

Oikeuden historiasta tulevaisuuden Eurooppaan

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Is a Harmonised Liability System a Necessary Prerequisite for European Multimodal Transport?

The Finnish Logistics Service Providers' Point of View

1 INTRODUCTION – QUESTIONS ADDRESSED

Sustainability is a core issue of the rapidly developing European Common Transport Policy. Increased use of multimodal or intermodal transport is an important part of the policy, as multimodal transport consisting of at least one rail or sea leg is considered a greener alternative to the dominating and increasing road carriage in the EU. When discussing a transport being carried out by two or more transport modes, the terms intermodal transport, multimodal transport, and combined transport are often used interchangeably in logistical research.¹ One of the more commonly used definitions for intermodal transport is from the European Conference of Ministers of Transport (1997) and the United Nations, and is “*the movement of goods in one and the same load unit or vehicle by successive modes of transport without handling of the goods themselves when changing modes*”. The OECD Glossary of Statistics also uses the same definition.² Also in legal theory the terms intermodal and multimodal carriage are exchangeable.³ Both cover “*carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract*”, which is the internationally accepted definition.⁴

¹ Eng-Larsson, F. – Kohn, C.: Modal shift for greener logistics – the shipper’s perspective. International Journal of Physical Distribution & Logistics Management 2012 42(1), p. 36–59.

² OECD, 2013. OECD Glossary of Statistics, <http://stats.oecd.org/glossary/search.asp> (accessed 3 May 2013).

³ Ulfbeck, V.: Multimodal Transport in the United States and Europe—Global or Regional Liability Rules. Tulane Maritime Law Journal 34 2009, p. 37–90.

⁴ De Wit: Multimodal Transport. Lloyd’s of London Press, London 1995 (book).

In order to promote multimodal carriage, the Commission is working on different projects. The most interesting project, from a legal point of view, is the project on a *regional legal regime for European multimodal carrier liability*. International multimodal carriage has for decades suffered from the lack of a harmonised legal regime. The legal position of the parties to a contract of carriage is thus unpredictable and unclear. Legal scholars have addressed the problem⁵ and several attempts have been done in order to mend the problem,⁶ unfortunately with no success so far.⁷ Neither the European attempt has reached any result as yet.

International conventions in the area of carriage of goods are normally justified by the need of a harmonised and balanced legal system. For example, the aim of the Comité Maritime International (CMI) since it was created has been the achievement of total uniformity.⁸ Also the European Commission, which has been preparing for a European legal system on multimodal carriage, has called for uniformity. However, the question is addressed from a slightly different point of view. According to the European Commission, the unpredictable liability situation in multimodal transport

⁵ See for example *Hoeks, Marian*: Multimodal Transport Law, The Law Applicable to the Multimodal Contract for the Carriage of Goods, Kluwer 2010. The author devotes the first chapter to explain the problems related to the lack of uniform multimodal carriage law. See also *Lamont-Black, Simone*: Claiming Damages in Multimodal Transport: A need for Harmonisation. In: Tulane Maritime Law Journal 2012, Volume 36, p. 707–724. Another example is *Clarke, Malcome*: The transport of goods in Europe: patterns and problems of uniform law. In: Lloyd's Maritime and Commercial Law Quarterly 1999, p. 36–70.

⁶ An overview of previous attempts is given by *Haak, K. F.*: The harmonization of intermodal liability arrangements. In: European Transport Law 2005, p. 13–51. Haak strongly argues for a harmonised liability system to minimize the problems of the existing laity systems. See also *Ramberg, Jan*: Harmonization of Law Carriage of Goods. In: Scandinavian Studies of Goods 1973, p. 211–252. Also Jan Ramberg calls for a harmonised system for all modes of transport (at p. 252).

⁷ On the contrary, scholars point out that the trend is going in the opposite direction. So called “hybrid carriage regimes” are developing both on a national and a unilateral level. See *Myburgh, Paul*: Uniformity or Unilateralism in the Law of Carriage of Goods by Sea? In: Victoria University Wellington Law Review 2000, Volume 31, p. 355–382.

