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DEROGATIONS – REVIEW OF ANNEX B TO ATMF

Discussion document

Secretariat's analysis and proposal for next steps

1. INTRODUCTION

This is version ~~2~~³ of document TECH-21016. Version 1 was reviewed by WG TECH at its 43rd session and version 2 was reviewed at the 44th session. For this 3rd version, the tracked changes of version 2 have been accepted and Modifications compared to version 2 are indicated by track changes mode.

On the basis of Article 7b of the ATMF Uniform Rules (ATMF), “*The Committee of Technical Experts is competent to adopt guidelines or mandatory provisions for derogations from structural and functional UTPs.*” Such provisions have been in force since 1 January 2014 in the form of [Annex B to ATMF](#).

At its 42nd meeting (17-18.11.2020), WG TECH discussed the subject of derogations. The final minutes contain the following:

*“The **European Commission** informed the meeting that the subject of non-application of TSIs, also referred to as derogations, was currently being discussed at EU level. The discussion would result in practical arrangements prescribed in the form of an implementing act.*

*The **Secretariat** reminded the meeting that at OTIF level, derogations from the application of UTP(s) was regulated in Annex B to ATMF: Requirements and procedure for derogations from application of UTP(s) related to a structural or functional subsystem. There was a significant difference between the non-application of TSIs at EU level and UTPs at OTIF level. Compliance with the TSIs was mandatory in the EU for all railway products before being placed on the EU market. The purpose of UTPs, on the other side, was not to place products on the market, but was solely to admit vehicles to international traffic. Compliance with UTPs was not a strict obligation, but rather a condition for the mutual acceptance of vehicles. Vehicles not intended for international traffic were not subject to UTPs. The Secretariat agreed that the non-application of UTPs and the need for modification or withdrawal of Annex B to ATMF could be analysed further at the WG TECH meetings.*

*The **Chair** concluded this item as follows:*

- [...]
 - WG TECH noted the discussion concerning the non-application (also known as derogation) of TSIs at EU level and suggested that this subject be further analysed at a future WG TECH meeting.”

The provisions of Annex B to ATMF were based on the rules applicable in the European Union and contained in Directive 2008/57/EC concerning the derogation for application of Technical Specification for Interoperability (TSIs). The said Directive has been recast and replaced by Directive (EU) 2016/797, in which the conditions for derogation from the application of TSIs have changed. This fact, and additional arguments set out in this document, justify a review of Annex B to ATMF.

2. DISCUSSION

There is no formal definition of ‘derogation’ in ATMF or its Annex B. However, the explanatory remarks on Annex B to ATMF note that “*A derogation constitutes permission not to apply entire, or particular parts of UTP regulations to a particular project. A derogation is applicable to a Contracting State which, based on the derogation, need not impose the application of the UTP.*”

2.1 ROLES AND PROCEDURES

The explanatory remarks indicate that Contracting States need ‘approval from the Organisation’ to grant certain derogations. The Organisation, in this context, is understood to include the Secretary General and the Committee of Technical Experts.

Firstly, the Committee of Technical Experts has a formal role in approving derogations, but due to the once-a-year meeting schedule, this could lead to significant delays for projects subject to a request for a derogation.

Furthermore, according to Annex B to ATMF, the Contracting State seeking derogation should send the Secretary General a file, and the latter should check whether the file is complete and inform the Contracting State of his findings. It is debatable whether the Secretary General should continue to have such a role. It could for example lead to situations where a Contracting State does not agree with the Secretary General's findings. This would put both parties in a difficult position and lead to questions of possibilities for recourse.

Lastly, it is worth noting that in the more than seven years that Annex B to ATMF has been in force, the Secretary General has never been sent a file requesting permission for a derogation. It is therefore questionable as to whether there is a practical need to maintain the rules for derogations as they are.

2.2 DEROGATIONS CONCERNING VEHICLES

In practice, there may be a need not to apply certain provisions of the UTP to certain vehicles. The questions that arise are what the consequences of not applying UTP provisions should be and whether there should be a formal centralised procedure? To answer these questions, it may be helpful to recall what the consequences of full UTP compliance are. Article 6 § 3 of ATMF lays down that:

Without prejudice to Article 3a an admission to operation issued for a vehicle which is in conformity with all applicable UTP shall be valid on the territories of other Contracting States provided that

a) all essential requirements are covered in these UTP and

b) the vehicle is not subject to

- *a specific case which affects the technical compatibility with the network of the Contracting State concerned, or*
- *open points in the UTP that are related to technical compatibility with the infrastructure, or*
- ***a derogation.***

The conditions for the free circulation may also be specified in the relevant UTP.

This provision of ATMF refers to vehicles only, and not, for example, to infrastructure.

From this provision, it is clear that if a vehicle is subject to a derogation, its admission is not automatically valid on the territories of all Contracting States. As a consequence, the vehicle can only be admitted in accordance with Article 6 § 4 of ATMF, which requires, inter alia, that *“the area of use concerning the initial admission shall be limited to the issuing State(s). The competent authority or authorities of the other States may ask the applicant for additional technical information such as risk analysis and/or vehicle tests before granting a complementary admission to operation and extending the vehicle's area of use”*.

This means that a separate admission must be requested for each Contracting State and that the consequences of non-compliance with UTP provisions (in the form of a derogation granted by one Contracting State) should be analysed by each consecutive Contracting State before the vehicle can be used on its territory. As long as there is full transparency as to which UTP provisions are not complied with for the first admission, and which alternative provisions have been applied, the consequences can and should be assessed by each consecutive state in which the vehicle is intended to be used.

