



ORGANISATION INTERGOUVERNEMENTALE POUR LES TRANSPORTS INTERNATIONAUX FERROVIAIRES
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"**

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Comments from interested international organisations and associations on the revision of the CUI UR

The Secretariat has received comments on document CUI 1/2 from the International Rail Transport Committee (CIT) and from the International Association of Tariff Specialists (IVT). The full texts of the comments are attached at annex.

Both these associations go into the question raised by the Secretary General concerning a new definition of the scope of application of CUI which better meets practical requirements, and provide some helpful ideas in this regard. In view of the aim and purpose of COTIF, the starting point for all considerations has to be international rail transport.

In mapping out a newly defined scope of application for the CUI UR, one of CIT's main concerns is to maintain harmonisation of the legal regime for the use of the railway infrastructure for the entire transport chain.

CIT points out that in practice, terms such as "international train path", "international allocation", "international train", "international contract of use of rail network", "international rail transport service" are interpreted differently, and gives examples to show the extent to which the current scope of application would be constrained by focusing on one criterion of "internationality" or another.

We understand CIT's opinion that terms such as "international train"/"international service" or "international train path" have to be considered in light of the requirement – essential from the perspective of COTIF – that the contract of use should cover all CIV/CIM transport operations from the point of departure to the point of destination.

On the other hand, it is not absolutely essential to seek a solution that would cover the scope of application, which has become very broad as a result of the current interpretation (see Annex to doc. CUI 1/2). Restricting this broad scope of application should in any case be examined.

The solution being sought should of course be compatible with EU law. But the conditions for applying the CUI UR cannot be formulated in such a way that compliance with them by the Member States of COTIF that are not members of the EU is excluded from the outset. IVT offers a generally formulated criterion that could be discussed, i.e. "all users of the infrastructure (railway undertakings) who are entitled to use the infrastructure in at least two Member States of OTIF."

CIT's remarks on the OTIF Secretary General's scoping note for the first meeting of his CUI ad hoc working group on 10 December 2014

Dear Mr Secretary General,

We would like to thank you for the invitation and for sending us your scoping note for the first meeting of your CUI Ad Hoc Working Group. We are delighted to have this opportunity to send you the CIT's position on the documents relating to the items on the agenda of the meeting sent on 9 October 2014. If you require further clarification, we would be glad to provide further details. Once again, thank you for allowing us to present our concerns to the working group.

The CIT considers your comments in the scoping note to be particularly helpful and we would like to place our thanks on record for your careful and well-founded analysis of the topics. We are at one with you that rewording the criteria for the scope of application for the CUI Uniform Rules and how they relate to other concepts will be a delicate and demanding task. We are very pleased for being allowed to become involved in the preparation of the partial revision of the CUI Uniform Rules and consider your proposals to be a helpful lead-in to the discussions.

1. Scope of application of the CUI Uniform Rules

a) Remarks regarding the criteria for the scope of application¹

In the CIT's view and in the view of its members, a key aspect to be taken into consideration when rewording the scope of application is that the objective of achieving legal harmonisation of the use of railway infrastructure for the entire transport chain of an international train movement be retained, whereby it would be appreciated if the scope of application of the CUI Uniform Rules were easier worded in future.

To extend the scope of application of the CUI Uniform Rules through the adoption into national law to national carriage as you mentioned would enable this objective to be achieved, to which we would therefore give it first priority support.

Your proposal for a new criterion for the scope of application leads us to expect a stimulating discussion and we welcome that. In the CIT's view, the proposed criterion of the international service/train path/contract of use of the infrastructure, however, is to be chosen only as a fall-back solution, since none of these criteria covers the application of the CUI Uniform Rules to the use of railway infrastructure for international carriage as completely as the current wording. Aspects not covered would primarily be international carriage by rail provided under a *single* uniform contract of carriage *and* with different trains (e.g. a passenger travelling with

¹ As the German expression „Anknüpfungspunkt“ does not exist in English, we use „criterion/a for the scope of application“.

a single ticket from Bonn (D) to Antwerp (BE²), or e.g. goods that are carried through three countries and transshipped in the second country).

