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REVISED OPINION

ERA/OPI/2016-3

OF THE EUROPEAN UNION AGENCY FOR RAILWAYS

for

European Commission

regarding

question of NB-Rail QC-STR-009 concerning the certification
according to withdrawn TSIs.

Disclaimer:

The present document is a non-legally binding opinion of the European Union Agency for Railways. It does not represent the view of other EU institutions and bodies, and is without prejudice to the decision-making processes foreseen by the applicable EU legislation. Furthermore, a binding interpretation of EU law is the sole competence of the Court of Justice of the European Union.

1. General Context

In its letters referenced as 'Ares(2016)5968515' and 'move.ddg2.c.4(2016) 7808306' addressed to the European Union Agency for Railways ("the Agency"), the European Commission – DG MOVE B2 requested the Agency to prepare a technical opinion regarding a request put forward by NB Rail in their Question/Clarification document n° QC-STR-009.

The question is relative to projects for which repealed TSIs apply; is it necessary to request a derogation for applying a repealed version of a TSI when a new version has entered into force?

NB-Rail proposes three statements :

1. If a TSI allows the application of a previous version of a TSI for certain projects, then EC verification is permitted according to this previous version without the need for derogation according to article 9 of Directive 2008/57/EC¹.
2. There is an exception for the TSI CCS 2016/919/EU²: since its entering into force on the 5th of July 2016 trackside or on-board CCS subsystems can be certified according to this version only. A derogation according to article 9 of Directive 2008/57/EC is required for applying an earlier version of the TSI.
3. Interoperability constituents can be certified by the notified body according to any relevant version of a TSI as requested by the manufacturer of the IC. When incorporating an IC into a subsystem the notified body responsible for EC verification of the subsystem shall assess the correct implementation into and compatibility with the subsystem taking into account the version of TSI used for the subsystem verification.

2. Legal Background

As highlighted in the request from NB-Rail, the Directive 2008/57/EC states in its article 5 (2) relative to the content of TSIs that *"subsystems shall comply with the TSIs in force at the time of their placing in service, upgrading or renewal, in accordance with this Directive"*.

The same article precises in the next point (3) that *"each TSI shall: (...)*

(f) indicate the strategy for implementing the TSIs. In particular, it is necessary to specify the stages to be completed in order to make a gradual transition from the existing situation to the final situation in which compliance with the TSIs shall be the norm."

The article 9 lists the cases for derogations and indicates in particular that *"in the absence of relevant specific cases, a Member State need not apply one or more TSIs in accordance with this Article in the following cases:*

(a) for a proposed new subsystem, for the renewal or upgrading of an existing subsystem, (...) at an advanced stage of development or the subject of a contract in the course of performance when these TSIs are published;

These articles apply to subsystems; as for Interoperability Constituents, the procedure for 'EC' Declaration of conformity or suitability for use is described in article 13, that states that *"in order to establish the 'EC' declaration of conformity or suitability for use of an interoperability constituent, the manufacturer or his authorised representative established in the Community shall apply the provisions laid down by the relevant TSIs."*

¹ Directive 2008/57/EC of the European Parliament and of the Council of June 2008 on the interoperability of the rail system within the Community - OJ L 191, 18.7.2008, p. 1–45

² Commission Regulation (EU) 2016/919 of 27 May 2016 on the technical specification for interoperability relating to the 'control-command and signalling' subsystems of the rail system in the European Union - OJ L 158, 15.6.2016, p. 1–79

It can be noted that the revised Interoperability Directive 2016/797³ has kept the same structure: article 4 2 and 3 (f) are equivalent to the article 5 2 and 3 (f) of Directive 2008/57 while article 7 in Directive 2016/797 is equivalent to article 9 of Directive 2008/57.

3. Analysis

The article 9 of the Directive 2008/57 is relative to the non-application of published TSIs. It is complemented by the article 5 (3) relative to the transition between:

- the situation where no TSI exists prior to the first TSI, or
- successive versions of a TSI.

Article 5 (3) requires that TSIs indicate an implementation strategy from the existing situation, i.e. the situation where

- another legislation is applicable, or
- an earlier version of the TSI is already in force.

This transition phase is described in several TSIs. As an example, the Commission Regulation (EU) No 1302/2014 (TSI LOC&PAS 2014)⁴ can be quoted.

