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**Transport as a Key Factor for Development – Objectives and  
Implementation of Selected EC and Georgian Transport Regulations**

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## INTERNATIONAL AND EUROPEAN COMMERCIAL AND COMPANY LAW

*Transport Law; Maritime Law; Aviation Law***Transport as a Key Factor for Development – Objectives and Implementation of Selected EC and Georgian Transport Regulations**

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**A. Introduction**

Transport is considered a prior policy field in the European Union<sup>1</sup> and in Georgia. This article will give an introduction to Europe's and Georgia's state of the transport sector and their transport policy's objectives. It will analyse recent legal measures regarding the road and rail sector. Due to different starting points and challenges a comparison of both approaches is difficult, but worth having an eye on it.

**B. The Transport Sector in the European Union****I. Transport as a Contribution to Economic Growth**

The transport industry accounts for about 7% of European GDP and for around 5% of employment in the EU. It hosts 7.5 M jobs in the EU.<sup>2</sup> It is an important industry in its own right and makes a major contribution to the functioning of the European economy as a whole. Mobility of goods<sup>3</sup> and persons<sup>4</sup> is an essential component of the competitiveness of European industry and services. Growth numbers of the transport sector go in line with general economic growth in the EU: good's transport grew on average to a rate of 2.3% in the period 1994–2004. Furthermore the transport sector itself must be seen as condition to vigorous economic growth de-

pending on an efficient transport system allowing full advantage to be taken of the internal market.

**II. Impacts of Transport**

Although the transport sector must be considered a major contribution to economic growth, it causes costs to society as well. The environmental costs are estimated at 1.1% of GDP. Road transport, shipping and air transport are large emitters of air pollutants. For example, greenhouse gas emissions from air transport have grown by over 4% per year in the last decade. Overall, domestic transport accounts for 21% of greenhouse gas emissions; these emissions have gone up by around 23% since 1990, threatening progress towards Kyoto targets.<sup>5</sup> Noise pollution is another impact of transport and is recently considered as crucially important according to the aim of ensuring living quality in the EU. Furthermore the safety aspect must be considered as well: High mobility in the first line depends on people's trust in the safety of transport systems.

**III. Objectives of European Transport Policy<sup>6</sup>**

Facing the transport sector's importance for the internal market *and* its impacts, EU transport policy considers a broad range of objectives. The very first overall objective must be to offer through an effective and efficient transportation system a high level of **mobility** to people and business throughout the Union. Through mobility the European internal market defined in Art. 14 EC-Treaty as **an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured** is established. Furthermore, due to the impacts of transport EU policy faces objectives which don't seem to be related to transport in the first view. Primarily the **protection of the environment** is considered equally impor-

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<sup>1</sup> The currently published White Paper of the European Commission on European Transport Policy for 2010 states, that transport is a key factor in modern economies: [http://ec.europa.eu/transport/white\\_paper/documents/doc/lb\\_com\\_2001\\_0370\\_en.pdf](http://ec.europa.eu/transport/white_paper/documents/doc/lb_com_2001_0370_en.pdf). Last access: 11 March 2007.

<sup>2</sup> [http://ec.europa.eu/dgs/energy\\_transport/matthias\\_ruete/mission\\_en.html](http://ec.europa.eu/dgs/energy_transport/matthias_ruete/mission_en.html). Last access: 11 March 2007.

<sup>3</sup> 72% of inland freight transport is carried by road, 17% by rail, 5.5% by inland waterway and 5.5% by pipelines; [http://ec.europa.eu/dgs/energy\\_transport/matthias\\_ruete/mission\\_en.html](http://ec.europa.eu/dgs/energy_transport/matthias_ruete/mission_en.html). Last access: 11 March 2007.

<sup>4</sup> 92% of inland passenger transport is by road (83% by private car and 9% by bus and coach) and 8% by rail; [http://ec.europa.eu/dgs/energy\\_transport/matthias\\_ruete/mission\\_en.html](http://ec.europa.eu/dgs/energy_transport/matthias_ruete/mission_en.html). Last access: 11 March 2007.

<sup>5</sup> Keep Europe moving - Sustainable mobility for our continent: Mid-term review of the European Commission's 2001 Transport White Paper. Available on: [http://ec.europa.eu/transport/transport\\_policy\\_review/doc/com\\_2006\\_0314\\_transport\\_policy\\_review\\_en.pdf](http://ec.europa.eu/transport/transport_policy_review/doc/com_2006_0314_transport_policy_review_en.pdf). Last access: 11 March 2007.

<sup>6</sup> See for this point in general the first section of the Mid-term review of the European Commission's 2001 Transport White Paper. Available on: [http://ec.europa.eu/transport/transport\\_policy\\_review/doc/com\\_2006\\_0314\\_transport\\_policy\\_review\\_en.pdf](http://ec.europa.eu/transport/transport_policy_review/doc/com_2006_0314_transport_policy_review_en.pdf). Last access: 11 March 2007.

tant as the mobility aspect, because environmental pressures have increased substantially and significant health and environmental problems will persist in the future. Moreover the promotion of **minimum labour standards** and the protection of citizens as users and providers of transport services – especially concerning **safety** – play an important role facing the state's duty of assuring a minimum of public welfare and security. Without considering these circumstances people would lose trust in the system of transport or investors would be reluctant to invest money into the sector. Good examples showing the sensitivity in that area are the latest measures of the European Union establishing security standards in the field of aviation as an answer to European citizens' concerns of security after the attacks on 11 September.<sup>7</sup> Equally important, the transport sector reveals an outstanding field for **innovation**. Increasing efficiency and sustainability of the growing transport sector the EU transport policy supports developing and bringing to the market future solutions on innovative transport systems. Energy efficiency or the use of alternative energy is supported through the funding of large projects such as Marco Polo.<sup>8</sup>

In summary the Mid-term review of the European Commission's 2001 Transport White Paper speaks of disconnecting mobility from its negative side effects and optimising each transport mode.

#### IV. The Realization of EU Transport Policy's Objectives: Regulation in Particular

Approximation and harmonisation in the transport sector is reached on the basis of Art. 71.1 EC-Treaty, which stipulates that the Council, for the purpose of implementing Art. 70,<sup>9</sup> shall, in accordance with the procedure referred to in Art. 251,<sup>10</sup> lay down (a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States; (b) the conditions under which non-resident carriers may operate transport services within a Member State; (c) measures to improve transport safety; (d) any other appropriate provisions.

<sup>7</sup> Following the attacks on 11 September 2001, the EU immediately decided to raise the matter of security with the ICAO (International Civil Aviation Organization) and asked for a special conference to be called in February 2002. The conference led to the adoption of international standards on the reinforcement of cockpit doors and a compulsory international control mechanism for compliance with international rules by the ICAO member; [http://ec.europa.eu/transport/air\\_portal/security/index\\_en.htm](http://ec.europa.eu/transport/air_portal/security/index_en.htm).

<sup>8</sup> Recently the Marco Polo II Programme will run between 2007 and 2013 with a global budget of 400 M EUR and will be the subject of yearly calls for project proposals. These projects support actions to reduce congestion, to improve the environmental performance of the transport system and to enhance intermodal transport, thereby contributing to a more efficient and sustainable transport system which will provide EU added value without having a negative impact on economic, social or territorial cohesion. See [http://ec.europa.eu/transport/marcpolo/index\\_en.htm](http://ec.europa.eu/transport/marcpolo/index_en.htm). Last access: 11 March 2007.

<sup>9</sup> Art. 70 EC-Treaty stipulates, that the objectives of this Treaty shall, in matters governed by this title, be pursued by Member States within the framework of a common transport policy.

<sup>10</sup> The procedure referred to in Art. 251 EC-Treaty opens the gate to the Council acting by qualified majority and moreover leads to a participation of the European Parliament.

### 1. Road Transport

Equivalent to the main transport policy objectives the aim of the Community's land transport policy is to promote sustainable mobility that is efficient, safe and has reduced negative effects on the environment. The harmonisation of safety and technical standards has always played a decisive role. Through a minimum of harmonisation mobility of goods shall be ensured. The existing legislation applying to road transport services establishes common rules on access to the market and to the profession, sets minimal standards for working time, driving and rest periods, sets minimal annual vehicle taxes and common rules for tolls and user charges.

