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Discussion paper

International railway market access conditions

INTRODUCTION

1. The aim of OTIF is to promote, improve and facilitate, in all respects, international traffic by rail, in particular by contributing to the removal, in the shortest time possible, of obstacles to the crossing of frontiers in international rail traffic, while taking into account special public interests, to the extent that the causes of these obstacles are within the responsibility of States. In order to achieve this general aim, specific instruments are available under COTIF: the development of systems of uniform law (appendices to the Convention) or “soft law” instruments, including recommendations, best practices etc.

In this framework, extending a model for railway interoperability beyond the EU is an objective which must be pursued for three main reasons:

- to facilitate the creation of Euro-Asian rail corridors and regional substructures that will be forming the mainstay of an efficient international transport network;
- to align technical developments in the construction of railway material within a single legal framework to facilitate investment and enable economies of scale;
- to promote a systematically shared, modern vision of rail transport,

all of which will improve the competitive position of rail transport.

At present, the EU is a prime example of a regional area that has defined legal provisions to transform a patchwork of largely incompatible railway systems into a consistent and modern model. The model is consistent because it enables the railway system to become genuinely interoperable, with a series of legal acts for the development of homogeneous technical solutions, taking into account the operational aspects as well (e.g. a European licence for drivers). It is also modern as it promotes innovation. On the one hand, technical developments are encouraged as the regulations rely mainly on functional requirements and go into prescriptive detail only when necessary for technical compatibility or safety. On the other hand, safety management through common safety methods allows members of the sector to define transparent and non-discriminatory voluntary harmonisation. These underpinning principles make the EU provisions interesting for consideration in a wider geographical context.

2. One of the obstacles to international railway traffic that still remains outside regional economic integration organisations, such as the EU and EAEU is that there are no multilateral agreements regulating access to a foreign state’s railway infrastructure by a railway undertaking for the purpose of international traffic. However, [t]here have always been local cross frontier operations in which one railway undertaking performed services on the “other” side of the frontier[...]. However, such transport was performed on behalf of and for the account of the national railway of the state on which the traffic was situated.¹

In the classic relationship an integrated railway owned infrastructure up to the state frontier and trains changed from being a train of one railway to being a train of the other on crossing the frontier. Revenue and safety responsibilities transferred at the same point. Operating and safety issues were resolved by mutual assurances. Transport provides a "horizontal" service which benefits the economy as a whole, including the production of both goods and services,

¹ Colin Buchanan and Partners. A study on the compliance of rail border traffic agreements with EU rail and competition legislation. 2005, paragraph 3.4.5.

and if it is paralysed, then it is the economy as a whole that suffers. It is also a "downstream", secondary activity whose cycles follow and amplify those of the general economy, i.e. an increase in GDP results in a more than proportional increase in the demand for transport². As a consequence, international instruments aimed at improving the efficiency of rail transport should be thoughtfully considered, as they may have positive effects on the economy as a whole.

3. This discussion paper is only a preliminary analysis of international railway market access, the aim of which is to initiate a debate on possible ways to move forward. In this context, the paper presents a preliminary brief overview of how international access is ensured on a multilateral and bilateral level: experience from the European Union (EU) and the Eurasian Economic Union (EAEU) in the railway sector, as well as experience from other transport sectors.

² World Trade Organization. Council for Trade in Services. Land Transport Services Part I - Generalities and Road Transport. Background Note by the Secretariat (S/C/W/60). 28 October 1998, paragraph 6.

I. OVERVIEW OF ACCESS RULES FOR RAIL TRANSPORT

I.1 – Liberalisation in the European Union

4. Europe's railways have traditionally been organised on entirely national lines. For the half century leading up to the 1990s, integrated national railways had an effective monopoly of operation within a state with a few minor exceptions. This meant that single bodies represented the railway industry on each side of the frontier, in some cases as governmental departments and in others as state owned corporations. Relationships between the railways were therefore simple, if not always harmonious. As trains ran across frontiers, their legal, commercial and operational status changed from being a train operated by railway A to one operated by railway B. Responsibility for the train and the generation of revenue passed from one organisation to the next, even though there was no change to the train itself.³

The far-reaching changes to the traditional operational model were brought about by EU regulations. For the purpose of this paper, it is important to look at the development of regulations not only as a final "product", but also in terms of intermediate stages that may be relevant for the development of a market access instrument within OTIF.