3.1. TSI LOC&PAS 2014

The transition from the existing situation is given in the Article 11 that specifies that *“Decisions 2008/232/EC and 2011/291/EU are repealed with effect from 1 January 2015.*

They shall however continue to apply to:

- (a) subsystems authorised in accordance with these Decisions;*
- (b) cases referred to in Article 9 of this Regulation;*
- (c) projects for new, renewed or upgraded subsystems which, at the date of publication of this Regulation, are at an advanced stage of development, are of an existing design or are the subject of a contract which is being carried out, as referred to in point 7.1.1.2 of the Annex to this Regulation.”*

The point 7.1.1.2 of the Annex is describing a transition phase that applies to:

- Projects at advanced stage of development, as defined in the clause 7.1.1.2.2*
- Contracts in course of performance, as defined in the clause 7.1.1.2.3*
- Rolling stock of an existing design, as defined in clause 7.1.1.2.4*

This approach is aligned with the article 5 (3) of directive 2008/57/EC and permits the use of the repealed TSI without any particular action to be undertaken from the applicant.

It can be noted that the article 7 of the TSI LOC&PAS 2014 requires that *“in accordance with Article 9(3) of Directive 2008/57/EC, each Member State shall communicate to the Commission within one year of the entry into force of this Regulation the list of projects being implemented within its territory and are at an advanced stage of development”*. The article 7 requires only the notification of projects. Being covered by the stipulations of article 11, these projects do not require a derogation.

³ Directive (EU) 2016/797 of the European Parliament and of the Council of 11 May 2016 on the interoperability of the rail system within the European Union - OJ L 138, 26.5.2016, p. 44–101

⁴ Commission Regulation (EU) No 1302/2014 of 18 November 2014 concerning a technical specification for interoperability relating to the ‘rolling stock — locomotives and passenger rolling stock’ subsystem of the rail system in the European Union

3.2. Other TSIs

The same transitional approach is given in other TSIs as follows:

- Article 11 of the Commission Regulation (EU) No 321/2013 of 13 March 2013 concerning the technical specification for interoperability relating to the subsystem 'rolling stock — freight wagons' of the rail system in the European Union and repealing Decision 2006/861/EC (TSI WAG)
- Article 11 of the Commission Regulation (EU) No 1299/2014 of 18 November 2014 on the technical specifications for interoperability relating to the 'infrastructure' subsystem of the rail system in the European Union (TSI INF)
- Article 11 of the Commission Regulation (EU) No 1300/2014 of 18 November 2014 on the technical specifications for interoperability relating to accessibility of the Union's rail system for persons with disabilities and persons with reduced mobility (TSI PRM)
- Article 11 of the Commission Regulation (EU) No 1301/2014 of 18 November 2014 on the technical specifications for interoperability relating to the 'energy' subsystem of the rail system in the Union (TSI ENE)
- Article 9 of the Commission Regulation (EU) No 1303/2014 of 18 November 2014 concerning the technical specification for interoperability relating to 'safety in railway tunnels' of the rail system of the European Union (TSI SRT)
- Article 9 of the Commission Regulation (EU) No 1304/2014 of 26 November 2014 on the technical specification for interoperability relating to the subsystem 'rolling stock — noise' amending Decision 2008/232/EC and repealing Decision 2011/229/EU (TSI NOI)

3.3. Case of the TSI CCS

In the case of the TSI CCS, such transition phase concerns only some aspects of the TSI, specified in article 12 and article 13:

- *Article 12 Repeal: Decision 2012/88/EU is repealed.*
- *Article 13 Transitional provisions Points 7.3.1, 7.3.2, 7.3.4 and 7.3.5 of the Annex III to Decision 2012/88/EU shall apply until the date of application of the implementing acts referred to in Article 47(2) of Regulation (EU) No 1315/2013.*

Note that there has been no change in this matter between the CCS TSI 2012/88/EU and the CCS TSI 2016/919/EU: when no specific transitional periods are indicated, a derogation is required.

As a consequence, a derogation according to Article 9 1 (a) of Directive 2008/57 is always required for projects at an advance stage of development, and a file describing the request for derogation has to be communicated to the Commission according to Article 9(2) of Directive 2008/57/EC.

Furthermore, according to Article 9(3) of Directive 2008/57/EC (as reminded in article 4 of the TSI CCS), within one year of entry into force of each TSI each Member State shall communicate to the Commission a list of projects that are taking place within its territory and are at an advanced stage of development. This has to be done regardless of whether these projects will require a derogation or not.

3.4. Case of Interoperability Constituents

For Interoperability Constituents, the term "relevant TSI" used in Article 11(2) and Article 13(1) of Directive 2008/57 (resp. in Article 10(1) of Directive 2016/797) is to be understood as "applicable TSI" or "TSI in force". This view is supported by:

- Article 11(5) of Directive 2008/57 (resp. Article 9(6) of Directive 2016/797) which states that transition periods may be defined for Interoperability Constituents (ICs);
- Article 1(1) of Decision No 768/2008/EC⁵ (New Approach Decision), which states that "*Products placed on the Community market shall comply with all applicable legislation.*"

The term "relevant TSI" can thus not be understood as "any TSI as requested by the applicant".

