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OPINION

OPI 2020 - 9

OF THE EUROPEAN UNION AGENCY FOR RAILWAYS

for

Romania

regarding

Negative assessment of national rules of Romania on dangerous goods relating to the use of buffer wagons along RFC 7

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

1.1. Scope

The scope extension of the Technical Specifications for Interoperability for the Operation and Traffic Management, hereinafter “TSI-OPE” (annex to Commission Implementing Regulation (EU) 2019/773¹), in particular the functional and technical harmonisation of requirements within this TSI made a series of national rules redundant and unnecessary. Appendix I of the TSI sets out topics for which national rules are permitted.

In addition the Article 8 of Directive (EU) 2016/798² indicates clearly cases where national rules may continue to apply. This is further discussed under section 2.1.

According to Article 8(1) and Annex II of Directive (EU) 2016/798, Member States have to notify existing rules. Since 16 June 2019, Member States may only adopt new national rules or revise existing national rules in the cases set forth in Art. 8(3). When notifying, Member States have to provide justification for the existence of national rules (e.g. identification of why the rule is not covered in EU legislation).

The Commission is preparing a communication for Member States, which shall require them to notify their national safety rules according to guidance that has been prepared. This will explain that until the Single Rules Database is available, the notification is performed in NOTIF-IT, but this is an opportune time to review all national safety rules to ensure that only those that are permitted by EU legislation are included. To help Member States, an excel database will be used in order to support the cleaning up of national and rules and the migration from NOTIF-IT to SRD. The starting point proposed for cleaning up the national safety rules is the national guide on Single Safety Certificates (SSC) as required to be published by the NSAs by Article 3(8) of the Commission implementing Regulation (EU) 2018/763³. The national safety authorities shall publish and keep up to date an application guide, free of charge, describing and where necessary explaining the national rules that apply in respect of the intended area of operation and the applicable national rules

The scope of the technical opinion covers the examination of national rules (existing or draft) leading to a negative assessment by the Agency.

¹ Commission Implementing Regulation (EU) 2019/773 of 16 May 2019 on the technical specification for interoperability relating to the operation and traffic management subsystem of the rail system within the European Union and repealing Decision 2012/757/EU (OJ L 139, 27.5.2019, p. 5).

² Directive (EU) 2016/798 of the European Parliament and of the Council of 11 May 2016 on railway safety (OJ L 138, 26.5.2016, p. 102).

³ Commission Implementing Regulation (EU) 2018/763 of 9 April 2018 establishing practical arrangements for issuing single safety certificates to railway undertakings pursuant to Directive (EU) 2016/798 of the European Parliament and of the Council, and repealing Commission Regulation (EC) No 653/2007 (OJ L 129, 25.5.2018, p. 49).

2. Legal Background

2.1. The basis for national rules

According to the provisions of Article 8 of Directive (EU) 2016/798, national rules and where relevant acceptable means of compliance (AMOC) shall apply in the cases defined below:

- a) when they fall into one of the types identified under Annex II and comply with Union law, including in particular TSIs, CSTs and CSMs; and would not result in arbitrary discrimination or a disguised restriction on rail transport operation between Member States.
- b) where rules concerning existing safety methods are not covered by a CSM;
- c) where operating rules of the railway network are not yet covered by TSIs, including open points as referred to in Appendix I of the TSI-OPE ;
- d) as an urgent preventive measure, in particular following an accident or an incident;
- e) where an already notified rule needs to be revised;
- f) where rules concerning requirements in respect of staff executing safety-critical tasks, including selection criteria, physical and psychological fitness and vocational training are not yet covered by a TSI or by Directive 2007/59/EC.

According to TSI OPE Section 4.4.2 National rules are not compatible except for Appendix I which lists the areas where no common operational principles and rules exist and which may continue to be subject to national rules. In accordance with the Decision (EU) 2017/1474 the Agency in cooperation with the Member State(s) concerned shall cooperate to assess the list of open points with a view to:

- a) further harmonise the requirements of this Regulation through detailed provisions or through acceptable means of compliance, or
- b) facilitate the integration of such national rules into the safety management system of the railway undertakings and the infrastructure managers, or
- c) confirm the need for national rules.

