage is logically therefore an ancillary service to the transport of passengers in both conventions.

Normally, the passenger receives a baggage ticket (or voucher) on handing in the luggage, Article 16 SMPS, Article 16 CIV.

The period for delivery is calculated according to Article 20 SMPS such that the transit period according to the timetable of the railway undertaking shall be relevant, however, always extended by the time for unloading and customs according to Article 21 § 1 SMPS.

Under the CIV, there is no specific provision for the calculating of the period for delivery, therefore, the period for delivery is subject to the agreement between the passenger and the carrier, with the addition of time for dealing with customs or other authorities as the case may be, Article 22 § 3 CIV.

Baggage will be handed out at the destination in return for the baggage ticket and the payment of any costs connected to the consignment (Article 22 § 1 CIV, Article 21 § 2 SMPS).

The carrier is not obliged to check whether the holder of the baggage ticket is authorised to receive the goods, Article 21 SMPS, Article 22 CIV.

If the baggage ticket is not presented then according to Article 22 § 3 SMPS, the railway undertaking can only hand out baggage to a person who proves the corresponding entitlement. The carrier can, however, in the case of inadequate proof, demand security (which is not the case under SMPS since under SMPS the luggage may not be handed out without the presentation of the voucher).

(2) According to the CIV

The admitted exceptions in Article 18 CIV (transport of luggage independently of a contract for the carriage of persons) under the general transport conditions in CIV, is rather a special form of express goods transport, to which the rules of the CIV rather than those of the CIM apply, Article 18 § 2 CIV.

Such an exception was not necessary in the SMPS because the transport of express goods is itself comprehensively regulated in the SMPS.

According to the CIV, the carrier can transport the luggage in a different train or other means of transport or by a route other than that used by the passenger, Article 18 § 3 CIV.

(3) According to the SMPS

According to the SMPS, the luggage should, if possible, be transported with the same train as the passenger, otherwise it must be transported on the next train, Article 16 § 2 SMPS.

(4) Interim Conclusion

The conventions vary in the manner of transporting luggage insofar as under SMPS the transport of luggage always requires that a ticket be presented by the passenger. Under CIV luggage may also be transported isolated (without showing a ticket), subject to the General Terms and Conditions of the relevant carrier, if they allow such transport.

Under CIV the carrier can transport the luggage in a different train or other means of transport or by a route other than that used by the passenger, which is also permitted under the SMPS, however only in the event it is not possible to use the same train as the passenger uses.

A further difference is the handling of luggage referred to above which is transported independently of a passenger contract of carriage. With the application of the CIV, it is dealt with as luggage, which is transported as an ancillary service to the contract for the carriage of persons. If the SMPS applies, the transport is carried out according to Article 22 to 28 SMPS as express goods. No great differences arise thereby, because under the SMPS express goods are dealt with very similarly to luggage, apart from deviating

provisions e.g. notification in the case of impediments to the transport, which are explained by the fact that the consignor/recipient is not around/nearby the express goods (contrary to the case with the passenger who should be transported in the same train as his luggage).

1.4.6. Transport of Express Goods

(1) According to the CIV

The transport of express goods is not subject to the CIV. The transport of express goods is however theoretically possible as transport of our registered luggage pursuant to Article 18 § 2 CIV for which the rules of registered luggage apply

(2) According to the SMPS

In the SMPS, special provisions on express goods are laid down in Article 22 to 28. The objects admitted as express goods are to be transported as express goods only if there is adequate room in the goods wagon to enable the object to be easily and rapidly unloaded, Article 22 § 1 SMPS. The consignor must, if this is required according to the internal regulations of the dispatching railway, make an application in writing to the supervisor of the dispatching railway station prior to handing in the goods, Article 23 SMPS. The application must be accompanied by the papers necessary to comply with customs- and other regulations, Article 23 § 3 SMPS. The railway is not obliged to check the completeness and accuracy of the accompanying papers, Article 23 § 4 SMPS.

The consignor receives, as confirmation of the acceptance of the express goods, an express goods ticket which contains the data on the order and which must be checked for accuracy by the consignor, Article 23 § 5 SMPS.

The delivery time for express goods is one day for check-in, and one day for every commenced 300 kms, Article 27 SMPS.

The provisions on packaging of express goods (Article 24 together with Article 17 SMPS) and the responsibility of the railway for damage or delay (Article 31 ff SMPS) are the same as those for luggage.

The procedure in the case of impediments to transport or delivery is provided in Article 28 SMPS. If the route has to be altered, the railway can demand the freight for the actual route and avail of a delivery period accordingly, if it is not at fault. Fault must be proved by the consignor. If no other route is available, or the transport is not possible for other reasons or if the delivery is prevented, the consignor is to be asked for instructions. He can request the return to the dispatching railway station or delivery to another recipient at the original destination railway station. All costs arising from transport or delivery impediments are borne by the consignor or the recipient. The delivery will be made to the recipient named in the accompanying ticket without presentation of the express goods ticket or to another person authorized by the recipient named in the accompanying ticket. The person collecting the goods must present his personal identity card.

1.4.7. Transport Charges/Costs

(1) Time of Performance/Charging

(a) According to the CIV

In the area of application of the CIV, unless otherwise agreed between the passenger and the carrier, the fare and freight are to be paid in advance, Article 8 § 1, Article 19 CIV.

The CIV contains no provision on the charging and imposition of the transport costs. In the 1980 version of the CIV (Article 1 § 2), the tariffs specify the connections for international tickets. This compulsory tariff has been omitted from the new version of the CIV. The central office of the OTIF explains⁹² in this respect that now, in the event of separation of the transport from the operation of the railway infrastructure and the implementation of the right to use other railway infrastructures, a single carrier and not only a group of carriers in succession to each other can provide international transport on the basis of the CIV. The central office nevertheless recommends, in the event of the performance of the contract of carriage by several successive carriers, that continuity of the transport and comparable conditions of transport be ensured by advance agreement with the

⁹² Explanatory report of the Central Office of the OTIF on the CIV, Article 1 Nr. 7.

participating carriers e.g. by international tariffs. This has meanwhile taken place, there is a common international tariff for the transport of persons (TCV).

(b) According to the SMPS

(aa) Time of Performance

The costs of transport according to SMPS are to be paid when obtaining the ticket or when the luggage or express goods ticket is issued and therefore in advance for the entire journey in the currency of the dispatching state, Article 29 § 4 together with Article 4 § 8, Article 16 § 4, Article 23 § 5 SMPS.

(bb) Calculation of Charges

The SMPS in Article 29 contains prescriptions for the charging and imposition of transport costs and the amount of transport costs for children in Article 8 SMPS. The transport costs for international transport are charged in accordance with the applicable tariffs, Article 29 § 1 SMPS. The applicable tariff must contain the necessary regulations for charging. Moreover, passengers must be granted access to all the regulations and provisions of the SMPS or the relevant tariffs at every single railway station or ticket sales point, which is subject to the relevant tariff. Furthermore, the applicable tariffs and their amendments or changes respectively, have to be published in the Member States of the SMPS in accordance with the applicable national law, Article 29 § 2 SMPS.

The calculation of transport charges takes place pursuant to the rates which are applicable on the day of selling the ticket or in the case of transport of luggage or express goods on the day of receipt. The costs of the entire transport are to be imposed when purchasing the relevant tickets in the currency of the country of departure, Article 29 § 4 SMPS. The railways must apply the tariffs indiscriminately and therefore in the same manner to everyone. Reductions in charges are only admissible if they are granted by at least two railway undertakings and only for certain purposes and in particular cases, Article 29 § 5 SMPS. In case of inappropriate calculation of the relevant tariff, the amount overpaid must be refunded to the customer, the amount underpaid must be charged ex post.

This means that the railway undertaking which has not charged the passenger appropriately, may charge ex post if there is no possibility of subsequent charging by another railway undertaking. In case the consignor was not charged appropriately, the railway undertaking to which the goods have been entrusted, may charge the consignor subsequently. In case of express goods, the railway undertaking delivering the goods to the place of destination may charge subsequently, but only the cost arisen during transportation or at the relevant railway station of destination. In case of over-charging, the railway undertaking which has been overpaid, must re-pay the relevant amount to the customer, Article 29 § 6 SMPS.

Article 8 SMPS contains prescriptions for the charging and imposition of the amount of transport costs for children. Children under the age of four on the first day of the journey are free of charge if accompanied each by at least one adult. If the child, however, needs a seat of its own, a special ticket for children at the half price of an adult's ticket (Article 8 § 3 SMPS) has to be purchased. The same is true for further or unaccompanied children or for children aged between four and twelve years, Article 8 § 1 SMPS. Children older than twelve years are charged the full price, Article 8 § 5 SMPS.

Regarding sleeping cars, children under the age of four on the first day of the journey are free of charge if accompanied each by at least one adult. A ticket for the sleeping car, however, has to be purchased irrespective of the age of the child if the child needs a bed of its own. The price of this ticket is, however, not subject to any special reduction in price irrespective of the age of the child, Article 8 § 2 SMPS.

(c) Interim Conclusion

The SMPS assumes that tariffs for international passenger transport exist according to which the fare is determined (however in SMPS SI only agreed tariffs are referred to which are applicable). In addition, Article 3 § 4 SMPS specifies that the transport is provided only between stations referred to in the applicable tariffs. The SMPS therefore in this respect corresponds to the CIV 1980 provisions namely that in its area of application compulsory tariffs apply. The CIV no longer relies on compulsory tariffs, because it has been amended in the course of the liberalization of rail transport by the EU, but

leaves the fixing of fares to the railway undertakings and thereby promotes competition.

(2) Consequences of Non-Payment

(a) According to the CIV

For transports according to the CIV, the passenger must obtain a valid ticket prior to commencement of the journey, Article 9 § 1 sentence 1 CIV. If, during the journey, he cannot show a valid ticket, the general conditions of transport may provide that he is obliged to pay the fare plus a surcharge. The validity of the contract of carriage is not affected thereby, Article 6 § 2 CIV. For the event that a passenger refuses immediate payment of the fare or surcharge, it can be provided in the general conditions of transport that he be excluded from transport, Article 9 § 1 CIV. If such provision is absent from the general conditions of transport, national law applies.

(b) According to the SMPS

If the passenger cannot produce a ticket valid for the train and wagon for transport under the SMPS, he is obliged to pay the fare for the distance already travelled as well as for the distance ahead. These payments are imposed in accordance with the internal regulations of the railway undertaking on which the passenger without a ticket is discovered, Article 10 § 2 SMPS.

If the passenger refuses payment, a notice in accordance with the internal regulations of the railway is to be issued by the head of the train or the conductor, Article 10, § 4 SMPS.

(c) Interim Conclusion

Both conventions, the SMPS and the CIV, provide that the transport costs are payable in principle in advance and that in the case in which no ticket can be shown, a surcharge or other charge in accordance with the internal regulations of the railway can be imposed.

In the SMPS, no exclusion of a passenger is provided for if he refuses to pay the fare and the surcharge, only a notice by the chief conductor or the conductor in accordance with the internal law of the railway is ordered.

The carrier under the CIV has more recourses. According to the CIV, the passenger can subsequently prove the existence of a contract of carriage and demand repayment of duplicate payments of the fare and surcharge. This follows from the contract of carriage being a consensual contract in the CIV. However, this possibility arises only if it is provided for in the general conditions of transport, Article 8 § 2, 9 § 1 c CIV.

(3) Refund of Carriage Charges

(a) According to the CIV

According to CIV regulations on the refund of carriage charges has to be stated in the General Conditions of Carriage, Article 8 § 2 CIV.

(b) According to the SMPS

The passenger may be refunded by the railway undertaking, if he did not use the ticket purchased, if he did not use the ticket purchased to its full extent or if the ticket could not be used according to its category due to a negligence of the railway undertaking, Article 30 § 1 SMPS. If the passenger claims such a refunding, he has to provide evidence by presenting the relevant ticket marked with a note issued by the railway undertaking. This note consists of the date and signature of a representative of the railway undertaking or otherwise of a official mark of the railway station, Article 30 § 1 SMPS. Further details on when and under what circumstances the ticket has to be marked with such a note, is provided in Article 30 § 2 seq. SMPS, e. g. if the passenger cannot use the ticket because of a negligence of the relevant undertaking or because of force majeure (e.g. sickness, accident immediately before the departure of the train).

1.4.8. Liability of the Carrier for Personal Injury and Damage to Hand Luggage

(1) General

The CIV contains provisions on the liability of the carrier for personal injuries, it should be noted that the carrier cannot limit its liability, not even by agreement, since the provisions are part of mandatory law unless the possibility of contractual deviations from the provisions of the CIV (see Article 5 CIV) is provided for.

The liability is formulated as being independent of fault in the CIV.

According to Article 2 § 1 CIV, each state can declare at any time that it will not apply any provisions of the CIV on liability of the carrier for death or injury of passengers, if the accident occurs on its territory and the passenger is a citizen of that state or has his usual place of residence in that state. This declaration of non-application which then refers also to the liability for damage to luggage has been made by Latvia and Austria. Consequently, the national law of these states applies to injuries suffered by citizens of these states in case of accidents occurring within their territories.

The SMPS contains no provision on the liability of the railway undertaking for personal injury or damage to hand luggage.

(2) Liability of the Carrier for Personal Injury According to CIV

(a) Liability Grounds, Article 26 § 1 CIV

The carrier is liable for damage due to the passenger being killed injured or if his bodily or mental health is adversely affected (e.g. by shock) by an accident in connection with the operation of the railway during his presence in a railway wagon or when boarding or alighting there from. It is a condition for liability that there is both a temporal and causal connection with the railway operation (Article 26 § 1 CIV). The carrier may, however, pursuant to Article 26 § 4 CIV, also be liable for cases not mentioned in Article 26 § 1 CIV.

If a carrier uses neither its own rolling stock nor its own infrastructure, at least the rolling stock is attributable to the carrier. The carrier cannot invoke defects of the wagon in order to escape liability. The term railway operation is also attributable in these cases, because of Article 51 CIV, to the operation

of the infrastructure, and accordingly the operator of the infrastructure is deemed to be the agent of the railway carrier.⁹³

If the carriage governed by a single contract of carriage is performed by successive carriers, the carrier bound pursuant to the contract of carriage to provide the service of carriage in the course of which the accident happened shall be liable in case of death of and personal injuries to passengers, Article 26 § 5 CIV. If the service was not provided by the carrier but by the substitute carrier, the two carriers shall be jointly and severally liable in accordance with the CIV provisions.

(b) Release from Liability, Article 26 § 2 CIV

The carrier is not liable if the accident is caused by circumstances not connected with the operation of the railway and which were unavoidable even with the exercise of due care, outside the railway operation, or if the accident is due to the fault of the passenger (Article 26 § 2 lit b) CIV) or conduct of a third party that was unavoidable even with the exercise of due care (Article 26 § 2 lit c) CIV). If the carrier is liable due to the behaviour of a third party in preventable events, the carrier shall be liable vis-à-vis the passenger, while however being entitled to have recourse against the relevant third party (Article 26 § 3 CIV).

(c) Legal Consequences, Article 27 to 30 CIV

In the case of death of the passenger, all necessary costs which arise as result of the death and in the case of death which is not immediate, compensation for injuries is payable (Article 27 § 1 CIV).

If the deceased was liable by law for the maintenance of others, compensation for this loss is payable (Article 27 § 2 CIV).

In the case of injury or other adverse effects on physical or mental health, compensation covers the necessary costs of treatment, care and transport and financial damage suffered by the passenger due to absence from work or increased need (Article 28 CIV).

⁹³ Explanatory report of the Central Office of the OTIF on the CIV, Article 26 No. 1.

Whether additional compensation is payable is a matter for national law (Article 29 CIV).

The compensation is payable in the form of a lump sum, or if national law admits the recognition of a pension, in that form, if this is demanded (Article 30 § 1 CIV).

Pursuant to Article 30 § 2 CIV, the amount of compensation has no upper limit under the CIV, it is in each case dependent on national law. However, a maximum of 175,000 SDR (210,000 €) for each passenger to be compensated is fixed if the national law provides for an upper limit of less than that amount (this is the case in Greece, Montenegro, the Netherlands, Rumania, Serbia, Slovenia, the Czech Republic).

According to Article 48 CIV, the limit of liability provided for in the CIV as well as in the national laws which limit the compensation to a fixed amount shall not apply if it is proven that a loss or damage resulted from an act or omission which the carrier committed either with intent to cause such a loss or damage or recklessly and with knowledge that such loss or damage would probably result.

(3) Liability of the Carrier for Personal Injury according to SMPS

The SMPS contains no provision on the liability of the railway for personal injury. Regulations with regard to the liability of the railway for damage to hand luggage are also absent. On the basis of Article 46 SMPS, national regulations of the relevant state are applicable if in the regulations attached to the convention and in other regulations no provision is made on the issue. In the service instructions (SMPS SI) nothing is found on this issue, because they do not deal with the relationship between passenger and railways, but refer only to railway employees, § 1 SMPS SI. It is, however, to be noted that in May 2005, an expert conference of OSJD took place which dealt with the introduction of provisions on the liability of railways for personal injury in the SMPS.⁹⁴ There are therefore efforts to include liability for personal injury in the SMPS, but they have not yet shown any results.

(4) Liability for Loss or Damage to Hand Luggage According to CIV

⁹⁴ the OTIF's annual report 2005, p. 31, 32.

(a) Liability Grounds, Article 33 CIV

In the event of death or injury of the passenger, the carrier is also liable for damage due to the total or partial loss or damage of hand baggage of the passenger. This liability is also independent of fault.

In addition (without accidental personal injuries) the carrier is liable for compensation due to the loss and damage of hand baggage only when it is at fault, Article 33 § 2 CIV.

(b) Release from Liability

For liability independent of fault for damage to hand luggage due to accident, the same three grounds of relief from liability as in the case of personal injury, Article 26 § 2 CIV, apply analogously.

For liability dependent on fault, no relief from liability is provided.

(c) Legal Consequences

The amount of liability independent of fault is limited in Article 34 CIV to 1,400 SDR (1,700 €) per passenger. This limit of liability does not apply if the carrier is guilty of gross fault, Article 48 CIV.

For liability dependant on fault there is no limit on liability.

(5) Liability for Loss or Damage to Hand Luggage According to SMPS

The SMPS contains no provision on liability for damage to hand luggage. Supervision of the completeness and safety of hand luggage and animals is imposed on the passenger, Article 12 § 5 SMPS. On the basis of Article 46 SMPS, national regulations of the relevant state are applicable, if in the regulations attached to the convention and in other regulations, no provision is made on the issue. In the regulations SMPS SI nothing is found on this issue, because they do not deal with the relationship between passenger and railways, but refer only to railway employees, § 1 SMPS SI. It is to be noted that in May 2005, an expert conference of OSJD took place which dealt with the introduction of provisions on the liability of railways for personal injury

in the SMPS.⁹⁵ There are therefore efforts to include liability for personal injury in the SMPS, but they have not yet shown any results

(6) Interim Conclusion

There is a conflict potential with EU Law which regard to liability for personal injury and damage to hand luggage. The SMPS does not protect the passenger. However, since SMPS refers in Article 46 to national law, no conflict need be anticipated in the EU Member States which belong to the SMPS, as soon as the third railway package is implemented and thereby adequate protection for the passenger ensured. The OSJD efforts to introduce liability of railways for personal injury into the SMPS and thereby to harmonize the rights of passengers are referred to.

1.4.9. Liability for Loss, Damage and Delay of Luggage

(1) Ground of Liability

(a) According to the CIV

According to Article 36 § 1 CIV, the carrier is liable for damage incurred by delay, the complete or partial loss or damage of luggage in the period from acceptance by the carrier to its being handed out .

(b) According to the SMPS

In the area of application of the SMPS, the railways are liable for compensation for exceeding the delivery period and for damage caused by the complete or partial loss or damage to luggage in the period between the acceptance for transport and the handing over, Article 32 § 1 SMPS.

(c) Interim Conclusion

The grounds for liability in both conventions are very similar. There are no differences.

(2) Relief from Liability

⁹⁵ the OTIF's annual report 2005, p. 31, 32.

(a) According to Article 36 § 2 and § 3 CIV

According to CIV, liability is relieved if the damage is caused by force majeure, particular defects in the luggage, fault of the passenger or instructions of the passenger other than a fault of the carrier. The carrier bears the burden of proof here (Article 37 CIV).

If the carrier establishes that the damage is caused because of defects in packaging, the handing in of non-permitted objects or the natural properties of the luggage, this also serves to relieve liability, insofar as the applicant cannot rebut this.

A relief from liability for damage arising from delay is also regulated in Article 36 § 2 of the CIV. Therefore the carrier is not liable if the damage due to delay is caused by force majeure, fault of the passenger or instructions of the passenger or defects in the luggage (Article 36 § 2 CIV)

(b) According to Article 32 SMPS

According to Article 32 § 2 SMPS, carrier's liability is relieved if the damage is caused by force majeure, the natural properties of the luggage or fault of the passenger, the railway undertaking bearing the burden of proof.

Likewise, liability is relieved if initially non-ascertainable defects in the packaging, the handing in of non-permitted objects, incorrectly declared or the handing in of luggage admitted only under special conditions with incorrect data, are established by the railway. When these issues are submitted, there is a presumption that the damage has been caused by them, and the presumption can be rebutted by the claimant.

The SMPS in the case of exceeding the delivery period has with Article 32 § 7 SMPS a special provision that the carrier is relieved of liability if the damage arises because the delivery period is exceeded due to natural disasters, for a period of fifteen days after orders of the central body of the railway of the relevant state, or if the damage arises because of special circumstances which result in the discontinuation or restriction of railway operations, in accordance with government orders issued by the relevant state.

(c) Interim Conclusion

The grounds for relieving liability for damage due to loss and damage are very similar in both systems, in practice no major differences arise. Only the onus of proof that damage has been caused by the natural properties of the luggage is distributed differently. According to the SMPS, the railway must prove this in order to be relieved of liability, while under the CIV it is presumed that the damage has arisen because of the natural quality of the luggage, if this is established by the carrier, until the passenger rebuts this presumption.

Both conventions provide for relief from liability due to a delay caused by force majeure. The SMPS provides however for further grounds for relief in the event of governmental issues.

(3) Legal Consequences

(a) Loss

(aa) Concordant Regulations

Under both conventions, compensation for loss covers the transport costs and other costs arising in connection with the transport of the lost baggage (e.g. customs), Article 41 § 2 CIV, Article 33 § 3 SMPS.

(bb) According to the CIV

In the case of loss, according to the CIV, Article 41, the carrier must pay the following amounts:

- if the amount of loss is not proven, compensation of 20 SDR (approximately 24 €) for each missing kilo or 300 SDR (approximately 360 €) for each item of baggage missing;
- if the amount of loss is proven in these amounts, compensation equal to that amount but not more than 80 SDR per missing kilo or 1,200 SDR (approximately 1,400 €) for each missing item of baggage.

(cc) According to the SMPS

Under Article 33 SMPS a distinction is made whether the luggage has been handed-in with or without a statement of value.

In case of loss of unvalued luggage, the compensation is the amount of actual value, but not more than 2 CHF for each missing kilo.

If the value of the baggage has been declared, then the determined value “or the relevant part of the value for each missing kilo”, without limit of liability, is payable as compensation.

(dd) Interim Conclusion

Large differences in the amount of compensation could arise here, depending on under which convention the claim can be made.

(b) Damaged Goods

The amount of compensation for damage to luggage is regulated similarly in both conventions (Article 34 SMPS and Article 42 CIV). The loss in value is to be made good, the compensation is limited to the amount of compensation payable in the case of partial loss; no further compensation is due.

(c) Delay

(aa) According to the CIV

According to the CIV Article 43, compensation is assessed as follows:

In case of delay in the delivery of registered luggage, the carrier must pay in respect of each complete 24-hour period after delivery has been requested, but subject to a maximum of fourteen days:

- if the person entitled proves that loss or damage has been suffered thereby, compensation equal to the amount of the loss or damage, up to a maximum of 0.80 SDR per kilogram of gross weight of the luggage or 14 SDR per item of luggage delivered late;

- if the person entitled does not prove that loss or damage has been suffered thereby, liquidated damages of 0.14 SDR per kilogram of gross weight of the luggage or 2.80 SDR per item of luggage delivered late.

The methods of compensation, by kilogram missing or by item of luggage, shall be determined by the General Conditions of Carriage.

In case of total loss of luggage, the compensation provided for in Article 43 § 1 CIV shall not be payable in addition to that provided for in Article 41.

According to Article 43 § 3 CIV, in case of a partial loss of luggage, the compensation provided for in Article 43 § 1 CIV shall be payable in respect of that part of the luggage which has not been lost.

Pursuant to Article 43 § 4 CIV, in case of damage to luggage not resulting from a delay in delivery, the compensation provided for in Article 43 § 1 CIV shall, where appropriate, be payable in addition to that provided for in Article 42.

Pursuant to Article 43 § 5 CIV on no account may the total of compensation provided for in § 1 together with that payable under Article 41 and 42 exceed the compensation which would be payable in case of a complete loss of the luggage.

Special provisions exist for motor vehicles pursuant to Article 44 seq. CIV).

(bb) According to the SMPS

According to Article 35 SMPS the following legal consequences arise:

If the delivery period is exceeded, compensation of 5% of the freight per day of the delay but not more than 50 % of the freight must be paid if luggage is concerned, and compensation of 1,5% of the freight which may not exceed 30% of the freight if express freight is concerned.

If together with partial loss the delivery period is also exceeded, compensation for exceeding the delivery time for the part not lost will be payable.

If both damage arises and the delivery period is exceeded, pursuant to Article 35 § 2 SMPS, compensation for exceeding the delivery period will be added to the compensation for damage. The compensation may, however, not be greater than the total sum of compensation which would be payable in

case of a complete loss. In case of a complete loss, no compensation for delay in delivery can be demanded, only for the loss.

(cc) Interim Conclusion

SMPS provides for compensation in case of delay according to the value of the freight, the CIV always in the same amount irrespective of the value of the freight.

1.4.10. The Passenger's Rights in Case of Delay, Cancellation, Missing Connection

(1) According to the CIV

According to CIV, there is a claim both to repeat performance and also to compensation, but there is no right of rescission.

(a) Repeat Performance

It is –in the absence of an express provision – assumed that in case of delay, cancellation, connections missed, a right of the passenger to repeat performance arises under general contract law.⁹⁶ The carrier must confirm the cancellation or the missed connection, Article 11. A right of rescission of the passenger is not provided for in the CIV. The refund of the fare is dealt with according to the general conditions of transport, Article 8 § 2 CIV.

(b) Compensation

The carrier is liable in the area of application of the CIV for compensation for loss due to the cancellation, delay or missed connection owing to which the journey cannot be continued on the same day or if continuation on the same day is unreasonable, Article 32 CIV. Relief from liability arises if the failure to comply with the schedule is due to circumstances lying outside the railway operations and which could not be avoided even with the exercise of due care, is due to fault of the passenger or conduct of a third party unavoidable even with the exercise of due care (enterprises which use the same infrastructure are not deemed to be third parties). The compensation

⁹⁶ Explanatory report of the Central Office of the OTIF on the CIV, Article 11 No. 1.

covers the reasonable costs incurred by the passenger in connection with an overnight stay and informing persons awaiting him. The extent to which other compensation may be due will be subject to national law.

(2) According to the SMPS

According to the SMPS, a right to repeat performance but no claim for compensation arises.

The railway is, according to Art 14 § 4 SMPS, obliged in cases of delay, cancellation or missed connections, to transport the passenger without surcharge if the passenger intends to continue the journey. From this latter phrase and the possibility of (partial) refund of the fare, a right of rescission according to the passenger can be deduced, although this is not expressly referred to in the SMPS. The station master or a railway employee authorised by him must confirm the delay or cancellation as the case may be. The refund of the fare for tickets not used or only partially used, is dealt with in Article 30; the ticket must be marked accordingly.

(3) Interim Conclusion

The SMPS provides for repeat performance, but not for compensation; this is remitted by Article 46 to national law. The CIV provides for compensation but not for repeat performance (an obligation of repeat performance is assumed) or for rescission, but refers to the general conditions of transport or national law in these respects.

If one considers the efforts of the EU in the third railway package, to increase the rights of the traveller precisely in cases of delay, the proposal of the Commission goes much further in this area than the CIV, under the SMPS and therefore a conflict of the SMPS with EU Law is foreseeable because the passenger has no rights other than to demand repeat performance. The passenger therefore under the SMPS has no claim to transport, but has, such a right– in the form of minimal solution – under the CIV.

1.4.11. Joint Liability of Carriers

(1) Concordant Regulation

Both the CIV (Article 38 CIV) and the SMPS (Article 31 SMPS) provide for joint liability of railways carriers in international passenger transport for objects and animals.

The railways are also, under both conventions, responsible for the provision of transport on the entire route until delivery.

(2) Exceptions in the CIV

Exceptions from joint liability in the CIV: Loss arising due to death and injury is the liability of the carrier providing the transport where the accident happens in accordance with a contract for carriage. If the services are provided by a sub-carrier, both carriers are liable, Article 26 § 5 CIV. (In the SMPS there is no such provision as the railways have no liability for personal injury under that convention).

1.4.12. Liability of Agents

(1) Concordant Regulation

Both conventions, Article 51 CIV or Article 37 SMPS, provide for liability of the railway carrier for their employees and persons who serve them in the contract of carriage, provided that these persons act in the exercise of duty.

(2) According to the CIV

The CIV assumes in Article 51 sentence 2 that the infrastructure operators are agents of the carriers.

(3) According to the SMPS

Under the SMPS, the railways are liable for their employees irrespective of whether the employees are engaged on their own or another railway.

As the SMPS still assumes a uniform railway model, i.e. no separation of transport services from the operation of the railway infrastructure, a provision like Article 51 sentence 2 CIV was not necessary in the SMPS.

1.4.13. Liability of Passengers

(1) According to the CIV

Within the scope of the CIV, the passenger is liable for all damage arising because of non-compliance with his obligations under customs and administrative legal provisions, special provisions under transport of vehicles in the general conditions of transport and under the RID and for damage caused by objects or animals which he is accompanying, Article 53 CIV. He is not liable if he can prove that the damage was due to circumstances which were unavoidable even with the exercise of due care or the consequences of which could not be prevented.

(2) According to the SMPS

Within the scope of the SMPS, the passenger is liable for all damage due to non-compliance with the provisions on the transport of hand-luggage, animals and provisions on non-permitted luggage, Article 12 §6, Article 19 § 1 SMPS. In addition, the passenger is liable, according to Article 10 § 3 SMPS, for damage which he causes during the journey in international transport by infringement of regulations on the transport of persons and baggage of a third party railway or of the railway. All costs and loss or damage to assets of the injured party are deemed to be damage in this sense.

(3) Interim Conclusion

The provisions are similar but in the SMPS there is no relief from liability for passengers.

1.4.14. Extinction of Claims under the Conventions

(1) According to the CIV

According to the CIV, the rights lapse if they are not invoked at least orally within the periods provided in Article 58 and Article 59 CIV. The CIV distinguishes in this respect between claims in the event of death and injury (Article 58 CIV) and claims regarding the transport of luggage.