5. *The initial steps were taken at the beginning of the 1990s.* Directive 91/440/EEC on the development of the Community's railways initiated the long process of establishing and making functional the direct operation of trains by the same railway undertaking in cross-border traffic. Over several decades, the European Union developed a very complex set of rail transport regulations. The basic conditions of access for a foreign railway undertaking to the infrastructure of another country were not developed alone, but in conjunction with requirements ensuring non-discrimination between railway undertakings and infrastructure managers.

From the very inception, a distinction was made between the provision of transport services and the operation of infrastructure and corresponding notions of 'railway undertaking' and 'infrastructure manager' emerged.

Member States were entitled to lay down rules for railway undertakings and their groupings to pay for the use of railway infrastructure; such payments must comply with the principle of non-discrimination between railway undertakings.

International groupings were granted access and transit rights in the Member States where their constituent railway undertakings were established, as well as transit rights in other Member States for international services between the Member States where the undertakings constituting the said groupings are established. Furthermore, railway undertakings were granted access to the infrastructure on equitable conditions in the other Member States for the purpose of operating international combined transport goods services.

At that time, access conditions were not well developed and were limited to:

- a requirement that the infrastructure user fee must not discriminate between railway undertakings;

³ Colin Buchanan and Partners. A study on the compliance of rail border traffic agreements with EU rail and competition legislation. 2005, paragraph 3.3.4.

- the conclusion of the necessary administrative, technical and financial agreements with the managers of the railway infrastructure used, with a view to regulating traffic control and safety issues concerning the international transport services referred to. The conditions governing such agreements must be non-discriminatory.

The next step was Directive 95/18/EC on the licensing of railway undertakings. In order to ensure that access rights to railway infrastructure are applied throughout the EU on a uniform and non-discriminatory basis, a licence for railway undertakings, which is valid throughout the EU, was introduced as an additional access condition.

6. *A major step forward was the railway packages, starting with the adoption at the beginning of 2001 of the first railway package.* This package established a developed set of access conditions and granted further rights of access to EU railway undertakings. In fact, all the subsequent regulations were based on the first railway package and only improved it and added more detail.

Directive 2001/12/EC granted railway undertakings access to the Trans-European Rail Freight Network under equitable conditions and, after 15 March 2008, to the entire rail network, for the purpose of operating international freight services. A definition of “international freight service” was adopted for this purpose: transport services where the train crosses at least one border of a Member State; the train may be joined and/or split and the different sections may have different origins and destinations, provided that all wagons cross at least one border.

Directive 2001/14/EC introduced detailed rules on the allocation of railway infrastructure capacity, the levying of charges for using railway infrastructure and some basic provisions on safety certification, as briefly described below:

- infrastructure managers or independent capacity allocation bodies grant the right to use specific infrastructure capacity in the form of train paths. Railway undertakings and some other entities may apply for infrastructure capacity. The capacity allocation must be fair and non-discriminatory;
- infrastructure managers or independent charging bodies must determine the charges for the use of infrastructure and collect them. The infrastructure charging system should be non-discriminatory;
- railway undertakings must obtain safety certificates. However, at that time the regulations concerning safety certification at EU level was limited to basic principles.

To ensure transparency and non-discriminatory access to rail infrastructure for all railway undertakings, two additional measures were introduced:

- all the necessary information required to use access rights has to be published in a network statement;
- establishment of a regulatory body that oversees the application of the EU rules and acts on market access as an appeal body, notwithstanding the possibility of judicial review.

The second railway package of 2004 accelerated the liberalisation of rail freight services by fully opening the rail freight market to competition as from 1 January 2007. It also harmonised the content of safety rules, safety certification of railway undertakings, the tasks and roles of the safety authorities and the investigation of accidents.

The third railway package adopted in October 2007 introduced open access rights for international rail passenger services, including cabotage, by 2010 subject to certain safeguards to avoid abuse of rights. Operators may pick up and set down passengers at any station on an international route, including at stations located in the same Member State.

