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## Cooperation agreements: main elements and related guidelines

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## INTRODUCTION

### Purpose

The purpose of this document is to set out the main elements that could be used for the future drafting of cooperation agreements (CA) between the European Union Agency for Railways (“the Agency”) and the national safety authorities (“the NSAs”) according to Article 76 of Regulation (EU) 2016/796. This document presents the guidelines for the mandatory elements the NSA subgroup and the Agency think necessary for concluding cooperation agreements. These guidelines are presented, for each element, under the sections “Minimum provisions”. In addition, the document also presents some useful additional guidelines which would benefit to be harmonised. These are presented in the sections “additional guidelines”.

The Management Board (MB) is invited to provide views on the draft elements and supporting guidelines.

According to the MB request during the MB workshop of the 28<sup>th</sup> of March 2018, the subgroup will develop arrangements related to the PoE. If a NSA decides to support the Agency via the PoE, these would be dealt in a voluntary part of the Cooperation Agreements. The MB will be informed by the Agency on the progress of this work.

### Development of this document

This list of main elements is based on the outcome of the discussions at the joint Agency and NSA subgroup (“the subgroup”) on cooperation agreements. The subgroup was supported by a group of lawyers from the Agency and some NSAs.

The subgroup wishes to keep the CA simple and to harmonise them as much as possible where it is appropriate to do so and where the national legal frameworks of the Member States do not prevent this, taking into account the interests of all concerned parties. This would, in the subgroup’s view, ensure efficient cooperation and consistent treatment for all signatories working under the finalised agreements.

The subgroup agreed that, based on the experiences during the learning cases, the shadow running and the first applications, the list of main elements presented in this document could be revised/completed. In this case, the MB will be informed by the Agency (refer to element “Amendments to the CA” for more details).

When drafting clauses for the elements and guidelines presented in this document, the order of the elements could be changed and some regrouping will have to be performed.

### Scope and assumptions

The subgroup has worked on the basis that:

- Elements relating to the development of specific cooperation agreements in accordance with Article 76(3) and (4) of Regulation (EU) 2016/796 are to be discussed on a case-by-case basis with the concerned NSAs. Nothing should prevent the parties to a cooperation agreement to enter into more specific cooperation arrangements at conditions to be agreed upon.
- According to Article 76(8) of Regulation (EU) 2016/796, the CA that the Agency will conclude with a NSA could deal with other elements that are not identified in this document. These elements shall nevertheless not conflict with the MB Decision on minimum provisions on “list of main elements and guidelines”. For ensuring transparency towards all NSAs and principle of equality amongst NSAs (that are

all entitled to have similar specific terms and conditions) the Agency will inform all NSAs on the development of these voluntary elements.

- The cooperation agreements should not repeat provisions of the relevant legislative acts but should describe how the requirements of the legal acts need to be put in place by the Agency and the NSA to ensure a smooth and efficient cooperation..
- The co-operation agreements concern cases where the Agency is acting as safety certification body or authorising entity, respectively for the issuing of single safety certificate and vehicle (type) authorisations.
- The scope of the agreement is the whole life cycle of an application for SSC or VA including the pre-engagement and application steps.
- Unless specified otherwise, the elements below equally apply for the issuing of single safety certificates and vehicle (type) authorisations.

The specific situation of Norway will have to be assessed considering the implication of the European Economic Area Agreement (EEA) and possibly the role of the EFTA Court.

## 1. COMMUNICATION

Minimum provisions relating to communication are:

- i. The arrangements on how the communication between the parties relating the Cooperation Agreement needs to be organised.
- ii. The need to identify one or more contact points in the Agency and each NSA responsible for coordinating administrative and related technical matters such as operational management of applications, requests for review of negative decisions, appeals; sharing relevant information about previously authorised vehicles or certified railway undertakings and financial issues.

Additional guidelines:

- iii. The arrangements on how the Agency and the NSAs engage with a potential new applicant or an applicant whose certificate is approaching expiry upon its request.
- iv. Communication is preferably done by electronic means, using the one-stop shop where appropriate.
- v. Without prejudice to the language provisions set out in the Implementing Acts for single safety certificate and vehicle (type) authorisations, the authorities should take into account the language(s) of the application file when allocating resources to the project and endeavour to agree on a common language to facilitate the coordination of the process.
- vi. The need to identify one or more contact points in the Agency and each NSA for exchanging information in the event of an accident or major incident involving a vehicle or a certified RU of which they were involved in the assessment.

