OPINION

ERA/OPI/2015-3

OF THE EUROPEAN RAILWAY AGENCY

FOR

GREEK REGULATORY AUTHORITY FOR RAILWAYS

REGARDING

Greek Shunting Services

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1. General Context

In an email dated the 5th of February 2015 with a form of Request for a Technical Opinion attached thereto, addressed to the European Railway Agency (ERA), the President of RAS (Greek Regulatory Authority for Railways – also National Safety Authority) requested ERA to provide them with a Technical Opinion regarding a company intending to provide only shunting services to the Infrastructure Manager and Railway Undertakings in marshalling yards and stations.

Pursuant to Article 2 (b) of Regulation (EC) 881/2004 of European Parliament and of the Council of 29 April 2004 establishing a European railway agency[1] (Agency Regulation), ERA "may issue opinions to the Commission pursuant to Articles 9a, 10, 13 and 15, and to the authorities concerned in the Member States pursuant to Article 10".

The questions addressed to ERA are the following:

"A. Assuming that the shunting locomotives move only in marshalling yards or / and stations,

I. Is the interested party considered as a RU under the Railway Safety Directive and therefore is it obliged to obtain a Part A and B safety certificate?

II. Are the relevant shunting locomotives required to be registered in the National Vehicle Register (NVR)?

III. We understand that the drivers of these shunting locomotives should be licensed by the NSA and certified by the relevant RU. How could these drivers be certified in case the interested party is not finally considered as a RU? Could they be certified by a third party (e.g. another RU, or even a staff outsourcing company)?

B. What are the answers to the above questions in the case that the shunting locomotives may need to move also on the open line in self-propelled mode (i.e. to travel between stations)?"

2. Legal Background

1. Article 10.1 the Agency Regulation provides the national regulatory bodies with the possibility to request a technical opinion from the Agency concerning safety-related aspects of matters drawn to their attention.
2. Article 3 (c) of Directive 2004/49/EC of European Parliament and of the Council of 29 April 2004 on safety on the Community's railways[2] (Railway Safety Directive - RSD), provides that "*'railway undertaking' means railway undertaking as defined in Directive 2001/14/EC, and any other public or private undertaking, the activity of which is to provide transport of goods and/or passengers by rail on the basis that the undertaking must ensure traction; this also includes undertakings which provide traction only*".

[1] OJ L 164, 30.04.2004, p. 1.
[2] OJ L 164, 30.4.2004, p.44.

3. The responsibility for the safe operation of the railway system and the control of risks associated with it is laid upon the infrastructure managers and railway undertakings (Article 4.3 of the RSD), "*without prejudice to the responsibility of each manufacturer, maintenance supplier, keeper service provider and procurement entity to ensure that rolling stock, installations, accessories and equipment and services supplied by them comply with the requirements and the conditions for use specified, so that they can be safely put into operation by the railway undertaking and/or infrastructure manager*" (Article 4.4. of the RSD).

4. Article 10.1 of the RSD, prescribes that "*In order to be granted access to the railway infrastructure, a railway undertaking must hold a safety certificate...*".

5. The format for safety certificates Part A and Part B, as well as the safety certificate application, is provided by Commission Regulation (EC) No 653/2007 of 13 June 2007 on the use of a common European format for safety certificates and application documents in accordance with Article 10 of Directive 2004/49/EC of the European Parliament and of the Council and on the validity of safety certificates delivered under Directive 2001/14/EC[3].

6. As regards the shunting locomotives, Art. 2 (c) of Directive 2008/57/EC of European Parliament and of the Council of 17 June 2008 on the interoperability of the rail system within the Community[4] (Interoperability Directive – IOD) regarding the definition of 'vehicle' needs to be taken into account ("'*vehicle' means a railway vehicle that runs on its own wheels on railway lines, with or without traction. A vehicle is composed of one or more structural and functional subsystems or parts of such subsystems*").

7. Registration of vehicles is mandated by Art. 33.1 of Directive 2008/57/EC ("*Each Member State shall keep a register of the vehicles authorized in its territory*") and detailed in Commission Decision 2007/756/EC of 9 November 2007 adopting a common specification of the national vehicle register provided for under Articles 14(4) and (5) of Directives 96/48/EC and 2001/16/EC[5] (NVR Decision).

