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APPLICATION OF THE CUI UR TO SERVICE FACILITIES

Advisory legal opinion on the interpretation of the CUI UR

adopted by the ad hoc Committee on Legal Affairs and International Cooperation at its 5th session on 8 November 2023

I. INTRODUCTION

1. The purpose of this advisory legal opinion on the interpretation of the Uniform Rules concerning the Contract of Use of Infrastructure in International Rail Traffic (CUI - Appendix E to the Convention, hereafter ‘CUI UR’) is to clarify their scope, in particular the term ‘infrastructure’. It has been prepared in response to a request from CIT as to whether the CUI UR cover fixed service facilities within the meaning of Directive 2012/34/EU. However, COTIF and, in particular, the CUI UR do not define or refer to ‘service facilities’.
2. The interpretation of the CUI UR is given based on
 - their character of international law and the need to promote uniformity;
 - the ordinary meaning to be given to their terms in light of their purpose, historical context and system.

Legal analysis and the views of registered stakeholders CIT, RNE and academic Dr Rainer Freise have been important in the preparation of this advisory legal opinion. It should be noted at the outset that the internal law of OTIF members serves as a context, but will not be the subject of an advisory legal opinion.

3. This advisory legal opinion has been prepared in relation to the CUI UR as adopted at the 5th session of the General Assembly (i.e. the Vilnius Protocol) with the modifications adopted at the:
 - 24th session of the Revision Committee (23-25.06.2009), which entered into force on 01.12.2010
 - 25th session of the Revision Committee (25-26.06.2014), which entered into force on 01.07.2015
 - 13th session of the General Assembly (25-26.09.2018), which have not yet entered into force.

II. CUI UR: SCOPE

A. Wording of relevant provisions

Article 1 of the CUI UR

4. The scope of the CUI UR is first analysed on the basis of the wording of the relevant provisions. The scope of the CUI UR is defined in its Article 1 § 1:

‘These Uniform Rules shall apply to any contract of use of railway infrastructure for the purposes of international carriage within the meaning of the CIV Uniform Rules and the CIM Uniform Rules. They shall apply regardless of the place of business and the nationality of the contracting parties. These Uniform Rules shall apply even when the railway infrastructure is managed or used by States or by governmental institutions or organisations.’
5. The scope of the CUI UR was modified at the 13th session of the General Assembly in 2018. Although the 2018 modification¹ has not yet entered into force, it is important to

¹ Modification of Appendix E (CUI) - (Text as modified by the 13th General Assembly) ([FR/DE/EN](#)).

refer to it, as its declared purpose was limited to clarifying the existing provision. The only substantive 2018 modification to Article 1 § 1 was the following, shown in bold:

‘These Uniform Rules shall apply to any contract of use of railway infrastructure **(contract of use) in a Member State in international railway traffic** for the purposes of international carriage within the meaning of the CIV Uniform Rules and the CIM Uniform Rules. [...]’

6. The key difference between the original version (1999) and the modified version (2018) of the above provision is the phrase ‘in international railway traffic’. The extent of such modification or clarification depends on the definition of the term ‘international railway traffic’. Furthermore, the definition of ‘railway infrastructure’ is crucial in understanding the scope of the CUI UR, especially in the context of the question raised by CIT.

Article 3 of the CUI UR

7. The scope of the CUI UR, as defined in its Article 1, must be read and interpreted in conjunction with the terms ‘railway infrastructure’ and ‘international railway traffic’, as defined in its Article 3.
8. The original version (1999) of the term ‘railway infrastructure’ in Article 3(a) of the CUI UR has never been modified and reads as follows:

“‘railway infrastructure’ means all the railway lines and fixed installations, so far as these are necessary for the circulation of railway vehicles and the safety of traffic’.
9. The literal interpretation of the term already provides some guidance on the meaning of terms for the purposes of the CUI UR. Firstly, it covers both railway lines and fixed installations, but it is unclear which specific objects are included. Secondly, they must be necessary for two cumulative purposes: the circulation of railway vehicles and the safety of traffic. Thirdly, it should be noted that the term is generic and can therefore evolve.
10. In order to clarify the scope of application of the CUI UR, at its 13th session in 2018 the General Assembly introduced the term ‘international railway traffic’ in Article 1 § 1 and defined it as follows in Article 3, letter aa):

“‘international railway traffic’ means traffic which requires the use of an international train path or several successive national train paths situated in at least two States and coordinated by the infrastructure managers or the bodies in charge of allocation of train paths that are concerned’.
11. One of the important elements of the definition of ‘international rail traffic’ is the term ‘train path’. However, the latter is not defined in COTIF.