Before achieving the architecture of the fourth railway package, the first railway package (Directive 2012/34/EU) had to be “recast”. The biggest change brought about by this directive was the detailed and comprehensive regulation of access to services facilities, the non-discriminatory supply of them and independent and transparent management of some of them. What is important is that within the EU it was realised that without access to services facilities, the railway undertakings would not be in a position to enjoy the basic right of access to foreign railway infrastructure.

Finally, the fourth railway package, in particular Directive (EU) 2016/2370, completes the process of gradual market opening started with the first railway package. It establishes the general right for railway undertakings established in one Member State to operate all types of passenger services everywhere in the EU, lays down rules aimed at improving impartiality in the governance of railway infrastructure and preventing discrimination and introduces the principle of mandatory tendering for public service contracts in rail transport. This package was adopted in 2016. Directive 2012/34/EU contains the complete list of access conditions and measures aimed at facilitation and enforcement of such rights.

I.2 Another rail transport practice: the Eurasian Economic Union

7. One of the objectives of the EAEU is to establish a common market of transport services. The Member States are required to strive for the gradual liberalisation of transport services provided between the Member States. The liberalisation procedure, conditions and stages is determined under international treaties within the Union, taking into account specifications provided for in the Treaty on the Eurasian Economic Union, particularly the annexes to the Treaty.

EAEU Member States defined inter alia the following objectives:

- the gradual establishment of a common market of transport services in the sphere of rail transport;
- to enable access for the rail transport organisations of one Member State to the domestic market of rail transport services of another Member State;
- to enable access to infrastructure services for carriers of the Member States.

However, it is important to stress that the above-mentioned regulations have only recently been introduced and it might be premature to evaluate how they have been implemented and whether they are effective. Nevertheless, it is worth mentioning these developments, as they show the interest that regional organisations have in developing regional access conditions.

8. Within EAEU, there are detailed provisions on tariffs. In particular it is laid down that tariffs for rail transport services and/or their threshold levels (price limits) must be fixed (changed) in accordance with the legislation of the Member States and international treaties, while allowing tariffs to be differentiated in accordance with the legislation of the Member States.

The “Rules for Access to Rail Transport Infrastructure within the Eurasian Economic Union” (one of the annexes to the treaty) govern the relations between carriers and infrastructure operators in the sphere of provision of access to rail transport infrastructure in various infrastructure sections within the Union. It must be emphasised that access is only granted for infrastructure sections, which are part of the railway infrastructure adjacent to the junction of two adjoining infrastructures of the Member States within a “locomotive circulation area” specified by the infrastructure operator.

Access to infrastructure services is granted for infrastructure sections and is based on the following principles:

- equality of requirements for carriers under the legislation of the Member State where the infrastructure is located;
- application to carriers of a common pricing (tariff) policy in the sphere of infrastructure services in accordance with the legislation of the Member State where the infrastructure is located;
- availability of information on the list of infrastructure services, the procedure for providing these services based on the technical and technological capabilities of the infrastructure, as well as information on tariffs, fees and charges for these services;
- rational planning of repairs, maintenance and servicing of the infrastructure for the effective use of its capacity and to ensure continuity of the transportation process and the integrity and safety of related processes;
- protection of information constituting a commercial or state secret which becomes known in the process of planning and organising transport activities and providing infrastructure services;
- priority (sequence) of the provision of access to infrastructure to carriers if there is limited infrastructure capacity in accordance with the standard train movement schedule;
- carriers must ensure that the rolling stock used is in proper technical condition.

The infrastructure operator must provide access to infrastructure services by to carriers having the following:

- licenses to carry out transport activities issued by the official authority of the Member State in accordance with the legislation of the Member State where the infrastructure is located;
- safety certificates issued by the official authority of the Member State in accordance with the legislation of the Member State where the infrastructure is located. The safety certificate certifies that the safety management system complies with the applicable safety rules;
- trained employees involved in the organisation, management and performance of the transport process, with documents confirming their qualifications and training in accordance with the legislation of the Member State where the infrastructure is located.

Access to infrastructure services must be provided on the basis of the requirements of the legislation of the Member State where the infrastructure is located and must include the following stages:

- development and publication by the infrastructure operator of a technical specification of infrastructure sections;

- submission by the carrier of an application for access to the rail transport infrastructure within the Eurasian Economic Union (hereinafter “the application”) according to the Annex;
- consideration of the application by the infrastructure operator;
- approval of the train movement schedule and timetable;
- conclusion of a contract for the provision of infrastructure services in accordance with the legislation of the Member State where the infrastructure is located.

