



ORGANISATION INTERGOUVERNEMENTALE POUR LES TRANSPORTS INTERNATIONAUX FERROVIAIRES
ZWISCHENSTAATLICHE ORGANISATION FÜR DEN INTERNATIONALEN EISENBahnVERKEHR
INTERGOVERNMENTAL ORGANISATION FOR INTERNATIONAL CARRIAGE BY RAIL

Working group "CUI UR"

1st Session

Report

Bern, 10 December 2014

AGENDA

1. Opening of the session
2. Election of Chairman
3. Partial revision of the CUI UR – Preliminary considerations
4. Any other business
5. Date and venue of the next session

DISCUSSIONS

1. Opening of the session

The Secretary General, **Mr Davenne**, opened the session and welcomed all the experts attending from the Member States and the interested associations to this 1st session of the CUI working group. He particularly welcomed the representatives of EIM and RNE, as this was the first time they had taken part in a meeting organised by OTIF.

AT and **DE** noted that there was only interpretation into English and asked when and on what basis it had been decided that there would only be interpretation into one of the working languages.

The **SG** explained that this was the arrangement that had been used in the CUV working group, which was also a working group of the Secretary General. This practice was therefore being continued.

DE regretted this approach and pointed out that no formal decision had been taken on this, and wondered whether some of the expertise would not be lost and hence the quality of the work might subsequently suffer.

The **Secretary General** closed the discussion by saying that this issue could be discussed further in the Administrative Committee if need be, but not at this working group. This was after all an issue that would have a financial impact.

2. Election of the Chairmen

The **working group** elected the Secretary General to chair this session.

3. Partial revision of the CUI UR – Preliminary considerations

- Doc. CUI 1/2 – Subjects to be revised - scoping note
- Doc. 1/3 – Comments from interested international organisations and associations on the revision of the CUI UR (CIT and IVT)
- Doc. 1/4 – Comments from European Rail Infrastructure Managers (EN)
- Meeting room doc. 1 – EIM position paper (translation from EN)
- Meeting room doc. 2 – Comments from Belgium (FR only)¹

The **Chairman** referred to the scoping note and introduced the most important questions that had been raised. He explained that compared with document CUI 1/2, some further elements arising from an exchange of views with the stakeholders had in the meantime been added to his presentation. The scoping note had deliberately been drafted in such a way as to raise questions, but not yet to propose any texts. He emphasised that his presentation also took account of the fact that there had been a discussion of principle on revising the CUI at a

¹ All the documents are available on OTIF's website:
<http://www.otif.org/en/law/working-group-revision-of-the-cui-ur/working-documents.html>.

working group in Brussels on 26 November 2014 set up by the European Commission's Single European Railway Area Committee (SERAC).

The **Chairman** described the initial situation, the parallel development of EU law and COTIF and showed how both were linked from the date when the CUI were created. From the very beginning, the COTIF regulations had focussed on contractual relations, and in so doing the mandatory provisions of EU law had had to be taken into account.

A difficult period between 2006 and 2011 in terms of the application of the CUI and, more generally, in terms of cooperation between OTIF and the EU, had been overcome in several steps:

- first revision of the CUI in 2009, thanks to which the CUI were made compatible with developing EU law (the revised version entered into force on 1.12.2010);
- EU's accession to COTIF on 1.7.2011;
- withdrawals of EU Member States' reservations against the CUI received by the Depositary (Article 42 COTIF).

Nevertheless, there were still hardly any practical cases of application of the CUI. On the other hand, the idea of the CUI was present in legal discussions.

When applying the rules of CUI concerning liability, there had to be a distinction between two categories of damage.

- Firstly, there were cases of indirect damage where the question arose as to whether the train in question was actually carrying a passenger with a CIV ticket or a consignment handed over in accordance with the CIM UR, in order to establish whether compensation had been paid in accordance with national law or in accordance with the CIV/CIM UR and depending on this, which legal basis applied to the carrier's right of recourse.
- Secondly, there were cases of direct damage where it was not possible to take these clear rules as a basis.

