

INTERNATIONAL TRAFFIC AND MUTUAL RECOGNITION BETWEEN NON-EU AND EU COTIF CONTRACTING STATES

Discussion Paper

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1. INTRODUCTION

- 1.1 The Convention concerning International Carriage by Rail (COTIF) 1999¹ contains obligations to facilitate the circulation of international traffic across contracting states. As part of delivering this objective, the obligations also require a degree of mutual recognition of certifications and approvals between contracting state boundaries.
- 1.2 Mutual recognition is achieved by commonly agreeing, or where different, accepting equivalence of different technical requirements on which the mutually recognised certificates and approvals are based. The aim to achieve mutual recognition, or equivalence, is articulated in Article 5.1 of the convention, which sets out the special obligations of Member States:

“The Member States agree to adopt all appropriate measures in order to facilitate and accelerate international rail traffic. To that end, each Member State undertakes, to the extent possible, to:

a) eliminate any useless procedure,

¹ http://otif.org/en/?page_id=172

- b) *simplify and standardise the formalities already required,*
- c) *simplify frontier checks.*”

Further to this, Article 5.2 of COTIF 1999 states that:

“In order to facilitate and improve international rail traffic, the Member States agree to lend their support to attain the highest possible degree of uniformity in the regulations, standards, procedures and methods of organisation relating to railway vehicles, railway personnel, railway infrastructure and auxiliary services.”

- 1.3 Contracting states are therefore obliged to support the circulation of international traffic under these terms. For the purposes of achieving Article 5 of COTIF 1999, it is therefore important to provide a clarification on what constitutes international traffic between EU and non-EU OTIF contracting states. Similarly, it is important to clarify how far mutual recognition can extend in terms of bodies that certify in EU and non-EU OTIF contracting states, so that seamless international traffic can be facilitated.
- 1.4 This issue was considered during the 12th session of the Committee of Technical Experts (CTE) (Item 6.3) as well as related discussions at 38th session of working group technology (WG TECH). However, no further exploratory work has yet be carried out on this issue and these questions remain.
- 1.5 The purpose of this paper is to examine the scope of mutual recognition of certification bodies, specifically those activities conducted by bodies that certify Entities in Charge of Maintenance (ECM) in EU and non-EU OTIF contracting states. The paper focusses on what constitutes international traffic and the implications on the extent of mutual recognition between contracting states.

2. STATE OF PLAY

- 2.1 The ATMF (Uniform Rules concerning the Technical Admission of Railway Material used in International Traffic) on rules for certification and auditing of entities in charge of maintenance (ECM), require that the “keeper” register a vehicle on relevant systems and identify a ECM for that vehicle. The EU also imposes a similar obligation for EU contracting states for vehicles in circulation within the EU.
- 2.2 A ‘keeper’ in this context means the person or entity that, being the owner of a vehicle or having the right to use it, exploits the vehicle as a means of transport and is registered as such in the vehicle register referred to in Article 13.1 of the ATMF.
- 2.3 The ‘keeper’ makes an informed decision on whether they wish to use the vehicle in international traffic across contracting state boundaries or domestically within a contracting state, which in turn will trigger the need to meet the relevant obligations set out under COTIF, the EU or non-EU country. It is then the responsibility of the states’ competent authorities to admit vehicles for use in international traffic.
- 2.4 For international traffic, a state authority can either suspend admissions on the basis of non-compliance (issued by itself or other states) or withdraw admissions (only those issued by itself) on the basis of

Article 10a ATMF. In terms of domestic traffic, any permissions or refusal is not based on COTIF provisions but rather depend on provisions applicable in the state concerned.

3. SEPARATING SERVICE FROM VEHICLE AND CERTIFICATION EVIDENCE

3.1 To understand how far the mutual recognition can extend, there is need to separate:

- The service which could be international or domestic or both;
- The vehicle which is intended to be used in that service; and finally
- The evidence of certification against technical requirements which have equivalence (because they are acceptable/equally effective in terms of safety and other aspects).

3.2 This will allow the applicant to assess when an obligation is triggered and how far compliance with those obligations can be relied on for services in other COTIF state.

4. MUTUAL RECOGNITION OF CERTIFICATION AGAINST EU OR ATMF PROVISIONS IRRESPECTIVE OF THE PLACE OF BUSINESS

4.1 An examination of EU and ATMF provisions would suggest that they are mutually recognisable in international traffic. Annex A of ATMF on the rules for certification and auditing of ECMs is equivalent to EU Commission Regulation 445/2011 on a system of certification of entities in charge of maintenance for freight wagons.

4.2 The extent of equivalence is clearly recognised in the provisions of ATMF. In Article 3a.5 of the ATMF Appendix G, it is stated that ECMs that have been certified against ATMF provisions should be recognised by EU and non-EU contracting states:

“An entity in charge of maintenance (ECM) for a freight wagon, certified according to Article 15.2, shall be deemed as certified according to applicable European Union and corresponding national legislation and vice versa in the case of full equivalence between the certification system adopted under Article 14a (5) of the EU Railway Safety Directive 2004/49/EC and rules adopted by the Committee of Technical Experts according to Article 15 § 2. These adopted rules are set out in Annex A to these Uniform Rules.”

4.3 This applies irrespective of where the ECM certification bodies are based and is confirmed by the related OTIF explanatory document² that states:

“ECM certification bodies may also assess and certify ECMs in all OTIF Contracting States, whether their place of business is inside or outside the EU”.