9. All disputes and disagreements between a carrier and the infrastructure operator must be resolved through negotiations. If, in the course of the negotiations, the carrier and the infrastructure operator fail to reach an agreement, all disputes and disagreements must be resolved in accordance with the procedure determined by the legislation of the Member State where the infrastructure is located.

II. AIR TRANSPORT PRACTICE: ICAO

II.1 Founding convention

10. In 1944 in Chicago, three international documents dealing inter alia with market access were adopted with implications for the multilateral regulation of international air transport:

- The Convention on International Civil Aviation, signed in Chicago on 7 December 1944, which is the most important document, containing the constitution of the International Civil Aviation Organization (ICAO) and certain Articles that bear on the topic of economic regulation.

- A second instrument is the International Air Services Transit Agreement, in which two freedoms of the air are regulated, recognising the multilateral exchange of rights of overflight and non-traffic stops for scheduled air services among the Contracting States.

- A third instrument is the International Air Transport Agreement, containing the five freedoms of the air for scheduled international air services. This document initially came into force for nineteen states only, eight of which renounced it at a later stage.⁴

[D]elegates at the 1944 Chicago conference failed to agree on a single global market system for international aviation⁵.

Article 6 of the Chicago Convention perfects the restrictive logic of the airspace sovereignty principle through a concessionary principle of market access. Thus, “[n]o scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or authorization of that State, and in accordance with the terms of such permission and authorization.”⁶

[T]wo ancillary agreements [in the framework of ICAO], the International Air Services Transit Agreement (“Two Freedoms Agreement”) and the International Air Transport Agreement (“Five Freedoms Agreement”) instituted the “freedoms of the air,” which are actually a series of restrictions that sought to confine market access rights within an ascending scale of relative openness. Of the two instruments, only the Two Freedoms Agreement – with its provisions limited to flyover and non-commercial landing rights – managed to win wide assent in a world suspicious of unbridled market forces. The Five Freedoms Agreement held the potential to allow airlines to develop deeper transnational route networks by generally granting an airline of a State party the privilege not only to carry traffic back and forth between any point in its home State and any point in a foreign State party to the Agreement, but also to move traffic “beyond” that foreign State to serve points in any third State party. But the Five Freedoms Agreement attracted few adherents and quickly became moribund.⁷ So in fact the Five Freedoms Agreement remained a dead letter.

II.2 Liberalisation through bilateral agreements and ICAO’s global approach to liberalisation

⁴ Elmar Gjemulla, Ludwig Weber. *International and EU Aviation Law. Selected Issues*. Kluwer Law International, 2011, p.129-130.

⁵ Brian F. Havel and Gabriel S. Sanchez. *The Principles and Practice of International Aviation Law*. Cambridge University Press, 2014, p. 72

⁶ Brian F. Havel and Gabriel S. Sanchez. *The Principles and Practice of International Aviation Law*. Cambridge University Press, 2014, p. 41-42.

⁷ Brian F. Havel and Gabriel S. Sanchez. *The Principles and Practice of International Aviation Law*. Cambridge University Press, 2014, p. 73-74

11. After the failure of the Five Freedoms Agreement to prompt a multilateral exchange of even minimally liberal market access privileges, States began to use bilateral ASAs [Air Services Agreements] as the principal diplomatic and political vehicle for these trades. As an object of purely bilateral exchange however, market access privileges were now to be conceded only on the basis of defensive reciprocity. A State could choose to tighten or loosen any number of operating restrictions, including constraints on pricing, capacity, frequencies, and traffic rights, in line with the recalcitrance or generosity of its bilateral partners.⁸

Despite criticism of the bilateral system in favour of a multilateral one, the former is still in force.