B. Explanatory Report, preparatory works and EU regulatory context

General historical context

12. The historical context of the proposal to adopt the CUI UR is set out in the Consolidated Explanatory Report to the CUI UR. In particular, the following is worth noting:
 - ‘In its analysis of the consequences of Directive 91/440/EEC of 29 July 1991, which the Secretariat sent to the Member States at the beginning of 1993, the Secretariat drew attention to the fact that the separation of infrastructure management from the provision of transport services would result in new legal relationships and new types of contracts. In such a case, the rail transport undertaking is a client and contractual partner of the infrastructure manager, whereas the passengers, freight consignors and keepers of private wagons are not in a direct contractual relationship with the

infrastructure managers, but only with the rail transport undertakings as carriers or users of wagons.’²

13. However, it is not possible fully to understand the historical context of the development of the CUI UR without recalling the aim of Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways³. In accordance with Article 1 of Directive 91/440/EEC ‘[t]he aim of this Directive is to facilitate the adoption [read: adaptation] of the Community railways to the needs of the Single Market and to increase their efficiency; [...] by separating the management of railway operation and infrastructure from the provision of railway transport services, separation of accounts being compulsory and organizational or institutional separation being optional [...]].’
14. The ‘Report by the OTIF Secretariat on the revisions of COTIF since OTIF’s 5th General Assembly’⁴ describes the scope of the CUI UR and emphasises the relationship with public law provisions. In particular ‘The CUI Uniform Rules are limited to regulating the contractual relations [...]. They do not affect provisions of public law, such as the European Union (EU) directives concerning rights of access and the conditions of the latter.’ This clarification is of considerable importance. Firstly, it is clear that public law rules have priority in determining what constitutes railway infrastructure and to which objects and services access is granted and under what conditions. Secondly, the fact that public law provisions are not affected means, as a consequence, that the legal regime of the CUI UR is complementary to the public law applied in OTIF members regulating the railway infrastructure and access to it.

Railway infrastructure

15. With regard to the term ‘railway infrastructure’, the Consolidated Explanatory Report provides the following useful clarification of the historical context and negotiations:

‘The Revision Committee decided intentionally not to refer to Annex I, Part A of the (EEC) Commission Regulation No. 2598/70 of 18 December 1970 concerning the definition of the content of the different positions of the registration plans of Appendix I of the (EEC) Council Regulation No. 1108/70 of 4 June 1970 or to take over in letter a) the text of the definition of the term “railway infrastructure” as contained in Directive 91/440/EEC. A more general definition is more appropriate since it allows account to be taken, as applicable, of any development in the subject and it prevents an EU regulation from becoming law in all the Member States of OTIF through the CUI Uniform Rules, a law which would have to be amended if the regulation were amended [...].’
16. It should be noted that the first draft of the future CUI UR proposed by the Secretariat contained a detailed definition of the term ‘railway infrastructure’ with a non-exhaustive list of infrastructure elements based on, but not carrying over word for word Commission Regulation No 2598/70.⁵ As EU legislation in fact triggered the development of the CUI UR in the 1990s, it is worth noting that the list of infrastructure items used to define ‘railway infrastructure’ in Regulation No 2598/70 has remained almost unchanged and, with only a few additions, is now in Annex I to Directive 2012/34/EU (see Annex).

² AG 12/13 Add. 8 ‘Consolidated Explanatory Report. CUI UR’ dated 30 September 2015 ([FR/DE/EN](#)), paragraph 1 of General points.

³ Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways ([FR/DE/EN](#)).

⁴ Report by the OTIF Secretariat on the revisions of COTIF since OTIF’s 5th General Assembly, Protocol of 3 June 1999 for the Modification of the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 (1999 Protocol) ([FR/DE/EN](#)), paragraph 32.1.

⁵ See Bulletin of International Carriage by Rail No. 3/1996, p. 181-182, 189 (French and German only).

17. The historical context shows that there was an agreement that the terms of railway infrastructure should be generic and allow for national developments. In other words, a very broad and general definition leads to certain variations in the OTIF members. Therefore, application of the CUI UR also depends on how the railway infrastructure is organised in a particular OTIF member. However, the classification of a particular object as railway infrastructure under the internal law of an OTIF member is not sufficient for the CUI UR to apply, since the cumulative requirements set out in the definition of railway infrastructure in Article 3 of the CUI UR must be met. For example, under EU law (see Annex), buildings used by the infrastructure department, including part of the installations for the collection of transport charges, are part of the railway infrastructure, but it is obvious that such buildings are not fixed installations necessary for the circulation of railway vehicles and the safety of traffic.

