Council of the
European Union

Brussels, 8 February 2018
(OR. en)

6034/18

Interinstitutional File:
2018/0026 (NLE)

TRANS 63

PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	8 February 2018
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2018) 63 final
Subject:	Proposal for a 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

Delegations will find attached document COM(2018) 63 final.

Encl.: COM(2018) 63 final

EUROPEAN
COMMISSION

Brussels, 7.2.2018
COM(2018) 63 final

2018/0026 (NLE)

Proposal for a

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

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on the Union's behalf at the 26th session of the Revision Committee of the Intergovernmental Organisation Convention for International Carriage by Rail (OTIF) as regards certain amendments to the Convention concerning International Carriage by Rail (COTIF) and to its Appendixes.

OTIF develops uniform legal regimes for international rail transport in three major areas of activity: technical interoperability, dangerous goods and railway contract law.

The OTIF Secretary 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. CONTEXT OF THE PROPOSAL

2.1. The Convention concerning International Carriage by Rail (COTIF)

The COTIF Convention is OTIF's founding legal text. It governs the running of the Organisation, its objectives, attributions, relations with the Member States and its activities in general. There are 46 countries party to the COTIF Convention, including 26 EU Member States, i.e. all expect Cyprus and Mata.

The COTIF convention comprises two parts: the Convention itself, and seven Appendices that establish uniform railway law, i.e. technical functional requirements and model contracts for the carriage of passengers and goods:

Appendix A	Contract of International Carriage of Passengers by Rail	CIV
Appendix B	Contract of International Carriage of Goods by Rail	CIM
Appendix C	International Carriage of Dangerous Goods by Rail	RID
Appendix D	Contract of use of vehicles in international rail traffic	CUV
Appendix E	Contract of use of infrastructure in international rail traffic	CUI
Appendix F	Validation of Technical Standards and the Adoption of Uniform Technical Prescriptions applicable to Railway Material intended to be used in International Traffic	APTU
Appendix G	Technical Admission of Railway Material used in International Traffic	ATMF

2.2. The agreement between the European Union and the Intergovernmental Organisation Convention for International Carriage by Rail (OTIF)

On 16 June 2011, the Council adopted Council Decision 2013/103/EU on the signing and conclusion of the Agreement between the European Union and the Intergovernmental Organisation Convention for International Carriage by Rail (OTIF) on the Accession of the European Union to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999[1]. The Agreement entered into force on 1st July 2011. The Union is a party to the Agreement as well as all Member States except Cyprus and Malta. Council Decision 2013/103/EU specifies that the Commission shall represent the Union at OTIF meetings. It also contains a Declaration by the Union concerning the exercise of competence (Annex I) and provides for internal arrangements for the Council, the Member States and the Commission in proceedings under OTIF (Annex III).

2.3. The OTIF Revision Committee

The Revision Committee has the competence to take decisions to amend COTIF, the CIV, CIM, CUV and CUI Uniform Rules, and the APTU and ATMF Uniform Rules in certain cases. In certain prescribed cases, the Revision Committee can approve amendments itself or submit adopted amendments to the Member States for approval at the General Assembly.

The last Revision Committee, 25th session, was held on 25 and 26 June 2014.

The Union and/or its Member States participate in that process in accordance with the procedural arrangements under OTIF, the Rules of Procedure of the Revision Committee and the provisions of the Agreement on the Accession of the Union to the COTIF Convention.

There is a quorum in the Revision Committee when the majority of the OTIF Member States enjoying the right to vote are represented there at the time of the vote. However, Article 13(3) of the COTIF Convention provides that OTIF Member States having made a declaration concerning the non-application of one or more Appendices do not have the right to vote concerning amendments to the given Appendix. Based on meeting document INF.2 of the 26th session of the Revision Committee circulated by the OTIF Secretariat on 19.1.2018, it was ascertained that all 26 EU Member States parties to COTIF apply all the Appendices.

2.4. Union competence and voting rights in the Revision Committee

Pursuant to Article 6 of the EU-OTIF Agreement,

"1. For decisions in matters where the Union has exclusive competence, the Union shall exercise the voting rights of its Member States under the Convention.

