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NOTE

From:	General Secretariat of the Council
To:	Delegations
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Subject:	COUNCIL DECISION on the position to be taken on behalf of the European Union at the 26th session of the OTIF Revision Committee as regards certain amendments to the Convention concerning International Carriage by Rail (COTIF) and to the Appendixes thereto

Attached is the annex to the above-mentioned Council Decision.

ANNEX

1. INTRODUCTION

OTIF Secretariat General (SG) has convened the 26th session of the Revision Committee of COTIF99 in Berne, Switzerland, 27 February – 01 March 2018. Documents concerning the agenda items are available on the website of OTIF at the following link: http://otif.org/en/?page_id=126

2. COMMENTS ON AGENDA ITEMS

Agenda Item 1 – Opening of the meeting and establishing the quorum

Document(s): none
Competence: Union (shared)
Exercise of voting rights: n/a

Position: none

Agenda Item 2 – Election of chair and vice chair

Document(s): none
Competence: Union (shared)
Exercise of voting rights: Member States

Position: none

Agenda Item 3 – Adoption of the agenda

Document(s): LAW-17125-CR 26/3.1
Competence: Union (shared and exclusive)
Exercise of voting rights: Union

Position: In favour of the adoption of the draft agenda

Agenda Item 4 – Modification of the Rules of Procedure

Document(s): LAW-17125-CR 26/4
Competence: Union (shared and exclusive)
Exercise of voting rights: Union

Position: Support proposed draft amendments to the Rules of Procedures of the OTIF Revision Committee, with the exception of the following points:

a. Article 9(2) of the Rules of Procedure should provide for "*The period shall be 12 weeks if the document is submitted in all three working languages.*"; and

b. the change to Article 9(4) of the Rules of Procedure on voting in the absence of language versions is rejected.

The current version of the Revision Committee's Rules of Procedure is anterior to Union's accession to the COTIF Convention; certain provisions are therefore obsolete and need to be updated. In particular, provisions governing the rights to vote of the Union and establishing the quorum (Articles 4, 20 and 21) have to be modified in order to comply with Article 38 of the COTIF and with the EU-OTIF Agreement.

Agenda Item 5 – Partial revision of the base Convention: amendment of the procedure for revising COTIF

Document(s): LAW-17126-CR 26/5
Competence: Union (shared)
Exercise of voting rights: Member States

Position: Support the adoption of the proposed revision of Article 34 of the Convention to provide for a fixed time period (36 months) for the entry into force amendments to the Appendices adopted by the General Assembly, including the clause of flexibility to extend such deadline on a case-by-case basis, where so decided by the General Assembly by the majority provided for under Article 14 § 6 of COTIF.

The proposal aims at improving and facilitating the procedure for revising the COTIF Convention with a view to the consistent and rapid implementation of amendments to the Convention and its Appendices, and in order to prevent adverse effects of the current lengthy revision procedure, including the risk of internal misalignment between amendments adopted by the Revision Committee and those adopted by the General Assembly, as well as external misalignment, particularly with Union law. The recommendation from the OTIF Secretariat reflected the dominant view within the relevant working group that dealt with this matter; it was established that OTIF Members should be capable of transposing adopted amendments, including through parliamentary procedures, within three years. The proposal appears necessary to support the efficient functioning and development of OTIF.

Agenda Item 6 – Partial revision of the CIM UR – Secretary General's report

Document(s): LAW-17126-CR 26/6
Competence: Union (shared and exclusive)
Exercise of voting rights: Union (in case a vote takes place)

Position: Take note of the Secretary General's report, provide some information on relevant on-going activities and developments, encourage further work on the assessment of interfaces between customs and rail transport regulations, and support the establishment of a working group of legal experts, or alternative coordination arrangements within existing OTIF bodies, concerning customs issues and the digitalisation of freight transport documents.

Agenda Item 7 – Partial revision of the CUI UR

Document(s): LAW-17128-CR 26/7.1; LAW-17129-CR 26/7.2
Competence: Union (shared)
Exercise of voting rights: Member States

Position: Support the proposals for amendments to Articles 1 § 1 and 2, 3 (new letter aa) and amendments to letters b), c) and g)), 5 § 1, 5bis § 1 and 2, 7 § 2, 8 § 1 and 2, 9 § 1, and 10 § 3 CUI, and request the Secretary General of OTIF to submit all the modifications to the CUI UR to the General Assembly for decision.