⁸ See *Berlingieri, Francesco*: Uniformity in Maritime Law and Implementation of International Conventions, in: Journal of Maritime Law and Commerce 1987, Volume 18 Issue 3, p. 317–350. Berlingieri argues that the different methods for implementation of international conventions might hamper the goal of uniformity. See also, on a general level, *Bonell, Michael Joachim*: International Uniform Law in Practice – Or Where the Real Trouble Begins. In: The American Journal of Comparative Law 1990, Volume 38, p. 865–888. In addition to pointing out the common acceptance of the feasibility and desirability of unifying various areas of law at an international level, Bonell also addresses the obstacles preventing this harmonisation.

is identified as a *bottleneck that prevents the parties from choosing the multimodal transport alternative*. Changing from unimodal to multimodal transport is considered not only a change of transport means, *but a change of transport systems* which entails a different legal framework. Such a change generates an unpredictable legal situation, mostly related to the liability problem but also to the conglomerate of different transport documents. In economic terms this change is leading to *transaction costs* which prevent the parties from choosing the multimodal transport alternative. By providing the multimodal industry with a regional legal regime containing predictable liability rules and rules on an electronic single document, the European Commission intends to remove these transaction costs, and thus make the change to environmentally friendly multimodal transport an easier alternative

One might, however, question the whole idea of legitimating a regional multimodal liability regime by claiming that the lack of such hampers multimodal transport. As will be pointed out, economists question the impact of a regional harmonised liability system as regards increased use of multimodal transport. Economic research shows that the transaction costs of an unpredictable liability system are minor and accordingly has insignificant impact on the choice of transport alternatives, see below (2)

2 IS A MULTIMODAL LIABILITY REGIME THE RIGHT TOOL?

As outlined above, the EU initiative on a regional multimodal liability regime is justified by the idea that a lack of such hinders multimodal transport. The economical reasoning behind this is that a change of transport system (from unimodal to multimodal) creates “*friction costs*” which prevent the formation of competitive multimodal transport chains. Friction costs are defined as a measurement of the inefficiency of a transport operation: They are expressed in the form of higher prices, longer journeys, more delays, less punctuality, lower availability of quality services, limitations on the types of goods available, higher risk of damage to cargo and more complex administrative procedures. In order to strengthen the multimodal transport chain, the friction costs, according to the Commission, would have to be identified and reduced. The unpredictable liability situation was identified as

part of the administrative bottlenecks which needed to be removed.⁹ Exactly how the lack of a legal framework would hamper multimodal transport in the Union was however not clear, and the Commission engaged a group of economists to quantify the underlying economics of the situation. The result was published in 2001 under the name: “*The Economic Impact of Carrier Liability on Intermodal Freight Transport*”, (hereinafter the Economic Impact Study).¹⁰ The scope of the study was multiple: Partly to analyse the loss and damage characteristics of shippers and their use of insurance to mitigate risk, and partly to analyse the current freight transport liability arrangements for all actors from the perspective of the supply chain. Also the impact of internet and e-commerce was examined.¹¹ Here the results as regards the friction costs will be highlighted.

In line with the Commissions assumptions, the Economic Impact Study defined the legal, liability related, friction costs as those from loss, damage, delay and consequential losses (*actual losses*) plus those arising from the administration of the regime that supplies insurance and deals with claims (*administrative costs*).¹² In the study the friction costs of all the stakeholders, the shipper, carrier and insurers, were calculated.

The Economic Impact Study revealed that friction costs in multimodal transport generally are low and that they vary for different types of assignments depending particularly on consignment (cargo) value, journey length and the level of risk.¹³ In order to illustrate the share of friction costs in the *total transport costs/freight charges*, the study referred to three markets: National, Intra-Europe (including non EU-Eastern Europe Countries), and Extra-Europe (transfer between Europe and North America).¹⁴ In national EU transport the level of friction costs was the highest, with an average of 6.3% of freight charges. Intra-Europe (including East-European countries) transport had a friction cost level of 3.9% whilst extra-European transport (in this study a transfer between Europe and North-America) had the lowest

⁹ Commission Communication to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, on Multimodality and Multimodal freight transport in the EU. COM(97)243 finale p. 85.

¹⁰ The Economic Impact study: IM Technologies (England) and Studiengesellschaft für den kombinierten Verkehr e.V (Germany): “The Economic Impact of Carrier Liability on Intermodal Freight Transport”, London 22 January 2001.

¹¹ Ibid.

¹² Ibid., p. 27.

¹³ Ibid., p. 31.

