



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 « RU CUI »  
Arbeitsgruppe „ER CUI“  
Working group "CUI UR"**

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## **4<sup>TH</sup> SESSION**

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Position of the European Rail Infrastructure Managers (EIM)

10 March 2016

## Introduction

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

A third Working Group (WG) session was held on 24<sup>th</sup> November 2015 in Bern, Switzerland. Apart from the ongoing discussions on the scope of application of the UR and the definitions contained therein, the negotiations moved on to the issue of the carrier’s right of recourse toward the rail infrastructure manager.

On 29<sup>th</sup> January 2016, the OTIF issued a new draft text for Article 1 on the scope of application, a revised definition for the term “carrier” and proposed a potential new definition of “international rail traffic”. It has also proposed two possible alternatives with regard to the infrastructure manager’s liability regime.

The new proposals will be discussed at the 4<sup>th</sup> OTIF WG on 31<sup>st</sup> May 2016 in Bern.

EIM – the Association representing the European rail infrastructure managers – is closely following the revision procedure and aims at providing input throughout the whole process. This new Paper covers the following issues brought forward by the latest OTIF draft proposals:

1. The scope of application: to which notions and concept of service should the legal definition of the scope of application be linked.
2. Definitions of “carrier” and “international rail traffic”.
3. Liability issues: the two alternatives for the carrier’s recourse submitted by the OTIF.

## 1. The scope of application

OTIF’s new draft proposal for the definition of the scope of application of the CUI UR keeps the reference to “train” and to “international railway traffic”. It is proposed that the latter will be defined in Article 3 among the “Definitions” whereas a definition for the term “train” – whose former proposal has been rejected – will not be investigated any further.

Consensus reached with regard to Article 1(1) stresses on the need to keep the wording as simple as possible in order to ensure clarity for the scope of application.

Eventually, an editorial amendment was brought about the text: the expression “*between states, one of which is a member state*” stands in for the former “*between two states [...]*”.

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

## Recommendation

- **The scope of application of the CUI UR should be clarified and fully consistent and directly linked with the scope of the CIV UR<sup>2</sup> and CIM UR<sup>3</sup>.**

## Justification

*Any amendment to Article 1 of the CUI UR should have the precise objective to clarify the scope of application of the UR. EIM acknowledges the effort which has been made by all parties in order to simplify the wording of the scope and avoid any ambiguity.*

*Accordingly, EIM supports a reference to “international railway traffic” – which excludes the possibility of an extension of the UR to domestic carriage and links the scope to the actual objective of the contract of use. This was agreed at the first working group.*

*EIM also welcomes the decision of the OTIF not to link the definition of “international railway traffic” to Article 6 of COTIF but, rather, to seek it in Article 3 of the CUI UR – among the “Definitions”.*

*Nonetheless, EIM remarks that more consistency, as well as a link, is necessary between the scope of the CUI UR and the scope of the CIV/CIM UR. We address this point below.*

*Whilst Article 1(1) of the CUI UR links “international railway traffic” to “states”, the definition of the scope of CIV/CIM uses the wording “member states”. Therefore, EIM recommends the scope of application of the CUI UR to be also linked “international railway traffic” to “member states”. This would ensure the consistency needed and prevent a possible extension of the scope of the CUI UR.*

## **2. Definitions**

An amended definition of “carrier”, which takes into account few comments made at the last WG, has been submitted by OTIF. The new draft still links the definition to the term “person”. In OTIF’s view, this would ensure coherence with the whole COTIF, the EU legislation – i.e. Directive 2012/34/EU – and some national legislation of the Member States<sup>4</sup>, which allows for the same conditions. Furthermore, in the amended definition, the reference to the CIV and CIM UR in the text has been removed.

The new draft definition of “carrier” would pertain to a “commercial use” – i.e. the carriage of passengers & goods – as principal business.

Following this further, France has issued a proposal for a new definition of “international railway traffic”. The draft definition expresses the concept of “train paths used for international traffic”. As outlined in the Explanatory Report, International (railway) traffic

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<sup>2</sup> Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (CIV – Appendix A to COTIF).

<sup>3</sup> Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM – Appendix B to COTIF).

<sup>4</sup> E.g. Slovenia or Czech Republic.

would be either performed on an international train path – i.e. a single train path established by agreement between two or more IMs (i.e. prearranged train paths on the Rail Freight Corridors) –, or two or more successive national train paths – where IMs coordinate their respective train path offers in order to allow a carrier to run a train crossing borders – in the case of an IM situated in two different states. This is linked to the scope in Article 1.

