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OUTCOME OF PROCEEDINGS

From:	General Secretariat of the Council
To:	Delegations
No. prev. doc.:	7962/23
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Subject:	Intergovernmental Organisation for International Carriage by Rail (OTIF): Common position at the 4th session of the OTIF Ad Hoc Committee on Legal Affairs and International Cooperation, 18-20 April 2023 – Outcome of proceedings

1. The Ad Hoc Committee on Legal Affairs and International Cooperation has been set up by the 15th General Assembly of the Intergovernmental Organisation for International Carriage by Rail (OTIF) in September 2021. The 4th meeting of the Ad Hoc Committee is planned for 18-20 April 2023.
2. On 28 March 2023, the Commission sent to the Council a non-paper¹ with annotated agenda to inform delegations on the work done for preparing for the 4th meeting and to lay out a draft position to coordinate for the meeting.
3. The “Land Transport” working party examined the non-paper at its meetings on 29 March and 5 April 2023, discussing at the latter date on the basis of a Presidency compromise paper². Delegations commented on the draft position and the suggested distribution of competences, also in writing. Some delegations expressed scrutiny reservations.

¹ ST 7693/23.

² ST 7962/23.

4. At the meeting on 5 April 2023, the Commission representative outlined the planned way forward in respect of item 3 on the Committee's agenda, for which the development of a Union position in respect of recommendations for follow-up requires more time. Following interventions from delegations, the Presidency introduced changes to the compromise document regarding the competences in order to better reflect the standing coordination arrangements.
5. The Presidency concluded that there was broad support for the draft common position, which is outlined in the Annex, and announced that, given the absence of meetings of Coreper or Council before 18 April 2023, Member States would be asked for their approval in writing.

Common position at the 4th session of the OTIF Ad Hoc Committee on Legal Affairs and International Cooperation, 18-20 April 2023

(with annotated agenda)

Introduction

The OTIF ad hoc Committee on Legal Affairs and International Cooperation ('the ad hoc Committee') was established by the 15th General Assembly. It held its third session on 4-6.10.2022. This document aims at establishing the EU position (*italic*) on the agenda items, except for those that are just information points and a Union position is not necessary. The text of the annotated agenda is reproduced under each relevant agenda item (*frame, italic*).

EU competence

The EU is a contracting party to the Convention concerning International Carriage by Rail (COTIF). In respect of this meeting's agenda items, considered to deal with matters containing elements of both national and Union competence, point 3.3 of the "Internal Arrangements" (Annex III of Council decision 2013/103/EU) should be followed. On item 2 (long-term strategy), item 3 (suspension of membership) and item 10 (gender-neutral language), the Commission and the Presidency will speak, and the Commission will vote. On items 1, 4, 5, 8, 9, 11, the Presidency and the Commission will speak, and Member States will vote. Member States may intervene to support and/or develop the common position. Subject to coordination on the spot, minor changes to the common position may be conducted.

Item 1. Adoption of the agenda

The agenda prepared by the Secretariat, completed and adapted if necessary, depending on proposals received from the Member States and the regional organisation, will be submitted for approval.

Comments

Documents of the session: LAW-23007-JUR 4/1, LAW-23013-JUR 4/1

Proposed EU position

- *Agree to the agenda as set out in 'Provisional agenda and annotated provisional agenda' and 'Provisional agenda and annotated provisional agenda and references to documents'*

Item 2. Development of a long-term strategy for OTIF

In accordance with its 2022-2024 Work Programme, the ad hoc Committee [...] should assist the Secretary General in the preparation of a long-term strategy based on the decision of the General Assembly. At its 15th session the General Assembly: instructed the Secretary General, in consultation with the organs of OTIF, in particular the ad hoc Committee on Legal Affairs and International Cooperation, to prepare a long-term strategy for OTIF and submit it for adoption to the next ordinary session of the General Assembly which is scheduled for autumn 2024 [...].¹ At its 2nd session (April 2022), the ad hoc Committee adopted a work plan for the development of OTIF's long-term strategy. At its 3rd session (October 2022), it took note of the following documents: 'Development of a long-term strategy for OTIF. Background analysis' and 'Development of a long-term strategy for OTIF. Draft strategy document' and instructed the Secretariat to update these two documents, taking into account the discussions at this session. The revised documents were to be submitted to the next session.