#### a) Access to Profession: Directive 96/26/EC and Directive 98/76/EC<sup>11</sup>

Directive 96/26/EC is of crucial importance for facilitating access to the Community's market of road transport.<sup>12</sup> It was designed to codify and strengthen the common rules on admission to the occupation of road transport operators and the mutual recognition of the diploma of such operators. It lays down three qualitative criteria to ensure the professional capacity of the European operators: good repute, financial standing and professional competence. Regular checks at least every five years ensure that undertakings continue to satisfy these three criteria.

#### aa) Good Repute<sup>13</sup>

The good repute criterion shall ensure the adequate entrepreneurial ethical behaviour.<sup>14</sup>

#### (1) Text of the Directive

The conditions for the good repute requirement are stipulated in the Directive's articles two to six. They require, that the applicant:

- has not been convicted of serious criminal offences, including offences of a commercial nature;

<sup>11</sup> Council Directive 96/26/EC on admission to the occupation of road haulage operator and road passenger transport operator and mutual recognition of diplomas, certificates and other evidence of formal qualifications intended to facilitate for these operators the right to freedom of establishment in national and international transport operations, OJ 1996 L 124/1, as amended by Council Directive 98/76/EC, OJ 1998 L 277/17.

<sup>12</sup> Later the Directive 96/26/EC was amended by the Directive 98/76/EC with the result of extending the scope of application of Directive 96/26/EC to vehicles of which the maximum authorised weight does not exceed 3,5 tonnes. On the other hand, provision was made for more stringent requirements concerning the good repute requirement, adding conditions concerning the protection of the environment and the professional liability of transport operators (Art. 3.2.c of Directive 96/26/EC). See also below aa).

<sup>13</sup> See for this point: Study on admission to the occupation of road transport operator: review of current arrangements in Member States and acceding countries. Available on: [http://ec.europa.eu/transport/road/studies/doc/2005\\_06\\_admission\\_road\\_operator\\_en.pdf](http://ec.europa.eu/transport/road/studies/doc/2005_06_admission_road_operator_en.pdf). Last access: 11 March 2007.

<sup>14</sup> [http://ec.europa.eu/transport/road/policy/access\\_market/rules\\_admission\\_occupation\\_en.htm](http://ec.europa.eu/transport/road/policy/access_market/rules_admission_occupation_en.htm). Last access: 11 March 2007.

- has not been declared unfit to pursue the occupation as appropriate under any rules in force concerning the pay and employment conditions in the profession, or in the area of road haulage or in the area of road passenger transport, in particular the rules relating to driver's driving and rest periods, environmental protection, as well as the other rules relating to professional liability.

### (2) Transposition in Member States

The good repute requirement has been properly, albeit sometimes very differently, transposed into the national legislation of the EU Member States. A typical feature of the coverage of good repute is that the legal standards are included in different legislative documents such as road transport codes but also penal law, environmental law, social legislation and fiscal legislation (e.g. Austria, Luxemburg, Finland, and Ireland). The danger is that authorities as well as the operators lose the overview. Indeed, this would be a contradiction to the overall aim of enforcing mobility through harmonized standards.

### (3) Race to the Bottom

A good example revealing the weakness of different interpretation and application in the Member States is the problem arising with the term "seriousness" of an offence. It is foremost the national authority who decides on whether an offence is considered serious. Consequently, an operator gaining "good repute" from an authority of a Member State demanding low standards could automatically offer his services in a Member State demanding stricter standards<sup>15</sup>. That situation is characterized by a race to the bottom, where the Member States proposing the most lenient rules or practices attract more companies.

### (4) Affection of Competition

Furthermore the different transposition in Member States reveals once more the delicate issue, that different domestic law, no matter in which area, always can affect competition and therefore the functioning of the internal market. Anyhow, the vagueness of the law leads almost invariably to a relatively lenient attitude towards the enforcement of such rules. To improve the implementation of the Directive 96/26/EC, harmonisation of the enforcement procedures and training of the administration and judiciary is necessary to ensure a fair competition on the European roads. In this respect, the sharing of information between all authorities, national and inter-EU, is

also crucial to allow for the extra-territorial enforcement of the Directive's good repute requirement.

### bb) Financial Standing

#### (1) Text of the Directive: Examples on How to Assess Financial Standing

The Financial Standing requirement is presented in the EC legislation in a very straight forward definition: road haulage firms must have available capital and reserves of, at least, EUR 9.000 when operating one vehicle and EUR 5.000 for each additional vehicle (Art. 3.3.c of the Directive 96/26/EC, as amended by Directive 98/76/EC). The Directive gives examples of what the competent authority shall have information in order to assess the financial standing: annual accounts of the undertaking, if any; funds available, including cash at bank, overdraft and loan facilities; any assets, including property, which are available to provide security for the undertaking; costs, including purchase costs or initial payment for vehicles, premises, plant and equipment and working capital (Art. 3.3.b of Directive 96/26/EC, as amended by Directive 98/76/EC).

#### (2) Transposition in the Member States: Interpretation of the Directive's Examples

Anyhow, national authorities are responsible for the transposition and application of the financial standing requirements.<sup>16</sup> Of crucial importance is the question what exactly is considered as financial standing. Remarkable differences arise from the way these indicators are used and interpreted by the different national authorities. In this regard the main difference in the Member States' legislation is the interpretation of what can be considered as available capital and reserves.

As a result of these different interpretations two consequences must be seen: On the one hand a competitiveness gap between transport firms of different Member States can arise.<sup>17</sup> On the other hand the system chosen by each country can determine the type of companies composing the haulage sector, as the compulsory deposit is a more difficult condition to be fulfilled by small firms.<sup>18</sup> Finally, as countries use different procedures and interpretations to assess the same "minimum EU standard", it can be argued that the text of the Directive is

<sup>15</sup> The application of different rules becomes even more problematic considering the fact that in federal states like Germany the work of the administration (who decides on whether a crime is considered as serious) is divided between the *Länder*. See: Study on admission to the occupation of road transport operator: review of current arrangements in Member States and acceding countries. See: Study on admission to the occupation of road transport operator: review of current arrangements in Member States and acceding countries. Available on: [http://ec.europa.eu/transport/road/studies/doc/2005\\_06\\_admission\\_road\\_operator\\_en.pdf](http://ec.europa.eu/transport/road/studies/doc/2005_06_admission_road_operator_en.pdf). Last access: 11 March 2007.

<sup>16</sup> In general transport authorities are the bodies involved in the application, although support of other bodies for verification duties is necessary. This involvement of several public agencies requires a high level of institutional collaboration.

<sup>17</sup> As an example the compulsory bank deposit can be considered as an additional fixed cost in comparison to companies in those countries where the trucks' value of the amount of their insurance policies is accepted as a complementary indicator for "available capital".

<sup>18</sup> Some transport officials interviewed pointed at the fact that, when transposing the Directive, the option of demanding a bank deposit as financial guarantee was considered. This was the case of Austria and Spain, where finally the deposit was not introduced as it was considered that most of the smaller companies simply would not be able to raise the needed amount. See: Study on admission to the occupation of road transport operator: review of current arrangements in Member States and acceding countries. Available on: [http://ec.europa.eu/transport/road/studies/doc/2005\\_06\\_admission\\_road\\_operator\\_en.pdf](http://ec.europa.eu/transport/road/studies/doc/2005_06_admission_road_operator_en.pdf). Last access: 11 March 2007.

too open in what refers to a minimum standard of financial conditions.

### cc) Professional Competence<sup>19</sup>

As a further aspect the Directive 96/26/EC demands that those, who want to fulfil transport activities, need to apply to a test and receive a Certificate of Professional Competence (CPC). The applicants shall prove specified knowledge concerning various topics such as civil and commercial law, business and financial management of the undertaking and subjects concerning road safety. Typically examination is carried out by a government institute whereas various types of entities provide training courses that allow applicants to prepare themselves.