The main substantial modification aim at clarifying the scope of the CUI UR by introducing a definition in Article 3 of *"international railway traffic"* to mean *"traffic which requires 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"*, and by amending Article 1 (Scope) accordingly, while keeping the link with CIV and CIM UR.

The objective is to ensure that the CUI UR are more systemically applied for their intended purpose, i.e. in international railway traffic. The draft amendment as proposed to the Revision Committee corresponds to the compromise text resulting from the work of the ad hoc working group within OTIF, which met on 10 December 2014, 8 July 2015, 24 November 2015 and May 31, 2016. The Commission contributed to the resulting outcome, which, in accordance with the scope and objective of the COTIF Convention, i.e. international carriage, confirms the application of CUI UR in international railway traffic, as set out in the new definition.

The Commission assessed that the draft amendments to Articles 1 and 3, as proposed by the OTIF Secretariat, are consistent with the definitions and provisions of the Union acquis regarding the management of rail infrastructure and the coordination between infrastructure managers (e.g. Articles 40, 43 and 46 of Directive 2012/34/EU (recast)).

As regards the draft amendment proposed by the OTIF Secretariat to Article 8 (Liability of the manager), this is essentially editorial and does not affect the scope or substance of the provision. The draft amendments proposed to Article 9 as well as to Articles 3, 5, 5bis, 7 and 10 are strictly editorial.

Agenda Item 8 – New Appendix H regarding the safe operation of trains in international traffic

Document(s): LAW-17130-CR26/8/9/10; LAW-17131-CR26/8.1; LAW-17132-CR 26/8.2
Competence: Union (exclusive)
Exercise of voting rights: Union

Position:

Support (LAW-17131-CR26/8.1) the inclusion of a new Appendix H to COTIF regarding the safe operation of trains in international traffic for decision of the General Assembly, subject to the following (deletion – strikethrough; addition – underlined, where appropriate):

– In Article (2)(b): Replace *"Certification Authority"* by *"Safety Certification Authority"*. The substitution should be implemented consequently throughout the text. In German: *"Sicherheitsbescheinigungsbehörde"* instead of "*Zertifizierungsbehörde*". In French: *"autorité de certification de sécurité"* instead of "*autorité de certification*".

– Article 4(1): Add the sentence *"The Safety Certification Authority and the Supervision Authority mentioned in Article 6(1) may be two separate entities or they may be incorporated into the same organisation."*

– Article 6(1): Add the sentence *"The Supervision Authority and the Safety Certification Authority mentioned in Article 4(1) may be two separate entities or they may be incorporated into the same organisation."*

– In Article 8(3): Modify the text so as to read as follows: "In order to implement the requirements of these Uniform Rules in a harmonised way, the Annexes to these UR shall include:

~~*a) Elements of the safety management system to be implemented by railway undertakings and infrastructure managers;*~~

~~*b)*~~*a) A Common Safety Method for safety management system requirements to be applied by Safety Certification Authorities when issuing Safety Certificates* *and by railway undertakings and infrastructure managers when developing, implementing, maintaining and improving their safety management systems*;

~~*c)*~~*b) A Common Safety Method on monitoring to be applied by railway undertakings* ~~*and, where relevant*~~*, infrastructure managers* *and entities in charge of maintenance*;

c) The necessary links to the Common Safety Method on risk evaluation and assessment to be applied by the railway undertakings, infrastructure managers and entities in charge of maintenance when making any technical, operational or organisational change to the railway system;

d) A Common Safety Method on supervision to be applied by Supervision Authorities."

– In Article 2(f), editorial improvement, alignment with Union terminology (German version): "*„Eisenbahnsystem“ das Schienennetz in jedem Vertragsstaat, bestehend aus ~~Linien~~Strecken, Bahnhöfen, Drehscheiben und Terminals* ".

– In Article7(4), editorial improvement (German version): *"Die am Betrieb von Zügen im internationalen Verkehr beteiligten Infrastrukturbetreiber und Eisenbahnunternehmen haben ~~ihr~~ein Sicherheitsmanagementsystem einzurichten und dessen korrekte Anwendung in Übereinstimmung mit diesen Einheitlichen Rechtsvorschriften zu kontrollieren."*

Agree to request the Secretary General to amend the Explanatory Report in support of the new Appendix H and submit it to the General Assembly for approval.