We think it is crucially important for the discussion and also for the rewording process to have precise definitions of the terms used in practice that have developed over the past ten years in Europe. We should note that the terms ‘international train path’, ‘international allocation’, ‘international train’, ‘international contract of use of the railway network’ and ‘international rail service’ can be interpreted differently and, depending on the understanding of the term, can restrict large areas of the current scope of application of the CUI Uniform Rules. In our opinion, therefore, these differences need to be given particular attention when discussing the criteria.

The CIT analysed different definitions for the expressions for criteria and alternatives mentioned in the scoping note. They showed that, notably the expression “international train path” can have several disadvantages. On one hand the expression allows different interpretations, which leads to legal uncertainties and on the other hand it might only cover a very small part of today’s scope of application of the CUI Uniform Rules depending on the interpretation used.

Based on its initial conclusions, the CIT would therefore suggest (as mentioned above as a fall-back solution only) to consider for the rewording the criterion “*a train path application for an international train run*” as an alternative for the scope of application, as this, would on one hand lead to a smaller restriction of the current scope of application³. On the other hand it would be possible to base the criterion for the implementation on the information about the train run when applying to a train path as currently required in Europe by the TSI TAP/TAF for the train path application message. “International” could be understood analogue to the

² Currently 4 daily connections are offered with a RE (Bonn – Köln) and an ICE (Köln – Brussels), for which one single ticket can be issued (source: sbb.ch). The connection with Thalys, can only be bought with two tickets (the Thalys has a global fare ticket IRT-System). Today the whole journey is a carriage according to the CIV UR. With the criterion “international train”, two different liability systems between the railway undertaking and the infrastructure manager would apply for the same journey e.g. for redress to the infrastructure manager.

³ With this criterion, at least all contracts of use of infrastructure for an “international train” could be harmonised, regardless of whether

- the train path is pre-constructed or tailor made,
- the train path is allocated on an “international“ or national basis,
- one or more railway undertakings perform the carriage (regardless of the operations model selected), or whether
- one (multilateral/“international“) or more national contracts of use of infrastructure is concluded between one or more railway undertakings and one or more infrastructure managers for the use of railway infrastructure for the carriage in question.

Also with this criterion for the scope of application the CUI Uniform Rules would in future no longer completely cover the use of infrastructure for international carriage according to the CIM/CIV Uniform Rules. Notably the use of infrastructure for carriages carried out with a single contract of carriage but with different trains would not be covered (and thus not harmonized) any more (e.g. a passenger travelling from Bonn (D) to Brussels (BE) or goods shipped with a CIM consignment note, that are transshipped or wagons marshaled whilst in transit.

definition for “international [...] service” in the points 4 and 5 of Article 3 of the SERA-Directive 34/2012/EU relating to the OTIF Member States.

Compared with the current scope of application, also the criterion of “a train path application for an international train movement” would restrict the current scope of application and thus the CUI Uniform Rules would in future no longer completely cover the use of infrastructure for international carriage according to the CIM/CIV Uniform Rules.

b) Applicability of the CUI Uniform Rules to service installations

Both within the discussions in the CIT’s CUI Committee and in the discussions with the infrastructure managers on updating the E-GTC-I there was general acceptance that the application of the CUI Uniform Rules to service installations should be restricted to those service installations which are operated according to national law by the infrastructure manager. We therefore propose this limitation as an option for discussion in the working group.

2. Extension of the liability in Article 8 § 1 c)

We would like to clarify one aspect of extending liability to pecuniary damages which are due under national law. The change suggested by the CIT to extend liability in Article 8 § 1 c) is intended to apply to compensations which the carrier has to pay to the final customer (i.e. passengers and consignors). To avoid any misunderstandings over other compensation which may be due under national law, we suggest discussing if it would be more appropriate to mention ‘customers’ explicitly in the text itself or in the explanatory remarks.

3. New point: Reservation for national law in article 5bis § 2 of the CUI Uniform Rules

As an additional item for discussion, we would suggest questioning the necessity of keeping Article 5bis § 2 of the CUI Uniform Rules for reservations for national law, to the extent that it relates to rules of national private law and in particular liability law. The CIT considers it both inconsistent with the compulsory nature of the liability regulations of the CUI Uniform Rules as stated in Article 4 and in terms of its impact as a problematic loophole to harmonized liability rules for international carriage that national law should take precedence over the liability rules outlined in Articles 8 and 9 of the CUI Uniform Rules.