#### Recommendation

- **The definition of “carrier” shall be amended in order to link it to the clarified, neither narrowed nor broadened, scope of application.**

#### Justification

*The definition of the term “carrier” is strictly connected to the scope of application of the CUI UR. However, in EIM’s view, the proposed definition does not serve the purpose of clarifying the scope and may instead lead to an extension of the latter.*

*First of all, a description of what could be considered exactly as “principal business” of the carrier would be difficult to identify. In addition, by defining the carriage of persons or goods as the “principal business” of the carrier, all those other situations not considered as such – e.g. maintenance trains or empty trains – could fall within the scope of the CUI UR – and would consequently broaden it.*

*The definition of the term “carrier” should instead unambiguously relate to the actual commercial use of the infrastructure – i.e. the carriage of persons or goods – by means of international carriage. The wording “principal business of which” should therefore be deleted, and a reference to the CIV/CIM UR should be included.*

#### Recommendation

- **The definition of “international railway traffic” shall be further clarified, and made consistent with the scope of application and the definition of “carrier”.**

#### Justification

*First of all, EIM welcomes the fact that the proposal made by France links the “international railway traffic” to the train path(s), as EIM recommended in its previous position paper.*

*EIM also believes that this proposal made by France needs to be partially modified. The aim is to avoid risks of ambiguity, and furthermore ensuring full coherence with the scope of application of the CUI UR.*

*In this regard, first and foremost, EIM recommends to replace the expression “implies” with “requires”<sup>5</sup>. Indeed, in EIM’s view, international railway traffic has to be strictly linked to the use of international train path and should not refer to anything beyond that.*

*Following this further, a reference to the CIV/CIM UR should be added to the text so that the definition of “international railway traffic” is linked to the use of train path(s) with the purpose of allowing the carriage of CIV and CIM contracts. This keeps the scope of the CUI UR within that of the current version the working group is seeking to clarify. This would also guarantee the link with the commercial use of the infrastructure, and the sound consistency with the amended definition of “carrier”. Finally, similarly to what has been recommended for the scope, “at least two states” should be replaced by “at least two member states”.*

#### Recommendation

- **The concept of the term “manager” should be clarified in the Explanatory Report**

#### Justification

*Throughout the whole CUI UR, the term “manager” is used to identify the (rail) infrastructure managers. On the other hand, the European legislation – e.g. Directive 2012/34/EU – uses the expression “infrastructure manager”. In addition, the new draft proposal for the definition of “international railway traffic” also uses the term “infrastructure manager”.*

*Therefore – in order to avoid potential misinterpretations – EIM suggests to stick to the “COTIF wording”, that is “manager” and to include in the Explanatory Report a clarification of the term “manager” to make sure it is understood within the same meaning as “infrastructure manager” used in European law<sup>6</sup>.*

### **3. Liability issues: the carrier’s recourse vis-à-vis the infrastructure manager**

The OTIF has submitted to the attention of the negotiation’s parties two different scenarios which concern the carrier’s right of recourse against the rail infrastructure manager. The question relates to the liability regime for the loss or damage caused by the infrastructure and for which the carrier is liable to its customers under the CIM or CIV UR.

The first proposal, suggested by France, would envisage deleting the reference to the CIV/CIM UR in Article 8 paragraph 1, letter c of CUI and replacing it with the wording “a train performing International railway traffic”. Thus, in the context of an amended scope of application, the existing rules in Article 8(1) would be maintained. It would be made

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<sup>5</sup> The French and German versions will also need to be modified accordingly.

<sup>6</sup> In this regard, one should also keep in mind that the definition of “infrastructure manager” used in European law is being currently investigated with a view to modify it within the frame of the “4th railway package”.

clear in the Explanatory Report that the recourse will only be available to carriers in respect of international trains – i.e. for international traffic.

The second scenario considers transferring the carrier's right of recourse from the CUI UR to the CIV/CIM UR. This solution would possibly allow the carrier to exercise its right of recourse in each instance of a contract of international carriage – regardless whether the train used is international or national. The CUI UR would still be applicable in the event of “other loss or damage”, according to Article 8(1a)-(1b) of CUI. Eventually, Article 8(1c) of the CUI UR would be deleted.

