

**OTIF**



**ORGANISATION INTERGOUVERNEMENTALE POUR  
LES TRANSPORTS INTERNATIONAUX FERROVIAIRES**

**ZWISCHENSTAATLICHE ORGANISATION FÜR DEN  
INTERNATIONALEN EISENBAHNVERKEHR**

**INTERGOVERNMENTAL ORGANISATION FOR INTER-  
NATIONAL CARRIAGE BY RAIL**

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Arbeitsgruppe ER CUV  
Working group CUV UR**

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CER comments on OTIF's working document

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### Remarks about CUV draft of 12/09/2013

To adapt CUV to the evolution of the EU and OTIF legislation with the introduction of ECM in directive 2004/49/CE and in ATMF is a good idea.

Here are some comments and proposals to be put on the table for the discussions.

1. As changing CUV is not (and shall not be) a frequent event, therefore it is useful to use this update to solve simultaneously different problems and not only to work on the ECM issue.
2. CUV is unclear about who is contracting with the railway transport undertaking(s) (named RU in this note):
  - In art. 1, nobody knows who contracts.
  - In art. 3, we read “the person who provides a vehicle, pursuant to a contract referred to in Art. 1, must ensure ...”. This leaves a lot of possibilities: is it the keeper, the consignor who has rented the vehicle for one month or for this travel to the keeper, the renter of a vehicle which is neither the keeper nor the consignor, another person?
  - In art. 6 and 12, who is: “The person entitled...”? By whom is it entitled?
  - Only in art. 8, the keeper intervenes really (additionally to his definition in art. 2 c of course) and in § b), we read the right sentence “the rail transport undertaking which is the *contractual partner of the keeper*”.

This is so right that OTIF, when proposing the draft of new art. 11, feels the need of writing clearly in its § 1 that it is the keeper who signs the contract listed in art. 1 and this is fully right.

Therefore this clarification should be made in the whole CUV.

3. A detail in art. 2 c): the definition of “keeper” is not exactly the same that the one in art. 2 n) of ATMF!
  - CUV: „keeper“ means the person who, being the owner or having the right to *dispose of* it, exploits a vehicle economically in a permanent manner as a means of transport;
  - ATMF: “keeper” means the person or entity that, being the owner of a vehicle or having the right to *use* it, exploits the vehicle as a means of transport and is registered as such in the vehicle register referred to in Article 13;

The ATMF definition is the most recent one, but it has a defect! It says that the keeper “uses” the vehicle, but, in the whole CUV, it is not the keeper but the RU which uses the vehicle. The word “dispose of” is not accurate in EN (= to get rid of), but one word different from “use” has to be chosen. In FR version, the word “utilisateur” is not accurate too, as the RU “utilise” the vehicle, but the words “il en a le droit de disposition” are accurate.

4. A detail: in art. 3 § 1, point b is strange; either the RU is the keeper of the vehicle, and it is referred under point a, or the RU is not the keeper and, if the RU rents the vehicle for a short time, why to make it mandatory to mark “*when applicable*, a statement of the rail transport undertaking to whose vehicle park the vehicle belongs”? Probably an old writing remaining since the past?
5. Art. 7 raises a lot of concerns from RUs and shall evolve. CER, in its proposals for amendments to the EC proposal about the technical part of the 4<sup>th</sup> Railway Package, and in particular the revision of the Safety Directive, has unanimously lobbied a lot in order to clarify the duties and liabilities of each type or railway actors intervening in the rail transport safety, and especially RUs, keepers and ECM. The Council in its meeting of 10 October 2013 adopted a new version of art. 4 of the Safety Directive, which emphasises the roles of other actors among which keepers and ECM. And a lot of parliamentarians’ amendments go in the same direction.
6. Art. 9 § 2 could be understandable in terms of liability<sup>1</sup>, but is strange and dangerous in terms of penal responsibility. The reason is that, in the EU, Regulation 1078/2012 (known as CSM monitoring) states in Art. 3 § 1 that “*Each railway undertaking... (b) shall ensure that risk control measures implemented by their contractors are also monitored in compliance with this Regulation. To this end, they shall apply the monitoring process set out in the Annex or require their contractors to apply this process through contractual arrangements*”.

It should be made clear that the RU has not to monitor the IMs on the networks of which the RU runs trains!