Nevertheless, the ICAO, receptive to the worldwide change in the international air transport field, initiated studies on worldwide air transport liberalization.⁹ ICAO has developed considerable policy and guidance material on market access. The guidance consists of relevant Assembly resolutions, model clauses for air service agreements, and conclusions, recommendations and declarations of the air transport conferences. The Template Air Services Agreements (TASAs) developed by ICAO provided useful guidance on liberalization and has been used by States in expanding air services relations. After careful study and preparation, ICAO introduced the first ICAO Air Services Negotiation Conference (ICAN) in 2008. ICAN provides a central meeting place for States to conduct bilateral negotiations in a one-stop fashion, thus greatly improving the efficiency of the negotiation process. Since its inception, this event has been held annually in different regions with growing participation. By 2012 a total of 107 countries (56 per cent of the ICAO membership) had utilized this facility at least once, resulting in the signing of over 300 air service agreements and arrangements.¹⁰

12. Recent developments in the international air transport market show that more States have embraced liberalization. Air services agreements granting largely unrestricted market access rights beyond Third and Fourth Freedoms¹¹, often referred to as “open skies agreements” (OSAs) have become widespread. The air transport industry continues to undergo structural changes, and the marketplace has become more competitive. Innovative and new business models, such as low cost carriers, are now widespread.

The growing number of liberal agreements, including OSAs, is a positive trend for building the basis for wider consensus towards multilateralism in the exchange of commercial rights, which remains one of ICAO’s goals.¹²

⁸ Brian F. Havel and Gabriel S. Sanchez. *The Principles and Practice of International Aviation Law*. Cambridge University Press, 2014, p. 74-75

⁹ Elmar Giemulla, Ludwig Weber. *International and EU Aviation Law. Selected Issues*. Kluwer Law International, 2011, p.177.

¹⁰ “Expanding market access for international air transport”. ICAO, Working paper (ATConf/6-WP/13), 2012, paragraphs 3.1, 3.2 and 3.3.

¹¹ **Third Freedom of The Air** - the right or privilege, in respect of scheduled international air services, granted by one State to another State to put down, in the territory of the first State, traffic coming from the home State of the carrier. **Fourth Freedom of The Air** - the right or privilege, in respect of scheduled international air services, granted by one State to another State to take on, in the territory of the first State, traffic destined for the home State of the carrier.

¹² “Expanding market access for international air transport”. ICAO, Working paper (ATConf/6-WP/13), 2012, paragraphs 2.1, 2.3 and 2.5.

In the ICAO Secretariat's paper "Expanding market access for international air transport" for the 6th Worldwide Air Transport Conference (Montreal, 18 to 22 March 2012) it was stated that:

*Expanded market access is fundamental to the development of the global air transport system, as all international air services are operated under the market access rights granted by States. Restrictions on market access remain one of the major barriers to achieving a more efficient regulatory framework for international air services, increasing route connectivity and securing maximum benefits from the aviation sector for States and citizens.*¹³

III. ROAD TRANSPORT PRACTICE: EXAMPLE OF BILATERAL AND MULTILATERAL APPROACHES

13. International market access conditions are today regulated either by regional economic integration organisations (e.g. EU) or by classical international bilateral and/or multilateral agreements. As will be illustrated below, such agreements may contain qualitative and /or quantitative market access rules. However, for the purpose of this paper, solutions adopted by regional economic integration organisations will not be described, even though they have inspired classical international agreements.

III.1 Bilateral road transport agreements¹⁴

14. International bilateral schemes are based on quantitatively restrictive models deriving from an intertwining system of bilateral governmental agreements. According to World Bank's QuARTA¹⁵ the most preferred limits imposed on international operations applied in quantitatively restricted bilateral relationships are the following:

- limited number of trip permits exchanged between contracting parties;
- limited annual quotas fixed in the same international legal context for various types of haulage, e.g., for bilateral traffic (export, import), transit traffic, traffic in the vicinity of national borders (e.g. within a 50 km wide strip on both sides of the border), third country traffic with or without transit obligations through the country of establishment, an annual review of the usage level of quotas and a related redistribution of unused quotas;
- restrictions imposed on return-cargo acquisition;
- total prohibition of cabotage;
- limitation of tax-free permits exchanged;
- limitation of the validity of permits in time (monthly, annually, etc.);
- tolerance in the system: permit-free and or quota-free operations allowed for certain types of transport.

¹³ "Expanding market access for international air transport". ICAO, Working paper (ATConf/6-WP/13), 2012, paragraph 1.1.