## 2. ARRANGEMENTS FOR THE USE OF THE ONE-STOP SHOP (OSS)

Minimum provisions relating to use of the one-stop-shop are:

- i. The updating of information by the Agency and NSAs regarding their respective contact point(s).
- ii. The notification by the Agency and NSAs of their respective public holidays in order to establish the formal start date of assessments.

Additional guidelines:

- iii. The recording and updating by the Agency and the NSAs of requirements which they are assessing, for the purpose of enabling the applicant to map their evidence against the EU and national requirements.
- iv. The managing of relevant communication, in particular between the authorities or between the authorities and the applicant, to ensure transparency and efficiency of the assessment.
- v. The interaction and integration between the OSS and the national IT system(s).
- vi. Alternative means in case the OSS operates below the planned service level.

## 3. ARRANGEMENTS FOR THE COORDINATION OF PROJECTS<sup>1</sup>

Minimum provisions relating to coordination of projects are:

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<sup>1</sup> The minimum provisions of the elements 4 to 7 of version 2.1 have been merged in the element 3, being all related to coordination of projects (element 4 – usage of common template, element 5 – exchange of information between supervision and SSC and VA assessment, element 6 – arrangements for visits, inspections or audits, element 7 – differences of opinions within an application project)

- i. The arrangements on how the appointed project team agrees on the milestones, deliverables and communication channels and how these are recorded.
- ii. The arrangements on how the parties will agree on having sufficient time to do their work taking into account the deadlines stated in the relevant legislation and milestones agreed.
- iii. Communication about deviations from the agreed planning and the agreement on the new planning with the other parties concerned.
- iv. Use of common templates and web forms from the OSS to facilitate the exchange of information between the authorities.
- v. The arrangements ensuring that the link between supervision evidence and the SSC assessment requirements will be easily identifiable and understandable.
- vi. The arrangements at project level for the planning, organisation, coordination and reporting of visits, inspections or audits.
- vii. Arrangements ensuring that both the Agency and the NSA(s) involved cooperate for a mutually acceptable assessment.

#### **4. COST OF TRANSLATIONS**

Minimum provisions relating to cost of translation are:

- i. Arrangements on the language in which documents prepared and shared between the Agency and the NSA for the purposes of the assessment are provided.
- ii. Rules of bearing the costs of translation of documents prepared by other authorities that are necessary for Agency or NSA for its own part of the assessment.
- iii. Rules of bearing the costs of translation of the decision concerning the issuing of the single safety certificate or vehicle (type) authorisation on request of the NSA where applicable (i.e. the language of the NSA is different from the one of the application file submitted by the applicant).

#### **5. TRAINING OF NSA STAFF**

Minimum provisions relating to training of the NSA staff are:

- i. Upon request of the NSA, the Agency assists NSA in familiarising its staff members to the use of the OSS in order to ensure that designated NSA staff will have the knowledge and skills needed to train other colleagues within their organisation.
- ii. The content of trainings referred to in point i is delivered free of charge.

#### **6. ARRANGEMENTS CONCERNING THE APPORTIONMENT OF THE FEES PAYABLE BY THE APPLICANT (IF NOT COVERED BY THE FUTURE IMPLEMENTING ACT ON FEES AND CHARGES)**

Minimum provisions relating to fees and charges are:

- i. Arrangements for the statements of costs issued by the NSAs involved in the assessment to the Agency.
- ii. Arrangements, when foreseen in the national legislation of the NSA, for supporting the Agency in its process to recover payment of invoices.
- iii. Delay for the payment of statement of costs issued by the NSA to the Agency.
- iv. Arrangements in case of dispute about a statement of costs.

Additional guidelines:

- v. Arrangements for the reimbursement of visits, inspections or audits carried out by the NSAs on request of the Agency when outside the concept of the PoE.

## 7. SHARING INFORMATION AFTER AN ASSESSMENT PROCESS

Minimum provisions relating to sharing information and other cooperation after issuing SSC / VA are:

- i. Arrangements for exchanging safety related information according to art 17(9) of RSD
- ii. Arrangements for coordinating following the request from the NSA according to Art, 17(5) of RSD and Art.53 of PA VA

Additional guidelines:

- iii. Arrangements for, when the circumstances allow, the NSA to inform the Agency before applying temporary safety measures in accordance with the obligation in Article 17(6) of Directive (EU) 2016/798 and Article 26(3) of Directive (EU) 2016/797 related to certificates or authorisations issued by the Agency.