Claims for personal injuries lapse according to Article 58 § 1 CIV if they are not notified to the relevant carriers at the latest 12 months after awareness of the injury. In case of oral notification, the carrier must issue a written

confirmation of the notification. According to Article 58 § 2 CIV, the claims do not, however, lapse despite a lack of notification if during the limitation period a complaint was made to the carrier, the carrier within that period otherwise obtained notice of the accident, the claimant is not responsible for the late notification or if the claimant proves that the accident was caused by the fault of the carrier.

Claims for the transport of luggage lapse, according to Article 59 § 1 CIV, on acceptance of the luggage. Pursuant to Article 59 § 2 CIV, they do, however, not lapse, if the passenger proves that the damage was caused by the fault of the carrier (Article 59 § 2 lit d CIV).

In case of partial loss or damage, the claims do not lapse if the loss or damage has been recorded prior to acceptance by the passenger, in an investigation (Article 54 CIV), or if the investigation should have taken place and has not taken place due solely the fault of the carrier.

If the loss or damage is not apparent and is not ascertained until after acceptance of the luggage by the passenger, the claim does not lapse if the passenger immediately after the discovery of the damage, at the latest however 3 days after acceptance, demands an inspection and can also prove that the damage was caused between the time of acceptance for carriage and the time of delivery (Article 59 § 2 lit b) CIV).

In the case of delayed delivery, the passenger must exercise his rights within 21 days after acceptance of the luggage in order to prevent extinction (Article 59 § 2 lit c) CIV).

(2) According to the SMPS

According to the SMPS, the right to compensation for exceeding the delivery period in the case of express goods, lapses if the express goods are not collected within 24 hours after notification by the railway. This does not apply to removal goods, Article 35 § 4.

1.4.15. Limitation of Claims

(1) According to the CIV

Claims under the CIV become statute-barred according to Article 60 CIV. Claims for personal injuries are statute-barred in 3 years after the accident, in the case of the passenger in 3 years after the death but at the latest 5 years after the accident. Claims for material damage become statute-barred in principle in 1 year, for damage caused by intent or negligent action or omission in 2 years. The running of the limitation period is interrupted by a written complaint, until the time at which the carrier rejects the complaint in writing and returns the vouchers submitted, Article 60 § 4 CIV.

(2) According to the SMPS

Claims under the SMPS become statute-barred according to Article 40 9 months after delivery, with the exception of claims for exceeding the delivery period, which must be made within 30 days after delivery. The calculation of the periods shall be in accordance with Article 40 § 2. The submission of the written complaint to the railway interrupts the running of the period of limitation.

(3) Interim Conclusion

Conflict area: In case of material damage through gross negligence of the carrier, the limitation periods vary enormously, under the CIV more than double those under the SMPS. According to the CIV, the limitation period in this case is two years. According to the SMPS it is only 9 months, because a longer limitation period in the case of gross fault is not stipulated.

The limitation periods for claims due to late delivery or exceeding the delivery period (CIV: 1 year; SMPS: 30 days) differ considerably. In practice however for luggage no great difference may exist because the claim under the CIV lapses if it is not made 21 days after acceptance of the luggage; such a period is not provided in the SMPS, and therefore the passenger has, in that case, 7 days longer in order to make his claim by written complaint which must be accompanied by the document on which the claim is based (the complaint interrupts the running of the period of limitation). It is to be noted however that the claim for delay in the case of express goods under SMPS lapses much faster, namely if the goods are not collected within 24 hours after notification by the railway (see above).

1.4.16. The Making of Claims

(1) Reclamation/Complaints

(a) According to the CIV

According to the CIV, complaints based on personal injury are in principle to be made to the carrier against to whom claims for personal injury can be made in court (see below). They must be made in writing. If the transport was the subject matter of a contract performed by successive carriers, the complaint can also be made to the first or last carrier or to the carrier which has its main establishment or branch or office with which the contract was concluded in the passenger's state of residence or state of normal abode (the act of the office must be an act of the carrier itself), Article 55 § 1 CIV.

Complaints because of other claims are to be in the case of a court claim directed in writing to the carrier which may be sued.

(b) According to the SMPS

According to the SMPS, complaints (Article 38 SMPS) for luggage/express goods are to be made by passengers, recipients/consignors of the express goods either to the dispatching railway or to the destination railway in writing. Complaints about fares are to be submitted to the office where the ticket in dispute was issued. There are offices specified for complaints (stated in appendix 2 to the SMPS). The complaint is a requirement for a claim to accrue.

(2) Legal Proceedings

(a) According to the CIV

Claims against carriers based on rights under the CIV, may, if they are not claims due to personal injury, be made against the first, the last or the carrier providing the part of the transport in the course of which the fact giving rise to the claim occurred. If, in the course of the transport by successive carriers, the carrier obliged to deliver the luggage or vehicle is entered with its consent in the luggage ticket or passenger ticket, the claim can then be made against it even if it has not received the luggage or has not taken over the vehicle.

Claims for personal injury can only be made against the carrier obliged according to the contract of carriage to provide the transport in which the accident occurred. If the transport was not provided by the carrier but by another carrier, the claim can be made against both or one of them, Article 56 § 1 CIV.

(b) According to the SMPS

A claim against a railway based on rights under the SMPS, can first be made if the claim has already been made by complaint according to Article 38 SMPS. A claim can be made by the entitled person only against the railway undertaking or the issuing office at which the complaint was made and then only if the railway or issuing office has rejected the claim in whole or in part or has not responded to the complaint within 180 days after receipt (Article 39 SMPS).

1.4.17. Court Jurisdiction

(1) According to the CIV

The courts of the Member States agreed between the parties are the courts of the Members States at which the defendant has its residence or normal place of abode or its main or branch office or office which concluded the contract, have jurisdiction for claims under the CIV. Only courts of Member States can have jurisdiction for claims under the CIV. This restriction was deemed necessary because in that case national law is extensively applicable to personal injuries.⁹⁷ More detailed provisions as to how agreement on court jurisdiction can be reached are not contained in the CIV. National law applies.

(2) According to the SMPS

The courts of the state to which the railway undertaking or the issuing office belongs have exclusive jurisdiction for claims against the railway or the issuing office for claims based on the SMPS.

⁹⁷ Explanatory report of the Central Office of the OTIF on the CIV, Article 57.

For claims for compensation against the passengers based on Article 10 SMPS, the claim shall be made to the court having jurisdiction over the residence of the defendant unless the costs can be estimated at the place of the event, Article 10 § 3 SMPS. It follows that compensation claims against passengers under Article 10 can be made before the court of the passenger's place of residence.

1.4.18. Accounting between the Railways/Carriers

(1) Concordant Regulations

Article 41 SMPS and Article 61 CIV have almost identical wording. In the SMPS the dispatching or destination railway and, in CIV the carrier, is obliged to pay to the other railways or carriers participating in the transport the portion of the costs for the transport to which they are entitled, or in the case of the CIV the transport price, which they charge.

(2) Special Features of the CIV

The manner and form of payment for CIV transports is provided for by agreement between the carriers. The CIV tickets have evidentiary value between the carriers.

(3) Special Features of the SMPS

The accounting for SMPS transports takes place according to the accounting provisions to the SMPS and SMGS conventions. In Article 41 SMPS the dispatching or destination railway is obliged to pay to the other railways or carriers participating in the transport the portion of the costs for the transport to which they are entitled.

(4) Interim Conclusion

Accounting between the railways for transport under the SMPS is prescribed in more detail, since there are specific accounting provisions; in the case of transport under the CIV, the railways can agree on the manner and form of the accounting and can also make agreements with one another deviating from Article 61 CIV, thus taking account of their business freedom which the SMPS does not do.

1.4.19. Recourse Between the Railways/Carriers

(1) Recourse Rights

(a) According to the CIV

If a carrier has paid compensation under the CIV, it has a right of recourse against the other participating carriers under Article 62 CIV.

The carrier who has caused the loss or damage shall be solely liable for it.

When the loss or damage has been caused by several carriers, each shall be liable for the loss or damage it has caused; if such distinction is impossible, the compensation shall be apportioned between them.

If it is not possible to prove which of the carriers has caused the loss or damage, the compensation shall be apportioned between all the carriers who have taken part in the carriage, except those who prove that the loss or damage was not caused by them; such apportionment shall be in proportion to their respective shares of the carriage charge.

In case of insolvency of any one of these carriers, the unpaid share due from that carrier shall be apportioned among all the other carriers who have taken part in the carriage, in proportion to their respective shares of the carriage charge.

(b) According to the SMPS

The SMPS provides for a more detailed regulation recourse between the railway undertakings. If a railway is obliged to pay compensation according to the SMPS, it may have recourse against the other railways participating in the transport for reimbursement and according to the provisions of Article 42 SMPS.

Comparable to Article 62 CIV, when loss or damage has been caused by several carriers, each shall be liable for the loss or damage it has caused; and if such distinction is impossible, the compensation shall be apportioned between them in the relation of their part of the distance travelled.

The carrier who has caused the loss or damage shall be solely liable for it.

If a carrier has reimbursed the fare, it is entitled to have recourse against those carriers for which the fare was paid.

In the event of a delay in the transport of luggage and express goods on several railway undertakings, the damage according to Article 35 SMPS is calculated on the basis of the total delay and the freight each participating undertaking has received (Article 42 § 2 SMPS).

Furthermore, there are specific provisions regarding delays in the transport of express goods:

The delivery periods set out in Article 27 SMPS for express goods are apportioned between the railways participating in the transport as follows:

the loading/dispatch period to the dispatching railway:

the transport period to the railways of each state in proportion to the tariff kilometres of the transport:

route covered:

the additional periods stated in Article 20 § 2 SMPS for the transport of luggage and express goods are occurred apportioned between the railways on the routes on which the delay for the reasons stated in Article 20 § 2 SMPS.

(c) Interim Conclusion

The recourse provisions of both conventions are almost identical, each railway or each carrier is liable for the damage which it causes. A difference however arises in the cases where it is not possible to prove what railway or what carrier has caused the damage, under the SMPS the damage will be divided between all railways participating in the transport in the proportion of the tariff kilometres of each to the actual entire route, under the CIV according to the proportion of the fare to which each carrier is entitled.

Article 64 CIV also in this case permits agreements between carriers deviating from Article 62.

(2) Recourse Procedure

(a) Concordant Regulations

Both conventions provide for resolution of disputes in court.

The court at the registered office of the defendant has jurisdiction according to Article 42 para. 6 SMPS.

In the events several defendants, the plaintiff has the right to choose the place of jurisdiction at any branch or office where the contract for carriage has been concluded with the relevant railway undertakings (Article 63, § 4 CIV and Article 42, § 6 SMPS).

According to Article 46 § 4 SMPS and Article 63 § 1 CIV, the validity of the payment made by the railway exercising the right of recourse may not be disputed by the railway against which the right of recourse is exercised, if compensation has been determined by a court and if the latter railway, duly served with notice, has been afforded an opportunity to intervene in the proceedings.

A carrier exercising its right of recourse must present its claim in one and the same proceedings against all the carriers with whom it has not reached a settlement, failing which the carrier shall lose its right of recourse vis-à-vis those against whom he has not taken action (Article 63 § 4 CIV and Article 42 § 9 SMPS)..

(b) According to the CIV

According to Article 63 § 1 CIV, the carrier claiming recourse must proceed against all carriers with which it has been unable to reach a settlement regarding one and the same claim. Otherwise the claim is against the carriers not claimed against will lapse.

(c) According to the SMPS

The recourse claim under SMPS must be made within 75 days after payment or in case of a court decision against the railways 75 days after the coming into effect of the court decision; after the expiry of this period the claim can no longer be made. As the SMPS contains no provision as to when a court decision becomes effective, the relevant national law is applicable according to Article 46 SMPS.

The court hearing on the recourse claim may not take place together with the claim for reimbursement, if the latter is made by a person who has the right of disposal according to Article 38 §§ 1, 2, 3, 4 of the Convention on the basis of a contract of carriage.

In case of a court hearing on the recourse claim in which several defendants participate, the court must determine the relevant responsibility and amount of each defendant in one and the same judgement.

The railways against which such action has been brought shall have no further right of recourse.

A judgement of the appropriate court granting the claim for reimbursement of compensation paid is executable in accordance with the registered place of business of each defendant in respect of which the judgement is issued, subject to compliance with of the prescribed formalities in each of the states concerned. The judgement is not appealable.

By agreement, railways may derogate from the provisions on reciprocal rights of recourse - with the exception of the provisions of Article 42 § 8.

1.4.20. Information Obligation

(1) According to the CIV

There are no information obligations incumbent on, the railways under the CIV.

(2) According to the Commission Draft Regulation on the Rights and Duties of Passengers in Cross-border Rail Transport

In the Commission draft regulation on the rights and duties of passengers in cross border rail transport, Article 3 together with appendix I and II, information obligations of railway enterprises are mentioned with a list of minimum information which should be provided by, during and after the journey, as well as minimum information to be stated on the ticket. There is no penalty or liability for non-compliance with the obligation, however, in Article 40 of the draft it is provided that the Member States are obliged to set penalties for breaches of the regulation.

(3) According to the SMPS

Information obligations of the railways are only laid down in Article 29 SMPS. The railways therefore have to organise information to enable passengers to inform themselves on the trains and wagons travelling on their routes and lines. A special information obligation exists in the SMPS and in the tariffs applicable to international transport. Every passenger must have the opportunity at the railway stations contained in the tariff applicable to

him to obtain knowledge of the SMPS and tariff. The applicable tariffs are to be published according to the internal regulations of the railways, amendments and additions thereto come into effect on the day stated in the publication, Article 29 § 1, 2 SMPS (No penalty is provided in the SMPS for a breach of this obligation).

1.5. Interim Conclusion

The conventions are similarly structured in the areas they regulate and lay down comparable rights and obligations.

The SMPS overall however displays a higher density of provisions and regulates areas which are either not addressed in the CIV and are left to national law, or in which the CIV only refers to the fact that they can be regulated in the general conditions of transport. The CIV also partially permits deviating agreements between carriers and between carriers and passengers.

The freedom of contract and commercial freedom of the carriers is given considerably more scope under the CIV than under the SMPS. In the CIV, a duty to transport and a compulsory tariff have been omitted intentionally after the liberalisation of the railway sector and the consequent break up of the monopoly position of the railways, because it is assumed that competition is better suited to provide a regulatory function than is an obligation to transport and compulsory tariffs..⁹⁸

Owing to the more intensive regulatory concentration of the SMPS on all areas, e.g. regarding the validity and possibilities of are changing tickets, the discretion and commercial freedom of the railways are restricted.

This is not the case in the CIV area, where very often references are made to the general conditions of transport. In addition, many areas are left to national laws. This means that the degree of legal uniformity is not as high as under the SMPS.

A comparison table of passenger rights under the CIV, Draft EU Regulation and the SMPS is provided as Annex VI to this study.

⁹⁸ Explanatory report of the Central Office of the OTIF on the CIV, page 6, No. 25.

1.5.1. Areas of Most concordance

In some areas there is overall agreement in the conventions being compared, due to the fact that they have the same root, namely, the Bern Convention. In these areas there is no particular potential for conflict even if the provisions are not identical in wording.

This applies *inter alia* in the areas of permitted objects and persons, the manner and nature of acceptance, transport and delivery of luggage, the principles on liability for material damage, the acceptance of joint liability of the railways/carriers, the liability of passengers, the charging and recourse between the railways (in this case deviating agreements are possible under the CIV).

1.5.2. Areas of Minor Differences

In some areas the conventions contain regulations which vary or the areas are regulated in a different degree of detail. Conflict however is mostly not present because more agreement can be created by general conditions of transport.

For example, in the CIV there are no provisions on the transport of express goods, the transport of luggage apart from a contract for the transport of a person can however be admitted by the general condition transport. The allocation of seats is not regulated in the CIV, but in the SMPS in detail. Nevertheless, particular potential for conflict is not seen here.

Under the CIV, the transport of vehicles can be admitted in the course of personal transport under the general conditions of transport, the transport of vehicles then takes place according to the CIV, but this is not anticipated in the SMPS where only two-wheeled vehicles are admitted. In the SMPS, the transport of coffins with human remains is provided for, while there is no such provision in CIV.

1.5.3. Areas of Major Differences

(1) Obligation to Transport and Compulsory Tariff

The SMPS imposes an obligation to transport on the railways, based on the principle that the railways have a monopoly position, abuse of which should be prevented.

Such an obligation to transport was apparently no longer considered necessary in the new version of the CIV, because due to the liberalisation of the railway sector, the monopoly position of the railways has ended.

A conflict between the conventions cannot arise here, however, because, in Article 4 para. 3 CIV, the states are free to introduce a transport obligation for bilateral traffic by agreement. This provision was intended, according to the head office COTIF,⁹⁹ to express the fact that it does not conflict with the CIV if a transport obligation is agreed between states and imposed on the railways operating in the territory of the relevant states. The SMPS is included in the concept of interstate treaties even if the members are the railways because they were (and still are) state railways at the time of conclusion and are represented in the SMPS by their transport ministries.

However, an obligation to conclude a contract on mostly prescribed conditions is imposed on the railways by the obligation to transport in connection with the compulsory tariff existing under the SMPS. This is a competitive disadvantage vis-à-vis other transport undertakings and renders competition between them difficult. To this extent, the SMPS conflicts with the objectives of the EU which are intended to be implemented by the railway package Directives.

(2) Executed Contract/Consensual Contract

A further fundamental difference is the structure of the contracts of carriage. The SMPS assumes this to be an executed contract, the CIV a consensual contract. Under the CIV the ticket is merely evidence.

This difference affects the status of the passenger also, under the CIV in principle if for example the passenger cannot show his ticket, he can subsequently prove the existence of a contract of carriage and then demand repayment of the double price paid, but only if this has been included in the general conditions of transport.

⁹⁹ See an explanation on CIV, page 7 Article 4.

The legal nature of the contract of carriage as a consensual agreement also corresponds to the structure in other international conventions on transport with other means of transport (Article 4 subsection 2 Warsaw Convention Article 5, 6 CVR), the structure of the CIV therefore corresponds to the harmonization efforts of the EU with the rights of other means of transport; the SMPS is in conflict with this because then structure of the contract of carriage is that of an executed contract.

(3) Liability for Material Damage

The principles on liability for damage and loss of luggage are very similar, although differences can arise in the calculation of the amount of compensation, in particular in a case of a loss of baggage, baggage under SMPS is compensated for at the rate of not more than 2 CHF per lost kilo and under the CIV at approximately 24 € per kilo.

(4) Liability for Personal Injury

In the SMPS there is no provision on liability of the railways for personal injury. There are, however, efforts to include such liability in the SMPS. Until then national law applies, Article 46 SMPS.

It is to be noted, however, that even under the CIV the provisions on the liability of carriers for personal injury can be declared by each state not to be applicable, as Austria and Latvia have done. According to Article 2 § 1 CIV, each state can declare at any time that it will not apply any provisions of the CIV on liability of the carrier for death or injury of passengers, if the accident happens on its territory and the passenger is a citizen of that state or has his usual place of residence in that state, so that national law applies.

In this area there is a conflict between the conventions, and also between SMPS and the efforts of the EU to strengthen the rights of passengers.

(5) Rights of Passengers in Case of Delay, Cancellation or Missed Connections

In this area under the SMPS the passenger only has a right to repeat performance (as well as a right of rescission, which is however not expressly

regulated, but can only be derived out of the context of the individual regulations). There is no right to compensation.

Under the CIV, the passenger has a right to repeat performance under national general contract law, a right of rescission or a reduction in price is not provided for, so that national law applies. The passenger has a right to compensation however only for the most necessary costs, overnight costs and the costs of notification.

(6) Liability for Agents

According to both conventions, the railways are liable for their agents, Article 37 SMPS. The CIV assumes that the operators of the infrastructure are agents of the carriers, Article 51 CIV. A similar provision is lacking in the SMPS, which still assumes that these are one and the same body. This can lead to conflict if carriers independent of infrastructure operators conduct SMPS transport.

2. The Transport of Goods

2.1. Subject for Comparison

The regulation of the international carriage of freight is not a subject matter of legislation of the EU. It is therefore necessary, in order to compare the OSJD Convention on international freight transport (SMGS), to have recourse to the rules of the OTIF. Within the OTIF, the rules on the international carriage of freight are laid down in the uniform legal provisions of the CIM, Appendix B to the COTIF.

On the territory of the OSJD, the carriage of freight is regulated in the SMGS. It is to be noted that formally speaking the SMGS is an independent treaty, not ratified by all Member States of the OSJD. The Czech Republic, Slovakia, Hungary and Romania are not parties to the SMGS.

The SMGS is at present undergoing review. Greater precision and convergence towards the EU are intended.

2.2. Participants

The CIM applies in all OTIF Member States and thereby meanwhile in all EU Member States with the exception of Estonia, whose ratification is not yet completed, Malta and Cyprus. The CIM, however, also applies beyond the borders of the EU.¹⁰⁰

The SMGS was concluded by the railways of the states, which were, however, represented by the relevant ministries (Article 1 SMGS).

The subscribing states as at today's date are Azerbaijan, Albania, Byelorussia, Bulgaria, Vietnam, Georgia, Iran, Kazakhstan, China, North Korea, Kyrgyz, Latvia, Lithuania, Moldavia, Mongolia, Poland, Russia, Tadjikistan, Turkmenistan, Uzbekistan, the Ukraine.

All OSJD states with the exception of the Czech Republic, Slovakia, Hungary and Romania are signatories of to the convention.

2.3. Areas of Application

Both conventions regulate the carriage of freight for reward between the various rail networks of the Member States. It is to be noted that this is not necessarily identical with the entire networks of the Member States.

2.3.1. According to the CIM

Article 1 § 1 CIM regulates the carriage of freight for reward between two Member States. The nationality of the sender or recipient is irrelevant.

The CIM is also applicable where only part of the transport takes place in OTIF Member States, in particular if the place of the transfer of the goods or the place of delivery lies within an OTIF Member State and the parties have agreed in the contract of carriage on application of the CIM (Article 1 § 2 CIM).

2.3.2. According to the SMGS

¹⁰⁰ The CIM applies outside the EU in the other Member States of the OTIF. A comparison table on the transport of goods is shown in Annex VII of this Study.

The SMGS is applicable to direct international rail transport for the carriage of goods with SMGS consignment notes on the routes of the railways participating in the convention between the railway stations stated in Article 3 § 2 of the SMGS. This is binding on the railways, the consignor and recipient, cf. Article 2 § 2 (2) SMGS.

Excluded from application (cf. Article 2 § 3 SMGS) are transports of goods

a) within the same state;

b) the dispatching and receiving railway stations for which are situated within the territory of the same state, although the territory of another state is crossed in transit by trains or wagons of the sending state:

c) between two states when the territory of a third state which is not an SMGS state is crossed in trains or wagons of the railway of the dispatching or receiving state.

2.4. Topics of Regulation

2.4.1. Contract of Carriage and Obligation to Transport

(1) According to the CIM

The contract of carriage is concluded differently in each of the two systems.

The basis for application of the CIM according to Article 6 CIM is, after the COTIF reform, a contract of carriage concluded between the parties. The duty to transport was abolished both vis-à-vis the customers and also between the carriers.¹⁰¹

A consignment note is not necessary for validity of the contract. The consignment note now has only evidentiary value (Article 6 § 1.2 CIM). For customs reasons, it is, however, necessary that freight in the EU be accompanied by a consignment note (Article 6 § 7 CIM).

The railway no longer has an obligation to transport within the territory of the EU. Every carrier is free to accept freight for transportation and to freely

¹⁰¹ Freise, TransportR 1999,417,422.

negotiate the relevant conditions. In addition, apart from effecting the transport itself, it may also sub-contract the transport.¹⁰²

(2) According to the SMGS

In contract, within the territory of the SMGS there is an obligation to transport according to Article 3 SMGS. The railways which are parties to the convention are obliged to transport all freight the transport of which is not excluded by Article 4 SMGS, in accordance with the provisions of the convention, unless the national regulations of the relevant railway provide otherwise.

2.4.2. Freight to be Transported

Both the CIM and the SMGS demarcate the freight to be transported negatively. In principle each good may be transported if not excluded by the relevant Convention. The CIM also refers in this respect to the RID (analogously to the provisions on luggage in the CIV) with respect to dangerous goods.

(1) According to the CIM

In principle, all goods may be given to the carrier for transport with exception of the goods which are excluded from transport pursuant to Article 9 CIM, which are now listed in an Appendix to Article 6 (the “RID”).

(2) According to the SMGS

In principle, all objects can be transported under SMGS. However, according to Article 4 SMGS, certain objects are excluded in principle from transport or the transport of such objects is admissible only under special conditions (the parallel provisions in the CIM itself were deleted during the reform of 1999).

According to Article 5 of the SMGS, the transport of goods the transport of which is excluded by the national law of a state of a participating railway and for the transport of which the postal service has the sole right of transport, is excluded. In principle, transport is also excluded if dangerous objects such as

¹⁰² Freise, TransportR 1999,417,422.

explosives, explosive material or ammunitions are concerned or if a certain weight is exceeded.

Objects the transport of which is permissible only under special conditions are rolling stock, Article 5 § 1 SMGS, live animals (Article 5 § 2), easily spoiled goods (Article 5 § 3, Article 6 § 3 SMGS together with Appendix 4), objects of special dimensions, a particular weight or the transport of which requires special container wagons (Article 5 §§ 4 to 5), motor vehicles and tractors (Article 5 § 6, Article 6 § 4 SMGS together with Appendix 7), dangerous goods according to Appendix 2 (Article 5 § 7 SMGS together with Appendix 2), and human remains (Article 5 § 8 SMGS).

2.4.3. Payment of Costs

(1) According to the CIM

Unless otherwise agreed between the parties, the transport costs are payable according to CIM by the consignor (Article 10 § 1 CIM). The sample general conditions of transport of CIT refer on this question to the “Handbook Consignment Note CIM” (GLV-CIM), which contains the standard provisions for the payment of costs.

(2) According to the SMGS

The SMGS contains a different provision on the obligation to bear the costs. The consignor is, in principle, obliged to pay the costs only on the routes of the first carrying railway (cf. Article 15 § 1, No. 1, § 2 subpara. 3 SMGS).

The recipient, in principle, bears the costs for the routes of the railway of destination, the reloading in case of transport between two neighbouring states (Article 16 § 3 SMGS) and for offloading at the destination.

There is no payment obligation provided for in the SMGS in relation to the costs of transit railways for transport and reloading. It is rather a matter for the consignor and the recipient to agree on these matters, which are to be noted in the consignment note. If payment by the consignor is not noted in the consignment note, the costs are payable by the recipient. Consignor and recipient must also agree on the costs for reloading by a transit railway. A payment obligation can be regulated in national tariffs.

2.4.4. Conclusion of the Contract of Carriage

(1) According to the CIM

There are no specific provisions regarding the conclusion of a carriage contract in the CIM. There are only provisions regarding the consignment note in Article 6 § 8 CIM. The issuance of a consignment note is however not a requirement for validity of a carriage contract.

(2) According to the SMGS

The provisions in Part II of the SMGS relate to the conclusion of the contract of carriage. Pursuant to Article 7 § 1 SMGS, the carriage contract is concluded by completing the consignment note. The required content of such a consignment note is then further mentioned in Article 7 §§ 1 to 14 SMGS. However, meanwhile a uniform CIM/SMGS consignment note exists.¹⁰³

The uniform SMGS/CIM consignment note was created after reforms took place in both organizations after the fall of the Iron Curtain. The EU eastwards expansion has rendered harmonization even more necessary, as some of the accession states are members of both conventions.

For European and intercontinental freight and passenger transport, an improvement of co-operation and efficiency of the CIM and SMGS is urgently required. A uniform consignment note is certainly only the first step.¹⁰⁴

Since 1 September 2006, the uniform CIM/SMGS consignment note is in force. The relevant provisions were adopted by the CIT in the Handbook GLV CIM-SMGS and by the OSJD in an Appendix to the SMGS.

The legal basis for the common consignment note is found in Article 6 § 8 CIM and Article 7 SMGS. Appendix 2 of the SMGS contains more detailed explanations. The regulations are available in Russian (SMGS), in German, French and English (CIM).

¹⁰³ Trollet/Evtimov, loc. cit., p. 2, 4.

¹⁰⁴ Supra cit.

The common consignment note, however, consists only of an amalgamation of both consignment notes, not a legal harmonization but, in principle, only a common form.

Thus above all a practical simplification is achieved, because now no re-consignment¹⁰⁵ of the goods is necessary at the legal freight frontiers.

2.4.5. Acceptance of Goods for Transport

(1) According to the CIM

In this regard, there are no regulations to be found in the CIM.

(2) According to the SMGS

According to Article 8 § 1 SMGS, the goods presented by the consignor with a consignment note are deemed to be a single consignment. There are four different kinds of consignments: wagonload, package freight, large container consignment, and contrailer consignment.

A wagonload is deemed according to Article 8 § 1 (2) SMGS to be goods delivered with a consignment note, for the transport of which, because of its volume or its nature, a wagon for exclusive use is necessary.

Package freight according to Article 8 § 1 (3) SMGS is deemed to be goods delivered with a consignment note of a total weight of not more than 5,000 kg and for the transport of which, because of its volume or nature, a wagon for exclusive use is not required.

According to Article 8 § 1 (4) SMGS, a large container consignment is a loaded or empty large container delivered with a consignment note.

According to Article 8 § 1 (5) SMGS, a contrailer consignment is a loaded car train, swap body or road semi-trailer.

2.4.6. Packaging, Marking, Sealing and Loading

¹⁰⁵ Re-consignment is the submission of goods for transport with the issue of a new consignment note and the relevant transport documents.

(1) According to the CIM

Pursuant to Article 13 CIM, loading and unloading are subject to an agreement between consignor and carrier. In the absence of such an agreement, the carrier is responsible for the loading and unloading of packages. However, for full wagonloads the consignor is responsible for loading and unloading.

Pursuant to Article 14 CIM the consignor is responsible for the packaging of the goods to be transported. The consignor is liable to the carrier for any loss or damage and costs due to the absence of, or defects in, the packaging of goods, unless the defective nature was apparent or known to the carrier at the time when it took over the goods and it made no reservations in that respect.

No provision exists regarding the sealing of the wagon. According to Article 15 CIM, the consignor is responsible for attachment of necessary documents to the consignment note or for making them available to the carrier.

(2) According to the SMGS

Article 9 §§ 1 to 9 of the SMGS contains detailed provisions on packaging, marking, loading, ascertainment of volume and quantity of the goods and the sealing of the wagon. The provision can be seen as a parallel to §§ 13 to 15 of the CIM but in considerably more detail. The difficulty is, however, to be seen in the resulting differences and contradictions.

