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Fachausschuss für technische Fragen
Committee of Technical Experts**

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VEHICLE ADMISSION IN RELATION TO CHANGING RULES

Analysis for discussion:

Concerning retroactive requirements to reduce the pass-by noise of existing freight wagons

1. BACKGROUND

During the 29th session of the standing working group technology (WG TECH), the European Union Agency for Railways gave a presentation about ideas to reduce, in Member States of the European Union, rolling noise emitted by freight wagons equipped with cast iron brake blocks.

In the presented scenario, the Technical Specifications for Interoperability (TSI) concerning rolling stock noise (NOI TSI) would be amended so that it would set requirements applicable not only to new vehicles, but also for existing vehicles. In practice the plans would require existing freight wagons which are equipped with cast iron brake blocks to be retrofitted with composite brake blocks. Composite brake blocks would smoothen the running surface of the wheels and by that significantly reduce the rolling noise of these wagons.

The OTIF Secretariat suggested that measures imposed in the EU, without imposing equivalent measures in COTIF, may not be legally enforceable for vehicles running in international traffic from outside the EU into the EU. After some discussion, the need for deeper analysis was identified. The hypothesis and question of principle would then be:

Hypothesis: a country or group of countries retroactively imposes, for existing vehicles, technical requirements which are additional to the provisions applicable through COTIF.

Question of principle: what are the legal consequences for the use in international traffic of vehicles that do meet the provisions applicable through COTIF for their use in international traffic, but not the additional retroactive requirements?

This document is drafted by the OTIF Secretariat and is intended to be used as a discussion document. It aims at analysing the provisions of ATMF concerning vehicle admission along five lines:

- General principles for admission of vehicles to international traffic
- Validity, or limitations thereof, of vehicle admissions according to ATMF
- Use in international traffic of vehicles which predate the ATMF or UTP
- Equivalence between EU and COTIF provisions
- Withdrawal of vehicle admissions

2. VEHICLE ADMISSION IN COTIF

2.1. GENERAL PRINCIPLES FOR ADMISSION OF VEHICLES TO INTERNATIONAL TRAFFIC

ATMF sets out, for railway vehicles, the procedure for the admission to circulation or use in international traffic. The admission of a new vehicle is a precondition for its use in international traffic and aims at ascertaining that vehicle complies with the construction prescriptions. These construction prescriptions are contained in UTPs¹.

Article 7 § 1a ATMF sets out that the UTP applicable at time of admission remains the reference for this vehicle during its use and should continue to comply with it. This implies that if a UTP is amended or revised it will, in principle, not have direct consequences for vehicles already in use.

¹ There may be additional applicable prescriptions contained e.g. in RID or in national technical requirements valid in accordance with APTU.

Vehicles shall comply with the UTPs applicable at the time of admission, upgrading or renewal, in accordance with these Uniform Rules; this compliance shall be permanently maintained while each vehicle is in use.

The responsibilities linked to maintaining this compliance rest with the Entity in Charge of Maintenance (ECM), the vehicle keeper and the railway undertaking in accordance with the provisions set out in Articles 15 and 15a ATMF.

2.2. VALIDITY OF VEHICLE ADMISSIONS

A Certificate of Operation, issued by a Competent Authority, is the evidence that a vehicle is admitted to operate in international traffic. Admission is not an on-going process and vehicles already in use are not subject to admission. Once admitted in accordance with ATMF, a vehicle in principle remains admitted in accordance with Article 10 § 9:

“A technical certificate shall be granted in principle for an unlimited period; it can be general or limited in scope.”

It is possible to limit the validity of the Certificate of Operation in accordance with Article 11 § 3 d) ATMF, but this should then be included in the certificate itself at time of admission.

New UTP provisions could, in principle, not limit or abrogate a Certificate of Operation already issued.

2.3. THE APPLICATION OF UTP

The Uniform Technical Prescriptions (UTP) set the technical requirements to be applied for the admission of vehicles to be used in international traffic.

