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New Appendix H to COTIF

Legal opinion of consultant Prof. R. Freise on the draft new Appendix H

This document prepared by Prof. R. Freise reflects the views of the author only and does not necessarily reflect the position of the OTIF Secretariat

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Comments on the draft new Appendix H to COTIF
for the 26th session of OTIF's Revision Committee

I. Introduction

The aim of the new Appendix H is to provide general principles and responsibilities for the cross-border operation of trains for states that already fully apply APTU and ATMF (see section1.2 of the draft text).

As the new Appendix is to be compatible with the provisions of EU law on the safety of the railway system, EU Member States and states that apply EU law do not in principle need to take any further implementing measures (justification for Art. 1). In accordance with the existing disconnection clause, these states do not in any case apply the law of COTIF in their mutual relations, but EU law, so that for them, the new appendix only applies if there are no European Union legal provisions concerning the subject in question or if the relationship between one of these states and a non EU OTIF state is concerned.

The new appendix only applies

- to relations between OTIF states that do not apply EU law, but which do apply the COTIF APTU and ATMF appendices,

- to relations between these states and a neighbouring state that applies EU law, and

- in all cases where no EU provisions apply to the subject in question, but only APTU and ATMF.

The basic aim in order to promote the interoperability of the rail system beyond the EU is to apply the principles and obligations of EU law to the cross-border operation of trains in those OTIF states that apply APTU and ATMF, but not EU law.

II. Comments on the draft

The Committee of Technical Experts has submitted the draft new Appendix H to COTIF to the Revision Committee for discussion (doc. CR 26/8/9/10, p. 3). In view of the significance of creating another appendix (the eighth) to the Convention, the fact that the draft can first be discussed among a broader group of people is to be welcomed. The following comments on the draft are submitted as a contribution to the discussion expected at the Revision Committee.

1. General comments

Promoting the interoperability of the railway system beyond the EU is to be welcomed. As international rail transport is characterised mainly by the use of cross-border trains, while railway infrastructures continue to be managed mainly at national level, it is also a welcome fact that the new appendix sets out uniform rules for the safe operation of trains in international traffic.

As there are already extensive regulations on interoperability and the safe operation of the railway system in the EU area, it is advisable that any new provisions should be harmonised with the existing EU rules on the same subject. Actors working at international level in the railway sector have to rely on not being subject to different requirements in different states, particularly in terms of railway safety. Tasks and responsibilities must therefore be allocated uniformly and consistently in accordance with all the applicable regulations and in all participating states, so that there is no doubt or uncertainty concerning the respective obligations and areas of responsibility and, in cases of loss or damage, who is liable.

It is therefore particularly important that the new Appendix H be compatible with the provisions of EU law. In the following, the main focus will be on this aspect.

2. Is Appendix H in line with EU law?

According to Art. 3 § 2 of the draft, the Contracting States must ensure that on their territory, responsibility for the safe operation of trains in international traffic and the control of risks associated with it rests with the infrastructure manager(s) concerned and the railway undertaking(s) which operate(s) the train. The justification for this says that railway undertakings and infrastructure managers should have shared responsibility for the safe operation of trains. In the EU, this principle is enshrined in the Rail Safety Directive (2016/798).

However, if one looks more closely at the separation introduced in the EU rail sector between infrastructure management and transport procedures on the infrastructure, and its implementation in EU law, some doubt arises as to whether this argument is correct.

a) Aim and provisions of Safety Directive 2016/798

Following the dismantling of the formerly integrated state railways, the railway infrastructure is managed by infrastructure managers, whereas the trains running on the infrastructure are operated by railway undertakings. “Joint operation” by both participants no longer exists. Each has his own, defined operations, so that there is no blurring of responsibility and liability. One of the consequences of this, for example, is that the railway undertaking is liable to the infrastructure manager if a wagon in the railway undertaking’s train derails and causes damage to the infrastructure. If there were joint responsibility and joint operation of the train by the railway undertaking and the infrastructure manager, there could be no such correlation of liability between the railway undertaking and the infrastructure manager.

This finding is not altered by the fact that, owing to the integrated wheel/rail system, the railway undertaking and infrastructure manager work closely together and must exchange all the relevant information.

This differentiation between infrastructure management and transport is given clear expression in **recital 7** of the **Rail Safety Directive**:

“The main actors in the Union rail system, infrastructure managers and railway undertakings should bear full responsibility for the safety of the system, each for their own part. Whenever appropriate, they should cooperate in implementing risk control measures.”

Several articles of the Safety Directive elaborate in more detail the allocation of respective areas of operation to railway undertakings and infrastructure managers under their own responsibility and liability – with the simultaneous obligation to work together (*emphasis added by the author*).

Article 4, paragraph 1 (d) of the Directive says that the Member States must ensure that the responsibility for the safe operation of the Union rail system and the control of risks associated with it is laid upon the infrastructure managers and railway undertakings, *each for its part of the system*, obliging them to: (i) implement necessary risk control measures [...], where appropriate in cooperation with each other; [...].