Pursuant to Article 9 § 1 of the SMGS, the consignor is responsible for packaging. In Article 9 § 1 SMGS it is further provided that goods are to be packed for their protection against loss, damage or spoiling in accordance with their nature. Special packaging regulations for dangerous substances are set out in Article 9 § 2 SMGS together with Appendix 2 of the SMGS.

Article 9 § 3 SMGS provides for the marking in detail and also mentions several specialities for specific states. For example, depending on the state, marking in Russian or Chinese is prescribed and for transport to or from North Korea, Mongolia or China, apart from the marking of the destination railway and the destination station, the numbers provided for the railways and the stations must also be stated.

There are also provisions to be found on loading (Article 9 § 4 SMGS), reloading (Article 9 § 5 SMGS) and sealing (§§ 7-9 SMGS) for specific wagons which refer to the requirements of the relevant national law (refrigerator wagon, covered wagon, tank wagon or bulk carrier wagon) As regards non-covered wagons, Appendix 14 of the SMGS applies.

2.4.7. Value and Interests in the Consignment

(1) According to the CIM

CIM does not provide any regulation regarding statement of value. This is governed by the relevant national law applicable to the carriage agreement.

(2) According to the SMGS

Article 10 SMGS lays down detailed provisions on the statement of the value of the goods and the interests in the consignment. In Article 10 § 1 SMGS it is provided that for the transport of certain goods the value must be stated. These goods included precious metals and precious stones, valuable furs, exposed films, paintings and other artistic objects and antiques. In the case of goods in the course of removal, the value is also to be stated although the consignor can avoid this by an unsigned declaration “without value”. According to Article 10 § 2 SMGS, the consignor can of course state the value of other goods if it wishes.

The statement of value is, according to Article 10 § 3 SMGS, to be made in the currency of the consigning state. The stated value is not only relevant for compensation but also for any additional charges in accordance with Article 10 § 4 SMGS.

2.4.8. Accompanying Documents

Both the CIM and the SMGS provide that certain documents accompany the transport. This refers to the common CIM/SMGS consignment note and other documents necessary for the transport or for customs purposes.

The CIM/SMGS consignment note serves in both systems in principle as a customs document.

Both systems also stipulate that the consignor is liable for the completeness of the documents (Article 15 § 1 CIM or Article 11 § 1 SMGS) and that the carrier has no duty to check the accompanying documents for completeness and accuracy (Article 15 § 2 CIM or Article 11 § 2 SMGS).

(1) According to the CIM

Under the CIM, according to Article 15 § 1 CIM, the consignor must attach the necessary documents to the consignment note or make them available to the carrier. Article 15 § 1 CIM does not define what the necessary documents are. But such necessary documents depend on the goods and the relevant provisions according to the applicable customs provision.

Pursuant to Article 15 § 2 CIM, the consignor is liable to the carrier for any loss or damage resulting from the absence or insufficiency of, or any irregularity in, such documents and information, save in the case of fault of the carrier. Therefore, the carrier is not obliged to check the correctness or sufficiency of the documents.

Pursuant to Article 15 § 3 CIM, the carrier is, however, liable for any consequences arising from the loss or misuse of the documents referred to in the consignment note and accompanying it or deposited with the carrier, unless the loss of the documents or the loss or damage caused by the misuse of the documents has been caused by circumstances which the carrier could not avoid and the consequences of which he was unable to prevent. Nevertheless any compensation payable shall not exceed that provided for in the event of loss of the goods.

(2) According to the SMGS

Pursuant to Article 11 § 1 SMGS, the consignor has to attach to the consignment note the documents necessary to meet the requirements of the applicable customs provisions and other provisions which are of relevance for the route of carriage, and, if necessary according to the applicable provisions of national law, a certificate and a specification. If certificates and specification are not added, the consignor has to declare in the consignment note that a certificate and a specification is not necessary (Article 11 § 1 ss. 4 SMGS).

The accompanying documents must be stated individually by the consignor in the consignment note in the column “documents enclosed by the consignor”. If documents are not attached, but sent to the relevant customs office, a declaration accordingly stating the customs office and number and date of issue of the documents is to be made (Article 11 §1 ss. 3 SMGS).

The railway station for depart is obliged pursuant to Article 11 § 1 ss. 5 SMGS to refuse the consignment, if it ascertains that the consignor does not comply with the above provisions. In this case the consignor is obliged to issue a new consignment note.

According to Article 11 § 2 SMGS, the railway is not, however, obliged to check the documents attached to the consignment note by the consignor for accuracy or completeness. The consignor is therefore liable for the consequences which arise from the absence of accompanying documents (Article 11 § 2 para 2 SMGS).

If the consignor does not comply with the above provisions and if this leads to a delay in carriage or delivery, the consignor is obliged to pay certain fees (deposit fee and demurrage) which are calculated according the provisions of the relevant railway undertaking where the incorrectness or incompleteness of the documents has caused a delay or a standstill of the relevant carrier (Article 11 § 2 ss. 3 SMGS). However, is not the case in the event that the delay or the stand-still of the carrier results from a default of the relevant railway. The fees for deposit of the goods and for demurrage are to be included in the consignment note and are to be paid by the consignor or the consignee, depending on who is obliged to pay, which is again subject to an agreement between the parties or. in the absence of an agreement, the tariffs of the relevant railways are applicable pursuant to Article 13 SMGS.

2.4.9. Common Consignment Note

A common CIM/SMGS consignment note will be used both on the territory of the CIM and that of the SMGS. This also serves as a customs document.

The common consignment note is not, however, based on a legal harmonization of the relevant provisions but is at present only the aggregate of the provisions in the CIM or the SMGS contained on one single form.

(1) According to the CIM

Pursuant to Article 8 § 1, the consignor is be responsible for all costs, loss or damage sustained by the carrier if declarations made by the consignor in the consignment note are irregular, incorrect, or incomplete or made elsewhere than in the allotted space, or if the consignor fails to make the entries prescribed by RID.

Further, pursuant to Article 8 § 2 CIM, the carrier must, at the request of the consignor, declare particulars on the consignment note. He shall be deemed, unless otherwise proven, to have done so on behalf of the consignor.

If the consignment note does not contain the statement provided for in Article 7 § 1 CIM, pursuant to Article 8 § 3 CIM the carrier shall be liable for all costs, loss or damage sustained through such omission by the person entitled.

(2) According to the SMGS

Pursuant to Article 7 § 1 SMGS, the consignment note consists of the original consignment note, waybill, duplicate consignment note, delivery note and receipt. The consignment note forms are to be completed in the language of the consigning state and in an official language of the OSJD, i.e. Russian or Chinese.

Pursuant to Article 12 § 1 SMGS, the consignor is liable for the correctness and completeness of the declarations made in the consignment note. Pursuant to Article 12 § 2 SMGS, the railway is entitled to check the declarations made by the consignor in the consignment note.

If the dispatch station establishes the incorrectness or incompleteness of the consignment note, the consignor is obliged to issue a new consignment note unless a correction is permitted by Article 7 § 5 SMGS.

During the transport the content of the carriage may only be examined if such an examination is necessary due to customs regulations or other provisions, or if this is required by operating safety and/or for maintenance of the goods to be transported.

If the destination station (or the interim station) establishes discrepancies between the declarations of the consignment note and the factual circumstances, the relevant station has to note this in the consignment note. The costs for the examination will also be noted in the consignment note. The costs have to be paid by the consignor if the examination took place on the dispatch railway, and if the above procedure takes place on destination railway by the consignee. If the above examination procedure takes place on the transit railway, the costs have to be paid by the consignor or the consignee depending on who is obliged to pay the transit freight (or by the relevant forwarding agent).

Further, additional freights may be payable according to Article 12 § 3 SMGS in the event of incorrect or incomplete consignment notes (up to five times the freight).

If the wagon is loaded over the permitted load capacity, the following procedure is to be observed:

- An excess ascertained on the dispatching railway will be unloaded and made available to the consignor.
- An excess ascertained on a transit railway or on the destination railway will be unloaded by the railway and sent on, if possible simultaneously with the main load, together with an additional freight dispatch note which is to be prepared in the necessary number of copies, to the destination railway station.
- Charges and freight for the unloading, reloading and the transport of the excess goods will be imposed as for a separate consignment and entered in the consignment note.

These provisions apply accordingly to all cases in which the permitted axle load (Article 8 § 3) is exceeded due to incorrect stating of the weight of the goods by the consignor in the consignment note.

2.4.10. Charging of Costs and Additional Charges

(1) Charging According to the CIM

The CIM itself contains no provisions on the charging of costs and additional charges. However, in the general conditions of transport, the GTC-CIM No. 8, corresponding statements are contained. The GTC-CIM are applicable to the legal relationship between the carrier and customer for consignments governed by the CIM. The conclusion of the contract of carriage shall be deemed as incorporating the GTC-CIM. However the parties are entitled to derogate from the GTC-CIM.

Pursuant to No 8 GTC-CIM charges to be paid by the customer include:

- carriage charges, i.e. all the charges for or closely linked to the provision of carriage between the point of accepting the goods and the delivery point, and
- the ancillary charges, i.e. the charges for supplementary services provided by the carrier, and
- customs duties, i.e. customs duties, taxes and other sums levied by customs and other administrative authorities, and
- other charges, imposed by the carrier and supported by appropriate documentation.

A list of the main charges and their codes is to be found in the GLV-CIM. The list of charges, the tariffs and conditions of the carrier who performs the carriage under the contract of carriage is, according to No 8.2 of GTC-CIM, applicable to the calculation of charges unless otherwise agreed.

Pursuant to No. 8.3 of the GTC-CIM, an entry in the consignment note in accordance with the GLV-CIM indicates who is responsible for which charges. The carrier may require the customer to pay charges in advance or to provide other guarantees.

Pursuant to No 8.4 of GTC-CIM, when the calculation of charges involves a currency conversion, the rate to be used shall be that which is applicable:

- the day the goods are accepted for those charges to be paid by the consignor;
- the day the goods are made available for those charges to be paid by the consignee.

(2) Charging According to the SMGS

The charging of costs and additional costs is provided in Article 12, 13 and 15 of the SMGS.

Article 12 § 3 SMGS contains provisions of additional freight in the event of incorrect or incomplete entries in the consignment note if certain requirements are met as outlined in Article 12 § 3 No 1 to 3 SMGS.

Article 13 § 1 SMGS defines the costs as freights, fares and ancillary fees. The amounts depend on the relevant national tariffs of the relevant dispatch, destination and transit railway undertakings.

In detail:

Pursuant to Art 13 § 1 SMGS, the costs (freight for the transport of the goods, the fare for the accompanying person, for the tractor driver, other charges and costs which arise between the acceptance of the goods for transport and the delivery to the consignee) will be calculated in accordance with the following tariff valid on the day of the conclusion of the contract of carriage:

- for traffic between stations of the railways of neighbouring states, for the transport on the railways of the dispatching and destination state according to the tariffs applicable on these railways for such transport, or, if there is a direct tariff between these railways, according to that tariff,
- for traffic in transit, for the transport on the railways of the dispatching and destination state according to the tariffs applicable on these railways for such transport and for the transport on transit railways, according to the transit tariff applicable to the relevant international traffic.

Pursuant to Art 13 § 2 SMGS, the freight will be charged by the border stations designated by the consignor in the consignment note, on the basis of the shortest distance to be determined in accordance with the applicable tariff. If the consignment is transported by a shorter route through border stations other than those designated by the consignor in the consignment note, the freight will be calculated according to the shortest route through these border stations.

Pursuant to Article 13 § 3 SMGS, the costs of the transport and the freight surcharges on the dispatching and destination railways will be calculated in the national currency, the costs for the transport and the freight surcharges on the transit railways in the currency of the transit tariff applicable to the relevant international traffic of the interested railways.

Pursuant to Article 13 § 4 SMGS, the costs incurred but not included in the applicable tariffs, e.g. costs for correcting loading, reloading in connection with correcting loading, costs for repairing the packaging necessary for the preservation of the goods, costs for covering and the use of the covering necessary for the protection of the goods if the railway is not under an obligation to cover the goods, are to be reimbursed to the railways. The costs are to be fixed separately for each consignment and corresponding vouchers presented.

These costs will be entered by the consignor in the consignment note if they are incurred on the dispatching railway, and charged to the consignee if they arise on the destination railway. If these costs arise on a transit railway, they will be charged to the consignor or the consignee, depending on which of them has to bear the costs of the transport on the relevant transit railway. If the consignor or the consignee has entrusted a payer (a carrier, a freight agent etc.), which has concluded a payment agreement with the transit railway, with the payment, the costs will be charged to that payer in accordance with the internal regulations of the transit railway.

Pursuant to Article 13 § 5 SMGS, if it is ascertained in the course of the journey that goods from one wagon must be re-loaded into one or several wagons of the same gauge, the freight will be calculated as for a consignment for the wagons in which the goods were loaded at the dispatching station and stated originally in the consignment note. If re-loading is necessary for reasons for which the consignor is not responsible, no re-loading charges will be imposed.

Pursuant to Article 13 § 6 SMGS, for the reloading of the goods into wagons of a different gauge or for the exchange of wagon bogies at the border stations, the railway imposes charges (including the cost of providing equipment and material by the railway for securing the re-loaded goods such as platforms, wire, nails, temporary storage etc.), if the destination railway

re-loads the goods or transfers the wagons to bogies of another gauge, in accordance with the internal tariff of that railway, or in other cases according to the transit tariff applicable to the relevant international transport.

Pursuant to Article 15 § 7, subject to derogating provisions between railways of neighbouring states having a direct tariff, the costs have to be treated in accordance with Article 15 §§ 1 to 6 SMPS.

According to Article 15 § 1 SMGS, the dispatching railway may demand payment of costs from the consignor pursuant to the applicable national provisions of the dispatching railway. Accordingly the destination railway may ask for payment of costs from the consignee.

In the event of a transit railway, the consignor has to pay the costs at the dispatching railway station and the consignee at the destination railway station. This is however only applicable if corresponding agreements between the relevant railway undertakings exist (Article 15 § 1 No 3 SMGS).

If the consignee shall bear the costs, it has to declare this in the consignment note. An entry in the consignment note is also necessary if the consignor does not want to pay the costs.

If no entry is made in this regard, the consignee shall bear the costs (Article 15 § 2 ss. 3 SMGS). This is however not the case if the relevant national provisions of the transit railways provide for the obligation of the consignor to bear the costs. Vice versa the consignee must bear the costs if the relevant national tariff provisions provide for a corresponding obligation of the consignee.

Pursuant to Article 15 § 2 ss. 2 SMGS, the consignor must declare if another person (e.g. the forwarding agent) will pay the costs for the transit railway.

Article 15 § 3 SMGS provides that costs may be charged for the reloading in case of the use of wagons of different gauges. The amounts are not mentioned in Article 15 § 3 SMGS. Therefore the national tariffs of the relevant railway undertakings are applicable. Article 15 § 3 SMGS provides in this respect that the consignor, or the consignee or a third person (e.g. the forwarding agent) bears the costs for reloading at the boarder station between the dispatching and the transit railway, depending on who has to pay the

transit costs, which is again subject to an agreement between the consignor and the consignee unless otherwise provided in the national transit tariffs of the relevant transit railway.

Pursuant to Article 15 § 4 SMGS, the consignor has to pay the costs in total if the consignee refuses to accept the goods transported to it.

The railway undertaking may require payment in the currency of the relevant state where the costs are paid.

Pursuant to Article 16 SMPS, cash advance and cash at delivery are not permitted.

2.4.11. Transit Periods

(1) According to the CIM

According to Article 16 § 1 CIM, the period for transit is firstly subject to an agreement between the parties. If the parties do not have an agreement on this issue, the provisions of Article 16 § 2 to § 4 CIM are applicable. E.g. the completion of wagon loading is 12 hours and for the transport 24 hours per 400 km. As regards package freight, the periods for loading are 24 hours and for the transport 24 hours. The carrier may, however, fix additional transit periods of specified duration if certain circumstances exist (e.g. consignment to be carried on lines of different gauge) or if other exceptional circumstances causing difficulties exist. The duration of these additional transit periods must however appear in the General Conditions of Carriage.

The transit period is calculated as follows: It starts to run after the taking over of the goods. It shall be extended by the duration of a stay caused without any fault of the carrier. The transit period shall be further suspended on Sundays and public holidays.

(2) According to the SMGS

Pursuant to Article 14 § 7 SMGS, the delivery period is subject to an agreement between the consignor and the relevant railway undertaking. If no agreement exists (in whole or in part), the relevant provisions of Article 14 § 1 to § 6 SMPS apply.

Article 14 § 1 and § 2 SMGS, specifies delivery periods, according to the nature of the goods and the distance to be travelled .

According to the SMGS, there is, in addition, a distinction between express and normal freight (Article 14 § 1 SMGS).

Normal freight refers to goods moved by corresponding means of transport and for the transport of which the carrier is entitled to remuneration. Freight in this context constitutes a chargeable criterion which will be transported with lesser priority compared to express goods.

Express goods are freight transported with higher priority. The provisions on express goods are similar to the provisions on freight under the CIM.

The delivery period begins at 0.00 hours on the day following the day on which the goods and the consignment note are accepted for transport. If the goods were accepted with prior storage, the delivery period begins at 0.00 hours on the day following the day specified for loading, which is to be noted in the consignment note.

Pursuant to Article 14 § 2 SMGS, the transport period will be calculated in accordance with the distance actually travelled between the dispatch and the destination stations.

Under the SMGS regime, the period for wagon loading both for express goods and freight is one day and for the transport of express goods one day for 320 km for and freight one day for each 200 km.

For package freight, the period for loading is also one day and for the transport of express goods 150 km per day and for freight 420 km per day.

Article 14 § 3 SMGS provides for an extension of the delivery periods in general by two days in each case for reloading onto another gauge, the loading of wagons onto wagon bogeys and the loading of wagons onto a ferry.

Pursuant to Article 14 § 4 SMGS, in the case of transport of goods exceeding the loading dimensions, the delivery period stated in § 1 of this Article and its extension is extended by 100% according to § 3 of the same Article.

Pursuant to Article 14 § 5, the delivery period is extended for the duration of

- a stoppage for dealing with customs and other regulations,
- an interruption of transport which, without fault on the part of the railway, temporarily prevents the beginning or continuation of the transport,
- a delay caused by a change to the consignment note,
- a stoppage for checking whether the goods correspond to the data in the consignment note or whether the precautions for goods which are to be

transported subject to certain conditions have been complied with, if irregularities are discovered in the course of checking,

- a stoppage caused by animals being led from the wagon, watered or examined by a vet,
- off-loading of an excess load, repair work on goods or their packaging and the re-loading or correct loading of goods, if the stoppage is caused by the consignor,
- other stoppages if due to the consignor or consignee.

The cause of a stoppage of a consignment which entitles the railway to avail of an extension of the delivery period and its duration shall be noted by the railway in the consignment note in the column "Extension of Delivery Period".

The extension of the delivery times is, according to Article 14 § 5 SMGS, also allowed for a stoppage for completion of customs and other requirements, interruptions of traffic, delays due to changes to the contract for carriage, checking of the consignment note, arranging the transport of animals, the removal of excessive weight or other delays caused by the consignor.

Pursuant to Article 14 § 6 SMGS, the delivery period is complied with if the good arrives at the station of destination and if the railway has informed the consignee of the arrival of the consignment and if the consignment is disposable for the consignee.

The notification to the consignee shall be made in accordance with the destination railway's applicable internal regulations.

If, in accordance with the destination railway's applicable internal regulations, the goods are to be delivered to the consignee at the address stated in the consignment note, the delivery period is deemed to be complied with if the goods are delivered to the consignee by the time the delivery period expires.

In the cases in which the goods have been re-loaded at a border crossing station, and part of the goods transported with a second freight card the receipt of the part of the goods received with the consignment note is decisive for the compliance with the delivery period.

2.4.12. Delivery of the Goods, Tracing

The performance of the contract of carriage is similar under the CIM and SMGS. The delivery of the goods takes place against payment of the costs stated in the consignment note (Article 17 CIM or Article 17 SMGS) or additional costs to be paid by the recipient. The goods are then delivered to the recipient against receipt.

(1) According to the CIM

Pursuant to Article 17 § 1 CIM, the carrier must hand over the consignment note and deliver the goods to the consignee at the place designated for delivery, against receipt and payment of the amounts due according to the contract of carriage.

Pursuant to Article 17 § 2 CIM, it shall be equivalent to delivery to the consignee if, in accordance with the prescriptions in force at the place of destination,

- the goods have been handed over to customs or authorities at their premises or warehouses, when these are not subject to the carrier's supervision,
- the goods have been deposited for storage with the carrier, with a forwarding agent or in a public warehouse.

Pursuant to Article 17 § 3 CIM, after the arrival of the goods at the place of destination, the consignee may ask the carrier to hand over the consignment note and deliver the goods to him. If the loss of the goods is established or if the goods have not arrived on the expiry of the period provided for in Article 29 § 1 CIM, the consignee may assert, in his own name, his rights against the carrier under the contract of carriage.

Pursuant to Article 17 § 4 CIM, the person entitled may refuse to accept the goods, even when he has received the consignment note and paid the charges

resulting from the contract of carriage, so long as an examination which he has demanded in order to establish alleged loss or damage has not been carried out.

Pursuant to Article 17 § 5 CIM in other respects, delivery of the goods shall be carried out in accordance with the prescriptions in force at the place of destination.

Pursuant to Article 17 § 6 CIM, if the goods have been delivered without prior collection of a cash-on-delivery charge, the carrier shall be obliged to compensate the consignor up to the amount of the cash on delivery charge without prejudice to his right of recourse against the consignee.

There is no tracing provision in the CIM. It is therefore left to the contractual arrangements or the provisions of the general conditions how loss or delay is dealt with.

(2) According to the SMGS

Pursuant to Article 17 § 1 SMGS the consignment has to be delivered to the consignee as soon as all costs as mentioned in the consignment note are paid to the railway undertaking, insofar as the national provisions do not provide for handing out before payment.

The consignee is obliged to pay the costs and take over the consignment. The consignee is, however, entitled to refuse the acceptance of the goods, only if the quality of the goods has changed due to damage, spoilage or other legitimate reasons with the effect that the consignment may, not be fit for use anymore, in whole or in part.

Pursuant to Article 17 § 2 SMGS, the freight is payable in full even if the consignment was not completely delivered. The consignee is, however, entitled to start proceedings according to Article 29 SMGS (Reclamation).

Pursuant to Article 17 § 3 SMGS, the railway undertaking may deliver the goods without re-weighing if the weight at dispatch was confirmed on the consignment note provided that the consignment is apparently not damaged.

Pursuant to Article 17 § 4 SMGS, the delivery shall take place according to the applicable national provisions of the railway.

A tracing application according to Article 17 § 5 SMGS is only possible if the delivery date is exceeded by 30 days.

With regard to tracing of delayed goods it is, however, to be noted that according to Article 17 § 5 SMGS, a tracing application can be made only after the expiry of a further 30 days after the period for delivery expires. Article 17 and 18 SMGS contain other provisions for tracing and investigation in the case of defective transportation which has led to delay or damage to the goods.

On the expiry of the period, the recipient can consider the goods as lost (cf. Article 17 § 6 SMGS).

If the goods nevertheless later arrive, the recipient is to be informed immediately. If not more than six months after expiry of the delivery period has passed, the recipient is obliged to accept the goods within a further 24 hours (Article 27 § 4 SMGS).

Compensation paid for loss and the costs of carriage to the consignor are to be repaid to the railway. This does not affect the consignee's right to claim compensation for the delay or the loss in quality (Article 17 § 6 ss. 3 SMGS).

2.4.13. Investigation

(1) According to the CIM

When partial loss or damage is discovered or presumed by the carrier or alleged by the person entitled, pursuant to Article 42 § 1 CIM the carrier must without delay, and if possible in the presence of the person entitled, draw up a report stating the loss or damage, the condition of the goods, their weight and, as far as possible, the extent of the loss or the damage, its cause and the time of its occurrence.

Pursuant to Article 42 § 2 CIM, a copy of the report must be supplied free of charge to the person entitled. Should the person entitled not accept the findings in the report, he may request according to Article 42 § 3 CIM that

the condition and weight of the goods and the cause and amount of the loss or damage be ascertained by an expert appointed either by the parties to the contract of carriage or by a court or tribunal. The procedure to be followed shall be governed by the laws and prescriptions of the State in which such ascertainment takes place.

(2) According to the SMGS

The SMGS has provided for a similar procedure in the event of loss or damage to the goods. According to Article 18 § 1 SMGS, the railway carrier is obliged to produce a report if the inspection at the time of delivery or during the transport regarding the condition of the goods, the weight or the number of goods and the existence of the consignment note reveals

- that the consignment is completely or partially lost, damaged or reduced in quality or if the declarations of the consignment note deviate from the factual situation regarding specification, weight or quantity of goods, the marks and numbers of items or the denomination of the destination railway station and of the consignee
- that the consignment note or parts of it are lost or the means of transportation are partially or completely missing.

This also applies in the event that an empty private or leased wagon is detected without a consignment note or if a consignment note without a wagon is detected.

The report has to be made by the railway station which has detected the irregularities. For this purposes a specific form according to Appendix 16 of the SMGS has to be used.

The obligation of investigation exists only if the irregularity could only have appeared in the time period between acceptance and delivery of the consignment (Article 18 § 1 SMGS). The fact of an investigation must be declared by the railway station in the consignment note.

If the consignee detects irregularities in the meaning of Article 18 § 1 SMGS, the consignee has to require the railway station of destination to conduct for an investigation. The destination railway station may refuse the investigation

if it is not possible for that the irregularity have happened in the time period between acceptance and delivery of the consignment or if the loss is minor in the sense of Article 18 § 5 SMGS.

The consignee may ask for investigation also after delivery if the national railway provisions permit such a later investigation and if the irregularity was not obvious at the time of taking over the consignment (Article 18 § 3 SMGS). The application for investigation must be demanded within 3 days after delivery. Sane for measures to be taken in order to protect the consignment from further damage or loss, the consignee may not alter the status of the consignment. The consignee has to hand over the seals and/or instruments for sealing and locking.

Under Article 18 § 3 SMGS the destination railway station is entitled to refuse a deferred investigation if

- the national provisions of the railway do not permit deferred investigations
- the application was not made in time
- the status of the consignment was unduly altered
- the irregularity definitely did not appeared within in the time period between acceptance and delivery
- the loss minor in the sense of Article 18 § 5 SMGS
- if the consignee fails to hand over the seals and the sealing and locking instruments.

Pursuant to Article 18 § 4 SMGS and subject to the national provisions of the railway, the destination railway station may request from the consignee the payment of costs and fees for the examination of the application for investigation if such application was not justified.

Pursuant to Article 18 § 5 SMGS, a investigation will only take place if the loss if of reasonable importance. For this purpose the limits of Article 24 § 1 SMGS have to be exceeded. Article 24 SMGS provides for certain percentages of loss regarding various types of goods which are not of relevance.

However, if the loss of consignment is more than 0,2 % compared to the entries in the consignment note, and provided that the consignment suffers a loss according to its natural consistence, the destination railway station has to provide for an investigation. The investigation report has to be signed by the relevant employee of the destination railway station and also by the consignee or its recipient.

If the consignee does not agree with the findings of the report, he is entitled to note this in the report (Article 18 § 6 SMGS).

Subject to the national provisions of the railway, an expert may be entrusted with the ascertainment of causes and scope of the loss, damage, spoilage or another reductions of quality of the consignment.

Pursuant to Article 18 § 9 SMGS, the above provisions apply accordingly to the consignor in the event that the consignment has been returned according to Article 20 § 2 No. 1 SMGS to the consignor or according to Article 21 § 3 to a third person acting for the consignor (e.g. forwarding agent).

2.4.14. Lien of the Railways

(1) According to the CIM

The CIM does not contain a specific provision regarding means of security. A lien in favour of the carrier can be required according No 8.3 GTC-CIM as means of security.

(2) According to the SMGS

Pursuant to Article 19 § 1 SMGS, the railway undertaking is granted a lien on the goods transported as means of security for all costs arising out of the contract for carriage, for as long as the goods are in the custody of the railway. The scope of the lien has to be determined in accordance with the national law of the state in which the goods have to be delivered (Article 19 § 2 SMGS).

2.4.15. Amendment to the Contract of Carriage Under the SMGS

The provisions on amending contracts for carriage are set out in Part IV of the SMGS.

(1) According to the CIM

Pursuant to Article 20 § 1 CIM, the consignor is entitled to dispose of the goods and to modify the contract of carriage by giving subsequent orders. He may in particular ask the carrier to discontinue the carriage of the goods, to delay the delivery of the goods, to deliver the goods to a consignee different from the one entered on the consignment note, or to deliver the goods at a place other than the place of destination entered on the consignment note.

Pursuant to Article 20 § 2 CIM, the consignor's right to modify the contract of carriage shall, notwithstanding that he is in possession of the duplicate of the consignment note, be extinguished in cases where the consignee has taken possession of the consignment note, has accepted the goods, has asserted his rights in accordance with Article 17 § 3 CIM, and also in cases where the consignee is entitled, in accordance with Article 20 § 3 CIM, to give orders. With respect to the latter, the carrier shall from that time onwards comply with the orders and instructions issued by the consignee.

Pursuant to Article 20 § 3 CIM, the consignee is entitled to modify the contract of carriage from the time when the consignment note is drawn up, unless the consignor indicates otherwise on the consignment note.

Pursuant to Article 20 § 4 CIM, the consignee's right to modify the contract of carriage shall lapse in cases where he has taken possession of the consignment note or accepted the goods or asserted his rights in accordance with Article 17 § 3 CIM, or given instructions for delivery of the goods to another person in accordance with Article 20 § 5 CIM and when that person has asserted his rights in accordance with Article 17 § 3 CIM.

Pursuant to Article 20 § 5 CIM, if the consignee has given instructions for delivery of the goods to another person, that person shall not be entitled to modify the contract of carriage.

Pursuant to Article 19 § 1 CIM, if the consignor or, in the case referred to in Article 18 § 3 CIM, the consignee wishes to modify the contract of carriage by giving subsequent orders, he must present to the carrier the duplicate of the consignment note on which the modifications have to be entered.

Pursuant to Article 19 § 2 CIM, the consignor or, in the case referred to in Article 18 § 3 CIM, the consignee must compensate the carrier for the costs and the prejudice arising from the carrying out of subsequent modifications.

Pursuant to Article 19 § 3 CIM, the carrying out of the subsequent modifications must be possible, lawful and reasonable to require at the time when the orders reach the person who is to carry them out, and must in particular neither interfere with the normal working of the carrier's undertaking nor prejudice the consignors or consignees of other consignments.

According to Article 19 § 4 CIM, the subsequent modifications must not have the effect of splitting the consignment.

Pursuant to Article 19 § 5 CIM, if, by reason of the conditions provided for in § 3, the carrier cannot carry out the orders which he receives, he shall immediately notify the person from whom the orders emanate.

Pursuant to Article 19 § 6 CIM, in the case of fault of the carrier he shall be liable for the consequences of failure to carry out an order or failure to carry it out properly. Nevertheless, any compensation payable shall not exceed that provided for in case of loss of the goods.

