

Annex III to the Programme Plan Rules cleaning-up

National rules applicable to fixed installations

1. Introduction

The purpose of this activity is to identify a necessary set of actions in order to support MS to bring their national technical rules in-line with the European Regulatory Framework as requested in June 2015 by the EU Transport Commissioner Violeta Bulc to the Executive Director of the European Railway Agency (now: European Union Agency for Railways) demanding an acceleration of the work to improve the functioning of the European railway area.

It has been pointed out that national rules may hinder the interoperability and create a risk in relation to the lack of transparency and a sort of hidden discrimination of some operators.

To avoid it DG MOVE, at the RISC meeting in October 2015, asked the Agency to prepare concrete proposals aimed at drastically reducing the number of national rules that are still in force despite that – at least – some of them are related to requirements already covered by the TSIs. This document contains a description and basic analysis of the problem and proposed actions to be undertaken by the Agency and the Member States for rules applicable to fixed installations.

2. Legal background

The TSIs as they are developed considering mostly the existing railway system, specify the optimal level of harmonisation. Therefore for fixed installations the national rules may only apply to cover (see also art. 13 of the new Interoperability Directive 2016/797/EU of 11.05.2016):

1. Essential requirements listed in the IOD that are not covered, or are not fully covered by the TSIs (art. 13.2(a) of the Directive). That includes open points: the issue is recognised to be harmonised, but no common requirements are set in the TSI yet; the national rule are used instead.
2. Rules used instead of TSIs when derogation was granted (art. 13.2(b) of the Directive).
3. Specific cases: the national rule requires something different from the TSI requirement (art. 13.2(c) of the Directive).
4. Technical compatibility between the new and existing systems (art. 13.2(d) of the Directive):
 - a. the national rule supplements the requirements set out in the TSIs, in order to maintain technical compatibility of the vehicles with existing infrastructure; these rules, however, normally do not apply to the fixed installations, but require an identification of constraints of existing infrastructure exported to vehicles.
 - b. the national rule sets up the requirements for the fixed installations in order to maintain technical compatibility of the network with existing vehicles; if such a rule applies to the new or renewed/upgraded lines, and the requirements (that cover parameters described in the TSI) are different than those in the TSI, the specific case is necessary.
5. Rules concerning the networks and vehicles not covered by TSIs (art. 13.2(e) of the Directive).
6. Rules adopted as an urgent temporary preventive measure (art. 13.2(f) of the Directive).

The national rules classified to the above categories need to be notified to the Commission and to the Agency according to art. 14 of the Interoperability Directive.

Apart from the above, there are other national rules, covering various requirements which are outside the scope of IOD, including those in the scope of other directives. Those rules do not need to be notified within the framework of the Interoperability Directive. They may, however, need to be notified according to the other European legislation.

3. Problem analysis

While it is clear that MSs have to notify to the Commission national rules that cover open points (1) and specific cases (3), national rules for technical compatibility (4) shall not be in contradiction with the characteristics expressed in the TSIs (unless the specific case was granted), especially in terms of interface parameters between fixed installations and vehicles (TSI section 4.3 'Interfaces between subsystems'), and which are necessary for evaluating the technical compatibility between vehicles and the network.

For this purpose the Register of Infrastructure has been developed (article 49 IOD) in order to provide the main features/characteristics of the EU railway network. 'The values of the parameters recorded in the register of infrastructure shall be used in combination with the values of the parameters recorded in the vehicle authorisation for placing on the market to check the technical compatibility between vehicle and network' (art. 49.2 of the Interoperability Directive).

The special attention needs to be given to other national rules that fall in the IOD but whose aspects (in total or partly) are not regulated in the TSIs (1) and still needed to demonstrate compliance with the essential requirements (the rules others than those used for open points are meant here). According to art. 14 of the Interoperability Directive, referring to art. 13.2 (in particular letter a) these rules shall also be notified by MSs including justification of their need. These provisions of the Directive are often used as justification for introduction of many national rules that specify requirements stricter (more demanding) than those already specified in the TSIs, or additional requirements on top of TSIs, or both. The two above issues need separate analyses. Before starting the identification of the national rules and subsequent notification followed by their assessment by the Agency, the criteria need to be established that enable the MSs to determine whether the given rule is allowed (thus should be notified for assessment and registration in the SRD), or not – in the latter case the rule should be removed from the national legal framework.

