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Position of the European Rail Infrastructure Managers (EIM)

Introduction

OTIF – The Intergovernmental Organisation for International Carriage by Rail – is continuing the revision of the Convention on International Carriage by Rail (COTIF) and its Appendices, including Appendix E (“CUI”¹) which specifically governs the contract for the use of the railway infrastructure between the infrastructure manager and the carrier.

Following the first Working Group (WG) session on 10th December 2014, OTIF has issued an amended draft text of Article 1 on the scope of application of CUI, and a new § 4 in Article 5 about a uniform contract between the infrastructure managers and the carriers.

The draft texts will be discussed during the next session of the WG on 8th July 2015 in Bern.

This paper covers the following issues brought forward by OTIF’s new draft text:

1. The scope of application: to which notion and concept should the legal definition of the scope of application be linked.
2. A single model-contract for the use of the infrastructure.

1. The scope of application

The amended text of Article 1 investigates whether the scope of application of CUI should take into account the notion of international service or an international train as a trigger for application of the uniform rules (UR).

OTIF’s proposal suggests to link the scope of application of CUI to the use of infrastructure for international transport services, whose definition should be derived from the corresponding definition included in Article 3(5) of Directive 2012/34/EU.

In OTIF’s view, the criterion used to decide whether a transport service is “international” or not would be the “principal purpose” of that service. International service as a main purpose would be either evident, or determined by the Regulatory body according to Art. 10(3) of Directive 2012/34/EU.

The new § 1 mentions two elements that the scope of application of CUI should include: 1) the actual crossing, by the train, of a State border at least once; 2) carriage within the meaning of CIV² UR and CIM³ UR as principal purpose of the service.

Eventually § 2 includes, within the scope of application, the succession of several national contracts granting the use of the infrastructure for international service.

Recommendations

- **The scope of application of CUI shall be clarified and not be either extended or restricted beyond what is already set forth in the current legal definition of COTIF and EIM views the drafting proposed in the new Article 1 §1(a) and (b) alone referred to above as doing that.**

¹ Uniform Rules concerning the Contract of Use of Infrastructure in International Rail Traffic (CUI – Appendix E to the COTIF)

² Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (CIV) - Appendix A to COTIF

³ Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM) - Appendix B to COTIF

- **The proposed wording in the two sets of square brackets below Article 1 §1(a) and (b), the additional definition of “international train” as a transport service foreseen in the train path order according to which the train will cross a State’s border at least once and the wording on joining and splitting trains is not needed.**

Justification

EIM welcomes OTIF’s confirmations that (1) any amendments to CUI UR are to clarify the scope only and not to extend it to national carriage or otherwise and that (2) service infrastructure is not within the scope – beyond what is already covered by Art. 3(a) –.

EIM supports the objective of the revision of the CUI UR to uniquely clarify the scope of application.

Recommendation

- **The scope of application of CUI does not need to be derived from Directive 2012/34/EU.**

Justification

EIM questions the need to base the definition of “international transport service” on Directive 2012/34, to which OTIF’s proposal links the scope of application of CUI.

As a matter of fact, Art. 3(5) of the Directive refers to “international passenger service”, whereas the new Article 1 of CUI would apply to both passenger and freight carriage. Furthermore – as OTIF also observes in its note – in the Directive there are two different definitions of “international transport service” for either carriage of passengers or carriage of goods.

Recommendation

- **The new draft Article 1 §2 shall be deleted.**

In EIM’s view § 2, which refers to the succession of several national contracts as part of the definition of the scope, is unnecessary since it does not bring any additional value to the purpose of clarification of the scope of CUI.

Furthermore, the current definition of the scope already includes “one or several national contracts” with regards to the application of CUI, stating that the Uniform Rules shall apply to “any” contract for the use of railway infrastructure⁴.

2. Single model-contract for the use of the infrastructure

OTIF proposes a new draft § 4 in Article 5 – based on Article 6(8) CIM – which sets forth the possibility for the Associations of both infrastructure managers and carriers to agree on general terms and conditions for the use of the infrastructure.

⁴ CUI UR (Appendix E to the COTIF) Article 1 – Scope

According to OTIF (and this is legally correct and supported by EIM), the model contract has an optional nature and would need to respect both EU and domestic laws in the State where the infrastructure is located.

Recommendations:

- **The proposed § 4 in Article 5 shall be deleted as it is not needed.**
- **Notwithstanding EIM's view above that this should be removed, if § 4 were kept in any proposal for further consideration, an extra sentence must be added to make clear: "The use of model general terms and conditions of use is not mandatory".**

Justification

The new draft § 4 is of limited value. Moreover, the article 6(8) of CIM doesn't seem the correct legal basis to propose a harmonized contract of use of infrastructure model.

§ 4 does not provide any added clarity to a situation that currently exists. The parties, infrastructure managers and carriers, can already agree on general terms and conditions without necessarily being provided such a right by the CUI UR. It already has been the case with the European General Terms and Conditions of use of railway infrastructure, negotiated between the CIT and RNE. These EGTC, published on the CIT website, are not mandatory and furnish a good example of "Tool box", using by infrastructure managers and railway undertakings.

EIM considers this provision should be removed, but if it is to remain in the draft proposal for further discussion, EIM stresses the importance of making clear in the Article's wording that the nature of § 4 is firmly optional and non-mandatory.