Pursuant to Article 19 § 7 CIM, if the carrier implements the consignor's subsequent modifications without requiring the production of the duplicate of the consignment note, the carrier shall be liable to the consignee for any loss or damage sustained by him if the duplicate has been passed on to the consignee. Nevertheless, any compensation payable shall not exceed that provided for in case of loss of the goods.

(2) According to the SMGS

In Article 20 § 1 SMGS it is initially provided that both the consignor and the consignee are entitled to amend the contract of carriage even after the beginning of its performance.

The consignor can accordingly amend the contract of carriage to the effect that the goods are to be returned to the original railway station, or the destination railway station can be changed (Article 20 § 2 SMGS).

The consignee can require that the goods be delivered to a different destination or a different consignee (Article 20 § 3 SMGS).

Amendments with the effect of dividing a consignment are, however, not admissible (Article 20 § 4 SMGS). According to Article 8 § 1 SMGS, goods presented by the consignor are deemed to be a consignment. The separation or division of the train or of wagons is therefore not permissible.

The amendment of the contract of carriage requires an application from the consignor or the consignee in accordance with a form provided in Appendix 17 to SMGS (§ 20 § 5 SMGS). The amendment application has to be translated into the official languages of the OSJD.

The application for amendment of the contract for carriage has to be presented by the consignor to the dispatch railway station and by the consignee to the border railway station of the destination state. The application has also to be entered in the consignment note. Both documents have to be presented to the railway undertaking.

The consignee may apply for amendments also regarding several consignments, if certain requirements are met (e.g carriage in a group of wagons and the provision of one and only destination station). The destination station has to confirm in a copy of the consignment note the receipt of the application for amendment, which then has to be returned to the consignor. The consignee may, however, present the application for amendment without the duplicate of the consignment note.

Pursuant to Article 20 § 6 SMGS, if the consignment has left the dispatch station or the border station at the time of the amendment application, these stations may, by teleprinted communication, inform all other stations en route and the destination station has at the expense of the consignor about the changes of the contract for carriage. However, the application for amendment of the contract of carriage needs be to be confirmed by transmission of the original application.

The railway undertaking is relieved of any liability for errors caused in the course of telegraphic transmission of the application.

The right of the consignor to request an amendment lapses upon acceptance of the consignment note by the consignee (Article 20 § 7 SMGS).

The consignor shall not be liable for any consequences caused by an amendment made by the consignee (Article 20 § 8 SMGS).

The consignor and the recipient can, however, according to Article 20 § 9, each amend the contract of carriage only once. This is a considerable restriction on contractual freedom. There is no reasonable ground for this even in the absence of technology which would simplify the implementation of changes.

The railway undertaking may object to the amendment only if the execution at the time of receipt of the application is not possible or if the railway traffic would be disturbed or if the relevant national law of the states of the relevant participating railway do not permit such amendments (Article 20 § 10 SMGS).

The railway undertaking has to inform the consignor or consignee about any impediments.

Pursuant to Article 20 § 12 SMGS, all costs caused by the amendment will be invoiced by the railway undertaking in accordance 13 and 15 SMGS. Further, the amendment will charged separately in accordance with the law of the relevant railway state in which the amendment is executed.

2.4.16. Impediments to Transport and Delivery

(1) According to the CIM

Pursuant to Article 20 § 1 CIM, when circumstances prevent the carriage of goods, the carrier shall decide whether it is preferable to carry the goods as a matter of course by modifying the route or whether it is advisable, in the interest of the person entitled, to ask him for instructions while giving him any relevant information available to the carrier.

Pursuant to Article 20 § 2 CIM, if it is impossible to continue carrying the goods, the carrier shall ask for instructions from the person entitled to dispose of the goods. If the carrier is unable to obtain instructions within a

reasonable time, he must take such steps as seem to him to be in the best interests of the person entitled to dispose of the goods.

Pursuant to Article 21 § 1 CIM, when circumstances prevent delivery, the carrier must without delay inform the consignor and ask him for instructions, save where the consignor has requested, by an entry in the consignment note, that the goods be returned to him as a matter of course in the event of circumstances preventing delivery.

Pursuant to Article 21 § 2 CIM, when the circumstances preventing delivery cease to exist before arrival of instructions from the consignor to the carrier, the goods shall be delivered to the consignee. The consignor must be notified without delay.

Pursuant to Article 21 § 3 CIM, if the consignee refuses the goods, the consignor shall be entitled to give instructions even if he is unable to produce the duplicate of the consignment note.

Pursuant to Article 21 § 4 CIM, when the circumstances preventing delivery arise after the consignee has modified the contract of carriage in accordance with Article 18 §§ 3 to 5 CIM, the carrier must notify the consignee.

Pursuant to Article 22 § 1 CIM, the carrier is entitled to recover the costs occasioned by his request for instructions, the carrying out of instructions received, the fact that instructions requested do not reach him or do not reach him in time, the fact that he has taken a decision in accordance with Article 20 § 1 CIM, without having asked for instructions, unless such costs were caused by his fault. The carrier may in particular recover the carriage charge applicable to the route taken and shall be allowed the transit periods applicable to such route.

Pursuant to Article 20 § 2 CIM, in the cases referred to in Article 20 § 2 CIM and Article 21 § 1 CIM, the carrier may immediately unload the goods at the expense of the person entitled. Thereupon the carriage shall be deemed to be at an end. The carrier shall then be in charge of the goods on behalf of the person entitled. He may, however, entrust them to a third party, and shall then be responsible only for the exercise of reasonable care in the choice of such third party. The charges due under the contract of carriage and all other costs shall remain chargeable against the goods.

Pursuant to Article 22 § 3 CIM the carrier may proceed to the sale of the goods without awaiting instructions from the person entitled, if this is justified by the perishable nature or the condition of the goods or if the costs of storage would be out of proportion to the value of the goods. In other cases he may also proceed to the sale of the goods if within a reasonable time he has not received from the person entitled instructions to the contrary which he may reasonably be required to carry out.

Pursuant to Article 22 § 4 CIM, if the goods have been sold, the proceeds of sale, after deduction of the costs chargeable against the goods, must be placed at the disposal of the person entitled. If the proceeds of sale are less than those costs, the consignor must pay the difference.

Pursuant to Article 22 § 5 CIM, the procedure in the case of sale shall be determined by the laws and prescriptions in force at, or by the custom of, the place where the goods are situated.

Pursuant to Article 22 § 6 CIM, if the consignor, in the case of circumstances preventing carriage or delivery, fails to give instructions within a reasonable time and if the circumstances preventing carriage or delivery cannot be eliminated in accordance with §§ 2 and 3, the carrier may return the goods to the consignor or, if it is justified, destroy them, at the expense of the consignor.

(2) According to the SMGS

Article 21 SMGS concerns the dealing with impediments to transport and delivery which arise in the dispatching railway station or in the course of transit and which require an amendment to the contract of carriage.

If such impediments arise, the railway carrier may decide whether it is necessary to obtain instructions from the consignor. The railway carrier is entitled to demand additional freight for any changes to the transit route and may extend the agreed the delivery period unless the railway carrier is at fault (Article 21 § 1 SMGS).

Pursuant to Article 21 § 2 SMGS, the railway station where the impediment occurred has to inform the consignor without undue delay if no alternative

transit route is available and shall ask the consignor for further instructions (via telegraph).

If such impediments are only of a temporary nature, the relevant railway station is not obliged to seek instructions. The consignor may insert in the consignment note particulars with instructions in case of impediments (Article 21 § 2 SMGS). If these particulars are, from the railway undertaking's view point, not sufficient, it shall ask for further instructions from the consignor.

The dispatching railway station shall inform the consignor of the impediment after receipt of the information without undue delay. The consignor shall instruct the dispatching station as to how to deal with the impediment. The consignor has to present a duplicate of the consignment note to the dispatching station so that the consignor's instructions can be inserted into that duplicate. If this duplicate is not presented, the instruction of the consignor is invalid.

The dispatching station shall then inform the railway station where the impediment incurred that instructions from the consignor have not been received.

Pursuant to Article 21 § 3 SMGS, if the consignor does not instruct the station where the impediment occurred within 8 days or in case of perishable goods within 4 days calculated from the day of the information about the impediment, the goods shall be dealt with in accordance with the national law applicable to the railway undertaking where the impediment occurred. However if perishable goods are in danger of perishing, the railway undertaking may take action without application of the 4 days period.

Pursuant to Article 21 § 4 SMGS, if the impediment disappears before receipt of the instructions from the consignor, the station where the impediment occurred shall transport the goods to the destination station without awaiting the instructions; the consignor shall be informed without undue delay.

Pursuant Article 21 § 5 SMGS, in the event that the goods were sold, the proceeds minus charges and freight and all costs arising from the sale of the goods will be transferred to the consignor.

Pursuant to Article 21 § 7 SMGS, in case of impediments which have been caused by the consignor or the consignee, the railway undertaking shall be entitled to a reimbursement of costs caused by this impediment. If the consignor or the consignee is not responsible for the impediment, all costs of the railway undertaking have to be reimbursed which are caused by the fact that the consignor or the consignee failed to provide the railway undertaking with further instructions or issued non-executable instructions.

If the impediment occurs at the dispatch railway or the destination railway or transit railway, the costs will be calculated according to the law and tariffs applicable to the relevant railway undertaking (Article 21 § 7 SMGS).

All the costs have to be inserted into the consignment note and paid by the consignor, the consignee or a third person acting as agent (e.g. forwarding agent), depending on who is responsible for the payment.

Responsibility for any additional costs then depends on responsibility for the necessary change. The consignor is responsible for additional costs if loading or packaging or incorrect data is responsible for impeding the transport.

2.4.17. Liability of the Railways

An important question in the comparison of both systems of the OTIF (CIM) and OSJD (SMGS) is the question of the liability of the railways. It can be said that in fundamental questions, most concordance has been ascertained between the two systems.

(1) Basis of Liability

(a) According to the CIM

Pursuant to Article 23 § 1 CIM, the carrier shall be liable for loss or damage resulting from the total or partial loss of, or damage to, the goods between the time of taking over of the goods and the time of delivery, and for the loss or damage resulting from the transit period being exceeded, no matter what railway infrastructure is used.

Pursuant to Article 24 § 1 CIM, specific provisions exist for vehicle transport. Pursuant to Article 24 § 1 CIM, in case of carriage of railway

vehicles running on their own wheels and consigned as goods, the carrier shall be liable for the loss or damage resulting from the loss of, or damage to, the vehicle or to its removable parts arising between the time of taking over for carriage and the time of delivery, and for loss or damage resulting from exceeding the transit period, unless the carrier proves that the loss or damage was not caused by its fault.

(b) According to the SMGS

Pursuant to Article 22 § 1 SMGS, the railway undertaking, having taken over the goods accompanied by an SMGS consignment note, shall be liable for execution of the contract of carriage until the delivery of the goods at the destination station. According to Article 22 § 2 SMGS, each subsequent railway undertaking, by taking over the goods, accedes of the contract of carriage and has to fulfil the obligation arising out of the contract.

Pursuant to Article 23 § 1 SMGS, the railway undertaking shall be liable for loss of and damage to the goods for and delays in delivery. Further, the railway undertaking is liable for the consequences of the loss of the accompanying documents and for all consequences caused by failure to apply for an amendment to the contract of carriage, if the railway undertaking is responsible in this respect.

(2) Relief from Liability

(a) According to the CIM

Pursuant to Article 23 § 2 CIM, the carrier shall be relieved of this liability to the extent that the loss or damage or the exceeding of the transit period was caused by the fault of the person entitled, by an order given by the person entitled other than as a result of the fault of the carrier, by an inherent defect in the goods (decay, wastage etc.) or by circumstances which the carrier could not avoid and the consequences of which it was unable to prevent.

Pursuant to Article 23 § 3 CIM, the carrier shall be relieved of this liability to the extent that the loss or damage arises from the special risks inherent in one or more of the following circumstances :

- carriage in open wagons pursuant to the General Conditions of Carriage or when it has been expressly agreed and entered in the consignment note; subject to damage sustained by the goods because of atmospheric influences, goods carried in intermodal transport units and in closed road vehicles carried on wagons shall not be considered as being carried in open wagons; if for the carriage of goods in open wagons, the consignor uses sheets, the carrier shall assume the same liability as it has for carriage in open wagons without sheeting, even in respect of goods which, according to the General Conditions of Carriage, are not carried in open wagons;
- absence or inadequacy of packaging in the case of goods which by their nature are liable to loss or damage when not packed or when not packed properly;
- loading of the goods by the consignor or unloading by the consignee;
- the nature of certain goods which particularly exposes them to total or partial loss or damage, especially through breakage, rust, interior and spontaneous decay, desiccation or wastage;
- irregular, incorrect or incomplete description or numbering of packages;
- carriage of live animals;
- carriage which, pursuant to applicable provisions or agreements made between the consignor and the carrier and entered on the consignment note, must be accompanied by an attendant, if the loss or damage results from a risk which the attendant was intended to avert.

For vehicle transport Article 24 § 2 CIM provides that the carrier shall not be liable for loss or damage resulting from the loss of accessories which are not mentioned on both sides of the vehicle or in the inventory list which accompanies it.

Pursuant Article 36 CIM, the limits of liability provided for in Article 15 § 3, Article 19 §§ 6 and 7 CIM, Article 30 CIM and Article 32 CIM shall not apply if it is proved that the loss or damage results from an act or omission which the carrier has committed either with intent to cause such loss or

damage, or recklessly and with knowledge that such loss or damage would probably result.

(b) According to the SMGS

Many exclusions of liability are provided for. Railways, according to Article 23 SMGS, are not responsible for damage

- which the railway could not have avoided (Article 23 § 3 (1) SMGS)
- caused by the defective quality of the goods or packaging or inappropriate transport equipment (Article 23 § 3 Nos. 2, 7, 8 SMGS)
- caused by the consignor or recipient (Article 23 § 3 No. 3 SMGS)
- due to non-compliance with customs regulations (Article 23 § 3 No. 13 SMGS)
- due to transport in open wagons (Article 23 § 3 No. 5 SMGS)
- due to the infringement of regulations not caused by the accompanying person appointed by the carrier (Article 23 § 3 No. 6)
- due to objects excluded from transport or only admitted on conditions, and which have been transported under incorrect, imprecise or incomplete description (Article 23 § 3 No. 9, 10 SMGS)
- due to reduction (spoilage) within the degree of tolerance (Article 23 § 3 No. 11 SMGS)
- due to loss of volume if no external impact on packaging or sealing is ascertainable or this has occurred for customs reasons (Article 23 § 3 No. 12 SMGS)

- due to loading or unloading if this is carried out by the consignor or recipient (Article 23 § 3 No. 4 SMGS)
- in the case of the transport of live animals (Article 23 § 3 No. 2 SMGS¹⁰⁶).

In addition, the SMGS still has a provision that liability for exceeding the delivery date by up to 15 days is excluded, if the reason for the delay, for example, in the case of a natural catastrophe, has been ascertained from the central railway authority of the relevant state (Article 23 § 5 SMGS).

(3) Burden of Proof

On the question of the burden of proof, both treaties also mostly agree.

(a) According to the CIM

Article 25 CIM provides that the carrier bears the burden of proof that the delay in delivery or the loss or damage to the goods was caused by the entitled person.

The carrier, according to Article 25 CIM, also bears the burden of proof that one of the grounds of Article 23 § 3 CIM applies. If the carrier so proves, liability of the consignor or recipient is assumed. This does not, however, apply in the case of extraordinary major losses in the context of Article 23 § 3 a CIM.

(b) According to the SMGS

Article 23 §§ 6 to 9 SMGS deal with questions of evidence with respect to liability claims against the railways.

According to Article 23 § 6 SMGS, there is also a presumption that the railway company is liable if the railway measures or confirms the volume or quantity in the consignment note.

If a loss, a relevant reduction, damage, spoilage or any other reduction in quality has been ascertained, either the consignor or the consignee must

¹⁰⁶ Exclusion of liability for damage because of special natural characteristics of the goods.

prove that these actually occurred during the transport, i.e. between acceptance for transport and the handover of the goods at the destination (Article 23 § 7 SMGS).

The railway bears the onus of proof that the damage was caused by the factors listed in Article 23 § 3 Nos. 1,3 SMGS (unsuitable packaging or loading inter alia).

If the damage could have been caused by reasons dealt with in Article 23 § 3 Nos. 2 and 4 to 13 SMGS, there is a presumption that these reasons apply until the opposite is proved by the consignor or the consignee (Article 23 § 9 SMGS).

Article 24 § 1 SMGS provides for several limits regarding various goods, within which the railway is not responsible for reduction. However, this relief from liability is not applicable if either the consignor or the consignee prove that the reduction was not caused by specific conditions of the relevant goods being transported.

(4) Amount of Compensation

(a) According to the CIM

Pursuant to Article 30 § 1 CIM, in case of total or partial loss of the goods, the carrier must pay, to the exclusion of all other damages, compensation calculated according to the commodity exchange quotation or, if there is no such quotation, according to the current market price, or if there is neither such quotation nor such price, according to the usual value of goods of the same kind and quality on the day and at the place where the goods were taken over.

Pursuant to Article 30 § 2 CIM, compensation shall not exceed 17 units of account per kilogramme of gross mass short.

Pursuant to Article 30 § 3 CIM, in case of loss of a railway vehicle running on its own wheels and consigned as goods, or of an intermodal transport unit, or of their removable parts, the compensation shall be limited, to the exclusion of all other damages, to the usual value of the vehicle or the intermodal transport unit, or their removable parts, on the day and at the

place of loss. If it is impossible to ascertain the day or the place of the loss, the compensation shall be limited to the usual value on the day and at the place where the vehicle was taken over by the carrier.

Pursuant to Article 30 § 4 CIM, the carrier must, in addition, refund the carriage charge, customs duties already paid and other sums paid in relation to the carriage of the goods lost except excise duties for goods carried under a procedure suspending those duties.

Specific provisions exist for wastage according to Article 31 CIM. Pursuant to Article 31 § 1 CIM, in respect of goods which, by reason of their nature, are generally subject to wastage in transit by the sole fact of carriage, the carrier shall only be liable to the extent that the wastage exceeds the following allowances, whatever the length of the route:

- two per cent of the mass for liquid goods or goods consigned in a moist condition;
- one per cent of the mass for dry goods.

Pursuant to Article 31 § 2 CIM, the limitation of liability provided for in § 1 may not be invoked if, having regard to the circumstances of a particular case, it is proved that the loss was not due to causes which would justify the allowance.

Pursuant to Article 31 § 3 CIM, where several packages are carried under a single consignment note, the wastage in transit shall be calculated separately for each package if its mass on consignment is shown separately on the consignment note or can be ascertained otherwise.

Pursuant to Article 31 § 4 CIM, in case of a total loss of goods or in case of loss of a package, no deduction for wastage in transit shall be made in calculating the compensation.

Pursuant to Article 31 § 5 CIM, Article 23 and 25 may not be derogated herewith..

Pursuant to Article 32 § 1 CIM, in case of damage to goods, the carrier must pay compensation equivalent to the loss in value of the goods, to the

exclusion of all other damages. The amount shall be calculated by applying to the value of the goods defined in accordance with Article 30 the percentage of loss in value noted at the place of destination.

Pursuant to Article 32 § 2 CIM, the compensation shall not exceed:

- the amount which would have been payable in case of total loss, if the whole consignment has lost value through damage;
- if only part of the consignment has lost value through damage, the amount which would have been payable had that part been lost.

Pursuant to Article 32 § 3 CIM, in case of damage to a railway vehicle running on its own wheels and consigned as goods, or of an intermodal transport unit, or of their removable parts, the compensation shall be limited, to the exclusion of all other damages, to the cost of repair. The compensation shall not exceed the amount payable in case of loss.

Pursuant to Article 32 § 4 CIM, the carrier must also refund the costs provided for in Article 30 § 4 CIM, in the proportion set out in Article 32 § 1 CIM.

Pursuant to Article 33 § 1 CIM, if loss or damage results from the transit period being exceeded, the carrier must pay compensation not exceeding four times the carriage charge.

Pursuant to Article 33 § 2 CIM, in case of total loss of the goods, the compensation provided for in § 1 shall not be payable in addition to that provided for in Article 30 CIM.

Pursuant to Article 33 § 3 CIM, in case of partial loss of the goods, the compensation provided for in Article 33 § 1 CIM shall not exceed four times the carriage charge in respect of that part of the consignment which has not been lost.

Pursuant to Article 33 § 4 CIM, in case of damage to the goods, not resulting from the transit period being exceeded, the compensation provided for in § 1 shall, where appropriate, be payable in addition to that provided for in Article 32 CIM.

Pursuant to Article 33 § 5 CIM, in no case shall the total of compensation provided for in Article 33 § 1 CIM together with that provided for in Article 30 and 32 CIM exceed the compensation which would be payable in case of total loss of the goods.

Pursuant to Article 33 § 6 CIM, if, in accordance with Article 16 § 1 CIM, the transit period has been established by agreement, other forms of compensation than those provided for in § 1 may be agreed. If, in this case, the transit periods provided for in Article 16 §§ 2 to 4 CIM are exceeded, the person entitled may claim either the compensation provided for in the agreement mentioned above or that provided for in Article 33 §§ 1 to 5 CIM.

Pursuant to Article 34 § 1 CIM the consignor and the carrier may agree that the consignor shall declare in the consignment note a value for the goods exceeding the limit provided for in Article 30 § 2 CIM. In such a case the amount declared shall be substituted for that limit.

Pursuant to Article 35 CIM, the consignor and the carrier may agree that the consignor may declare, by entering an amount in figures in the consignment note, a special interest in delivery, in case of loss, damage or exceeding of the transit period. In case of a declaration of interest in delivery, further compensation for loss or damage proved may be claimed, in addition to the compensation provided for in Article 30, 32 and 33 CIM, up to the amount declared.

(b) According to the SMGS

The amount of compensation under the SMGS is provided for in Article 25 SMGS. It depends on the price stated in the certified invoice extract of the foreign supplier. If a price cannot be ascertained, it will be fixed by a state-recognized expert commission (Article 25 § 1 para. 2 SMGS).

If, in the case of a total or partial loss of removal goods, the note in the column “special declarations of the consignor” “without value stated” has been entered, compensation of six Swiss Franks per kg will be paid (Article 25 § 1 para. 4 SMGS).

Pursuant to Article 25 § 3 SMGS, for costs or losses of the consignor not arising out of the contract for carriage no compensation can be derived.

Pursuant to Article 26 SMGS, in the case of damage or spoiling, the railway must pay the loss of value as compensation. The amount of compensation may also be calculated on the basis of a report of an expert (Article 26 § 3 in connection with Article 18 § 7 SMGS) which shall be prepared in accordance with the law of the state of destination.

However, the amount to be paid under Article 26 SMGS shall not exceed the indemnification which would have to be paid for the partial or total loss of the goods. For the amount of compensation in the case of delay in delivery, there is a detailed provision in Article 27 § 1 SMGS. In the case of exceeding the delivery date by one tenth, the compensation is 6% of the freight, by up to two tenths, 12% of the freight, by up to three tenths 18% of the freight and by up to four tenths 24% of the freight. If the delivery date is exceeded by more than four tenths, the compensation amounts to 30% of the freight.

This compensation may not be demanded in the case of a total loss (Article 27 § 1 para. 1 SMGS).

According to Article 27 § 4 SMGS, a compensation claim is extinguished if the goods are not collected within 24 hours after notification by the railway of receipt of the goods and its notification.

(5) Interest on Compensation

(a) According to the CIM

Within the CIM, interest on compensation is very briefly regulated in Article 37 § 2 and § 3 CIM. The entitled party has a right to 5% interest per annum from the day of complaint or, if no complaint is made, from the day of the filing of the claim.

(b) According to the SMGS

In the SMGS, the payment of compensation is more extensively dealt with in Article 28 and deviates considerable from the CIM provision. According to Article 28 § 1 of the SMGS, payment of compensation will be made in the currency of the country the railway of which is obliged to pay the compensation.

In the event that compensation or an overpayment is paid out after the expiry of more than 180 days after filing of the application, the amount is subject to interest according to Article 28 § 3 SMGS of 4% per annum.

The interest is calculated according to Article 28 § 3 (2) SMGS up to the day on which the amount is actually transferred or paid out and even in the case of complaints for excess costs charged, is credited from the day of the charging of these costs and in the case of compensation claims from the day they are made.

For compensation claims of up to 100 Swiss Franks and overpaid costs up to 10 Franks, there is no right to interest according to Article 28 § 3 (3) SMGS.

If the railway makes compensation claims against the consignor or recipient under the contract of carriage, the provisions of Article 28 § 3 SMGS on payment and interest are applicable accordingly (Article 28 § 4 SMGS). There are therefore considerable differences in the right to interest. Under the SMGS regime the interest rate is 4% and under the CIM 5%. However, the right to interest under the SMGS arises only if the compensation claim is paid more than 180 days after having been made.

In addition, under the SMGS there is no claim for minor losses.

2.4.18. Complaints, Limitation of Claims

(1) Complaints

(a) According to the CIM

Pursuant to Article 42 § 1 CIM, in case of loss of or damage to the goods, the railway undertaking must draw up a report stating the condition of the goods and the extent of the loss or damage. The report shall be made if possible in the presence of the person entitled to the claim for damage.

Pursuant to Article 42 § 2 CIM, a copy of such report shall be supplied free of charge to the person entitled. If the person entitled does not agree with the findings of the report, the loss or damage may be ascertained either by an expert appointed by both parties or by a court or tribunal.

Pursuant to Article 43 § 1 CIM, claims must be addressed in writing to the relevant railway undertaking. For the establishment of a claim according to Article 43 § 3 CIM, the consignor must produce a duplicate of the consignment note. The same applies in case of a claim of the consignee if the consignment note has been handed over to him (Article 43 § 4 CIM). If the claim is settled, the relevant railway is entitled to require the original of the consignment note.

Pursuant to Article 44 § 1 CIM, claims may be brought against the railway carrier by the consignor until the consignee has either taken possession of the consignment note or accepted the goods.

Pursuant to Article 44 § 2 CIM, the right of the consignee to bring an action against a railway undertaking extinguishes as from the date the consignee has passed on the consignment note to a third person to whom the goods will be delivered, Article 18 § 15 CIM.

According to Article 44 § 13 CIM, an action for the recovery of a sum paid may only be brought by the person who made the payment.

Pursuant to Article 45 § 1 CIM, actions against the carrier may be brought only against the first carrier, the last carrier or the carrier having performed the part of the carriage on which the event giving rise to the claim occurred. An action for the recovery of a sum paid may be only brought against the carrier who collected the sum, Article 45 § 13 CIM.

If the claimant has a choice between several carriers, his right to choose extinguishes as soon as he brings an action against any one of them.

Pursuant to Article 46 § 1 CIM, claims may be exclusively brought before the courts or tribunals of the Member State designated by the parties or before the courts or tribunals of a state on whose territory the defendant has his domicile or principal place of business or the place where the goods were either taken over or should be delivered. Pursuant to Article 46 § 2 CIM, a pending action before any of the courts being competent pursuant to Article 46 § 1 CIM, bars any new action of the same parties on the same grounds.

The right of action lapses if the goods are accepted by the person entitled unless the loss or damage was ascertained before the acceptance of the goods

or if the ascertainment of the loss or damage was omitted through fault of the railway carrier or if the loss or damage was not apparent when accepting the goods. In the case of the latter, the claimant remains only entitled to his right of action if he asks for ascertainment of the loss or damage immediately after detecting it and no later than 7 days after acceptance of the goods, and proves that the loss or damage occurred between the time of taking over and the time of delivery, Article 47 § 2 CIM.

Pursuant to Article 47 § 2 c CIM, the right of action is not extinguished in cases where the transit period has been exceeded, if the person entitled has within 60 days asserted his rights against one of the carriers.

Further the right of action is not excluded despite of the acceptance of the goods, if the person entitled proves that the loss or damage was caused by intent or severe default on the part of the railway carrier.

(b) According to the SMGS

Pursuant to Article 29 § 1 SMGS, consignor and consignee are entitled to establish claims under the contract of carriage.

Pursuant to Article 29 § 2 SMGS, claims have to be made in writing, accompanied by a reasoning and an indication of the amount claimed. The consignor has to file such claims with the dispatching railway undertaking and the consignee with the destination railway undertaking.

Pursuant to Article 29 § 3 SMGS, claims for the reimbursement of costs which have been paid under the contract of carriage can be made by the party who made such payments against the railway undertaking which has collected the relevant amount.

Pursuant to Article 29 § 4 SMGS, claims because of spoilage of goods cannot be pursued if the amount claimed is less than 23 Swiss Franks per consignment note. Claims for private consignment cannot be pursued if the amount claimed is less than 5 Swiss Franks per consignment note. Claims because of delay for delivery cannot be pursued if the amount claimed is less than 5 Swiss Franks per consignment note.

Pursuant to Article 29 § 5 SMGS, if claims are made by an attorney on behalf of the consignor or consignee, a power of attorney has to be produced.

Pursuant to Article 29 § 6 SMGS, the claims have to be presented at the railway authorities listed in the appendix 19 to the SMGS.

Pursuant to Article 29 § 7 SMGS, claims against the railway undertaking can be made

- in case of loss of goods by the consignor or the consignee by production of a duplicate of the consignment note

- in case of partial loss or spoilage of the goods by the consignor or the consignee by production of a duplicate of the consignment note and the protocol of ascertainment provided by the railway undertaking to the consignor

- in case of late delivery by the consignor by the production of the original of the consignment note and an application form for delay of delivery according the form provided in Appendix 20 to the SMGS

- in case of overpaid costs by the consignor by the production of the duplicate of the consignment note and by the consignee by the production of the original of the consignment note

Pursuant to Article 29 § 8 SMGS, the railway carrier has to verify and respond to the claim and pay the amount awarded between a term of 180 days calculated from the date of receipt of the claim

Article 29 § 9 SMGS provides that a set off is permitted if missing mass and excess mass was determined at the same time in different wagons.

Article 29 § 10 SMGS provides that claims shall be addressed to the destination railway undertaking if such undertaking is a member of the SMGS and not a member of other international railway agreements. If the destination railway undertaking is not a member to the SMGS, the claim can be filed with that undertaking if the problems occurred on it. If the verification of the claim by the railway undertaking being a member of the SMGS shows that a railway undertaking is liable for the loss or damage

which is not a member of the SMGS, the claim has to be rejected and claimant informed accordingly. Any documents which have accompanied the claim have to be returned to the claimant.

Pursuant to Article 29 § 11 SMGS, the railway undertaking denying a claim full or in part has to provide the claimant with the reasons for the denial and return any documents provided with the claim.

Pursuant to Article 30, § 1 SMGS, legal proceedings can only be started by the person entitled to raise the claim against the railway undertaking. Legal proceedings can be started only if the claim has been filed beforehand with the railway undertaking in accordance with Article 30§ 1 SMGS.