2. For decisions in matters where the Union shares competence with its Member States, either the Union or its Member States shall vote.

3. Subject to Article 26, paragraph 7, of the Convention, the Union shall have a number of votes equal to that of its Member States who are also Parties to the Convention. When the Union votes, its Member States shall not vote."

In the interest of the Union and its Member States, voting rights should be exercised by the Union on all points subject to a vote and on which a Union position is proposed. This should apply not only to cases of exclusive competence, but also in cases of shared competence, where that Agreement indeed offers a choice between vote by Member States and by the Union [Article 6(2) thereof].

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[1] Council Decision 2013/103/EU of 16 June 2011, OJ L 51, 23.2.2013, p. 1.

This means in practice that, for matters under Union competence where a Union position is established, the representative of the Union will represent 26 votes, the quorum will be automatically reached, and Union position should prevail. Votes would be accounted for without regard to representation of individual Member States at the meeting.

2.5. Notification to the OTIF Secretary-General

The following table summarises the area of Union competence and the intended representation of the voting rights:

Agenda item	Union competence	Representation of voting rights
2 – Election of chair and vice chair	Shared	Member States
3 – Adoption of the agenda	Shared and exclusive	Union
4 – Modification of the Rules of Procedure	Shared and exclusive	Union
5 – Partial revision of COTIF Convention	Shared	Union
6 – Partial revision of the CIM UR (report)	Exclusive	Union (if a vote takes place))
7 – partial revision of the CUI UR	Shared	Union
8 – New Appendix H	Exclusive	Union
9 – Partial revision of the ATMF UR	Exclusive	Union
10 – Partial revision of the APTU UR	Exclusive	Union
11 – Need to harmonise access conditions (discussion)	Shared	n/a
12 – AOB (setting up of a working group of legal experts)	Shared	Member States
13 – Partial revision of the CUV UR	Shared	Union

Pursuant to Article 6(4) of the EU-OTIF Agreement, the Union, represented by the Commission, should inform OTIF in advance of the meeting with regard to the items on the agenda of the Revision Committee falling under Union competence (exclusive or shared) where the Union will exercise the voting rights. The Commission should address a letter to the OTIF Secretary-General for this purpose.

3. POSITION TO BE TAKEN AT THE 26TH SESSION OF THE OTIF REVISION COMMITTEE

This section examines the items deserving further explanation. The annex to the proposed decision addresses each of the agenda points and exposes in particular the situation as regards competence as well as positions to be taken.

3.1. ITEM 4 - Modification of the Rules of Procedure of the Revision Committee

Relevance

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. The proposals for modification of the Revision Committee's Rules of Procedure are set out in Annex of Doc. LAW-17125-CR 26/4, which also aims at addressing certain issues relating to the language regime and working arrangements of the Committee (Articles 1, 3, 7, 8, 9, 10, 11, 15, 25 and 26). These other draft amendments concerning procedural issues appear appropriate as they aim at improving the administrative management of the Committee.

Competence and exercise of voting rights

The proposed modifications to the Rules of Procedure of the Revision Committee are a matter falling under Union competence, since they inform the exercise by the Union of its competences within OTIF. Some of the amendments are directly related to it having acceded to the COTIF Convention. Even to the extent competence is shared with Member State, voting rights should in this case be exercised by the Union in order to ensure that 26 votes are represented in the vote.

Position

All draft amendments proposed by the OTIF Secretariat under this item should be supported.

3.2. ITEM 5 - Partial revision of the base Convention

Relevance

The proposal as laid down in Doc. LAW-17126 CR 26/5 aims at improving and facilitating the procedure for revising the COTIF Convention with a view to the consistent and rapid implementation of amendments to COTIF 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 document submitted by the OTIF Secretariat recalls the work and consultations carried out over the past two years with regard to the current legal framework and the need/possibilities for an amendment to the COTIF revision procedure, the complexities and adverse effects of the current COTIF revision procedure, and the international law and practice on the enactment of treaty amendments in the context of international organisations.