Use of the railway infrastructure took place on the basis of one contract of use, or in the case of cross-border transport services, on the basis of two or more contracts of use. For example, the operation of Lyria trains was thus based on two co-existing contracts of use of infrastructure in France and Switzerland.

With regard to Article 1 of CUI, there are currently two different interpretations of the question of when the CUI apply, i.e.:

- to all use of infrastructure on which international carriage can be performed, i.e. a de facto extension to national transport;
- to the use of infrastructure (actually) for international carriage (only), which is not, however, provided for in EU law.

It appeared that CIT was more in favour of the first of these interpretations. However, in the Chairman's view, such an interpretation went too far. After all, it could not be ruled out for any regional route that for a passenger, it forms part of his journey across one or more borders. Taking the line from Marseilles to Toulon as an example, it would be an exaggeration to claim that this line is intended for international traffic.

The criterion of "use of the infrastructure for cross-border transport services" would seem to reflect the reality more closely. In the process, in cross-border transport services it should be remembered that in practice, two or more contracts of use are concluded, despite a "one-stop shop". If possible, all transport services should be covered in the CIV/CIM UR legal regime in terms of this criterion as well.

With the help of a very clear example (see slide 10 of the presentation attached to this report), the Chairman showed the effect on the application of the CUI, depending on whether, in defining cross-border transport services, the pre-contracted international train paths or the train path order in accordance with TAF TSI or TAP TSI is taken into account.

He gave a brief summary of the responses received from the stakeholder associations and thanked them for their position papers, comments and advice concerning both subject areas, the scope of application and the uniform liability regime.

At the end of his presentation, he outlined the next steps, as follows:

Roadmap

- The CUI apply to international transport services, i.e. the scope of application is linked to the **"use of the infrastructure for international transport services."**
- Dealing with the question of the scope of application for indirect damage, which should correspond to the scope for direct damage.
- During this work, the correlation with train path contracts for such transport services should also be clarified.
- Dealing with the question of an international uniform liability regime underpinning international train path contracts for international transport services.

=> Together with CIT/CER/EIM and RailNet Europe, OTIF will draft suitable provisions.

He added that he had intentionally left the question of service infrastructure to one side. This should not be part of the considerations on the scope of application.

The **European Commission** reported that at the time of the Revision Committee meeting (25-26.6.2014), it had not been in a position to adopt a coordinated position on the revision of the CUI UR. Against this background, the Single European Rail Area Committee (SERAC) had set up a working group which had met on 26 November 2014. DE, ES, FR, NL, GB and CER, CIT, ERFA, UIC and UIP took part in this working group. As there were no official proposals, the aim of the meeting had only been to exchange opinions, not to reach a

coordinated position. In a comprehensive presentation, CIT had set out its observations, which led to suggestions to amend the CUI UR (doc. CR 25/12). Member States which participated in the meeting on 26 November made clear that they would not support the extension of the scope of CUI to domestic transport or the inclusion of mandatory general terms and conditions. They also were quite cautious as to the extension of liability rules. At the same time, they declared their openness to give further consideration to proposals for clarification. CIT clarified that the drafting of its suggestions needed further refinement.

The European Commission was open to any further proposals, provided they did not cross the two "red lines", i.e. **no extension to national transport and no mandatory General Conditions of Use.**

The **working group** shared the view that these two "red lines" should be observed.

CIT thanked the meeting for the opportunity of presenting its views. It highlighted two important points:

1. extending liability for indirect damage (above and beyond pecuniary loss resulting from compensation in accordance with CIV and CIM) in order to balance out the status of the contracting parties to the contract of use;
2. harmonised provisions, so that carriers can perform international transport, e.g. from Rotterdam to Genoa, without being confronted with a huge number of provisions and documents. This situation was not in line with the aim of the EU to make the rail mode more competitive.

IVT referred to its written comments.

RS thanked IVT and CIT for their comments and observations. In RS, the transport market and access to the railway infrastructure were not yet open, but this would soon be the case. Against this background, RS thought the written observations the associations had submitted were very helpful.

DE asked whether there would first be a general discussion on the presentation or whether it could go directly onto the individual points of the scoping note CUI 1/2.