Pursuant to Article 30 § 2 SMGS, legal proceedings can be started by the claimant only against the railway undertaking against which the claim has been filed and if the railway undertaking has not complied with the 180 days term in which the claim has to be verified and answered.

Pursuant to Article 30 § 3 SMGS, legal proceedings can only be started before the courts of the state of the place of business of the relevant defendant railway undertaking.

(2) Limitation

(a) According to the CIM

The limitation of claims is provided for in Article 48 CIM. According to Article 48 § 1, claims arising out of contracts of carriage are statute-barred in principle after one year. After two years, claims for payment of receipts or proceeds from the sale by the carrier are statute-barred, also in case of deliberate or grossly negligent causation of damage. In addition, claims out of prior contracts of carriage are only statute-barred after two years if, according to Article 23 § 9 SMGS. it is assumed that the damage was caused during these transports.

The limitation periods begin, according to Article 48 § 2 CIM, in the case of total loss thirty days after expiry of the delivery date, in case of partial loss upon the delivery and in all other cases on the day from which the claim can be made.

According to Article 48 § 3 CIM, the running of the limitation period is interrupted by the filing of a written complaint.

According to Article 48 § 4 CIM, the making of statute-barred claims by way of defence or counter claim is explicitly excluded.

In addition, as to the limitation periods according to Article 48 § 5 CIM, national law is decisive.

(b) According to the SMGS

Under the SMGS, the limitation periods are considerably shorter.

For payment of compensation claims these are only nine months (Article 31 § 1 SMGS).

As regards delays in delivery, the shorter limitation periods of two months apply according to Article 31 § 1 SMGS.

The limitation period for compensation claims begins to run on the day of the delivery of the goods or in the case of delay in delivery upon expiry of the thirty-day-period after the arranged delivery day (Article 31 § 2 SMGS).

For payment claims of the railways, the delivery of the goods is also the date of commencement of the limitation period. As regards all other claims, the limitation period begins from the day on which the claimant acquires knowledge of the basis for the claim (Article 31 § 2 SMGS).

The running of the limitation period is interrupted by the submission of a complaint (Article 31 § 3 SMGS). However, the period of limitation starts to run again upon the day the railway undertaking informs the claimant about the denial of the claim, either in total or partially.

It is also explicitly provided that claims which are already statute-barred cannot be made by way of a lawsuit (Article 31 § 4 SMGS).

2.4.19. Accounting and Regress between the Railways

(1) According to the CIM

Pursuant to Article 49 § 1 CIM, any carrier who has or ought to have charges under the contract of carriage must pay to the other carriers concerned their respective shares. The methods of payment are subject to an agreement between the carriers concerned.

Pursuant to Article 50 § 1 CIM, a carrier who has paid compensation pursuant to CIM has a right of recourse against the other carriers who have taken part in the carriage. Thereby, the carrier who has caused the loss or damage shall be solely liable for it.

If the loss or damage has been caused by several carriers, each carrier shall be liable according to its causal contribution to the damage. If it cannot be proved which of the carriers has caused the damage, the compensation shall be apportioned among all carriers who have taken part in the carriage except those who are able to prove that they have not caused the damage. The apportionment shall follow the shares of the carriage charge.

(2) SMGS

The procedure of recourse is mentioned in Article 51 and 52 SMGS. Pursuant to Article 51 § 1 SMGS, a payment made by the carrier exercising the right of recourse cannot be disputed by the carrier against whom the right of recourse is exercised if the compensation has been determined by a court or tribunal and if the latter carrier has been given the possibility to intervene in the proceedings.

A carrier exercising its right of recourse pursuant to Article 51 § 2 SMGS has to enforce such right in one set of proceedings against all other concerned carriers.

Pursuant to Article 51 § 4 SMGS, the courts of the state on the territory of which one of the carriers participating in the carriage has its principal place of business shall be competent for the recourse claim. If the action must be brought against several carriers, the claiming carrier is entitled to choose the court having competence in accordance with Article 51 § 4 SMGS (Article 51 § 5 SMGS).

Pursuant Article 51 § 6 SMGS, recourse proceedings cannot be proceedings for compensation.

Pursuant to Article 52 SMGS, the recourse claim can be excluded or amended by the participating railway carriers.

2.4.20. General Provisions

(1) According to the CIM

Pursuant to Article 1 § 1 to § 2 CIM, the CIM shall apply to every contract of carriage of goods by rail if the place of taking over the goods and the place designated for delivery are situated in two different member states or, if at least one of these states is a member state and the parties to the contract of carriage submit the contract of carriage to the CIM.

Pursuant to Article 1 § 3 CIM, the CIM shall also be applicable if international carriage includes not only railway but also carriage by road or inland waterways in internal traffic of a member state.

Pursuant to Article 1 § 4 CIM, where international carriage being the subject of a single contract of carriage includes carriage by sea or transfrontier carriage by inland waterway as a supplement to carriage by rail, the CIM shall apply if the carriage by sea or inland waterway is performed on services included in the list of services provided for in Article 24 § 1 CIM.

Pursuant to Article 1 § 5 CIM, CIM shall not apply to carriage performed between stations situated on the territory of neighbouring states, if the infrastructure of these stations is managed by one or more infrastructure managers subject to only one of those states.

Pursuant to Article 1 § 6 CIM, any state which is party to a convention concerning international through-carriage of goods by rail comparable with these Uniform Rules may, when it makes an application for accession to the CIM, declare that it will apply the CIM only to carriage performed on part of the railway infrastructure situated on its territory. This part of the railway infrastructure must be precisely defined and connected to the railway infrastructure of a Member State. When a state has made the above-mentioned declaration, these Uniform Rules shall apply only on the condition - that the place of taking over of the goods or the place designated for delivery, as well as the route designated in the contract of carriage, is situated on the specified infrastructure, or

- that the specified infrastructure connects the infrastructure of two Member States and that it has been designated in the contract of carriage as a route for transit carriage.

Pursuant to Article 1 § 7 CIM, a state which has made a reservation in accordance with Article 1 § 6 CIM may withdraw it at any time by notification to the Depositary. This withdrawal shall take effect one month after the day on which the Depositary notifies it to the Member States. The declaration shall cease to have effect when the convention referred to in § 6, first sentence, ceases to be in force for that state.

(2) According to the SMGS

Pursuant to Article 2 § 1 SMGS, the SMGS is applicable to the transport of goods in international railway traffic between the railway stations mentioned in Article 3 § 2 SMGS, if the transports are made on the basis of SMGS consignment notes and exclusively on infrastructures of railways that are members of the SMGS.

Pursuant to Article 2 § 2 SMGS, the transport of goods from states the railways of which subscribe to the SMGS, in transit through states the railways of which also subscribe to the SMGS, to states the railways of which do not subscribe to the SMGS and in the opposite direction - insofar as no other convention on direct international rail transport of goods applies – is conducted in accordance with the provisions of the transit tariff applicable to the relevant international transport of the interested railways.

The acceptance of new members is dealt with in Article 40 SMGS. However, reference is simply made to the statutes of the OSJD and the procedure provided for by the committee of the OSJD.

With reference to the opening of the OSJD territory for new independent railways, it is to be noted that signatories to the convention are exclusively the transport ministries of the participating states, which act as representatives of their railways in each case. The participation of non-state or "foreign" railways is evidently not anticipated at all in the SMGS system. The OSJD has meanwhile made other provision in its statutes and facilitated the entry of other members.

2.5. Interim Conclusion

Both conventions reveal very similar structures. Many provisions in their nature leave no room for fundamental differences.

2.5.1. Regulations which Display the Greatest Correspondence

In some areas of the conventions to be compared, there is already the most concordance, so that there is either from the outset no potential for conflict or at least no urgent need for harmonisation.

These are the areas dealing with objects which are admitted to or excluded from transport. This is logical for practical reasons.

The same applies to the presumption or responsibility of the consignor in the event of improper or defective packaging or marking and to the liability for incorrect entries in the consignment note.

The liability of railways and the limitations of liability which are, in principle, identical, do not present any conflict between the OTIF and the OSJD.

The creation of a common CIM/SMGS consignment note and its recognition as a common customs document have led to a considerable simplification of international carriage of goods by rail. While there is no comprehensive harmonisation so far, the present solution is practical and relieves the urgent need for harmonisation.

2.5.2. Areas Where Regulations Differ but Without Particular Potential for Conflict

In some areas, the conventions differ but these differences do not generate any particular potential for conflict because they are so small or because other regulations are provided by related regulations such as the general conditions of transport, or can be so provided.

E.g. in the issue of goods excluded from transportation or just admissible under special conditions (Article 9 CIM; Article 4 to 6 SMGS) the CIM and the SMGS do not fundamentally differ, but only with regard to density of regulation for the treatment of certain goods. The CIM refers to the RID, while the SMGS contains its own rules.

For the acceptance of goods for the transport the CIM does not provide for any provisions. In contrast the SMGS defines the kinds of consignments in

Article 8 § 1 SMGS as wagon loads, package freight, container and container consignment. However, these classifications are also applied under the CIM contracts.

While both conventions display a different but overlapping group of participants, this does not at present give rise to conflict potential.

The regulations of the SMGS on the acceptance of goods, the transport itself and on charging of costs and additions are not reflected in the CIM. These areas are left to contractual arrangements or the general conditions of transport in the OTIF territory.

Relevant fundamental differences with conflict potential cannot be identified here.

The parts of both conventions on accounting between the railways have no special conflict potential. Differences arise mainly in relation to the mediation in any conflicts between the railways. While the SMGS prescribes mediation by a committee of the OSJD, the CIM does not provide for out-of-court mediation. Nevertheless, this is, of course, possible so that in practical application, no especially relevant differences in this respect are revealed.

2.5.3. Areas Where Harmonisation is Required

In spite of the wide agreement between the conventions, the areas covered and the objectives, there are some areas in which the differences are so fundamental that conflicts could arise and harmonisation is therefore desirable.

The formation of the contract of carriage is fundamentally differently treated after the CIM reform of 1999.

The legal structure of the contract of carriage is, according to the CIM, a consensual agreement while under the SMGS an executed contract is formed. It follows that the railways are free under the CIM as to whether and with whom and on what conditions freight transport and the associated services are agreed. The SMGS lays down an obligation to transport.

Although the CIM reform of 1999 did not contribute to harmonisation of the two systems, a wider view indicates that the executed contract is an obstacle to the privatisation of railways and the development of competition. Harmonisation therefore will logically be in the direction of the consensual agreement.

A further area in the regulations which differs between the two systems is the fundamental obligation to bear costs arising out of the contract of carriage. While the CIM, in Article 10, clearly provides that the consignor is, in principle, liable for the costs, this obligation is not clearly set out in the SMGS. The recipient bears the costs, in case of doubt, incurred on the route of the recipient railway.

There is a need for harmonisation in this area in order to establish clarity as to the liability for costs on the various stages of the route.

A considerable difference with conflict potential is also evident in the differing delivery periods, in particular for the various transport categories.

For the transport of wagon loads as freight, according to the SMGS, the delivery periods are double those under the CIM, while the transport of wagon loads as express goods does not exist as a category in the CIM, but is just as long under the SMGS as normal freight transport under the CIM.

The transport of packaged freight as freight is 25% quicker under the CIM, while under the SMGS as express goods it is more than twice as quick as normal packaged freight under the CIM.¹⁰⁷

Harmonisation and uniformity of these categories would be desirable on practical grounds.

Another area with conflict potential is that of the legal conditions for complaints.

Under the CIM, complaints under the contract of carriage are always to be made to the carrier against which court claims can be filed. Under the SMGS,

¹⁰⁷ Regarding the regulated maximum transit periods in Article 17 CIM and Article 14 SMGS.

on the contrary, complaints are, in principle, to be directed to the dispatching railway.

These differences provide considerable potential for conflict in the international carriage of goods by rail in particular in connection with the relatively short and differing limitation periods provided.

The limitation periods under the CIM are, in principle, one year, two years in certain cases (Article 48 CIM). In the SMGS, payment and compensation claims are statute-barred after nine months and claims for delay after even three months (Article 31 SMGS).

Finally, there are fundamental differences on the question of the admissibility of amendments to the contract of carriage.

While amendments under the CIM are subject, in principle, to the intentions of the parties, the possibilities of amending the contract of carriage are limited under the SMGS. Consignor and recipient can each amend the contract only once. Furthermore, no later division of the consignment is permitted.

There are, therefore, considerable restrictions on contractual freedom under the SMGS. Adjustment to the demands of the market economy should lead to harmonisation in this respect, and the scope for such changes should be left to the parties.

3. Interaction of SMPS and SMGS with Directive 91/440 EC

The legal subject of the Directive 91/440 has no direct impact on the provisions of the SMGS and the SMPS. The latter concern the rights and obligations between the railway undertakings and the relevant customer.¹⁰⁸ On the other hand, the Directive 91/440 concerns the opening of the market and the independence of the railway undertakings from the state. The Directive 91/440 provides in this meaning measures to be taken by the relevant Member States. Therefore, there is no restriction of the commercial freedom of the railway undertakings by the SMPS and SMGS. Further the railway undertakings are free to leave the SMPS and SMGS

¹⁰⁸ See D III, 2 (SMPS) and 3 (SMGS)

In a broader sense, one could see a restriction of commercial freedom by the SMPS/SMGS insofar as the SMPS/SMGS provides for an obligation of the railway signatories of the SMPS to transport (Article 3, § 1 of the SMPS and Article 3, § 1 of the SMGS). According to the concept of the Directive 91/440 the railway undertakings shall have commercial freedom in order to act on an economic basis on the market. An obligation to transport by railway undertakings shall only exist, pursuant to Art. 5 ss. 3 indent 3 of the Directive 91/440, subject to provisions of the Regulation 1091/69.

Further, as both documents, SMGS and SMPS, are agreements concluded between the relevant railway undertakings and not by the states, the SMGS and SMPS cannot be deemed international treaties. They have to be classified as private international agreements and are therefore inferior to the EC Treaty and secondary EC Law.

4. The Fixing of Tariffs

4.1. Applicable Regulations

4.1.1. In the Territory of the EU

There is no EC legislation which fixes tariffs for railway transport in the territory of the EU. EC law provides that price fixings are not permitted.¹⁰⁹ Further, the OTIF does not make any binding provisions on the fixing and application of tariffs. This is based on the fact that after the cancellation of the transport obligation with the reform of the COTIF 1999, there was no further necessity for this.

However, for the areas of passenger transport, there seems to exist a "common standard tariff" for the international transport of passengers, cited as "TCV"¹¹⁰ which is discussed at the level of the International Rail Transport Committee (CIT).¹¹¹ The members of the CIT are the respective railway undertakings of various states. This tariff scheme is used by the relevant railway undertakings as a basis for general terms and conditions for the international transport of passengers.

¹⁰⁹ See Details in Section E, VII, 3.4 of this Report

¹¹⁰ Abbreviation for Tarif commun international pour le transport des voyageurs.

¹¹¹ Abbreviation for Union Internationale des Chemins de Fer

It could meet with reservations from the viewpoint of EC antitrust law as regards the standard tariff, if the TCV provides for a fixing of tariffs between the various members of the CIT who could be potential competitors after opening of the railway transport market since Article 3 lit g) of the Regulation 1017/68 does not permit price fixings between railway undertakings (with exception of sole and pure technical agreements).¹¹²

In the area of transport of goods by rail, no international regulations have been ascertained. This kind of transport therefore is a matter for regulation by the parties.

4.1.2. In the Territory of the OSJD

In the area of the OSJD, there is a total of three tariff agreements: The “International Railway Tariff (MTT)”, the “Uniform Transit Tariff (ETT)” and “Agreement on the Transport of Persons and Luggage by Rail in international direct transport (MPT)”.¹¹³ The agreements MTT and ETT are both applied to the transport of goods by rail. The MPT is the tariff agreement for the transport of passengers by rail.

4.2. Scope of Application of the OSJD Tariffs

In order to demarcate the application of the two agreements on goods transport, MTT and ETT, in the area of the OSJD, the location of the freight must first be depended on (in which direction the transport will take place), and then the relevant routes. In the agreements, there is a section in each case (MTT: Sect. VI, ETT: Sect. IIX) which specifies the routes on which the agreement is applicable.

The MTT generally applies to longer routes. A reducing increase of the transport charge takes place (§ 1 No. 9 of the MTT agreement). The ETT, on the other hand, is applied to shorter routes, mainly in international transport of goods by rail between Russia and the CIS. In this case, the increase in the transport charge is linear.

¹¹² See in detail E VII, 3.4

¹¹³ Abbreviation used by the OSJD; the abbreviation MPS also appears but is also used for the Russian ministry of transportation.

4.2.1. Area of Application of the International Railway Transit Tariff (MTT)

Participants in the MTT are the railway routes of the Byelorussian railway, “Georgian railway routes” GmbH, the Kazakh railway routes, Latvian railway routes, Lithuanian railway routes AG, Moldavian railway routes, Mongolian railway routes, Azerbaijani state railway routes, the railway of the Russian Federation, Tajik railway routes, Uzbek railway routes, Ukrainian railway routes, Czech railway routes AG, Estonian railway routes.

The International Railway Transit Tariff (MTT) applies to the transport of goods in transit on the railways of participants under existing tariffs of the SMGS, the CIM, the conditions for agreements on international transport of goods by rail (VIE), the uniform legal provisions for the contract on the international transport of goods by rail (CIM) or another international transport law. Nevertheless, the tariff does not apply to the transport of transit goods through Vietnam, China, North Korea, or Mongolia, which are simultaneously members of the ETT (§ 1.1 MTT).

Pursuant to § 1.2 MTT, the tariff also applies to the carriage of goods via seaports of the railway stations which are participants of the MTT. However, the MTT only applies to the carriage of goods via border stations and seaport stations in the directions mentioned in part VI, section 1 (§ 1.3 MTT).

The MTT applies according to § 1.4 regardless of the entry made in the consignment note by the consignor.

Therefore,¹¹⁴ in the case of a transport of goods between Germany and Russia through Poland, Byelorussia and the Ukraine, the MTT may possibly apply. For a transport between Poland and China through Byelorussia the Ukraine and Russia, the MTT does not apply, because these railways through China are joined by the ETT and the SMGS. Between Poland and Mongolia, in case of transit traffic through Byelorussia and the Ukraine, the MTT only applies if large containers are transported.

¹¹⁴ Examples taken from Zolcinski „Der Reformierte internationale Eisenbahn-Transittarif (MTT)“, Journal of the OSShD, p. 12.

The area of application is, according to § 1 No. 2 MTT, now applicable to the transport of freight at re-loading stations in the course of arriving and departing traffic.

The special conditions in transit traffic through harbours according to § 1 No. 5 MTT have been repealed in the course of the reform, because these special conditions “in fact constitute a restriction of free contractual agreement and international economic relations”.¹¹⁵

4.2.2. Application of the Uniform Transit Tariff (ETT)

The uniform transit tariff (ETT) applies to the transport of goods in transit on routes of the participating railways, between ETT railways and railways which participate in the SMGS or which apply the SMGS or the CIM and also between ETT railways and other railways which do not participate or apply in the SMGS.

The ETT provides for the procedure for dealing with goods transport, the additional charges and their calculation and the transit distances stating the direction. In addition, the ETT contains a list of goods and regulations for the classification of goods and a freight indicator.¹¹⁶

The ETT in Article 2.1 also expressly states its subsidiarity to the law of the participating railways with other railways.¹¹⁷

4.2.3. Scope of Application of the Agreement on International Public Transport Tariffs (MPT)

The “Agreement on International Public Transport Tariffs (the MPT agreement)” was concluded by the railway companies in Belarus, Vietnam, Kazakhstan, China, North Korea, Kyrgyzstan, Latvia, Lithuania, Mongolia,

¹¹⁵ Zygmunt Zolcinski „Der reformierte Internationale Eisenbahn-Transittarif (MTT)“, Journal of the OSSHd, p. 12.

¹¹⁶ Sapundshijew „Einheitlicher Transittarif und einige Fragen seiner Anwendung“, Journal of the OSSHd, p. 1.

¹¹⁷ Sapundshijew „Einheitlicher Transittarif und einige Fragen seiner Anwendung“, Journal of the OSSHd, p. 1.

Russia, Tajikistan, Turkmenistan, Uzbekistan, Ukraine and Estonia for the purpose of organising passenger transport in international direct traffic.

The MPT tariff has, according to Article 1, No.1 MPT, independent legal character and should be aligned with the MPT agreement.

According to Article 1, No. 2 of the MPT agreement, the arrangement applies to the transport of passengers, luggage and goods in the international railway traffic.

Pursuant to Article 1, No. 3, the MPT does not intend to exclude the possibility of granting discounts, even in case of the application of the MPT.

Pursuant to Article 1.4 of the Contract to the MPT, the interests of the railway undertakings are represented by the central bodies of the consigning railway undertakings.

4.3. Topics of Regulation

4.3.1. The Contract on International Railway Tariffs

(1) General

The contract on the MTT consists of only four articles. Article 1 is headed “international railway tariffs” and provides for the entry into force and the amendment of the MTT.

According to Article 1.7, the members of the MTT, if they are also members of other tariffs, can apply these if they are not in conflict with the MTT.

Unanimity is required to change the tariffs according to Article 1.8 of the MTT.

In Article 1.9 of the MTT it is clear that the MTT is directed at application to long distance routes. For distances over 1000 km, it is prescribed that the reduction granted must be higher than that for distances of up to 1000 km. The reference points for the reduction are connections of 1000 km.

The exact amount of the reduction is to be fixed by the railways which have railway routes of 1000 km.

Article 1.10 to 1.12 of the MTT specify the amendment procedure for the MTT.

No. 10 refers to the amendment procedure in general, No. 11 to dealing with proposed changes, No. 12 paragraph 1 to proposals with no effect on tariffs and No. 12 paragraph 2 to the amendment of the level of tariff for small wagons and contrailer transport. The tariffs for small wagons and contrailer transport can in each case only be implemented on 1 January of the following year.

(2) Organs of the MTT

Article 2 of the MTT stipulates for its organs. According to Article 2.1 MTT, the committee of the OSJD is the leading organ of the MTT, a function

which, however, can, in accordance with the general procedure for amending the MTT, be assigned to a member state on application.

The tasks of the leading organ are, apart from the preparation of the calling of the committee meetings, representation vis-à-vis third parties and the answering of enquiries regarding the MTT.

The working language of the leading organ is Russian.

(3) The Committee of Representatives

The organ of the member states of the MTT is the committee of representatives provided for in Article 3 MTT.

Ordinary meetings take place once yearly. The location of the meetings changes in rotation according to the alphabetical order of the member states.¹¹⁸

The responsible member in each case is the chairman and secretary (Article 2.2 to MTT).

The Committee of Representatives has a quorum according to § 3 point 5 of the MTT, if 2/3 of the members are present. Each member has one vote. The members can, however, authorize another member in writing to represent them. This is to be notified 20 days prior to the meeting.

In preparation for the Committee meetings, experts may be engaged (Article 3, point 17 MTT).

The resolutions are, in principle, to be passed unanimously. The working language of the Committee of Representatives, which is also binding for working documents, is Russian.

(4) Concluding Provisions

Article 4 of the MTT contains the concluding provisions. Under point 1 Article 4 of the MTT, the possibility of accession for other railways is provided. A written application to the leading organ is to be made. The

¹¹⁸ by the Russian alphabet.

accession is dealt with as an amendment and in accordance with the amendment procedure as provided in Article 1 point 10 of the MTT.

Accordingly, accession is deemed to be effective upon amendment of the agreement.

According to Article 4.3 of the MTT, the agreement is terminated by notification to the leading organ. The termination is effective as of 1 January of the following year in each case. The notice period is three months, the receipt of the notice of termination by the leading organ being crucial.

4.3.2. The International Railway Transit Term (MTT)

The International Railway Transit Tariff (MTT) was fundamentally revised in 1995 in order to take better account of the various competing means of transport, and to improve the transport of goods by rail and its economic sustainability.¹¹⁹

Above all, special provisions for individual states, for example the provisions on the area of application in § 5 – 9 MTT, and questions of piggyback traffic, were added to the relevant sections.¹²⁰

The Russian abbreviation MTT is used to refer to this agreement in all languages.

(1) Members

The members of the MTT are the railways of Byelorussia, Georgia, Kazakhstan, Kyrgyz, Latvia, Lithuania, Moldavia, Mongolia, Azerbaijan, Russia, Tadzhikistan, Uzbekistan, Ukraine, the Czech Republic and Estonia.

¹¹⁹ Zygmunt Zolcinski „Der reformierte Internationale Eisenbahn-Transittarif (MTT)“, Journal of the OSShD, p. 12.

¹²⁰ Special regulation for the further road transport via Georgia, Tadzhikistan, AzerbAidshan or Uzbekistan.

(2) Language of the Tariff

According to § 3 MTT the official language of the tariff is Russian. However, the tariff is published in each Member State in the official national language (§ 3.1 MTT).

Pursuant to § 3.2 MTT, in the case of discrepancies, the specification is made by the Russian language.

(3) Currency of the Tariff

The currency of the tariff is Swiss Francs (§ 4.1 MTT).

The fees and transport charges provided in the MTT and stated in Swiss Francs, are collected in accordance with the procedure applicable in each state (§ 4.2 MTT).

Pursuant to § 4.3 MTT, the charges and fares not laid down in the MTT are to be calculated in accordance with the internal provisions and tariffs of the relevant state and stated in the transport documents in CHF, if this is required by the provisions of the applicable international transport laws.

(4) Calculation of the Transport Charges

The general rules for calculation of the transport charges are found in Sect II §§ 5-9 MTT.

The ascertainment of the charges is carried out on the basis of the denomination of the goods, the tariff route, the mean of transportation, the speed of the transportation, the weight of the carriage, the category of the container and other conditions designated in the tariff (§ 5 MTT).

The description of the goods (§ 6 MTT) has to be in accordance with the separately issued harmonized goods descriptions. In the dispatch note, the descriptions and codes are to be stated accordingly.

With regard to the specification of the route, § 7 MTT, the transport charge is imposed individually for each railway for the distances stated in part VI.

The nature of the transport, § 8 MTT, is initially distinguished according to the type of wagon, small items, container and piggyback traffic. Whether the transport is to be at normal or higher speed is also specified.

Transports accepted on the basis of a single dispatch note are deemed to be one transport, § 8.1 MTT.

The MTT distinguishes between carriage per wagon, smaller items, containers or contrailers (§ 8.1.1 MTT) and carriage with low or high speed (§ 8.1.2 MTT).

If it is not possible to ascertain on the basis of the declarations made in the consignment whether the respective carriage is a carriage of smaller items or a wagon loading, but the carriage is accomplished in a single wagon, the carriage is calculated as a wagon loading (§ 8.2 MTT).

Unless otherwise stated in the MTT, the weight of the transport, according to § 9.1 MTT, consists of the weight of the goods, the weight of the packaging and, in the cases specified in §§ 26 and 27 MTT, the weight of the transport equipment.

Pursuant to § 9.2 MTT, the weight on which the calculation of the tariff for small items is based, is rounded up to full 100 kg. Incomplete 100 kg count as complete units.

Pursuant to § 9.3 MTT, the weight on which the calculation of the tariff for wagon loadings is based, is rounded up to full tons, while 500 kg and more are rounded up to a full ton and incomplete 500 kg are not taken into consideration.

According to § 9.4, for the calculation of additional costs the actual weight of the carriage is rounded up to full 100 kg. Incomplete 100 kg count as complete units.

According to § 10 MTT, the fare is finally rounded up to full Swiss centime, while half centimes are rounded up and less than half centimes are rounded down.

§ 26 MTT at No. 2 provides that no charge be made for the transport of tarpaulin covers stated separately according to weight in the dispatch note. The same applies in § 26 No. 3 MTT to loading equipment, although its weight may be a maximum of 10% of the entire freight. The weight above 10% is added to the volume of freight.

According to § 26 No. 4, the full freight for goods and transport equipment is payable if the volume of the transport equipment is not shown separately.

The transport of private means of transport without freight takes place according to the general provisions, § 26 No. 5 MTT.

§ 26 applies mutatis mutandis according to § 27 MTT to means of protection from heat and cold.

In the case of piggyback transport, the weight of the car train, the removable load space or the trailer is to be added according to § 9 No. 1 MTT.

(5) Charging for the Transport

Unless otherwise provided in the MTT, transport charges calculated in accordance with this tariff and tariffs according to § 11 MTT, are payable by the consignor at the original railway station or by the recipient at the destination, in accordance with the provisions of the applicable international transport law.

Payment by carrier organizations which have an agreement with the relevant railway is also possible. In that case, a note on each of the transit railway routes payable, describing the carrier organization and the code allotted to the payer, must be shown on the dispatch note.

(a) Charges for High Speed Transport

For the calculation of charges for high speed transport, the charge for transport at lesser speed is increased by 50%.

For the calculation of transport charges at the speed intended for passenger traffic (wagon transport, large container or piggyback transport on passenger trains), the charge for transport at lesser speed is increased by 100%.

(b) Calculation of the Transport Charge for Transport at Lower Speed

(aa) Wagon Transport

The calculation of the transport charge takes place according to § 14 MTT for each transit railway route separately by the multiplying of the tariff rate for the relevant weight category (minimum 5 tons) determined in accordance with part VI Sect. II, by the number of tons of weight of the goods:

Weight of wagon transport	weight category
up to 8 tons	5 tons
from 9 to 12 tons	10 tons
from 13 to 16 tons	15 tons
from 17 to 23 tons	20 tons
from 24 tons and over	25 tons

Provisions as to how the weight category is determined, if at a reloading station reloading takes place from one wagon of one gauge to several wagons of another gauge or several wagons to one wagon, follow.

(bb) Transport in HABBINS-Wagons

In § 13 No. 2, the section on the calculation of the tariff for transport in HABBINS-Wagons was inserted. HABBINS is a covered large-space sliding wall wagon with four axles without a separate compartment system. The doors can be moved by one person and loading with a forklift is possible. The HABBINS is regarded as the sliding door wagon with the largest loading capacity on the market.

According to § 13 ss. 1, a surcharge of 65% is chargeable when reloading from one HABBINS wagon into two conventional wagons takes place.

On reloading of two conventional wagons to one HABBINS wagon, the freight for each wagon is charged separately.

(cc) Small Transport

The transport charges for small transports are calculated according to § 14 MTT separately for each transit railway route, by multiplying the tariff rate for small transports stated in part VI, s. II, by the number of 100 kg.

$$\text{tariff rate} \times \text{number of 100 kg} = \text{transport charge}$$

If the transport charge which would be applicable for wagon transport is less, the lesser charge applies.

(c) Special Tariffs Regulations

(aa) Large Dimension Goods

The transport charge for large dimension goods is calculated according to § 16 MTT in accordance with the general rules for wagon transport and then increased by up to 100% depending on the degree of excess dimensions. The actual percentage rate will be determined for each transit railway route under the agreement on the conditions of transport. In the same procedure, the additional charge for excess weight will be determined.

If the transport is not by the shortest route, but in agreement with the consignor over a diversion, which is stated in the dispatch note, the transport charge will be calculated for the actual route travelled.