8. The certification of train drivers operating locomotives and trains on the railway system in the European Union is covered by Directive 2007/59/EC of European Parliament and of the Council of 23 October 2007 on the certification of train drivers operating locomotives and trains on the railway system in the Community[6] (Train Drivers Directive – TDD).

9. The RSD, pursuant to Article 2, "*applies to the railway system in the Member States*". The "railway system" is "*the totality of the subsystems for structural and operational areas, as defined in Directives 96/48/EC and 2001/16/EC, as well as the management and operation of the system as a whole*", according to the definition of Article 3(a). The TDD applies "*to train drivers operating locomotives and trains on the railway system in the Community for a railway undertaking requiring a safety certificate or an infrastructure manager requiring a safety authorisation*" (Article 2(1)). For the purpose of the TDD the "railway system" is defined as "*the system composed of the railway infrastructures, comprising lines and fixed installations of the rail system, plus the rolling stock of all categories and origin travelling on that infrastructure, as defined in Directives 96/48/EC and 2001/16/EC*" (Article 3(d)). Directives 96/48/EC (on the "interoperability of the trans-European HS rail system") and 2001/16/EC (on the "interoperability of the trans-European conventional rail system") have been replaced by the IOD. The purpose of the IOD is "*to achieve interoperability*

[3] OJ L 153, 14.6.2007, p. 9.
[4] OJ L 191, 18.7.2008, p. 1.
[5] OJ L 305, 23.11.2007, p. 30.
[6] OJ L 315, 3.12.2007, p. 51.

within the Community rail system", as stipulated in Article 1(1) and its scope covers the trans-European conventional and high speed rail system "*identified in Decision No 1692/96/EC*[7]", as well as the vehicles likely to travel on all or part of this rail network (Annex I of the IOD).. Member States have the possibility to exclude from the measures they adopt for in implementation of the:

i. RSD (Article 2(2)):

"(a) metros, trams and other light rail systems;
(b) networks that are functionally separate from the rest of the railway system and intended only for the operation of local, urban or suburban passenger services, as well as railway undertakings operating solely on these networks;
(c) privately owned railway infrastructure that exists solely for use by the infrastructure owner for its own freight operations
(d) heritage vehicles that run on national networks provided that they comply with national safety rules and regulations with a view to ensuring safe circulation of such vehicles;
(e) heritage, museum and tourist railways that operate on their own network, including workshops, vehicles and staff."

ii. TDD (Article 2(3))

"(a) metros, trams and other light rail systems;
(b) networks that are functionally separate from the rest of the rail system and are intended only for the operation of local, urban or suburban passenger and freight services;
(c) privately owned railway infrastructure that exists solely for use by the infrastructure owners for their own freight operations;
(d) sections of track that are temporarily closed to normal traffic for the purpose of maintaining, renewing or upgrading the railway system".

iii. IOD (Article 1(3)):

"(a) metros, trams and other light rail systems;
(b) networks that are functionally separate from the rest of the railway system and intended only for the operation of local, urban or suburban passenger services, as well as railway undertakings operating solely on these networks;
(c) privately owned railway infrastructure that exists solely for use by the infrastructure owner for its own freight operations;
(d) infrastructure and vehicles reserved for a strictly local, historical or touristic use."

10. Decision No 1692/96/EC has been repealed by Decision No 661/2010/EU[8], which has also been repealed by Regulation (EU) No 1315/2013[9]. Article 11(1) of Regulation (EU) 1315/2013 provides the railway infrastructure components of the comprehensive network:

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[7] Decision No 1692/96/EC of the European Parliament and of the Council of 23 July 1996 on Community guidelines for the development of the trans-European transport network (OJ L 228, 9.9.1996, p. 1).
[8] Decision No 661/2010/EU of the European Parliament and of the Council of 7 July 2010 on Union guidelines for the development of the trans-European transport network (OJ L 204, 5.8.2010, p. 1).
[9] Regulation (EU) No 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU (OJ L 348, 20.12.2013, p.1).

"Railway transport infrastructure shall comprise, in particular:
(a) high-speed and conventional railway lines, including:
(i) sidings;
(ii) tunnels;
(iii) bridges;.....".