An admission to operation issued for a vehicle which meets the requirements of Article 6 § 3 ATMF shall be valid on the territories of other Contracting States. This means that once the competent authority of one Member State has approved the vehicles, this approval is recognised by the others. In order for the principles of Article 6 § 3 ATMF to apply, a full set of UTPs need to be available and applied. A full set of UTPs for freight wagons has been available and in force since 1.12.2012.

The admission of a vehicle that does not comply with the full set of harmonised UTP specification due to the UTP being not available at time of admission (prior to 1.12.2012), or e.g. the vehicle being subject to e.g. specific cases, open points or derogations, is not valid in all Contracting States. Such vehicle should be admitted on a State-by-State basis, by the Competent Authority of each State concerned and on the basis of the conditions of Article 6 § 4 ATMF.

2.4. USE IN INTERNATIONAL TRAFFIC OF VEHICLES PREDATING ATMF

Article 19 ATFM sets out transitional provisions, in particular to cover vehicles that are not admitted to operation in accordance with the procedures of ATMF.

The COTIF provisions concerning the admission of vehicles in international traffic are relatively recent, compared to the many decades that vehicles have been operated in international traffic. Before the ATMF provisions applied, vehicles were put in international operation based on agreements between railway companies (rather than States), in particular the RIV agreement. Such vehicles do generally not have a Certificate of Operation.

ATMF does not hinder or make impossible the use of older vehicles predating the ATMF, in particular those marked RIV. The rights of continued use of old vehicles, which might not comply with all current requirements, is sometimes referred to as 'grandfather rights'. Article 19 § 2 ATMF regulates grandfather rights:

These Uniform Rules do not affect admissions to operation issued before 1.1.2011 for vehicles which exist as at 1.1.2011 and which are marked with RIV or RIC as proof of current compliance with the technical provisions of the RIV 2000 agreement (revised edition of 1 January 2004) or the RIC agreement respectively and for existing vehicles not marked RIV or RIC but admitted and marked according to bilateral or multilateral agreements between Contracting States notified to the Organisation.

2.5. RETROACTIVE REQUIREMENTS

Grandfather rights are not absolute as per Article 19 § 5 ATMF. New UTP requirements concerning vehicle marking and maintenance do apply retroactively, as does RID. In addition the Committee of Technical Experts may, through UTP requirements, impose rules on existing vehicles:

Regardless of this transitional provision, the vehicle and its documentation shall comply with the prescriptions in force of the UTP concerning marking and maintenance; compliance with the prescriptions of RID in force shall also be ensured, where applicable. The Committee of Technical Experts may also decide that, for duly justified safety or interoperability reasons, prescriptions introduced in the UTP shall be complied with within a certain deadline.

The last sentence of this paragraph gives competence to the Committee of Technical experts to impose retroactively, through an UTP, rules on existing vehicles with grandfather rights. It would then be in their competence to answer the question whether or not noise requirements are covered under ‘*duly justified safety or interoperability reasons*’.

As Article 19 concerns transitional provision for vehicles that predate the ATMF, the obligation to comply with UTP prescriptions within a certain deadline would not apply to vehicles that were issued a Certificate of Operation in accordance with the ATMF. For these more recent vehicles Article 7 §1a applies as explained in section 2.1 of this document.

2.6. EQUIVALENCE BETWEEN EU AND COTIF PROVISIONS

The vehicle provisions between EU and COTIF are harmonised so that they are equivalent. The EU and OTIF coordinate their regulatory developments in order to establish and maintain this equivalence.

Based on the assumption of full equivalence between the EU and OTIF provisions, Article 3a ATMF sets out that

...vehicles which have been admitted to operation according to these Uniform Rules shall be deemed as authorised for placing in service in the Member States of the European Union and in the States which apply European Union legislation as a result of international agreements with the European Union...