In accordance with the action plan, the ad hoc Committee should consider the following step at its 4th session: '2) Re-examination, specification and prioritisation of the strategic goals'.

The ad hoc Committee is invited to resume the discussions on this topic on the basis of a revised background analysis and a draft strategy document prepared by the Secretariat on the basis of the decisions taken at the 2nd and 3rd sessions.

Comments

Documents of the session: LAW-23014-JUR 4/2, LAW-23015-JUR 4/2, LAW-23016-JUR 4/2

Reference is made to the position of the EU on this issue at the 15th OTIF General Assembly in September 2021² and at the 3rd session of the ad hoc Committee.

It was noted that the two main working documents (Background analysis, Draft strategy document) have been slightly revised, in line with the discussion of the ad hoc Committee at the 3rd session, although there is still no clear articulation between the two documents, or to say otherwise, between the challenges identified, the strategic goals and the operational objectives.

¹ See point 7.4 of OTIF-21001-AG 15 'Final Document'

² Council Decision (EU) 2021/1744 of 28 September 2021 establishing the position to be adopted on behalf of the European Union at the 15th General Assembly of the Intergovernmental Organisation for International Carriage by Rail (OTIF), OJ L 351, 4.10.2021, p. 1–10

There can be no strategy without some sort of evaluation of OTIF's current performance; while the background analysis is well structured and describes effectively the context, it does not provide much concrete information about the actual problems faced by OTIF in its mission. For example, the precise mapping of the implementation and application of COTIF Appendixes by OTIF members is missing – and it is known for a fact that many OTIF members do not apply all COTIF Appendixes or do not implement the requirements in a uniform manner. This should be one of the main strategic goals of OTIF's long term strategy: to significantly increase the application of COTIF Appendixes in the OTIF region and to ensure their uniform implementation. Similarly, the current draft documents do not sufficiently elaborate on the approach for extending the geographical application of COTIF, i.e. to expand the membership of OTIF. The strategy should identify the countries or regions, where OTIF should focus its efforts and priorities.

Some non-EU OTIF members have concluded agreements with the EU that require the implementation of the EU rail acquis in these countries; this should also be documented in the background analysis. As per the last bullet point of the revised 'Draft strategy document', it is also noted that the Secretary-General proposes that the operative goals (or operational objectives) are defined separately in OTIF's biannual work programme.

Proposed EU position

- *Comment that the linkages between the 'Background analysis' and the 'Draft strategy document' are unclear; for example, the conclusions reached at the 3rd session and reported in points 33 and 47 of the revised 'Background analysis' are not reflected in the revised 'Draft strategy document';*
- *Suggest to restructure the documents to highlight explicitly the relations between the challenges (background analysis) and the corresponding strategic objectives (draft strategy document);*
- *When discussing the strategic objectives, there are some general principles that could be taken into account. Objectives should be specific, measurable and relevant to the overall goal of OTIF. Therefore, improvements could be proposed along the lines:*

Suggest to shorten and reorder the list of strategic objectives that should focus on the following core issues:

1. *Improve the application of OTIF law over the widest possible geographical area.*
2. *Enhance OTIF leading role in international cooperation in rail transport and contribute to finding synergies with other relevant international organisations and associations.*
3. *Contribute to the harmonisation and unification of international railway law systems.*
4. *Ensure that OTIF's legal framework remains relevant over time.*

Item 3. Suspension and termination of COTIF and/or membership of OTIF with regard to a particular Member State

In a written procedure on 4 August 2022, the ad hoc Committee decided to include the topic of 'suspension and termination of COTIF and/or membership of OTIF with regard to a particular Member State' in its Work Programme. The objective and scope of work are as follows: 'review OTIF and international law rules and relevant practice on suspension and termination of treaties and membership including limitation of some rights.' At its 3rd session, the ad hoc Committee took note of the inception paper prepared by the Secretariat (LAW-22082 JUR 3/5) and decided to adjourn discussions on this matter.