3. Analysis

The requirements of the Railway Safety Directive (RSD), the Interoperability Directive (IOD), and Train Drives Directive (TDD) are valid only for the railway system that fall under the scope of these Directives. The RSD and the TDD share broadly the same scope as the IOD, as they cover the "railway system" as defined in the previous interoperability Directives 96/48/EC (on the "trans-European HS rail system") and 2001/16/EC (on the "trans-European conventional rail system").

The IOD aims at achieving *"interoperability within the Community rail system"* as a whole (Article 1(1)). That is why it is also stated that *"When this Directive enters into force, its scope will cover conventional and high-speed European networks as defined in Decision No 1692/96/EC of the European Parliament and of the Council of 23 July 1996 on Community guidelines for the development of the trans-European transport network and the vehicles likely to travel on those networks. The scope will be progressively extended to the whole network and all vehicles, ..."* (Whereas (20)). The scope of the TSIs has been extended *"to the whole rail system, including track access to terminals and main port facilities serving or potentially serving more than one user "*(Article 1(4)). If the scope of the TSIs has been extended to the whole EU railway network, it is because the scope of the IOD is the entire EU railway system (as the legal basis for TSIs is the IOD).

Decision 1692/96/EC "on Community guidelines for the development of the trans-European transport network" (which is referred to in Annex I that defines the scope of IOD) has been replaced by Regulation (EU) 1315/2013 that refers explicitly to sidings in Article 11(1)(a). Thus, marshalling yards are not excluded by definition from the scope of the IOD.

Moreover, marshalling yards, in principle, do not fall within any of the exceptions which Member States may exclude from the scope of transposition of the IOD into national laws (except where the conditions of any of such exception are met): They are not *"functionally separate from the rest of the railway system and intended only for the operation of local, urban or suburban passenger services"* (Article 1(3)(b)of the IOD). If they are not privately owned, or even if privately owned but used by others than the owner of such lines, they do not fall within the exception of Article 1(3)(c) of the IOD. The reference to infrastructure *"reserved for a strictly local ...use"* (Article 1(3)(d)) refers to a line which is not connected to the main network: this cannot be the case of a marshalling yard.

From the questions in section 1, two cases are distinguished:

A. Shunting locomotives moving only in marshalling yards and/or stations; and

B. Shunting locomotives moving also on the open lines.

Bearing in mind that railway lines, stations and marshalling yards that do not meet the conditions to be excepted by Member States, are part of the railway system under the scope of the Directives, the specific questions relating to the safety certification, the registration of shunting vehicles and the certification of train drivers, for both cases, are dealt with as follows:

I. Safety Certification

- According to Article 3 of the RSD, 'Railway Undertaking' means railway undertaking as defined in Directive 2001/14/EC, and any other public or private undertaking, the activity of which is to provide transport of goods and/or passengers by rail on the basis that the undertaking must ensure traction, including undertakings which provide traction only. Directive 2012/34/EU establishing a single European railway area and replacing Directive 2001/14/EC[10], provides that "'Railway Undertaking' means any public or private undertaking licensed according to this Directive, the principal business of which is to provide services for the transport of goods and/or passengers by rail with a requirement that the undertaking ensure traction; this also includes undertakings which provide traction only". This means that the requirements of the RSD regarding safety certification are valid for those RU that are licenced under the national provision transposing Directive 2012/34/EU, and also for those undertakings the activity of which (but not the principal activity of which) is to provide transport of goods and/or passengers by rail on the basis that the undertaking must ensure traction and those undertakings that provide traction only.
- To ensure that safety risks are controlled, no movement of trains or rakes of vehicles can be made on the railway system if the risks associated to this movement are not controlled through the SMS of a railway undertaking (RU) or of an infrastructure manager (IM). This principle derives from Article 9(2) of RSD, and means that in the railway system falling under the scope of the RSD, shunting locomotives can only be operated by RUs or IMs having valid safety certificates or safety authorisations respectively, or by any other organisation acting as subcontractor for those RUs or IMS and covered by their SMS.
- Shunting activities are industrial activities interfaced with railway and railway activities such as composition, preparation and movement of rakes of vehicles. The shunting operator that is a subcontractor of an RU or an IM has the responsibility, as a service provider, "*to ensure that rolling stock, installations, accessories and equipment and services supplied by them comply with the requirements and the conditions for use specified, so that they can be safely put into operation by the railway undertaking and/or the infrastructure manager*", as stipulated in Article 4.4 of the RSD.
- The RU, and/or the IM, has contractual arrangements with the operator that provides shunting facilities, which should be managed respectively by the SMS of the railway undertaking and/or the SMS of the infrastructure manager. The RU, and/or the IM, must be informed of all events that took place during the activities of this shunting operator. Events include damages, accidents and incidents on vehicles. Through its SMS the railway undertaking and/or the infrastructure manager controls the risks associated to its own operations in relation to this information received.
- A shunting service provider, that operates in the railway system without being a railway undertaking having a valid safety certificate, or an infrastructure manager having a valid safety authorisation, or a subcontractor of this RU or IM, should apply for a safety certificate using the safety certificate application form provided for in Annex III of Commission Regulation (EC) No 653/2007, and be certified as a shunting only railway undertaking (Cf. point 2.1.4 of the safety certificate application).