The same principle applies vice-versa for vehicle authorised in the EU, so that they are deemed as admitted to operation by all Contracting States.

Only if the UTP and TSI are fully equivalent, the principles of Article 3a ATMF can be applied. As such equivalence was first established for freight wagons as of 1.12.2012, vehicles admitted before this date are not subject to the principle above.

This provision is relevant for vehicles that have been admitted according ATMF in compliance with a full set of UTPs, without open points, without derogations and without specific cases that limit the conditions for admission. At time of writing these conditions can be only met by freight wagons, because for other type of vehicles there is no resolution to deal with open points and specific cases in a harmonised manner.

Vehicles that were admitted by a non-EU State in accordance with ATMF are deemed as authorised to run in the EU. Once the conditions are fulfilled, this status ‘deemed as authorised’ is not conditional or limited in time. This means that provided the vehicle is well maintained and continues to comply with the rules valid at time of its admission it should be allowed to operate in all Contracting States, even if the rules have changed.

2.7. WITHDRAWAL OF VEHICLE ADMISSIONS

Article 10a § 2 ATMF concerns the withdrawal of Certificates of Operation and stipulates:

A Certificate of Operation may be withdrawn

a) when the railway vehicle no longer satisfies

- the prescriptions contained in the UTP and in applicable national provisions in force according to Article 12 of the APTU Uniform Rules, or

- the special conditions of its admission under Article 7a or

- the construction and equipment prescriptions contained in RID or

b) if the keeper does not comply with the requirement of the competent authority to remedy the defects within the prescribed time or

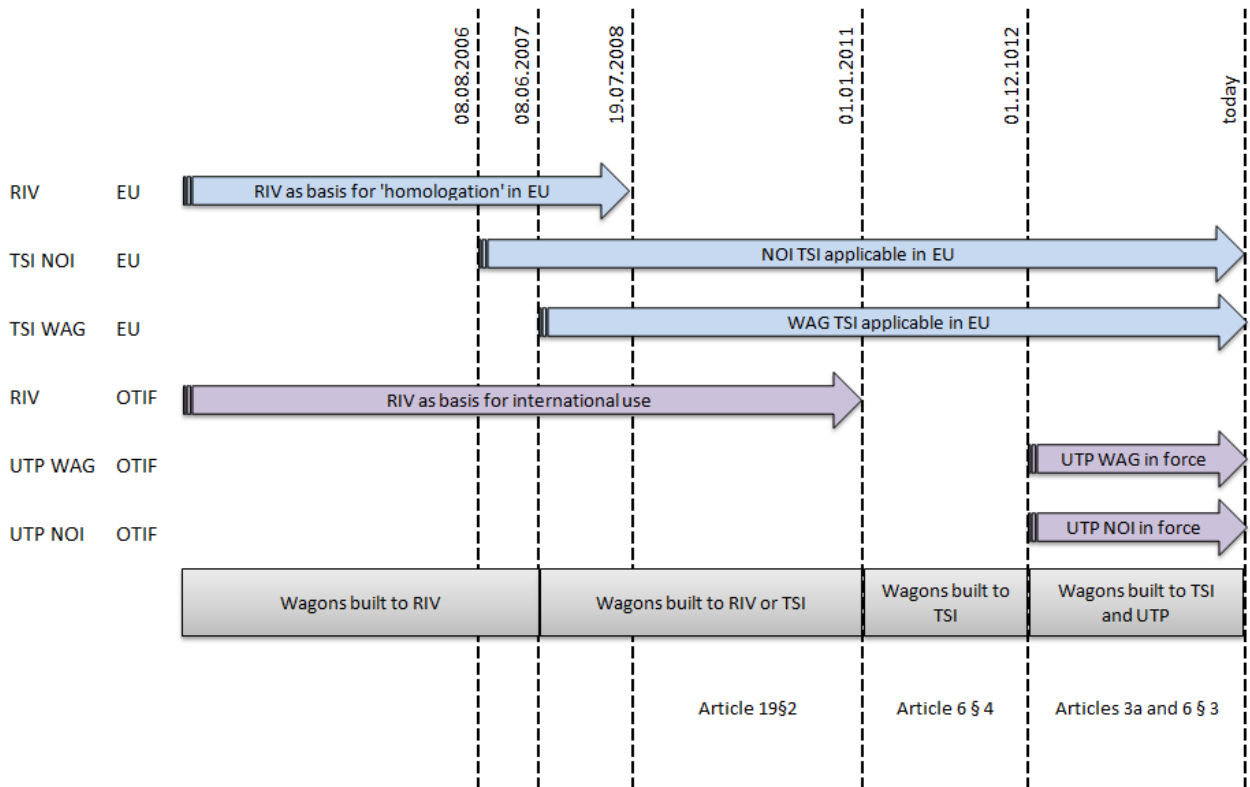
c) when stipulations and conditions resulting from a limited admission under Article 10 § 10 are not fulfilled or complied with.

