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European Union

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NOTE

From:	General Secretariat of the Council
To:	Permanent Representatives Committee
Subject:	COUNCIL DECISION on the position to be taken on behalf of the European Union at the 5th session of the OTIF ad hoc Committee on Legal Affairs and International Cooperation

1. INTRODUCTION

The 5th session of the ad hoc Committee on Legal Affairs and International Cooperation of the Intergovernmental Organisation Convention for International Carriage by Rail (OTIF) will take place on 8-9 November 2023. The meeting documents are available on the website of OTIF at the following link: http://extranet.otif.org/jur/?page_id=6227

2. EU COMPETENCE

The EU is a contracting party to the Convention.

In respect of this meeting's agenda items 3, 4, 6, 7, 8, 9 and 10, 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 items 6 (long-term strategy) and 7 (suspension and termination of COTIF and/or membership), the Commission and the Presidency will speak, and the Commission will vote. On the other items, the Presidency and the Commission will speak, and Member States will vote. Member States may intervene to support and/or develop the common position.

3. COMMENTS ON AGENDA ITEMS

Agenda Item 3 – Application of the CUI UR to service facilities

<i>Document(s):</i>	LAW-23108-JUR 5/3; LAW-23109-JUR 5/3; LAW-23085-JUR 5
<i>Exercise of voting rights:</i>	Member States
<i>Position:</i>	Support the adoption of the advisory legal opinion on the interpretation of the CUI UR as set out in LAW-23109-JUR 5/3. Recall that only Union courts can authoritatively interpret Union law.

Agenda Item 4 – The digitalisation of international transport, particularly freight transport documents

<i>Document(s):</i>	LAW-23102-JUR 5/4; LAW-23024-JUR 4/9; LAW-22084-JUR 3/9-Corr.1; LAW-22031-JUR 2/11
<i>Exercise of voting rights:</i>	Member States
<i>Position:</i>	Note the inception paper prepared by the Secretariat (LAW-23024-JUR 4/9); Consider that, while there is no urgency to amend CIM, it is worth examining further whether certain provisions should be clarified (cf. paras 123-125 of the inception paper); Invite the Secretariat to prepare for the 6 th session an analytical non-paper presenting possible modifications to the CIM UR with the view to facilitating the uptake of the CIM electronic consignment note.

Agenda Item 6 – Development of a long-term strategy for OTIF

<i>Document(s):</i>	LAW-23115-JUR 5/6; LAW-23116-JUR 5/6
<i>Exercise of voting rights:</i>	Union
<i>Position:</i>	<p>Welcome the submission by the Secretary General of a revised, consolidated version of the ‘draft single strategy document’;</p> <p>Support in general the current draft structure and substance of the long-term strategy, subject to the following comments: regarding the strategic objective 1, it would be useful to outline concrete generic proposals, e.g. the organisation of regional workshops to promote the application and the uptake of all COTIF appendices by the OTIF members; regarding the strategic objective 4, it would be useful to outline concrete generic proposals for enhancing OTIF’s leading role in international rail transport; regarding the strategic objective 5, the narrative should refer to the cooperation with the European Agency for Railways ‘ERA’ and include a paragraph on the Luxembourg Protocol (to the Cape Town Convention) and the role of OTIF in supporting its implementation.</p>

Agenda Item 7 – Suspension and termination of COTIF and/or membership of OTIF with regard to a particular Member State