According to **paragraph (e)** of this provision, each infrastructure manager and each railway undertaking is made responsible *for its part of the system* and its safe operation [...].

Art.4, paragraph 3 (a) of the Safety Directive stipulates that railway undertakings and infrastructure managers must implement the necessary risk control measures [...], where appropriate in cooperation with each other and with other actors.

According to **Art.9, paragraph 1** of the Safety Directive, infrastructure managers and railway undertakings must establish their *respective* safety management systems.

b) Safety philosophy of the new Appendix H

Compared with the division of tasks and responsibilities under the Safety Directive, several parts of the draft new Appendix H emphasise different aspects:

According to **Art. 3 §§ 2 and 3** of the draft, the Contracting States must ensure that responsibility for the safe operation of trains in international traffic and the control of risks associated with it rests with the infrastructure manager(s) concerned and the railway undertaking(s) which operate(s) the train, and that the participating railway undertakings and infrastructure managers have implemented a safety management system and monitor its correct application. Only in the justification is it made clear that each railway undertaking and each infrastructure manager should have its own safety management system.

Art. 7 §§ 2 – 4 of the draft also describes both infrastructure managers (even referred to here first of all, as in Art. 3 § 2!) and railway undertakings as being involved in the operation of trains. According to **§ 3** of this Article, infrastructure managers and railway undertakings must cooperate to ensure that trains in international traffic *under their responsibility* are operated safely.

The differences in wording between the Safety Directive and the draft Appendix H might seem slight, but they can cause uncertainty and doubt with regard to the precise division of tasks and responsibilities between railway undertakings and, in cases of loss or damage, conflict as to who is liable.

In order to achieve full compatibility between EU law and the new Appendix H, it is proposed here not to treat infrastructure managers as (joint) operators of trains. As the purpose of Appendix H is to regulate the safe operation of trains in international traffic, it seems appropriate to concentrate the provisions of this appendix on railway undertakings and not always to refer to infrastructure managers as well. **Art. 3 § 2 of the draft** could instead read as follows:

"Without prejudice to the responsibilities of ***the infrastructure managers concerned*** and Entities in Charge of Maintenance of railway vehicles and of all other actors having a potential impact on the safe operation of the railway system, Contracting States shall ensure that on their territory, responsibility for the safe operation of trains in international traffic and the control of risks associated with it rests with ***the railway undertaking(s) which operate(s) the train***."

Art. 3 § 4 of the draft could read as follows:

"Contracting States shall ensure that all binding operational rules ***and rules concerning the safe operation of trains*** are published and made available to ***railway undertakings***."

If the basic conclusion proposed here is accepted (i.e. that the new appendix does not affect the infrastructure manager's obligations), **the references to the infrastructure manager can be deleted from all the other Articles** in the appendix. The entities in charge of maintenance of railway vehicles and all other actors having a potential impact on the safe operation of the railway system are also mentioned only once, namely in Art. 3 § 2.

3. Target audience of the new Appendix H

Articles 3 to 6, 8 and 9 of the draft are aimed at the Contracting States, their certification authorities and OTIF's Committee of Technical Experts. Only **Article 7** is aimed directly at railway undertakings (and infrastructure managers). This Article therefore occupies a special position, the justification for which should be reconsidered.

Article 7 § 1 contains a statement of the obvious and seems superfluous. It already says in Art. 5 § 1 that: "Contracting States shall only permit the operation of trains in international traffic by railway undertakings whose Safety Certificate is valid on their territory."

The other paragraphs of Article 7 also set out obligations which, following on from the previous Articles and because of their very general wording, are self-evident. Art. 3 § 2 already states that the Contracting States must ensure that responsibility for the safe operation of trains in international traffic and the control of risks associated with it rests with the railway undertaking(s) which operate(s) the train. In addition, Article 6 § 2 requires each Supervision Authority to supervise the correct application of the safety management system of railway undertakings (in this case, the infrastructure manager is quite rightly not referred to).

Moreover, Art. 7 § 2 is worded so generally, and at the same time so comprehensively, that in specific cases, it may not be clear what the scope of this provision is: for example, does this provision still permit so-called "mutual agreements on the technical inspection of wagons", according to which only spot checks on wagons need to be carried out, so as to speed up and facilitate cross-border traffic between the participating railway undertakings in certain cases?

In view of the generalised wording and resulting ambiguity of Article 7 of the draft, and because this provision is to some extent a foreign body in the new appendix aimed at states and authorities, I would propose that this Article be deleted.

III. Conclusion

It is proposed:

1. That the new Appendix H be limited to railway undertakings and that infrastructure managers only be referred to in the context of Article 3 § 2 as another actor in the safe operation of trains in international traffic.
2. To delete Article 7 of the draft.

Signed Rainer Freise.