These provisions do not apply to the transport of empty wagons of 1520 mm gauge which do not belong to the railway.

(bb) Goods of Excess Length

The transport charge for goods of excess length with a dispatch note, and which are transported on two or more wagons, is charged separately for each wagon according to § 17 MTT under the general rules for wagon transport, the total weight being equally divided over all wagons.

If the goods are loaded onto two flat wagons which constitute a fixed connected unit and have a number, only one transport charge for one wagon will be calculated.

(cc) Dangerous Goods

For the dangerous goods specified in the tariff, the transport charge according to § 18 MTT will be calculated according to the general tariff rules and increased by up to 100%. The exact percentage rate of the increase will be determined by each transit railway.

(dd) Private Wagons

The transport charge for wagons which do not belong to the railway (private wagons) or leased from the railway, is set according to § 22 MTT ss. 1 at the normal transport charge less a reduction of 15% for the use of private wagons.

According to § 22 ss. 2, sentence 2 MTT, this provision does not apply on the territory of Czech railways.

(d) Transport Regulations for Containers

The calculation of the transport charge for containers is set in accordance with § 34 MTT table III of part VI of § II of the MTT, in accordance with which the transport charge is calculated separately for each container.

(e) Transport Regulations for Piggyback Transport

Transport charges for loaded or car trains, car loading capacity which may be removed and flat semi-trailers by which container freight is transported, is calculated according to § 37 MTT irrespective of the degree of excess volume accordance with the rules of the tariff for wagon transport, at least one weight category of 10 tons being used a basis.

If car trains, removable car loading capacity and flat semi-trailers are unloaded, the transport charge depends on the rules of part II of the tariff.

(6) Transport Procedure

Railways which are members of the tariff propose conditions for the transport of goods with a new version of the dispatch note between the states in which two systems apply and which actually also apply these systems.

The conversion/passing of the transport documents by a transit railway which applies both legal systems of international transport law, creates a direct connection and mutual dependence between two transport documents, which gives this transport the appearance of a continuous transport under application of a uniform dispatch note.

It is, however, to be taken into account here that the proposed new version of the consignment note, which means a re-consignment, is meanwhile no longer necessary.

The cooperation between the CIT and the OSJD created the possibility for the consignor to select a uniform SMGS/CIM consignment note. If the goods are transported with this consignment note, re-consignment no longer takes place and re-writing the data is no longer necessary, thus leading to savings of time and errors.

(a) Transport East/West

Transport from east to west is dealt with under the provisions of § 40 MTT.

(aa) Transport to the First Boarder Station

In the case of transport of transit traffic on Polish, Slovakian, Lithuanian and now also Bulgarian railways in transit through Rumanian railway routes, goods transport is dealt with in accordance with § 41 MTT up to the first border station under the transport documents of the SMGS.

(bb) Transport from the First Boarder Station

At the first border station, the processing for dispatch to the country of destination takes place.

The first border station transports the goods to the final destination station with the use of the CIM consignment note, all data being transferred to the CIM consignment note from the SMGS dispatch note, which will be attached to the CIM consignment note, which will bear a corresponding reference.

At the request of the consignor entered in the SMGS dispatch note, the processing station sends him the original CIM consignment note according to § 40 No. 7 MTT.

The charge for the transport on the basis of the SMGS dispatch note will be imposed on the consignor at the originating railway station. The charge for the transport on the basis of the CIM consignment note will be imposed on the recipient at the destination station (§ 48 MTT).

Payment of the charge and fees by a carrier organisation is also admissible according to § 49 MTT.

(b) Transport West to East

§ 41 MTT deals with the provisions on transport from west to east. The transport by transit on Polish, Slovakian, Lithuanian and now also Bulgarian railway routes via Rumanian railway routes from states which apply the CIM into states which apply the SMGS, takes place according to the provisions of § 40 MTT, the entries in the CIM consignment note being taking over into the SMGS dispatch note by the railway of the first border station.

At the request of the consignor, the processing station sends him the original SMGS dispatch note according to § 41 No. 8 MTT.

The transport charge on the basis of the CIM dispatch note will be imposed on the consignor at the original station. The transport charge on the basis of the SMGS despatch note will be imposed on the recipient at the destination station (§ 41 No. 9 MTT).

The payment of the charges and fees by a carrier organisation under the conditions described in (a) is also admissible.

4.3.3. Uniform Transit Tariff (ETT)

The Members of the ETT are the railways of Byelorussia, Bulgaria, Vietnam, Kazakhstan, China, North Korea, Kyrgyz, Lithuania, Moldavia, Russia, Tadzhikistan, Uzbekistan, the Ukraine and Estonia, § 1 ETT.

The uniform transit tariff ETT of the OSJD is applied by the Member States to the carriage of goods on transit traffic between states applying the ETT and states applying the ETT on the one hand, and states not applying the ETT on the other hand. The carriage has to be conducted either under the SMGS or the CIM (§ 1,ss. 2 ETT), if the goods are forwarded via border or seaport station or reloading stations to road transport in the directions mentioned in section VIII of the ETT.

The ETT as an international agreement is binding for the relevant signatory railways. Previously it was an integral part of the SMGS.¹²¹

(1) Calculation of Freight

The calculation of freight in transit transport of goods on the territory of railways which are members of the SMGS takes place on the basis of tables of tariff distances (Sect. IX ETT), according to which the tariff distances of the transport are specified on the transit railway from entry border post to exit border post or the relevant harbour, by means of the harmonised goods terminology (Sect. VIII ETT) in which the tariff class of the goods to be transported is specified and by means of the calculation table of freight charges for the goods transport (§ 3 ETT).¹²²

The freight is calculated by multiplying of the tariff rate per each 100 kilos and the number of 100 kilometres with a surcharge of 100% or 200% for rush or express goods respectively. In the case of wagon loads, a standard of 20 tons or 30 tons is used as a basis in the second class as minimum. In the case of unit goods, the actual weight is rounded up to a full 100 kilos and increased by 50%. Charging is in Swiss Francs.

¹²¹ Sapundshijew „Einheitlicher Transittarif und einige Fragen seiner Anwendung“, Journal of the OSSH, p. 1.

¹²² Sapundshijew „Einheitlicher Transittarif und einige Fragen seiner Anwendung“, Journal of the OSSH, p. 1.

In practice, the tariffs may be applied differently on the railways.¹²³

(2) Issue of the Transport Documents

(a) Issue of the Transport Documents for Transport between ETT- and/or SMGS-Estates

For goods transport between

- the states whose railways participate in ETT, or
- states the railway of which participate in the ETT and those whose railways participate in the SMGS or apply its provisions,

transport documents for the whole route will be issued according to the SMGS (The transport is processed under the SMGS).

(b) Issue of Transport Documents in Transport between ETT-States and Non-SMGS-States

(aa) Transports of Goods in States in Which the SMGS is not Applied

Processing of transport from the ETT area into the area in which the SMGS does not apply (through Poland, Romania, Slovakia):

- up to the Polish, Romanian or Slovakian border post, the processing takes place according to the SMGS, the transport documents will be issued according to the SMGS
- at the border post of entry, all data in the SMGS accompanying documents will be transferred by the entry border station in its responsibility into the newly issue transport documents which apply to the subsequent transports
- the entry border station sends on the goods as authorized consignor and in its responsibility to the destination station on the basis of the

¹²³ Sapundshijew „Einheitlicher Transittarif und einige Fragen seiner Anwendung“, Journal of the OSSHd, p. 2.

transport documents which apply to the subsequent transport (CIM-transport documents).

(bb) Transport of Goods from States in Which the SMGS is not Applied

Processing of transport from the territory in which the SMGS does not apply in the ETT area (through Poland, Romania, Slovakia):

- up to the exit border station from Poland, Romania or Slovakia, processing is by documents of the CIM, in which the consignor marks the exit border station as the station of departure and the station master as recipient, and the actual recipient of the goods at the destination.
- on basis of this data, the exit border station transports the goods as authorized representative consignor and in *its* responsibility on the basis of the SMGS dispatch note to the final destination.

Goods transport to/from Romania from/to states the railways of which do not participate in the SMGS takes place analogously to the above-described goods transport.

4.3.4. The Agreement on the International Public Transport Tariffs (MPT Agreement)

(1) General

The agreement on the international passenger transport tariffs (MPT agreement) governs the cornerstones of organisations and processes of the MPT agreement.

The international public railway transport tariff forms an inseparable part of the MPT agreement (Article 1, No. 1 of the MPT agreement).

According to Article 1, No. 2 of the MPT agreement, the arrangement is of a binding nature for the contractual partners with regard to passengers, luggage and goods in the international railway traffic.

However, according to Article 2 MPT agreement, the agreement shall neither obstruct the contracting railway companies, relations to other railway undertakings, which are not participating in the MPT (Article 2, No. 1 MPT)

nor shall it obstruct the railway undertakings from concluding bilateral or multilateral agreements, the pricing for which is realised in compliance with the MPT agreement.

Determination of the tariff is realised in Swiss Francs, which is the key currency according to Article 3, No. 1 of the agreement on MPT agreement.

In order to inform passengers and carriers appropriately, pursuant to Article 3 No. 2 the tariff is fixed according to the regulations applicable in the respective Member States of the participating railway undertakings.

The accounting in relation to the MPT is effected according to the accounting rules applicable to the international carriage of passengers and goods by railway or on the grounds of particular bi- or multilateral agreements (Article 3, No. 3 MPT).

The management and monitoring of the administration is the responsibility of the Committee of the OSJD (Article 8, No. 1 of the MPT agreement). According to Article 8, No. 2 of the MPT agreement, the languages of instruction are Russian and Chinese. The agreement is concluded for an unlimited period of time (Article 8 No. 3 MPT agreement). The languages of the agreement are also Russian and Chinese, while the Russian version is binding in case of divergences (Article 8 No. 4 MPT agreement).

Changes to the MPT agreement have to be published according to Article 5 MPT agreement according to the internal rules of the participating railway undertakings at the latest 15 days before coming into force.

The tables and distances can be changed at most two times a year with the summer and the winter timetable. Proposals have to be handed in to the OSJD Committee (Article 6 MPT agreement).

Each railway undertaking has the right according to Article 6, No 2 to fix independently a level of tariffs for the carriage of passengers, luggage, goods and the fare for tickets providing the right to a seat and sleeping cars.

(2) Interpretation of and Amendments to the MPT Agreement

The representatives of the contracting railway partners shall decide on any matters in dispute arising from the application of the MPT agreement as well as on amendments and supplements (Article 4, No. 1 of the MPT agreement).

The summoning of such assembly shall take place according to Article 4 No. 1 of the agreement on the MPT agreement upon request by the railway companies or the OSJD Committee. The MPT agreement stipulates no quorum for such summoning, but states that the meeting has a quorum if two thirds of the participants are present and in possession of a written authorisation of their railway undertaking.

If suggestions on amendments or supplements to the MPT agreement are to be discussed, these shall be communicated to all participants in the MPT agreement at least two months in advance. If agreed accordingly, such communication can take place in electronic form (Article 4, No. 5 of the MPT agreement).

Pursuant to Article 4 No. 5 MPT agreement, the OSJD Committee hands over a summary of the respective materials at the latest two months before the assembly. If the relevant quorum cannot participate in the assembly, the OSJD Committee informs the delegations within fifteen days that the assembly will not take place. However, the beginning of this delay is not stipulated.

The chairman of the Commission for proposals is entitled to decide upon a change of the place and date of the assembly or on the cancellation, after written agreement with the railway undertakings. This also contains a decision about an extraordinary assembly and the fixing of its date and place (Article 4, No. 7 MPT agreement).

Article 4, No. 5, sent. 2 of the MPT agreement provides the possibility of electronic communication of documents.

As is also the case with the MTT agreement, experts can be consulted on the preparation of issues to be discussed within the framework of the MPT agreement (Article 4, No. 1, sec. 2 of the MPT agreement).

(3) Proportion of Votes, Representation of Other Railway Companies

The assembly of the representatives of the railway companies shall always take its decisions with a two-thirds majority (Article 4, No. 2, line 1 of the MPT agreement). Any supplements and amendments made to the MPT agreement shall be passed unanimously (Article 4, No. 2, line 1 of the MPT agreement).

Each delegation participating in the assembly has a vote (Article 4, No. 3 of the MPT agreement). Each railway company is entitled to represent (only) one other railway company and cast a vote for it (Article 4, No. 3 of the MPT agreement). This requires a written proxy.

Pursuant to Article 4, No. 4, the voting during the assembly are carried out by open ballot. The voting are held according to the Russian alphabet. Written statements by railway undertakings not present at the assembly also have to be considered pursuant to Article 4, No. 4, ss. 2 MPT agreement

(4) Accession to the MPT Agreement

According to Article 7, No. 1 of the MPT agreement, further railway companies can join the agreement.

The application for accession shall be submitted to the Committee of the OSJD. As is also a common feature of other conventions of the OSJD, the Committee of the OSJ notifies the railway member companies of the MPT agreement and their accession will enter into force unless it is objected to within two months (Article 7, No. 2, sec. 1 of the MPT agreement). All members will be informed about the new accession (Article 7, No. 2, sec. 2 of the MPT agreement).

(5) Withdrawal from the MPT Agreement

The MPT agreement, which according to Article 8, No. 2 has been concluded for an indefinite period of time, may be quit by any participating railway company according to Article 7, No.3 of the MPT agreement. In this case, the Committee of the OSJD and the other railway member companies shall be informed about such withdrawal.

The MPT agreement does not provide any other rules of procedure or deadlines for withdrawal from the MPT agreement.

4.3.5. The International Public Railway Transport Tariff (MPT)

(1) General Provisions

In addition to the provisions on the scope of application (§ 1) and the reference to the list of the start and destination stations, the general provisions contained in Part I of the MPT agreement also contain a provision under § 3 of the MPT agreement according which the CIV agreement shall be consulted as a supplement in case of any loopholes in the MPT agreement.

(2) Remuneration for the Transport of Passengers, Luggage and Goods

According to § 4, the remuneration for railway transportation of passengers, luggage and goods will be calculated separately by each individual railway company on the basis of the valid rates of the MPT.

Such calculation will be made on the basis of distance tables for railway transport (§ 4, sec. 2 a of the MPT agreement), the basic table for passenger transport fares and seat ticket fares in the sleeper (§ 4, sec. 2 b of the MPT agreement), the basic table of fares for the transport of luggage and goods (§ 4, sec. 2 c of the MPT agreement) and the fee table for the determination of the value of luggage and goods (§ 4, sec. 2 d of the MPT agreement).

The basic fare for the transport of passengers, luggage and goods from the depart station to the destination shall be shown in Swiss Francs according to § 5, sec. 1 of the MPT agreement. The determination of the basic fare is made by the railway company to which the fare is paid.

Article 7 deals with the fare for travelling children, which are generally obliged to have a proper ticket from the age of four years on (§ 7.1 MPT). They pay half the price for adults.

The price for a children's ticket providing the right for a seat or a place in a sleeping car shall be the same price as for adults.

Group travellers receive a 25 % discount according to § 7.2 MPT but can only travel on the route agreed upon (§ 7.4 MPT). Single travellers travelling

on a round-trip ticket receive a 25 % discount according to § 7.3 MPT. Children can just receive one kind of discount (§ 7.3 MPT). If a ticket is not used in one direction without a legitimate reason, reimbursement is not possible (§ 7.3 MPT).

Blind persons are entitled to travel accompanied by either another person or a dog (§ 7.5 MPT).

§ 8 of the MPT provides a regulation for the entrainment of dogs or monkeys. They pay half the price for a second-class ticket.

(3) Excess Fares

Part III of the MPT agreement governs excess fares for the determination of the luggage value (§ 9, No. 9.1 of the MPT agreement), reservations (§ 9, No. 9.2, sec. 1 and § 10 of the MPT agreement) and fare reimbursements (§ 9, No. 9.2, sec. 2 of the MPT agreement). The provisions contain only general stipulations leaving determination of the specific amounts of the excess fares to the relevant railway companies.

(4) Rounding Up Weight and Fares

Part IV of the International Public Transport Tariff (MPT agreement) contains provisions on the rounding up weight and ticket prices.

According to § 11, sec. 1 of the MPT agreement, goods up to weight of 1000kg will be rounded up to the full 10kg for determination of prices for the transport of goods.

The calculation of the ticket price and excess fares for the transport of luggage or goods with a weight of less than 20kg is nevertheless based on a weight of 20kg, according to § 12, sec. 1 of the MPT agreement.¹²⁴

The calculated fare for the transport of passengers, luggage and goods as well as the excess fares are rounded up to the full centime¹²⁵ according to § 11, sec. 2 of the MPT agreement.

¹²⁴ Unless the luggage or goods concerned are skis, for which a weight of 10kg is used as basis according to § 13, no. 13.1 of the MPT agreement.

In addition, § 13 of the MPT agreement contains special provisions on the transport of items, such as skis, perambulators, wheel-chairs and bicycles.

(5) Terms and Conditions of Use for Special Trains, Railcars and Wagons

(a) Scope of Application of Part IV of the MPT Agreement

According to § 14 of the MPT agreement, Part V of the MPT agreement governing the terms and conditions of use for special trains, railcars and wagons only applies to railways in Belarus, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Russia, Uzbekistan, Ukraine and Estonia.

(b) Special Trains

According to § 15, No. 15.1 of the MPT agreement, special trains are trains which after prior coordination by the railway companies participating in the trip and in compliance with the request by an organisation, are provided in addition to regular trains¹²⁶ for the transport of a large group of persons. They can be provided for one-way-travels as well as for round-trips, while each route must be at least 50 km (§ 15.2 MPT).

According to § 15, No. 15.3 of the MPT agreement, the price for such a special train shall correspond to the fare for the actually transported passengers but shall at least amount to the fare for 300 passengers transported in the second class while taking into account any discounts or excess fares.

The journey may only be interrupted by the whole group and only at the same station according to § 15.1 MPT.

In special trains or special railcars travellers can travel with tickets issued according to § 6, Article 4 CIV.

¹²⁵ The Russian version of the MPT agreement says “сантима” (centime), probably referring to the French designation for the centime as the subdivision of Swiss francs.

¹²⁶ A regular train is a train departing at regular times which are shown on the schedule.

(c) Special Railcars

Special railcars are provided according to the terms and conditions stipulated in § 16, No. 1, 2 and 4 to 10 of the MPT agreement.

According to § 16 of the MPT agreement, the fare shall be calculated on the basis of the number of seats provided by railcars and wagons.

(d) Special Wagons

According to § 17 of the MPT agreement, special wagons such as salon wagons, baggage cars or dining cars can be connected to regular trains. A special wagon is a wagon which according to § 17, No. 17.2 is planned to be used for a trip in addition to the regularly departing wagons upon request of an organisation.

4.3.6. Interim Conclusion

The provisions of the MPT agreement which entered into force in 1991 and was last updated in 2005 are mostly quite modern.

For example, for the amendment procedure, Article 4, No. 5 of the MPT agreement provides the possibility of electronic communication of documents. Furthermore, the members are allowed to represent each other (Article 4, No. 3 of the MPT agreement).

As is the case with the MTT agreement, the valid version of which last entered into force on 15 January 2007, experts can be consulted on the preparation of the issues to be discussed (Article 4, No. 1, sec. 2 of the MPT agreement).

More than a great step towards the unification of the law on rail traffic in Europe was taken by the contracting parties of the new MPT agreement¹²⁷ with § 3 of the MPT agreement. This article stipulates that the CIV agreement is to be consulted in case of loopholes in the MPT agreement, this means that the public transport agreement of the OTIF can be used as a reference.

¹²⁷ The first passenger tariff agreement (MPT) entered into force already in 1951.

The remaining provisions on the determination of the individual tariffs do not contain any particularities. The nature and extent of these provisions corresponds to probably most of the general terms and conditions for public transport of the railway companies in the EU.

Numerous provisions, such as those on the liability of railway companies, the issues of which are normally not contained in any tariff agreement or which are governed by other agreements of the OSJD, especially the SMPS agreement, have been excluded from the MPT agreement.

4.4. Consideration under European Antitrust Law

4.4.1. General Remark

Since a number of contracting railway undertakings of the OSJD are located in countries which are Member States (railway undertakings of Bulgaria, Slovakia, Hungary, Lithuania, Latvia, Poland, Rumania, the Czech Republic and Estonia), these railway undertakings have to observe not only the provisions of the OSJD but also EC law. This may lead to the problem that the respective railway undertakings may have concluded agreements under the OSJD regime which could be against European law.

Several OSJD agreements, namely the MPT, MTT, ETT and PPW, contain provisions which restrict the scope for manoeuvre in business and hence the freedom of competition of the railway undertakings. It is therefore important to examine whether and the extent to which the above-mentioned regulations can lead to conflicts with European antitrust law (Arts. 81 and 82 EC).¹²⁸

4.4.2. Applicability of European Antitrust Law in the Railway Transport Sector

Article 70 EC does provide for a common transport policy of the Member States. However, since the *Nouvelles Frontières* decision of the ECJ in 1986,

¹²⁸ See comparable issue for the standard tariff system TVC, E VII, 3.x

it is clear that EC antitrust law is also applicable in the transport sector.¹²⁹ This was confirmed by the ECJ decision *Ahmed Saeed*.¹³⁰

Consequently, the provisions of Arts. 81 and 82 EC also apply to the sector of railway transport law.

4.4.3. Article 81 EC

Article 81 of the EC prohibits all agreements between undertakings, decisions taken by associations of undertakings and concerted practices which are likely to impair trade between the Member States and the object or effect of which is to prevent, restrict or distort competition within the European single market.

(1) Agreements between Undertakings

Article 81 EC applies to agreements between undertakings. The OSJD tariffs constitute such agreements between undertakings.¹³¹ The definition of what is to be understood by an agreement in the sense of Article 81 EC Treaty is uninfluenced by national provisions or concepts of contracts.¹³² The decisive factor is that the undertakings express a common intent to conduct themselves in a certain manner on a certain market.¹³³

Railway undertakings are undertakings in this respect, in the sense of Article 81 EC. There is a functional understanding of the term undertaking in European antitrust law, according to which each unit performing economic activities is considered an undertaking.¹³⁴ The term undertaking is applicable

¹²⁹ ECJ decision of 30.04.1986, [1986] ECR 1425 – Ministère Public/Asjes („Nouvelles Frontières“)

¹³⁰ ECJ decision of 11.04.1989, [1989] ECR 803, 804 Rn. 32/33 – Ahmed saeed et al /Zentrale zur Bekämpfung unlauteren Wettbewerbs

¹³¹ The term agreement in the sense of Article 81 EC, encompasses not only agreements concluded under civil law. Agreements on public services that are governed by public law can also fall within the ambit of Article 81.

¹³² [1990] ECR I-45 Sandoz.

¹³³ [1992] ECR II-1275, marg. note 301 Chemie Linz.

¹³⁴ [1991] ECR I-1979 marg. note 21 Höfner und Elser; [1995] ECR I- 4022 marg. note 14 Fédération Française des Sociétés d' Assurance; [1997] ECR I- 7119 marg. note 21 Job Centre coop; Commission, OJ 1989 L 74/1 PVC; OJ 1994 L 243/1 Karton.

irrespective of the registered office of the undertaking acting, the consequence being that even undertakings from non-EU countries can also fall within the ambit of Arts. 81 and 82 EC, insofar as their business activities relate to the European single market.¹³⁵

(2) Appreciable Restriction of Competition

The above said tariffs (MPT, MTT, ETT) contain provisions which determine on the one hand the structure of the pricing for transport of persons (MPT) and goods (MTT and ETT). However, the MPT and the ETT contain not only provisions regarding the price structure but also provisions fixing the actual prices for the relevant international transport. A restriction of competition, in the meaning of Article 81 EC, however, is only given if the restriction of competition has a relevant impact on the Market (appreciable).¹³⁶

Provisions on prices for railway transport services can therefore restrict the freedom of competition of the railway undertakings, if they are concluded between (potential) competitors in the relevant market. However, it is questionable whether in cases of consecutive performances of transports (railway A arranges the transports within State A and railway B arranges the consecutive transport in State B) agreements regarding the fare constitute forbidden horizontal price agreements violating Art. 81 EC.

On the other hand, as soon as the railway transport markets will be opened, it could be possible that other railway companies will enter market and offer international transports. If these companies, which would be then competitors, also signed the above tariffs, a violation of Art. 81 EC would have to be assumed.

¹³⁵ Roth/Ackermann in *Frakfurter Kommentar, KR*; Article 81(1) EC Treaty; marg. note 42.

¹³⁶ Commission notice on agreements of minor importance (*de minimis* notice), OJ C 368 of 22 December 2001, p. 13.

(3) Appreciable Impairment of Trade between Countries

In the event that a restriction on competition is given because (potential) competition of several railway undertakings on the same market (the relevant corridor) would be possible (open market), one may assume that the impairment of trade between countries would be appreciable since the railway undertakings would serve significant market shares (in some cases almost in the manner of a monopoly).¹³⁷

(4) Exemptions from the Ban on Cartels in the Railway Transport Sector

Since it can be assumed that a appreciable restriction of competition would be existing in the event that several railway undertakings, competing on the relevant market for international transport, sign the above mentioned tariffs, a violation of Art. 81 EC is theoretically possible. Such agreements would be void pursuant to Art. 81 ss. 2 EC. Therefore the above tariffs would only be valid, if an exemption pursuant to Art. 81 ss. 3 EC is given. Under two aspects an exemption can be discussed:

(a) Art. 5 para. 3 Directive 91/440

Art. 5 para 3, third indent provides that, in the context of the general policy guidelines determined by the EU Member States and taking into account national plans and contracts including investment and financing plans, railway undertakings shall, in particular, be free to:

- establish with one or more other railway undertakings an international grouping;
- control the supply and marketing of services and fix the pricing thereof, without prejudice to Council Regulation (EEC) N° 1191/69 of 26 June 1969 on action by Member States concerning the obligation inherent in the concept of a public service in transport by rail, road and inland waterway.

¹³⁷ Commission notice. Guidelines on the effect on trade concept (NAATA), OJ C101 of 27 April 2004, p. 81.

However, it is questionable whether this Directive exempts the railway undertakings from the prohibition of cartels in the meaning of Article 81 EC. The fact that Article 5 para. 3 indent 3 of the Directive 91/440 refers to the Council Regulation (EEC) N° 1191/69 shows that this Article merely governs the independence of the railway undertakings from the state. Article 5 para 3 indent 3 of the Directive 91/440 provides at least that the railway undertakings and not the relevant Member State shall be competent for the pricing of railway transport services.

(b) Art. 3 EC Regulation No. 1017/68/EEC

Article 3 lit g EC Regulation No. 1017/68/EEC on the application of competition rules to transport by railway, road and inland waterway, which is applicable to the OSJD tariffs pursuant to Article 1 of EC Regulation 1017/68 insofar as railway undertakings of EU member states are affected,¹³⁸ sets out that the ban under Article 81 para. 1 EC, does not apply to

“agreements, decisions and concerted practices the sole purpose or effect of which is to apply technical improvements or achieve technical co-operation through

....

c) the organization and execution of successive, complementary, substitute or combined transport operations, and the establishment and application of inclusive rates and conditions for such transport operations, including special competitive rates;

.....

g) the establishment of uniform rules for the structure of tariffs and their conditions of application, provided such rules do not lay down transport rates and conditions”

¹³⁸ Regulation of 19 July 1968 (OJ L 175 of 23.07.1968, most recently amended by Council Regulation 1/2003 of 16.12.2002, OJ 2003 L 1/1, and by the Acts on the terms of the accession of the Republic of Estonia, the Republic of Latvia, the Republic of Lithuania, the Republic of Malta, the Republic of Poland, the Slovak Republic, the Czech Republic, the Republic of Hungary and the Republic of Cyprus, OJ L 236 2003, p. 33.;

Firstly it has to be examined whether the OSJD tariffs have as sole purpose or effect any technical improvements or necessity to achieve technical cooperation.

This is questionable. Technical agreements have to be distinguished from purely commercial agreements which, according to the view taken by the Commission, are not eligible for an exemption under Article 3 Regulation 1017/68/EEC.¹³⁹

Technical agreements are agreements which restrict the cooperation to the execution of rationalization without encompassing the business dealings concerning the results of such rationalization.¹⁴⁰ Such a rationalization of processes has to be the “sole” purpose and sole effect according to the wording of the Regulation.

Even if one were to assume that the tariff agreements are purely technical agreements (which is questionable), there are nevertheless considerable reservations under antitrust law since the 3 tariff agreements do not only establish uniform rules on the structure of transport rates and conditions,¹⁴¹ but also, at the same time, they lay down rates and conditions of carriage (see Article 3 lit. g Regulation 1017/68/EEC).

Further, no exemption is possible in this respect under Article 3 lit. c of the Regulation since this provision applies solely to multimodal transport operations.¹⁴²

(aa) ETT

¹³⁹ Comm. 1.4. 1992 OJ 1992 L 134/1 Tz. 44 „Reederausschüsse in der Frankreich – Westafrika - Fahrt“; Comm. 23.12.1992 OJ 1993 L 34/20 Tz. 41 „CEWAL“; Comm. 28.2.1993 OJ 1993 L 73/38 Tz. 36 – 48 „Tarifstrukturen im kombinierten Güterverkehr“; Comm. 21.9.1994 OJ 1994 L 25/24 Tz. 55.58 „Night Services“; Comm. 19.10.1994 OJ 1994 L 376/1 Tz. 380 „Trans Atlantic Agreement“; siehe auch ECJ decision of 21.10.1997 – Case No. 229/94 „Deutsche Bahn/Kommission“, „HOV – SVZ/MCN“, [1997] ECR II–1689, Tz. 37

¹⁴⁰ Basedow in: Immenga/Mestmäcker, „Wettbewerbsrecht: EG“, 4th ed. 2007, Part B. Inland Transport, note 22

¹⁴¹ See Part VI, § 15 und § 19 ETT

¹⁴² Basedow in: Immenga/Mestmäcker, „Wettbewerbsrecht: EG“, 4th ed. 2007, Part B. Inland Transport, note 23

The ETT tariff agreement (signed by the railway undertakings of Bulgaria, Latvia and Estonia) determines transport rates in Section VI, § 15 and § 19. It also provides for certain surcharges, e.g. for excessive loads (Table VII, point 1), for customs investigations of freight (Table VII, point 3), and for the completion of transport documents (Table VII, point 4). These do not constitute direct price-fixing provisions, yet they do have an indirect impact on the amount of the final transport rates.

However, the ETT (§ 18 et seq., § 19 and § 45.4), contain schedules for calculation of tariffs which lead to a fixing of an actual price for the transport.

(bb) MPT and Contract on the MPT

The signatories of the Agreement on Application of the MPT (signed by the railway undertakings of the Baltic States) undertook to apply in relations with one another international valid tariffs for passenger transports. In certain cases reductions are permitted, and the participants in the tariff may enter into bi- or multilateral tariff agreements with other railway undertakings (Article 2 para. 2, MPT). According to Article 6 para 2, MPT, every signatory is entitled to determine the carriage rates for passengers and luggage independently and without co-ordination with other signatories. The MPT Agreement as such does not set fixed prices or carriage rates and, therefore, is to be understood as an itemization of uniform tariff provisions of the various railway undertakings in international transport. However, the MPT does include provisions which show a clear tendency to fix carriage rates and which are therefore not eligible for an exemption pursuant to Article 3 lit. g Regulation 1017/68/EEC.