The **Chairman** explained that the discussion was now opened on all the points mentioned in his presentation.

In **DE's** view, the issues of the "scope of application" and "liability" should be kept apart. If these two issues were considered completely separately and if the scope of application was geared to the purpose of the use (of the infrastructure), it could not be a matter of individual passengers. The scope should not be geared to the actual use. Instead, the parties to the contract of use would have to consider the purpose of the use beforehand, irrespective of whether they are concluding a contract for a period of use, a framework contract for a longer period or a contract of use relating to a specific train path for a specific transport operation.

The **Chairman** agreed in principle that the issues of the "scope of application" and "liability" should be kept apart. However, this did not rule out checking the possibility of a uniform international liability regime backing train path contracts for international services. He noted that in gearing the scope to the purpose of the use, the question of how international transport

could be characterised in advance remained unresolved, as in practice, no international contract of use was concluded, but nationally geared, individual contracts of use with each infrastructure manager. These could at best be concluded by means of a one-stop shop.

GB shared the view that there were ambiguities in terms of the scope of application and that too broad an interpretation would lead to illogical consequences. As an international convention, COTIF was not suitable for regulating national transport. In principle, he was of the view that the criterion of "international transport services" was a good approach. Perhaps some refinement was required in this respect. A suitable, precisely worded definition could certainly be found in further discussions. In so doing, it should also be remembered that OTIF also included Member States that are not members of the EU, e.g. Serbia. The carriers' interests would also of course have to be taken into account. However, it seemed to him that this new criterion did in fact correspond exactly to the carriers' interests, as it would create more clarity in terms of whether only international or also national transport came within the scope of application.

The **Chairman** agreed with **GB** and added that transport operations from Member States such as Serbia or Turkey could travel into the EU. This was also an aspect in support of redefining the scope of application more precisely. He suggested taking as a basis for the new definition the definitions of the terms "international freight service" and "international passenger service" in Directive 2012/34/EU. An informal working group should draft a suitable proposal for the text. It was particularly important for the stakeholder associations to be involved. He was sure that CIT and CER would be interested in being involved in this.

EIM confirmed that it would be interested in taking part in the informal editorial group.

In principle, **RNE** would not be averse to working in an editorial group, but explained that it could not take a position on a draft law, as this was the CER's task, including for the infrastructure companies that are members of RNE.

DE said that it would like to take part in the revision of the CUI as soon as some specific text proposals were available. At the moment, the revision was at a very early stage. At this stage, the most that could be achieved was brainstorming.

The **Chairman** thought it was very important to agree on a general understanding of the direction in which the work should continue. It was not necessary to repeat the discussion that had taken place at the SERAC working group on 26 November.

GB also said it would be interested in taking part in the further work.

In reply to a question from **GB**, the **Chairman** explained that more time would be needed for the CUI revision, so it was not possible to put this item on the agenda of the General Assembly that would be taking place at the end of September 2015. Three to four months of discussions in a small working group consisting of OTIF, CIT, CER, EIM, perhaps RNE, and DE and GB would have to be anticipated. OTIF would draft a preliminary proposal with the help of its partner organisations.

In reply to a question from **DE**, the **Chairman** confirmed that the preliminary proposal would be sent to all the Member States. **DE** assumed that the date of this first meeting shortly before the end of the year had prevented some Member States from taking part, even though they might have been interested in taking part in the working group's future work.

The **Chairman** emphasised that the discussions on the preliminary draft would take place in a very restricted working group made up of committed experts, which would work in only one language (English).

The **Chairman** intended to proceed as follows:

- With input from the stakeholders and interested Member States, OTIF would prepare a preliminary draft text by 23 March 2015 and in so doing, would take as a basis the roadmap on page 4.
- This draft would be sent to all Member States and the stakeholders concerned on 23 March 2015 so that they could make comments.
- The draft would be discussed by an editorial group. Member States other than those that had attended the first session of the working group could also be members of the editorial group.
- The draft would be discussed until the beginning of June 2015 (preferably by e-mail or, if necessary, in personal meetings with stakeholder associations in EN only).
- 8 June 2015 – The calling notice for the 2nd session of the CUI working group to be held on 8 July 2015 would be sent out together with the proposed text amended by the editorial group as a result of the preparatory discussion.