The Agency may by means of technical opinion define acceptable means of compliance, which shall be presumed to ensure compliance with specific requirements and ensure safety in accordance with Directive (EU) 2016/798 (Section 4.4.3 of OPE TSI).

According to the provisions of Article 8(4) of Directive (EU) 2016/798, draft national rules and national rules shall be examined by the Agency in accordance with the procedures laid down in Articles 25 and 26 of Regulation (EU) 2016/796.

According to the provisions of Article 25 (3) of the Agency Regulation (EU) 2016/796, where the examination of a draft national rule leads to a negative assessment, the Agency shall inform the Member State concerned and ask it to state its position regarding that assessment. If, following that exchange of views with the Member State concerned, the Agency maintains its negative assessment, the Agency shall within a maximum period of 1 month:

- (a) issue an opinion addressed to the Member State concerned, stating the reasons why the national rule or rules in question should not enter into force and/or be applied; and
- (b) inform the Commission of its negative assessment, stating the reasons why the national rule or rules in question should not enter into force and/or be applied.

According to the provisions of Article 26 (3) of the Agency Regulation 2016/796, where the examination of an existing national rule leads to a negative assessment, the Agency shall inform the Member State concerned and ask it to state its position regarding that assessment. If, following that exchange of views with the Member State concerned, the Agency maintains its negative assessment, the Agency shall within a maximum period of 1 month:

- (a) issue an opinion addressed to the Member State concerned, stating that the national rule or rules in question has or have been the subject of a negative assessment and the reasons why the rule or rules in question should be modified or repealed; and
- (b) inform the Commission of its negative assessment, stating the reasons why the national rule or rules in question should be modified or repealed.

According to Article 6 (2)(a) of the Directive (EU) 2008/68 on the inland transport of dangerous goods⁴, Member States may request derogations from the Commission for the transport of small quantities of certain dangerous goods provided that the conditions for such transport are no more stringent than the conditions set out in Annex II of this Directive. Furthermore this Article states that Member states may also request derogations for the transport of dangerous goods within their territory in the case of local transport by rail on particular designated routes, forming part of a defined industrial process and being closely controlled under clearly specified conditions (subparagraph (2)(b)(ii)).

The Commission shall examine in each case whether the conditions laid down in the above mentioned Article have been met and shall decide, in accordance whether to authorise the derogation and to add it to the list of national derogations set out in Annex II of this Directive. This Annex II refers to the RID, appearing in the Appendix C to the Cotif. The current version of the RID is applicable as from the 1st January 2019.

2.2. The justification for national rules

The adoption of the Fourth Railway Package confirmed the need to ensure that National Rules “comply with Union Law, including in particular TSIs, CSTs and CSMs” and don’t duplicate them (Art. 8(1) and (2) of 2016/798). The issue of the clean-up and removal of National Rules has been an on-going issue for a number of years. In April 2016, Commissioner Violeta Bulc wrote to all Member States asking for National Rules to be cleaned up. In addition, the Commission sent a follow-up email to all Member States in October 2016 pressing the need for the clean-up and removal of NRs, particularly Types 1, 2 and 6. However, this has not, in the majority, taken place. With very few Member States delivering a more appropriate system of National Rules.

In relation to operational rules (type 3 and 4), ERA developed guidance to support how to analyse operational rules (type 3 and 4). This was sent around to all NSAs in December 2015 and was used in a series of bilaterals with Member States, National Safety Authorities and the sector during 2016/17. The information from the bilaterals was reviewed by ERA alongside all the National Implementation Plans (NIPs) that were required by Commission Regulation (EU) 2015/995⁵ ERA received up until March 2018 (the original deadline was July 2017).

⁴ Directive 2008/68/EC of the European Parliament and of the Council of 24 September 2008 on the inland transport of dangerous goods (OJ L 260, 30.9.2008, p. 13).

⁵ Commission Regulation (EU) 2015/995 of 8 June 2015 amending Decision 2012/757/EU concerning the technical specification for interoperability relating to the ‘operation and traffic management’ subsystem of the rail system in the European Union (OJ L 165, 30.6.2015, p. 1).