#### (1) Quality of the Test

Concerning the exam, the Directive 96/26/EC does not lay down specifically what topics shall be included and what form the test should be of. Consequently the demands differ from Member State to Member State. Passing rates in Spain for example are about 17%, on the contrary in Portugal 70%.<sup>20</sup> Obviously potential operators from Western Spain try to take the test in Portugal and get a Portuguese CPC. Furthermore low passing rates in Spain reveal, that the CPC is used there as an alternative way to control access to the profession. Taking a test in a different Member State (“diploma-tourism”) anyhow – due to language difficulties – is not that easy at all.

#### (2) Training

Additionally in some countries training, e.g. preparation, is obligatory, in some Member States, as for example in Luxembourg, it is compulsory, unless the candidate has at least five years of professional experience in the road transport industry, and in others as for example in Germany preparation is recommended. Indeed, passing the test without training in Germany is quite difficult.

The advantage of training measures is obvious: they help to increase the skills and knowledge in the sector for those who need it.

#### (3) Derogation

Derogation from the test on the basis of experience and prior education is expressly allowed by the Directive. Great differences can be witnessed throughout the different Member States. In France for example 85% of the CPC are given on

the basis of derogation and only about 15% of the applicants actually take the test. In other countries, like for example the Netherlands, less derogations are granted. Moreover the opportunity exists to grant such an exemption only for single modules of the test.

#### (4) Person Who Shall Apply to the CPC-Test

There is no common definition to whom the requirement of professional competence should apply. The Directive 96/26/EC (as amended by 98/76/EC) states, that the person who has to pass the test should be the applying natural person (the road transport operator) or the one who shall continuously and permanently manage the transport operations of the undertaking.

Consequently, also in this area, due to different interpretation many rules exist in the Member States. In Germany the entrepreneur must take the exam, but also people not directly involved in the undertaking can take the test. In Ireland for example the undertaking can employ someone on a fulltime basis to fulfil the requirements of the Directive. In order to avoid that so called phantom transport managers take the exam, the Member States have found different solutions: In Ireland the manager can only be involved in one company,<sup>21</sup> in Spain the person has to be “in charge of the daily operations” and in Denmark the person has to spend at least 70% of his work time managing the transport. In many countries anyhow it is not clear, who shall actually take the test, which leads consequently to competitive disadvantages for those companies, who are settled in Member States with clear standards.

#### b) Community License – Transport *between* Member States: Regulation 881/1992/EC<sup>22</sup>

While the establishment of a common transport policy involves laying down common rules applicable to access to the market in the international carriage of goods by road within the territory of the Community,<sup>23</sup> the European Council has adopted Regulation 881/1992/EEC concerning transport *between* the Member States. Any road transport operator wishing to carry out an operation *between* Member States must hold a Community license, issued by the Member State of establishment, which gives him free access to the whole European market.<sup>24</sup>

<sup>19</sup> See: Study on admission to the occupation of road transport operator: review of current arrangements in Member States and acceding countries. Available on: [http://ec.europa.eu/transport/road/studies/doc/2005\\_06\\_admission\\_road\\_operator\\_en.pdf](http://ec.europa.eu/transport/road/studies/doc/2005_06_admission_road_operator_en.pdf). Last access: 11 March 2007.

<sup>20</sup> A table revealing examination scheme and passing rates in the Member States can be found in the Study on admission to the occupation of road transport operator: review of current arrangements in Member States and acceding countries. Available on: [http://ec.europa.eu/transport/road/studies/doc/2005\\_06\\_admission\\_road\\_operator\\_en.pdf](http://ec.europa.eu/transport/road/studies/doc/2005_06_admission_road_operator_en.pdf). Last access: 11 March 2007.

<sup>21</sup> This solution would consequently bring disadvantages for smaller companies. A company with 1000 trucks only needs to have one CPC holder whereas the same CPC holder is not allowed to represent two companies with two trucks each.

<sup>22</sup> Council Regulation (EEC) No 881/92 of 26 March 1992 on access to the market in the carriage of goods by road within the Community to or from the territory of a Member State or passing across the territory of one or more Member States.

<sup>23</sup> See: Motives of the Council Regulation 881/92/EEC.

<sup>24</sup> With the help of such a document the operators don't need a single license for any Member State anymore. The Community license brings the security for authorities in other Member States that the operator at least fulfilled the requirements of his home country. Approximation of the requirements as it is for example laid down in the Directive 96/26/EC is not the purpose of this Directive.

### (1) Text of the Directive

The Directive stipulates in Art. 3 that such a Community license shall be granted when the operator

- is established in a Member State in accordance with the legislation of that Member State,
- is entitled in that Member State, in accordance with the legislation of the Community and of that State concerning admission to the occupation of road haulage operator to carry out the international carriage of goods by road.

The license is issued for a period of five years. This period is renewable. Where the holder of a license no longer satisfies the conditions required for maintaining the license, the national authorities shall withdraw the Community license.

### (2) Translation in Member States

Anyhow, regarding the points above, it is decisive what requirements the Member States, in which the operator is entitled, demand. In Germany these requirements don't differ from those of domestic authorisation.<sup>25</sup> Fees are laid down in a separate regulation. They differ between the *Länder* and amount to 50-180 EUR for the authorisation and to 15-70 EUR for each copy.<sup>26</sup>

#### c) Cabotage – Transport in other Member States: Regulation 3118/93/EEC<sup>27</sup>

##### (1) Objective

While Regulation 881/1992/ECC made transport between different Member States possible, domestic transport has not been liberalized and remains a national competence. Anyhow Regulation 3118/93/EEC states in its Art.1.1., that “any road haulage carrier [...], who is a holder of the Community authorisation provided for Regulation 881/92/EEC, shall be entitled to operate on a temporary basis national road haulage services [...] in another Member State without having a registered office or other establishment therein. The objective of this Regulation is to allow the provision of transport services on a national market by non-resident hauliers.”<sup>28</sup>

##### (2) Interpretation of “temporary basis”

The primary question regarding cabotage is the lack of definition what exactly is meant by “on a temporary basis”. In

2005 the European Commission has issued an “interpretative communication”<sup>29</sup> clarifying the notion of temporality. Thereafter the temporary character of cabotage transport activities should be assessed not only in the light of their duration but also in the light of their frequency, periodicity and continuity. Some Member States have issued additional specifications to clarify the temporality criteria. In Germany the Regulation for freight transport and cabotage<sup>30</sup> in § 10 II stipulates, that “admission is issued for a limited amount of time, at least on day. The number of trips can be limited for this amount of time”.<sup>31</sup> The German authority points out the need for a homogeneous cabotage regulation in Europe, in order to harmonise the competitive conditions among the Member States and to avoid distortion of competition. On the contrary, in France tendencies of protectionist behaviour can be witnessed, as the national authority by circular of 22 January 2002 announced that ‘any vehicle continuously engaged in cabotage operations for more than a week on the national territory must be considered to be in breach’.<sup>32</sup>

#### d) Driver Attestation: Regulation 484/2002/EC<sup>33</sup>

A specific EU-problem arose when transport between the Member States increased. It occurred that operators hired nationals from non-Member States especially for the realization of transports in other Member States than their own. Inspections according to the employment status of drivers in other Member States were not possible. Unlawfully employed drivers often worked in precarious conditions and were underpaid, which jeopardised road safety. Furthermore such a systematic breach of national legislation has led to serious distortion of competition between hauliers engaged in such practices and those resorting solely to lawfully employed drivers.<sup>34</sup> The Regulation therefore introduced a driver attestation, which is a uniform document certifying that the driver of a vehicle carrying out road haulage operations between Member

<sup>25</sup> See for example information on the internet for the *Land* Saxony (in German language): <http://amt24.sachsen.de>.

<sup>26</sup> Regulation in the Transport Market and Personal Costs of Driving Staff in Germany, Comité National Routier, available on: [http://www.cnr.fr/services/fondamentaux/europe/liste.md?val\\_pays=allemagne&ctype=text.html](http://www.cnr.fr/services/fondamentaux/europe/liste.md?val_pays=allemagne&ctype=text.html). Last access: 11 March 2007.

<sup>27</sup> Council Regulation (EEC) No 3118/93 of 25 October 1993 laying down the conditions under which non-resident carriers may operate national road haulage services within a Member State.