The **working group** noted these plans.

DE said that it thought it was necessary to discuss the various points of the scoping note.. **DE** was given the opportunity to explain its position on the various questions raised in the scoping note.

DE supported the **SG's** point of view on two of the issues, i.e.

- that the CUI should only concern the use of infrastructure for international transport; there was no need to broaden application of the CUI to national transport. Individual Member States were free to transpose the provisions into national law;
- that there was no need for new regulations on the use of service infrastructure. Part of the service infrastructure was already covered by Article 3 a) of CUI.

The **Chairman** concluded from this that the working group agreed unanimously on these two points.

DE then explained its position on those points on which it did not share the **SG's** point of view. According to **DE**, the hitherto significant element of the definition of the CUI scope of application "CIV/CIM carriage" should be retained. However, consideration could be given to whether other application scenarios should be accommodated, for instance

- if the parties to the contract of carriage have their place of business in different Member States or

- if the railway infrastructure managed by an infrastructure manager extends beyond the border of one Member State into another.

DE also expressed its concerns about the term "use of international train paths" and warned against replacing one problem of application by another. Up to now, this term had not been in common use in COTIF and its Appendices and was therefore unclear. Infrastructure to be used for the purposes of performing international carriage was already covered by the wording of Article 1 CUI.

The **Chairman** agreed that it was difficult to define international train paths clearly. But this was precisely the task that OTIF was facing. As indicated in his presentation, it seemed that it would be best to gear the scope towards cross-border transport services and in defining these services, to take as a basis the definitions of "international freight service" and "international passenger service" used in Article 3 of Directive 2012/34/EU.

In this case, **DE** pointed out that in so doing, it would have to be taken into account that the Member States at which this Directive was aimed and the Member States of OTIF that apply the CUI are not entirely the same.

DE informed the meeting that it did not quite understand the problem of "direct damage" described in the presentation. Article 8 § 1 a) and b) CUI established liability for all bodily loss or damage and loss of or damage to property. It did not make liability dependent upon the injured party or at least one passenger having concluded a CIV contract of carriage. Neither could this be concluded from the provision on the scope in Article 1 CUI.

On the other hand, DE could certainly understand CIT's request to extend the carrier's right of recourse to compensation paid in accordance with the Passengers' Rights Regulation (PRR), but thought that CIT's suggestion to this effect, which was set out in document CR 25/12, went too far ("pecuniary loss resulting from damages payable by the carrier under the CIV UR, the CIM UR and national law ..."). DE had considerable reservations against such wording. This would include not just compensation in accordance with PRR, but many other cases, culminating in any other compensation not prohibited by national law, e.g. contractual penalties. In addition, such expansion would also have to have an effect on Article 8 § 2. Looked at from the perspective of Article 4 CUI, the result of this expansion would be that the parties would not be able to limit this broad scope for recourse in the event of pecuniary loss. Either the amount would have to be limited or it would have to be left up to the parties to agree a limit.

The **Chairman** agreed with DE that the current version of Article 8 CUI was clear. The scope of application would have to be defined equally clearly.

CIT underlined its request to cover pecuniary loss caused as a result of compensation paid in accordance with PRR in Article 8 CUI and hence to equalise the relationship between carriers and infrastructure managers, and confirmed that it would be prepared to carry out further work on its suggestions.

Lastly, **DE** commented on the question in the scoping note as to whether it was necessary to create a parallel between Article 8 § 1 and Article 9 § 1. In DE's view, this seemed reasonable at first glance, but it would have to be given further consideration, taking into account the origins of these provisions and the reasons why no parallel between these provisions had been created at that time.

The **Chairman** emphasised that no proposals along these lines had yet been submitted, but that a question raised by CIT had just been included in the scoping note. He agreed with DE that this would have to be considered further. At the moment though, the Secretariat would concentrate on the issue of the "scope of application". He thanked DE for all the comments it had made, which would be very useful for the further work.

He specifically thanked the meeting for all the written comments that had been received, particularly from EIM and CIT.