'Stricter requirements' means more demanding values for a given parameter listed in the TSIs (e.g. the INF TSI requests a minimum radius of horizontal curve of 150 meters whilst the national rule demands a minimum radius of 500 meters). 'Additional requirements' means the requirements setting the required values (or features) for the parameters that for any reason are not dealt with in the TSI. The Agency has performed an analysis of positive and negative aspects of introducing the stricter and additional requirements than those set out in the fixed installations TSIs (i.e. INF TSI and ENE TSI):

Positive aspects – PROS

- Interoperability is not jeopardised. The subsystem and the constituents will fulfil the requirements of the TSIs, as long as the possible additional requirements are not contradictory to the TSIs.
- For certain parameters, it could enforce the infrastructure managers/manufacturers to build a more performing and more reliable subsystem/constituent (e.g. more conservative requirements for resistance of new bridges to traffic loads).

- Railway infrastructure is, in a vast majority of the cases, property of the Member State. Railway assets are considered strategic. National rules would allow the Member state to control the performance level of the infrastructure developed in its territory, beyond assuring interoperability.

Negative aspects – CONTRAS

- The construction cost of the subsystem or constituents will normally be increased: possible loss of competitiveness versus other modes of transport.
- New entrants (i.e. a private infrastructure manager) will be impaired when trying to develop a project that could be optimized if it followed exactly the requirements of the TSIs.
- The free market for component, in particular the interoperability constituents, will face difficulties due to stricter and/or additional requirements; especially when an IC with an EC declaration of conformity or suitability for use manufactured in a different Member State enters in to a national market that obliges stricter features by law.
- INF TSI and ENE TSI are regulations and therefore no transposition into the national legal framework is needed. From the legal point of view, a national rule covering the same requirements and diverging from the EU legislation would immediately create a legal issue.
- The new approach allows manufacturers to choose the way to meet the essential requirements. The materials and product design may be adapted to technological progress. A more demanding (due to both stricter and additional requirements) national regulatory framework means less room for innovation.

There are also certain legal aspects that have to be considered. Interoperability Directive 797/2016 sets out different provisions for subsystems and constituents that have an interface with national rules. This is an extract of those relevant to the existence of national rules stricter or additional than those in the fixed installations TSIs:

Art. 13:

1. The Agency and the national safety authorities shall consider as meeting the essential requirements, those structural subsystems constituting the rail system which are covered, as appropriate, by the 'EC' declaration of verification established by reference to TSIs, in accordance with Article 15, or the declaration of verification established by reference to national rules in accordance with Article 15(8), or both.

2. National rules for implementing the essential requirements and, where relevant, acceptable national means of compliance, shall apply in the following cases:

(a) where the TSIs do not cover, or do not fully cover, certain aspects corresponding to the essential requirements, including open points as referred to in Article 4(6);

These provisions could be interpreted as: TSIs are enough to comply with the part of the essential requirements covered there in. This apply also to national rules covering open points and specific cases.

For example, in the INF TSI, the basic parameter structure gauge covers essential requirements safety and technical compatibility. If a national rule requests a bigger structure gauge, it cannot be claimed that it is needed because the INF TSI does not fully cover the essential requirement safety.

Art. 8:

2. Member States shall not, in their territory and on the basis of this Directive, prohibit, restrict or hinder the placing on the market of interoperability constituents for use in the Union rail system where these constituents comply with this Directive.

This provision mandates the acceptance of constituents compliant with the Directive and therefore with the TSIs. Setting out stricter or additional rules for constituents would contradict this provision.

Taking all above into consideration, it seems that **the national rules mandating the stricter requirements for the same parameters that are already specified in the TSIs should not be allowed**. Such the rules should be removed from the national legal framework. Within the process of reviewing its rules, the MS is expected to identify such rules, remove them and not to notify them to the Agency. If the MS would decide to keep such a rule and notify it, the rule should not be accepted, and the MS should be obliged to remove it.