The outcome of this process has resulted in one main recommendation, which is to revise Article 34 of the Convention to provide in principle for a fixed time period (36 months) for the entry into force of amendments to the Appendices adopted by the General Assembly. The draft amendment also includes a clause of flexibility to extend such deadline on a case-by-case basis, where *"The General Assembly may decide, by the majority provided for under Article 14 § 6 for taking decisions about proposals aiming to modify the Convention, to defer the entry into force of modifications."*

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 – which also corresponds to the usual period of time between meetings of the General Assembly. The proposal appears balanced, flexible, proportionate and necessary to support the efficient functioning and development of OTIF.

Competence and exercise of voting rights

The proposed partial revision of the COTIF Convention is relevant to the exercise by the Union of its competences within OTIF. It falls under Union competence. Even to the extent competence is shared with Member State, voting rights should in this case be exercised by the Union in order to ensure that 26 votes are represented in the vote.

Position

The proposal to amend Article 34 of the COTIF Convention should be supported.

3.3. ITEM 6 - Partial revision of Appendix B (CIM UR) – Report from OTIF Secretary-General

Relevance

The report informs the Revision Committee on progress made in the preparation of a revision of the CIM UR, with particular attention to the provisions to be put in place concerning the electronic consignment note. The CIM UR working group agreed that the principle of the functional equivalence[2] of data registration with the paper form is a prerequisite (current Article 6 § 9 of the CIM UR) for all the functions that the paper consignment note fulfils at present. However, this principle has been implemented differently and has therefore sometimes been a source of differences between national laws. In addition, it has not resolved all the issues, particularly with regard to the electronic signature.

The Secretary General is reporting to the 26th session of the Revision Committee on the main recent developments that have emerged over the past two years, namely: the CIT's report on the railways' digitisation of transport documents and the conclusions of the report, the current work of the digital transport and logistics forum (DTLF), the developments in the customs sector and the potential impact on the CIM consignment note as transit document.

The report points out to the need to work on a solution for simple digital rail transit which has an efficient interface with the transport documents. In OTIF-Secretariat's view, this will require definition of the interfaces to be developed with the sector's digital solutions.

For this purpose, the Secretary General intends to include the following two priority issues in the work programme of the working group of legal experts that may be set up in 2018:

– Assessment of interfaces between customs and transport regulations in order to ensure efficient international railway traffic, particularly in the area of freight transport;

– Assessment of digitalisation of international transport, in particular transport documents.

Competence, expression of the position and possible exercise of voting rights

As mentioned in the section above, the digitalisation of rail transport documents affects certain areas of Union legislation, in particular customs legislation. Therefore, Union

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[2] The functional equivalence principle lays out criteria under which electronic communications may be considered equivalent to paper-based communications. In particular, it sets out the specific requirements that electronic communications need to meet in order to fulfil the same purposes and functions that certain notions in the traditional paper-based system seek to achieve – for example, "writing", "original", "signed" and "record".

competence in this matter is exclusive. The Union should express position in this case and, should a vote be organised, exercise the voting rights.

Position

The following position is proposed: take note of the 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, 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.

3.4. ITEM 7 - Partial revision of the CUI UR (Appendix E)

Relevance

This item deals with the Unified Rules for Contract of Use of Infrastructures (CUI UR).

The proposed modifications concern Article 1 (Scope), Article 3 (Definitions), Article 8 (Liability of the manager), Article 9 (Liability of the carrier), as well as editorial changes in Articles 3, 5, 5bis, 7 and 10 of the CUI UR. It is also proposed to adapt the Explanatory Report to reflect the modifications to be adopted on the CUI UR.

