

Position Paper III

REVISION OF COTIF – UR CUI (Appendix E) The Scope of Application & Definitions

6th November 2015

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 second Working Group (WG) session on 8th July 2015, OTIF has issued a new draft text of Article 1 on the scope of application of CUI, and has proposed new definitions in Article 3 for “carriers” and “train”.

The new draft text and definitions will be discussed at the 3rd OTIF WG on 24th November 2015 in Bern (Switzerland).

EIM – the Association representing the European rail infrastructure managers – has been closely following the revision procedure, providing input throughout the whole process. This new Paper covers the following issues brought forward by the latest of OTIF’s 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”, “train” and “International train”.

1. The scope of application

The first point concerns Article 1 of the CUI setting the definition of the scope of application of the UR. OTIF’s new draft text links the scope of application to a “train” performing “International railway traffic” between two States – at least one of which is a Member State.

According to the OTIF’s revision committee, linking the scope of application to “International railway traffic” will make sure that the CUI – as well as the CIM and CIV – has not been created for domestic traffic. This would comply with the decision previously endorsed during the negotiations not to extend the scope of application to national traffic.

Furthermore, the wording “International railway traffic” should be considered within the meaning of Article 6 of COTIF.

Eventually, it has been proposed that International railway traffic would be performed between “two States”, as this would ensure consistency with Article 1(2)² of the CIM UR.

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

² *“These Uniform Rules shall apply also to contracts of carriage of goods by rail for reward, when the place of taking over of the goods and the place designated for delivery are situated in two different States, of which at least one is a Member State and the parties to the contract agree that the contract is subject to these Uniform Rules”* – Article 1(2) Uniform Rules Concerning the Contract of International Carriage of Goods by Rail (CIM).

Recommendation

- **The concept of “International railway traffic” in the scope should be defined in a clearer way. The reference to Article 6 of COTIF, made in the Explanatory Report, should be removed.**

Justification

The main objective with regard to the scope of application should be a clarification of the scope. In this regard, EIM welcomes the fact that the new draft text of Article 1 of CUI – by referring to “International rail traffic” – seems to exclude the possibility of an extension of the UR to domestic traffic.

The main argument supporting a connection between the scope of application and “International railway traffic” is the reference to Article 6 of the COTIF³. Accordingly, this link would provide the consistency necessary to avoid the need of seeking new definitions.

However, it should be pointed out that Article 6 of the COTIF merely mentions the wording “International rail traffic”. It does not provide for any conceptualisation of the term and simply refers back to the different Appendixes, including the CUI. Therefore, there is no added value in the link with Article 6 of COTIF, and a definition for “International rail traffic” would still have to be identified and clarified.

2. Definitions

Two new proposals for the definitions of the terms “carrier” and “train”, both in Article 3 of the CUI UR, have been drafted.

Furthermore, the OTIF revision committee is exploring the possibility to identify a definition for “International train” by taking into account the following elements: 1) any operating unit – one or more wagon; 2) border crossing – intended/agreed by both parties to the contract of use (the actual border cross would not be necessary); 3) the use of rail infrastructure on the territory of at least either: two States or alternatively two Member States.

A prospective definition could be included either in Article 1 (scope) or Article 3 (definitions).

Recommendation

- **The definition of “train” shall not be linked to the scope of application and shall be carefully modified.**

Justification

In EIM’s view, the proposed definition of “train” is too broad and ambiguous. Notably the text defines a train as “operating unit”, which may refer to rolling stock. However, it should be

³ Article 6 Convention concerning International Carriage by Rail (COTIF) “Uniform Rules”

pointed out that “train” is not merely a “thing”, but an “action” – namely the action of running the rolling stock on the infrastructure according to a pre-determined schedule.

Moreover, the new draft Article 1 links the scope of application of the UR to such large definition. This may lead to an extension of the scope, potentially jeopardising the efforts of seeking clarity and certainty in the revision of CUI.

The definition of the term “train” shall thus be modified and clarified. In this regard, a solution could be that of linking the definition of train to the use of a “train path”. This would notably provide a reference to infrastructure capacity, which is the object of a contract between an infrastructure manager and a carrier.

Recommendation

- **“Carrier” should be read within the meaning of “entity” rather than “person”.**

Justification

Replacing the word “person” with “entity” would ensure a better legal clarity to the definition of “carrier”. As a matter of fact, not everyone may understand that “person” refers in fact to “legal person”.

Suggestion

- **A definition for “International train” could be investigated, and the possibility of linking the scope of application to such definition may be explored.**

Justification

EIM is open to the possibility of looking for a definition of “International train”. There would be an additional fourth element – beyond those mentioned by the OTIF – to prospectively include in the definition: an International train would be “performing International transport, which would imply the use of several train paths”.

Following this further, EIM would like to propose to link the scope of application of the CUI UR with a newly defined concept of International train. In this regard, it should be recalled that during the negotiations “International train” has already been chosen over other options – e.g. “International transport service” – to be connected with the scope of application of the UR for ensuring greater legal certainty.

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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.