4. Any other business

This item was not discussed.

5. Date and venue of the next session

The next session will be convened on 8 July 2015 in Berne. It will discuss a draft text (see "summary of decisions"²) prepared by a small editorial group. There will be the same arrangement regarding the interpretation.

² DE suggested amending the title and sub-titles of this Annex as follows:

SUMMARY

1 – Decisions of principle of the CUI working group

2 – Next steps planned by the Secretary General of OTIF

It also suggested

- in the **first part**, to delete the addition in brackets in point 1, the second sentence under point 2 and to delete points 3 to 5 completely. Point 6 would therefore become point 3 of the “decisions of principle”;
- that the first indent of the **second part** should start with the words “The Secretary General of OTIF will ...”;
- to delete the third and fourth indents completely;
- to amend the fifth and sixth indents as follows:
 - 8 June 2015 – invitation to the 2nd meeting of the CUI working group sent together with the OTIF Secretary General’s draft text – amended again if necessary – and the comments.
 - 8 July 2015 – 2nd session of the CUI working group, which will discuss the draft together with the comments.

The **Chairman** closed the meeting and thanked all those present for their active participation. He welcomed the fact that representatives of infrastructure managers would be involved in seeking a solution for the scope of application of CUI and looked forward to the future work.

ANNEXES:

- List of participants
- Secretary General's presentation
- Summary of decisions²



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ZWISCHENSTAATLICHE ORGANISATION FÜR DEN INTERNATIONALEN EISENBAHNVERKEHR
INTERGOVERNMENTAL ORGANISATION FOR INTERNATIONAL CARRIAGE BY RAIL

**Groupe de travail "RU CUI"
Arbeitsgruppe „ER CUI“
Working group „CUI UR“**

**1^{ère} session/1. Sitzung/1st session
Berne/Bern, 10.12.2014**

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S'est excusée.
Hat sich entschuldigt.
Sent apologies.

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S'est excusée.
Hat sich entschuldigt.
Sent apologies.


Norvège/Norwegen/Norway

S'est excusée.
Hat sich entschuldigt.
Sent apologies.

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S'est excusée.

Hat sich entschuldigt.

Sent apologies.

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OSJD


S'est excusé.
Hat sich entschuldigt.
Sent apologies.

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Translator, Head of Section



Revision of the CUI UR

Questions to be dealt with by the
working group “CUI UR”

SG – CUI WG – 10/12/2014



EU

- dir. 91/440/EEC, 95/18, 95/19
- 1st railway package: dir. 2001/12, 13, **14**
- 2nd railway package: dir. 2004/49, 50, 51, reg. 881/2004
- 3rd railway package:
- dir. 2007/58, 2007/59, reg. 1370/2007, 1371/2007

OTIF

- 1995-1996 – recognised that a uniform international regulation on relationship between IM and carrier would be useful and desirable – 1st draft 1.7.1996
- 3.6.1999 – adopted
- 1.7.2006 – entry into force
- 2006-2010 – declarations of EU MS – non application of CUI
- 1.7.2011 – accession of the EU
- 2011 until today – withdrawals of declarations



- 24th session of the Revision Committee, **June 2009**: Art. 3, 5 and 7 amended, new Article 5bis
CUI made compatible with EU law
- **1.12.2010** – entry into force of the revised version of the CUI UR

- 25th session of the Revision Committee, **June 2014**:
editorial amendment to Article 5bis
- **1.7.2015** - entry into force

Since 2006 no actual application of CUI UR, but the CUI idea was present in legal discussions.



Indirect losses



Direct loss and damage





- **International** CIV ticket or CIM consignment note → damages (CIV/CIM) which the carrier pays to the customer → right of recourse in accordance with the CUI
- **Domestic** ticket or consignment note → damages (under national law) which the carrier pays to the customer → right of recourse in accordance with national law



EU/OTIF

CIV/CIM
Uniform Rules

Contract(s) of use of infrastructure

Provisions of
Directive 2012/34/EU

Liability regime

CUI/national law



The use of railway infrastructure “for the purposes of international carriage within the meaning of the CIV/CIM UR” is ambiguous:

2 possible interpretations :

1. It is only necessary that the infrastructure can take international carriage: there is a de facto extension to national traffic.