It could therefore be argued that no centralised or coordinated procedures are needed in order to grant derogations for vehicles, as long as there is transparency as to whether parts of a vehicle do not comply with the UTPs and which alternative requirements were applied instead.

2.3 DEROGATIONS CONCERNING INFRASTRUCTURE

At its 11th session, the Committee of Technical Experts noted that there is a difference in principle between the application of COTIF to vehicles and the application of COTIF to infrastructure. As vehicles cross borders, it is very important that they can be accepted for use in international traffic on the networks of all Contracting States. In this context, vehicles compatible with all UTP requirements and admitted to operation in accordance with the conditions of ATMF Article 6 § 3 acquire the right to be used in international traffic, because they are mutually accepted by all Contracting States. Fixed installations, on the contrary, remain stationary in one state and are not subject to (mutual) acceptance by other states.

The UTP on infrastructure (adopted at the 13th session of the Committee of Technical Experts on 22-23 June 2021) is based on the principle that Contracting States on whose territory a line is located have to decide whether the UTP is applicable to that line.

Furthermore, according to chapter 7 of this UTP on infrastructure: “*Contracting States shall publish a list of lines to which this UTP is applicable, indicating for each line whether it fully complies with the technical provisions of this UTP. Non-compliance shall be identified, where possible indicating the characteristics of the line which deviate from the UTP provisions and where these deviations occur. Stations where lines with different characteristics come together shall be indicated.*”

Contracting States may therefore decide not to apply the UTP without any centralised derogations procedure. Consequently, Annex B to ATMF should not deal with derogations for infrastructure.

2.4 DEROGATIONS CONCERNING GENERAL PROVISIONS (UTP GEN SERIES)

Annex B to ATMF concerns derogations from the application of structural or functional UTPs. Derogations from UTPs concerning general provisions (UTP GEN) are not permitted.

3. NEXT STEPS

In view of the above, the Secretariat suggests that the following questions should be subject to consideration by WG TECH:

– Are binding rules for derogations still necessary?

The Secretariat is of the view that with regard to vehicles, a formal mandatory procedure for derogations might not be necessary. Vehicles not complying with one or more UTP provisions would simply not be mutually accepted in international traffic. Consequently, each vehicle not complying with one or more UTP requirements needs separate admission from each Contracting State where admission is sought.

As for infrastructure, the UTP INF already permits Contracting States on whose territory a line is located to decide whether the UTP INF applies to that line. Further rules are not needed.

It is also important to understand the difference between the (non-)application of COTIF's technical rules by non-EU Contracting States and the (non-)application of EU law by EU Member States. Unlike COTIF's technical rules, EU law not only regulates the admission and use of vehicles and other railway material to international traffic, but has much broader aims, including authorisation for placing products on the EU market and the creation of a single European railway area. It is therefore justified for COTIF to have a different approach to non-compliance with the UTPs, compared to non-compliance with TSIs in the EU.

– Is there a need for guidelines concerning derogations?

The Secretariat is of the view that in the future it would be useful to have guidelines concerning derogations, contained in Annex B to ATMF. Such guidelines should be adopted by the Committee of Technical Experts.

This approach would be in compliance with Article 7b of the ATMF UR, which stipulates that “The Committee of Technical Experts is competent to adopt guidelines or mandatory provisions for derogations from structural and functional UTPs. “

- **If rules or guidelines should continue to exist, what should be the role of the different entities, such as the Committee of Technical Experts, the Contracting States, the Secretariat and the Secretary General?**

The Secretariat is of the view that as a general rule:

Contracting States should be responsible for correctly implementing any rule and for following any guideline. Contracting States could be required to provide transparency concerning any derogation from UTP requirement for vehicles admitted to international traffic.

The Secretary General (and the Secretariat on behalf of the Secretary General) should not have any role which involves assessing information provided by Contracting States or by sector associations and forming an opinion on this information. The reasons are that the Convention does not assign such authority to the Secretary General and that there are no procedures for conflict resolution between Contracting States and the Secretary General, should they have different views. The competences of the Secretary General are laid down in Article 21 of [COTIF](#). The Secretary General may be required to publish information submitted by Contracting States.

If any role would be assigned to the Committee of Technical Experts, consideration should be taken of the fact that it meets only once per year.

In view of the above, the Secretariat suggest drafting a proposal for the adoption of a new version of Annex B to ATMF and to repeal the current version. The new version could include the following principles:

- Contracting States should be competent to grant derogations from application of specific provisions of specific UTPs.
- Applicants should request permission for derogations concerning specific provisions from the Competent Authority of the Contracting State. [The applicant must justify its request.](#) The Competent Authority should examine the request and decide whether to accept or reject the request.
- Guidelines could be included, which should aim at helping Competent Authorities decide on acceptance or rejection of a derogation request.
- Derogations should be described in the Design Type Certificate and in the Certificate of Operation (Article 11 of the [ATMF UR](#)). In particular, there should be a precise description of which UTP provisions were not applied, and which alternative requirements were applied instead. The aim of the description should be to allow Competent Authorities of other Contracting States to understand the impact of the derogation and the consequences for a possible admission of the vehicle to the network(s) on their territory [and to facilitate route compatibility assessments](#).
- The provisions should apply to vehicle admissions by non-EU Contracting States. This would include the vehicle admission by a non-EU Contracting States for vehicles first authorised in accordance with EU law that have a derogations granted in accordance with EU law.

After deliberation, WG TECH should inform the Committee of Technical Experts of its findings and recommendations.