<sup>28</sup> Study on Road Cabotage in the freight transport market. Available on: [http://ec.europa.eu/transport/road/studies/index\\_en.htm](http://ec.europa.eu/transport/road/studies/index_en.htm). Last access: 11 March 2007.

<sup>29</sup> Commission interpretative communication on the temporary nature of road cabotage in the movement of freight, available on: [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/c\\_021/c\\_02120050126en00020007.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/c_021/c_02120050126en00020007.pdf). Last access: 11 March 2007.

<sup>30</sup> Verordnung über den grenzüberschreitenden Güterverkehr und Kabotageverkehr. Available (in German language) on: [http://www.transportrecht.de/transportrecht\\_content/1144241181.pdf](http://www.transportrecht.de/transportrecht_content/1144241181.pdf). Last access: 11 March 2007.

<sup>31</sup> “Die Erteilung erfolgt für einen bestimmten Zeitraum, mindestens einen Kalendertag. Die Zahl der Fahrten, die innerhalb dieses Zeitraums durchgeführt werden dürfen, kann begrenzt werden.”

<sup>32</sup> Anyhow, the French Conseil d'Etat (Supreme Administrative Court) has annulled this circular by claiming that the French Ministry of Transport doesn't have the competence of drawing up new cabotage rules. Concerns according the possible impact of cabotage to the domestic industry are obvious considering that France and Germany are the two Member States that are most preferred in which to undertake cabotage, accounting 31% and 28% of the total cabotage respectively. The geographically peripheral countries of the EU have a share of less than 1%. See: Commission Interpretative Communication on the temporary nature of road cabotage in the movement of freight, available on: [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/c\\_021/c\\_02120050126en00020007.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/c_021/c_02120050126en00020007.pdf). Last access: 11 March 2007.

<sup>33</sup> Regulation (EC) No 484/2002 of the European Parliament and of the Council of 1 March 2002 amending Council Regulations (EEC) No 881/92 and (EEC) No 3118/93 for the purposes of establishing a driver attestation.

<sup>34</sup> See: Motives of the Regulation 484/2002/EC.

States is lawfully employed by the Community transport operator concerned in the Member State, in which the operator is established, or lawfully placed at the disposal of that operator.

**e) Driving Time and Rest Periods: Regulation 561/2006/EC<sup>35</sup>**

Regulation 3820/85/EEC was recently repealed and replaced by this regulation providing a common set of Community rules for maximum daily and fortnightly driving times as well as daily and weekly minimum rest periods for all drivers of road haulage and passenger transport vehicles, subject to specified exceptions and derogations. The daily driving period shall not exceed 9 hours, with an exemption of twice a week when it may be 10 hours. The daily rest period shall be at least 11 hours, with an exception of going down to 9 hours three times a week. There is provision for a split rest of 3 hours followed by 9 hour rests to make a total of 12 hours rest per day. Weekly rest is 45 continuous hours, which can be reduced to 24 hours. Compensation arrangements apply for reduced weekly rest periods. Breaks of at least 45 minutes (separable into 15 minutes followed by 30 minutes) should be taken after 4 ½ hours at the latest.<sup>36</sup>

**f) Recording Equipment – the Tachograph: Regulation 3821/85/EEC,<sup>37</sup> with amendment by Regulation 2135/98/EC<sup>38</sup>**

This regulation provides the basis for the installation of technical devices recording driving time, breaks and rest periods. The reason is obvious: without having the technical opportunity of enforcing Regulation 561/2006/EC social security and safety on European roads remain theoretic. In 1998 through regulation 2135/98/EC the digital tachograph was introduced. Through less possibilities of abuse and better control the usage of digital tachographs will give a major impulse to the regulation's objectives of automatic recording and regular monitoring.<sup>39</sup> The "Monitoring of the Implementation of Digital Tachograph" Project, partly financed by the European Commission, has been introduced by the Swedish Road Administration in order to support concrete implementation measures in all 27 Member States of the European Union.<sup>40</sup>

<sup>35</sup> Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85.

<sup>36</sup> [http://ec.europa.eu/transport/road/policy/social\\_provision/social\\_driving\\_time\\_en.htm](http://ec.europa.eu/transport/road/policy/social_provision/social_driving_time_en.htm). Last access: 11 March 2007.

<sup>37</sup> Council Regulation (EEC) No 3821/85 on recording equipment in road transport.

<sup>38</sup> Council Regulation (EC) No 2135/98 of 24 September 1998 amending Regulation (EEC) No 3821/85 on recording equipment in road transport and Directive 88/599/EEC concerning the application of Regulations (EEC) No 3820/84 and (EEC) No 3821/85.

<sup>39</sup> See: Motives of regulation 2135/98/EC.

<sup>40</sup> For detailed information, see: <http://www.eu-digitaltachograph.org/Home.asp> (last access: 11 March 2007). Furthermore the recent status of implementation in all Member States can be observed there.

**2. Rail Transport**

**a) A Non Competitive Sector in the EU**

Rail transport in the European Union has always been considered a non competitive sector. Due to the fact that public monopoly companies provided rail transport services in Europe the railway sector was unable to respond adequately to challenges such as the globalisation of transport logistics, the shift away from heavy industry towards a service and retail economy, in addition to the increase in car ownership and road building.<sup>41</sup> Consequently, in the EU the modal share of rail freight declined from 19.6 % in 1995 to 16.4 % in 2004, although freight transport by road has tripled in the same period.<sup>42</sup>

**b) Reform: The First Railway Package**

To prevail over the total collapse of the rail transport industry and in order to reduce negative side effects of road traffic<sup>43</sup> at the European Community level,<sup>44</sup> the White Paper in 1996 on rail transport of the European Commission<sup>45</sup> laid down the strategic principles aimed at revitalizing the railway sector in order to increase its competitiveness and attractiveness with customers. The overall aim of these measures was to gain participation of the railway sector in transport growth by allowing railway firms to act as commercial entities at a European level.<sup>46</sup> Finally, the result was the adoption of three Directives on 26 February 2001 (First Railway Package), which represents today, after all Member States have implemented their requirements, the basis of European rail transport legislation. Anyhow, the key question remains whether the framework put into place is helping to achieve the desired political objectives.

<sup>41</sup> *Jan Scherp*, Railway (De-) Regulation in EU Member States and the future of European Rail. Available on: [http://www.eva-akademie.de/c\\_301\\_1.html](http://www.eva-akademie.de/c_301_1.html). Last access: 11 March 2007.

<sup>42</sup> [http://ec.europa.eu/transport/rail/overview/current\\_en.htm](http://ec.europa.eu/transport/rail/overview/current_en.htm). Last access: 11 March 2007.

<sup>43</sup> One negative side effect for sure is the increase of CO<sup>2</sup> emissions caused by road traffic. By 2010 CO<sup>2</sup> emissions from transport are expected to increase 50%. If present trends continue, transport will be the main factor in failing to fulfil Kyoto commitments – 8% by 2010. Compare: [http://ec.europa.eu/transport/intermodality/highlights/doc/eu\\_policy\\_on\\_intermodality\\_and\\_logistics.pdf](http://ec.europa.eu/transport/intermodality/highlights/doc/eu_policy_on_intermodality_and_logistics.pdf). Last access: 11 March 2007.

<sup>44</sup> Some Member States of the European Union started already at the end of the 1980s and in the 1990s to restructure the railway sector and to reform the regulatory framework. In Germany on 1 January 1994 the railway reform legal package was enacted in order to fulfil the requirements of Directive 91/440/EEC – the separation of infrastructure and operation of transport services. Nevertheless, the Directive and its transposition remained ineffective, see below.

<sup>45</sup> This White Paper is the starting point for all initiatives which the Commission has taken since 1996, particularly the proposals for the three infrastructure directives put forward in July 1998, which finally gave birth to the first railway packages which will be examined in this paper. The recent 2001 White Paper is available on: [http://ec.europa.eu/transport/rail/overview/white\\_paper\\_2001\\_en.htm](http://ec.europa.eu/transport/rail/overview/white_paper_2001_en.htm). Last access: 11 March 2007.

<sup>46</sup> *Jan Scherp*, Railway (De-) Regulation in EU Member States and the future of European Rail. Available on: [http://www.eva-akademie.de/c\\_301\\_1.html](http://www.eva-akademie.de/c_301_1.html). Last access: 11 March 2007.