For the rules containing additional requirements on top of those specified in the TSI, the analysis should be performed in the first instance by the MS concerned to determine whether the rule creates unnecessary constraints. Assuming that the rule is supposed to cover the essential requirement(s) not covered, or not fully covered by the TSI, the following issues need to be considered:

- Is the parameter really linked with any essential requirements? If no, rule is not needed and should be removed. If yes, the further analysis has to be performed.
- Is the parameter in question within the scope of the TSI? If yes, why it was not included in the TSI? If it was considered that this parameter would not need to be harmonised, and the essential requirements would have been met without it, then the national rule basically would also not be needed.
- If the parameter is beyond the scope of the TSI, does it need to be regulated at all? Would the subsystem or component meet the essential requirements without specific national requirement?
- If it is still considered that the parameter needs to be covered by the national rule, all possible impacts on the costs of investments, opening the market, free circulation of goods etc. should be taken into account.

Therefore **it is not possible to state a priori whether the rule containing additional requirements on top of the TSIs should be allowed or not**. Each rule needs to be analysed and assessed, taking into consideration, among others, the issues mentioned above. This analysis should be first done by the MS, and if the rule is notified, by the Agency.

4. Conclusions of the problem analysis

Having analysed various cases the Agency came to the following conclusion:

- **The national rules imposing stricter requirements for the parameters that are already specified in the TSIs should not be allowed**, therefore such the rules should not be accepted, and the rules should be removed. When necessary, stricter requirements may be specified in the tender documentation, it should however be a decision of the contracting entity based on the business analysis, and not imposed by the legislation. On the other hand, there might be a need to establish a legal environment allowing the contracting to demand stricter parameters in the tender, and ensuring that such the stricter tender documentation would not be questioned by unhappy tenderer.
- **Setting up the additional requirements on top of the TSIs, could be allowed as long as the requirements going beyond the features and parameters specified in the TSIs**. That is particularly important for the interoperability constituents (IC), as it may cause that the certified IC accepted in other MS would not be accepted in the MS having additional requirements on top of the TSI. **Therefore in each case the national rule would need to be assessed, and the decision whether such a rule should be accepted or not would be taken based on the result of such analysis.**

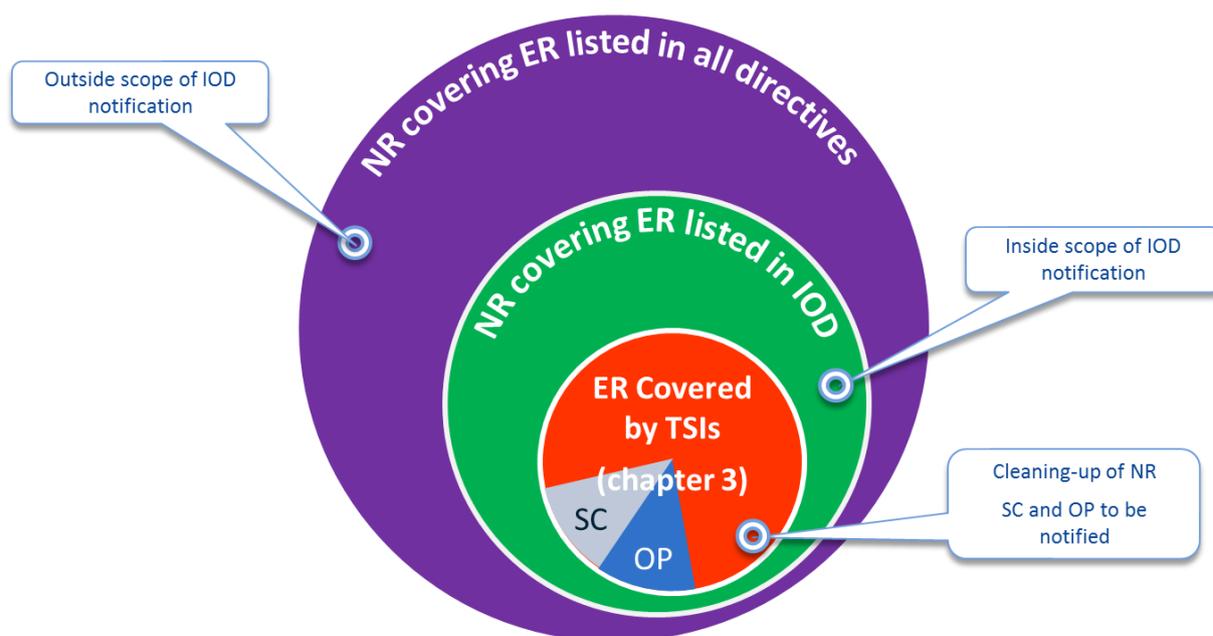
The national rules applying to the networks and vehicles not covered by TSIs (item 5 in section 2 above) have also to be notified (art. 13.2(e) and art. 14 of the Interoperability Directive), but their detailed assessment by the Agency is not seen as the first priority, as there is no potential conflict with TSIs; as already proposed for vehicles, the Agency will focus in first priority to remaining national rules applying in addition to TSIs (i.e. networks covered by TSIs).