## 8. REVIEWING DECISIONS

Minimum provisions relating to reviewing decisions are:

- i. Arrangements where a negative decision of the Agency relates to the assessment done by the NSAs on the “national items”.
- ii. Arrangements for ensuring an impartial, independent and transparent review process in coordination with the national safety authorities concerned with the intended area of operation/use.

## 9. LIABILITY REGIME APPLICABLE TO THE PARTIES

Minimum provision related to liability regime is : None

Additional guidelines:

- i. The liability of the Agency is governed by Article 72 of Regulation 2016/796 and the liability of the NSA is governed by its national legal framework.

## 10. APPLICABLE LAW

Minimum provision related to applicable law is :

- i. EU law supplemented by the [substantive] laws of [the Member State of the NSA][(excluding choice of law provisions)]

## 11. JURISDICTION

Minimum provision related to jurisdiction is :

- i. The Court of justice of the European Union has jurisdiction to hear disputes between the Parties that could not be resolved amicably

## 12. AMICABLE SETTLEMENT OF DISAGREEMENTS AND DISPUTES<sup>2</sup>

Minimum provisions relating to amicable settlement are:

- i. A simple mandatory mechanism based on a communication between representatives of each signatory.
- ii. Obligation to seek amicable settlement (within a limited time frame) before initiating an arbitration at Board of Appeal or before proceeding in court.

## 13. DURATION, SUSPENSION AND TERMINATION OF THE CA

Minimum provision relating to duration, suspension and termination of the CA is :

- i. The cooperation agreement is of indefinite duration but it can be suspended and terminated in certain cases: default of a party (that is not remedied within a period of, e.g., thirty days from notice of one party), no agreement following a request for amendment (in accordance with provision on amendments) or by prior notice of, e.g., [X months], from one party to the other party or parties.

## 14. AMENDMENTS TO THE CA – EVALUATION AND REVIEW

Minimum provisions relating to amendments, evaluation and review are:

- i. A procedure for amendments to the cooperation agreement whereby, in particular:
  - a) the Agency informs all NSAs about such request (giving details as provided by an NSA asking for amendments),
  - b) informs the MB that decides whether or not the “list of main elements” needs to be modified, and
  - c) every NSA is entitled to ask for a similar amendment of its cooperation agreement.
- ii. A procedure of review and evaluation that could result in amendments thereto [after a decision from the MB]. The procedure should allow for less significant changes to be accepted without a further approval or review by the Management Board [any amendment to the “list of main elements” is considered as a significant change.

## 15. LANGUAGE(S) OF THE CA

Minimum provision related to the language of the CA is:

- i. When allowed by the national legislation of the NSA, the CA shall be signed in EN. If not, the CA shall be signed in (one of) the official language(s) of the NSA.
- ii. The Agency shall provide a courtesy translation in EN when the CA is signed in (one of) the official language(s) of the NSA

## 16. PUBLIC ACCESS TO DOCUMENTS AND TRANSPARENCY

Minimum provisions related to public access to documents and transparency are :

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<sup>2</sup> Could be merged with element 7 in the clause document.

- i. Respect the strict requirements under the EU<sup>3</sup> and national legal frameworks on public access to documents held by the Agency and by the NSA, and include only a simple mechanism of mutual information and consultation in case of a request to access documents held by a Party that emanates from the other or in case of documents stored in the OSS.
- ii. There are national confidentiality clauses which need to be followed in consideration of art 78 of 796/2016.

### **17. (a) POTENTIAL CONFLICTS OF INTEREST<sup>4</sup>**

Minimum Provision relating to potential conflicts of interest, in addition to those dealing with possible conflicts of interest of experts in the “Pool of Experts” (in the agreement dealing with Pool of Experts), is:

- i. Addressing conflict of interest of the Agency and the NSAs’ respective individual agents.

### **17. (b) SEGREGATION OF TASKS**

Minimum provision relating to segregation of tasks is : None

Additional guideline:

- i. Segregation of tasks (e.g. “Chinese Walls”).

### **18. SUBCONTRACTING**

Minimum provision around subcontracting is: None

### **19. MISCELLANEOUS PROVISIONS (THAT ARE USUAL IN INTERNATIONAL AGREEMENTS)**

Minimum provisions relating to miscellaneous provisions are:

- i. “Force majeure”.
- ii. Duty of confidentiality (subject to rules on public access to documents).
- iii. Provisions on protection of personal data.
- iv. Definitions.
- v. Other general standard provisions if not covered above (severability of provisions, etc).

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<sup>3</sup> Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (applicable to the Agency under Article 77(1) of Regulation (EU) 2016/796).

<sup>4</sup> There are discussions in the subgroup if this element needs to be considered.