The main substantial modification aim at clarifying the scope of the CUI UR by introducing in Article 3 a definition 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. Indeed, the current definition of the scope of application originates from the beginnings of the CUI UR in the 1990s when the European Union introduced the concept of separating the operation of railway infrastructure from the provision of railway services. At that time OTIF noted that the two areas to be regulated were linked and that it was particularly important to establish a uniform legal regime (private contract law) for the right of recourse between carriers/railway undertakings and infrastructure managers under the COTIF Convention. In this context, it seemed logical at the time to link the scope of application of the new Appendix E, which governed the contracts of use of infrastructure, with the performance of transport operations in accordance with the CIV and CIM contracts of carriage. As a result, the CUI Uniform Rules apply *"to any contract of use of railway infrastructure for the purposes of international carriage within the meaning of the CIV Uniform Rules and the CIM Uniform Rules"* (Article 1 of the CUI UR).

This was generally interpreted to mean that it is the relationship between the railway undertaking and its customers which determines the law that applies between the railway undertaking and the infrastructure manager (national law for domestic contract of carriage; CUI UR for international contract of carriage). The key issue was to consider whether, for CUI UR to apply, it was sufficient that the train carry at least one single passenger with a CIV ticket or one consignment with the CIM consignment, irrespective of whether the train path would include one or several legs in domestic traffic only – also noting the fact that CUI liability principles are more restrictive in comparison to certain domestic ones and that, pursuant to Union law, infrastructure capacity is allocated at national level.

The problem arises from the fact that: (1) to carry out a single contract of carriage, the carrier does not necessarily have to conclude a single contract of use of railway infrastructure; (2) it is difficult to make a clear distinction between the use of railway infrastructure for national

transport and for international transport, notably where the path includes a leg between two Member States, in combination with one or several legs operated on domestic path only.

The OTIF secretariat set up a dedicated working group in 2014 with representatives from COTIF Member States, the European Commission and industry stakeholders.

The draft amendment as proposed to the Revision Committee corresponds to the compromise text resulting from the work of the ad hoc working group, which met four times 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 only, as explicated in the new definition.

In response to the proposal from the OTIF Secretariat, the International Railway Transport Committee (CIT) submitted a position paper Doc. LAW-17155-CR 26/7.1 Add. 1 stressing a number of concerns already debated within the above-mentioned working group during the past sessions. In substance, the CIT advocates that, as far as a carrier's recourse against the infrastructure manager is concerned, the domestic leg prior to or following international traffic should not be excluded but actually covered by the CUI UR. The CIT proposes a modification of the draft text suggested by the Secretariat in Article 3, as follows (deletion – strikethrough; addition, underlined): *"aa) "international railway traffic" means traffic which requires the use of an international train path, ~~or~~ of several successive national train paths situated in at least two States and coordinated by the infrastructure managers concerned~~;~~ or of one train path for the purpose of international railway carriage with the meaning of the CIV Uniform Rules and the CIM Uniform Rules."*

The stated objective of the proposal from the CIT is to provide for an extensive application of the CUI UR, to also cover domestic train paths when combined with an international train path. It is argued that *"railway undertakings' right of recourse against the infrastructure manager being placed under national law is problematic in terms of transparency and legal certainty, given that the general national (contract) law of the particular countries is coloured by fine differences especially as regards the distribution of the burden of proof or consequential damage to or loss of assets."*

The Commission considers that this proposal does not improve the draft amendment proposed by the OTIF Secretariat and does not adhere to the basic principle that CUI UR are not designed to apply on domestic train path, where it is in principle appropriate for national law to apply.

As regards the draft amendment proposed by the OTIF Secretariat to Article 8 (Liability of the manager), the Commission notes that 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.

Procedural issues

As analysed by the OTIF Secretariat in Doc. LAW-17126 CR 26/7.2, the Revision Committee may not competent to take decision on all the points proposed for modifications, which may fully or partially fall under the remit of the General Assembly's competence. The Secretariat suggests that the Revision Committee should adopt the proposals for amendments and all the modifications to the CUI UR be submitted to the General Assembly for decision.

Competence and exercise of voting rights

The Uniform Rules under Appendix E pertain to private contract law on the use of infrastructure in international rail traffic. The proposed modifications do not appear to affect

or alter the scope of existing Union rules. Therefore, the Union shares competence on this matter with Member States. Since the Union holds a number of votes equal to the Member States which are contracting parties to COTIF, in order to ensure that 26 votes are represented in the vote, it is proposed that the Union exercises its voting rights on behalf of the Member States.