Support (LAW-17131-CR26/8.2), for the purpose of the inclusion of the new Appendix H into COTIF, the modifications to Articles 2, 6, 20, 33 and 35 of COTIF, and agree to request the Secretary General to submit them to the General Assembly for decision.

The draft new Appendix H sets out provisions to regulate the safe operation of trains in international traffic with the objective to harmonise COTIF with the Union's acquis and support interoperability beyond the European Union. The proposed text is in line with the provisions of the new safety Directive (EU) 2016/798 and the related secondary legislation, save for minor issues which should be addressed in accordance with the above proposals. As indicated, it is also necessary to modify certain provisions of the COTIF Convention for the purpose of the inclusion of this new Appendix H.

Agenda Item 9 – Partial revision of the ATMF UR

Document(s): LAW-17130-CR26/8/9/10; LAW-17133-CR26/9; LAW-17134-CR26/09-10
Competence: Union (exclusive)
Exercise of voting rights: Union

Position: Support the partial revision of the ATMF UR as proposed by the OTIF Secretariat, subject to the following (deletion – strikethrough; addition – underlined, where appropriate):

– In Article 7(1a), modify the text so as to read as follows: " *Vehicles shall comply with the UTPs applicable at the time of the request for admission, upgrading or renewal, in accordance with these Uniform Rules and taking into account the migration strategy for application of the UTPs as set out in Articles 8(2a) and 8(4)(f) of the APTU, and the possibilities for derogations set out in Article 7a of the ATMF; this compliance shall be permanently maintained while each vehicle is in use*.

– *The CTE shall consider the need of developing an Annex to these Uniform Rules including provisions allowing applicants to get increased legal certainty on the prescriptions to be applied, already before they submit their request for admission, upgrading or renewal of vehicles.*"

– In Article 2(w), modify the definition and use the term *"vehicles"* consistently throughout the text (all languages). The definition should read: *"vehicles" means a railway vehicle suitable to circulate on its own wheels on railway lines with or without traction."* The term "*vehicle(s)*" should be used throughout the text, and not the term *"railway vehicle(s)",* which figures in some places.

– In Article 5, editorial improvement (German version): Replace "*Notifikation*" by "*Notifizierung*" in *"Jeder Vertragsstaat hat durch ~~Notifikation~~Notifizierung […]."* and further *"Die ~~Notifikation~~Notifizierungen können durch regionale Organisationen, die dem COTIF beigetreten sind, im Namen von Vertragsstaaten, die Mitglied der betreffenden Organisation sind, vorgenommen werden."*

– In Article 10, editorial improvement (German version): Replace "*Verzeichnis*" by "*Dossier*" in *"Wenn eine neue Betriebszulassung erforderlich ist, hat der Antragsteller dem betreffenden Vertragsstaat ein das Vorhaben beschreibendes ~~Verzeichnis~~Dossier zu übersenden."* and further *"Der Vertragsstaat hat seine Entscheidung spätestens vier Monate nach der Vorlage des voll-ständigen ~~Verzeichnis~~Dossiers durch den Antragsteller zu treffen".*

– In Article 13(1)(a), editorial improvement (English and German versions): Replace CTE by the full name of the Committee in *"comply with the specifications adopted by the ~~CTE~~Committee of Technical Experts;"* and *"mit den vom ~~CTE~~Fachausschuss für technische Fragen angenommenen Spezifikationen übereinstimmen;".*

– Add the following Article 14: *"Article 14 - Annexes and recommendations*

§ 1 The Committee of Technical Experts shall decide whether to adopt an Annex or a provision amending it in accordance with the procedure laid down in Articles 16, 20 and 33 § 6 of the Convention. The decisions shall enter into force in accordance with Article 35 §§ 3 and 4 of the Convention.

§ 2 An application for adoption of an Annex or a provision amending it may be made by: a) any Contracting State; b)any regional organisation as defined in Article 2 x) of ATMF; c) any representative international association for whose members the existence of the Annex is indispensable for reasons of safety and economy in the exercise of their activity.

§ 3 The preparation of Annexes shall be the responsibility of the Committee of Technical Experts assisted by appropriate working groups and the Secretary General on the basis of applications made in accordance with § 2.

§ 4 The Committee of Technical Experts may recommend methods and practices relating to the technical admission of railway material used in international traffic."

