



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

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**Groupe de travail « CUI UR »  
Arbeitsgruppe „ER CUI“  
Groupe de travail RU CUI**

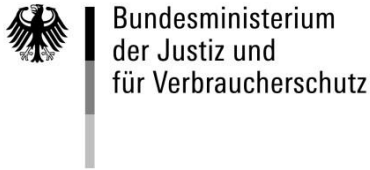
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Position of Germany



**Position of the German delegation  
on the OTIF Secretary General's circular of 19 March 2015 (A 91-  
01/503.2015) concerning the scope of application of the CUI**

**I. Comments on the Secretary General's considerations in the Annex to the circular of 19 March 2015**

1. Establishing the scope of application of the CUI upon conclusion of a contract

The German delegation maintains that in revising the scope of application of the CUI UR, what matters most is the perspective of the contracting parties when concluding a contract. At the time the contract is concluded, the parties to a contract of use of infrastructure must know whether this contract is subject to the CUI UR. So if the currently applicable provision and the proposed provision are geared towards the objective of use, it can only concern the purpose intended by the parties beforehand, irrespective of whether the parties conclude 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 the purpose of specific transport. Therefore, how the train is actually used subsequently by passengers or goods can only be a factor if the parties were also intending such use when the contract was concluded.

2. The term "international transport service"

- a) From the German delegation's point of view, new problems of interpretation must be avoided when amending the provision on the scope of application of the CUI UR. However, this is precisely the concern if, on the basis of Directive

2012/34/E (hereinafter: DIR), application of the CUI UR is made dependent upon transport services' being concerned whose principal purpose is carriage within the meaning of the CIV UR or CIM UR. (In the German version of the text, there is also a problem with different words being used for "transport services"). Focusing on the undefined legal term of "principal purpose" causes us considerable concern. In particular, it seems rather inappropriate to justify using this term with reference to the DIR. Firstly, it should be pointed out that in defining the term "international freight service", the DIR does not refer to the term "principal purpose" (Article 3, paragraph 4 of the DIR). Secondly, the DIR does not seem to be a suitable model. Recital 18 of the DIR sets out examples of possible interpretation criteria (proportion of turnover and volume of passengers) based on which a principal purpose of being international must first be determined in an appropriate procedure described in Article 10, paragraph 3 of the DIR on the basis of specially collected data. The DIR therefore makes clear itself that it is difficult to determine the "principal purpose". However, the procedure prescribed in the DIR to resolve this problem cannot be transferred to the CUI UR, because here, it is not a question of the conditions under which railway undertakings obtain the right to access to railway infrastructure in the EU Member States. The question is rather what is contained in the contract of use of infrastructure concluded between the infrastructure manager and the railway undertaking. Here, it makes little sense in terms of interpreting the contract to have recourse to the opinion of an authority, especially as it is not at all clear which authority might come into consideration, particularly in the non-EU Member States.

- b) Using the term "international transport service" also seems problematic. In particular, it is not quite clear why this term should be used in preference to the currently used term, "international carriage by rail". It would be more logical to use the term "train", which is already used in COTIF, even if only sporadically.

### 3. The term "international train"

In principle, applying the CUI to international trains is preferable. However, the third and fourth sentences of Article 1 § 1 provide a more precise interpretation, which the German delegation thinks is problematic. Firstly, the third sentence of

the proposed Article 1 § 1 assumes that "all wagons" will cross at least one border. This would mean that the parties could rule out applying the CUI if a single wagon was uncoupled before the first border on the route was crossed and likewise if a single wagon was attached after the last border on the route was crossed. In view of the fact that the aim of the revision is to make the scope of application of the CUI UR as broad as possible, this is a very questionable effect.

It is also questionable whether the proposal to refer to the "train path" in the fourth sentence of Article 1 § 1 results in greater clarity. As far as can be seen, there is no internationally uniform definition of the term "international train path". It would also seem advisable not to use this term. If the focus is ultimately on the purpose of the transport to be achieved by the train in question, nothing seems to be gained compared with the current legal situation. In addition, it does not seem conducive to legal certainty again to describe the term "international train" as a "transport service" for the purpose of the definition in the fourth sentence of Article 1 § 1 of the draft and hence to link the terms in Article 1 § 1, 2<sup>nd</sup> sentence, letters a) and b). Apart from this, a definition should not be included in Article 1 of CUI, but in Article 3 of CUI which is provided for definitions.

#### 4. Place of business and nationality of the contracting parties

In the draft, in line with the second sentence of the current Article 1 § 1, the scope of application is to be determined regardless of the place of business or nationality of the parties to the contract of use. However, it should be noted that the place of business of the contracting parties can also constitute an international dimension of the contract of use, because it is precisely here that applying uniform international regulations can make matters easier.

5. Adapting other provisions of the CUI UR

Any changes to the scope of application will also mean that the relevant consequential amendments will have to be taken into account; this is particularly the case with respect to the definitions in Article 3 c) of the CUI.

**II. The Secretary General's proposal to amend the wording of Article 1 CUI**

1. Contracts of use (Article 1 § 1, 1<sup>st</sup> sentence and § 2 of the draft)

If the current wording is partly maintained in the first sentence of Article 1 § 1 ("These Uniform Rules shall apply to any contract of use of railway infrastructure..."), a provision as proposed in § 2 of the draft is no longer necessary.

2. Article 1 § 1, 2<sup>nd</sup> sentence (letters a and b) and 3 of the draft

This provision would be clearer if definitions such as those proposed in the second and third sentences of Article 1 § 1 – apart from the concerns already mentioned with regard to the content – were to be placed in Article 3 of CUI provided for this purpose.

3. Other definitions ("train", "principal purpose" and "transport service")

Apart from the concerns already mentioned with regard to the content, terms such as "train" or "transport service" should not be used without defining them separately in CUI. Furthermore, in the German version of Article 1 § 1, second sentence, letter b) and in Article 1 § 2, first sentence of the draft, the term "*Verkehrsleistung*" (transport service) is used, whereas Article 1 § 1, third sentence refers to "*Verkehrsdienstleistung*" (transport service). Harmonised terms should be used.

### III. The Secretary General's proposal for a new Article 5 § 4

The proposal to introduce an Article 5 § 4, second sentence of CUI should be deleted. There is no need for a provision enabling international associations of infrastructure managers and international associations of carriers to agree general terms and conditions of use of infrastructure and to provide a "harmonized contract of use model". The reference to Article 6 § 8 CIM does not replace the justification for the requirement for such a provision. There is no gap in the regulations and no need for clarification. If such general terms and conditions are required, they can also be negotiated without a specific provision, as the example of the "European General Terms and Conditions" (EGTC) shows. The application of such general conditions of use cannot be prescribed by means of this provision. The conditions only become part of the contract if the parties agree to apply them in the framework of their contractual freedom. The proposed provision does not imbue such private contractual conditions or models with more authority, nor can it ensure "accordance with all relevant mandatory prescriptions in force in States in which the infrastructure is located". Furthermore, the term "international associations" is also unclear.