### aa) Market Opening and Integration: Directive 2001/12/EC<sup>47</sup>

Already in 1991 the Directive 91/440/EEC provided the principle of non-discriminatory access charges to railway infrastructure. Nevertheless Directive 2001/12/EC amends Directive 91/440/EEC by requiring concrete<sup>48</sup> organizational entities for transport operations and infrastructure management.

#### (1) Separation of Accounting and Management

For example in section III of the Directive, named "separation between infrastructure management and transport operation", it is demanded from the Member States to separate accounting in order to reflect the prohibition that public funds may not be transferred from the infrastructure sector to the operation sector, Art. 6.1. Furthermore infrastructure shall be managed in a separate entity, Art. 6.2. Moreover, according to Art. 8 the manager of the infrastructure shall charge a fee for the use of the railway infrastructure for which he is responsible, payable by railway undertakings and international groupings using that infrastructure. Consequently the management of the infrastructure can not be managed anymore by the main operator in the field.

#### (2) Responsibility for Non-Discriminatory Access

Additionally, the Directive explicitly states in Art. 7.2., that Member States shall take the measures necessary to ensure that the functions determining equitable and non-discriminatory access to infrastructure are entrusted to bodies or firms that do not themselves provide any rail transport services. This compulsory organizational requirement shall strengthen the separation of the operators from the network.

#### (3) Extension of Access to the Market to All Undertakings

Member States are required to introduce into national legislation non-discriminatory access for *all* freight railway undertakings to the Trans European Rail Freight Network (TERFN), which was previously granted only to international groupings.<sup>49</sup> Obviously this restriction to the obligation of

granting market access led in former times to the consequence that a national railway undertaking could nearly freely decide to which companies it wanted to open its network. This made the access for new undertakings extremely difficult.<sup>50</sup> The TERFN has a length of approximately 50.000 km. Some 70% of the rail freight traffic is carried out over the TERFN.<sup>51</sup> According to today's version of the Directive 2001/12/EC only the national section of the network has to be opened to the market, but from 15 March 2008 on all railway undertakings must have access to the entire network to provide international freight services.

#### (4) Translation in Germany: The Federal Network Agency

Anyhow it must be questioned how effective and to what extent the requirements have been translated in the Member States. In Germany a new regulatory authority, the Federal Network Agency (Bundesnetzagentur),<sup>52</sup> has been established. With the Third Act amending the Railway Regulations of 27 April 2005 the General Railway Act (Allgemeines Eisenbahn Gesetz) has obtained changes so far, that the tasks of the agency were revised in order to fulfil the requirements of the Directive 2001/12/EC.

##### (a) Independent Manager

The agency was given responsibility in the field of railway regulation, which started on 1 January 2006, and is tasked with monitoring rail competition. In this regard it acts as the independent manager of the infrastructure foreseen in Directive 2001/12/EC. Its responsibility for ensuring non-discriminatory access to railway infrastructure is taken by controlling all public railway infrastructure operators, irrespective of their market position.<sup>53</sup> In some instances the rail-

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

<sup>50</sup> A good example illustrating the trouble for new undertakings entering a foreign market due to the international grouping requirement is the case between GVG, an undertaking based in Frankfurt and active in air and rail transport, and FS, the Italian state-owned railway operator, who abused this requirement by refusing to enter such a grouping and therefore not giving GVG access to the Italian market. See the press release of the EC concerning this case: IP/03/1182, available on: [http://209.85.129.104/search?q=cache:BMnKqQSWPXCJ:europa.eu/rapid/start/cgi/guesten.ksh%3Fp\\_action.gettxt%3Dgt%26doc%3DIP/03/1182%257C0%257CRAPID%26lg%3DEN+international+grouping+directive+91/440&hl=de&ct=clnk&cd=8&gl=de](http://209.85.129.104/search?q=cache:BMnKqQSWPXCJ:europa.eu/rapid/start/cgi/guesten.ksh%3Fp_action.gettxt%3Dgt%26doc%3DIP/03/1182%257C0%257CRAPID%26lg%3DEN+international+grouping+directive+91/440&hl=de&ct=clnk&cd=8&gl=de). Last access: 11 March 2007.

<sup>51</sup> [http://ec.europa.eu/transport/rail/overview/infrastructure\\_en.htm](http://ec.europa.eu/transport/rail/overview/infrastructure_en.htm). Last access: 11 March 2007.

<sup>52</sup> The Federal Network Agency is not only responsible in the railway sector, but also in the sector of telecommunications, post, electricity and gas. See: [http://www.bundesnetzagentur.de/enid/9de4a0b63236bee0de2257a797eb3f0/Areas/Railway\\_Regulation\\_29e.html](http://www.bundesnetzagentur.de/enid/9de4a0b63236bee0de2257a797eb3f0/Areas/Railway_Regulation_29e.html). Last access: 11 March 2007.

<sup>53</sup> Deutsche Bahn AG (Group) is the largest provider of rail services in Germany. Based on mileage, by the end of 2003 its market share was 94% for freight services. Since the reform of the railway sector in 1994 there has been only some entry of new undertakings in rail freight market. Although Railion (former DB Cargo) is still the dominant operator for freight (>91% in 2003), there are other private operators emerging in specific freight markets. See: *Knieps, Günther*, Railway (De-) Regulation in Germany, available on: [http://www.eva-akademie.de/dcms\\_downloads](http://www.eva-akademie.de/dcms_downloads). Last access: 11 March 2007.

<sup>47</sup> Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community's railways. A consolidated version can be found on: [http://europa.eu/eur-lex/en/consleg/pdf/1991/en\\_1991L0440\\_do\\_001.pdf](http://europa.eu/eur-lex/en/consleg/pdf/1991/en_1991L0440_do_001.pdf). Last access: 11 March 2007.

<sup>48</sup> Although, for example in Germany, separate branches for infrastructure (DB Netz AG) and commodity transportation (DB Transport und Logistik) were founded in accordance with Directive 91/440/EEC, a *real* separation has not taken place. Although accounting separation between service level and infrastructure level was considered a necessary precondition to guarantee non-discriminatory access to the tracks for all providers of train services, the newly founded Federal Railway Administration was only responsible for settling conflicts between the DB Netz AG and third parties. For more information see: *Knieps, Günther*, Railway (De-) Regulation in Germany, available on: [http://www.eva-akademie.de/dcms\\_downloads](http://www.eva-akademie.de/dcms_downloads). Last access: 11 March 2007.

<sup>49</sup> According to Art. 3 of the Directive 91/440/EEC international grouping shall mean any association of at least two railway undertakings es-



way infrastructure operator – primarily the Deutsche Bahn Netz AG – will be obliged to notify the Agency *in advance*<sup>54</sup> of planned decisions, e.g. when it intends to reject an application for allocation of railway embankments or for access to service facilities. Within very short periods (scaled from one day to four weeks), the Agency will have the chance to withhold consent to the planned decision.<sup>55</sup> Apart from these preventive regulatory rights, there will also be the possibility of subsequent verification of usage conditions for rail tracks and service facilities and of rules about the level or structure of route rates and other rates.

## (b) Activity Report

Finally, in accordance with the requirement of Art. 7.2. of Directive 2001/12/EC the Federal Network Agency will draft an activity report for the federal government for each period covered by a train schedule, currently spanning a whole year. The Act also prescribes the establishment of a Railway Infrastructure Advisory Council.<sup>56</sup>

### bb) Licensing of Railway Undertakings and Network Statement – Directive 2001/13/EC<sup>57</sup> and Directive 2001/14/EC<sup>58</sup>

Apart from Directive 2001/12/EC the First Railway Package contains two other Directives aiming at facilitating competition. Directive 2001/13/EC defines the conditions under which companies can obtain a licence to run rail freight services over the TERFN. Directive 2001/14/EC provides that the infrastructure manager shall publish a network statement, which contains information on the technical nature and limitations of the network, the access conditions to the network and rules on capacity allocation.<sup>59</sup>

## C. Transport Law in Georgia

### I. Current Situation of the Transport Sector in Georgia

The transportation sector comprises 9.6% of GDP, fifth after agriculture, trade, construction and industry. In 2005, the

volume of transported cargo increased by 11.4% since 2004. Cargo transport by vehicle accounted for nearly 58.7% of all carried cargo, while railway cargo transport accounted for 41.2% of total turnover.<sup>60</sup> After opening the borders<sup>61</sup> the transport sector gained access to foreign markets. Especially opening up the border with Turkey dramatically increased operation of the motor vehicle transport. Anyway the road sector is still suffering from underdeveloped infrastructure. The whole potential of freight flow is not reached yet. On the other hand first results are visible and give confidence for further measures.