¹⁴ See World Bank; IRU. 2016. Road Freight Transport Services Reform: Guiding Principles for Practitioners and Policy Makers. World Bank, Washington, DC. © World Bank. <https://openknowledge.worldbank.org/handle/10986/25853> License: CC BY 3.0 IGO, p. 39-40

¹⁵ Kunaka, Charles; Tanase, Virginia; Latrielle, Pierre; Krausz, Peter. 2013. Quantitative analysis of road transport agreements (QuARTA). Washington DC: World Bank. <http://documents.worldbank.org/curated/en/175601468157187988/Quantitative-analysis-of-road-transport-agreements-QuARTA>.

The bilateral agreements cover similar subjects. Due to their multiplication they became difficult to manage and to implement. All the important decisions on practical implementation of the agreements are entrusted to a joint committee composed of representatives of two countries, which generally meets once a year. Deregulation (replacement of quantitative restrictions with qualitative criteria) emerged in the same period when the system of bilateral agreements reached its peak, but it did not have much influence on the content and functioning of bilateral agreements. Some basic qualitative elements for access to the profession were integrated into a number of bilateral agreements, but quantitative market access rules remained almost untouched.

In parallel to this development, the introduction and implementation of a set of international transport conventions have reinforced the legal context of the qualitative nature of bilateral agreements. Efforts were undertaken to create harmonized provisions in bilateral agreements, though without notable success. Discrimination, which is an inherent characteristic of bilateral agreements, continued to play against operators, who were treated differently under each agreement. Even if provisions of agreements were drafted according to the same formal patterns and sometimes principles, discrimination prevailed among operators. Although at a multilateral level the approaches have steadily moved toward transport liberalization, bilateral road transport agreements continue to prevail as instruments to regulate access to international markets in all the regions of the world. For example, in Western Africa, the ECOWAS Member States adopted in 1982 a Convention to regulate interstate transport. This Convention defines the basic rules to be applied for itineraries of international routes, and the technical conditions for vehicles (weight and dimension), but leaves the implementation of freight distribution to bilateral agreements.

III.2 Multilateral road transport agreements¹⁶

15. Such agreements may be trade-led agreements which cover a multitude of complex issues, for instance the North American Free Trade Agreement (NAFTA) or transport-led agreements and schemes. Only transport-led agreements will be described in detail below.

International cooperation can have a significant positive impact on the facilitation of road transport for countries in their respective subregions. The best-known examples to date are the European Conference of Ministers of Transport (ECMT) created in 1953.

On 1 January 1974 the European Conference of Ministers of Transport (ECMT, which became the ITF in 2006) introduced the Multilateral Quota, which is a system of transport licenses for pan-European road haulage. These licenses enable hauliers to undertake an unlimited number of multilateral freight operations in 42 European member countries participating in the system. The Multilateral Quota is managed by ITF's Road Transport Group (RTG), which allocates licenses to the 42 member countries of the system and publishes a User Guide.

ECMT multilateral permits authorise transport undertakings established in an ECMT member country to carry goods by road for hire or reward between ECMT member countries and in transit through the territory of one or several ECMT member country(ies). The licences are not valid for transport operations between an ECMT member country and a third country, nor for cabotage operations.

¹⁶ See World Bank; IRU. 2016. Road Freight Transport Services Reform: Guiding Principles for Practitioners and Policy Makers. World Bank, Washington, DC. © World Bank. <https://openknowledge.worldbank.org/handle/10986/25853> License: CC BY 3.0 IGO, p. 35, 40-41.

Just like any system that needs to adjust in order to develop, the ECMT quota system went through a number of challenges over the last ten years, the most important being:

- an unbalanced distribution of licences between the countries;
- certain restrictions imposed on the use of the licences have reduced the efficiency of usage of the ECMT quota;
- the system of controls and sanctions in the Quota System is mainly the responsibility of the country where the vehicle is registered and there is little cooperation between the various national supervisory authorities or between the authorities of various countries in terms of road transport enforcement and infringement; and
- certain countries have become more protectionist, a trend undoubtedly reinforced by the recent economic crisis.

In May 2015, ministers approved a Quality Charter for Road Haulage under the ECMT Multilateral Quota System, establishing qualification standards for companies, managers and drivers. The Quality Charter entered into force on 1 January 2016. The Charter focuses on four specific areas:

- admission to the occupation of transport operators;
- compliance with driving and rest times;
- categorisation of infringements; and
- driver training.