<i>Document(s):</i>	LAW-23103-JUR 5/7; LAW-23086-JUR 5; LAW-22082-JUR 3/5
<i>Exercise of voting rights:</i>	Union
<i>Position:</i>	<p>Regarding the proposal for decision under this item, the European Union recalls that the aim of OTIF is technical and limited to international rail transport, and that COTIF does not set any general or universal objectives. The European Union sees merit in preserving the technical nature of OTIF. Nevertheless, it remains open to further discussing the option of expanding criteria related to which sanctions may apply.</p> <p>In that context, the European Union proposes to mandate the OTIF Secretariat to set up an ad hoc working group of OTIF members to outline and draft possible modifications to the Convention, including the relevance and implications of such modifications, to be discussed at the 6th session of the Ad Hoc Committee.</p> <p>As a contribution to the work of such a working group, the European Union would like to put forward the following elements and guiding principles.</p> <p><i>Whether, as a general rule, sanctions for the breach of OTIF rules should only be imposed if expressly provided for by COTIF.</i></p> <p>The inception paper prepared by the OTIF Secretariat shows that, in general, decisions on sanctions against a member of an international organisation follow formal procedures explicitly provided for in the relevant convention or agreement concerned. This was the case in the Council of Europe in 2022, where the decisions to suspend and exclude a member from the organisation were based on the breach of obligations undertaken within the Council of Europe. It is therefore the view of the European Union that any sanction for the breach of OTIF rules should only be imposed if expressly provided for by COTIF, including clearly defined rules and procedures with regard to the assessment of potential breaches and of the relevant circumstances and on the definition of the applicable sanction.</p> <p><i>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?</i></p> <p>The aim of OTIF is technical and limited to international rail transport: COTIF does not set any general or universal objectives, such as the maintenance of international peace or the promotion of the rule of law. In principle it could be envisaged to lay down</p>

provisions in COTIF that would require compliance with rules or principles contained in other international instruments (e.g. the UN Charter or international human rights treaties) or in customary international law, and to also provide sanctions in COTIF for the breach of those rules or principles. Such clauses, however, are not usually found in treaties establishing technical organisations like OTIF. This would affect the technical nature of the organisation.

Whether COTIF should set out sanctions for breaches other than non-payment of contributions. If so, what potential breaches should be included?

Article 1 §1 COTIF provides that the contracting parties constitute the organisation ‘OTIF’. Hence, it may be considered that OTIF Members share collectively the responsibility – stemming from their membership of OTIF and their obligations under COTIF – to achieve the aim of OTIF (Article 2 §1 COTIF), which is to “*promote, improve and facilitate, in all respects, international traffic by rail (...)*”. Following this rationale, it may be envisaged to amend COTIF to define sanctions for breaches of certain COTIF provisions other than for the non-payment of financial contributions to the budget, including: (1) breaches of OTIF rules that cause a potential or actual dysfunction of the international rail traffic regulated by COTIF and/or (2) breaches of OTIF rules that seriously hamper the aim of OTIF to promote, facilitate and improve international rail traffic.

To elaborate further on this, it would be necessary to: (a) Identify certain OTIF rules which are particularly relevant for the achievement of the objectives of the organisation; (b) Identify certain OTIF rules in relation to which violations by OTIF Members are likely to disrupt the proper functioning of international rail traffic; (c) Identify certain OTIF rules in relation to which violations (be it of specific rules or of combinations thereof) by OTIF Members are likely to undermine the integrity or functioning of OTIF; (d) Define a methodology to determine whether a breach of OTIF rules could seriously hamper the aim of OTIF to promote, facilitate and improve international rail traffic.

The following types of sanctions could be envisaged with regard to a breach of OTIF provisions other than the non-payment of contributions: suspension of voting rights; suspension of membership; termination of membership (exclusion), eventually to be applied if no appropriate corrective actions are implemented after suspension.

Several cross-cutting principles should also be applied: any sanctions to be set out must be effective, proportionate, and dissuasive; different types of sanctions should be envisaged and calibrated to account for different levels of gravity of the breach

and potential aggravating factors, which could also be applied if no appropriate corrective actions are implemented after the sanction; procedural aspects such as the right to be heard, right of appeal, requests for remedial actions, restoration of rights and the readmission of expelled OTIF Member should be considered.

The United-Kingdom (LAW-23086-JUR 5, point 5.2) proposes a specific way forward by considering circumstances that would impact the performance of OTIF and which are linked to differing behaviours, such as an act of war by one OTIF Member which unreasonably undermines the ability of another OTIF Member to meet its obligations under COTIF, or if an OTIF Member attacks another Member's rail infrastructure, unreasonably undermining that Member's ability to meet their COTIF obligations.

