

Moving Europe towards a sustainable and
safe railway system without frontiers.

OPINION

ERA/OPI/2023-2

OF THE EUROPEAN UNION AGENCY FOR RAILWAYS

for

ESTONIA

regarding

one (1) notified draft rule introducing amendments to an existing
law applicable in Estonia

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 line with Article 8 of Directive (EU) 2016/798 (Railway Safety Directive) and Article 25 (3) of Regulation (EU) 2016/796 (the Agency Regulation), this opinion covers the examination by the European Union Agency for Railways (hereinafter the Agency or ERA) of a draft national rule of Estonia amending the railway technical use regulations.

This opinion is addressed to Estonia with a copy to the European Commission (EC) and is uploaded on the Single Rules Database (SRD) and on the Agency's website.

Estonia notified this draft rule in the SRD¹ on 8 November 2022. The Agency assessed it and reached the conclusion (also recorded in the SRD) that the notified legal requirements appeared to contain references which are not in line with the EU legal framework². This is because only the amending texts were uploaded in SRD, while ERA did not have access to the complete rule in force, which was not uploaded entirely in SRD.

The Agency shared with Estonia its negative assessment on 5 January 2023.

On 3 March 2023, Estonia notified the Agency in SRD its rejection of the Agency's negative assessment on the draft rule.

2. Legal Background

Article 25(3) of the Agency Regulation sets out the following:

Where the examination referred to in paragraph 1 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.

This shall not prejudice the right of a Member State to adopt a new national rule in accordance with point (c) of Article 8(3) of Directive (EU) 2016/798 or with point (b) of Article 14(4) of Directive (EU) 2016/797.

The applicable EU legislation which is relevant for this opinion is:

- Directive (EU) 2016/798 of 11 May 2016 on railway safety;
- 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;
- 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;
- Commission Regulation (EU) No 1078/2012 of 16 November 2012 on a common safety method for monitoring to be applied by railway undertakings, infrastructure managers after receiving a safety certificate or safety authorisation and by entities in charge of maintenance;

¹ Rule ID EE-SA-446-1-D (reference in SRD).

² Reference to legal documents included under chapter 3 of this opinion.

- Commission Delegated Regulation (EU) 2018/761 of 16 February 2018 establishing common safety methods for supervision by national safety authorities after the issue of a single safety certificate or a safety authorisation pursuant to Directive (EU) 2016/798 of the European Parliament and of the Council and repealing Commission Regulation (EU) No 1077/2012;
- Commission Implementing Regulation (EU) 2015/1136 of 13 July 2015 amending Implementing Regulation (EU) No 402/2013 on the common safety method for risk evaluation and assessment

3. Analysis

The Agency could not assess the proposed amendment to the Estonian Regulation No. 71 of November 9, 2020 of the Minister of Economy and Infrastructure Railway Technical Use Regulation because the complete Regulation in force was not uploaded into SRD.

Only the parts that relate to the amendment were attached as references. Nevertheless, the Agency understands that Estonia's position seems to be that the whole Regulation remains accepted by the Agency as a national rule because it is still in the old database, namely in NOTIF-IT.

The complete Regulation had been only uploaded in NOTIF-IT which following the deployment of the SRD is no longer an acceptable IT tool for formal notifications, while ERA has no real access to the rules established by the Estonian Regulations. Estonia expressed its view that as this rule was approved by ERA in 2018 and is in NOTIF-IT, it remains unclear why ERA now gives a negative assessment to the amendment of this rule.

In response, the Agency explained to Estonia in the original assessment of the amending provision in SRD that as the draft rule appears to contain requirements on the design construction, maintenance, and inspection of level of crossings, this draft rule cannot be accepted as a national rule because this is not permitted by Appendix I of EU Regulation 2019/773 and is for the Infrastructure Manager's (IMs) Safety Management System. Besides, if the notified draft contains additional requirements/information on the failure of level crossings obliging the (Railway Undertakings) RU to take operational action, then this draft rule can be re-notified as a type 3 rule, but this needs to be clearly set out and justified by Estonia.

In addition, the Agency has explained to Estonia that all national rules now need to be reviewed before they can be accepted in the SRD and has proposed bilateral meetings to discuss the new process and what should be uploaded into SRD. Until now no such meeting has been held.

The European Commission has also explained to all EU Member States during the RISC meetings and at workshops on national rules that following the adoption of new EU railway legislation and particularly EU Regulation 2019/773 (which sets out the scope of operational rules that can be accepted) a comprehensive review should take place and the revised rules uploaded into SRD for assessment by ERA. The Agency agrees with the need for such a review.

In general, all national rules need to be reviewed against the new EU legal requirements. The EU Member States have a statutory duty under article 8 (2) (b) and 16 (2) (i) of the Safety Directive to review any national rule made redundant by Union law, including TSIs and to monitor and update the safety regulatory framework including the system of national rules.

More precisely, at RISC 96 in November 2022, the Commission explicitly stated in its presentation on national rules that 'Member States must notify the Commission and the Agency rules that become redundant after publication or revision of TSI (Art. 13(1d) IOD). As a consequence, after entry into force of TSIs revision package 2022 Member States are obliged to revise their existing national rules and repeal redundant ones. As a reminder, following adoption of 4th RP and TSIs revisions (2019, 2020), MSs should have revised their NRs and repealed the redundant ones'.