At its 4th session, the ad hoc Committee is invited to resume the discussions and to consider, in particular, the following questions: – Whether, as a general rule, sanctions for the breach of OTIF rules should only be imposed if expressly provided for by COTIF. – Whether COTIF should set out sanctions for a breach of international law in general when its own rules are not breached. If so, what potential breaches should be included? – Whether COTIF should set out sanctions for breaches other than non-payment of contributions. If so, what potential breaches should be included? – Which OTIF organ should be responsible for deciding whether the relevant rules have been breached? – Which OTIF organ should decide on the application of sanctions, the restoration of rights and the readmission of expelled Member States and by what majority? – Should circumstances precluding the wrongfulness of an act be expressly included in COTIF? – In case of expulsion, should the readmission of expelled members follow the same procedure as for the admission of new members or should the procedure be different? Should any specific conditions be imposed?

The ad hoc Committee is also called to decide whether to:

- a) adjourn discussions on the suspension and termination of COTIF and/or membership of OTIF with regard to a particular Member State to the 5th session;*
- b) decide that the discussions should be closed and that the existing provisions of COTIF should not be supplemented by additional rules and procedures for the suspension and termination of COTIF and/or membership of OTIF with regard to a particular Member State;*
- c) instruct the Secretariat to prepare a proposal to modify COTIF, taking into account the guidelines established by the ad hoc Committee at this session.*

Comments

Documents of the session: LAW-23017-JUR 4/3

This item of the work programme was introduced at the request of the UK during the 2nd session. The objective was to create a formal process to examine this issue. The inception paper prepared by the Secretariat at the 3rd session assesses relevant international and OTIF law and practice on the suspension and termination of treaties and membership of international organisations.

The inception paper highlights the following main elements:

- Law and practice of international organisations: in general, sanctions are linked to a patent breach of the obligations undertaken within the international organisations concerned;
- While in COTIF the only sanction mechanism concerns the non-payment of contributions to the budget, the possibility of taking countermeasures against a Member State that has severely breached the rules of OTIF (threat to the functioning of the organisation) is in theory possible, even in absence of explicit legal provisions;
- The rules and functioning of OTIF must be based on general principles of law, so that each case of an alleged breach of an obligation must be examined to determine the infraction and any circumstances preventing the fulfilment of the obligations;
- OTIF is by nature a technical organisation with a limited aim, which is to promote and facilitate international railway traffic.

Proposed EU position

- *The 4th meeting of the ad hoc Committee should be used to further review the relevant law and practice and seek clarification where necessary;*
- *As regards follow-up action, propose to adjourn discussions on the suspension and termination of COTIF and/or membership of OTIF with regard to a particular Member State to the 5th session*

Item 4. Use of electronic signatures in official communications between OTIF and its members

In accordance with its 2022-2024 Work Programme [...], the ad hoc Committee should 'examine the legal requirements for the use and acceptance of electronically signed documents (credentials, letters, approvals, reservations, depositary notifications etc.) in official communications between OTIF and its members.' As a result of the above examination, it should 'issue a recommendation on the use and acceptance of electronic signatures in official communications between OTIF and its members'. The ad hoc Committee is invited to discuss this topic on the basis of an inception paper prepared by the Secretariat and to decide on general instructions for the preparation of the recommendation. In addition, in accordance with Article 25 of its Rules of Procedure, the ad hoc Committee may wish to set up a Drafting Working Group to prepare the draft recommendation for adoption at its 5th session.