The MPT prescribes the application of certain prices, e.g. for passenger transport and seat reservations in sleeping cars (basic table on tariff agreements), indicating specific prices for the various coach classes and various route lengths (§ 5 of the Contract on the MPT).

cc) MTT

The MTT also provides also for price settings which can lead to artificial price-fixing (§§ 22 and 34 MTT).

4.4.4. Interim Conclusion on Antitrust Aspects of the Tariffs

If the railway undertakings are competitors on the relevant market of international transport (i.e. the concrete corridor), the fixing of prices in the tariffs could be regarded as forbidden horizontal price agreement pursuant to Article 81 EC. However, in case of consecutive services of railway transports by two or more railway undertakings (each on its own market) such price fixing is not against Article 81 EC. However, if the monopoly in the relevant partial market would be used to ask unfair prices which could not be asked in a functioning competition situation, a violation of Article 82 could be assumed.

4.5. Interim Conclusion for the Determination of Tariffs

When determining the tariffs, one has to distinguish between the transport of passengers and the transport of goods.

Under the OSJD regime there are two tariffs for the transport of goods (MTT and ETT). The ETT is applicable to international transit transport.

Regarding passenger transport the MPT constitutes a private agreement between the railway undertakings of the OSJD regime.

A further standard tariff is the TCV of the CIT which is used by the railway undertakings as basis for standard terms and conditions regarding international passenger transport.

However, within the EU, there is no regulation or directive which determines the tariffs of passenger transport within Europe. This solely lies with the railway companies.

One may assume antitrust concerns if the relevant railway undertakings will be considered as potential competitors within the same market (on the same route or within the same corridor), because the OSJD tariffs contain agreements on prices to be asked from the passenger or the customer for international transports. However this is not the case if the railway undertakings are offering their services for international transport in a consecutive way in the framework of a group service.

F. Final Conclusions

I. Different Role of EC and OSJD

The role and the influence of the EC and the OSJD on the development of European and international railway transport is fundamentally different.

Whereas the EC is an international and a supra-national organisation, provided with legal powers under international public law to develop and unify the European international railway transport law with binding effect for its Member States, the OSJD, is in contrast founded by the railway undertakings and not the states.

Therefore the OSJD is a non-governmental organisation, although under a certain influence of their respective states, as these are either owners or at least shareholders of the respective railway undertakings being member to the OSJD. The railway undertakings are represented by their respective state ministries of transport in the OSJD Ministerial Board, which is the topmost body of the OSJD.

Whereas the EC has the capacity to create rules binding on all its member states via directives and/or regulations, the OSJD has not such legal power. Moreover it is subject to the decision of each railway undertaking being member to the OSJD whether it participates in the various OSJD agreements or not. For example, the Common Railway Policy of the OSJD promotes a reduction of delivery times, but cannot enforce this.

Further the approach of OSJD and EC regarding harmonisation of transport is different. Whereas the EC, in a first step, has arranged for the independency of railway undertakings from the state and, in further steps, promoting competition on the Common Market, the OSJD has emphasized activities in harmonizing the standards of railway traffic through the territories of its members.

The issue of opening the market and increasing competition in the territories is not treated by the OSJD and is therefore subject to the capacity of the legislative bodies of each single state of the OSJD members.

The OSJD has only little influence on the legislation of the member's states by means of recommendations. Therefore many issues which are subject to binding supra-national law under the EU only have the status of political objectives in the OSJD and therefore remain subject to diverging national regulations or bi-lateral agreements.

Nevertheless, the OSJD is an important institution for the eastern and Asian railway since it is the platform for the ongoing development and organisation of a trans-national eastern railway system.

It is remarkable that the OSJD in its Common Railway Policy also deals with the EC Directives in the area of rail transport and their influence on the present and future situation of railway undertakings, and recommends to the respective states, which themselves are not also Members of the EU, but whose respective railway undertakings are members of the OSJD, that they apply the EC Directives. The Directives of the European Community could be applied according to the assessment of the OSJD for the development of railway and transport policy in the states, whose respective railway undertakings are members of the OSJD, although they might be adjusted to the situation of each state.

II. Results Regarding the Areas Examined

1. Independence of Railways from the State

In the scope of the OSJD, there are no regulations on the question of the independence of railway undertakings from the state and the infrastructure managers at supranational level. The OSJD has no rules on this issue and therefore this topic is left to European and the member's state national cartel law.

The legal framework of railways on the territory of the OSJD extends from state-owned/-controlled railway undertakings to privatised railway undertakings, acting as joint stock companies and being separated from the respective infrastructure managers.

The OSJD has not expressly dealt with the separation of state and railway undertakings or railway undertakings and railway infrastructure in its regulation so far. Within the respective states of the railway undertakings

being member to the OSJD, there will in this respect probably be various standards of development and interests.

2. Independence of Railway Undertakings and Infrastructure Managers

Because the OSJD has issued no regulations on the independence of railway undertakings and infrastructure managers, and therefore left the regulation of this topic to each state, only the absence of common regulations on the territory the OSJD can therefore be ascertained.

This, however, does not mean that the states, whose respective railway undertakings are members of the OSJD, cannot provide for an independence of railway undertakings, being themselves independent from the state, and infrastructure managers.

3. Access to the Infrastructure

Apart from technical problems of access to infrastructure - there are differing gauges in the different states of Eastern Europe and Asia – legal problems arise for railway undertakings in the absence of common (or supra-national) regulations regarding the access to infrastructure of the OSJD.

The OSJD itself has not provided for regulations on access by independent carriers. It remains therefore for each state to decide whether and how it enables independent domestic and foreign carriers to access the railway infrastructure. The situation is different if the state of the railway undertaking being member to the OSJD is an EU Member State. In this case the EC law applies even under the regime of the OSJD.

4. Use of Wagons

According to the absence of EC legislation in the narrow sense, the provisions of the CUV, which is an annex to the COTIF, have been compared with the OSJD provision of the RWU (an annex to the PPW).

The content of the PPW/RWU exceeds that of the CUV by more than ten times. Most issues dealt within the RWU are not dealt within the CUV and therefore left to mutual agreements between the contracting parties under the CUV.

On the other hand, there are issues regulated in CUV, such as the damage caused by wagons, which are in turn not regulated by the RWU and therefore subject to the applicable national material law.

Differences exist in the area of contracts on wagons usage as regards the scope and the density of regulations.

Similar concepts exist regarding the use of wagons with respect to liability for loss of or damage to the wagons. Liability is both in the CUV and the RWU restricted to the damage sustained and at maximum the value of the wagons.

With regard to types of wagons, the CUV does not distinguish between passenger wagons, goods wagons and private goods wagons. In the RWU, the distinction between passenger wagons, goods wagons and private goods wagons is always made.

Major differences exist with regard to the use of wagons in the areas of wagon types, damage caused by wagons and subrogation. With regard to damage caused by wagons, the RWU contains no provisions.

Finally, the lack of provisions regarding limitation in the area of the PPW and RWU leads to considerable legal uncertainty as the limitation is governed by the respective applicable national law in each case. Claims under Article 4 and 7 CUV are statute-barred after three years according to Article 12 § 1 CUV.

5. The Use of Uniform Containers

The provisions on the use of uniform containers in international railway goods transport is an area of the most concordance due not only to international but also to multimodal technical connections, like the CCO and the ISO-container standards.

As there is no specific EC legislation on the use of uniform containers, this Study compared the Container Agreement of the OSJD with the CIM, which is an annex to the COTIF.

Since the entry into force of the COTIF 1999, the COTIF does not provide for a separate container agreement any more. The relevant provisions have been included in the CIM.

There is also most concordance with regard to charges and the use of containers of the railways themselves, because both conventions leave this to a large extent to tariff agreements or contractual provisions.

With respect to charges, the CIM provides for an obligation of the sender to bear the cost, at least if no contractual provision is made on the charges (Article 10 § 1 CIM). According to § 4.5 Container Agreement the Container Agreement confines on the statement that the charges are subject to the parties' agreement.

However, this does not present a crucial difference between the CIM and the Container Agreement as both the CIM and the Container Agreement basically refer to contractual provisions to be made for the use of containers in international transport.

6. Handing over of Containers

With regard to the handover and return of containers owned by the railway undertakings themselves, the CIM provides for the carrier to hand over the consignment note and deliver the goods to the consignee at the place designated for delivery against receipt and payment of the amounts due according to the contract of carriage (Article 17 § 1 CIM). A delivery to the consignee in a differing procedure, provided for by national provisions or the handing over to another persons entitled by the consignee should, however, be equivalent (Article 17 §§ 2-5 CIM).

In § 2 of the Container Agreement, the container Agreement provides for a record of takeover (§§ 2.2, 2.3 Container Agreement). Furthermore, there are provisions dealing with the condition of the containers and providing for consequences for the handing over of damaged containers or containers, which are not ready for use (§§ 2.4, 2.6, 2.7 Container Agreement).

7. Handling of loss and damage

With respect to the handling of loss and damages both the CIM and the Container Agreement provide for a limitation of the compensation on the actual value of the lost or damaged container. The CIM provides for a limitation on the actual value in Article 30 § 3 CIM in case of loss and Article 32 § 3 CIM in case of a damage.

The Container Agreement, on the other hand, provides for a replacement of the container by another equivalent container or the payment of the compensation in the amount of the actual value in § 6.3 of the Container Agreement.

There are no provisions in CIM regarding the conduct of container transport and the obligations of the user. The Container Agreement contains, however, provisions on care and repair in § 5 of the Container Agreement. The need for harmonisation in this respect is limited because under the regime of the OTIF such obligations can be assigned to the user by way of separate contract, and this appears also to be appropriate.

8. Passenger Transport

The recourse provisions of both sets of regulations on passenger transport are similar. In principle, each railway undertaking or each carrier is liable for the damage which it causes (Article 38 CIV and Article 31 SMPS).

A difference arises in the cases in which it cannot be proved what railway undertaking or what carrier has caused damage.

Under the SMPS, the compensation is apportioned amongst all carriers involved in relation to the tariff kilometres of the route actually followed. In contrast, under the CIV, the apportionment is made on the basis of the shares in the fare to which the carriers are entitled (Article 38 CIV and Article 31 SMPS). However, assumed that the apportionment of the shares in fare relates approximately to the relation of the tariff kilometres, no major difference should arise.

In general, the CIV and SMPS conventions are, in the areas which they regulate, similarly structured and generally grant comparable rights and duties.

However, the SMPS overall displays a higher density of regulation and deals also with areas which are either not referred to in the CIV and hence left to national law or are dealt with in the CIV only with the reference that they can be regulated in general conditions of transport.

The CIV also partially permits deviating agreements between the carriers and between the carriers and the passengers (e.g. Article 5 CIV). In contrast, the SMPS declares its provisions to be binding for the contracting parties (Article 2 § 1, para. 2 SMPS).

In the CIV, after the liberalisation of the railway sector which lead to an ending of the monopoly of the railway undertakings, an obligation to transport and a compulsory tariff were deliberately avoided.¹⁴³

Because of the intensity of the regulations of the SMPS in all areas, e.g. also on the validity (Article 5 §§ 1-5 SMPS) and possibility of changing tickets (Article 4 § 6, Article 5 § 6 SMPS), the freedom of movement and commercial freedom of the railways is restricted

This is not the case in the CIV. Reference is often made to general conditions of transport and national law.

In some areas there are different regulations. In the CIV there are no regulations on the transport of express goods. The transport of luggage independently of a passenger transport contract can, however, be permitted under general conditions of transport. The allocation of places is not regulated in the CIV either, which is on the other hand more precisely stipulated in the SMPS (Article 7 SMPS).

The SMPS imposes an obligation to transport on the railway (Article 3 SMPS). Such an obligation was not deemed necessary in the new version of the CIV because due to the liberalisation of the railway sector the monopoly

¹⁴³ Explanatory report of the Central Office of the OTIF on the CIV, page 6, No. 25.

of the railways has ended and the consensual contract respects the privity of contract.

No conflict between the conventions can arise in this matter, because in Article 4 § 3 CIV the states are free to introduce an obligation to transport in bilateral transport by way of agreements.

Because an obligation to transport in the meaning of an obligation to conclude a contract is imposed by the SMPS in Article 3 SMPS, the freedom of the railways to contract is limited vis-à-vis other means of transport.

Considering the purpose of the obligation to transport, it can be assumed that the SMPS continues to proceed on the basis of a monopoly of the railways. It is, however, to be notified that the obligation to transport does not in principle hinder the liberalisation of the railway sector, although it is a serious intervention on the privity of contract.

With regard to liability for personal injury and damage to hand luggage, there is potential for conflict.

Protection of passengers is not adequately mentioned in the SMPS. Because the SMPS, according to Article 46 SMPS, refers to national law, no further conflict is to be expected in the Member States, whose respective railway undertakings are contracting parties to the SMPS as soon as the Third Railway Package is implemented and thereby adequate protection for passengers provided. It is again pointed out that the OSJD shows inclinations to include liability of the railways for personal injury in the SMPS and thereby promote harmonization of the rights of passengers.

The grounds providing relief from liability with regard to compensation for loss and damage are provided similarly in both conventions. Only the burden of proof that the damage has arisen because of the natural qualities of the luggage is distributed differently.

Compensation in case of delay in the SMPS is based on the value of the freight and the delay period, under the CIV always of the same amount irrespective of the delay period, Article 43 § 1 CIV.

The SMPS provides for repeat performance but not for compensation so that according to Article 46 SMPS national law applies. The CIV provides for compensation but not for repeat performance (a duty of repeat performance is however assumed) or possible rescission, but refers to the general conditions of transport or national law, Article 44 CIV.

The accounting between the railway undertakings for transport under the SMPS is prescribed in Article 41 SMPS referring to accounting regulations for SMPS and SMGS. Under the CIV, the railways can agree on the manner and nature of the accounting and can also make other agreements which deviate from Article 61 CIV.

By the obligation to transport in connection with the compulsory tariff provided for under the SMPS, an obligation to conclude a contract on mostly prescribed conditions is imposed on the railway (Article 3 SMPS). This is a disadvantage in competition with other means of transport and renders competition between railways more difficult. The SMPS therefore conflicts with the objectives of the EC which are intended to be implemented by the directives of the Railway Packages.

A further fundamental difference is the classification of the contract of carriage. The SMPS assumes an executed contract according to Article 3 SMPS, while the CIV assumes a consensual contract (Article 6 CIV). The classification of the CIV also corresponds to the intentions of the EU of harmonization with the rules of other means of transport. The SMPS' classification of the contract of carriage as an executed contract, conflicts with this.

The principles of liability for damage and loss of luggage are quite similar, both, in SMPS and CIV, although differences could arise in the calculation of the amount of compensation, in particular in the event of a loss of baggage (Art. 34 CIV and Art 33 SMPS).

In the SMPS, there is no provision on the liability of railway undertakings for personal injury. In the CIV the liability for personal injury is provided for in title IV, chapter I of the CIV.

9. Goods Transport

Both conventions, CIM and SMGS, have very similar systematic structures with regard to the transport of goods.

The creation of a uniform CIM/SMGS consignment note (Article 6 § 8 CIM and Article 7 SMGS) and its recognition as the uniform custom's document have led to a significant simplification of international goods transport by rail. While, however, no comprehensive harmonisation has taken place, this does not give reason for an urgent need for further harmonisation.

The regulations on the acceptance of goods and the provisions on transport and the charging of costs and surcharges contained in the SMGS are not reflected in the CIM (Article 13 § 3 SMGS). These areas are left to contractual regulation or general conditions of transport on the territory of the OTIF.

In principle, after the CIM-reform of 1999, the technique of the conclusion of a contract for carriage varies. The contract for carriage, under the CIM is concluded by way of a consensual agreement while, under the SMGS, this is done by way of an executed agreement.

A further matter which is differently dealt with in both conventions is the obligation of bearing the cost under the freight contract. While Article 10 CIM provides clearly that the consignor has the obligation to pay the costs in principle, this obligation under the SMGS is not expressly provided as the regulation leaves scope for exceptions and diverging national regulations (Article 15 SMGS). There is, therefore, a need for harmonization here, in order to create clarity in relation to any costs on the various sections of the route.

The different delivery periods, in particular the different transport categories also constitute an important difference with conflict potential.

For the transport of wagon loads as freight, the periods under the SMGS are twice as long as those under the CIM, while those for the transport of wagon loads as express goods do not exist under the CIM as a category, but are just as long according to Article 14 § 1, No. 2.3 SMGS as the normal freight transport under Article 16 CIM.

In the case of the transport of package freight, the delivery period under the CIM is 200 kilometres per day (Article 16 § 2 lit. b CIM), while the delivery period for package freight under the SMGS is either 150 kilometres for ordinary transportation or 420 kilometres per day for express goods (Article 14 § 1 SMGS). An adoption and uniformity of these categories would be desirable for grounds of practicality.

Another issue with conflict potential is that of the legal conditions for complaints. Under the CIM, complaints arising out of the contract of carriage have to be made against the carrier against whom a prospective court claim could be made (Article 45 CIM). In contrast, according to the SMGS, complaints are in principle to be made against the railway undertaking to which the reclamation was addressed to (Article 30 § 2 SMGS). The distinction generates a certain conflict potential in international transport of goods by rail in particular when seen together with the relatively short and also considerably divergent limitation periods.

The limitation period for claims under the CIM is one year in principle, in some cases two years (Article 48 CIM).

Under the SMGS, payment and compensation claims become statute-barred after nine months and claims for delay even after three months (Article 31 § 4 SMGS).

Finally, there are different provisions on the question of the admissibility of amending a contract of carriage for freight. While changes under the CIM can be made by the parties, the possibility of changing the contract under the SMGS is limited. The consigner and recipient may each change the freight contract only once. In addition, no subsequent division of the consignment can be made (Article 31 § 9 SMGS).

The SMGS, therefore, imposes considerable restrictions on contractual freedom. With the increasing market economy requirements, harmonization in this respect should result and the structure of such changes should be left to the parties.

The legal basis of liability is to be found in Article 23 § 1 CIM and Article 22 § 1 SMGS.

Pursuant to Article 23 § 1 CIM, the carrier shall be liable for loss or damage resulting from the total or partial loss of, or damage to, the goods between the time of taking over of the goods and the time of delivery, and for the loss or damage resulting from the transit period being exceeded, no matter what railway infrastructure is used. Pursuant to Article 24 § 1 CIM, specific provisions exist for vehicle transport (e.g. vehicles running on their own wheels). In this case the carrier shall be liable for the loss or damage resulting from the loss of, or damage to, the vehicle.

Pursuant to Article 22 § 1 SMGS, the railway undertaking which has taken over the goods accompanied by an SMGS consignment note, shall be liable for execution of the contract of carriage until the delivery of the goods at the destination station.

Pursuant to Article 23 § 1 SMGS, the railway undertaking shall be liable for loss of and damage to the goods and delay of delivery. Further, the railway undertaking is liable for the consequences of the loss of the accompanying documents and for all consequences caused by failure to file an application for amendment of the contract of carriage, if the railway undertaking is responsible in this respect.

The carrier may be relieved from liability according to Article 23 § 2 CIM to the extent that the loss or damage or the exceeding of the transit period was caused by the fault of the person entitled, by an order issued by the person entitled other than as a result of the fault of the carrier, by an inherent defect in the goods such as decay or wastage, or by circumstances which the carrier could not avoid and the consequences of which it was unable to prevent.

Pursuant to Article 23 § 3 CIM, the carrier shall be relieved of this liability to the extent that the loss or damage arises from the special risks inherent to certain circumstances mentioned in Article 23 § 3 CIM. For vehicle transport Article 24 § 2 CIM provides that the carrier shall not be liable for loss or damage resulting from the loss of accessories which are not mentioned on both sides of the vehicle or in the inventory list which accompanies it.

Pursuant to Article 36 CIM, the limits of liability provided for in Article 15 § 3, Article 19 §§ 6 and 7 CIM, Article 30 CIM and Article 32 CIM shall not apply if it is proved that the loss or damage results from an act or omission

which the carrier has committed either with intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result.

Many exclusions of liability are provided for. According to Article 23 SMGS, railway undertakings are not responsible for damage, e.g. if the railway undertaking could not have avoided it or if the damage occurred because of the defective quality of the goods or packaging or inappropriate transport equipment or was in some other way caused by the consignor or recipient.

In addition, the SMGS contains a provision that liability for exceeding the delivery date by up to 15 days is excluded if the reason for the delay, for example, in the case of a natural catastrophe, has been ascertained by the central railway authority of the relevant state (Article 23 § 5 SMGS).

10. Fixing of Tariffs

When determining the tariffs, one has to distinguish between the transport of passengers and the transport of goods.

In general, the practices to determine tariffs for passenger transports are quite similar in the territory of the EU and in the territory of the OSJD.

But, contrary to the OSJD, there are, within the EU, no rules providing for fixed transport tariffs. First of all, within the EU there is no regulation or directive providing for fixed passenger transport tariffs. This lies solely with the railway undertakings.

However, with the MPT agreement, the OSJD presents binding guidelines for passenger transport including tariff determination and terms and conditions of transport for passengers and luggage.

One may assume antitrust concerns if the relevant railway undertakings will be considered as potential competitors within the same market (on the same route or within the same corridor), because the OSJD tariffs contain agreements on prices to be asked from the passenger or the customer for international transports. However this is not the case if the railway

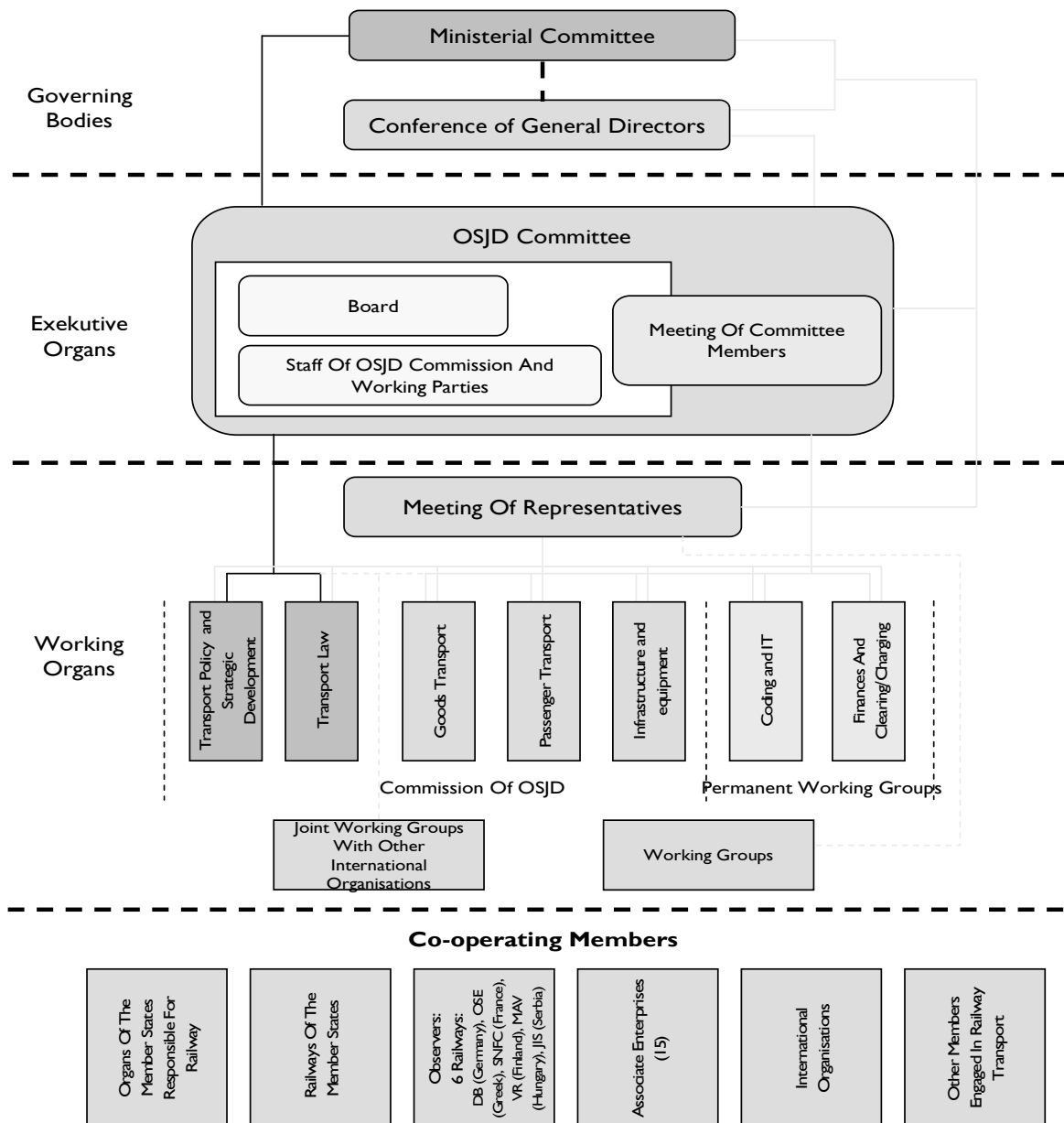
undertakings are offering their services for international transport in a consecutive way in the framework of a group service.

G. Annexes

I. Annex I: Structure of the OSJD

ANNEX I: Organigram of the OSJD

source: OSJD; www.osjd.org



II. Annex II: List of Member States

State	E U	O T I F	OSJD									
			OSJD	SMPS	SMGS	ETT	MTT	MPT	Combined Transport	Container	PPW	WGO Annex 1 PPW
Albania¹⁴⁴	-	+	-	+	+	-	-	+	-	-	-	-
Bosnia Herzegovina¹	-	+	-	-	-	-	-	-	-	-	-	-
Bulgaria¹⁴⁵	+	+	+	+	+	+	-	+	+	+	+	+
Croatia²	-	+	-	-	-	-	-	-	-	-	-	-
Cyprus²												
Czech Republic²	+	+	+	-	-	-	+	-	+	-	-	-
Estonia²	+	-*	-	+	+	+	+	-	+	-	+	+
Hungary²	+	+	+	-	-	-	-	-	+	+	+	+
Latvia²	+	+	+	+	+	+	+	-	+	+	+	+
Lithuania²	+	+	+	+	+	-	+	-	+	+	+	+
Malta²	+	-	-	-	-	-	-	-	-	-	-	-
Macedonia, FYR¹⁴⁶	-	+	-	-	-	-	-	-	-	-	-	-
Montenegro³	-	-	-	-	-	-	-	-	-	-	-	-
Poland²	+	+	+	+	+	-	-	+	+	-	+	+
Romania²	+	+	+	-	-	-	-	+	+	+	+	+
Serbia¹	-	+	-	-	-	-	-	-	-	-	-	-

¹⁴⁴ Official Potential Candidate Country

¹⁴⁵ New Member State

¹⁴⁶ Official Candidate Country

Slovakia²	+	+	+	+	-	-	-	-	+	-	-	-
Slovenia²	+	+	-	-	-	-	-	-	-	-	-	-
Turkey³	-	+	-	-	-	-	-	-	-	-	-	-

* = currently acceding

III. Annex III: Members of the OSJD

Members of the OSJD

State	Railroad
Azerbaijan	Azerbaijani State Railway (AZ)
Albania	Albanian Railroad
Belorussia	Belorussian Railway (BC)
Bulgaria	Bulgarian State Railways (BDZ EAD)
Hungary	JSC "Hungarian State Railways" (JSC MAV)
Vietnam	Vietnamese Railway State Company (VZB)
Georgia	JSC Georgian Railway (GR)
Iran	Railways the Islamic Republic of Iran (RAI)
Kazakhstan	Kazakhstan National Railway Enterprise (KZH)
Kirgizia	Kirgizh Railway National Company (KRG)
China	Chinese Railways (KZD)
Cuba	- (railway is not participating)
Latvia	State JSC Latvian Railway (LDZ)
Lithuania	JSC Lithuanian Railway (LG)
Moldova	Moldova Railway State Enterprise (CRM)
Mongolia	Mongolian Railway (MTZ)
Poland	JSC "Polish State Railways" (PKP)
Russia	JSC Russian Railways (RZD JSC)
Romania	Romanian National Railway Company (CFR- SA)
Slovakia	Slovakia" Railway Company (ZSSK CARGO)
Tadzhkistan	Railway State Unitary Enterprise "Rahe Ahanie Tajikistan" (TDZ)
Turkmenistan	Ministry of Railway Transport of Turkmenistan (TRK)
Uzbekistan	State Railway JSC "Uzbek Railways" (UTI)
Ukraine	State Administration for Ukrainian Railway Transport (UZ)
Czech Republic	JSC "Czech Railways" (CD JSC)
Estonia	JSC Estonian Railway (EVR JSC)

IV. Annex IV: Wagon Usage

Use of Wagons

	CUV	PPW/WGO	Differences
Requirements for wagons in use	- description and marking	- technical requirements in Schedule 1 to WGO	+
Hire of wagons	- no provision	- process provided	+
Use of wagons	- no provision	- Special provisions on use, cleaning and charging	+
Repair and maintenance	- no provision	- regulated by WGO	+
Liability	- amount of damage - assumption of loss after 3 months	- amount of damage - assumption of loss after 3 or 6 months	+
Treatment of private wagons	- no difference between types of wagons	- Passenger wagons - Goods wagons -private goods wagons	+
Damage caused by wagon	- owner responsible for condition	- no provision	++

Subrogation	- assignment and recourse rights	- comprehensive compensation system	++
Liability for employees	- liability for agents	- no provision	+
Limitation	- for claims based on Art. 4 and Art. 7 the limitation period is 3 years	- no provision	++

IV. Annex V: Uniform Containers

Area regulated	CIM	Container-GO	Differences
Application	Use of containers in international carriage of goods by rail	Use of containers in international carriage of goods by rail	-
Technical requirements	Technical requirements of CSC and CCO	Technical requirements of CSC and CCO	-
Hand-over and return of railway's own containers	Hand over of consignment note and delivery according to contract	Regulations on records and condition of wagons in § 2	+ Possibly unified records as with consignment note?
Charges for railway's own containers	Regulated by tariffs	Regulated by tariffs or contract	-
Use of the railway's own containers	-contract	Contract	-
Return	Regulated by tariffs	Return to owner; Differing provisions admissible.	-
Container transport	No provisions	Repair and maintenance provisions	(+)

Loss and damage	<ul style="list-style-type: none"> - examination on taking-over - liability for fault and for agent - provisions on compensation 	<ul style="list-style-type: none"> - presumption of loss after 6 months - provisions on investigation - provisions on compensation 	+
------------------------	---	---	---