4.4 It should be noted that ‘full equivalence’ between the new EU provisions in Commission Regulation 2019/779 and the COTIF provision has yet to be established by COTIF. This is because the relevant

²http://otif.org/fileadmin/user_upload/otif_verlinkte_files/06_tech_zulass/05_Explanatory_docs/A_94-30_2_2013_e_v2_ECM_regulations.pdf

regulations under Directive 2004/49/EC will formally be repealed and replaced from 16 June 2020 onwards.

- 4.5 It is important to note that ‘equivalence’ and the associated ‘recognition’ signifies that both the EU and ATMF provision are equally effective in meeting the objectives of the two frameworks. Article 15.2 of ATMF states the following:

“Each vehicle, before it is admitted to operation or used on the network, shall have an ECM assigned to it and this entity shall be registered in the data bank referred to in Article 13. The ECM shall ensure that the vehicles for which it is in charge of maintenance are in a safe state of running by means of a system of maintenance. The ECM may make use of contractors including maintenance workshops.”

- 4.6 The European Commission’s notice to stakeholders issued on 27 February 2018 on the withdrawal of the UK and the EU rules in area of rail transport³ asserts a contradictory interpretation of these provisions, however. It states that:

“As of the withdrawal date, certificates issued by the United Kingdom will no longer be valid in the EU-27. ECMs holding a certificate delivered by the United Kingdom and wishing to continue their professional activities in the European Union will have to apply for a certificate in an EU-27 Member State.

In addition, as of the withdrawal date, ECMs may apply for a certificate according to the legal framework of the Convention concerning international carriage by rail (COTIF), to which the 26 EU Member States with a railway system are parties”.

- 4.7 The UK takes the view that this interpretation is in conflict with Article 3a.5 of the ATMF Appendix G. As set out in the preamble to Commission Regulation 445/2011, certificates issued by bodies in third countries appointed under equivalent criteria and meeting equivalent requirements to those contained in this Regulation should normally be accepted as being equivalent to the ECM certificates issued in the Union. There should not therefore be a requirement for ECMs certified outside the EU to apply for a certificate in an EU-27 Member State.

5. CLARIFYING THE SCOPE OF MUTUAL RECOGNITION IN INTERNATIONAL TRAFFIC

- 5.1 COTIF 1999 (as amended) sets out the scope of relevant provisions under the convention which is limited to international rail traffic. Additionally, the ATMF (appendix G to the convention) states in Article 1 that

“These Uniform Rules lay down, for railway vehicles and other railway material, the procedure for the admission to circulation or use in international traffic.”

International traffic is also defined in the ATMF as

“...circulation of vehicles on railway lines over the territory of at least two Contracting States.”

³ https://ec.europa.eu/info/sites/info/files/file_import/rail_transport_en.pdf

- 5.2 Additionally, ‘Uniform Rules concerning the Contract of International Carriage of Passengers by Rail’ (CIV - Appendix A to the Convention) Article 1§1 states:

*“These Uniform Rules shall apply to every contract of carriage of passengers by rail for reward or free of charge, **when the place of departure and the place of destination are situated in two different Member States**, irrespective of the domicile or the place of business and the nationality of the parties to the contract of carriage.”*

While ‘Uniform Rules Concerning the Contract of International Carriage of Goods by Rail’ (CIM - Appendix B to the Convention) Article 1§1 states:

*“These Uniform Rules shall apply to every contract of carriage of goods by rail for reward **when the place of taking over of the goods and the place designated for delivery are situated in two different Member States**, irrespective of the place of business and the nationality of the parties to the contract of carriage.”*

- 5.3 Member states with railways within the EU are individual signatories as contracting states of COTIF within their own right as well as being part of the EU. In this context the accession agreement of the EU to COTIF⁴ is relevant where Article 2 states the following:

“Without prejudice to the object and the purpose of the Convention to promote, improve and facilitate international traffic by rail and without prejudice to its full application with respect to other Parties to the Convention, in their mutual relations, Parties to the Convention which are Member States of the Union shall apply Union rules and shall therefore not apply the rules arising from that Convention except in so far as there is no Union rule governing the particular subject concerned.”

- 5.4 This means for relationships between non-EU and EU contracting states, COTIF obligations apply.
- 5.5 Where both the place of departure and the place of destination are within one or many EU contracting states then the relevant EU obligations will apply.
- 5.6 However, where the scenario in 5.5 is a continuing leg of a journey which started in another non-EU contracting state i.e. the original place of departure was in a non-EU contracting state, then this continuing leg is still part of ‘international traffic’ as it is consistent with the definition of international traffic set out in the ATMF as well as CIV and CIM, and in this scenario, COTIF obligations will apply as part of the relationship between a non-EU and EU contracting states.

6. CERTIFICATES FOR DOMESTIC AND INTERNATIONAL EU-ONLY TRAFFIC

- 6.1 Once OTIF obligations have been met then there is a different question about whether the keeper can rely on the same evidence obtained to gain admission for circulation of vehicles in EU domestic traffic (i.e. departure and destination in a single EU contracting state) and EU-only international traffic (i.e. departure and destination in a different EU contracting states). Given the equivalence of ATMF and EU provisions (which are mainly aimed at within EU circulation), and to address the contracting state obligation to “*eliminate any useless procedure*”, reliance on ATMF provision compliance (without any additional assessments) for EU-only international traffic should be a reasonable

⁴ http://otif.org/fileadmin/user_upload/otif_verlinkte_files/04_recht/02_COTIF/AG_10-5_ad1_e.pdf

extension of recognition. The same could be said for EU domestic traffic, although that cannot be considered international traffic, therefore COTIF provisions do not apply.

- 6.2 However, it is recognised that any extension of the scope of recognition of COTIF obligations to domestic or EU-only international traffic relies on agreement/mutual understanding for such a recognition between the EU, non-EU contracting state and OTIF.
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