Finally those national rules outside the scope of the IOD are not subject to notification. Therefore the activity of the European Union Agency for Railways for cleaning-up the national rules is not covering the rules discussed in the last paragraph of section 2 'Legal background'.

5. Project for cleaning up of national rules applicable to fixed installations

5.1. Scope of the Project

The scope of the cleaning up of national technical rules for fixed installations is the whole EU railway network (EU Members States and Norway, Switzerland if confirmed by the Commission). The following figure describes the possible set of rules as above explained.



5.2. Identification of NTR

As indicated in the section 2 'Legal background', the cleaning-up activity will apply to NTRs that cover the essential requirements that are not covered, or are not fully covered by the TSIs including open points (item 1 of the list in section 2), derogations (item 2), specific cases (item 3) and some complementary aspects of the technical compatibility with the existing system (e.g. 'legacy system' not covered by a specific case) as above explained (item 4). Therefore it is of paramount importance that the Member States will review their national rules applying to fixed installations covered by TSIs, and classify them according to the 4 items listed above (and explained in the section 2 'Legal background' above). After having done this classification, the rules falling under item 1, 2, 3, 4 will be notified to the

Agency. These rules will later be assessed by the Agency according to art. 26 of Regulation (EU) 2016/796 (the Agency Regulation).

Regarding existing rules falling under items 5 and 6, they will be assessed by the Agency in a 2nd phase of this project.

Note: new submitted draft rules notified in accordance with the Interoperability Directive will be assessed according to the Agency Regulation (independently of this cleaning-up-project).

The rules not classified to any of the groups 1 to 6 should be analysed in order to identify whether they cover requirements outside the scope of the Interoperability Directive (see the last paragraph of section 2) – if yes, they can remain and do not need to be notified, if not, the rules should be removed.

5.3. Steps and objectives of the project

The process of cleaning the NTR for fixed installations is divided into 3 steps:

Step 1.

The objective of this phase is MSs to verify the rules already notified in Notify-IT, and remove those that are redundant due to the current legal framework (EU Directives and TSIs).

When: November 2016 – March 2017

Step 2.

The objective of this phase is twofold.

- The first part is to analyse, together with MSs, examples of existing/potential NTR of groups , and define the criteria to be used to evaluate the rules taking into account the specificities of the fixed installations (that do not move) in comparison with the rolling stock (that moves between the networks).

Bilateral meetings will be organised between the Agency and some MSs on this issue.

When needed, the discussions will be raised to the European Commission.

A final workshop will be organised by the Agency.

The result of this phase will be a guide document explaining what MSs should notify as NTR, including examples.

When: January 2017– August 2017

- In the second part of this phase MSs are expected to classify the rules according to the criteria defined in the previous phase and prepare the rules to be notified in the SRD.

When: September 2017 – March 2018

Step 3.

The objective of this phase is MSs to notify the rules into SRD (or into NOTIF-IT until SRD is operational), and the Agency to evaluate them according to the steps and timelines as defined in the workflow for the notification of existing/draft national rules according to art. 26 of the Regulation (EU) 2016/796.

When: March 2018 – onwards

5.4. Process to assess NTRs with consideration of TSIs

The following flowchart provide steps to assess the NTRs with consideration of TSIs.