The first indent of letter a) should be understood in relation with Article 7 §1a ATMF, which states that compliance with the UTP applicable at time of admission should be maintained (as opposed to the latest UTP in force).

The Certificate of Operation for the vehicle may only be withdrawn by the competent authority that has granted the Certificate. The withdrawal should be documented in the National Vehicle Register under entry 10.

3. OVERVIEW OF DIFFERENT CASES

The COTIF provisions for vehicle admission have developed over the recent years. In order to draw the full picture and distinguish different cases, it is important to analyse not only the COTIF provisions but also the EU provisions applicable to freight wagons. The following diagram gives a basic and simplified overview of the different cases possible.



This diagram illustrates that existing vehicles may have been approved in accordance with different regimes.

3.1. RIV WAGONS

This section describes the provisions applicable for RIV wagons. In the context of this document a RIV wagon is a wagon that was used in international traffic on the basis of RIV provisions and has not been assessed for compliance with the TSIs or UTPs.

From 8.6.2007 the WAG TSI (EU Commission Decision 2006/861/EC) applied, which complemented the NOI TSI (EU Commission Decision 2006/66/EC) which applied since 8.8.2006. From that time RIV stopped being a basis for vehicle 'homologation' in the EU, with the possible exceptions of contracts already signed or under final phase of tendering procedure at entry into force of the TSI.

Until 1.1.2011 RIV could be used outside the EU as a basis for the use of wagons for international traffic, after that date all admission should have followed the provisions of ATMF. In the absence of UTPs this should have been done in accordance Article 6 § 4 by applying national technical requirements at a State-by-State basis. This principle would even apply if RIV were used as national technical requirements.

For RIV wagons the different cases are:

- RIV vehicles which were in service before 19.7.2008² have grandfather rights both in the EU and OTIF and therefore can be used in international traffic;
- RIV vehicles which were admitted before 1.1.2011 have grandfather rights in OTIF, which permits the use of these vehicles in international traffic.

² The new Directive (EU) 2016/797 extended the period for RIV wagons from 19.7.2008 to 15.6.2016. This extended deadline in practise applies to vehicles which were first authorised outside the EU, because from 19.7.2008 onwards all authorisations in the EU had to be granted in accordance with EU Directive 2008/57/EC on the basis of TSIs.

- Vehicles admitted to operation from 1.1.2011 onwards and marked RIV need admission to operation in accordance with Article 6 § 4, i.e. complementary admission in each State.

3.2. TSI WAGONS

In the context of this document a TSI wagon is a wagon that has been authorised for placing in service in the EU in compliance with the WAG TSI and the NOI TSI.

From 8.6.2007 the EU had technical provisions applicable for the authorisation of new freight wagons. Only from 1.12.2012 a full set of equivalent UTPs was in force. During the period from 8.6.2007 until 1.12.2012, the EU had a full set of TSIs for freight wagons, but there were no equivalent UTPs in force. As the equivalence provisions of Article 3a ATMF were not met, the authorisations issued in the EU in accordance with the TSIs were not valid in non-EU States.