4. Possibilities to hand in later further points for the discussion later

The CIT assumes that it still will be possible to propose additional items for discussion on the revision and on liability rules at a later date. In view of the new situation regarding a more fundamental and extended revision of the CUI Uniform Rules, our members have expressed the need to discuss some new aspects (e.g. application of the CUI Uniform Rules to empty trains, additional types of liability, new liability issues relating to parties to new contracts to be concluded in the future, such as how to settle the liability of applicants in the sense of the SERA-Directive 34/2012/EU who are not railway undertakings).

We would like to thank you once again for being given this opportunity of becoming involved in the development of the CUI Uniform Rules and look forward to working with you in your CUI Ad Hoc Working Group.

With best regards

sig. Cesare Brand
Generalsekretär

sig. Myriam Enzfelder
Senior Legal Adviser

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Comments from the International Association of Tariff Specialists (IVT)

The IVT thanks OTIF for the invitation to take part in the 1st session of the working group on the revision of the CUI UR on 10 December 2014 (letter dated 9.10.2014 (ref. GZ A 91-01/502.2014)).

The IVT would like to make the following comments on the questions raised in document CUI 1/2, which was sent out with the invitation.

Scope of application of the CUI UR

1. *Can the performance of "international carriage within the meaning of the CIV/CIM UR" be maintained as a determining criterion of the scope of application of the CUI?*

There may certainly be some problems linked to the fact that at present, application of the regulations on the legal relationships between infrastructure managers and infrastructure users (railway undertakings) depends on whether the infrastructure user (the railway undertaking) has concluded, or could have concluded, contracts with third parties in accordance with the CIM/CIV UR.

2. *Which other criteria could be considered?*

The basic purpose of COTIF is to ensure that for rail transport, the most uniform rules possible apply when it is not just a single Member State that is concerned. Accordingly, the scope of application of the CUI UR could cover all users of the infrastructure (railway undertakings) who are entitled to use the infrastructure in at least two Member States of OTIF.

3. *Should the scope of application of the CUI be linked to that of contracts for allocating train paths for international transport?*

The term "contracts for allocating train paths" seems too specific.

4. *If the scope of application were linked to the "use of international train paths", would it not be much clearer and more practical than the criterion of the performance of "international carriage within the meaning of the CIV/CIM"?*

In principle, with reference to the reply to question 2, this question should be answered in the affirmative. However, the expression "international train paths" seems too specific.

5. *In this case, the use of the infrastructure by "international", i.e. transfrontier trains, would become the only new criterion. 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.*

Within the terms of the reply to question 2, it would not concern use by "international", i.e. cross-border trains, but use of the infrastructure by "international users", i.e. those

(railway undertakings) that, in the event of non-application of the CUI UR, might be affected by inconsistent liability law etc. in relation to the infrastructure manager.

6. *Consequently, can/must the application of the CUI be extended to all national networks within the framework of the EU?*

This would be welcome in the interests of legal uniformity.

Service infrastructures

7. *Should the provisions of the CUI UR apply to all – or at least to most of – the services associated with the use of the infrastructure?*

Extending the current scope of application along these lines should be examined with the greatest caution. In particular, the "services associated with the railway infrastructure" concerned by this extension would have to be clearly defined.

Liability

8. *Can the problem of direct damage be resolved by means of an amended definition of the scope of application of the CUI?*

Presumably so, because the scope of application in terms of the above statements on 2. and 5. would only depend on the designation of the injured party as an "international infrastructure user" and not on his relationship with third parties.

9. *With regard to indirect damage (right of recourse), must the provisions of CUI be broadened to cover other damage?*

In principle, yes.

10. *If so, should recourse in the case of compensation paid by the carrier in accordance with legal texts other than the CIV/CIM UR be covered?*

In principle yes, insofar as the "other legal texts" are defined with sufficient clarity (law applicable in the Member State in which the infrastructure is located or in which the infrastructure manager has his place of business?)

11. *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?*

In principle yes, insofar as the legal basis on which the compensation payments by the infrastructure manager are based is also clearly defined in this case as well.