Position

The Secretariat General's proposals for amendments should be supported, i.e. concerning 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 of the CUI UR.

The Secretary General of OTIF should be requested to submit all the modifications to the CUI UR to the General Assembly for decision.

3.5. ITEM 8 - New Appendix H regarding the safe operation of trains in international traffic

Relevance

At the General Assembly in 2015, the Secretary General of OTIF suggested to create a legal basis in COTIF to support interoperability beyond the European Union. The draft new Appendix H sets out provisions to regulate the safe operation of trains in international traffic. The concept is that state authorities would issue Safety Certificates for railway undertakings based on harmonised criteria, as proof that the railway undertakings are able to operate trains safely in the state concerned. This draft text is directly inspired from the Union's acquis and represents one more step toward common provisions related to the requirements concerning railway undertaking and infrastructure managers in order to ensure safe operation of trains within and beyond the Union. Provided certain comments are taken into account, the draft text of the new Appendix H to the COTIF Convention would be fully in line with the provisions of the new safety Directive (EU) 2016/798 and the related secondary legislation.

Competence and exercise of voting rights

The Union has adopted a substantial number of legal instruments in the area of interoperability and safety, including as part of the 4th railway package adopted in 2016. The proposed adoption of a new Appendix H to COTIF affects the area covered by Directive (EU) 2016/798 on railway safety (recast). The Union's competence is therefore exclusive in nature, and the Union should therefore exercise the voting rights.

Position

As regards the draft text of the new Appendix H (Doc. LAW-17131-CR26/8.1), the Union should vote in favour of the proposed text, subject to the following (deletion – strikethrough; addition – underlined):

– 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*".

  This proposal is intended to ensure consistency with the terminology of the EU acquis, as well as within Appendix H itself (Article 5 refers to *“safety certification”).* This improvement is recommended but not required for the positive vote.

– 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.*"

This proposal is intended to clarify that both institutional setups are allowed and avoid that Member States in which the National Safety Authority fulfils both roles are requested to set up two separate entities.

– 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."*

This proposal is intended to clarify that both institutional setups are allowed and avoid that Member States in which the National Safety Authority fulfils both roles are requested to set up two separate entities.

– Article 8(3)(b): Modify the text so as to read as follows: *"Procedures as well as a Common Safety Method for safety management system requirements to be applied by Certification Authorities when issuing Safety Certificates, including the necessary links to the Common Safety Method on risk assessment and other relevant legislations."*

Addition of a reference to "procedures": Such procedures were included in the EU Common Safety Method for safety management system requirements (CSM on SMS) and have now been incorporated to the Commission's draft "implementing regulation on practical arrangements for issuing single safety certificates". If OTIF wants to keep the same harmonization scope as initially planned, it should thus include the related procedures in addition to the CSM for SMS requirements. This improvement is recommended but not required for the positive vote.

Link to the Common Safety Method on risk assessment (CSM RA) and other relevant legislations: The draft Commission Delegated Regulation establishing common safety methods on safety management system requirements requires the application of the CSM RA and other legislation (in particular but not limited to the Operation and traffic management technical specification for interoperability, 'OPE TSI') in order to ensure that "(*the organisation's) operational arrangements conform to the safety-related requirements of applicable Technical Specifications for Interoperability and relevant national rules and any other relevant requirements"*. Therefore, the above improvement of Article 8(3)(b) should be supported and forcefully defended.

– Article 8(3)(c): Modify the text to *"A Common Safety Method on monitoring to be applied by railway undertakings ~~and, where relevant~~, infrastructure managers and entities in charge of maintenance"*.

This proposal is in line with Article 7(4) of Appendix H, which requires both railway undertakings and infrastructure managers to *"establish their safety management system and monitor its correct application"*. Application of the CSM on monitoring is mandatory for infrastructure managers in the EU and would be beneficial beyond the Union. Application of the CSM on monitoring shall be mandatory for entities in charge of maintenance (ECMs). The mandatory application of CSM by infrastructure managers is recommended but not required for the positive vote. The mandatory application of CSM by ECMs is a requirement and should be included in the text.