#### Recommendations:

- **The provisions of the CUI UR in terms of liability for indirect damages shall not be broadened.**
- **The financial equilibrium of the IMs, ensured by the obligation imposed by EU Law on Member States, shall be safeguarded.**

#### Justification

*EIM wishes to firmly reiterate its previous positions with regard to the rail infrastructure manager's liability framework.*

*Any attempt to broaden the provisions on liability would result in the CUI UR dealing with national law, which goes beyond the scope of international carriage in COTIF.*

*Following this further, EIM points out that the infrastructure manager is subject to tight regulation on prices on the basis of EU law<sup>7</sup>. In principle, the price for the use of the infrastructure is, as a principle, the one of the costs directly incurred as a result of operating the train service. Consequently, the IM is unable to incorporate the operational risks in its prices, as a regular company would do.*

*As a matter of fact, the infrastructure manager has no influence on the price policy of a railway undertaking, therefore it has no influence on the amount of compensation either. For this reason, it is fundamental to ensure that the rail infrastructure manager is fully independent from railway undertakings' price policies, as it would not have control over the amount of compensation he might have to bear.*

*Also, extending the liability of the IM for indirect damages comes with a legal and financial risk. This risk would be borne by the IM in first instance, but also in fine by the respective Member States (at least those who are EU members), who are compelled by the European law to ensure the financial equilibrium of the IMs<sup>8</sup>.*

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<sup>7</sup> As the scoping note rightly stressed, EU is public order law.

<sup>8</sup> See art. 8 Directive 2012/34/EU.

Recommendation:

- **The two scenarios concerning the carrier's right of recourse against the rail infrastructure manager shall be rejected.**

Justification – first proposal

*The first option, suggested by France, extends the liability regime. EIM is concerned about the wording being used, as it appears too broad and ambiguous and does not link back to compensating for CIV or CIM liability.*

*On the one hand, there is no link to any legal basis of the damages – i.e. the IM may end up being liable for damages that the carrier is bound to pay to its customers even on a mere contractual basis. On the other hand, the proposed text provides no reference to any person to whom the carrier would be liable.*

Justification – second proposal

*The second alternative submitted by OTIF paves the way to legal, financial and procedural risks. First and foremost, in case of indirect damage, this proposal could lead to an extension of the scope of application of the CUI UR. In fact, regardless the “international” or “national” nature of the journey performed by the train, a right of recourse would always exist if the infrastructure manager is liable. This would lead to the carrier's right of recourse being applied on the member states' entire national network.*

*Furthermore, by moving the place where the recourse is dealt with to the CIV/CIM UR, there is a potential clash between the proposal and Article 5bis(2)<sup>9</sup> of the CUI UR. The latter ensures that the liability regimes of the IM and the carrier do not interfere with the obligations which the parties to the contract of use have to meet in an EU Member State. According to this second scenario, this may not be any longer ensured.*

*Moreover, EIM points out the incongruity between the scope of application of the CUI UR, on the one hand, and the one of the CIV/CIM UR on the other. Indeed, the CUI UR deal with the relationship between the carrier and the infrastructure manager, whereas the CIV/CIM UR deal with the relationship between the carrier and the customers. As a consequence, the scopes of CIV/CIM would have to be adjusted accordingly: as they are, they only apply to the contract of carriage and not to the contract of use of the infrastructure, to which the infrastructure manager is a party. Actually, the whole structure of the current COTIF – providing for an appendix applicable to each contract - would consequently be affected.*

*It is also worth noting that some member states have a reservation in place in relation to CUI. If provisions are transferred to CIV and CIM, then it must follow that a member state's right to hold a reservation in relation to the relevant appendices must be reconsidered.*

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<sup>9</sup> Article 5bis(2) CUI: “The provisions of Articles 8 and 9 shall not affect the obligations which the parties to the contract of use of infrastructure have to meet in an EC Member State or in a State where Community legislation applies as a result of international agreements with the European Community”.

*Eventually, this proposal entails some risks from the procedural point of view, notably concerning the possibility of a simultaneous review of the CIV/CIM UR and CUI UR. EIM points out that the revision of the Appendixes A and B to COTIF has never been on the table. Moreover, arguably, a revision of CIV would necessarily involve a complicated co-ordination with EU law and the Passengers' Right Regulation (PRR)<sup>10</sup> – to which the CIV has been largely embodied as an Annex.*

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EIM, the association of European Rail Infrastructure Managers, was established in 2002 to promote the interests and views of the independent infrastructure managers in Europe, following the liberalisation of the EU railway market. It also provides technical expertise to the appropriate European bodies such as the European Railway Agency. EIM's primary goal is promoting growth of rail traffic and the development of an open sustainable, efficient, customer orientated rail network in Europe.