## II. Objectives of Georgian Transport Policy

### 1. Unified Transport Administration

In order to facilitate the development of the transport sector and to increase transparency the Georgian government follows a unified approach on transport administration. The unified transport administration – covering airborne, sea and motor vehicle transport, but excluding railway transport – was established by the Law on Management and Regulation of the Transport Sphere, passed on 28 March 2007 (in force since 27 May 2007, 60 days after its publication). The state supervision over the transport sphere is to be implemented by the Ministry of Economic Development of Georgia, as for the unified transport administration, it will be in charge of technical regulation.<sup>62</sup>

### 2. Facilitation of Competition

A further objective for the government is to create a certain environment for the transport sector. Barriers to operation shall be reduced in order to become attractive for transit. To achieve this, Georgia follows the European Union's policy in facilitating competition with the aim of creating incentives for the operator to be more efficient. Another objective is to improve technical and safety control in order to establish confidence concerning safety and reliability for operators and customers not only from Georgia but mainly for international operators.

### 3. Facilitation of Transit

In this regard Georgia's transport policy is mainly aimed at obtaining the role of transit country in the future. According

<sup>54</sup> Former, the Federal Railway Administration wasn't able to control access charges, granted by the Deutsche Bahn Netz AG, ex ante.

<sup>55</sup> This is, at least, the statement given on the homepage of the Federal Network Agency, see: <http://www.bundesnetzagentur.de>. Last access: 11 March 2007.

<sup>56</sup> In regard to the tasks of the Federal Network Agency see: [http://www.bundesnetzagentur.de/enid/9de4a0b63236bee0de2223a797eb3f0/Areas/Railway\\_Regulation\\_29e.html](http://www.bundesnetzagentur.de/enid/9de4a0b63236bee0de2223a797eb3f0/Areas/Railway_Regulation_29e.html). Last access: 11 March 2007.

<sup>57</sup> Directive 2001/13/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 95/18/EC on the licensing of railway undertakings.

<sup>58</sup> Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification.

<sup>59</sup> [http://ec.europa.eu/transport/rail/overview/infrastructure\\_en.htm](http://ec.europa.eu/transport/rail/overview/infrastructure_en.htm). Last access: 11 March 2007.

<sup>60</sup> See: [http://www.investinggeorgia.org/en/investing/key\\_sectors/?id=175](http://www.investinggeorgia.org/en/investing/key_sectors/?id=175). Last access: 11 March 2007.

<sup>61</sup> The collapse of the Soviet Union can be considered as a turning point of the state of Georgia's transport capacity. During the Soviet times the activity of its transport sector was mainly oriented on internal operation.

<sup>62</sup> According to the Law on Management and Regulation of the Transport Sphere the structure and regulation of the administration will be approved by the Minister of Economic Development. The Head of the Administration will be appointed and discharged by the Prime Minister as specified in Art. 8 of the law. The administration budget will be 2.5 M GEL (appr. 1,05 M EUR). Control over its finances will be carried out according to the Georgian Law on Budgetary System.

to the Government of Georgia this will contribute to the economic efficiency of the country. Furthermore harmonisation with regulations of the EU will facilitate operation of European transport companies within Georgia and the whole Caucasus region. The participation in the Transport Corridor Europe-Caucasus-Asia (TRACECA) programme<sup>63</sup> serves to achieve this goal. Also in cooperation with the European Union this aim is considered a key factor for the development of the Georgian economy. Art. 58 PCA reveals that “modernization and development of railways, waterways, roads, ports, airports and air navigation infrastructure including the modernization of major routes of common interest and the trans-European links for the above modes, particularly those related to the TRACECA project”, shall be included in the cooperation within the transport sector. TRACECA’s main goal is to develop economic relations, trade and transport communications along the Corridor Europe, Caucasus and Asia. Georgia as one Contracting-State of the programme therefore needs to take full advantage of its geopolitical location.<sup>64</sup> The development of international transport networks shall facilitate the intended rise of freight flows.<sup>65</sup>

### III. Recent Measures in the Transport Sector

In order to achieve the transport policy objectives Georgia has been recently working on several legislative measures. The whole transport policy is based on the Partnership and Cooperation Agreement with the European Union (PCA).<sup>66</sup> Ac-

ording to Art. 45 PCA transport law is considered one of the ten priority sectors of economic cooperation between the EU and Georgia. In this regard especially the NPHL is working on recommendations of harmonizing Georgian Transport Law with that of the EU. Therefore the NPHL regularly develops action plans<sup>67</sup> in order to give advice to the Georgian Parliament concerning transport law harmonisation. Since the beginning of the implementation of the NPHL the Georgian Parliament has passed several laws in this field. The level of harmonisation differs from one sector to another.

#### 1. Road Transport

Georgia has 20.229 km of public roads, including 1.474 km of international, 3.326 km of state and 15.439 km of local roads.<sup>68</sup> In 2005 26.9 M tons of cargo (4.7% rise) and 263.1 M passengers (1.2% rise) were carried by road transport.<sup>69</sup> Legislative measures currently concentrate on harmonizing legislation with that of the EU.

##### a) Law on Changes and Amendments to the Law on Motor Vehicle Transport

The Law on Changes and Amendments to the Law in Motor Vehicle Transport was passed in December 2003 and is aimed at harmonizing the Georgian transport sector with relevant EU legislation.

##### aa) Standard Setting according to the Access to the Profession of Road Transport Operators

In order to facilitate the entering of international and national road transport operators the law is basically orientated on Directive 96/26/EC. It stipulates the guidelines necessary to obtain authorisation concerning certain qualification and experience of personnel of road transport operators. Similar to EU regulations qualification according to vehicle and road safety and protection of environment is required. Anyway concrete requirements remain vague. Since the European Union’s rules remain to some extent ineffective due to wide interpretation possibilities, it is important to state, that, at this point of time, the three qualitative criteria – good repute, financial standing and professional competence – are not even mentioned in the Law on Changes and Amendments to the

<sup>63</sup> It is an EU founded project and was established in 1993 by originally eight nations. The Basic Multilateral Agreement (MLA) was signed at “TRACECA Summit - Restoration of the Historic Silk Route” in 1998 in Baku and the Intergovernmental Commission (IGC) was created in 2000 in Tbilisi. Today 13 nations have signed the Multilateral Agreement: Armenia, Azerbaijan, Bulgaria, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Romania, Turkey, Ukraine, Uzbekistan, Tajikistan. From 1996 till 2006 61 Technical Assistance projects and 15 investment projects were supported by the TRACECA program, having disbursed a total amount of about Euro 160 M EUR. For detailed information, including a thematic project list, see the official website: <http://www.traceca-org.org/default.php?l=en>. Last access: 11 March 2007.

<sup>64</sup> Georgia therefore can be characterized as a “geopolitical bridge” connecting several important economic regions with a total of 827 M people, including the EU (495 M), the Commonwealth of Independent States (243 M), Turkey (73 M) and the Caucasus Region (16 M), see <http://www.investinggeorgia.org/sectors/transport>. Last access: 12 May 2007.

<sup>65</sup> The Ministry of Economic Development currently is in the process of working out the necessary amendments to the President’s order no. 211 on Air Transportation Liberalization Measures from 23 March 2005 in order to remove restrictions existing in the international agreements with Georgia. Furthermore the drafts of the projects on transportation by airborne means between the Georgian government and the governments of 27 countries have been worked out by the Ministry of Economic Development, see working documents of the Ministry of Economic Development 2007. A further change worth to be referred to is the opening of the new international terminal in Tbilisi, which is expected to increase air traffic. Rehabilitation of the infrastructure of the airports in mountainous regions is also planned.