International railway traffic

18. The Consolidated Explanatory Report, as amended in connection with the amendment of the CUI UR adopted at the 13th session of the General Assembly, clarifies the term “international railway traffic”:

‘The term “international railway traffic” required a specific new definition geared towards the train paths used for such traffic [...]. This need not necessarily be an international train path (i.e. one established by agreement between two or more infrastructure managers); international traffic can also be performed on two or more successive national train paths located in at least two States. Both cases can be referred to as international use of railway infrastructure. [...]

In EU law (see Directive 2012/34/EU of the European Parliament and of the Council, establishing a single European railway area) along with the notion of train path, the notion of capacity exists. The latter means the potential to schedule train paths requested for an element of infrastructure for a certain period.[...]⁶

19. Neither the CUI UR nor the Explanatory Report define the term ‘train path’, which is an integral part of the definition of the term ‘international rail traffic’. However, the Explanatory Report refers to Directive 2012/34/EU with regard to the notion of train path. Article 3 of the Directive contains the following two definitions:
- ‘(24) “infrastructure capacity” means the potential to schedule train paths requested for an element of infrastructure for a certain period; [...]
 - (27) “train path” means the infrastructure capacity needed to run a train between two places over a given period;’
20. The Explanatory Report, read together with the definition of train path, makes it clear that international use of infrastructure occurs in two cases where there is an international infrastructure capacity or successive national infrastructure capacities needed to run a train between two places.

Service facilities

21. As already mentioned, the CUI UR do not refer to service facilities. However, for the purpose of this advisory legal opinion, it is necessary to refer to some basic provisions of EU law concerning service facilities.
22. The category of railway infrastructure was defined in detail at European level in 1970 and has remained stable in principle ever since. The requirements for the management of

⁶ Amendments to the Consolidated Explanatory Report in Annex 4 to SG-18088-AG 13 ‘Final Document’ dated 26 September 2018 ([FR/DE/EN](#)).

railway infrastructure and access to it have been subject to continuous development since 1991. Much later, an additional and independent category of service facilities was introduced into EU legislation. They were first included in 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.⁷ The definition and list of service facilities are currently laid down in Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (recast) (see Annex)⁸. Recitals 26 and 27 of the Directive accordingly clarify that:

- ‘In order to ensure fair competition between railway undertakings and to guarantee full transparency and the non-discriminatory access to and supply of services, a distinction should be made between the provision of transport services and the operation of service facilities. [...]’
- ‘Non-discriminatory access to service facilities and the supply of rail-related services in these facilities should allow railway undertakings to offer better services to passengers and freight users.’

23. As can be seen from the timeline, the category of service facilities was introduced after the adoption of the CUI UR. Furthermore, during the subsequent preparation and discussion of the amendments to the CUI UR, EU law on service facilities was not directly or indirectly considered.

III. CONCLUSION

- 1) The CUI Uniform Rules apply to any contract of use of railway infrastructure for the purposes of international carriage within the meaning of the CIV Uniform Rules and the CIM Uniform Rules. The CUI Uniform Rules do not affect the public law applied in OTIF members concerning railway infrastructure and access to it and are complementary to that law.
- 2) International use of infrastructure occurs in two cases where there is an international infrastructure capacity or successive national infrastructure capacities needed to run a train between two places.
- 3) It is necessary to ensure a harmonised and complementary interpretation of the CUI UR and the public law applied in the OTIF members in order to avoid conflicts between two legal regimes and to enable application of the CUI UR. A definition of railway infrastructure in the CUI Uniform Rules which goes beyond the corresponding definition in internal law would create a situation in which the scope of the contract of use would extend beyond the railway infrastructure to which access is granted, which would therefore be contradictory. Consequently, the determination of what constitutes ‘railway infrastructure’ for the purposes of the CUI Uniform Rules should be carried out in two stages. Firstly, it is the public law applied in the OTIF member which determines what constitutes railway infrastructure and what the conditions of access to it are. Secondly, only railway infrastructure as defined by the applicable public law of an OTIF member and meeting the requirements of Article 3(a) of the CUI UR can be the subject of a contract of use under the CUI UR.

⁷ 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 ([FR/DE/EN](#)).

⁸ Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (recast) ([FR/DE/EN](#)).