[10] OJ L 343, 14.12.20127, p. 32.

II. Registration of shunting locomotives in the National Vehicle Register (NVR)

- Annex I Section 1.2 of the IOD stipulates that "*The trans-European conventional rail system shall comprise all the vehicles likely to travel on all or part of the trans-European conventional rail network*".
- Interoperability Directive (Article 2(c)) defines a "vehicle" as "*a railway vehicle that runs on its own wheels on railway lines, with or without traction...*".
- All vehicles (both new and existing) operated in the railway system have to be registered, as provided for in Article 33 of the Interoperability Directive and the NVR Decision (Decision 2007/756/EC). "Electric shunting engine", "diesel shunting engine" and other "special vehicles" are included (Cf. appendix 6 of NVR Decision – part 8).
- These mean that a shunting locomotive operating on the railway system is a vehicle that has to be registered in a NVR.

III. Train drivers

- Without prejudice to Art. 37 of the Train Drivers Directive (TDD), "*Gradual phasing-in and transition periods*", all train drivers operating locomotives and trains on the railway system in the European Union for a railway undertaking requiring a safety certificate or an infrastructure manager requiring a safety authorization, not excluded from the scope of transposition of the TDD by the Member States in accordance with its Art. 2.3, have to hold a licence and one or more certificates.
- Following the analysis under section I, train drivers of shunting locomotives operating on the railway system, are employed or contracted by a railway undertaking and/or an infrastructure manager, or by an organisation acting as subcontractor of a railway undertaking or an infrastructure manager.
- Pursuant to Article 6 (2) of the TDD,"*A certificate shall be issued by the railway undertaking or the infrastructure manager who employs or contracts the driver...*" and pursuant to Article 15 of TDD "*Each railway undertaking and infrastructure manager shall set up its own procedures for issuing and updating certificates in accordance with this Directive, as part of its safety management system...*".
- When train drivers of shunting locomotives are employed or contracted by a railway undertaking and/or an infrastructure manager, the provisions of the TDD apply and they must hold a licence and the certificate(s) accordingly.
- When train drivers of shunting locomotives are employed or contracted by a subcontractor of a railway undertaking or an infrastructure manager, in essence they are contracted by this railway undertaking and/or this infrastructure manager. This means that the provisions of the TDD should also be applied for these train drivers. They should be considered as train drivers to be licenced under the TDD by a NSA, contracted by a railway undertaking or an infrastructure manager, and covered by the procedures of their respective SMS for issuing and updating certificates.

4. The Opinion

The Agency is of the opinion that:

The operation of shunting locomotives in marshalling yards and stations is an operation that falls within the scope of the Safety Directive and as a result would need to be covered by a certified or

authorised Safety Management System. The Railway Undertaking either needs to hold its own Safety Certificate or to be a subcontractor to another Railway Undertaking or Infrastructure Manager. In the latter case they need to be covered by the Safety Management System of that Railway Undertaking or Infrastructure Manager.

Shunting locomotives, operating on the railway system, should be considered as vehicles under the scope of the Interoperability Directive and have to be registered in a NVR.

Finally, the drivers of shunting locomotives that operate on the railway system should be licensed and certified according to the provisions of the Train Drivers Directive by the railway undertaking or the infrastructure manager that employs or contracts them directly or through a subcontractor.

Valenciennes, 20.07.2015

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