From 1.12.2012 this equivalence was established with the entry into force of the UTP WAG and UTP NOI. These UTPs were equivalent with respectively EU Commission Decision 2006/861/EC as amended by Commission Decision 2009/107/EC and EU Commission Decision 2011/229/EU. Wagons authorised in the EU in accordance with these or later TSIs and meeting the conditions set out in Article 3a are, from 1.12.2012 onwards, deemed admitted to operation in all OTIF Contracting States.

3.3. UTP WAGONS

Until 1.12.2012, COTIF did not provide technical provisions for the international approval of freight wagons. From this date full equivalence existed between the COTIF and EU provisions for freight wagons. This meant that, provided the conditions of Articles 3 and 6 § 3 were met, UTP compliant wagons are not only admitted to international traffic in accordance with ATMF, but also deemed as authorised for placing in service in the EU.

3.4. OTHER WAGONS

Wagons in international service which do not fall in any of the other categories are supposed to have been admitted on the basis of bilateral- or multilateral agreements, or on a State-by-State bases in accordance with Article 6 § 4 ATMF.

4. HOW NOISE RETROFITTING COULD BE IMPOSED ON EXISTING WAGONS

Without suggesting it would or would not be justified, this chapter explores the possibility of imposing retroactive fitting of composite brake blocks to reduce pass-by noise of existing freight wagons.

- Wagons which were in use before 1.1.2011 have never been formally admitted to operation in accordance with ATMF. Article 19 § 5 ATMF gives competence to the CTE to decide that for duly justified interoperability or safety reasons, prescriptions introduced in the UTP shall be complied with within a certain deadline. It would then be in the competence of the CTE to answer the question whether or not noise requirements are covered under '*duly justified safety or interoperability reasons*' and if so if wagons should be retrofitted with composite brake blocks before a certain deadline.
- The certificate of a wagon admitted to operation in accordance with Article 6 § 4 is valid on a State-by-State basis. The States where the vehicle is admitted should, in principle, not require any retrofitting. Should the keeper of such a wagon seek additional admission in another State, this State could impose retrofitting by means of a national technical requirement in accordance with article 12 APTU.

- The certificate of a wagon admitted to operation on the basis of UTP/TSI in accordance with Article 6 § 3 ATMF remains valid unless the certificate is withdrawn. The entry into force of new UTP specifications with retroactive effect is not a basis for withdrawal. However, all wagons admitted in accordance with Article 6 § 3 comply with the UTP NOI or NOI TSI. So there will be no need for retrofitting.

5. REMAINING QUESTIONS CONCERNING MANDATORY RETROFITTING

This document shows that imposing retrofitting is challenging from a legal perspective. The analysis did not yet address the following questions that remain to be answered:

- Whether or not noise can be considered as a ‘*duly justified safety or interoperability reasons*’, as per Article 19 § 5 ATMF?
- The assessment of consequences as per Article 7a APTU, which requires that this *assessment shall indicate the likely impact for all Contracting States, operators and other relevant actors concerned. If the proposal has an impact on UTP other than the one for which the proposal is directly intended, these interfaces shall also be taken into account.* It is the duty of applicant (the State, regional organisation or association that proposes the modification of the UTP) to provide reasoning and justification. What if the impact is negative for one or several States?
- What would be the consequences if a State or number of States would make a declaration in accordance with Article 9 APTU that it will not apply or will apply only partially, the adopted UTP, so far as it concerns the railway infrastructure situated on its territory and the traffic on that infrastructure? Retroactive provisions and the possibility of declarations by States not to apply these provisions make a strange mix which could potentially harm the interoperability of existing wagons.