The results are available in the report on the TSI-OPE revision www.era.europa.eu/library/consultations_en. It was found that on the whole the majority of the TSI-OPE (2015 version) has or will be implemented by the Member States by 2019. However, there seems to be a lack of understanding by some Member States on the role of national rules. From the National Implementation Plans (NIPs) it can be seen that national rules continue to be used to implement the requirements in the TSI-OPE in a level of detail that does not take into account how the SMS should be developed by the RU to address the operational context and the particular safety risks.

The information on the NIPs was used to develop the latest TSI-OPE, which sets out national rules (type 3 and 4) that are compatible with the requirements. This corpus of rules reduces the scope for National Rules which is a fundamental requirement for the effective implementation of the Fourth Railway Package and in particular the applications for the single safety certificates.

3. Analysis

3.1. Tasks under the responsibility of the Member States:

In accordance with the preparation of the implementation of the Fourth Railway Package, Member States should:

- Identify and remove national rules made redundant by EU Regulations on CSMs/CSIs/CSTs.
- Identify and remove national rules superseded by Commission implementing Regulation (EU) 2018/763. For example, there should be no rules on indicators or targets and operational rules should be restricted to areas not covered by the TSI OPE.
- Identify and remove national rules made redundant by TSIs-OPE.

Based on the outcome of this activity, Member States should have:

- Published their reviewed national rules in the NOTIF-IT Database and in the national guide on SSC;
- Aligned their national legislation in order to make the Single Safety Certification process more transparent and effective for cross border operations.

3.2. Tasks carried out by the Agency

As part of the project of cleaning up of national rules, the Agency will continue to:

- Provide technical support to Member States in the cleaning up of the remaining rules by ensuring:
 - o Consistency with the EU framework, including register of infrastructure and responsibilities of actors as defined in the Safety Directive and TSI-OPE.
 - o That rules relate to : open points, specific cases permitted in Appendix I of TSI-OPE
 - o That the rule is transparent and not discriminatory.

3.2.1. National rules subject to assessment by the Agency

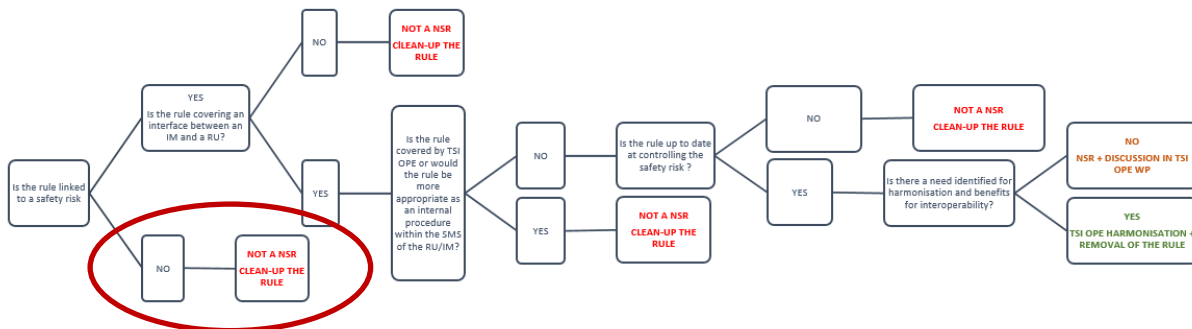
This assessment is in relation to the following Romanian current applicable national rule :

RO – ORDER n° 1816/2005:

Art. 99 and Art. 100 concerning regulations for trains and shunting

This rule is a type 3 national safety rule and handles about train composition. This operational rule that is analysed is not in line with TSI-OPE Appendix I, which lists the area where national rules are allowed (although Appendix I does not come into effect until 16 June 2021, MSs have to clean-up these rules for when EU Regulation 2018/762 applies because of the potential inconsistencies between national operational rules and the requirements with EU legislation. When considering Appendix I, train composition is not an area for national rules. Train composition principles are listed in TSI-OPE point 4.2.2.5.2; but it is up to the RUs to define how to implement these principles in their own SMS by applying appropriate risk assessment methods.