Whereas there is no specific transition phase defined in TSIs for the Interoperability Constituents, the transition between successive versions of a TSI is covered by the period of validity of the type or design examination or suitability for use certificate (e.g. five years specified in point 7.1.3.2 of the TSI LOC&PAS 2014, seven years specified in article 8 of the TSI INF); during this period of validity, ICs manufactured in conformity to the type can be placed on the market, even if a revised TSI enters in force. Before the end of the period of validity of the type or design examination or suitability for use certificate, the IC type shall be re-assessed according to the latest revision of the relevant TSI.

There may be other circumstances requiring a subsystem manufacturer to source ICs conforming to superseded TSIs, in order to allow their integration in a subsystem conforming to those superseded TSIs. This can be the case:

- a) for ICs intended to be integrated in subsystems for which a derogation having an impact on the IC has been granted,
- b) for ICs for which there is no backward compatibility with previous versions of a TSI, if one of the following conditions is met:
 - i) when the TSI in force explicitly allows the use of a previous version of a TSI; or
 - ii) in the case of spare parts for subsystems that are already placed in service when the corresponding TSI enters into force, as specified in Article 11(4) of Directive 2008/57 (resp. in Article 9(5) of Directive 2016/797).

In both cases a) and b), these constituents could be certified by the notified body in accordance with an earlier version of a TSI, namely the most recent version of the TSI that ensures compatibility of the IC with the TSI requirements that apply (or applied) to the subsystem at the time of its authorisation⁶.

It is the responsibility of the applicant for the subsystem including such constituents to ensure the appropriateness of the version of the TSI selected for those constituents and their consistency at subsystem level. It is the responsibility of the notified body assessing the Subsystem that integrates these Interoperability Constituents to verify their integration at Subsystem level in accordance with the applicable TSIs.

Case b) should remain exceptional as, when revising TSIs, the Agency should ensure the backward compatibility of technical requirements, so that ICs conforming to the latest version of a TSI remain

⁵ Decision No 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC – OJ L 218, 13.8.2008, p. 82–128

⁶ The version of the TSI to be used could be: 1. The version used at the time of authorisation, if no subsequent version ensures backward compatibility, or 2. The most recent version that ensures backward compatibility (might be one version between the one used at the time of authorisation and the version in force).

compatible with subsystems conforming to a previous version of the same TSI. There may however be exceptional cases where backward compatibility is not possible or wished⁷.

An example of situation (b)(i) is the case for the IC "universal toilet module" defined in the TSI PRM, for which it is stated in article 3: "*Universal toilet modules which have been assessed against the requirements of Commission Decision 2008/164/EC shall not be re-assessed when they are intended for rolling stock of an existing design as defined in Commission Regulation (EU) No 1302/2014.*" It is also the case for the ICs defined in the TSI CCS, that includes in the table 6.2 of its Annex the way to handle ICs certified for previous versions of the TSI, when assessing a subsystem⁸.

4. The opinion

The Agency is of the opinion that derogations are not required in cases where a repealed TSI is used instead of the latest version of this same TSI when this is specified in the implementation strategy of the TSI specifying the transition from the existing situation as per article 5 (3) of Directive 2008/57/EC. This is the case for all TSIs listed in paragraphs 3.1 and 3.2. It does not exempt Member State from the communication to the Commission, within one year of the entry into force of a TSI, of the list of projects being implemented within its territory that are at an advanced stage of development.

In the case of the CCS TSI, that does not specify a transition, the Agency is of the opinion that derogations according to article 9 1 (a) of the Directive 2008/57/EC are mandatory.

The Agency is of the opinion that Interoperability constituents shall be certified according to the latest applicable version of a TSI, being understood that the TSI implementation strategy (e.g. transition period) defined for subsystems also applies to the ICs. There are two exceptions for which the constituent could be certified according to an earlier version of a TSI in addition to the cases defined in the implementation strategy of the TSI in force: (i) a derogation granted to the subsystem and (ii) ICs for which there is no backward compatibility, under the conditions detailed above in point 3.4.

Valenciennes, 26.06.2017



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⁷ Recital 16 and Article 6(9) of Directive 2008/57/EC (resp. Recital 17 and Article 5(10) of Directive 2016/797) state that "when developing new TSIs the aim should always be to ensure compatibility with the existing authorised system". Cases where there is no backward compatibility should remain exceptional. "Backward compatibility" is to be understood as: the requirements of the revised TSI ensure conformity with the previous TSI.

⁸ Further explanations can be found in the CCS TSI Application Guide, section 3.6.5: <http://www.era.europa.eu/Document-Register/Pages/TSI-Application-Guide.-CCS-TSI.aspx>

ANNEX 1

Letters from DG MOVE referenced as 'Ares(2016)5968515' and 'move.ddg2.c.4(2016) 7808306' and Question/Clarification document n° QC-STR-009 from NB Rail