6. ALTERNATIVE TO IMPOSED RETROFITTING

Making retrofitting of freight wagons mandatory comes with several legal and procedural difficulties, as illustrated in this paper. At the same time rail freight noise is a very serious subject in a number of OTIF Contracting States.

These two facts suggest that also other possibilities for reducing rail freight noise could be explored, in particular those which have an effect at places where the noise problem occurs. In this respect the concept of ‘silent freight corridors’ may be a possible way forward. The idea is that pass-by noise could be defined as a parameter of compatibility between network and vehicle. It would then be the responsibility of the railway undertaking to ensure that it runs only ‘silent’ wagons on these defined corridors. The concept is not much different from the railway undertaking’s duty to ensure that e.g. the operating speed, the axle load and the gauge of the vehicles and the infrastructure are compatible.

Article 6 §2 ATMF would support such a concept: *An admission to operation allows the rail transport undertakings to operate a vehicle only on infrastructures compatible with the vehicle according to its specifications and other conditions of the admission; it is the responsibility of the rail transport undertaking to ensure this.* In addition, Article 15a ATMF clarifies that the railway undertaking, the infrastructure manager and the keeper must exchange information that will enable the railway undertaking to ascertain that his trains are compatible with the requirements of the infrastructure.

The advantage of making pass-by noise a train-infrastructure compatibility parameter is that it allows imposing pass-by noise requirements where it matters most, without imposing retroactive rules to entire fleets. Presumably this would particularly concern heavily used corridors, such as the Rotterdam Genoa corridor running through NL, DE, CH and IT. As this kind of corridor is heavily used, the

relative costs per km for retrofitting wagons running on it may be limited. Of course also this alternative comes with downsides, such as an increased administrative burden, possible unclarity of local rules, limitation of interoperability, etc. At the same time these downsides should be compared to the alternative of mandatory retrofitting of entire fleets.

7. CONCLUSION

Should a Member State or group of Member States of OTIF be of the view that freight wagons should be retrofitted with composite brake blocks by a certain deadline, the following is identified in this analysis:

A State can at any time impose any rule on vehicles used only in national traffic as COTIF just applies to international traffic. Vehicles coming from other Contracting States should not be hindered in international traffic by such a rule.

Any group of States can agree, in the form of a bi-or multilateral agreement, to impose rules in addition to COTIF as long as these rules are compatible with COTIF. These rules would apply for vehicles used only in the States that take part in the agreement. Vehicles coming from other Contracting States should not be hindered in international traffic through the States that take part in the agreement.

Based on the accession agreement between OTIF and the EU and Article 3a § 3 ATMF, vehicles intended to be used only in Member States of the EU³ are regulated by the applicable EU and national legislation. This means that the EU can impose, for vehicles intended to be used only in the EU, rules which do not necessarily have to be compatible with ATMF. Such rules should however not hinder vehicles in international traffic coming from non-EU Contracting States when running through the EU, even when not complying with these EU rules. In other words, if EU rules would require retrofitting of wagons with composite brake blocks, these rules would not automatically apply to wagons coming from non-EU States.

The OTIF Committee of Technical Experts may adopt UTP provisions which require, for wagons not admitted in accordance with ATMF (such as RIV wagons), compliance within a certain deadline in accordance with Article 19 § 5 ATMF. Wagons which in the past have been formally issued a Certificate of Operation in accordance with ATMF will in principle not be subject to retroactive UTP requirements, as in general such a certificate was issued for an unlimited period (Article 10 § 9) and remains valid until suspended or withdrawn.

Making retrofitting of freight wagons mandatory comes with several legal and procedural difficulties, as illustrated in this paper. At the same time rail freight noise is a very serious subject in a number of OTIF Contracting States. These two facts suggest that also other possibilities should be explored, for example the creation of 'silent freight corridors' where all freight wagons running on these corridors must be silent, but wagons not running on them would not be affected.

³ EU should be read here as to include Contracting States which apply relevant EU legislation as a result of international agreements with the EU, e.g. Switzerland and Norway.