Comments

Documents of the session: LAW-23018-JUR 4/4, LAW-23019-JUR 4/4

Proposed EU position

- *Take note of the information presented by the Secretariat (inception paper);*
- *Support the preparation of a draft recommendation, preferably prepared by the Secretariat, on the use of electronic signature in official communications between OTIF and its members, for consideration and possible adoption at the next session of the ad hoc Committee;*
- *As regards general principles, the different level of experience of OTIF members with electronic signatures should be considered, and therefore it appears appropriate that the recommendation, in a first phase, covers “simple” communications only.*

Item 5. Information from the Secretariat

The Secretary General and the Secretariat’s Legal Department will inform the ad hoc Committee about relevant developments in the fields of legal and international cooperation, in particular: • the status of the Convention and OTIF membership (including the approval of modifications to COTIF adopted by the 12th and 13th General Assemblies); • progress on the nomination of focal points and registered stakeholders; • UNECE initiative on Unified Railway Law; • UNCITRAL work on negotiable multimodal transport document; • cooperation with international intergovernmental organisations and international associations; • progress on other items in the Work Programme of the ad hoc Committee; • information about the Luxembourg Protocol.

Comments

Documents of the session: LAW-23020-JUR 4/5

Proposed EU position

- *Take note of the information presented by the Secretariat*

Note: This Union position is without prejudice to Member States interventions in case the Secretariat asks about the state of the UNECE consultation on Unified Railway Law

Item 6. Information from members of the ad hoc Committee

OTIF members may wish to inform the ad hoc Committee about relevant developments and activities in the field of international railway transport.

Item 7. Information from the registered stakeholders and intergovernmental organisations

Registered stakeholders and intergovernmental organisations may wish to inform the ad hoc Committee about relevant developments and activities in the field of international railway transport. Suggestions with regard to the Work Programme may also be made under this agenda item.

Item 8. Application of the CUI UR¹ to service facilities

In accordance with its Work Programme, the ad hoc Committee should 'examine the issue of the application of the CUI UR to service facilities. In particular, it should be established whether the CUI UR apply and to what extent'. As a result of the above examination, it should 'issue an advisory opinion'.

The ad hoc Committee is invited to discuss this topic on the basis of an inception paper prepared by the Secretariat and to decide on general instructions for the preparation of an advisory opinion.

In addition, in accordance with Article 25 of its Rules of Procedure, the ad hoc Committee may wish to set up a Drafting Working Group to prepare the draft advisory opinion for adoption at its 5th session.

Comments

Documents of the session: LAW-23021-JUR 4/8, LAW-23022-JUR 4/8

Based on the inception paper prepared by the Secretariat, the ad hoc Committee is invited to consider the following question: to which service facilities do the COTIF CUI UR apply?

The CUI UR were introduced in COTIF by the Vilnius Protocol of 3 June 1999 for the Modification of the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980.

The 'Report by the OTIF Secretariat on the revisions of COTIF since OTIF's 5th General Assembly' describes the scope of the CUI UR and emphasises the relationship with public law provisions: 'The CUI Uniform Rules are limited to regulating the contractual relations, particularly the liability, between the manager of the railway infrastructure and the carrier, as well as the actions of the auxiliaries of the infrastructure manager or of the carrier against the other party to the contract of use. They do not affect provisions of public law, such as e.g. the European Union (EU) directives concerning rights of access and the conditions of the latter.'

Proposed EU position

- *Take note of the information presented by the Secretariat (inception paper);*
- *Support the preparation of a draft legal opinion, preferably by the Secretariat, on the application of CUI UR to service facilities, for consideration and possible adoption at the next session of the ad hoc Committee. The draft legal opinion should be based on the general principles outlined in the document.*

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

Item 9. The digitalisation of international transport, particularly freight transport documents

The 2022-2024 Work Programme [...] of the ad hoc Committee provides that: 'new technologies, digitalisation in particular, have the potential to change the organisation and management of railway transport. However, digitalisation brings both improvements and new challenges. The aim is to monitor and assess how digitalisation, and which specific aspects, should be supported and/or regulated by OTIF.' This topic was given a high priority in the Work Programme.