2. It only applies to a contract for the use of infrastructure for international traffic, which does not formally exist in EU law.

➔ Which criterion is to be adopted ?



Should the scope of application of the CUI be **linked to that of contract(s) for allocating train paths for international services?**

- If the scope of application were linked to the **"use of infrastructure for international services"**, it would be much clearer and more practical.
- In this case, the use of the infrastructure by "international", i.e. transfrontier trains, would become the only new criterion.

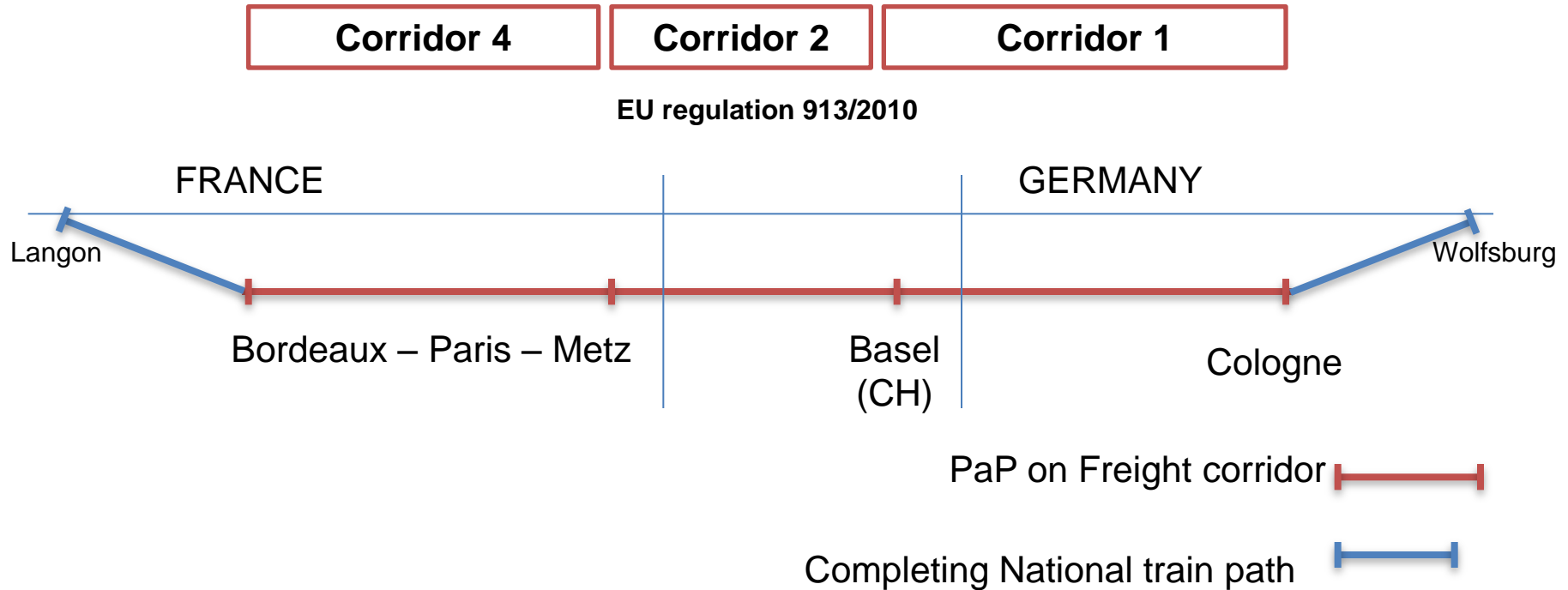


Consequences:

- With regard to compensating the carrier for indirect damages, the carrier's recourse in the event of compensation paid to customers in accordance with national legislation would **also be covered**, to the extent that it would concern passengers or goods carried in domestic transport in "international" trains.
- **Criteria should be understood as also covering** international carriage by rail provided under a single uniform contract of carriage (CIV or CIM) and with a succession of formally national trains (such as Thalys or Lyria).