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<sup>10</sup> Regulation (EC) No 1371/2007 on rail passengers' rights and obligations



**Annexes:**

**Annex 1 - Table on the modifications/amendments proposed by EIM**

**Annex 2 - RNE Legal Matters Working Group Statement**

## Annex I – Table on the modifications/amendments proposed by EIM

10th March 2016

Topic/Issue	OTIF's proposal 3rd WG, 24th November 2015, Bern	EIM's proposal 4th WG, 31st May 2016, Bern
<p><i>Scope of application</i> Article 1(1) CUI</p>	<p>1. <i>These Uniform Rules shall apply to any contract of use of railway infrastructure in a Member State by a train for international railway traffic between States, at least one of which is a Member State.</i></p>	<p>1. <i>These Uniform Rules shall apply to any contract of use of railway infrastructure in a Member State by a train for international railway traffic between <b>at least two Member States</b>. <del>States, at least one of which is a Member State.</del></i></p>
<p><i>Definition of "carrier"</i> Article 3 CUI</p>	<p>c) <i>"carrier" means the natural or legal person the principal business of which is to carry persons and/or goods by rail in international traffic and who is licensed in accordance with the laws and prescriptions relating to licensing and recognition of licenses in force in the State in which the person undertakes this activity;</i></p>	<p>c) <i>"carrier" means the natural or legal person <del>the principal business of which is to carry</del> <b>carries</b> persons and/or goods by rail in international traffic <b>under the CIV Uniform Rules or CIM Uniform Rules</b>, and who is licensed in accordance with the laws and prescriptions relating to licensing and recognition of licenses in force in the State in which the person undertakes this activity;</i></p>
<p><i>Definition of "international railway traffic"</i> Article 3 CUI</p>	<p>aa) <i>"international railway traffic" means traffic which implies the use of an international train path or several successive national train paths situated in at least two States and coordinated by the infrastructure managers concerned.</i></p>	<p>aa) <i>"international railway traffic" means traffic which <b>requires</b> the use of an international train path or several successive national train paths situated in at least two <b>member</b> states and coordinated by the managers concerned in order to allow carriage of persons or goods <b>within the meaning of the CIV Uniform Rules or the CIM Uniform Rules.</b></i></p>

## Annex II – RNE Legal Matters Working Group Statement



**RNE Legal Matters Working Group Statement  
on the proposals sent by the OTIF Secretary General with reference to the Revision of  
the Uniform Rules concerning the Contract of Use of Infrastructure in International  
Rail Traffic (CUI – Appendix E to the COTIF) dated 29 January 2016 - Annex to circular  
91-01/501.2016  
10 February 2016, Zagreb**

The RNE Legal Matters Working Group (RNE LM WG) has thoroughly studied the new proposals issued by the Otif 29 January 2016.

RNE LM WG comments the single proposals as follows:

### **I. AMENDED DRAFT TEXT CONCERNING THE SCOPE OF APPLICATION**

#### **Article 1 Scope**

**§ 1** *These Uniform Rules shall apply to any contract of use of railway infrastructure **in a Member State by a train for international railway traffic between States, at least one of which is a Member State.***

**§ 2** ***These Uniform Rules** shall apply irrespective of the place of business or the nationality of the contracting parties **and** even when the railway infrastructure is managed or used by States or by governmental institutions or organizations.*

**§ 3** *Subject to Article 21, these Uniform Rules shall not apply to other legal relations, such as in particular*

- a) the liability of the carrier or the manager to their servants or other persons whose services they make use of to accomplish their tasks;*
- b) the liability to each other of the carrier or the manager of the one part and third parties of the other part.*

#### **The RNE LM WG comments as follows:**

The RNE LM WG acknowledges that in principle the new formulation would lead to more clarity. Nevertheless we would like to point out that this formulation can be seen in connection with the following new proposals (see II. - IV.) we explicitly do not support.

Therefore we would favour the following formulation, as the idea of the WG for CUI UR was to clarify - not to widen or to narrow the scope:

“These Uniform Rules shall apply to any contract of use of railway infrastructure in a Member State by a train for international railway traffic between two Member States”. The proposal does not work without the second reference to a member state.

In addition, the scope of the CUI UR needs to be linked to CIV and CIM contracts – that has always been the case and it had never been intended to change the scope, but to give clarity. This either needs to be done in Article 1 itself, or if we follow the suggestion in Annex to circular A 91-01/501.2016 to include a new definition of “international railway traffic” as proposed by France, included in that definition (see below).