The provisions of the ATMF UR are compatible with the provisions of the European Union's Interoperability Directive 2008/57/EC and with part of the Safety Directive 2009/49/EC. With the adoption of the fourth railway package, the Union changed several provisions of this acquis. On the basis of an analysis by the Commission, the OTIF Secretariat and the relevant working group prepared modifications concerning Articles 2, 3a, 5, 6, 7, 10, 10b, 11 and 13 of the ATMF UR. These modifications are necessary in order to harmonise some terminology with the new EU provisions and to take into account some procedural changes in the EU, in particular the fact that the EU Agency for Railways will be competent to issue vehicle authorisations. The basic concept of ATMF is not affected by the proposed changes.

Agenda Item 10 – Partial revision of the APTU UR

Document(s): LAW-17130-CR26/8/9/10; LAW-17135-CR26/10; LAW-17134-CR26/09-10
Competence: Union (exclusive)
Exercise of voting rights: Union

Position: Support the adoption of the modifications to Article 8 of Appendix F to the COTIF and the approval of the modifications to the relevant Explanatory Report.

The provisions of the ATMF UR are compatible with the provisions of the Interoperability Directive 2008/57/EC, in particular those concerning the content of Uniform technical Prescriptions (UTPs) and their equivalence with the European Union Technical Specifications for Interoperability (TSIs). With the adoption of the fourth railway package and in particular the recast Interoperability Directive (EU) 2016/797, the Union changed several provisions of this acquis. On the basis of an analysis by the Commission, the OTIF Secretariat and the relevant working group prepared modifications to APTU UR to ensure continued harmonisation with Union law. The modifications concern Article 8 of the APTU UR and consist in the addition of two sections in the content of the UTPs equivalent to the EU TSIs. These changes are necessary in order to ensure that the content of future European Union TSIs and COTIF UTPs remains equivalent. The basic concept of APTU is not affected by the proposed changes.

Agenda Item 11 – General discussion on the need to harmonise access conditions

Document(s): LAW-17130-CR26/11
Competence: Union (shared)
Exercise of voting rights: n/a

Position: none

Agenda Item 12 – Any other business

Document(s): LAW-17130-CR26/12
Competence: Union (shared)
Exercise of voting rights: Member States

Position: Not oppose the setting up of a working group of legal experts to assist and facilitate the functioning of the existing organs of OTIF in the legal field and to ensure the effective management of the Convention.

Agenda Item 13 – Partial revision of the CUV UR

Document(s): LAW-17144-CR 26/13 (Proposal transmitted by Switzerland)
Competence: Union (shared)
Exercise of voting rights: Member States

Position: Oppose the proposal for consideration of amendment of Article 7 of the CUV UR submitted by Switzerland.

Article 7, paragraph 1 of the CUV UR, deals with the liability of the vehicle keeper and the user of the vehicle (railway undertakings) in the event of damage caused by the vehicle and which has its origin in a defect of the vehicle. The draft amendment proposed adds a new criterion to provide proof of the keeper's liability for damage caused by a defect in the vehicle. Under the current Article 7 of the CUV UR, if applied by the contracting parties, the holder of the vehicle is liable only if it is proven that the damage caused by the vehicle comes from a fault for which he is responsible. The amendment proposal seems to add a second criterion which would be that the holder has to prove that he is not responsible for the defect which is at the origin of the damage.

Paragraph 2 of the current Article 7 of the CUV specifies that *"the parties to the contract may agree on provisions derogating from paragraph 1"*. On that basis, the companies in the sector negotiated between 2013 and 2016, resulting in an agreement approved by 600 rail companies and allowing the necessary amendments to the single general Contract of Use for wagons (GCU) to better clarify the responsibilities of the wagon owners. The signed agreement introduced a new Article (27) in the GCU concerning the principle of liability in the case of damage caused by a wagon, in order to achieve a better balance and provide more clarity for the whole sector in the event of damage caused by a wagon. It introduces the notion of *"presumption of fault"* which allows incurring the liability of the keeper for a fault of the vehicle caused by a breach of its maintenance obligation. This amendment has been applicable since 1 January 2017. Today, most keepers and railway undertakings operating in the Union apply the GCU. The Swiss proposal is therefore not necessary because the agreements reached by the companies in the sector is sufficient to clearly define the responsibilities of the keeper and railway undertakings in the event of damage caused by a vehicle under a contract of sale. There are no indications that this agreement fails to strike a proper balance between the interests of the respective parties. Also, the proposal does not provide a robust rationale and sufficient justification for the proposed amendments.