– 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"*.

– 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."*

As regards the proposed modifications to Articles 2, 6, 20, 33 and 35 of the COTIF Convention (Doc. LAW-17131-CR26/8.2), which are indeed necessary for the purpose of the inclusion of the new Appendix H into COTIF, the Union should vote in favour of the proposed text and agree to request the Secretary General to submit them to the General Assembly for decision.

3.6. ITEM 9 - Partial revision of the ATMF UR (Appendix G)

Relevance

It is important for international rail traffic that the provisions applicable under Union law and the COTIF Convention are harmonised. The provisions of the ATMF UR are compatible with the provisions of the European Union's Interoperability Directive 2008/57/EC and with the relevant parts of the Safety Directive 2009/49/EC. With the adoption of the fourth railway package, the Union changed several provisions of this acquis and informed the Committee of Technical Experts (CTE) of OTIF and its standing working group about these changes. On the basis of an analysis by the Commission, the OTIF Secretariat and the working group prepared modifications to ATMF UR to ensure continued harmonisation with Union law.

The modifications concerning Articles 2, 3a, 5, 6, 7, 10, 10b, 11 and 13 of the ATMF UR 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 the subject of the proposed changes.

Competence and exercise of voting rights

The Union has adopted a substantial number of legal instruments in the area of interoperability and safety, including as part of the fourth railway package adopted in 2016. In the present case, the draft text amends the ATMF UR, which covers vehicle authorisations. These provisions are covered by Directive (EU) 2016/797 on the interoperability of the rail system within the European Union (recast). The matter is thus falling under Union's (exclusive) competence and the Union should therefore exercise the voting rights.

Position

The draft amendments as laid down in Doc. LAW-17133-CR26/9, are based on a Union proposal and, provided that the comments below comments are taken into account, would be fully in line with the related provisions of the new interoperability Directive (EU) 2016/797 and the related secondary legislation.

The Union should support the proposed draft amendments, subject to the following: (deletion – strikethrough; addition – underlined).

– 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."

Legal certainty is critical for EU industry. The objective of the proposal is to improve legal certainty, including by introducing the (EU) notion of pre-engagement, a voluntary process during which, based on information provided by the applicant, the authorising entity issues an opinion including a determination of the version of the TSIs and national rules that are to be applied for the subsequent application for authorization (without prejudice to changes in legal requirements that would invalidate this opinion). The proposal aims at giving the CTE the mandate to consider the inclusion of such provisions in COTIF.

– 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."* This definition is consistent with the definition figuring in Article 2(3) of Directive (EU) 2016/797 on interoperability. The term *"vehicle(s)"* should be used throughout the text, and not the term *"railway vehicle"*, 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."

This article is necessary to set out how the CTE can deliver on the mandate that is given to it in the proposed additional sentence to Article 7(1a). It is the same as Article 8 of the new Appendix H.

3.7. ITEM 10 - Partial revision of the APTU UR (Appendix F)

Relevance

It is important for international rail traffic that the provisions applicable under Union law and the COTIF Convention are harmonised. 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 and informed the Committee of Technical Experts (CTE) of OTIF and its standing working group about these changes. On the basis of an analysis by the European Commission, the OTIF Secretariat and the 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 the subject of the proposed changes.

Competence and exercise of voting rights

The Union has adopted a substantial number of legal instruments in the area of interoperability and safety, including as part of the fourth railway package adopted in 2016. In the present case, the draft text amends the APTU UR, which covers technical specifications for railway vehicles. These provisions are covered by Directive (EU) 2016/797 on the interoperability of the rail system within the European Union (recast). The matter is thus falling under Union's exclusive competence and the Union should therefore exercise the voting rights.

Position

The draft amendments as laid down in Doc. LAW-17133-CR26/10 are based on a Union proposal and are fully in line with the provisions of the new interoperability Directive (EU) 2016/797 and the related secondary legislation.

The Union should support the modifications to Article 8 of Appendix F to the COTIF Convention and the approval of the modifications to the relevant Explanatory Report.