## II. AMENDED DRAFT TEXT REGARDING THE DEFINITIONS

### **Article 3** **Definitions**

*For the purposes of these Uniform Rules the term*

**aa) “international railway traffic” means traffic which implies the use of an international train path or several successive national train paths situated in at least two States and coordinated by the infrastructure managers concerned;**

~~c) “carrier” means the person who carries~~ **natural or legal person the principal business of which is to carry persons and/or goods by rail in international traffic under the CIV Uniform Rules or the CIM Uniform Rules and who is licensed in accordance with the laws and prescriptions relating to licensing and recognition of licenses in force in the State in which the person undertakes this activity;**

~~x) “train” means the operating unit which the carrier utilizes on the railway infrastructure; the train may be joined and/or split, and the different sections may have different origins and destinations].~~

**The RNE LM WG comments as follows:**

Definition aa) – “International railway traffic”:

The RNE LM WG suggests to add “the principle purpose of which is carriage within the meaning of the CIV or CIM Uniform Rules”. Indeed, we understand that the intention of the OTIF regarding the CUI UR is to clarify the scope, not to change it (by extending or narrowing it).

The RNE LM WG suggests to change “implies” to “requires”. “States” should be changed to Member States.

Therefore we would favour the following formulation:

“international railway traffic” means traffic which requires the use of an international train path or several successive national train paths situated in at least two Member States and coordinated by the infrastructure managers concerned the principal purpose of which is carriage within the meaning of the CIV Uniform Rules and the CIM Uniform Rules.;

Definition c) “Carrier”:

The RNE LM WG objects to the deletion of the reference to the CIV or CIM Uniform Rules. We need to link the manager’s responsibility under CUI to those suffered by the carrier under CIV and CIM obligations. By clarifying the scope and removing the provisions above, we have in effect created a separate regime detached from COTIF, which was not the intention. The term international traffic refers to aa where it is defined as international railway traffic. So railway must be added.

The term “the principal business of which is to carry” is not very clear. We suggest “who carries”.

Therefore we would favour the following formulation:

“carrier” means ~~the person who carries~~ **natural or legal person who carries** persons **and/or** goods by rail in international railway traffic under the CIV Uniform Rules or the CIM Uniform Rules and who is licensed in accordance with the laws and prescriptions relating to licensing and recognition of licenses in force in the State in which the person undertakes this activity;

General usage of the term “manager”:

Even though the term “infrastructure manager” has been used for at least 15 years in the European railway world, the COTIF as such does not know the term but uses “manager” instead. To be consistent with the COTIF we would therefore suggest to use “manager” in the CUI, too. To make things clear, the RNE LMWG suggests to make a clarification on this in the explanatory report (see hereunder).

### **III. AMENDED DRAFT TEXT CONCERNING THE CARRIER’S RECOURSE**

With regard to the carrier’s recourse against the infrastructure manager, two alternatives presented at the 3<sup>rd</sup> session of the CUI working group are presented to be investigated further.

1. Maintain the existing rules – in the context of the newly defined scope of application – in Article 8 § 1 c) CUI
2. Deal with the carrier’s recourse (new) in the CIV/CIM UR

**[Text in the annex 1 /annex 2 to this statement]**

**The RNE LM WG comments as follows:**

The LM WG would prefer to maintain the existing rules without any changes.

The scope of the CUI UR working group looking at amendments to CUI was to deal with clarification and not to make changes to or widen the scope of application or liability.

We do not support the approach to deal with the carrier’s recourse in the CIV/CIM UR because this stipulation would disconnect the liability regime from the CUI (E. g. it would not be clear whether the IM would be relieved from his indirect liability under Art. 62bis CIV under the conditions stated under of Art. 8 para 2 CUI.)

In addition, we would like to remark that Art. 5bis applies to Art. 8 para 1, so we would need the same provisions to be duplicated.  
Art. 8 para 2 would also need to be moved.

There are also a number of member states that have reservations to CUI and this would need to be reviewed if this provision was moved to other appendices where there are no reservations.

We do not think that the issue of pecuniary loss should be dealt with separately as suggested in the explanation on the second alternative. The track access charges, to be paid by the railway undertakings, are capped by European law (see Dir. (EU) 2012/34), so that the operational risk (and notably the pecuniary loss) is not covered by these charges.. The IM has no influence on the price policy of a RU therefore it has no influence on the amount of compensation either. The IM is unable to incorporate the operational risks in its prices, as a regular company would do.

#### **IV. AMENDMENTS TO THE EXPLANATORY REPORT PROPOSED IN CONNECTION WITH THE AMENDED DRAFT TEXTS**

**[Text in the annex 2 to this statement]**

#### **The RNE LM WG comments as follows:**

Apart from our comment in III. on pecuniary loss, we would still suggest to add a commentary on the usage of the term “manager”: The term “manager” used in this text means “infrastructure manager” in the sense of European directives and regulation.