The EU remains open towards the possibility of discussing the introduction of sanctions for breaches other than non-payment of contributions in OTIF. However, at this juncture, the works should concentrate on proposals that take due account of the technical nature of OTIF. The European Union appreciates the views presented by the UK and suggests considering the possible inclusion in COTIF of provisions requesting members to respect the physical and functional integrity of the rail infrastructure of other members. This could be for example inserted in Article 5 of COTIF (Special obligations of the Member States). The breach of such new provision could be sanctionable.

Which OTIF organ should be responsible for deciding whether the relevant rules have been breached?

The General Assembly is OTIF's supreme decision-making body and should be formally responsible for deciding whether relevant OTIF rules have been breached. Based on the institutional set up of OTIF, it would be the role of the Secretary-General to examine any alleged breach of OTIF rules. This may involve consultations of other OTIF organs and require external expertise with the view to preparing the necessary proposals for decision, where appropriate, for consideration by the General Assembly.

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?

The General Assembly is OTIF's supreme decision-making body and should be formally responsible for deciding on the application of sanctions, the restoration of rights and the readmission of expelled Member States. Given the importance and impact of the application of sanctions, the qualified two-third majority of the OTIF Member States present referred to in Article 14 §6 COTIF would likely be appropriate in this case.

	<p><i>Should circumstances precluding the wrongfulness of an act be expressly included in COTIF?</i></p> <p>The European Union is of the view that a non-exhaustive description of circumstances precluding the wrongfulness of an act should indeed be expressly included in COTIF. As an example, a force majeure clause in COTIF could set out clear conditions that would be outside of the control of an OTIF Member, consistent with the general framework of States' responsibility for internationally wrongful acts as developed in paragraphs 24 to 35 of the OTIF Secretariat's inception paper.</p> <p><i>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?</i></p> <p>On the assumption that sanctions are indeed implemented, as a matter of principle, the readmission of expelled members should only be considered and accepted under specific conditions, and in any case only if the breach of OTIF rules that gave rise to the sanction is effectively corrected. Conditions for sanctions to be revoked and membership's rights to be restored would need to be clearly identified and formulated.</p>
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Agenda Item 8 – Use of electronic signatures in official communications between OTIF and its members

<i>Document(s):</i>	LAW-23104-JUR-5/8; LAW-23019-JUR 4/4
<i>Exercise of voting rights:</i>	Member States
<i>Position:</i>	<p>Take note of the information presented by the Secretariat (inception paper) and recall that, for the EU, the matter is covered by the Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market; Support the preparation of a draft recommendation, preferably by the OTIF 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.</p>

Agenda Item 9 – Legal protection of OTIF’s name, abbreviation, logo and works

<i>Document(s):</i>	LAW-23119-JUR 5/9; LAW-23120-JUR 5/9
<i>Exercise of voting rights:</i>	Member States
<i>Position:</i>	Support the development of a copyright policy and instructs the Secretariat to prepare such policy including licensing under open access licensing models where appropriate and taking into account the rights of ownership especially the rights of third parties in the different types of documents published by OTIF; Express the view that the General Assembly should approve the logo and guidelines on use of the organisation’s name, logo, flag and abbreviation; Agree to instruct the OTIF Secretariat to prepare draft guidelines on the use of OTIF’s name, abbreviation and logo to be discussed at the next session of the Committee and to proceed with the communication of OTIF’s “name, abbreviation, emblem or armorial bearings” to WIPO (World Intellectual Property Organisation) in accordance with Article 6ter of the Paris Convention for the Protection of Industrial Property.

Agenda Item 10 – Involvement of registered stakeholders in the ad hoc Committee on Legal Affairs and International Cooperation

<i>Document(s):</i>	LAW-23105-JUR 5/10
<i>Exercise of voting rights:</i>	Member States
<i>Position:</i>	Support the proposal of the OTIF Secretariat to clarify that, for the purpose of involving stakeholders in the activities of the Committee, the term ‘expert’ means experts in their independent professional capacity and experts as representatives of legal persons active in the international rail sector, such as carriers and infrastructure managers; Note the decision of the Bureau of the Committee that requests from experts, academics and researchers to give a presentation at a session of the ad hoc Committee must be approved by the Bureau before the relevant session in order to ensure that the session is managed efficiently.