In this light, for the Agency to undertake an assessment of the Estonian rule, Estonia needs to upload in the SRD the complete rule in force and not restrict the notification to the amending provisions. Parts of the rule

may be accepted (i.e., in relation to speed) under Appendix I of EU Regulation 2019/773, but in the absence of the whole legal text currently in force and the justification of the amendments, the Agency cannot formally react to a definite conclusion.

4. The opinion

The Agency's opinion is that the provisions in the draft national safety rule of Estonia are not compliant with relevant EU legal requirements as described in chapter 3. Analysis of this opinion.

For this reason, in accordance with Article 25 (3) of Regulation 2016/796, the Agency confirms its negative assessment. This opinion is addressed to Estonia, with a copy to the European Commission (DG Move).

Valenciennes, 30/03/2023

Signed

Josef DOPPELBAUER
Executive Director

Annex 1

Impact Assessment Note

Regarding one (1) notified draft rule introducing amendments to an existing law applicable in Estonia

Issued as per Art. 8(1) of Regulation (EU) 2016/796 and the Impact Assessment procedure adopted by the ERA Management Board (Decision n.290, 16/03/2022)

1. Context and assessment of impacts**1.1. The national rule in object**

As part of the assessment of the national safety rules under Article 8 of Directive (EU) 2016/798 in conjunction with article 25 of Regulation (EU) 2016/796, the Agency received from Estonia the notification of the national rule in subject amending the railway technical use regulations.

Estonia notified this draft rule in the Single Rules Database (SRD) on 8 November 2022. The Agency assessed it and reached the conclusion that the notified legal requirements appeared to contain references which are not in line with the EU legal framework. This is because only the amending texts were uploaded in SRD, while ERA did not have access to the complete rule in force, which was not uploaded entirely in SRD.

1.2. Analysis performed

The Agency shared with Estonia its negative assessment on the 5th of January 2023. The Agency could not assess the proposed amendment to the Estonian Regulation No. 71 of 9 November 2020 of the Minister of Economy and Infrastructure (Railway Technical Use Regulation) because the complete Regulation in force was not uploaded into SRD. Only the parts that relate to the amendment were attached as references. Nevertheless, the Agency understands that Estonia's position seems to be that the whole Regulation remains accepted by the Agency as a national rule because it is still in the old database, namely in NOTIF-IT.

On 3 March 2023, Estonia notified the Agency in SRD its rejection of the Agency's negative assessment on the draft rule, expressing its view that as this rule was approved by ERA in 2018 and is in NOTIF-IT, it remains unclear why ERA now gives a negative assessment to the amendment of this rule.

The complete Regulation had been only uploaded on NOTIF-IT which following the deployment of the SRD is no longer an acceptable IT tool for formal notifications, while ERA has no real access to the rules established by the Estonian Regulations. The Agency has explained to Estonia on several occasions that all national rules now need to be reviewed before they can be accepted into SRD

As the draft rule appears to contain requirements on the design, construction, maintenance, and inspection of level of crossings, this draft rule cannot be accepted as a national rule because this is not permitted by Appendix I of EU Regulation 2019/773 and is for the Infrastructure Manager's (IMs) Safety Management System. Besides, if the notified draft contains additional requirements/information on the failure of level crossings obliging the RUs to take operational action, then this draft rule can be re-notified as a type 3 rule, but this needs to be clearly set out and justified by Estonia.

Parts of the rule may be accepted (i.e. in relation to speed) under Appendix I of EU Regulation 2019/773, but this cannot be decided without the whole rule and the relevant parts identified and justified.

1.3. Assessment of impacts

The draft rule in object by Estonia falls within the scope of the Light Impact Assessment 'Revision of the Common Safety Methods on Conformity Assessment and the Common Safety Methods on Supervision' performed by the Agency in February 2017. The impacts were therefore already adequately assessed, and it is confirmed that the adoption of the draft rule would compromise uniformity of application of well-established EU requirements on SMS, increase the risk of low transparency of the national rules framework that stakeholders have to comply within Estonia as well as possibly interoperability for RUs.

Overall, in order for the Agency to undertake an assessment, the whole rule in force needs to be uploaded into SRD, not restricting the notification to the amending provisions.

1.4. Stakeholders affected

| | | | |
|----------------------------------|-------------------------------------|--|-------------------------------------|
| Railway undertakings (RU) | <input checked="" type="checkbox"/> | Member States (MS) | <input type="checkbox"/> |
| Infrastructure managers (IM) | <input checked="" type="checkbox"/> | Third Countries | <input type="checkbox"/> |
| Manufacturers | <input type="checkbox"/> | National safety authorities (NSA) | <input checked="" type="checkbox"/> |
| Keepers | <input type="checkbox"/> | European Commission (EC) | <input type="checkbox"/> |
| Entity Managing the Change (EMC) | <input type="checkbox"/> | European Union Agency for Railways (ERA) | <input type="checkbox"/> |
| Notified Bodies (NoBo) | <input type="checkbox"/> | Shippers | <input type="checkbox"/> |
| Associations | <input type="checkbox"/> | Other (Please specify) ... | <input type="checkbox"/> |

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| 2. Preferred option |
| 2.1. Recommendation |
| No alternative options are to be assessed and it is confirmed a negative assessment of the draft rule by Estonia. |