3.8. ITEM 13 - Partial revision of the CUV UR (submission by Switzerland)

Relevance

On 13 November 2017, Switzerland submitted Doc. LAW-17144-CR 26/13 with a proposal for amendment of Article 7, paragraph 1 of the CUV UR, concerning 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.

On 18 December 2017, an external legal expertise on the Swiss proposal was published by the OTIF Secretariat (Doc. LAW-17156-CR26/13 Add.1). On 19 January 2018, the OTIF Secretariat also published Doc. LAW-18001-CR26/13 Add.2 on the review of proposals to amend Article 7 of the CUV UR. The latter document recapitulates earlier discussion on this issue within the relevant working group of OTIF and recalled that no proposal for decision could be taken at the last meeting of the General Assembly in September 2015.

The proposal from Switzerland is submitted to the Revision Committee for consideration and possible submission to the next meeting of the General Assembly for decision. This proposal adds a new criterion to provide proof of the keeper's liability for damage caused by a defect in the vehicle. Indeed, 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.

It should be noted that 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 this 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)[3] 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. Notably, 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.

Article 27 of the GCU currently reads as follows: *"Article 27: Principle of liability*

27.1 The keeper or a previous user subject to this contract shall be liable for damage caused by the wagon when they can be shown to be at fault. The keeper shall be presumed to be at fault if he has not correctly fulfilled his duties as these arise from Article 7, unless this breach of duty did not cause or contribute to the damage.

27.2 The liable party shall indemnify the user RU against any third party claims if the user RU is not at fault.

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[3] The General Contract of Use for wagons (GCU) is a multilateral contractual framework based on, and supplementing, the CUV (Appendix D of the COTIF) for the use of wagons; it contains all relevant mutual rights and obligations of railway undertakings and wagon keepers regarding the use of wagons and saves the parties of the contract the need of negotiating numerous bilateral agreements thereby ensuring wagon interoperability in a liberalized European rail market; it can be complemented flexibly by other contractual arrangements if necessary; it does not include commercial conditions.

27.3 Where the user RU is partly responsible, the compensation shall be borne by each party in proportion to its respective share of responsibility.

27.4 When a third party is responsible or partly responsible for the damage, the parties to the contract shall claim compensation for the damage primarily from this third party. In particular the signatory which has a contract with the third party shall pursue the claim vis-à-vis the third party as a matter of priority.

27.5 Upon request, the keeper shall be required to provide proof of his civil liability insurance in accordance with applicable laws."

Today, most keepers and railway undertakings operating in the Union apply the GCU in accordance with paragraph 2 of the current Article 7 of the CUV. 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 Swiss proposal does not provide a robust rationale and sufficient justification for the proposed amendments.

Competence and exercise of voting rights

The Uniform Rules under Appendix D pertain to contract law on the use of vehicles in international rail traffic. The proposed modifications, dealing with liability for loss or damage caused by a vehicle, do not affect or alter the scope of existing Union rules. Therefore, the Union shares competence on this matter with Member States.

Since the Union holds a number of votes equal to the Member States which are contracting parties to COTIF, in order to ensure that 26 votes are represented in the vote, it is proposed that the Union exercises its voting rights on behalf of the Member States.

Position

The Union should oppose the proposal for consideration of amendment of Article 7 of the CUV UR submitted by Switzerland.

4. LEGAL BASIS

4.1. Procedural legal basis

Article 218(9) TFEU provides for decisions establishing 'the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.'

The notion of '*acts having legal effects*' includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are '*capable of decisively influencing the content of the legislation adopted by the EU legislature*'.[4]

The OTIF Revision Committee is a body set up by an agreement, namely the European Union to the Convention concerning International Carriage by Rail (COTIF).

[4] Case C-399/12 Germany v Council (OIV), ECLI:EU:C:2014:2258, paragraphs 61-64.

The acts which OTIF Revision Committee is called upon to adopt constitute acts having legal effects. The envisaged acts are capable of decisively influencing the content of EU legislation in the area of rail transport.