¹⁴ Ibid., p. 31.

friction cost level of 2.4%.¹⁵ By using the share of friction costs in the three markets and weighting them by their share of intermodal consignments, the level of intermodal transport friction costs in the EU was calculated to approximately 450–550 million Euros yearly.¹⁶

The most interesting part of the study is that the introduction of a strict and full liability regime (which was the recommendations from the Commission in the 1997 Communication) would not change the situation very much. Eliminating the three types of uncertainty related to location of damage/loss, identification of carrier/contract and the question of applicable liability regime (as identified by the 1999 legal expert group) would only reduce the friction costs by 20%. The savings would thus amount to 50 million Euros per annum.¹⁷ The Economic impact study consequently concludes that:

*“Strict and full liability on balance might therefore lead to some reduction in the administrative friction costs, though the potential for reduction may not be as large as some proponents suggests.”*¹⁸

In other words, introducing a voluntary, uniform liability system would probably not reduce the legal friction costs to a large degree. The results of the Economic Impact Study seem to be contradictory to the perception of the Commission when mapping the obstacles preventing multimodal transport of goods within the Union. Accordingly the Helsinki based InterTran research group, to which the authors of this article belong,¹⁹ decided to examine the Finnish Transport Industry’s perception. To understand the Finnish perspective, we start by describing the current trade and transport patterns between Finland and continental Europe (3.1). We then move on to the Logistics Service Provider’s (LPS) view as to the assumptions of the Commission (3.2).

¹⁵ Ibid., pp. 32–33.

¹⁶ Ibid., p. 34.

¹⁷ Ibid., pp. 39–40.

¹⁸ Ibid.

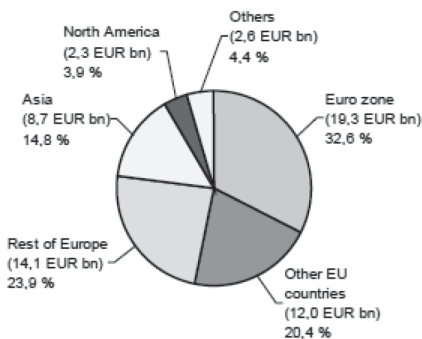
¹⁹ The InterTran research group is an interdisciplinary research project focusing on the mentioned European transport policy from a legal and logistical point of view. The research is performed jointly by researchers from the University of Helsinki (law) and the Aalto University School of Business (logistics). More information of the research group: <http://www.helsinki.fi/katti/english/InterTran-project.htm>.

3 THE FINNISH SERVICE PROVIDERS POINT OF VIEW

3.1 The Finnish Transport Patterns

Europe's role in Finland's export and import is important as seen in the figure 1. Almost half of Finland's imports are metal, machinery and transport equipment or chemical industry products. These same products and forest industry products constitute most of Finland's exports.²⁰

Imports by groups of countries in 2012



Exports by groups of countries in 2012

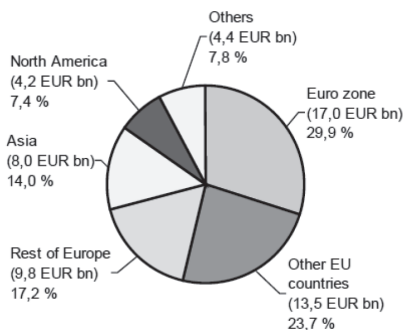


Figure 1. Finland's imports and exports by countries.²¹

²⁰ Finnish Customs 2013. Pocket 2012. – <http://www.tulli.fi/fi/tiedotteet/ulkomaankauppatalastot/katsaukset/tiedotteet/taskutilasto2012/liitteet/pocket2012.pdf> [Accessed February 26, 2014].

²¹ Finnish Customs 2013. Pocket 2012. – <http://www.tulli.fi/fi/tiedotteet/ulkomaankauppatalastot/katsaukset/tiedotteet/taskutilasto2012/liitteet/pocket2012.pdf> [Accessed February 26, 2014].