Using ERA flowchart provided in guidance sent out to the NSA Network in December 2015⁶, in order to help them in NRs cleaning up process, the following applies to the RO NSRs :



This rule sets a list of cases in which buffer wagons are needed to mitigate some risks not further detailed but, at the same time, the rule provides some exceptions that seems to be not in line with the first approach. The rule is not linked to a safety risk.

The only mandatory rule is RID. Other NSRs dealing with train composition must be cleaned-up as per the railway safety directive that define the migration strategy from a rule based approach to a risk based one. According to section 4.2.2.5 of the Decision 2012/757/EU the railway undertaking must define the rules and procedures to be followed by his staff so as to ensure that the train is in compliance with the allocated path.

The mitigation of the risk related to improper interactions between dangerous goods in train composition and between dangerous goods and vehicle with people in the same composition is up to the RU by the means of their own SMS (Commission Implementing Regulation 2018/762⁷ – Annex I – point 3.1.1 and point 5). Point 3.1.1 concerns the SMS requirements for risk assessment of the Railway Undertaking. Point 5 concerns the SMS requirements on operational planning and control, asset management, contractors partners and suppliers, management of change and emergency management.

In international traffic, these NSRs **may introduce additional risks** to the driver or shunter in normal operations because of potential shunting activities on border sections.

RUs can use a variety of information sources (f.e. good practices) as an input to their risk assessment process **but only if it can be proved that the related risks can be effectively mitigated by the NSR and other risks are not introduced**. However, it should be noted that the responsibility for making this decision is via the RU and their SMS because they are the ones responsible for managing the risks and know the operational context of their organization.

Romania was notified about this point of view by written communication on the 3th of December 2019. Until today ERA has not received any feedback.

⁶ Minutes of Meeting – Final Version- NSA Network – 39th Meeting, Valenciennes 24 and 25 November 2015. ([Link](#))

⁷ Commission Delegated Regulation (EU) 2018/762 of 8 March 2018 establishing common safety methods on safety management system requirements pursuant to Directive (EU) 2016/798 of the European Parliament and of the Council and repealing Commission Regulations (EU) No 1158/2010 and (EU) No 1169/2010 (OJ L 129, 25.5.2018, p. 26).

4. The opinion

In accordance with article 26(3) of Regulation 2016/796, the opinion covers the examination of national rules of Romania by the Agency leading to a negative assessment.

The Annex 1 provides Romania:

- The list of actions to be taken into account,
- An assessment table with :
 - o The national rule,
 - o The Agency assessment of the requirement and the reasons why this is not accepted,
 - o The status of the assessment indicating whether the requirement should be modified or repealed.

This opinion is addressed to Romania with a copy to the European Commission.

Valenciennes, 18.05.2020



Josef DOPPELBAUER
Executive Director

5. Annex 1: Examination of national rules leading to negative assessment

The national rules related to the use of buffer wagons in Romania are defined in Art. 99 and Art. 100 of Order n) 1816/2005 on the approval of the Regulation on train movements and the manoeuvre of railway vehicles.

This rule cannot be a basis for the NSA or the infrastructure manager to impose National rules. However, it is important that the RU takes into account all the risk factors in their operational context when deciding what is good practice and what could be adopted.

Romania has been informed of the position of ERA but to date no response has been received.

The table below presents the rule where the evaluation performed by the Agency lead to a negative assessment.

Subsystem	Distribution of remaining rules	National rules and acceptable national means of compliance	Examination of national rules and acceptable national means of compliance leading to a negative assessment	Agency assessment status
OPE	Other rules not covered by the TSI-OPE (e.g. potential area for national rules-local operational rule-TSI)	4.2.2.5.2 Train composition: the railway undertaking is responsible for ensuring that all vehicles composing the train including their load are technically fit for the journey to be undertaken and remains so throughout the journey.	Agency: The rules for train composition are well described under part 4.2.2.5.2 in the TSI-OPE, it is clearly stated that the railway undertaking is responsible for ensuring the train composition and it is up to the railway undertaking to implement this in their own safety management system. Furthermore, the RID requirements are not prescriptive, instead the operational risks must be ensured through the SMS of the RU	Not accepted National Rule should be repealed