The envisaged acts do not supplement or amend the institutional framework of the agreement.

The procedural legal basis for the proposed decision, therefore, is Article 218(9) TFEU.

4.2. Substantive legal basis

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is adopted on behalf of the Union. The envisaged act concerns rail transport.

The substantive legal basis of the proposed decision, therefore, is Article 91 TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Articles 91 TFEU in conjunction with Article 218(9) TFEU.

5. PUBLICATION OF THE ENVISAGED ACT

As the act of the OTIF Revision Committee will amend COTIF and some of its Appendices, it is appropriate to publish it in the *Official Journal of the European Union* after its adoption.

2018/0026 (NLE)

Proposal for a

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

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 91, in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) The Union has acceded to the Convention concerning International Carriage by Rail of 9 May 1980 as amended by the Vilnius Protocol of 3 June 1999 (the 'COTIF') in accordance with Council Decision 2013/103/EU[5].

(2) All Member States, with the exception of Cyprus and Malta, apply the COTIF.

(3) The Revision Committee set up in accordance with point (c) of Article 13(1) of the COTIF Convention, at its 26th session due to take place from 27 February to 1 March 2018, is expected to decide upon certain amendments to the COTIF as well as to certain Appendices thereto, namely Appendices E (Uniform Rules concerning the Contract of Use of Infrastructure in International Rail Traffic — CUI), F (Uniform Rules concerning the Validation of Technical Standards and the Adoption of Uniform Technical Prescriptions applicable to Railway Material intended to be used in International Traffic — APTU) and G (Uniform Rules concerning the Technical Admission of Railway Material used in International Traffic — ATMF).

(4) At that session the Revision Committee is also to decide on the adoption of a new appendix H regarding the safe operation of trains in international traffic.

(5) The amendments to the Rules of Procedure of the OTIF Revision Committee aim to update certain provisions as a result of the accession of the Union to the COTIF in 2011, in particular with regard to provisions governing the right to vote of the regional organisation and establishing the quorum.

(6) The amendments to the COTIF aim at improving and facilitating the procedure for revising the Convention with a view to the consistent and rapid implementation of amendments to the COTIF and its Appendices, and in order to prevent adverse effects

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5 Council Decision 2013/103/EU of 16 June 2011 on the signing and conclusion of the Agreement between the European Union and the Intergovernmental Organisation for International Carriage by Rail on the Accession of the European Union to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999 (OJ L 51, 23.2.2013, p. 1). The text of the Agreement between the European Union and the Intergovernmental Organisation for International Carriage by Rail (OTIF) on the Accession of the European Union to the COTIF Convention (the 'Agreement') is annexed to the Council Decision.

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, in particular with Union law.

(7) The amendments to Appendix E (CUI) aim at clarifying the scope of application of the CUI UR to ensure that the CUI UR are more systemically applied for their intended purpose, i.e. in international railway traffic such as in freight corridors or in international passenger trains.

(8) The amendments to Appendices F (APTU) and G (ATMF) aim at achieving harmonisation between OTIF rules and Union rules, in particular after the adoption of the fourth railway package by the Union in 2016.

(9) The new appendix H is intended to improve interoperability beyond the European Union based on the concept of harmonised criteria for the issuance by state authorities of Safety Certificates for railway undertakings as proof that the railway undertakings are able to operate trains safely in the state concerned.

(10) Most of the proposed amendments are in line with the law and the strategic objectives of the Union, and should therefore be supported by the Union. Some amendments need more discussion within the Union and should be rejected at the 26th session of the Revision Committee,

HAS ADOPTED THIS DECISION:

Article 1

1. The position to be taken on the Union's behalf at the 26th session of the Revision Committee set up by the Convention concerning International Carriage by Rail of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999, is set out in the Annex to this Decision.

2. Minor changes to the documents referred to in the Annex to this Decision may be agreed by the representatives of the Union in the Revision Committee without further Decision of the Council.

Article 2

After its adoption, the Decision of the Revision Committee of OTIF shall be published in the Official Journal of the Europan Union.

Article 3

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President