Finland's geographical position at the Baltic Sea is as an island. Due to this fact most of the exports and imports to and from other European countries are intermodal in nature. The transports always include a sea leg and frequently also a road leg (sea-road combinations). Based on statistics, 70.3% of Finland's seaborne trade was with EU countries.²² In 2012 Finland's major seaborne trading partners in EU were Germany (16.8%), Sweden (14.4%) and the Netherlands (8.8%). Outside the EU, the main seaborne trading partner was Russia (14.3%). In 2012, in all Finnish exports, sea transport accounted for 88.4%, road transport for 8.5% and rail for 2.5%. The situation with imports was similar: sea transport accounted for 79.7%, rail for 10.6% and road for 3.9%.²³ However, these figures seem to be somewhat misleading as all trucks transported by ship are counted as sea freight in the statistics (the transport modes are counted based on the mode crossing the border). Most Finnish foreign trade by rail goes to Russia, either directly or by transit. Finnish railways' track gauge is similar to the track gauge in Russia. This offers an opportunity for efficient distribution of goods and raw materials to and from Russia.²⁴ When looking at the transport activities in Europe, in 2010 total goods transport in the EU-27 were estimated to amount to 3 831 billion tkm, and of this total road transport accounted for 45.8%, rail for 10.2%, inland waterways for 3.8% and oil pipelines for 3.1%.²⁵

As the figures above indicate, we can conclude that still after all efforts toward sustainable development the proportion of rail-based intermodal transport within the EU is still rather low. Also from the point of view of the Finnish Transport Industry the question on mapping the obstacles to a modal shift towards more environmental friendly transport intermodal transport is motivated.

²² Finnish Transportation Agency, 2013. Statistics, Seaborne international transports by country in 2012. – http://portal.liikennevirasto.fi/portal/page/portal/f/aineistopalvelut/tilastot/vesiliikennetilastot/ulkomaan_meriliikenne/mlt_ta_maittain.htm [Accessed February 26, 2014].

²³ Finnish Customs 2012. – http://www.tulli.fi/en/finnish_customs/statistics/graphics/liitteet/Kuviot_2011EN.pdf; http://www.tulli.fi/fi/tiedotteet/ulkomaankauppatilastot/tilastot/kuljetukset/kuljetukset12/liitteet/2013_M08.pdf

Suomen virallinen tilasto (SVT): Tavaroiden ulkomaankauppa [verkkojulkaisu]. Tulli, Helsinki, <http://www.tilastokeskus.fi/til/tavu/index.html> [Accessed 26.2.2014]

²⁴ *Hilmola, O.-P.*: European railway freight transportation and adaptation to demand decline: Efficiency and partial productivity analysis from period of 1980–2003. *International Journal of Productivity and Performance Management* 2007 56(3), p. 205–225.

²⁵ EC, 2012. EU Transport in figures – Statistical pocketbook 2012.

3.2 The Finnish Service Providers view on the assumption of the Commission

The aim of our research is to examine whether or not the assumptions of the Commission, on the need for a legal instrument, is representative for the industry itself. Thus, in order to explore the industry's view, we have collected data from 14 LSP operating in Finland. Two questions were posed: (1) *Is there a need for a harmonised legal instrument for better support of intermodal transport, and* (2) *is the liability issues a problem in the current legal framework.* We focused particularly on the LSP's view on rail-based intermodal transport. The load units under analysis included containers and trailers.

In qualitative research design case studies can provide description and prediction on a smaller scale, and multiple case studies can be used to describe a phenomenon.²⁶ For collecting data we used a multiple case-study design and a sample of 14 LSPs operating in Finland, all with transport operations in Europe. The sample included both users and potential users of rail-based intermodal transport. Eight (57%) of the 14 respondents reported that they use rail-truck intermodal transport in the EU. The 14 LSPs represented different types of companies, offering different kinds of services such as logistics and transportation (some with a broader set and some focusing on a certain transport mode in an intermodal transport chain), and freight forwarding. We selected several types of service providers from intermodal transport chains in order to get a holistic view. Based on previous research²⁷ and the research group's earlier experience, it was reasoned that this number of interviewed companies was enough to provide new knowledge on the topic.

In a case study protocol two keys to reliability are (1) an interview guide and (2) the development of a case study database.²⁸ To ensure reliability, we therefore decided to develop a questionnaire to ensure that we will get answers to the multidimensional issue of obstacles in intermodal transport. We used a semi-structured interview protocol with a combination of open and scaled questions to get an in-depth view of the factors. The results discussed

²⁶ Ellram L. M.: The use of the case study method in logistics research, *Journal of Business Logistics* 1996, Vol. 17, No. 2, pp. 93–138; Yin, R. K.: *Case Study Research: Design and Methods*. 3rd ed. Sage Publications, London 2003.