At its 2nd session, the ad hoc Committee, among other matters: '1) noted document LAW-22031 JUR 2/11 on 'The digitalisation of international transport, particularly freight transport documents. Preliminary Inception Paper.'; 2) after consulting the Focal Points on what questions to include in the surveys, instructed the Secretariat to carry out a survey of: – OTIF members on the national law that is applicable to electronic railway transport documents; – stakeholders on using electronic railway transport documents in national and international rail transport, their experience with them and what their further requirements for them might be.'

At its 3rd session, the ad hoc Committee, among other matters: '1) noted the Report on the consultation on rules concerning electronic railway transport documents (LAW-22084-JUR 3/9); 2) noted the European Commission's presentation entitled 'Electronic Freight Transport Information (eFTI) Regulation (EU) 2020/1056'; 3) noted that there is no immediate need to modify the CIM UR with regard to electronic railway transport documents; 4) instructed the Secretariat to submit to its next session a proposal for possible follow-up actions on the electronic railway transport documents under the CIM UR, taking into account the discussions at this session.'

At its 4th session, the ad hoc Committee is invited to consider and decide whether any follow-up actions on this topic are necessary.

Comment

Documents of the session: LAW-23023-JUR 4/9, LAW-23024-JUR 4/9

In 2022, the ad hoc Committee organised a survey on rules concerning electronic railway transport documents. The results of the 'The digitalisation of international transport, particularly freight transport documents and the report on the consultation on rules concerning electronic railway transport documents' were submitted to the 3rd session of the ad hoc Committee for consideration.

After discussing the results of the survey, the ad hoc Committee 'noted that there is no immediate need to modify the CIM UR with regard to electronic railway transport documents and instructed the Secretariat to submit to its next session a proposal for possible follow-up actions on the electronic railway transport documents under the CIM UR, taking into account the discussions at this session.'

In the revised Inception paper prepared by the Secretariat, it is noted that the case of the electronic CIM-SMGS consignment note developed jointly by the Organization for Cooperation of Railways (OSJD) and the International Rail Transport Committee (CIT) is not documented. This joint “OTIF-OSJD” consignment note exist in electronic format and is administered, for the OTIF part, by the CIT. There exists several documents developed in this framework that effectively supplement the general provisions of COTIF on the functional equivalence of the electronic consignment note, in particular: ‘Consignment note CIM/SMGS’¹, and ‘Specifications for the electronic CIM/SMGS consignment note’².

Proposed EU position

- *Note the inception paper prepared by the Secretariat (LAW-23024-JUR 4/9);*
- *Consider that the existing provisions of the CIM UR are sufficient for paperless carriage;*
- *invite the Secretariat to prepare for the next session an analytical non-paper on possible modification to CIM UR with the view to facilitate the uptake of the CIM electronic consignment note.*

Item 10. Use of gender-neutral language in OTIF

In accordance with its 2022-2024 Work Programme, the ad hoc Committee should consider ‘the introduction of gender-neutral language in OTIF legal instruments.’ For that purpose, it should ‘- assess the feasibility of using gender-neutral language in OTIF’s legal instruments, the extent to which it should be used and the manner in which it should be used; - issue recommendations on the use of gender-neutral language in OTIF’s legal instruments’. At its 2nd session, the ad hoc Committee: ‘1) Confirmed that OTIF’s legal instruments do not have a discriminatory effect; 2) Decided, in principle, to support the use of gender-neutral language in OTIF’s legal instruments; 3) Considered that initially, the introduction of gender-neutral language should be limited to the provisions of legal instruments under binding or non-binding institutional law which is addressed to natural persons or which refers to specific roles, positions or offices; 4) Decided to support the establishment of guidelines on the use of gender-neutral language within the Organisation to ensure its consistent use.’