<sup>66</sup> The aim of this cooperation is the contribution to the process of economic reform and recovery and sustainable development in Georgia. To this end cooperation will also will also concentrate, in particular, on economic and social development, human resources development, support for enterprises (including privatisation, investment and development of financial services), agriculture and food, energy, transport, tourism, environmental protection, regional cooperation and monetary policy, Art. 45 PCA.

<sup>67</sup> The latest action plan is available on: <http://www.geplac.org/eng/eugeorgiadocs.php>. Last access: 11 March 2007.

<sup>68</sup> Reconstruction of Georgia’s central highway is one of the top priorities in the Government’s infrastructure rehabilitation programme. Most roads of international importance were constructed and rehabilitated in 2005. In 2005 the state budget expenditure in reconstruction and development of the automobile roads network was higher than before and is therefore known as the Millennium Challenge Georgia Fund. One project example is the implementation of the Samtskhe-Javakheti Road Rehabilitation Project (about 245 km of road) covering a budget of 102.2 M GEL (appr. 42.9 M EUR). As far as a social-economic study of the region will be approved the construction works will be launched in August-September 2007, see <http://www.mcg.ge/?l=1&ci=247>. Last access: 12 May 2007.

<sup>69</sup> [http://www.investinggeorgia.org/en/investing/key\\_sectors/?id=175](http://www.investinggeorgia.org/en/investing/key_sectors/?id=175). Last access: 11 March 2007.

Law on Motor Vehicle Transport. The report on the current status of the national programme of harmonisation of the national legislation with that of the EU (NPHL 2006) states that the requirements of the Directive are “more or less reflected” in the Georgian legislation.<sup>70</sup> According to the GEPLAC-team it should be noted, that the requirements are included in the draft Code of Motor Vehicle Transport, which is anyhow not yet in force. As the European experience reveals, for example according to the good repute principle, differently interpreted domestic law affects competition and therefore the functioning of the internal market. To avoid the failure of enforcement of such rules it must be considered necessary to clarify the key requirements of the legislation as concrete as possible.

### bb) Driving Time and Rest Periods

Furthermore the Law on Changes and Amendments to the Law on Motor Vehicle Transport provides a list of documents necessary to acquire authorisation and conditions of authorisation including the issues related to certain social legislation such as the rules relating to drivers' driving and rest periods. Through these clarifications the law fulfils the requirements of Directive 3820/85/EC which must be seen as a contribution to road safety and reliability for foreign investors. Anyhow, in practice the Law does not provide sufficient provisions on safety, which has led to the consequence that NGO's and foreign companies have worked out their own regulations for safety and security. One example is British Petroleum (BP) in Georgia, which has set out its internal regulations following the EU standards: driving and resting times, such as 1 hour break after 3 hours of driving. The importance of the security sector is revealed by the setting of driving safety through BP as one of its *golden rules*. The company also issues the permits for night driving for its staff.

### cc) No Harmonisation regarding Recording Equipment

The Law on Changes and Amendments to the Law on Motor Vehicle Transport doesn't foresee any harmonisation with Regulation 3821/85/EC on recording equipment in road transport. As the practice of private legislation of BP shows, state legislation on driving times and rest periods remains forceless, if their application is not controlled. At this point of time the draft Code for Motor Vehicle Transport of Georgia stipulates controlling requirements by Art. 11 of Chapter 4.<sup>71</sup> Two possibilities are mentioned in the draft: the installation of special control equipment in vehicles comparable with such in the European Union or the usage of driver's personal control cards. Although the second way remains questionable because

of its obviously high susceptibility for abuse it must be considered as a progress.<sup>72</sup>

## b) Law on Licensing and Authorisation

As the Law on Changes and Amendments to the Law on Motor Vehicle Transport stipulates certain requirements concerning qualification and experience of personnel in the transport sector, the Law on Licensing and Authorisation contains the rules on procedures of obtaining *permits*<sup>73</sup> according to the transport sector. It was passed in summer 2005.

### aa) Restriction to International Transport

The Law on Changes and Amendments to the Law on Motor Vehicle Transport declares under section III (Issuance of Permit) in article 24 that types of permits are:

- Permit to perform international cargo transportation provided by international agreements (no. 30)
- Permit for the international cargo transportation from the territory of Georgia [...] performed by a foreign carrier (no. 31)

In this regard, international cargo transportation seems to mean transport between different countries (as the Community License, respectively, stipulates), no matter whether they are performed by a national or international operator. This means, that domestic transport doesn't require any permit of authorities. The report on the current status of the national programme of harmonisation of the national legislation with that of the EU (NPHL 2006) reveals in this regard that the procedure of obtaining licenses “is left mandatory only for international operators”.<sup>74</sup> It is questionable how the requirements of the Law on Changes and Amendments to the Law on Motor Vehicle Transport can be controlled, if there is no authority to issue licenses. Furthermore it must be seen as discrimination of foreign operators, that they are required to obtain a license if they want to perform transportation from the territory of Georgia to another country. According to Cabotage, e.g. transport of foreign operators in Georgia, no special rules are foreseen in the Law on Licensing and Authorisation. Consequently it must be seen as free of any obligation of authorisation.

<sup>70</sup> Implementation of the National Programme for Harmonisation of the Georgian Legislation with that of the EU (NPLH), Current Status, as of 13 June 2006. Available on: <http://www.geplac.org/eng/geodocuments.php>. Last access: 11 March 2007.

<sup>71</sup> Implementation of the National Programme for Harmonisation of the Georgian Legislation with that of the EU (NPLH), Current Status, as of June 13, 2006. Available on: <http://www.geplac.org/eng/geodocuments.php>. Last access: 11 March 2007.

<sup>72</sup> Furthermore innovation in the sphere of recording equipments can be witnessed by the installation of Closed Circuit Television Cameras (CCTV) across the streets of the Georgian capital initiated in March 2007 for detecting any breaches of traffic regulation.

<sup>73</sup> Very important in this connection is the fact, that, according to the law, a license is a right granted by the administrative body to perform the relevant activity for an unspecified period of time and under requirements specified by the law, a permit is either a one-time right or a right issued for a restricted period of time to perform relevant entrepreneurial activity on the certain territory under requirements specified by law, see: <http://www.investingorgia.org/en/legislation/overview> (last access: 11 March 2007). Consequently, international transport is only a one-time right and therefore its issuance even more restrictively granted than Cabotage in the EU.

<sup>74</sup> Implementation of the National Programme for Harmonisation of the Georgian Legislation with that of the EU (NPLH), Current Status, as of 13 June 2006. Available on: <http://www.geplac.org/eng/geodocuments.php>. Last access: 11 March 2007.

### bb) Simplification of Authorisation for International Transport

Anyhow, the number of licenses and permits in the field of transport has been reduced to six. The procedure for obtaining such permits was considerably simplified. Permits for

- international regular passenger transportation by road transport specified by international treaties;
- freight transportation by road transport specified by international treaties; and
- transportation of international freight carriers through Georgia's territory (above the quota agreed by the international treaties)

are issued by the road transport administration on the basis of the Law on Road Transport.<sup>75</sup> For instance, in the previous year the Commission for transport regulation issued according to the quota system 13.330 permits foreseen by International Agreements with 25 foreign countries, out of which 6.000 were issued to Georgian operators (source: Ministry of Economic Development).

