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Comments on the OTIF Secretary General's modified draft texts dated 29.1.2016 for the revision of CUI

I. General remarks

The Secretary General's new draft texts follow on from the conclusions of the 3rd session of the CUI UR working group. To continue the work, these conclusions refer to three questions that are still pending:

- definition of the term "international railway traffic",
- better definition of the term "carrier",
- investigation of two scenarios relating to the carrier's right of recourse against the infrastructure manager.

The comments that follow deal mainly with these three questions, although the first two can be dealt with together.

II. Definition of the terms "international railway traffic" and "carrier"

1. Conceptualisation in the Recast Directive and in COTIF

Following the division of the formerly unified "railways", the term "railway traffic" now covers two areas, i.e. the "operation of the railway infrastructure" and the provision of "transport services" on the railway infrastructure. EU Directive 2012/34 ("Recast Directive") reflects this: it refers to the "railway infrastructure" (Art.3 (3)) and "transport services" (Art. 3 (4) to (7)), particularly "international freight service" and "international passenger service". According to the Directive, a "passenger service" is a transport service for the carriage of passengers (Art. 3 (5)) and accordingly, a "freight service" is a transport service for the carriage of freight.

The Recast Directive does not contain the term "railway traffic". This is possibly because nowadays, the term "railway traffic" is ambiguous. It may sometimes refer to the operation of the railway infrastructure and sometimes to the provision of transport services, or both.

With regard to the **actors in the railway sector**, the Recast Directive refers to "**railway undertakings**" (Art. 3 (1)), "**infrastructure managers**" (Art. 3 (2)) and "**applicants**" (Art. 3 (19)). The Recast Directive does not contain the term "carrier". Instead, it defines the "railway undertaking" as any licensed undertaking, the principal business of which is to provide services for the transport of goods and/or passengers by

rail; this includes undertakings which provide traction only, i.e. which do not conclude a contract of carriage with passengers or freight forwarders.

For the work of the CUI working group, it is important to look at the definitions used in the Recast Directive because at the third session of the working group, several requests were made to take account in the revision of the concepts defined in European law in order to avoid contradictions between the various regulations and hence the resulting misunderstandings and legal uncertainty.

Looking at COTIF and its terminology, it can be seen that the title “Convention concerning International Carriage by Rail” covers both areas of the now divided railways. There is also justification for this, because Appendices A and B concern the contract concerning international carriage by rail of passengers/goods, i.e. the provision of transport services, while according to its title, Appendix E governs the contract of use of infrastructure in international railway transport, i.e. the use of infrastructure, not the provision of transport services.

For the sake of completeness, it should also be mentioned that both COTIF and the Recast Directive contain the term “international carriage” (Art. 1 CIV/CIM) and “international transport service” (Art. 3 (4) to (7) of the Recast Directive). The Recast Directive also contains the term “cross-border agreement” (Art. 3 (13)). So the term “**international**” is common to both sets of regulations and, if need be, can also be used in the context of revising the CUI.

2. Conclusions for the revision of CUI

What ensues for the revision of CUI from the overview of the terms currently used in EU law and COTIF?

a) As the term **“international railway traffic”** is ambiguous, because it covers international transport services and the international use of infrastructure, it is correct to define it more precisely in Art. 3 CUI and, for the purposes of CUI, to limit it to the use of (train) paths in the meaning of the Recast Directive (Art. 3 (27)), as in the texts proposed by the Secretary General. This makes it clear that the “train for international railway traffic” referred to in Art. 1 § 1 CUI (new) does not mean a train that performs international transport services, but a train that uses allocated train paths internationally (= cross-border), i.e. which travels on the railway infrastructure across borders.

b) The term “**carrier**” is a special term of international rail transport law in CIV and CIM. CUI took over this term in 1999 because it was (only) to govern recourse between CIV and CIM carriers and infrastructure managers. However, as a result of the 2009 revision of CUI, the scope of application of CUI was extended in terms of personnel: according to the new version of Art. 5 § 1, the contract of use is concluded between the infrastructure manager and the carrier or “any other person entitled to enter into such a contract”. Art. 5bis CUI also refers to the “parties to the contract of use of infrastructure” and in this context, names the infrastructure manager on the one hand and railway undertakings or the authorised applicant on the other (Art. 5bis § 3). This currently aligns with the above-mentioned terms in the Recast Directive, although one difference should be noted: **“Applicant”** within the meaning of the Recast Directive may be different undertakings, persons and authorities with a “commercial interest in procuring infrastructure capacity”. However, **“authorised appli-**

cants” within the meaning of CUI are only those undertakings and persons who, according to Art. 5 § 1 CUI, are entitled to enter into a contract of use of infrastructure under the laws and prescriptions in force in the State in which the infrastructure is located.