As far as access to the profession is concerned, four criteria are considered: professionalism, honour, financial standing and establishment in one of the ECMT member countries.

IV. CONCLUSIONS AND WAY FORWARD

16. As was illustrated above, establishing the conditions for access is a very sensitive and complex issue. However, it is indispensable for improving transport efficiency. The overview of air and road transport demonstrates the need for an instrument for multilateral market access conditions. Moreover, there are examples of successes and failures to be taken into account. It has to be kept in mind that many problems international transport faces today originated in the past, but the international economic and legal environment is now different.

The patchwork of fully developed heritage national rail systems within the EU is still complex. In order to extend the scope of common regulations outside the EU for mutually agreed international traffic, it will be necessary to adapt and simplify the EU's fully developed regulations.

EU rail legislation covers the entire rail system, including main lines as well as branch lines. In the framework of developing interoperability within COTIF, provisions will only cover international traffic.

Finally, the concept of interoperability in the EU is linked to the opening of the markets within a competitive model. However, within their own borders, or in regional areas such as the GCC project in the Gulf, states can also organise their railway system around an organisational model that aims at cooperation and reciprocity rather than competition. COTIF is and should remain compatible with any organisational model of railways.

The desire to make railways more efficient and business-oriented is not exclusive to Member States of the EU. In order to use railways to their full potential for international traffic, it

would be advisable to allow international train access to be coordinated and agreed upon with neighbouring states without imposing a common market model for train operation. This way of thinking leads to a distinction between:

- technical interoperability (this is an on-going process which will be reflected in the new Appendix H and will allow direct operation of trains among OTIF Member States, and
- access conditions that can be defined in a multilateral framework once it has been clarified to what extent an access model can be shared among OTIF Member States.

17. Within the OTIF area, railway undertakings and infrastructure managers may be vertically integrated or may be independent entities; companies may be private, state-owned or even part of an authority. A national railway market may be internally liberalised or may function as a monopoly. However, as has been shown above, international cooperation may be organised in a considerably more efficient way than today by providing an appropriate legal framework and thus interfaces between the national railway systems.

In this framework, the criteria developed and used in the EU seem to be replicated by the EAEU with certain adaptations. Therefore, regional regulation of the EU and EAEU seems to be a good starting point for designing an international multilateral instrument adapted to the particularities of OTIF's Member States. The corresponding work should be concentrated along the following lines:

- Defining access conditions (capacity allocation, infrastructure charges etc.);
- Defining the scope of access (core infrastructure, including or excluding services facilities, whole network or certain lines, restrictions);
- Defining requirements for railway undertakings, infrastructure managers and the relationship between them (licence, civil liability insurance, safety certificate, contract of use etc.);
- Defining an appropriate legal form for the instrument and a mechanism for acceding to it (general application among all parties to the instrument or application only between states which have mutually agreed to apply it).

For the purposes of COTIF, the definitions of RU and IM should be functional, and must not impose a particular legal and/or organisational form (vertical integration or separation) as is the case in the EU. Some other questions may be worth discussing, since they are more sensitive and relate to the organisation of national markets, such as appropriate enforcement mechanisms (national regulatory bodies, intergovernmental commissions etc.).

These questions should be explored, keeping in mind the solutions that have been developed both for air and road transport, which have succeeded in developing global regulations. Nevertheless, harmonisation with the EU regulations should be maintained and seen as an asset.

Moreover, further discussions on this subject should also take into account the relevant provisions of the General Agreement on Trade in Services (GATS), Annex 1B to the

Marrakesh Agreement of the World Trade Organization. However, for the purpose of this assessment it is sufficient to say that GATS is applicable to rail transport services, and in particular passenger and freight transport.

OTIF has the opportunity to review the current fragmented approaches to market access conditions and to explore the possibility of establishing an international multilateral legal regime for international market access. Thoughtful consideration of the subject by the Member States of OTIF would enable an appropriate and balanced solution to be found, both in terms of form and substance.

Proposal for decision

1. The Revision Committee notes the analysis made by the OTIF Secretariat which is contained in document LAW-17136-CR 26/11 and notes that the following Member States [list] expressed an interest in developing harmonised access conditions.
2. The Revision Committee mandates the Secretary General to continue the work on this issue along the lines set out in document LAW-17136-CR 26/11, part IV.