## 2. Rail Transport

Georgia's railway policy is surely one of the most important fields considering the country's involvement in the TRACECA project. The development of the rail infrastructure is meant to provide a staging area for companies providing products and services to the oil industry,<sup>76</sup> as well as warehousing, distribution. In 2005 the amount of cargo (18.9 M tones) carried by railway increased by 22.7% versus 2004.<sup>77</sup> On 7 February 2007 an agreement was signed to build a railway from Turkey through Georgia to Azerbaijan. The new 104.803 km railway will carry up to 15 tons annually by 2010-12.<sup>78</sup>

### a) Georgian Railways LTD

At the end of 1998 the Railway Department of Georgia was transformed into a limited liability company "Georgian Rail-

ways". Georgian Railways LTD has been established in accordance with the Georgian State Law on Enterprises. The State 'represents a co-founder, whose rights and obligations are carried out by the legal entity of the Public Law-Agency for Enterprise Management, except of the right of privatisation and management of shares which is reserved to the Ministry of Economy, Industry and Trade through contributing 364.820.580 GEL (100%) to the authorised capital stock.'<sup>79</sup> Consequently, 100% of shares are owned by the Georgian State. The rights of the partner are realised by the legal entity of the public law – Enterprise Management Agency. The authorised capital stock of the enterprise can be modified under the decision of the partner. Furthermore management rights are reserved to the ministry. According to the Law on Entrepreneurs the dominant group of partners can influence the decisions via votes (in the case of Georgian Railways LTD - 100% of shares belong to the State). Based on the order no. 1-1/209 on "Adopting the Regulation on the Rules of Disposal and Transfer of the Main Facilities on the Balance of the Enterprises With More than 50% Participation of the Government" issued by the Minister for Economic Development on 19 June 2004, the State

has the right to agree on lease;

- is authorised to take off main facilities from charter capital;
- can make use of the existing facilities; and
- must approve lend agreements.

The State can also take other actions in accordance with the civil code provisions in agreement with the Enterprise Management Agency.

### b) Dependence on Infrastructure Investments

It must be taken into account that, although the Georgian railway network is well equipped, it isn't comparable to EU standards. Especially considering the aim of attracting foreign transport companies, the development of the technical conditions of the network may not be forgotten.<sup>80</sup> In this regard, Georgia also depends on the strategic targets of its donors. So, the EU has refused to include the Baku-Akhalkalaki-Kars railway project in the ENP Action Plans, despite demands by Tbilisi, because it is more in favour of using Georgia and its ports as a transit link towards the Balkans and Central Europe, especially in light of Bulgaria's and Romania's new EU memberships.<sup>81</sup>

<sup>75</sup> For the regular air transportation (both – freight and passenger) the licenses are issued by the Administration of the Civil Aviation, according to the Government decree no. 212 from 23 November 2005.

<sup>76</sup> Over half of the Georgian Railways (GR) traffic and revenue is provided by oil and by-products transit moving from Kazakhstan, Turkmenistan, and Azerbaijan to Georgia's Black Sea ports of Batumi and Poti, see: Trade, Transport and Telecommunications in the South Caucasus: Current Obstacles to Regional Cooperation, World Bank working paper, 2005, available on: <http://www.worldbank.org.html>. Last access: 11 March 2007.

<sup>77</sup> [http://www.investinggeorgia.org/en/investing/key\\_sectors/?id=175](http://www.investinggeorgia.org/en/investing/key_sectors/?id=175). Last access: 11 March 2007.

<sup>78</sup> The construction of the new railway line is an additional step designed to cement the strategic alliance between the three countries after the inauguration of the Baku-Tbilisi-Ceyhan (BTC) oil pipeline in July 2006 and the completion of the Baku-Tbilisi-Erzurum (BTE) gas pipeline. Kazakhstan has already expressed interest in joining the three projects and Astana's participation would thus open a door to China, see: The Baku-Akhalkalaki-Kars railway line: cement for a strategic alliance?, Di Puppò, Lili, available on: [http://www.caucas.com/home\\_eng/breve\\_contenu.php?id=303](http://www.caucas.com/home_eng/breve_contenu.php?id=303). Last access: 11 March 2007.

<sup>79</sup> Tbilisi Didube-Chugureti Regional Court, no. 3/4-965, from 21-22 January 2004. Order # 1-3/5. Georgian Railways LTD – effective from the date of its registration in the court.

<sup>80</sup> <http://www.geplac.org/eng/geodocuments.php>. Last access: 11 March 2007.

<sup>81</sup> The idea of the EU-funded Transport Corridor Europe Caucasus Asia (TRACECA) is to link Central Asia with Europe via the Black Sea and the Balkans rather than via Turkey. Therefore other projects as the regional integration with Turkey through rail remain questionable in order of its high economic costs, see: Di Puppò, Lili, The Baku-Akhalkalaki-Kars railway line: cement for a strategic alliance?, available on: [http://www.caucas.com/home\\_eng/breve\\_contenu.php?id=303](http://www.caucas.com/home_eng/breve_contenu.php?id=303). Last access: 11 March 2007.

**c) Opening up Markets:**

What has been a problem in the German railroad sector for years – the lack of competition due to no real opening of markets – is currently being considered during the transformation of the Georgian railroad sector as a key factor for development.

**aa) Law on Changes to the Railway Code**

The Law on Changes to the Railway Code, passed by the parliament in July 2005, aims according to the current report on the implementation of the National Programme for Harmonisation of the Georgian legislation with that of the EU (NPLH) at “improving the situation in establishing tariffs and additional charges for services provided, with consideration of interests of parties involved, international practices and experience, and main principles of railway tariff policy”.<sup>82</sup> The Law may comply with Directive 91/440/EC on the development of the Community's railways, stipulating that “railway undertakings shall be free to control the supply and marketing of services and fix the pricing thereof”. Formally, the management of the railway operation and infrastructure has been separated from the provision of railway transport services. Whether this facilitates the access to further undertakings, despite of Georgian Railway LTD, must be observed. Recently the management of the railway operation and infrastructure is carried out by the Ministry of Transport and Communications until Railway Transport Administration is established.<sup>83</sup>

**bb) Law on Free Trade and Competition**

Another measure in order to open up markets has been undertaken by abolishing the setting of prices based on the Georgian Law on Free Trade and Competition. Subsequently, the list of state regulated tariffs were also abolished, as for instance the tariff for the services for cargo transportation by means of railway, which were set by Georgian Railways LTD or the tariff for cargo loading/unloading services, liberalized

by the decree of the Minister of Economic development no. 1-1/52 from 19 July 2004.<sup>84</sup> Thus, judging from the Georgian Law on Free Trade and Competition, the functions of the transport administration in terms of tariff regulation are not as strong as in the European Union.

**D. Concluding Statement**

Both, the European Union and Georgia, consider transport as a key factor for development. While Georgia's primary objective is to facilitate competition and therefore gain from the economic growth of the sector, the EU follows also ecological, social, innovation and safety objectives. Road traffic is fully developed in the EU, anyhow efficient common rules in order to facilitate competition and integrating domestic transport markets into a common market remain difficult to prevail over domestic protection tendencies. In Georgia, anyhow, also tendencies protecting domestic operators are to be witnessed. State regulation is not always effective in order to contribute to the objectives of the government's road transport policy. In the railway sector Georgia maintains the advantage of having a young railway industry, while the European Union's transport policy is designated by always taking measures in order to force traditional domestic structures to open. Georgia's chance lies in fully privatising railway services and separating network and service from the beginning on as effectively as possible.

<sup>82</sup> Implementation of the National Programme for Harmonisation of the Georgian Legislation with that of the EU (NPLH), Current Status, as of 13 June 2006. Available on: <http://www.geplac.org/eng/geodocuments.php>. Last access: 11 March 2007.

<sup>83</sup> This temporary solution is foreseen in Georgia's law on “Management and Regulation rules of the Transport and Communications Sphere”.

<sup>84</sup> Nevertheless it has to be noted that the service based tariffs (tariffs approved by the Ministry of Economic Development according to order no. 48 from 16 July 1998) for airborne transportation means and for services in charge of controlling air transport routes (Ministry of Transport and Communications according to order no. 85 from 2 November 1999 and no. 63 from 8 October 2002) are still in force.

INTERNATIONAL AND EUROPEAN INTELLECTUAL PROPERTY LAW

OGH (AT) 22 May 2007 – 4 Ob 43/07p  
 Brussels I Regulation Articles 27(1) and 79(1); Regulation (EC) No. 6/2002 on Community designs<sup>1</sup> Article 1(3) – Community design – Parallel proceedings – No identity of parties – No binding effect – Jurisdiction

The principle of the uniformity of Community designs does not effect that the court of a Member State which has jurisdiction according to Article 82 of the Regulation on Community design is bound by the judgment of another Community design court regarding the same Community design, where the parties in the first set of proceedings are not identical with those in the parallel proceedings. (*Headnote of the Court*)

<sup>1</sup> Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs 32002R0006 (OJ 2002, L 3 at 1).

For the full text of the decision, please refer to section II of this issue, at 148.