Train path vs international service ?



Question :

Should CUI application be limited to the pre-constructed international train path (PaP) -> red line

or

take into account the train path order according to TAF-TSI or TAP (Red and Blue lines) that is needed to build the actual carriage service

- **EIM:** “could be explored”
- **CIT:** “only as a fall-back solution”; if so, then rather “a train path application for an international journey” as a new criterion (lesser restriction of the current scope of application than in case of “international allocation” as criterion)
- **IVT:** “seems too specific”



Questions regarding the CUI liability

- With regard to indirect damage (right of recourse), must the provisions of CUI be broadened to cover other damage?
- If so, should recourse in the case of compensation paid by the carrier in accordance with legal texts other than the CIV/CIM UR (national law) be covered?
- Is it necessary to create a parallel between Article 8 § 1 and Article 9 § 1, i.e. to insert a new letter c) in addition to the carrier's liability for bodily loss or damage (a) and for loss or damage to the infrastructure manager's property (b) in order to cover the infrastructure manager's pecuniary loss (indirect damage) as well?



- **EIM:** „liability for indirect damages should not be broadened”; “the financial equilibrium of the IMs should be safeguarded”
- **CIT:** suggestions presented to the Revision Committee:
 - also to include recourse in case of damages paid to carrier’s customers according to national law
 - amend the provision saying what can be agreed between parties
- **IVT:** in favour of broadening liability for indirect damages (if national law is clearly defined – infrastructure as criterion)

Is it necessary, at EU level, to have a uniform international liability regime backing the international train path contract(s) for international services?

- ➔ The definition of international service used in Directive 2012/34/UE could be used by adapting it to take into account the fact that in most situations, there is a succession of national train path contracts;
- ➔ the CUI would become the de facto legal basis of the E-GTC-I, the question of their extension to national train path contracts remaining open.



- CUI applies to international services, i.e.: the scope of application is linked to the “**use of infrastructure for international services**”.
 - Address the question of scope of application for indirect damages that should be consistent with direct damages.
 - This work implies clarification of the links with the path allocation contract(s) for such services.
 - Address the question of a uniform international liability regime backing the international train path contract(s) for international services.
- => OTIF in coordination with CIT/CER/EIM and Railnet Europe will draft relevant provisions**



**THANK YOU
FOR YOUR ATTENTION**



SUMMARY OF DECISIONS – WORKING GROUP “CUI UR” - 10.12.2014

1 - DECISIONS OF PRINCIPLE

1. In the work which will follow, two red lines (~~defined at the meeting of the SERAC working group on 26.11.2014 in Brussels~~) must be observed:
 - do not extend the scope of application of the CUI UR to domestic traffic.
 - General Terms and Conditions should not be mandatory. The CIT should continue its drafting and must eliminate this concern.
2. Consider separately the scope of application on the one hand and the liability system on the other. Scope of application first, then liability.
3. Explore the “use of infrastructure for international services” as a new criterion for the scope – find an appropriate definition of “international services” (can be based on Article 3 of Directive 2012/34/EU). Clarify the links with the path allocation contract(s) for such services.
4. Service infrastructure will not be included (beyond what is already covered by Article 3 letter a).
5. Check the possibility of a uniform international liability system backing the international train path contract(s) for international services.
6. The revision of CUI will need some more time; therefore it will not be possible to finish it at the 12th General Assembly in September 2015.

2 - NEXT STEPS

- OTIF Secretary General will draft a preliminary proposal for a text with input from stakeholders and interested Member States by 23 March 2015.
- The draft will be sent to all Member States and stakeholders concerned for comments on 23 March 2015.
- The draft will be discussed in an editorial group. Member States other than those which participated in the 1st session of the WG may also become members of the editorial group.
- The draft will be discussed (preferably by e-mail exchange, if need be, in physical meetings with stakeholder associations, EN only) until the beginning of June 2015.

- 8 June 2015 – invitation to the 2nd meeting of the WG CUI sent together with the proposal adapted by the editorial group as a result of the preliminary discussion.
- 8 July 2015 – 2nd session of the WG CUI with the same arrangement regarding interpretation.