Another point should be studied: the scope and limits of liability should be the same between the keeper and the RU for IM issues and between the RU and the IM in CUI as far as the damage concerns the keeper.

7. In new Art. 11,
  - Why to speak only of wagons? Any vehicle (also locomotives, coaches, EMUs, DMUs) shall have an ECM according to ATMF Art. 15 § 2! The only specificity of wagons is their ECM shall be certified according to the same article and §. Proposal: to write a § common for all types of vehicles + a specific § for additional requirements for wagons.
  - The 2<sup>nd</sup> sentence of § 1 is vague (as the keeper has to be registered for each vehicle) and useless if the ATMF definition of keeper is copied with the correction proposed in § 3 of this note.
  - In § 2, it is strange to write that “the keeper shall be *responsible* for the maintenance of the wagon”! It is contrary to ATMF art. 15 § 2 which states “The ECM shall *ensure* that the vehicles for which it is in charge of maintenance are in a safe state of running by means of a system of maintenance”. The duties (improperly called responsibilities) shall not be mixed between different actors. Two solutions can be studied for liability:

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<sup>1</sup> Responsabilité civile in FR

- Either to refer to art. 9 stating that either the keeper is also the ECM for the vehicle concerned, or the ECM he chooses is considered as one of the “other persons whose services ‘it’ makes use of”, and in such case the liability problem is solved: vis-à-vis the RU, the keeper is liable for himself and for the ECM (I write “liable” and not “responsible”).
- Or to do as above, but to complement this by an article defining the liability rules between the keeper and the ECM. This would be more complex, but similar to what exists for the IM: vis-à-vis the keeper, art. 9 § 2 of CUV applies, but CUI exists between the IM and the RU.
- The first sentence of § 3 is strange: the ECM is indicated in the vehicle register (Art. 15 § 2 of ATMF<sup>2</sup>), but not in the contract between the RU and the keeper (for instance the GCU).
- All the safety duties of the keeper should be listed. Some first ideas about this: The keeper applies for registration of the vehicle in the vehicle register and for modifications of the content of the register; he shall choose either to be the ECM or to designate an ECM and to establish a contract with it before the vehicle is placed into service; he shall exploit the vehicle in compliance with its characteristics and with safety decisions of the ECM and of NSAs/competent authorities. He shall be an interface between the consignor or the consignee and the ECM to ensure the exchange of information useful for safety between them.
- Note that the exchange of information useful for safety between the ECM and the RU<sup>3</sup> is a complex issue:
  - The RU knows the ECM thanks to the vehicle register, according to legislation, but the ECM often does not know in the trains of which RUs the vehicle it maintains runs or will run. And the keeper is also often in the same situation.
  - When several RUs intervene from the same transport from A to Z, who does what? The sentence “It shall also stipulate these obligations in the case of recourse to a subrogated rail transport undertaking” is very theoretical.
  - It is the reason why the vehicle register shall be the only easy way to inform each RU concerned (which can consult it). Of course, as required strongly by CER, the registers shall exist, be efficiently updated and reachable by any RU. Contracts are not sufficient!
- For wagons, it is not possible to rely on the ECM informing the keeper when it is decertified by its certification body and the keeper informing the RUs concerned. The safe way is: certification body => ERA or OTIF => quick update of the vehicle register. Think of black sheep!

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2 “this entity shall be registered in the data bank referred to in Article 13”

3 The RU knows the ECM thanks to the vehicle register, but the ECM often does not know in the trains of which RUs the vehicle it maintains runs.

- § 4 shall be changed:
  - The contract is not an accurate and sufficient way to give to the RU the certainty that the ECM is certified! It is the role of the certified ECM register and of the vehicle register! These registers shall be listed here in link with art. 13 (in particular its § 4) of ATMF. Look also § 5.8, 10.3 and 10.4 of “Uniform Rules set out in accordance with Article 15 § 2 – Certification and Auditing of entities in charge of maintenance (ECM)”
  - The sentence “a certified ECM which is *capable of* ensuring ...” is strange. ATMF art 15 § 2 stipulates that “The ECM shall ensure that the vehicles for which it is in charge of maintenance are in a safe state of running by means of a system of maintenance”. It should be better to use a sentence like in § 5.6 of the UR listed above.
  - Why to speak only of the RU? IMs also run trains with wagons (look at § 2.3 of the UR listed above).