As the CUI, according to the title, govern the contract of international use of the railway infrastructure, and as restricting the scope (Art. 1) to contracts of use of infrastructure to carry out (only) CIV or CIM transport is to be dispensed with, it would be appropriate in future no longer to refer to the “carrier” as the infrastructure manager’s contracting partner, but to refer, more inclusively, to the “**infrastructure user**” (abbreviated to “**user**”), or the “person entitled to use the infrastructure”. Bearing in mind the stipulations of Art. 5 and 5bis CUI, this could be defined in **Art. 3 c) of CUI** in place of the carrier, as follows:

“(Infrastructure) user” means a railway undertaking or any other person who, under the laws and prescriptions in force in the State in which the infrastructure is located, has concluded a contract of international use of railway infrastructure [with the infrastructure manager]”.

If this definition were chosen, it would also clarify the question of what applies to trial runs carried out by railway vehicle manufacturers or to journeys performed by maintenance or track construction trains on public railway networks: Manufacturers and track construction companies are infrastructure users in the meaning of CUI if, under the laws and prescriptions in force in the State in which the infrastructure is located, they have concluded a contract of international use of railway infrastructure.

If the infrastructure user were to be defined thus, the term “carrier” and the misunderstood term “**carrier by rail**”, which is only used in the CUI, could be **dropped**.

- The first sentence of **Art. 6 § 1 CUI** could be deleted; the following sentence could read as follows: **“The personnel employed by the (infrastructure) user and the vehicles to be used by the latter must satisfy the safety requirements.”**

- **Art. 7 § 1 a) CUI** could read: **“...the (infrastructure) user is no longer authorised to enter into contracts of use;”.**

- **Art. 3 f) CUI** could be amended accordingly: **“‘licence’” means the authorisation [to enter into contracts of use] issued to a railway undertaking;”.**

c) The revision of CUI could be used as an opportunity to **clarify the definitions**:

- The term “**railway infrastructure**” used in the Recast Directive and in Art. 1 § 1, Art. 3 a) and b) and Art. 10 § 2 CUI should also be used in Art. 3 g), Art. 5 and 5bis, Art. 7 § 2 CUI, etc. (rather than just “infrastructure”).

- The **title of CUI** could be clearer: **“Uniform Rules concerning the Contract of International Use of Railway Infrastructure”.**

- The term “**contract of use**” introduced into **Title II** of CUI and then used throughout the text should also be used in Art. 5bis §§ 1 and 2 (instead of “contract of use of infrastructure”).

III. Assessment of the two alternatives for recourse between infrastructure users and infrastructure managers

1. Preliminary remark

The two alternatives do not rule each other out, they complement each other, although **the first alternative takes priority**:

If the scope of application of the CUI is extended by dispensing with the restriction to CIV and CIM transport operations, there will still be a need to deal with recourse between users and infrastructure managers in cases where one of them has to pay compensation for which the other is liable. **Alternative 1** must therefore **definitely** be implemented, but without restricting it to CIV and CIM transport operations. It always applies when there is a contract on the international use of the railway infrastructure, i.e. including in those cases where CIV or CIM transport takes place in the framework of the international use of infrastructure. This will require amendments to Articles 8, 9 and 23 of CUI.

Alternative 2 can be implemented **as a supplement**: It should ensure that the CIV or CIM carrier can also obtain recourse against the infrastructure manager when CIV or CIM transport takes place in the context of the purely national use of railway infrastructure, particularly at the start or end of a journey, so that the CUI that has been reduced to the *international* use of infrastructure does not apply.

2. Implementation proposal

a) Implementation of alternative 1 in any event:

- In **Art. 8 § 1 CUI**, **delete letter c)** ; replace it by a **new 2nd sentence**:

  “The manager shall also be liable for pecuniary loss resulting from damages payable under legal provisions by the (infrastructure) user to third parties for bodily loss or damage or for damage to property [or for delays] when such loss or damage has its origin in the infrastructure [of this manager].”

  Justification: Creating a self-standing second sentence would be clearer than the structure of Art. 8 § 1 c), which currently reads as follows (only slightly shortened): “The manager shall be liable for pecuniary loss resulting from damages payable by the carrier under the CIV Uniform Rules and the CIM Uniform Rules caused to the carrier or to his auxiliaries during the use of the infrastructure and having its origin in the infrastructure.” In the German version at least, this provision is unfortunately worded and not quite factually correct. The carrier or his auxiliary do not *suffer* any damages according to CIV or

CIM, and *auxiliaries* certainly do not suffer any pecuniary damage as a result of the *carrier* having to pay compensation in accordance with CIV or CIM.