VI. Annex VI: Comparison table of passenger rights

Liability of railways (~Carriers) and Passenger Rights

CIV	Draft Regulation (Commission)	SMPS
Personal Injury		
<p>Ground of liability</p> <p>Art. 26 § 1 liability for</p> <ul style="list-style-type: none"> • death • bodily and • mental injury <p>if accident happens while on the train or boarding or alighting</p> <p>and</p> <p>damage by accident in connection with the railway operations</p> <p>→ temporal and causal connection</p>	<p>Ground of liability</p> <p>Art. 7 (1) liability for</p> <ul style="list-style-type: none"> • death • bodily and • mental injury <p>if accident happens while on the train or boarding or alighting</p>	<p>No provision,</p> <p>at least not in SMPS itself, is governed by national law cf. Art. 46 SMPS</p>
<p>Relief from liability</p> <p>Art. 26 § 2</p> <ul style="list-style-type: none"> • outside rail operations, unavoidable events • fault of passenger • unavoidable third party conduct (other railway operators on the same network are not third parties) • proof of absence of fault does not relieve liability 	<p>Relief from liability</p> <p>Art. 26</p> <ul style="list-style-type: none"> • Fault or contributory fault of passenger <ul style="list-style-type: none"> • above 220.00 Euro 	

	liability only in case of fault of railway	
<p>Amount of Liability</p> <p>Art. 30</p> <ul style="list-style-type: none"> depends on national law, maximum must be at least 175,000 SDR (~ 210,000 Euro) 	<p>Amount of Liability</p> <p>Art. 12</p> <ul style="list-style-type: none"> unlimited, in principle up to 220,000 Euro (~ 175,000 SDR) liability cannot be excluded/limited above that, no liability on proof of no fault 	
	<p>Advance payment</p> <p>Art. 13</p> <p>The railway must pay an advance to cover direct financial necessity, 15 days after the entitlement of the person, in case of death at least 21,000 Euro</p>	
	<p>Compulsory Insurance</p> <p>Art. 7 (2)</p> <p>Compulsory insurance for liability to passengers (approval conditions in RL 95/18/EG) Minimum cover per passenger 310,000 Euro</p>	
Loss of and Damage to Hand Luggage		
<p>Ground of liability</p> <ol style="list-style-type: none"> accidental damage, Art. 33 § 1 non-accidental damage, fault 	<p>Ground of liability</p> <ol style="list-style-type: none"> accidental damage, Art. 8 Nr. 1 non-accidental damage, fault required, Art. 8 	<p>No provision in the SMPS itself, national law, cf. Art. 46)</p>

required Art. 33 § 2	Nr. 2	
Relief from liability: 1: Art. 26 § 2 (see above) 2: (-)	Relief from liability 1: Art. 26 (see above) 2: (-)	
Amount of liability 1: maximum 1,400 SDR, ~1,700 Euro, Art. 34; Unlimited liability in case of gross negligence, cf. Art. 48 2: unlimited	Amount of liability 1: maximum 1,800 Euro, Art. 14 No. 1 Maximum applies even in case of gross negligence 2: 1,800 Euro, Art. 14 No. 1	
Damage to/Loss of/Delay of Luggage (= L.) and Express goods (= EG) While in the custody of the railway		
Ground of liability Art. 36 § 1 • delay • loss • damage	Ground of liability Art. 9, 10 • delay in transport of luggage • loss • damage	Ground of liability Art. 32 § 1 • delivery period exceeded • loss • damage • loss or non-production of papers handed over (documented)
Relief from liability Art. 36 §§ 2, 3 Damage, loss, delay • force majeure • defect in L. • fault of passenger • instructions of	Relief from liability Art. 26: for Damage, loss • fault of passenger	Relief from liability Art. 32 § 2: for Damage, loss • force majeure • natural properties of the L./EG • fault of passenger or consignor or recipient

<p>passenger</p> <p>→burden of proof: carrier, Art. 37 § 1</p> <ul style="list-style-type: none"> • defective packaging • non-permitted L. handed in for transport • natural properties of the L <p>→Presumption of cause; claimant must rebut assumption, Art. 37 § 2</p>		<p>or person accompanying the EG</p> <p>→burden of proof: railway Art. 32 § 3</p> <ul style="list-style-type: none"> • packaging defect not ascertainable • non-permitted L./EG handed in for transport with incorrect description • delivery of L./EG admissible subject to conditions, but with incorrect description <p>→Presumption of cause; claimant must rebut assumption, Art. 32 § 4</p> <p>Art 32 § 5, § 6 loss of volume in course of transport, liability begins only on</p> <ul style="list-style-type: none"> • loss of 1 % volume of dry; • 2 % of liquid, fresh, moist EG <p>If loss is due to natural properties of the EG there is no liability, if full number of EG and properly packed is delivered</p>
---	--	---

	<p>Art. 10 (2) delay</p> <ul style="list-style-type: none"> • Natural disasters • unusual weather conditions • war/acts of terror 	<p>Art. 32 § 7 delivery period exceeded</p> <ul style="list-style-type: none"> • Natural disasters, for 15 days after order of the central railway authority of the relevant state • other circumstances resulting in the suspension/restriction of operations after government order of relevant state
<p>Amount of liability</p> <p>Art. 41 Loss</p> <ul style="list-style-type: none"> • Amount not proved: 20 SDR (~24 €) per Kg or 300 € per item • Amount of loss proved: that amount, not more than 80 SDR (~100 €) per missing kg or 1,200 SDR (~1.440 €) for each item of luggage • freight and other costs connected with the transport of the lost RP. <p>Art. 42, Damage</p> <ul style="list-style-type: none"> • loss in value 	<p>Amount of liability</p> <p>Art. 14 no 2, 9 Loss, damage</p> <p>1.300 Euro (irrespective of number of items of luggage concerned)</p>	<p>Amount of liability</p> <p>Art. 33 Loss</p> <ul style="list-style-type: none"> • handed-in without statement of value: actual value, not more than 2 CHF per missing kg • handed-in with statement of value: (in proportion to value per kg) • Transport and other costs connected with the transport of the lost RP/EG and arising out of the contract of carriage <p>Art. 34, Damage</p> <ul style="list-style-type: none"> • loss in value

<ul style="list-style-type: none"> • no further compensation • limited to compensation, payable on (partial) loss <p>Art. 43, Delay</p> <p>Each commenced 24 hours since request for</p> <ul style="list-style-type: none"> • if damage proved, the amount of the damage, at most 080 SDR per kg or 14 SDR per delayed item of luggage • no proof of damage, 0.14 SDR per kg or 2.80 per delayed item 	<p>Delay</p> <p>No provision in detail</p>	<ul style="list-style-type: none"> • no further compensation • limited to compensation, payable on (partial) loss <p>Art. 35, Delay</p> <p>For each day exceeding the delivery date</p> <ul style="list-style-type: none"> • RG: 5 % freight • EG: 1.5 % freight
<p>Rights of passengers in case of delay, cancellation and missed connections</p>		
<p>Repeat performance under general contract law (cf. explanations of OTIF on CIV) The carrier is obliged to certify the cancellation or missed connection, Art. 11.</p> <p>Any refund of the fare is according to the general conditions of transport, Art. 8 § 2</p>	<p>In case of major delay, the passenger can demand minimum fixed compensation without losing the right to be transported Art. 15.</p> <p>In case of missing a connection or train cancellation, the passenger has an option, Art. 16.</p> <ul style="list-style-type: none"> • refund of fare and return transport • onward transport in suitable manner to next possible, or • onward transport at time chosen by the passenger 	<p>The railway is obliged according to Art. 14 § 4 to carry the passenger onwards without surcharge, if the passenger wishes to continue the journey (right of rescission). Delay or cancellation is to be certified</p> <p>Refund of fare, Art. 30</p>

Compensation in case of delay, cancellation and missed connections		
<p>Ground of liability</p> <p>For loss due to being unable to continue the journey on the same day, or it being unreasonable to do so, due to</p> <ul style="list-style-type: none"> • cancellation • delay • missed connections 	<p>Ground of liability</p> <p>Railway is liable for</p> <ul style="list-style-type: none"> • cancellation • delay • missed connections due to delay 	<p>No provision in SMPS, national law, cf. Art. 46</p>
<p>Relief from liability</p> <ul style="list-style-type: none"> • circumstances, outside railway operations, unavoidable even with due care • passenger's fault • conduct of third parties unavoidable even with due care (businesses using the same infrastructure are not deemed to be third parties) 	<p>Relief from liability</p> <ul style="list-style-type: none"> • unusual weather conditions • Natural disasters • war and acts of terror 	
<p>Amount of liability</p> <ul style="list-style-type: none"> • Overnight • informing waiting persons • other compensation in accordance with national law 	<p>Amount of liability</p> <ul style="list-style-type: none"> • Care services, Art. 17 (greater need in case of delay) • With delay of more than 1 h reimbursement of resulting costs Art. 11, unlimited 	

VII. Annex VII: Transport of Goods

	CIM	SMGS	Conflict between regulations
Participants	CIT contracting parties	National railways, represented by the relevant ministries	Overlapping
Scope of application	International carriage of goods by rail on CIT routes	International carriage of goods by rail on SMGS routes	Overlapping
Regulations			
Contract of carriage	Contract of carriage (Agreement) Art. 6 CIM	Obligation to transport (Real Contract) Art. 4	++
Subject matter Items to be transported	Excluded goods - goods admitted for transport under special conditions - dangerous goods (Art. 9 CIM)	Excluded items (Art. 4 SMGS) - admissible under certain conditions (Art. 5, 6 SMGS) - dangerous goods (Art. 5, § 7 together with appendix 2 SMGS)	-
Contract of carriage	Costs payable by consignor in principle (Art. 10 CIM)	Diverging provisions	+

Consignment note	Common CIM/SMGS- consignment note as consignment note and customs document; content of the consignment note: Art. 7 CIM	Common CIM/SMGS consignment note as consignment note and customs document	-
Acceptance of goods for transport	No provisions in the CIM	- goods presented deemed as consignment (Art. 8, § 1 SMGS) - kinds of consignment: wagon load, package freight, major container and contrailer consignment	+
Packaging and marking	Liability of the consignor vis a vis the carrier for all damage due to defective packaging (Art. 14 CIM)	Liability of the consignor to the carrier for all damage caused by defective packaging (Art. 9 § 1 , subsection 1, sentence 2 SMGS)	-
Accompanying papers	Common CIM/SMGS consignment note as consignment note and customs document; - consignor is liable for completeness (Art. 15, § 1 CIM)	Common CIM/SMGS consignment note as consignment note and customs document, consignor is liable for completeness (Art. 11, § 1 SMGS)	-

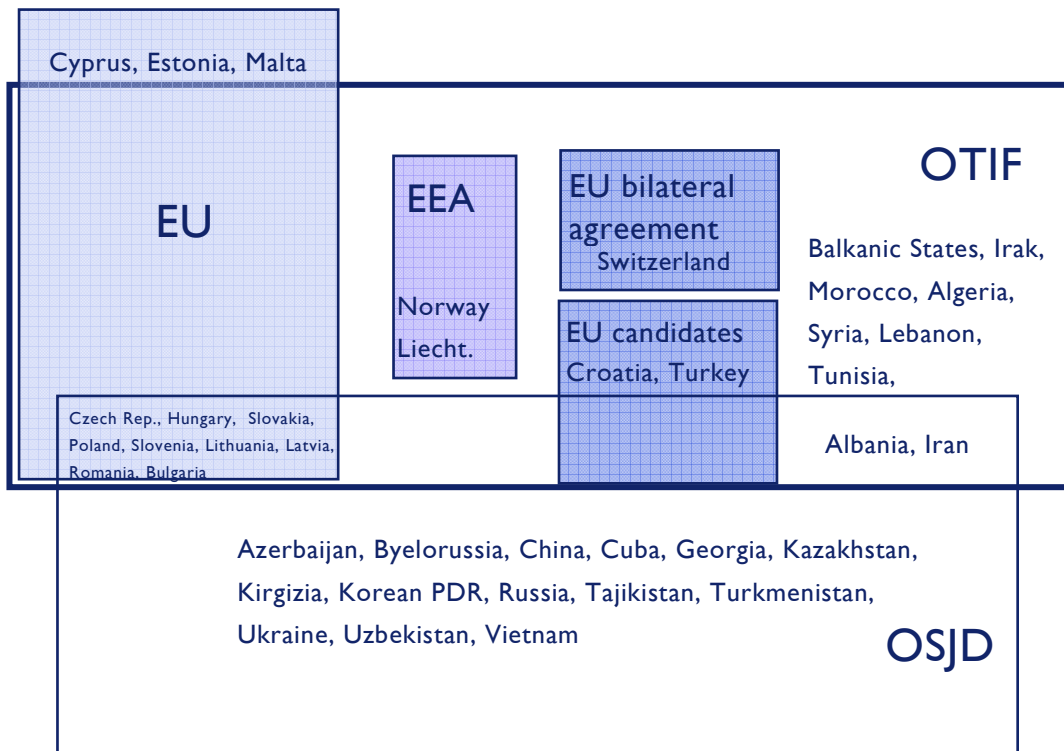
	- no obligation of the carrier to check (Art. 15, § 2 CIM)	- carrier has no obligation to check this Art. 11 § 2 SMGS	
Liability for entries in the consignment note	liability of the consignor (Art. 8 CIM)	liability of the consignor (Art. 12 SMGS)	-
Charging of costs and additions	- no provision in CIM - provision in ABB-CIM at point 8	- calculation according to internal or transit tariff	+
Delivery period	- wagon load: loading: 12 hours transport: 24 hours/400 km - package freight: loading: 24 hours transport: 200 km/24 hours - additional charges can be determined by the carrier according to Art. 1 § 3	- subdivision into express and freight goods - wagon loads: loading: 1 day transport: 1 day 200/400 km - package freight: loading: 1 day transport: 1 day 150/420 - fixed additional price (Art. 14 § 5 SMGS)	++
Performance of the contract of carriage	- delivery of the goods against payment of the costs in the consignment note and against	- delivery of the goods against payment - out of the consignment note	++

	<p>receipt (Art. 17 CIM)</p> <p>- tracing not regulated in CIM</p> <p>- investigation by court appointed expert (Art. 42 § 3 CIM)</p>	<p>against receipt (Art. 17 SMGS)</p> <p>- tracing of the 30 days delay (Art. 17 § 5 SMGS)</p> <p>- investigation by the railway effected (Art. 18 SMGS)</p>	
Complaints	<p>- under the contract of carriage to be made to the carrier against whom the claims can also be made in court (Art. 43 CIM)</p>	<p>complaint on the contract of carriage to be made to the dispatching railway (Art. 29 SMGS)</p>	+
Limitation of claims	<p>- 1 year in principle</p> <p>- 2 years in the case of claims of payment for proceeds of sale,</p>	<p>payment and compensation claims: 9 months</p> <p>- exceeding delivery period: 3 months (Art. 31 SMGS)</p>	++
Amendment to contract of carriage	<p>- no special restrictions on amendments to the contract of carriage</p>	<p>- consignor and recipient can each amend the contract of carriage once (Art. 20 § 9 SMGS)</p> <p>- no division of the consignment</p>	++

<p>Liability of the railway</p>	<ul style="list-style-type: none"> - common liability (Art. 26 CIM) - liability from acceptance to delivery for damage/loss, delay (Art. 23 § 1 CIM) - restriction to damage duly caused (Art. 23 §§ 2,3 CIM) - burden of prove (Art. 25 CIM) amount of compensation: consignment note 	<ul style="list-style-type: none"> - common liability (Art. 22 SMGS) - liability from acceptance to delivery for damage/loss, delay - limited to damage caused - burden of prove (Art. 22 §§ 6 – 9 SMGS) quantity deviations: consignment note 	<p>-</p>
<p>Accounting between railways</p>	<ul style="list-style-type: none"> - accounting between the railways in accordance with the share in the transport (Art. 49 CIM) - recourse according to the share in causality (Art. 50 CIM) - mediation: court proceedings (Art. 51 CIM); agreement otherwise is admissible 	<ul style="list-style-type: none"> - accounting between the railways in accordance with participation in the transport (Art. 32 SMGS) - recourse in accordance with the share in cause (Art. 33 SMGS) - mediation by binding decision of the committee of the OSJD 	<p>-</p>

VIII. Annex VIII: Railway Geography

Railway geography



H. Abbreviations

AEIF	European Association for Railway Interoperability
APTU	Uniform Rules concerning the Validation of Technical standards and the Adoption of Uniform Technical Prescriptions applicable to Railway Material intended to be used in International Traffic (OTIF) (Règles uniformes concernant la validation de normes techniques et l'adoption de prescriptions techniques uniformes applicables au matériel ferroviaire destiné à être utilisé en trafic international)
ATMF	Uniform Rules concerning the Technical Admission of Railway Material used in International Traffic (OTIF) (Règles uniformes concernant l'admission technique de matériel ferroviaire utilisé en trafic international)
CEN	European Committee for Standardization (comité européen de normalisation)
CCO	Container Customs Convention
CENELEC	European Committee for Electrotechnical Standardization (comité européen de normalisation électrotechnique)
CFI	Court of First Instance
CIM	Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (CIV - Appendix A to the Convention)
CIT	International Rail Transport Committee

CIV	Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (CIV - Appendix A to the Convention)
COTIF	Convention concerning International Carriage by Rail Convention relative aux transports internationaux ferroviaires
CSC	International Convention on Safe Containers (CSC)
CSI	common safety indicators (EU)
CSM	common safety methods (EU)
CST	common safety targets (EU)
CUI	Uniform Rules concerning the use of Railway Infrastructure (règles uniformes concernant le contrat d'utilisation de l'infrastructure en trafic international ferroviaire)
CUV	Uniform Rules concerning the Contract for the Use of Wagons (Règles uniformes concernant les contrats d'utilisation de véhicules en trafic international ferroviaire)
CVR	Convention on the Contract for the International Carriage of Passenger by Road
EC	European Communities
ECJ	European Court of Justice
EEC	European Economic Community
ERA	European Railway Agency
ETSI	European telecommunications standards institute

	(institut européen des normes de télécommunication)
ETT	Uniform Transit Tariff
GLV-CIM	CIM Consignment Note Manual (GLV-CIM)
GTC –CIM	Terms and Conditions of Carriage for International Freight Traffic by Rail
ISO	International Organisation for Standardisation
MPT	International Passenger Tariff
MTT	International Transit Tariff
OSJD	Organization for cooperation of railways
OTIF	The Intergovernmental Organisation for International Carriage by Rail (OTIF)
	(organisation intergouvernementale pour les transports internationaux Ferroviaires)
PPW	Rules for Use of Wagons in International Traffic
RICo	Regulations concerning the International Carriage of Containers by Rail
RID	Regulations concerning the International Carriage of Dangerous Goods (OTIF)
	(Règlement concernant le transport international ferroviaire des marchandises dangereuses)
RIV	Railway vehicle agreement of the UIC

RWU	Rules for Wagon Usage
SDR	Special drawing rights
SMGS	OSJD - Agreement on International Railway Freight Communication
SMPS	OSJD - Agreement on Passenger Communication
SMPS SI	SMPS Service Instructions
TCV	International tariff for the transport of persons (Tarif commun pour voyageurs)
TERFN	Trans European Rail Freight Network
TSI	Technical Specification for Interoperability
UIC	International Union of Railways
UNESCAP	United Nations Economic and Social Commission for Asia and the Pacific

I. Bibliography

I. Monographs

1. Caspari, Manfred: „Die Beihilferegeln des EWG-Vertrags und ihre Anwendung“ in: FS-von der Groeben, 1987, p. 69;
2. Mestmäcker, Ernst-Joachim: „Auf dem Weg zu einer Ordnungspolitik für Europa“ in: FS-von der Groeben, 1987, p. 9;
3. Schmitt-Kötters, Thomas, in: Heidenhain: „Handbuch des Europäischen Beihilfenrechts“, 1st Edition of 2003, 4th Chapter, B II, para. 52 seq;

II. Legal Articles

1. Allégret, Marc: „Geschichtlicher Überblick der Übereinkommen CIN, CIF, CIV, COTIF und der internationalen Eisenbahn“ in: ZIntEisenb 1994, p. 3-20;
2. Basedow, Jürgen: „Faire Preise für die Benutzung von Infrastrukturen“ in: EuZW 1999, p. 417 seq.;
3. Basiewicz, Tadeusz/ Golaszewski, Andrzej/ Kopcinski, Edward: “Konzeption eines europäisch-asiatischen Verkehrsnetzes (EA-Verkehrsnetz)” in: Schienen der Welt 05/1992, p. 33 seq.;
3. Burgmann, Michel: “Die Bedeutung des Einheitsrechts für den internationalen Eisenbahnverkehr” in: ZintEisenb 1995, p. 220 seq.; CIT (Editor): “CIT-Info – Special Edition COTIF 1999”, 1999; CIT (Editor): “COTIF law and EC law relating to international carriage by rail”, 2006;
4. Deboeck, Hennie/ Spero, Richard/ Thomson, Lou: „Railway Reform in China: The great railway challenge“ in: Railway Economics Research, Feb. 2000, p. 1-12;
5. Durfournaud, Jean-Luc: „Die Haftung des Beförderers im internationalen Eisenbahnverkehr im Falle von Tod oder Verletzung von Reisenden: Untersuchung der Regelung gemäß COTIF (1999) und gemäß Vorschlag für eine Verordnung der Europäischen Union über die Rechte und Pflichten der

- Fahrgäste im internationalen Eisenbahnverkehr“ in: CIT-Info 3/2005, p. 2 seq.;
6. Ebeling, Klaus/ Kirsch, Klaus D.; „Konzept eines gesamteuropäischen Eisenbahnnetzes“ in: Internationales Verkehrswesen 2000, p. 304-307;
 7. Ebeling, Klaus: „Internatioanl Railway Cooperation in a changing Europe“ in: JRTR, 1997, p. 18 seq.; ECMT (Editor): „Competition and Co-operation in international Rail Freight Services“, April 2002;
 8. Eiermann, Rudolf: „Die Benutzung der Eisenbahninfrastrukturen durch Eisenbahnverkehrsunternehmen“ in: NJW 1998, p. 1846 seq.;
 9. Filimonov, Andrej/ Wang, Yangqi (Editors): „Presentation on the 50th Anniversary of the OSJD” Publication of the OSJD, 2006;
 10. Freise, Rainer: „Das neue internationale Eisenbahnfrachtrecht (CIM 1999)“ in: TranspR 1999, p. 417 seq.;
 11. Freise, Rainer: “Der Verordnungsvorschlag der Europäischen Kommission zu den Fahrgastrechten im grenzüberschreitenden Eisenbahnverkehr“ in: RRA 2005, p. 242 -249;
 12. Freise, Rainer: „Reform der Reform des Eisenbahntransportrechts in Europa?“ in: TranspR 2004, p. 377 seq.;
 13. Götz, Volkmas: „Verfassungsschranken interventionistischer Regulierung nach europäischem Gemeinschaftsrecht im Vergleich mit dem Grundgesetz“ in: JZ 1989, p. 1021-1024;
 14. Golaszewski, Andrzej: “Aktivitäten auf dem Gebiet der Modernisierung des Eisenbahnverkehrs zwischen Europa und Asien” in: Schienen der Welt 04/1995, p. 2 seq.;
 15. Golaszewski, Andrzej: „OSShD – Organization for the Collaboration of Railways“ in: Japan Railway & Transport Review, 1997, p. 27 seq.;
 16. Isliker, Hans Rudolf: „Die Zukunftsvision der OTIF ausgehend vom COTIF 1999“ in: ETR 2003, p. 595 seq.;

17. Jürgensen, Thomas: „Gemeinschaftliche Aspekte beim Ausbau transeuropäischer Verkehrsnetze“ in: UPR 1998, p. 12-16;
18. König, Christian/ Neumann, Andreas/ Schellberg, Margret: „Neue Spielregeln für den Zugang zur Eisenbahninfrastruktur als Voraussetzung für chancengleichen Wettbewerb auf der Schiene“ in: WuW 2006, p. 139-149;
19. König, Christian/ Scholz, Michael: „Die Förderung transeuropäischer Netzinfrastruktur“ in: EWS 2003, p. 223-229;
20. Koller, Ingo: „Die Aktivlegitimation im Recht des internationalen Eisenbahngütertransports“ in: TranspR 2006, p. 336 seq.;
21. Kunz, Wolfgang: „Das neue Übereinkommen über den internationalen Eisenbahnverkehr“ in: TranspR 2005, p. 329 seq.;
22. Leimgruber, Thomas: „Das Haftungssystem des COTIF“ in: CIT-Info 6/2005, p. 2 seq.;
23. Maier, Martina/ Dopheide, Jan Hendrik: „Europäischer Schienengüterverkehr nach dem Ersten EU-Eisenbahnpaket: Freie Fahrt für alle?“ in: EuZW 2003, p. 456-460;
24. Mietzsch, Oliver: „Neue Entwicklungen im europäischen und nationalen Rechtsrahmen für den ÖPNV“ in: IR 2005, p. 5-9;
25. Müller-Graf, Peter-Christian: „Die Erscheinungsformen der Leistungssubventionstatbestände aus wirtschaftsrechtlicher Sicht“ in: ZHR 152 (1988), p. 403-438;
26. Nowak, Herwig: „Karel van Miert und der frische Wind in der europäischen Infrastruktur“ in: Internationales Verkehrswesen 2004, p. 304-306;
27. Oberson, Isabelle: „Die zukünftige gemeinschaftsrechtliche Verordnung über die Passagierrechte im Lichte der jüngsten Rechtsprechung des EuGH“ in: CIT Info 2nd Issue/ July 2006, p. 2 seq.;
28. Oberson, Isabelle: „Intermodalität: Überblick über laufende Projekte“ in: CIT Info 4th Issue/ November 2006, p. 2;

29. OSJD (Editor): „Organisation for Co-operation between railways (OSJD)“, April 2006; OTIF (Editor): „Business Report 2005“;
30. Pohar, Michael A.: „Der Vorschlag der Kommission für eine VO über die Rechte und Pflichten der Fahrgäste im grenzüberschreitenden Eisenbahnverkehr KOM (2004) 143 endg.“ in: RRa 2004, p. 194 – 198;
31. Editor: „Weißbuch „Die europäische Verkehrspolitik bis 2010: Weichenstellungen für die Zukunft““ in: EuZW 2002, p. 2;
32. Roth, Frank: „Von der Direktvergabe zur Ausschreibung öffentlicher Verkehrsleistungen“ in: NVwZ 2001, p. 616-620;
32. Roth, Wulf-Henning: „Die Harmonisierung des Dienstleistungsrechts in der EWG“ in: EUR 1987, p. 7 seq. and p.340 seq.;
33. Rottmann, Manuela: „Absage an die marktorientierte Direktvergabe imÖPNV: Interner Entwurf der EU-Kommission für eine neue Verordnung“ in: IR 2005, p. 26-28;
33. Sack, Maria: „Optimierung der transportrechtlichen Schnittstelle CIM/SMGS“ in: CIT Info 1st Issue /March 2005, p. 1 seq.;
34. Sapundshijew, Georgi: „Einheitlicher Transittarif und einige Fragen seiner Anwendung“ in: Journal of the OSShD, 1996, p. 1 seq.;
35. Sellmann, Klaus-Albrecht: „Die Entwicklung des öffentlichen Verkehrsrechts“ in: NVwZ 2004, p. 51-60;
36. Schmidt-Bendun, Rüdiger: „Internationales Eisenbahnverkehrsrecht made in Brüssel – Zum Verordnungsvorschlag der EG-Kommission KOM (2004) 143 endg.“ in: GRP 2004, p. 193 – 198;
37. Silla, Olivier: „Der Aufbau des Binnenmarktes im Schienengüterverkehr (Stand 2002)“ in: www.ec.europa.eu/transport/rail/overview/articles_de.html (as at 14.02.2007);
38. Trolliet, Henri/ Evtimov, Erik: “Vom Atlantik bis Ural mit einem einzigen Beförderungsdokument: dem Frachtbrief CIM/SMGS” in: CIT Info 1st Issue/ February 2006, p. 2 seq.;

39. Zólcinski, Zygmunt: „Der reformierte internationale Eisenbahntarif (MTT)“ in: Journal of the OSShD, 1996, p. 12 seq.;
40. Zólcinski, Zygmunt: „Kollisionsnormen in der CIM und im SMGS“ in: Bulletin des transports internationaux par chemins de fer, 1971, p. 26 seq.;

III. Commentaries

1. Boeing, Detlev on Article 70 EC, para. 116-131; Article 73 EC, para. 1-8 and Article 76 EC, para. 1-4 in: Grabitz/Hilf: „Das Recht der Europäischen Union“, Volume II, as with supplemental set. 22, 2003;
2. Cremer, Wolfram on Article 87 EC, para. 62f. in: Callies/Ruffert: „Das Verfassungsrecht der Europäischen Union“, 3rd Edition of 2007;
3. Erdmenger, Jürgen on Article 73 EC, para. 2-4 in: Von der Groeben/Schwarze: „Kommentar zum EG-/EU-Vertrag“, 6th Edition, 2003;
4. Holst, Axel on Directive 91/440/EEC (as at 2001) in: Frohmeyer/Mückenhausen: „EG-Verkehrsrecht“, loose-leaf-collection, as at 2004;
5. Kunz, Wolfgang (Editor): „Eisenbahnrecht – Systematische Sammlung mit Erläuterungen der deutschen, europäischen und internationalen Vorschriften“ Loose-leaf-collection, Volumes III und IV, Stand 1.Mai 2006;
6. Rossi, Matthias/Jung, Christian on Article 71 EC, para. 9-16; Article 73 EC, para. 1-14 and Article 76 EC, para. 1-3 in: Callies/Ruffert: „Das Verfassungsrecht der Europäischen Union“, 3rd Edition 2007

IV. Publications of the European Commission

1. Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251 (2) of the EC Treaty concerning the common position of the Council on the adoption of a Regulation of the

- European Parliament and of the Council on international rail passengers' rights and obligations: Date of publication: 18. 09. 2006;
2. Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the regions on the implementation of the first railway package: Date of Publication: 03. 05. 2006;
 3. Commission on the aid scheme implemented by Spain for the purchase of commercial vehicles via the Cooperation Agreement of 26 February 1997 between the Ministry of Industry and Energy and the Official Credit Institute: Date of Publication: 26.03.2000
 4. Commission Decision on a tax credit scheme introduced by Italy for professional road hauliers (C 45/95 ex NN 48/95): Date of publication: 22.10.1996
 5. Commission Decision on the measures for the restructuring of road haulage and the development of intermodality (Law No 454 of 23 December 1997) which Italy intends to implement: Date of publication: 04.05.1999
 6. Opinion of the European Economic and Social Committee on the Revised proposal for a Regulation of the European Parliament and of the Council on public passenger transport services by rail and by road: Date of publication: 20.07.2005
 7. The Commission's 19th Report on Competition Policy 1989

Munich, 23 April 2007

NÖRR STIEFENHOFER LUTZ • Partnerschaft

Dr. Mansur Pour Rafsendjani
Rechtsanwalt

Christian-Thomas Stempfle
Rechtsanwalt