²⁷ Guest, G. – Bunce, A. – Johnson, L.: How many interviews are enough? An experiment with data saturation and variability. *Field methods* 2006, Vol. 18, No. 1, pp. 59–82.

²⁸ Ellram 1996, pp. 93–138.

in this paper are part of a larger questionnaire in which also other questions were posed. The respondents in the companies were chosen on the basis of their knowledge of intermodal transport, business development and transport liability issues; the interviewees were CEOs, logistics managers and legal counsels at the case companies. Some of the interviews included two persons from a company. In order to avoid biases in the data collection it is often recommended that the interviews are done in teams of several researchers.²⁹ All interviews thus included two or three members of the research team. An interview guide was sent to the interviewees beforehand.

As mentioned, our aim in this study is to examine whether or not the assumptions of the Commission on the need for a legal instrument is representative for the industry itself. The questions posed in the questionnaire were: (1) Is there a need for a harmonised legal instrument for better support of intermodal transport, and (2) are the liability issues a problem in the current legal framework. Our results, from the LPS industry representatives, indicate that liability issues are not a problem in rail-based intermodal transport. Our findings are thus in line with the Economic Impact Study. Regarding the damages, the interviewees commented that damages occur very seldom. Thus, interviewees did not find damages and liability a limiting issue for using intermodal transport. When summarizing the comments regarding the need of harmonized legal instrument for better support of intermodal transport, the results indicate that the interviewees did not see any need for a new instrument. In general they find the current instruments clear enough. However, a couple of interviewees commented that having the same liability rules for all types of transport would be beneficial.

Moreover, the results indicate that the LSPs find the shared responsibilities between the customers and themselves relatively clear and normally governed by the CMR Convention (Convention on the Contract for the International Carriage of Goods by Road, Geneva 1956). Also, because cargo insurances are used by the customers to protect the cargo for possible damages, liability and damages are not huge economic risks to the LSPs. However, sometimes when damages occur it is difficult to identify where in the transport chain the damage has occurred and thus to identify the applicable liability regime. These problems normally arise in relation to other LSP (sub carriers) and are, according to our interviewees, normally solved

²⁹ Eisenhardt, K. M.: Building theories from case study research. *Academy of Management Review* 1989, Vol. 14, No. 4, pp. 532–550.

by negotiations. In these cases there might be a loss for the LSP. However, these cases do typically not end up in court.

4 CONCLUSION

The results indicate that liability issues in an intermodal transports in not seen a problem for the LSP industry. In other words, the assumption of the Commission, on the need for a harmonised legal instrument on multimodal contracts of carriage, is not representative for the industry itself.

The friction costs related to the change of transport mode are low and have only minor impact on the choices made by the transport integrators and their customers. The total outcome of the European liability project seems accordingly to be marginal and not at all in line with the rather extensive policy goal on reduction of CO₂ emissions from transport, which according to the Commission should be 80–95% below 1990 levels by 2050. If nothing is done, CO₂ emissions from transport will remain one third higher than their 1990 level by 2050 and congestion costs will increase by about 50%. It seems obvious that a harmonised liability regime is *not a sufficient tool to promote sustainable, multimodal transport in the EU*. Leaving the issue to the transport industry is not an alternative either. So far this has merely given negative results: European Transport is constantly growing and road carriage is expanding its already high share.³⁰ The current development is in other words inconsistent with the transport policy. If the Commission is serious about its environmental commitment, other tools should be considered. A harmonised contractual liability regime is apparently not efficient. *If and how contract law otherwise can be used as a tool to promote sustainable carriage* of goods is thus a topic for the InterTran research group. As the results of our interviews indicate that the key challenge in limiting the use rail-based intermodal transport is a *perceived lack of services*,³¹ also this question is subject to further research by the group.

³⁰ See above at 2.1.

³¹ Raitasuo, P. – Bask, A. – Rajahonka, M. – Kuula, M. – Eftestøl-Wilhelmsson, E.: Why the share of intermodal transport with a rail leg is low in the EU – Finnish LSPs' perspective. Presentation in Nofoma 2013 Conference, Gothenburg, Sweden; Raitasuo, P. – Bask, A. – Rajahonka, M. – Kuula, M. – Eftestøl-Wilhelmsson E.: Challenges in the Use of Rail-based Intermodal Transport in Europe: case Finland. Unpublished paper [pending?].