At its 4th session, the ad hoc Committee is invited to discuss draft guidelines on the use of gender-neutral language within the Organisation prepared by the Secretariat and consider whether any follow-up action on this topic is required.

Comment

Documents of the session: LAW-23025-JUR 4/10, LAW-23026-JUR 4/10

¹ https://www.cit-rail.org/secure-media/files/consignment_note_cim_smgs_ru-en_2019-01-01.pdf?cid=311294

² https://www.cit-rail.org/media/files/documentation/freight/cim/e-fb_cim-smgs_en_2019-07-01.pdf?cid=311290

Proposed EU position

- *Take note of the preliminary draft guidelines on the use of gender-neutral language prepared by the Secretariat;*
- *Reiterate the view that OTIF's legal instruments do not have a discriminatory effect and support in principle the use of gender-neutral language in OTIF's legal instruments;*
- *Reiterate the consideration made by the ad hoc Committee at its 2nd session that initially the introduction of gender-neutral language should be limited to the provisions of legal instruments under binding or non-binding institutional law which are addressed to natural persons or which refer to specific roles, positions or offices (e.g. vacancy notice);*
- *Recommend that gender-neutral language should only be used in relevant legal instruments (see previous point) on condition that the clarity, readability, legal certainty and consistency of texts in OTIF's three working languages are ensured;*
- *Recommend that gender-neutral language should be used consistently throughout relevant legal instruments (see third point above);*
- *Recommend that the Secretariat should ensure the consistent use of gender-neutral language in relevant legal instruments (see third point above) by means of guidelines on the use of gender-neutral language;*
- *State that the application of the non-legally binding guidelines on gender-neutral language in OTIF shall by no means have any effect on the legal order of OTIF Member States.*

Item 11. Work Programme

[...] The ad hoc Committee may consider updating the Work Programme as a result of the discussions and decisions at the session and on the basis of written proposals submitted in advance.

In particular, the ad hoc Committee is invited to consider deletion of the topic of 'Uniform contract for international train paths' under Part I, Section B, point 3 of the Work Programme following RNE/CIT's presentation on a European Standard Contract of use of railway infrastructure (E-SCU-I) and RNE's presentation on Timetable Redesign under agenda item 8 'Information from the registered stakeholders and intergovernmental organisations' (see LAW- 23004-JUR 3 '3rd session. Minutes').

Comment

Documents of the session: LAW-23027-JUR 4/11

Proposed EU position

- *Support deletion of the topic of ‘Uniform contract for international train paths’ under Part I, Section B, point 3 of the Work Programme;*
- *Item 3 "Handbook on COTIF and its implementation and application by international associations", under Part II of the work programme, may carry high priority in the work programme;*
- *Inclusion of an additional item 7 under Part I (Legal matters), Section B (Legal advice): “Legal protection of the name, abbreviation, logo and works of OTIF, with a “low” priority, is acceptable.*

Item 12. Planning and organisation of the next sessions

At its 3rd session, the ad hoc Committee: ‘1) decided to hold its 4th session on 18-20 April 2023 as a hybrid meeting in Berne; 2) decided to hold its 5th session on 7-9 November 2023 as a hybrid meeting in Berne; 3) encouraged OTIF members to take part actively in the activities of the ad hoc Committee and, whenever possible, to participate in person in its sessions; 4) endorsed the Secretariat’s suggestion to organise a special event immediately before, during or after its 5th session on the occasion of the 130th anniversary of the entry into force of CIM and the 95th anniversary of the entry into force of CIV.’

The ad hoc Committee may wish to consider the preparations for the 5th session (autumn 2023) and the preliminary planning for the 6th session (spring 2024).

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