ANNEX

Extract of relevant provisions from Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (recast) as amended

The list of infrastructure items used to define ‘railway infrastructure’ in Regulation No 2598/70 has remained almost unchanged and, with only a few additions (in bold), is now in Annex I to Directive 2012/34/EU.

‘ANNEX I

LIST OF RAILWAY INFRASTRUCTURE ITEMS

Railway infrastructure consists of the following items, provided they form part of the permanent way, including sidings, but excluding lines situated within railway repair workshops, depots or locomotive sheds, and private branch lines or sidings:

- Ground area,
- Track and track bed, in particular embankments, cuttings, drainage channels and trenches, masonry trenches, culverts, lining walls, planting for protecting side slopes, etc.; passenger and goods platforms, **including in passenger stations and freight terminals**; four-foot way and walkways; enclosure walls, hedges, fencing; fire protection strips; apparatus for heating points; crossings etc.; snow protection screens,
- Engineering structures: bridges, culverts and other overpasses, tunnels, covered cuttings and other underpasses; retaining walls, structures for protection against avalanches, falling stones, etc.,
- Level crossings, including appliances to ensure the safety of road traffic,
- Superstructure, in particular: rails, grooved rails and check rails; sleepers and longitudinal ties, small fittings for the permanent way, ballast including stone chippings and sand; points, crossings, etc.; turntables and traverses (except those reserved exclusively for locomotives),
- Access way for passengers and goods, **including access by road and access for passengers arriving or departing on foot**,
- Safety, signalling and telecommunications installations on the open track, in stations and in marshalling yards, including plant for generating, transforming and distributing electric current for signalling and telecommunications; buildings for such installations or plant; track brakes,
- Lighting installations for traffic and safety purposes,
- Plant for transforming and carrying electric power for train haulage: substations, supply cables between substations and contact wires, catenaries and supports; third rail with supports,
- Buildings used by the infrastructure department, including a proportion of installations for the collection of transport charges.’

*Article 13***Conditions of access to services**

In accordance with Article 13 of Directive 2012/34/EU:

- Infrastructure managers shall supply to all railway undertakings, in a non-discriminatory manner, the minimum access package laid down in point 1 of Annex II.
- Operators of service facilities shall supply in a non-discriminatory manner to all railway undertakings access, including track access, to the facilities referred to in point 2 of Annex II, and to the services supplied in these facilities.
- Where the operator of the service facility provides any of the services referred to in point 3 of Annex II as additional services, it shall supply them upon request to railway undertakings in a non-discriminatory manner.

‘ANNEX II**SERVICES TO BE SUPPLIED TO THE RAILWAY UNDERTAKINGS****(referred to in Article 13)**

1. The minimum access package shall comprise:

- (a) handling of requests for railway infrastructure capacity;
- (b) the right to utilise capacity which is granted;
- (c) use of the railway infrastructure, including track points and junctions;
- (d) train control including signalling, regulation, dispatching and the communication and provision of information on train movement;
- (e) use of electrical supply equipment for traction current, where available;
- (f) all other information required to implement or operate the service for which capacity has been granted.

2. Access, including track access, shall be given to the following services facilities, when they exist, and to the services supplied in these facilities:

- (a) passenger stations, their buildings and other facilities, including travel information display and suitable location for ticketing services;
- (b) freight terminals;
- (c) marshalling yards and train formation facilities, including shunting facilities;
- (d) storage sidings;
- (e) maintenance facilities, with the exception of heavy maintenance facilities dedicated to high-speed trains or to other types of rolling stock requiring specific facilities;
- (f) other technical facilities, including cleaning and washing facilities;
- (g) maritime and inland port facilities which are linked to rail activities;
- (h) relief facilities;
- (i) refuelling facilities and supply of fuel in these facilities, charges for which shall be shown on the invoices separately.

3. Additional services may comprise:

- (a) traction current, charges for which shall be shown on the invoices separately from charges for using the electrical supply equipment, without prejudice to the application of Directive 2009/72/EC;
- (b) pre-heating of passenger trains;
- (c) tailor-made contracts for:
 - control of transport of dangerous goods,
 - assistance in running abnormal trains.

4. Ancillary services may comprise:

- (a) access to telecommunication networks;
- (b) provision of supplementary information;
- (c) technical inspection of rolling stock;
- (d) ticketing services in passenger stations;
- (e) heavy maintenance services supplied in maintenance facilities dedicated to high-speed trains or to other types of rolling stock requiring specific facilities.'