In the new provision being proposed here, the reference is no longer to CIV and CIM alone, but to "legal provisions" in general, on the basis of which the infrastructure user has to pay "damages". The word "Entschädigungen" (compensation) used up to now in the German version in Art. 8 § 1 c) concerns damages paid by the carrier in accordance with CIV or CIM, so the use of the term "Schadenersatz" (damages) being proposed here is only an editorial clarification and does not change the substance. The word "Entschädigungen" is also replaced by "Schadenersatz" in Art. 8 § 2 a) and b) in the German version.

- **Art. 8 § 2 CUI** would be worded as follows:

  The manager shall be relieved of this liability

  a) in case of bodily loss or damage and pecuniary loss resulting from damages payable by the infrastructure (user) as a result of bodily loss or damage or delays to passengers,

  1. if ...,
  2. to the extent...,
  3. if ...;

  b) in case of loss of or damage to property and pecuniary loss resulting from damages payable by the (infrastructure) user for loss or damage to property or delay to the goods being carried, when the loss or damage was caused by the fault of the (infrastructure) user or by an order given by the (infrastructure) user which is not attributable to the manager or by circumstances which the manager could not avoid and the consequences of which he was unable to prevent."

  Justification: The grounds for relief from liability must continue to distinguish between pecuniary damage because of compensation for bodily loss and damage or because of compensation for loss or damage to property. The different treatment of loss or damage to hand luggage and registered luggage that has been included in CIV (cf. Art. 33 and 36 CIV) will not be dealt with here.

- It must be decided whether a **new second sentence** should be added to **Art. 9 § 1 CUI**:

  ["The (infrastructure) user shall also be liable for pecuniary damage resulting from damages payable under legal provisions by the manager to third parties for bodily loss or damage or for damage to property when such loss or damage was caused during the use of the infrastructure by the (infrastructure) user or by the means of transport used or by the persons or goods carried."]

Justification: It needs to be discussed whether extending the scope of application of the CUI and the user's possibilities for recourse would also mean giving the manager possibilities for recourse against the user.

- **Article 23 CUI** should read as follows:

  The validity of the payment made by the (infrastructure) user [or manager] on the basis of legal provisions may not be disputed when the obligation to pay has been determined by a court or tribunal and when the manager [or (infrastructure) user], duly served with notice of the proceedings, has been afforded the opportunity to intervene in the proceedings."

  In this provision, the word "compensation" has been replaced by the words "obligation to pay" (regarding the German version cf. above re. Art. 8 § 1, second sentence and Art. 8 § 2).

b) Further implementation of alternative 2

If the user's recourse against the manager also has to be ensured when the user has performed CIV or CIM transport in the context of the *national* use of railway infrastructure (e.g. on the basis of Art. 1 § 3 CIV or Art. 1 § 4 CIM, when international inland waterway or maritime transport on registered lines takes place prior to or after *domestic* carriage by rail), it is recommended that the CIV or CIM carrier's recourse be transferred to the CIV and CIM. In this case, CIV and CIM should be amended as proposed in alternative 2. It should also be made clear in CUI that the recourse provisions in CIV and CIM take precedence over the recourse provisions that continue to exist in the CUI.

- **Art. 8 § 5 (new) CUI:**

  "Article 62bis of the CIV Uniform Rules and Article 50bis of the CIM Uniform Rules shall not be affected."

- **Article 23, second sentence (new) CUI:**

  "Article 63 of the CIV Uniform Rules and Article 51 of the CIM Uniform Rules shall not be affected."

IV. Summary

Owing to the lack of clarity of their scope of application, which many consider to be too broad, many States do not currently apply the liability provisions of the CUI at all. In these States, recourse between carriers and infrastructure managers is dealt with exclusively in accordance with national law.

Clarification of the **scope of application of the CUI** (applicable to the **contract of international use of railway infrastructure**), together with the implementation of **alternative 1**, would lead one to expect that the CUI would be complied with in future and applied to the international use of infrastructure. This would constitute

progress compared with the current legal situation and would ensure that CIV or CIM carriers can obtain recourse against the infrastructure manager in the international use of infrastructure. In future, the purely national use of infrastructure would certainly no longer be covered by the CUI and a CIV or CIM carrier must then obtain recourse against an infrastructure manager acting only at national level under national law, as is the current practice.

Alternative 2 constitutes an **addition**, as it *always* gives the CIV and CIM carrier recourse against the infrastructure manager in accordance with CIV and CIM when the infrastructure manager is liable for loss or damage which the carrier has to compensate in accordance with CIV or CIM. Outside CIV and CIM transport, the recourse rules of the CUI remain applicable.